Beyond the Visiting Room: A Defense Counsel Challenge to Conditions in Pretrial Confinement

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BEYOND THE VISITING ROOM: A DEFENSE COUNSEL CHALLENGE TO CONDITIONS IN PRETRIAL CONFINEMENT

Amber Baylor*

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INTRODUCTION

“Marlon says he is in solitary confinement because he has ‘Bing time owed at Rikers’,” I reported to co-counsel, a senior attorney and possessor of limitless wisdom in the universe of Manhattan Criminal Court oddities. I sat down next to him in a hallway bench outside of the courtroom and recounted my visit to the jail the night before: I arrived at the general housing area only to be shuttled from one brick, boxy building to another, finally ending up at the high security area where Marlon had been re-designated. When I arrived at the new facility, I was directed to enter two security clearances, go through a room stocked with riot gear, and wait in a small corner adjacent to a closet-sized counseling area. A correctional officer escorted Marlon down the hall to meet me. The twenty-one year old shuffled to the visiting room like an old man with chains draped between his ankles. His hands were also cuffed together. The officer separated the cuff from one hand and tethered it to the table as if Marlon had recently escaped a chain gang. As soon as the officer walked out of the room, I asked him about his orange jumpsuit, unique to people in segregated housing units. He was not certain why they had moved him to segregated housing, but he was told that he was sent to solitary confinement (the “Bing”) because of a disciplinary ticket he received at Rikers three years ago for not following a correctional officer’s orders. Three years ago, while held at the jail pretrial on a separate matter, he was sanctioned to time in solitary confinement. When the criminal court case he had at the time ended, he was released before he finished the solitary time at the jail. Since his arrival at Rikers, no one had reopened the previous matter to discuss whether solitary confinement was appropriate three years after his original infraction. He was simply sent to the Bing.

As I retold the story, the sharp wrongness of our client’s time in solitary crystallized. A negligent correctional officer’s mistake, I thought. Perhaps Marlon, who was generally personable, was accused of some serious infraction in the facility that he wanted to keep to himself. I thought that something wasn’t quite right. “He owes time. They do that.” my friend said, barely looking up from his examining the file before him, a case waiting to be called in the nearby courtroom. The committed and veteran public defender was un-amazed at the flippant use of isolation against the young man while awaiting trial.
In subsequent visits to see Marlon, I found him less focused and more anxious, especially that his criminal case be resolved so he could leave the jail. "I can't take being in there by myself" was as much as he would reveal about his life in solitary. The relief of human contact during subsequent visits was evident in the lingering, non case-related questions he asked, which extended the visits. He seemed younger, repeating the same questions about the charges and shaking his head each time, as though he could not comprehend the attachment of the accusatory words against him. Putting together a life history report to persuade the prosecutor to make a better offer was hard. Marlon could not remember the specifics of his achievements in sports only four years earlier or which juvenile facilities he was in just a few years ago. He was initially uninterested in a plea, but in lieu of exploring the consequences of each option with me, the twenty-one year old deferred, saying he was tired and wanted his mother to decide for him.

I did not know much about the contours of his life in solitary confinement. I was particularly unaware of the elements that did not easily emerge in conversation, such as the impact of fear and isolation on his mind, the clarity of his thoughts, his mounting anxiety, his heart palpitations, his unheard thoughts bouncing off the cement walls, his increasing paranoia, and the slipping away of his sense of self. The impact of those traumatic effects had immense consequences on the way he discussed and made decisions during our counseling visits. The damage from trauma and isolation to his mental health, especially his ability to rationally think through options and legal strategy, damaged his ability to communicate with me, his lawyer, and my ability to assist in his case.

Defense attorneys are well acquainted with the ill-considered and extreme use of solitary confinement in local jails. Isolation is one of

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1 Solitary confinement is called a number of different things. I interchange terms between solitary confinement, isolation, the Bing, and the Box, the last two being commonly used informal terms in New York City jails. Other common terms include: segregation, administrative segregation, and special housing unit (SHU). Many of the examples in this article stem from jails in New York City, where I worked as a staff attorney for a number of years at a holistic, public defense office.

many problems clients face while locked up in jail awaiting trial. Other common conditions of pretrial confinement include lack of mental health treatment, inadequate medical care, violence from corrections staff, and lack of protection from the violence of others. 

"Owing time", a recently dismantled practice, is just one example of jails' frivolous use of extreme isolation practices. At times, youth in the juvenile facility at Rikers were placed in solitary so often that there was a waitlist at the facility.

These abuses are happening to people that have not been convicted of crimes. Common forms of mistreatment in pretrial detention affect the emotional and mental health and cognitive abilities of people,

at Committee on Fire and Criminal Justice Services (July 12, 2014) (transcript available at http://bds.org/wp-content/uploads/BDS-Testimony-on-NYC-Council-Solitary-Reporting-Bill-6.12.14.pdf) ("Aside from being harsh and cruel, the punishment regime in city jails appears entirely arbitrary. We cannot make any sense out of what will land our clients in the box or how much time they will get.").


4 See BRONX DEFENDERS, VOICES FROM THE BOX: SOLITARY CONFINEMENT AT RIKERS 5 (2014) [hereinafter BRONX DEFENDERS SOLITARY CONFINEMENT REPORT] ("However, clients were also placed in solitary for non-violent behavior such as disobeying orders, failing drug tests, and cursing at correction officers. Moreover, at least one client was placed in solitary for fighting even after a correction officer submitted a written statement indicating that the client had fought in self-defense."); Press Release, NYC Department of Corrections, At Board of Correction Meeting, Commissioner Ponte Outlines Dramatic Reforms to Reduce Jail Violence, Enhance Safety of Staff and Inmates Alike (Nov. 18, 2014), http://www.nyc.gov/html/doc/downloads/pdf/press/FOR_IMMEDIATE%20RELEASE_111814.pdf (announcing elimination of "time owed" in solitary). The designation to solitary confinement without process was publicly challenged by organizers in New York City's Jail Action Coalition (JAC) in 2014. Subsequently, under pressure by community groups like JAC, the New York City Council (which lacks the authority to make DOC regulations) issued an advisory resolution to end the practice of "time owed." NEW YORK JAILS COALITION, http://www.nyjac.org/about/ (last visited July 31, 2015). Finally, Legal Aid Society's Special Litigation Unit and a private firm filed a complaint in federal court alleging that the practice violated due process. See Complaint, supra note 2, at 24-25 (challenging the Department of Corrections' practice of sending people to solitary confinement without a hearing, for "time owed"). The new commissioner of the NYC Department of Corrections halted the practice following his appointment by the new, reform-friendly Mayor de Blasio. See Press Release, NYC Department of Corrections, supra.

just as they are asked to make momentous decisions in their lives. Despite the impact of trauma experienced in jail on critical thinking, attorneys rarely address abuse in detention as integral to a criminal case.

The article explores the effects of solitary confinement, one of the most extreme forms of mistreatment in U.S. jails, its effect on people awaiting trial, and how abuse in jail impacts the ability of those detained to consult with counsel in defense of their criminal charges. The trauma of isolation is associated with impaired cognitive abilities and problems communicating and reasoning through legal options with an attorney. By continuing to allow traumatizing conditions to persist in jails, the state interferes with people’s ability to access assistance of counsel.

Public defense offices are in a unique position to expose pretrial conditions of confinement. The attorneys that work with people in the country’s jails hear and witness the abuses that jails inflict, even though investigation into the experience of incarceration is not often construed as part of a defense attorney’s job. Criminal defense offices can amplify the voices of those abused in pretrial detention, and can articulate why conditions of confinement are a speedway towards mental harm, antisocialization, unjust process, convictions, and more incarceration. In many cities, defense lawyers have brought Sixth Amendment challenges for classes of clients where jails physically interfered with clients’ right to counsel. An advocacy framework that links the trauma of incarceration to the mandate of the holistic defense office to provide effective assistance would push the purview of the work into the hidden reaches of the pretrial detention centers.

