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CONSTITUTIONAL ASPECTS OF ATTORNEY-PRISONER COMMUNICATION IN PRISON REALITIES

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Introduction

This paper examines attorney communication with an incarcerated client, and the limitations and other unique issues facing this communication in the realities of prison existence. It explores what legal, and specifically constitutional, rights are implicated when an intrusion into this communication is shown, and how (depending on the source of those rights) these rights may be more fully vindicated.

Traditionally, there have been three ways for an attorney to communicate with an incarcerated client: by phone, by physical mail, or in person. In the last 10 years, email is now available to a considerable number of incarcerated persons in the U.S. The Federal Bureau of Prisons provides email in all its prisons through the TRULINCS emails system, and 19 state departments of corrections offer email access to persons incarcerated in their facilities.[1] Video links are also being introduced, amidst controversy, for prisoner contact. [2]

Advocates over the decades have challenged restrictions, impediments, and limits of various kinds on these methods of communication. Impediments include phone, email or direct conversation monitoring/recording (by policy or surreptitiously), and administrative processes that limit the number or means of privileged calls, in-person visits, and receiving physical mail. Litigation has challenged virtually every aspect: the legality of recording or surveilling attorney-client communication, requirements for special markings on legal mail, prison opening and scanning of incoming or outgoing legal mail and whether a prisoner must be present for it, requirements that counsel pre-register with prisons for access, unavailability of or restrictions on privileged phone calls and on attorney contact visits, inadequate space for such visits, and so on. Email, and the digital revolution's impact on defense representation, presents unique considerations – at once facilitating greater and more meaningful, attorney contact yet also allowing deeper and more sweeping prosecutorial/governmental penetration.

Resolution of these challenges have largely turned on a given court's interpretation of the right asserted. Most commonly, the right to communicate with one's attorney is an aspect of the Sixth Amendment right to counsel and of the right of access to the courts. But it is also viewed as an independent First Amendment, a due process or privacy right, and may implicate the Fourth Amendment prescription against unreasonable search and seizure or wiretap law.

It is helpful to try to extrapolate generally recognized constitutional minimums to secure privilege. But, oddly, even when a procedure is deemed constitutionally mandated, failure to comply with the procedure does not necessarily constitute a constitutional violation. Case law addresses whether an infringement of attorney-client communication violates a constitutional right only if it results in substantial injury or prejudice to the incarcerated client, or if infringement itself is the violation. This injury requirement, when applied in prisoner communication cases, often presents a higher bar than exists in traditional constitutional injury case law, and at times consumes the communication right entirely. Showing injury often cannot be made, at least not to the satisfaction of a court, precisely because the infringement on attorney communication may have kept a case or claim from being adequately developed. In this way, the cart is routinely placed before the horse. Or the

[1] PA, ND, MN, IA, OK, CO, IN, KA, LA, MI, GA (women only), MO, NV, NH, OH, TN, TX, WA, and VA.

[2] Video communication, often at significant prisoner expense, is being forced as a mandatory (and less costly for the government) substitute for in-person visits.

infringement must abrogate a related claim or relationship; a sliver of opportunity, no matter how fleeting or theoretical, defeats injury. Injury is also misused as a device to screen merits. And conspicuous by their absence are court-directed and guided opportunities to amend.

When prisoners communicate with counsel using means known to be monitored (typically housing unit telephone or email systems), courts routinely find waiver of privilege or consent to monitoring, rendering lawful eavesdropping on, and even prosecutorial use of, attorney communication. But the realities of mass incarceration – understaffing, delays in obtaining or outright denial of privileged communication, limits inherent in regular mail, difficulties in arranging contact visits – are ignored. With few exceptions, the burdens on counsel in timely meeting the requirements for privileged contact, particularly under the pressures of ongoing litigation, are dismissed. Application of waiver or consent here should be analyzed in the contact of prison reality. Waivers under duress are invalid. If a prisoner's immediate choice is monitored attorney contact or none, there is hardly a knowing or voluntary relinquishment of the constitutional right to privileged communication. As one court put it, "knowledge [of monitoring] is not consent [to it]." Disclosure of otherwise privileged communication to a third party is not a relinquishment of privilege when the disclosure is involuntary. And third party doctrine does not apply when the third party is essential to or otherwise facilitates the attorney-client communication. It could be argued prison avenues of communication – including monitored telephone and emails –facilitate attorney-client communication, and therefore are not third party disclosure.

Remedy for breach of attorney-client privilege involves identification of which constitutional interest was at stake, and turns on the nature of suit (an alleged civil right infringement or a challenge to a criminal conviction). It may range from evidentiary suppression, vacation of conviction and new trial, indictment dismissal, monetary damages or even sentence reduction.

To protect attorney-incarcerated client privilege, constitutionally minimum standards should be identified for all means of communication. The era of mass incarceration requires a comprensible national standard to which all places of custody are held.

I. Attorney-Client Privilege

Most discussion of attorney-client communication begins with the nature of the attorney-client privilege itself.

A. History

The oldest of the privileges, the attorney-client privilege is commonly identified as existing since the reign of Queen Elizabeth. *Hartford v. Lee*, 21 Eng. Rep. 34 (Ch. 1577); Wigmore deemed it unquestioned even then. 8 John Henry Wigmore, Evidence § 2290, at 542 (John T. McNaughton ed., 1961); John William Gergacz, Attorney-Corporate Client Privilege § 1.04, at 1-4 (3d ed. 2000); *Clausen v. National Grange Mutual Ins. Co*., Del. Super.1997, 730 A.2d 133, 136. Some date it to the Roman era.[3] Others dispute Wigmore's conclusion and find the privilege not established until the 19th century.[4] Originally a privilege of the attorney, associated with ensuring "honor" among gentlemen and professional qualification, it gravitated to the client in modern practice.[5]

B. Scope

Attorney-client privilege attaches to confidential communications between a lawyer and his client made to obtain legal services. See *U.S. v. Lentz*, 524 F.3d 501 (4th Cir. 2008). The classic statement of the privilege is:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 John Henry Wigmore, Evidence § 2292, at 542 (John T. McNaughton ed., 1961). In its modern statement, "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *Fisher v. United States*, 425 U.S. 391, 403 (1976).

It includes communication by client to attorney, or attorney to client, when it includes confidential information from the client or legal advice. *United States v. Margolis*, 557 F.2d 209,

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[3] *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999) ("Some legal scholars even suggest the roots of the privilege extend to Roman times, as a product of the ancient concept that a slave was incompetent to bear witness against his master and the idea that a roman advocate was incompetent to testify against his client. Max Radin, "The Privilege of Confidential Communications Between Lawyer & Client," 16 Cal. L.Rev. 487, 487–88 (1928).

[4] Hazard, Under Shelter of Confidentiality, 1999, 50 Case.West.Res.L.Rev. 1, 3 ("it was not until the 19th century that the attorney-client privilege became firmly established in the common law rules of evidence.") And see Langbein, The Criminal Trial Before the Lawyers, 45 U. Chi. L Rev. 263, 307-14 (1978) (questioning the representative nature of Wigmore's sources, dating even routine acceptance of right to consult counsel a century later).

[5] Section 5472, Policy of the Privilege, 24 Fed. Prac. & Proc. Evid. § 5472 (1st ed.): "In its early days, the privilege was given a much narrower scope than it has today. It only covered testimony by the lawyer concerning communications from his client with respect to pending litigation. This limited scope was probably a reflection of the view that litigation, which was reserved to the more gentlemanly barrister, was the noblest activity of the profession." (citations omitted).

211 (9th Cir. 1977). It includes communication by an individual seeking representation, even if an attorney-client relationship was not ultimately formed. See *United States v. Morrell-Corrada*, 343 F. Supp. 2d 80, 86 (D.P.R. 2004), citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 90–358, Sept. 13, 1990 (recognizing attachment of privilege even where representation is declined). Pending litigation is not required for the privilege to attach, but the individual must reasonably expect confidentiality.[6] Thus, a client's disclosure to a non-privileged third party typically – but not always - vitiates privilege. *United States v. Morrell-Corrada,* 343 F. Supp. 2d at 86 and cases cited. [7]

C. **Purpose**

The purpose of the privilege is safely to afford full client disclosure to her counsel to enable vigorous advocacy. 8 Wigmore §§ 2291, 2306, p. 590; McCormick § 87, p. 175, § 92, p. 192, cited in *Fisher v. United States,* 425 U.S. 391, 403 (1976), It also promotes broader public interests:

> [I]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.... 'The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.' .... [T]he privilege...'is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.'

Upjohn Co. v. United States, 449 U.S. at 389 (quotations omitted). The privilege is construed narrowly because, as with all evidentiary privileges, it may impede the search for truth. *United States v. Bryan*, 339 U.S. 323, 331 (1950). Such privileges apply "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

[6] 8 Wigmore, § 2285, at 531 ("The communications must originate in a confidence that they will not be disclosed."); *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991); *United States* v. Dennis, 843 F.2d 652, 656-57 (2d Cir. 1988); see also *Upjohn Co. v. United S*tates, 449 U.S. at 395.

[7] Discussed more fully at Part VII, below, exceptions include joint interest, involuntary disclosure, and essentiality.

II. Constitutional Protection of Attorney-Client Privilege

The attorney-client privilege is a creation of the common law, not the Constitution. *Upjohn Co. v. United States*, 449 U.S. at 389; *Lange v. Young*, 869 F.2d 1008, 1012 (7th Cir. 1989). It is an evidentiary rule not independently grounded on the Constitution. *Maness v. Meyers*, 419 U.S. 449, 466 nn. 8, 15, 95 S. Ct. 584, 42 L.Ed.2d 574 (1975); *Lange v. Young*, 869 F.2d 1008, 1012 n. 2 (7th Cir.1989); *Smith v. Moore*, 137 F.3d 808, 819–20 (4th Cir.1998); *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir.1985); *Gomez v. Vernon*, 255 F.3d 1118, 1131 (9th Cir.2001). See *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir.1992) ("'[s]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right.' ") (quoting *Clutchette v. Rushen*, 770 F.2d at 1471, citing *Maness v. Meyers*, 419 U.S. 449, 466 n. 15 (1975)). As with other non-constitutional privileges, it is solely testimonial. [8]

Attorney-client privilege, however, implicates constitutional rights and thus receives constitutional protection precisely to vindicate them. The sources of its constitutional protection are multi-fold.

A. Sixth Amendment Right to Counsel

It is black letter law that the Sixth Amendment right to counsel in criminal proceedings includes the right to communicate with counsel. *Geders v. United States*, 425 U.S. 80, 89 (1976) (order preventing defendant from consulting his attorney during overnight recess infringes upon this substantial right); *Miranda v. Arizona*, 384 U.S. 436, 465, n. 35 (1966) (preventing attorney consultation with client independently violates Sixth Amendment right to the assistance of counsel); *Perry v. Leeke*, 488 U.S. 272, 281 (1989) (an absolute right to such consultation). See *United States v. Triumph Capital Grp., Inc*., 487 F.3d 124, 129 (2d Cir. 2007) (effective assistance of counsel requires that the defendant be allowed to communicate with his or her attorney). [9] It obtains immediately: "A meaningful exercise of the defendant's right to counsel should not depend upon whether a defendant requests permission to consult privately with his lawyer." *State v. Beaupre*, 123 N.H. 155, 159, 459 A.2d 233, 236 (1983) (admission of attorney communication violative regardless whether prisoner asked detective to leave room).

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[8] Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The use of privileged evidence to construct a prosecution does not require an exclusionary taint hearing where government did not seek to introduce it. *United States v. Squillacote*, 221 F.3d 542, 560 (4th Cir. 2000); *United States v. Warshak*, 631 F.3d 266, 294 (6th Cir. 2010) (unwise to extend the fruit-of-the-poisonous-tree doctrine beyond the context of constitutional violations). Accord: *Wharton v. Calderon*, 127 F.3d 1201, 1205 (9th Cir. 1997) ("[t]he attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a client and a lawyer. . . .[T]he rule does not apply where there is no forced disclosure of a confidential communication in a judicial proceeding." (citation and internal quotation marks omitted).

[9] A *Geders*-type error (of period of complete bar to access) is deemed structural: "a violation of a defendant's Sixth Amendment right to counsel ... constitutes a structural defect which defies harmless error analysis and requires automatic reversal." *United States v. Triumph Capital Grp., Inc., 487 F.3d* at 131 (2d Cir. 2007) (citations omitted). Accord: *United States v. Santos*, 201 F.3d 953, 966 (7th Cir. 2000).

Such consultation must be afforded privacy. *United States v. Andreadis*, 234 F. Supp. 341, 346 (E.D.N.Y. 1964) ("There is no question that a defendant has a right to a private consultation with his attorney free from the presence of an informer."); *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973) (the essence of the Sixth Amendment right is...privacy of communication with counsel). See also *United States v. Henry*, 447 U.S. 264, 295 (1980) ("the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney." (Rehnquist, J., dissenting)). [10]

One commentator has opined the Sixth Amendment protection of attorney client communication is broader than the privilege itself, as the latter applies only to compelled disclosures but the former bars infiltration of defense to obtain information it not otherwise obtainable by compulsory process: "Even when the attorney-client privilege is inapplicable, the constitutional right to counsel insulates confidential defense preparations and thus maintains the legitimacy of the adversary process." [11] This principle, however, is fettered by more recent, stringent injury and prejudice standards. See Part V, below.

B. Right of Access to Courts

Protection of attorney-client communication is also compelled by the constitutional right of access to the courts. *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (right of access to the courts must include right of contact with counsel); *Robbins v. Budke*, 739 F. Supp. 1479 (D.N.M.1990) (patients' constitutional right of access to the courts violated by limitations on attorney access); *Dreher v. Sielaff*, 636 F.2d 1141, 1143 (7th Cir. 1980) (opportunity to communicate privately with an attorney is part of meaningful access); *Davis v. Doyle*, No. 05-C-374-C, 2005 WL 2105756, at *3 (W.D. Wis. Aug. 29, 2005); *Medford v. Walt*, No. 17-CV-1015-JPG, 2018 WL 339292, at *3 (S.D. Ill. Jan. 9, 2018).

The Supreme Court has confirmed the existence of this right while unclear as to its precise constitutional moorings. See *Lewis v. Casey*, 518 U.S. 343, 350 (1996), limiting *Bounds v. Smith*, 430 U.S. 817 (1977) (*Bounds* correctly acknowledged right of access to the courts but is clarified to require injury showing to establish standing). The right of access to the courts applies beyond criminal litigation, ensuring that all citizens have "[t]he right to sue and defend in the courts." *Bourdon v. Loughren*, 386 F.3d 88, 93 (2d Cir. 2004), citing *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.").[12]

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[10] "[I]n the prison setting, attorney- client communications generally are distinguished from other kinds of communications and exempted from routine monitoring." *Lonegan v. Hasty*, 436 F. Supp.2d 419, 432 (E.D. N.Y. 2006); see also *Evans v. Inmate Calling Solutions*, No. 3:08-cv-00353-GMN-VPC, [2011 BL 438895], 2011 WL 7470336, at 15 (D. Nev. July 29, 2011)"[I]t is objectively reasonable for confidential communication between an inmate and his attorney to remain private.").

[11] Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 Harv. L. Rev. 1143, 1145–46 (1984).

[12] State constitutions referenced open courts as early as the eighteenth century. The right of access to the courts, however, did not fully develop in the case law until the mid-to late-twentieth century. See discussion in *A.M. v. New Mexico Dep't of Health*, 148 F. Supp. 3d 1232, 1268 (D.N.M. 2015).

1. **Due Process/Equal Protection**

The due process right to hearing includes the right to the aid of counsel when sought and obtained by the party asserting the right. *Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010). Court access includes "the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." *Hatfield v. Bailleaux,* 290 F.2d 632, 637 (9th Cir. 1961); *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011) (prisoner right to litigate free from active prison interference), overruled on other grounds *Richey v. Dahne*, 807 F.3d 1202, 1209 n. 6 (9th Cir. 2015).

The Supreme Court regularly has identified due process as the source of the right of access. *Ex parte Hull*, 312 U.S. 546 (1941); *Johnson v. Avery*, 393 U.S. 483, 490 (1969); *Boddie v. Connecticut*, 401 U.S. 371, 380–381 (1971); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Bounds v. Smith*, *supra*; *Murray v. Giarratano*, 492 U.S. 1, 11, n. 6 (1989); *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 335 (1985). It has identified Fourteenth Amendment Equal Protection interests at stake. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). See *Murray v. Giarratano*, *supra*, (right of access is consequence of right to due process of law and aspect of equal protection). It has also grounded the right of access to courts in the Article IV Privileges and Immunities Clause, *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. at 148; *Blake v. McClung*, 172 U.S. 239, 249 (1898); *Slaughter–House Cases*, 16 Wall. 36, 79 (1873).

The federal judiciary follows. "The Sixth Circuit has observed that this right finds its origins in several constitutional provisions, including the Fourteenth Amendment's Due Process and Equal Protection Clauses, the right to petition government for redress of grievances contained in the First Amendment, and the Privileges and Immunities Clause in Article IV. See *Swekel v. City of River Rouge*, 119 F.3d 1259, 1261–62 (6th Cir.1997) (collecting cases); *Garcia v. Wyeth-Ayerst Labs*., 265 F. Supp. 2d 825, 833 (E.D. Mich. 2003), aff'd, 385 F.3d 961 (6th Cir. 2004); *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir.1990); *Ryland v. Shapiro*, 708 F.2d 967, 971–72 (5th Cir.1983); *Bourdon v. Loughren*, 386 F.3d 88, 89 (2d Cir. 2004). See also *Dreher v. Sielaff*, 636 F.2d at 1143 (Fourteenth Amendment guarantees meaningful access to courts), cited in *Medford v. Walt, supra*.

2. **First Amendment**

Another line of case law recognizes the First Amendment Petition Clause as the source of the right of access to courts. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). The First Amendment theory of right of access developed initially in the antitrust context. See *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc*. 365 U.S. 127, 138 (1972) (lobbying not restraint of trade; "[t]he right to petition is one of the freedoms protected by the Bill of Rights, and we cannot [...] lightly impute to Congress an intent to invade these freedoms"). See also *California Motor Transport Co. v. Trucking Unlimited*, *supra* ("the right of access to courts is

indeed but one aspect of the right to petition).[13] In *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, the Supreme Court re-affirmed the right of court access is within the First Amendment right to petition and preserved from Taft-Hartley injunction an employer's well-founded lawsuit challenging employee conduct. *Id.*, 461 U.S. at 742–43.

C. First Amendment

The First Amendment is an independent source of constitutional protection for attorney-client privilege. Unquestionably it protects a person's right to hire and consult an attorney. *Denius v. Dunlap*, 209 F.3d 944, 953 (7th Cir.2000) ("The right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition"). *Smith v. Lemmon*, No. 1:11-CV-00785-WTL, 2014 WL 111116, at *3 (S.D. Ind. Jan. 10, 2014). Because the maintenance of confidentiality in attorney-client communications is vital to the ability of an attorney to effectively counsel her client, interference with this confidentiality impedes the client's First Amendment right to obtain legal advice. *Denius v. Dunlap*, 209 F.3d at 954. See *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir.1990) (police retaliation because target hired attorney violated First Amendment rights of association and free speech); *Martin v. Lauer*, 686 F.2d 24, 35 (D.C.Cir.1982) (government employees' speech interests infringed by policy restricting their communication with counsel).

D. Right to Privacy

Finally, an interesting line of cases places the right to privileged attorney communication in the privacy rights associated with the Fourteenth Amendment. The Supreme Court recognizes distinct, constitutionally-protected privacy interests: "One is the individual interest in avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977). The former has been characterized as a "right to confidentiality," *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994). See also *Nixon v. Administrator of General Servs.*, 433 U.S. 425 (1977) (legitimate expectation of privacy in personal communications). In *Williams v. Price*, 25 F. Supp. 2d 623, 628 (W.D. Pa. 1998), failure to allow private communication with counsel independently violated the right to privacy. *Ibid.* Accord: *Talley v. Varner*, No. 3:17CV965, 2019 WL 1405403, at *3 (M.D. Pa. Mar. 28, 2019); *Telepo v. Martin*, No. 3:08CV2132, 2009 WL 2476498, at *7 (M.D. Pa. Aug. 12, 2009), aff'd, 359 F. App'x 278 (3d Cir. 2009). See also *Stevenson v. Koskey*, 877 F.2d 1435, 1443 (9th Cir.1989) (Reinhardt, J., dissenting) ("reading legal mail is a violation of the prisoner's privacy rights").

[13] While it held a *Clayton* act claim had been stated by allegation that lobbying group interfered with operating rights of others, it noted generally that "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors. 404 U.S. at 510–11.

III. Prisoner Right to Attorney-Client Communication

A. Prisoners Retain Core Fundamental Constitutional Rights

It is uniformly recognized, over many decades, that prisoners retain constitutional rights, albeit in truncated form. *Wolff v. McDonnell*, 418 U.S. at 555 ("But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."). Prisoners do not surrender all constitutional protections simply by incarceration. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

1. Right to Basic Communication

Core communication rights are protected. A prisoner's ability to communicate, via mail, phone and visit, receives some constitutional protection under the First Amendment. *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) ("courts have recognized detainees' and prisoners' first amendment right to telephone access."); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), opinion amended on denial of reh'g, 135 F.3d 1318 (9th Cir. 1998); *Johnson v. Galli*, 596 F. Supp. 135, 138 (D. Nev. 1984) ("reasonable access to the telephone, and that such use is protected by the First Amendment"); *Johnson v. Goord*, 445 F.3d 532, 534 (2d Cir.2006) (recognizing prisoners' First Amendment right to "the free flow of incoming and outgoing mail"); *Muhammad v. Pitcher*, 35 F.3d 1081, 1984–85 (6th Cir.1994) (citing *Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir.1992)). Unreasonable restrictions on prisoners' telephone and visitation access may also violate the Fourteenth Amendments. *Duran v. Elrod*, 542 F.2d 998, 1000 (7th Cir. 1976); *Montana v. Commissioners Court*, 659 F.2d 19, 23 (5th Cir. 1981); *Feeley v. Sampson*, 570 F.2d 364, 374 (1st Cir. 1978).

2. Right to Private Attorney Client Communication

Prisoners retain a constitutional right to privileged attorney communication, a right described as "sacrosanct." *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) (*Nordstrom I)*; *In re Jordan*, 12 Cal. 3d 575, 579, 526 P.2d 523, 526 (1974) (a prisoner has a right to consult with his attorney in absolute privacy); *United States v. Novak*, 531 F.3d 99 (1st Cir. 2008), and *Medina v. Cnty. of Riverside*, 308 Fed. Appx. 118 (9th Cir. 2009).

This includes a right to receive and to send privileged legal mail. *Bellezza v. Holland*, 730 F. Supp. 2d 311, 315 (S.D.N.Y. 2010); *Nordstrom I*, 762 F.3d at 910; *Gomez v. Vernon*, 255 F.3d 1118, 1131 (9th Cir. 2001). It includes telephone access to counsel. *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991); *Montana v. Commissioners Court*, 659 F.2d 19, 23 (5th Cir. 1981); *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250 (D.N.M. 2003) (preliminary injunction to enjoin defendants from limiting detainee's phone calls to their lawyers to five minutes). It includes attorney contact visits. *Ching v. Lewis*, 895 F.2d at 609–10.

The multiple constitutional bases for this right remain the same for prisoners as for anyone: in criminal proceedings, the Sixth Amendment right to counsel (*Mangiaracina v. Penzone*, 849 F.3d 1191, 1196 (9th Cir. 2017) (prisoners have Sixth Amendment right to confer privately with counsel); [14] a right of access to the courts (*Dreher v. Sielaff*, 636 F.2d at 1143 (the opportunity to communicate privately with an attorney is an important part of that meaningful access); a First Amendment right of petition and of expression (*Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006); *Al-Amin v. Smith*, 511 F.3d 1317, 1333–34 (11th Cir. 2008); *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1211 (9th Cir. 2017); *Hinton v. Mark*, 544 F. App'x 75, 78 (3d Cir. 2013) (due process violation to prevent prisoner from hiring outside counsel for disciplinary proceeding), and finally a right of privacy (*Williams v. Price, supra)*.

Judge Posner suggests a prisoner's right to private attorney communication is best viewed as an access/due process right:

> A number of cases characterize the reading of mail to or from a prisoner's lawyer in a pending or impending litigation as infringing the right of free speech rather than or in addition to the right of access to the courts. The theory is that reading communications between a lawyer and his client 'chills the individual's ability to engage in protected speech'.... But since the purpose of confidential communication with one's lawyer is to win a case rather than to enrich the marketplace of ideas, it seems more straightforward to base the concern with destroying that confidentiality on the right of access to the courts (or, as we're about to point out, on the due process right to a fair hearing.

Guajardo-Palma v. Martinson, 622 F.3d at 802 (quotation and citations omitted).

B. Reasonableness in the Mass Incarceration Era: *Turner v. Safley*

Prisoner constitutional interests are nearly always trumped by "legitimate penological interests." Accommodation of prison administrative interests is a mainstay in prisoner litigation, and constrains, often irrationally, a fuller recognition of prisoner constitutional rights.

Turner v. Safley is the generally applicable standard. [15] There, the Supreme Court held that prohibiting inmate-to-inmate correspondence was constitutional because it was reasonable related to security concerns of the prison officials, but a policy requiring the inmates to have special permission to marry was not. The Court reviewed its own prisoners' rights jurisprudence and found its consistent deference to the professional expertise of corrections officials on prison security decisions still warranted: Such decisions "are peculiarly within the province and, and, in

[14] Of course it does not independently attach to corollary proceedings. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano, supra* (no right to counsel in post-conviction proceedings).

[15] *Turner* applies to prisoners incarcerated after conviction, where security concerns assertedly are highest. A distinct standard applies to pre-trial detainees, not yet adjudicated guilty. "For pretrial detainees, the Due Process Clause of the Fourteenth Amendment protects an individual's right to be free of punishment before an adjudication of guilt, and pretrial detainees possess a liberty interest in avoiding conditions of confinement that "amount to punishment of the detainee." *Gaspar Ramirez v. Smith*, No. 18-CV-0283 (CM), 2019 WL 3890460 at 3 (S.D.N.Y. Aug. 19, 2019), citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (inquiry on restrictions of pretrial detention is whether those conditions amount to punishment of the detainee). This paper does not distinguish between the two unless otherwise germane.

the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id.*, 482 U.S. at 86 (quoting *Pell v. Procunier*, 417 U.S. 817 (1974)). It amalgamated its prior holdings into a clear standard: a prison regulation infringing on prisoner constitutional rights is valid if it is "reasonably related to legitimate penological interest."

> Four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a "'valid, rational connection'" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation.

Overton v. Bazzetta, 539 U.S. 126, 132 (2003), citing *Turner*, 482 U.S. at 89–91.[16]

Turner applies to virtually all prison rules affecting prisoner constitutional interests, including all rules and policies controlling prisoner/attorney communication. See, e.g., *Lashbrook v. Hyatte*, 758 F. App'x 539, 541 (7th Cir. 2019) (First Amendment does not mandate "unrestricted and unlimited private contacts" with counsel, and prisons may restrict prisoner contact with counsel if the restrictions reasonably relate to legitimate penological interests) citing *Turner*, 482 U.S. at 89. [17]

Notwithstanding the admonition that *Turner* is not "toothless,"[18] it does not take much to show a reasonable relationship. The Supreme Court has upheld all prison rules in all its prison cases since *Turner* issued. [19] It upheld under *Turner* an isolation unit's wide-ranging prohibition on publications and personal photographs based largely on one official's testimony that the prohibition would likely motivate a prisoner's rehabilitative efforts, to regain these benefits in general population. *Beard v. Banks,* 548 U.S. 521, 546–47 (2006) (Stevens, J. and Ginsburg, J., dissenting). In his dissent, Justice Stephens noted the inherent "race to the bottom" nature of this rationale:

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[16] A lack of a rational connection is fatal to any regulation, "irrespective of whether the other factors tilt" in favor of upholding the regulation. *Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001). The burden is on the prisoner to disprove the regulation's validity of the regulation or decision. *Overton*, 539 U.S. at 132. But it is the prison officials' burden to demonstrate a threshold rational connection between the regulation and a valid penological interest. *Fontroy v. Beard*, 559 F.3d 173, 177 (3d Cir. 2009). "[T]his burden, though slight, must 'amount to more than a conclusory assertion.' " *Wolf v. Ashcroft*, 297 F.3d 305, 308 (3d Cir. 2002) quoting *Waterman v. Fa*rmer, 183 F.3d 208, 217, 218 n.9 (3d Cir. 1999)). The *Turner* test examines the facial validity of prison rules, not as applied. *Shaw v. Murphy*, 532 U.S. at 230.

[17] The Supreme Court applies a strict scrutiny standard to all governmental race-based classifications, including those of prisons. *Johnson v. California*, 543 U.S. 499, 505 (2005), citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

[18] *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989) (citation omitted).

[19] For an eye-opening review of prison rules held valid under *Turner*, see David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutin*y, 84 Geo. Wash. L. Rev. 972 (2016). See also Brief of Law Professors as Amici Curiae in Support of Petitioner, Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, No. 18-355, October 19, 2018 at 2 (since *Turner* "courts of appeals have applied unquestioned deference to prison officials' safety-related justifications…*Turner* reasonableness analysis [not meant] to devolve into…an absurdity check"), cert. den, __ U.S. __, 139 S. Ct. 795, Jan. 7, 2019.

> Any deprivation of something a prisoner desires gives him an added incentive to improve his behavior. This justification has no limiting principle; if sufficient, it would provide a "rational basis" for any [deprivation]…[for] 'regulations that deprive prisoners of their constitutional rights will always be rationally related to the goal of making prison more miserable.' Indeed, the more important the constitutional right at stake (at least from the prisoners' perspective), the stronger the justification for depriving prisoners of that right.

Id., 548 U.S at 546-47 (quotation omitted).

Prison administrative interests take on an new meaning and impact in the era of mass incarceration. Overcrowding, underfunding and understaffing, public opposition to new facilities, the absence of diversionary placements - all contribute to near-emergency conditions in which asserted security justifications broaden considerably. More to the point, over the last 30 years, judicial interpretation has noticeably expanded those interests. And it is no wonder. Notwithstanding the Prisoner Litigation Reform Act of 1996,[20] prisoner litigation represents a significant portion of the federal docket and has risen commensurately with the advent of mass incarceration. In 1970, some 2200 civil rights petitions were filed from a U.S. prison population of 360,000; in 2012, 22,600 such petitions issued from over 2.2 million prisoners. The filings per thousand just about doubled.[21] Reasonableness affords a basis for quick disposition. It is the judicial equivalent of "a lick and a promise."

[20] The 1996 Prison Litigation Reform Act served its purpose. It resulted in an immediate and substantial decrease in the number of civil rights petitions filed by State and Federal prison inmates. Bureau of Justice Special Report, *Prisoner Petitions Filed in U.S. District Courts*, 2000, with Trends 1980-2000, January 2002.

[21] Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, UC Irvine L. Rev. 5, no. 1 (2015): 153-79, 157 (Table 1: Prison and Jail Population and Prisoner Civil Rights Filings in Federal District Court, Fiscal Years 1970-2012).

IV. Constitutional Minimums: Mail, Calls and Visits

Reasonableness impacts attorney-prisoner communication in practice because it protects from scrutiny attorney contact limitations inherently difficult to measure. It also obscures definition of what the Constitution requires to protect attorney-prisoner privilege.

A. Identifying Legal Mail

Most attorney-prisoner-client communication litigation surely involves privileged mail, either to or from attorneys, advocacy groups, courts, prosecutors or other government entities. This makes sense. Notwithstanding the advent of email and video contact (which cost money), regular mail is the most accessible means of communication inside prison. Almost any prisoner can scare up a piece of paper and a stamp. "Given their incarceration and often distance from their attorneys, prisoners' use of the mail to communicate with their attorneys about their criminal cases may frequently be a more important free speech right than the use of their tongues." *Al-Amin v. Smith*, 511 F.3d at 1333-34. Others have noted the importance of written correspondence, due to the location of prisons in rural areas, the difficulty of obtaining calls and visits, the need to send lengthy documents, etc. [22] The inviolability of that correspondence is one of the few areas of her life over which a prisoner may still claim control.

