NOTES

DOUBLING DOWN ON DUE PROCESS: TOWARD A GUARANTEED RIGHT TO LEGAL COUNSEL IN JAIL DISCIPLINARY PROCEEDINGS

*Nkechi N. Erondu**

Wolff v. McDonnell *is the seminal case outlining the due process rights due to incarcerated people in disciplinary hearings. The Court held that incarcerated people are entitled to the minimum procedures appropriate under the circumstances and required by the Due Process Clause but stopped short of adopting the full panoply of procedural safeguards. Namely, the Court found that incarcerated people have no due process right to confront and cross-examine adverse witnesses or to appointed or retained counsel, believing that extending such rights would undermine institutional safety and correctional goals.*

This Note advocates for a reexamination of the due process protections afforded to pretrial jail populations—specifically the right to counsel in jail disciplinary proceedings. It demonstrates that the Wolff *Court failed to adequately consider all the interests of an incarcerated person by refusing to impose the requirement of counsel in disciplinary hearings. Even further, this Note contends that in the era of COVID-19, where the harms of pretrial detention generally, and solitary confinement more specifically, are well-documented, an unlimited right to counsel is needed now more than ever in jail disciplinary hearings.*

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INTRODUCTION

The dehumanizing conditions of U.S. jails have been a topic of concern over the past few years, but the COVID-19 pandemic has laid bare the dire need for widespread reexamination of correctional policies and practices.[1] In jails, where social distancing is nearly impossible and overcrowding is persistent,[2] incarcerated people are facing deteriorating conditions, including rising violence, self-harm, severe illness, correctional officer use of force, and death.[3] Furthermore, correctional staff shortages,

1. See Jonah E. Bromwich & Jan Ransom, 10 Deaths, Exhausted Guards, Rampant Violence: Why Rikers Is in Crisis, N.Y. Times (Nov. 8, 2021), https://www.nytimes.com/2021/09/15/nyregion/rikers-island-jail.html (on file with the *Columbia Law Review*) (explaining the history of dysfunction on Rikers Island and the more recent efforts to improve the facilities); Spencer S. Hsu & Paul Duggan, Unacceptable Conditions at D.C. Jail Lead to Plan to Transfer About 400 Inmates, Officials Say, Wash. Post (Nov. 2, 2021), https://www.washingtonpost.com/local/public-safety/dc-jail-inmates-transferred/2021/11/02/b5255388-3be8-11ec-bfad-8283439871ec_story.html (on file with the *Columbia Law Review*) ("The inspection, and the planned removal of federal prisoners, raises questions about the treatment of nonfederal inmates, who make up a vast majority of the jail's population.").

2. Though jails across the country released people at unprecedented rates at the beginning of the COVID-19 pandemic, jail numbers have begun to creep back up to pre-pandemic rates. See Jerry Iannelli, COVID-19 Is Spreading Faster Than Ever. Jail Populations Are Surging, Too, Appeal (Feb. 3, 2021), https://theappeal.org/covid-19-jail-populations-surging/ [https://perma.cc/EGX4-QRYS] ("But now, nearly one year later, COVID-19 is spreading at a higher rate, and the county jail population has instead risen once again.").

3. See Timothy G. Edgemon & Jody Clay-Warner, Inmate Mental Health and the Pains of Imprisonment, 9 Soc'y & Mental Health 33, 35–36 (2018) (finding that overcrowding and

coupled with the pandemic, have exacerbated tensions inside correctional facilities, resulting in overenforcement of disciplinary action, including excessive use of restrictive housing.[4] Though a dearth of research exists regarding the use of disciplinary action in jails, recent research has shown that jails employ restrictive housing as much as, if not more than, prisons.[5]

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punitiveness are correlated with depression and hostility); The Associated Press, New York's Rikers Island Jail Spirals Into Chaos Amid Covid Pandemic, Syracuse.com (Sept. 17, 2021), https://www.syracuse.com/state/2021/09/new-yorks-rikers-island-jail-spirals-into-chaos-amid-covid-pandemic.html [https://perma.cc/4QC2-BK5Y] ("The jail's federal monitor, Steve J. Martin, said in a letter to U.S. District Judge Laura Swain . . . that worsening conditions in the city's jails—rising violence, self-harm, death and use of force by guards—were tied directly to a spike in 'excessive and unchecked staff absences' . . . ."); Katie Rose Quandt & Alexi Jones, Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health, Prison Pol'y Initiative (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealth impacts/ [https://perma.cc/FN8C-EHHA] ("Many jails and prisons throughout the country are overcrowded, which makes the inherently negative carceral environment even worse. Overcrowding often means more time in cell, less privacy, less access to mental and physical healthcare, and fewer opportunities to participate in programming and work assignments.").

4. See Christopher Blackwell, In Prison, Even Social Distancing Rules Get Weaponized, The Marshall Project (May 28, 2020), https://www.themarshallproject.org/2020/05/28/in-prison-even-social-distancing-rules-get-weaponized [https://perma.cc/G5NA-D2FB] (describing correctional officers' overuse of solitary confinement); Dana Gentry, Incarcerated Pay Price for Prison System Staffing Shortages, Nev. Current (Oct. 25, 2021), https://www.nevadacurrent.com/2021/10/25/incarcerated-pay-price-for-prison-system-staffing-shortages/ [https://perma.cc/NBC9-P8HF] ("Some inmates complain they've lost good time credits and seen their release dates pushed back because they say they're forced to 'act up' to get the attention of what they say is a bare-boned staff."); Katja Riddersbusch, COVID Precautions Put More Prisoners in Isolation. It Can Mean Long-Term Health Woes, NPR (Oct. 4, 2021), https://www.npr.org/sections/health-shots/2021/10/04/1043058599/rising-amid-covid-solitary-confinement-inflicts-lasting-harm-to-prisoner-health [https://perma.cc/E3C5-U4X9] ("[A]t the height of the pandemic last year, up to 300,000 incarcerated individuals were in solitary . . . ."); Emily Widra & Wanda Bertram, More States Need to Use Their "Good Time" Systems to Get People Out of Prison During COVID-19, Prison Pol'y Initiative (Jan. 12, 2021), https://www.prisonpolicy.org/blog/2021/01/12/good-time/ [https://perma.cc/3R5G-U76Y] ("Shockingly, despite clear evidence that solitary confinement is not a suitable replacement for medical isolation or quarantine, the use of solitary confinement has increased 500% during the pandemic.").

5. See Craig Haney, Joanna Weill, Shirin Bakhshay & Tiffany Lockett, Examining Jail Isolation: What We Don't Know Can Be Profoundly Harmful, 96 Prison J. 126, 131 (2016) ("There are several reasons to believe that solitary confinement . . . is used at least as frequently—if not more often—in jails as in the nation's prisons.").

Restrictive housing, or solitary confinement,[6] should be based on a finding—after a disciplinary hearing[7]—that an incarcerated person violated correctional agency rules or standards.[8] Aspects of disciplinary hearings vary greatly throughout the country.[9] In general, all incarcerated people are subject to disciplinary codes of conduct and may be subject to sanctions if they violate any of the rules.[10] If an incarcerated person is alleged to have violated a rule, a correctional staff member, typically called the reporting officer, will formally charge them by writing an incident report.[11] The charged person will face a hearing body, typically consisting of other correctional officers, and have an opportunity to plead their case.[12] After the presentation of all the evidence, the hearing body will deliberate and then deliver a decision.[13]

The disciplinary process was established in *Wolff v. McDonnell*.[14] Prior to this case, the imposition of punishment was remarkably arbitrary with

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6. Restrictive housing usually involves limited interaction with other incarcerated people, limited programming opportunities, and reduced privileges. Disciplinary segregation, punitive segregation, administrative segregation (largely nonpunitive in nature), solitary confinement, Special Housing Units (SHUs), or Intensive Management Units are all terms used to describe restrictive housing. For the purposes of this Note, the terms restrictive housing, disciplinary segregation, and solitary confinement will be used interchangeably. See generally Allen J. Beck, Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12 (2015), https://bjs.ojp.gov/content/pub/pdf/urhuspj1112.pdf [https://perma.cc/3GUK-S4HQ] (discussing the use of restrictive housing in U.S. prisons and jails).

7. Generally, movement of an incarcerated person to restrictive housing occurs after a due process hearing. Circumstances may, however, require the imposition of temporary restrictions on an incarcerated person prior to the due process hearing. This is typically called administrative segregation. While there is an argument to be made about the unconstitutionality of administrative segregation, namely the insidious ways that correctional facilities use administrative segregation as a way to avoid having to provide incarcerated people due process protections, it is not the topic of this Note. See Marie Gottschalk, Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails, 125 Yale L.J. Forum 253, 257 (2016) (describing how many states impose no time limits on how long correctional officials can place someone in administrative segregation).

8. See Miranda Berge, Your Rights at Prison Disciplinary Proceedings, *in* A Jailhouse Lawyer's Manual 542, 544 (12th ed. 2021), https://jlm.law.columbia.edu/files/2017/05/30.-Ch.-18.pdf [https://perma.cc/UQ6M-HWGK] ("Prison officials in New York may put a prisoner in a Segregated Housing/Holding Unit (SHU) for a set period of time if they find that the prisoner broke a rule." (footnote omitted)).

9. See id. at 542 (noting that disciplinary proceedings may vary by state).

10. Correctional facilities are required to publish rules governing the conduct of incarcerated people. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

11. See infra sections I.A.1–.2.

12. See infra section I.A.3.

13. See infra section I.A.3.

14. 418 U.S. 539 (1974).

no guarantee of notice or a hearing.[15] *Wolff* defined the due process rights of incarcerated people who have been convicted of crimes, but the Court has clarified that its holdings are applicable to those confined in jails pretrial.[16] In *Wolff*, the Supreme Court held that incarcerated people are entitled to due process in disciplinary proceedings that can result in the loss of good-time credit[17] or in punitive segregation.[18] The Court declined to extend the right to counsel to incarcerated people in disciplinary proceedings, however.[19] In justifying its decision, the Court explained that inserting counsel into the disciplinary process would make proceedings more adversarial, undermine correctional goals, cause unnecessary delays, and create practical problems in sufficiently providing counsel at every disciplinary hearing.[20]

This Note will argue for a reexamination of the due process protections afforded to pretrial jail populations under the backdrop of the COVID-19 pandemic—specifically the right to counsel in jail disciplinary proceedings.[21] Part I describes the *Wolff* protections afforded to incarcerated people in disciplinary proceedings and explores how jurisdictions have applied the *Wolff* protections and restrictions. Part II asserts that denying a right to counsel in jail disciplinary proceedings contradicts critical constitutional and penological principles. Part III highlights various state and jurisdictional systems that provide counsel to incarcerated people in jail disciplinary proceedings and examines practical barriers to widespread provision of counsel.

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15. See William Babcock, Due Process in Prison Disciplinary Proceedings, 22 B.C. L. Rev. 1009, 1009 (1981).

16. See Bell v. Wolfish, 441 U.S. 520, 545 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").

17. Good-time credit or good time is a statutorily determined sentence reduction provided to incarcerated people who maintain good behavior while in prison or jail. A person can also lose good-time credit for committing disciplinary infractions while incarcerated. See Paul J. Larkin, Jr., Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release, 11 Geo. J.L. & Pub. Pol'y 1, 11 (2013).

18. *Wolff*, 418 U.S. at 539, 557–58, 571 n.19.

19. Id. at 570; see also Baxter v. Palmigiano, 425 U.S. 308, 315 (1976) ("We see no reason to alter our conclusion so recently made in *Wolff* that inmates do not 'have a right to either retained or appointed counsel in disciplinary hearings.'" (quoting *Wolff*, 418 U.S. at 570)).

20. *Wolff*, 418 U.S. at 570.

21. For the purposes of this Note, any reference to people confined in jails specifically refers to people detained pretrial—in other words, people awaiting trial and thus still legally innocent. Though some people held in local jails have been convicted, the large majority—over 80%—have not been convicted. See Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2022, Prison Pol'y Initiative (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/PR7J-ZFJC].

I. DISCIPLINARY HEARINGS AND DUE PROCESS

This Part summarizes the constitutional due process guarantees established under *Wolff*, discusses the Court's rationales for the due process restrictions, and explores the ways in which jurisdictions have applied the *Wolff* standards.

