South Carolina Law Review

Volume 70
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 8

Summer 2019

Can You Hear Me Now: The Impacts of Prosecutorial Call Monitoring on Defendants' Access to Justice

Hope L. Demer

CAN YOU HEAR ME NOW? THE IMPACTS OF PROSECUTORIAL CALL MONITORING ON DEFENDANTS' ACCESS TO JUSTICE

Hope L. Demer*

---

* J.D. Candidate, May 2020, University of South Carolina School of Law. I would like to thank my husband, Jeter Guinn, for his love, support, and patience; University of South Carolina School of Law Professor Seth Stoughton for his guidance and encouragement as I have worked on this Note; Fifth Circuit Defender E. Fielding Pringle for bringing the issue of prosecutorial call monitoring to my attention and for providing feedback along the way; and the editorial board at the *South Carolina Law Review*. All thoughts, errors, and omissions in this Note are my own.

I. INTRODUCTION

Imagine waking up in jail one morning. The day before, you had a few drinks at a friend's house while you watched the big game. On the drive home, you rolled through a stop sign in your neighborhood. In spite of the blue lights flashing behind you, you drove the rest of the block, coming to a stop in your driveway.[1] Getting out of your car, you realized that you left your wallet—driver's license inside—at your friend's house.[2] The officer arrested you after you failed a field sobriety test. Due to an indiscretion while you were an undergraduate, this DUI charge will be your second.[3] Your attorney tells you that he thinks that the solicitor may agree to drop the charges for driving without a license and failure to stop for blue lights in exchange for a guilty plea to driving under the influence with a sentence of five days and a substantial fine. After you speak with your lawyer, you call your wife. She tells you that she can get the money together for the fine if you need her to. Next, you call the friend who invited you over the day before. You tell him that, if anyone asks, you need him to say that you only had a few drinks in the hours before the arrest.

The next day, the solicitor approaches your attorney with an offer of a plea deal: five days and a hefty fine for the DUI. Your attorney, considering the initial offer to be the beginning rather than the end of negotiations, counters with an offer comprised of no jail time. The solicitor reiterates his initial offer. He mentions your call to your friend, saying that jurors frown on witness tampering. The plea deal you were previously uncertain of is now your best option.

In South Carolina, as in much of the country,[4] it is a common practice for prosecuting attorneys to monitor the phone call recordings of pretrial

---

1. Failing to stop when signaled by law enforcement is punishable by up to three years' imprisonment. S.C. CODE ANN. § 56-5-750(B)(1) (2018).

2. Driving without a license is punishable by up to thirty days' incarceration. S.C. CODE ANN. § 56-1-440(A) (2018).

3. The sentence for a second offense of driving under the influence is between five days and one year. S.C. CODE ANN. § 56-5-2930(A)(2) (2018).

4. *See* Jessica Anderson, *Recorded Jail Phone Calls Provide Valuable Tool to Prosecutors*, BALT. SUN (Nov. 4, 2012), http://articles.baltimoresun.com/2012-11-04/news/bs-md-co-recorded-inmate-phone-calls-20121031_1_jail-phone-defense-attorneys-prosecutors; Richard A. Oppel Jr., *Calling Your Lawyer's Cell from Jail? What You Say Can and Will Be Used Against You.*, N.Y. TIMES (May 22, 2018), https://www.nytimes.com/2018/05/22/us/new-orleans-jail-call-lawyer.html; Wallin & Klarich, *Jailhouse Phones Are Tapped. Watch What You*

detainees.[5] In many cases, solicitors derive substantial, legitimate benefits from having unrestricted access to inmates' telephone call recordings.[6] They may catch defendants discouraging witnesses from testifying or victims from pressing charges,[7] discussing schemes for meritless defenses,[8] or revealing incriminating details of their crimes on recorded lines.[9] Of all intercepted jail calls, these are the primary categories of recordings that ultimately come back to haunt defendants[10]—and used for these purposes, they apparently further the legitimate goals of a criminal justice system driven by the search for truth.

But there are much more insidious consequences of the practice by which solicitors are given access to and use of inmate call recordings. These consequences arise when the information obtained is not incriminating, but rather revelatory of some element of the defendant's trial strategy.[11] Pretrial detainees make telephone calls for many of the same reasons we all do when we have to leave home unexpectedly; they reschedule appointments, call their employers, and reach out to loved ones to maintain a semblance of normalcy

---

Say, S. CAL. DEF. BLOG (June 26, 2015), https://www.southerncaliforniadefenseblog.com/2015/06/jailhouse-phones-are-tapped-watch-what-you-say.html.

5. E-mail from E. Fielding Pringle, Circuit Pub. Def., 5th Judicial Circuit, to author (July 19, 2018, 9:36 EST) (on file with author).

6. Telephone Interview with Shawn Graham, Deputy Solicitor, Lexington Cty. Solicitor's Office (Oct. 5, 2018).

7. *E.g.*, Susan Candiotti & Sally Garner, *Recorded Calls Keep Inmates Locked Up*, CNN (Mar. 26, 2011, 8:09 AM), http://www.cnn.com/2011/CRIME/03/26/jailhouse.calls.recordings/index.html (noting that, in the case of Eric Persaud, a New York man facing charges for searing his girlfriend's face with a hot iron, the prosecution found evidence of witness tampering in a recording in which Persaud told the victim, "[Y]ou don't want to cooperate" and "I need you to prepare the kids to start lying.").

8. Bob Segall, *Jail Phone Calls Offer Valuable Weapon in Indiana—Sometimes*, WTHR, https://www.wthr.com/article/jail-phone-calls-offer-valuable-weapon-in-indiana-sometimes (last updated Apr. 14, 2016, 8:30 PM) (noting that a jury sentenced capital defendant Frederick Baer to death after hearing a recorded phone call in which he admitted to feigning insanity by affecting certain mannerisms and changing his handwriting in order to get sentenced to a nearby psychiatric facility instead).

9. Elisabeth Hulette, *Jails Are All Ears for Inmates' Phone Calls*, VIRGINIAN-PILOT (May 26, 2015), https://pilotonline.com/news/local/crime/article_6b7a0d14-9245-53ad-bec9-7cf67a4875fd.html.

10. *See* Telephone Interview with Shawn Graham, *supra* note 6.

11. *See* Telephone Interview with Shawn Graham, *supra* note 6 (noting that, while uncommon, it is not unheard of for solicitors to overhear defendants discuss their trial strategy in recorded phone calls).

Although there are abundant examples of cases in which the recorded information served to inculpate the defendant, there is a deficit of corresponding cases in which defendants were disadvantaged by the revelation of trial strategy. This can be explained by the fact that, in order for incriminating information to harm the defendant, it must be revealed to the defense in discovery or admitted at trial; in order for the defendant's trial strategy to be used against him, however, it need only be known by opposing counsel. *See infra* pp. 992–93.

while away from home.[12] Unlike most of us, however, incarcerated individuals also use telephones to make arrangements with bail bondsmen and to keep abreast of their legal defenses. When a solicitor intercepts these calls, she may seriously and unfairly undermine a defendant's case.

This interception of trial strategy—or the very real possibility of it—subjects defense attorneys to this catch-22: either comply with the ethical obligations to keep clients apprised of the circumstances and strategies of their cases,[13] or withhold that information from clients for fear that prosecutorial monitoring will subvert their defenses.[14] For defense attorneys and for clients, there is no good solution to that dilemma. Under the first option, unsophisticated defendants who are kept fully apprised of their cases and trial strategies may have their seemingly innocuous statements used against them. Under the second option, defendants who are already laboring under the burden of uncertainty may be denied information to which they are entitled. Under either option, however, defense counsel necessarily becomes less effective than it would be in the absence of prosecutorial call monitoring.

In addition to their own knowledge, abilities, and collaboration with law enforcement investigative bodies, direct access to a defendant's audio recordings of jail calls permits solicitors to construct their cases "on wits borrowed from the adversary."[15] In this way, prosecutorial monitoring of pretrial detainees' phone calls seems to undermine "[t]he very premise of our adversary system of criminal justice": "that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[16] Specifically, it diminishes the ability of only one side, the defense, to engage in effective partisan advocacy.

---

12. Even neutral information such as this may be used to compromise the defendant's bargaining position. If a solicitor learns of some external pressure upon the defendant to leave prison, she can leverage this information to make a plea deal more enticing.

13. MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR. ASS'N 2018); S.C. RULES OF PROF'L CONDUCT r. 1.4 (2018). The requirement under both rules that attorneys need only "reasonably inform[]" their clients about their case status and the means of achieving the desired results may provide a compelling argument that defense attorneys are not, in fact, trapped between two losing options—if communication with clients would be unreasonable in light of its potential for compromising their positions, the attorneys should play their cards close to their vests. However, if the primary casualties of this practice are the subset of defendants who are in jail and thus already less capable or aiding in their own defenses, and if the recording practice is itself unreasonable, this argument might not be as compelling as it appears on its face.

14. Interview with E. Fielding Pringle, Circuit Pub. Def., 5th Judicial Circuit, in Columbia, S.C. (May 23, 2018).

15. Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) (explaining the importance of ensuring that communications and documents that are not strictly privileged are nonetheless protected from discovery by the opposing party).

16. Herring v. New York, 422 U.S. 853, 862 (1975).

The DUI arrest described earlier depicts both the value and the risk of permitting solicitors to monitor the phone calls of pretrial detainees. While you may have simply wanted to be certain that your friend could confirm the events leading up to the arrest as they happened, you were caught attempting to influence a potential witness's testimony on recorded and monitored telephone lines. It is undeniable that the prosecutorial interest in witness tampering is legitimate. However, the solicitor was able to use call recordings made in the exact same fashion to listen to a marital communication and obtain information about a conversation you had with your attorney, the interception of which one might be reluctant to consider reasonable. These distinct outcomes are two sides of the same coin.

Part II of this Note will focus on the history of the practice by which solicitors monitor pretrial detainees' call recordings, the ways in which such calls are used to support cases against criminal defendants, and the justifications for doing so. Part III will confront the constitutional implications and infringements inherent in this practice. Part IV will address the ethical and practical problems with prosecutorial jail call monitoring, highlighting the disparate impact on indigent defendants. Part V will confront the inefficacy of current attempts to mitigate the harm posed by prosecutorial call monitoring, and Part VI will present possible solutions that will assist in the preservation of the rights of the accused.

