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# READING THE PRISONER'S LETTER: ATTORNEY-CLIENT CONFIDENTIALITY IN INMATE CORRESPONDENCE

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*No one in our society has a more compelling need to communicate in complete confidence with a lawyer than a prisoner, when challenging a conviction as wrongful or prison conditions as unlawful. No one has a greater need to be able to engage in the uninhibited discussion of highly personal matters, tragic events, and official misconduct. A prisoner's constitutional rights to freedom of speech, access to the courts, due process, and assistance of counsel are placed in unique jeopardy when a correctional system insists on prying into the substantive contents of legal mail.*

*In this Article, we explain the vital need for confidentiality in prisoner correspondence with legal counsel to avoid chilling prisoner expression and allow lawyers to ethically and effectively represent prisoners; survey the written policies of the nation's correctional systems regarding legal mail; describe and analyze the constitutional protections for prisoners in confidential correspondence with lawyers through the rights of free speech, due process, access to the courts, and assistance of counsel; and address the procedural steps and obstacles for a prisoner to seek relief from the courts when that confidentiality is breached by prison policies or practices.*

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TABLE OF CONTENTS

## INTRODUCTION

> [E]ven in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection . . . .[1]

Death row has historically been a lonely place. And for most of its history, death row in Arizona was a "uniquely severe environment."[2] Each

[1] Lanza v. New York, 370 U.S. 139, 143–44 (1962).

[2] Brief of the Arizona Capital Representation Project as Amicus Curiae in Support of Plaintiff-Appellant and in Favor of Reversal at 6 (authored by Amy Armstrong and Natman Schaye), Nordstrom v. Ryan, 762 F.3d 903 (9th Cir. 2014) (No. 12-15738). In recent years, judges have suggested that systems of solitary confinement may impose torture in violation of

inmate lived in a single cell—11' 7" by 7' 9"—with a combination toilet/sink, a desk, a stool, and a hard platform for a bed.[3] The cell was constantly and brightly illuminated through the day and night.[4] Poor airflow and humid conditions produced "a foul and stagnant smell."[5] The condemned were denied contact with any other prisoner, received their meals through the cell door, and were confined for up to 23 hours a day, other than when they were moved in full restraints to another no-contact secured area for shower or exercise.[6] A description of solitary confinement by a former inmate in another prison captures the isolation experienced by the men in the death row unit in Florence, Arizona:

> There was nothing to hear except empty, echoing voices from other parts of the prison. . . . There was no touch. My food was pushed through a slot. Doors were activated by buzzers, even the one that led to a literal cage directly outside of my cell for one hour per day of 'recreation'. . . . Losing [human] contact, you lose your sense of identity. You become nothing.[7]

Prisoners in such strictly controlled isolation may go for years "without experiencing any form of touch beyond the chaining and unchaining of wrists through the cuffport in the door."[8] Solitary confinement becomes "a form of living death," leaving inmates so separated from any social life that they are at great risk of profound psychological distress.[9]

In 2011, Scott Nordstrom was entering into his fourteenth year languishing in his segregated maximum security cell on the Arizona death row. Into the figurative darkness of solitary incarceration (while subject

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the Eighth Amendment. *See* Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (observing that "[y]ears on end of near-total isolation exact a terrible price" and suggesting that the judiciary may need to evaluate whether alternatives are workable and constitutionally required); Porter v. Clarke, 290 F. Supp. 3d 518, 521 (E.D. Va. 2018) (holding that long-term imposition of solitary confinement on death-row inmates violates the Eighth Amendment). Subsequent to the events narrated above, the Arizona Department of Corrections settled a constitutional challenge to solitary confinement, brought by Scott Nordstrom, by allowing death row inmates to seek re-classification into close custody conditions equivalent to those for other inmates. Stipulation and Notice of Settlement at 2, Nordstrom v. Ryan, No. 2:15-cv-02176 (D. Ariz. Mar. 3, 2017).

[3] Complaint at 6, Nordstrom v. Ryan, No. 2:15-cv-02176 (D. Ariz. Oct. 28, 2015).

[4] *Id.*

[5] *Id.*

[6] *See* Brief of the Arizona Capital Representation Project as Amicus Curiae, *supra* note 2, at 7.

[7] Five Omar Mualimm-ak, *Solitary Confinement's Invisible Scars*, THE GUARDIAN (Oct. 30, 2013).

[8] LISA GUENTHER, SOLITARY CONFINEMENT 164 (2013).

[9] *Id.* at xii. *See generally* Davis v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (describing the "human toll wrought by extended terms of isolation").

literally to constant illumination even at night)[10] had come a metaphorical ray of sunshine. With newly-discovered evidence of prosecutorial misconduct, Nordstrom finally had reason to hope that the courts might re-hear his case.

From the beginning, Scott Nordstrom had steadfastly maintained his innocence in the murders of six people during two robberies in Tucson, Arizona in 1996.[11] His brother David Nordstrom had initially been arrested for the murders, but immediately sought to cast the blame in another direction.[12] Later, having accepted a generous plea agreement for a short prison term, homicide-suspect-turned-prosecution-witness David insisted that his similar-appearing sibling Scott was the one who had committed the crimes along with Robert Jones.[13] With no fingerprint or trace evidence from the crime scenes, David became the star witness for the prosecution in securing a conviction and death sentence against Scott.[14]

At Scott Nordstrom's trial, the prosecutor had vouched for brother David's alibi at the time of the second robbery as "rock solid" because he was being electronically monitored on home arrest at night as part of his early release from prison.[15] The prosecutor represented to the jury that electronic monitoring records showed David was home at the time of the second robbery and that tests conducted on the monitoring system showed it could not be defeated.[16]

More than a decade later, Scott Nordstrom's claim of wrongful conviction was given new life after the man who prosecuted him unexpectedly died while under ethics investigation by the state bar.[17] Found in the office files of that deceased prosecutor were records that called into question the state's assertions that the prosecution's lead witness, David Nordstrom, had an air-tight alibi, including witnesses to his statements that he regularly evaded electronic monitoring.[18] The prosecutor had also

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[10] Brief of the Arizona Capital Representation Project as Amicus Curiae, *supra* note 2, at 7 ("Cells are often illuminated 24 hours a day, making it difficult for inmates to sleep.").

[11] A.J. Flick, *Compromised Conviction? Death Row Inmate Scott Nordstrom Maintains He's Innocent and Plans an Appeal*, TUCSON WKLY. (Aug. 27, 2009).

[12] *Id.*

[13] Appellant's Opening Brief at 12–14, State v. Nordstrom, 280 P.3d 1244 (Ariz. 2012) (No. CR-09-0266-AP); *David Nordstrom's Deal*, TUCSON CITIZEN (June 5, 1997); *Tucson Nears 15th Anniversary of Killing Spree*, KGUN TV (June 11, 2011).

[14] *Id.*

[15] Appellant's Opening Brief, *supra* note 13, at 12.

[16] *Id.* at 3, 58.

[17] Patty Machelor, *2nd County Prosecutor Accused of Misconduct*, TUCSON CITIZEN (July 24, 2001); Flick, *supra* note 11.

[18] Flick, *supra* note 11; Appellant's Opening Brief, *supra* note 13, at 12–14.

provided false information and concealed the suggestive procedures used by police to elicit identification from an eyewitness.[19] In addition, the prosecutor had withheld witness reports to police indicating another party was involved in the homicide.[20] Together with other evidence and witness information, Nordstrom hoped that his long struggle for justice might finally attract judicial attention.[21]

Standing alone against the State and isolated in his segregated death row cell, Scott Nordstrom took pen in hand to write a confidential letter to his only ally—the court-appointed attorney for his criminal appeal from re-sentencing. After writing a handwritten letter sharing sensitive information, Nordstrom put it into an envelope marked "legal mail" and addressed it to his court-appointed lawyer.[22] He handed it to a correctional officer to be mailed, only to watch the officer proceed to read the letter.[23] As later described by a court,[24] when Nordstrom objected, "the guard told him to go pound sand" and said that he was authorized to "search the legal mail for contraband as well as scan the content of the material to ensure it is of legal subject matter."[25] When Nordstrom complained about this intrusion into attorney-client communications in a prison grievance, the Director of the Arizona Department of Corrections responded that staff are "*not prohibited from reading the mail* to establish the absence of contraband and ensure the content of the mail is of legal subject matter."[26]

This interception and reading of a confidential letter to counsel occurred during the critical stage of the direct appeal from the re-sentencing to death.[27] This dispute thus arose just as Nordstrom was trying to develop a rapport with his attorney through the exchange of highly sensitive information in an appeal involving poignant and troubling questions of family betrayal and prosecutorial misconduct.[28] Moreover, Nordstrom found himself in the difficult position of opposing the state's law enforcement establishment to accuse a prominent prosecutor of withholding evidence and presenting false

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[19] Petition for Post-Conviction Relief at 18–32, Nordstrom v. Ryan, No. CR-55947 (Ariz. Superior Ct. June 20, 2015).

[20] *Id.*

[21] Appellant's Opening Brief at 12–14, State v. Nordstrom, 280 P.3d 1244 (Ariz. 2012) (No. CR-09-0266-AP); Flick, *supra* note 11.

[22] Nordstrom v. Ryan, 762 F.3d 903, 906–07 (9th Cir. 2014).

[23] *Id.* at 907.

[24] *Id.* at 906.

[25] *Id.* at 907.

[26] *Id.*

[27] *See id.*

[28] *See* Appellant's Opening Brief at 3–40, State v. Nordstrom, 280 P.3d 1244 (Ariz. 2012) (No. CR-09-0266-AP).

evidence to the jury to secure a conviction and death sentence—only to then discover that their law enforcement brethren in the prison would be looking over his shoulder when he wrote to his lawyer.

Any prison policy or practice of reading legal mail constitutes a deliberate and direct intrusion by the government into the attorney-client relationship in violation of a prisoner's constitutionally-protected rights to confidential communications with and effective assistance of counsel.[29] Not surprisingly, then, every federal court of appeals to address the question has held that it is "a violation of an inmate's constitutional rights for the prison officials to read legal mail."[30] But even as the foundations for protection of prisoner legal mail have been fixed ever more firmly in place, some judges remain reluctant to bar prison officials from reading the contents of legal mail,[31] and abusive interference with legal mail by prison personnel persists.[32]

In this Article, we explain the vital need for confidentiality in prisoner communications with legal counsel to avoid chilling prisoner expression and allow lawyers to ethically and effectively represent prisoners;[33] survey the written policies of the nation's correctional systems regarding legal mail that respect attorney-client confidentiality;[34] describe and analyze the constitutional protections for prisoners in confidential correspondence with lawyers through the rights of free speech, due process, access to the courts, and assistance of counsel;[35] and address the procedural steps and obstacles for a prisoner to seek relief from the courts when that confidentiality is breached by prison policies or practices.[36]

## I. CONFIDENTIALITY IN ATTORNEY-CLIENT CORRESPONDENCE WITH PRISONERS

> It takes no stretch of imagination to see how an inmate would be reluctant to confide in his lawyer about the facts of the crime, perhaps other crimes, possible plea bargains,

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[29] *See generally* Gregory C. Sisk, *Legal Ethics and the Practice of Law* § 4-9.12(c)(3)*, in* LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 632–33 (2018) (discussing the interception by government of privileged communications).

[30] *See* Lemon v. Dugger, 931 F.2d 1465, 1467 (11th Cir. 1991); *see also* Al-Amin v. Smith, 511 F.3d 1317, 1326–32 (11th Cir. 2008) (surveying legal mail decisions); *see generally* 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 12:26 (4th ed., 2012).

[31] *See infra* notes 232–252 and accompanying text.

[32] *See infra* notes 319–321 and accompanying text.

[33] *See infra* Part I.

[34] *See infra* Part II.

[35] *See infra* Part III.

[36] *See infra* Part IV.

> and the intimate details of his own life and his family members' lives, if he knows that a guard is going to be privy to them, too.[37]

## A. ATTORNEY-CLIENT CONFIDENTIALITY IN GENERAL

Confidentiality is "the cornerstone" of the attorney-client relationship.[38] As attorneys, we serve as confidants in whom our clients may repose trust. If the client were fearful of disclosure of communications, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."[39] Because clients are guaranteed confidentiality, they are willing to share their most private thoughts and relate the most sensitive and embarrassing information, secure in the knowledge that what has been shared will be safeguarded.

Confidentiality is necessary both to build a strong and trusting attorney-client relationship and to ensure that the lawyer obtains the information necessary to represent the client well. As the Supreme Court recently reiterated, "the need for confidence" is an essential ingredient of that constitutionally-protected attorney-client relationship.[40] Without such "private consultation," the client "does not enjoy the effective aid of counsel."[41]

Intrusion by an outsider into privileged communications is demoralizing to any ethically responsible lawyer and may discourage that lawyer from accepting or continuing the representation. A lawyer has an ethical duty to ensure that communications with a client are kept confidential.[42]

Moreover, the vital attorney-client privilege may be lost when communications are not made in confidence.[43] If a third person may intercept the message, the communication is not in confidence and the privilege does

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[37] Nordstrom v. Ryan, 762 F.3d at 910.

[38] Sisk, *supra* note 29, § 4-6.1, at 305.

[39] Fisher v. United States, 425 U.S. 391, 403 (1976); *see also* AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 149–50 (3rd ed. 1993) ("Without [confidentiality], the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution.").

[40] Luis v. United States, 136 S. Ct. 1083, 1089 (2016) (plurality).

[41] Nordstrom v. Ryan, 762 F.3d at 910 (quoting Coplon v. United States, 191 F.2d 749, 757 (D.C. Cir. 1951)).

[42] *See* Rule 1.6(c), MODEL RULES OF PROF'L CONDUCT (2016) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.").

[43] *See generally* Sisk, *supra* note 29, § 4-6.3(b)(4), at 322 ("The privilege is lost, or really never comes into being, if the communication is not made in secret.").

not attach.[44] Thus, for example, if a person makes statements over the phone to his attorney while in the presence of police officers searching his residence, those statements are admissible against him in a later criminal case.[45]

As the Ethics Bureau at Yale stated in an amicus brief in the context of confidentiality in legal mail between attorneys and prison inmates:

> By forcing lawyers to violate client confidentiality, the [prison policy permitting correctional staff to read legal mail] also precludes lawyers from fulfilling four additional ethical duties: to communicate openly with clients, to respect clients' autonomy, and to provide competent as well as diligent representation.[46]

The Yale Ethics Bureau concluded that the lawyer faced with an irreconcilable dilemma of an unavoidable intrusion into the confidentiality of attorney-client communications must then withdraw from the representation.[47]

The lawyer's duty to protect against the risk of interception of confidential communications is well-illustrated by recent controversies involving client communications through an employer's email system. In the past several years, several courts have denied the protection of the attorney-client privilege to communications sent by an employee through an employer's computer network.[48] If the company policy grants the employer the right to access electronic messages and files, the privilege may be denied for electronic communications between an employee and a lawyer as not having been made in confidence.[49]

Responding to these cases, the American Bar Association's Standing Committee on Ethics and Professional Responsibility directs lawyers to warn clients of the risk of sending electronic communications where there is a

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[44] *See* In re Jordan, 500 P.2d 873, 879 (Cal. 1972) (invalidating prison review of legal mail because "letters read by mailroom guards would not be 'confidential' within the meaning of [the statutory privilege] and the inmate could not claim the privilege").

[45] United States v. Gann, 732 F.2d 714, 722–23 (9th Cir. 1983).

[46] Brief of the Ethics Bureau at Yale as Amicus Curiae at 3 (authored by law students under the supervision of Lawrence Fox and Kelly A. Kszywienski), Nordstrom v. Ryan, 762 F.3d 903 (9th Cir. 2014) (No. 12-15738).

[47] *Id.* at 17–19.

[48] *See* Gregory C. Sisk & Nicholas Halbur, *A Ticking Time Bomb? University Data Privacy Policies and Attorney-Client Confidentiality in Law School Settings*, 2010 UTAH L. REV. 1277, 1286–93; Paula Schaefer, *Technology's Triple Threat to the Attorney-Client Privilege*, 2013 PROF. LAW. 171, 176–78 (2013).

[49] *See, e.g.*, Peerenboom v. Marvel Entm't, LLC, 148 A.D.3d 531 (N.Y. App. Div. 2017); Aventa Learning, Inc. v. K12, Inc., 830 F. Supp. 2d 1083, 1107–10 (W.D. Wash. 2011); Holmes v. Petrovich Dev. Co., 119 Cal. Rptr. 3d 878, 883, 893–99 (Cal. Ct. App. 2011); Scott v. Beth Isr. Med. Ctr. Inc., 847 N.Y.S.2d 436, 438–41 (N.Y. Sup. Ct. 2007); Kaufman v. Sungard Inv. Sys., No. 05-CV-1236, 2006 WL 1307882, at *4 (D.N.J. May 9, 2006).

significant risk that a third party may gain access, with specific reference to the scenario of an employee using an employer's computer system.[50]

## B. ATTORNEY-CLIENT CONFIDENTIALITY AND THE INMATE

The inmate is in a most vulnerable position when it comes to attorney-client confidentiality because she is entirely dependent on the prison establishment to confidentially transmit correspondence to and from her counsel, allow unmonitored telephone calls with counsel, and arrange for attorney-client meetings in a confidential setting. When, for example, an inmate knows that correctional officers will be reading or skimming letters to counsel, the inmate cannot be candid with the lawyer. This is especially true when the inmate is revealing information contrary to the interests of the government or needs to share sensitive personal information that could be used against her by the correctional officer or others in the prison for leverage or control or simply for teasing.

Moreover, when confidentiality is compromised by invasive prison rules or practices, the attorney may face an ethical dilemma and could be obliged to withdraw. Even if willing to persevere in such a representation, the lawyer would be forced to limit the number and scope of communications, to speak indirectly and avoid sensitive subjects, to leave much unsaid altogether, and to discourage the client from saying or writing anything that might be used by the opposing side.

Knowing of a prison's refusal to respect confidentiality and faced with awkward restrictions on communications, the client would likely lose any remaining trust in both the lawyer and the judicial system. And the lawyer would be deprived of information that may be helpful, even essential, to avoid or overturn a conviction or secure a lesser sentence or to effectively challenge abusive prison conditions. As a result, the inmate client may actually or effectively be deprived of legal representation.

### *1. The Prisoner's Need for Confidentiality in Legal Communications*

A prisoner challenging the prison's failure to provide basic medical care should not have to submit his legal correspondence to a correctional officer who will search its contents and evaluate whether complaints about adequate medical care are sufficiently legal in nature. A prisoner who has been sexually abused by a guard should not be forced to hand his letter seeking help from his attorney to that very same guard if she is authorized to read or skim its contents. A death row inmate challenging a wrongful conviction

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[50] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11–459 (2011).

should not be required to allow agents of the State that seeks to execute him to look over his shoulder when he writes a letter to his attorney.

In an amicus brief in a prisoner legal mail case, the Equal Justice Initiative summarized well the necessity of confidentiality in attorney-client legal mail for effective representation of prisoner clients in post-conviction matters:

> Confidential correspondence with prisoners serves multiple purposes. It builds trust with clients whose prior experience with the legal system can result in distrust of lawyers. It provides a secure outlet for people who cannot safely talk with anyone around them about their cases. Perhaps most importantly, written correspondence provides an efficient, inexpensive, reliable way for prisoners and their lawyers to communicate about the myriad facts and details that are critical to building a postconviction pleading.[51]

Even before a formal attorney-client relationship has been created, correspondence by a prisoner to a lawyer may be essential to seek assistance with a problem or by a lawyer to provide notice of prisoner rights. In *American Civil Liberties Union Fund of Michigan v. Livingston County*,[52] the Sixth Circuit firmly rejected a jail's argument that it was required to respect legal mail only after a prisoner designated a particular attorney as his counsel.[53]

When a lawyer writes to the prisoner client, the purpose is both to fortify the client's emotional standing and to exchange information vital to the representation. "It takes little more than common sense to realize that a tender note, so important to the morale of the incarcerated individual, might never be penned if the writer knew that it would first be scrutinized by a guard."[54] Lawyers at the Equal Justice Initiative report that prisoner correspondence with counsel "cover a range of topics, from case-specific legal strategy to painful struggles with mental illness and childhood sexual abuse, revelations of guard-on-inmate assaults, and allegations about toxic mold in prison dorms."[55]

If this information were to be disclosed, especially when provided by a vulnerable prisoner, the correspondent could be subject to exploitation by

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[51] Brief of The Equal Justice Initiative as Amicus Curiae at 8 (authored by Bryan A. Stevenson, Carla C. Crowder, and Benjamin H. Schaefer), Nordstrom v. Ryan, 762 F.3d 903 (9th Cir. 2014) (No. 12-15738).

[52] 796 F.3d 636 (6th Cir. 2015).

[53] *Id.* at 644–45.

[54] Wolfish v. Levi, 573 F.2d 118, 130 (2d Cir. 1978), *rev'd on other grounds,* Bell v. Wolfish, 441 U.S. 520 (1979).