A Sixth Amendment challenge to conditions of confinement in U.S. jails is an alternative framework for addressing the concerns of people held awaiting their trials. When framed as an issue connected to rights in a criminal case, a person facing abuse has a ready forum in the

6. See Schrebersdorf, supra note 2 ("Every client who is placed in solitary suffers from the experience and the changes in their personalities and behaviors are readily apparent to attorneys, social workers and other staff.").

7. Niki A. Miller & Lisa M. Najavits, Creating Trauma-Informed Correctional Care: A Balance of Goals and Environment, EUR. J. PSYCHOTRAUMATOLOGY 3 (2012), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3402099/?report=reader ("The correctional environment is full of unavoidable triggers, such as pat downs and strip searches, frequent discipline from authority figures, and restricted movement.").

8. In Gideon v. Wainwright, the Supreme Court established that the Sixth Amendment guarantees the right to counsel in non-capital felony state cases. 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").
criminal court and an advocate in their criminal defense attorney. People bringing a challenge to their mistreatment are able to surpass many of the obstacles people traditionally face in bringing legal challenges to the conditions of confinement.

I discuss the factors leading to detention in jail while awaiting trial in the first section of this article, focusing on the impact on economically underprivileged people. I also discuss the logistical barriers of pre-trial detention on the client-attorney counseling relationship and review three core components of client-attorney work on the criminal case: narration, communication, and decision-making.

In the second section I focus on the effect of trauma from jail conditions in general, and the impact of solitary confinement in particular on narration, communication, and decision-making. Defense attorneys work on criminal cases of people facing a range of mistreatments: solitary confinement, inadequate health care, prohibition from communication with family, exposure to physical harm from other jailed individuals, and brutalization by staff at the facilities. This section describes how all of these forms of abuse, particularly in the environment of incarceration, impact psychological well-being. Solitary confinement in particular has been cast in international human rights norms as a form of torture, and despite this, continues to be an acknowledged and commonplace practice at nearly all U.S. jails. Examining the consequences of isolation provides a model for diagramming the complexity of jail mistreatment on psychology and cognition, and the direct implication of those harms on a person’s ability to consult with counsel and successfully advocate for themselves in criminal proceedings.

In the fourth section I examine the shortcomings of existing avenues of advocacy in challenging abusive pretrial conditions of confinement in U.S. jails. While many defense offices do address some conditions of confinement that individual clients face, they are rarely linked to the work on the defense case. For this reason, courts do not have to grapple with the problems as seriously as those that implicate the

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10 But see Shireen Barday, Prison Conditions and Inmate Competency to Waive Constitutional Rights, 111 W. Va. L. Rev. 831 (2009) (arguing that appellate courts should consider prison conditions as a part of competency determinations; people in solitary confinement post-conviction may waive appellate rights when their mental capacity has been affected by isolation).
protections of the Sixth Amendment. This section also describes why
the transitory nature of jail presents distinct difficulties for would-be
civil litigants and litigators, and lessens incentives for those undergoing
mistreatment to challenge abusive conditions.

I conclude with the benefits of a challenge to pretrial conditions of
confinement founded on the Sixth Amendment right to effective assis-
tance of counsel. The lives of people in pretrial detention beyond the
visiting room are a necessary part of the calculus of fair access to assis-
tance of counsel. Defense offices modeled on a theory of holistic prac-
tice operate on the premise that issues in a client’s life outside of the
criminal courtroom are also integral to effective defense work.11 The
impact of mistreatment on effective representation provides a justifica-
tion for defense attorneys to frame challenges to jail conditions in Sixth
Amendment terms. Incorporation of strategies for documenting, analy-
zizing, and publicizing abuses that occur in jail is a potent and necessary
component of protecting clients’ rights in defending themselves against
the state. In taking on conditions of confinement as an integral part of
criminal defense work, public defense offices have the opportunity to
project the experience of incarceration into the criminal courtroom. At-
torneys can challenge systemic jailhouse abuses that would otherwise
continue unaddressed.

I. PRETRIAL DETENTION AND ASSISTANCE OF COUNSEL

In the holding pens in back of the arraignment courtroom, the
room is stale with a few days worth of perspiration.12 The sweat of the
unexpectedly-detained crowd is tinged acidic with fear, the scent radiat-
ing from the packed cells. Tired bodies are pressed onto benches
shared with strangers. Some folks find a lone corner on the floor to sit,
and rest their heads against their own bent knees. The pens are a con-
densed preview into the difficulties in communication between those in
detention and the people working as their lawyers on the outside. Often
in the back of the arraignment courtroom, the person detained and the
lawyer are literally speaking through a glass window, and negotiating the
layers of radio static embedded in the initial counseling conversation.

11 See McGregor Smyth, "Collateral" No More: The Imperative of Holistic Defense in a Post-Padilla
12 The arraignment courtroom is typically where criminal charges are first read to people
accused of crimes and bail conditions are set by the court.
The client and attorney must try to talk above the din of conversation around them, including background voices recounting heatedly various experiences since arrest, and those who have been frequently detained offering seasoned advice to newcomers on what to expect from the lawyers and judges. Less tangible, but equally palpable in the arraignment pen, is a thick and unavoidable tension. The people trying to tell their story to a lawyer from the holding pen have every reason to be tense with worry about their future and whether the lawyer can successfully get them released. The stakes for communication in this chaotic setting are high; the bail hearing will determine if the person will be able to speak with their attorney on their own terms, in the free world, or if they will have to try and work with the attorney on immense decisions relating to their case through the constant interference of life in jail.

A. Physical Impediments to Client-Lawyer Counseling from Detention

Jail creates obvious impediments to an attorney and client from working together to establish strategy and a strong defense to charges. The logistics of jail visits places the power of attorney-client communications in the hands of the attorney. A detained person cannot stop by her attorney’s office for a conversation; they instead must wait for an attorney to schedule a visit. The design of detention facilities also affects confidential communication. Visits often take place in a shared room or a booth under correctional officer surveillance, sometimes

13 See Byrnon Bain, *Three Days in NYC Jail*, VILLAGE VOICE (Sept. 23, 2003), http://www.villagevoice.com/news/three-days-in-nyc-jails-6409345 (describing the pens and troubling encounters with attorneys at arraignment. The attorney doubted a young African-American man’s identity as a law student and artist and did not share this information with the court. He was held in on bail.).


within hearing range of the officers.\textsuperscript{16}

These interferences with communication and counseling are obvious to attorneys consulting with clients at the jail. Attorneys are aware of the quelling effect on open disclosures and safe exchange of information.\textsuperscript{17} They may respond to this by adjusting the conversation, perhaps speaking carefully about sensitive topics or speaking in code. Attorneys may accommodate the lack of control incarcerated people have over when conversations take place by being responsive to calls or accepting office visits from family members.\textsuperscript{18} Such adjustments address but do not fix the disadvantage of incarceration on counseling and effective representation of counsel.

The logistical complications of counseling in detention including things such as how frequently visits occur, where the conversations happen, and who controls the communications, are parts of defense work that criminal defense attorneys negotiate as a regular part of practice. What does not often surface is that people detained in jail enter the conversation with counsel from the very unique and disorienting experience of life in jail, and must return to the conditions of incarceration after the conversation is over.\textsuperscript{19}

\section*{B. Client-Lawyer Work on the Criminal Case: Communication, Narration, and Decision-Making}

Clear communication between a client and attorney is critical in all legal work, but is particularly time-constrained and pressing within the early stages of a criminal case.\textsuperscript{20} From the outset, the attorney and client must accomplish many tasks together effectively.\textsuperscript{21} The clients of good attorneys should expect to fully understand the state's charges against

\textsuperscript{16} See, e.g., Johnson-El v. Schoemehl, 878 F.2d 1043 (8th Cir. 1989).
\textsuperscript{17} See, e.g., Davies, supra note 15.
\textsuperscript{18} Id.
\textsuperscript{20} See ABA Criminal Justice Standards, supra note 14, § 4-3.3(a) ("Early in the relationship, the defense attorney should aim to establish trust by communicating her role to the client."); see also Powell v. Alabama, 287 U.S. 45, 57 (1932) (describing the time from arraignment to trial as the "most critical period of proceedings" and a time when the work of defense counsel is vital).
\textsuperscript{21} ABA Criminal Justice Standards, supra note 14, § 4-3.3(c) (attorneys should review key areas of the case as early as practicable).
them, have a clear roadmap of future proceedings, discuss potential strategies, and know about potential consequences of a conviction on housing options, immigration status, child custody, employment, benefits, student loans, parole, and other civil concerns. In order to maintain support systems for a person while in detention, the attorney should make referrals for non-criminal law concerns, facilitate communication with family to mitigate disruptions in their outside life, and speak with doctors and treatment providers to make sure the client’s medical needs are addressed.