II. JAIL PHONE MONITORING IN SOUTH CAROLINA

Most jails in South Carolina contract with one of three companies to provide their telecommunications services: AmTel,[17] Securus,[18] and Global Tel*Link (GTL).[19] In the past, solicitors had to ask law enforcement officers for access to call recordings.[20] One solicitor explained that, when he first began using call recordings as a tool in prosecutions, the sheriff's department in his county selectively sent his office links to download the recordings, which expired after twenty-four hours.[21] At least two of these telecommunications companies, Securus and AmTel, have since cut out the

17. *See Calling Options*, AMTEL, https://www.myphoneaccount.com/Service/Facility/Facility_sm.php?State=Rates (last visited Mar. 8, 2019).

18. *Inmate Communications*, HORRY COUNTY SHERRIFF'S OFF., http://sheriff.horrycounty.org/Detention/InmateServices/InmateCommunications.aspx (last visited Mar. 8, 2019). *See also Detention Center: Telephone Services*, GREENVILLE COUNTY, https://www.greenvillecounty.org/DetentionCenter/Telephone.aspx (last visited Mar. 8, 2019).

19. *Telephone Calls*, S.C. DEP'T CORR., http://www.doc.sc.gov/family/TelephoneCalls.html (last visited Mar. 8, 2019).

20. Telephone Interview with Shawn Graham, *supra* note 6.

21. *See, e.g.*, *id.*

middleman, providing solicitors with information with which they can log into the companies' web portals and obtain direct access to the inmates' call recordings.[22] Securus allows those with log-in credentials to download the recording in two formats: one, a locked audio file which cannot be edited for any purpose; the other, a .wav file which can be redacted and enhanced as needed.[23]

This practice has been authorized by the Omnibus Crime Control and Safe Streets Act, which includes a "law enforcement exception" permitting law enforcement officers to intercept telephonic communications as a routine part of their investigations or when a party has consented.[24] Further, courts have held that law enforcement interception of detainees' phone calls does not violate the Fourth Amendment because there is no reasonable expectation of privacy extending to calls made while incarcerated.[25]

Through this practice, South Carolina solicitors' offices have access to information they may be unable to obtain through traditional discovery methods.[26] Rule 5(b)(2) of the *South Carolina Rules of Criminal Procedure*, which sets forth what the defense is not required to disclose to the prosecution, states as follows: "[T]his subdivision does not authorize the discovery or inspection . . . of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, his agents or attorneys."[27] Unfortunately, there are no citing references as to this particular provision, nor have any committee notes or comments been made publicly available to resolve the vagueness of this rule. On its face, this rule seems to protect statements made by specified parties (defendants, their agents and attorneys, and actual or potential witnesses) to a smaller number of specified parties (defendants, their agents, and their attorneys). It offers no reciprocal protection for statements made *by* defendants or their proxies *to* actual or potential witnesses. Conflicting definitions of what constitutes a statement enshroud even that interpretation in doubt.[28] In any case, the dragnet approach to recording inmates' phone calls bypasses the discovery limitation imposed by the *South Carolina Rules of*

---

22. *Id.*

23. *Id.*

24. United States v. Frink, 328 F. App'x 183, 189–90 (4th Cir. 2009) (discussing the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 (2006)).

25. State v. Martin, No. 2015-001065, 2017 WL 4641406, at *2 (S.C. Ct. App. June 21, 2017) (citing United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002)).

26. *See* S.C. R. CRIM. P. 5(b)(2).

27. *Id.*

28. *Compare* S.C. R. EVID. 801 ("[A]n oral or written assertion"), *with Statement*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An account of a person's knowledge of a crime, taken by the police during the investigation of the offense.").

Criminal Procedure to the benefit of the prosecution and the detriment of incarcerated defendants.

In many cases, this approach also eliminates the argument that the relevant statement is hearsay, one of the most commonly-raised objections to the admission of call recordings in criminal cases.[29] South Carolina's rule against hearsay is substantively similar to that in the Federal Rules of Evidence, defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and barring such statements from admission into evidence unless subsequent rules provide otherwise.[30] Audio recordings of pretrial detainees' phone calls are often admitted over hearsay objections on the grounds that they are statements made by defendants as party-opponents or records made contemporaneously with the call "in the course of a regularly conducted business activity."[31] Once again, information that would be inadmissible in the absence of the call recording practice is rendered admissible due its broad application.

It is noteworthy that this issue primarily impacts pretrial detainees.[32] All jail inmates may have their calls recorded, but the majority of people in jails have not been convicted of the crimes for which they are being detained.[33] Further, those are exactly the people whom the prosecution is most likely to monitor; solicitors are unlikely to put much, if any, time into listening to jail phone calls to build a case against someone they have already convicted. In this way, pretrial detainees are significantly disadvantaged vis-à-vis defendants released on bond, whose personal phones do not automatically become subject to warrantless recording.[34] Pretrial detainees are not only

29. Telephone Interview with Shawn Graham, *supra* note 6.

30. S.C. R. EVID. 801–802; *see also* FED. R. EVID. 801–802.

31. Telephone Interview with Shawn Graham, *supra* note 6; S.C. R. EVID. 801(d)(2), 803(6).

32. There are four reasons why a defendant may find himself as a pretrial detainee: (1) he may be charged with a capital offense; (2) the court may consider him to be a threat to the community or to a specific person; (3) the court may find him unlikely to appear for future hearings; or (4) he may simply be unable to afford the bail set for him. S.C. CODE ANN. § 17-15-10 (2018); *see also* Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU (Dec. 11, 2017, 4:30 PM), https://www.aclu.org/blog/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail (noting that the financial means of those accused of a crime dictate whether they will be detained pretrial and suggesting that "[m]oney shouldn't determine someone's freedom from incarceration").

33. Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), https://www.prisonpolicy.org/reports/pie2018.html (noting that, of 615,000 total jail inmates in the United States, 465,000 have not been convicted).

34. Riley v. California, 573 U.S. 373, 373 (2014) (stating there is a heightened privacy interest in people's personal cell phones); Carpenter v. United States, 138 S. Ct. 2206, 2221

limited in their ability to assist in building their own defenses,[35] but they are more likely to risk compromising those defenses by inadvertently revealing information to the prosecution.[36]

Prosecutorial monitoring of pretrial detainees' phone calls is not a new practice. Born of the necessity to ensure the safety of detention centers,[37] the practice has grown through technological advances from physical recordings available only upon request into digital records which are automatically available to solicitors and detention officials alike.[38] This progression has occurred so gradually that it has largely gone without either notice or challenge, regardless of whether such a challenge is due.

III. INMATE CALL MONITORING AS A CONSTITUTIONAL ISSUE

From a Constitutional perspective, prosecutorial jail call monitoring is problematic. Implicated within it are the First Amendment's freedom of expression, the Fourth Amendment's freedom from unreasonable search, and the Sixth Amendment's right to counsel. While the constitutionality of using recordings of inmates' calls against them has been raised and dismissed,[39] the distinct question of direct monitoring of inmates' calls by solicitors has been given insufficient attention.

A. Reasonableness of Restrictions on Inmates' Constitutional Rights

Time and again, the Supreme Court has applied a different standard to the abrogation of the rights of inmates than to similar restrictions of the rights of

---

(2018) (stating that law enforcement officers are generally required to obtain a search warrant under the Fourth Amendment to obtain cell-site records).

35. CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 16 (2016) (being jailed pretrial can also undercut a defendant's ability to mount an effective defense).

36. *See infra* Part II.

37. In *Turner v. Safley*, the petitioners questioned the policy of the prisons in which they were housed to limit mail between inmates at different facilities. 482 U.S. 78, 78 (1987). The Court held that, although monitoring inmates' communications in order to censor that which might threaten the security of the institution would be a reasonable alternative to prohibition of entire categories of communication, the "more than . . . *de minimis* cost" of such monitoring rendered it impracticable. *Id.* at 79. In the years since Turner, technological advances have led to the automatic recording of all inmates' phone calls, and the costs of monitoring communications, once deemed prohibitive, have since become *de minimis*.

38. *A Brief History of Call Recording*, VERSADIAL BLOG, https://www.versadial.com/blog/a-brief-history-of-call-recording/ (last visited Feb. 28, 2019).

39. *See, e.g.*, State v. Martin, No. 2015-001065, 2017 WL 4641406, at *2 (S.C. Ct. App. June 21, 2017).

free individuals.[40] Convicted prisoners and pretrial detainees alike are denied the full scope of constitutional freedoms due to constraints inherent in incarceration.[41] Nevertheless, prisoners still maintain some constitutional rights to the extent that they are "not inconsistent with [their] status as prisoner[s] or with the legitimate penological objectives of the corrections system."[42]

One must question whether there can be a penological interest with regard to individuals who have not been convicted. Although "penology" is derived from the Latin word for punishment, the *Oxford English Dictionary* indicates that the word no longer refers strictly to "[t]he study of the punishment of crime," but also to the study "of prison management."[43] As the Supreme Court reasoned in *Bell v. Wolfish*, the Due Process Clause prohibits the deprivation of liberty of those who have not been convicted to the extent that such a deprivation constitutes a punishment.[44] Nevertheless, defendants' constitutional rights may be limited if the penological interests served by doing so are the administrative needs of the detention facility.[45]

Some identified penological interests are the deterrence of subsequent crimes, the incapacitation and rehabilitation of prisoners, and, above all, the safety of inmates and employees within detention facilities.[46] Although jail call monitoring cannot reasonably serve to rehabilitate criminals, it can theoretically serve to deter future crimes or incapacitate would-be criminals. Inmates who would plan their crimes over detention center phone lines may choose not to do so with the understanding that they are being recorded, and those crimes which they do plan over recorded lines may be intercepted and foiled by the monitoring law enforcement agent. Jail call monitoring may also protect the safety of fellow inmates and detention center officials by exposing smuggling schemes, escape plots, and inmate rivalries.

Conspicuously absent from the list of recognized penological interests is the facilitation of a solicitor's case against a pretrial detainee. It may be that the interest served by outsourcing the monitoring of detainees' phone calls

---

40. *Compare* Turner v. Safley, 482 U.S. 78, 78 (1987), *with* Zablocki v. Redhail, 434 U.S. 374, 374 (1978).

41. *See* Bell v. Wolfish, 441 U.S. 520, 521 (1979).

42. *Turner*, 482 U.S. at 95 (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974), and expanding the holding from its application to First Amendment rights to constitutional rights in general); *see also* 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 2:2 (5th ed. 2018).

43. *Penology*, OXFORD ENGLISH DICTIONARY (3d ed. 2005).

44. *Bell*, 441 U.S. at 520 (finding that "double-bunking" and cavity searches, among other practices, did not violate pretrial detainees' constitutional rights because they were not punitive in nature).

45. *Id.* at 523–24 (citing Wolfish v. Levi, 573 F.2d 118, 124 (1978)).

