Saint Louis University Law Journal

Volume 61
Number 4 *Indigence and the Criminal Justice System (Summer 2017)*

Article 5

2017

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Recommended Citation

Brandon Buskey, *Escaping the Abyss: The Promise of Equal Protection to End Indefinite Detention Without Counsel*, 61 St. Louis U. L.J. (2017).
Available at: https://scholarship.law.slu.edu/lj/vol61/iss4/5

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ESCAPING THE ABYSS: THE PROMISE OF EQUAL PROTECTION TO END INDEFINITE DETENTION WITHOUT COUNSEL

BRANDON BUSKEY*

INTRODUCTION: INDEFINITE DETENTION WITHOUT COUNSEL IN MISSISSIPPI

Indefinite detention. It is a phrase most recently associated with the War on Terror that the United States launched after the terrorist attacks of September 11, 2001. It conjures the military camp at Guantanamo Bay, Cuba, where the country detained hundreds of those it labeled "enemy combatants" for years without trial. Many were found guilty of the accusations against them. Many were not. But our nation's failure to respect the rule of law has forever tainted our confidence in those results. Most Americans would perhaps be surprised to learn that indefinite detention is not an anomaly sprung from the existential threat of 9/11. Rather, it was engineered on our shores, and it is alive and well.

I discovered this truth for myself during the summer of 2014, when, as a staff attorney for the American Civil Liberties Union, I began investigating the indefinite detention of those held prior to trial in Mississippi. In 2003, the NAACP Legal Defense Fund ("LDF") reported that, across the state, felony arrestees could be held in jail for months or years before trial, or before even being formally charged.[1] Widespread deficiencies in the state's public defender system had also been extensively documented.[2] Our goals were to find whether the practice had survived in the decade since the LDF report, and, if it did, to isolate a particularly virulent strain of the problem: indefinite detention of the poor without access to counsel.

Our investigation took us to twelve counties in each of the state's major geographic/cultural regions, including the Delta, the Gulf Coast, and the

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1. SARAH GERAGHTY & MIRIAM GOHARA, NAACP LEGAL DEFENSE AND EDUCATION FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS (2003), https://static.prisonpolicy.org/scans/Assembly_Line_Justice.pdf [http://perma.cc/EQY6-3RTM].

2. *See, e.g.*, PHYLLIS E. MANN, NAT'L LEGAL AID & DEFENDER ASSOCIATION, MISSISSIPPI: A SHORT STORY (2010), http://nlada.net/library/article/ms_ashortstory [http://perma.cc/6U7A-NMEJ].

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Appalachian Foothills.[3] In our conversations with public defenders, prosecutors, judges, and policymakers across Mississippi, it became clear that the phenomenon had deep roots. In almost every county, local officials described systems by which arrestees who could not afford counsel were held for months or longer without seeing a lawyer. Amazingly, those in counties that only required arrestees to languish in jail for "only a few weeks" typically viewed themselves as exemplary. Even where the county *did* make an arrestee wait for months, some other county was always worse.

We eventually identified three structural reasons why Mississippi's criminal justice system breeds indefinite detention without counsel. The first is that under the state constitution, a district attorney must obtain an indictment from a grand jury before prosecuting a felony.[4] But state law does not place any limit on how long a felony arrestee may be held in jail before a prosecutor obtains an indictment. The absence of such a limit converts this supposed right into a ransom, holding arrestees hostage to their own constitutional protection.

Mississippi is by no means an outlier in this regard. Eighteen states do not have a statute-specified time frame in which formal charges must be filed—either by indictment or information.[5] Six states require the filing of charges between three months and six months of arrest.[6] Ten states require the filing of charges between one month and three months of arrest.[7] Fifteen states require the formal filing of charges within a month of arrest.[8] Thus, the majority of

3. *See View By Region*, MISSISSIPPI ARTS COMMISSION (2013), http://www.arts.state.ms.us/folklife/view-by-region.php [http://perma.cc/G4EJ-UL9D].

4. MISS. CONST. art. 3, § 27.

5. The states are as follows: Alabama, Alaska, Colorado, Connecticut, Georgia, Hawaii, Kansas, Massachusetts, Mississippi, Missouri, New Jersey, New Hampshire, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, and West Virginia.

6. Nebraska (NEB. REV. STAT. § 29-1201 (West, Westlaw through 2017)); North Carolina (N.C. GEN. STAT. ANN. § 15-10 (2016)); Rhode Island (R.I. GEN. LAWS § 12-13-6 (2016)); South Carolina (S.C. R. CRIM. P. R. 2 (2016); S.C. R. CRIM. P. R. 3 (2016)); Pennsylvania (PA. R. CRIM. P. 600 (West, Westlaw through 2017)); and Texas (TX. CODE CRIM. PROC. ART. 32.01 (2015); Ex parte Martin, 6 S.W.3d 524, 529 (Tex. Crim. App. 1999)).