Before a case reaches trial or resolution stage, an attorney’s initial conversations with their clients involve deeply delving into their stories. Consultations in preparation for trial should allow the lawyer to script out chronologies, clarify important details of time, locations, witnesses and other sources of evidence, and iron out any inconsistencies before the narrative is told in the courtroom. Cases that are not headed to trial also require intensive and sensitive conversations. Effective plea negotiation involves putting together a persuasive life narrative of the person charged, including: discussions about often harrowing life events, locating corroborating records, getting informed consent to access records, manufacturing a life history report for negotiation and sentencing, updating the negotiation status, finding and applying to treatment alternative programs, explaining terms of potential pleas to the client, and planning for in-court statements. Through these initial conversations, defense attorneys and those they represent cement trust, build elements of a defense, assess the case, and make quick decisions about plea offers.

The efficacy of this work is dependent upon clear and nuanced communication between the individual and the attorney. For instance, a person’s ability to precisely recall the events of the day in question with counsel could unveil an alibi witness. Or, when an attorney has established a trusting relationship and explained the basis for probing personal questions, a person might feel more secure in sharing medical information that could support a request for diversion to a treatment program.

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22 Id. (reviewing topics that these early discussions should cover, including “collateral consequences”).
23 Id. § 4-5.4 (mandating consideration of counseling on “collateral consequences”).
24 See id § 4-3.7(c) (listing “prompt and thorough” actions an attorney must take to develop strategy).
25 See id § 4-6.3 (describing the attorney’s duty to explore, negotiate, and counsel on pleas).
program. In all cases, the basic decision of whether to take a plea or go to trial requires digging through priorities and tracing the potential consequences of each decision with counsel.

C. Defense Attorney Exposure to Conditions of Confinement in Detention

Defense attorneys are the most likely outside parties to learn of outrageous conditions at the detention center through conversations with incarcerated clients. For instance, an attorney may ask a follow-up question about mental health provisions and learn that the facility will not give a person the proper treatment. A person in jail might describe prolonged isolation in solitary as the reason they feel so compelled to plead, just to be out of the jail. Or, a lawyer might notice a sling on a person's arm as they enter the visiting booth, ask their client about the arm, and learn that he or she was injured by corrections staff.

Unless defense counsel inquires, it is likely that many problematic conditions would never be exposed. People often undergo traumatic experiences that are never shared with their criminal court attorneys. In a study of incarcerated minors in solitary confinement, researchers found that most defense attorneys representing the minors on their cases never knew that they had been placed in isolation. Jails are not alerting defense attorneys to incidents within the detention facility. Attorneys are not asking the people they represent about life in jail. Defense attorneys often have little information about the world beyond the visiting room.

D. Who is in the Jail?

The population of jails is made up of people who are held in custody before trial without bail, those who could not pay their bail amounts, and those already sentenced to time or awaiting transfer to

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26 See, e.g., Doyle, supra note 2.
27 See, e.g., BRONX DEFENDERS SOLITARY CONFINEMENT REPORT, supra note 4, at 11.
28 See, e.g., Doyle, supra note 2.
29 See Schreibersdorf, supra note 2 ("One of the biggest obstacles we face in terms of helping our clients in segregation is that we are not even aware that they have been moved to these facilities.").
30 HUMAN RIGHTS WATCH, GROWING UP, LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES (2012).
another facility or court. Most people living in jails are awaiting trial. The majority of people held in custody and awaiting trial are incarcerated because they cannot afford to pay bail.

In 2008, 87% of the people in jail in New York City held in on amounts under $1,000 could not afford bail. Judges, acting on statutory considerations for bail decisions or commonly instinctive considerations, often set monetary bail rather than release people on their own recognizance. In many places, the justification for bail is to secure people’s presence in court. The bail factors that statutes direct courts to consider in assessing risk of absconding include information about employment status and stability of the individual’s residence, factors clearly affected by economic status.

E. What is Happening Inside of Our Jails

Conditions of confinement problems can be framed in a number of ways. There are conventions like the use of solitary confinement that corrections officials acknowledge but do not see as a problem. There are conditions that corrections officials may occasionally acknowledge as a problem, but view it as somewhat situational rather than abusive, similar to inadequate care to meet mental health needs of people in

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32 See JUSTICE POLICY INSTITUTE, supra note 14, at 24 (finding 7 out of 10 people in the country are not released because of lack of money). Fifty-one days is the median amount of time in jail in the 75 most populous counties in the U.S. Id.

33 HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW-INCOME NON-FELONY DEFENDANTS IN NEW YORK CITY 2 (2010), http://www.hrw.org/sites/default/files/reports/us1210webcouver_0.pdf. In 2015, New York City embarked on an initiative to eradicate bail for nonviolent, non-felony charges. Advocates argued that the oppressive conditions of conditional release are also a burden on people that are already likely to return to court if released on their own recognizance. Robin Steinberg & David Fage, The Problem with NYC’s Bail Reform, MARSHALL PROJECT (July 9, 2015), https://www.themarshallproject.org/2015/07/09/the-problem-with-nyc-s-bail-reform.

34 HUMAN RIGHTS WATCH, supra note 33, at 3.

35 Id.

36 See id. at 41 (describing that judges state that the court administrator method for weighing the factors penalized poor people). In the U.S., African-American people are four times more likely to be detained than white individuals. VERA INSTITUTE, supra note 31, at 5.

Finally, there are incidents that all parties agree are abusive, such as beatings by guards; however, corrections officials may argue that they are justified uses of force or deny that physical abuse is implicitly sanctioned by the administration. The effects of mistreatment on individuals undergoing abuse in jail is not only a human rights problem, but it is an issue that impacts the stated aims of defense counsel.

For the attorney in the visiting room working with the client to provide effective assistance of counsel, the world at the other end of the hallway has implications on the client’s right to a fair trial and assistance of counsel. Facing abuse in jail is not just harmful to people in the moment that they are experiencing mistreatment, but it also interferes with an individual’s ability to assist in their own defense and contemplate critical decisions in consultation with his or her defense counsel.

F. Pretrial Confinement Leads to Worse Outcomes in Court

The experience of confinement impacts outcomes in criminal court. Empirical comparisons of similarly situated individuals—those in pretrial detention and those pending trial from the outside—show a better court outcome for those who had not been in jail awaiting trial. This discrepancy could be attributed to a jury’s implicit bias against defendants in jail or the multitude of barriers to effective investigation and communication with an attorney from jail. At their core, these studies tell us that incarceration while awaiting trial compromises the promise of a fair opportunity to defend oneself at trial.

II. PSYCHOLOGICAL AND COGNITIVE IMPACT OF ABUSIVE JAIL CONDITIONS ON DEFENSE ADVOCACY

Mistreatment in jail is rampant and its existence is almost unchallengeable. One specific form of abuse, the frequent use of solitary confinement in New York City jails, presents a model of the impact of pre-

38 See Press Release, NYC Department of Investigation, supra note 3 (during investigation showing the jails’ mental health care supplier failed to diligently provide care).
39 See Investigation, supra note 3 (finding a failure to address extraordinarily violent behavior by staff).
40 In New York City, the Criminal Justice Agency found that “pretrial detention had an effect on conviction after controlling statistically for the number and severity of arrest charges, the offense type of the arraignment charge, the defendant’s criminal history, demographic characteristics, borough, and length of case processing, among other factors.” HUMAN RIGHTS WATCH, supra note 33, at 33.
trial detention on the ability to defend oneself and the difficulties of reforming the practice through traditional channels. To understand isolation and its effect on the attorney-client relationship, one has to understand both the overall traumatic impact of jail on an individual and the specifically extreme toll that isolation takes on an individual.