46. *Pell*, 417 U.S. at 822–23.

from detention centers to solicitors' offices is the preservation of funds within detention centers. In theory, more resources can be allocated to directly serve legitimate penological interests if they are not allocated toward staff tasked with monitoring phone calls. In light of the breadth of solicitors' duties, this argument has no teeth. Although phone call recordings are powerful tools for solicitors in building their cases, it is unrealistic to expect solicitors to monitor calls as they are made when they have other time-sensitive obligations such as filing motions, responding to discovery requests, and preparing for hearings and trials. Solicitors' offices cannot, nor should they be expected to, review every call recording in such a timely manner as to ensure the safety of inmates and jail employees. Detention centers still must allocate staff to ensure prison safety. Providing call recordings to solicitors does not lighten that load.

When detention centers find it necessary to intrude on the constitutional rights of inmates, they may do so only if the chosen regulation is "reasonably related" to the interest it is intended to serve.[47] To determine the reasonableness of a regulation impacting the exercise of detainees' constitutional rights, the Court in *Turner v. Safley* set forth the following factors for consideration: the nexus between the regulation and the neutral government interest justifying it; the availability of alternative means of exercising the right; the impact any accommodations for the right will have on inmates, staff, and resources; and the proportionality of the regulation to the issue it purportedly addresses.[48]

The question of whether prosecutorial call monitoring satisfies the first of these factors—"whether there is a 'valid, rational connection' between the regulation and a legitimate and neutral governmental interest put forward to justify it, which connection cannot be so remote as to render the regulation arbitrary or irrational"[49]—is easily answered in the negative. Although there is a legitimate government interest in prosecuting alleged offenders,[50] there is a countervailing government interest in "fairly and accurately determining guilt or innocence."[51] When a form of regulation is effectuated in such a way as to systematically provide only one party to an adversarial process with inside information it can use to gain the upper hand against its opponent, it is

47. *Turner*, 482 U.S. at 78.

48. *Id.* at 78–79.

49. *Id.* at 78.

50. Brenda A. Likavec, *Unforeseen Side Effects: The Impact of Forcibly Medicating Criminal Defendants on Sixth Amendment Rights*, 41 VAL. U. L. REV. 455, 463 (2006) (citing Winston v. Lee, 470 U.S. 753, 755 (1985)); *see also* Tiffany L. Johnson, *Mental Health-Crimes: The United States Supreme Court Sets Guidelines for Forcibly Medicating Incompetent Pre-Trial Detainees Solely for Prosecutorial Purposes*, 80 N.D. L. REV. 355, 367 (2004) (citing Riggins v. Nevada, 504 U.S. 127, 135 (1992); Illinois v. Allen, 397 U.S. 337, 347 (1970)).

51. *Winston*, 470 U.S. at 754.

difficult to argue that the practice is neutral. Nor is the long-recognized government interest served by the abrogation of inmates' rights—safety within the detention center and the prevention of future crimes[52]—properly served by providing solicitors with direct access to the information obtained from the intrusion.

The second factor is "whether there are alternative means of exercising the asserted constitutional right that remain open to inmates, which alternatives, if they exist, will require a measure of judicial deference to the corrections officials' expertise."[53] In one case heard nearly thirty years ago, the Eighth Circuit Court of Appeals considered the propriety of a prison's policy restricting the number of people inmates may call.[54] Ostensibly applying the *Turner* factors listed above, the Court held that mail and visitation privileges were sufficient alternative means of exercising the rights the plaintiff claimed had been infringed.[55] A closer analysis of the realities of visitation and mail privileges agitate against this holding.

Today, there is little reason to believe that inmates' rights receive any greater protection within their written correspondences in comparison to their verbal communications.[56] In addition to the fact that written communication is much slower—and therefore less adept at addressing urgent issues—mail sent or received by inmates is also subject to monitoring. Advances in technology have made monitoring inmates' correspondence much easier and less costly.[57] While some detention centers in the state satisfy themselves with opening mail in front of the recipient inmate to check for contraband,[58] others use scanning technology to create an electronic copy of the message which must be processed through security filters and approved by jail staff before being delivered electronically to a detainee's account.[59] In either case, inmates

---

52. *E.g.*, Bell v. Wolfish, 441 U.S. 520, 547 (1979).

53. *Turner*, 482 U.S. at 78.

54. Benzel v. Grammer, 869 F.2d 1105, 1106 (8th Cir. 1989).

55. *Id.* at 1109.

56. Hudson v. Palmer, 468 U.S. 517, 517 (1984) (finding that inmates have no right to privacy in their physical effects).

57. *SmartJailMail Electronic Messaging System*, SMART COMM., https://smartcommunications.us/services/smartjailmail-electronic-messaging-system/ (last visited Oct. 18, 2018).

58. *Inmate Information*, LEXINGTON COUNTY SHERIFF'S DEP'T, https://www.lex-co.com/Sheriff/inmate.aspx?iid=vi (last visited Dec. 18, 2018) [hereinafter *Lexington Inmate Information*].

59. *Detention Center: Inmate Mail*, GREENVILLE COUNTY, https://www.greenvillecounty.org/DetentionCenter/Mail.aspx (last visited Mar. 8, 2019) [hereinafter *Greenville Inmate Mail*]. Some detention facilities, such as the Greenville County Detention Center, have also embraced e-mail services for inmates. *Id.* The program it uses, SmartJailMail, monitors e-mails for designated keywords so that flagged messages can easily

are likely aware of diminished privacy within their written communications. Moreover, fifty-six percent of inmates "have very limited literacy skills,"[60] further obviating the viability of mail as an alternative to phone calls. It is unreasonable to think, without further information, that a paper trail would be more accessible or secure than the spoken word.

Visitation is also an inadequate alternative. Strict limits are placed on the hours during which a detainee may receive visitors, the number of visitors he may receive at a given time, and the number of visitors approved to visit a given inmate.[61] Beyond these limitations imposed by the detention center are those inherent in life outside of jail; individuals who wish to speak with an inmate may have difficulty obtaining time off work, childcare for the time of the visit, or transportation to and from the detention center. Although visits between attorneys and their clients are much less restricted by the detention centers themselves,[62] the demands of attorneys' jobs make such visits highly impractical as the primary mode of truly confidential communication.[63] Although visitation and mail certainly fulfill the communicative needs of inmates to some degree, their viability as alternatives to telephone calls should be reconsidered in light of the needs that phone calls uniquely serve.[64]

---

be combed through by investigators, storing messages for up to seven years. *SmartJailMail Electronic Messaging System*, *supra* note 57. This means that an inmate's e-mails can be used not only to support charges the inmate is currently facing, but also in any cases occurring within the following seven years.

60. *Literacy Needs and Services Assessment for Midlands of South Carolina* 15–16, LITERACY POWERLINE (2012).

61. *E.g.*, *Inmate Information*, *supra* note 58. *See also Detention Center: Visitation*, GREENVILLE COUNTY, https://www.greenvillecounty.org/DetentionCenter/Visitation.aspx (last visited Mar. 8, 2019) [hereinafter *Greenville Visitation*].

62. *See Inmate Information*, *supra* note 58; *Greenville Visitation*, *supra* note 61.

63. When attorneys are required to visit their clients in jail in order to communicate with them confidentially, they must leave their offices, travel to the detention center, and pass through multiple levels of security before ever seeing their clients. Public defenders must make such trips to see only one or a few clients when their overall caseloads number in the hundreds. *See* Meg Kinnard, *SC's Public Defenders Crunched Between Cases, Cash*, T&D (Apr. 15, 2011), https://thetandd.com/news/sc-s-public-defenders-crunched-between-cases-cash/article_0d924542-67a3-11e0-b9c8-001cc4c002e0.html. The time spent commuting and passing through security is time that could otherwise be spent performing substantive work for clients. For defendants who retain private attorneys, this wasted time also results in the accrual of hundreds of dollars in legal fees before a confidential word may even be spoken.

64. For example, if a detainee wanted a family member's help to get a potential alibi witness in touch with his lawyer before the witness was scheduled to leave town, the detainee would have to make sure that the family member was on his list of approved visitors and wait for visitation day, hoping that his relative could make it. Or the detainee could write his family member a letter, which may or may not be intercepted by detention center officials, and which may or may not arrive in time for his relative to get in touch with the witness. Or, more simply, the detainee may call his family member. In doing so, he would be exposing information about

The third *Turner* factor is "whether and the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates' liberty, and on the allocation of limited prison resources, which impact, if substantial, will require particular deference to corrections officials."[65] The only accommodation necessary to protect inmates' rights to communicate with their attorneys and others via telephone is simply to deny solicitors access to inmates' phone calls, although additional accommodations can be made to preserve—to some degree—the legitimate benefits solicitors obtain from inmates' call recordings. Limiting access to those detention center officials or their proxies tasked with ensuring the safety of the facility is unlikely to impose any greater a burden on them than they currently bear, except, arguably, when it comes to fulfilling discovery requests for these records. However, this burden can hardly be said to be substantial in light of the impact of the regulation on defendants, especially considering that detention centers were responsible for fulfilling these discovery requests long before transmission of audio recordings to solicitors became automatic.[66]

Finally, we must consider "whether the regulation represents an 'exaggerated response' to prison concerns, the existence of a ready alternative that fully accommodates the prisoner's rights at *de minimis* costs to valid penological interests being evidence of unreasonableness."[67] Given that detention center officials are already permitted access to call recordings and solicitors could theoretically issue a subpoena to obtain them on a case-by-case basis, the fact that solicitors were ever provided unimpeded access to call recordings seems like a highly exaggerated response to the burden of discovery in criminal trials. The only legitimate penological interest served by recording and monitoring pretrial inmates' calls is that of institutional safety, which is not furthered by permitting solicitors access to audio recordings.

If a court holds as valid any constitutional arguments against prosecutorial call monitoring, the conclusion that the violation of those rights is unreasonable seems logically to follow. While monitoring and recording inmates' calls seems justifiable in and of itself as a response to the need for safety within detention centers, it is providing solicitors with access to those calls that is a constitutionally problematic overstep.

---

his trial strategy to opposing counsel. However, it may be the only way to ensure that his alibi witness would be available. Under such circumstances, the supposed alternatives are insufficient to protect the defendant's right to hold the state to its burden in seeking to convict him.

65. Turner v. Safley, 482 U.S. 78, 78 (1987).

66. *See* Telephone Interview with Shawn Graham, *supra* note 6 (noting that detention center officials previously had to send the Solicitor's Office links to download audio recordings of inmates' phone calls).