7. Arkansas (ARK. R. CRIM. P. 8.6 (West, Westlaw through 2017)); Delaware (DEL. SUP. CT. CRIM. R. 48 (2017)); Iowa (IOWA R. CRIM. P. 2.33 (2017)); Kentucky (KY. R. CRIM. P. 5.22 (2016)); Louisiana (LA. CODE CRIM. PROC. ART. 701 (West, Westlaw through 2017)); Maine (ME. R. CRIM. P. 48 (2016)); Maryland (MD. R. 4-212 (West, Westlaw through 2017); MD. R. 4-221 (West, Westlaw through 2017)); Nevada (NEV. REV. STAT. ANN. § 171.178 (2015); NEV. REV. STAT. ANN. § 171.196 (2015); NEV. REV. STAT. ANN. § 173.035 (2015); Berry v. Clark County, 571 P.2d 109 (1977)); New Mexico (NM. R. MAG. CT. R. 6-203 (2016); NM. R. DIST. CT. R. 5-302 (2016); NM. R. DIST. CT. R. 5-201 (2016)); and Wisconsin (WIS. STAT. ANN § 970.01 (2017); WIS. STAT. ANN § 970.03 (2017); State v. Evans, 522 N.W.2d 554, 563 (Wis. Ct. App. 1994)).

8. Arizona (ARIZ. R. CRIM. P. 4.1 (West, Westlaw through 2017); ARIZ. R. CRIM. P. 5.1 (West, Westlaw through 2017); ARIZ. R. CRIM. P. 13.1 (West, Westlaw through 2017)); California (CAL. PENAL CODE § 1382(a)(1) (West, Westlaw through 2017)); Florida (FL. ST.

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states allow individuals to be held at least a month without formal charges.[9] However, many states mitigate this risk with speedy trial laws mandating that trials occur within specified times of arrest.[10] Mississippi's speedy trial act, however, triggers after indictment, not arrest, and it still allows the state 270 days after indictment to commence a felony trial.[11]

The second reason for indefinite detention is historical. Across the state, judges and court officers still "ride circuit" within a judicial district. The term evokes images of 19th Century judges riding on horseback or in carriages from courthouse to courthouse to conduct the judicial business of each locality. Today, the practice involves court personnel traveling among county seats—presumably by car—for set periods over the course of a year.[12] For example, in a district comprised of four counties, there will be a trial term in each county three times a year, with each term lasting about a month.[13] Trial terms generally overlap with convenings of the grand jury. By design, there will be approximately two months between each trial session in this hypothetical district.

The risk of delay under this system is immediately apparent. Someone arrested on a felony during a trial term stands almost no chance of their case being presented to the sitting grand jury. They must instead wait two months until the next grand jury. If they cannot make bail, they must spend two months in a jail cell just waiting for the next session. Many districts,

CRIM. P. R. 3.134 (2016)); Idaho (I.C. § 19-615 (2016); I.C.R. 5.1 (2016); I.C.R. 7 (2016)); Illinois (725 ILL. COMP. STAT. 5/109-3.1 (West, Westlaw through 2016)); Indiana (IND. CODE ANN. § 35-34-1-4(b)(1) (2016); Pawloski v. State, 380 N.E.2d 1230, 1234 (Ind. 1978)); Michigan (MICH. COMP. LAWS ANN. § 764.26 (West, Westlaw through 2017)); MICH. COMP. LAWS ANN. § 766.4 (West, Westlaw through 2017)); Minnesota (MINN. R. CRIM. P. 4.02 (2016); MINN. R. CRIM. P. 5.01 (2016); MINN. R. CRIM. P. 8.02 (2016)); Montana (MONT. CODE ANN. § 46-11-203 (2015)); New York (N.Y. CRIM. PROC. LAW § 180.80 (2017); People ex rel. Maxian on Behalf of Roundtree v. Brown, 570 N.E.2d 223, 225 (N.Y. 1991)); Oregon (OR. REV. STAT. § 135.745 (2016)); Utah (UTAH R. CRIM. P. R. 7 (West, Westlaw through 2017)); Vermont (VT. R. CRIM. P. 3 (2016); VT. R. CRIM. P. 5 (2016)); Washington (WASH. SUPER. CT. CRIM. P. R. 3.2.1 (2016)); and Wyoming (WYO. R. CRIM. P. 5 (2016)).

9. Virginia generally belongs to this group. However, because its charging statute is keyed to trial terms rather than finite days from arrest, and because judicial circuits differ substantially with respect to the frequency of trial terms, it cannot easily be classified into any of the above categories. VA. CODE ANN. § 19.2-242 (2016). The Virginia Circuit Court terms can be found at http://www.courts.state.va.us/directories/circ.pdf [https://perma.cc/SL69-JYAF].

10. *See, e.g.*, OHIO REV. CODE ANN. § 2945.71 (West, Westlaw through 2017) (requiring felony trial within 270 days of arrest).

11. MISS. CODE ANN. § 99-17-1 (West, Westlaw through 2017).

12. *See* MISS. CODE ANN. § 9-7-3 (West, Westlaw through 2017).

13. *See Circuit Court Terms in* Delbert Hosemann, Secretary of State, *2017 Mississippi Judiciary Directory and Court Calendar*, at 34–40, *available at* http://www.sos.ms.gov/Education-Publications/Documents/Downloads/2017%20JudicialDirectory/2017%20Judiciary%20Directory%20%20Court%20Calendar.pdf [https://perma.cc/Q6VM-TG8R].