A. Psychological and Cognitive Effects of Trauma on Communication, Narration, and Decision-Making

i. Trauma of Jail Conditions

Almost all people who have spent some time in incarceration suffer some psychological injury. Jail creates traumatic experiences.\(^{41}\) In jails across the country, people awaiting trial are subjected to a number of inhumane conditions. These inescapable conditions can cause psychological distress. People often experience hypervigilance, or exaggerated sensitivity to threat, in environments where their safety is constantly at risk.\(^{42}\) Some individuals adopt social distancing as a form of shielding themselves from vulnerability.\(^{43}\) Many people contemporaneously experience the effects of the post-traumatic stress disorder (PTSD), especially those with histories of past experiences of witnessing and surviving violence.\(^{44}\)

ii. Cognitive Impact of Trauma

Not only are people in pretrial detention suffering from the immediate disorientation of psychological distress, but their cognitive abilities are also altered by these traumatic experiences.\(^{45}\) Potential abuse is a perpetual threat during the duration of one's time in jail.\(^{46}\) Prolonged exposure to danger can cause trauma, commonly known as Type II Trauma, which results in neurological alterations of the brain.\(^{47}\) This

\(^{41}\) Miller & Najavits, supra note 7.
\(^{43}\) Id.
\(^{44}\) Id.
\(^{46}\) Id.
\(^{47}\) Id.
can throw off the natural balance and regulation of certain hormones and affect one's reaction to stress. Trauma can increase the production of norepinephrine and HPA hormones. See Vanessa M. Brown & Rajendra A. Morey, Neural Systems for Cognitive and Emotional Processing in Post-traumatic Stress Disorder, 3 FRONTIERS PSYCHOLOGY 449-50 (2012).

People who are exposed to trauma have difficulties maintaining their previous attention capacities and have problems with memory encoding and retrieval. One reason for these results is that the energy needed for cognitive function is instead spent in casting defensive behavior. Since cognitive and emotional systems are intertwined, the debilitating effect of past trauma on cognition is heightened when presented in an emotionally charged setting or if a traumatizing issue is under consideration. People have a hard time disengaging from the threat and reorienting their attention towards the question before them.

iii. Impact of Trauma on Communication with Counsel

An important component of someone in pretrial detention's communication skills is his or her relationship with counsel. Trauma can affect the development of authentic attorney-client relationships, a crucial foundation for candid legal counseling. Legal advice is only valuable when the client feels it is trustworthy. For people that do not have the ability to establish a trusting relationship with the lawyer, they are essentially deprived of the value of legal counsel. Likewise, their lawyer will have less information to work with in creating a defense. A common result of trauma in jail, social distancing, can create a huge wedge in the flow of communication necessary for effective assistance on a criminal case.
iv. Impact of Trauma on Narrative Memory

Trauma has an impact on narrative memory; it affects people's ability to recollect and identify significant happenings from their past.\(^{56}\) This could result in a diminished ability to extract memories that are significant to the case. In the context of a pending criminal case, people may not be able to put together the life history narratives necessary for effective representation and valuable sentencing negotiations.

v. Impact of Trauma on Decision-Making

A good deal of research has been done on the decision-making abilities of people undergoing stressful conditions. Stress theorists have found that stress handicaps cognitive functions necessary for decision-making.\(^{57}\) In some instances, stress theorists have found people forced to make decisions irrationally fixate on one option as a way of managing stress.\(^{58}\) Studies show that people often place a positive or optimistic spin on information rather than balancing it equally against negative information.\(^{59}\) A person might also find herself frozen with helplessness when important and intimidating matters before her are combined with the effect of stress on her cognition.\(^{60}\) Studies of those who live in highly regulated conditions with a constant threat of violence and who lack the power to control or predict the violence show that people often develop learned helplessness.\(^{61}\) Minimizing one's impulses for autonomy may be helpful in surviving life in detention, but it is counter to the skills necessary to make life changing decisions regarding one's own criminal case.

B. Psychological and Cognitive Effects of Isolation

i. Description of Isolation

People subject to solitary confinement are simultaneously affected

\(^{56}\) Id.

\(^{57}\) This is often referred to as “learned helplessness.” ROBERT M. SAPOLSKY, WHY ZEBRAS DON’T GET ULCEERS 301 (2004).

\(^{58}\) Id.; see Hila Keren, Consenting Under Stress, 64 HASTINGS L.J. 679, 719 (2013).


\(^{60}\) SAPOLSKY, supra note 57, at 301.

\(^{61}\) DeVeaux, supra note 45, at 257.
by both the trauma of incarceration and the extreme psychological and cognitive effects of isolation. In solitary confinement, people are placed in a portion of the jail that contains only small, isolated cells. Many cells have no windows and no visibility through the steel doors; they contain one slot operated from the outside for surveillance and another slot to deliver food and place restraints on the person inside.62 People in isolation are often prevented from receiving mail, reading, making calls to family, and speaking to other people.63 Jails typically keep people in isolation for 23 hours a day, with one hour out for recreation.64 In many places, the recreational hour does not occur.65

Because of the effects of isolation on the human mind, solitary confinement is widely considered a form of torture.66 Some of the symptoms of time in isolation include acute confusional states, apathy, difficulties with thinking, concentration and memory, anxiety, panic attacks, obsessions and overt paranoia, diminished impulse control, illusions, and hallucinations.67 A woman in solitary confinement in Indiana wrote that “[t]he isolation degenerates us into madness, or at least depression.”68 John McCain famously revealed that “solitary crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.”69 One minor described his solitary confinement at Rikers Island and recounted an onset of hallucinations, “It’s like you see the black dots and you focus on the black dots and your eyes just follow them around in the cell all over. ... You’re just looking and you know you try to escape seeing the black dots, but you can’t.”70

62 See Complaint, supra note 2, at 24-25 (challenging the Department of Corrections’ practice of sending people to solitary confinement without a hearing, for “time owed”); see also Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring) (describing respondent’s living conditions as “a windowless cell, no larger than a typical parking spot for 23 hours a day... and no opportunity for conversation or interaction with anyone.”).

63 See Complaint, supra note 2, at 24-25.

64 Id.

65 Id.

66 See Mandela Rules, supra note 9, at 18 (Rule 43).


70 Daffodil J. Altan & Trey Bundy, For Teens at Rikers Island, Solitary Confinement Pushes Mental Limits, REVEAL NEWS (Mar. 4, 2014), https://www.revealnews.org/article-legacy/for-teens-at-
ii. Cognitive Effect of Isolation

Stewart Grassian, a psychiatrist focused on studies of experiences of isolation, has found that only a few days in isolation causes abnormal electroencephalogram (EEG) patterns in brain activity. The resulting patterns of people in isolation are similar to those of individuals in a state of stupor and delirium. Soon after placement in solitary, people are unable to stay alert or attentive to their environments. Grassian describes the effects seen in brains of people in isolation as resembling an anoxic brain injury, or the result of an oxygen starved brain.

iii. Impact of Isolation on Communication

The psychological effects resulting from isolation highly complicate communications with a lawyer. One study found that 41% of people in isolation experienced hallucinations. Grassian has found that all people in isolation experience confusion and problems with thinking, focus, and concentration almost from the start. An authentic, trusting relationship may be difficult to establish under these circumstances. Basic communication becomes challenging when one is impaired in his or her ability to articulate thoughts and comprehend information.

iv. Impact of Isolation on Narrative Memory

The ability to narrate experiences from memory, which is necessary for people to work with their lawyers on their criminal changes, is highly impacted by isolation. One person interviewed described isolation: “your mind's narcotized. . .memory's going. You feel like you are losing something you might not get back.” The effect on the ability to recall is not the only narrative problem. Isolation impairs not only autobiographical memory, but also metacognition, or a person’s ability to
ascertain the meaning of events. Human social interaction is necessary for people to maintain a sense of intersubjectivity, or an understanding of one’s self through primary experiences and as a third person character that we can describe to others. This function is necessary for temporal ordering and telling a story. Isolation disintegrates the ability of a person facing charges to maintain that intersubjectivity and tell the clear, chronological, and meaningful story necessary for a defense.

v. Impact of Isolation on Decision-Making

Decision making has been defined by psychologists as identifying alternatives, evaluating their probability, and estimating their consequences. Isolation is devastating to these decision-making functions. Examinations of other social animals in isolation demonstrates that when animals live alone, they are not very good at coping with challenges. Similarly, studies of teenagers that have been in solitary confinement show that such adolescents have underdeveloped cognitive abilities in tasks that require complex information.