67. *Turner*, 482 U.S. at 78–79.

B. The First Amendment

Prosecutorial monitoring of detainees' phone calls can infringe upon the First Amendment rights of both detainees and those with whom they communicate by chilling their exercise of free speech.[68] Beyond the incidental abrogation of the expressive freedoms of laypeople with whom defendants communicate from behind bars,[69] prosecutorial call monitoring notably results in self-censorship by defense attorneys with regard to which information they tell their clients for fear of its falling upon the ears of opposing counsel.[70] Moreover, defense attorneys frequently warn their clients of the risks attendant to discussing their cases with anyone over jail phone lines.[71] Armed with knowledge of the state's practice of jail call monitoring, the best case scenario is that a defendant will also refrain from discussing his case or anything related to it.

From a constitutional perspective, it is troubling that self-censorship is the optimal outcome in response to a government practice. The Supreme Court has repeatedly addressed cases in which governmental actions have caused individuals to censor themselves, a result identified as an impermissible "chilling effect" on First Amendment freedoms.[72] In *Laird v. Tatum*, the Court addressed the effect of the Army's surveillance of political

---

68. A foundational assumption of the First Amendment analysis of this practice is that criminal defendants have a right to make phone calls. This assumption, although contested, is not without merit. In cases dealing with price gouging via prison telephone charges, the Sixth and Ninth Circuit Courts have suggested that the First Amendment protects inmates' right to telephone access, although the First and Seventh Circuits have found that no such right exists. Nicholas H. Weil, *Dialing While Incarcerated: Calling for Uniformity Among Prison Telephone Regulations*, 19 WASH. U. J.L. & POL'Y 427, 431–35 (2005) (citing Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994); Johnson v. California, 207 F.3d 650 (9th Cir. 2000); Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001); and United States v. Footman, 215 F.3d 145 (1st Cir. 2000)). Among these cases, there is no common doctrinal thread joining or explaining the diverging opinions. Weil, *supra*, at 436. However, given that pretrial detainees have inequitably diminished access to justice in absence of the right to communicate with those outside of jails, it would be wise for the courts to adopt a uniform approach guaranteeing the First Amendment right of inmates to use telephones.

69. Procunier v. Martinez, 416 U.S. 396, 396 (1974).

70. Interview with E. Fielding Pringle, *supra* note 14.

71. *See* Michael R. Buchanan, *Arrested & Taken to Jail: Be Careful About What You Say over the Jail Phone, You Are Being Recorded*, DETHOMASIS & BUCHANAN, PA (Feb. 25, 2015), https://reasonabledoubt.org/criminallawblog/entry/arrested-a-taken-to-jail-be-very-careful-about-what-you-say-over-the-jail-phone.

72. *See, e.g.*, Laird v. Tatum, 408 U.S. 1, 11 (1972) (citing Baird v. State Bar of Arizona, 401 U.S. 1, 13 (1971); Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); Lamont v. Postmaster General of U.S., 381 U.S. 301, 307 (1965); and Baggett v. Bullitt, 377 U.S. 360, 374 (1964)).

protests on the First Amendment freedoms of would-be protesters.[73] The court held that, in each of the prior cases recognizing a government-induced chill on the exercise of speech as a First Amendment violation, "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging."[74] It held that the chilling effect stemming from the surveillance at issue, in contrast, "ar[ose] merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other addition[al] action detrimental to that individual."[75]

Prosecutorial call monitoring shares characteristics with both regulations overturned for their chilling effect and those upheld in spite of the same. A chill certainly arises from an attorney's knowledge that the solicitor's office is engaged in the practice of monitoring her client's calls and from her concomitant fear that, armed with such recordings, the solicitor's office may use information divulged via telephone to the detriment of her client, the defendant. However, that apprehension seems to exceed the "mere" qualifier, presenting instead "an objective harm or threat of specific future harm."[76] A substantial consideration in the Court's holding in *Laird* was that no plaintiff could identify specific actions taken against them that contributed to the chilling effect.[77] In contrast, every defendant who makes a phone call is subject to call monitoring,[78] which presents a real and verifiable threat to the prognosis of many defendants' cases. In fact, when the information obtained from such calls can serve to compromise the defendant's bargaining position,[79] bare knowledge, without more, is sufficient to shape the solicitor's

---

73. *Laird*, 408 U.S. at 1.

74. *Id.* at 11 (citing *Baird*, 401 U.S. at 4; *Keyishian*, 385 U.S. at 604; *Lamont*, 381 U.S. at 305–06; and *Baggett*, 377 U.S. at 379).

75. *Id.*

76. *Id.* at 1.

77. *Id.*

78. *See Monitored Jail Phone Calls Admissible Evidence*, PRISON LEGAL NEWS (May 15, 2007), https://www.prisonlegalnews.org/news/2007/may/15/monitored-jail-phone-calls-admissible-evidence/.

79. Basic negotiation principles indicate that a defense attorney attempting to obtain a plea deal for a client should first present an option lower than that for which he is willing to settle. *See* H. WARREN KNIGHT ET AL., CALIFORNIA PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION 2-E (Dec. 2018 update) ("Make an offer that leaves room to negotiate: Expect your initial offer to be rejected. Therefore, if you represent the plaintiff, make your first offer on the high side of reasonableness, leaving room to make concessions in further negotiations. (Conversely, defendants' initial offers should be on the low side, leaving room to come up

approach to the case to the defendant's detriment. It is a bell that cannot be un-rung. Like other practices found to impermissibly chill the exercise of free expression, prosecutorial call monitoring is also ostensibly imposed as a regulatory measure for the purpose of ensuring the safety of detention centers and is compulsory to those who wish to maintain a connection with the outside world while kept behind bars.[80] Because of both the nature and the impact of the practice, a court would be justified in finding that the First Amendment rights of pretrial detainees have been abrogated when solicitors are permitted to monitor their calls.

C. The Fourth Amendment

The Fourth Amendment may also provide an avenue for relief for detainees subjected to prosecutorial call monitoring. The law has long recognized that recording phone calls of criminal suspects may run afoul of the Fourth Amendment, beginning with *Katz v. United States*.[81] In that case, the defendant was suspected of illegal gambling activity, and in order to obtain evidence of this alleged crime, investigators attached a recorder to the top of the telephone booth from which he routinely made his calls.[82] The Court held that, although the booth from which the defendant placed his calls was enclosed in glass and any passerby may have observed him without obstruction, the search was unreasonable because the defendant's expectation

---

slowly.)"). The prosecutor, of course, has the discretion to accept a plea to a lesser offense. State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 346–47 (1994). In the best-case scenario for the defendant, the solicitor would be willing to accept the first plea offered, and the defendant would serve less prison time than he was willing to accept. Alternatively, the solicitor may make a counteroffer somewhere between the defense's initial offer and the sentence that the solicitor hoped to obtain at trial, which may align more closely with what the defendant discussed with his attorney. In any case, solicitor may decline to offer a plea deal. However, if the solicitor overhears the defendant telling someone about the plea deal their attorney considered attainable, the defendant's initial bargaining position will be compromised. It is unlikely that a solicitor will consider anything less than the charge or the sentence the defendant agreed to; he may even negotiate up from there or, knowing that the defense attorney considers her own case to be weak, refuse to offer a plea deal at all. The length of the defendant's ultimate sentence is likely to increase because the solicitor intercepted—albeit lawfully—the defendant's phone calls.

80. Laird v. Tatum, 408 U.S. 1, 11 (1972) ("[I]n each of these cases [in which a chilling effect was found], the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature . . . .").

81. Katz v. United States, 389 U.S. 347, 347 (1967). *See contra*, On Lee v. United States, 343 U.S. 747, 749–51 (1952) (finding that there was no Fourth Amendment violation when an undercover informant wore a wire, transmissions from which were monitored by the police).

82. *Katz*, 389 U.S. at 347.

of privacy in his conversation *was* reasonable.[83] Although the right to privacy is severely curtailed in carceral settings,[84] "the Fourth Amendment protects people, not places."[85]

1. Third Party Doctrine

Investigative agencies have been able to avoid the constitutional interpretation of call recordings as searches via the knowing exposure doctrine, also called the third-party doctrine, whereby information knowingly relayed to a third party is not subject to a reasonable expectation of privacy.[86] By communicating information to a third party, whether that information be details of wrongdoing, trial strategy, or something truly innocuous, defendants arguably forego any claim of privacy in that information.[87] On that basis, one could conclude that it does not matter whether the conversation is recorded and monitored. Communication of a private matter destroys the objective reasonableness of the belief that no further audience will receive that information.

The fact of recording, especially in light of the notice played before the recorded phone calls,[88] may further justify prosecutorial monitoring of detainees' phone calls under the third-party doctrine. Fourth Amendment jurisprudence is rife with cases in which defendants were held to have no privacy interest in information recorded by or simply transmitted through companies as a regular part of business. In *United States v. Miller*,[89] the Court held that the defendant had no Fourth Amendment interest in records of his banking activity because the records belonged to the bank, not to the

---

83. *See id.* at 361 (Harlan, J., concurring) (establishing the test wherein a person must have a subjective expectation of privacy which society is prepared to deem reasonable).

84. *See* Hudson v. Palmer, 468 U.S. 517, 517 (1984) (finding that prisoners have no reasonable expectation of privacy within their cells).

85. *Katz*, 389 U.S. at 351.

86. *See* California v. Greenwood, 486 U.S. 35, 41 (1988) (quoting *Katz*, 389 U.S. at 351) (holding that garbage placed on the curb for collection was not subject to a reasonable expectation of privacy because it was knowingly turned over to a third-party garbage collector). *See also* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 561 (2009) (defining what the third-party doctrine is and the doctrines controversial characteristics).

87. Hoffa v. United States, 385 U.S. 293, 302 (1966) ("Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. Indeed, the Court unanimously rejected that very contention . . . .").

88. *See* Ken Armstrong, *A Phone Call from Jail? Better Watch What You Say*, MARSHALL PROJECT (Sept. 4, 2015, 7:15 AM), https://www.themarshallproject.org/2015/09/04/a-phone-call-from-jail-better-watch-what-you-say.

89. *United States v. Miller*, 425 U.S. 435 (1976).

defendant.[90] Likewise, in *Smith v. Maryland*,[91] the Supreme Court held that no search had taken place when the police installed a pen register on a defendant's phone line to document the phone numbers he dialed.[92] "Regardless of the phone company's election" to record or abstain from recording, "petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police."[93] This case applies directly to the practice of monitoring inmates' calls, assuming, *arguendo*, that the information is indeed conveyed voluntarily.