[55] Brief of The Equal Justice Initiative as Amicus Curiae, *supra* note 51, at 9.

either fellow prisoners or by corrections officers and staff.[56] And when the inmate is challenging prison conditions or abusive conduct by prison staff, the risk of direct retaliation would chill any inmate from communications that are not protected by confidentiality. As the United States Court of Appeals for the Ninth Circuit observed:

> [P]risoners' 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.[57]

Even if the information is not used against the prisoner, the loss of confidentiality impairs the attorney-client relationship and leaves the attorney in an untenable situation. As the Ethics Bureau at Yale observed, "it is the tangible risk, rather than actual use of confidential information by a third party, that triggers the lawyer's breach of the duty of confidentiality. . . . The interception itself is the evil from which lawyers must protect their clients."[58]

The need for a free, open-ended, and confidential exchange is at its greatest when a lawyer is representing a prisoner on death row. "From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."[59] To ensure the scrupulous accuracy of factual findings and the legal justifiability of a sentence of death, a capital defendant's right to confidentiality in communications with counsel must be protected against all forms of interference by the State.

"Developing an effective relationship may be counsel's most difficult task in a capital case."[60] Indeed, the failure to effectively represent the death penalty client is most likely to be attributable to "bad lawyering" by failing to establish a trusting attorney-client relationship.[61] As the American Bar

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[56] *See id.* at 16 ("Confidential communication is therefore critical to protect vulnerable, younger prisoners from the repercussions of their personal histories falling into the wrong hands."); *see also* Vasquez v. Raemisch, 480 F. Supp. 2d 1120, 1140 (W.D. Wis. 2007) (noting that if prison officials are allowed to read "sensitive legal communications," prisoners may be chilled in expression "out of fear of retaliation or embarrassment").

[57] Hayes v. Idaho Corr. Ctr., 849 F.3d 1204, 1210 (9th Cir. 2017).

[58] Brief of the Ethics Bureau at Yale as Amicus Curiae, *supra* note 46, at 8.

[59] Gardner v. Florida, 430 U.S. 349, 357–58 (1977).

[60] Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 322 (1983).

[61] American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, *in* 31 HOFSTRA L. REV. 913, 1009 (2003).

Association guidelines for lawyers in capital cases advises, "[s]imply treating the client with respect, listening and responding to his concerns, and keeping him informed about the case will often go a long way towards eliciting confidence and cooperation."[62]

The sacrosanct confidentiality of the attorney-client relationship encourages clients to share the most intimate—and perhaps painful or embarrassing—details of their lives with their lawyers.[63] And when an individual is facing a death sentence, every aspect of the person's life becomes pertinent, not only in trying to establish innocence, but in parsing out what might be considered mitigating factors for capital punishment proceedings.[64]

A criminal defendant who is facing a death sentence for capital murder must be free to share the most intimate details of his life history, safe in the assurance that no one other than his lawyer will be able to peruse his statements. Counsel in a capital case are directed to "engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case."[65]

Moreover, death row prisoners—and indeed any vulnerable prisoner—must be regularly evaluated to ensure an understanding of legal proceedings and the mental health necessary to meaningfully participate in the matter. As the Arizona Capital Representation Project explained in an amicus brief in a legal mail case:

> Critically, such monitoring frequently includes correspondence that may not appear to a corrections officer to be strictly legal. For example, defense counsel may inquire into her client's sleeping habits, television watching, hobby activities, which pen pals he is writing to, and whether he is experiencing any medical problems. Such information, particularly when monitored consistently over a period of time, can provide the defense team with valuable insight into the client's daily life and whether he is experiencing symptoms of physical or mental illness that may impact the litigation. Moreover, inquiring about the client's daily life is an important part of building rapport.[66]

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[62] *Id.*

[63] *See* Brief of the Arizona Capital Representation Project as Amicus Curiae, *supra* note 2, at 1 ("To provide effective assistance, capital defense counsel must persuade their clients to talk about their most horrifying and shameful personal and family experiences.").

[64] *See* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (holding that the sentencer must "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death;'" (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion))).

[65] *ABA Guidelines*, Guideline 10.5(C), *in* 31 HOFSTRA L. REV. at 1005.

[66] Brief of the Arizona Capital Representation Project as Amicus Curiae, *supra* note 2, at 9–10.

### *2. The Impact of Invasive Prison Legal Mail Rules on the Availability of Legal Counsel for Prisoners*

The attorney market for prisoner cases, whether civil or criminal, is hardly dynamic and competitive.[67] As the Equal Justice Initiative explained in an amicus brief:

> As the prison population has expanded from 300,000 people in 1972 to 2.3 million today, the resources available to incarcerated people have become increasingly inadequate. There are very few organizations who are willing and able to provide legal services to this population. This places a burden on existing resources that would be unbearable without the aid of confidential communication through written correspondence with clients.[68]

"Prisoner cases are particularly unpopular" and the courts rarely can find "counsel willing to represent pro se civil rights litigants."[69] These cases often are difficult, navigating the special procedural restrictions[70] on prisoner complaints is time-consuming and frustrating, and the prospect of meaningful compensation is slim because "the [Prison Litigation Reform Act] restricts the hourly rate for attorneys' fees below market."[71]

For these reasons, it is a most fortunate prisoner who is able to attract legal representation,[72] not only to provide vital litigation experience and knowledge but also to obtain some professional imprimatur of the merits of the case. But the lawyer who learns that the prison will not respect confidentiality in communications with the inmate client, thus impairing the

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[67] *See* Graves v. Arpaio, 633 F. Supp. 2d 834, 847 (D. Ariz. 2009) (describing prisoner case as "undesirable" because "class actions on behalf of prisoners involving the conditions of confinement are exceedingly fact-intensive, time-consuming, and expensive to litigate, and the [Prison Litigation Reform Act] restricts the hourly rate for attorney's fees below market").

[68] Brief of The Equal Justice Initiative as Amicus Curiae, *supra* note 51, at 3.

[69] LaPlante v. Pepe, 307 F. Supp. 2d 219, 223 (D. Mass. 2004); *see also* Kelly v. Wengler, 822 F.3d 1085, 1104 (9th Cir. 2016) (citing district court finding that, "due to the inadequacy" of attorney's fees, attorneys "have been unwilling to accept appointment in prisoner civil rights cases seeking injunctive and declaratory relief"); Roger A. Hanson & Henry W.K. Daley, U.S. DEPT. OF JUSTICE, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* 21 (1994) (for Section 1983 civil rights suits, "ninety-six percent of all prisoners proceed *pro se*; only four percent have counsel whether court appointed or otherwise"), available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=544 [https://perma.cc/65VP-DUHJ].

[70] *See infra* Part IV.

[71] *Graves*, 633 F. Supp. 2d at 847.

[72] *See* Barbara Belbot, *Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?*, 84 PRISON J. 290, 302 (2004) ("The vast majority of prisoner civil rights lawsuits are filed pro se.").

lawyer's ethical responsibilities, will be discouraged from accepting that representation.[73]

And, as the Supreme Court has said, "[l]awyers in criminal cases 'are necessities, not luxuries.'"[74] That necessity becomes an imperative when the defendant in a criminal case faces the ultimate sentence of death. Yet there is a painful shortage of attorneys willing to provide indigent criminal defense, and finding qualified legal representation in capital cases is especially difficult.

As already inadequate budgets for criminal defense for poor defendants are cut further, the number of attorneys volunteering to do such work at poverty wages is far from robust, and willing attorneys encounter crushing caseloads.[75] A report from the American Bar Association found that "thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation."[76] The inevitable consequence is that criminal defendants are held in jail without counsel for lengthy periods, and occasions are on the rise for serious errors in criminal trials.[77]

Even fewer attorneys possess the emotional stamina and are willing and able to devote the time and develop the expertise to represent individuals facing the death penalty:

> [T]he defense of capital cases often requires more expertise, commitment, and resources than individual lawyers are able to offer. . . . The supply of lawyers who are willing to make the sacrifice has never come close to satisfying the desperate needs of the many poor who face the death penalty throughout the country today.[78]

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[73] *See infra* notes 251–252 and accompanying text.

[74] United States v. Cronic, 466 U.S. 648, 653 (1984) (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

[75] *See* Mary Sue Backus & Paul Markus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1039–63 (2006).

[76] American Bar Association Standing Committee on Legal Aid & Indigent Defendants, *Gideon's Broken Promise,* iv (2004), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [https://perma.cc/EK9X-5FVN].

[77] *See* Backus & Markus, *supra* note 75, at 1031–34 (sharing stories of injustice due to inadequate criminal defense).

[78] Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1869–70 (1994); *see also* Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 492–93 (1993).

Defense counsel in capital cases already carry "psychological and emotional pressures unknown elsewhere in the law."[79] For counsel in capital cases to face intrusions into the confidential relationship by prison officials who insist on reading the contents of legal correspondence would be frankly demoralizing and would further discourage attorneys from undertaking this vital work.

### C. THE VITAL IMPORTANCE OF LEGAL MAIL TO THE ATTORNEY-CLIENT RELATIONSHIP

Because of significant burdens on attorneys and restrictive prison rules for personal meetings with prisoners (and especially those on death row),[80] written correspondence is important to maintaining regular communication with a prisoner. Prisons are generally not located in population centers where lawyers have their offices.[81] Attorneys willing to represent prisoners pro bono may be located many hundreds of miles away.[82] For these reasons, the use of confidential mail correspondence is vital to effective representation and indeed for access to legal representation at all.[83]

As explained in an amicus brief by the American Civil Liberties Union, Prison Law Office, and the Arizona Center for Disability Law:

> [O]rganizations that frequently represent prisoners . . . are familiar with the special challenges in communicating with incarcerated clients. In-person visits and phone conversations are extremely limited, and electronic mail is nonexistent. Often the best

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[79] Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357 (1995).

[80] Brief of the Arizona Capital Representation Project as Amicus Curiae, *supra* note 2, at 10 ("[I]n-person visitation is necessarily limited by the restricted legal visitation schedule, geographic, and time constraints.").

[81] *See* Rowe v. Gibson, 798 F.3d 622, 641 (7th Cir. 2015) (referring to "the rural areas where so many prisons are located"); Phillip M. Gentry, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1680 (2003) (discussing the "impact upon family relationships [of prisoners] because prisons tend to be built in remote rural locations").

[82] Brief of The Equal Justice Initiative as Amicus Curiae, *supra* note 51, at 15–16 ("Even when an attorney is willing [to represent a prisoner], that attorney is often based in a location that is hundreds of miles from the prison where their client is housed. In addition, the prison where their client is housed may be hundreds of miles from the courthouses where the case will be heard.").

[83] *See* Al-Amin v. Smith, 511 F.3d 1317, 1333–34 (11th Cir. 2008) (describing importance of legal mail for prisoner communication with lawyers "given their incarceration and often distance from their attorneys").

> and only method of communication is through the legal mail system administered by the institution in which the client is housed.[84]

Even unmonitored telephone communications are no substitute for the use of confidential correspondence between lawyers and inmates. Confidential telephone calls with counsel typically must be arranged in advance and are limited in time.[85] Even more importantly, legal documents, drafts of pleadings, motions and briefs, and written comments on drafts cannot be shared by telephone.

Legal mail is essential to exchange documents and drafts and timely receive feedback from the inmate, thereby upholding the lawyer's ethical duty to regularly inform and consult with the client.[86] As the Ninth Circuit has recognized, "legal representation is by nature a document-heavy enterprise, and the contents of documents cannot always be communicated by phone and should not always be communicated in non-privileged email."[87]

Nor are alternative means for transmittal of litigation documents feasible. The time to arrange in-person meetings and the expense to travel to the prison to share every document, and then to repeat that trip for every change or comment, would soon drain away the energy of even the most zealous attorney, deplete the resources of pro bono organizations, and make it impossible to adhere to court briefing schedules or other timelines.[88] When a prison policy so "burdens counsel with substantially higher costs, representational inefficiencies, and logistical difficulties, necessarily

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[84] Proposed Brief by American Civil Liberties Union as Amici Curiae, Prison Law Office, and Arizona Center for Disability Law at 5 (authored by Donald Specter and Corene Kendrick), Nordstrom v. Ryan, 762 F.3d 903 (9th Cir. 2014) (No. 12-15738).

[85] Cal. Code Reg., Title 15, Div. 3, Subchapter 2, Art. 4 § 3282(g)(1) (2014) ("Confidential calls may be approved on a case-by-case basis by the institution head or designee, upon written request from an attorney on the attorney's office letterhead stationery."); Ariz. Dep't Corrections, Legal Access to the Courts 902.12 (providing that "[l]egal phone calls may be approved when it is reasonable and necessary to do so" and "should not exceed 30 minutes in length"); N.Y. Dep't Corr. & Comm. Supervision No. 4423, IX.B (2014) (providing that "confidential attorney legal calls" "must be requested in writing or over the telephone by an attorney," "the attorney must not have had a legal call with the inmate in the past 30 days," and "the call must not exceed 30 minutes in duration").

[86] *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2013) (requiring a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," "keep the client reasonably informed about the status of the matter," and "promptly comply with reasonable requests for information").

[87] Hayes v. Idaho Corr. Ctr., 849 F.3d 1204, 1210–11 (9th Cir. 2017); *see also* Mangiaracina v. Penzone, 849 F.3d 1191, 1198 (9th Cir. 2017) (explaining, in a prisoner legal mail case, that "criminal cases often involve paperwork that can only feasibly be transported by mail").

[88] *See* Brief of The Equal Justice Initiative as Amicus Curiae, *supra* note 51, at 15-16.

compromising the representation," the policy unconstitutionally deprives the inmate of the right of access to the courts.[89]

Even when a lawyer and prisoner-client have been able to meet in person, follow-up correspondence remains vital to effective legal representation. As the Ethics Bureau at Yale observed in an amicus brief:

> Clients and lawyers are human. Clients often remember additional details or have new ideas after having some time to think about a conversation with counsel, lawyers often forget to ask a question and need to follow up, and lawyers often learn new information or revise their thinking after the conversation, requiring another communication. If barred from written correspondence [because of lack of confidentiality in legal mail], the inmate's lawyer would be forced to schedule a new call or repeat the travel process. If time is of the essence or the client or lawyer thinks (even mistakenly) that the information is not sufficiently critical to justify the effort, the follow up may never occur.[90]

Finally, a prison policy that would deny confidentiality to correspondence while supposedly conferring it for in-person meetings would be perplexing. The special setting of a meeting between a lawyer and an inmate imposes greater burdens and security risks for prison staff, while legal correspondence is comparatively innocuous.[91] If confidentiality truly were guaranteed, meetings and telephone calls pose at least as much risk of transmitting whatever it is that a prison would wish to intercept by reading or scanning legal mail. As the United States Court of Appeals for the Eleventh Circuit has said, a prisoner's "use of the mail to communicate confidentially with attorneys about his cases is not inconsistent with his

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[89] Brief of the Ethics Bureau at Yale as Amicus Curiae, *supra* note 46, at 8 (citing Procunier v. Martinez, 416 U.S. 396, 420 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989), as overturning a prison policy that prevented lawyers from having other employees conduct client interviews, and thus effectively required lawyers to meet with clients in person on every occasion, because the policy "imposed a substantial burden on the right of access to the courts").

[90] Brief of the Ethics Bureau at Yale as Amicus Curiae in Support of Plaintiff-Appellant and in Favor of Reversal at 12 (authored by law students under the supervision of Lawrence Fox and Kelly A. Kszywienski), Nordstrom v. Ryan, 856 F.3d 1265 (9th Cir. 2017) (No. 16-15277).

[91] *See generally* Chesa Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation Policies: A Fifth-State Survey*, 32 YALE L. & POL'Y REV. 149, 160–67 (2013) (describing prison policies to ensure security for in-person visits to inmates, including limitations on number and timing of visits, restricting eligibility based on security classification, requiring advance approval of visitors, and searching visitors); *see also* Miller v. Carson, 563 F.2d 741, 749 (5th Cir. 1977) (observing that prison officials have "a duty to adopt reasonable measures to prevent visitors from smuggling weapons or contraband to prisoners, whether the prisoners are convicted or unconvicted and whether they are classified as maximum or minimum security risks").

prisoner status or with legitimate penological objectives, but promotes the state's interest in institutional order and security."[92]

## II. A SURVEY OF PRISON POLICIES ON LEGAL MAIL

When evaluating whether prison security interests demonstrate "the need for a particular type of restriction," the Supreme Court has advised that "[w]hile not necessarily controlling, the policies followed at other well-run institutions would be relevant."[93]

With rare and constitutionally dubious exceptions,[94] 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.[95]

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[92] Al-Amin v. Smith, 511 F.3d 1317, 1333 (11th Cir. 2008).

[93] Procunier v. Martinez, 416 U.S. 396, 414 n.14 (1974); *see also* Warsoldier v. Woodford, 418 F.3d 989, 999–1000 (9th Cir. 2005) (observing that other states, while having "the same compelling interest in maintaining prison security, ensuring public safety, and protecting inmate health," had less restrictive policies that did not infringe on a prisoner's religious liberty).

[94] Only three states appear to allow significant access to the substantive contents of confidential attorney-client mail. One of those policies has been overturned in court as unconstitutional. For discussion of Arizona's policy to read or skim the contents of a prisoner's outgoing legal mail and the successful constitutional challenge to that policy, see *infra* Part III.D.3.c. Although Minnesota specifies that outgoing legal mail may not be read, the policy permits prison staff to "skim the contents to ensure that it is legal/official in nature." Minn. Dep't of Corr. Policies, Directives & Instructions Manual 302.020 (2018). The North Carolina prison policy authorizes correctional staff to "ensure that the contents of letters from these persons are free of contraband and are, in fact, official or legal correspondence from the person whose name and return address appears on the outside of the envelope or package," but the policy cautions that "[t]he correspondence shall not be read beyond what is necessary to make this determination." North Carolina Dep't of Pub. Safety Div. of Prisons, Policy & Proc., Chapter D, Section 0.310(b) (2012). These policies are vulnerable to constitutional challenge. As discussed later, skimming of legal mail for substantive contents is as destructive of confidentiality as reading. *See infra* Part III.D.3.a.

[95] For the reader's convenience, in an appendix available online, we have set forth the sources for, description of, and internet links to the policies of the federal Bureau of Prisons and state correctional departments regarding treatment of mail between prisoners and counsel. *See Appendix: Federal Bureau of Prisons and State Corrections Department Policies on Prisoner Attorney-Client Legal Mail* (Revised July 2018), personal.stthomas.edu/GCSISK/Appendix.Legal.Mail.Policies.docx [https://perma.cc/6CRM-7Z6R].

### A. PRISON REGULATIONS ON INCOMING ATTORNEY MAIL TO PRISONERS

The federal Bureau of Prisons and some thirty-one state correctional departments expressly prohibit the reading of legal mail (at least without probable cause to believe the correspondence is a threat to facility security or involves criminal activity).[96] Several more state departments implicitly or effectively prohibit reading by carefully limiting any inspection to discovery of contraband.[97]

For example, absent "specific circumstances or specific information" about illegal conduct or threats to security, Oregon provides that legal mail may be "examined for contraband in the presence of the inmate, but shall not be read or photocopied."[98] Iowa expressly declares that "[c]onfidential mail may be read only after a finding of probable cause by a court of competent jurisdiction that a threat to the order and security of the institution or abuse of correspondence exists."[99]

While several states permit prison officials to inspect the contents of incoming legal mail in some limited way,[100] they do not appear to allow actual reading of the correspondence, which would be constitutionally troubling.[101] Some of these states do attempt to restrict the inspection in a manner that mitigates the invasion and minimizes the chance that the substantive contents will be reviewed. Florida, for example, states that "[o]nly the signature and letterhead may be read," presumably to confirm that an attorney is the source.[102]

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[96] *Id.*

[97] *Id.*

[98] Or. Dept. of Corr., Division 131 Mail (Inmate), 291-131-0030 (2008).

[99] Iowa Admin. Code 201-20.4 (2010); *see also* Maine Dep't of Corr. Chapter 21: Prisoner Communication, 21.2, at VI(D) (2016) (providing that incoming legal mail may be read only if "there is probable cause to believe that the correspondence is being used to plan or conduct criminal activity, e.g., contains threats, obscene language or pictures, or escape or assault plans"); Virginia Dep't of Corr. Operating Proc. 803.1, at IV.C.1.d.iii (2017) (observing that "[r]eading of most types of legal mail require Court approval based upon specified probable cause to believe that a state or federal criminal statute is being violated, or that there exists a valid threat to the security of the facility"). Other prison regulations permit access to the contents of legal mail based on "reasonable suspicion" that unlawful material is included. *See, e.g.*, Illinois Dep't Corr. Mail Procedures, 20 Ill. Adm. Code 525.130 (2003); Nevada Dep't of Corr. Admin. Reg. 722.08–.10, Inmate Legal Access (2016); Tennessee Admin. Policies & Proc., Inmate Mail, Index No. 507.02, at VI.C, K (2017).

[100] *See* Appendix, *supra* note 95.

[101] *See infra* Part III.D.3.