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particularly in more rural areas—and Mississippi is very rural—have only two or three trial terms per year, forcing arrestees to wait three to five months *just to see if the grand jury acts on their case*. Compounding matters, local officials in several counties reported that cases are rarely presented to the grand jury during the next trial term either. Our arrestee in the hypothetical district must now wait five to six months to learn her fate with the grand jury.

To determine how long arrestees actually wait until indictment, we surveyed public defenders from seventeen of the state's twenty-one judicial districts.[14] The results confirmed that these hypothetical concerns are quite real. Almost without exception, indictments typically occurred within six months to a year of arrest, and no public defender reported that the district regularly secured indictments within three months of arrest.[15]

The third driving force behind indefinite detention is another omission. Mississippi is one of six states that delegates non-capital, trial-level defense entirely to its counties.[16] There are no standards for the timing of counsel appointment, nor is there any oversight mechanism to enforce existing constitutional and ethical standards for appointed counsel. In this void, many districts wait until an arrestee is indicted to appoint counsel.

This perfect storm of deficiencies has helped spawn a culture of apathy toward the accused. To minimize the costs of providing appointed counsel, many counties use a flat-fee contract system to retain public defenders.[17] These arrangements usually involve a county contracting with one or more attorneys to handle all or some percentage of the county's indigent caseload. The contracting attorneys typically accept this work on a part-time basis, maintaining a private practice along with their defender duties.[18] The county's incentive to control costs is thus passed on to the public defender. As each new appointed client reduces the marginal value of the contract, while also threatening the time the attorney can devote to "paying clients," defenders naturally look to minimize their time on appointed cases.[19] One of the lasting memories from our investigation was a part-time public defender who candidly

14. Brandon Buskey & Marshall Thomas, *Mississippi Public Defender Survey* (Dec. 2014) (on file with author).

15. *Id.*

16. MANN, *supra* note 2.

17. OFFICE OF THE STATE PUBLIC DEFENDER, THE STATE OF THE RIGHT TO COUNSEL IN MISSISSIPPI: REPORT & RECOMMENDATIONS (2014), http://www.ospd.ms.gov/MS%20Report%20updated%20October%202014.pdf [http://perma.cc/68U7-FLED].

18. *Id.*

19. JON MOSHER, FLAT FEE CONTRACTS, NAT'L LEGAL AID & DEFENDER ASSOCIATION (2010), http://www.nlada.net/library/article/na_flatfeecontracts [http://perma.cc/DPX4-9BAQ] ("Because the lawyer will be paid the same amount, no matter how much or little he works on each case, it is in the lawyer's personal interest to devote as little time as possible to each appointed case, leaving more time for the lawyer to do other more lucrative work.").

admitted that she did not know her clients existed until indictment, and that, if she was to "keep the lights on" at her private practice, she could not afford to know them.

As open secrets go, indefinite detention without counsel may be one of Mississippi's most shameful. A lack of reliable data prevents an accounting of the number of people victimized by the state's de facto system of indefinite detention. But the practice was apparent wherever we visited.

Our investigation culminated in a lawsuit challenging the system of indefinite detention without counsel in Scott County, Mississippi. Located about forty-five minutes east of the capital Jackson, Scott County had all the features that make indefinite detention so pervasive. There are only four trial terms per year. Along with the other three counties in the district, Scott County only appointed counsel at indictment. Finally, the county relied on a part-time, flat-fee contract to retain public defenders.

The two named plaintiffs in the class action lawsuit we ultimately filed in federal court exemplified the problems in Scott County and the rest of the state.[20] The first, Josh Bassett, spent eight months in jail on a $100,000 bail he could not afford.[21] He was charged with a nonviolent property offense.[22] The second, Octavious Burks, had spent ten months in jail on a $30,000 bail he could not afford for an alleged attempted armed robbery.[23] Mr. Burks was no stranger to Scott County's indefinite detention system. He had spent fully three of the previous five years in the Scott County Detention Center on a variety of felony offenses.[24] Each time the county released him without an indictment.[25] A few days after we filed our lawsuit in September 2015, the county released both Mr. Bassett and Mr. Burks without requiring bail.[26] Mr. Bassett's charges were eventually dismissed; Mr. Burks was never indicted.[27]

But, the most shocking aspect of the lawsuit was our main defendant, then-senior district court judge Marcus Gordon. When Gordon died earlier this year, he was celebrated in the *New York Times* for his role in giving the maximum

20. This paragraph is based primarily on the author's knowledge gathered as lead counsel on Burks v. Scott County, No. 3:14-cv-00745-HTW-LRA (S.D. Miss. Sept. 23, 2014). Citations to filed court documents have been provided in notes 20–26, *infra*, for the benefit of the reader. All errors or omissions belong to the author.

21. Class Action Compl. at ¶¶ 23, 27, Burks v. Scott County, No. 3:14-cv-00745-HTW-LRA (S.D. Miss. Sept. 23, 2014).

22. *Id*. at ¶ 21.

23. Am. Class Action Compl. at ¶¶ 7, 9, 12, Burks v. Scott County, No. 3:14-cv-00745-HTW-LRA (S.D. Miss. Sept. 23, 2014).