1. Marking

Legal mail litigation primarily involves marking and procedures for receipt or sending. *Wolff v. McDonnell*, *supra*, controls both. There, prisoners challenged, among other policies, a prison requirement that legal mail be specifically marked, and that, when marked, it could be opened by staff, in the presence of the prisoner, to verify an absence of contraband. The lower courts granted relief, requiring the prison itself to verify the sender was an attorney if there was any doubt. *Id.*, 418 U.S. at 575. The Supreme Court disagreed. As to marking, it stated:

> We think it entirely appropriate that the State require any such communications to be specially marked as originating from an attorney, with his name and address being given, if they are to receive special treatment

Id., 418 U.S. at 576–77 (the issue of opening in the prisoner's presence is discussed below). The Court did not decide if a constitutional interest was at stake (or which one) but examined, "whether, assuming some constitutional right is implicated, it is infringed by the procedure now found acceptable by the State." *Id.,* 418 U.S. at 576. It held not.

The Federal Bureau of Prisons regulation provides:

> The inmate is responsible for advising any attorney that correspondence will be handled as special mail only if the envelope is marked with the attorney's name and an indication that the person is an attorney, and the front of the envelope is marked "Special Mail -

[22] The importance of legal mail is comprehensively described in Gregory Sisk et al*., Reading the Prisoner's Letter: Attorney-Client Confidentiality in Inmate Correspondence*, 109 J. Crim. L. & Criminology 559, 575-76 (2019).

Open only in the presence of the inmate." Legal mail shall be opened in accordance with special mail procedures.

28 CFR § 540.19(b). This specific BOP procedure has been repeatedly validated. See, e.g., *U.S. v Stotts*, 925 F.2d 83, 89 (4th Cir. 1991); *Henthorn v. Swinson*, 955 F.2d 351, 353 (5th Cir. 1992); *Martin v. Brewer*, 830 F.2d 76, 77-78 (7th Cir. 1987); *Cox v. Inch*, No. 17-CV-1334-JPG-SCW, 2018 WL 4403375, at *3 (S.D. Ill. Aug. 13, 2018), report and recommendation adopted sub nom. *Cox v. Hurwitz*, No. 17-CV-1334-JPG-SCW, 2018 WL 4401740 (S.D. Ill. Sept. 14, 2018).

(a) Magic Words

Courts generally, but not always, endorse very precise prison marking requirements. In *Cox v. Inch*, at *3 (S.D. Ill. Aug. 13, 2018), the court upheld a strict "magic word" requirement ("special mail, open only in presence of inmate" – not simply "privileged mail communication") as "easy to comply with." *United States v. Stotts*, 925 F.2d 83 (4th Cir. 1991) (requirements that legal sender be specifically identified on envelope and marked "special mail" not unconstitutional).

Other courts have rejected the view that only letter-perfect adherence to the regulation invokes protection: In *Burt v. Carlson*, 752 F. Supp. 346, 349 (C.D. Cal. 1990), the court found BOP rejection of mail labeled "Legal Mail; To be opened only in the presence of Benton Burt—Confidential" or "Confidential Attorney/Client Correspondence: To be opened only in the presence of Benton Burt" unnecessarily strict: "the markings [were] patently sufficient to notify the prison officials that the mail is claimed to be legal, and that the special handling … is claimed and appropriate." Accord: *Thornley v. Edwards*, No. CIV. A86-1503, 1988 WL 188333, at *2 (M.D. Pa. Mar. 29, 1988) (specific "special mail" marking...does not further security, order or any other important government interest").

(b) Name of Specific Attorney and Bar Status

The BOP and many state departments of correction require the sender to be an attorney, be identified as an attorney, and specifically be identified by name. For example, the phrase "Esquire" by itself will not substitute for "attorney-at-law." *Glover v. White*, No. CIV.A. 04-1989 (NLH), 2006 WL 3534485, at *6 (D.N.J. Dec. 7, 2006). The name of the law firm alone will not suffice. Courts are generally, but again not always, sympathetic. See *Lavado v. Keohane*, 992 F.2d 601, 609 (6th Cir.1993) (envelope that did not contain an attorney's name did not strictly comply with regulation); *Casey v. Hazelton USP Mail Room*, No. 3:16-CV-154, 2017 WL 4981954, at *6 (N.D.W. Va. Oct. 3, 2017), report and recommendation adopted sub nom. *Casey v. Hazelton U.S.P. Mail Room*, No. 3:16-CV-154, 2017 WL 4980858 (N.D.W. Va. Nov. 1, 2017), and *Stotts*, 925 F.2d at 87 (requirement that a specific attorney be identified as sender is reasonably related to security interests of prison administrators) [23] with *Merriweather v. Zamora*,

[23] Accord: *Bagguley v. Barr*, 893 F. Supp. 967 (D.Kan.1995)("those envelopes which do not identify a specific attorney as the sender do not qualify as special mail"); *Brown v. Williams*, No. 95 CV 3872 (SJ), 1998 WL 841638, at *3 (E.D.N.Y. Dec. 2, 1998); *Casey v. Hazelton USP Mail Room*, *supra,* at 7; *Treglia v. Cate*, No. Civ. 11-3438 LHK PR, 2012 WL 3731774, at 5 (N.D. Cal. Aug. 28, 2012); *Harrison v. Cty. of Cook, Ill*., 364 F. App'x 250, 253 (7th Cir. 2010); *Brown v. Williams*, No. 95 CV 3872 (SJ), 1998 WL 841638, at 3 (E.D.N.Y. Dec. 2, 1998). A

569 F.3d 307, 314 (6th Cir. 2009) (regulation only requires an indication that the person is an attorney; satisfied by "attorney/client" marking). A prison practice limiting privilege to attorneys within the county was invalidated as to an out-of-county attorney. *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty*., 796 F.3d 636, 648 (6th Cir. 2015).

2. Attorneys of Record/Pre-Representation

Some decisions uphold policies requiring the sender attorney be attorney of record in pending litigation. *Marr v. James*, N" o. 07–1201, 2010 WL 1997126, *1 (W. D. Mich. May 19, 2010) (citing *Bell–Bey v. Williams*, 87 F.3d 832, 839 (6th Cir.1996) (letters not legal mail because they were not "confidential communications pertaining to pending litigation"); *Jensen v. Klecker*, 648 F.2d 1179, 1182 (8th Cir.1981) (legal mail only includes "mail to or from an inmate's attorney," the contents of which "come within the parameters of the attorney/client mail privilege"); *Daniel v. Blanas*, 52 Fed. Appx. 394, 394 (9th Cir.2002) (citing *Keenan v. Hall*, 83 F.3d at 1094, amended by135 F.3d 1318 (9th Cir.1998)) (legal mail only includes "mail from a prisoner's lawyer"). But correspondence regarding representation is generally included. *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty*., 796 F.3d at 648. See also *Kaufman v. McCaughtry*, 419 F.3d 678, 686 (7th Cir.2005) (correspondence did not qualify as legal mail because plaintiff "was neither represented nor seeking to be represented by an attorney from any of the organizations with which he exchanged correspondence"). Legal mail does not encompass a non-attorney with power of attorney for a prisoner. *Saunders v. Vinton*, No. 3:12-CV-581 MPS, 2013 WL 1729264, at *3 (D. Conn. Apr. 22, 2013), aff'd, 554 F. App'x 36 (2d Cir. 2014).

3. Legal Service Organizations

Multiple decisions address ACLU mail access to prisoners. Generally, unless the ACLU is serving in a representative capacity, the mail is not legal mail. See *Mann v. Adams*, 846 F.2d 589, 590–91 (9th Cir. 1988) (per curiam) (Not ACLU if not counsel; inmates have no right to be present when mail sent to them by "recognized civil rights groups," expressly including the ACLU, is opened). Accord: *Turner v. Williams*, No. CV 16-6764-PA (JPR), 2018 WL 1989512, at *3 (C.D. Cal. Mar. 9, 2018), report and recommendation adopted, No. CV 16-6764-PA (JPR), 2018 WL 1989513 (C.D. Cal. Apr. 25, 2018), appeal dismissed, No. 18-55617, 2018 WL 6041666 (9th Cir. Oct. 2, 2018); *Samonte v. Maglinti,* No. Civ. 05-00598 SOM-BMK, 2007 WL 1963697, at *6 (D. Haw. July 3, 2007) (mail from ACLU when not acting as counsel, Prison Legal News, Office of the Ombudsman, Office of the Prosecuting Attorney, and U.S. Department of Justice not legal mail). See also *Jensen v. Klecker*, 648 F.2d 1179, 1182-83 (8th Cir. 1981) (ACLU letter bearing no other markings does not fall within the scope of that privilege, but letter from National Prison Project with attorney name and stamped "Lawyer Client Mail Do Not Open Except In Presence of Prisoner" well within the definition of attorney-client mail).

In *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty*., 23 F. Supp. 3d 834, 842 (E.D. Mich. 2014), aff'd. 796 F.3d 636 (6th Cir. 2015), cert. denied sub nom. *Livingston Cty., Mich. v. Am. Civil Liberties Union Fund of Michigan, supra*, the court upheld injunctive relief against a prison's refusal to deliver ACLU mail because it did not comply with its "postcard

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prisoner may be required to produce the actual envelope to establish property marking. *Moss v. Knox*, No. 516CV00010MTTMSH, 2017 WL 1425603, at 9 (M.D. Ga. Jan. 5, 2017) citing *Harrison v. Cty. of Cook*, *supra*.

only" policy. The letters related directly to potential legal action against prison officials, including those screening incoming legal correspondence (and at least one letter was forwarded to prison counsel). The court stated:

> Attorneys from "legal assistance organization" like the ACLU (or any other attorney for that matter) must be able to send confidential communication prior to initiating a legal action or formally creating an attorney-client relationship….Otherwise, attorneys will be unable to use the mail to communicate in confidence with inmates about the Jail's conditions of confinement or assess whether a constitutional violation at the Jail is occurring. Indeed, both attorneys and inmates have a strong interest in keeping communications relating to the initial investigative stages of a legal matter confidential such that the correspondence is not disclosed to Jail personnel or other inmates.

Id. 796 F.3d at 644, citing *Muhammad v. Pitcher*, 35 F.3d 1081, 1085 (6th Cir.1994) (attorney general mail privileged because that office may act on behalf of prisoners). [24]

In contrast, mail from the American Bar Association, a county clerk, or a register of deeds rarely constitutes "legal mail" because it is not mail from someone who can provide legal advice or who can act on behalf of a prisoner and therefore does not implicate right of access. *Dunham-Bey v. Wemple*, No. 1:09-CV-00191, 2010 WL 1257928, at *2 (W.D. Mich. Mar. 29, 2010), citing *Sallier v. Brooks*, 343 F.3d 868, 876–77 (6th Cir.2003) at 875-76.

4. Court Mail; Other Government Entities

Court mail presents a mixed picture. Many courts find no constitutional protection attaches because the material is already a matter of public record, and could otherwise be accessed by prison authorities. *Keenan v. Hall*, 83 F.3d at 1094 (9th Cir.1996) ("All correspondence from a court to a litigant is a public document, which prison personnel could if they want inspect in the court's files"), citing to *Martin v. Brewer*, 830 F.2d 76, 78 (7th Cir.1987) ("[W]ith minute and irrelevant exceptions all correspondence from a court to a litigant is a public document, which prison personnel could if they want inspect in the court's files"); *McCain v. Reno*, 98 F. Supp. 2d 5, 7 (D.D.C. 2000) (relationship of court with a prisoner does not raise same concerns about privilege and confidentiality as relationship between prisoner and lawyer), cited in *Smith v. Canu*, No. 1:04-CV-06637AWIGSAP, 2008 WL 1925015, at *6 (E.D. Cal. Apr. 29, 2008); *Mann v. Adams*, 846 F.2d at 590-91 (mail from public agencies, public officials, civil rights groups and news media may be opened outside the prisoner's presence, given security concerns); *Hayes v. Idaho Corr. Ctr.*, 849 F.3d at 1211 (district court properly dismissed an inmate's claim about court mail opened outside his presence because such mail is not legal mail); *Burgess v. Dormire*, No. 05-4111-CV-C-SOW, 2006 WL 1382317, at *3 (W.D.Mo. May 17, 2006) (filings with the court and any court orders or recommendations are matter of public record), citing *Harrod v. Halford*, 773 F.2d 234 (8th Cir.1985); *United States v. Scott*, 925 F.2d 83, 88–90 (4th Cir.1990) (court mail not be marked confidential nor did it contain privileged attorney-client communication). See also *Perry v. Williams*, No. 4:13-CV-475-RMG, 2013 WL 1703741, at *2 (D.S.C. Apr. 19, 2013) (administrative law hearing documents are generally available to the public).

[24] The Sixth Circuit protects such mail only if properly marked. *Boswell v. Mayer*, 169 F.3d 384, 388 (6th Cir. 1999).

Court documents may be excluded from constitutional protection even if the prison regulations otherwise include them within the scope of legal or special mail.[25] *Blaisdell v. Dep't of Pub. Safety*, Civil No. 14–00433 JMS/RLP, 2014 WL 5581032, at *6 (D. Haw. Oct. 31, 2014) ("A prison may set a higher standard than that required by the First Amendment, but doing so does not elevate a violation of a prison policy into a constitutional claim"); *Vitasek v. Maricopa Cnty. Sheriff's Office*, No. CV 10–1777–PHX–RCB (JRI), 2012 WL 176313, at *5 (D. Ariz. Jan. 23, 2012) (prison's broader definition of what constitutes legal mail does not control for First Amendment purposes); *Keenan v. Hall*, 83 F.3d at 1094 (The OSP defines legal mail to include mail from lawyers and courts but it must have the words "Legal Mail" written on the envelope"); *Cripe v. Hininger*, No. 6:12CV422, 2013 WL 1984379, at *3 (E.D. Tex. Apr. 25, 2013), report and recommendation adopted, No. 6:12CV422, 2013 WL 1984368 (E.D. Tex. May 13, 2013)

However, in *Sallier v. Brooks*, the Sixth Circuit held that, "[i]n order to guard against the possibility of a chilling effect on a prisoner's exercise of his or her First Amendment rights and to protect the right of access to the courts" court mail constitutes 'legal mail' and cannot be opened outside the presence of a prisoner who has specifically requested otherwise. *Id.* at 873, 877. See also *Baker v. Mukasey*, 287 F. App'x 422, 425 (6th Cir. 2008) (actionable claim on opening unmarked court mail regardless of BOP requirement that court mail be specially marked). Accord: *Boswell v. Mayer*, 169 F.3d 384, 389 (6th Cir.1999) (no requirement for court mail received by prisoners to be marked confidential for special handling), cited in *Hunter v. Helton*, No. 1:10-CV-00021, 2010 WL 2405092, at *3 (M.D. Tenn. June 10, 2010). [26]

5. Delivery to Prison; Package and Enclosures

Delivery method is not limited to United States Postal Service but includes mail by courier or hand delivery. *Kensu v. Haigh*, 87 F.3d at 174. There, several boxes hand-delivered to the prison by a private party, and marked as privileged, had to be opened in the prisoner's presence. Packages, however marked, have been held outside BOP special mail procedures because BOP regulations only use the word "envelope." *Lavado v. Keohane*, 992 F.2d 601, 609 (6th Cir. 1993).

B. Prison Delivery to or Receipt from Prisoner

1. Opening in Presence of Inmate

The legal "gorilla in the room" is the issue whether legal mail may be opened by prison staff, and if so, whether it must be done in the prisoner's presence. In *Wolff*,

> [t]he narrow issue…presented [was] whether letters determined or found to be from attorneys may be opened by prison authorities in the presence of the inmate or whether

[25] As does the BOP: 28 CFR §§ 540.18-19. It does, however, require such mail to be marked as "special mail," and that requirement has been upheld. *Pinson v. U.S. Dep't of Justice*, No. Civ. 12-1872 (RC), 2015 WL 13673660, at *3 (D.D.C. July 28, 2015)

[26] Judge Posner has opined that public availability does not necessarily render court documents nonsensitive: "[S]ome are sensitive. [But s]uppose the prisoner were asking that materials that he had submitted ex parte be held in camera or withheld from his adversary." *Guajardo-Palma v. Martinson*, 622 F.3d 801 at 804 (citation omitted).

> such mail must be delivered unopened if normal detection techniques fail to indicate contraband….

Wolff v. McDonnell, 418 U.S. at 575. The Court acknowledged the "constitutional status of the rights asserted…[was] far from clear. *Ibid.* Assuming such protection,

> It [is] entirely appropriate that the State require any such communications to be specially marked as originating from an attorney, with his name and address being given, if they are to receive special treatment. It would also certainly be permissible that prison authorities require that a lawyer desiring to correspond with a prisoner, first identify himself and his client to the prison officials, to assure that the letters marked privileged are actually from members of the bar. As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, since the inmate's presence insures that prison officials will not read the mail. The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters.

Id., 418 U.S. at, 576–77. "[A] rule whereby the inmate is present when mail from attorneys is inspected [is] all, and perhaps even more, than the Constitution requires." *Ibid.*

Courts consistently overread *Wolff*. See, e.g., *Jensen v. Klecker*, 648 F.2d 1179, 1182–83 (8th Cir. 1981) ("*Wolff* requires that all such mail be specially marked as originating from an attorney, with that attorney's name and address."). It doesn't. As noted in *Faulkner v. McLocklin*, 727 F. Supp. 486 (N.D. Ind. 1989):

> *Wolff*... does not so hold. In *Wolff*, the inmate contended open[ing] his [legal] mail in his presence violated several of his constitutional rights [but] Court disagreed...., stat[ing] that 'the petitioners, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, have done all, and perhaps even more, than the Constitution requires.'....The suggestion that allowing the inmate's presence may provide greater protection than that required by the constitution falls well short of holding that the inmate has a right to be present.

Id., 727 F. Supp. at 489 (quotation omitted).

But opening legal mail in the presence of the prisoner has become a generally accepted national practice. [27] While *Wolff* validated, but did not require, segregating properly marked legal mail, and opening and inspecting it in the presence of the prisoner, a substantial body of case law addresses whether it is constitutionally required to open the legal mail in the presence of the prisoner, or not.

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[27] "With rare and constitutionally dubious exceptions, the formal written policies of correctional departments across the nation protect the confidentiality of the contents of attorney-client mail. These policies countenance no reading of either incoming or outgoing legal mail. And outgoing legal mail generally is subject to minimal inspection, given that the risk of contraband leaving the institution is far lower than the risk of its introduction into a correctional facility." Gregory Sisk et al., *Reading the Prisoner's Letter: Attorney-Client Confidentiality in Inmate Correspondence*, 109 J. Crim. L. & Criminology at 577.

The majority rule requires the prisoner to be present. *Muhammad v. Pitcher*, 35 F.3d 1081, 1984–85 (6th Cir.1994) (policy of a prison or a jail to open legal mail outside of a prisoner's presence is unconstitutional); *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir.2006). Prisoners have a right to be present when their legal mail is opened, and "[i]nterference with legal mail implicates a prison inmate's rights to access to the courts and free speech." *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir.2003); *Al-Amin v. Smith*, 511 F.3d at 1336 (defendants "had fair and clear notice that opening [Plaintiff's] attorney mail outside his presence was unlawful and violated the Constitution."); *Bledsoe v. Biery*, 814 F. Supp. 58 (D.Kan.) aff'd 992 F.2d 1222 (10th Cir.1993) (settled law); *Hayes v. Idaho Corr. Ctr*., 849 F.3d 1204, 1211 (9th Cir. 2017) ("[W]e recognize that prisoners have a protected First Amendment interest in having properly marked legal mail opened only in their presence."); *Mangiaracina v. Penzone*, 849 F.3d 1191, 1196 (9th Cir. 2017) ("We therefore now clarify that ...prisoners have a Sixth Amendment right to be present when legal mail related to a criminal matter is inspected."); *Rivers v. Hodge*, No. 1:11CV644 CMH/TRJ, 2013 WL 989957, at *7 (E.D. Va. Mar. 12, 2013), aff'd, 539 F. App'x 306 (4th Cir. 2013) (well-established"); *Smith v. Robbins*, 454 F.2d 696 (1st Cir.1972). The Eighth Circuit aligns most closely with *Wolff*, i.e., that opening in presence of prisoner is, at least, not unconstitutional. *Gardner v. Howard*, 109 F.3d 427, 430 (8th Cir. 1997), citing *Harrod v. Halford,* 773 F.2d 234, 235–36 (8th Cir.1985).

These cases invoke both First and Sixth Amendment interests, and the right of access to courts. They invoke the overarching need for confidentiality, the chill that might affect a prisoner's ability to be candid with his counsel if he believes his legal mail is being read, the possibility of retaliation should the correspondence involve prison conditions, negative impact from potentially "opening up" defense strategy and so forth. Under *Turner*, these interests trump the minimal burden on prison administration.[28]

The Fifth Circuit is the outlier, consistently holding it constitutional to open legal mail outside the prisoner's presence. [29] Under *Turner* reasonableness, and the application of *Turner* to incoming mail in *Thornburgh* (albeit not legal), the Fifth Circuit holds opening incoming legal mail outside a prisoner's presence does not violate a constitutional right. *Id.*, 3 F.3d at 825.

The underlying assumption in these cases, including *Wolff*, is that allowing the prisoner to be present while the legal mail is opened and inspected is prophylactic because the prisoner can deter, or at least report, actual staff reading of the privileged material. See *Wolff*, 418 U.S. at 577: "As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, *since the inmate's presence insures that prison officials will not read the mail*." (emphasis added).

There are two rather significant problems in that statement. First, it assumes a recognizable difference between inspection and reading. Second, it assumes the prisoner has

[28] A routine caveat exists when there is reason to believe legal mail contains contraband. See, e.g, *Kensu v. Haigh*, 87 F.3d 172, 174–75 (6th Cir. 1996).
[29] *Brewer v. Wilkinson*, 3 F.3d 816, 825 (5th Cir.1993); *Patel v. Haro*, 470 Fed.Appx. 240, 244 (5th Cir.2012); *Collins v. Foster*, 603 F. App'x 273, 275 (5th Cir. 2015); *Clemons v. Monroe*, 423 F. App'x 362, 364 (5th Cir. 2011).

viable recourse should actual reading occur. Some courts have addressed the first issue. The prohibition, of course, is on actual reading. [30] In the context of outgoing mail, discussed below, the Ninth Circuit invalidated a "scanning practice" of reading words in an attorney letter and looking at each page, but not reading the text line-by-line. *Nordstrom II,* 856 F.3d at 1271. It is conceded that "[t]he line between an impermissible reading (or apparent reading) of outgoing legal mail and a permissible checking of that mail for contraband may blur easily." *Proudfoot v. Williams*, 803 F. Supp. 1048, 1053 (E.D. Pa. 1992).[31]

More to the point is the question of recourse. A prisoner may allege the official actually read and survive initial screening, but there is ultimately no inherent credibility in a prisoner's allegation as opposed to an officer's denial. And even where a court credits the prisoner's statement, as discussed below, without a clear explication of how the unlawful reading resulted in prejudice or injury, the reading simply may not matter. See Part V, below.

2. Outgoing Legal Mail

A prison may establish procedures for outgoing legal mail, but such procedures are evaluated under a less deferential standard. It is accepted that outgoing mail inherently presents less of a security risk than incoming mail. *Thornburgh v. Abbott,* 490 U.S. at 413 ("The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials."). "[T[here must be a closer fit between the regulation and the purpose it serves." *Witherow*, 52 F.3d at 265. Policies regarding outgoing legal mail receive heightened scrutiny under which a prison's inspection policy must "further an important or substantial government interest unrelated to the suppression of expression" and must not limit First Amendment freedoms "greater than is necessary or essential to the protection of the particular governmental interest involved." *Jones v. Caruso*, 569 F.3d 258, 267 (6th Cir. 2009).

A prisoner may have to mark outgoing legal mail as "privileged" to ensure confidentiality. *People v. Stroud*, No. D040833, 2003 WL 22853769, at *3 (Cal. Ct. App. Dec. 3, 2003). Such mail may be scanned for contraband, but it cannot be read. *Shatner v. Page*, No. 00-0251-DRH, 2009 WL 260788, at *20 (S.D. Ill. Feb. 4, 2009).

Scanning outgoing legal mail received a thorough review in the *Nordstrom* decisions. There, a prisoner challenged a prison policy allowing outgoing mail to be actually read for contraband. Contraband was broadly defined to include information deemed not legally

[30] *Lemon v. Dugger*, 931 F.2d 1465, 1468 (11th Cir.1991) (claim stated where a prison official read a letter from his death penalty appellate attorney in his presence); *Al–Amin*, 511 F.3d at 1323 n. 13 ("Nor do defendants deny that the law is well-established that Al–Amin has a constitutional right that precludes them from reading Al–Amin's attorney mail."); see also, e.g., *Peterson v. Arpaio*, No. CV04–2276–PHX–SMM–LOA, 2006 WL 3736060, at *4 (D.Ariz. Nov. 21, 2006)("Prisoners have a constitutional right to have their legal mail delivered to them uncensored and unread.").

[31] Cf. *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty*., 796 F.3d at 645 (independent screening itself defeats the purpose of the privilege). See also *Guajardo-Palma v. Martinson*, 622 F.3d at 805 ("Protection of the privacy of attorney mail [by screening] is imperfect; the prison employee who opens the letter will have to glance at the content to verify its bona fides.").

relevant, and thus correspondence was read for content. In its first review, the Ninth Circuit held that the prisoner stated a Sixth Amendment claim and remanded for determination whether such practice existed. *Nordstrom I*, 762 F.3d at 906. The lower court again denied relief, which the Ninth Circuit again reversed. *Nordstrom II* 856 F.3d at 1268. The court found content-reading to violate both Sixth and First Amendment guarantees:

> We have recognized a defendant's "ability to communicate candidly and confidentially" with defense counsel as "essential to his defense" and "nearly sacrosanct." Thus, prison officials may not read an inmate's "outgoing attorney-client correspondence..., the mail "shall not be read by staff" and must be sealed in the inmate's presence following inspection. The inspection must be "only to the extent necessary to determine if the mail contains contraband, or to verify that its contents qualify as legal mail and do not contain communications about illegal activities."

Nordstrom II, 856 F.3d at 1271–72. Defining contraband to include non-legal content in legal mail, and scanning for same, was illegal. *Ibid.* Outgoing mail is protected even if not addressed to counsel of record. *Watson v. Cain*, 846 F. Supp. 621 (N.D. Ill. 1993). Outgoing legal mail generally may not be required to be left unsealed. *Owens-El v. Robinson*, 442 F. Supp. 1368, 1388 (W.D. Pa. 1978).

Special receptacles may be designated for outgoing legal mail, or prisoners may have to hand over such mail to designated staff. In 2006, the BOP removed its prior "special mail" boxes and directed legal mail to be delivered sealed to unit team staff at a certain time daily. That staff person verifies the prisoner's identity matches the return addressee, and electronically scans the envelope. The change was intended to eliminate the possibility of a prisoner mailing out harmful material via outgoing legal mail. This changeover was validated in *Hairston v. Samuels*, No. CIV. 06-4894 (JBS), 2008 WL 5117293, at *5 (D.N.J. Dec. 4, 2008) as serving a legitimate security interest and minimally burdening the prisoner.[32]

Outgoing legal mail may be subject to greater review if the prisoner seeks postage from the prison. In *Bell Bey v Williams*, 87 F.3d 832 (6th Cir. 1996), the policy of submitting an unsealed letter to prison staff, for visually scanning to determine if a postage loan was warranted, was upheld. Procedural safeguards limited the scanning only to identify docket numbers, case title, requests for documents, it occurred in the prisoner's presence, and the mail was sealed thereafter. *Id.*, 87 F.3d at 837. Absent such safeguards, scanning indigent prisoners' outgoing legal mail is unwarranted. *Beeman v. Heyns*, No. 1:16-CV-27, 2016 WL 1316771, at *12 (W.D. Mich. Apr. 5, 2016). In *Washington v. Davis*, 416 F. App'x 563, 564 (6th Cir. 2011), requiring indigent prisoners to leave their legal mail with staff for up to three days to be read outside the prisoner's presence to justify photocopies stated a constitutional claim.

C. Telephone Calls

[32] Procedures for deposit of legal mail affects prisoner litigation, as the date of deposit is deemed date of filing under the "prison mailbox rule." "[T]he pro se prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay." *Houston v. Lack*, 487 U.S. 266, 271 (1988). When a prisoner is required to hand- deliver outgoing legal mail to staff, but staff availability may be intermittent or unreliable, filing deadlines are potentially adversely affected.

1. Unique Means of Access

Attorney-prisoner telephone calls are the most staff-intensive means of communication. They require staff hours not just to arrange, but also often to actually observe them during the call.[33] More than mail and even more than in-person visits, restrictions on telephone calls receive the greatest leeway under "reasonableness." See e.g., *Mullins v. Churchill*, 616 N.W.2d 764 (Minn. Ct. App. 2000) (because prison officials placed the calls themselves, limiting the number of telephone calls was valid restriction to avoid inundating case managers with call requests). At the same time, attorney phone calls are unique: Aside from in-person visits (expensive and time-consuming for defense counsel), phone calls are the only means of immediate give-and-take, of simultaneous dialogue between counsel and client. Associate Justice Berndon of the Connecticut Supreme Court addressed this cogently:

> In this age, access to counsel, which is meaningful in its time and manner, includes telephonic communication. The realization of the right of access to counsel cannot depend upon postal correspondence, for contemporaneous dialogue is often vital to the attorney-client relationship. Development of a proper defense requires open and uninhibited communication between the client and the attorney. Matters that may seem unimportant to the client could ultimately prove to be crucial to his or her defense. The majority's focus on postal correspondence as a means of communication between an attorney and his or her client also ignores the situation of those inmates who are illiterate and poorly educated. Furthermore, the physical location of counsel often renders the telephone the most effective means of communicating. As the trial court noted, the state's prisons are often a significant distance from the attorney's office or the court. Restricting telephonic communication will discourage attorneys from representing inmates, further drain the resources of the public defender's office, and hinder the establishment of an appropriate relationship between an incarcerated client and his or her attorney.

Washington v. Meachum, 238 Conn. at 740–41 (denial of request for two attorney calls per month not violative) (Berndon, Associate Justice, dissenting) (footnote omitted).

2. Reasonable Access Required

A prisoner is entitled to some telephone access to counsel. *Adams v. Carlson*, 488 F.2d at 630 (right to verbal interaction with counsel protected) (citations omitted); *Green v. Nadeau,* 70 P.3d 574, 578 (Colo. App. 2003) (must be permitted telephone access to contact the courts and attorneys under certain circumstances); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1313–14 (S.D.W.Va.1981) (failure to provide sufficient and regular telephone service in the jail operates to deprive prisoners of their right to have a reasonable opportunity to seek and receive the assistance of attorneys). A prison may impose reasonable restrictions on that right. *Pino v.*

[33] In the absence of a dedicated privileged line, typically the prisoner is taken to a staff area and the call is placed. Under these circumstances, the appropriate arrangement is for the staff member to stand out of earshot, while still able to visualize the area of the call, or to wait outside a closed room while the call is conducted. E.g., *Washington v. Meachum*, 238 Conn. 692, 742, 680 A.2d 262, 287 (1996) (Associate Justice Berndon, dissenting) ("Such calls shall be placed by staff who shall verify the party's identity prior to placing the inmate on the 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.")

Dalsheim, 558 F. Supp. 673, 675 (S.D.N.Y.1983) ("State is not obligated to provide … best manner of access;" telephone restrictions permitted where other access available).