A. *Minimum Protections Established Under* Wolff

In *Wolff v. McDonnell*, Robert O. McDonnell, on behalf of himself and other similarly situated incarcerated people at the Nebraska Penal and Correctional Complex, challenged several of the prison's practices and regulations.[22] McDonnell argued that prison officials engaged in a pattern of retaliation against incarcerated people who petitioned the courts.[23] For example, McDonnell testified that a day after appearing in federal court, he was reassigned from being a clerk-typist in the reception center of the prison to a much less favorable work assignment in the soap factory.[24] McDonnell also challenged the procedure denying all people incarcerated in the Reformatory Unit—a unit designed for first-time nonviolent offenders—access to the law library.[25] Furthermore, McDonnell testified that he and other incarcerated people were reluctant to make use of legal assistants (i.e., incarcerated people who have general knowledge of legal procedure and are appointed by the complex to assist other incarcerated people who are in need of legal assistance) for fear that information provided to the legal assistant would be forwarded to prison administration.[26] And finally, plaintiffs stated that they lost good time for arbitrary reasons such as not wearing socks or failing to shave and that on occasion, when called before the disciplinary committee, McDonnell was not made aware of the charges against him until after he arrived before the committee.[27] McDonnell filed a class action under 42 U.S.C. § 1983 alleging, inter alia, that prison disciplinary proceedings were conducted without regard for procedural or substantive due process[28] in violation of the Due Process Clause of the Fourteenth Amendment.[29]

In resolving the case, the Supreme Court explained the procedural safeguards due to incarcerated people in disciplinary hearings. The Supreme Court held first that an incarcerated person's interest in

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22. *Wolff*, 418 U.S. at 542.

23. McDonnell v. Wolff, 342 F. Supp. 616, 619 (D. Neb. 1972).

24. Id.

25. Id. at 620.

26. Id.

27. Id. at 619–20.

28. See Berge, supra note 8, at 542–43 ("Substantive due process means the government must treat people with 'fundamental fairness.' The government cannot interfere with these rights unless it is absolutely necessary for a more important public need." (footnote omitted)).

29. Wolff v. McDonnell, 418 U.S. 539, 542–43 (1974).

disciplinary proceedings is included in the Fourteenth Amendment's due process concept of "liberty."[30] Therefore, an incarcerated person is entitled to at least some minimum procedures appropriate under the circumstances, and the court is required by the Due Process Clause to ensure that the right to a fair hearing "is not arbitrarily abrogated."[31] These minimum procedural requirements were set forth in *Morrissey v. Brewer*, a parole case, and included written notice of the claimed violations of parole, disclosure to the person on parole of evidence against them, opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation), a "neutral and detached" hearing body such as a traditional parole board, and a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[32]

After making this determination, the *Wolff* Court assessed which protections incarcerated people should receive in disciplinary proceedings. The Court was sure to underscore its view that due process does not require rigid procedures that are universally applicable to every conceivable situation.[33] In the tradition of *Goldberg v. Kelly*,[34] the *Wolff* Court employed a balancing test, weighing the competing interests of the parties to arrive at the minimum due process requirements necessary in prison disciplinary proceedings.[35] The *Wolff* Court placed a great deal of weight on the state's need to maintain order and discipline within a tightly controlled complex that houses people who have violated criminal laws, and it noted the very real potential for retaliation between incarcerated people.[36] The Court recognized that disciplinary hearings inherently involve confrontations between incarcerated people and correctional authorities as well as between incarcerated people who are being disciplined and those who would charge or furnish evidence against them; consequently, the safety of correctional staff and those incarcerated may be compromised.[37]

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30. Id. at 556–57 ("We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that Clause against state infringement, the interest of prisoners in disciplinary procedures is not included in that 'liberty' protected by the Fourteenth Amendment.").

31. Id. at 557.

32. 408 U.S. 471, 489 (1972).

33. *Wolff*, 418 U.S. at 560 ("We have often repeated that '(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961))).

34. 397 U.S. 254 (1970).

35. *Wolff*, 418 U.S. at 561–62.

36. Id.

37. Id. at 562 ("[D]isciplinary hearings . . . necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. . . . [T]he basic and unavoidable task of providing reasonable safety for guards and inmates may be at stake . . . .").

Acknowledging incarcerated people's interest in securing a just determination of charges to avoid further liberty deprivations, the Court held that incarcerated people charged with disciplinary violations should be afforded many due process protections.[38] But the Court also held that incarcerated people do not enjoy the full range of procedures outlined in *Morrissey*.[39] First, the Court held that incarcerated people were guaranteed at least twenty-four hours of written notice of charges prior to a disciplinary hearing.[40] Second, it mandated that at the conclusion of the hearing, incarcerated people must receive a written statement by the disciplinary committee of the evidence relied on in reaching its decision.[41] Third, the Court granted incarcerated people a qualified right to present evidence and call witnesses but only if doing so would not be harmful to institutional safety or correctional goals of retribution, rehabilitation, deterrence, and incapacitation.[42] The *Wolff* Court's holding applied to any cases involving the potential of punitive segregation or deprivation of good-time credit, but the Court declined to clarify whether the minimum protections would apply in situations involving lesser penalties such as loss of privileges, including not being allowed to watch television or go to the yard.[43]

1. *Advance Written Notice.* — *Wolff* guarantees incarcerated people the right to receive written notice of charges brought against them at least twenty-four hours before a disciplinary hearing is scheduled to begin.[44] Providing adequate and timely notice is a fundamental requirement of due process and arguably underpins all other due process safeguards.[45] The purpose of advance written notice is well-documented.[46] In the context of disciplinary proceedings, advance written notice may serve several purposes. First, written notice that contains the allegations against an incarcerated person allows the disciplinary board to effectively determine the facts of a

38. Id. at 539–40.

39. Id. at 539–40, 556.

40. Id. at 563–64.

41. Id. at 564–65.

42. Id. at 566.

43. Id. at 571 n.19.

44. Id. at 563–64.

45. See Cole v. Arkansas, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding . . . ."); Karla M. Gray, Note, The Fourteenth Amendment and Prisons: A New Look at Due Process for Prisoners, 26 Hastings L.J. 1277, 1285 (1975) ("It has been established that timely and adequate notice is not only essential to a factfinding inquiry, but is also a prerequisite to any other due process requirements.").

46. See, e.g., *Wolff*, 418 U.S. at 564 ("We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense."); In re Gault, 387 U.S. 1, 33 (1967) ("Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'") (quoting President's Comm'n on L. Enf't & Admin. of Just., The Challenge of Crime in a Free Society 87 (1967))).

case.[47] Oral notice, on the other hand, is insufficient because it tends to be less precise than written notice, and an incarcerated person cannot easily refer to it should they forget or misunderstand any allegations.[48] Second, written notice is necessary for people to comprehensively understand the charges brought against them. Lastly, written notice of the charges becomes part of the written documentation of the proceeding, which serves as a record for both the incarcerated person and correctional authorities if the hearing is formally reviewed.[49]

Some jurisdictions, such as New York and Washington, D.C., establish more stringent notice requirements than those articulated in *Wolff*. For example, they require that the written notice contain information such as the date, time, place, and nature of the allegation, as well as the housing unit and cell number where the alleged violation occurred.[50] Additionally, if more than one incarcerated person was involved in the incident, the specific role played by each must be included.[51] Furthermore, non-English speaking incarcerated people have the right to translations of the notice of the charges and statements of evidence and are also entitled to have a translator present at the disciplinary hearing.[52] Those who are illiterate, deaf, or hard of hearing have similar rights.[53]

Inserting counsel in the disciplinary process may help further the goals of providing advance written notice. After receiving notice, however, incarcerated people are expected to prepare their defenses without the aid of counsel. In some instances, incarcerated people may face several charges in one disciplinary proceeding and will be expected to establish a defense for each charge.[54] Incarcerated people may lack the experience and skills to sufficiently study and establish adequate defenses for various

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47. See Gray, supra note 45, at 1285 ("[T]he disciplinary committee or board cannot properly determine the facts if only one side of the facts is presented to it.").

48. See id.

49. See id. ("Further, written notice of the charges should become part of the written record of the proceeding, to protect both inmate and authorities on review of the hearing or at any other time an inmate's records are reviewed.").

50. See N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(a) (2022); Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 14 (D.C. Dep't of Corr. 2019); see also Howard v. Coughlin, 593 N.Y.S.2d 707, 708–09 (4th Dep't 1993) (finding notice insufficient when it provided the wrong date for when the alleged misconduct occurred).

51. N.Y. Comp. Codes R. & Regs. tit. 7, § 251–3.1(c).

52. Id. § 254.2.

53. Id.

54. For example, in one incident, an incarcerated person may be charged with possession of contraband, tampering with a witness or informant, lack of cooperation, and disrespect. The incarcerated person would need to prepare a defense for each of the alleged violations in twenty-four hours. See Benitez v. Wolff, 985 F.2d 662, 665 (2d Cir. 1993) (involving an incarcerated person who was charged with twelve offenses, given twenty-four hours to prepare a defense, and was only allowed to have written notice of the offenses against him for roughly thirty minutes per offense).

charges with the limited time and resources available to them.[55] Furthermore, though written notice of the charges must be clear enough to provide incarcerated people a meaningful opportunity to prepare a defense, *Wolff* does not require the notice to have any specific content.[56] Incarcerated people may be at a disadvantage if they are in jurisdictions with more lax notice requirements. Ultimately, where the written notice lacks critical information necessary to marshal facts and gather evidence in preparation for an adequate defense, incarcerated people may not be equipped with the advocacy strategies counsel effectively employ to help clients mitigate these types of issues.[57]

2. *Written Statement of Fact Findings*. — With certain exceptions, *Wolff* guarantees an incarcerated person the constitutional right to receive a written statement of the evidence being used against them and a statement detailing the reasons for the decision.[58] A written record of proceedings is required for several reasons: to protect incarcerated people against collateral consequences that may stem from a misunderstanding of the original proceeding,[59] to ensure that the disciplinary board acts fairly,[60] and to serve as a reference on examination of the hearing by other authorities and any other time an incarcerated person's records are reviewed.[61] Though due process does not require appellate review, a

55. See Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, The Signaling Effect of Pro Se Status, 42 Law & Soc. Inquiry 1091, 1093 (2017) (describing skills attorneys hold that are beneficial to incarcerated clients).

56. Wolff v. McDonnell, 418 U.S. 539, 563–65 (1974) (holding that due process requires advance written notice "of the charges against" the incarcerated person but failing to state what content or details are required for notice to satisfy due process); see also *Benitez*, 985 F.2d at 665 (finding that an incarcerated person was denied due process because he was only allowed to review the actual written charges five hours in advance of his hearing even though he was provided twenty hours of advance notice); Spellmon-Bey v. Lynaugh, 778 F. Supp. 338, 342 (E.D. Tex. 1991) (holding that notice was inadequate when the charge was given in writing because the specific acts that gave rise to the charge were unclear, making it impossible for the incarcerated person to prepare a defense because they did not know what conduct gave rise to the charge).

57. See Quintanilla et al., supra note 55, at 1093 ("Unrepresented claimants may also experience confusion with complex documents and procedures.").

58. *Wolff*, 418 U.S. at 565 ("It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission.").

59. Id.

60. Id. ("[T]he provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly.").

61. Gray, supra note 45, at 1285 ("Further, written notice of the charges should become part of the written record of the proceeding, to protect both inmate and authorities on review of the hearing or at any other time an inmate's records are reviewed.").

written statement of findings is critical in jurisdictions that do allow for administrative appeals of disciplinary proceeding decisions.[62]

The written statement standard is very low and varies across jurisdictions and correctional agencies. Some courts have held that the hearing record must include reasons for the decision, copies of any reports relied upon, and summaries of any interviews conducted.[63] However, the written statement need only provide *some* evidence supporting a disciplinary board's decision.[64] The written statement standard does not require hearing officers to produce evidence beyond a reasonable doubt, or even the lower standards of substantial evidence or a preponderance of evidence.[65] Furthermore, in *Baxter v. Palmigiano,* the Supreme Court held that even facts that come to light after disciplinary hearings may be included in the written record as they may help officials understand the incident and tailor penalties to further penological goals.[66]

Jurisdictions have adopted a wide array of standards clarifying what is required in the written statement. The D.C. Circuit, for example, has held that correctional agencies need not repeat any evidence already set out in an officer's investigative report in written statements of findings.[67] The D.C. Court of Appeals has also held that statements must be more than a reiteration of the evidence and prohibits findings that are simply "generalized, conclusory, or incomplete."[68] Similarly, New York standards effectively require a detailed written account of the alleged incident.[69] For

62. See Griffin v. Illinois, 351 U.S. 12, 18 (1956) (noting that, because appellate review is an integral part of the Illinois trial system, the state must ensure that the Due Process and Equal Protection guarantees are provided to appellants).