24. *Id*. at ¶¶ 21–24.

25. *Id*.

26. *Id*. at ¶¶ 25, 42, 46.

27. *Id*. at ¶ 44. Mr. Burks did take a plea to being a felon in possession of a firearm in a separate federal prosecution for the same incident. *Id*. at ¶ 30.

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sixty-year sentence to Edward Ray Killen, the man convicted in 2005 of the infamous 1964 assassination of three civil rights workers in Philadelphia, Mississippi.[28] But in September 2015, when the *Times* interviewed Gordon about our lawsuit, he seemed less the civil rights champion. When asked why he prefers to wait until indictment to appoint counsel, he offered, "The reason is, that public defender would go out and spend his time and money and cost the county money in investigating the matter . . . . And then sometimes, the defendant is not indicted by the grand jury. So I wait until he's been indicted."[29] As to indigent arrestees who want help prior to indictment to challenge their arrest or lower their bail, Gordon was unmoved. Such a person "can represent himself, or he can employ an attorney."[30] Gordon's callousness may have been unique, but the system of indefinite detention he helped maintain was all too common.

Scott County, and Mississippi more generally, present a vexing challenge. Particularly in a country purportedly committed to the presumption of innocence, the Kafkaesque practice of warehousing people prior to trial is abhorrent on a number of levels. Yet it is not clearly unconstitutional. Below, I discuss the Court's Sixth Amendment right to counsel jurisprudence to identify the proverbial cracks into which so many criminal defendants have slipped. Specifically, though the Court has held that criminal defendants have a Sixth Amendment right to counsel for all "critical stages" of the prosecution, it has never held that the initial appearance is one of those critical stages. More importantly for places like Mississippi, the Court's critical stage jurisprudence does not—and perhaps cannot—address when counsel must be appointed if the state detains someone but delays or does not conduct any subsequent critical stage before trial.

However, when and if the Court does confront the issue of indefinite detention without counsel, I propose that the Sixth Amendment lens, with its heavy focus on trial outcomes, is ultimately too myopic to offer meaningful solutions. The Court should instead return to the doctrinal roots of fundamental fairness and equal justice that animate its seminal decision in *Gideon v. Wainwright*,[31] and that drives the Court's access to courts jurisprudence. This new lens focuses on whether the state has provided meaningful access to the

28. Sam Roberts, *Marcus D. Gordon, Judge in 'Mississippi Burning Case', Dies at 84*, N.Y. TIMES (May 27, 2016), http://www.nytimes.com/2016/05/29/us/marcus-d-gordon-judge-in-mississippi-burning-case-dies-at-84.html [http://perma.cc/MP4X-JMQX].

29. Campbell Robertson, *In a Mississippi Jail, Convictions and Counsel Appear Optional*, N.Y. TIMES (Sept. 24, 2014), http://www.nytimes.com/2014/09/25/us/in-a-mississippi-jail-convictions-and-counsel-appear-optional.html [http://perma.cc/FQ7E-C534].

30. *Id.*

31. Gideon v. Wainwright, 372 U.S. 335 (1963).

pretrial process without regard to wealth. Indefinite detention without counsel cannot survive such a standard.

I. CRITICAL STAGES AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment requires that states provide attorneys for felony[32] and most misdemeanor trials,[33] as well as sentencing.[34] Once a prosecution has begun, the Sixth Amendment also secures a right to counsel for certain pretrial proceedings. As early as 1932, the Supreme Court recognized that because the pretrial period was "perhaps the most critical period of the proceedings," it necessitates "the guiding hand of counsel" to avoid emptying the right to a fair trial of all its force.[35] However, the right to counsel prior to trial is not absolute. Counsel is required only if the pretrial proceeding qualifies as a "critical stage," which the Supreme Court has most recently defined "as [a] proceeding[] between an individual and agents of the State (whether formal or informal, in court or out) that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary."[36] In essence, the critical stage analysis asks whether counsel is necessary to preserve a defendant's right to a fair trial.[37]

Hence, in *United States v. Wade*, the Court declared that an in-person line-up, where the accused is displayed with others so that a witness may attempt an identification, is a critical stage because counsel could both ensure the fair conduct of the line-up and use her observations to cross-examine a witness's potentially devastating courtroom identification.[38] However, a photographic line-up, while just as easily leading to a damaging courtroom identification, is not a critical stage, primarily because the defendant's absence prevents a trial-like confrontation with the state.[39] In another example of contrasting critical stage outcomes, the Supreme Court has deemed preliminary hearings to be critical stages, since a defendant may challenge the state's probable cause for the offense by examining and cross-examining witnesses, as well as argue the need for a mental health exam or lowered bail.[40] But a judicial finding of

32. *Id*. at 343.

33. Shelton v. Alabama, 535 U.S. 654, 661 (2002).

34. Mempa v. Rhay, 389 U.S. 128, 137 (1967).

35. Powell v. Alabama, 287 U.S. 45, 57, 69 (1932).

36. Rothgery v. Gillespie Cty., 554 U.S. 191, 212 n.16 (2008) (quotations and citations omitted).

37. Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1517 (2013).