[102] Fla. Admin. Code, Legal Documents and Legal Mail, 33-210.102(8)(d) (2012); *see also* 28 C.F.R. § 540.18 (2009) ("The correspondence may not be read or copied if the sender is adequately identified on the envelope, and the front of the envelope is marked 'Special

## B. PRISON REGULATIONS ON OUTGOING PRISONER MAIL TO ATTORNEYS

Consistent with the Supreme Court's observation that a prison's security concerns regarding *outgoing* mail are of a "categorically lesser magnitude,"[103] the federal Bureau of Prisons and a growing majority (now twenty-eight) of State correctional departments allow prisoners to send outgoing legal mail without it being subsequently opened or inspected by prison personnel, absent some individualized suspicion of wrongdoing.[104]

As an example from the state with the largest prison population, the Texas Department of Criminal Justice directs: "In order to facilitate the attorney-client privilege, an offender may send sealed and uninspected letters directly to legal correspondents. No correspondence from an offender to any legal correspondent shall be opened or read."[105]

While some states do authorize a "scan" or "inspection" of outgoing legal mail, such correctional policies typically provide that outgoing legal mail may be inspected for contraband, but without reviewing the text of the correspondence.[106] As a prominent example, California—which has the second largest prison population in the nation—directs that, when outgoing

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Mail— Open only in the presence of the inmate.'"); Ky. Corr. Policies and Procs. 16.2, at C(3), Inmate Correspondence (2014) ("Incoming privileged mail shall not be read if the sender is adequately identified on the envelope and the purpose of the mail is not an issue in determining whether it should be considered privileged mail.").

[103] Thornburgh v. Abbott, 490 U.S. 401, 413 (1989).

[104] *See generally* Appendix, *supra* note 95; *see, e.g.*, 28 C.F.R. § 540.18(c)(1) ("[O]utgoing special mail may be sealed by the inmate and is not subject to inspection,"); Del. Dep't of Corr. Policy Manual, Ch. 4, § 4.0, IV.D.2 (2015) ("Outgoing legal/privileged mail will be recorded and shall not be opened for inspection or any other purpose or otherwise impeded in its transmission," if "properly addressed and marked and passing a fluoroscope examination."); 20 Ill. Adm. Code 525.130(c), (d) (2003) ("Outgoing mail which is clearly marked as privileged and addressed to a privileged party may not be opened for inspection" absent reasonable suspicion of contraband); N.Y. Dep't of Corr. & Community Supervision, Privileged Correspondence No. 4421, 7 NYCRR 721.3, III.A.2, C (2014) ("Outgoing privileged correspondence may be sealed by an inmate, and such correspondence shall not be opened, inspected, or read without express written authorization by the facility Superintendent" supported by facts giving reason to believe the law has been violated or safety endangered).

[105] Texas Dep't of Criminal Justice, Uniform Offender Correspondence Rules, BP-03.91, III.A (2013).

[106] *See* Colo. Dep't of Corr. Admin. Regulation 300-38 (IV.D) (2015) (providing that prisoners may "send sealed letters" to counsel, subject only to an inspection for contraband before being sealed"); S.D. Corr. Policy, 1.5.D.3, at IV.6.C (2015) (authorizing inspection only to "prevent the movement of contraband").

legal mail is inspected for contraband, prison staff are directed to "remove the contents of the envelope upside down to prevent reading."[107]

## III. CONSTITUTIONAL PROTECTION FOR PRISONER-ATTORNEY CORRESPONDENCE

> [T]here has been widespread agreement that communications by post between an inmate and his attorney are sacrosanct, subject only to tests on incoming mail for the presence of contraband which fall short of opening it when the inmate is not present.[108]

Every federal circuit to address the question has concluded that it is "a violation of an inmate's constitutional rights for the prison officials to read legal mail."[109] As the leading treatise on prisoner rights summarizes, "the courts have almost universally agreed that it is not constitutional to read an inmate's legal mail or open it outside of an inmate's presence."[110]

Protecting the confidentiality of legal mail ensures that "the inmate's correspondence with his attorney is not inhibited or chilled by his fear that this correspondence may be read by prison officials."[111] In addition, the only effective protection against abuse by state officials in appropriating and misusing confidential attorney-client information is to preclude access to the contents of legal mail by anyone outside the attorney-client relationship.[112] Moreover, the prisoner's interest in "unimpaired, confidential communications with an attorney is an integral component of the judicial process."[113] And, "a critical component of the right of access to the courts [is], namely the opportunity to receive privileged communications from counsel."[114]

Most courts have grounded the right in the Free Speech Clause of the First Amendment or the right of access to the courts under the Due Process

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[107] Cal. Code Reg., tit. 15, § 3142 (2014).

[108] Adams v. Carlson, 488 F.2d 619, 631 (7th Cir. 1973).

[109] *Lemon*, 931 F.2d at 1467; *see also* Nordstrom v. Ryan, 762 F.3d 903, 906 (9th Cir. 2014); Al-Amin v. Smith, 511 F.3d 1317, 1331 (11th Cir. 2008). On the prohibition of reading of prisoner-attorney correspondence, see generally Part III.D.1 *infra*.

[110] MUSHLIN, *supra* note 30, § 12:26.

[111] *Al-Amin*, 511 F.3d at 1331; *see also* Vasquez v. Raemisch, 480 F. Supp. 2d 1120, 1140 (W.D. Wis. 2007)*; see generally* Part I *supra*.

[112] *See* Gomez v. Vernon, 255 F.3d 1118, 1123–24, 1131 (9th Cir. 2001) (upholding injunction against prison officials when a prison employee made a copy of a letter from a lawyer to inmates summarizing the strength of their claims and shared it with lead counsel for the defendant state department).

[113] Sallier v. Brooks, 343 F.3d 868, 877 (6th Cir. 2003).

[114] *Gomez*, 255 F.3d at 1133.

Clause of the Fourteenth Amendment.[115] The Seventh Circuit in *Guajardo-Palma v. Martinson*[116] opined that "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 . . . ."[117] By contrast, the Eleventh Circuit in *Al-Amin v. Smith*, in holding that a prisoner has "a First Amendment free speech right to communicate with his attorneys by mail, separate and apart from his constitutional right to access to the courts," believed that "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."[118]

While a lower court may occasionally deprecate a prisoner's First Amendment right to confidential correspondence with a lawyer by observing that the attorney-client privilege is not a constitutional rule,[119] that argument largely misses the point. To be sure, the common-law evidentiary attorney-client privilege, with all of its elements, definition, and exceptions, has not been incorporated into constitutional law.[120] But the fundamental principle of confidentiality in communication with legal counsel, which underlies the attorney-client privilege as well, has a strong purchase on the First Amendment. Because confidentiality is at the core of the attorney-client relationship, that constitutionally-protected relationship cannot go forward

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[115] *See* Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003) ("Interference with legal mail implicates a prison inmate's rights to access to the courts and free speech as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution."); *see also Al-Amin*, 511 F.3d at 1333-34; Nordstrom v. Ryan, 762 F.3d at 909 & n.2 (describing courts analyzing confidentiality of prisoner-attorney correspondence under the First Amendment right to freedom of speech and the Fourteenth Amendment rights to due process and access to the courts "or some combination of these rights"). On free speech and right of access to court rulings, see generally Part III.A *infra*.

[116] 622 F.3d at 801 (7th Cir. 2010).

[117] *Id.* at 802.

[118] *Al-Amin*, 511 F.3d at 1333–34.

[119] Toevs v. Quinn, No. 15-cv-02838-RBJ, 2017 WL 1055314, at *7 (D. Colo. Mar. 21, 2017) (rejecting a prisoner's First Amendment claim based directly on breach of the attorney-client privilege).

[120] *See* Howell v. Trammell, 728 F.3d 1202, 1222 (10th Cir. 2013) ("[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right."); Bradt v. Smith, 634 F.2d 796, 800 (5th Cir. 1981) ("[T]he attorney-client privilege constitutes an evidentiary privilege that is secured by state law, and not by the Constitution or laws of the United States."); Guajardo-Palma v. Martinson, 622 F.3d at 802 ("Not that the lawyer-client privilege is constitutional").

without it.[121] As the Seventh Circuit has recognized, "[b]ecause 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."[122]

Although the substance of the right to confidentiality in prisoner legal mail appears to be the same under both the Free Speech and Due Process Clauses, the source of the right may matter greatly in terms of the showing that must be made by the prisoner to have standing. As discussed in a subsequent part of this Article, a prisoner claiming an interference with his right of access to the courts under the Due Process Clause must establish an "actual injury" by showing that his pursuit of litigation was thereby impeded.[123] By contrast, the courts have held that a prisoner need not show injury beyond the invasion of the free speech right to maintain an action under the Free Speech Clause.[124]

An even more robust right to confidentiality in prisoner-attorney correspondence should attach when the prisoner is defending against a criminal charge or seeking to overturn a wrongful conviction or sentence. Because "[a] criminal defendant's ability to communicate candidly and confidentially with his lawyer is essential to his defense," "the right to privately confer with counsel is nearly sacrosanct."[125] Accordingly, the courts also agree that, when the Sixth Amendment right to counsel attaches in a criminal case, a prisoner's confidential correspondence with counsel may not be deliberately invaded by officials of the state, which of course includes prison officials.[126]

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[121] *See* Mothershed v. Justices of Supreme Court, 410 F.3d 602, 611 (9th Cir. 2005) (ruling that the "right to hire and consult an attorney" is protected by the First Amendment).

[122] Denius v. Dunlap, 209 F.3d 944, 954 (7th Cir. 2000).

[123] *See* Lewis v. Casey, 518 U.S. 343, 349 (1996). On the "actual injury" requirement as required for claims of access to the courts involving legal mail, see Part IV.C.4 *infra*.

[124] Nordstrom v. Ryan, 856 F.3d 1265, 1271 (9th Cir. 2017); Al-Amin v. Smith, 511 F.3d 1317, 1333–35 (11th Cir. 2008); Jones v. Brown, 461 F.3d 353, 359–60 (3d Cir. 2006). On the requirements for standing for a free speech claim involving legal mail, see Part IV.C.2 *infra*.

[125] Nordstrom v. Ryan, 762 F.3d 903, 910 (9th Cir. 2014).

[126] *Id.* at 909–11; Guajardo-Palma v. Martinson, 622 F.3d 801, 803 (7th Cir. 2010); Merriweather v. Zamora, 569 F.3d 307, 317–19 (6th Cir. 2009). On the Sixth Amendment right to counsel, see generally Part III.A *infra*.

## A. PRISONER FREE SPEECH AND ACCESS TO COURT RIGHTS TO CONFIDENTIALITY IN ATTORNEY CORRESPONDENCE

### *1. Supreme Court Precedent*

In *Wolff v. McDonnell*,[127] decided in 1974, the Supreme Court addressed a case that began as a challenge to a prison policy allowing prison officials to read all incoming mail, including that clearly marked as from attorneys. By the time the *Wolff* case reached the Supreme Court, however, prison officials had abandoned that intrusive policy and "concede[d] that they cannot open and *read* mail from attorneys to inmates."[128] The Court approved a revised prison policy that prohibited prison officials from reading such legal mail, but allowed the mail to be opened in the prisoner's presence to inspect for contraband.[129] In response to the prisoners' continuing concerns that the policy interfered with their constitutional rights, the Court observed:

> 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*.[130]

The Supreme Court has not retreated from *Wolff* over the past four decades.

Subsequently, in the context of incoming non-legal mail, the Supreme Court qualified earlier decisions that had suggested a standard of "strict" or "heightened" scrutiny for prison regulations implicating First Amendment rights, rather than a reasonableness standard, while affirming that prison concerns with outgoing mail remain of a "categorically lesser magnitude."[131] In *Thornburgh v. Abbott*, decided in 1989, the Court directed that the reasonableness standards for evaluating prison penological interests against prisoner constitutional rights articulated in *Turner v. Safley*[132] should be applied to prison regulations restricting incoming publications.[133] Because the entry of materials into a prison poses greater threats to prison security, the Court afforded prison officials greater discretion in formulating policies affecting incoming mail.[134]

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127 418 U.S. 539 (1974).

128 *Id.* at 575 (emphasis in original).

129 *Id.* at 576–77.

130 *Id.* at 577 (emphasis added).

131 Thornburgh v. Abbott, 490 U.S. 401, 413 (1989).

132 482 U.S. 78 (1987).

133 *Thornburgh*, 490 U.S. at 413.

134 *Id.*

However, the *Thornburgh* Court held, regulations pertaining to *outgoing* mail demand a "closer fit between the regulation and the purpose it serves" because departing correspondence from prisoners does not "by its very nature, pose a serious threat to prison order and security."[135] Because "[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials,"[136] the Supreme Court adhered to the standard for outgoing mail articulated earlier in *Procunier v. Martinez*.[137]

In sum, for outgoing inmate mail—even non-legal outgoing mail—a prison regulation must further "an important or substantial governmental interest" and "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[138] *Procunier* remains the controlling Supreme Court law on regulation of outgoing prisoner mail.[139]

### *2. Circuit Precedent (Majority)*

Courts naturally are "concerned about [prison officials] reading the prisoner's correspondence with his lawyer," because it would be "like a litigant's eavesdropping on conferences between his opponent and the opponent's lawyer."[140] As the Second Circuit summarized in *Davis v. Goord*,[141] "[i]n balancing the competing interests implicated in restrictions on prison mail, courts have consistently afforded greater protection to legal mail than to non-legal mail, as well as greater protection to outgoing mail than to incoming mail."[142] Since the Supreme Court's decision in *Wolff*, "lower courts have drawn the line pretty much where the court in *Wolff* did, balking at permitting the reading of inmate-attorney mail or the opening of it outside the presence of the inmate."[143]

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[135] *Id.* at 411–12; *see also* Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (quoting *Thornburgh* for the proposition that "[w]hen a prison regulation affects outgoing mail as opposed to incoming mail, there must be a 'closer fit between the regulation and the purpose it serves'").

[136] *Thornburgh*, 490 U.S. at 413.

[137] 416 U.S. 396 (1974).

[138] *Martinez*, 416 U.S. at 413.

[139] Barrett v. Belleque, 544 F.3d 1060, 1062 (9th Cir. 2008) ("*Procunier* is controlling law in the Ninth Circuit and elsewhere as applied to claims involving outgoing prisoner mail.").

[140] Guajardo-Palma v. Martinson, 622 F.3d 801, 802 (7th Cir. 2010).

[141] 320 F.3d 346 (2d Cir. 2003).

[142] *Id.* at 351.

[143] MUSHLIN, *supra* note 30, § 12:26.

Two years before *Wolff*, the First Circuit recognized the right of inmates to be present when their legal mail is opened because "the prisoner has a right to have the confidence between himself and his counsel totally respected."[144] After *Wolff*, eight additional circuits followed suit in protecting the prisoner's right of confidentiality in legal mail, mostly on free speech or access to the courts grounds.[145]

As the Eleventh Circuit explained in *Al-Amin v. Smith*, "opening mail in an inmate's presence 'insures that prison officials *will not read the mail*' and thus does not chill attorney-inmate communication."[146] Similarly, in *Jones v. Brown*, the Third Circuit stated that "'the only way to ensure that mail is not read when opened . . . is to require that it be done in the presence of the inmate to whom it is addressed.'"[147]

In addition to those decisions ensuring opening of legal mail in the prisoner's presence on First Amendment grounds, the Ninth Circuit has affirmed the same rule in the context of criminal representation under the Sixth Amendment. In *Mangiaracina v. Penzone*,[148] the Ninth Circuit "clarif[ied]" that "prisoners have a Sixth Amendment right to be present when legal mail related to a criminal matter is inspected."[149] To the jail's protest that the prisoner had not alleged that officials who opened his mail had actually read it, the court countered:

> But indeed, how could he? If the practice of opening legal mail in the presence of the prisoner is designed to prevent correctional officers from reading it, then the natural corollary is that a prisoner whose mail is opened outside his presence has no way of knowing whether it had been (permissibly) inspected or (impermissibly) read.[150]

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[144] Smith v. Robbins, 454 F.2d 696, 697 (1st Cir. 1972).

[145] *Davis*, 320 F.3d at 352; Jones v. Brown, 461 F.3d 353, 359 (3d Cir. 2006); Jones v. Caruso, 569 F.3d 258, 267 (6th Cir. 2009); Kaufman v. McCaughtry, 419 F.3d 678, 686 (7th Cir. 2005); Jensen v. Klecker, 648 F.2d 1179, 1182–83 (8th Cir. 1981); Nordstrom v. Ryan, 856 F.3d 1265, 1271–73 (9th Cir. 2017) (First and Sixth Amendment); Nordstrom v. Ryan, 762 F.3d 903, 906 (9th Cir. 2014) (Sixth Amendment); Ramos v. Lamm, 639 F.2d 559, 582 (10th Cir. 1980); Al-Amin v. Smith, 511 F.3d 1317, 1330–32 (11th Cir. 2008).

[146] *Al-Amin*, 511 F.3d at 1332 (quoting Wolff v. McDonnell, 418 U.S. 539, 577 (1974)) (emphasis in original); *see also* Gardner v. Howard, 109 F.3d 427, 431 (8th Cir. 1997) ("The policy that incoming confidential legal mail should be opened in inmates' presence . . . serves the prophylactic purpose of assuring them that confidential attorney-client mail has not been improperly read in the guise of searching for contraband."); 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.").

[147] Jones v. Brown, 461 F.3d at 359 (citation omitted).

[148] 849 F.3d 1191 (9th Cir. 2017).

[149] *Id.* at 1196.

[150] *Id.* at 1197.

*3. Circuit Precedent (Minority)*

Although a minority of circuits allow somewhat greater leeway to prison officials to inspect attorney-client mail, no circuit has approved a direct invasion into the confidentiality of legal mail by allowing prison authorities to read such correspondence.

Alone among the circuits, the Fifth Circuit held in *Brewer v. Wilkinson*,[151] that prison officials did not violate rights to free speech and access to the courts by opening incoming legal mail outside of the prisoner's presence.[152] Treating the *Brewer* decision as an "anomaly,"[153] other circuits continue to hold that a prison practice of opening properly marked incoming legal mail outside the inmate's presence violates the Constitution.[154]

In any event, although "incoming legal mail was opened and inspected for contraband outside [the prisoner's] presence,"[155] prison officials in *Brewer* were not alleged to have actually read the attorney-client correspondence. Indeed, a student law review article defending *Brewer*'s allowance of inspection of incoming legal mail in the prison mailroom acknowledged that "a prison mail clerk would certainly violate an inmate's rights by censoring or reading the legal mail."[156]

And, importantly, the Fifth Circuit emphasized that the prisoner's "claim regarding *outgoing* legal mail poses a different question."[157] Because the Supreme Court has held that a prison's penological interests regarding outgoing mail are of a "categorically lesser magnitude,"[158] the *Brewer* Court reversed summary judgment against the prisoner's constitutional claims that his outgoing legal mail was censored by the removal of legal material.[159]

The closest any circuit has come to condoning the actual reading of legal mail by prison officials—and it is not at all close—might be the Sixth Circuit in *Bell-Bey v. Williams*.[160] The court there held that requiring a prisoner to

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[151] 3 F.3d 816 (5th Cir. 1993).

[152] *Id.* at 825.

[153] Aaron C. Lapin, *Are Prisoners' Rights to Legal Mail Lost Within the Prison Gates?*, 33 NOVA L. REV. 703, 727 (2009).

[154] *See, e.g.*, Al-Amin v. Smith, 511 F.3d 1317,1330–31 (11th Cir. 2008); Bieregu v. Reno, 59 F.3d 1445, 1458 (3d Cir. 1995), *abrogated on other grounds*, Lewis v. Casey, 518 U.S. 343 (1996).

[155] *Brewer*, 3 F.3d at 825.

[156] Michael Kummer, Note, *Pushing the Envelope of Prisoners' Rights: Legal Mail and the Right of Access to the Courts*, 77 U. CIN. L. REV. 1195, 1195 (2009).

[157] *Brewer*, 3 F.3d at 825 (emphasis in original).

[158] Thornburgh v. Abbott, 490 U.S. 401, 413 (1989).

[159] *Brewer*, 3 F.3d at 825–26.

[160] 87 F.3d 832 (6th Cir. 1996).

prove the legal nature of a letter after exhausting his monthly postal allotment did not overburden his First Amendment rights.[161] As that court repeatedly emphasized, a prisoner under that policy could avoid any inspection of correspondence to lawyers by either holding to his allotment of ten stamps per month or by simply paying for the postage himself.[162]

Moreover, even in the limited context of a prisoner who had used up his postal allotment, the prison regulation reviewed in *Bell-Bey* tightly controlled the discretion of the reviewing staff member to look for identifiable legal information such as docket numbers or case titles and most assuredly did "not authorize prison employees to 'read' the prisoner's legal mail."[163] Indeed, the Sixth Circuit agreed that "[i]f the policy [permitted prison officials to read legal mail], it could chill a prisoner's free expression, communication with counsel, or access to the courts for fear his jailer reads the contents."[164]

#### *4. Whether Prison Intrusion Occurs Inside or Outside Presence of Prisoner as Being Irrelevant to Prohibition on Reading*

The constitutional *right* at issue here is the prisoner's "use of the mail to communicate confidentially with attorneys about his cases."[165] The constitutional *wrong* comes with the breach of that confidentiality through the reading of legal mail by prison personnel. Nothing turns on where this wrong occurs, whether inside or outside the presence of the prisoner. If anything, a prisoner who must watch a corrections officer read his legal mail in front of him—which the prisoner inevitably experiences as taunting—is even more likely to be chilled from future attempts at confidential correspondence.

In the Ninth Circuit case of *Nordstrom v. Ryan*,[166] the State of Arizona presented the decidedly novel thesis that a constitutional violation occurs only "when officials read the prisoner's mail outside his presence, while the officer [in this case] read [the prisoner's] letter in his presence."[167] In other words, Arizona contended that the Constitution is offended only when a prison official reads a prisoner's letter to counsel *outside of his presence*, but

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[161] *Id.* at 839–40.