Each stage of the criminal case requires deliberate attention to weighty factors that must be processed in order to make decisions. For instance, envision a person making the critical decision between taking a plea that results in less jail time than would conviction in a trial. She would have to consider the implications of the plea, incarceration, the civil consequences that follow a conviction, the consequences of trial, and weigh the impact of potential witnesses against her.

Cognitive impairment in isolation causes both an inability to focus and shift attention. Inability to shift attention is associated with fixation on one thing, such as noises coming from a neighbor’s cell. People who have spent time in isolation describe experiencing a dissociative stupor, mental fog, difficulty grasping or recalling things, reading, and thinking. Although some people are more vulnerable to the disruptive

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79 Id.
80 Id.
81 See Ilse Kryspin-Exner et al., Posttraumatic Stress Disorder (PTSD) and Decision-Making—Neural Correlates and Possible Therapeutic Effects, http://bdi.psy.univie.ac.at/research/decisions/.
82 See Ravindran, supra note 74, at 18.
83 Id. at 21.
84 Grassian, supra note 67, at 331.
85 Id.
impact of isolation than others, everyone in isolation has problems with thinking and concentration, obsessional thinking, agitation, irritability, and tolerating external stimuli.\textsuperscript{86}

\textbf{vi. Articulating the Effect of Trauma and the Role of Isolation on Defense Counsel}

Defense attorneys are aware that many people pleading guilty are not acting voluntarily or fully free from duress. Few defense attorneys believe detained people are truly asserting their free will when making decisions about their criminal case.\textsuperscript{87} Attorneys are fully aware that many people detained before their trial, including innocent people, are offered a choice between two evils: a conviction with freedom or reduced jail time, or further detention on bail until trial (and the risk of lengthier periods of incarceration after trial).\textsuperscript{88} People who are not able to afford bail often plead guilty so as not to lose a job, jeopardize their home, or have the state take their children. Public defense attorneys constantly deal with the reality that the experience of incarceration, the human yearning for liberty, as well as the practical need to return to outside obligations, pressures people into pleas that can cause irreparable future harm.\textsuperscript{89}

Stress due to mistreatment in confinement further affects how an individual makes decisions important to his or her criminal case. A plea implicates voluntariness. Decisions made in the context of mistreatment, the immense stress of which has an impact on cognition and decision-making, may further undermine expectations that people can make knowing, intelligent, or voluntary decisions in their own cases.\textsuperscript{90} Issues that arise in pretrial confinement occur contemporaneously with criminal court proceedings. In the case of conditions of confinement, lawyers must step outside of the bounds of a system that pretends that a criminal court matter can be divorced from the life experiences of the person charged, and they must argue that such poor conditions impact the validity of decisions made while in detention.

In instances where terrible conditions push people to decide to

\textsuperscript{86} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
plea in order to escape, the conditions affect voluntariness in a very direct way. Based on its impact on brain functioning, duress can also play a subtler role in all of the stages of an individual's defense. The psychological pressures resulting from trauma-inducing practices affect people's decision-making and reasoning capacities. Abusive conditions impact a person's cognitive skills and abilities to communicate with his or her attorney. In order to best represent their clients, defense counsel must address jail abuses, challenge poor conditions, and simply raise awareness to this critical problem.

C. Trauma in Jail is a Violation of the Sixth Amendment

Why should stress caused by jail conditions be distinguished in its impact on a case from the general stress of one being subjected to criminal charges? Assistance of counsel and the ability to work on one's defense are integral to our country's understanding of a fair process.\footnote{This is guaranteed by Constitution:}

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. It has long been recognized that the right to counsel is the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).
i. Jail Policies that Interfere with the Right to Assist or Communicate with Counsel have been Recognized as Violations of the Sixth Amendment

Public defense offices have a legacy of challenging jail policies that undermine clients' right to counsel. Many cases brought by public defense offices have specifically challenged barriers to attorney-client communication caused by the jail.

In Johnson-El v. Schoenbl, individuals held at the St. Louis City Jail in the late 1980s were forced to meet with counsel in a lobby within the facility rather than in private attorney visiting areas. Guards stayed in the area, and even when speaking in low voices, the attorney and client could be overheard. Consequently, the privacy of the individual session was violated. People incarcerated at the jail also had very limited access to the law library. The court articulated the level of violation accorded when a jail hinders access to counsel:

Ordinarily we accord great deference to the internal administrative decisions of prison officials. But where, as here, a prisoner alleges that a particular restriction imposed impinges upon his exercise of constitutionally guaranteed rights, it is incumbent upon us to carefully scrutinize the effect of the restrictions. It is clear that ready access to the courts is one of, perhaps the fundamental constitutional right.

Conditions of confinement created by the facility, especially those having to do with abuses or neglect on the body that spur or exacerbate cognitive difficulties, likewise create obstacles to the ability to consult with counsel and assist in one's own defense. Trauma from mistreatment is an institutionally imposed obstacle to communication with counsel.

ii. Allowing Impaired Cognition Runs Counter to the Expectation of Individual Autonomy in Case Resolutions

The agency of the individual, including the ability to assist in her

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92 878 F.2d 1043 (8th Cir. 1989).
93 Id. (the phone call area was too noisy, and the client had to yell to be heard, forfeiting privacy)
94 Id. at 1052.
95 Id. at 1051 (citing Campbell v. McGruder, 580 F.2d 521, 531-32 (D.C. Cir.1978)).
defense and access counsel, has been relied upon in justifying the finality of cases. Where the state creates conditions to undermine that agency or effective consultation, it destabilizes courts’ arguments in favor of finality. By allowing people to be detained pretrial in abusive environments, courts effectively put people in a position to make bad decisions.

The case of Richard Flowers demonstrates the destabilizing effect of abuse in jail on court resolutions. Flowers was a man held pretrial at the Queens House of Detention in New York City, where, as his criminal court attorney repeatedly informed the court, he was facing abuse in the facility.6 He was targeted as a gay man and sexually assaulted by other people in the jail.7 The guards made no efforts to protect him and also subjected him to physical abuse because of his complaints.8 He filed a suit against the facility based upon his treatment.9 During court proceedings, his attorney requested a transfer due to the abuse. When the judge refused to move him out of the facility, Flowers agreed to take a plea and resolve his case simply to be transferred from the jail. He stated on the record that he wanted the plea because the court would not otherwise alleviate his condition of confinement. The Court of Appeals later found a dear record that the assault amounted to duress, and therefore his plea was not voluntarily made as required under law.10 As evident in Flowers, the context of jail conditions during decisions regarding one’s criminal case can invalidate convictions.

III. CONDITIONS OF CONFINEMENT WORK IS INTEGRAL TO EFFECTIVE DEFENSE WORK

The mandate of defense counsel—to provide effective assistance—suggests that offices should be linking the cognitive harm of mistreatment to its impact on people’s criminal cases. The ethos of “holistic” public defense advocates—that “collateral” matters are integral to representation on the criminal case—provides a helpful lens for analyzing the intersection of defense counsel and conditions of confinement. If anyone can create this change, it is defense counsel.