63. See N.Y. Comp. Codes R. & Regs. tit. 7, §§ 253.7(a)(2), 254.7(a)(2) (2022); McQueen v. Vincent, 384 N.Y.S.2d 475, 476–77 (App. Div. 1976) (remanding the case to determine whether due process requirements were met in light of an incomplete hearing record); see also Tolliver v. Fischer, 2 N.Y.S.3d 694, 695 (App. Div. 2015) (granting prisoner's petition due to an out of order transcript, portions of missing witness questionings, and a cut off petitioner statement); People ex rel. Lloyd v. Smith, 496 N.Y.S.2d 716, 717 (App. Div. 1985) (holding that failure to include a superintendent's proceeding minutes in the record made adequate review impossible, resulting in remand for review of the minutes).

64. See Berge, supra note 8, at 565 ("The only requirement is that some evidence support the hearing officer's final decision. This standard is very low. It does not require the hearing officer to produce substantial evidence or a preponderance of evidence against you.").

65. Id. There is no clear evidentiary standard of review for disciplinary proceedings.

66. 425 U.S. 308, 322 n.5 (1976) ("It would be unduly restrictive to require that such facts be excluded from consideration, inasmuch as they may provide valuable information with respect to the incident in question and may assist prison officials in tailoring penalties to enhance correctional goals.").

67. See Crosby-Bey v. District of Columbia, 786 F.2d 1182, 1185 (D.C. Cir. 1986) (explaining that the board is not required to repeat evidence already shown in an officer's charge or report).

68. See Kennedy v. District of Columbia, 654 A.2d 847, 853 (D.C. Cir. 1994); Newsweek Mag. v. D.C. Comm'n on Hum. Rts., 376 A.2d 777, 784 (D.C. Cir. 1977).

69. See People ex rel. Vega v. Smith, 485 N.E.2d 997, 1002 (N.Y. 1985) (observing that state regulations require that "inmates must be served with . . . a written misbehavior report, . . . describing with specificity the alleged incident and rule violated"); Tuitt v. Martuscello,

example, in a case where reports merely recited that all the incarcerated people in the dining hall were part of a disturbance without describing their specific misbehavior, the New York Court of Appeals found that the evidence was insufficient to support a disciplinary finding against them.[70] Jurisdictions also vary on when correctional agencies are required to provide incarcerated people with the written record of the findings.[71]

The goals undergirding the written statement standard suggest a need for counsel. Incarcerated people are expected to keep track of hard copies of their hearing records, many of which are dozens of pages long, so that they may refer to them when their records are reviewed for purposes such as transfer to another institution or in preparation for trial.[72] But the realities of jail conditions make it difficult for incarcerated people to keep track of their possessions, let alone pages of disciplinary proceeding records. Furthermore, overcrowding in jails causes high rates of transfers of incarcerated people, which has been exacerbated by the COVID-19 pandemic.[73] Excessive transfers not only make it challenging for incarcerated people to keep track of critical documentation but also for

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965 N.Y.S.2d 669, 670 (App. Div. 2013) (holding that the "detailed misbehavior report provides substantial evidence supporting the determination of guilt"); James v. Strack, 625 N.Y.S.2d 265, 266 (App. Div. 1995) (holding that the misbehavior report was "sufficiently detailed, relevant and probative to constitute substantial evidence supporting the hearing officer's finding of guilt"); Nelson v. Coughlin, 619 N.Y.S.2d 298, 299 (App. Div. 1994) (holding that the misbehavior report provided sufficient evidence that the prisoner violated a rule prohibiting prisoners from making or possessing alcoholic beverages and that the officials were not required to chemically test the beverage for the presence of alcohol).

70. See Bryant v. Coughlin, 572 N.E.2d 23, 26–27 (N.Y. 1991) (concluding that misbehavior reports that did not specify the particulars of prisoner misconduct and only alleged a mass incident were insufficient).

71. Alaska provides that an incarcerated person is entitled to a written decision of the disciplinary board within five working days of the decision. See Alaska Admin. Code tit. 22, § 05.475(b) (1977). Washington, D.C., regulations require that agencies provide the written statement to the incarcerated person within two business days of the alleged misconduct. See Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 14–15 (D.C. Dep't of Corr. 2019). Massachusetts requires provision of the written statement within five days. See 103 Mass. Code Regs. § 430.17(1)(d) (2019). And New York requires that the written record be provided to the incarcerated person no later than twenty-four hours after the end of the hearing. See N.Y. Comp. Codes R. & Regs. tit. 7, §§ 253.7(a)(2), 254.7(a)(2) (2022).

72. See Gray, supra note 45, at 1296 (discussing the functions of a written statement in a fact-finding inquiry). In some situations where charges involve conduct punishable as a crime under state law, the written record of the fact-finding is critical in potential state court prosecutions.

73. See Victoria Law, "People Are at a Breaking Point" After Transfers From Rikers, Nation (Dec. 10, 2021), https://www.thenation.com/article/society/rikers-transfers-bedford/ (on file with the *Columbia Law Review*) ("[A]fter ongoing protests about the violence and abuse at Rikers Island[,] . . . New York Governor Kathy Hochul announced the transfers of approximately 230 women and trans people from the New York City complex to Bedford Hills Correctional Facility, a women's state prison 45 minutes north of the city.").

jail systems, which are plagued by incomplete data tracking.[74] Counsel, unlike jail staff and incarcerated people, are much better equipped to store the written records of their clients' disciplinary proceedings, furnish them for their clients in situations where they are being reviewed, and ultimately ensure that their clients' records are not lost in the system.[75] Furthermore, counsel also have the motivation and ethical duty to track their client's documents.

3. *Call Witnesses and Present Documentary Evidence.* — Finally, the *Wolff* Court confusingly articulated a constitutional guarantee to call witnesses during disciplinary proceedings but stated strict limits on the right, effectively rendering it toothless.[76] The Court specified that an incarcerated person should be allowed to call witnesses and present evidence in their defense but only as long as doing so would not create undue threats to institutional safety or correctional goals.[77] This limitation applies both to collecting and presenting documentary evidence and to calling witnesses during the hearing, which could create a risk of retaliation or undermine correctional authority.[78] Though the Court noted that it would be useful for disciplinary boards to provide a rationale for refusing to let the accused call witnesses, it ultimately did not make such explanations a requirement.[79] Subsequent cases have reiterated that such explanations are not required.[80]

The Court predicated the right to call witnesses and present documentary evidence upon the balancing of interests of correctional agencies and incarcerated people. It specifically expressed concern that

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74. See, e.g., Amanda Klonsky & Eric Reinhart, As Covid Surges Again, Decarceration Is More Necessary Than Ever, Nation (Dec. 22, 2021), https://www.thenation.com/article/society/covid-prisons-decarceration/ (on file with the *Columbia Law Review*) ("In Florida, both local jails and state prisons are bracing for a large backlog of incarcerated people awaiting transfer from overcrowded jails. The prisons to which these individuals will be transferred are grossly unprepared to receive them."); Conrad Wilson, Tony Schick, Austin Jenkins & Sydney Brownstone, Booked and Buried: Northwest Jails' Mounting Death Toll, OPB (Apr. 2, 2019), https://www.opb.org/news/article/jail-deaths-oregon-washington-data-tracking/ [https://perma.cc/JUY8-VNWC] (explaining that incomplete data tracking in local jails has caused "a crisis of rising death rates" that avoids the spotlight).

75. See Quintanilla et al., supra note 55, at 1093 (describing skills attorneys hold that are beneficial to incarcerated clients).

76. See Wolff v. McDonnell, 418 U.S. 539, 566 (1974) ("We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.").

77. Id.

78. Id. at 566–67.

79. Id. at 566 ("Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases.").

80. See, e.g., Ponte v. Real, 471 U.S. 491, 496 (1985) (concluding that the Due Process Clause of the Fourteenth Amendment does not require a disciplinary board to provide reasons for refusing to call witnesses).

granting incarcerated people an unrestricted right to call witnesses from the prison population would be disruptive and jeopardize correctional safety and goals.[81] Thus, the Court ultimately held that the right to call witnesses is subject to the discretion of correctional officials.[82] The discretion provided to correctional staff is not unlimited, however, and their decision to restrict the right cannot be arbitrary.[83] In Alaska, for example, the Department of Corrections requires that hearing officers provide incarcerated people a reasonable opportunity to interview witnesses, collect statements, or compile other evidence, but only if that action would not create a risk of reprisal or undermine security.[84] Washington, D.C., mandates that hearing officers document specific reasons for limiting witnesses in the hearing record.[85] New York similarly requires that prison officials provide some objective evidence supporting a decision to withhold testimony or information.[86]

Inserting counsel into the disciplinary process could bolster the right to call witnesses and present documentary evidence. The right to offer testimony of witnesses is the right to present the accused's and the accuser's version of the facts to the disciplinary board so that it may decide the truth of the matter.[87] Thus, suggesting that this due process safeguard is not essential by vesting complete discretion in correctional authorities undermines the fact-finding nature of disciplinary hearings.[88] Though inserting counsel in the disciplinary process would not necessarily address the fact that correctional agencies have undue discretion in determining whether witnesses may be called, counsel could potentially help to legitimize the process. In disciplinary proceedings, oftentimes the only evidence available is the statement of the accused; however, there is the added

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81. See *Wolff*, 418 U.S. at 566 ("[T]he right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries . . . potential for disruption [of] the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution.").

82. Id. ("Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence.").

83. See Sanchez v. Roth, 891 F. Supp. 452, 456–58 (N.D. Ill. 1995).

84. Alaska Admin. Code tit. 22, §§ 05.440, 05.445 (2022).

85. Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 25 (D.C. Dep't of Corr. 2019).

86. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 253.5(a), 254.5(a) (2022); see also Moye v. Selsky, 826 F. Supp. 712, 716–17 (S.D.N.Y. 1993) (explaining that prison officials may have to give incarcerated people an explanation for excluding witnesses from disciplinary hearing).

87. See Washington v. Texas, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.").

88. See Gray, supra note 45, at 1286 ("To suggest that this due process protection is not essential in a prison disciplinary proceeding is to ignore the factfinding nature of that proceeding.").

problem of an "unreliable" accused,[89] whose statement is unlikely to be believed.[90] Correctional officers may be more inclined to believe statements coming from counsel, who likely do not trigger the same subconscious biases and hostilities associated with incarcerated people. The Court's concerns around retaliation are valid, but it is ultimately the duty of correctional authorities to protect testifying witnesses without unnecessarily interfering with the fairness and reliability of disciplinary hearings.[91]

B. *The Unavailable Rights*

In conducting the balancing of interests, the *Wolff* Court held that there was no constitutional right to confrontation and cross-examination or retained or appointed counsel, stopping short of adopting the full range of procedures suggested by *Morrissey* for people accused of violating parole.[92] The majority balanced McDonnell's interest in avoiding loss of good time against the needs of the prison and concluded that they must provide prison administrators with some amount of flexibility.[93] The Court ultimately found that the state's interest in maintaining security necessitated barring the right to confrontation and cross-examination and the requirement of counsel, fearing that extending such rights would increase the potential for havoc inside correctional facilities.[94]

1. *Confrontation and Cross-Examination.* — In balancing the interests of McDonnell and other parties with the correctional agency, the *Wolff* Court held that confrontation and cross-examination present serious hazards to institutional interests and thus are not constitutionally guaranteed.[95] The Court asserted that allowing confrontation and cross-examination of those furnishing evidence against an incarcerated person as a matter of course would lead to considerable potential for havoc inside the prison walls.[96] Furthermore, proceedings would inevitably be longer and tend toward unmanageability.[97] While the Court acknowledged that some states allow cross-examination at disciplinary proceedings, it concluded that the Constitution should not be read to compel the

89. Clutchette v. Procunier, 497 F.2d 809, 818 (9th Cir. 1974).

90. Gray, supra note 45, at 1286–87 ("This right to offer evidence other than the statement of the accused is even more important where, as in prison disciplinary proceedings, there is the added problem of an 'unreliable' accused, whose own statement is not likely to be readily believed.").