[162] *Id.* at 837, 839.

[163] *Id.* at 835.

[164] *Id.* at 839.

[165] Al-Amin v. Smith, 511 F.3d 1317, 1333 (11th Cir. 2008).

[166] 762 F.3d 903 (9th Cir. 2014).

[167] Brief of the State of Arizona as Amicus Curiae in Support of Affirmance at 2, Nordstrom v. Ryan, 762 F.3d 903 (9th Cir. 2014) (No. 12-15738).

that the Constitution imposes no bar when a prison official reads the same letter *in the prisoner's presence*.[168]

No federal court of appeals has approved the actual reading of a prisoner's legal mail, whether in or out of the prisoner's presence. Indeed, the Eleventh Circuit in *Lemon v. Dugger*[169] recognized the "constitutional right not to have [a prisoner's legal] mail read" in a case where the prison official read an attorney's letter in the presence of the prisoner to whom it was addressed.[170] Moreover, Arizona's argument turned the extensive legal mail case-law on its head, as the judicial direction for "opening mail in an inmate's presence 'insures that prison officials *will not read the mail*' and thus . . . not chill attorney-inmate communication."[171]

The Third Circuit's decision in *Jones v. Brown*[172] is illustrative. In that case, the prison policy specifically prohibited prison staff from reading or censoring the contents of legal correspondence.[173] And yet the prison's intrusion into the contents of the legal mail by inspecting it in the prison mailroom defeated the assurance of confidentiality and discouraged prisoners from engaging in correspondence with counsel:

> A state pattern and practice, or, as is the case here, explicit policy, of opening legal mail outside the presence of the addressee inmate interferes with protected communications, strips those protected communications of their confidentiality, and accordingly impinges upon the inmate's right to freedom of speech. The practice deprives the expression of confidentiality and chills the inmates' protected expression, regardless of the state's good-faith protestations that it does not, and will not, read the content of the communications. This is so because "the only way to ensure that mail is not read when opened . . . is to require that it be done in the presence of the inmate to whom it is addressed."[174]

The Arizona prison policy challenged in the *Nordstrom* case in the Ninth Circuit presented a much more direct and egregious violation of prisoner constitutional rights than did the New Jersey policy struck down in *Jones v. Brown*. The Third Circuit invalidated a prison's policy of opening legal mail outside the presence of the prison because of the *risk* that confidential legal mail would be read.[175] In the *Nordstrom* case, that risk had exploded into a *reality*.

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[168] *Id.* at 2, 15–16.

[169] 931 F.2d 1465, 1468 (11th Cir. 1991).

[170] *Id.* at 1468.

[171] *Al-Amin*, 511 F.3d at 1332 (quoting Wolff v. McDonnell, 418 U.S. 539, 577 (1974) (emphasis in original).

[172] 461 F.3d 353 (3d Cir. 2006).

[173] *Id.* at 357.

[174] *Id.* at 359 (citing *Wolff*, 418 U.S. at 576–77).

[175] *Id.*

The Ninth Circuit rejected Arizona's claimed power to read a death row inmate's legal mail as long it was read in his presence, observing that Arizona "fail[ed] to explain how that practice ameliorates the chilling effect likely to result from an inmate's knowledge that every word he writes to his lawyer may be intercepted by prison guards and possibly used against him."[176]

## B. PRISONER RIGHT TO ASSISTANCE OF COUNSEL IN CRIMINAL MATTERS AND CONFIDENTIALITY IN ATTORNEY CORRESPONDENCE

> The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel, which includes the right to confer privately with that counsel. State intrusion into those private conversations is a blatant violation of a foundational right. We strongly condemn "the odious practice of eavesdropping on privileged communication between attorney and client."[177]

Because most cases involving interference by prison officials with legal mail have not involved direct criminal proceedings, the courts have seldom had occasion to address the full implications of the Sixth Amendment right to counsel.[178] Nonetheless, the courts agree that a "practice of prison officials reading mail between a prisoner and his lawyer in a criminal case would raise serious issues under the Sixth Amendment (and its application, by interpretation of the Fourteenth Amendment, to state criminal defendants), which guarantees a right to counsel in criminal cases."[179] And the Ninth Circuit, in *Nordstrom v. Ryan*,[180] has expressly grounded its holding that prison officials may not read a prisoner's confidential letter to his attorney on the Sixth Amendment, given that the prisoner involved was a death row inmate whose sentence was on direct appeal.[181] Likewise, the protective measure of requiring incoming mail from an attorney to be opened only in

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[176] Nordstrom v. Ryan, 762 F.3d 903, 910 (9th Cir. 2014).

[177] State v. Fuentes, 318 P.3d 257, 258 (Wash. 2014) (quoting State v. Cory, 382 P.2d 1019, 1023 (Wash. 1963)).

[178] *See, e.g.*, Bieregu v. Reno, 59 F.3d 1445, 1454 (3d Cir. 1995) (stating that, because the prisoner failed to indicate that opened legal mail involved a criminal proceeding, "we will explore plaintiff's Sixth Amendment claim no further"), *abrogated on other grounds,* Lewis v. Casey*,* 518 U.S. 343 (1996); Alvarez v. Horel, 415 Fed. App'x 836, 837 (9th Cir. 2011) ("The district court properly dismissed [prisoner's] claim that defendant [correctional officer] violated his Sixth Amendment right to counsel by opening his legal mail because the Sixth Amendment applies only to criminal proceedings.").

[179] Guajardo-Palma v. Martinson, 622 F.3d 801, 803 (7th Cir. 2010); *see also* Merriweather v. Zamora, 569 F.3d 307, 317–19 (6th Cir. 2009) (denying qualified immunity because prison officials were on notice that "opening properly marked legal mail alone, without doing more," implicated the Sixth Amendment).

[180] 762 F.3d 903 (9th Cir. 2014).

[181] *Id.* at 909–11.

the prisoner's presence has been affirmed under the Sixth Amendment, parallel to the same requirement in civil representation under the First Amendment.[182]

"Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect."[183] In *Wolff v. McDonnell*,[184] the Supreme Court described the Sixth Amendment right for prisoners as designed to "protect the attorney-client relationship from intrusion in the criminal setting."[185] Accordingly, "[w]hen 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."[186]

An incarcerated prisoner retains the fundamental right to a confidential attorney-client relationship. As the Supreme Court stated a half century ago, "even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection."[187] Accordingly, the American Bar Association's *Standards for Criminal Justice* provide that "[p]ersonnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication or correspondence between client and defense counsel relating to legal action arising out of charges or incarceration."[188]

In *Nordstrom v. Ryan*, the Ninth Circuit joined other circuits in prohibiting the reading of prisoner legal mail to attorneys and did so in a case that "f[e]ll squarely within the scope of the Sixth Amendment right to counsel."[189] Reaffirming that "'an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him,'" the court characterized the right of confidential communications by a criminal defendant with his lawyer as "nearly sacrosanct."[190] Because reading by prison officials of an inmate's letters to counsel "is highly likely to inhibit the sort of candid communications that the right to counsel and the attorney-

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[182] Mangiaracina v. Penzone, 849 F.3d 1191, 1196 (9th Cir. 2017).

[183] Patterson v. Illinois, 487 U.S. 285, 290 n.3 (1988).

[184] 418 U.S. 539 (1974).

[185] *Id.* at 576.

[186] Williams v. Woodford, 384 F.3d 567, 584–85 (9th Cir.2004).

[187] Lanza v. New York, 370 U.S. 139, 143–44 (1962).

[188] AMERICAN BAR ASS'N, Standards for Criminal Justice, Defense Function, Standard 4-3.1(c) (3d ed. 1993).

[189] Nordstrom v. Ryan, 762 F.3d 903, 909 (9th Cir. 2014).

[190] *Id.* at 910 (quoting Coplon v. United States, 191 F.2d 749, 757 (D.C. Cir. 1951)).

client privilege are meant to protect," the court held that "the Constitution does *not* permit . . . *reading* outgoing attorney-client correspondence."[191]

Moreover, we are talking here not only about convicted criminal defendants who are in prison after trial or plea and sentencing, but also those who are being detained prior to trial and who have not yet been found guilty of any crime. As the New York County Lawyers Association and the National Association of Criminal Defense Lawyers reminded in an amicus brief, "roughly half a million people in jail are pretrial at any given time," with high percentages of city and county jail beds being occupied by pretrial detainees, from 71 percent in California to 74 percent in Phoenix, Arizona and up to 85 percent in New York City.[192]

The Supreme Court has not extended the Sixth Amendment right to counsel to post-conviction proceedings, although the Court observed that when a prisoner's first opportunity to raise an issue, such as ineffective assistance of counsel, comes only after a direct appeal, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."[193] Still, while there may be no constitutional right to appointment of counsel for post-conviction proceedings, "[t]here is, however, a right to due process."[194] Whatever may be the parameters of the Fourteenth Amendment right to due process in post-conviction proceedings, it surely must include the right to be free from deliberate government intrusion into confidential letters between an inmate and his attorney challenging a criminal conviction or sentence.

### C. PROTECTING A PRISON'S LEGITIMATE PENOLOGICAL INTERESTS

> [A prisoner's] use of the mail to communicate confidentially with attorneys about his cases is not inconsistent with his prisoner status or with legitimate penological objectives, but promotes the state's interest in institutional order and security.[195]

As discussed above,[196] the federal courts of appeals have uniformly found that prisons fail to raise any penological interest sufficient to justify the extraordinary step of reading a prisoner's legal mail to his attorney. Moreover, as discussed immediately below, ample alternative means for

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[191] *Id.* (emphasis in original).

[192] Brief of N.Y. Cty. Lawyers Ass'n & Nat'l Ass'n of Crim. Defense Lawyers as Amici Curiae at 26–27 (authored by Elliott Dolby Shields and Robin E. Wechkin), Nordstrom v. Ryan, 856 F.3d 1265 (9th Cir. 2017) (No. 16-15277).

[193] Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).

[194] Bonin v. Vasquez, 999 F.2d 425, 429 (9th Cir. 1993).

[195] Al-Amin v. Smith, 511 F.3d 1317, 1333 (11th Cir. 2008).

[196] *See supra* Part III.A & B.

security are available to the prison that do not require invasion into the substantive contents of attorney-client correspondence.

*1. Protecting Against Introduction of Contraband*

The prison's need to protect against contraband being introduced into the prison is legitimate and certainly justifies appropriate protective steps. In this same respect, as discussed above,[197] the Supreme Court and the substantial majority of corrections systems in the country recognize that the security concerns with respect to outgoing mail are minimal. Indeed, in the federal and many state corrections systems, a prisoner may submit outgoing legal mail already sealed for transmittal by the prison without further inspection.[198] After all, common sense tells us that the problem typically is with contraband being mailed into—not out of—the prison.

In any event, whether we are addressing incoming or outgoing legal mail, as the Sixth Circuit remarked in *Reneer v. Sewell*,[199] "it is difficult to understand why prison officials would ever have to read an inmate's legal mail in search of such 'contraband.'"[200] Especially because "attorneys are unlikely to send contraband,"[201] a prison has no legitimate basis to go beyond physical inspection for contraband—a justification that diminishes even further with respect to outgoing mail.

Most courts view the protections against opening and reading of legal mail as appropriately limited to correspondence to or from a specifically named licensed attorney when the envelope is clearly marked as privileged and confidential.[202] The federal courts of appeals are divided on what additional steps may be imposed that could compromise confidentiality but protect against *incoming* fraudulent legal mail. For example, in *Fontroy v. Beard*,[203] the United States Court of Appeals for the Third Circuit rejected a First Amendment constitutional challenge to a prison policy requiring a lawyer correspondent to affix a control number to the envelope before it would be separately processed as confidential legal mail.[204] Under this prison policy, any attorney could obtain a control number within one day by submitting a letter request that verified the attorney's information and

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197 *See supra* Part II.B.

198 *See supra* Part II.B.

199 975 F.2d 258 (6th Cir. 1992).

200 *Id.* at 260 (emphasis in original).

201 Al-Amin v. Smith, 511 F.3d 1317,1333 (11th Cir. 2008).

202 *See* Wolff v. McDonnell, 418 U.S. 539, 576–77 (1974); Boswell v. Mayer, 169 F.3d 384, 386–88 (6th Cir. 1999).

203 559 F.3d 173 (3d Cir. 2009).

204 *Id.* at 174.

promising to use legal mail for only essential confidential communications and to enclose no contraband.[205] Because the record confirmed that law firm envelopes had been stolen and return addresses of purported lawyers falsified, the court agreed "verifying the source of legal mail through the use of Control Numbers and the safety and security problems posed by inmates using the legal mail system to smuggle contraband."[206]

By contrast, the Sixth Circuit in *Knop v. Johnson*,[207] ruled "that prisoners may not be required to designate particular attorneys in order to activate privileged treatment of their legal mail."[208] And, indeed, the Sixth Circuit maintains that the protections of confidentiality for legal mail attach to prisoner-lawyer communications that precede initiation of litigation or creation of an attorney-client relationship.[209]

In any event, the control number approach approved by the Third Circuit should have a limited impact on attorney-client exchanges. No comparable risk of introduction of contraband or other security concerns (as discussed immediately below) applies to outgoing prisoner mail to attorneys, so correspondence initiated by the prisoner to the attorney would always remain confidential. And the prisoner in his initial letter could instruct the attorney to obtain the control number before responding.

### *2. Interrupting Illegal Communications*

The prison has other security and penological interests that implicate communication by mail, such as detecting prisoner escape plans and preventing illegal conduct.[210] However, we must remember that we are addressing here correspondence with attorneys, not family members or other associates of the prisoner from outside the prison walls.[211] In *Bout v. Abramajtys*,[212] in an unpublished decision, the Sixth Circuit observed:

> [T]he risk that the prisoner will attempt to send personal rather than legal mail to a court is speculative at best. Although that fear is somewhat heightened with mail addressed to supposed attorneys, this concern can be ameliorated by requiring prisoners to present in advance the name and business address of the attorney with whom they wish to

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[205] *Id.* at 175–76.

[206] *Id.* at 178.

[207] 977 F.2d 996 (6th Cir. 1992).

[208] *Id.* at 1012.

[209] Am. Civil Liberties Union Fund of Michigan v. Livingston Cty., 796 F.3d 636, 643–45 (6th Cir. 2015).

[210] *See* Part III.D *infra*.

[211] For more on the risk of illegal communications involving lawyers, see Part III.D.3 *infra*.

[212] No. 93-1383, 1994 WL 329219 (6th Cir. July 7, 1994).

> communicate so that the prison officials may verify it in state and reference books containing attorneys admitted to practice.[213]

The greater and more legitimate prison security concern is with "bogus legal mail" that is "disguis[ed] to look like legal mail" and "masquerad[es] as attorney-client correspondence."[214] Gangs and other criminal enterprises attempt to smuggle contraband and plan illegal activities by fraudulent legal mail designed to evade the more thorough inspection methods applied to ordinary prison mail.[215]

But assiduously protecting confidentiality in legitimate legal mail does not undermine prison efforts to intercept fraudulent mailings that are not being sent to an actual lawyer. A prison has ample alternative and less intrusive means to verify that the correspondence is with a lawyer,[216] just as the prison verifies that the person on a confidential telephone call or at an in-person meeting with a prisoner is a duly-authorized lawyer. As the Ninth Circuit observed in *Nordstrom v. Ryan*,[217]

> [c]hecking a state bar's list of licensed attorneys is no more onerous than page-by-page inspection to confirm legal content. Indeed, an [Arizona Department of Corrections] prison mail supervisor testified that he uses the Arizona Bar Association's website 'every single day,' and that finding out whether a given individual is an attorney can be done 'very easily.'[218]

And of course the prison may investigate when probable cause exists that a particular prisoner poses a security risk that is being advanced by supposed legal mail.[219] As the Sixth Circuit acknowledged in *Reneer v. Sewell*,[220] it is "perfectly reasonable . . . that prison officials have authority to read certain inmate's mail, where, for example, there is probable cause to

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[213] *Id.* at *2.

[214] *See* Nordstrom v. Ryan, 128 F. Supp. 3d 1201, 1205–06, 1216 (D. Ariz. 2016), *rev'd*, 856 F.3d 1235 (9th Cir. 2017).

[215] *Id.* at 1205.

[216] *See* Nordstrom v. Ryan, 856 F.3d 1235, 1273 (9th Cir. 2017) ("[The prison] could use procedures to ensure that outgoing legal mail is sent to a licensed attorney, rather than inspecting the contents to make sure that the letter concerns legal subject matter."); American Civil Liberties Union Fund of Michigan v. Livingston Cty., 796 F.3d 636, 647 (6th Cir. 2015) (saying that jail could require "that any letter marked 'legal mail' include an attorney's name and bar number"); United States v. Stotts, 925 F.2d 83, 87 (4th Cir. 1991) (observing that federal prison regulation requiring that a specific attorney be identified on the envelope of legal mail made it easier "to verify in advance of delivery that a given letter is genuine," because the prison official "can simply and quickly speak with the named lawyer").

[217] 856 F.3d 1235, 1265 (9th Cir. 2017).

[218] *Id.* at 1273.

[219] *See, e.g.*, Iowa Admin. Code 201-20.4 (2010); Maine Dep't of Cor. Chapter 21: Prisoner Communication, 21.2, at VI(D)12 (2018).

[220] 975 F.2d 258 (6th Cir. 1992).

believe the inmate is conspiring with persons outside the prison to traffic in contraband or to arrange a breakout."[221] A commentator explains that "reasonable limits can—and should be—imposed upon communications between [detained criminal defendants who pose a danger] and their lawyers, albeit in appropriate circumstances and with meaningful judicial review."[222]

If the prison has "'reasonable suspicion that the prison's security was being jeopardized,'" then mail could be opened and even read.[223] Thus, for example, in *McMaster v. Pung*,[224] where the female attorney had previously engaged in sexual activity with the prisoner in the prison room for attorney-client meetings, the court "agree[d] with the district court's finding that appellant's female attorney was a threat to the security and orderly administration" and thus "correctional officers were justified in inspecting appellant's legal mail to and from the female attorney in his presence."[225]

### *3. Upholding the Critical Need for Attorney-Client Confidentiality*

Even when we can imagine a legitimate penological interest for reviewing the contents of legal mail, "that determination commences rather than concludes [the judicial] inquiry."[226] The questions would remain whether prisoners have "alternative means of exercising" the affected constitutional right and assessment of the burden on the prison of accommodating the right.[227] Especially in criminal matters, prison "strictures . . . cannot unduly burden [a prisoner's] fundamental constitutional right to a vigorous defense by an independent attorney under the Sixth Amendment."[228]

Given that prisoners are captive (pun quite intended) to the prison mail system, they have no alternative venue for transmitting confidential legal communications to their legal counsel.[229] As discussed earlier,

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[221] *Id.* at 260.

[222] Tamar R. Birckhead, *The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend*, 43 AM. CRIM. L. REV. 1, 14 (2006).

[223] *Reneer*, 975 F.2d at 260 (quoting Parrish v. Johnson, 800 F.2d 600, 604 (6th Cir. 1986)).

[224] 984 F.2d 948 (8th Cir. 1993).

[225] *Id.* at 953; *see also* Salerno v. Munoz, 507 Fed. App'x 677 (9th Cir. 2013) (affirming summary judgment where prison officials read the contents of a prisoner's letter to his attorney "after defendants were notified of the threat posed by the letter").

[226] *See* DeHart v. Horn, 227 F.3d 47, 53 (3d Cir. 2000) (en banc).

[227] *See* Turner v. Safley, 482 U.S. 78, 89–90 (1987).

[228] United States v. Reid, 214 F. Supp. 2d 84, 92 (D. Mass. 2002).

[229] *See* Al-Amin v. Smith, 511 F.3d 1317, 1332 (11th Cir. 2008) (discussing the "essential role of postal communications . . . because the fact of incarceration sharply restricts an inmate's means of communication with his attorney").

correspondence by mail is essential to ethical and effective representation of client, for which confidential telephone calls and in-person meetings are not an adequate substitute in every instance.[230] Because the prospect of correctional officers reading a prisoner's confidential letters to counsel is so alarming and so damaging to the attorney-client relationship, such prison behavior practically invites multiple grievances and continuing disruptions as well as prejudice to the rights of criminal defendants and civil rights plaintiffs, which in turn could result in convictions being overturned and litigation and relief being delayed. And a prison policy allowing access to the confidential substance of attorney-client correspondence places the lawyer in what the Ethics Bureau of Yale rightly calls "a Hobson's choice" between upholding ethical responsibility to maintain regular communication with the client and the ethical obligation not to communicate confidential information in an unsecure means.[231]

## D. READING VERSUS INSPECTION VERSUS SCANNING

### *1. Impermissibility of Reading Attorney-Client Letters*

Every circuit to address the question, whether under the free-speech/access-to-court line of cases or the right to counsel in criminal matters, agrees that reading of a prisoner's correspondence with his or her attorney is forbidden and transgresses constitutional boundaries.[232] In *Lemon v. Dugger*,[233] the Eleventh Circuit stated the proposition in no uncertain terms: it is "a violation of an inmate's constitutional rights for the prison officials to read legal mail."[234] In *Bell-Bey v. Williams*,[235] the Sixth Circuit

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[230] *See supra* Part I.C.

[231] Brief of the Ethics Bureau at Yale as Amicus Curiae, *supra* note 90, at 4.