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6 People v. Flowers, 30 N.Y2d 315 (1972).
7 Id. at 317.
8 Id. at 318.
9 Id.
10 Id. at 319.
BEYOND THE VISITING ROOM

A. Defense Attorneys are Frontline Witnesses to Abuse

Attorneys at public defense offices are often the frontline witnesses to mistreatment of clients. They are uniquely positioned to see systemic problems and can analyze their impact on their own work with clients. They have the ability to collect claims, locate harmed individuals, and direct public attention to problematic jail practices and chronic abuses.101

i. Bail Hearings are the Traditional Way to Advocate Against Pretrial Detention

In most jurisdictions, assigned counsel's first job is to help their client avoid pretrial detention imposed in the bail hearing. The vigor and passion that an attorney advocates against pretrial detention is foundational to the attorney-client relationship.102 Attorneys are also aware of the consequences that follow an inability to return to one's life, and the repercussions of detention on the eventual outcome of the case.103 The importance of bail hearing representation to the relationship hints to the integrated nature of pretrial liberty and one's ability to receive assistance of counsel in their criminal case.

B. Defense Counsel's Advocacy Role from Within the Jail

Defense offices already advocate for clients who are in jail. Much of this work implicitly acknowledges the connection between the role of the holistic law office and the conditions clients face inside of jails. Holistic defense offices at times communicate with corrections staff at jails to help meet individual clients' needs. The paradigmatic example of informal advocacy is working with medical staff at a facility to try to get medical treatment for a client. Defense offices often have social workers on staff that may follow up with health practitioners at the jail.104 Through informal requests, defense offices ensure that jail facilities treat clients who are otherwise neglected.

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101 See, e.g., BRONX DEFENDERS SOLITARY CONFINEMENT REPORT, supra note 4, at 11.
102 See Bain, supra note 13.
103 ABA CRIMINAL JUSTICE STANDARDS, supra note 14, § 4-3.2 (emphasizing the importance of an attorney's initial appearance at arraignment).
Attorneys may also participate in disciplinary hearings at the jail. Jails may hold hearings on an alleged rule violation before imposing sanctions like solitary confinement. Some defense offices, if they are aware of the hearing, represent people in these disciplinary hearings. Defense offices have often expanded their expertise and tools of representation to meet the unique needs, communication difficulties, abuse, and neglect caused by pretrial incarceration; this should extend to disciplinary hearings as well.

i. Defense Counsel Historically Informs Court of Limitations on Access to Counsel

Defense counsel has traditionally alerted courts to conditions of confinement that result in limited access to counsel. For instance, where a facility has practices that limit visiting hours or makes phone calls to defense counsel arduous, public defense offices have brought these practices to the attention of criminal court judges. Judges have been asked to grant injunctive relief or issue directives to the jail to address infringements on defendants’ Sixth Amendment rights.

ii. Expansion of Defense Duties, or Deepening of Representation?

The ethos of “holistic criminal defense” directs defense attorneys to advocate for clients on issues beyond simply their criminal charges. Since people who are pulled into the criminal justice system may have an array of non-criminal law issues at play in their lives, defense attorneys may be required to familiarize themselves with other areas of advocacy. Areas of law that commonly intersect with criminal arrests and convictions like housing law, family law, or immigration law, are commonly known as “collateral consequences” to a criminal case. The

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106 See generally Arpaio v. Baca, 217 Ariz. 570 (Ariz. Ct. App. 2008) (In Maricopa County, the local detention centers moved to a very restrictive attorney visiting schedule, purportedly in response to budget cuts. The hours limited attorneys' abilities to consult with clients. The public defense office worked with named clients to bring a suit for injunctive relief in the criminal court.).
107 Id.
108 Id.
109 See Smyth, supra note 11.
Supreme Court has knocked down the walls of distinction between “direct” and “collateral” matters to a criminal case. The Court stated, “[T]his Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally ‘reasonable professional assistance’ required under Strickland.” Holistic defense advocates have since cited to this as affirmation that the variety of things happening in one’s life should be considered for its impact on a person’s ability to make fully-considered decisions about their future.

C. Public Defenders’ Historic Role in Addressing Conditions that Affect Defense Work

Public defenders have a long history of defining the systemic contours of Sixth Amendment rights, including access to counsel and the right to assist in one’s own defense. This history helps lay out a path for defense offices to embrace fighting conditions of confinement as a part of their work.

Public defense offices have long identified high caseloads as impacting a lawyer’s ability to connect with and diligently represent clients. Lobbyists for greater support of defense offices have struggled for years to give weight to the meaning of one’s right to assistance of counsel. Public defense organizations have argued, and in many instances convinced policymakers, that effective assistance requires more than a lawyer simply standing by an accused’s side. Defense offices

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110 Padilla v. Kentucky, 559 U.S. 356 (2010). In Padilla, the criminal court attorney misinformed his client about the immigration consequences of his plea, and thus failed to ensure that Padilla was able to give informed consideration to the implications of the plea. The law requires that people make knowing and voluntary decisions in their criminal cases.

111 Id. at 356.

112 See McGregor Smyth, From ‘Collateral’ to ‘Integral’: The Seismic Evolution of Padilla v. Kentucky and its Impact on Penalties Beyond Deportation, 54 How. L. J. 795 (2011). Smyth argues that non-criminal law concerns in the lives of individuals facing charges are not collateral, though they are characterized as such, even by holistic defense offices. As with immigration law, considerations about child custody, benefits, employment, and housing consequences are all elements that make up the complex lives of the person in front of the court. These issues are, Smyth argues, “integral” to the criminal matter. For instance, as Smyth delineates, a lack of information about the effect of a criminal case on immigration status may affect the “knowing” and “voluntariness” of a person’s decisions on their criminal case. Holistic defense offices, he argues, must be committed to working through these issues with their clients. In Padilla, Smyth argues, the court decided that one must have a broader context for understanding what it means to make an informed decision in the courtroom.

have highlighted ways in which a lawyer's duty to safeguard the rights of the accused is impacted by real world factors, particularly the amount of caseloads that an assigned attorney must carry. Offices have engaged in various methods for trying to ensure effectiveness by limiting caseloads, including policy oriented work, lobbying, class action lawsuits, and strike protest actions.\textsuperscript{114} Just as a lawyer might push to change a state defender system that assigns her too many cases to provide high-quality representation, defense lawyers can challenge other system-wide, state-imposed barriers to high-quality representation, such as conditions in jails.

i. Defense Counsel Protects its Ability to Counsel

Defender offices have also played an integral part in protecting an individual's ability to communicate with counsel and reason through decisions regarding their case. For instance, in \textit{Benjamin v. Fraser}, New York City's Legal Aid Society office brought a lawsuit against the New York City Department of Corrections on both their and their clients' behalf.\textsuperscript{115} At the time, the space in the attorney visiting area at the city jails was limited, leading to long waits before attorneys could even see clients. People in the jail were often brought to the visiting area and returned to their cells without seeing a lawyer. If lawyers resorted to calling clients to court to speak with them, individuals were required to get up and be transported predawn to the courthouse where they would spend the day in handcuffs just to meet with their attorney.\textsuperscript{116} Legal Aid lawyers served as key witnesses in the case, since the challenge was centered on the right to consult with counsel.\textsuperscript{117} The lawyers testified during the trial to critical elements of Sixth Amendment violations, including their experience of limited communication and how that impacted their relationships and abilities to work with clients incarcerated at the facility.\textsuperscript{118}

Although the cognitive and psychological consequences of con-

\textsuperscript{114} See id.; defense counsel has engaged in collective action to change systemic caseload injustices, with some actions resulting in work strikes. \textsc{Norman Lefstein, American Bar Assc., Securing Reasonable Caseloads} (2011), http://www.americanbar.org/content/dam/aba/publications/books/ls_schaid_def_securing_reasonable_caseloads.authcheckdam.pdf.

\textsuperscript{115} 161 F.Supp.2d 151 (S.D.N.Y. 2001).

\textsuperscript{116} Id.

\textsuperscript{117} Id.

\textsuperscript{118} Id.
finement discussed in this piece are different from the inability of attorneys and clients from speaking with or hearing each other, both have an impact on the right to counsel and the right to assist in one's own defense. The expansion into advocacy for clients facing other poor conditions of confinement is in line with the historic role of the institutional defender challenging systemic Sixth Amendment violations.