Third-party doctrine takes into consideration which information investigators *could* obtain rather than which information they are *likely* to obtain through other means. In the context of jail call recordings, many if not most of the parties to whom information is relayed in phone calls before trial will not be subpoenaed—nor would they voluntarily cooperate with the prosecution.[94] When a witness's failure to cooperate is the result of intimidation on the defendant's part,[95] admission of audio recordings of phone calls to or regarding that witness seems fair and just. Society would likely consider the application of the third-party doctrine to be reasonable under such circumstances to ensure that criminals are convicted. But solicitors need not even try to interview a witness in order to admit their call recordings under the status quo, let alone call them to testify.

In fact, an intercepted communication may be one which, under different circumstances, would be protected by a privilege such that the other party to the conversation may not be compelled to testify.[96] Considerations of what

---

90. *Id.* at 435.

91. 442 U.S. 735 (1979).

92. *Id.* at 745.

93. *Id.*

94. *See, e.g.*, Sarah Stillman, *Why Are Prosecutors Putting Innocent Witnesses in Jail?*, NEW YORKER (Oct. 17, 2017), https://www.newyorker.com/news/news-desk/why-are-prosecutors-putting-innocent-witnesses-in-jail (noting that it is not uncommon for key witnesses to refuse to testify).

95. In Baltimore, Maryland, Sterlin Matthews, a nineteen-year-old who was awaiting trial for a murder in which the perpetrator had worn a mask, colluded with his friends over jail phone lines to prevent witnesses who could place Matthews in the mask from testifying. Jessica Anderson, *Recorded Jail Phone Calls Provide Valuable Tool to Prosecutors*, BALT. SUN (Nov. 4, 2012), http://articles.baltimoresun.com/2012-11-04/news/bs-md-co-recorded-inmate-phone-calls-20121031_1_jail-phone-defense-attorneys-prosecutors. Matthews was convicted after these recordings were admitted into evidence. *Id.*

96. *See, e.g.*, S.C. CODE ANN. § 19-11-30 (2018) (prohibiting the compulsion of one spouse to testify about communications with another, except in cases involving harm to children).

information investigators can obtain are greatly expanded via the third-party doctrine at the expense of lawful limits imposed for public policy reasons.[97] This may not be an issue in and of itself when one considers that efficiency of law enforcement has long been considered a legitimate government interest.[98] However, given the possibility that the information intercepted is that which has deliberately been made unavailable through other means—specifically, information about trial strategy—the risks imposed upon defendants are too great to warrant deference to investigative efficiency.

Further complicating the matter is that, in most cases, phone calls from inmates to their attorneys are—at least theoretically[99]—exempted from recording.[100] The same warning plays before their attorneys' calls as before any other call made from jail,[101] but detainees are still entitled to attorney–client privilege in their phone calls from jail.[102] If defendants could reasonably expect privacy in their phone calls to their attorneys under the exact circumstances in which it would be unreasonable to expect privacy in their phone calls to anyone else, it is certainly not the carceral context of the phone call—or even the recording notice—that diminishes the reasonableness of a defendant's expectation of privacy. Inmates *can* use jail phones to have confidential conversations. It is easy to understand why some defendants, in recognition of this fact and of the substantial volume of calls made through detention centers, expect no one to listen.[103]

The Supreme Court has created exceptions to the third-party doctrine when public policy has called for it. In *Carpenter v. United States*,[104] the Court recognized that individuals have a reasonable expectation of privacy in their cell-site location data, which cell phone companies collect as a routine part of their business.[105] The Court in *Carpenter* characterized the holdings of earlier cases regarding the third-party doctrine as creating "a reduced expectation of privacy in information knowingly shared with another," as opposed to

---

97. *See* GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY § 501.3 (2001).

98. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 393 (1978) (noting that police efficiency alone is not a substantial enough justification to override Fourth Amendment concerns).

99. *See* discussion *infra* section III.D.1.

100. *See, e.g.*, *Recordings Raise Questions About Inmate Rights*, NBC NEWS, www.nbcnews.com/id/26013015/ns/us_newscrime_and_courts/t/recordings-raise-questions-about-inmaterights/#.VDny_efFE7A (last updated Aug. 4, 2008, 6:04 PM).

101. E-mail from E. Fielding Pringle, Circuit Pub. Def., 5th Judicial Circuit, to author (Dec. 7, 2018, 12:56 PM) (on file with author).

102. *See* 28 C.F.R. § 540.102 (2008).

103. *See* Candiotti & Garner, *supra* note 7 ("We had one (mother) who said to her son, 'They may be listening.' And his response was 'Mom, they don't have time for this.'").

104. 138 S. Ct. 2206, 2212 (2018).

105. *Id.* at 2212.

eliminating the expectation of privacy altogether.[106] The court distinguished Miller's bank records and the phone numbers dialed by Smith from Carpenter's cell-site location information by emphasizing the "world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers."[107] While the Court limited its holding to cell-site location data, it stated that, in the future, courts should consider the "nature of the particular documents sought and limitations on any legitimate expectation of privacy concerning their contents."[108] It also cautioned government agents against "uncritically extend[ing]" the third-party doctrine to cases involving emerging technology.[109] However, when jail call recording technology transitioned from analog to digital and the transmission of such recordings to solicitors became automatic rather than by request, the third-party doctrine was uncritically applied to support these changes. The information made available through jail phone call recordings falls on a continuum somewhere between the phone numbers revealed by a pen register and the cell-site location information automatically gathered by mobile phone carriers.[110] Unlike cell-site location data, call recordings require some action on the part of the user before information can be gathered.[111] On the other hand, in much the same way that cell phones are "indispensable to participation in modern society,"[112] the ability to use a phone is indispensable to a defendant who is trying to prepare for trial, arrange bail, and maintain employment and family relationships. The third-party doctrine is not without exception, and inmate phone calls fit the framework for what should qualify as such as an exception.

2. *In the Absence of Individualized Suspicion*

If we accept that there is indeed a privacy right, however limited, in phone calls made from jail, the issue emerges of whether those who would intercept them have the requisite degree of suspicion to do so. On its face, the Fourth Amendment requires that searches and seizures be conducted in a reasonable

106. *Id.* at 2210.

107. *Id.*

108. *Id.* (internal punctuation omitted) (quoting United States v. Miller, 425 U.S. 435, 442 (1976)).

109. *Id.* at 2222.

110. *See id.* at 2210 (explaining how much information is available through CSLI); Smith v. Maryland, 442 U.S. 735, 741 (1979) (explaining how much information is available through pen registers).

111. *Id.* at 2210.

112. *Id.*

manner.[113] Generally speaking, reasonableness requires that the police have "individualized suspicion of wrongdoing" before conducting a search or seizure.[114] However, a narrow exception to this rule permits searches and seizures when individualized suspicion is lacking: The reasonableness of such a search or seizure will depend upon its programmatic purpose and its "connection to the particular law enforcement practices" used to achieve it.[115] The purpose justifying a search or seizure may not be "ordinary criminal wrongdoing,"[116] and the efficacy of a suspicionless search at revealing evidence of crimes will not be dispositive, nor will it be particularly informative, of its constitutional status.[117] The paradigm for suspicionless seizures is the roadblock checkpoint: officers stop all or most vehicles travelling along a road, briefly inspect each vehicle or its occupants for evidence of the targeted wrongdoing, and either direct the vehicle to a secondary location for further investigation if particularized suspicion has developed, or permit it to continue along its route.[118]

Jail call monitoring is, in essence, a telephonic roadblock-style checkpoint through which inmate communications must pass in order to reach individuals on the outside. Unlike drivers, however, inmates may be unaware that they are passing through it. Furthermore, while those stopped at physical checkpoints will only find themselves in trouble when police discover actual criminal wrongdoing, inmates subjected to call monitoring also suffer harm due to the interception of non-incriminating information. While highway

113. U.S. CONST. amend. IV.

114. City of Indianapolis v. Edmond, 531 U.S. 32, 32 (2000).

115. *Id.* at 33. A series of cases validated traffic checkpoints for reasons such as immigration enforcement and drunk driving interdiction when the circumstances of the checkpoints were sufficiently related to their respective purposes. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976) (finding that Border Patrol agents have a sufficient interest in illegal immigration to justify traffic checkpoints within 100 miles of the United States border); *see also* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451–52 (1990) (finding that the government interest in curbing drunk driving is sufficient to justify a roadblock-style checkpoint). However, when the City of Indianapolis created a drug interdiction roadblock, the Supreme Court found it in violation of the Fourth Amendment. *Edmond*, 531 U.S. at 32. The Court classified drug crimes as "ordinary criminal wrongdoing" with an insufficient nexus to public thoroughfares to justify checkpoints there. *Id.* at 41–42.

116. *Edmond*, 531 U.S. at 41.

117. The Court in *Edmond* found that the drug interdiction roadblock violated the Fourth Amendment, although it resulted in a substantially higher rate of arrest than did the immigration and drunk driving roadblocks combined. *Id.* at 32–35; *Sitz*, 496 U.S. at 445 (noting that the arrest rate of its checkpoint was about 1.6 percent, compared to 0.5 percent in *Martinez-Fuerte*).

118. *Martinez-Fuerte*, 428 U.S. at 545–46; *Sitz*, 496 U.S. at 447.

checkpoints are almost always temporary,[119] jail phone checkpoints are static—they last the duration of *every* phone call—and inevitable.[120] In this way, they are akin to a permanent roadblock at the entrance to the defendant's neighborhood, and the defendant is subjected to a search each and every time he wishes to engage with those outside.

While the practice has been justified in the name of safety concerns unique to detention centers, the method in which the checkpoint is implemented—providing call recordings directly to solicitors—is insufficiently related to the goal. Because the information gathered is often used to fortify cases against defendants or serve as the basis for new charges, the stated goal falls away, revealing the true target of the search to be something much more akin to "evidence of ordinary criminal wrongdoing."[121] The absence of individualized suspicion becomes obviously problematic when prosecutorial call monitoring is categorized as a search. While there is "no irreducible requirement of such suspicion,"[122] the practice does not clearly fall into a category of search that has been recognized as exempt. Rather, it is analogous in many ways to searches which have been found violative of the Fourth Amendment.

D. The Sixth Amendment

By monitoring inmates' phone calls, solicitors compromise the Sixth Amendment rights of pretrial detainees by diminishing the efficacy of their counsel, discouraging them from participating in their own cases, and undermining the sanctity of attorney–client privilege.[123] The language of the Sixth Amendment—granting each defendant the right "to have the Assistance of Counsel for his defence"[124]—has been interpreted as "contemplating a norm in which the accused, and not a lawyer, is master of his own defense."[125] Under this constitutional framework, both the defendant and the attorney have critical roles to fulfill, and both are hindered by prosecutorial call monitoring.