[232] Some lower federal courts, especially in those circuits that have not spoken emphatically to the question, have questioned or resisted this foundational premise that legal mail may not be read. *See, e.g.*, Evans v. Skolnik, No. 3:08-cv-00353-RCJ-CBC, 2018 WL 5831213, at *3–4 (D. Nev. Nov. 7, 2018) (arguing that a prison official would need to read some of the content of legal mail to conduct an inspection and questioning the validity of Ninth Circuit precedent prohibiting such reading); Hmeid v. Nelson Coleman Corr. Ctr., No. 18-3449, 2018 WL 4922381, at *3, 16–17 (E.D. La. Aug. 15, 2018) (dismissing as frivolous a prisoner's First Amendment claim that prison officials tampered with his outgoing mail to his attorney and suggesting that whether reading of legal mail violates the Constitution requires balancing of prisoner rights and prison security); Toevs v. Quinn, No 15–cv–02838–RBJ, 2017 WL 1055314, at *7 (D. Colo. Mar. 21, 2017) (ruling that a prisoner could not maintain a First Amendment free speech claim for interference with legal mail, which is protected only as to content involving access to the courts).

[233] 931 F.2d 1465 (11th Cir. 1991).

[234] *Id.* at 1467.

[235] 87 F.3d 832 (6th Cir. 1996).

recognized that if a prison "policy directs officials to read prisoners' legal mail . . . it could chill a prisoner's free expression, communication with counsel, or access to the courts for fear his jailer reads the contents."[236]

Even the Fifth Circuit, which departs from other courts to permit physical inspection of incoming mail for contraband outside the prisoner's presence, appears to draw the line at reading, at least for outgoing mail. In *Brewer v. Wilkinson*,[237] that court allowed prison officials to conduct a non-reading inspection for contraband of incoming mail in the prison mailroom,[238] but did not suggest that the inspection could carry over into reading the substance of incoming legal mail.[239]

The sole departure from the otherwise uniform approach across the decades in every ruling circuit that bars reading of attorney-client communications may be found in the dissent to the Ninth Circuit's 2014 decision in the first appeal of *Nordstrom v. Ryan*.[240] To affirm prison security and to prevent harm to others, the dissenting judge would have allowed prison personnel "to read legal letters to the extent necessary to detect illegal conduct."[241]

In the *Nordstrom* dissent's view, "some reading of the mails" is necessary to guard against dissemination of escape plans and other proposed criminal activity.[242] The dissent contended that the Supreme Court's legal mail decision in *Wolff v. McDonnell*[243] should not be understood to prevent reading by prison officials of confidential letters to attorneys because the

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[236] *Id.* at 839.

[237] 3 F.3d 816 (5th Cir. 1993).

[238] *Id.* at 825.

[239] For more on *Brewer*, see *supra* notes 151–159 and accompanying text. In *Walker v. Navajo County. Jail*, 4 F.3d 410 (5th Cir. 1993), the Fifth Circuit upheld dismissal of a prisoner's complaint alleging that "his incoming legal mail was opened and read but not censored," saying this assertion "failed to state a cognizable constitutional claim for denial of his right to access to the courts." *Id.* at 413 (citing *Brewer*). However, the court explained that "a jail has a legitimate security interest in opening and inspecting incoming mail for contraband," *id.*, without offering any justification for a further intrusion into the substantive contents of the mail. In any event, the *Walker* court's analysis was limited to incoming, rather than outgoing, legal mail. *See supra* notes 157–159 and accompanying text (describing the *Brewer* court's reversal of summary judgment against prisoner's claim regarding outgoing legal mail).

[240] *See* 762 F.3d 903, 912–21 (9th Cir. 2014) (Bybee, J., dissenting); *see also* Evans v. Skolnik, No. 3:08-cv-00353-RCJ-CBC, 2018 WL 5831213, at *4 (D. Nev. Nov. 7, 2018) (citing to Judge Bybee's dissent as supporting the conclusion that inspecting a letter "necessarily requires reading its contents"). For discussion of the second appeal in *Nordstrom v. Ryan*, see *infra* Part III.D.2.

[241] 762 F.3d at 916–20.

[242] *Id.* at 916–17.

[243] 418 U.S. 539 (1974).

prison in that case had retreated from that position before the Court decided the case.[244]

But that development in the *Wolff* litigation cuts the other way. Having wisely abandoned the untenable policy allowing reading mail between prisoners and their attorneys, the prison sought permission to inspect incoming legal mail for contraband, while the prisoners' counsel contended that even such a limited intrusion breached attorney-client confidentiality.[245] The *Wolff* Court approved a compromise whereby incoming attorney mail would be opened to inspect for contraband but only in presence of the prisoners where "the inmate's presence insures that prison officials will not read the mail.[246] In any event, the dissent acknowledged that other circuits agreed with the *Nordstrom* majority that reading of prisoner correspondence with attorneys contravened constitutional rights.[247]

Significantly, even the *Nordstrom* dissent qualified the prison's permission to read legal mail to when it would not chill legal communications.[248] As the dissent framed it, "some reading of legal letters is permissible, absent censorship and the chilling of legal communications."[249] As the *Nordstrom* majority recognized, however, a chilling effect from allowing prison officials to read prisoner letters to attorneys is obvious and unavoidable: "it is highly likely that a prisoner would not feel free to confide in his lawyer such things as incriminating or intimate personal information—as is his Sixth Amendment right to do—if he knows that the guards are reading his mail."[250]

Moreover, a lawyer is ethically required to direct a client not to use a method of communication that is not confidential and secure.[251] Thus, a lawyer upon learning of a prison policy allowing reading would be ethically obliged to instruct the prisoner never to use the mail system for communicating confidential information. And, because confidential correspondence with a prisoner often is essential to effective representation, to uphold the ethical duties of keeping the client informed and acting with

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[244] *Nordstrom*, 762 F.3d at 914–16 (Bybee, J., dissenting) (discussing *Wolff*).

[245] *See Wolff*, 418 U.S. at 575–77.

[246] *Id.* at 577.

[247] *Nordstrom*, 762 F.3d at 915 (Bybee, J., dissenting).

[248] *Id.* at 916.

[249] *Id.*

[250] *Id*. at 906 (majority opinion).

[251] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011). On the duty of the lawyer to ensure confidentiality in communications, see generally *supra* Part II.A.

diligence in the matter, especially for a lawyer who is at any distance from the prison, the lawyer likely would have to withdraw from representation.[252]

No greater "chilling effect" on legal communications can be imagined than creating an environment in which every ethically responsible lawyer would have to warn prisoner clients never to use legal mail and, as a consequence of this break-down in regular communications, likely be ethically mandated to withdraw from representation. In this way, then, the *Nordstrom* dissent's analysis that reading is permissible unless it has a chilling effect ultimately collapses in on itself.

### *2. The Danger of Allowing Even Limited Access to the Substantive Contents of Attorney-Client Mail*

In the first appeal in *Nordstrom v. Ryan*,[253] the Ninth Circuit held plainly that that "the Constitution does *not* permit . . . *reading* outgoing attorney-client correspondence."[254] By contrast, the court said, prison officials were not prevented from inspecting legal mail "in [the prisoner's] presence, to make sure that it does not contain, for example, a map of the prison yard, the time of guards' shift changes, escape plans, or contraband."[255] The Arizona Department of Corrections took this narrow permission for a limited scan of the contents of the outgoing legal mail as the warrant for an intrusive page-by-page content review of prisoner legal correspondence.[256] On a second appeal, the Ninth Circuit confirmed that skimming the substantive contents of a prisoner's outgoing letter to his lawyer contravenes both the First and Sixth Amendment.[257] The limited inspection of outgoing legal mail for "suspicious features" authorized by the court envisioned a cursory inspection that involved no reading of the words on the page.[258]

The Ninth Circuit's recognition of the obvious—that skimming a letter for keywords or phrases is reading and destructive of any meaningful confidentiality[259]—was a welcome and inevitable response to the overreaching of the Arizona Department of Corrections.[260] At the same time,

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[252] Brief of the Ethics Bureau at Yale as Amicus Curiae, *supra* note 46, at 3. On the attorney's ethical duties in representation, including the duty to withdraw if ethical responsibilities cannot be upheld, see generally *supra* Part II.A.

[253] 762 F.3d 903 (9th Cir. 2014).

[254] *Id.* at 910–11.

[255] *Id.* at 910.

[256] Nordstrom v. Ryan, 856 F.3d 1265, 1268 (9th Cir. 2017).

[257] *Id.*

[258] *Id.* at 1272.

[259] *See infra* Part III.D.3.a.

[260] *See infra* Part III.D.3.c.

the court's ruling on the first *Nordstrom* appeal set the stage for confusion, and invited abuse by an outlying correctional department. By opening the door to circumscribed access to the contents of the outgoing legal mail envelope—even for a narrow purpose and to a very limited extent—the Ninth Circuit departed at least slightly from other circuits that have perceived no need for prison officials to peek inside the envelope of a letter being delivered outside the prison and properly addressed to a legitimate lawyer.[261]

a. Skimming of Legal Mail is a Form of Reading That Would Eviscerate Confidentiality

Only by the most assiduous protection of the confidentiality of legal mail can we ensure that an "inmate's correspondence with his attorney is not inhibited or chilled by his fear that this correspondence may be read by prison officials."[262] A prison policy that allowed, not merely an inspection for contraband, but skimming of the contents of a letter to a lawyer for its "subject matter," would "emasculate[] the confidentiality."[263] Far from being "nearly sacrosanct,"[264] attorney-client confidentiality in legal mail would become a false and illusory promise under any policy allowing content review by interloping prison officials of that correspondence.

What counts as "reading" in a particular context turns on its purpose and effect. A driver "reads" a stop sign and understands its message, even though the sign contains only one word. A diner at a restaurant "reads" the menu by browsing for entrées of interest. A person "reads" a newspaper, not by scrutinizing every line of every story on every page, but by checking over the stories that are of greatest interest to that reader. Each has "read" in a consequential way.

If a correctional officer were to explore the writing committed to paper by a prisoner to his lawyer by skimming each page for keywords and evaluating the legal or non-legal nature of the text, the officer is engaged in "reading" by any meaningful measure. The privacy of the prisoner's letter is destroyed, and the essence of the message is revealed to the prison officer.

For example, if a prisoner writes a letter to counsel containing a "keyword" such as "sexual assault"—whether to describe himself as a victim or as a perpetrator—a keyword "scanning" protocol guarantees the content

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[261] *See infra* Part III.D.3.c.

[262] *Al-Amin*, 511 F.3d at 1331.

[263] In re Jordan, 500 P.2d 873, 876 (Cal. 1972).

[264] Nordstrom v. Ryan, 762 F.3d 903, 910 (9th Cir. 2014).

will be accessed by the correctional officer skimming the letter.[265] And if the officer in the initial scan were to discover a "keyword" or "buzzword"—such as "kill" or "gun" or "gang"—that the officer mistakenly believes indicates a security threat, then the officer or his supervisor would have to delve deeper to determine the context of the passage, which almost surely will be discussion about the underlying criminal case.

The very kinds of sensitive topics that exemplify the need for confidentiality in prisoner correspondence with a lawyer are also the very kinds of nomenclature that a subject-matter skimming approach would target. As the Ninth Circuit ruled in *Nordstrom v. Ryan*, a prisoner must be able to correspond confidentially with his lawyer about "facts of the crime, perhaps other crimes" to be able to obtain the effective assistance of counsel in a criminal case.[266]

In sum, whether described as skimming or scanning, if the prison's search protocol intrudes into the substantive content of prisoner legal mail, nothing meaningful remains of confidentiality. This commonsense and unavoidable conclusion can be pointedly illustrated by a commonplace example. Consider the classic family episode of the big sister's diary being intercepted by the nosy little brother. If when caught with the diary in hand, the brother were to retort that he was "not reading it, but only skimming for keywords," the sister would not be mollified. Skimming no less than reading wholly destroys confidentiality and invades the privacy of the narrative.

b. The Rare Prospect of the Rogue Lawyer Engaging in Criminal Misconduct

The prospect that some lawyer somewhere and sometime may engage in misconduct with a prisoner cannot justify lifting confidentiality in all other attorney-client communications given the vital constitutional rights inherent in protecting such confidentiality. As one court reasonably observed, the contents of legal mail "'cannot, except on the most speculative theory, damage the security interests of jail administration'" and, even in the unlikely event, "'it must be assumed'" that any outgoing mail to "'licensed attorneys'" that did contain contraband or information about illegal activities would be properly treated by the recipients.[267]

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[265] *See infra* 286–298 and accompanying text (describing the subsequently-invalidated policy of the Arizona Department of Corrections for keyword scanning of outgoing legal mail).

[266] *Nordstrom*, 762 F.3d at 910.

[267] Watson v. Cain, 846 F. Supp. 621, 630–31 (N.D. Ill. 1993) (quoting Taylor v. Sterrett, 532 F.2d 462, 474 (5th Cir. 1976)).

Nor have federal and state correctional institutions found it appropriate to lump prisoner counsel into the category of security dangers justifying intrusion into attorney-client confidentiality, absent indicia of wrongdoing. As the Third Circuit in *Jones v. Brown*[268] held, a prison's supposition that legal mail might contain plans for escape or to incite violence could not justify opening and reading legal mail: "[W]hile it was true that legal mail conceivably might contain such plans and the opening of it might conceivably thwart those plans, the risk allegedly addressed was too insubstantial to justify incursion on First Amendment interests."[269]

Because a rogue lawyer is unlikely to commit damning evidence of illegality to writing that is sent through the prison mail system, the rare case of abusive communications by a lawyer with a prisoner is more likely to occur during telephone calls or in-person meetings. And yet surely no court or correctional system would contemplate that prisons begin monitoring confidential telephone calls between prisoners and lawyers or bugging the rooms where inmates meet with their counsel.

The comparatively negligible risk that a lawyer will engage in illicit correspondence with a prisoner makes intrusion into the substance of such confidential communications all the harder to justify. And, of course, the prison remains able to intrude into such attorney-client communications—by voice or letter—when there is probable cause that wrongdoing is afoot.[270] A general policy of regular access to the contents of attorney-client communications, even for a brief inspection of those contents, runs too hard against the sacrosanct nature of and heightened need for confidentiality in attorney-client communications.

The rare case of the miscreant lawyer is illustrative of the point. In 1995, Sheikh Abdul Rahman was convicted, in the words of a court, "of engaging in a seditious conspiracy to wage a war of urban terrorism against the United States, including the 1993 World Trade Center bombing and a plot to bomb New York City landmarks."[271] In 2005, attorney Lynne Stewart, who continued to represent Rahman after his conviction,[272] was found guilty by a jury, among other charges, of "providing and concealing material support to a conspiracy to kill and kidnap persons in a foreign country."[273] Using her trusted position as an attorney, Stewart had "smuggled messages to and from the incarcerated Abdel Rahman" encouraging renewed violence

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[268] 461 F.3d 353 (3d Cir. 2006).

[269] *Id.* at 361.

[270] *See supra* notes 99, 219 and accompanying text.

[271] United States v. Sattar, 272 F. Supp. 2d 348, 355 (S.D.N.Y. 2003).

[272] *Id.*

[273] United States v. Stewart, 686 F.3d 156, 162 (2d Cir. 2013).

by an Egyptian militant group[274] and cooperated in dissemination of "a *fatwah* to kill Jewish people."[275] This attorney's misconduct was carried out, not by sending letters through the prison mail system, but through in-person meetings and telephone calls with the client in the prison.[276]

Significantly, access to attorney-client communications between Stewart and Rahman in prison and the securing of evidence of criminal conspiracy was obtained in proper course through a warrant approved by a judge based on probable cause.[277] Even with such probable cause of wrongdoing and a warrant, the government used a special privilege unit, or "taint team," to monitor these communications, which then redacted the material to prevent any attorney-client privilege or work product information from being shared with government trial attorneys.[278] Moreover, as a warning to other lawyers, Stewart received an enhanced sentence because her actions "constituted an abuse of her trust and privilege as a member of the bar."[279]

In sum, even in the volatile environment of terrorist conspiracies, the government may not presume that every lawyer is a criminal suspect and conduct general monitoring of attorney-client communications, whether oral

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[274] *Id.*

[275] *Sattar*, 395 F. Supp. at 98; *see also Stewart*, 590 F.3d at 116.

[276] *Stewart*, 590 F.3d at 104, 107–08.

[277] *Id.* at 105. In the specific context of terrorism, the Federal Bureau of Prisons has adopted a regulation for "special administrative measures" that allow greater constraints on and even monitoring of attorney-client communications with an inmate, without prior judicial approval. 28 C.F.R. § 501.3 (2010). The validity of this regulation may be questioned, as the most pertinent federal statutes allow for monitoring of attorney-client communications only by an ex parte order from a federal judge after a showing of probable cause. *See* 18 U.S.C. §§ 2510–21 (2012). The constitutionality of the authorization to invade attorney-client communications without judicial supervision is also doubtful. Birckhead, *supra* note 222, at 27–50; Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469, 548–54 (2003). One court has insisted that, regardless of this regulation, "[i]f the government feels the need for specific protective orders applicable to all counsel alike, it may make application to the Court." United States v. Reid, 214 F. Supp. 2d 84, 94 (D. Mass. 2002). In any event, rather than being applied in blanket fashion, such measures may be imposed as to a particular prisoner only after the Attorney General has identified a "substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons," 28 C.F.R. § 501.3(a), and, even then, attorney-client communications may be monitored only when "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism." *Id.* § 501.3(d). Thus, the special administrative measures regulation is suffused with the language of individualized suspicion.

[278] *See* United States v. Sattar, No. 02 CR. 395 JGK, 2003 WL 22137012, at *20 (S.D.N.Y. Sept. 15, 2003).

[279] *Stewart*, 686 F.3d at 181.

or written. Instead, before intruding into the substance of those exchanges, the government must establish individualized suspicion that the attorney-client relationship is being abused in a particular circumstance.

c. Nordstrom v. Ryan: Rejecting Skimming and Highlighting Absence of Evidence of Lawyer Abuse of Legal Mail

In *Nordstrom v. Ryan*,[280] the Ninth Circuit held plainly that that "the Constitution does not permit . . . reading outgoing attorney-client communication."[281] By contrast, the court said, prison officials were not prevented from inspecting legal mail "in [the prisoner's] presence, to make sure that it does not contain, for example, a map of the prison yard, the time of guards' shift changes, escape plans, or contraband."[282] In this way, the Ninth Circuit departed at least slightly from other circuits in permitting prison officials to look inside the contents of the legal mail,[283] albeit for a distinctly limited purpose and to a pointedly limited extent.

By opening the door even a little to review the contents of prisoner-attorney correspondence, however, the Ninth Circuit inadvertently invited abuse by prison officials or overzealousness in inspections by poorly trained correctional officers. "Inspection" or "scanning" of the contents of confidential legal mail could become weasel words used by prison administration to justify broad intrusions into legal mail. And that is just what happened as the *Nordstrom* case continued.

In its first appellate decision in *Nordstrom v. Ryan*,[284] the Ninth Circuit issued a landmark opinion upholding a death row inmate's Sixth Amendment

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[280] 762 F.3d 903 (9th Cir. 2014).

[281] *Id.* at 910–11.

[282] *Id.* at 910.

[283] In *Guajardo-Palma v. Martinson*, 622 F.3d 801 (7th Cir. 2010), the Seventh Circuit said that a prison employee opening an incoming envelope, "to protect the prison's interest in security. . . will have to glance at the content to verify its bona fides." *Id.* at 805. But none of the letters at issue in that case were from the prisoner's lawyer. *Id.* at 806. In any event, a quick *glance* at incoming mail to confirm that it is from an attorney and that the envelope does not contain contraband does not intrude into the substantive contents of the correspondence. And, the Seventh Circuit emphasized, a practice of *reading* such letters would offend constitutional principles of due process. *Id.* at 805. In *Gaines v. Lane*, 790 F.2d 1299 (7th Cir. 1986), the Seventh Circuit had approved a prison policy allowing incoming privileged mail to "be opened in the presence of the committed person to whom it is addressed to inspect for contraband, to verify the identity of the sender, and to determine that nothing other than legal or official matter is enclosed." *Id.* at 1305–06. However, the court clarified that what was contemplated by this policy was not an actual evaluation of the contents or nature of the enclosed material but only that "prison officials [may] search privileged mail for contraband while the prisoners look on." *Id.* at 1306.

[284] 762 F.3d 903 (9th Cir. 2014).

right to correspond confidentially with his attorney and firmly rejecting the position of the Arizona Department of Corrections (ADC) that correctional officers may read outgoing legal mail:

> In American criminal law, the right to privately confer with counsel is nearly sacrosanct. It is obvious to us that a policy or practice permitting prison officials to not just inspect or scan, but to *read* an inmate's letters to his counsel is highly likely to inhibit the sort of candid communications that the right to counsel and the attorney-client privilege are meant to protect.[285]

On remand, rather than revising its legal mail policy to respect the confidentiality of attorney-client legal mail, the ADC dismissed the Ninth Circuit's constitutional ruling as a quibble about "vocabulary words."[286] Other than a cosmetic substitution of the words "inspect" or "scan" for "read," the new ADC policy reaffirmed review of the text of a letter to counsel to "verify that its contents qualify as legal mail and do not contain communications about illegal activity."[287] To prop up the policy of "scanning" the substantive contents of prisoner legal correspondence, the ADC further altered the common definition of "contraband" to cover "non-legal" documents submitted as legal mail.[288]

At an evidentiary hearing, the prison mail supervisor, stated that correctional officers should "inspect that document [prisoner letter to a lawyer] page by page, one at a time."[289] In this inspection, the officer looks at the content of the letter for "keywords to determine its legal legitimacy."[290] He explained that inspecting, not only for contraband but also for "whether it qualifies as legal mail," takes from 15 to 30 seconds for each page.[291] The deputy warden testified that correspondence between a prisoner and counsel about music, sports, or anything beyond "legal documents" constitutes "contraband."[292] As "contraband," the letter could be seized for further examination.[293]

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[285] *Id.* at 910 (citation omitted) (emphasis in original).