That inquiry is fact-intensive, and often looks to availability of other means of communication, whether the limit temporary or related to disciplinary or classification status. See, e.g., *Hall v. McLesky*, 83 S.W.3d 752 (Tenn. Ct. App. 2001) (temporary interruption of attorney telephone access not prejudicial; restriction was limited and other channels of communication existed); *Jeffries v. Reed*, 631 F. Supp. 1212, 1219 (E.D. Wash. 1986) (intensive management unit restrict of three attorney calls weekly in business hours not unreasonable). Minimally, a prison telephone restriction may require extended factual finding to identify a valid security concern. See, e.g., *Lashbrook v. Hyatte*, 758 F. App'x 539, 542 (7th Cir. 2019) (elimination of periodic private calls and limit to use open dormitory telephones bank without ability to schedule calls; hearing required to evaluate resource concerns, the impact on prison staff of request for confidential attorney–client calls, or the viability of other means of communicating with attorney).

A complete bar on unmonitored calls, with no security justification, is inherently unreasonable. *Brown v. Madison Cty. Illinois*, No. 3:04-CV-824-MJR, 2008 WL 2625912, at *2 (S.D. Ill. June 27, 2008) (more than bare assertions of security concerns needed justify otherwise impermissible restrictions on inmate communications with their attorney). Serious restrictions on access, or total bars over some period of time, are likely unreasonable. *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250, 1258 (D.N.M. 2003) (complete ban on visitation with clients and a five-minute limit on telephone calls with counsel "unjustifiably obstruct the availability of professional representation); *Divers v. Department of Corrections*, 921 F.2d 191 (8th Cir. 1990) (calls only permitted if prisoner had court date set within thirty days; claim not frivolous); *Simpson v. Gallant*, 231 F. Supp. 2d 341, 348 (D. Me. 2002) (pretrial detainee's 3 month denial of access to any attorney call, even when due to disciplinary segregation, stated claim); *Tucker v. Randall*, 948 F.2d 388, 390–91 (7th Cir. 1991) (no calls were permitted for four days and all later phone calls taped presumably including his lawyer, claim should proceed); *Rodgers v. Lincoln Towing Service, Inc*., 771 F.2d 194, 199 (7th Cir.1985) (denying a pre-trial detainee complete access to a telephone for four days violative); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (for pre-trial detainees, one chance every two weeks to call attorney violated due process); *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250, 1258 (D.N.M. 2003) (ban on counsel visitations and a five-minute limit on telephone calls with counsel, unreasonable).

Conversely, valid restrictions generally maintain a core of regular access, even if limited in scope, or if requiring some prior administrative step. See, e.g., *Robbins v. South*, 595 F. Supp. 785, 789–90 (D.Mont.1984) (policy requiring inmates to obtain prior written authorization to telephone their attorney and limiting those calls to one per week found reasonable, given correspondence rights and prison visits); *Feeley v. Sampson*, 570 F.2d 365, 373–74 (1st Cir. 1978) (one ten-minute call daily, reasonable); *Hines v. Carter*, No. 3:17-CV-388-MGG, 2018 WL 5249912, at *6 (N.D. Ind. Oct. 18, 2018) (prison did not restrict when or how long prisoners could call their attorneys using the Offender Calling System; offenders put attorneys on Telephone List and could tell staff not to monitor, and could also call attorneys collect); *Decraene v. United States*, 1999 WL 246708 (E.D. La., April 26, 1999) (30 day telephone bar not violative where prisoner communicated with his attorney both by personal visit and mail

during the time of restricted telephone); *Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981) (restricting inmates to one call per week was lawful); *Bellamy v. McMickens*, 692 F. Supp. 205, 214 (S.D. N.Y. 1988) (occasional delays of a day to use phone for attorney calls reasonable).

Sometimes, extreme restrictions are upheld. See, e.g., *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir.1986) (30 minute delay post-arrest not due process violation, even when detainee hung himself in that period); *Brown v. Day*, 1999 WL 816378 (E.D. La. Oct. 7, 1999) (84 day phone bar while on "no-duty," which allegedly prevented attorney call, dismissed as frivolous because mails were available); *Sellers v. Roper*, 554 F. Supp. 202, 208 (E.D. Va. 1982) (phone bar during extended disciplinary period not violative where no special need for access to a telephone nor showing mails inadequate for communication with lawyers and courts). *Woods v. St. Louis Justice Ctr*., No. 406-CV-233 CAS, 2007 WL 2409753, at *10 (E.D. Mo. Aug. 20, 2007) (refusal of free attorney call for four months not actionable where prisoner had access to pay telephone, could have called the attorney collect, or called public defender for free). A requirement that prisoners call their attorneys collect has been upheld, even where attorneys did not accept collect calls. *Aswegan v. Henry*, 981 F.2d 313, 314 (8th Cir.1992).

3. Availability of Alternatives

In *Rivera v. Chesney*, No. CIV. A. 97-7547, 1998 WL 639255 (E.D. Pa. Sept. 17, 1998), the court specifically addressed the issue whether alternative means validated phone restrictions:

> It is not clear if alternative means were available to Rivera as his request on July 21, 1998 to contact his attorney was denied without explanation. But cases holding that preventing an inmate from contacting his attorney is actionable only when the inmate had no alternative means of communication apply an unnecessarily constrained view of the right of access to counsel. See, e.g., *Williams v. ICC Committee*, 812 F. Supp. 1029, 1034 (N.D.Cal.1992). Alternative means of access are relevant in determining the reasonableness of a prison regulation; *they are not dispositive*. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2262, 96 L.Ed.2d 64 (1987).

Id., at 3 (emphasis added). The court denied summary dismissal of the prisoner's claim a three month delay in adding his attorney to his phone list violated his right of access:

> Over three months elapsed between Rivera's initial attempt to add his attorney to his telephone list and permission to call his attorney. The prison regulations regarding the Automated Inmate Telephone System permitted new telephone numbers to be added during the first five days of each month. A Unit Manager receiving timely submissions was apparently authorized to approve all additions except attorneys, who had to be independently verified. The prison may be able to establish that these procedures were reasonably related to penological interests and did not unduly interfere with an inmate's ability to access the courts. However, Rivera has alleged sufficient facts that, if proven, may constitute an unconstitutional infringement on his right of access secured by the First, Sixth, and Fourteenth Amendments [and] survive this motion to dismiss.

Ibid.

BOP policy also addresses alternative means. Its policy is interpreted by staff and courts as requiring justification for a call – for virtually any call. This may be a showing that alternative means are not adequate, or there is pending litigation, or some particular emergency.[34] The actual policy statement, however, provides that occasional calls are part of *routine* attorney contact. It is only *frequent* calls that require additional justification. The policy provides:

> The Warden may not apply frequency limitations on inmate telephone calls to attorneys when the inmate demonstrates that communication with attorneys by correspondence, visiting, or normal telephone use is not adequate.] The Bureau provides each inmate with several methods to maintain confidential contact with his or her attorney. For example:
> - inmate-attorney correspondence is covered under the special mail provisions;
> - private inmate-attorney visits are provided; and
> - the inmate is afforded the opportunity to place an occasional unmonitored call to his or her attorney.
>
> Based on these provisions, *frequent confidential inmate-attorney calls should be allowed only when an inmate demonstrates that communication with his or her attorney by other means is not adequate.* For example, when the inmate or the inmate's attorney can demonstrate an imminent court deadline (see the Program Statements on Inmate Correspondence and Inmate Legal Activities). [sic] Staff are to ensure that the unmonitored calls they place on an inmate's behalf are to an attorney. Inmates are responsible for the expense of unmonitored attorney telephone calls. Third-party calls are not authorized.

BOP Program Statement 5264.07, January 31, 2002, "Telephone Regulations for Inmates" 12 (emphasis added).

This distinction – an important distinction – is routinely lost. For example, in *Mosby v. Fed. Bureau of Prisons*, No. 06-344 MJDFLN, 2006 WL 3617894, (D. Minn. Aug. 21, 2006), the court stated:

> According to BOP policy,... to receive permission to place an unmonitored attorney call, inmates are normally required to establish that communication with attorneys by other means is not adequate.... Plaintiff has not established that he will suffer irreparable harm or prejudice if he is denied access to unmonitored legal telephone calls. Plaintiff has not established, let alone alleged, that alternate avenues of communication, such as a legal prison visit or a written communication to the attorneys, are inadequate. Therefore, Plaintiff has not met his burden to show that there is a threat of irreparable harm to Plaintiff if the preliminary injunction requiring the BOP to give him access to unmonitored legal calls is denied. Plaintiff has a reasonable opportunity to seek and

[34] Showing pending court deadlines is a common call requirement, yet "prisoners have other issues besides court deadlines necessitating a call to an attorney. *Casey v. Lewis,* 834 F. Supp. 1553, 1564 (D. Ariz. 1992), aff'd, 43 F.3d 1261 (9th Cir. 1994), rev'd on other grounds, 518 U.S. 343, and vacated, 91 F.3d 1365 (9th Cir. 1996). Similarly, availability of visitation does not substitute for inquiries seeking an initial attorney visit. *Johnson–El*, 878 F.2d at 1052.

> receive assistance from attorneys through other avenues, such as written communications or legal visits.

Id. at *7 (no violation in denial of request for two attorney calls because no court deadline and no showing of inadequacy of other means). In *Elrod v. Swanson*, 478 F. Supp. 2d 1252, 1266–67 (D. Kan. 2007), the court denied relief, stating:

> Under BOP regulations, an inmate may be provided a legal call when he demonstrates to staff that communication by correspondence, visiting, or normal telephone use is not adequate. The inmate bears the responsibility under this regulation to alert staff as to the need for the inmate-attorney telephone call, such as a pending court deadline where correspondence and visitation would not be effective. Plaintiff does not assert or provide evidence that he showed prison officials of a need to contact his attorney and that despite such a need, his request was denied.

Ibid. The prisoner had been allowed a fifteen-minute call with his attorney which was cut short, was not allowed to call back, and then was disallowed a second call thirty days later.

In *Cesal v. Bureau of Prisons*, No. CivA 04CV281 DLB, 2006 WL 2803057 (E.D. Ky. Sept. 28, 2006), the prisoner was denied calls three times in one month, days before a briefing deadline. The deadline was extended, and the prisoner was denied a call two weeks before that deadline. He was granted one call five days before the brief deadline. All subsequent requests for unmonitored phone calls were denied. The court dismissed an interference claim:

> BOP reasonably denied request for a second unmonitored attorney call; prisoner had four months to communicate with counsel through regular mail, had ample opportunity to express desire for certain direct appeal theories and to answer counsel questions; rarely necessary for counsel to converse by telephone to form direct appeal strategy [and counsel so acknowledged].

Id., at 6.[35]

These cases turn on a reading of BOP policy that is patently wrong. The underlying staff denials - and thousands more that do not find their way into court – are equally wrong. Occasional calls – however that may be defined – require no justification but are a normal means of prisoner-attorney communication. Yet they are routinely denied.

D. In-Person Visits: Access and Conditions

1. Contact Visits Required

Generally, contact, or barrier-free, visits are constitutionally protected and cannot be arbitrarily barred. *Ching v. Lewis*, 895 F.2d at 610*; Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th

[35] In *Hoffenberg v. Fed. Bureau of Prisons*, No. 4:03-40226-GAO, 2004 WL 2203479, at *1 (D. Mass. Sept. 14, 2004), prisoner's claim that BOP 300 minute monthly telephone kept him from attorney's services for lawsuits to collect funds for restitution was held invalid.

Cir. 1995).[36] It is thought direct, face-to-face contact provides a type of communication, assessment, and development of rapport, unavailable through any other means: "[O]nly a face-to-face meeting allows an attorney to assess the client's demeanor, credibility, and the overall impression he might have on a jury." [37] It also allows contemporaneous document assessment with the client. A partitioned visit requires specific security justification. *Cty. of Nevada v. Superior Court*, 236 Cal. App. 4th 1001, 1011, 187 Cal. Rptr. 3d 27, 36 (2015) (nonpartitioned visits had been allowed for some 20 years before unjustified change); *Jones v. Wittenberg*, 440 F. Supp. 60 (N.D. Ohio 1977) (partition between prisoner and attorney ordered removed and soundproof doors ordered installed).

But the right is not unfettered. *Mann v. Reynolds, supra.* There is not an absolute right to physically touch one's attorney. *Cty. of Nevada v. Superior Court*, 236 Cal. App. 4th at 1008, 187 Cal. Rptr. 3d at 34. A bar on contact visits was upheld for high risk inmates notwithstanding the absence of any record evidence the asserted justification of escape, hostage-taking or assault had ever occurred. *Casey v. Lewis*, 4 F.3d 1516, 1521 (9th Cir. 1993). Accord: *Keenan v. Hall*, 83 F.3d at 1094; *Ramon Luna Bueno, Plaintiff, v. J. Chang*, et al., No. CV1603450, 2019 WL 5698675, at *18 (D. Ariz. Nov. 4, 2019); *Mitchell v Dixon,* 862 F. Supp. 95 (E.D.N.C. 1994) (limits at maximum security facility warranted); *Bruscino v. Carlson*, 854 F.2d 162, 166 (7th Cir.1988) (boxed handcuffing and shackling for attorney visits at Marion reasonable given history of violence and "incorrigible, undeterrable character of the inmate"). But see *Mann v. Reynolds*, (non-contact policy for death row inmates invalid where no rationale offered and contact visits allowed for non-attorneys); *Lopez v. Cook*, No. 2:03-CV-1605 KJM DAD, 2014 WL 1488518, at 4 (E.D. Cal. Apr. 15, 2014) (contact visits ordered where security threat of prisoner overstated and prison offered no alternative); *Caruso v. Solorio*, No. 115CV00780, 2019 WL 1789682, at 5 (E.D. Cal. Apr. 24, 2019) (bar on contact visits unlawful where no allegations or evidence counsel assisted prisoner in alleged criminal activities; spurious allegation against counsel stricken from filing); *State v. Walker*, 804 N.W.2d 284, 294 (Iowa 2011) (partitioned visit unlawful where no indication prisoner would present any special difficulties). Cases differ whether the prison need only assert a hypothetically valid security interest or must put forward specific evidence of a compelling interest. Compare *Barnett v. Centoni*, No. C 92-0935-CAL, 1996 WL 263643, at *3 (N.D. Cal. May 7, 1996) (prison need show only some evidence asserted interest is the actual reason; not required to show attorney visits have in fact led to violence, escapes or smuggling) with *Lopez v. Cook*, No. 2:03-CV-1605 KJM DAD, 2014 WL 1488518, at *3 (E.D. Cal. Apr. 15, 2014) and *Walker v. Sumner*, 917 F.2d 382 (9th Cir. 1990) (prison must put forward concrete evidence).

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[36] But see *Delago v. Godinez*, No. 15-CV-1180-SLD, 2015 WL 6848102, at 2 (C.D. Ill. Nov. 6, 2015), aff'd sub nom. *Delgado v. Godinez*, 683 F. App'x 528 (7th Cir. 2017) (Supreme Court approval of ban on all contact visits generally demonstrated no constitutional right, even for attorney visits). Modified partitioned rooms were approved *in United States v. Loera*, No. 09-CR-00466 (BMC), 2017 WL 4675773, at 3 (E.D.N.Y. Oct. 17, 2017) (partitioned room adequate provided alterations made to allow for easier review of documents) and *United States v. Sellers*, No. 207cr00145, 2008 WL 11343606, at 1 (D. Nev. Sept. 23, 2008) (barrier permissible but prison ordered to modify attorney visit area where heavy steel mesh screen separated attorneys from client, only one immovable backless stool, and no writing surface, was available and prisoner sat in darkness); *Small v. Superior Court*, 79 Cal. App. 4th 1000, 1013, 94 Cal. Rptr. 2d 550, 558 (2000) (physical barriers not necessarily unlawful as long as privacy provided).

[37] *Com. v. Brown*, 2016 PA Super 176, 145 A.3d 196, 202 (2016), quoting *Com. v. Brooks*, 576 Pa. 332, 339, 839 A.2d 245, 250 (2003). Failure to meet face-to-face in a capital case is ineffective assistance of counsel. *Ibid.*

It may fairly be assumed that, as officers of the court, attorneys rarely present a threat to prison security or discipline. *State ex rel. McCamic v. McCoy*, 166 W. Va. 572, 276 S.E.2d 534 (1981).[38]

2. Visit Privacy

In-person visits require privacy. *Mastrian v McManus*, 554 F.2d 813 (8th Cir. 1977); *Johnson-El v Schoemehl*, 878 F.2d 1043 (8th Cir. 1989); *Ahrens v. Thomas*, 434 F. Supp. 873 (W.D.Mo.1977) (lack of facilities for private consultation denied Sixth Amendment right of access to the courts); *Goldsby v. Carnes*, 365 F. Supp. 395 (W.D.Mo.1973) (private attorney consultation rooms free of audio and visual intrusion required). Private conversation must be possible. *People v. Torres*, 218 Cal. App. 3d 700, 267 Cal. Rptr. 213 (5th Dist. 1990), reh'g denied and opinion modified, (Apr. 5, 1990); *Wright v. State*, 250 Ga. 570, 300 S.E.2d 147 (1983) (attorney-client relationship unconstitutionally impaired where partitioned room required conversing at a level loud enough to be overheard by other prisoners and guards);

BOP regulations provide visits shall take place in a private conference room, if available and staff may not surveil them for sound. 28 C.F.R. § 543.13(e); 28 C.F.R. § 543.13(b). Compare *Zimmerman v. Tippecanoe Sheriff's Dept*., 25 F. Supp. 2d 915 (N.D. Ind. 1998) (meeting in locked room with intercom did not violate protected rights when there was no indication that the conversations were overheard); *Jiles v. Department of Correction*, 55 Mass. App. Ct. 658, 774 N.E.2d 150 (2002) (no claim where lowered voices would have allowed for confidential attorney-client communications). But see *Kuebler v. Mason,* 274 So. 3d 925, 930 (Miss. 2019) (presence of guards within earshot was necessary for security).

While audio surveillance is forbidden, courts disagree whether video surveillance alone violates privacy. See *Case v. Andrews*, 226 Kan. 786, 603 P.2d 623 (1979) (camera surveillance of attorney-client conference is unjustified). In *Grubbs v. O'Neill*, 744 F. App'x 20, 22–23 (2d Cir. 2018), the court remanded for the district court to consider the "chilling effect" that the video surveillance could have on candid communication. In *United States v. Carter*, the massive privilege violation case at Leavenworth (see Part X.E below), after viewing the unauthorized videos of attorney-prison visits, Chief District Judge Robinson found one "could easily observe non-verbal communications, including the communicants' use of their hands, fingers, and other body language" and "non-verbal communication can provide an observer a wealth of information about the communicants." *United States v. Carter*, No. 16-20032-02-JAR, 2019 WL 3798142, at *30 (D. Kan. Aug. 13, 2019). See also *Case v. Andrews*, 226 Kan. 786, 791, 603 P.2d 623, 627 (1979) ("Absent a showing of any risk to the order or security of the jail, the practice of visually monitoring an attorney-client conference when privacy is requested, is unreasonable."), *State v. Walker*, 804 N.W.2d at 295 ("in the absence of any individualized showing of a safety or security risk video surveillance violates an arrestee's right to "see and consult confidentially" with his attorney "alone and in private.") and *State v. Sherwood*, 174 Vt. 27, 800 A.2d 463, 466 (2002) (videotaping unlawful).

[38] Attorney was entitled to mandamus relief from visitation privileges revocation after he unknowingly passed envelope containing prison contraband tobacco to inmate during attorney-client conference; penalty was shocking to one's sense of fairness. *Zuntag v. City of New York*, 18 Misc. 3d 210, 853 N.Y.S.2d 469 (Sup 2007).

Other courts have found video surveillance either harmless or justified by security needs. In *People v. Dehmer*, 931 P.2d 460 (Colo. App. 1996), the defendant claimed video surveillance impaired his attorney-client relationship because he was not free to use physical gestures to communicate with his attorney, had to cover his mouth while speaking, and therefore spoke louder and might be overheard. *Id.*, 931 P.2d 460. The court found no violation of privilege where no indication conversation was overheard or lip movements observed. *Id.*, 931 P.2d at 464–65; *Baker v. Beto*, 349 F. Supp. 1263, 1271 (S.D. Tex. 1972), vacated sub nom. *Sands v. Wainwright*, 491 F.2d 417 (5th Cir. 1973) (physical observation "obviously necessary" for internal security); *People v. Parsons*,15 P.3d 799, 805 (Colo.App.2000) (restricting his attorney visit to a room with a glass partition with a pass-through).

3. Scope of Visit Access

Hours for visitation must be reasonable. They must include some access within regular working hours. *Jones v. Hamelman*, 869 F.2d 1023, 1029 n.9, (7th Cir. 1989) (attorney-client interviews were conducted during normal visiting hours or preapproved and arranged through the office of the Release Coordinator); *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir. 1978), judgment rev'd on other grounds, 441 U.S. 520 (1979) (attorney visiting hours from 8:00 a.m. to 8:00 p.m., seven days a week); *Negron v. Wallace*, 436 F.2d 1139, 1144 (2d Cir. 1971) (9:00 a.m. to 5:00 p.m. or by special arrangement); *Nunez v. Boldin*, 537 F. Supp. 578, 582 (S.D. Tex.), dismissed 692 F.2d 755 (5th Cir. 1982) (prohibiting evening visit unreasonably given remoteness of facility); *Sturm v. Clark*, 835 F.2d 1009 (3d Cir. 1987) (evening and weekend visiting access very important).

Some provision must be made for emergency visits. *Dreher v. Sielaff*, 636 F.2d 1141, 1145 (7th Cir. 1980) ("Any plan would be expected to provide some flexibility for special or emergency situations."). Every preference should be for a private meeting room. *Case v. Andrews*, 226 Kan. at 790, 603 P.2d at 626 (1979) ("If there is a private room readily available, it should be made available to the jail inmate and his attorney. If there is no private room available, then as much privacy should be afforded as is reasonably possible under the circumstances."). Regular visitation areas may suffice if private communication can be achieved with no undue delays. *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir. 1978) (enjoining jail policies that required "most attorney visits [to be] made in the general visiting rooms during visiting hours" because the policies "entail[ed] long delays, limit[ed] the attorney's time with his client, and totally vitiate[d] confidentiality" (emphasis added)), rev'd on other grounds, *Bell v. Wolfish*, 441 U.S. 520 (1979). But see *Lane v. Tavares*, No. 3:CV-14-991, 2015 WL 435003, at *11 (M.D. Pa. Feb. 3, 2015) (denial of contact visits in a private room likely not meritorious).

Health concerns did not warrant an absolute bar on contact visits during the flu season. *Office of State Pub. Def. v. McMeekin*, 2009 MT 439, 6, 354 Mont. 130, 132, 224 P.3d 616, 618. In *In re Roark*, 48 Cal. App. 4th 1946, 56 Cal. Rptr. 2d 582 (1996), requiring counsel to remove his prosthetic leg for inspection and possible disassembly, absent particularized suspicion, did not protect reasonable security interests and impermissibly chilled right.

Generally, visitation privileges should be available for attorneys not of record. *Gates v. Cook*, 234 F.3d 221 (5th Cir. 2000) (potential counsel protected even if other counsel has already

been appointed). But see *Elie v. Henderson*, 340 F. Supp. 958 (E.D. La. 1972) (no right to meet with attorney not actually representing prisoner); *United States v. Bundy*, No. 216CR00046, 2017 WL 81391, at 3 (D. Nev. Jan. 9, 2017(prisoner limited to visits from appointed counsel). Group visits are warranted only in class actions. *Valvano v. McGrath*, 325 F. Supp. 408, 412 (E.D. N.Y. 1970); *Boyd v. Anderson*, 265 F. Supp. 2d 952 (N.D. Ind. 2003) (no right to meet as a group). Attorneys may be restricted from bringing in computers. *United States v. Rivera*, 83 F. Supp. 3d 1154 (D. Colo. 2015) (BOP reasonably refused to allow counsel to bring laptop into maximum security facility).

E. Pre-Registration, Opt-In and Control Numbers

Some prison systems use systems where the prisoner and/or attorney must register or select a process to preserve privilege in any communication method. This may include mandatory attorney pre-registration with the prison, formal prisoner selection of a privileged process (opt-in) or assignment of a control number (for legal mail).

1. Attorney Pre-registration

Systems that require an attorney to register with a prison before being allowed access to privileged mail, calls or visits are valid. In *Wolff*, the Supreme Court held not unconstitutional a prison requirement "that a lawyer desiring to correspond with a prisoner, first identify himself and his client to the prison officials, to assure that the letters marked privileged are actually from members of the bar." *Id.*, 418 U.S. at 576–77. It has become an accepted, though not required, practice. See *Frazier v. Donelon*, 381 F. Supp. 911, 919 (E.D. La. 1974), aff'd, 520 F.2d 941 (5th Cir. 1975) (as condition precedent unfettered correspondence attorney should have to communicate to the jail authorities existence of an attorney-client relationship); *Abraham v. James*, No. 86 CIV. 4940 (JFK), 1987 WL 17420, at *2 (S.D.N.Y. Sept. 17, 1987).

The BOP requires attorneys seeking legal visits to pre-register:

> The Warden may require an attorney to indicate where he is licensed as an attorney and how that fact may be verified. Prior to each appointment or visit, the Warden shall require each attorney to identify himself and to confirm that he wishes to visit an inmate who has requested his visit or whom he represents or whom he wishes to interview as a witness. The Warden may not ask the attorney to state the subject matter of the lawsuit or interview. If there is any question about the identity of the visitor or his qualification as an attorney in good standing, the Warden shall refer the matter to the Regional Counsel.

28 § 543.13(c). Attorneys must submit a "Visiting Attorney Statement" certifying they are a licensed attorney seeking a prisoner visit "for the purpose of facilitating the attorney-client or attorney-witness relationship and for no other purpose." Form BP-A0241. Some facilities may require a special ID card for attorney access. Requiring attorneys to be placed on the prisoner's visiting list has been upheld. *Moore v. Lehman*, 940 F. Supp. 704, 706 (M.D. Pa. 1996). The Orleans Parish Sheriff's allows unrecorded inmate calls to a lawyer's landline (not cell) only if the lawyer submitted an affidavit listing their landline number.

2. Opt-in

Opt-in systems require a prisoner to notify the prison they seek privileged contact. It may involve prisoner notification it desires the benefit of special mail procedures or involve submitting an attorney phone number to the (usually private) prison phone management. It may require an attorney to submit her phone number to a jail or prison, to be entered into a "do not record" channel.

All things being equal, opt-in systems are valid. No constitutional violation was found in *Samonte v. Maglinti*, No. CIV 05-00598 SOM-BMK, 2007 WL 1963697, at *8 (D. Haw. July 3, 2007). The prisoner had not identified certain attorneys for privileged outgoing mail, nor had any attorneys complied with the prison rule to pre-identify themselves to the prison for legal mail benefits. In *Sallier v. Brooks*, the prison rule required the prisoner to request to be present when legal mail was opened; a legal mail violation existed only after the prisoner requested opt-in. *Id.*, 343 F.3d at 878. Accord: *Robinson v. Rodarte*, No. 16-CV-13691, 2018 WL 783677, at *2 (E.D. Mich. Feb. 8, 2018) (no legal mail violation where no record evidence prisoner had requested opening in his presence in accord with prison policy).

However, an opt-in system was invalidated in *Knop v. Johnson*, 667 F. Supp. 467, 473 (W.D. Mich. 1987). There, a state regulation required prisoners to specific written request for legal mail privileges. The district court upheld the system in principle but found it unconstitutional as applied. *Id.*, 667 F. Supp. at 474. Specifically, the inmate guidebooks explaining the procedure were both unclear and routinely available to all prisoners. *Id.*, 667 F. Supp. at 474. Each institution implemented the policy differently, which were not adequately explained. *Ibid.* The requests had to be renewed upon transfer, burdensome because of the high number of transfers. Last, the requirement that specific attorneys be designated might cause unintentionally waiver if the prisoner did not designate the attorney when first hired, and because it could inhibit class action representation. *Ibid.* The court ordered implementation of a revised policy and provided very specific guidance. *Id.*, 667 F. Supp. at 475.

Requiring prisoners or attorneys to submit attorney phone numbers to access a "do not record" line suffers repeatedly from technological breakdown. Prison screening of a private channel was enjoined in *Randolph v. Nevada, ex rel. Nevada Dep't of Corr.*, No. 3:13-CV-00148-RCJ, 2014 WL 5364118, at *1 (D. Nev. Oct. 21, 2014). The prisoner submitted an "Allowed Calling List Request" form listing his state-licensed attorney, telephonically entered the phone number into the private company's legal database and was approved. But during a subsequent attorney call, a notice of monitoring tape played. Both client and attorney unsuccessfully made repeated steps to privatize their calls. In *Johnson v. CoreCivic*, No. 4:16-CV-00947-SRB, 2018 WL 7918162, at *1 (W.D. Mo. Sept. 18, 2018), calls made to attorney numbers designated for a private channel were recorded multiple times. The court granted class action status for attorneys so affected to proceed with constitutional and statutory claims,

In *United States v. Carter*, *supra*, thousands of attorney calls at the Leavenworth detention facility were recorded because neither local attorneys nor the prisoners were properly informed of the procedure to privatize a number. Technical errors abounded. Even when numbers were privatized, many were still recorded. 2019 WL 3798142, at 37.[39] Compare *Walen v. Embarq*

[39] The company testified they might input the wrong phone number or delay in inputting it, input the name in different formats, privatize the number for calls placed from only certain areas or for only subpopulations. 2019 WL 3798142 at 40. This outsized Leavenworth litigation is described more fully at Part X.E, below.

Payphone Servs. Inc., No. 06-14201, 2009 WL 3012351, at *1 (E.D. Mich. Sept. 17, 2009), where due to technical error multiple calls to properly designated attorney number were recorded was not a constitutional violation where the tapes were destroyed, the recordings not repeated and no injury was otherwise sustained.

Major technical flaws in Global Tel Link Corporation (GTL) maintenance of a "do not record" line in Orange County came to light in 2018. GTL had switched over to a new platform in 2015, but the "do not record" numbers were not properly uploaded. Over a thousand attorney calls were recorded. In subsequent lawsuits, similar errors in other jail phone lines maintained by GTL in other parts of the country were identified.[40] The taint spread to a mass murder conviction, propelling the judge to bar the death penalty.[41]

A major hack of security at Securus Technologies, a leading national provider of prison and jail phone services, provided *The Intercept*, an online news publication, with about 70 million records of phone calls, in at least 37 states from late 2011 to the spring of 2014, with possibly 14,000 recorded conversations between inmates and attorneys. Securus, too, maintained a "do not record" channel where calls were still accessible. Some of these calls were evidence in the Austin, Texas litigation.[42] Kentucky faced controversies regarding taping of attorney calls, where "do not record" lines were inadequately maintained and defense counsel not informed of procedures to register their numbers.[43] Consistent error in manually entering attorney numbers propelled Santa Clara community leaders to oppose allowing local prosecutors warrantless access to local jail calls.[44] Comparable cases have arisen elsewhere, largely attributable to software glitches on "do not record" lines.[45] Prosecutorial access to jail phone calls is a regular news item.