---

119. *Sitz*, 496 U.S. at 448 (noting that the checkpoint's average duration was seventy-five minutes); *see also Martinez-Fuerte*, 428 U.S. at 552 (identifying three types of Border Patrol checkpoints: permanent, temporary, and roving).

120. *Privacy*, SECURUS TECHS., https://securustech.net/privacy/index.html (last visited Feb. 27, 2019).

121. *Edmond*, 531 U.S. at 41.

122. *Martinez-Fuerte*, 428 U.S. at 561.

123. *See* NBC NEWS, *supra* note 100.

124. U.S. CONST. amend. VI.

125. Gannett Co. v. DePasquale, 443 U.S. 368, 382 n.10 (1979) (citing Faretta v. California, 422 U.S. 806, 819–20 (1975)).

The role of the defendant is substantially impeded by pretrial incarceration itself; behind bars, he is unable to actively participate in his own defense by helping his attorney gather evidence or find witnesses, for example.[126] When solicitors can use information revealed in a defendant's phone calls to undermine his case, attorneys are loath to reveal any more information to their clients than is essential for fear that their clients may disclose it on recorded lines. This further erodes the defendant's ability to serve as the master of his own defense.

Although the Constitution places attorneys in the role of mere assistants, the criminal trial process demands much of the assistance attorneys provide,[127] particularly when their clients are incarcerated. Defense attorneys are granted deference in their strategic choices, including filing and responding to motions, conducting cross-examination, determining which witnesses to call and which evidence to present, and deciding how to engage in plea negotiations.[128] Because defendants maintain the ultimate authority to make certain decisions such as whether to accept a plea bargain, have a jury trial, or testify, attorneys must communicate no less than the information necessary for defendants to make these decisions for themselves.[129] With respect to other, less imperative matters, attorneys should consult with their clients and give substantial weight to their opinions whenever appropriate.[130] The consideration of whether a defendant's communications will be intercepted and trial strategy compromised adds another layer of difficulty to the fraught collaboration between a defense attorney and her incarcerated client. Defendants' Sixth Amendment rights are unjustly compromised when opposing counsel is permitted to construct this obstacle to the attorney–client relationship.

---

126. Oppel, *supra* note 4.

127. Due to the specialized nature of the legal field, a layperson with no formal education or experience in criminal law practice would struggle to make the requisite tactical decisions involved in her case unaided. In fact, in many cases where criminal defendants seek to proceed *pro se*, courts have appointed advisory or stand-by counsel to assist defendants in preparing or even trying their cases. *See* H. Patrick Furman, *Pro Se Defendants and the Appointment of Advisory Counsel*, 35 COLO. LAW., 29, 29–30 (2006); Kevin Sack, *Dylann Roof to Represent Himself at Trial in Charleston Church Shootings*, N.Y. TIMES (Nov. 28, 2016), https://www.nytimes.com/2016/11/28/us/dylann-roof-charleston-massacre.html (noting that the defendant's former counsel would remain on the case as "advisory 'standby counsel'" after the defendant was found competent to proceed *pro se*).

128. STANDARDS FOR CRIMINAL JUSTICE § 4-5.2 (AM. BAR ASS'N 2018).

129. *Id.*

130. *Id.*

1. Attorney–Client Privilege

Although solicitors may be inclined to deny that calls between attorneys and their clients are swept up in the nets of automatic recording,[131] there is reason to believe that such calls do not always escape prosecutorial attention. The nature of the practice is such that, were a solicitor to obtain a recording of a call between an attorney and his client, the breach of privilege may never be proven unless the recordings themselves are turned over to defense counsel.[132] Theoretically, any useful evidentiary information relayed could be used to find external corroboration of the underlying facts. Alternatively, if the conversation is strictly about trial strategy, the only indication that the solicitor overheard such dialogue would be a well-prepared case—which is hardly a "tell" in a field where a high degree of competency is required.[133] While it may be commonly assumed that the government will not record attorney–client conversations, at least one jail in Columbia, South Carolina has admitted to doing exactly that.[134]

We need not rely on the admissions of jail officials to determine that inappropriate monitoring takes place, though. The track records of jail telephone service providers themselves present damning evidence of the practice; Securus and Global Tel*Link, two detention center telecommunications providers active in South Carolina, have been implicated in scandals involving thousands of recorded attorney–client phone calls in recent years.[135] While there is no clear evidence that solicitors listened to any of those recordings, there is also a lacuna of evidence that they did *not*, leaving no way to establish that putatively impermissible monitoring did not affect the plea offers that solicitors made or the strength of their cases. Under such conditions, the interests of justice seem ill-served by granting the solicitor, rather than the defendant, the benefit of the doubt.

---

131. *See, e.g.*, Telephone Interview with Shawn Graham, *supra* note 6.

132. *See* E-mail from E. Fielding Pringle, *supra* note 101 (noting that the Fifth Circuit Public Defender's Office has received discovery containing attorney–client phone call recordings).

133. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2018).

134. Oppel, *supra* note 4.

135. Jordan Smith & Micah Lee, *Not So Securus: Massive Hack of 70 Million Prisoner Phone Calls Indicates Violations of Attorney–Client Privilege*, INTERCEPT (Nov. 11, 2015, 12:43 PM), https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/ (indicating that roughly 14,000 attorney–client phone calls were recorded in a three-year period); Thy Vo, *Company Under Fire for Recording Attorney–Client Jail Phone Calls Made the Same Mistake Twice Before*, VOICE OC (Aug. 24, 2018), https://voiceofoc.org/2018/08/company-under-fire-for-recording-attorney-client-jail-phone-calls-made-the-same-mistake-twice-before/ (noting that over 1,000 privileged phone calls were discovered to have been recorded).

Nevertheless, when confronted with seemingly improper recordings of attorney–client phone calls, courts in other jurisdictions have attempted to resolve this issue by ruling that whatever privilege may have existed has been waived when defendants place calls on recorded lines.[136] Specifically, the courts in those cases found waiver of privilege when detainees were notified that their calls would be recorded or when they failed to avail themselves of alternative means of communicating with their attorneys in private, whether through mail or visitation, or by having their attorneys' phone numbers added to a list of numbers exempted from recording.[137]

Aside from the shortcomings of other methods of communication relative to phone calls,[138] these "opt-out" lists also provide inadequate protection for privileged communications in two ways. First, opt-out provisions for attorneys' phone numbers have often limited defense counsel to providing landline telephone numbers, leaving all calls between inmates and their attorneys' cell phones vulnerable to monitoring.[139] Second, even when a defendant takes the necessary steps to have his attorney's phone number added to an exemption list, there is no guarantee that his calls to his attorney on the listed number will be protected thereafter.[140] Indeed, when Global

---

136. Danielle Burkhardt, *Read, White, and Blue: Prosecutors Reading Inmate Emails and the Attorney–Client Privilege*, 48 J. MARSHALL L. REV. 1119, 1135–36 (2015) (citing United States v. Novak, 531 F.3d 99, 103 (1st Cir. 2008); United States v. Lentz, 419 F. Supp. 2d 820, 835 (E.D. Va. 2005)).

137. Burkhardt, *supra* note 136 (citing *Novak*, 531 F.3d at 103 (holding that the denial of privilege applied even when the defendant was not affirmatively informed of ways in which he could speak to his attorney in confidence); *Lentz*, 419 F. Supp. 2d at 835 (holding that an attorney could visit or send mail to his client in order to preserve privilege)).

138. *See supra* pp. 987–89. Although attorneys are often given extended hours during which they may visit their incarcerated clients, *see Inmate Information*, BEAUFORT COUNTY S.C., https://www.bcgov.net/departments/public-safety/detention-center/inmate-information.php (last visited Apr. 14, 2019), requiring them to make a trip to jail for what could easily be a brief conversation is a substantial burden. When attorneys must also interview witnesses, write motions, review discovery, and conduct trials for their other clients, who number in the hundreds for public defenders, *see* Kinnard, *supra* note 63, attorneys must choose between their duties of communication and their other job responsibilities. And providing the necessary information via mailed letters is not necessarily a safe alternative, either, given the reduced expectation of privacy detainees have in their property—including legal documents—while incarcerated. *See* Hudson v. Palmer, 468 U.S. 517, 517, 536 (1984) (finding no violation of the defendant's constitutional rights when a corrections officer searched his cell and destroyed his property, including legal papers). In addition to the delay inherent in written correspondence, inmates would still have no guarantee of privacy in letters sent to and received from their lawyers.

139. *See* Oppel, *supra* note 4; Rob Price, *These 70 Million Leaked Calls Suggest that Jails Breach Prisoner-Lawyer Confidentiality All the Time*, SLATE (Nov. 12, 2015, 11:20 AM), https://slate.com/business/2015/11/anonymous-hacker-released-70-million-jail-calls-indicating-routine-violation-of-attorney-client-privilege.html.

140. *See* Vo, *supra* note 135.

Tel*Link was exposed for recording over 1,000 attorney–client phone calls, the violation was directly attributed to the failure of detention center officials to add attorneys' phone numbers to exemption lists.[141] One can hardly conclude that attorney–client privilege is given adequate weight when only a fraction of attorneys' phone numbers are eligible for protection and a delay or typographical error by a corrections officer could result in a violation sufficient to compromise a defendant's entire case.

2. *Effective Assistance of Counsel*

Despite the obstacles to timely, full, and frank discussions between incarcerated defendants and their attorneys, lawyers maintain a duty to communicate promptly with their clients and to keep them apprised of the progress of their cases.[142] Peppered throughout the Model Rules of Professional Responsibility establishing this duty is language limiting it to that which can reasonably be achieved.[143] Sometimes, however, the condition dictating the reasonableness of an attorney's disclosures to her client is the *un*reasonable practice by which opposing counsel directly monitors the client's communications. In no other context is an attorney entitled to direct access to the unredacted thoughts and impressions of an opposing party; in no other context are the stakes as high as when that party's life and liberty are on the line.

Unfortunately for criminal defendants, the bar for an ineffective assistance of counsel claim is often insurmountable. In *United States v. Cronic*,[144] the court held that a defendant must point to specific errors made by trial counsel in order for an ineffective assistance claim to lie.[145] When attorneys have to choose between providing their clients with information about their cases and withholding that information out of fear that their clients will unwittingly divulge their trial strategy to the solicitor, neither choice may seem exactly right, nor would either constitute plain error. Defense attorneys may act to the very best of their abilities, and their representation will still be less effective than it could be were their clients' phone calls exclusively monitored by detention center officials or other parties disinterested in the outcome of the case. While some of the information obtained through jail call monitoring is of legitimate interest to solicitors, the Sixth Amendment costs are too great to ignore.