91. See *Clutchette*, 497 F.2d at 819 (noting that procedural protections that address concerns of fundamental fairness should take priority over accommodations meant to protect testifying witnesses).

92. Wolff v. McDonnell, 418 U.S. 539, 561–62 (1974).

93. Id. at 566.

94. Id. at 567.

95. Id.

96. Id.

97. Id.

procedure and that sufficient bases for a decision in disciplinary cases can be reached without cross-examination.[98]

In arriving at its decision, the Court yet again tipped the balance of interests in favor of the state and vested a great deal of deference in correctional officials.[99] Though the Court recognized that there very well may be a narrow range of cases where interest balancing may dictate cross-examination, it decided that the best course of action, "in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons."[100] Like the right to call witnesses and present evidence, the Court *suggested* that it would be worthwhile for disciplinary boards to state their reasons for denying an incarcerated person the right to confront or cross-examine witnesses.[101] The Court, however, ultimately increased the possibility of administrative arbitrariness by refusing to *constitutionally require* disciplinary boards to provide incarcerated people with such a statement.[102]

Correctional authorities tend to argue against extending the right to confrontation and cross-examination to incarcerated people.[103] Correctional authorities have contended, and some courts have agreed,[104] that extending the right to cross-examine correctional staff would subvert the traditional relationship between correctional officials and incarcerated people and reduce correctional officials' authority.[105]

Fortunately, the notion that correctional officials have unlimited discretion in controlling the lives of those housed in correctional facilities is increasingly becoming antiquated, in large part due to community advocacy and judicial intervention.[106] In the past, correctional authorities exercised nearly absolute power in the operation of this nation's correctional facilities and had total discretion over the treatment of

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98. Id. at 568.

99. Id.

100. Id. at 569.

101. Id. at 566–67.

102. See Ponte v. Real, 471 U.S. 491, 496 (1985) (establishing that prison officials can state the reason for denying a prisoner's witness request either in the administrative record or later in court testimony when there is a dispute over the refusal to call a witness). But see Scarpa v. Ponte, 638 F. Supp. 1019, 1023 n.4 (D. Mass. 1986) (distinguishing *Ponte v. Real* because in that case, prison officials failing to provide reasons in the administrative record had an explanation related to safety or correctional goals, in contrast to the clear absence of threat to prison security in *Scarpa v. Ponte*).

103. See Gray, supra note 45, at 1288.

104. See, e.g., Nolan v. Scafati, 306 F. Supp. 1, 4 (D. Mass. 1969), vacated, 430 F.2d 548 (1st Cir. 1970) ("Cross-examination of a superintendent, a guard, or a fellow prisoner would . . . tend to place the prisoner on a level with the prison official . . . . [I]t is hardly likely that in the prison atmosphere discipline could be effectively maintained after an official has been cross-examined by a prisoner.").

105. See Michael A. Millemann, Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing, 31 Md. L. Rev. 27, 53 (1971).

106. See Gray, supra note 45, at 1289.

incarcerated people.[107] Recently, however, courts have recognized the need to scrutinize more closely the way in which incarcerated people are treated, and community advocates' demands to reduce jail populations have reached fever pitch in the height of the COVID-19 pandemic.[108] The COVID-19 pandemic has also catalyzed a resurgence of public concern regarding the conditions and treatment incarcerated people endure. Thus, in the current environment—where incarcerated people are facing serious harms at the hands of jail officials—incarcerated people's interest in a fair and impartial disciplinary hearing is paramount.

2. *Retained or Appointed Counsel.* — Finally, the *Wolff* Court held that incarcerated people generally do not have a right to either retained or appointed counsel in disciplinary proceedings.[109] In arriving at its decision, the Court cited as rationale that counsel would inevitably make the proceedings more adversarial and would undermine correctional goals.[110] According to the Court, the services that counsel provide in disciplinary hearings are not always enough to raise counsel to the level of an entitlement; rather, the right to counsel is only borne out of the potential that incarcerated people may make self-incriminatory statements at hearings that could later be used against them in criminal prosecutions.[111]

The Court also expressed efficiency concerns. Citing *Gagnon v. Scarpelli*,[112] it held that counsel would unduly delay the decisionmaking process and increase financial burdens on the state.[113] While it is true that practical difficulties may arise in providing sufficient counsel and paying for those services, these issues can be minimized by an effective program of providing such assistance that does not levy significant system costs.[114]

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107. See William D. Wick, Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements, 18 S.D. L. Rev. 309, 313 (1973) ("[I]n many prisons even such minimal procedures do not exist, or if they do, they are freely circumvented by the guards.").

108. See, e.g., Chad Flanders, COVID-19, Courts, and the "Realities of Prison Administration" Part II: The Realities of Litigation, 14 St. Louis U. J. Health L. & Pol'y 495, 497 (2021) (describing the various lawsuits being filed on behalf of incarcerated people requesting that incarcerated people be released, socially distanced, or transferred to safer facilities); Kelly Servick, Pandemic Inspires New Push to Shrink Jails and Prisons, Science (Sept. 17, 2020), https://www.science.org/content/article/pandemic-inspires-new-push-shrink-jails-and-prisons [https://perma.cc/6H7B-L4A9].

109. Wolff v. McDonnell, 418 U.S. 539, 570 (1974).

110. Id.; see also Baxter v. Palmigiano, 425 U.S. 308, 315 (1976) ("We see no reason to alter our conclusion so recently made in *Wolff* that inmates do not 'have a right to either retained or appointed counsel in disciplinary hearings.'" (quoting *Wolff*, 418 U.S. at 570)).

111. See *Baxter*, 425 U.S. at 315 (asserting that counsel is only necessary in situations where incarcerated people may make statements at hearings that could perhaps be used in later state court prosecutions for the same conduct).

112. 411 U.S. 778 (1973).

113. *Wolff*, 418 U.S. at 569–70 (citing *Gagnon*, 411 U.S. at 788). In *Gagnon v. Scarpelli*, the Court listed these burdens as being costs "for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review." 411 U.S. at 788.

114. See infra Part III for a discussion of a framework.

Moreover, efficiency is not the purpose of a disciplinary hearing and should not be a dispositive factor in balancing correctional agency interests and incarcerated people's interests.[115]

Though dicta, the Court carved out some situations in which an incarcerated person would be entitled to assistance.[116] An incarcerated person is permitted to seek substitute counsel, or assistance in the form of aid from correctional staff or from a fellow incarcerated person,[117] if they are illiterate or when the case or issue is so complex that it would be difficult for them to adequately represent themselves in a disciplinary proceeding.[118] In addition, the Court stated that there may be situations that trigger the need for counsel—namely, disciplinary proceedings that involve violations that prosecutors may also charge under state law.[119]

Many jurisdictions provide a much more expansive right to representation than the standard provided by *Wolff*. Alaska, California, Colorado, Kentucky, Massachusetts, Minnesota, New York,[120] Washington, and Washington, D.C., all provide for retained counsel in some form in disciplinary proceedings.[121] Some correctional agencies make such an allowance but have established that it is incarcerated people's responsibility to secure their own representation in disciplinary proceedings. In both Massachusetts and Washington, D.C., incarcerated people must complete a form requesting representation and coordinate their own

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115. See Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency.").

116. *Wolff*, 418 U.S. at 570.

117. See id. at 576 (citing Johnson v. Avery, 393 U.S. 483 (1969), which established the right of incarcerated people to render legal assistance to fellow incarcerated people where the state provided no alternative source of legal aid).

118. Id. at 570 (noting that "the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case").

119. See id. at 572 n.20 ("The Ninth Circuit, [in] *Clutchette v. Procunier*, . . . has determined that counsel must be provided where a prison rule violation may be punishable by state law.").

120. In March 2021, New York passed the Humane Alternatives to Long-Term Solitary Confinement (HALT) Act, which limits the use of segregated confinement for all incarcerated people to fifteen days, implements alternative rehabilitative measures, provides access to counsel in disciplinary hearings, and establishes guidelines for humane conditions in jails. The Act went into effect in April 2022. However, Mayor Eric Adams reinstated the use of solitary confinement in New York City jails. The fate of incarcerated people's right to counsel in disciplinary hearings in both the City and State of New York remains uncertain. See Erin Durkin, Adams' Solitary Confinement Stance Sets Up Fight With City Council, Politico (Jan. 7, 2022), https://www.politico.com/news/2022/01/13/adams-solitary-confinement-stance-sets-up-fight-with-city-council-527051 [https://perma.cc/M7VY-YZDV].

121. See Tahanee Dunn, Julia Solomons & Martha Grieco, Bronx Def. Staff, Comment Letter on Proposed Restrictive Housing Rule, https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2017-Restrictive-Housing/2020-01-31-BOC-Restrictive-Housing-CommentsBRONX-DEFENDERS.pdf [https://perma.cc/75KM-YLSC] (last visited Sept. 5, 2022).

representation.[122] Kentucky permits incarcerated people to have an assigned legal aid present if they are unable to collect and present evidence themselves.[123]

The fact that many jurisdictions have adopted greater due process standards than those articulated in *Wolff* suggests that it may be time to recalibrate the balancing test invoked in the case. As the *Wolff* Court acknowledged, the problems of correctional institutions evolve, and correctional goals are constantly reshaped.[124] Consequently, new considerations must be included in the interest-balancing analysis.

II. WHAT THE SYSTEM STANDS TO GAIN: COUNSEL IN FURTHERANCE OF CONSTITUTIONAL AND PENOLOGICAL PRINCIPLES

This Part argues for an unlimited right to counsel in jail disciplinary proceedings. Guaranteeing representation of counsel for people jailed pretrial not only ensures that they receive assistance in furtherance of a fair trial but also facilitates fair and impartial administration of discipline to avoid unnecessary punishment. These critical considerations support the notion that people who are incarcerated pretrial should be entitled to the assistance of counsel in disciplinary proceedings and undermine the *Wolff* Court's arguments against extending the right.

A. *Recalibrating the Balancing Test*

In refusing to impose the requirement of counsel on disciplinary hearings, the *Wolff* Court weighed the protection of the integrity of the correctional system against McDonnell's interest in avoiding loss of good time.[125] In striking the balance that the Due Process Clause demands, the Court determined that the specific context of disciplinary hearings necessitated that some due process protections be withheld.[126] The Court took seriously the fact that prison disciplinary hearings occur in an environment comprised of people who have violated criminal law and who "have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life."[127] Thus, the Court held that the prison system's interest in furthering institutional safety, correctional goals, and efficiency eclipsed McDonnell's interest in avoiding loss of good time.[128]

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122. See 103 Mass. Code Regs. § 430.11(6) (2019) ("If an inmate wishes to be represented in accordance with the provisions of 103 CMR 430.12(1) and (2)[,] . . . the inmate shall complete the request for representation and witness form and submit it to the Disciplinary Officer within 24 hours of receipt.").

123. See 501 Ky. Admin. Regs. 6:020 § (II)(B)(3)(b)(2018).

124. See *Wolff*, 418 U.S. at 568.

125. See id. at 566–71.

126. See id. at 561.

127. Id. at 562.

128. See id. at 561.

The dire nature of the current correctional environment, however, suggests that the due process right to counsel in disciplinary hearings is needed now more than ever. In general, the state's interests in accurately determining the facts and in preventing arbitrary treatment coincide with those of the incarcerated people and thus appear consistent with the due process right to counsel requirement. Requiring assistance should be curtailed only if the state's other interests are of such magnitude as to override this necessity. The *Wolff* Court found this to be the case; however, when one compares the magnitude of the harms incarcerated people face *today* when denied the right to counsel in furtherance of a fair and accurate determination, the balance of interests comes out differently.

Jails and prisons are no longer the black box they were at the time *Wolff* was decided. The patterns of violence, overcrowding, correctional staff brutality, draconian conditions of solitary confinement, extreme heat, poor medical care, and intolerable living conditions that incarcerated people face are now well-documented largely due to community and policy advocacy.[129] And the COVID-19 pandemic has only further exacerbated the inhumane conditions that have plagued the country's jails for years.[130]

The excessive and inhumane use of solitary confinement, in particular, has been brought to light and interacts directly with disciplinary hearings.[131] In conducting the balancing test, the *Wolff* Court seemingly only considered McDonnell's interest in his good-time credits.[132] Puzzlingly, the majority made no mention of the fact that incarcerated people may face placement in solitary confinement if found guilty (wrongly or not) of violating correctional rules. And research has shown that solitary confinement causes serious and sometimes irreparable harm.[133] Thus, a reassessment of the balancing test that considers changed circumstances and known harms facing incarcerated people is warranted.