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[40] Orange County Grand Jury Report 2018-2019, "Your Call May Be Recorded," p. 5.
[41] https://mynewsla.com/crime/2018/10/02/dekraai-attorney-jumps-into-jail-phone-scandal/
[42] Jordan Smith & Micah Lee, *Not So Securus: Massive Hack of 70 Million Prisoner Phone Calls Indicates Violations of Attorney-Client Privilege*, INTERCEPT (Nov. 11, 2015, 12:43 PM), https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/ (indicating that roughly 14,000 attorney-client phone calls were recorded in a three-year period); Thy Vo, *Company Under Fire for Recording Attorney-Client Jail Phone Calls Made the Same Mistake Twice Before*, VOICE OC (Aug. 24, 2018), https://voiceofoc.org/2018/08/company-under-fire-for-recording-attorney-client-jail-phone-calls-made-the-same-mistake-twice-before/ (noting that over 1,000 privileged phone calls were discovered to have been recorded).
[43] https://www.wdrb.com/in-depth/sunday-edition-kentucky-jails-scrutinized-for-recording-attorney-inmate-phone/article_34e289c0-3150-11e9-a39d-8f0982296333.html
[44] https://www.mercurynews.com/2019/05/20/santa-clara-county-in-fight-over-giving-da-easy-access-to-inmate-phone-calls/
[45] https://www.sfchronicle.com/bayarea/article/Alameda-County-Sheriff-s-Office-may-have-14065656.php; https://www.alaskapublic.org/2019/08/30/alaska-meth-case-stalls-on-secret-recordings-of-attorney-client-phone-calls-now-it-might-be-up-to-a-taint-team-to-sort-it-out/

3. Control Numbers

Pennsylvania Department of Corrections (DOC) uses control numbers to process legal mail. A 1999 departmental report in the 1990's found that "privileged correspondence ha[d] been used...to introduce contraband into...facilities for years.[46] The report stated x-ray equipment was inadequate, and "random sampling of incidents involving legal mail abuse" from the past thirteen years shows this is an ongoing problem and is "extremely compelling evidence to support inspection of legal mail outside the presence of the inmate as there is a substantial governmental interest of security and the orderly running of our facilities." *Ibid.* [47] The DOC negotiated with advocacy groups to revise its privileged mail policies. See narrative in *Robinson v. Pennsylvania Dep't of Corr.*, No. CIV.A. 03-05180, 2007 WL 210096, at *5 (E.D. Pa. Jan. 23, 2007), aff'd sub nom. *Robinson v. Pennsylvania Dep't of Correction*, 327 F. App'x 321 (3d Cir. 2009). In 2002, the DOC changed its legal mail policies. Under its new policy, "Incoming privileged correspondence that is hand-delivered to the Department... or which is identified by a control number ... will be opened and inspected for contraband in the presence of the inmate to whom it is addressed." Section 2(B), DC-ADM 803 § 2(B); 37 Pa. Code § 93.2(c). Otherwise, the mail would be opened outside the prisoner's presence as regular mail. To obtain a control number, an attorney must verify that all mail bearing a control number contains only "essential, confidential attorney-client communication" and contains no contraband.

The procedure was immediately challenged. Most decisions upheld the policy as a reasonable restriction on constitutional rights, that prison security and safety was enhanced when trained, off-site Corrections Mail Inspectors inspected mail instead of on-site Housing Unit Officers. *Brown v. PA Dep't of Corr*., 932 A.2d 316, 322 (Pa. Commw. Ct. 2007(Judge Friedman dissenting); *Caldwell v. Folino*, No. CIV.A. 09-217, 2009 WL 3082524, at *5 (W.D. Pa. June 10, 2009), report and recommendation adopted, No. CIV. A. 09-217, 2009 WL 3055298 (W.D. Pa. Sept. 21, 2009); *Newman v. Beard*, No. 3:06-CV-214-KRG-KAP, 2008 WL 2149605, at *4 (W.D. Pa. May 21, 2008). Claims of legal mail violations were dismissed if the prisoner could not show a control number had been present on the mail or that the attorney could not get one. *Lawson v. Pennsylvania Dep't of Corr*., No. 644 M.D. 2016, 2017 WL 2119502, at *3 (Pa. Commw. Ct. May 16, 2017); *Stockton v. Lewis*, No. 556 M.D. 2013, 2014 WL 2999696, at *4 (Pa. Commw. Ct. July 1, 2014); *Jones v. Pennsylvania Dep't of Corr*., No. 201 M.D. 2016, 2016 WL 4521116, at *2 (Pa. Commw. Ct. Aug. 26, 2016) ("The fact that correspondence is from a district attorney's office does not justify an exemption from the requirement that incoming mail be marked with a control number in order to be treated as privileged.") But see *Nifas v. Darr*, No. 1133 WDA 2014, 2015 WL 7572368, at *2 (Pa. Super. Ct. Mar. 19, 2015), where the court reversed the trial court's summary dismissal because the prisoner had alleged that his mail had not only been opened outside his presence but also read and copied.

One initial district court had held the control number procedure unlawful. In *Fontroy v. Beard*, 485 F. Supp. 592 (E.D.Pa.2007), the court found the policy infringed on the First

[46] Declaration of Charles McKeown with Privileged Correspondence Inspection and Contraband Report, September 20, 1999, submitted in *Fontroy, et al. v. Beard, et al.*, No. 02-cv- 2949 (E.D.Pa. 2002). A November 1999 report analyzing the high-profile escape of an inmate (the "Escape Report") suggested that the hacksaw blade and security screwdriver the inmate used to escape were obtained through mail treated as Privileged Correspondence.

[47] The 1999 escape report cataloged less than a dozen incidents of contraband being found in legal mail from 1986 through 1999, most of which was harmless or low-grade contraband such as a greeting card or personal letters. This contraband was discovered using the method predating the control number procedure.

Amendment rights, while recognizing other courts differed. (E.g., *Fontroy v. Beard*, 2007 WL 1810690 *2 n .4 (E.D.Pa. June 21, 2007), citing *Robinson v. Pennsylvania Dep't of Corrections,* 2007 WL 210096 (E.D.Pa. January 23, 2007) and *Harper v. Beard*, Civil Action No. 05–1803 (E.D.Pa. April 23, 2007).) It found security was not enhanced because the control number policy only established where staff inspects mail for contraband (at the mail processing site or in the housing unit); that the prisoner's right is not secured because the attorney may, or may not, use a control number; and that no additional staff hours were involved to open in front of the prisoner regardless of marking. The Third Circuit reversed. *Fontroy v. Beard*, 559 F.3d 173, 178 (3d Cir. 2009). It found the evidence of legal mail abuse substantial, warranting limits on the acknowledged constitutional right to be present. The policy was less burdensome on prison employees than prior policy, any proposed alternative could not be achieved at *de minimis* cost, and alternatives existed for prisoners if attorneys were unwilling or unable to get control numbers. *Id.*, 559 F.3d at 175–76. It has re-affirmed that decision. *Harper v. Beard*, 326 F. App'x 630, 633 (3d Cir. 2009); *Robinson v. Pennsylvania Dep't of Correction*, 327 F. App'x 321, 322 (3d Cir. 2009).

In August, 2019, Pennsylvania DOC instituted yet another new policy where only copies of all mail, including privileged communications, would be distributed to the prisoners. Original would be held by the prison. Further, all mail, including privileged communications, would be scanned into a database and maintained for seven years. The policy was immediately challenged.[48] On March 25, 2019, a settlement was reached, and on April 6, 2019, the DOC reinstated the attorney control number ("ACN") system, which system may be supplemented by an additional verification system, ceased copying legal mail, and agreed to destroy or return to its intended recipient any legal mail it had retained. Yet outlier policies remain in Pennsylvania. In York County, prisoners who receive legal mail will now be given gloves, goggles and protective face masks and allowed to open their own legal mail under staff supervision.[49]

[48] *Pennsylvania Institutional Law Project v. Wetzel* and *Hayes v. Wetzel*, Nos. 1:18-cv-2100 and 1:18-cv-2099 (M.D.Pa. 2019).

[49] https://www.yorkdispatch.com/story/news/2019/04/09/york-county-prison-adopts-new-legal-mail-policy-response-aclu-demands/3410382002/

V. Injury

Part IV, above, surveys the prison procedures available to safeguard attorney-prisoner privileged communication in mail, calls and visits, including those deemed minimally necessary to protect the multiple constitutional interests at stake. But violations of those procedures, even when constitutionally mandated, often are not constitutional violations without showing demonstrable prejudice.

Courts require showing injury to find a violation of the right of access based on an infringement of attorney-prisoner communication. *Al-Amin v. Smith*, 511 F.3d at 1341; *Jones v. Brown*, 461 F.3d at 359 (3d Cir. 2006); *Banks v. York*, 515 F. Supp. 2d 89, 108 (D.D.C. 2007); *Simkins v. Bruce*, 406 F.3d 1239, 1243 (10th Cir. 2005); *Cochran v. Morris*, 73 F.3d 1310, 1317 (4th Cir.1996) (*en banc*); *Morgan v. Montanye*, 516 F.2d 1367, 1372 (2d Cir.1975); *Kensu v. Haigh*, 87 F.3d at 175; *Snyder v. Nolen*, 380 F.3d 279, 291 n. 11 (7th Cir.2004); *Berdella v. Delo*, 972 F.2d 204, 210 (8th Cir.1992); *Phillips v. Hust*, 477 F.3d 1070, 1076 (9th Cir. 2007), vacated on other grounds, 555 U.S. 1150 (2009).

Showing injury or prejudice is also required to find a violation of the Sixth Amendment right to counsel based on interference with attorney-prisoner communication. See, e.g., *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."), citing *Weatherford v. Bursey*, 429 U.S. 545, 556-58, 97 S. Ct. 837, 845, 51 L. Ed. 2d 30 (1977). See also *Nordstrom I*, 762 F.3d at 910 (right to counsel is violated when (1) "the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel," and (2) the interference "substantially prejudices the criminal defendant). (In contrast, injury is not required to establish infringement with attorney- prisoner communication as a First Amendment violation. See section VI, below.)

A. Standing in Right of Access: *Lewis/Harbury*

The requirement that plaintiffs establish actual injury in any claimed abridgement of the right of access, including any involving attorney-prisoner communication, stems from Supreme Court jurisprudence that the right of access is derivative and therefore must always rest on an underlying action.

In *Lewis v. Casey*, 518 U.S. 343 (1996), the Supreme Court examined a wide-ranging lower court order finding that conditions at the Arizona Department of Corrections violated the prisoners' right of access to the courts under *Bounds v. Smith*, and by injunction requiring specific library hours, educational requirements for law librarians, inmate training, access for all prisoners at all custody levels, and specialized assistance for illiterate and non-English-speaking prisoners.[50] The Supreme Court reversed because the lower court had insufficient evidence of

[50] The injunctive order was based on extensive showings by the ACLU National Prison Project that prisoners were arbitrarily denied access to attorney calls or required to speak in monitored conditions (violating access to courts),

systemic actual injury to access to justify the sweeping order. 518 U.S. at 349. The Court acknowledged that its prior decision in *Bounds* held the fundamental constitutional right of access to the courts requires prison authorities to assist inmates with legal filings through adequate law libraries or trained assistants. 518 U.S. at 350, citing *Bounds*, 430 U.S., at 817, 830. But *Bounds* did not vitiate a prior, and longstanding, requirement of injury or impediment to the underlying claim to which the access allegation related.

> "[M]eaningful access to the courts is the touchstone,'... and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.... [A]lthough *Bounds* itself made no mention of an actual-injury requirement, it can hardly be thought to have eliminated that constitutional prerequisite. And actual injury is apparent on the face of almost all the opinions in the 35–year line of access-to-courts cases on which *Bounds* relied.

518 U.S. at 351.[51] The Court overturned the system-wide injunction because the record evidence of actual injury was one instance of a case dismissal and one inability to file. 518 U.S. at 356.

In *Lewis*, the Supreme Court gave examples of what might constitute "hindrance" of a legal claim:

> He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered *arguably actionable* harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

518 U.S. at 351 (emphasis added). The Court stated *Bounds* protects only "the capability" of bringing contemplated challenges – not guarantees [of] particular methodology." 518 U.S. at 356. Injury may be generally alleged at the pleading stage, but requires affidavit or other specific facts to defeat summary judgment. 518 U.S. at 358.[52]

In *Christopher v. Harbury*, 536 U.S. 403 (2002), the Supreme Court elucidated further on right to access claims. There, the widow of a Guatemalan activist alleged she had been actively misdirected by U.S. officials in her efforts to obtain information which would have led to a lawsuit that might have saved him from death. The Court denied relief "for two reasons.... [T]he complaint...fails to identify an underlying cause of action for relief that the plaintiff would have raised had it not been for the deception alleged. [Alternatively], respondent fails to seek any relief presently available for denial of access to courts that would be unavailable otherwise." 536 U.S. at 405–06.

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disallowed confidential document copying, faced overly harsh indigency standards for receipt of legal supplies and special limitations for higher custody levels, and had untrained assistants and inadequate access to legal materials.

[51] The obligation to facilitate access – as opposed to removing barriers thereto – applies only to criminal proceedings (including collateral habeas actions) and challenges to prisoner conditions. *Lewis*, 518 U.S. at 355.

[52] The Court also relied on the lower court's failure to conduct a *Turner* reasonableness inquiry as to policies delaying lock-downed prisoner access, stating that, if the regulation is reasonable under *Turner*, the resultant delays "are not of constitutional significance, even [if they were to] result in actual injury." 518 U.S. at 362.

The latter ground warrants elaboration. The Court in *Harbury* identified two categories of cases at play in its denial of access jurisprudence:

> In the first are claims that systemic official action frustrates a plaintiff...in preparing and filing suits at the present time.... The opportunity has [been lost] only in the short term; the object of the denial-of-access suit...is to [enable] the plaintiff...to pursue a separate claim for relief once the frustrating condition has been removed.... The second category covers claims...that cannot now be tried...[regardless of future action]. The official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case.... The ultimate object of these sorts of access claims [is] relief obtainable in no other suit in the future.

536 U.S. at 413-14. The access claim is ancillary to the lost or frustrated suit and that suit must itself be pled. In backward-looking claims, the plaintiff must also seek a remedy not available elsewhere, Therefore, "the predicate claim [must] be described well enough to apply the 'nonfrivolous' test and to show that the 'arguable' nature of the underlying claim is *more than hope*." 536 U.S. at 416 (emphasis added).

B. ***Lewis/Harbury* As Applied**

Courts apply these standing requirements to claimed interference with attorney-prisoner communication when considered under the right of access rubric. See, e.g., *Woods v. St. Louis Justice Ctr*., No. 406-CV-233 CAS, 2007 WL 2409753, at *10 (E.D. Mo. Aug. 20, 2007; *Williams v. ICC Comm*., 812 F. Supp. 1029, 1034 (N.D. Cal. 1992). Courts have embraced them wholeheartedly, stretching to apply them as broadly (and as restrictively) as possible.

1. **Negligence or Inadvertence**

As a threshold matter, some courts bypass the standing/injury issue in access claims by characterizing any alleged access infringement as inadvertent or merely negligent, and therefore not susceptible of relief under § 1983 regardless of injury.[53] Intentional conduct is required in any substantive due process interference claim. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (guarantee of due process applies to deliberate governmental decisions). It requires an active deprivation.[54] This requirement has been applied to prisoner access claims under a due process or First Amendment theory. *Pink v. Lester*, 52 F.3d 73, 76 (4th Cir. 1995) ("abridgement" connotes a conscious act; failure to process filing fee money order because of bureaucratic mishandling not actionable). Some courts have extrapolated a malicious intent requirement. *Riley v. Semple*, No. 3:17-CV-45 (VAB), 2017 WL 507214, at *2 (D. Conn. Feb. 7, 2017) (must show

[53] Any1983 action requires a finding of injury to sustain compensatory damages. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306-08 (1986) (purpose of § 1983 damages is to provide compensation for injuries caused by violation of a plaintiff's legal rights; no compensatory damages may be awarded absent proof of actual injury), citing *Carey v. Piphus*, 435 U.S. 247, 255, 264 (1978) (quotation omitted).

[54] In *Daniels*, the Supreme Court did "not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care. " *Daniels v. Williams*, 474 U.S. at 334. The intent question does not have "a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." *Baker v. McCollan*, 443 U.S. 137, 139–140 (1979).

that the defendant's actions were deliberate and malicious, and that the actions caused him to suffer an actual injury); *Davis v. Goord*, 320 F.3d at 351 (legal mail tampering access claim requires specific allegations of invidious intent or of actual harm); *Cancel v. Goord*, No. 00 Civ 2042, 2001 WL 303713, at *4 (S.D.N.Y. March 29, 2001) (must allege conduct was deliberate, malicious and injurious). But see *Simkins v. Bruce*, 406 F.3d at1242 (intentional conduct interfering with legal mail does not require malicious motive). In *Simkins*, the court held that mail room staff had deliberately interfered when they "decided" not to forward the prisoner's legal mail to his new location. *Ibid.* "Deliberate delay in the delivery of inmate legal mail is sufficient to satisfy the intent requirement for a right-of-access claim;" *Id.*, 406 F.3d at 1242, n. 3. See also *Sims v. Landrum*, 170 F. App'x 954, 956 (6th Cir. 2006), collecting cases.

Inadvertent mishandling is commonly found in legal mail cases, usually involving opening correctly marked legal mail outside the prisoner's presence. See *Smith v. Maschner*, 899 F.2d 940, 944 (10th Cir.1990) (accidentally opened one piece of protected legal mail outside prisoner's presence, not actionable); *Gardner v. Howard*, 109 F.3d 427, 431 (8th Cir.1997) (isolated, single instance of opening incoming confidential legal mail does not support a constitutional claim). In *Hall v. Chester*, No. 08-3235-SAC, 2008 WL 4657279, at *3 (D. Kan. Oct. 20, 2008), the court held that "without any evidence of improper motive or resulting interference with an inmate's right to counsel or court access," two incidents of improperly opened mail failed to state a constitutional claim.

Intent and injury are often loosely used interchangeably, without precision. Actions based on conduct found to be unintentional may be dismissed even when substantial injury results. In *Keaton v. Martin*, No. Civ. A. 7:04-CV-55(HL, 2007 WL 841949, at *2 (M.D. Ga. Mar. 20, 2007), a legal mail error that resulted in a lost habeas appeal opportunity was not actionable because it was not intentional. But see *Dorn v. Lafler*, 601 F.3d 439, 444 (6th Cir. 2010), abrogated on other grounds *Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624 (2011) ("regardless whether prison officials intended to prevent [pursuit of] appeal of right, the effect was the same. The prison's [negligent] handling [precluded pursuit of] statutory right of appeal.)

2. Inflation of the Injury Standard

Independent of intent, many courts apply an overly rigorous injury standard to conjure a dismissal. If there is a pathway to find the underlying claim not "ultimately" affected by the access infringement, or to find the underlying claim "ultimately" without merit, some courts will find it, no matter how contorted the reasoning. The *Lewis* standard requires only that the alleged impediment to have "hindered…efforts to pursue a legal claim" - not to have defeated it outright. *Lewis v. Casey*, 518 U.S. at 351. Nor is a court required to determine the ultimate merits of the underlying claim. It is enough to show that the "arguable" nature of the underlying claim is *more than hope*" (*Christopher* 536 U.S. at 416) or the claim is "*arguably actionable*" (*Lewis*, 518 U.S. at 351) (emphasis added).

(a) Delay

But many courts do both. Dismissals or rejections of claims because of legal mail error, for example, are found not injurious if, somehow, the prisoner was able to re-activate the case, no matter the length of delay or other, possible collateral consequences. In *Slaughter v. Rogers*, 408 F. App'x 510, 513 (3d Cir. 2010), staff legal mail error caused the prisoner's case to be dismissed, but it was not injurious where he ultimately got his case reinstated. See also *Oliver v. Fauver*, 118 F.3d 175, 177 (3d Cir.1997) (must show actual loss or outright rejection of legal claim); *Jordan v. Cicchi*, 617 F. App'x 153, 157–58 (3d Cir. 2015) (administrative dismissal due to legal mail error not injury where case was reinstated several months later). But see *Green v. Johnson*, 977 F.2d 1383, 1389 (10th Cir.1992) ("Any deliberate impediment to access [to the courts], even a delay of access, may constitute a constitutional deprivation") (quotation omitted); *Alston v. DeBruyn*, 13 F.3d 1036, 1041 (7th Cir.1994) (showing of 'some quantum of detriment resulting in the interruption and/or delay of pending or contemplated litigation') (quotation omitted).

In *Camillo-Amisano v. Fed. Bureau of Prisons*, No. Civ. 17-06634-ODW-JDE, 2018 WL 6017029 (C.D. Cal. Aug. 17, 2018), the dismissal of an underlying suit because of an untimely filing traceable to legal mail error, was not actionable where an alternative merits finding had also supported the dismissal. *Id.*, at 5. Where a prisoner ultimately filed a petition, even with access impediment, no injury existed because he had completed some filing (of whatever quality) and the court had made a merit determination. *Young v. Garfield Cty*., No. CIV-06-146-D, 2008 WL 4525469, at *16 (W.D. Okla. Sept. 30, 2008), appeal dismissed and remanded sub nom. *Young v. Winchester*, 329 F. App'x 846 (10th Cir. 2009). Accord: *Watson v. Sec'y Pennsylvania Dep't of Corr.,* 567 F. App'x 75, 78 (3d Cir. 2014); *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988) (isolated incident not a constitutional violation because prisoner was able to re-prepare and timely file writ). In *Kensu v. Haigh*, no injury was found where a prisoner lost brief preparation time because of an impediment, but still had one month to file a brief. *Id.*, 87 F.3d at 175. Accord: *Richards v. Saunders*, No. CIV.A. 7:01-CV-00805, 2003 WL 24056723, at *3 (W.D. Va. Oct. 2, 2003), aff'd, 86 F. App'x 570 (4th Cir. 2004) (prisoner technically had two weeks left despite legal mail error, and did not ask court for more time).

These decisions contain multiple, implicit assumptions about the litigation knowledge and skills of the prisoner pro se litigant.[55] There is also no consideration of how, had the delay not occurred, the prisoner might have been able to increase her chances for success, whether through her own work or by obtaining assistance of counsel or others. A Third Circuit panel addressed the latter in *Montgomery v. Ray*, 145 F. App'x 738 (3d Cir. 2005). There, a right of access injury in a telephone sanction was viable even where the prisoner had received some staff assistance:

> [We] do not agree that the telephone sanction had no adverse effect on his ability to contact an attorney. Although the prison made three unsuccessful attempts to contact attorneys on Montgomery's behalf, if Montgomery had been able to make phone calls

[55] Often an unjustified level of sophistication is assumed. In *Barroca v. Hurwitz*, 342 F. Supp. 3d 178 (D.D.C. 2018), a prisoner challenged the BOP's use of mandatory mailing labels as blocking access to courts. Court mail had been returned, and a habeas petition dismissed as untimely because the prisoner could not fit the full name of the court onto the label. The court denied relief because there "was sufficient space for prisoner to have fit court's address on mailing label had he used commonly accepted abbreviations."

> personally, he might have been more persistent and might have been able to make contact with an attorney. The fact that he was able to file the instant lawsuit has no bearing on whether he was able to contact a criminal defense attorney for his pretrial preparation.

Id., 145 F. App'x at 741. Delay is particularly detrimental for a prisoner with limited law library or attorney access. Open law library hours are limited; count times and other lockdowns bar access, and prisoners typically have mandatory work assignments also limiting access. There is also the issue of pro se skill sets; prisoners require additional time to develop research and analysis skills for the most part alien to them, even to interact knowledgeably with counsel. Debunking an access claim because, of three months, the prisoner still had one left after the interference, disregards prison realities.

(b) Premature Merits Review

Often, the loss or confiscation of legal mail may constitute injury only where the prisoner can plead with specificity exactly how the lost material would have affected the merits. The court drills down into the merits. See, e.g., *Robles v. Kane*, 550 F. App'x 784, 787 (11th Cir. 2013) (no injury where prisoner did not show what specific arguments were missed, and how brief would have been improved, had he received legal mail correctly). In *Galeas v. Inpold*, 845 F. Supp. 2d 685, 688 (W.D.N.C. 2012), the prisoner asserted lost legal mail had affidavits that would have proven his innocence, but the court rejected the claim because he did not "state who these individuals are or how the statements in their affidavits would prove his innocence." *Ibid.* See also *Monroe v. Beard*, 536 F.3d 198, 206 (3d Cir. 2008) (after confiscation of all legal materials, prisoners alleged lost opportunity to pursue attacks of their convictions and civil rights claims but did not specify facts demonstrating that the claims were non-frivolous). Accord: *Ray v. Wyciskalla*, 461 F. App'x 507, 508 (7th Cir. 2012) (confiscation of legal mail and reading incoming legal mail, and resultant loss of opportunity to file certiorari petition, not actionable where prisoner "never identified the underlying claim or claims that were lost); *Lamp v. Wallace*, No. Civ. A304CV317, 2005 WL 5303512, at *8 (E.D. Va. Mar. 23, 2005), aff'd, 205 F. App'x 151 (4th Cir. 2006) (confiscation and reading of legal mail; general allegations of loss of "vital materials" which caused dismissal insufficient).

In *Penton v. Pool*, 724 F. App'x 546, 549–50 (9th Cir. 2018), a Ninth Circuit panel cautioned against equating the standing inquiry with a full merits determination. There, legal mail error lost the prisoner his opportunity to object to the magistrate report and to pursue an appeal. The panel rejected a lower court dismissal based on extensive merits examination of the underlying case:

> As *Lewis* makes plain, the "actual injury" analysis is akin to an Article III standing inquiry. [] It is not an assessment of the merits of the underlying claim that is now lost. [Here, the lower court] drilled into the merits of [the] original habeas petition, transforming a threshold standing inquiry into an independent assessment of [the] separate habeas action.

Id., 724 F. App'x at 549-50. The court found the prisoner had satisfied the threshold inquiry because he alleged legal mail error tied to a lost nonfrivolous habeas action. The prisoner also

sought a remedy – money damages – not available elsewhere. Therefore, the *Lewis* standing was met. *Ibid.* The Tenth Circuit raised the same point in *Simkins*, *supra* ("*Lewis* does not suggest that the plaintiff must prove a case within a case .... [C]ognizable harm arises not only when a claim is lost or rejected on account of the defendant's misconduct, but also when the plaintiff's efforts to pursue a claim are impeded" citing *Walters v. Edgar*, 163 F.3d 430, 434 (7th Cir.1998). *Simkins v. Bruce,* 406 F.3d at 1244.[56]

C. Sixth Amendment Prejudice

1. *Lewis* Inapplicable

The injury/standing analysis of *Lewis* does not apply to privilege infringement as a Sixth Amendment claim because, unlike the right of access, the right to counsel is a direct constitutional right. The Second Circuit explained:

> *Lewis* 's [sic] reasoning is premised on the distinction between the standing required to assert direct constitutional rights versus the standing required to assert claims that are derivative of those rights. Because [access issues] do not represent constitutional rights in and of themselves, but only the means to ensure "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts," prisoners must demonstrate 'actual injury' in order to have standing. [ ]. In the absence of actual or imminent harm, 'the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches,' [ ] requires the judicial branch to leave to the political branches the choice among 'alternative means to achieve .... meaningful access to the courts.' [ ] By contrast, where the right at issue is provided directly by the Constitution or federal law, a prisoner has standing to assert that right even if the denial of that right has not produced an 'actual injury.

Benjamin v. Fraser, 264 F.3d 175, 185 (2d Cir. 2001) (citations and quotations omitted), cited in *Pena v. Semple*, No. 3:19-CV-261 (KAD), 2019 WL 1317920, at *4 (D. Conn. Mar. 22, 2019).[57]

The difference, however, may be form over substance: while injury may not be required for Sixth Amendment standing, it is generally required to show an actual violation.[58]

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[56] *In Medford v. Walt*, No. 17-CV-1015-JPG, 2018 WL 339292 (S.D. Ill. Jan. 9, 2018), the court identified the chilling impact on uninhibited counsel communication as the necessary hindrance in an access claim: "[P]roof of a practice of reading a prisoner's correspondence with his lawyer should ordinarily be sufficient to demonstrate hindrance [because it highly likely will] reduce the candor of those communications." *Id.*, at 2–3, quoting *Guajardo-Palma*, 622 F.3d at 805-06.

[57] The inapplicability of *Lewis* to direct Sixth Amendment claims apparently has not been addressed by any other federal appellate court. One district court similarly discussed *Lewis*' inapplicability to direct constitutional violations, and denied summary dismissal of an attorney access claim (guards refusing to leave attorney-prisoner meeting) even when considering it as a First Amendment right of access to courts ("a deprivation of his right to meaningfully access his attorney...is a direct component of the First Amendment right of access to courts not] merely ... held ... as a proxy for such right. [Therefore] Plaintiff is not required to make a showing of actual harm." *McWright v. Gerald*, No. Civ. 03-70167, 2004 WL 768641, at *4 (E.D. Mich. Mar. 26, 2004).

[58] Section 1983 claims alleging Sixth Amendment infringements of attorney-client privilege also face their own threshold hurdle: Such claims are not ripe for consideration under § 1983 if they would negate the validity of the underlying conviction. *Heck v. Humphrey*, 512 U.S. 477 (1994) ("in order to recover damages for allegedly

2. Prejudice As Sixth Amendment Requirement

The "'benchmark' of a Sixth Amendment claim is 'the fairness of the adversary proceeding.' " *Shillinger v. Haworth*, 70 F.3d 1132, 1141 (quoting *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)). Therefore, when infringement of attorney-prisoner privileged communication is alleged as a Sixth Amendment violation, showing prejudice usually is required. See *United States v. Morrison*, 449 U.S. 361, 365 (1981) (stating that relief for infringement on the right to counsel requires "some adverse effect upon the effectiveness of counsel's representation or ... some other prejudice to the defense"); *Weatherford v. Bursey,* 429 U.S. at 558 (defining prejudice as a realistic possibility of injury to the prisoner or benefit to the State).[59] Even active governmental interjection into attorney-prisoner privileged communication may not violate the Sixth Amendment without it. *Ibid.* There are cases, though, in which overt prejudice is not required, or is presumed outright.

Where correspondence from an attorney to her prisoner client is opened in contravention of legal mail handling procedures, and even when it is actually read, a Sixth Amendment violation typically still requires actual harm beyond the act itself. In *Stanley v. Vining*, 602 F.3d 767, 770 (6th Cir. 2010), the guard read the prisoner's legal mail but the court dismissed a Sixth Amendment claim because "the prisoner [did] not allege that the guard's conduct created any barrier to the prisoner's relationship with counsel." In *Thomsen v. Ross*, 368 F. Supp. 2d 961, 974–75 (D. Minn. 2005), staff interception and actual reading of attorney mail was not a Sixth Amendment violation because contents were primarily administrative and did not address matters of defense strategy. In *Williams v. Woodford*, 384 F.3d 567, 584–85 (9th Cir. 2004), jail interception of defense psychiatric documents, causing the defense psychiatrist to withdraw, did not substantially prejudice because he already had three court-appointed mental health experts and could have asked the court to replace the one who had withdrawn. Accord: *Carr v. Tousley*, No. CV-06-0125SJLQ, 2009 WL 1514661, at *33 (D. Idaho May 27, 2009) ("Since Plaintiff has not alleged how he was prejudiced as a result of the alleged monitoring of telephone calls, attorney visits, and legal mail, Plaintiff has not stated a constitutional violation."). Compare

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unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid..., or called into question by...a writ of habeas corpus, … A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983." 512 U.S. at 486–87. Therefore, "district courts must undertake a fact-intensive inquiry with regard to each claim raised by the plaintiff and determine whether success on that claim would necessarily impugn the integrity or imply the invalidity of the plaintiff's criminal conviction." *Whitenight v. Elbel*, No. 2: 16-CV-00552, 2017 WL 8941221, at *7 (W.D. Pa. Apr. 10, 2017), report and recommendation adopted, No. 16-CV-00552, 2017 WL 2198371 (W.D. Pa. May 19, 2017) (citations omitted). But see *Wolff v. McDonald*, 418 U.S. at 554–55, holding that damages claim ancillary to ongoing sentence correction habeas claim may proceed even if it involves a merit determination. The *Heck* court narrowly distinguished *Wolff* by noting the 1983 claim there attacked the procedure used to determine sentence credit, not the allocation itself. 512 U.S. at 483.

[59] Privileged communication between an attorney and prisoner protected by the Sixth Amendment may also be impeded by court order. See, e.g., *Geders v. United States*, 425 U.S. 80, 91 (1976) (order preventing defendant from consulting his counsel during 17-hour overnight recess between direct and cross examination violated right to counsel guaranteed by the Sixth Amendment regardless of prejudice). This study, however, examines only executive branch infringements by prison or law enforcement practices on attorney-prisoner privilege.