38. 388 U.S. 218, 236–37 (1967).

39. United States v. Ash, 413 U.S. 300, 317 (1973).

40. Coleman v. Alabama, 399 U.S. 1, 9–10 (1970).

probable cause to authorize a brief period of detention is not a critical stage, as "[t]his issue can be determined reliably without an adversary hearing."[41]

Though the Supreme Court has grappled with the critical stage inquiry for over eighty years, it has never addressed an issue near the center of indefinite detention without counsel: whether an indigent defendant has a right to counsel at the first court appearance.[42] The Court came closest to deciding this issue in 2008 with *Rothgery v. Gillespie County*.[43] Walter Rothgery went six months—including three weeks in jail—without an attorney on a felony charge of being a felon in possession of a weapon.[44] Only, Mr. Rothgery had never been convicted of a felony.[45] Soon after his arrest, Rothgery had one court appearance, where a magistrate found probable cause for the arrest, informed Rothgery of the charge, and set bail.[46] By custom, the prosecutor did not attend the proceeding, nor did the county provide counsel to Mr. Rothgery. Instead, like Scott County, Gillespie County waited until after Rothgery's indictment to provide an attorney,[47] who promptly contacted the prosecutor with proof that his client was the victim of a faulty criminal background check.[48] Rothgery then sued the county for delaying the appointment of counsel, which Rothgery asserted would have prevented his indictment and time in jail—most of which occurred after his re-arrest upon indictment.[49]

When Rothgery's case reached the Supreme Court, the Court appeared poised to decide whether he should have been provided an attorney at his initial appearance before the magistrate judge.[50] The Court instead answered the antecedent question of whether Rothgery's right to counsel "attached" at the initial appearance. The general rule is that the right to counsel attaches once a criminal prosecution has begun; thereafter, the state must appoint counsel within a reasonable time to provide competent representation at any subsequent critical stage.[51] The Court had twice held that attachment occurs at the first appearance before a judicial officer.[52] Yet Gillespie County asserted that the absence of a prosecutor meant that Rothgery's prosecution had not

41. Gerstein v. Pugh, 420 U.S. 103, 120 (1975).

42. Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 333–34 (2011).

43. 554 U.S. 191, 194–95 (2008).

44. *Id.* at 196.

45. *Id.* at 195.

46. *Id.* at 196.

47. *Id.* at 196–97.

48. *Rothgery*, 554 U.S. at 196–97.

49. *Id.* at 197.

50. *See* Colbert, *supra* note 41, at 341.

51. *Rothgery*, 554 U.S. at 211–12.

52. *Id.* at 199.

begun.[53] The Court rejected this distinction, clarifying that the prosecutor's presence was immaterial to attachment.[54] But the Court explicitly left for another day the resolution of "whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights," and it also declined to articulate what standards might govern that decision.[55] Until then, this task falls to the states and lower courts. As was the case before *Rothgery*, most states still do not guarantee counsel at the first appearance.[56]

II. THE SIXTH AMENDMENT'S LIMITS IN ADDRESSING INDEFINITE DETENTION WITHOUT COUNSEL

Rothgery reveals a major crack in the Court's right to counsel jurisprudence. By sidestepping whether counsel is required at the first appearance, states must continue measuring the timing for counsel appointment backward from the next critical stage—i.e., estimate when the critical stage will occur, and calculate how far in advance of that stage counsel must be appointed. To avoid such guesswork, several commentators have asserted that counsel is required at the first appearance because a defendant's fundamental right to pretrial liberty is at stake. They contend that defendants must have representation at first appearance bail hearings—which have not been declared critical stages—to guard against arbitrary detention.[57] Valuable in its own right, securing pretrial release also improves a defendant's chances at a favorable outcome either in plea bargaining or at trial.[58] Further, bail hearings typically involve complex questions beyond the layperson's ken, such as the propriety of nonmonetary bond and release conditions. On these grounds, New York's highest court has declared that the first appearance is a critical stage under the Sixth Amendment,[59] while Maryland's highest court reached the same conclusion under the state constitution's due process clause.[60]

I agree with these commentators and these courts that bail hearings should qualify as critical stages. But no one should expect that such a ruling from the Supreme Court will be enough to halt indefinite detention without counsel. One problem in places like Mississippi is that bail often is not set in a hearing. Many judges and law enforcement officers instead rely on bail schedules,

53. *Id.* at 197–98.

54. *Id.* at 207–08.

55. *Id.* at 213.

56. *See* Colbert, *supra* note 41, at 386.

57. *E.g.*, Gerstein, *supra* note 36, at 1523; Colbert, *supra* note 41, at 344.

58. Will Dobbie, et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* (The Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016).