---

141. *Id.*
142. MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2018).
143. *Id.*
144. 466 U.S. 648 (1984).
145. *Id.* at 666.

IV. ETHICAL AND PRACTICAL IMPLICATIONS

Beyond the constitutional concerns raised by solicitors' monitoring of inmates' calls, the practice also raises concerns with respect to prosecutorial authority and defendants' rights. Moreover, the effects of economic inequality on criminal justice outcomes are implicated, as is the broader conversation about bail reform. In light of the issues posed by prosecutorial call monitoring, we must seriously question whether the practice is one deserving of preservation.

A. From Your Mouth to the Solicitor's Ears

Prosecutorial monitoring of inmates' calls "ha[s] turned a body responsible for detaining individuals to assure their presence in court"—that is, detention centers—"into an evidence gathering arm of the district attorney's office."[146] Indeed, there seems to be a logical leap between permitting detention centers to record inmates' phone calls and permitting solicitors to use these recordings in their cases. This is true whether the use is explicit, as in the case of admitting such recordings into evidence, or more subtle, as in the case of using knowledge of the defendant's strategy to strengthen the prosecution's. In the past, incriminating communications had to be discovered by detention center officials and delivered to the solicitor in order to be incorporated into a case or form the basis of a separate charge.[147] Now, corrections officials need never know about an incriminating phone call or even receive a request from the solicitor to look for one.[148] The solicitor (or those in his office, as the case may be) may access significantly more of a defendant's communications—whether they be incriminating, strategic, or neutral—than at any point in history.

When courts have upheld the use of inmates' call recordings against them in trial,[149] the result has been tacit approval of direct prosecutorial call monitoring. The issue of whether detention centers can curtail or monitor

---

146. Joe Sexton, *Using Prisoner Phone Calls to Convict? NY's Highest Court Puts Critical Question on Hold*, PROPUBLICA (Aug. 31, 2016, 8:00 AM), https://www.propublica.org/article/prisoner-phone-calls-convict-new-york-highest-court-question-on-hold.

147. *See* Telephone Interview with Shawn Graham, *supra* note 6 (noting that the prior version of inmate call recording technology required detention center officials to send solicitors links to the recordings).

148. *Id.*

149. *See, e.g.*, State v. Martin, No. 2015-001065, 2017 WL 4641406, at *2–*3 (S.C. Ct. App. June 21, 2017).

certain forms of inmate expression has long been settled.[150] Solicitors' permission to benefit from the practice, on the other hand, has merely been assumed. It is unclear whether a solicitor's right to admit a detainee's calls against him is part and parcel of the right to access *all* of a detainee's recorded calls, not just those determined to have evidentiary value by the parties explicitly authorized to monitor them. Considering the rights jeopardized by this practice, more than mere adherence to custom is necessary.

B. Call Recording, Money Bail, and the Indigent Defendant

While all pretrial detainees are at risk of having their trial strategies and bargaining positions compromised when solicitors monitor their calls, it is indigent defendants who are most likely to be impacted. In South Carolina, only three categories of individuals are held in detention centers before trial. The first, capital defendants, are statutorily ineligible for bail.[151] The second category is comprised of those whom the court, in its discretion, deems a risk of nonappearance or threat to the community based on a cursory bond hearing.[152] These inmates account for approximately ten percent of all pretrial detainees; the remaining ninety percent of pretrial detainees are those who simply cannot afford the bail set for them.[153] Unfortunately for indigent defendants and for society as a whole, neither pretrial detention nor the information solicitors may obtain from the resulting jail calls is necessarily bound to result in more accurate determinations of guilt or innocence in criminal proceedings.

If prosecutorial call monitoring were simply another mechanism used to ensure that the guilty are punished, it is unlikely that it would provoke a degree of concern substantial enough to motivate change to the practice. On the contrary, it is but one piece of the puzzle that serves to decrease the bargaining power of pretrial detainees to such a degree that they may plead guilty regardless of whether they actually committed the crime for which they have been charged.[154] Due in part to the mandatory minimum sentences

150. *See* Wagner & Sawyer, *supra* note 33.

151. S.C. CODE ANN. § 17-15-10 (2018).

152. *Id.*

153. BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR 1 (2016) (noting that, for every one hundred criminal defendants in 2009, thirty-eight were incarcerated in advance of trial, and thirty-four of those were detained for their inability to pay bail).

154. *See* NATIONAL ASS'N OF CRIM. DEFENSE ATTORNEYS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 17 (2018) [hereinafter NACDL REPORT] (noting that anywhere between 1.6 percent and twenty-seven percent of criminal defendants plead guilty despite being innocent). Even when a

accompanying solicitors' chosen charges,[155] criminal defendants tend to face higher potential sentences if they go to trial than if they agree to plead guilty.[156] For defendants who are incarcerated in advance of trial, the likelihood of being convicted increases drastically as well.[157] When defendants face both a higher likelihood of conviction and a higher potential sentence if they do not accept a plea, they are under immense pressure to do what they must to ensure the shortest possible sentence—that is, plead guilty[158]—especially when there are people on the outside who depend upon them. Although the state inherently has the upper hand in criminal cases,[159] a solicitor may continue to gain leverage over the most vulnerable defendants by monitoring their phone calls.[160]

Also noteworthy is the quality of assistance available to defendants subjected to prosecutorial call monitoring. Although public defenders are highly experienced trial attorneys, their excessive caseloads diminish the amount of individualized attention they can give each client.[161] Not only are

---

defendant faces a relatively minor charge, she may insist on a trial. But if she is unable to pay bail, she will likely lose her job and experience strained relationships with her family while she remains incarcerated. If the defendant is a single parent or one with little community support, her children may even be placed in foster care. *See* Shaila Dewan, *Family Separation: It's a Problem for U.S. Citizens, Too*, N.Y. TIMES (June 22, 2018), https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html. Under these circumstances, the pressure to do whatever it takes to secure a prompt release can be overpowering. *See* NACDL REPORT, *supra*, at 9.

155. NACDL REPORT, *supra* note 154, at 7.

156. *Id.* at 5 ("Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose.").

157. Ofer, *supra* note 32 (noting that the conviction rate for misdemeanors increases from fifty percent to ninety-two percent, and from fifty-nine percent to eighty-five percent for felonies when the defendant is incarcerated in advance of trial).

158. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html (noting that ninety-seven percent of Federal criminal cases and ninety-four percent of state cases that are not dismissed result in plea bargains).

159. William C. Waller, *The Beginning of the End of Peremptory Challenges:* Georgia v. McCollum, *112 S. Ct. 2348 (1992)*, 16 HARV. J.L. & PUB. POL'Y 287, 292 (1993) ("The model envisioned by the Constitution is not a model of symmetry between two equal parties. Instead, constitutional safeguards exist to protect defendants against the imbalance of power created by the unlimited resources available to the state in its prosecution.").

160. *See* discussion *supra* note 12.

161. Individual public defenders in South Carolina often handle far more cases than the suggested limit of 150 felonies or 400 misdemeanors at a given time. S.C. COMM'N ON PROSECUTION COORDINATION, CASELOAD EQUALIZATION 2 (2018); Kinnard, *supra* note 63 (noting that public defenders handled an average of 467 cases each in the 2009–2010 fiscal year); *About SCCID*, SCCID: S.C. COMMISSION ON INDIGENT DEF., https://sccid.

indigent defendants more likely to wait in jail in advance of trial than wealthier defendants as a direct result of their poverty,[162] but they are also less likely than their wealthier peers to have open channels of communication with their attorneys due to the varied effects of prosecutorial call monitoring.[163] The way in which this practice is implemented is ostensibly equitable—all jail inmates have their calls recorded—but it is one of many factors in the criminal justice system that leaves indigent defendants with substandard access to justice. Given the odds against poor defendants in particular and incarcerated defendants in general,[164] it hardly seems just to permit solicitors to have direct, uninhibited access to the recordings of their telephone calls. Because the practice has only ever tacitly been accepted, it seems justified that it now be explicitly rejected.

V. INSUFFICIENCY OF CURRENT SOLUTIONS

At present, there are two purported solutions to the issue of impermissible prosecutorial call monitoring. First, by warning defendants that their calls will be recorded and by obtaining their consent before they speak, solicitors hope to establish that the information revealed over jail phone lines is knowingly and willingly disclosed.[165] Second, in the event that either the warning or the consent are deemed inadequate, defense attorneys could move to suppress the contents of any such calls from the proceedings against their clients.[166] Although both of these remedies are well-intended, neither is appropriately tailored to address the scope of the harm posed by prosecutorial call monitoring.

---

sc.gov/about-us/overview (last visited Apr. 15, 2019) ("About 80–85 percent of all criminal court cases in South Carolina are handled by public defenders.").

162. *See* RABUY & KOPF, *supra* note 153 (noting that thirty-eight percent of criminal defendants are released from jail on bail before trial, while thirty-four percent cannot pay the bail set for them).

163. Not only may attorney–client calls be monitored in spite of assurances to the contrary, but public defenders have limited time to visit their clients in jail, and any information conveyed by the attorney to his client may later be repeated on recorded lines. These concomitant challenges serve to undermine attorney–client communications.

164. Ofer, *supra* note 32.

165. State's Brief on the Admissibility of Jail Recordings at 5–9, State v. Avery, No. 05-CF-381 (Wis. Ct. App. Nov. 2, 2006).

166. FED. R. CRIM. P. 41(h).

A. Consent

The most substantial objection to any constitutional challenge of prosecutorial call monitoring is that inmates consent to having their calls recorded. While such wiretaps may be impermissible on phone lines in the absence of notice, surely the fact that inmates must agree to being recorded in order to place a call is sufficient to transform the nature of the recording from an unreasonable search into a consent search. The automated warning played at the beginning of these phone calls does indeed inform both the caller and the person they have called that their words may be monitored and that, by continuing to have a conversation, they are providing their consent. By advising detainees that they will be recorded and obtaining their consent, passively manifested as it is, detention centers seek to obviate the constitutional challenges posed by the use of such recordings.