Greeno v. Litscher, 13 F. App'x 370, 376 (7th Cir. 2001) (erroneous return of legal manual violated Sixth Amendment because it resulted in missed filing deadline).

Remarkably, in *Christian v. Jackson*, No. 310-CV-0852-P-BK, 2010 WL 3730347 (N.D. Tex. July 24, 2010), report and recommendation adopted, No. 3:10-CV-0852-P-BK, 2010 WL 3730306 (N.D. Tex. Sept. 8, 2010) the district court denied a right to counsel claim because the prisoner did not show with specificity how legal mail confiscation would negatively affect him in his upcoming trial. The prison had confiscated a prisoner's letter to his attorney, which included a draft letter to the judge *acknowledging his guilt*. The court stated: "Assuming arguendo that the opening of the envelope implicated his Sixth Amendment right to communicate freely with his attorney, Plaintiff has not alleged legal prejudice as a result of Officer Bines' conduct sufficient to show a constitutional deprivation.... He fails to explain why he cannot recreate the missing letter, which it appears he wrote (at least in part) himself. As for any resulting injury, Plaintiff simply asserts that he does not know "'how this is going to harm [him] in trial.'" *Id.*, at *2. It strains credulity to hypothesize that government possession of a letter confessing guilty might not harm the prisoner at trial.

An allegation "that a party monitored the accused's conversations with his attorney does not necessarily establish a Sixth Amendment violation. Rather, the accused must [allege], in addition, that the substance of the overheard conversation was of some benefit to enforcement officials. Absent this [assertion], a monitoring allegation must be denied." *Mastriano v. McManus*, 554 F.2d 813, 821 (8th Cir.1977); see also *United States v. Hernandez*, 937 F.2d 1490, 1493 (9th Cir.1991). But see *Coplon v. United States*, 191 F.2d 749, 759 (D.C. Cir. 1951) (electronic eavesdropping violated Sixth Amendment right to counsel regardless whether prejudice resulted).

In *United States v. Lentz*, 419 F. Supp.2d 820, 835–36 (E.D.Va.2005), a jail's policy of recording all outgoing inmate calls, including those made to counsel, did not violate Sixth Amendment right to counsel because defendant had other avenues of confidential communication with counsel, such as writing or in-person conferences at jail. In *Groenow v. Williams*, No. 13 Civ. 3961 PAC JLC, 2014 WL 941276, at *6–7 (S.D.N.Y. Mar. 11, 2014), the prisoner had to use a monitored phone to call his attorney, but no plausible Sixth Amendment deprivation existed, also because he had other methods of communication. In *Carr v. Tousley*, the prisoner alleged all legal calls, visits and mail were monitored, but because "Plaintiff has not alleged how he was prejudiced as a result of the alleged monitoring of telephone calls, attorney visits, and legal mail, Plaintiff has not stated a constitutional violation." *Id.*, No. CV-06-0125SJLQ, 2009 WL 1514661, at *33. In *Krull v United States,* 240 F.2d 122 (5th Cir. 1957), the right to counsel was not violated when a correctional officer refused to leave a consultation room because the room large enough for attorney and prisoner to speak in low voices but nothing overheard was communicated to the government. In *United States v. Jenkins*, 178 F.3d 1287 (4th Cir. 1999), a prosecutor advised he had been provided with a recording of the defendant's attorney meeting in which the defendant admitted culpable conduct. No Sixth

Amendment violation existed, however, because the convicting evidence had been independently obtained.[60]

3. No Overt Prejudice Required

For some courts, the chilling effect of privilege violations on candid client/counsel communication is itself sufficient injury to find a Sixth Amendment violation.[61] In *Mangiaracina v. Penzone*, 849 F.3d 1191, 1196 (9th Cir. 2017), two incidents of opening properly marked legal mail from his attorney outside the prisoner's presence would establish a Sixth Amendment violation. The court found the acts chilled protected communications with criminal attorneys, stating "[t]he absence of a clear pattern beyond these two incidents does not preclude relief... even a single instance of improper reading of a prisoner's mail can give rise to a constitutional violation." 849 F.3d at 1197 (citation omitted). Compare *Green v. Denning*, 465 F. App'x 804, 807 (10th Cir. 2012) citing *Smith v. Maschner*, 899 F.2d 940, 944 (10th Cir.1990) (single improper opening of legal mail not Sixth Amendment violation where no interference with representation function).

In *Grubbs v. O'Neill*, 744 F. App'x at 22–23, the court remanded for the district court to consider the "chilling effect"of video surveillance in attorney-detainee interview rooms. But see *Thomsen v. Ross*, 368 F. Supp. 2d at 974–75 ("[p]laintiff's assertion that he felt unable to freely correspond with his lawyer [because of monitoring], even if accepted by a jury, simply does not rise to the level of a Sixth Amendment violation.") and *Carr v. Tousley*, (insufficient where prisoner alleged he "was bothered by the capability of the jail to monitor conversations through the use of intercoms, video cameras and other recording or listening device").

In *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1052–53 (8th Cir. 1989) forcing prisoners "to meet with their attorneys in public areas of the Jail where their conversations could be overheard by guards and other prisoners," violated their "clearly established ... right[s] to counsel" regardless of injury. "Forcing prisoners to conduct their meetings with their attorneys in the open or to yell over the phone obviously compromises the consultation." 878 F.2d at 1052. Accord: *Wolfish v. Levi*, 573 F.2d at 133 (2d Cir. 1978). In *J.B., et al. Plaintiffs, v. Onondaga Cty., et al., Defendants. Additional Party Names: Eugene Conway, Ryan McMahon*, No. 519CV137LEKTWD, 2019 WL 3776377, at *6 (N.D.N.Y. Aug. 12, 2019), a challenge to a policy requiring law enforcement officers be present in courthouse rooms during pre-arraignment attorney-client interviews required no showing of outright injury to sustain a Sixth Amendment violation ("the Sixth Amendment guarantees criminal defendants more than a warm body with a law degree sitting at counsel table"). Id, at 9.

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[60] In *Evans v. Skolnik*, 637 F. App'x 285, 287 (9th Cir. 2015), a Ninth Circuit panel upheld under the Federal Wiretap Act and the Fourth Amendment a routine practice of "initially screening and occasionally checking in on" attorney calls.

[61] The Supreme Court recognizes the potential damage from such chill. See, e.g. *Wolff v. McDonnell,* 418 U.S. at 577 ("Neither could [inspecting mail in inmate's presence] chill such communications, since the inmate's presence insures that prison officials will not read the mail."); *Weatherford v. Bursey*, 429 U.S. at 554 ("One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard.").

In *Benjamin v. Fraser,* the Second Circuit declined to overturn a consent decree mandating, among other items, improved attorney-client access on Rikers Island Jail and other New York City borough jails. The lower decree had remedied routine, severe time delays in attorney client meetings alleged as Sixth Amendment violations. Id, 264 F. 2d at 175, n. 6. The Second Circuit disagreed with the government whether the *Lewis* standing requirement applied to right to counsel infringement claims. It stated "unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right." 264 F.3d at 185. It also clarified when prejudice – or any comparable harm standard - is at play in a Sixth Amendment attorney-client communication violation:

> The [government's] argument confuses "actual injury" with "harmless error." Where a defendant's Sixth Amendment were violated and the relief sought is a new trial, "harmless error" analysis applies. See, e.g., *Lainfiesta v. Artuz*, 253 F.3d 151, 158 (2d Cir. 2001) (finding refusal to permit co-counsel of choice to cross examine witness to be harmless error). By contrast, in an action such as this one, the remedy sought is the removal of unjustifiable interference with attorney-client communication. Compare *Cobb v. Aytch*, 643 F.2d 946, 960 (3d Cir.1981) (affirming district court's finding that no remedy at law could compensate for interference with detainees' right to counsel and therefore granting injunctive relief limiting city's authority to transfer detainees to far-away facilities), with *United States v. Lyons*, 898 F.2d 210, 216 n. 6 (1st Cir.1990) (denying new trial because prisoner was not prejudiced by pretrial transfer to different facility).

Benjamin v. Fraser, 264 F.3d at 186, n. 9. See also *Nordstrom I*, 762 F.3d at 911 ("Were Nordstrom challenging a conviction following an improper intrusion into the attorney-client relationship, we would examine whether the violation caused prejudice requiring the reversal of the conviction.[] Nordstrom's case, however, is a civil rights lawsuit aimed at enjoining the continuation of an unconstitutional practice. The harm Nordstrom alleges is not that tainted evidence was used against him but that his right to privately confer with counsel has been chilled. This is a plausible consequence of the intentional reading of his confidential legal mail.") Challenging a present infringement does not require prejudice because the damage is ongoing and perhaps not fully calculable. But in a past (completed) infringement, the benefit of hindsight arguably allows it.

4. Active or Deliberate Government Interference in Privilege

(a) Weatherford v. Bursey

Active and often deliberate government interference in attorney-client privilege receives particularized judicial treatment. In *Weatherford v. Bursey*, an undercover law enforcement agent was arrested and indicted along with the defendant, to maintain cover. As an ostensible co-defendant, the agent was invited to and did attend certain trial preparation sessions. The agent testified for the prosecution without referencing those meetings. The defendant was convicted and thereafter sued the agent under Section 1983 alleging his right to counsel had been so violated. The district court denied relief, because it found that no details or information regarding

defense plans or strategy had been relayed to the government. *Weatherford*, 429 U.S. at 548. The Fourth Circuit reversed, holding that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." *Id.* at 549 (quotation omitted).

The Supreme Court reversed the Fourth Circuit and held no Sixth Amendment violation had occurred. It relied on two distinct points: First, no information had been communicated to the government. "As long as the information … remained uncommunicated,…no substantial threat to…Sixth Amendment rights" [existed];" it cannot always be assumed that an informer will communicate what he hears or that such communication will be harmful. *Id.*, 429 U.S. at 556. Second, the government had not deliberately planted the undercover agent in defense meetings. He "went, not to spy, but because he was asked and because the State was interested in retaining his undercover services on other matters." *Id.*, 429 U.S. at 557. Fundamentally, "unless … the substance of [defense] conversations [was communicated] and thereby created *at least a realistic possibility of injury* to [the defendant] or benefit to the State, there can be no Sixth Amendment violation." *Id.*, 429 U.S. at 558 (emphasis added).

The Court reserved ruling whether its holding would differ absent either factor:

> [W]e need not agree … that whenever a defendant converses with his counsel in the presence of a third party thought to be a confederate and ally, the defendant assumes the risk…. Had [the agent] testified at … trial as to the conversation between [the defendant] and [his attorney]; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of [the defendant]; or even had the prosecution learned from [the] undercover agent the details of the ... conversations about trial preparations, [the defendant] would have a much stronger case.

Id. at 554. The Court noted the government's amicus brief concession that a deliberate intrusion with receipt of privileged defense information would be an unequivocal Sixth Amendment violation because that right is premised on private attorney consultation. *Ibid.*, n. 4.

Shortly thereafter, in *United States v. Morrison*, the Supreme Court held, assuming a Sixth Amendment violation in the government's conduct, the district court erred in dismissing the indictment without evidence of "adverse consequence to…representation or to the fairness of the [underlying] proceedings. 449 U.S. at 364. The government agents twice met privately with the defendant to obtain her cooperation. They disparaged her choice of counsel and attempted to convince her to change counsel. She did not respond and notified her attorney. The Court noted in its prior decisions finding infringement of the right to counsel, remedies had been tailored to the injury suffered, including options such as suppression or granting a new trial. 449 U.S. at 365.

(b) Appellate Interpretation

Since *Weatherford* and *Morrison*, federal appellate courts have wrestled with the parameters of a Sixth Amendment violation when the government has directly monitored or otherwise purposely invaded attorney-client privilege. They have addressed, disparately, whether a deliberate purpose must exist, whether detriment must be shown, or whether a per se standard exists.

The Fourth, Fifth, Sixth, Ninth and Eleventh Circuits require an affirmative showing of prejudice: *United States v. Jenkins*, 178 F.3d 1287 (4th Cir. 1999) (no Sixth Amendment violation because no showing government derived any evidence from sheriff's office videotape of attorney-defendant meeting; government interference with the attorney-client relationship not a Sixth Amendment violation unless "some showing of prejudice"); *United States v. Franklin*, 598 F.2d 954, 957 (5th Cir. 1979) (undermines conviction for government to obtain defense strategy from an attorney only where there is a realistic possibility of injury to defendant or benefit to the state; here, evidence had minimal impact); *United States v. Steel*e, 727 F.2d 580, 586 (6th Cir.1984) ("Even where there is intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted"); *United States v. Fernandez*, 388 F.3d 1199, 1240 (9th Cir. 2004), modified 425 F.3d 1248 (9th Cir. 2005) (for alleged attorney-client relationship intrusion to violate the Sixth Amendment, defendant must show intrusion was purposeful, that defense strategy was communicated to prosecution, or that intrusion resulted in tainted evidence); *Le v. United States*, 204 F. App'x 812, 817, n. 4 (11th Cir. 2006) (per se prejudice precluded by *Morrison*, which requires demonstrable prejudice even for a deliberate intrusion). The Eighth Circuit requires a knowing intrusion and either demonstrable prejudice or a substantial threat thereof. *United States v. Singer*, 785 F.2d at 234, citing *Morrison*, 449 U.S. at 366.

In *United States v. DiDomenico*, 78 F.3d 294 (7th Cir. 1996), absent showing prejudice, the defendants were not entitled to an evidentiary hearing to determine bugging of the jail attorney meeting room. But Chief Judge Posner, writing for the panel, declined to hold that <u>any</u> denial of right to counsel required prejudice (or harmlessness) for remedy, and linked its affirmance of the lower court's post-conviction hearing denial to the defense's repeated pre-trial rejections of same.[62]

The Third Circuit has presumed prejudice on intentional intrusion with conveyance of privileged information. *United States v. Levy,* 577 F.2d 200, 209 (3d Cir.1978) (where government informer sat in on conferences between defendant and attorney, and then told prosecution what defense strategy would be, dismissal was required without further showing of prejudice to defendant). See also *United States v. Costanzo*, 740 F.2d 251, 254 (3d Cir.1984). In *United States v Mitan*, 499 F. App'x 187, 193 (3d Cir. 2012), the panel declined to consider whether *Levy*'s presumption of prejudiced survived *Morrison* as it found there no intentional

[62] Judge Posner opined some types of violations would not require any showing of harm (e.g., constant recording of all privileged communication, even if never revealed): "[D]enial of the … basic right to some counsel… or of any other fundamental rights of criminal defendants (such as the right to an impartial judge or to trial by jury) is reversible error even if not shown to be prejudicial—even if shown to be completely harmless." *United States v. DiDomenico,* 78 F.3d at 299.

intrusion into privilege. The D.C. Circuit has made the same presumption. *Briggs v. Goodwin*, 698 F.2d 486, 494–95 (D.C. Cir.), vacated on other grounds, 712 F.2d 1444 (1984).[63]

In *Shillinger v. Haworth*, a deputy sheriff was present during several pretrial sessions between defendant and his counsel, substantive information from these sessions was communicated to the prosecutors and used at trial. 70 F.3d at 1135. The Tenth Circuit upheld a lower court's grant of habeas and order for new trial. It found the intrusion intentional and lacking a legitimate law enforcement purpose. 70 F.3d at 1139. It construed *Weatherford* and *Morrison* as leaving open the narrow issue whether an intentional intrusion, with no law enforcement justification, required prejudice. It adopted the following standard:

> Because we believe that a prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant, and because a fair adversary proceeding is a fundamental right secured by the Sixth and Fourteenth Amendments, we believe that absent a countervailing state interest, such an intrusion must constitute a per se violation of the Sixth Amendment. In other words, we hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed. In adopting this rule, we conclude that no other standard can adequately deter this sort of misconduct.

Id., 70 F.3d at 1142.

The First Circuit employs a burden-shifting analysis. In *United States v. DeCologero*, 530 F.3d 36 (1st Cir. 2008), it stated:

> Because [attorney-client privilege] intrusions pose a serious risk to defendants' constitutional rights, and because it would be unreasonably difficult for most defendants to prove prejudice, we only require defendants to make a prima facie showing of prejudice by "prov[ing] that confidential communications were conveyed as a result" of the government intrusion into the attorney-client relationship. [ ] The burden then shifts to the government to show that the defendant was not prejudiced; that burden is a demanding one.

Id., 530 F. 3d at 64, citing *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir.1984). [64]

The Second Circuit will also require a taint hearing when intentional intrusion has occurred. *United States v. Schwimmer,* 924 F.2d 443, 447 (2d Cir. 1991). There, the government

[63] In *United States v. Kelly*, 790 F.2d 130, 137 (D.C.Cir.1986), the D.C. Circuit remanded for a hearing whether an informant's infiltration and alleged theft of defense documents resulted in Sixth Amendment prejudice, without referencing *Briggs.* Several other circuits have referred to *Briggs* as establishing a per se rule. See *United States v. Danielson*, 325 F.3d 1054, 1070 (9th Cir. 2003); *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984). In *United States v. Neill*, 952 F. Supp. 834, 839–42 (D.D.C. 1997), the court cited *Kelly* to establish a prejudice requirement, but found the government's taint team screening process served to rebut a presumption the acquired privileged material had been conveyed to the prosecution, citing *Briggs,* 698 F.2d at 495 n. 29.

[64] In *United States v. Danielson*, 325 F.3d 1054, 1059 (9th Cir. 2003), the Ninth Circuit cited *Mastroanni* also to require a taint hearing for a determination of prejudice, but has since placed that burden on the defendant.

had come into possession of a file with work papers from a defense accountant, and had conducted meetings with that person. The lower court found those meetings had focused exclusively on damage calculations for a co-defendant, and the prosecutor had affirmatively prevented any discussion of the defendant's privileged communication; various prosecutors had confirmed the papers were of little probative value. The Second Circuit agreed that any impact the privileged information might have had on the prosecution was conjectural and insubstantial. 924 F.2d at 446 (quotation omitted). See also *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985) (hearing required on a claimed sixth amendment violation resulting from unintentional or justifiable presence of a government informant or agent at an attorney-client conference when specific facts indicate communication of privileged information to the prosecutor and prejudice resulting therefrom). But "[e]ven intentional intrusion by the government into the attorney-client privilege does not require automatic reversal." *United States v. Sanin*, 113 F.3d 1230, at *4 (2d Cir. 1997), cited in *United States v. Hoey*, No. 15 CR. 229 (PAE), 2016 WL 270871, at *6 (S.D.N.Y. Jan. 21, 2016).

(c) Measuring Impact

Both the Third and D.C. Circuits have discussed the difficulties inherent in any attempt to parse out the specific role privileged information might have had in a prosecution, and for that reason, have presumed prejudice. In *Briggs v. Goodwin*, *supra*, a prosecutor had lied in testifying whether a government informant was among the grand jury witnesses; that informant then participated in joint defense meetings and relayed defense strategy to the government. Although all defendants were acquitted, they brought a § 1983 suit against the prosecutor alleging a Sixth Amendment violation. The D.C. Circuit reversed and remanded a lower court summary dismissal on qualified immunity grounds. But it also reviewed the merits of the Sixth Amendment issue. It stated the threat of harm required in *Weatherford* was not limited solely to trial outcome but could include "the whole range of the accused's interests implicated by a criminal prosecution." *Id.*, 698 F.2d at 494. As to those interests,

> It would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those decisions. [Therefore, mere] possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant.

698 F.2d at 494–95. Similarly, in *Levy*, in rejecting a taint hearing remedy, the Third Circuit stated:

> [I]t is highly unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself.... In addition, the record here indicates the substantial risk that case agents of law enforcement agencies…might not even disclose to the government attorneys that certain information was obtained from the defense by an informer. In such cases the sixth amendment violations might be disclosed, if at all, late in the trial or after the trial had

> been completed. At that point a trial court applying an actual prejudice test would face the virtually impossible task of reexamining the entire proceeding to determine whether the disclosed information influenced the government's investigation or presentation of its case or harmed the defense in any other way.

United States v. Levy, 577 F.2d at 208. See also *State v. Lenarz*, 301 Conn. 417, 429, 22 A.3d 536, 544 (2011) ("the very reason for the presumption of prejudice…is that, when the prosecutor …has knowledge of confidential defense strategy, there is no way that the defendant can know whether the prosecutor has or has not 'used' that information."). Cf. *Christian v. Jackson,* (dismissal for lack of injury where prisoner stated he did not know "'how [confiscation] would harm [him] in trial"). *Id.*, at *2.

The Supreme Court has declined to grant certiorari to resolve this circuit split on shifting burden in establishing prejudice. *Cutillo v. Cinelli*, 485 U.S. 1037 (1988). Justices White, with whom Justice O'Connor and Chief Justice Rehnquist joined, dissented. *Id.*, 485 U.S. at 1037–38. They would have granted certiorari to resolve the circuit split (the First Circuit's shifting burden, the Sixth and Ninth Circuits' burden on defendant to establish prejudice *en toto*, and the Third Circuit's per se rule on intentional intrusion).

D. Obligation to Permit Amendment

The discussion of injury above – whether as standing in an access claim or as a merits requirement in a Sixth Amendment analysis – raises an important, related issue: the obligation of the trial court before dismissal to allow, even to steer, a pro se, prisoner litigant to amend a complaint to address any perceived deficiency in evidence of injury.

Initially, complaints alleging infringement of attorney client privilege as access or right to counsel violations should not be held to a uniquely stringent pleading standard on injury. To do so contravenes clear Supreme Court direction. In *Lewis*, the Supreme Court contemplated that at "the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice...." 518 U.S. at 358 (citations and quotation omitted). In *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), the Supreme Court reversed and remanded a dismissal for failure to state Eighth Amendment harm: "Whether petitioner's complaint is sufficient in all respects is a matter yet to be determined, for respondents raised multiple arguments in their motion to dismiss. In particular, the proper application of the controlling legal principles to the facts is yet to be determined. The case cannot, however, be dismissed on the ground that petitioner's allegations of harm were too conclusory to put these matters in issue." [65]

Requiring a more detailed injury showing contravenes liberal pleading: "Rule 8(a)(2)...only requires the plaintiff to plead such facts as are necessary to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Lewis* at 93 (alteration in

[65] The lower court dismissal had concluded: "A close reading of the Prisoner Complaint shows that the plaintiff does not allege that as a result of the discontinuance of the treatment itself shortly after it began or the interruption of treatment for approximately eighteen months he suffered any harm, let alone substantial harm, than what he already faced from the Hepatitis C itself. Instead, plaintiff merely focuses on the fact that treatment was stopped." *William Erickson, Plaintiff, v. Barry J. PARDUS and Dr. Anita Bloor, Defendants*, 2006 WL 4674305 (D.Colo.)

original) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The prisoner's claim he required Hepatitis C treatment, was denied it as a disciplinary measure, and this denial was threatening his life would survive initial screening because it gave the defendants "fair notice" of the claim against them. Hence, it satisf[ied] Rule 8(a) (2). *Twombly,* 551 U.S. at 94.

Pro se complaints alleging constitutional violations deserve judicial guidance. The PLRA requires district courts initially to screen prisoner complaints if the case is "a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). A court must dismiss a complaint if it is "frivolous, malicious, or fails to state a claim upon which relief may be granted," or if it "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b). Dismissal for failure to state a claim under § 1915A "incorporates the familiar standard applied in the context of failure to state a claim under Federal Rule of Civil Procedure 12(b) (6)." *Nordstrom I*, 762 F.3d at 908, citing *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.2012). But because pro se complaints are construed liberally, they "*may only be dismissed 'if it appears beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Ibid.*,762 F.3d at 908 (quotation omitted) (emphasis added). See *Schucker v. Rockwood*, 846 F.2d 1202, 1203–04 (9th Cir.1988) ("Dismissal of a pro se complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." (quotation omitted)).

Appellate courts have remanded lower court dismissals precisely because an opportunity to cure, and to show injury, was not allowed. See, e.g., *Johnson v. Polizziani*, 3 F. App'x 587, 588 (9th Cir. 2001), citing *Karim–Panahi v. Los Angeles Police Dep't*., 839 F.2d 621, 623 (9th Cir.1988) (appellant failed to allege *Lewis* injury but a pro se litigant "must be given leave to amend his or her complaint unless it is obviously clear that the deficiencies in the complaint could not be cured by amendment); *Davis v. Goord*, 320 F.3d at 352 , citing *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795 (2d Cir.1999) (per curiam) ("While it is unlikely that Davis will be able to sustain a constitutional claim if the letter simply was returned for an insufficient return address, additional factual allegations regarding the nature of the interference could possibly establish that Davis' rights were violated and he should be given an opportunity to allege those facts."); *Childress v. Walker*, 787 F.3d 433, 436 (7th Cir. 2015) (dismissal premature); *Reynoldson v. Shillinger*, 907 F.2d 124, 127 (10th Cir. 1990) (alleged deprivations of liberty and property could raise substantial issues upon further investigation and development; therefore, dismissal with prejudice was error); *Burks v. Raemisch*, 555 F.3d 592, 594 (7th Cir. 2009) ("It is enough to lay out a plausible grievance"); *Romano v. Lisson*, 711 F. App'x 17, 19 (2d Cir. 2017) ("[a] pro se complaint should not be dismissed without the Court granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated."); *John v. New York Dep't of Corr*., 130 F. App'x 506, 508 (2d Cir. 2005) ([t]he issue at this stage 'is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence [of legal mail interference] to support the claims.'")(citation and quotations omitted). But see *Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 335 (7th Cir. 2018) ("Nothing in Rule 15, nor in any of our cases, suggests that a district court must give leave to amend a complaint where a party does not request it or suggest to the court the ways in which it might cure the defects.").

Some district courts do provide an appropriate opportunity to amend. See, e.g., *Arnold v. Green*, No. Civ.A. 10-5090, 2011 WL 4807918, at *8 (E.D. Pa. Oct. 11, 2011) ("we are not certain that Plaintiff cannot allege facts that would state a cognizable claim based on Sergeant Wood's conduct [in reading legal mail]. We therefore grant him leave to re-assert this claim in his Third Amended Complaint, provided that he can allege facts that would support a cognizable claim under the standards set forth above."); *Osborne v. Clark Cty. Sheriff's Office*, No. 316CV05307BHSDWC, 2016 WL 3017706, at *3 (W.D. Wash. May 25, 2016) (plaintiff directed to file amended complaint on legal mail issue per court's explanation); *Pincombe v. Collins*, No. 2:14-CV-01328-RCJ, 2014 WL 5822802, at *4 (D. Nev. Nov. 6, 2014); *Cage v. Johnson*, No. 4:17CV3115, 2017 WL 6557469, at *3 (D. Neb. Dec. 22, 2017) (on court's own motion, prisoner has 30 days to file an amended complaint on legal mail claim; specifically must name specific individuals and how conduct caused injury); *Gradford v. McDougall*, No. 117CV00575AWIMJSPC, 2017 WL 2345657, at *2 (E.D. Cal. May 30, 2017) ("Plaintiff should file an amended complaint describing what precisely transpired when Defendant opened and inspected his mail that led Plaintiff to believe Defendant read the contents rather than merely inspected them."). In *Green v. Fed. Det. Ctr., Philadelphia*, No. 04-CV-43, 2007 WL 44012, at *3 (E.D. Pa. Jan. 4, 2007) the court held while the complaint, standing alone, could not survive summary judgment, leave to amend should be provided to allow evidence to establish a constitutional cause of action: " Plaintiff must specifically identify when the alleged violations took place, identify where the mail was from and how it was marked, and detail the harm allegedly suffered as a result, including what proceedings were affected and how they were affected." Ibid.

This critical procedural step is the exception, not the rule. On amendment, a prisoner may well show, for instance, that repeated but unavailing efforts to obtain an unmonitored attorney call show this "alternative means" was not a true alternative; that delay lost specific avenues of defense, or objective bases to believe a letter was actually read. But without some guidance from the court on what might meet a legitimate injury standard, and the opportunity to do so, the constitutional interest remains unprotected.

VI. First Amendment Claims

Violation of attorney-prisoner privilege may also be alleged as a direct First Amendment violation. *Jones v. Brown*, 461 F.3d 353, 360 (3d Cir. 2006) (opening attorney mail outside presence); *Al-Amin v. Smith*, 511 F.3d at 1333-34 (allegations of reading attorney mail); *Latson v. Clarke*, 346 F. Supp. 3d 831, 871 (W.D. Va. 2018); *Reneer v. Sewell*, 975 F.2d 258, 260 (6th Cir. 1992) (reading attorney mail as First Amendment claim). *Davis v. Doyle*, No. 05-C-374-C, 2005 WL 2105756, at *4 (W.D. Wis. Aug. 29, 2005) ("interference with attorney mail also can constitute a violation of the right to free speech"); *Ramos v. Lamm*, 639 F.2d 559, 582 (10th Cir. 1980), abrogated in part on other grounds by *Thornburgh*, 490 U.S. 401; *Merriweather v. Zamora*, 569 F.3d 307, 317 (6th Cir. 2009); *Hayes v. Idaho Corr. Ctr*., 849 F.3d 1204, 1211 (9th Cir. 2017); *Davis v. Goord*, 320 F.3d at 35; *Castillo v. Cook County Mail Room Dept*., 990 F.2d 304, 306-07 (7th Cir. 1993) (allegations that prisoner's legal mail was opened outside of his presence stated First Amendment claim).

A. Pattern and Practice

Typically stand-alone First Amendment claims involve interference with an established legal mail procedure. In such circumstances (and contrary to comparable access or right to counsel claims), no actual injury is required.

Unlike the provision of legal libraries or legal services, which are not constitutional "ends in themselves but only the means for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts,'[ ] protection of an inmate's freedom to engage in protected communications is a constitutional end in itself." *Jones v. Brown*, 461 F.3d 353, 360 (3d Cir. 2006) (quotation omitted). Accord: *Al-Amin v. Smith*, 511 F.3d at 1341; *Hayes v. Idaho Corr. Ctr*., 849 F.3d at 1212; *Banks v. York*, 515 F. Supp. 2d at 108. See *Brock v. Corr. Emergency Response Team*, No. 18-CV-3814, 2018 WL 6433907, at *4 (E.D. Pa. Dec. 7, 2018) (scanning of legal mail into permanent database, without more, violated First Amendment).

Isolated incidences of legal mail tampering, however, rarely show a First Amendment legal mail violation. *Fortune v. Hamberger*, 379 F. App'x 116, 120 (3d Cir. 2010) (single instance insufficient); *Woods v. St. Louis Justice Ctr*., No. 406-CV-233 CAS, 2007 WL 2409753, at *6 (E.D. Mo. Aug. 20, 2007); *Smith v. Maschner*, 899 F.2d 940, 944 (10th Cir.1990); *Castillo v. Cook County Mail Room Dept.,* 990 F.2d at 306; *Davis v. Goord*, 320 F.3d at 351; *Schreane v. Holt*, 482 F. App'x 674, 677 (3d Cir. 2012); *Gardner v. Howard*, 109 F.3d 427, 430–31 (8th Cir.1997); *Sizemore v. Wiliford*, 829 F.2d 608, 610 (7th Cir. 1987) (sporadic disruption not violative); *Sims v. Landrum*, 170 F. App'x 954, 957 (6th Cir.2006).