IV. SYSTEMIC HURDLES TO CHANGING CONDITIONS OF CONFINEMENT IN JAIL THROUGH DUE PROCESS CHALLENGES AND TRADITIONAL AVENUES OF PRISON REFORM

Jails are transient spaces. When people enter jail, they have no idea how long their case will last or how long they will be in jail. Once the case is resolved, people are released or transferred. Few people foresee themselves being in the facility again. The lack of stability in pretrial detention centers can cause difficulties for any efforts to reform. Advocates for jail reform know anecdotally that mistreatment occurs in the jail, but potential witnesses and litigants shift quickly out of the facility, making it difficult to gather and document their experiences. Abusive practices at jails during pretrial detention are under-challenged, particularly when compared to conditions-related reform campaigns at post-conviction facilities or prisons. Because of the limitations of prison reform models in jails, integrating jail conditions into criminal court advocacy is necessary to supplement traditional models for jail reform.

A. People Detained During Pretrial have Reduced Incentives to Make a Complaint Compared to People Serving Sentences in Prison

In contrast to people challenging conditions in post-conviction prisons, people undergoing mistreatment in jail have fewer incentives to bring challenges. Public defense offices are in a unique position to facilitate otherwise difficult efforts to address conditions of confinement in pretrial facilities.

For individuals in custody that are considering bringing a challenge, depending on the length of the case, the stint in jail may not be long enough to develop a challenge to mistreatment before the person's release. In the time it takes for a person to recognize an injury as mistreatment, talk it over with a legal expert, investigate and develop the claim, reach out for support, and start the complaint process, people may no longer be held at the facility. People shift so quickly in and out of jail that the organizations working on impact litigation have to con-
continuously restart outreach efforts to find people currently affected by jail conditions. By the time litigators are primed to challenge the particular jail condition, waves of people have likely been transferred or released from the facility.119

While people in jail are subjected to harsh treatment, they may perceive little usefulness in challenging their conditions. People may not expect to spend much time in pretrial detention, thereby diminishing any individual incentives to bring any jail conditions challenges. A person who faces time in prison post-conviction with years to serve her sentence might anticipate that she could be subjected to a particular forms of mistreatment again, and be motivated from fear of repeated mistreatment to challenge the prison practice. Jail is a less permanent community. People may be less invested in reforms that they perceive will not affect them or their immediate community.

For a detained person, success in the criminal court case presents an alternative avenue to alleviating mistreatment in confinement. A person in jail undergoing mistreatment may wisely decide to dedicate her resources (research time, advocacy from supporters in community and family, lawyer’s attention) to the criminal case rather than have those resources diverted in a battle over conditions of confinement. Success in the criminal case and release, a plea that results in being transferred from the jail, or a guilty plea to time served or a short sentence in jail are all resolutions that could potentially get the individual out of the facility and away from the problematic conditions.120

For people undergoing mistreatment in confinement, a number of factors may limit communication with attorneys about their experiences. Individuals undergoing mistreatment may not see their defense advocates as a resource in addressing mistreatment in confinement. Shame attached to experiencing harmful disciplinary sanctions, physical, or sexual abuse in jail may limit disclosures about such experiences. Without being prompted to bring up accounts of mistreatment by their defense attorney, many people may choose to

119 Interview with Barbara Hamilton, Staff Attorney, Legal Aid Society Special Litigation Unit (Apr. 28, 2014).

120 See Anne Morrison Piehl & Margo Schlanger, Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates, 1 J. EMPIRICAL LEGAL STUD. 79, 88 (2004) ("State prisoners are nearly all felony convicts, but even among the jail inmates who stay in jail for more than a day or two, a large portion are pretrial and preoccupied with their pending criminal cases. Accordingly, jail inmates dedicate less attention to noncriminal matters, including civil litigation.").
remain silent. Damien Echols, a man who was formerly imprisoned on death row, articulated the tendency not to disclose conditions of confinement. He explained that he never shared conditions of solitary confinement on death row with his advocate (now his wife) because "without anything she could do about it . . . it would just become a form of torture [for her]."

Attorneys can also discourage disclosures from clients, explicitly or subconsciously. Anticipating an inability to assist, attorneys may shy away from the frustration of efforts to address jail conditions. They might fear damage to the relationship with the client if they cannot effectively change conditions. Further, lawyers might simply find challenging conditions an overwhelming addition to the rigors of providing a good defense on the legal case.

B. Jails have Fewer Self-Advocacy Resources

Fewer challenges to jail conditions, as compared to prisons, may also be attributed to the lack of institutional knowledge amongst those in jails. People in prison usually have legal experts in the prison community that are recognized and known for their expertise. Jailhouse lawyers, who are fluent in legal research and analysis, often work in the prison library and are storehouses of knowledge about mistreatment in the facility prison and potential remedies. In the transitory jail environment, there may be no known easily recognized person on the inside to help guide challenges to abuses. As compared to jails, prisons have more established libraries and greater access to self-help materials.

Organized action has been a dominant vehicle for change in the prisoners rights movement. Significant components of successful prison protests are not available to people in pretrial detention. Chief among these is the role of alliances constructed among incarcerated people. In pretrial detention facilities, the community does not often have identifiable or established leaders, tested strategies for unifying detainees, or meeting space necessary to identify and name shared systemic injustices. The roll-out of a single action, especially in the community

123 See generally Smyth, supra note 112.
education and recruitment stages, requires more time than feasible for those in jail.

C. Federal Claims are Constrained by Prison Litigation Reform

Even when litigation is feasible, it may not alleviate conditions of confinement in jails. Jail conditions of confinement cases are procedurally different than prison cases, in that they should be construed as Due Process challenges rather than Eighth Amendment challenges. The Due Process requirements can be arduous to meet. In practice, when evaluating the mistreatment, the standards from post-conviction, Eighth Amendment challenges to cruel and unusual punishment are often applied. When courts apply post-conviction Eighth Amendment standards to the treatment of pretrial detainees, they often require a high level of egregious behavior in order to be actionable.

The Prisoner Litigation Reform Act (PLRA), signed into law by President Clinton in 1996, shut down what lawmakers perceived as a flood of frivolous lawsuits by incarcerated people about conditions of confinement in the nation's prisons. This law limited awards and types of claims, imposed exhaustion requirements, and gave courts leeway to dismiss claims they deemed frivolous at the onset of the suit. During the introduction of the PLRA in 1995, Senator Kyl complained, "the most crowded place in today's prisons may be the law library." The senator continued, "In the words of the Third Circuit Court of Appeals, suing has because [sic], recreational activity for long-term residents of our prisons."
This image of the mellow prison life and frivolous prisoner complaints was an important factor in the passage of PLRA. Lawmakers envisioned people idling away years in prison, spinning dead time into daydreams of monetary awards. Their rationale failed to consider the claims arising from people temporarily imprisoned in pretrial detention centers.

People held in the jail pretrial are not at the jail facility for predetermined expanses of time. Usually, people are there for relatively short periods of time, focused on defending themselves in their criminal cases and regaining their liberty. The difficulties in filing cases in prison litigation reform regimes results in jails being protected from inspection and challenges to abusive conditions. Under the PLRA, jails have the ability to defend themselves against claims that have not met requirements that can be quite time consuming for detainees to fulfill. For instance, with some exceptions, a defendant facility can point to a detainee’s “failure to exhaust administrative remedies” as an affirmative defense before the court will even get to the merits of the case. The exhaustion requirement means that a petitioner has to appeal their complaint up the entire chain of command at the local jail before they can file a complaint in the court, a difficult task for someone to complete before leaving the jail. Few pretrial detainees, particularly those that have not been at the facility for a long time, will be aware of the process for filing complaints. People must have some familiarity with the jail staff and the administrative hierarchy to successfully appeal the case up the chain of command. The exhaustion requirement also incentivizes jails to be increasingly bureaucratic in terms of creating filing requirements: the more complex the filing procedures, the more difficult exhaustion becomes for complainants. If a person attempting to exhaust administrative remedies makes a mistake, such as filling out the paperwork incorrectly, the improper filing is a valid reason for the jail to ignore the complaint and to argue in court that the petitioner did not meet the exhaustion requirement.