59. Hurrell-Harring v. State, 930 N.E.2d 217, 223–24 (N.Y. 2010).

60. DeWolfe v. Richmond, 76 A.3d 1019, 1031 (Md. 2013).

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which prescribe preset bail amounts or ranges according to the alleged offense.[61]

In fact, most places are like Mississippi on this score. By one survey, nearly two-thirds of counties around the country use bail schedules.[62] Consequently, many arrestees find that a judge has set bail before they are brought to court. As we witnessed time and again in Mississippi, if bail is addressed at the initial appearance, the only thing judges consider beyond the schedule is the arresting officer's recommendation as to the bail amount. Yes, the arresting officer. The prosecutor is rarely present. It is thus a fair assumption that most arrestees jailed on bail they cannot afford have never received anything resembling a hearing on their right to pretrial release. Indeed, the whole point of bail schedules is to eliminate such hearings.[63]

A likely rejoinder is that bail schedules are unconstitutional; they violate Supreme Court precedent prohibiting wealth-based detention and requiring individualized bail determinations. In fact, a number of courts and the Department of Justice have condemned bail schedules on these grounds.[64] Again, I agree. But the constitutional status of bail schedules says nothing about whether an initial appearance is a critical stage. The answer to that question is tied instead to another: when are states required to provide an individualized bail hearing—at the initial appearance, or some later date?

The Supreme Court has never squarely addressed the issue of by when an arrestee must receive a bail hearing. In *Gerstein v. Pugh*, where the Court recognized the right to a prompt probable cause hearing, the Court allowed states to experiment with conducting the probable cause and bail

61. *See* Lindsay Carlson, *Bail Schedules: A Violation of Judicial Discretion?* 26 CRIM. JUST. 12 (2011).

62. *Id.* at 14.

63. *Id.*

64. *See* Pugh v. Rainwater, 572 F.2d 1053, 1057–58 (5th Cir. 1978) (en banc); State v. Blake, 642 So. 2d 959, 968 (Ala. 1994); Lee v. Lawson, 375 So. 2d 1019, 1023 (Miss. 1979); Thompson v. Moss Point, 1:15-cv-182-LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); Jones v. City of Clanton, 2:15-cv-34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); Cooper v. City of Dothan, 1:15–cv–425–WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015); Pierce v. City of Velda City, 4–15–cv–570–HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015); *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951) (recognizing right to an individualized bail determination); Statement of Interest of the United States at 1, Varden v. City of Clanton, 2:15–CV–34–MHT (M.D. Ala. Feb. 13, 2015) (stating that the use of secured bail to detain the indigent "not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy"); Walker v. City of Calhoun, No. 4:15-cv-00170 (N.D. Ga. Jan. 26, 2016) (order granting preliminary injunction) ("[K]eeping individuals in jail solely because they cannot pay for their release, whether via fines, fees, or a cash bond, is impermissible") (citing Tate v. Short, 401 U.S. 395, 398 (1971) and Williams v. Illinois, 399 U.S. 235, 240–41 (1970)) (on appeal to the U.S. Court of Appeals for the Eleventh Circuit).

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determinations at the initial appearance.[65] While the Court later ruled that the probable cause determination must happen within forty-eight hours of arrest,[66] regardless of when the initial appearance occurs, it has remained silent on whether arrestees have a comparable constitutional right to a prompt bail determination.[67]

Absent a constitutional requirement that states must conduct meaningful bail hearings at the first appearance, it is far from certain that the Court will require counsel at a proceeding most judges could literally conduct without looking up at or hearing from the defendant, where they need only recite the alleged charges and preset bail amount.[68] There is nothing "trial-like" about this process, though, as described above, the outcome of that process—release or detention—may prejudice the outcome in a defendant's case. Yet, even if the Court finally settles whether initial appearances are critical stages and/or the required promptness of bail hearings, there remains another puzzle to solving indefinite detention without counsel: when must counsel be appointed if the initial appearance and/or bail hearing is delayed? Or simply never happens?

Consider the curious case of Jessica Jauch. Police in Starkville, Mississippi arrested Ms. Jauch on April 26, 2012, for several traffic offenses.[69] The police then transferred Ms. Jauch to the nearby Choctaw County jail because she had an outstanding misdemeanor warrant in that jurisdiction.[70] Ms. Jauch cleared the warrant, but remained in jail after learning that the Choctaw County grand jury had issued a felony indictment against her in January 2012.[71] Unfortunately, Choctaw County was not in trial term when Jauch was arrested, and would not be until August.[72] Tragically, like Walter Rothgery, Jessica Jauch was innocent. Despite her repeated assertions of innocence and requests to be taken to a judge to post bail, Ms. Jauch sat in jail for 96 days. She finally appeared in court on July 31, 2012, wherein the judge appointed counsel and

65. 420 U.S. 103, 123–25 (1975).

66. Cty. of Riverside v. McLaughlin, 500 U.S. 44, 58–59 (1991).

67. The Court has recognized that "[a] prompt hearing is necessary," but in the context of interpreting the federal Bail Reform Act of 1984. United States v. Montalvo-Murillo, 495 U.S. 711, 716 (1990).

68. *See* Pauch v. Gautreaux, 973 F. Supp. 2d 658 (M.D. La. 2013) (holding that arrestee's Sixth Amendment right to counsel did not attach because the only hearing during seven months of detention was a video "jail callout" where a non-judge court commissioner set bail according to the bail schedule and the arrestee was not informed of charges); *see also* Farrow v. Lipetzsky, 637 F. App'x 986, 988 (9th Cir. 2016) (holding that "preliminary bail determination" did not render initial appearance a critical stage).