[286] Defendant's Response to Motion for Preliminary Injunction and Suggestion of Mootness at 3, Nordstrom v. Ryan, No. CV11-02344-PHX-DGC(MEA) (D. Ariz. Jan. 15, 2015).

[287] Arizona Dept. of Corr., Director's Office, Memorandum, Director's Instruction # 333, Modification of Department Order 902, Inmate Legal Access to the Courts, Nordstrom v. Ryan, No. CV11-02344-PHX-DGC(MEA) (D. Ariz. Jan. 8, 2015).

[288] *Id.*

[289] Transcript of Proceedings at 167, Nordstrom v. Ryan, No. CV11-02344-PHX-DGC (MEA) (D. Ariz. Mar. 12, 2015).

[290] *Id.* at 166.

[291] *Id.* at 167.

[292] *Id.* at 189–90.

[293] *Id.*

The correctional officer who collected mail on death row, stated that he "scans" mail to "make sure that it actually is, in fact, legal mail and it's not anything personal in nature."[294] When asked on cross-examination about the difference between scanning and reading, this officer volunteered that "the definition of 'scanning' is to hastily read something."[295]

At the conclusion of the hearing, the district court acknowledged that "what these officers are doing are reading portions of the letter. I can't get around that."[296] Nonetheless, the court ruled that "reading" of legal mail is prohibited only if it involves "reading the text of the letter line-by-line."[297] The district court reasoned that the ADC's policy of searching the contents of outgoing attorney-client mail for keywords and nomenclature was justified by the problem of "inmates send[ing] criminal communications in mail masquerading as attorney-client correspondence."[298]

However, despite its practice of "scanning" all outgoing legal mail, the ADC had never found an outgoing letter from a prisoner to an actual lawyer at the correct address that posed any security threat, enclosed any contraband, or asked any lawyer to engage in illegal activity. At the evidentiary hearing, the special security coordinator, with 26 years at the Arizona prison, admitted he had never seen abuse of legal mail involving actual lawyers.[299] Likewise, the police detective testifying to episodes of abuse of legal mail acknowledged that he could not recount a single incident where a letter going from a prisoner to an actual lawyer had been intercepted as improper.[300] Not one of the pieces of fraudulent legal mail presented by the ADC at the hearing involved genuine prisoner correspondence to an actual lawyer.[301]

The district court acknowledged that the evidence presented about the problem of "bogus legal mail" had not included any example of "criminal communications in a letter to or from a legitimate licensed attorney."[302] Instead, the court relied on evidence that three lawyers and a mitigation specialist had passed illegal drugs in or had carried messages out from in-person meetings in a county jail to conclude that "prison officials cannot

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294 *Id.* at 147.

295 *Id.* at 154.

296 *Id.* at 238.

297 Nordstrom v. Ryan, 128 F. Supp. 3d 1201, 1215 (D. Ariz. 2016), *rev'd*, 856 F.3d 1235 (9th Cir. 2017); *see also* Allah v. Virginia, No. 7:16CV00002, 2017 WL 1901650, at *5 (W.D. Va. May 9, 2017) (upholding prison practice of searching legal mail for gang writings by "reading . . . in sufficient detail to recognize" gang identifiers).

298 *Nordstrom*, 128 F. Supp. 3d at 1216.

299 Transcript, *supra* note 289, at 216.

300 *Id.* at 141.

301 *Id.* at 171–74.

302 *Nordstrom*, 128 F. Supp. 3d at 1206–07.

assume a communication does not present a security threat simply because it is addressed to or from a licensed attorney."[303] Accordingly, the court upheld the ADC's policy of reviewing the substantive contents of prisoner mail to legal counsel against First, Sixth, and Fourteenth Amendment claims.[304]

If this intrusive practice had continued, the ADC's policy effectively nullified the constitutional promise of confidentiality for prisoners in corresponding with their lawyers. By allowing correctional officers to skim through legal correspondence for keywords and to verify legal content, the confidentiality of the letter was irretrievably lost. Skimming is no less destructive of confidentiality than line-by-line reading.[305] Indeed, the ADC's protocol of skimming for keywords or components was tailor-made to uncover the very type of communication—about "facts of the crime, perhaps other crimes," etc.—that the Ninth Circuit had specifically declared should not be uncovered by a prison guard.[306] By insisting on the power to evaluate the substance of outgoing prisoner mail to attorneys, the ADC had not merely pushed the envelope. The ADC had ripped the envelope of attorney-client confidentiality away altogether.

Not surprisingly, then, the Ninth Circuit on a second appeal recognized that the ADC's skimming protocol continued and even intensified the illegitimate practice of reading confidential prisoner correspondence to lawyers.[307] In the return visit to the Ninth Circuit of *Nordstrom v. Ryan*,[308] the court of appeals clarified that the permissible "'cursory visual inspection'" of outgoing legal mail "should be for 'suspicious features' that can readily be identified without reading the words on a page; i.e., 'maps of the prison yard, the times of guards' shift changes, and the like.'"[309] By contrast, the ADC's "page-by-page content review of inmates' confidential outgoing legal mail" fails constitutional muster.[310]

The court further invalidated the ADC's boot-strap policy of redefining "contraband" to include "non-legal written correspondence or communication."[311] Observing that the common definition of "contraband" refers to "smuggled or otherwise illegal goods," the court refused to accept

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303 *Id.* at 1216.

304 *Id.* at 1217, 1219–20.

305 *See supra* Part III.D.2.a.

306 *See* Nordstrom v. Ryan, 762 F.3d 903, 910 (9th Cir. 2014).

307 Nordstrom v. Ryan, 856 F.3d 1235, 1268 (9th Cir. 2017).

308 *Id.*

309 *Id.* at 1272 (quoting *Nordstrom*, 762 F.3d at 906; Witherow v. Paff, 52 F.3d 264, 265–66 (9th Cir. 1995)).

310 *Id.* at 1268.

311 *Nordstrom*, 856 F.3d at 1272.

the ADC's "broad definition of contraband [to] transform[] permissible inspection into page-by-page content review of inmates' confidential outgoing legal mail."[312]

The Ninth Circuit's rejection of the ADC's policy of evaluating outgoing prisoner letters to lawyers for its "legal" content fits comfortably with the Sixth Circuit's contemporaneous ruling in *American Civil Liberties Union Fund of Michigan*.[313] The Sixth Circuit enjoined jail personnel from making a "'subjective' and inexpert determination as to whether a particular legal matter is 'legitimate'" for attorney correspondence to a prisoner to be treated as protected legal mail.[314] Rejecting such a review of "the content of the letters," the court said that—

> [A] system in which the Jail may *first independently screen* the substance of the legal communication from an attorney to a specific inmate regarding the constitutionality of jail policies would defeat the very reason to protect legal mail—to safeguard sensitive and confidential legal communication. Of course, this means the Jail would not know the contents of the communication, but this is true of all legal mail.[315]

Finally, the ADC's exceptional policy and practice of reviewing the substantive contents of outgoing prisoner letters to lawyers was based on a dangerous syllogism destructive of fundamental constitutional rights and due process. As discussed above, the ADC's witnesses admitted there had not been a single episode in the history of the Arizona prison system in which legal mail sent to an actual lawyer had been abused.[316] Nonetheless, because three lawyers for jail inmates elsewhere had engaged in misconduct (not involving legal mail), the ADC regarded all lawyers as criminal suspects.

The Ninth Circuit agreed, of course, that "outgoing legal mail *could* be used to facilitate criminal activity, but ADC did not present any evidence that this has ever happened, or that it is likely to happen."[317] While the ADC was eager to sacrifice attorney-client confidentiality on the altar of prison security, the "ADC presented no evidence that outgoing legal mail addressed to a licensed attorney has ever posed the security threats identified by the district court."[318]

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[312] *Id.*; *see also* In re Jordan, 500 P.2d 873, 876 (Cal. 1972) (characterizing prison's reference to "verbal contraband" to justify "inspecting" the "subject matter" of prisoner legal mail as "an ingenious effort to expand the reasonable (and legislative) meaning of a term to include what was never meant to be included within the meaning of 'contraband'").

[313] 796 F.3d 636 (6th Cir. 2015).

[314] *Id.* at 648.

[315] *Id.* at 645 (emphasis in original).

[316] *See supra* notes 299–301 and accompanying text.

[317] *Nordstrom*, 856 F.3d at 1273.

[318] *Id.*

## IV. PROCEDURES FOR ASSERTING RIGHT TO CONFIDENTIALITY IN PRISONER LEGAL MAIL

Although the foundational principles of confidentiality of legal mail are coalescing around the First and Sixth Amendments in the federal courts of appeals, resistance recurs occasionally in the federal district courts, even to the point of insisting that some reading of attorney-client mail is permissible.[319] Moreover, even when the foundations are accepted, litigation persists to this day about correctional officer tampering with legal mail, ranging from opening of legal mail outside the presence of the prisoner[320] to reading the specific contents of and even copying prisoner correspondence with legal counsel.[321]

A prisoner cannot establish an unconstitutional intrusion into the confidentiality of prisoner legal mail on the merits without navigating around a daunting series of procedural and other obstacles. These prerequisites and limitations are grounded in the Constitution (standing[322] and qualified

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[319] *See supra* note 232.

[320] For examples in just the past two years of court rulings on complaints asserting improper opening of legal mail, see, e.g., Gibson v. Bibb County Law Enforcement Center, 5:17-CV-423-MTT-CHW, 2018 WL 1221870, at *3 (M.D. Ga. Feb. 9, 2018) (denying dismissal of a prisoner's First Amendment claim alleging opening of mail on two occasions as sufficiently showing a regular and unjustified practice); Pitts v. Tuitama, No. 17-00137 JMS-KSC, 2017 WL 3880653, at *3–4 (D. Haw. Sept. 5, 2017) (going forward with a prisoner's First Amendment claim about opening of legal mail even though envelope may not have included a privilege marking or the attorney's bar number as required by prison regulation); Geier v. Davis, No.16-cv-01980-JSC, 2017 WL 1133219, at *2–3 (N.D. Cal. Mar. 27, 2017) (dismissing a prisoner's First Amendment claim alleging opening of legal mail outside his presence on a single occasion as barred by qualified immunity but denying dismissal of Sixth Amendment claim).

[321] For examples in just the past two years of court rulings on complaints alleging correctional officers have read legal mail, see, e.g., Carson v. Ryan, No. CV-17-01641-PHX-ROS (BSB), 2018 WL 4782325, at *3–4 (D. Ariz. July 13, 2018) (concluding that the prisoner stated a First Amendment claim by alleging that prison officials had conspired to read his legal mail); Smith v. Eckstein, No. 17–cv–667–pp, 2018 WL 2976031, at *1–3 (E.D. Wis. June 13, 2018) (proceeding forward on the plaintiff's First and Sixth Amendment claims alleging that jail officials had opened and read the prisoner's letter to defense counsel and then sent a copy of the letter to the prosecutor, who declined to read it and notified the criminal court); Patterson v. Johnson, No. 17-cv-1067-MJR, 2017 WL 6021832, at *6 (S.D. Ill. Dec. 5, 2017) (ruling that a prisoner stated a First Amendment claim by alleging that a prison official admitted he read legal mail to ensure the prisoner was not suing anyone at the prison); Ellison v. Montana Wardens, CV 17–00045–H–DLC–JTJ, 2017 WL 9324794, at *1–4 (D. Mont. June 21, 2017) (ruling that a prisoner stated claims under the First and Sixth Amendments by alleging that mail from his attorney had been "opened and ransacked" by prison officials who removed material and insisted they could "do as they pleased" and who asserted it was not "legal mail" even though sent by the Appellate Defenders' Office).

[322] *See infra* Part IV.C.

immunity[323]), federal statutes (exhaustion of the prison grievance system[324] and limitations on available relief[325]), and court rules (pleading[326]).

The Prison Litigation Reform Act (PLRA)[327] "rewrote both the law of procedure and the law of remedies in individual inmate cases in federal court," imposing special rules on exhaustion of administrative remedies, filing fees, costs, judicial screening of complaints, limitations on damages, restrictions on injunctive relief, and limitations on attorney's fees.[328] In this part of the Article, we focus on those elements of the PLRA that may apply to legal mail cases in a particular way, as contrasted with the rules that generally apply to all prisoner civil rights suits.

### A. EXHAUSTION OF ADMINISTRATIVE REMEDIES: THE PRISON GRIEVANCE PROCESS AND LEGAL MAIL CASES

Under the Prison Litigation Reform Act (PLRA), a prisoner must exhaust prison grievance procedures before filing a suit challenging prison conditions.[329] Many, perhaps most, prisoner civil rights suits run aground on the exhaustion requirement.[330]

In *Krilich v. Federal Bureau of Prisons*,[331] a prisoner argued that a prison's "attempts to intrude on [attorney-client] confidentiality are not 'prison conditions'" and therefore the case was not subject to the prison grievance requirements of the PLRA.[332] The Sixth Circuit responded that "[p]rison intrusions on a prisoner's privacy, legitimate or not, are obviously

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[323] *See infra* Part IV.E.

[324] *See infra* Part IV.A.

[325] *See infra* Part IV.D.

[326] *See infra* Part IV.B.

[327] Pub L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321 –66 to –77 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

[328] Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1627 (2003); *see also* BARBARA BELBOT & CRAIG HEMMENS, THE LEGAL RIGHTS OF THE CONVICTED 219–20 (2010) (generally discussing the provisions of the PLRA).

[329] *See* 42 U.S.C. § 1997e(a) (West 2018) ("No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

[330] *See* Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1778 (2008); *see also* Derek Borchardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L REV. 469, 470–71 (2012) (for a prisoner seeking judicial protection, the PLRA's exhaustion requirement proved to be the largest hurdle).

[331] 346 F.3d 157 (6th Cir. 2003).

[332] *Id.* at 159.

prison conditions" and thus the duty to exhaust the prison grievance process fully applied.[333]

When the prison grievance process includes multiple steps, typically providing for appeal from an initial unfavorable answer to a higher level within the prison administration, the prisoner is obliged to timely complete every single stage before initiating a civil rights complaint.[334] When litigation arises, however, the burden falls on the defendant to show that the prisoner had failed to comply with the prison's grievance system.[335]

In theory, the exhaustion requirement of the PLRA does not demand detailed notice on every aspect of a potential claim. To begin with, a grievance need only have "the level of detail required by the prison's regulations."[336] "[W]hen a prison's grievance procedures are silent or incomplete as to factual specificity, 'a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought.'"[337]

In other words, "the grievant need not lay out the facts, articulate legal theories, or demand particular relief."[338] Instead, "[a]ll the grievance need do is object intelligibly to some asserted shortcoming."[339] As the Supreme Court reiterated in *Jones v. Bock*, "'the primary purpose of a grievance is to alert prison officials to a problem.'"[340] A grievance is not an opening salvo in an adversarial process but the invitation to the prison administration to deliberate and resolve the problem.

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[333] *Id.*

[334] Woodford v. Ngo, 548 U.S. 81, 90-91 (2006) (explaining, in context of prison grievance requirements, that administrative exhaustion means properly using all steps afforded by the agency process); Bryant v. Rich, 530 F.3d 1368, 1378 (11th Cir. 2008) (ruling that "[t]o exhaust administrative remedies in accordance with the PLRA, prisoners must 'properly take each step within the administrative process;'" internal citation omitted).

[335] *See* Jones v. Bock, 549 U.S. 199, 211–16 (2007) (holding that an asserted failure by the plaintiff to exhaust administrative remedies is an affirmative defense to be raised by the defendant).

[336] Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010).

[337] Griffin v. Arpaio, 557 F.3d 1117, 1120 (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)); *see also* Kikumura v. Osagie, 461 F.3d 1269, 1283 (10th Cir. 2006) (stating that the "grievance will satisfy the exhaustion requirement so long as it is not 'so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally;'" citations omitted).

[338] *Strong*, 297 F.3d at 650.

[339] *Id.*; *see generally* Antonieta Pimienta, *Overcoming Administrative Silence in Prisoner Litigation: Grievance Specificity and the "Object Intelligibly" Standard*, 114 COLUM. L. REV. 1209, 1210 (2014).

[340] *Jones*, 549 U.S. at 219 (quoting Johnson v. Johnson, 385 F.3d 503, 522 (5th Cir. 2004)).

Unfortunately, prisons typically demand "meticulously correct prior use of onerous and error-inviting prison grievance procedures"[341] and are quick to assert that a prisoner's grievance failed to specifically advert to the type of claim later made in a civil rights suit. To be sure, a rule of administrative exhaustion imposing "technicalities" that forfeit a litigant's claims through procedural errors is "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[342] Nonetheless, prisons will seize on any purported ambiguity or omission in a grievance to seek dismissal of a civil rights suit before a hearing on the merits.

Accordingly, the prisoner would be well-advised to be fairly specific about the nature of any prison intrusion into the confidentiality of legal mail and any consequences that follow. If the objection stated in the grievance is only to the opening of legal mail outside the prisoner's presence, the prison likely will argue that a later claim of reading of the mail was not sufficiently encompassed within the literal terms of the grievance. If the prisoner objects generally to interference with legal mail but does not specify that that attorney-client mail was involved, the prison may assert that a civil rights complaint focused on interference with the attorney-client relationship was not adequately grieved. If the prisoner is asserting deliberate interference with confidential attorney-client mail, the grievance might specify that the reading or opening was done intentionally and not inadvertently.[343] In any of these hypothetical instances, the prison's objection should be rejected, as the purpose of the grievance was fully served by alerting the prison to a problem involving legal mail. But the prisoner wanting to avoid the distraction of later litigating an exhaustion question should specify the nature of the legal mail involved and the character of the prison's intrusion at each stage of the grievance process.

When a prisoner has placed the prison on notice through a grievance of a problem with respect to confidential legal mail, the prisoner should not be legally obliged to submit a new grievance for every new application of an ongoing policy or practice. In *Diaz v. Palakovich*,[344] the Third Circuit held in an unpublished decision that a prisoner who had indisputably "fully exhausted" at least "one grievance relating to the opening of his legal mail outside of his presence" was not obliged to exhaust the process for seven

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[341] *See* Margo Schlanger, *Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts*, 69 U. MIAMI L. REV. 519, 520 (2015).

[342] Love v. Pullman Co., 404 U.S. 522, 527 (1972).

[343] On whether inadvertent intrusions into legal mail constitute a constitutional violation, see *infra* Part IV.C.1.

[344] 448 Fed. App'x 211 (3d Cir. 2011).

other grievances making the same complaint.[345] Instead, the court said, "[t]hose seven other grievances are contemporaneous parts of the prison record as they all address the same practice of improper legal mail handling and directly bear on the fully exhausted grievance addressing the identical issue."[346] Similarly, in *Aiello v. Litscher*,[347] a District Court held that once having exhausted the grievance process in challenging a prison policy regarding access to First Amendment-protected material, the prisoners were not obliged to file another grievance for subsequent incidents in which the policy is applied: "Each alleged unconstitutional application is not treated as a separate grievance but rather as evidence that the regulation is not reasonably related to legitimate penological interests. . . ."[348] Accordingly, a prisoner challenging a formal prison policy that allows reading or opening or another violation of attorney-client confidentiality in correspondence is not required to file more than one grievance, at the risk of being precluded from presenting evidence about the ongoing application in a later civil rights suit.

Here, too, though, the wise prisoner will preempt any possibility that the prison will insist that each individual episode had to be separately grieved. Moreover, by persistence in filing a new grievance for each repeat performance by prison officers of improper intrusion into legal mail, the prisoner creates an administrative record that may contradict a later attempt by prison officials to downplay the frequency or regularity of the problem. Indeed, a series of grievances on repeated incidents of interference with legal mail may serve as evidence that a supervisor or warden had knowledge of and acquiesced in subordinates' violations of legal mail confidentiality, as necessary to prove personal liability under Section 1983 by a supervisor.[349]

Importantly, a prisoner is not required to name in the grievance all persons who might conceivably be named as defendants in a later lawsuit. To again quote the Supreme Court's decision in *Jones v. Bock*, "the primary purpose of a grievance is to alert prison officials to a problem, *not to provide personal notice to a particular official that he may be sued*; the grievance is not a summons and complaint that initiates adversarial litigation."[350] Thus, a prisoner grievance that names the correctional officer who opened or read

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[345] *Id.* at 216.

[346] *Id.*; *see also* Johnson v. Johnson, 385 F.3d 503, 520–21 (5th Cir. 2004) (holding that a prisoner who had completed the grievance process and notified the prison that he was being subjected to repeated sexual assaults was not required to file a new grievance for each new episode of assault).

[347] 104 F. Supp. 2d 1068 (W.D. Wis. 2000).

[348] *Id.* at 1074.