A recalibrated test must seriously weigh an incarcerated person's interest in avoiding increased restrictions on their liberty in the form of solitary confinement and thus would tip in favor of finding a right to counsel in disciplinary hearings. While correctional system's interest in maintaining order and safety and minimizing costs are still relevant, it is

129. See, e.g., Prison & Jail Conditions, S. Ctr. for Hum. Rts., https://www.schr.org/mass-incarceration/prison-jail-conditions/ [https://perma.cc/8HEN-WB66] (last visited Sept. 5, 2022).

130. See, e.g., Nancy Harty, Advocates Demand Outside Oversight for Cook County Jail COVID Conditions, WBBM Newsradio (Mar. 29, 2021), https://www.audacy.com/wbbm780/news/local/advocates-want-outside-oversight-for-cook-county-jail [https://perma.cc/9WJ2-LNST].

131. See Vera Inst. of Just., Why Are People Sent to Solitary Confinement? The Reasons Might Surprise You 1–2 (2021), https://www.vera.org/downloads/publications/why-are-people-sent-to-solitary-confinement.pdf [https://perma.cc/J6FH-MHZV].

132. *Wolff*, 418 U.S. at 561.

133. See, e.g., N.Y. Campaign for Alts. to Isolated Confinement, The Walls Are Closing In on Me: Suicide and Self-Harm in New York State's Solitary Confinement Units, 2015–2019, at 6–7 (2020), http://nycaic.org/wp-content/uploads/2020/05/The-Walls-Are-Closing-In-On-Me_For-Distribution.pdf [https://perma.cc/59D2-STKG].

difficult to argue that they eclipse the well-documented harms that incarcerated people experience by being placed in solitary confinement. A due process right to counsel at disciplinary hearings may prevent incarcerated people from erroneously losing good-time credits or being placed and languishing in solitary confinement.

B. *Fair Trials and a Fairer Disciplinary System*

In addition to finding a due process right to counsel, a right to counsel in disciplinary proceedings may be available under the Sixth Amendment. The Sixth Amendment guarantees to criminal defendants assistance of counsel for their defense.[134] The Sixth Amendment guarantee of counsel is designed to ensure that people are not forced to stand alone against the state during criminal prosecution and applies to all "critical stages" in a criminal proceeding.[135] Over the decades, the Supreme Court has slowly delineated many events in cases as being critical stages, although it has never purported to have capped the list of events that may fall into this category. The critical stage events include, but are not limited to, custodial interrogations both before and after commencement of prosecution;[136] lineups at or after commencement of prosecution;[137] during plea negotiations and at the entry of a guilty plea;[138] arraignments;[139] the pretrial period between arraignment and the

134. U.S. Const. amend. VI.

135. See Rothgery v. Gillespie County, 554 U.S. 191, 211–12 (2008); United States v. Gouveia, 467 U.S. 180, 181 (1984).

136. See Brewer v. Williams, 430 U.S. 387, 401 (1977) (explaining how a person has a right to legal representation when the government interrogates him); Miranda v. Arizona, 384 U.S. 436, 442–44 (1966) (explaining the importance of constitutional protections during the interrogation process); Massiah v. United States, 377 U.S. 201, 204–06 (1964) (discussing the need for clear constitutional protections during interrogations).

137. See Moore v. Illinois, 434 U.S. 220, 227–28 (1977) (holding that the defendant's Sixth Amendment right to counsel was violated by a corporeal identification conducted after initiation of adversary judicial criminal proceedings and in the absence of counsel); United States v. Wade, 388 U.S. 218, 237 (1967) (holding that post-indictment lineup was a critical stage of prosecution at which the defendant was as much entitled to the aid of counsel as at trial itself).

138. See Lafler v. Cooper, 566 U.S. 156, 162 (2012) ("During plea negotiations defendants are 'entitled to the effective assistance of competent counsel.'" (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970))); Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.").

139. See Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (holding that arraignment is so critical a stage of Alabama criminal procedure that the denial of counsel at arraignment required reversal of the conviction).

beginning of trial;[140] trials;[141] sentencing;[142] direct appeals as of right;[143] and, to some extent, probation revocation proceedings and parole revocation proceedings.[144] Though the Supreme Court has never identified disciplinary proceedings as a critical stage, the way in which the outcomes of disciplinary hearings affect trials suggests that they may rise to the level of a critical confrontation necessitating counsel.

In *United States v. Gouveia,* the Supreme Court held that both the language and purpose of the Sixth Amendment supported the conclusion that the right to counsel is only triggered at or after the start of an adversarial judicial proceeding against the defendant.[145] First, the majority established that a detained person is not accused until the initiation of formal adversarial proceedings.[146] This is because it is not until that point that the government actually has committed itself to prosecute the incarcerated person.[147] Second, the Court held that the purpose underlying the right to counsel is to guarantee to the accused the assistance of counsel "at critical confrontations with his adversary."[148]

The language in *Gouveia* supports the notion that incarcerated people should be entitled to the right to counsel in jail disciplinary hearings. The *Gouveia* Court noted that the right to counsel should be extended to pretrial proceedings in which the results of the proceeding might settle the incarcerated person's fate and render the trial meaningless.[149] This directly implicates jail disciplinary proceedings. Pretrial detention occurs in the vital interval preceding trial and what occurs during that time has significant downstream implications. Research shows that pretrial detention leads to worse outcomes for the people who are held in jail—both in their trials and in their lives—compared to similarly situated people who secure pretrial

140. See *Brewer*, 430 U.S. at 398; Powell v. Alabama, 287 U.S. 45, 57 (1932).

141. See Alabama v. Shelton, 535 U.S. 654, 667 (2002); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

142. See *Lafler*, 566 U.S. at 165; Wiggins v. Smith, 539 U.S. 510, 511 (2003); Mempa v. Rhay, 389 U.S. 128, 129 (1967).

143. See Halbert v. Michigan, 545 U.S. 605, 619 (2005); Douglas v. California, 372 U.S. 353, 357–58 (1963).

144. See Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (holding that people are entitled to minimal due process rights during parole revocation hearings but declining to decide whether a parolee is entitled to counsel at those hearings). But see Gagnon v. Scarpelli, 411 U.S. 778, 788–89 (1973) (holding that the state does not have a constitutional duty to provide counsel in probation or parole hearings but the decision as to the need of counsel may be made on a case-by-case basis).

145. 467 U.S. 180, 188 (1984).

146. Id.

147. Id. at 189.

148. Id.

149. Id. at 187–88; see also Johnson-El v. Schoemehl, 878 F.2d 1043, 1051 (8th Cir. 1989) (describing how restricting people who are incarcerated pretrial from accessing their attorneys may compromise fair adjudication of their eventual trial).

release.[150] This is because people who are released are able to maintain a clean record, engage in substance abuse treatment or anger management, or provide restitution—all preventative measures that lead to charges being dismissed and encourage more lenient treatment.[151] Detained people, by contrast, have essentially accumulated credits toward a final sentence and are thus more likely to accede to and receive sentences of imprisonment at trial.[152] If simply being detained in jail negatively impacts a person's trial, then being subject to disciplinary measures after being deprived of procedural tools essential to a meaningful defense only further exacerbates negative outcomes. When a person awaiting trial is accused of violating correctional rules, they are faced with the possibility of additional restraints on their liberty, including placement in solitary confinement, loss of privileges and good-time credits (i.e., more time in jail), or being held in handcuffs or other restraining devices. These disciplinary measures detrimentally affect an incarcerated person's mental and physical health.[153] And they very well may "settle the accused's fate and reduce the trial itself to a mere formality" by limiting an incarcerated person's ability to prepare for their case.[154] Additionally, an incarcerated person's jail disciplinary record may come in as evidence at trial and negatively affect the result.[155] Ultimately, disciplinary hearings have not been identified as a critical stage; however, providing incarcerated people the right to counsel may help prevent unfair outcomes in disciplinary hearings, and thereby also lessen negative trial outcomes.

Support for the position of a guaranteed right to counsel in jail disciplinary hearings is also evident in other Supreme Court decisions. In *United States v. Wade*, the Court held that it is critical to examine any pretrial confrontation to determine whether the insertion of counsel

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150. Léon Digard & Elizabeth Swavola, Vera Inst. of Just., Justice Denied: The Harmful and Lasting Effects of Pretrial Detention 5 (2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf [https://perma.cc/5BNY-NMDS].

151. See Paul Heaton, Sandra G. Mayson & Megan Stevenson, The Downstream Consequences of Misdemeanor Pretrial Detention, 69 Stan. L. Rev. 711, 747 (2017) (discussing the negative impacts of pretrial detention).

152. Id.

153. See, e.g., Chase Montagnet, Jennifer Peirce & David Pitts, Vera Inst. of Just., Mapping U.S. Jails' Use of Restrictive Housing: Trends, Disparities, and Other Forms of Lockdown 17 (2021), https://www.vera.org/downloads/publications/mapping-us-jails-use-of-restrictive-housing.pdf [https://perma.cc/7C75-XAQH] (describing how restrictive housing can decrease an individual's sense of belonging, self-control, self-esteem, and pro-social behavior).

154. *Gouveia*, 467 U.S. at 189; see also Digard & Swavola, supra note 150, at 5 ("Other explanations for the increased likelihood of conviction include the impact of detention in limiting people's ability to meet with their defense counsel and to assist in preparing a defense case." (footnote omitted)).

155. See, e.g., Rodriguez v. Quarterman, 204 F. App'x 489, 496 (5th Cir. 2006) (finding that the trial court properly admitted the defendant's jail disciplinary records under the business records exception to the general rule barring hearsay).

would be vital in protecting the defendant's right to a fair trial.[156] As mentioned, because jail disciplinary records may be deemed admissible during a trial and affect the outcome, disciplinary hearings are certainly the type of pretrial confrontation where the insertion of counsel would further fair trials.[157] Moreover, the *Wade* Court found that the Sixth Amendment guarantees the assistance of counsel "*whenever* necessary" to guarantee a meaningful defense.[158] Entitling incarcerated people to counsel that have the skills and experience to advocate for them would facilitate the fact-finding process of collecting documentary evidence and calling witnesses.[159] Furthermore, in *United States v. Ash,* the Court developed a test to determine when a right to counsel should be triggered.[160] The test required an examination of the event to determine whether the incarcerated person required aid in addressing critical legal problems implicated in the case.[161]

Other cases have emphasized that to protect people's rights from prejudice, a person is entitled to representation at any interrogation that becomes accusatory rather than investigatory.[162] The purpose of disciplinary proceedings is to elucidate the facts of an incident; however, the practical realities of jail, where tensions are particularly high between correctional authorities and incarcerated people, reduce the utility of disciplinary proceedings as a fact-finding mechanism.[163] Put simply, people detained in

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156. 388 U.S. 218, 227 (1967) (noting that it is important to "scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial"); see also Coleman v. Alabama, 399 U.S. 1, 7 (1970) (considering whether the petitioners were entitled to appointed counsel during a preliminary hearing).

To analyze when a specific situation requires the presence of counsel, the *Wade* Court focused on two issues: (1) whether the particular confrontation could substantially prejudice the defendant's rights, and (2) whether the presence of counsel would reduce that prejudice and facilitate a fair trial. *Wade*, 388 U.S. at 227; see also *Coleman*, 399 U.S. at 9.

157. See, e.g., *Rodriguez*, 204 F. App'x at 496 (finding that the trial court properly admitted the defendant's jail disciplinary records under the business records exception to the general rule barring hearsay).

158. *Wade*, 388 U.S. at 225 (emphasis added).

159. See Deborah L. Yalowitz, Sixth Amendment—Right to Counsel of Prisoners Isolated in Administrative Detention, 75 J. Crim. L. & Criminology 779, 797 (1984) ("[T]he Court has concluded that the presence of counsel when a suspect is being investigated 'enhances the integrity of the fact-finding' procedure." (quoting Miranda v. Arizona, 384 U.S. 436, 466 (1966))).