69. Jauch v. Choctaw Cty., No. 1:15-cv-75-SA-SAA, 2016 WL 5720649, at *1 (N.D. Miss. Sept. 30, 2016).

70. *Id.*

71. *Id.*

72. *Id.*

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set bail. Ms. Jauch was released on August 6, 2012, and the prosecution finally dropped the charges against her in January 2013.

For those advocating the right to counsel at initial appearance, what should we make of Ms. Jauch's ordeal? She received counsel and a bail determination at her first appearance, but by that time she had been locked in jail *for three months*.[73] Like Walter Rothgery, Ms. Jauch filed a federal civil rights action against the county and its sheriff for the delays in bringing her to court and appointing counsel.[74] The federal district court made quick work of these claims. The court first dismissed Ms. Jauch's presentment claim on due process grounds.[75] It found that, because Ms. Jauch had already been indicted on the felony charge, she had no right to an initial appearance within forty-eight hours under Mississippi law, since the indictment supplied the requisite probable cause finding.[76] Denying Ms. Jauch's right to counsel claim thus became a matter of course under *Rothgery*—she was not subjected to a critical stage before her first appearance, and she received counsel at that first appearance.[77] The Sixth Amendment apparently requires nothing more.

The cases described above, particularly Jessica Jauch's, force the question of whether the Sixth Amendment is equal to the challenge of indefinite detention without counsel. The Supreme Court has made the right to pretrial counsel contingent on how the proceeding in question either affects or mimics the trial. This is entirely the wrong question. Once counsel was appointed, Josh Bassett, Walter Rothgery, and Jessica Jauch all had their cases dismissed by the prosecution without a trial. It is therefore hard to say counsel was appointed too late to protect their right to a fair trial. While theirs is certainly not the experience of most defendants subjected to prolonged pretrial detention—many of whom are willing to plead guilty despite their innocence—it does suggest the limitations of such an instrumentalist view of counsel's importance.

III. A NEW PATH: EQUAL ACCESS TO COURTS

Rather than ask whether counsel is necessary to protect a defendant's right a fair trial under the Sixth Amendment, the better question is whether we can condone a criminal justice system that tolerates unequal treatment of defendants based on wealth. Indefinite detention without counsel is almost exclusively the experience of the poor. Wealthier defendants can simply buy their way out of it by retaining counsel. Such inequities are properly addressed under the Fourteenth Amendment's Equal Protection and Due Process Clauses,

73. *Id.* at *2.
74. *Jauch*, 2015 WL 5720649, at *2.
75. *Id.* at *13.
76. *Id.* at *2 (citing Unif. R. of Cir & Cty. Ct. 6.05).
77. *Id.* at *4.

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and the Court's line of cases establishing the right of meaningful access to courts. Framed this way, the right to counsel inquiry shifts from whether counsel is needed to avoid prejudice at a defendant's trial to whether counsel is needed to ensure that defendants are being treated fairly without regard to their resources.

The Court's access to courts jurisprudence finds its origins in *Powell v. Alabama*,[78] where the Court addressed the right to counsel in the infamous "Scottsboro boys" capital case. Though limiting itself to the extraordinary facts presented, the Court made clear its broader concern with "the inequitable treatment of indigents in criminal proceedings" and "indigents' ability to participate in the judicial process."[79] The Court later held in *Griffin v. Illinois* that the state could not deny trial transcripts on appeal to those unable to afford them when such access was necessary to secure meaningful appellate review.[80] In sweeping terms, the plurality opinion declared that, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[81]

This same principle of equal access is easily recognized in *Gideon v. Wainwright*, the Court's landmark decision guaranteeing state defendants the right to counsel in felony cases.[82] Though the Court grounded its decision in the Sixth Amendment, *Gideon* channeled *Griffin*, expressly noting that criminal justice systems must guarantee that "every defendant stands equal before the law."[83] In the Court's view, that counsel was an element essential to equality was apparent from the fact that "there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses."[84] Indeed, as originally understood, the Sixth Amendment primarily protected the right to counsel of choice for those who *could* afford attorneys.[85] Affirmatively requiring states to provide counsel to the indigent was therefore a radical shift, and one that only truly makes sense if the goal is to equalize access to the justice system.

It is worth noting that the parties in *Gideon* expressly grappled over whether *Griffin*'s equal access rule required the appointment of counsel in

78. 287 U.S. 45 (1932).

79. Lauren S. Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1221 (2013) (citing Sundeep Kothari, *And Justice for All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents with Meaningful Access to the Courts*, 72 TUL. L. REV. 2159, 2163 n.22 (1998)).

80. 351 U.S. 12, 13–14, 16, 19 (1956) ("Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").

81. *Id*. at 19.

82. 372 U.S. 335 (1963).

83. *Id*. at 344.