[349] *See, e.g.*, Diaz v. Palakovich, 448 Fed. App'x 211, 215–16.

[350] Jones v. Bock, 549 U.S. 199, 219 (2007) (emphasis added) (internal citations omitted).

legal mail has served the purpose. If the matter later results in civil litigation, the prisoner should be permitted to name the officer's supervisor, mail-room individuals, warden, or corrections director as appropriate when seeking recompense for past violations or injunctive relief against future violations. Moreover, the very fact that the grievance is addressed at subsequent stages to such higher officers in the prison administration is more than adequate notice of their official responsibility for the matter.

### B. LIBERAL CONSTRUCTION OF PRO SE PRISONER COMPLAINTS IN LEGAL MAIL CASES

Most civil rights suits involving prisoners will begin (and end) with pro se complaints.[351] Under the Prison Litigation Reform Act, the District Court is instructed to "screen" the prisoner complaint to "identify cognizable claims" or to dismiss any claim that is "frivolous, malicious, or fails to state a claim upon which relief may be granted" or where monetary relief is sought "from a defendant who is immune from such relief."[352] Statutory screening of prisoner complaints allows a court to dismiss all or part of a complaint *sua sponte* for failure to state a claim, "incorporat[ing] the familiar standard applied . . . under Federal Rule of Civil Procedure 12(b)(6)."[353]

Through the *Iqbal-Twombly* (or *Twiqbal*) line of cases, the Supreme Court has directed that a complaint filed by an attorney on behalf of a plaintiff must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[354] However, the Supreme Court continues to say that "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."[355]

As the Ninth Circuit ruled in *Wilhelm v. Rotman*, "*Iqbal* did not alter the rule that, 'where the petitioner is *pro se*, particularly in civil rights cases,

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[351] *See* Szillery v. Career Sys. Dev. Corp., No. CV–08–62–B–W, 2008 WL 2789492, at *2 (D. Me. July 17, 2008) (observing that "a *pro se* party, often a prisoner, realizes he is out of his depth and urgently petitions for counsel, the appointment of which is a decided rarity in civil cases," with the consequence that "most frequently, the *pro se* party's complaint, again often a prisoner's, is simply 'doomed to failure in federal court'"); Barrick Bollman, Note, *Deference and Prisoner Accommodations Post*-Holt*: Moving RLUIPA Toward "Strict in Theory, Strict in Fact*," 112 Nw. U. L. Rev. 839, 869 (2018) ("[P]risoners often file pro se and often lack the resources and legal knowledge needed to represent their arguments effectively.").

[352] 28 U.S.C. § 1915A(b).

[353] Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012).

[354] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

[355] Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (internal citations omitted).

[courts should] construe the pleadings liberally and . . . afford the petitioner the benefit of any doubt.'"[356] The federal courts of appeals thus hold the prisoner to the "plausible on its face" standard of *Twiqbal*, while simultaneously emphasizing that a prisoner pro se complaint is to be liberally construed.[357]

By this analysis, pro se prisoners only need meet a "low threshold for proceeding past the screening stage."[358] A pro se complaint must be construed "liberally" and may be dismissed only if it appears "beyond doubt" that no set of facts could be proven to entitle the plaintiff to relief.[359]

The rationale underlying liberal construction of pro se pleadings is even more compelling in light of the instructions to the form complaints that District Courts typically direct prisoners to use, which explicitly discourage factual detail.[360]

Given the many litigated cases in which prison authorities have intruded into confidential prisoner-attorney mail, the allegation of such an episode should easily pass the facial plausibility standard, especially under liberal construction. Thus, if a prisoner alleges a practice or policy of reading confidential attorney-client mail, the complaint should not be dismissed without at least a judicial investigation into whether sufficient evidence of the practice or policy is present for standing.[361] In *Nordstrom v. Ryan*,[362] for example, the prisoner alleged that a correctional officer had read his confidential letter to his lawyer and that the director of the state correctional department had notified him that legal mail was subject to being read.[363]

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[356] *Wilhelm*, 680 F.3d at 1121 (quoting Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010)).

[357] Balcar v. Jefferson Cty. Dist. Ct., No. 17-5402, 2017 WL 4535934, at *1 (6th Cir. Sept. 8, 2017); Turley v. Rednour, 729 F.3d 645, 651 (7th Cir. 2013) (stating that "even after *Twombly* and *Iqbal, pro se* complaints . . . are to be construed liberally") (internal citations omitted); Boykin v. KeyCorp, 521 F.3d 202, 213–14 (2d Cir. 2008) (ruling that, despite new *Twombly* pleading standard, liberal construction rule continued to apply to pro se complaint).

[358] *Wilhelm*, 680 F.3d at 1123.

[359] Silva v. Di Vittorio, 658 F.3d 1090, 1101 (9th Cir. 2011) (internal citations omitted).

[360] *See, e.g.*, U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA, *Civil Rights Complaint Instructions-Form* at 3 (Rev. 2016) (advising pro se plaintiffs to state the underlying facts "as briefly as possible"), http://www.azd.uscourts.gov/sites/default/files/forms/Civil%20Rights%20Complaint%20instructions-form.pdf [https://perma.cc/63SB-YVZ9]; U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, *Complaint Under the Civil Rights Act*, 42 U.S.C. § 1983, at 2 (Rev. 2018) (same), https://www.paed.uscourts.gov/documents/forms/frmc1983f.pdf [https://perma.cc/2875-ZBDA]; U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, *Prisoner Civil Rights Complaint*, at 5 (Rev. 2013) (same), http://www.njd.uscourts.gov/sites/njd/files/forms/DNJ-ProSe-006.pdf [https://perma.cc/6HRW-LAZ5].

[361] *See infra* Part IV.C.

[362] 762 F.3d 903 (9th Cir. 2014).

[363] *Id.* at 906–07.

Citing the rule of liberal construction for pro se complaints, the Ninth Circuit ruled that the prisoner's "allegations that prison officials read his legal mail, that they claim entitlement to do so, and that his right to private consultation with counsel has been chilled state a Sixth Amendment claim."[364]

## C. STANDING FOR LEGAL MAIL CLAIMS

### *1. Proving a Practice or a Policy of Reading or Opening Attorney-Client Mail*

To have standing to raise a claim of unconstitutional interference with the confidentiality of legal mail, a prisoner must either (1) show a practice of tampering with legal mail, or (2) adduce a policy allowing reading and "show that the prison has enforced the purportedly unconstitutional policy against him."[365]

First, appreciating that mistakes may be made even by conscientious prison employees implementing proper prison policies on legal mail, the prisoner must establish a "pattern and practice" of interference with legal mail not merely to establish standing but to assert a constitutional violation.[366] Thus, the prisoner must show regular interference with confidential mail rather than isolated and inadvertent mistakes.[367] A one-time accidental opening of a single piece of legal mail is not cognizable as a constitutional violation.[368]

However, the courts have proven quick to find the necessary pattern when the number of intrusions on confidentiality add up to more than a solitary mistake. In *Washington v. James*,[369] the Second Circuit determined that only two incidents of interference with legal mail indicated "an alleged continuing activity rather than a single isolated instance."[370] In *Bieregu v. Reno*, the Sixth Circuit ruled that three documented occasions of opening court mail outside the prisoner's presence was sufficient "for a reasonable

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[364] *Id.* at 911.

[365] Miller v. Jones, 483 Fed. App'x 202, 203 (6th Cir. 2012) (reversing summary judgment in prison officials' favor and holding that a fact issue remained on whether prison officials had read prisoner's outgoing mail, thus giving him standing to sue under the First Amendment).

[366] *See* Bieregu v. Reno, 59 F.3d 1445, 1452 (3d Cir. 1995), *abrogated on other grounds,* Lewis v. Casey, 518 U.S. 343 (1996).

[367] *See* Gardner v. Howard, 109 F.3d 427, 431 (8th Cir. 1997) (saying that "an isolated, inadvertent instance of opening incoming confidential legal mail" did not support a civil rights claim).

[368] *See* Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003).

[369] 782 F.2d 1134 (2d Cir. 1986).

[370] *Id.* at 1139.

person to infer that there exists a pattern and practice of opening plaintiff's incoming court mail outside his presence."[371]

Moreover, even an isolated incident may infringe the prisoner's constitutionally-protected right of confidentiality if performed with an "improper motive."[372] Thus, if a prison official had a deliberate intent to gain access to confidential material or acted "arbitrarily or capriciously" to interfere with two or three pieces of mail, a constitutional violation is stated.[373]

Second, and by contrast, when the question is the validity of a prison policy, whether formally adopted as a regulation or expressly stated in another manner,[374] then the prisoner need not establish any pattern or allege a series of episodes. Rather, the prisoner need only show that such a policy exists and that it has been applied to the prisoner on at least one occasion.[375]

A constitutional claim is stated when the prisoner shows either "a state pattern and practice, or . . . explicit policy" of interference with protected attorney-client communications.[376] "[W]here the harm alleged is directly traceable to a written policy, there is an implicit likelihood of its repetition in the immediate future."[377]

### *2. Standing for First Amendment Free Speech Claim*

When a prisoner alleges a constitutional injury to free speech rights by a prison's interference with legal mail, the courts agree that a prisoner need "assert an injury no more tangible than a chilling effect on First Amendment rights."[378] Thus, a prisoner need not show that underlying litigation in which

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[371] 59 F.3d at 1452.

[372] Smith v. Maschner, 899 F.2d 940, 944 (10th Cir. 1990).

[373] Hayes v. Idaho Cor. Ctr., 849 F.3d 1204, 1212 (9th Cir. 2017) (holding that, where the prisoner "alleged a plausible claim that his protected mail was arbitrarily or capriciously opened outside his presence on two separate occasions," that "[n]othing further is required"); Merriweather v. Zamora, 569 F.3d 307, 317 (6th Cir. 2009) (ruling that "two or three pieces of mail opened in an arbitrary or capricious way suffice to state a claim"). *But see Hayes*, 849 F.3d at 1214, 1216–17 (Bybee, C.J., concurring in the judgment) (resisting the arbitrary and capricious standard and insisting that "proof of intentional, not merely negligent, acts" is necessary to show a constitutional violation).

[374] *See* Nordstrom v. Ryan, 762 F.3d 903, 911–12 (9th Cir. 2014) (finding sufficient allegations of standing where the prisoner adduced a written statement by the director of corrections allowing reading of legal mail by prison officials and application of that policy to him on one occasion).

[375] *Id.*

[376] Jones v. Block, 461 F.3d 353, 359 (3d Cir. 2006).

[377] Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001), *abrogated on other grounds by* Johnson v. California, 543 U.S. 499, 504–05 (2005) (internal citations omitted).

[378] Gomez v. Vernon, 255 F.3d 1118, 1127 (9th Cir. 2001).

she is represented by an attorney has been disrupted or prejudiced by the prison's intrusive policy or practice.

In *Jones v. Brown*,[379] the Third Circuit outlined the current test for prisoner standing to challenge a prison policy on legal mail as violating the Free Speech Clause of the First Amendment.[380] In *Lewis v. Casey*,[381] in which prisoners claimed that restrictions on use of the prison law library infringed their constitutional right of access to the courts, the Supreme Court had held that a prisoner must prove that he had actually been injured by denial of access to the courts, that is, was hindered in pursuing a legal claim.[382] By contrast, the Third Circuit explained in *Jones*, a prisoner asserting a free speech claim need not prove an injury-in-fact "beyond the infringement of constitutionally-protected speech."[383] The Third Circuit reasoned that the requisite injury to assert standing depends on the nature of the right being asserted:

> 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.[384]

In *Lewis*, the Supreme Court had characterized the right at issue there as being the "right of *access to the courts*," not "the right to a law library or to legal assistance."[385] In the *Jones* legal mail case, by contrast, the right at issue was the freedom of speech, a right that directly encompasses confidential exchanges by a prisoner with his lawyer.[386]

Likewise, the Eleventh Circuit in *Al-Amin v. Smith*[387] held that a prisoner objecting to interference with legal mail properly raised a "free speech claim [that] is distinct from his access-to-courts claim."[388] Agreeing with the Third Circuit, the Eleventh Circuit ruled that "the actual injury requirement applies to access-to-courts claims but not to free speech claims."[389] The Ninth Circuit likewise held in a prisoner legal mail case that

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379 461 F.3d 353 (3d Cir. 2006).
380 *Id.* at 351, 359–60.
381 518 U.S. 343 (1996).
382 *Id.* at 351. On the access-to-court theory and standing, see *infra* Part IV.C.4.
383 Jones v. Brown, 461 F.3d at 359.
384 *Id.* at 359–60 (citation omitted).
385 *Lewis*, 518 U.S. at 350.
386 Jones v. Brown, 461 F.3d at 359.
387 511 F.3d 1317 (11th Cir. 2008).
388 *Id.* at 1333.
389 *Id.* at 1334.

the chilling of private conferral with counsel stated a First Amendment claim.[390]

Accordingly, when a prisoner objects on free speech grounds to intrusion by prison officials into confidential legal mail, she need not "allege any consequential injury stemming from that violation, aside from the violation itself."[391]

### *3. Standing for Sixth Amendment Right to Counsel Claim*

#### a. Showing of Prejudice When Seeking Retrospective Relief

Claims that a criminal defendant has been deprived of the Sixth Amendment right to assistance of counsel are most commonly encountered in collateral or post-conviction challenges to a criminal conviction.[392] Under the classic and stringent test of *Strickland v. Washington*,[393] to overturn a conviction on the basis of ineffective assistance of counsel, the accused ordinarily must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[394]

But the *Strickland* test for prejudice is wholly inapposite when the Sixth Amendment right is raised, not in an attempt to overturn a final judgment of conviction because of failures by the defendant's own counsel, but to be compensated in a civil rights damages case (or, as discussed in the next subsection, to obtain prospective relief to prevent ongoing or future interference with assistance of counsel by the deliberate actions of the State).

More directly on point is the Supreme Court's decision in *Weatherford v. Bursey*.[395] After a convicted criminal defendant discovered that a person invited to a meeting between him and his lawyer was an undercover agent, he filed a Section 1983 retrospective suit for compensatory damages.[396] The Court ruled that prejudice in the form of "tainted evidence" must be shown to recover for an unconstitutional conviction.[397] In that particular case, the

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[390] Hayes v. Idaho Corr. Ctr., 849 F.3d 1204, 1212 (9th Cir. 2017).

[391] Jones v. Brown, 461 F.3d at 359; *see also* Al-Amin v. Smith, 511 F.3d 1317, 1334 (11th Cir. 2008) (same); *Hayes*, 849 F.3d at 1212 (same).

[392] *See, e.g.*, Woods v. Donald, 135 S. Ct. 1372, 1374 (2015); Lafler v. Cooper, 566 U.S. 156, 160-62 (2012); Premo v. Moore, 562 U.S. 115, 118–21 (2011); Smith v. Spisak, 558 U.S. 139, 141 (2010); Wong v. Belmontes, 558 U.S. 15, 15–16 (2009).

[393] 466 U.S. 668 (1984).

[394] *Id.* at 694.

[395] 429 U.S. 545 (1977).

[396] Bursey v. Weatherford, 528 F.2d 483, 484 (4th Cir. 1975).

[397] *Weatherford*, 429 U.S. at 557–58.

Court also noted that the episode was less likely to inhibit attorney-client communications because the government did not deliberately send the agent to the meeting—that is, it was not a "purposeful intrusion."[398] This third party had been invited to the attorney-client meeting, so the problem could have been avoided by simply excluding that person.[399]

After *Weatherford*, the courts demanded a showing of prejudice when the person complaining about government invasion into the attorney-client relationship seeks backward-looking relief, such as the request for damages for an unconstitutional conviction in *Weatherford* or a direct or collateral attack on a criminal conviction. For example, in *United States v. Danielson*,[400] a criminal defendant sought reversal of the conviction because the state had surreptitiously obtained privileged trial strategy information from the defense.[401] Agreeing that "that the government improperly interfered with [the defendant's] attorney-client relationship," the Ninth Circuit held that the defendant had to show substantial prejudice but shifted the burden to the government to prove that it had not obtained tainted evidence.[402]

Even when the Sixth Amendment challenge is used in an attack on a conviction, a less stringent test than the *Strickland* prejudice applies when the state has purposefully interfered with the attorney-client relationship. Instead, "substantial prejudice" is established by showing that the prosecution gained "an unfair advantage of trial" by using confidential information to introduce evidence or anticipate the strategies of the defense.[403]

In *United States v. Gonzalez-Lopez*,[404] the Supreme Court held that no further prejudice need be shown when the Sixth Amendment right to select counsel of the defendant's own choice is wrongly denied, because "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants."[405] The Court explained that "erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.'"[406] Because a person accused

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398 *Id.* at 554 n.4, 557–58.

399 *Id.*

400 325 F.3d 1054 (9th Cir. 2003).

401 *Id.* at 1069.

402 *Id.* at 1071–73.

403 Williams v. Woodford, 384 F.3d 567, 585 (9th Cir. 2004).

404 548 U.S. 140 (2006).

405 *Id.* at 148.

406 *Id.* at 150 (quoting Sullivan v. Louisiana, 508 U.S. 275, 282 (1993)).

of a crime makes many decisions that "do not even concern the conduct of the trial at all," such as whether to plea bargain or cooperate with the government, the Court reasoned that requiring the person to show prejudice in such decisions by being deprived of legal counsel of choice "would be a speculative inquiry into what might have been in an alternate universe."[407]

Similarly, depriving a criminal defendant of the freedom to share confidential information with an attorney because of a state policy or practice of reading attorney-client correspondence goes directly to the underpinnings of the right to assistance of counsel. And, here as well, trying to demonstrate how interruption of the confidential attorney-client relationship by state invasion has impacted litigation decisions is impossible to quantify and further risks revelation of confidential information.[408]

b. No Need to Show Past Prejudice When Seeking Prospective Relief

A prejudice or actual-injury test simply has no purchase when a criminal defendant objects to the government's ongoing invasion of the confidential relationship with the attorney, not in pursuit of money damages, but for a prospective remedy to arrest the continuation of that interference. A criminal defendant cannot be left without recourse until the government's continuing misconduct has prejudiced him to the point of depriving him of liberty, or perhaps his very life. A death row inmate who experiences an ongoing invasion by prison officers into his confidential communications with counsel surely does not have to wait until an execution date has been set before being allowed to object. Constitutional protections for the accused—especially against "the odious practice of eavesdropping on privileged communication between attorney and client"[409]—are not so hollow.

And, indeed, both in terms of other Sixth Amendment claims and a Sixth Amendment claim involving legal mail, the courts have not demanded past harm or some type of actual injury when the party seeks forward-looking relief. As discussed immediately below, these courts recognize that the required showing of Sixth Amendment prejudice for a prisoner seeking prospective-only relief by challenging a prison policy or continuing pattern is logically different from the type of harm that must be shown for such retrospective relief as overturning a conviction on collateral attack or obtaining damages for a civil rights action.[410]

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[407] *Id.* at 150.

[408] On the risk of further revelation of confidential information, see *infra* Part IV.C.4.

[409] State v. Fuentes, 318 P.3d 257, 258 (Wash. 2014) (quoting State v. Cory, 62 Wash. 2d 1019 (1963).

[410] *See* Nordstrom v. Ryan, 762 F.3d 903, 911 (9th Cir. 2014).

In *Benjamin v. Fraser*,[411] the Second Circuit held that, when challenging city jail regulations resulting in substantial and unpredictable delays in attorney visits, pretrial detainees were not required to show actual injury to present a Sixth Amendment claim. Because the right of an accused to the assistance of counsel in an ongoing criminal proceeding "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.'"[412]

Similarly, in *Luckey v. Harris*,[413] the Eleventh Circuit held that criminal defendants did not have to prove "future inevitability of ineffective assistance"[414] to gain standing under the Sixth Amendment to challenge state deficiencies in providing indigent representation. Because the Sixth Amendment "protects rights that do not affect the outcome of a trial," the court held that criminal defendants did not have to wait until after they had been convicted before raising a prospective objection to the infringement of the right to assistance of counsel.[415] Where a defendant seeks to overturn a conviction, "powerful considerations" of finality, post-trial burdens on counsel, and the independence of counsel warrant a demand that prejudice be demonstrated.[416] But the prejudice "standard is inappropriate for a civil suit seeking prospective relief."[417]

In *Nordstrom v. Ryan*,[418] the Ninth Circuit held (over a dissent) that a prisoner seeking to enjoin a prison policy allowing reading of confidential legal mail need show no injury other than chilling interference with the attorney-client relationship. As the court explained:

> Were [the prisoner] 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. [This] case, however, is a civil rights lawsuit aimed at enjoining the continuation of an unconstitutional practice. The harm [the prisoner] 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.[419]

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411 264 F.3d 175, 184–88 (2d Cir. 2001).

412 *Id.* at 185.

413 860 F.2d 1012 (11th Cir. 1988).

414 *Id.* at 1016.

415 *Id.* at 1017.

416 *Id.*; *see also* Dretke v. Haley, 541 U.S. 386, 393 (2004) (explaining *Strickland* requirements to overturn criminal convictions as "show[ing] due regard for States' finality and comity interests").

417 *Luckey*, 860 F.2d at 1017.