160. See 413 U.S. 300, 313 (1973).

161. Id.

162. See Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (concluding that when an interrogation shifts from investigatory to accusatory, the accused is entitled to the assistance of counsel based on the Sixth Amendment); see also *Miranda*, 384 U.S. at 470 (holding that a suspect is guaranteed the assistance of an attorney during custodial interrogation to reduce the possibility of prejudice resulting from abuse of the interrogation process).

163. Gray, supra note 45, at 1295 (describing the subconscious prejudices and antipathies of disciplinary committees toward incarcerated people).

jails face an almost insurmountable presumption of guilt.[164] Allowing incarcerated people to have an attorney during the disciplinary process could reduce the possibility of prejudice not only in the disciplinary hearings themselves but also, importantly, in criminal prosecutions.

A guaranteed right to counsel in jail disciplinary proceedings also aligns with the Court's articulation of the purpose of the Sixth Amendment: to equip incarcerated people with the fundamental tools necessary for the presentation of a meaningful defense against their adversaries.[165] Disciplinary proceedings are inherently adversarial. Incarcerated people face a panel of correctional officers in such proceedings. This panel is tasked with determining whether an incarcerated person is guilty of the alleged misconduct that violates correctional rules.[166] Correctional officers overseeing hearings must be impartial, but they do not have to meet the high standard of impartiality that applies to judges.[167] Correctional agency members handle every aspect of the process, from writing up the initial disciplinary infraction and the investigation process, to conducting the hearing and then making a determination. In essence, the disciplinary system requires that correctional officers serve as judge, jury, and prosecutor.[168] The disciplinary hearing structure unfairly burdens incarcerated people by forcing them to be both the subject of fact-finding inquiries and their

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164. See Tracey Meares & Arthur Rizer, The Square One Project, The "Radical" Notion of the Presumption of Innocence 21 (2020), https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf [https://perma.cc/9BXC-AJUD].

165. See United States v. Wade, 388 U.S. 218, 224–25 (1967) (asserting that the Sixth Amendment guarantees the assistance of counsel "whenever necessary to assure a meaningful 'defence'").

166. Gray, supra note 45, at 1292–93.

167. See Allen v. Cuomo, 100 F.3d 253, 259 (2d Cir. 1996) ("The degree of impartiality required of prison officials does not rise to the level of that required of judges generally. It is well recognized that prison disciplinary hearing officers are not held to the same standard of neutrality as adjudicators in other contexts."); Sloane v. Borawski, 64 F. Supp. 3d 473, 488 (W.D.N.Y. 2014) ("A hearing officer may satisfy the standard of impartiality if there is 'some evidence in the record' to support the findings of the hearing." (quoting Superintendent v. Hill, 472 U.S. 445, 454 (1985))); Moore v. Selsky, 900 F. Supp. 670, 676 (S.D.N.Y. 1995) (finding that a hearing officer may be allowed to have a biased view that a scientific test for evidence is reliable, so long as the hearing officer would be willing to consider whether he may be mistaken in his view impartially).

Some scholars and practitioners have noted the biased nature of disciplinary boards and are advocating for "mixed" boards—those consisting of "outsiders" (i.e., volunteers from the community) and correctional officers. Gray, supra note 45, at 1295–96. They contend that "mixed" boards would better achieve the impartiality as is constitutionally required and might well increase incarcerated people's confidence in the disciplinary process by removing from prison officials the total discretion customarily enjoyed by them in determining the facts. Id.

168. See Gray, supra note 45, at 1295 ("It is unrealistic to contend that those who promulgate the rules and regulations, who daily enforce them, and who view enforcement as an important goal can possibly be objective in this setting.").

own advocate in an incredibly hostile environment.[169] Juggling these dual roles inhibits incarcerated peoples' capacity to objectively analyze the allegations made against them.[170] It is also reasonable that an incarcerated person would have difficulty presenting their own version of a disputed set of facts, particularly where the presentation requires examining witnesses or offering or dissecting complex documentary evidence.[171] On the other hand, legal counsel could take a more objective view of the factual statements and allegations; put together a more accurate picture of the particular incident by interviewing witnesses; determine whether the testimony of a particular witness would be helpful to the defense, thus saving time; and ensure that their clients understand the charges against them, thus avoiding the necessity of repetitive notice.[172] Inserting counsel into the disciplinary process would not only ease the process of mounting a viable defense but would also aid the disciplinary board in reaching a fair decision.[173]

C. *The Right Not to Be Punished*

Bell v. Wolfish clarified that the most important difference between people incarcerated pretrial and those incarcerated following conviction is that pretrial detainees cannot be punished.[174] Nonetheless, incarcerated people who have not been convicted of crimes clearly do not enjoy the full range of freedoms guaranteed to people who are not incarcerated. This limitation of freedom is to ensure the presence of people at trial,[175] either in

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169. See Mark A. Seff, Note, Right to Counsel at Prison Disciplinary Hearings, 2 U. Balt. L. Rev. 263, 279 (1973) ("His dual role of advocate and subject of the inquiry leaves him in a position from which he would not be able to make an objective analysis of the impact and significance of the charges made by his accuser.").

170. Id.

171. See United States v. Gouveia, 467 U.S. 180, 189 (1984) (reasoning that "the average defendant does not have the professional legal skill to protect himself" when confronted with the complexities of criminal law and the experience of a government prosecutor (internal quotation marks omitted) (quoting Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938))); Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) (describing the difficulty that probationers and parolees face in preparing and presenting their case without the aid of counsel).

172. See Seff, supra note 169, at 279 (imagining a role for legal counsel to aid in disciplinary hearings by helping with interviews, obtaining documents, evaluating potential witnesses, and helping incarcerated people understand the charges brought against them).

173. See id. at 276 ("The role of counsel in this setting is not to challenge the role of correctional officers, but to develop facts which aid in reaching a fair decision.").

174. 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

175. See id. at 539–40. If the government could limit the liberty of detainees only to the degree necessary to ensure their presence at trial, "house arrest would in the end be the only constitutionally justified form of detention." Id. at 540 (internal quotation marks omitted) (quoting Campbell v. McGruder, 580 F.2d 521, 529 (D.C. Cir. 1978)); see also James Brian Boyle, Comment, Constitutional Law—Pretrial Detention—Due Process—*Bell v. Wolfish*, 26 N.Y. L. Sch. L. Rev. 341, 353 (1981) ("[T]he *Bell* Court adopted the 'deference'

cases where they are accused of a capital crime or, more frequently (and unlawfully), where they cannot afford the bail set for them.[176] Put simply, the justification for pretrial custody is only to guarantee that people attend trial; any jail policies or measures that are so excessive that they effectively entail punishment of the incarcerated person will be deemed impermissible.

In examining whether jail policies or disciplinary measures are excessive so as to violate due process by constituting a punishment, the *Wolfish* Court stated that courts should grant correctional authorities a great deal of deference for their judgments about what practices are needed to maintain order and security in a detention facility.[177] Excessively harsh restrictions, however, will be deemed violative of incarcerated people's due process rights. For example, when a person awaiting trial was kept in restrictive housing for nine months for no apparent reason, the Second Circuit determined that such treatment "smacks of punishment."[178] The Eighth Circuit held that chaining and handcuffing pretrial people for over twelve hours and depriving them of access to toilets after a failed escape attempt would violate due process if the jury found that the restraints were not a reasonable method of preventing incarcerated people from escaping again or if less punitive methods could have been used.[179] Moreover, a significant restriction of pretrial detainees' out-of-cell time may signal punitive intent and constitute punishment, even when dealing with incarcerated people who are determined to be prone to attempt escapes or to assault correctional staff or other incarcerated people or who are likely to need protection from other incarcerated people.[180]

Although people held pretrial have the right to be free from punishment, the brutal realities of jail draw into question whether this due process guarantee is truly actualized.[181] Living conditions in jails tend to

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rationale when it stated that impositions on detainees need not only be directed toward ensuring their presence in court . . . .").

176. Boyle, supra note 175, at 347.

177. *Wolfish*, 441 U.S. at 540–41 & n.23 ("In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order . . . , courts 'should ordinarily defer to [correctional officials'] expert judgment in such matters.'" (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974))).

178. Covino v. Vt. Dep't of Corr., 933 F.2d 128, 130 (2d Cir. 1991).

179. See Putman v. Gerloff, 639 F.2d 415, 420 (8th Cir. 1981) (finding that the correctional agency unconstitutionally punished pretrial detainees and deprived them of their liberty without due process by chaining them overnight).

180. See Cal. Code Regs. tit. 15, § 1053 (2022) ("Administrative segregation shall consist of separate and secure housing but shall not involve any other deprivation of privileges than is necessary to obtain the objective of protecting the inmates and staff."); see also Pierce v. County of Orange, 526 F.3d 1190, 1196 n.3, 1208 (9th Cir. 2008) (holding that pretrial detainees must be given adequate time out of their cells to exercise and observe their religions).

181. Perhaps the most well-known tragedy illustrating the inhumanity of pretrial detention is that of Kalief Browder.

In May 2010, Kalief Browder, a 16-year-old from the Bronx, was arrested and charged with robbery. The allegation was that he and a friend had stolen a man's backpack. The

be substantially worse than conditions in state prisons.[182] This is because while prisons are designed for longer-term incarceration, jails hold more transient populations, resulting in less developed and less maintained facilities as well as less programming. Overcrowding in jails is extremely common and can lead to lack of overall cleanliness; overburdened maintenance such as plumbing, heating, cooling, and ventilation; and inadequate food services.[183]

People incarcerated pretrial can be disciplined for misconduct that occurs while awaiting trial,[184] but it is questionable whether the current jail disciplinary system truly furthers correctional goals or whether it functions merely to subjugate incarcerated people to constitutionally impermissible punishment. In other words, jail discipline is often excessive and baseless, meaning that people awaiting trial are being punished in violation of the

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judge who presided over his arraignment ordered him held unless someone paid $3,000 in bail to secure his release. He was sent to Rikers Island. Seventy-four days after his arrest, a grand jury voted to indict him. This triggered a violation on an open probation case, and Browder was remanded without bail. He remained at Rikers for over three years. He was placed in solitary confinement repeatedly, for a near-continuous stretch of seventeen months. He was assaulted by a corrections officer and by other incarcerated people. He was ultimately released, after refusing multiple plea offers, because prosecutors dismissed the charges against him. Two years after his release from Rikers Island, Kalief Browder died by suicide. His death came after several previous suicide attempts, beginning while he was in solitary. Vaidya Gullapalli, Bail Reform Is About Safety and Well-Being, Appeal (Feb. 10, 2020), https://theappeal.org/bail-reform-is-about-safety-and-well-being/ [https://perma.cc/NR3X-ACKC].

182. See, e.g., David C. May, Brandon K. Applegate, Rick Ruddell & Peter B. Wood, Going to Jail Sucks (and It Really Doesn't Matter Who You Ask), 39 Am. J. Crim. Just. 250, 250–66 (2014) (using survey results to demonstrate that average people would be willing to do a longer sentence in prison if that meant they would avoid time in a local jail); Abbie Vansickle & Manuel Villa, California's Jails Are So Bad Some Inmates Beg to Go to Prison Instead, L.A. Times (May 23, 2019), https://www.latimes.com/local/lanow/la-me-california-jails-inmates-20190523-story.html (on file with the *Columbia Law Review*).

183. In overcrowded jails, people may be double- or triple-bunked in a single cell; forced to sleep dormitory style in dayrooms, classrooms, or gymnasiums; housed in ad hoc structures like tents or mobile homes set up adjacent to a facility; or made to sleep on mattresses or "boats"—plastic temporary beds described as "casket-like"—on the floor. Overcrowding can also overtax the operational systems in a facility—such as plumbing, ventilation, heating, and cooling, as well as food and health services systems—in ways that can result in environmental or health hazards that directly impinge on the well-being of both staff and incarcerated people. Chris Mai, Mikelina Belaineh, Ram Subramanian & Jacob Kang-Brown, Vera Inst. of Just., Broken Ground: Why America Keeps Building More Jails and What It Can Do Instead 11–12 (2019), https://www.vera.org/downloads/publications/broken-ground-jail-construction.pdf [https://perma.cc/X9ED-6ZXY].

184. See Rapier v. Harris, 172 F.3d 999, 1003 (7th Cir. 1999) (noting that though a pretrial detainee cannot be punished for the underlying crime that he has been accused of committing, he "can be punished for misconduct that occurs while he is awaiting trial"); Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) ("[P]retrial detainees are [not] free to violate jail rules with impunity."); Collazo-Leon v. U.S. Bureau of Prisons, 51 F.3d 315, 318 (1st Cir. 1995) (holding that reasonable punishment may be imposed to enforce prison requirements, but not to punish the unproven criminal allegations).