Instead, courts generally require a "pattern and practice" or established policy of legal mail interference to find a First Amendment violation. *Davis*, 320 F.3d at 351 (prisoner must show regular and unjustifiable interference); *Banks v. York*, 515 F. Supp. 2d at 108; *Castillo v. Cook County Mail Room Dep't*, 990 F.2d at 306 (reversing dismissal because violations indicated

ongoing activity); *Phillips v. Superintendent Chester SCI,* 739 F. App'x 125, 130–31 (3d Cir. 2018), citing *Jones v. Brown*, 461 F.3d at 359 ("A state pattern and practice ... of opening legal mail outside the presence of the addressee inmate interferes with protected communications... and accordingly impinges upon the inmate's right to freedom of speech"); *Hunter v. Helton*, No. 1:10-CV-00021, 2010 WL 2405092, at *4 (M.D. Tenn. June 10, 2010) (general allegation that policy exists to delay or destroy incoming legal mail, and grievance from one instance, states colorable First Amendment claim). In *Davis v. Doyle*, No. 05-C-374-C, 2005 WL 2105756, at *4 (W.D. Wis. Aug. 29, 2005), the court declined to dismiss a First Amendment legal mail interference claim because it could not ascertain from complaint whether interference was "inadvertent or isolated." In *Cox v. Inch*, No. 17-CV-01334-JPG, 2018 WL 1336091 (S.D. Ill. Mar. 15, 2018), the court declined to dismiss a complaint characterizing mail interference as a regular "practice" that intimidated the prisoner, and identifying eight specific instances. *Id.*, at 6. Courts may also look to whether the practice is alleged as arbitrary. *Reneer v. Sewell*, 975 F.2d 258, 260; *Merriweather v. Zamora*, 569 F.3d 307, 317 (6th Cir. 2009), citing *Sallier*, 343 F.3d at 879–80 and *Lavado v. Keohane*, 992 F.2d 601, 610 (6th Cir.1993).

Courts vary widely as to what constitutes a pattern and practice. In *Banks v. York*, *supra*, an allegation that legal mail was opened outside the prisoner's presence "on numerous occasions" during a four-month period, and was intentional, stated a First Amendment claim. *Id.*, 515 F. Supp. 2d at 108. In *Greeno v. Litscher*, 13 F. App'x 370 (7th Cir. 2001), an allegation that legal mail was repeatedly opened for approximately one and one-half years stated a First Amendment claim. *Id.*, at 376. In *Baker v. Mukasey*, 287 F. App'x 422, 425 (6th Cir. 2008), four instances presented an actionable claim. In *Davis v. Doyle*, opening seven pieces of legal mail in less than 8 months was actionable. See also *Merriweather*, 569 F.3d at 317 (improper opening of sixteen pieces of legal mail violated the plaintiff's constitutional rights), and *Sallier*, 343 F.3d at 877–80 (upholding jury verdict as to the opening of three pieces of the prisoner's legal mail). Three instances were insufficient in *Hall v. Ekpe*, 408 F. App'x 385, 387 (2d Cir. 2010), as was four in *Stevens v. Harper*, 213 F.R.D. 358, 380 (E.D. Cal. 2002).

Some courts suggest fewer occasions of interference support a violation only when accompanied by "invidious intent or actual harm." *Riley v. Semple*, No. 3:17-CV-45 (VAB), 2017 WL 507214, at *3 (D. Conn. Feb. 7, 2017), citing *Davis*, 320 F.3d at 351. See also *Bellezza v. Holland*, 730 F. Supp. 2d 311, 316 (S.D.N.Y. 2010) (single incident may sustain a First Amendment violation if actual harm resulted). In *Lavado v. Keohane*, a BOP staffer stood in front of the prisoner, read through his mail and then handed him a business card so his name would be spelt correctly in any complaint. This single incident "gave rise to an inference" of arbitrary action and allowed the First Amendment claim to proceed to trial. *Id.*, 992 F.2d at 611. In *Sallier*, three instances of legal mail tampering, was "objectively unreasonable" when the mail had clearly been designated legal mail. *Id.*, 343 F.3d at 880.

The degree of specificity that must be pled to show a pattern or practice varies. Naming eight specific dates of mail interference was "sufficient...to nudge his constitutional claims...across the line from conceivable to plausible." *Jones v. Nebraska Dep't of Corr. Servs. Officials*, No. 8:13CV67, 2013 WL 2147409, at *3 (D. Neb. May 15, 2013). But in *Hall v. Chester*, No. 08-3235-SAC, 2008 WL 4657279 (D. Kan. Oct. 20, 2008), naming multiple, specific dates was insufficient:

> [W]hile plaintiff makes the conclusory allegation that defendants acted intentionally, he alleges no facts to support an inference that the two incidents upon which his complaint is based were the product of improper motive rather than inadvertence or negligence. Nor has he alleged facts, rather than conclusions, which if proven would demonstrate that defendants engaged in a pattern or practice of opening inmates' legal mail outside their presence.

Id., at 4. See also *Senty-Haugen v. Goodno*, 462 F.3d 876, 891 (8th Cir. 2006) (allegation alone, without evidence staff read or opened attorney correspondence, insufficient), citing *Gardner v. Howard*, 109 F.3d 427, 430–31 (8th Cir.1997) (unsupported assertions in affidavit cannot defeat summary judgment). In contrast, in *Hunter v. Helton*, the prisoner's mere allegation of a "policy" of delay stated a claim. And in *Davis v. Doyle*, the court declined to dismiss because it could locate no affirmative evidence showing the incidents were merely inadvertent or isolated – essentially assuming a practice exists unless shown otherwise. *Id.*, at 4.

Interference with privilege in attorney telephone or in-person visits may also be alleged as a First Amendment violation. See, e.g., *Romano v. Lisson*, 711 F. App'x 17, 19 (2d Cir. 2017) (plausible allegation that phone restrictions which included phone access to attorneys stated First Amendment claim). As covered in Part IV above, phone or visitation First Amendment claims often concern access, i.e., whether a restriction on the availability of attorney phone or in-person contact is lawful. That issue commonly examines alternative means of communication. But First Amendment interference with the conduct of phone and in-person visits (as opposed to their frequency) typically involves monitoring. And monitoring raises questions of chill.

B. Chill As Injury

First Amendment attorney privilege interference claims present a very specific, and somewhat contradictory, analysis of chill. The chilling impact of the infringement may be asserted as the reason no actual injury must be shown; at the same time, it may be the injury itself.

In *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty.*, the lower court enjoined legal mail interference (a "postcard only" policy and refusal to deliver pre-representation ACLU mail as legal mail). It found a likelihood of success on the merits, and threat of irreparable injury, because "[t]he loss of First Amendment freedoms, for even minimal periods of time unquestionable constitutes irreparable injury." *Id.*, No. CV 14-11213, 2014 WL 12662064, at *2 (quotation omitted). The Sixth Circuit upheld the injunction: "Precluding this pre-litigation correspondence and investigation, at the very least, chills important First Amendment rights." *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d at 645. In *Sallier*, opening properly marked legal mail alone by itself implicates the First Amendment because of the potential chilling effect on candid attorney-client communication. 343 F.3d at 877. But see *Stanley v. Vining*, 602 F.3d at 770 (no First Amendment violation in active reading of legal mail).

In *Hayes v Idaho Corr. Cntr*., *supra,* the Ninth Circuit held the prisoner's First Amendment rights had been violated by repeated opening, outside his presence, of the prisoner's civil legal mail. 849 F.2d at 1208. It noted a majority rule in federal appellate courts that opening legal mail outside of a prisoner's presence at minimum implicated the First Amendment, and found the position persuasive:

> When a prisoner receives confidential legal mail that has been opened and re-sealed, he may understandably be wary of engaging in future communication about privileged legal matters. Moreover, prisoners' communications with civil attorneys often relate to lawsuits challenging the conditions of confinement in the prison or wrongful conduct of prison employees. When prison officials open legal mail, prisoners may justifiably be concerned about retaliation from the very officers the prisoner has accused of wrongdoing. Prisoners may also worry that the contents of the letters could be passed along to the facility's lawyers, who would learn of the prisoner's legal strategy.

849 F.3d at 1210. Because of this chill, no separate finding of injury was needed. 849 F.3d at 1212. Instead, "the injury... is "that his right to privately confer with counsel has been chilled." 849 F.3d at 1208 (quotation omitted). The Ninth Circuit relied on *Laird v. Tatum*, 408 U.S. 1, 11 (1972), for the proposition that "'constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [actions] that fall short of a direct prohibition against the exercise of First Amendment rights." *Ibid.* Cf. *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997) (holding, in a First Amendment retaliation claim, "the injury asserted is the retaliatory accusation's chilling effect on ... First Amendment rights.... [a] failure to demonstrate a more substantial injury does not nullify [a] retaliation claim) and *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,) citing *New York Times Co. v. United States*, 403 U.S. 713 (1971).

But in *Laird*, the ultimate holding of the Court was that no justiciable First Amendment violation existed in the Army's intelligence-gathering and distributing system on anti-war activists because "the principal sources of information were news media and publications in general circulation." *Id.*, 408 U.S. 1, 13-14. The Court stated: "Allegations of a subjective 'chill' [were] not [in that case] an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Ibid.* Its statements that constitutional violation may arise from chill alone were dicta.

In *Williams v. Price*, *supra*, the court distinguished *Laird* and held that failure to provide a place for private attorney-prisoner meetings created actual injury. *Laird* was deemed inapplicable because it involved public, not private, information.

> [I]n *Laird*...all of the information gathered was public information.... [But the] Court recognized that constitutional violations may arise from the deterrent, or "chilling," effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.... Here Plaintiffs have shown that the ability of other persons to overhear their conversations with their attorneys prevents them from being able to discuss

> private matters with their attorneys and results in limiting their discussions with their attorneys. [Therefore,] Plaintiffs have shown actual injury.

Id., 25 F. Supp. 2d at 630. In contrast, in *Andersen v. Cty. of Becker*, No. CIV 08-5687 ADM RLE, 2009 WL 3164769, (D. Minn. Sept. 28, 2009), the court held that, even assuming chill existed from monitoring attorney-prisoner phone calls, the prisoner lacked standing to raise First Amendment claim because no actual (independent) injury existed. It interpreted *Laird* as requiring actual harm to have standing to raise such a claim. *Id.*, at 7.

Monitoring presents an interesting twist on the concept of chill as injury. There is a distinct, and somewhat perverse, line of cases that finds no First Amendment violation in monitoring if the prisoner is unaware of it because, in such circumstances, the parties cannot have been subjectively chilled in their communication. See *Brown v. Temple*, No. CIV.A. 11-0797-JJB, 2013 WL 1335750 (M.D. La. Apr. 1, 2013):

> [T]to the extent that the plaintiff was aware that his legal telephone conversations were ...being monitored and/or recorded... he had other means available to him to exercise his First Amendment rights and to confer with his attorneys. And to the extent that the plaintiff was truly unaware that his legal telephone calls were ... recorded and potentially monitored, then the alleged wrongful conduct of prison officials can have had no chilling effect upon his exercise of First Amendment rights.

Id., at 3, citing *Busby v. Dretke*, 359 F.3d 708, 721, n.13 (5th Cir. 2004) (First Amendment monitoring claim weakened because prisoner was unaware of it). Even where chill is acknowledged, an infringement may be deemed reasonable under *Turner*. See *O'Keefe v. Van Boening*, 82 F.3d 322, 325 (9th Cir. 1996) (reading prisoner grievance mail reasonable to ensure institutional security).

The conundrum of chill in First Amendment claims of attorney privilege violation parallels the difficulties it presents in constitutional standing and overbreadth doctrines generally. It speaks to both merits and Article III standing and has spawned a legion of jurisprudence and secondary analyses. There are consistent themes: in free speech cases projected or potential injury often satisfies injury-in-fact and the nature of the right impacts the protection afforded it. In free speech claims, "the chilled plaintiff has suffered an injury sufficient to confer constitutional standing to sue." [66] In a First Amendment claim based on breach of attorney-client privilege, chill should be paramount because of the multiple constitutional interests at stake and because it is a point of departure from which to protect all legal rights.

[66] Jonathan R. Siegel, *Chilling Injuries As A Basis for Standing*, 98 Yale L.J. 905, 914 (1989).

VII. Privilege Waiver

Under the majority rule, a prisoner's informed use of a monitored communication method - typically telephone or email - vitiates attorney-client privilege.

A. Use of Monitored Communication Method

Abrogation of privilege occurs by waiver. *U.S. v. Eye*, 2008 WL 1701089, at *12 (W.D. Mo. Apr. 9, 2008) (defendant waived attorney-client privilege by communicating with his attorney on the prison telephone because the facility provided notice by informing the defendant upon his arrival, through signs on the telephone, and via a recorded message before all calls they were monitored and recorded); *U.S. v. Lentz*, 419 F. Supp. 2d 820, 829 (E.D. Va. 2005) (prisoner waived privilege by making attorney calls with notice they were recorded); *Brown v. Temple, supra*; *United States v. Thompson*, No. 07-30010, 2007 WL 2700016, at *1 (C.D. Ill. Aug. 9, 2007) (prisoner waived any privilege disclosing the information in a telephone conversation he knew was being recorded).

Loss of privilege may occur because the parties could not have had a reasonable expectation of privacy for Fourth Amendment purposes. Fourth Amendment protection of jail telephone call is far more limited because inmates have no reasonable expectation of privacy in such calls. *United States v. Paul*, 614 F.2d 115, 116 (6th Cir.1980), citing *Lanza v. New York*, 370 U.S. 139 (1962). Generally, a prisoner's knowledge that communication is monitored precludes a reasonable expectation of privacy. See *U.S. v. Friedman*, 300 F.3d 111 (2d Cir. 2002) (inmate on notice that calls are recorded has no reasonable expectation of privacy); *United States v. Horr*, 963 F.2d 1124, 1126 (8th Cir.1992) (same). See also *United States v. Adams*, 321 F. App'x 449, 462 (6th Cir. 2009) ("[Defendants] could not have expected privacy where a message at the start of every telephone call informed the inmates that they had no right to privacy and that their conversation was being recorded and possibly monitored."). But see *Jayne v. Bosenko*, 2014 WL 2801198, *23 (E.D. Cal. 2014), on reconsideration in part, 2016 WL 3213552 (E.D. Cal. 2016) (finding that pretrial detainees reasonably expect privacy in phone calls to their attorneys).

Use of a monitored line may also constitute consent under Federal Wiretap Act (Title III, Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510 et seq. ("Title III")). That Act applies to prison telephone conversations. *United States v. Paul*, 614 F.2d at 116; *United States v. Noriega*, 764 F. Supp. 1480, 1490 (S.D.Fla.1991), citing *United States v. Amen*, 831 F.2d 373, 378 (2nd Cir.1987). Consent to monitoring, and monitoring within the normal scope of law enforcement duties, are exempt from the general surveillance bar. Sections 2510(5) (a) and 2511(2) (c), Title 18, U.S. Code. Consent is construed broadly and permits interception where it impliedly exists. *Griggs–Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir.1990) (initial warning that calls were recorded manifested implied or consent in fact sufficient to trigger consent exception), citing *United States v. Amen*, 831 F.2d 373, 378 (2nd Cir.1987). See also *Gilday v. Dubois*, 124 F.3d 277, 296 (1st Cir. 1997) and *United States v. Footman*, 215 F.3d 145, 154–155 (1st Cir.2000) (holding no Title III violation when prisoner impliedly consented via audio message informing him of interception); *Novak v. United States*, No. CIV.A. 10-11975-RGS, 2012 WL 170885, at *1, n. 4 (D. Mass. Jan. 20, 2012) (collecting cases). Such monitoring may be lawful

under the law enforcement exception as well. *United States v. Daniels*, 902 F.2d 1238, 1244 (7th Cir. 1990).[67]

These concepts are premised on advance notice. *United States v. Morris*, No. 07–20, 2008 WL 5188826, at *3–4 (W.D.Pa. Dec. 8, 2008). ("Defendant was given advance notice that his phone calls would be monitored and recorded. By using the telephone knowing the calls would be recorded, Defendant could not possibly have had a reasonable expectation of privacy."). The absence of notice may render the surveillance unprotected. See *Jayne v. Bosenko*, 2014 WL 2801198, *23 (E.D. Cal. 2014), on reconsideration in part, 2016 WL 3213552 (E.D. Cal. 2016) (finding that pretrial detainees reasonably expect privacy in phone calls to their attorneys); *Sowards v. City of Milpitas*, No. C-03-3036-JF, 2005 WL 1566540, at *3 (N.D. Cal. July 5, 2005) (holding that the police violated the Fourth Amendment by recording an attorney- client conversation in an interrogation room). In *Gennusa v. Shoar*, 879 F. Supp. 2d 1337 (M.D. Fla. July 17, 2012), the court found that the arrestee reasonably expected privacy in his "attorney-client conversations held in the police interview room" where they were given no indication conversation was being records. 879 F. Supp.2d at 1349. Accord: *United States v. Walker*, No. 2:10cr186–MHT, 2011 WL 3349365, at *2 (M.D.Ala. July 14, 2011) (finding that the inmate's recorded calls to his lawyer from prison were privileged where the jail's recorded message "explicitly excluded attorney-client calls from being recorded and monitored," so the inmate and his attorney were not aware that they were being recorded). In *United States v. Noriega*, the court also found that privilege had not been waived where it was not clear the prisoner had been fully and accurately informed of the proper procedures to obtain a privileged call: "[I]t was the responsibility of prison officials to clearly and explicitly explain [therefore the prisoner] was apparently never fully and unequivocally advised of the procedures which have been laid out for this court." 764 F. Supp. at 1487.

B. Third Party Doctrine

Such waiver follows the general rule in privilege doctrine that the party asserting it must intend for the communication to be privilege and must act in a consistent manner. P.R. Rice, Attorney-Client Privilege in the United States § 9:24 (2d ed. 1999). Communicating in the presence of a third party generally contradicts a confidential intent. See 1 McCormick on Evid. § 91 (6th Ed. Supp.2009) ("Wherever the matters communicated to the attorney are ... revealed to third persons, obviously the element of confidentiality is wanting." (footnotes omitted)). See, e.g., *Bower v. Weisman*, 669 F. Supp. 602, 606 (S.D.N.Y. 1987) (privilege did not apply to defendant's letter to his attorney because it was left spread out on a table in an office's waiting room); *United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984) (statements made by a client to his attorney over the telephone while detectives were searching his house were not privileged); *United States v. Mejia*, 655 F.3d 126, 134 (2d Cir. 2011) (prisoner's awareness of monitoring and decision nevertheless to tell his sister the substance of the communication directed to his attorney, showed absence of affirmative action to preserve confidentiality.). Accord: *Hawkins v.*

[67] Fourth Amendment analysis and the Federal Wiretap Act apply to prisoner-attorney communications. *United States v. Noriega*, 764 F. Supp. at 1490; *Sowards v. City of Milpitas*, No. C-03-3036-JF, 2005 WL 1566540, at *3 (N.D. Cal. July 5, 2005) (police violated the Fourth Amendment by recording an attorney- client conversation in an interrogation room).

Stables, 148 F.3d 379, 384 n. 4 (4th Cir.1998) ("[I]mplied waiver occurs when the party claiming the privilege has made any disclosure of a confidential communication to any individual who is not embraced by the privilege."); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege.").

Courts have fashioned "the presence of the recording device [as] the functional equivalent of the presence of a third party, such that the attorney-client privilege is destroyed." *United States v. Walker*, No. 2:10cr186–MHT(WO), 2011 WL 2728460, at *2 (M.D.Ala. Jul. 13, 2011), citing *United States v. Hatcher*, 323 F.3d at 674. Monitoring is an "unsympathetic third party" listening in. *United States v. Lentz*, 419 F. Supp. 2d 820, 823 (E.D. Va. 2005), aff'd on other grounds 24 F.3d 501 (4th Cir. 2008); *United States v. Mitchell*, No. 3:11-CR-248(S1)-J-34, 2013 WL 3808152, at *13 (M.D. Fla. July 22, 2013). Therefore, knowing use of monitored means of communication precludes an intent to preserve privilege. [68]

C. A Minority View: The Hobson's Choice

Application of traditional waiver or consent theories in the context of prison realities is jarring because there is an inherently coercive nature to incarceration that renders traditional consent concepts an ill fit. The precise purpose of incarceration is to eliminate personal control. Some courts have recognized this and have considered whether a prisoner's use of a recorded phone is a knowing and free waiver or consent.

> [I]t is instead no more than a choice between unattractive options—a limited choice imposed on plaintiffs by defendants. The issue then becomes whether the law allows the defendants to impose this limitation of choice on the plaintiffs and call their response an implied consent. At the least, grounds exist for genuine dispute about whether defendants are authorized by law to impose such a limited choice on plaintiffs and whether "implied consent" under these circumstances is "consent" as that term is used in the federal act, and legally effective consent under the Department's regulations. See Griggs–Ryan v. Smith, 904 F.2d 112 (1st Cir.1990) (holding that "implied consent" is consent concluded from associated circumstances indicating that a party knowingly agreed to surveillance).

Langton v. Hogan, 71 F.3d 930, 936 (1st Cir. 1995). There, the First Circuit upheld a permanent injunction, requiring among other things that prison authorities cease overly broad telephone interception, including attorney calls. The prison had sought declaration that its regulations were permitted by a settlement, and monitoring was lawful because the prisoners consented by use of monitored lines. 71 F.3d at 936. The court declined to so find. *Ibid.*

In *Evans v. Skolnik*, 637 F. App'x 285, 288 (9th Cir. 2015), the Ninth Circuit struck down a prison's pre-screening practice which surveyed all calls, including initial survey of attorney

[68] Prosecutors are increasingly aggressive about asserting waiver and utilizing prisoner calls. See, e.g., Justin Scheck*, Privilege Feud Flares Up in Federal Court,* Law.com, August 16, 2006, reviewing use of recorded attorney jail phone calls in several California federal cases, and quoting a retired federal prosecutor: "I was surprised they're being as aggressive as they are," said Jeffrey Bornstein, who left the San Francisco U.S. attorney's office last year to become a partner at Kirkpatrick & Lockhart Nicholson Graham. "We always took a very conservative approach when I was a prosecutor, out of fear of infringing on someone's right to counsel."

calls. It rejected the lower court's determination that use of phones with knowledge of that practice constituted consent for Fourth Amendment purposes:

> Contrary to the district court's conclusion, the fact that [the prisoner] was subjectively "aware" that the [prison] was screening his calls does not defeat his Fourth Amendment claim. This is a case in which the "normative inquiry"—not the subjective expectation of privacy—governs the extent of the Fourth Amendment's protection. See *Smith v. Maryland*, 442 U.S. 735, 740 n. 5, 99 S. Ct. 2577, 61 L.Ed.2d 220 (1979); *United States v. Scott*, 450 F.3d 863, 867 (9th Cir.2006) (citation omitted). Nevada cannot defeat an inmate's constitutional right to confidential attorney-client communications simply by informing him that his communications will no longer be confidential. See Scott, 450 F.3d at 867 ("[W]here an individual's subjective expectations had been conditioned by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.") (quoting *Smith*, 442 U.S. at 740 n. 5, 99 S. Ct. 2577).

It remanded for a reasonableness determination under *Turner*. 637 F. App'x at 288.

In *United States v. Daniels*, *supra*, the Seventh Circuit reviewed a lower court's inclusion of evidence of obtained from surveillance of the prisoner's telephone calls. It rejected the government's argument that the parties had consented to monitoring by their knowing use, and that therefore the Federal Wiretap Act had not been violated. Judge Posner took strong exception:

> The government does not advance its cause ... by arguing … consent can be inferred from [knowledge calls were] monitored. That is the kind of argument that makes lawyers figures of fun to the lay community, and although a respected sister court has accepted it, *United States v. Amen*, 831 F.2d 373, 379 (2d Cir.1987), we place no weight on it.

902 F.2d at 1245. The court noted that even the prisoner's coded reference to monitoring during the call did not equal consent:

> He thought that by the use of a simple code he could prevent the eavesdroppers from understanding what he was doing. He thought wrong. This may make his case seem identical to that of a person who consents to the search of his house, erroneously believing… the police will fail to … uncover the contraband …. No law shields evidence thus obtained from use in a criminal prosecution. But knowledge and consent are not synonyms. Taking a risk is not the same thing as consenting to the consequences if the risk materializes. A person who walks by himself late at night in a dangerous neighborhood takes a risk of being robbed; he does not consent to being robbed. We would be surprised at an argument that if illegal wiretapping were widespread anyone who used a phone would have consented to its being tapped and would therefore be debarred from complaining of the illegality.

Ibid. The court allowed the evidence, however, under the law enforcement exception. *Ibid.*

Another court distinguished *Daniels* from employer surveillance precisely because employees do not face the same dire consequences prisoners do:

> The dicta from *Daniels* must be read in light of the facts at issue in that case. Prisoners are faced with the Hobson's choice of "consenting" to having their private calls recorded or being cut off from the outside world. Under such circumstances, the idea of implied consent does indeed seem ludicrous. See *Daniels*, 902 F.2d at 1245 ("That is the kind of argument that makes lawyers figures of fun to the lay community."). The same concerns are not present in the context of an employer recording calls made by its employees. The employee is not dependent on the phone calls to interact with the outside world and does not have the same personal interest in the business calls as a prisoner has in his or her private calls.

Burrow v. Sybaris Clubs Int'l, Inc., No. 13 C 2342, 2016 WL 3213397, at *3 (N.D. Ill. June 10, 2016).

Drawing on *Daniels*, a respectable body of judicial support exists questioning the majority waiver/consent rule: See *United States v. Cheely*, 814 F. Supp. 1430, 1443 (D. Alaska 1992) aff'd, 21 F.3d 914 (9th Cir. 1994), opinion amended and superseded, 36 F.3d 1439 (9th Cir. 1994), and aff'd, 36 F.3d 1439 (9th Cir. 1994).") (law enforcement exception applied to recording prison family call, but consent exception questionable; "I share the concern expressed [in] *Daniels*, that this reasoning turns acquiescence into consent…, it tortures the meaning of the word to call it 'consent'"). See also *United States v. Feekes*, 879 F.2d 1562, 1565 (7th Cir.1989) (same; "this argument is troubling. To take a risk is not the same thing as to consent."); *Crooker v. U.S. Department of Justice*, 497 F. Supp. 500, 503 (D.Conn.1980), citing *Campiti v. Walonis*, 453 F.Supp. 819, 823 (D.Mass.1978), aff'd, 611 F.2d 387 (1st Cir. 1979) (monitoring, including some attorney calls, not valid under Title III on consent theory; "[I]n the present case, knowledge of the monitoring ... and the existence of a justifiable need for such monitoring are clearly not sufficient to establish consent.") See also *Com. v. Baumhammers*, 599 Pa. 1, 32, 960 A.2d 59, 78 (2008); *Breest v. Dubois*, No. CIV.A. 94-4665H, 1997 WL 449898, at *5 (Mass. Super. July 28, 1997) (no practical alternative to acquiescence…so the question is not free from doubt). But see *U.S. v. Rivera*, 292 F. Supp.2d 838, 845 E.D.Va. (NO. CR.A. 02-376-A) (lack of consent argument only persuasive if prisoners had absolute right to calls). [69]

The minority view applies with greater force attorney calls because the pressure to place an attorney call at a particular time, even if monitored, may at times be greater than that for routine contact calls. These calls allow for immediate, interactive contact with counsel in urgent and time-sensitive situations. See *State v. Garza*, *supra*. Yet such calls are staff-intensive, and difficult and time-consuming to arrange. Indeed, a showing that the prisoner tried but could not access a privileged call may vitiate waiver. See, e.g., *Ayers v. Lee*, No. 14CV542-BGS (NLS),

[69] See Hope L. Demer, *Can You Hear Me Now? The Impacts of Prosecutorial Call Monitoring on Defendants' Access to Justice*, 70 S.C. L. Rev. 977, 987 (2019), discussing limitations on valid consent, and constrained alternatives, inherent in prison existence.

2018 WL 6589834, at *7 (S.D. Cal. Dec. 14, 2018) ("[S]he presents no affirmative evidence that she was prevented from utilizing [privileged call] procedures.").

D. Third Party Doctrine Exceptions

1. Involuntary Disclosure

The minority rule follows third party doctrine: When disclosure to a third party is involuntary, privilege is not waived. See *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir.1992); *United States v. Ary*, 518 F.3d 775, 783 (10th Cir. 2008). "Involuntary disclosures include "[c]ommunications which were intended to be confidential but are intercepted despite reasonable precautions." J. Weinstein & M. Berger, Weinstein's Evidence, 503(a) (4) [01] at 503–31 (1982 ed.); *Dukes v. Wal-Mart Stores, Inc*., No. 01-CV-2252 CRB JSC, 2013 WL 1282892, at *4 (N.D. Cal. Mar. 26, 2013). Acquiescing to a "Hobson's Choice" is not a voluntary disclosure.

2. Facilitating Attorney Communication

Another aspect of third party doctrine is relevant. Disclosure to a third party is not a waiver if that party facilitates attorney-client communication. "As a general matter, the privilege is not destroyed when a person other than the lawyer is present at a conversation between an attorney and his or her client if that person is needed to make the conference possible or to assist the attorney in providing legal services." *Miller v. Haulmark Transp. Sys*., 104 F.R.D. 442, 445 (E.D.Pa.1984). And see, *In re Restasis*, 352 F. Supp. 3d 207, 211 (E.D.N.Y. 2019) (privilege extends to a communication disclosed to a third party "if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client."); *Hendrick v. Avis Rent A Car System, Inc*., 944 F. Supp. 187, 189 (W.D.N.Y.1996) ("communications to any person whose intervention is necessary to secure and facilitate the communication between an attorney and client are privileged, [such] as communications through an interpreter, a messenger or any other intermediary"). In *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir.1961), attorney-client privilege attached to a conversation between the attorney and client in the presence of an accountant hired by attorney, as the "presence of the accountant [was] necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit."

Arguably, monitored channels of prison communication are at times necessary for attorney representation because the privileged attorney communication cannot happen without it. Therefore, disclosure of privileged materials through such channels is not waiver. [70]

Minimally, a realistic rule would investigate or inquire as to staff responsiveness. Ideally, it would require the government to demonstrate specific availability of a privileged mode, to sustain consent or waiver. It would acknowledge prisoners function within and are limited by prison reality. See, e.g., *Gomez v. Vernon*, 255 F.3d 1118, 1133 (9th Cir. 2001) ("by marking the binders with the name of the case, placing it on a restricted-access shelf, and requiring a sign-out

[70] Demer, 70 S.C. L. Rev. at 996 ("The third-party doctrine is not without exception, and inmate phone calls fit the framework for what should qualify as such as an exception.").

procedure for use of the file, 'the inmates could not have done anything more to secure the confidentiality of these documents because there are no areas in the prison that are accessible only to inmates.'").

In short, realities matter.[71]

[71] Cf. *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002), where the court reviewed the constitutionality of an anti-cruising city ordinance which effectively barred a homeless man from visiting his attorney: "Au France's exclusion from Over the Rhine prohibited him from traveling to his attorney's office.... [It] was particularly problematic because Au France was homeless, thus he had no readily available, realistic alternative to communicate with his attorney. For example, Au France's lawyer could not take the exceptionally accommodating step of making a "house call" to discuss Au France's legal affairs. And, as a homeless individual, Au France lacked access to a private telephone to seek and receive legal advice. Given the obviously privileged nature of his conversations, it cannot be said that Au France's access to the City's predominantly, unenclosed public phones, alleviated his problem of access. An urban street corner simply does not provide a sufficient guarantee of privacy and a realistically effective guard against disclosure of privileged and confidential information to be considered a viable alternative. Even if Au France secured a wholly enclosed public phone, he is homeless, and thus, in all likelihood lacks the money for anything more than a short conversation with his attorney. Thus, the Ordinance not only blocked Au France's physical access to his attorney's office, it effectively blocked all access to his attorney. While this a troubling scenario regardless of the underlying factual circumstances, it is particular troubling in Au France's case. Au France is a homeless man, existing at the margins of our society, where he is uniquely vulnerable and in particular need of unobstructed access to legal representation and a buffer against the power of the State." *Id.*, at 506.

VIII. EMAIL

A. Subject to General Waiver

Email as a method of attorney-prisoner privileged conversation presents its own issues. Email is available in federal prisons via the same software platform – TRULINCS – which incorporates telephone, mailing labels and even legal research access. It is called CORRLINKS. The prisoner is charged 15 cents per 5 minutes of usage and, unlike telephone, there is no maximum allotment other than what the person can afford. In its final form, it is not a direct email contact but passes through a website and only accessible when pre-accepted by the outside individual. Staff thus has the opportunity for staff to review and censor any email traffic it chooses via a permanent electronic record.

Many state departments of corrections provide email contact to those in its state prisons (see n. 1, above). Generally, such contact is handled by a private contractor, and costs considerably more than the federal equivalent.