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131 See id; bill proponents also argued that convicted criminals deserved many of the hardships they complained of in prison, a disturbing justification that does not apply to pretrial detainees.

132 Altan and Bundy, supra note 70 (at Rikers, 85% of people are awaiting trial).

D. Finding Potential Plaintiffs is an Obstacle for Litigators

One basic difficulty with creating change through jail reform litigation is that civil legal organizations and impact litigation offices have difficulties maintaining ties with harmed individuals and/or potential witnesses after they leave jail. A litigator must maintain a stable connection to such affected people not only in order to establish named plaintiffs in a lawsuit, but also to acquire testimony from first-hand witnesses.

Freed litigants are more attractive plaintiffs for such suits. Plaintiffs do not have to exhaust administrative remedies, they are not limited to recovery for “physical injury”, and they can request attorney’s fees. Many of the people incarcerated in jails may not have stable contact information at the time they arrive at the jail. The factors that make people vulnerable to arrest and detention, such as lack of access to stable housing, employment, and mental health treatment, can also make it hard to find people. Many people exiting the jail return to unstable living situations, often exacerbated by their time in confinement. Being held in jail or convicted further increases the chance that a person has lost her home or is not likely to be at the phone number reported at the time of arrest. People that are no longer in the facility may not feel incentivized to relive the trauma and abuse they experienced in jail through a lawsuit, especially when compensatory relief is restricted by tort reforms.

Potential advocates for those mistreated while held in pretrial detention, such as defense attorneys, family members, formerly jailed individuals, and civil rights activists, know that these abusive practices exist. Attorneys surveyed about an issue at a local jail may know anecdotally that a practice occurs, but unless they are collecting names and documenting abuses as a part of their practice, they may not be able to recall precisely which clients have been affected by mistreatment over the years, thereby limiting chances for effective reform.

134 Interview with Barbara Hamilton, supra note 119.
135 Id.
136 42 USC § 1997e (People that are no longer in the jail are not subjected to the requirements of PIRA. 42 USC § 1997e(h) defines “prisoners” as “any person incarcerated or detained in any facility”).
137 Interview with Barbara Hamilton, supra note 119.
138 Id.
V. BENEFITS OF A SIXTH AMENDMENT FRAMEWORK FOR CHALLENGES TO CONDITIONS

A. Sixth Amendment Challenges Capture the Immediate Attention of Stakeholders in Criminal Court

Ultimately, the link between Sixth Amendment protections and conditions of confinement is not simply a convenient justification for publicizing abusive conditions. The core of “holism”—feeling human and hearing and addressing the needs of a fellow human—means that conditions of confinement have to be considered in a holistic criminal defense practice. Mistreatment while in pretrial detention destabilizes physical, mental, and emotional health during the criminal court case, which is precisely when an individual most needs her ability to reason and make sound strategic decisions. Public defense offices have an interest in investigating and unearthing the inhumane treatment of individuals in jail. To do so lays bare the economic and racial inequalities, humiliation, and repression of agency intertwined in pretrial detention. Incarceration is the antithesis to the exercise of the right to a fair trial.

If torts claims have limited success, and defense counsel are the ones who see the impact of confinement, the Sixth Amendment is the best tool for defense counsel to challenge these conditions. While mistreatment in jail may not currently be a clear basis for reversal of a criminal court holding, much of the power of a Sixth Amendment claim is simply in naming a constitutional violation in the courtroom. Claims of constitutional violations, particularly assertions of ineffective assistance of counsel that might require a new trial, grab the attention of the court. Judges are often more attentive to claims of constitutional violations that have the potential to undermine proceedings. Similarly, where avoidable, prosecutors want a record free from obvious error, as they wish to avoid having convictions overturned. Another powerful aspect of naming jail abuses in court and linking them to Sixth Amendment protections is increased awareness in the courts of these practices, which can ultimately result in the courts being held publicly accountable for bail and pretrial detention decisions. Such a looming responsibility may alter the calculus of judges making bail decisions and shift some courts’ default reliance on pretrial detention.

Traditionally, criminal court judges have been immediately responsive to defense attorney claims that a jail has interfered with a client’s right to effective assistance of counsel by not allowing for adequate
consultation. All players in the criminal courtroom, particularly those interested in finality, have an interest in the attorney's ability to speak with the client to make informed decisions about the case. Linking conditions of confinement to the Sixth Amendment right to counsel integrates concerns about efficiency and finality of proceedings to advocating for reforming jail conditions. Judges and prosecutors may also be swayed to collaborate in relief efforts by reversing certain faulty decisions during the proceedings or remanding cases where distress has been proven. By persuading stakeholders in courts that a person faces serious mistreatment in detention, those that have the power to change these conditions might do so immediately, without cause for a separate civil action.

B. Encourage the Public to Question Courts' Reliance on Pretrial Detention

Our criminal courts should be operating with accurate and vivid testimony about the realities of pretrial detention. Courts should be pushed to weigh bail decisions with as much information about the consequences of life in jail as possible. They should be aware that the impact of mistreatment in pretrial detention can also result in infringements on protections that are crucial when navigating the criminal court system. The public should demand that courts and policymakers operate in the full light of the truth of the mistreatments that occur.

In New York City, the tragic death of a young man named Kalief Browder provided an example of public awareness about local jail conditions. His solitary confinement in particular led to a policy change from the city administration. Kalief Browder was imprisoned at Rikers Island and isolated in solitary confinement for years following a charge that was ultimately dropped. Videos from the facility emerged that showed him brutalized by correctional staff and neglected during his imprisonment. These recordings surfaced with the assistance of journalists following the case. Subsequent to his release, the young man struggled with psychological injuries he incurred from the mistreat-

141 Id.
142 Id.
ment, ultimately resulting in his death by suicide.¹⁴³ The story of his life and experience with pretrial incarceration has sparked public pressure for jail reform.¹⁴⁴ Months after his death, the city reformed bail setting practices to reduce the amount of people held in jail before trial.¹⁴⁵

The movement to address mistreatment in jail is gathering steam. Though advocates do not often tie jail conditions to their impact on an individual criminal case, a few public defense offices have engaged in public awareness campaigns about conditions in local jails. In some instances, public defense offices have compiled testimony to bring to light the stories of clients who face mistreatment in jail. By associating the harm suffered to the constitutional guarantees of a fair trial, lawyers who publicize conditions of confinement play a role in ending the rampant reliance on pretrial detention.

CONCLUSION

In most jails, protocol requires one who temporarily leaves their solitary confinement cell to first put their hand through a slot for an officer to cuff them. While in the shower, recreation areas, and often in counsel visiting areas, they remained cuffed and tethered with chains, caged in wire, or under constant surveillance. These restraints are the physical manifestation of the total constraints on life in solitary confinement. Isolation and all forms of mistreatment in jail incapacitate people both psychologically and cognitively. Devastatingly, these abuses occur when people need these abilities the most. Trauma has a demonstrated impact on the ability of people to narrate from memory, communicate with counsel, and make decisions.

Defense attorneys are first-hand witnesses to the connection between the effects of abuse in jail and the ability to access the Sixth Amendment right to counsel. As long as the psychological restraints imposed by jails are under-exposed and under-challenged, people without the means to afford bail, people who we presume are innocent, will continue to suffer both the degradation of abuse and the consequences on their defense. By expanding the purview of defense work to conditions of confinement, attorneys deepen the definition of holistic work

¹⁴³ Id.
¹⁴⁴ Id.
on issues integral to the client's needs and her criminal case. Public defense offices can document the abuses, expose the realities of detention in the criminal courtroom, analyze the constitutional violations, and inform the broader public of these practices. In challenging the abusive conditions of pretrial detention, or pretrial detention itself, defense attorneys achieve their professional objectives by removing limitations on clients from creating their own defense.