Due Process Clause.[185] Because jails are typically unable to tailor housing placements for incarcerated people, correctional staff are more likely to abuse disciplinary measures, such as restrictive housing, as a means to monitor and control.[186] People housed in jails also generally have fewer privileges than those in prison.[187] Consequently, as a response to misconduct, withholding programming or privileges is often not available as a punitive response, and restrictive housing may be the easiest and most readily available option.[188]

Since the start of the COVID-19 pandemic, jails have seen an alarming uptick in the use of restrictive housing.[189] For example, people incarcerated at New York City's notorious Rikers Island jail complex spent more time in solitary confinement in the first six months of 2020 than in the previous three years.[190] Incarcerated people at Rikers Island have reported that when they show up for their disciplinary hearings, hearing officers threaten them with more time in restrictive housing if they go through with the proceeding.[191] They have also reported being placed in restrictive housing without a hearing.[192] Incarcerated people at the D.C. Central Detention Facility have also experienced similar patterns of due process

185. See supra note 4 and accompanying text.

186. Montagnet et al., supra note 153, at 12.

187. Id.

188. Id.

189. See supra note 4 and accompanying text.

190. See Jan Ransom, As N.Y.C. Jails Become More Violent, Solitary Confinement Persists, N.Y. Times (Oct. 12, 2020), https://www.nytimes.com/2020/10/12/nyregion/rikers-solitary-confinement.html (on file with the *Columbia Law Review*) ("In the first six months of 2020, about 13 percent of 7,200 people detained on Rikers Island spent time in solitary confinement, a much higher percentage so far this year than during the previous three years."); see also Lauren Teichner, Zakya Warkeno, Martha Grieco, Tahanee Dunn & Julia Solomons, Bronx Defs. Staff, Comment Letter on Proposed Restrictive Housing Rule 1, https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2021-Restrictive-Housing/the-bronx-defenders-written-comment-on-the-proposed-restrictive-housing-rule.pdf [https://perma.cc/S4R6-T953] (last visited Sept. 5, 2022). Furthermore, Daquan Carrasco's experience at Rikers Island illustrates how the Department of Correction's (DOC) current disciplinary system in city jails responds with punishment rather than support. In 2020, Mr. Carrasco experienced his first mental health crisis while awaiting trial on Rikers Island. His mental health deteriorated quickly under the stress of his pending criminal case, the dangerous conditions in jail, and the isolation of incarceration—all magnified exponentially by the COVID-19 pandemic. At the time of this first mental health crisis, Mr. Carrasco was housed in General Population, and the DOC saw his behavior as violent and aggressive. As a result, he was placed in disciplinary segregation, followed by a prolonged stay in solitary confinement. Mr. Carrasco's story is typical of how DOC disciplinary systems function throughout the country. Lauren Teichner, Zakya Warkeno, Martha Grieco, Tahanee Dunn & Julia Solomons, Bronx Defs. Staff, Comment Letter on Proposed Restrictive Housing Rule 1, https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2021-Restrictive-Housing/the-bronx-defenders-written-comment-on-the-proposed-restrictivehousing-rule.pdf [https://perma.cc/S4R6-T953] (last visited Sept. 6, 2022).

191. See Dunn et al., supra note 121.

192. See id.

rights deprivations in disciplinary proceedings.[193] Furthermore, it is not uncommon for correctional officers to make dubious allegations that lack any evidence or support, because it is ultimately only an officer's word against an incarcerated person's.[194] And far too often, incarcerated peoples' perspectives of events are not valued or heard. Depriving incarcerated people of the aid of counsel during the disciplinary process—a process that can be capricious and cruel—only further supports the notion that they are being punished for simply being in jail.[195] Because correctional staff are inclined to overuse disciplinary measures, counsel could help ensure that incarcerated people are not subjected to overly excessive or wholly unfounded liberty deprivations and lessen the probability that people are unconstitutionally punished.

Pretrial detention *inherently* abuses and punishes people presumed innocent. Thus, each additional deprivation beyond confinement itself must be balanced against the rights of incarcerated people.[196] As jails throughout the country spiral into chaos amid the COVID-19 pandemic, the failures of the disciplinary proceeding process have been exposed.[197] And as the disciplinary system overloads, the risk of lowering of standards and undue punishment increases.[198] Guaranteeing a right to counsel in disciplinary hearings not only has the potential to prevent correctional authorities from impermissibly punishing people but also to ensure that incarcerated people are consistently provided the full panoply of due process protections afforded to them under *Wolff*. Providing full access to counsel is a direct way to ensure due process in disciplinary proceedings and is critical in fostering a disciplinary system that is at worst comprehensible and consistent and at best impartial and fair.[199]

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193. The Adjustment Board at the D.C. jail has disallowed incarcerated people from furnishing evidence or calling witnesses despite D.C. law guaranteeing those rights. See Memorandum from the Prisoner and Reentry Legal Services Program of the Public Defender Services for the District of Columbia on DOC Disciplinary Hearings: Expectations, Issues, and Goals 2–3 (Nov. 10, 2021) (on file with the *Columbia Law Review*).

194. See Teichner et al., supra note 190.

195. See id.

196. See Boyle, supra note 175, at 363.

197. See supra note 1 and accompanying text.

198. See Dunn et al., supra note 121 ("The more the disciplinary system is overloaded, the greater the temptation to lower standards.").

199. See Ann Marie Rocheleau, An Exploratory Examination of a Prison Disciplinary Process: Assessing Staff and Prisoner' Perceptions of Fairness [sic], J. Qualitative Crim. Just. & Criminology, Apr. 1, 2014, at 1, 23, https://www.qualitativecriminology.com/pub/v2i1p5/release/1 [https://perma.cc/82NM-5R4K] ("If prisoners gauge staff and disciplinary processes to be unfair, it reduces the legitimacy of the disciplinary process regime and may be counterproductive to prison administrators' goals of reducing serious prison misbehavior and violence.").

III. A FRAMEWORK FOR A GUARANTEED RIGHT TO COUNSEL IN JAIL DISCIPLINARY PROCEEDINGS

Parts I and II demonstrated that provision of counsel should be a constitutional right guaranteed to jail populations. Section III.A of this Part will highlight how various state systems are effectively providing counsel to incarcerated people in disciplinary proceedings and therefore undermining the *Wolff* Court's reservations. Section III.B will address practical concerns around instituting a right to counsel.

A. *Best Practices From the District of Columbia and State Systems: Leveraging What Works*

When *Wolff* was decided, there were practically no jail systems that guaranteed a right to counsel in disciplinary proceedings.[200] Today, even though there is still no constitutional right to an attorney in disciplinary proceedings, eight states and Washington, D.C., all afford incarcerated people facing a disciplinary board the right to have an attorney present at the hearing.[201] And with the renewed attention on jail conditions prompted by the COVID-19 pandemic, it is reasonable to expect that other jurisdictions may follow suit.

Elements of various jurisdictions' programs demonstrate the feasibility of a counsel provision in disciplinary hearings. For example, the Prisoner Legal Assistance Project at Harvard Law School provides access to counsel in disciplinary proceedings for incarcerated people in Massachusetts.[202] The project has a hotline that incarcerated people can call directly to request representation in an upcoming hearing.[203] Several New York legal aid organizations provide incarcerated people with assistance, including the Legal Aid Society through its Prisoners' Rights Society,[204] Prisoner's Legal Services of New York,[205] and the Bronx Defenders.[206]

Some public defender programs are proving that the criminal defense system may be more equipped to take on widespread provision of counsel

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200. See Seff, supra note 169, at 263 (exploring and analyzing the effects of the "budding trend" to require legal counsel at prison disciplinary hearings).

201. See supra note 121 and accompanying text.

202. See Disciplinary Hearings, Prisoners' Legal Servs. of Mass., https://plsma.org/find-help/d-hearings/ [https://perma.cc/N577-N5HX] (last visited Sept. 6, 2022).

203. Id.

204. See The Prisoners' Rights Project, Legal Aid Soc'y, https://legalaidnyc.org/programs-projects-units/the-prisoners-rights-project/ [https://perma.cc/H8YK-WV5Z] (last visited Sept. 6, 2022).

205. See The Second Look Project, CUNY Sch. of L., https://www.law.cuny.edu/academics/clinics/defenders/initiatives/ [https://perma.cc/7JQH-7XZH] (last visited Sept. 6, 2022) ("In partnership with Prisoner's Legal Services, student defenders represent NY State inmates who have received disciplinary violations and are serving lengthy sentences in solitary confinement.").

206. See Dunn et al., supra note 121; Teichner et al., supra note 190.

in disciplinary proceedings than the *Wolff* majority anticipated. The *Wolff* Court specifically expressed concern that there would be practical issues in providing counsel in sufficient numbers at hearings.[207] Fortunately, every person awaiting their trial in jail already has an attorney available to represent them in a disciplinary proceeding.[208] For example, in Kentucky, an incarcerated person who is represented by the Kentucky Department of Public Advocacy (Kentucky's public defense system) may request that their attorney represent them in a disciplinary hearing.[209] The Bronx Defenders is currently advocating to employ a similar model for their clients.[210] In many public defender offices throughout the country, particularly ones that employ holistic defense models,[211] attorneys already assist and represent their clients in various ancillary hearings.[212] Simply allowing attorneys to represent their clients in the collateral process of disciplinary hearings would dispel the idea that such a provision would be too inefficient.

The Public Defender Service for the District of Columbia (PDS) is a model program when it comes to extensive and efficient provision of counsel in jail disciplinary proceedings. In Washington, D.C., whenever someone is written up for a Class 1 disciplinary infraction,[213] the

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207. Wolff v. McDonnell, 418 U.S. 539, 570 (1974) ("There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage[,] . . . we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.").

208. See Dunn et al., supra note 121; see also Alabama v. Shelton, 535 U.S. 654, 674 (2002) (holding that the defendant "is entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined"); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) ("[W]hen the trial of a misdemeanor starts[,] . . . no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel."); In re Gault, 387 U.S. 1, 41 (1967) (holding that juveniles are also entitled to legal representation); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that the right to counsel is fundamental).

209. See 501 Ky. Admin. Regs. 6:020 § (II)(B)(3)(b) (2018) ("Staff counsel or an assigned legal aide shall be appointed if it appears that an inmate is not capable of collecting and presenting evidence on his behalf.").

210. See Holistic Defense, Defined, The Bronx Defs., https://www.bronxdefenders.org/holistic-defense/ [https://perma.cc/VW8F-2ZLT] (last visited Sept. 6, 2022) (describing holistic defense as recognizing clients' needs and meeting those needs in a meaningful manner).

211. Id.

212. Some examples include DMV hearings, OATH (Office of Administrative Trials and Hearings) proceedings, and custody hearings. See Mission and Story, The Bronx Defs., https://www.bronxdefenders.org/who-we-are/ [https://perma.cc/3ABN-DPXR] (last visited Oct. 3, 2022) (noting that its various teams support clients in drug charges that give rise to deportation hearings and housing cases that lead to child welfare cases).

213. A Class 1 offense is the most serious disciplinary infraction an incarcerated person can commit and carries the harshest penalties. See Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 37 (D.C. Dep't of Corr. 2019). Many jurisdictions similarly delineate tiers of offenses.

Department of Corrections provides the person in custody a form in which they can request that PDS represent them at the hearing.[214] The Department then emails PDS a notification of the hearing at least twenty-four hours before it occurs.[215] PDS completes a conflict check[216] and then staffs someone to represent the incarcerated person in the hearing.[217] Hearings must occur within a week of the incident and always occur at the same time.[218] Surveillance video and stills are frequently marked "for attorney's eyes only" to accommodate security regulations.[219] Attorneys speak with their clients, either in person or over the phone. Sometimes they meet with witnesses in interview rooms and obtain affidavits for submission at hearings.[220] A disciplinary committee consisting of three correctional officers, known as the Adjustment Board, presides over the hearing and

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One of the many questions left unanswered by *Wolff* is whether an incarcerated person charged with a minor violation for which they could only receive a minor penalty has any guaranteed due process protections. Babcock, supra note 15, at 1022. The Supreme Court had the opportunity to clarify the lesser penalties question in *Baxter v. Palmigiano*, 425 U.S. 308 (1976). In *Baxter*, the Supreme Court reversed the Ninth Circuit in concluding that the issue should not have been reached in that case because each named plaintiff had received penalties consisting of suspension of privileges such as loss of good time or punitive segregation. *Baxter*, 425 U.S. at 323–24. The Court held that because plaintiffs had not committed minor violations and thus had not received minor penalties, the Court was not in a position to address the issue. Id. Though the question of whether due process is required for the imposition of fewer penalties is largely unanswered, *Baxter* did establish that *Wolff* standards are required wherever a major penalty could potentially be imposed. Id. at 324.