84. *Id.*

85. United States v. Van Duzee, 140 U.S. 169, 173 (1891).

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criminal cases.[86] And the same day the Court issued *Gideon*, it also decided *Douglas v. California*, which held that *Griffin* required the appointment of counsel on a defendant's first appeal as of right.[87] More explicit about its equal access framework, the *Douglas* Court explained:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[88]

Taken together, *Griffin*, *Gideon*, and *Douglas* support the proposition that relative wealth should not dictate a defendant's treatment in the criminal justice system. If the "basic tools" necessary for fair treatment are available for a price, the state must guarantee access to those for whom that price is too high.[89] From the equal access perspective, indefinite detention without counsel is not acceptable simply because the state fails to initiate a critical stage proceeding, though the practice may survive—and has survived—a Sixth Amendment challenge. Instead, the practice is unconstitutional because detained defendants with means would invariably hire an attorney to seek every available avenue to secure their release.

That a separate constitutional provision might guarantee a right to counsel outside the Sixth Amendment is not unusual. As mentioned above, the Fourteenth Amendment already guarantees a right to counsel on appeal, along with a right to counsel for juveniles facing detention in juvenile court.[90] And the Fifth Amendment's guarantee of a right to counsel for those facing custodial interrogation[91]—an iconic feature of *Miranda* warnings—is arguably better known than the Sixth Amendment's guarantee. The Court declared all of these rights either at the time of or after deciding *Gideon*. The Fifth Amendment right to counsel is especially significant because, like the equal access rule proposed here, it applies before a prosecution commences.

Thus, particularly for those facing detention, the equal access framework proposed here untethers the right to counsel from the Sixth Amendment's more rigid reliance on attachment, critical stages, and trial outcomes. A person's

86. Jerod H. Israel, Gideon v. Wainwright – *From a 1963 Perspective*, 99 IOWA L. REV. 2035, 2041–42 (2014).

87. Douglas v. California, 372 U.S. 353, 357–58 (1963).

88. *Id.*

89. Britt v. North Carolina, 404 U.S. 226, 227 (1971); *see also* State v. Touchet, 642 So. 2d 1213, 1215 (La. 1994) (finding that *Britt*'s requirement that the state provide "basic tools of an adequate defense" stems from *Griffin*'s equal access mandate) (quotations omitted).

90. *In re* Gault, 387 U.S. 1, 41 (1967).

91. Miranda v. Arizona, 384 U.S. 436, 471 (1966).

experience with the criminal justice system may begin before their prosecution, and includes more dimensions than will ever be addressed at trial. For example, it is difficult to conceive how the amount of bail prescribed *ex parte* by a schedule would ever become a substantive issue at trial.[92] Yet those who can and those who cannot afford that bail amount will experience dramatically different justice systems. As the families of Kalief Browder[93] and Sandra Bland[94] can attest, the difference is all too often that between life and death. The right to counsel at the first appearance—or upon detention—necessarily flows from the imperative to eliminate invidious discrimination of this sort. Critical stage or not, if a jurisdiction sets bail with a schedule, defendants with access to counsel, but who cannot afford bail, will have the means to contest that determination immediately. States cannot price the indigent out of the same opportunity.

Equal access thus allows a re-evaluation of the Jessica Jauch case. Had she been able to afford counsel, that attorney could have challenged her detention without bond through a habeas petition in the local trial courts,[95] or with a petition to the state appellate courts.[96] Counsel also could have begun preparing her defense, uncovered the evidence of her innocence, and confronted the prosecutor to have the case dismissed. Counsel could have done all this without waiting three months for the next trial term. The fact that Ms. Jauch's lack of wealth blocked her access to these vital protections undoubtedly violates the principles of equal justice outlined above. The same is true for every other defendant trapped in our nation's systems of indefinite detention.

CONCLUSION

Eradicating indefinite detention without counsel is not possible without first freeing defendants from the strictures of the Sixth Amendment's critical

92. *See* O'Donnell v. Harris Co., No. CV H-16-1414, 2016 WL 7337549, at *19 (S.D. Tex. Dec. 16, 2016) ("The inability to pay bail cannot be raised as a defense in a subsequent criminal prosecution.").

93. Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html [http://perma.cc/AQV2-NNGM].

94. Leon Neyfakh, *Why Was Sandra Bland Still in Jail?*, SLATE (July 23, 2015, 8:17 PM), http://www.slate.com/articles/news_and_politics/crime/2015/07/sandra_bland_is_the_bail_system_that_kept_her_in_prison_unconstitutional.html [http://perma.cc/6GRQ-NG2L].

95. *See* MISS. UNIF. R. CIR. & CTY. CT. 2.07 (West, Westlaw through 2017) ("The writ of habeas corpus shall extend to all cases of illegal confinement or detention by which any person is deprived of his/her liberty, or by which rightful custody of the person is withheld from the person entitled thereto.").

96. *See* MISS. R. APP. P. 9 (West, Westlaw through 2017).

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stage analysis. Pretrial detention is critical in its own right. Jailing an unconvicted person is always an emergency. It is an emergency to which people with means respond by hiring a lawyer. But, for the indigent in places like Mississippi, it is an emergency that too often goes unanswered. While the Constitution may tolerate delaying counsel until a critical stage, it cannot tolerate dual criminal justice systems based on wealth. Recognizing this command under the equal protection and due process principles outlined above, though a departure from the Court's recent Sixth Amendment jurisprudence, is more fundamentally a return to that doctrine's roots in meaningful and equal access to courts. It is also the clearest way to end the shame of indefinite detention without counsel.