In the federal system, email contact is prefaced with the same "notice of monitoring" that exists for housing unit phone calls, and inmates acknowledge it in writing before email use is allowed. [72] Because of this notice, courts have imposed the same "waiver" or "implied consent" principle to privileged email communications as exists for lawfully monitored calls (see part). In a resentencing in *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011), the government sought and was granted enhancement of a fraud, tax evasion, and obstruction of justice sentence based on extensive federal prison email content. The government successfully relied on hundreds of prison emails sent by the defendant, many of which included his attorney, to establish his lack of remorse and continued efforts to manipulate the system. [73] In *Fed. Trade Comm'n v. Nat'l Urological Grp., Inc*., No. 1:04-CV-3294-CAP, 2015 WL 13687741 (N.D. Ga. Nov. 19, 2015), the defendants alleged the government had illegally seized e-mails between a defendant and counsel while he was detained in a federal facility, in violation of Sixth Amendment and right of access rights. The court denied the claim twice, holding the defendant's "constitutional rights were not violated because he consented to the monitoring [of his e-mails] and thus had no reasonable expectation of privacy, and because the Sixth Amendment [did] not apply in [that] civil contempt proceeding." *Id.*, at 2.

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[72] See Program Statement #5265.13, *Trust Fund Limited Inmate Computer System (TRULINCS) - Electronic Messaging*, 2/19/2009: "By participating in the TRULINCS program, inmates, and the persons in the community with whom they correspond, voluntarily consent to having all incoming and outgoing electronic messages, including transactional data, message contents, and other activities, monitored and retained by Bureau staff. This authority includes rejecting individual messages sent to or from inmates using TRULINCS that jeopardize the above-mentioned interests…. An inmate's participation in TRULINCS is conditioned on his/her notice, acknowledgment, and voluntary consent to the Warden's authority, as indicated above. Each inmate's notice, acknowledgment, and voluntary consent must be documented on the Inmate Agreement for Participation in TRULINCS Electronic Messaging Program Form (BP-0934). As a reminder to inmates, a warning banner appears each time an inmate participant accesses the system, indicating his/her consent to monitoring." *Id.*, pp. 2-3.

[73] http://media.philly.com/documents/110111_Prosecution_Fumo.pdf

But in *United States v. Aguilar*, 831 F. Supp. 2d 1180 (C.D. Cal. 2011), the prosecutorial team had sought and obtained leave from the presiding judge to review a defendant's BOP telephone calls to his wife, and in that process, also obtained emails, which included attorney communication. With that act identified as part of a significant list of other prosecutorial misconduct, the court exercised its supervisory power to dismiss the indictment. 831 F. Supp. 2d at 1206.

B. The New York Cases

A cluster of recent cases in the Southern and Eastern Districts of New York addressed the same issue and brought heightened national scrutiny to it. The U.S. Attorney's office there gave notice to the local Federal Defenders in June of 2014 it would cease affirmatively reviewing seized inmate emails to segregate out any containing attorney-client communication.[74] Multiple defense counsel objected, presenting various arguments and, in all cases, explaining at length the burden associated with in-person visits and arranging privileged calls, the delay in regular mail, and the greatly heightened utility afforded by the inmate email system for attorney-client communication. Results varied.

In *United States, v. Walia*, 2014 WL 3724943 (E.D.N.Y.), defense counsel learned government discovery including emails with attorney-client communication and sought to exclude them. So did the Medicare fraud defendant in *United States v. Ahmed*, No. 1:14-cr-00277 (E.D.N.Y. June 27, 2014), the racketeering defendant in *United States v. Asaro*, No. 14-CR-26 (ARR), 2014 WL 12828985 (E.D.N.Y. July 17, 2014), and the terrorism-related defendant in *United States v. Saade*. In *Asaro* the defendant argued violation of right of access and due process; the *Walia* and *Ahmed* defendants a right of counsel violation. None argued that attorney-client privilege obtained.

In *Walia* and *Asaro*, exclusion was denied, albeit reluctantly. In *United States v. Walia*, No. 14-CR-213(MKB), 2014 WL 3734522, at *16 (E.D.N.Y. July 25, 2014), the district court declined to find a Sixth amendment violation in prosecutorial review of federal inmate emails:

> While the Court may not agree with the position of the United States Attorney's Office to review non-privileged email communications between inmates and their attorneys communicated over a monitored system, the Court has no legal basis to find that the fundamental right of access to effective assistance of counsel . . . is compromised by the review of communication that both Defendant and his counsel knew to be monitored and thus not privileged.

United States v. Walia, No. 14-CR-213 MKB, 2014 WL 3734522, at *16 (E.D.N.Y. July 25, 2014). In *Asaro*, the court concluded the same:

> The government's policy does not…"unreasonably interfere" with Mr. DiFiore's ability to consult his counsel, as other means of privileged communication remain open to him,

[74] Letter from James G. McGovern, Chief, Criminal Div. of the U.S. Att'y for the E.D.N.Y. to Peter Kircheimer, Att'y-in-Charge, Fed. Defenders of N.Y. for the E.D. 1 (June 9, 2014) available at http://nylawyer.nylj.com/adgifs/decisions14/072214letter.pdf.

> including phone calls, mail, and in-person visits with his attorney…. Mr. DiFiore has not alleged any interference with his ability to consult counsel through these other media, other than his counsel's expending time and funds on traveling to visit him and the inconvenience of having to arrange phone calls in advance.

United States v. Asaro, No. 14-CR-26 (ARR), 2014 WL 12828985, at *1 (E.D.N.Y. July 17, 2014), citing *Benjamin v. Fraser*, 264 F.3d 175, 187 (2d Cir. 2001). In *Saade*, the parties settled, with, at the court's urging, the government agreeing to refrain from review of emails with attorney-client content.

In *Ahmed*, however, Eastern District of New York Chief Judge Dori Irizarry declined to follow.[75] At hearing, Judge Irizarry excoriated the U.S. Attorney. She questioned why the government had suddenly changed its policy, now reading emails with privileged content. *Id.*, at 7. She rejected the government's argument that, unlike telephone calls, it was administratively burdensome to manually segregate emails.

> THE COURT: Oh, give me a break. Give me a break. You're going to tell me so you can see the phone number, but you can't see the e-mail address.
>
> THE GOVERNMENT: The problem for the government is there's no easy way when you obtain e-mails to screen out attorney-client e-mails.
>
> THE COURT: You know what, I'm not buying that. We are in the 21st century. The technology that we have now is incredible. And even I, with my simple knowledge of computers and e-mails, am aware that in G-mail, for example, if you have a G-mail account, a G-mail user may very simply program the G-mail account so that the e-mails that are coming from Mr. Buford to me can automatically be put in a segregated file. And I find it very hard to believe that the Department of Justice, with all of the resources that it has, with the access to the Department of Homeland Security and NSA, cannot come up with a simple program that segregates identified e-mail addresses [for] person who they believe to whom the attorney-client privilege will apply… those e-mails are identified both by the inmate and one of those addresses is identified and programmed very simply to go into a separate folder. And that can be done mechanically, by a machine, where no human eyes have to see this….
>
> What I'm telling you is that there's no way, technologically speaking, that this system cannot be adjusted and probably adjusted very simply, and I'd be willing to bet that there are undergraduates at MIT who could do it today, who could adjust the program to eliminate this particular issue"

Id., at 11-12. Judge Irizarry rejected as "hogwash" the government's contention it was not reviewing the email for, or reaping from them, any litigation advantage. *Id.*, at 17. She also rejected the concept that available alternatives justified "non-protection" of the emails. *Id.*, at 19-20. She cited her own recent experiences attempting to implement cost containment on the

[75] Transcript in *U.S. v. Ahmed*, 14-CR-00277(DLI) (EDNY 2014), June 27, 2014, at http://www.kmbllaw.com/wp-content/uploads/CorrlinksPrivilegeHearing.pdf

federal public defender budget, her negotiations with the area federal warden to reduce wait times for defense counsel visits, and the detailed, cumbersome process involved with arranging a privileged telephone call. *Ibid.* She was perplexed at the federal government's inability to remedy these access burdens by alternative, technically facile, and cost-saving arrangements. *Ibid.* Ultimately, Judge Irizarry flatly concluded, without more, that "the government [was] precluded from looking at any of the attorney-client e-mails, period." *Id.*, at 21.

C. The ABA Resolution and Proposed Federal Legislation

This series of litigation attracted national attention in a way other, similar cases have not. It generated substantial press, both in mainstream and in prison reform publications.[76] Multiple law review articles have been authored, a national bar resolution passed and federal legislation introduced.

Many are sympathetic to the concept that privilege should attach to attorney-prisoner emails, given their easy availability as ready alternative to administratively-laden, cumbersome alternatives. In *Should the Medium Affect the Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, the author argues that the bulk of challenges to prosecutorial review of privileged content emails mistakenly attack prosecutor conduct as unconstitutional, rather than the legitimacy of BOP policy (of not providing a privileged email channel) in the first place.[77] The former are typically dismissed based on a lack of prejudice/harm in a specific case, or on the availability of alternatives. Direct challenges to a failure to provide privileged email might have better chances of success. It might not survive *Turner* reasonableness review because email is a predominant means of communication, and because developing a privileged channel would be non-burdensome and present no security issues. *Id.*, at 2156. He also posits that prosecutors should not review any privileged material simply as officers of the court, or that courts should regulate such behavior through their inherent authority. *Id.*, at 2144-45, 2167.

Another author suggests defendants should be allowed to selectively waive privilege, as exists in securities litigation.[78] Yet another states that reading attorney-prisoner email should be

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[76] *Prosecutors Are Reading Emails From Inmates to Lawyers*, New York Times, Jul. 24, 2014, Stephanie Clifford, https://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html; *When Prisoners Email Their Lawyers, It's Often Not Confidential*, NPR All Things Considered, Nov. 18, 2015, http://www.npr.org/sections/alltechconsidered/2015/11/18/456496859/when-prisoners-email-their-lawyers-its-often-not-confidential; *You've Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation*, Prison Policy Initiative Report, January 2016, Stephen Raher, https://www.prisonpolicy.org/messaging/report.html; *Courts Divided on Confidentiality of Attorney-Prisoner Email*, Prison Legal News, Vol. 27, No. 7, July 2016, https://www.prisonlegalnews.org/news/2016/jul/6/courts-divided-confidentiality-attorney-prisoner-email; *Government Surveillance Undermines Attorney-Client Privilege, Brennan Center for Justice at NYU Law School*, August 26, 2014, *Faiza Patel,* https://www.brennancenter.org/analysis/government-surveillance-undermines-attorney-client-privilege; DOJ Says They Can No Longer Afford To Respect The Attorney-Client Privilege, Above The Law blog, July 24, 2014, Matt Kaiser, http://abovethelaw.com/2014/07/doj-says-they-can-no-longer-afford-to-respect-the-attorney-client-privilege.

[77] Brandon P. Ruben, *Should the Medium Affect the Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 Fordham L. Rev. 2131 (2015).

[78] Christopher J. Milazzo, *When It Comes to Privilege, You're Better Off Dead: Protecting Attorney-Client Communications Sent Through Prison Email Systems*, 25 Cornell J.L. & Pub. Pol'y 269, 277 (2015).

considered a Sixth Amendment violation because it interferes with effective defense representation, and that legal emails should be treated as regular legal mail, requiring, under *Turner*, a privileged avenue.[79] Others suggest a privileged email channel would logically parallel those now available for mail, phone and visits.[80]

Turner reasonableness also relies heavily on the availability of alternatives (see III.B, above), so it is not at all sure that a prison's failure to provide a privileged email channel would be deemed unreasonable – at least not without showing other alternatives are not viable. And prosecutorial monitoring of privileged communication, sometimes even when deliberate, may not constitute a constitutional violation absent harm (see V.C.4, above). If self- or court-regulation has not surfaced over the decades for more overt prosecutorial monitoring, it seems unlikely it would appear now for email monitoring that comports with well-established waiver principles. The bottom line is that the law protects prosecutor review of prisoner email – or any other mode of communication – containing privileged content where the prisoner knows the communication is monitored and has not used reasonably available alternatives set up expressly to protect privilege. And a prison's obligation is solely to make available those reasonable alternatives. Justification for a privileged email channel requires across-the-board, national quantification of the burden associated with traditional means of communication, and attendant harm, to show that other alternatives are not realistically available.

Following the brouhaha in the Eastern District of New York, the Criminal Justice Section of the New York County Lawyers Association sponsored a resolution at the 2016 American Bar Association mid-year convention suggesting the BOP develop a privileged channel of email communication. The resolution provided:

> RESOLVED, That the American Bar Association urges the Department of Justice and the Federal Bureau of Prisons to amend their policies with respect to monitoring emails between attorneys and their incarcerated clients to permit attorneys and their incarcerated clients to communicate confidentially via email and thereby maintain the attorney-client privilege.

Resolution 10A, submitted by New York County Lawyers Assn., Criminal Justice Section, Feb. 8, 2016.[81] The accompanying report identified the following as core:

> Prison monitoring of inmates' email communications creates at least two significant problems. First, although defense lawyers must avoid making confidential disclosures and warn their clients against doing so, defendants sometimes discuss confidential information in TRULINCS emails. More troubling, the BOP's email monitoring policy deprives attorneys of the most effective means to promptly inform and consult with their inmate clients regarding important case matters, as required by Model Rule of

[79] Gregory R. Steele, *You've Got Legal Mail: Applying Constitutional Protections to Attorney-Inmate E-Mail Communications,* 50 Ga. L. Rev. 947, 984 (2016).
[80] Amelia H. Barry, *Inmates' E-Mails With Their Attorneys, Off-Limits For The Government?* Catholic University Law Review, Nov 2014, Vol. 64:753.
[81] Text of Resolution and Accompanying Report found at https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2016_hod_midyear_meeting_electronic_report_book.authcheckdam.pdf.

> Professional Conduct 1.4,7 and frustrates their ability to provide meaningful Sixth Amendment representation. Moreover, by forcing inmates and their attorneys to rely on traditional media to communicate confidentially, the BOP's Legal Email monitoring policy causes significant administrative burdens and may thereby decrease prison security.

Id., at 2. The Report noted that defense counsel's ethical obligations to provide zealous representation are continually undermined by " traditional channels [that are] grossly inefficient and impose[] substantial burdens on attorneys, especially compared to the relative speed, ease, and low cost of [potential] confidential Legal Email." *Id.*, at 3. Regular mail may take up to two weeks for delivery and express mail typically is not available because of internal prison mailroom handling. Unmonitored calls require an inordinate amount of time, from both counsel and prison staff, to arrange. A month from request may pass before the call is actually placed. In-person visits require travel rime and then typically clearance time and a substantial wait period is involved before the prisoner is conducted to the visit. Visits during off-hours also require staff presence. *Id*., at 10-11.

In contrast, privileged legal email would allow immediate client communication with virtually no related administrative time. It would eliminate staff time absorbed in regular legal mail processing and in arranging private calls and visits, freeing up staff for other security matters. It would present no additional security issues than already exists, and would likely reduce them as physical contraband cannot be snuck in via an email as it might in hard copy mail. *Id.*, at 7. It is efficient for pre-trial detainees where direct Sixth Amendment interests are at stake. It strikes to the core of the goal of indigent representation as embodied in the Criminal Justice Act statutory scheme, which is already significantly challenged by reduced budgets and burgeoning prisoner population. *Id.*, at 4-5.

The Report argues that the constitutionality of ongoing failure to provide privileged legal email is questionable; given the ease with which it may be developed, its ready availability would factor significantly into a *Turner* (or, for pre-trial detainees, an even less deferential *Bell* analysis. So would the lessened security concerns in legal email usage (as compared to existing privileged communication means). It was precisely the enhanced security afforded by email (as compared to regular, physical mail) that propelled its original implementation. [82] *Id.*, 8-11.

In October of 2015, Representatives Hakeem Jeffries of New York and Doug Collins of Georgia introduced H.R. 3864, the *"Effective Assistance of Counsel in the Digital Era Act*," which declared it unlawful for anyone to monitor any prisoner electronic communication from a BOP facility that contains attorney-client privileged communication, unless the Attorney General believes national security is at risk. [83] It was reintroduced as H.R. 956 in 2017.

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[82] *Id.*, at 7, n. 42, citing U.S. DEPARTMENT OF JUSTICE, PROGRAM STATEMENT: TRULINCS (2009), available at http://www.bop.gov/policy/progstat/5265_013.pdf.

[83] See *Two Congressmen Propose Barring U.S. Prosecutors From Reading Inmates' Emails to Lawyers*, NY Times, by Stephanie Clifford, Oct. 29, 2015 https://www.nytimes.com/2015/10/30/nyregion/congressmen-plan-bill-barring-us-prosecutors-from-reading-inmates-emails-to-lawyers.html.

IX. Burdens on Defense Counsel

The publicity and professional engagement surrounding the 2015-2016 email litigation placed a spotlight on defense counsel burdens from managing privileged communication with their incarcerated clients. It provided strong anecdotal evidence of that burden, and at least raised the possibility of quantifying it.

A. Identifying Burden

Defense counsel in *Ahmed* set forth succinctly the burdens it faced in attempting privileged communication with their client.[84] Regular mail usually took 2 weeks to reach the client, and another two weeks for a reply. *Id.*, at 2-3. Its efforts even to learn how to arrange an unmonitored call went days with no reply from the staff counselor. Nor would phone calls allow for direct document review with the client. *Ibid.* In-person visits typically required two hours of transit, one hour of waiting, then the limited meeting, and return transit hours. Ahmed counsel estimated that his "last meeting required close to five hours of time – much of which was spent in transit – costing ... more than $600 (at $125/hour)," which contravened their duty to use court-appointed funds in "the most fiscally responsible fashion" possible. *Id.*, at 4. Counsel stated "while in- person visits will, of course, be necessary, it is considerably more cost-effective and efficient for us to communicate with Dr. Ahmed via TRULINCS than to expend significant time – and scarce public resources – traveling to and from the MDC or seeking approval for an un-monitored telephone call each time we need to speak with him about his case." *Ibid. Asaro* defense counsel noted the same.[85]

These issues were not new. The dynamics of arranging an unmonitored telephone call with prison staff were painstakingly laid out in *Rivera v. Chesney, supra*, where three months passed between the prisoner's request to add an attorney number and actual placement of an attorney call. Associate Justice Berndon, in dissenting in *Washington v. Meacham*, noted the trial court's finding that "[a] number of inmates credibly testified that requests for privileged phone calls duly accompanied by attorney letters had either been ignored altogether or had been granted at some time after the time specified in the attorney letter had already passed." 238 Conn. at 744.

The financial cost of calls may be placed upon counsel. Local jails or prisons may legitimately limit attorney phone access to collect calls. See, e.g., *Carr v. Tousley*, No. CV-06-0125SJLQ, 2009 WL 1514661, at *33 (D. Idaho May 27, 2009); *Wooden v. Norris*, 637 F. Supp. 543 (M.D. Tenn. 1986); *Van Riper v. Oedekoven*, 2001 WY 58, 26 P.3d 325 (Wyo. 2001); *Hines v. Carter*, No. 3:17-CV-388-MGG, 2018 WL 5249912, at 7 (N.D. Ind. Oct. 18, 2018). But see *Lynch v. Leis*, No. 1:00-CV-274 SJD, 2002 WL 33001391 (S.D. Ohio Feb. 19, 2002) (collect attorney calls unduly restrictive where staff did not facilitate direct emergency calls). Remarkably, a bar on toll-free calls may be upheld even where the attorney would not accept collect calls under court limitation:

[84] *United States v. Ahmed*, 1:14-cr-00277-DLI Document 38, 06/20/14, set forth at https://www.whitecollarbriefly.com/wp-content/uploads/sites/9/2014/09/CorrlinksPrivilegeClaimLetter.pdf

[85] Letter Request to Preclude Gov't from Reading Att'y/Client Email-- Redacted As to Thomas DiFiore at 4, *Asaro*, No. 1:14-cr-00026 (E.D.N.Y. July 11, 2014).

> This attorney now refuses to accept collect calls.... [T]he district court...ordered him not to accept collect calls because of their cost to a pro bono fund established by the district court. Thus, we have a situation in which the prison's collect call option is impeded by the prisoners' own attorneys. Nevertheless, Aswegan and Harris use the other available methods to contact their attorneys, and they do not allege the lack of toll free access to their attorneys adversely affects their ability to file papers, meet legal deadlines, or process matters in litigation.

Aswegan v. Henry, 981 F.2d 313, 314 (8th Cir. 1992). Cf. *Curry v. McNeil*, No. 4:07CV351-SPM/WCS, 2008 WL 5157516, at 7 (N.D. Fla. Dec. 9, 2008) (elimination of toll-free calls did not privilege third-party call to attorney).

Time involved in personal client visits is also significant defense burden. First, visits outside of regular visitation hours require staff arrangement and supervision. See 28 C.F.R. §543.13(b) for BOP attorney visits. Any attorney visit typically also requires pre-visit certification of the attorney herself.

Then there is the physical distance defense counsel must travel. "Since 1980, the majority of new prisons built to accommodate the expanding U.S. prison population have been placed in non-metropolitan areas, with the result that the majority of prisoners are now housed in rural America." [86] Because pro bono representation, and representation in capital cases generally, is challenging and infrequent, such attorneys are "often based in a location that is hundreds of miles from the prison where their client is housed." [87] See *Rowe v. Gibson*, 798 F.3d 622, 641 (7th Cir. 2015) (rural areas are common prison locations).

The lower court in *Washington v. Meacham*, acknowledged:

> Lawyers who represent incarcerated clients, like the incarcerated clients themselves, have no control over the location in which those clients are confined. Clients may be confined at a substantial distance from either their lawyers' offices or the courts in which those lawyers are obliged to appear. Lawyers are busy people. An attorney in Stamford who represents a client incarcerated in Somers will rarely have the luxury to take a day from his busy schedule and visit his client in person. If he is required to do so, other clients (and the courts) will be deprived of his services for that day.

Washington v. Meachum, No. 534616, 1995 WL 127823, at 33 (Conn. Super. Ct. Mar. 6, 1995), aff'd in part, rev'd in part, 238 Conn. 692, 680 A.2d 262 (1996). But not all courts are solicitous. In *Hines v. Carter*, the court discounted the 100 miles distance between the prison and most local counsel: "If Plaintiffs choose not to spend their money on phone calls through the Offender

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[86] Tracy Huling, *Building a Prison Economy in Rural America,* in Invisible Punishment: The Collateral Consequences of Mass Imprisonment , eds. Marc Mauer and Meda Chesney-Lind, The New Press. 2002. See, e.g., *"Prison Valley": The Town With 13 Prisons*, ("A town in the middle of nowhere with 36,000 souls and 13 prisons, one of which is Supermax, the new 'Alcatraz' of America"), at http://humaneexposures.com/blog/prison-valley-the-town-with-13-prisons.html.

[87] Brief of Amicus Curiae The Equal Justice Initiative In Support of Plaintiff-Appellant Scott D. Nordstrom; Urging Reversal at 15, *Nordstrom v. Ryan,* 762 F.3d 903 (9th Cir. 2014) (No. 12-15738).

Calling System, they can still exchange written correspondence with their attorneys at no cost.... If their learning disabilities make writing less than effective, Plaintiffs' counsel can visit them. And WCF has not restricted Plaintiffs ability to call their attorneys collect. These inconveniences are merely that—inconveniences arising as some of the ordinary incidents of prison life." *Id.*, at 7.

Even in nearby metropolitan centers, visiting absorbs counsel hours. In *Benjamin v. Fraser*, New York Legal Aid Society witnesses laid out the detail:

> Several Legal Aid Society ("LAS") attorneys testified that they had largely stopped visiting clients at particular facilities, that they were sometimes forced to abandon efforts to meet with clients after arriving at Department facilities, and that the delays deterred necessary consultation, particularly given that LAS attorneys typically handle 60–100 cases at a time. For example, LAS attorney Heidi Segal testified that [b]ecause you know you're experiencing significant delays ... you make determinations about whether or not you even have the time to visit a client, so there are times that you would forego a visit if you only had four hours free that day as opposed to six or seven. On days ... where I experienced significant delays, I would cut short my visit.... Similarly, Jesse Uhrman, the social work supervisor for LAS's Parole Revocation Defense Unit, stopped visiting clients at one of the facilities because of extensive delays. LAS witnesses testified that the delays impaired their ability to establish rapport and trust with clients, to collect information from clients, to counsel clients in a crisis, and to assist clients in considering plea agreements.

Id., 264 F.3d at 180.[88]

These burdens arise in an era when caseload burdens faced by public defenders are overwhelming. These issues have become well-publicized. In Louisiana, public defender overload propelled the State Public Defender Commission to issue caseload standards identifying maximum loads that can be carried to guarantee effective representation. 18 CSR 10–4.010, as cited in *State ex rel. Missouri Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 599 (Mo. 2012). Extreme caseloads are noted in South Carolina,[89] in Missouri,[90] Wisconsin,[91] and many other areas. It has generated prime cable programming. [92] "'National standards recommend that public defenders handle no more than 150 felony, 400 misdemeanor, 200 juvenile, 200 mental health, or 25 appeals per year.' Based on these standards, only 21% of state-based public defender offices

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[88] The lower court had stated: "One can only imagine the impact of delay on the 18B lawyers that represent a significant fraction of the Department's inmates. Each out of court hour compensated at the absurd rate of $25 per hour not only fails to meet the average cost of overhead but may be a violation of Sixth Amendment rights all by itself." *Benjamin v. Kerik*, 102 F. Supp. 2d 157, 177 (S.D.N.Y. 2000), aff'd sub nom. *Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001).

[89] See Meg Kinnard, SC's Public Defenders Crunched Between Cases, Cash, T&D (Apr. 15, 2011), https://thetandd.com/news/sc-s-public-defenders-crunched-between-cases-cash/article_0d924542-67a3-11e0-b9c8-001cc4c002e0.html, cited in Demer, 70 S.C. L. Rev. at 988.

[90] https://www.youtube.com/watch?v=USkEzLuzmZ4

[91] https://www.wisconsinrapidstribune.com/in-depth/news/2019/08/20/wisconsin-public-defender-shortage-leaves-poor-jailed-cases-stalled/1139227001/

[92] Public Defenders: Last Week Tonight with John Oliver (HBO), September 14, 2015 https://www.youtube.com/watch?v=J83USTgK0wo

and 27% of county-based public defender offices have enough attorneys to manage their caseloads." [93] The issue is regularly monitored by the American Bar Association.[94] The Attorney General addressed it in 2013 on the 50th anniversary of *Gideon v. Wainwright*.[95]

B. Burden and Standing

In *Guild v. Securus Techs., Inc.*,[96] travel burden and associated expense conferred standing to sue on defense counsel. There, a group of Austin, TX defense attorneys, and a prison jail inmate membership organization, sued the private company managing local jail telephone services, the Sheriff and local prosecutors. The class action alleged interference with the rights of both counsel and inmates by the company's policy of surreptitiously recording all inmate calls, whether with counsel or not, and providing same to local prosecutors, who then made use of the content. The plaintiffs alleged wiretap act violations, unreasonable search and seizure, denial of effective assistance of counsel in violation of the Sixth Amendment and denial of access to the courts in violation of First, Fourth, and Fifth Amendments. As part of its summary disposition request, defendants alleged counsel-plaintiffs lacked standing because attorney-client privilege is held solely by the client, nor did they have associational or third party standing

The attorney association argued its members had suffered injury-in-fact because the telephone monitoring interfered with their business relationships. "Specifically, 'attorneys' incomes are reduced' by being unable to consult with their detained clients via telephone.... Instead, to avoid prejudicing their clients' cases, attorneys are forced to travel to the jail and engage in the rigorous and time-consuming security and visitation processes." *Id.*, at 4.

The court agreed that being forced to visit rather than quick and inexpensive telephone calls demonstrates concrete injury. *Guild v. Securus Techs., Inc.*, at 4. It found associational standing for the group plaintiffs and direct standing for the individual plaintiffs but not third-party standing for the detainees.

But such standing is limited to a finding of counsel injury. See *Massey v. Wheeler*, 221 F.3d 1030, 1035 (7th Cir. 2000) (attorney does not have third party standing to challenge limits on unmonitored calls based on prisoner First Amendment rights). Cf. *Am. Civil Liberties Union Found. v. Spartanburg Cty.*, No. CV 7:17-1145-TMC-KFM, 2017 WL 9292260, at 3 (D.S.C. June 26, 2017), report and recommendation adopted, No. 7:17-CV-01145-TMC, 2017 WL 5589576 (D.S.C. Nov. 21, 2017) (regulation denying in-person visit unless counsel were of

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[93] Theodore Schoneman, *Overworked And Underpaid: America's Public Defender Crisis,* Fordham Political Review, October 10, 2019, citing Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, Brennan Center for Justice, New York University School of Law. September 9, 2019, n 9 and studies cited therein.

[94] https://www.americanbar.org/groups/legal_aid_indigent_defendants/indigent_defense_systems_improvement/public-defense-news-archive/2018/

[95] https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-justice-departments-50th-anniversary-celebration-us, Friday, March 15, 2013.

[96] No. 1:14-CV-366-LY, 2015 WL 10818584, at 4 (W.D. Tex. Feb. 4, 2015), report and recommendation adopted sub nom. *Austin Lawyers Guild v. Securus Techs., Inc.*, No. 1:14-CV-366-LY, 2015 WL 11237655 (W.D. Tex. Mar. 23, 2015).

record not unduly burdensome on counsel's First Amendment rights where alternative means of access available).

C. Quantifying Burden

To support its 2016 bar resolution, the New York County Bar Assn. reviewed the technology to implement such a channel with software developers who estimated a one-time, up-front cost of approximately $100,000. Its Report attempted to estimate savings that might accrue from a privileged email channel. It allocated one staff-person hour per prisoner per month – at least for pre-trial detainees. This hour could include staff time spent arranging a privileged call, attending it, processing and delivering legal mail, arranging and escorting the prisoner to in-person visits, and training time for all such services. It multiplied that by the estimated 740 prisoners at the Manhattan Correctional Center, and found a potential savings of 8,900 staff hours per month. At an average BOP wage of $22 per hour, the total was approximately $195,000 per year. *Id.*, at 10.

The BOP directly operates 12 such pre-trial facilities, with about 9000 BOP pre-trial detainees.[97] That same ratio would total over $2.25 million in wage savings nationally. Fewer staff hours would be involved at prisons housing post-conviction prisoners, whose need for direct legal contact is arguably less. But even reducing the staff hour estimation to one hour per inmate every 3 months, the savings are potentially enormous. There are 140,000 post-trial inmates in BOP facilities. Four staff hours per year per post-conviction prisoner are 560,000 staff hours annually. At the same average hourly rate, savings might equal over $12 million in wage hours. These numbers are hypothetical. Nor would all staff hours involved with arranging privileged attorney communication be eliminated. But even half that amount is substantial.

Those are just possible savings in BOP staff expenses. There remains potential public savings from reduced federal defender and CJA attorney expenses, and alleviation of the immense burden placed on those dedicated counsel. It is a fruitful avenue for further research.

[97] See https://www.bop.gov/locations/list.jsp?security=Administrative&sort=&addAlphabet=false&sortDescending=false)

X. Remedy

Unlawful intrusion into the attorney-client relationship requires consideration of remedy. In a criminal case, remedy ranges from an evidentiary hearing, suppression of evidence, vacation and retrial, removal of some or all of the prosecutorial attorney team, or dismissal of the indictment in its entirety. In a civil suit, it may involve damages.

A. Remedy Tailored to Injury

As a threshold matter, prejudice necessary to establish a Sixth Amendment violation is separate from question of remedy, although "the type of remedy that is appropriate will by necessity depend on the type of prejudice that was suffered." *United States v. Woods*, 319 F. Supp. 3d 1124, 1133 (W.D. Ark. 2018). Thus, in the Sixth Amendment context, prejudice analysis exists at two levels: to establish the existence of a Sixth Amendment violation; then to ascertain the remedy, if any. *United States v. Kelly*, 790 F.2d 130, 138 (D.C. Cir. 1986), fn. 6.