Some jurisdictions extend the right to counsel based on the severity of the offense. Washington, D.C., for example, only allows incarcerated people with Class 1 offenses to obtain counsel, whereas those charged with lower-level Class 2 offenses may only seek staff representatives for assistance. Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 20 (D.C. Dep't of Corr. 2019). Similarly, Minnesota's Department of Corrections does not allow an attorney to represent a resident at Minor Discipline Hearings; however, attorneys may be present for Major Discipline Hearings. Mn. Dep't of Corr § 303.010 (G)(2), (H)(2) (2021). But if the resident is unable to understand the discipline process, they are always entitled to representation. Id. § 303.010 (D)(2)(c). Alaska permits a resident legal representation in disciplinary proceedings only when the district attorney has filed a criminal complaint. Alaska Admin. Code tit. 22, § 05.440 (1977).

214. See Dunn et al., supra note 121.

215. Id.

216. A conflict check is a process by which an attorney ensures their representation of one client does not adversely affect another client. In the context of disciplinary proceedings, this typically requires that an attorney ensure that they are not representing two people implicated in an incident. For example, if two incarcerated individuals are accused of assaulting one another, an attorney will be unable to represent both in their separate disciplinary hearings.

217. The chief judge of the District of Columbia issued an administrative practice order to allow law students to represent incarcerated people at these hearings under PDS attorneys' supervision. Administrative Order 07-20 (D.C. Super. Ct. Aug. 16, 2007), https://www.dccourts.gov/sites/default/files/2017-03/07-20.pdf [https://perma.cc/SA92-RTEU].

218. Id.

219. Id.

220. Id.

renders a decision almost immediately.[221] Interestingly, much of what is contested are procedural violations, such as claims that the officer who investigated the case and obtained statements from other officers was also involved in the incident, chain of custody issues for possession of contraband, or failing to provide notice to the person in custody.[222]

Washington, D.C.'s program showcases how providing counsel in disciplinary hearings does not, as the *Wolff* Court said, "reduce their utility as a means to further correctional goals."[223] A concern expressed by the *Wolff* majority was that counsel would delay the decisionmaking process.[224] As mentioned, however, the Adjustment Board delivers their decision fairly quickly, suggesting that inserting counsel does not prolong the decisionmaking process significantly.[225] In fact, counsel could potentially accelerate the deliberation process, as they may more readily spot procedural violations that will automatically result in a not guilty verdict. Furthermore, one unique aspect of PDS's program is that staff meet regularly with the Department of Corrections commissioner to discuss issues and concerns with respect to the disciplinary process.[226] Keeping the commissioner abreast of patterns of due process violations as they arise ensures that ameliorative measures are taken more swiftly.

Though Washington, D.C.'s program is impressive, an exemplary model should incorporate a few modifications. Washington, D.C., only allows incarcerated people to have counsel for the most serious violations.[227] This is likely because these violations carry the most severe penalties, namely solitary confinement.[228] Equally concerning, however, are violations that result in loss of good-time credit, which essentially extends someone's sentence, and loss of privileges. Incarcerated people face these penalties for almost any type of minor violation.[229] Because any type of liberty deprivation has detrimental effects on not only the physical and mental health of

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221. Id.

222. Id.

223. Wolff v. McDonnell, 418 U.S. 539, 570 (1974).

224. Id. at 570 ("Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial." (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1972))).

225. See supra note 221 and accompanying text.

226. Interview with Chiquisha Robinson, Deputy Chief, Prisoner and Reentry Legal Servs. Program, in Washington, D.C. (Nov. 5, 2021) (on file with author).

227. Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 20 (D.C. Dep't of Corr. 2019).

228. Id. at 37–38.

229. See id. at 37–46; see also Rocheleau, supra note 199, at 4 ("[Prison disciplinary] processes have enormous consequences both for individual prisoners and prison systems alike and can result in sanctions that range from the revocation of privileges (e.g., visits, use of the phone, loss of personal items) to extended periods in segregation along with the loss of good time.").

incarcerated people but also on the outcome of their case,[230] counsel should be provided in all disciplinary hearings. Additionally, incarcerated people should not be required to request counsel. Rather, counsel should be automatically provided, and incarcerated people should have the ability to opt out. This ensures that people are not deprived of the right to counsel due to human or clerical error.

B. *Examining Other Practical Concerns Around Provision of Counsel*

1. *Human and Economic Burden.* — Guaranteeing a right to counsel in disciplinary hearings could pose both financial burdens on the state and stretch already overworked attorneys even thinner.[231] Furthermore, the sheer frequency of disciplinary proceedings may make it difficult to staff an attorney to attend every hearing, particularly because public defenders already juggle extremely high caseloads.[232] Private attorneys who may be interested in representing incarcerated people at disciplinary hearings may be disincentivized by the fact that, unlike guaranteed fees in court-appointed criminal cases or the possibility of court awarded fees if they prevail in a civil rights suit, they have no guarantee that they will ever be paid for representing incarcerated people in disciplinary hearings.[233]

While there is no panacea for this concern, several viable solutions exist. One workaround could be to dedicate specific staff members to exclusively handle disciplinary proceedings to ensure that other attorneys do not take on more work than they can handle. Also, allowing law students under the supervision of attorneys to represent incarcerated people in disciplinary hearings could alleviate the cost and human burden associated with providing counsel.[234] Finally, law firms could create pro bono projects dedicated to providing counsel to incarcerated people at disciplinary hearings.

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230. See supra notes 150–154 and accompanying text.

231. See Wolff v. McDonnell, 418 U.S. 539, 570 (1974) (noting the financial and practical infeasibility of providing counsel in disciplinary hearings).

232. See Norman Lefstein, Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate, 38 Hastings Const. L.Q. 949, 951 & n.6 (2011) (discussing the enormous caseloads of public defenders); Richard A. Oppel, Jr. & Jugal K. Patel, One Lawyer, 194 Felony Cases, and No Time, N.Y. Times (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html (on file with the *Columbia Law Review*) (discussing public defenders' massive caseloads).

233. A. Mechele Dickerson, A Reevaluation of Inmates' Fifth and Sixth Amendment Rights at Disciplinary Hearings Which Precede Criminal Prosecutions, 32 How. L.J. 427, 432 (1989); see also Webb v. Dyer Cnty. Bd. of Educ., 471 U.S. 234, 243–44 (1985) (holding that attorneys, under the Civil Rights Attorneys Fees Act, cannot be compensated for fees incurred in optional state administrative proceedings that relate to the incident giving rise to the civil rights suit).

234. See supra note 217 and accompanying text.

It is worth mentioning that instituting any due process protection will come with a certain degree of costs, hence the need for a balancing test.[235] The Supreme Court has made clear, however, that "[p]rocedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person . . . ."[236] Furthermore, local governments spend over twenty-five billion dollars on jails despite falling crime rates and fewer people being admitted to jail—a powerful indicator of priorities.[237] Finding a constitutional right to counsel in disciplinary proceedings would force local governments to reallocate resources to ensure that people awaiting trial are afforded representation, thus precluding them from denying counsel provision on mere cost or efficiency grounds.

2. *Legitimizing the Use of Solitary Confinement.* — Another valid concern around guaranteeing counsel in disciplinary proceedings is that doing so would legitimize the inhumane use of solitary confinement. Abolitionist scholars have demonstrated the limits of procedural justice (the fairness of processes used by those in positions of authority to reach specific outcomes or decisions) to redress serious concerns about violent systems and their concentrated effect on poor, Black, and brown communities.[238] One major critique of procedural justice is that it centers criminal justice system actor legitimacy and citizen compliance as the goals of reform.[239] Thus, any efforts in procedural justice reform arguably aid in legitimizing systems that ultimately should be disrupted or dismantled. Nonetheless, the dire conditions of jails necessitate swift action in the form of increased safeguards. Even with the minimum *Wolff* safeguards in place, the disciplinary hearing process is failing to honor the humanity of people confined in jails.[240] And when incarcerated people view staff and disciplinary processes as unfair, it not only reduces the validity of the disciplinary process regime but also is counterproductive to correctional authorities' goals of reducing violence.[241] The mere presence of counsel

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235. See generally Mathews v. Eldridge, 424 U.S. 319 (1976) (deciding whether due process under the Fifth Amendment applies to social security disability benefits); Goldberg v. Kelly, 397 U.S. 254 (1970) (discussing whether due process under the Fifth Amendment applies to public assistance aid).

236. Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972).

237. Local Spending on Jails Tops $25 Billion in Latest Nationwide Data, The Pew Charitable Trs. (Jan. 29, 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-$25-billion-in-latest-nationwide-data [https://perma.cc/RFB6-88UP].

238. See, e.g., Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 Calif. L. Rev. 1781, 1807 (2020) ("Scholars in law and beyond have demonstrated the limits of procedural justice to redress serious concerns about police violence and its concentration in poor, Black, and brown communities."); Monica C. Bell, Safety, Friendship, and Dreams, 54 Harv. C.R.-C.L. L. Rev. 703, 716–22 (2019).

239. Akbar, supra note 238, at 1809.

240. See supra notes 1–3 and accompanying text.

241. Rocheleau, supra note 199, at 23.

in disciplinary proceedings may make correctional officers more likely to adhere to *Wolff* standards. Allowing counsel into the disciplinary process would add a level of consistency into the disciplinary process and create a system of checks and balances ensuring that incarcerated people are provided the full extent of their due process protections.

By no means is this Note intending to assert that guaranteeing a right to counsel to incarcerated people in jail disciplinary hearings is the end-all, be-all. It is critical that jails also revise disciplinary policies and practices to emphasize proportional sanctions to minimize the use of restrictive housing for disciplinary infractions in facilities. They should also substantially reduce the number of violations that can result in disciplinary hearings. And finally, correctional agencies should develop additional, alternative sanctions to disciplinary segregation and encourage their staff to use them more often. Ultimately, one of the most, if not the most, direct measures to ensure that people are extended the full array of due process rights is to not incarcerate them at all. The harmful consequences of pretrial detention cannot be overstated. Thus, it is essential that correctional systems significantly reduce the number of people who cycle in and out of jail.

CONCLUSION

Underpinning Justice William O. Douglas's dissent in *Wolff* was a concern that allowing prison officials to wield largely unchecked discretion in authority would cause incarcerated people to feel that prison officials were authoritarian and capricious and ultimately result in a crisis of legitimacy.[242] Almost fifty years after the ruling and under the backdrop of a global pandemic, Justice Douglas's concern has unquestionably come to pass. Depriving incarcerated people of access to counsel in disciplinary practice undermines any sense of faith in the system overall. In acknowledgement of the potential for future changes in the disciplinary process, the *Wolff* Court declared that their conclusions were "not graven in stone," and that circumstances may arise that require the Court to take on further consideration and reflection.[243] As jail conditions deteriorate and due process abuses go unchecked, the time is nigh for a reexamination of the *Wolff* standards.

Access to counsel in disciplinary hearings is necessary, straightforward, and attainable. Jurisdictions that guarantee access to counsel in jail disciplinary proceedings demonstrate how inserting advocates into in the disciplinary system has the potential to create a system of accountability and to ensure that all other procedural safeguards, both constitutional and discretionary alike (e.g., notice, calling witnesses, presenting evidence, and confrontation and cross-

242. Wolff v. McDonnell, 418 U.S. 539, 599–601 (1974) (Douglas, J., dissenting).

243. Id. at 571–72 (majority opinion).

examination), are upheld. The right to counsel is "the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys."[244] Guaranteeing a right to counsel in jail disciplinary proceedings would reify each incarcerated person's dignity and worth, insert accountability into a system largely devoid of it, and ultimately ensure a more just and reliable disciplinary process.

244. Kaley v. United States, 571 U.S. 320, 344 (2014) (Roberts, C.J., dissenting).