418 Nordstrom v. Ryan, 762 F.3d 903, 911 (9th Cir. 2014).

419 *Id.* at 911 (citations omitted).

c. The Potential Problem of Mootness

Given that criminal cases proceed more rapidly on the court docket, a prisoner who was covered by the Sixth Amendment when he attempted to correspond confidentially with his criminal defense lawyer may find that the underlying criminal case has concluded before the civil rights lawsuit on the legal mail matter has reached a final judgment. As noted earlier, the Sixth Amendment indisputably attaches to a person both at the trial and direct appeal stage,[420] but has not yet been extended to post-conviction proceedings.[421]

A prisoner who initiates a civil complaint about interference with legal mail while engaged in criminal defense may experience the transition of the underlying matter from the criminal trial or appeal stages to post-conviction proceedings. In this way, a case that properly had Sixth Amendment standing when it began may become moot simply due to the passage of time.

The Supreme Court has explained that, "[i]n contrast [with standing], by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal."[422]

Given the comparatively quick disposition of a criminal appeal, the right to confidential legal mail under the Sixth Amendment for Arizona prisoners becomes an issue "capable of repetition, yet evading review."[423] The "capable of repetition, yet evading review" exception to mootness has two elements, which are readily met in a typical legal mail interference case:

With respect to the capable-of-repetition element, the prospect of a vacation of a conviction or sentence may suffice. In *Nebraska Press Association v. Stuart*,[424] the Supreme Court regarded the possibility that a criminal defendant's conviction could be reversed on appeal with a new trial ordered as sufficient to show that another restrictive order on trial publicity by the news media might be entered in the future.[425] If the prisoner who initiated the civil rights complaint during a criminal defense is still corresponding with counsel on a post-conviction petition, the possibility that

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[420] *See* Ha Van Nguyen v. Curry, 736 F.3d 1287, 1293 (9th Cir. 2013) ("The Sixth Amendment right to effective counsel applies equally to both trial and appellate counsel.").

[421] *See supra* notes 193–194 and accompanying text.

[422] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 191–92 (2000).

[423] *See* Turner v. Rogers, 564 U.S. 431, 440 (2011) (quoting Southern Pacific Terminal Co. v. ICC, 219 U. S. 498, 515).

[424] 427 U.S. 530 (1976).

[425] *Id.* at 546.

a criminal defendant's conviction might be reversed and the case returned to a trial posture supports the capability of repetition element.[426]

With respect to the evading-review element, given the comparatively expeditious resolution of a criminal case, as contrasted with the period of time necessary to fully adjudicate a civil rights complaint, "the litigation window might never stay open long enough to resolve" the Sixth Amendment question.[427] This is especially true in a case of interference with legal mail for a prisoner in a state prison. Because a criminal defendant in the states typically is held in a city or county jail before and during trial, a defendant is remanded to the custody of a state prison only after conviction. Thus, the only stage of the direct criminal process that remains to unfold during the period in which a prisoner is subject to a state prison legal mail policy is the criminal appeal. The direct criminal appeal almost certainly will be concluded before a newly-initiated civil rights complaint on the legal mail practice or policy can proceed through the prison's grievance process and then be fully litigated through appellate review.[428]

Finally, even if the particular prisoner who presented the legal mail complaint did not face repeated application of the state prison legal mail policy in a Sixth Amendment context, mootness would not prevent the court from deciding the question. Especially when prospective relief is sought against a policy or practice, another prisoner will find him or herself in the same position of resisting that prison's interference with legal mail while defending against a criminal charge. For example, in *United States v. Howard*,[429] the Ninth Circuit held that a challenge by criminal defendants to a federal policy requiring the shackling of all defendants making their initial appearance in a criminal case was not mooted by the conclusion of pretrial proceedings, because the dispute was capable of repetition, yet evading review.[430] Although the court could not assume that the particular defendants

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[426] Hunt v. National Broadcasting Co., 872 F.2d 289, 291–92 (9th Cir. 1989) (holding that the possibility that a criminal defendant's conviction might be reversed to support the capability of repetition element).

[427] *See* A.D. ex rel. L.D. v. Hawaii Dept. of Educ., 727 F.3d 911, 914 (9th Cir. 2013) (applying mootness exception where the upper age limit for special education services would be reached in two years).

[428] *See* Kingdomware Tech, Inc. v. United States, 136 S. Ct. 1969, 1976 (2016) (applying mootness exception to a bid protest because, even though the government contract had since been performed, "a period of two years is too short to complete judicial review of the lawfulness of procurement").

[429] 480 F.3d 1005 (9th Cir. 2007).

[430] *Id.* at 1008.

would be charged in the future with other crimes, the shackling policy would apply in the future to other criminal defendants.[431]

If there remained any doubt about the viability of and availability of full relief from legal mail interference under the Sixth Amendment, the prisoner would still and alternatively have standing for a claim under the First Amendment until his release from custody.[432]

#### *4. Standing for Right-of-Access-to-the-Courts Claim*

As a general rule, under the Supreme Court's ruling in *Lewis v. Casey*,[433] a prisoner asserting denial of access to the courts must prove an injury-in-fact by showing the prison's policy or practice "hindered his efforts to pursue a legal claim."[434]

The courts have clarified that the showing of injury does not require proof that the cause would have been lost on the merits but for the government's action or inaction. In *Simkins v. Bruce*,[435] the Tenth Circuit explained that the prisoner must show "an impediment or hindrance" to the litigation, but was not required to "prove a case within a case to show that the claim hindered or impeded by the defendant necessarily would have prevailed."[436] While proof of an adverse outcome of a non-frivolous claim certainly establishes a constitutional harm, demonstrating that the pursuit of the claim was impeded is sufficient, such as showing that an opportunity to respond or challenge an argument was lost[437] or that opposing governmental party gained "an unfair advantage" by having gaining access to confidential attorney-client information.[438]

Most courts have held without analysis that, in contrast with free speech claims,[439] a prisoner asserting a right-of-access-to-the-courts claim involving

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[431] *Id.* at 1009–10.

[432] For prisoner standing in a legal mail case under the First Amendment, see *supra* Part IV.C.2.

[433] Lewis v. Casey, 518 U.S. 343 (1996).

[434] *Id.* at 351.

[435] Simkins v. Bruce, 406 F.3d 1239 (10th Cir. 2005).

[436] *Id.* at 1243–44.

[437] *See id.* at 1244; *see also* Penton v. Pool, 724 Fed. App'x 546, 549–50 (9th Cir. 2018) (emphasizing that the "actual injury" requirement for standing in an access-to-courts claim "is not an assessment of the merits of the underlying claim that is now lost," and that prison officials' withholding of court mail that "frustrated [an inmate's] ability to timely object" to a magistrate judge's ruling and then to timely appeal from the district court stated a claim).

[438] Cody v. Weber, 256 F.3d 764, 768–69 (8th Cir. 2001).

[439] *See supra* Part IV.C.2.

legal mail must satisfy this actual-injury test.[440] But a strong argument can be made that the *Lewis* actual injury requirement simply does not extend to legal mail cases, at least where the prison has deliberately invaded confidentiality through the reading attorney-client correspondence. Because *Lewis* involved a claim of a purported right of access through affirmative assistance by the prison by providing a law library, at least one court has held that "*Lewis* does not speak to a prisoner's right to litigate in the federal courts without unreasonable interference."[441] In addition to a prisoner's limited right to affirmative assistance by the prison in gaining access to courts, "prisoners have a right under the First and Fourteenth Amendments to litigate claims challenging their sentences or the conditions of their confinement to conclusion without *active interference* by prison officials."[442] Accordingly, when a prisoner alleges direct intrusion into the attorney-client relationship by a prison officer through the reading of confidential legal mail, the prisoner has simultaneously established standing and stated a claim for a violation of the right to access the courts without active interference.

Moreover, an exacting actual-injury test would put a prisoner asserting invasion of confidentiality in a classic "Catch-22" scenario. When a prisoner shows the extraordinary action of a prison official in reading legal mail, the defendant prison officials should not be rewarded for that misconduct by forcing a prisoner to further disclose confidential information about his strategy to contest a criminal conviction or prison conditions.

A ready analogy may be found in the way the courts address a party's complaint that his or her former attorney should be disqualified for a successive conflict of interest. Under Rule 1.9 of the Model Rules of Professional Conduct, a lawyer may not represent an adversary of a former client if the two matters are "substantially related."[443] Under both federal and state law, "the ethical prohibition against acceptance of adverse employment involving prior confidential information includes potential as well as actual use of previously-acquired privileged information," such that "it matters not whether confidences were in fact imparted; the underlying concern is the possibility that [the lawyer] may have received confidential information from [the former client] in a substantially related matter."[444] As the Seventh Circuit explained in two classic decisions regarding successive conflicts, "it is not appropriate for the court to inquire into whether actual confidences

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[440] *See, e.g.*, Al-Amin v. Smith, 511 F.3d 1317, 1332–33 (11th Cir. 2008); Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003).

[441] Silva v. Di Vittorio, 658 F.3d 1090, 1103 (9th Cir. 2011).

[442] *Id.* at 1103 (emphasis in original).

[443] MODEL RULES OF PROF'L CONDUCT R. 1.9 (2016).

[444] Thomas v. Mun. Court, 878 F.2d 285, 289 n.4 (9th Cir. 1989) (alteration in original).

were disclosed,"[445] because of "the difficulty of taking evidence on the question without compromising the confidences themselves."[446]

In sum, a prisoner should not have to prove that she was harmed by seizure of confidential information by further disclosing that very confidential information—especially to the government that is aggressively seeking to uphold a conviction or defend against a charge of unconstitutional prison conditions. Such a mandate for revelation is impossible to reconcile with the constitutional protections surrounding the attorney-client relationship.

### D. RETROSPECTIVE AND PROSPECTIVE RELIEF IN LEGAL MAIL CASES

The Prison Litigation Reform Act includes limitations on both retrospective and prospective relief in prisoner cases challenging the conditions of confinement,[447] although these limitations should have little bearing in most legal mail cases.

When a prisoner seeks retrospective relief in the form of damages, the PLRA excludes recovery for "mental or emotional injury suffered while in custody without a prior showing of physical injury."[448] While the apparent purpose of this provision is to restrict recovery for a prisoner claiming emotional harm without physical injury in an Eighth Amendment challenge to physically-abusive prison conditions,[449] some courts have applied the limitation to other violations of constitutional rights.[450] The circuits are evenly-divided on whether a prisoner may recover damages (absent a

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[445] Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 224 (7th Cir. 1978).

[446] Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1269 (7th Cir. 1983). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2013) ("A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter.").

[447] Blake P. Sercye, Comment, *"Need-Narrowness-Intrusiveness" Under the Prison Litigation Reform Act of 1995*, 2010 U. CHI. LEGAL F. 471, 472 (2010) ("While Congress enacted the PLRA predominately as a means of eliminating meritless lawsuits, the PLRA also places strict limits on the remedies courts can offer inmates.").

[448] 42 U.S.C. § 1997e(e).

[449] *See* Royal v. Kautzky, 375 F.3d 720, 730 (8th Cir. 2004) (Heaney, J., dissenting) ("When a plaintiff files suit for a violation of his First Amendment rights, his claim is based on a deprivation of an intangible right. Whether his claim is valid is not linked to the existence or severity of his mental or emotional anguish.").

[450] *See generally* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 143–45 (2008).

physical injury) for a violation of the First Amendment rights of free exercise of religion and free speech.[451]

In any event, even if the PLRA limitation were held inapplicable to a claim for the intangible harm caused by a deliberate interference with the attorney-client relationship, most prisoners likely would recover little more than nominal damages. The injury to the attorney-client relationship being difficult to quantify, and not comparable in immediacy and concreteness of injury to episodes of physical abuse, a fact-finder is unlikely to award substantial amounts of compensation for violating the confidentiality of mail.

Still, the PLRA limitation plainly does not apply prevent an award of nominal damages and should not readily be understood to preclude punitive damages.[452] And when a pattern or policy is shown of deliberate intrusion into confidential legal mail, especially after the right to confidentiality has been clearly established,[453] punitive damages are entirely appropriate.

Prospective relief is likely to be of greater value in most legal mail cases. When a prisoner has experienced interference by the prison with confidential attorney-client communications, he is likely to be primarily concerned that the invasion be recognized as wrongful in nature and that it not continue.

The PLRA also limits the availability of prospective relief to that which is "necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."[454] Before granting injunctive relief, or accepting a consent decree that includes injunctive relief, the court must "find[] that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[455] In making that evaluation, the

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[451] *Compare* Sisney v. Reisch, 674 F.3d 839, 842–43 (8th Cir. 2012) (holding that the PLRA limitation on mental damages applies to all constitutional claims, including free exercise of religion); Thompson v. Carter, 284 F.3d 411, 417–18 (2d Cir. 2002) (same); and Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) (same), *with* Aref v. Lynch, 833 F.3d 242, 262–66 (D.C. Cir. 2016) (holding that a prisoner is entitled to damages relief for a First Amendment claim standing alone, regardless of physical injury); King v. Zamiara, 788 F.3d 207, 213 (6th Cir. 2015) (same); Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir. 1999) (same); and Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (same).

[452] Smith v. Allen, 502 F.3d 1255, 1271 (11th Cir. 2007); Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003); *Thompson*, 284 F.3d at 418; *Allah*, 226 F.3d at 251–52. *But see* Al-Amin v. Smith, 637 F.3d 1192, 1197–98 (11th Cir. 2011) (holding that PLRA limitation on mental damages covers punitive damages).

[453] On showing that a right is clearly established to defeat a defense of qualified immunity, see *infra* Part IV.E

[454] 18 U.S.C. § 3626(a)(1)(A) (West 2018).

[455] *Id.*

court "shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."[456]

Given the nature of the wrong involved in legal mail cases, these statutory limitations on injunctive relief should be easily accommodated. First, in a legal mail case, the prospective remedy would be targeted to the particular harm of opening legal mail outside the prisoner's presence or reading it, which would not prevent such other security measures as physical inspection for contraband. Thus, such an "[i]njunction does not require court supervision, [it] enjoins only enforcement of the unconstitutional policy and does not interfere with prison mail security measures."[457] Second, because prisons have no legitimate need to read the contents of attorney-client correspondence,[458] absent individualized suspicion of wrongdoing, any claim of a "public safety" concern would be strained. And, third, as for concerns about "the operation of a criminal justice system," a prison's intrusion into the attorney-client relationship poses a danger to the criminal justice system and thus judicial relief would bolster criminal justice.

To be entitled to injunctive relief in general, a civil rights plaintiff must demonstrate "that he is realistically threatened by a repetition of the experience" that constitutes a constitutional violation.[459] As the Ninth Circuit has explained, "[t]here are at least two ways in which to demonstrate that such injury is likely to recur":[460]

*First*, "a plaintiff may show that the defendant had, at the time of the injury, a written policy, and that the injury 'stems from' that policy."[461] When a prison has a policy that by its terms allows invasion of confidential attorney-client correspondence, and thus "the harm alleged is directly traceable to a written policy, there is an implicit likelihood of its repetition in the immediate future."[462]

*Second*, and alternatively, "the plaintiff may demonstrate that the harm is part of a 'pattern of officially sanctioned . . . behavior, violative of the

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[456] *Id.*

[457] *See* Clement v. Cal. Dept. of Corr., 364 F.3d 1148, 1153 (9th Cir. 2004) (discussing injunction against a prison policy prohibiting prisoner receipt of mail including written material downloaded from the internet).

[458] *See supra* Parts III.C & D (describing other means by which a prison may protect against the introduction of contraband and interrupt illegal communications and contrasting legitimate inspection with reading or skimming of the contents of legal mail).

[459] City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983).

[460] Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001), *abrogated on other grounds by* Johnson v. California, 543 U.S. 499, 504–05 (2005).

[461] *Armstrong*, 275 F.3d at 861. On standing as established by a policy, see *supra* Part IV.C.1.

[462] *Id.* (internal citations omitted).

plaintiffs' [federal] rights.'"[463] Thus, if the prison administration has affirmed a corrections officer's conduct (such as denying a grievance filed by the prisoner)[464] or fails to take action after being informed of the problem (such as by the filing of a grievance by the prisoner), then the officer's behavior would have been "officially sanctioned."[465] Likewise, if a pattern or practice of interference with legal mail is proven, the prison administration would be accountable for ongoing behavior and its failure to bring it to a stop.[466]

As another form of prospective judicial relief, a prisoner may be entitled to a declaratory judgment regarding the unconstitutionality of the State's intrusion into the confidentiality of a prisoner's communications with his lawyer. A declaratory judgment is in order when the plaintiff shows "the particularized nature of the harms alleged," "the prospect of future interference by the officials," and "the Government's failure to disavow application of the challenged" policy or practice.[467]

### E. QUALIFIED IMMUNITY FOR PRISON OFFICERS IN LEGAL MAIL CASES

In *Harlow v. Fitzgerald*,[468] the Supreme Court concluded that the proper "balance between the evils" of abuse of office by government officials and the social costs of litigation against government officials (which run against the innocent as well as the guilty) was best measured by affording *qualified,* but not *absolute,* immunity to those officials.[469] The question of whether qualified immunity covers the defendant official's conduct turns upon the objective reasonableness of the official's conduct.[470] In defining the standard for qualified immunity, the *Harlow* Court expressed the crucial inquiry as whether the official violated "clearly established statutory or constitutional

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[463] *Id.* (quoting LaDuke v. Nelson, 762 F.2d 1318, 1323 (9th Cir. 1985)).

[464] On the prison grievance process, see *supra* Part IV.A.

[465] *Armstrong*, 275 F.3d at 861.

[466] *See* Melendres v. Arpaio, 695 F.3d 990, 998 (9th Cir. 2012) (affirming the District Court's finding of standing for injunctive relief against a policy or practice of racially profiling Latinos in vehicle stops based on the county sheriff's "express claim of 'authority'" to detain persons believed not legally present in the United States and after plaintiffs were allowed to present evidence that the sheriff "engaged in a pattern or practice" of such traffic stops).

[467] LSO, Ltd. v. Stroh, 205 F.3d 1146, 1154–55 (9th Cir. 2000); *see also* Babbitt v. United Farm Workers, 442 U.S. 289, 302 (1979) (affirming lower court's declaration (and injunction) of a statute where "the State has not disavowed any intention of invoking" a criminal penalty against the unions for unfair labor practices and thus the union reasonably feared prosecution).

[468] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[469] *Id.* at 813.

[470] *Id.* at 818–19.

rights of which a reasonable person would have known."[471] By adopting an objective test for qualified immunity, the Court insisted that it was not thereby granting any "license to lawless conduct" because the public interest in deterring official wrongdoing is adequately protected by a test that focuses upon the objective reasonableness of the official's acts.[472] As the Court later said in *Brosseau v. Haugen*,[473] "[b]ecause the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct."[474]

With respect to claims for damages, the right of a prisoner to relief when a prison employee has invaded attorney-client correspondence depends on whether the right to confidentiality in legal mail was clearly established in that jurisdiction at the time of the episode.

The progression toward clear establishment of a right to confidentiality in legal mail right is well-illustrated by developments in the Sixth Circuit. In 1993, in *Lavado v. Keohane*,[475] when evaluating whether defendant prison officials were entitled to qualified immunity, the Sixth Circuit remarked that the circuit had not yet "clearly established" that opening or reading legal mail violated "constitutional rights in and of itself."[476] Even so, the court reversed summary judgment for the defendants, concluding it was well-established "that opening/reading inmates' mail in 'arbitrary' or 'capricious' fashion does violate inmates' First Amendment rights."[477] Later, in 2003, in *Sallier v. Brooks*,[478] the Sixth Circuit stated that while the confidentiality of mail to a prisoner from a court had not been well-settled, "[a]ttorney mail is, of course, an altogether different story."[479] The court denied qualified immunity for opening mail from an attorney outside of the prisoner's presence.[480] Subsequently, in 2009, in *Merriweather v. Zamora*,[481] the Sixth Circuit confirmed that opening a prisoner's legal mail outside of his presence now did violate "clearly established" First and Sixth Amendment rights.[482]

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471 *Id.* at 818.
472 *Id.* at 819.
473 Brosseau v. Haugen, 543 U.S. 194 (2004).
474 *Id.* at 198.
475 Lavado v. Keohane, 992 F.2d 601 (6th Cir. 1993).
476 *Id.* at 609.
477 *Id.* at 609–10 (internal citations omitted).
478 343 F.3d 868 (6th Cir. 2003).
479 *Id.* at 879.
480 *Id.*
481 569 F.3d 307 (6th Cir. 2009).
482 *Id.* at 316–17.

Finally, qualified immunity for individual officers is not available in an action for declaratory or injunctive relief.[483] Qualified immunity applies only to claims for *monetary damages*.[484]

## CONCLUSION

No one in our society has a more compelling need to communicate in complete confidence with a lawyer than a prisoner, especially one on death row, when challenging a conviction as wrongful or prison conditions as unlawful. No one has a greater need to be able to engage in the uninhibited discussion of highly personal matters, tragic events, and official misconduct. Courts must be vigilant in assuring that a prisoner's right to effective and attentive counsel is not compromised by prison officials who pry into confidential communications.

[483] Pearson v. Callahan, 555 U.S. 223, 242–43 (2009) (saying that qualified immunity is not available "in a suit to enjoin future conduct;" (quoting County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998)); Gardner v. Howard, 109 F.3d 427, 431 (8th Cir. 1997); Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 527 (9th Cir.1989))).

[484] Hydrick v. Hunter, 669 F.3d 937, 939-940 (9th Cir. 2012).