The general rule is to "tailor the remedy to the injury suffered." *United States v. Morrison*, 449 U.S. 361 (1981). There, government agents deliberately met with the defendant alone, without permission of her counsel, to seek her cooperation in a related investigation. They disparaged her counsel and told her she would benefit if she cooperated but would face a stiff jail term if she did not. She notified her attorney, but the agents visited her again alone. She continued with her private attorney, and later moved to dismiss the indictment. 449 U.S. at 362-63. The trial court denied but was overturned on appeal, where indictment dismissal was ordered. The Supreme Court "assume[d], without deciding, that the Sixth Amendment was violated in the circumstances of this case" (449 U.S. at 364) and reversed dismissal of the indictment. It stated "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." 449 U.S. at 364. But without allegation or proof of actual impact on the representative process, indictment dismissal was unwarranted:

> The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial. More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate.

Id., 449 U.S. at 367.

In *Black v. United States*, 385 U.S. 26 (1966), the Supreme Court vacated a conviction and ordered a new trial where illegal wiretaps in an unrelated criminal investigation had included attorney-client communication and were provided to the government in the tax prosecution at bar. A new trial was deemed the only means to protect the defendant from evidence otherwise potentially inadmissible. 385 U.S. at 29. There, the Solicitor General had sought the relief.

Justice Harlan dissented.[98] Parallel facts produced the same result in *O'Brien v. United States*, 386 U.S. 345, 345 (1967). Similarly, new trials were ordered in both *Caldwell v. United States*, 205 F.2d 879, 881 (D.C. Cir. 1953), and *Coplon v. United States*, 191 F.2d 749, 759 (D.C. Cir. 1951), based on deliberate, illegal intercepts of attorney-client communications, even with no showing of prejudice (though acquittal was deemed properly denied). But in *Hoffa v. United States*, 385 U.S. 293, 307 (1966) the jury tampering trial testimony of a government witness about conversations with the defendant, when he had been present at defendant's attorney conversations in the underlying trial, did not invalidate the latter conviction. The incriminating statements to which the witness testified were unrelated in both time and subject to any earlier, alleged attorney-client intrusion; therefore, "fruit of the poisonous tree" was inapplicable. 385 U.S. at 30.[99]

Minimally, an evidentiary hearing should be conducted to ascertain the impact of the intrusion on the defense. *United States v. Valencia*, 541 F.2d 618, 622 (6th Cir. 1976) (proper course was remand to determine whether any evidence produced against appellants derived from counsel's secretary's role as government informant); *United States v. Costanzo*, 625 F.2d 465, 470 (3d Cir. 1980) (2255 evidentiary hearing required where counsel had been petitioner's lawyer, communicating with him during trial while simultaneously informing the F.B.I. about petitioner). The defendant, however, may have to show some threshold level of prejudice before a hearing will be ordered. *United States v. Miller*, 116 F.3d 641, 665–66 (2d Cir. 1997) ("In order to require a hearing [and] assuming that the government has not interfered with the attorney-client relationship deliberately, the defendant bears the burden of alleging specific facts that indicate communication of privileged information to the prosecutor and prejudice resulting therefrom."). Accord: *United States v. Aulicino*, 44 F.3d 1102, 1117 (2d Cir.1995) (bare assertion that cooperating defendant provided information from joint defense meetings insufficient to warrant hearing); *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985) (defendant must make offer specific facts). Where an evidentiary hearing is needed but not held, a trial court's failure to conduct one may require vacation of the conviction. *State v. Bain*, 292 Neb. 398, 422, 872 N.W.2d 777, 793 (2016).

Most commonly, and particularly where specific, tainted evidence can be identified, a new trial is ordered with suppression of the evidence produced by the attorney-client intrusion. *Bishop v. Rose*, 701 F.2d 1150, 1157 (6th Cir. 1983) (introduction of defendant's notes to counsel seized from cell did not warrant dismissal of indictment where exclusion of evidence at new trial would preserve rights). In *United States v. Lin Lyn Trading, Ltd*., 149 F.3d 1112, 1113 (10th Cir. 1998), the government intentionally seized and distributed defendant's notepad with notes of attorney-client communication. The district court dismissed the indictment. The appellate court reversed, in part because the district court did not explain why suppression and retrial would be insufficient. 149 F. 3d at 1118. In *United States v. Sander*, 615 F.2d 215, 219 (5th Cir. 1980), dismissal was unwarranted where police examined confidential attorney files because any resultant evidentiary purpose could be remedied at trial. See also *State v. Robinson*, 209 A.3d 25,

[98] Vitiating the original conviction "puts the cart before the horse." Correct procedure would be to remand for a hearing and findings on the issues in question. *Id.*, 385 U.S. at 31.

[99] The Court in *Weatherford*, *supra*, declined to interpret those holdings as requiring establishing a per se rule Sixth Amendment violations did not require prejudice. *Weatherford v. Bursey*, 429 U.S. at 551.

58 (Del. 2019), reargument denied (Apr. 25, 2019) (dismissal only if finding of irreparable prejudice).

B. Indictment Dismissal

The difficulty arises where prejudice cannot be so easily measured. The Supreme Court intimated in *Morrison*, that dismissal might be appropriate where continuing prejudice from a constitutional violation cannot be remedied by suppression of the evidence. 449 U.S. at 365–66 n. 2. But how is that ascertained?

1. Pervasive impact

In *Barber v Municipal Court for San Luis Obispo County*, 24 Cal 3d 742, 157 Cal Rptr 658, 598 P.2d 818 (1979) (Manuel, Justice, concurring and dissenting), a government agent had participated in defense meetings and reported details to his superiors. The prosecutors knew the undercover agent but ostensibly did not receive materials from them. Eventually the presence of the undercover agent became public knowledge. The defendants (a group of anti-nuclear protestors) became suspicious and reluctant to communicate with counsel. The California Supreme Court found the defendants' rights under state law to communicate privately with counsel had been violated. It distinguished *Weatherford* because there the agent attended defense meetings at the behest of the defendant and communicated no information to other government officials. 24 Cal. 3d at, 756, 598 P.2d 826.

The court discussed the limitations of an exclusionary remedy. The lack of cooperation among defendants and their counsel resulted directly from the government intrusion and restricted counsel's ability to prepare adequately for trial; proceeding such conditions "would be contrary to basic notions of fair play and simple justice." *Ibid.*

> Furthermore, the enforcement of an exclusionary rule would involve exceedingly difficult problems of proof for the aggrieved client. Subtle forms of prejudice are nearly impossible to isolate. Consider the prosecution witnesses who learn of some of the illegally obtained information. Even if the witnesses do not divulge the information to the prosecutor, the witnesses will be "in a position to formulate in advance answers to anticipated questions, and even to shade their testimony to meet expected defenses.

24 Cal. 3d at 757, 598 P. 2d at 826. Any exclusionary hearing also would require publication of the privileged communication to the court and to the prosecution, thus compounding the violation and rendering any remedy "illusory." Finally, no deterrence value would accrue. *Ibid.* The court ordered dismissal of all charges. 24 Cal. 3d at 760, 598 P. 2d at 828. Two justices in partial concurrence would have ordered a hearing, placing a burden on the prosecution to rehabilitate its evidence.[100]

[100] "If the trial court is faced with "inability" to rule on the independent or untainted source of the People's evidence without knowing the substance of the illegal information, the trial court may simply rule that the People have not met their burden to prove an independent source beyond a reasonable doubt." *Id.*, 24 Cal. 3d at 763, 598 P.2d at 830. The dissent found no reasonable basis to distinguish *Weatherford*, and reliance exclusively on state law was disingenuous.

In *State v. Kelly*, 640 So. 2d 231, 232 (Fla. Dist. Ct. App. 1994), after the first day of a murder trial the prosecutor and police went to the defendants' house without counsel knowledge, talked to defendants, gained admission to a fenced-in backyard on their property, studied the area and looked at the crime scene inside the house. The district court dismissed the indictment because, in its view, "a mistrial would be a remedy without substance." 640 So. 2d at 233. The state appellate court upheld because "[u]pon a review of the transcript, [it was] simply unable to say that no reasonable judge would have ruled as this one did." *Ibid.* One justice dissented. 640 So. 2d at 234.

2. **Acquiring Trial Strategy**

Concerns are strongest where trial strategy has been revealed. In *United States v. Danielson*, 325 F.3d 1054, 1070 (9th Cir. 2003), as amended (May 19, 2003), the prosecution team deliberately used an informant to tape conversations with privileged information about the defendant's trial strategy. 325 F.3d at 1059. The Ninth Circuit remanded the case for a hearing that placed the burden of showing non-use on the government. It noted: "The problem in this case, however, is not that the government obtained incriminating statements or other specific evidence, but rather that it obtained information about...trial strategy." 325 F.3d at 1067. In such circumstances,

> [T]he question of prejudice is more subtle... [I]t will often be unclear whether, and how, the prosecution's improperly obtained information about the defendant's trial strategy may have been used, and whether there was prejudice. More important, in such cases the government and the defendant will have unequal access to knowledge. The prosecution team knows what it did and why. The defendant can only guess.

Ibid. Similarly, in *United States v. Levy*, 577 F.2d 200 (3rd Cir. 1978), the Third Circuit held indictment dismissal was appropriate when law enforcement officials used a government informer to obtain defense strategy. 577 F.2d at 210. The Court rejected basing dismissal only if a measurement of specific harm could be identified:

> Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government,...overwhelming considerations militat[e] against a standard which [weighs harm. It] is highly unlikely that a court can...arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself.

577 F.2d at 208. See also *United States v. Peters*, 468 F. Supp. 364, 366 (S.D. Fla. 1979) (government agents and the prosecutor listened to a taped call between the defendants and their attorney in which defense strategies were discussed; dismissal only remedy). In *State v. Lenarz*, 301 Conn. 417, 439–40, 22 A.3d 536, 551 (2011), the Connecticut Supreme Court held, where government intrusion provided privileged materials with highly specific, core trial strategy, the burden was on the government to demonstrate that dismissal would not be a required remedy. In *Briggs v. Goodwin*, 698 F.2d 486, 494–95 (D.C. Cir.), reh'g granted and opinion vacated on other

grounds, 712 F.2d 1444 (D.C. Cir. 1983), a government informant participated in defense strategy meetings for a group of anti-war defendants. Rumor spread that an informant had infiltrated their group. At hearing, the government denied the informant's identify, even when tentatively identified as such. The informant continued to inform the government. The defense ultimately learned his identify, but prevailed at trial. They then bought a *Bivens* action against the prosecutor who had failed to identify. The court held that a Sixth Amendment claim was not mooted by the acquittal.[101] It also commented on the difficulty of isolating the precise harm:

> The prosecution makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those decisions. Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is inherently detrimental,...unfairly advantage[s] the prosecution, and threaten[s] to subvert the adversary system of criminal justice.

698 F.2d at 495.[102] The court reversed summary denial of dismissal and ordered an evidentiary hearing. Compare *United States v. Melvin*, 650 F.2d 641, 644 (5th Cir.1981), where, after intercepting attorney-client strategic communication when a cooperating defendant was invited to participate in defense meetings, the district court's dismissal was reversed, with directions to consider whether a less drastic alternative was possible.

3. Extreme Intrusions

Overt or extreme intrusions may also result in dismissals of the indictment regardless of prejudice. In *United States v. Gartner*, 518 F.2d 633, 636 (2d Cir. 1975), a cooperating co-defendant taped the defendant's attorney conference while hidden in a closet. The Second Circuit declined to overturn a conviction where the trial court had fully considered the defendant's motion to dismiss and found the intrusion did not affect the trial result. 518 F. 2d at 638. But it cautioned it would not hesitate to consider dismissal where circumstances warranted, but stated dismissal was inappropriate where the government's conduct was not "manifestly and avowedly corrupt." 518 F.2d at 637.

United States v. Marshank, 777 F. Supp. 1507 (N.D. Cal. 1991) presented one such case. Throughout the investigation of the defendant's case, his attorney cooperated with law enforcement agents and the prosecutors assigned to his case, including arranging other targets to cooperate with the government against the defendant (and having the defendant pay their costs). The government officials encouraged the attorney to aid the investigation and exploited the information they received to arrest and prosecute him. This complicity led to one indictment,

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[101] "The right to counsel protects the whole range of the accused's interests [which] may extend beyond the wish for exoneration to include, for example, the possibilities of a lesser charge, a lighter sentence, or the alleviation of 'the practical burdens of a trial." *Briggs v. Goodwin,* 698 F.2d at 494.

[102] One writer posits the "difficulty of monitoring the transfer of information following an intrusion argues strongly for marking a violation at the instant of intrusion, rather than at the time when information is transferred." *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 Harv. L. Rev. 1143, 1152 (1984).

which, although dismissed by the government, led to a second. The attorney continued to assist the government even after his discharge and through the motion to dismiss. The court attributed the attorney's conduct to the government: "In light of the astonishing facts of this case, it is beyond question that [counsel's] representation of [the defendant] was rendered completely ineffectual and that the government was a knowing participant in the circumstances that made the representation ineffectual." 777 F. Supp. at 1520. The court ordered dismissal of the indictment on Fifth and Sixth Amendment grounds:

> Suppression is an appropriate remedy where the court can identify and isolate the evidence obtained in violation of the defendant's [constitutional] rights. The prosecution is thus denied "the fruits of its transgression" and the...right to a fair trial is preserved.... In the case at bar, however, the fruit of the prosecutor's transgression is the indictment itself. In such a situation, it is simply impossible to excise the taint of the government's constitutional transgressions from the prosecution of the defendant. The taint of the government's transgressions spreads to all the evidence obtained against [the defendant].

777 F. Supp. at 1522. It also held that the government could not "evade the Sixth Amendment simply by dismissing the initial indictment and re-indicting the defendant on charges stemming from the same investigation because it would eviscerate the right to counsel.[103] But see *United States v. Ofshe*, 817 F.2d 1508, 1512 (11th Cir. 1987), where co-counsel (himself a target) was a government informant, wore a body wire during his conversations with his client, and advised client decisions solely to enhance his own value as an informant. There, dismissal was unwarranted because actual damage could not be specifically traced to the conduct.

4. Deterrence

Dismissal may be ordered for deterrence purposes through the court's supervisory powers. *United States v. Aguilar*, 831 F. Supp. 2d 1180, 1206 (C.D. Cal. 2011) (dismissal as exercise of supervisory power appropriate to deter broad range of prosecutorial misconduct including illegally obtaining attorney-client communication). In *State v. Granacki*, 90 Wash. App. 598, 959 P.2d 667 (1998), dismissal was not an abuse of discretion as a sanction for misconduct of lead police detective who, during a recess, read notes at defense table about defendant's communications with his attorneys. The deputy's abuse of the court's trust and the court's desire to curb the "'odious practice of eavesdropping on privileged communication between attorney and client'" warranted the relief. 90 Wash. App. at 603, quoting *State v. Cory*, 62 Wash. 2d 371, 378, 382 P.2d 1019, 1023 (1963). In *Cory*, the court held that the "shocking and unpardonable conduct" of the sheriff's officers, in eavesdropping upon private consultations between the defendant and his attorney, deprived him of its right to effective counsel, vitiated the proceeding and warranted dismissal. 62 Wash. 2d at 378. See also *State v. Mazzarisi*, 440 N.J.

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[103] Pre-indictment interference may form a basis for a Sixth Amendment violation when it impacts Sixth Amendment interests post-indictment. *United States v. Stein*, 541 F.3d 130, 153 (2d Cir. 2008). Accord: *United States v. Neill*, 952 F. Supp. 834, 839 (D.D.C. 1997) (right to a fair trial could be crippled by government interference with the attorney-client privilege long before the formal commencement of a criminal proceeding). But see *United States ex rel. Shiflet v. Lane*, 815 F.2d 457 (7th Cir. 1987) (details of murder disclosed to sheriff by defense investigator facilitated execution of search warrant; admission of evidence from search did not violate Sixth Amendment because disclosures were made prior to filing charges).

Super. 433, 454, 114 A.3d 745, 758 (App. Div. 2015) (dismissal may be justified to preserve fundamental fairness even in absence of constitutional violation).

C. **Disqualification**

Another remedy is disqualification of members of the prosecutorial team. In *United States v. Singer*, 785 F.2d 228, 232 (8th Cir. 1986), the trial court had ordered: (1) the government to return all documents from the illegally obtained attorney file except those related to alleged perjury; (2) no government attorney with any knowledge of the contents of the documents could participate in retrial; and (3) no law enforcement officer with any knowledge of the contents of the documents could use or mention them while working on new prosecutors on retrial. The Eighth Circuit upheld conviction after retrial, finding these narrowly tailored measures had been adequate to preserve a fair trial. 785 F.2d at 237. It found the case-in-chief evidence only tangentially affected by the file materials. *Ibid.*

In *State ex rel. Winkler v. Goldman*, 485 S.W.3d 783, 790–91 (Mo. Ct. App. 2016), the court granted a motion to disqualify the entire prosecutorial team and appointed a special prosecutor. The prosecutor had breached defendant's attorney-client privilege by interviewing her husband about trial strategy, defenses, and other privileged information. Suppression of evidence partially protected the defendant's Sixth Amendment and due process rights, but because the entire office had access to privileged materials, it was impossible to prospectively quantify and neutralize taint of violations by suppression alone. A lead prosecutor was also disqualified in *United States v. Horn*, 811 F. Supp. 739, 752 (D.N.H.1992), based on his repeated disregard of court orders to not review work product impermissibly obtained from defendants. A failure to disqualify, when it should have been ordered, may invalidate the underlying conviction. *State v. Quattlebaum*, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000) (deputy solicitor eavesdropped on a privileged conversation; conviction reversed and solicitor's office disqualified from prosecuting new trial).

Inadvertent prosecutor review of privileged material rarely supports disqualification; rather, disqualification should be based on prior representation, conflicts of interest, prosecutorial misconduct, and other unethical attorney behavior. *United States v. Stewart*, 294 F. Supp. 2d 490, 494 (S.D.N.Y. 2003). See also *United States v. Skeddle*, 989 F. Supp. 890, 899 (N.D.Ohio 1997) (prosecutors' access to attorney-client and work product-protected documents did not compel their disqualification, because the search that uncovered the documents was proper). Disqualification of a prosecutor is appropriate "'only to prevent the accused from suffering prejudice that he otherwise would not bear." *McWatters v. State*, 36 So. 3d 613, 636 (Fla. 2010).

Use of a taint team may stave off disqualification, or even indictment dismissal. *United States v. Mihalich*, No. 1:06-CR-345, 2006 WL 2987732, at *1 (N.D. Ohio Oct. 17, 2006); *United States v. Johnson*, No. 2:11-cr-00501-DN-PMW, 2016 WL 297451, at *1 (D. Utah Jan. 22, 2016).

D. **Damages**

Damages can be awarded when there are no means of affecting the prior criminal proceeding or repairing the retroactive Sixth Amendment damage. The court awarded damages in *Briggs v. Goodwin*, reasoning:

> Damages are a traditional remedy for unwarranted harm resulting from the judicial process.... Moreover, alternative remedies are often unavailable for violation of Sixth Amendment rights. An exclusionary rule may provide prospective relief in some cases, but does not offer any compensatory relief. Appellate review of convictions provides no relief for those who would have been convicted in spite of the Sixth Amendment violation, for those who are acquitted, and for those who are never even taken to trial but who are nonetheless dragged through the early stages of the criminal process. The vindication of Sixth Amendment rights to the effective assistance of counsel for such persons will depend solely on the availability of a damage remedy. For such persons "the 'exclusionary rule' is simply irrelevant[;] [f]or people in [their] shoes, it is damages or nothing.

698 F.2d at 497.

Damages have been awarded in § 1983 actions challenging, for instance, improper opening of legal mail. See *Sallier v. Brooks*, 343 F.3d at 880 ($750 in compensatory damages and $250 in punitive damages per claims not clearly excessive, nor show jury acted from passion, bias, or prejudice; does not shock judicial conscience). Compensatory damages require actual injury. *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986).[104] See *Faulkner v. McLocklin*, 727 F. Supp. 486, 492 (N.D. Ind. 1989) (prisoner suffered no actual damage from wrongful legal mail opening; prisoner may not recover damages based on the abstract value or importance of the constitutional right at issue).

Nominal damages only were awarded in *Preston v. Cowan*, 369 F. Supp. 14, 19 (W.D. Ky. 1973), aff'd in part, vacated in part, remanded sub nom. *Ault v. Holmes*, 506 F.2d 288 (6th Cir. 1974), where petitioner did not show the eventual disposition of the legal matters pertaining to which his blocked legal mail applied. Typically, denial of procedural due process is actionable for nominal damages without proof of actual injury. *Carey v. Piphus*, 435 U.S. 247, 266–267 (1978). Punitive damages rest on willfulness or reckless disregard. "Callous indifference" to prisoner constitutional rights warrants punitive damages, which is a jury question; compensatory damages are mandatory once liability is found. *Smith v. Wade*, 461 U.S. 30, 52 (1983). Punitive damages were awarded in *Shatner v. Page*, No. 00-0251-DRH, 2009 WL 260788 (S.D. Ill. Feb. 4, 2009). There, the prison official purposefully opened and read legal mail even when he knew formal handling policies and then disciplined the prisoner when he saw his name in one letter.

[104] A common-law system of recovery was intended for constitutional tort liability; the basic purpose of § 1983 damages is "to compensate persons for injuries that are caused by the deprivation of constitutional rights." *Carey v. Piphus*, 435 U.S. at 254.

E. **Sentence Relief: Leavenworth**

Breach of privilege by the government may also result in sentence reduction in habeas. A major breach of attorney-client privilege was uncovered at the federal facility at Leavenworth in 2016 which drew significant media attention. [105] The private prison management company managing the facility had regularly videotaped attorney-client conference rooms, and its taping of prisoner telephone calls regularly included attorney conversations. The local federal prosecutor's office had obtained collections of these tapes as it investigated a possible drug smuggling ring at the prison. Local defenders learned of even greater violations. (Ultimately, it was learned there were 1338 instances of recorded calls between the local defenders and their clients detained at CCA between 2011 and 2013 and an estimate 700 recorded visits.) A Special Master was appointed to investigate the privilege violations. The investigation, over many months, was wracked by U.S. Attorney recalcitrance and ineptitude on document preservation and recovery. The litigation consisted of a class action suit filed by two former detainees and intervention by the federal defender on behalf of their clients in the originating criminal matter, with cross-claim motions to return property (the surveillance). *United States v. Carter*, No. 16-20032-02-JAR, 2019 WL 3798142, at *85 (D. Kan. Aug. 13, 2019).[106]

By its August 2019 decision the Kansas district court made diverse rulings, including holding the U.S. Attorney in contempt by failure to comply with discovery, that it used the surveillance for strategic advantage and not for legitimate law enforcement purposes, that avenues for privileged calls were routinely disregarded. The court "understood from the very beginning that there were going to be people that filed 2255s and claim prosecutorial misconduct. Rightly or wrongly, that litigation was going to happen. There was never any question about it." *Id.*, at 83. While prejudice would be evaluated individually, a common evidentiary record was developed for all. *Ibid.*[107]

Two weeks after the district court opinion issued in the Leavenworth litigation, the parties tentatively settled and the private companies agreed to pay $1.45 million into a settlement fund for the inmates.[108] Deputy Attorney General Rod Rosentein declined to approve blanket sentence reduction for the affected prisoners, leaving the 2255 cases to proceed individually.

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[105] See, e.g. Faiza Patel, *Government Surveillance Undermines Attorney-Client Privilege*, Brennan Center for Justice at NYU Law School, August 26, 2014, https://www.brennancenter.org/analysis/government-surveillance-undermines-attorney-client-privilege; Justin Glawe, *U.S. Attorney's Office Under Investigation After 700 Lawyers Were Spied On in Prison*, Daily Beast, Mar. 27, 2017, http://www.thedailybeast.com/us-attorneys-office-under-investigation-after-700-lawyers-were-spied-on-in-prison.

[106] The class action named the private company in *Johnson v. CoreCivic*, No. 4:16-CV-00947-SRB, 2018 WL 7918162 (W.D. Mo. Sept. 18, 2018).

[107] In one case, surveillance had revealed one prisoner's desperate concern, expressed in attorney communication, about loss of custody of her children to her husband. The prosecutor used this information to obtain an early plea and cooperation. It then obtained a time-served sentence for her husband, allowing his retention of custody. *United States v. Carter,* at 47.

[108] https://www.kcur.org/post/leavenworth-inmates-reach-145-million-settlement-over-taped-attorney-client-phone-calls#stream/0

Conclusion

This paper attempts to place issues facing attorney/prisoner privileged communication in the context of prison existence. The first step is broadly to identify constitutional minimums. What are the barebones of attorney communication the Constitution requires to protect the constitutional rights implicated by attorney-client privilege? We know that all modes must be accessible – written word, telephone and in-person visits. As to the written word, there is consensus that legal mail must not be read, that it must be delivered and opened in the presence of the prisoner, and, at that point, only scanned. Incoming mail must be clearly identified as privileged mail sent from a licensed attorney – of any bar. It need not be an attorney of record, and may include prospective representation. Magic words are not uniformly required. Court mail rarely is legal mail, with some exceptions. Nor is advocacy group correspondence, unless pertaining to representation. Control numbers for legal mail exist in only one jurisdiction; surely if deemed helpful, their use would be more widespread. Outgoing mail may also require special marking, but must be sent unread and sealed. An exception may exist to verify indigent legal mail requiring prison support. Outgoing mail cannot be delayed. No permanent record can be made of any legal mail.

It is difficult to quantify privileged telephone call requirements. An absolute bar is unlawful. Lengthy deprivation of attorney telephone access is only remotely justifiable as a disciplinary measure. Pre-trial detainees require more telephone access than prisoners in post-conviction status. A reasonable measure for pre-trial access might be twice weekly – unless, as some local facilities offer, there is simply an open line for unrestricted incoming telephone calls. Post-conviction access might be reasonable at once monthly, but that measurement is skewed by requirements to show pending litigation, or insufficiency of mail. Periodic telephone calls for post-conviction prisoners – perhaps once a month - should be a matter of course. Only frequent calls – perhaps weekly – should require additional justification. This is how BOP policy actually reads, although not how it is implemented. Telephone calls should last at least twenty minutes; they must occur in an unmonitored location without staff audio access. The time between request for a call and its implementation should be limited to 72 hours. A procedure for emergency telephone access should be available. Emergency access should be of no cost to the prisoner. A requirement that an attorney pre-identify herself to the prison is reasonable, but it must accommodate prospective counsel. Verification that the person being called is a licensed attorney can be made through the internet. Opt-in procedures offer a useful, and expedient, means for telephone access. But unless a fool-proof system can be developed, they are continually subject to human and technological error. [109]

Attorney visits are perhaps less complicated. Attorney access during regular visitation should be a matter of course, with private rooms available. (It is, however, possible to have a confidential discussion in a set-off area of an open visitation space.) Videotaping should be prohibited; visualization can accommodate security. There is consensus that contact (barrier-free) visits must be provided. Any security-based restriction on contact visits should be justified by prison staff with concrete, verifiable evidence. Both of-record and prospective counsel should

[109] Proposed solutions have included mandatory third-party (defense counsel) review prior to prosecutorial access, or use of artificial intelligence tools. See Demer, 70 S.C. L. Rev. at 1010-12.

have access to visits. Again, pre-registration is reasonable. Off-visitation hours must be available, including some during working hours and some after. These may depend on the specifics of any given prison (accessibility, etc.). During off-hours, and with advance notice, the wait between an attorney's appearance at the prison and actually meeting the client should be under one hour. Regular hour visitation should have no appreciable waiting time. There should be provision for emergency visits.

Emails present the simplest method. At least in the BOP system, with unitary, national software, filtering emails to exclude those to identified addresses from monitoring would be ridiculously easy. Chief Judge Irrizarry is right. It is less easy with state facilities. There, email is often administered by the same tech conglomerates that run phone access. Email is expensive. Videoconferencing is growing, but is also subject to cost restraints.

That would be life in a perfect world, or at least one arguably preserving the constitutional interests involved by attorney-client privilege in the era of mass incarceration. And it can be argued there is rough consensus in case law for such parameters. State practices, both regulatory and in statute, need to be culled, to generate some concept of an accepted national standard. This has been done in pieces.[110] States address most or all of these issues, to varying degree of specificity. Added to the mix are standards from accrediting or other professional entities. These include Core Jail Standards,[111] American Correctional Association Standard 4275, U.N. Standard Minimum Rule 93, and Standard 23-9.4, Access to legal and consular services, of the ABA Treatment of Prisoners Standard (2011). Sheriff and other law enforcement organizations have relevant standards.[112] Of these, the ABA standard offers the most detail, although it is amazingly brief.[113]

These practices and standards can be analyzed in tandem with what might be deemed minimum constitutional standards. A Model Code Governing Attorney-Incarcerated Client Communication would provide a recognizable standard for advocacy. Comprehensive standards make life easier for the administrator, as less is open for litigation. See, e.g., Uniform Law Commissioners' Model Sentencing and Corrections Act § 4-108(d) (2008).[114] They also provide judicial guidance.[115]

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[110] State legal mail policies are compiled in an appendix to Sisk et al, 109 J. Crim. L. & Criminology at 632. Electronically available policy on legal visits, mail and calls are summarized in an appendix to Johanna Kalb, *Gideon Incarcerated: Access to Counsel in Pretrial Detention*, 9 UC Irvine L. Rev. 101, 119 (2018).

[111] http://corrections.wpengine.com/wp-content/uploads/2014/09/Core-Jail-Standards-as-printed-June-2010.pdf

[112] National Sheriff's Association Jail Supervisor's Training Manual· Chapter Three, "Protecting The Legal Rights of Inmates and Employees: The Supervisor's Responsibilities," (1989), available at https://www.ncjrs.gov/pdffiles1/Digitization/121187NCJRS.pdf, pp. 32-33.

[113] https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.pdf, pp. 309-311.

[114] "Persons providing legal assistance to confined persons may have access to facilities and confined persons at any reasonable time unless the director determines that a state of emergency exists; an employee of the department may not impede or unreasonably delay the access of a confined person to legal assistance."

[115] "This Court is unaware of any other reported decision discussing the level of contact minimally required to protect plaintiffs' constitutional rights." *Young v. Larkin*, 871 F. Supp. 772, 783 (M.D. Pa. 1994), aff'd, 47 F.3d 1163 (3d Cir. 1995)

But aside from whether constitutional minimums or a workable national standard can be ascertained with any certainty, there remains a fundamental contradiction: violation of a constitutionally required practice is not necessarily a violation of the associated constitutional right. A right of access violation requires injury, a right to counsel violation prejudice, and courts invoke both types of harm to render violations (and therefore relief and deterrence) essentially harmless and difficult to establish. An unenforceable constitutional standard is useless.

Then there is the question of waiver. The tide may be slowly turning against it, but otherwise the majority rule holds firm, and it is based on an artificial view of prison reality. Alternatives are, in reality, very limited. Using a monitored line when no other options realistically exist is not a knowing or voluntary decision. Imprisonment is inherently coercive, a context which must be acknowledged.[116]

This brings us to an agenda for the future: the impact of prison realities on attorney-prisoner communication must be quantified. Evidence must be generated to show, for example, that formal "alternative avenues of communication" aren't alternative because it may take 6 weeks to obtain a privileged call. This reality often propels a prisoner's use of monitored communication, rendering such use essentially involuntary (and therefore not a valid waiver). Mail may take 2 weeks for actual personal delivery to the prisoner and cannot serve exigent needs. And the burden on defense counsel to arrange a visit may be triple the time of the actual visit – hours most always charged to the public tab. Then there are the countless staff hours involved in arranging and supervising calls and visits, and in legal mail processing. These can and should be measured.

The unworkability of current systems must be demonstrated and realistic ones developed. This requires a national effort.

[116] "When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests ... must occasionally be accommodating." *Stutson v. United States*, 516 U.S. 193, 196 (1996).