There are two problems with this strategy. First, research on the psychology of consent reveals that individuals may not feel free to withhold consent from those in positions of authority over them.[167] Second, the functional necessity of telephone calls and the absence of meaningful alternatives further undermine the validity of pretrial detainees' consent.[168] In the philosophical struggle to determine whether laws should shape reality or whether reality should shape the law, it appears that the courts have taken their stance in the former camp on the issue of consent searches.[169] Nevertheless, reality has not fallen in line.[170]

The standard for determining the consensual nature of searches or seizures is thus: If a reasonable person would have felt free to leave, decline the request, or terminate the encounter, the subject's cooperation is consensual.[171] However, in determining what a reasonable person would have

---

167. *See, e.g.*, Janice Nadler & J. D. Trout, *The Language of Consent in Police Encounters*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW 326, 332 (Lawrence M. Solan & Peter M. Tiersma eds., 2012) ("Because people perceive discourse originating from an authority to be coercive regardless of the assertive linguistic cues, authority figures need not use highly face-threatening language—part of that burden is carried by the badge and gun.").

168. *See supra* text accompanying notes 56–64.

169. *See* Nadler & Trout, *supra* note 167, at 337 ("[T]he Court assumes that citizen in that situation clearly feels free to terminate the encounter or to leave."); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 156 ("In light of mounting empirical evidence, it is remarkable that the 'totality of the circumstances' standard has nearly always led the Court to the conclusion that a reasonable person would feel free to refuse the police request to search.").

170. *See generally* Nadler, *supra* note 169.

171. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 429 (1991); United States v. Drayton, 536 U.S. 194, 195 (2002). Jail call monitoring is different from traditional consent searches in that no individual law enforcement officer has directly sought or obtained permission to search the

felt, judges have relied on their own intuition rather than empirical evidence of how people *actually* feel in such situations.[172] The evidence reveals that people feel less free to refuse consent "under situationally induced pressures," which, although "imperceptible to a person experiencing them . . . can be so overwhelming that attempts to reduce them with prophylactic warnings are insufficient."[173]

For example, a study of traffic stops in Ohio uncovered only a negligible change in the rate of consent when officers notified drivers of their rights.[174] One explanation for this phenomenon, derived from the psychology of authority, suggests that police officers' power is legitimate only in part;[175] the remainder of their authority is coercive.[176] In other words, society grants police the power necessary to conduct their work, but it also grants them the latitude necessary to make errors in their work, leaving individuals vulnerable and often without recourse when officers make the wrong call or escalate a situation unnecessarily. On this foundation, the arguments proceeds thus:

> If the officer administers the . . . warning, in essence, the warning has delegitimized his lawful authority to command the subject's consent. If the [subject], after being given the . . . warning, still feels he must give consent, the authority of the police officer may not have been founded upon legitimate power. If the authority is not couched in lawfulness, the only source of social power that remains is coercive.[177]

---

detainee or the contents of his phone calls. *See Drayton*, 536 U.S. at 194 (holding that two men on a bus subject to a routine drug search provided valid consent to the search of their persons even though they were not told of their right to refuse consent). On the other hand, they are similar in that the fruits of such searches have been deemed admissible regardless of detainees' subjective ignorance of their right to refuse consent and the manipulative manner in which consent may be sought. *See, e.g.*, Nadler & Trout, *supra* note 167, at 330. Unlike, for example, an individual detained at a traffic stop who may continue along his route after refusing to consent to a search of his car, a pretrial detainee may not continue in making a phone call after refusing to consent to having his call recorded. Although there are elements of call recording which may seem to render them less coercive than other consent searches, these are counteracted by other elements which heighten the coercive effect.

172. Nadler, *supra* note 169, at 167. In fact, even when lower courts have found searches unconstitutional on the basis that consent was not freely given, the Supreme Court has overturned those decisions and upheld the searches. Nadler & Trout, *supra* note 167, at 334.

173. Nadler, *supra* note 169, at 155.

174. Illya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the "Voluntary" Waiver of Fourth Amendment Rights*, 44 HOW. L.J. 349, 373 (2001).

175. *Id.*

176. *Id.* at 364.

177. *Id.* at 364–65 (citations omitted).

Circumstances are concededly different between jail and roadside traffic stops.[178] Although a driver may feel pressure to be agreeable in order to conclude the traffic stop and resume his normal route as quickly as possible, he is at liberty to escape the coercive presence of the officer as soon as the traffic stop concludes.[179] Inmates are afforded no such relief.

Instead, detainees must choose either to end their phone calls before they are made, opting for an alternative that may neither adequately serve their needs nor offer them more privacy,[180] or to agree to the terms of the recording and simply hope that what they say will not be used against them. Because pre-call warnings do not notify defendants that solicitors, not just prison officials, will be monitoring their calls, their consent can hardly be deemed informed. Neither, in the absence of any reasonable alternatives, should it be presumed voluntary.

B. Suppression

When information obtained in the course of an investigation is not discoverable or is otherwise improperly obtained, one simple remedial measure currently available to defense counsel is the motion to suppress.[181] The grounds for such a motion could be constitutional, or they could arise under Rule 5(b)(2) of the South Carolina Rules of Criminal Procedure if the party contacted is an attorney, an agent of the defendant, a witness, or a potential witness.[182] The limitations of the latter grounds for suppression are apparent; while attorney–client privilege may be more scrupulously honored were this remedy effective, no other constitutional issue posed by prosecutorial call monitoring would be impacted. Motions to dismiss on constitutional bases would likely prove ineffective under *United States v. Leon*,[183] which held that the exclusionary rule only applies when it can deter the unconstitutional actions of law enforcement officers.[184]

---

178. *See* Berkemer v. McCarty, 468 U.S. 420, 421 (1984).

179. *Id.* at 421.

180. *See supra* text accompanying notes 55–69.

181. State v. Rosier, No. 2015-UP-275, 2015 WL 3536564 (S.C. Ct. App. June 3, 2015) (citing S.C. CODE ANN. § 17-30-110(A), wherein the process of motions to suppress intercepted communications is described).

182. S.C. R. CRIM. P. 5(b)(2).

183. United States v. Leon, 468 U.S. 897 (1984).

184. *Id.* at 898. In one way of framing the problem, it is the conduct of solicitors, not law enforcement officers, that is unconstitutional. Although they may qualify as law enforcement officers by definition alone, *Law-Enforcement Officer*, BLACK'S LAW DICTIONARY (10th ed. 2014), it is unlikely that courts would be willing to stretch long-standing interpretations of what jobs constitute law enforcement officers in order to curtail a practice that can be addressed more

There is a chance, albeit a slim one, that a motion to suppress a call recording would be successful if the information obtained through it were inculpatory in nature. If, on the other hand, the recording revealed trial strategy, it would likely never come up in court and therefore be impervious to suppression. The damage is done once the solicitor hears it. Notwithstanding a more robust approach to suppressing inmates' phone calls that reveal incriminating information, the risk of compromised bargaining position would remain, as would the chilling effect on communications between attorneys and their detained clients.

VI. PROPOSED SOLUTIONS

The nuances of the problems posed by prosecutorial call monitoring should guide the search for a solution. Any remedy should be crafted in consideration of the compelling government interest of ensuring the safety of detention centers and those who live and work in them,[185] so it should provide a method for ensuring that the telephone lines are not being used to plan criminal activity. Furthermore, any alternative should minimize the burden it places on detention centers' resources.[186] Finally, as noted in *Florence v. Board of Chosen Freeholders of the County of Burlington*,[187] "[o]fficers who interact with those suspected of violating the law have an 'essential interest in readily administrable rules,'"[188] so any solutions must be clear and unequivocal. The following remedies could serve to diminish, in whole or in part, the deleterious effects of prosecutorial call monitoring upon defendants.

A. Third-Party Monitoring

One such solution would be to enact legislation prohibiting solicitors from accessing defendants' phone calls without third-party review to ensure that only information relevant to the solicitors' cases is turned over in discovery. The appropriate party to conduct such monitoring should be aware of the constitutional impacts of providing calls including trial strategy to the prosecution, and they should be sufficiently thorough for defense counsel to

---

directly. Alternatively, because it is detention center officials and sheriffs' departments that arrange for solicitors to have blanket access to inmates' calls, it could be said that they acted wrongfully in facilitating the recording and permitting solicitors to access calls.

185. *See* Turner v. Safley, 482 U.S. 78, 79 (1987).

186. *Id.* at 78–79.

187. Florence v. Bd. of Chosen Freeholders of Burlington, 566 U.S. 318 (2012).

188. *Id.* at 338 (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001)).

have confidence that no such information would be impermissibly relayed. Only then would the chilling effect on attorney–client communications abate.

In light of these considerations, it seems that the optimal party to review pretrial detainees' phone calls would be defense counsel. Because attorneys may reveal confidential information to the extent necessary to prevent their clients from committing crimes, this solution could be implemented without compromising jail security.[189] Detention centers may retain access to call recordings in order to serve their safety needs, but rather than requiring defense attorneys to ask solicitors for access to call recordings, solicitors would seek that information from defense attorneys or *pro se* defendants. In theory, no funds would have to be diverted for this purpose because many defense attorneys already review their clients' jail phone calls during the discovery phase.[190] The defense would then have the opportunity to redact undiscoverable information before turning it over. The purpose of recording calls would remain fulfilled, and the defendant would lose no rights in the process.

B. Advanced Technology

Artificial intelligence may also prove useful for screening phone calls for security threats. Much like the keyword-screening mail scanners used in Greenville County's detention center,[191] software can be used to listen for distinct words and phrases indicating threats, obviating the need for continual monitoring of calls by the detention center officials themselves. It could also be programmed to seek out keywords in multiple languages, ensuring that schemes relayed in languages spoken by few detention center officials or unknown to them altogether are nonetheless thwarted. Such technology is not as futuristic as it may sound. A patent was filed in 2017 for software that can screen for keywords, trigger an alarm, and forward recordings to a monitoring server in the event that a threat is detected,[192] all while prohibiting anyone

189. MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (AM. BAR. ASS'N 2018); S.C. RULES OF PROF'L CONDUCT r. 1.6(b) (2015).

190. Considering the underfunding of public defenders' offices nationwide, it would be wise to increase their funding regardless. *See, e.g.*, Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017, 5:55 AM), https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111.

191. *SmartJailMail Electronic Messaging System*, *supra* note 57; *Greenville Inmate Mail*, *supra* note 59.

192. U.S. Patent No. 10,027,797 (filed May 10, 2017) [hereinafter 797 Patent] (patent for software that monitors inmates' phone calls, triggering an alarm and forwarding recordings to

concerned with trial strategy from hearing any discussions about a defendants' case. This patent has been assigned to Global Tel*Link, one of the major providers of inmate telecommunications services in South Carolina.[193] With the use of this or similar technology, calls could be recorded much more selectively, and only when they implicate legitimate penological concerns.

The use of artificial intelligence to monitor jail call recordings seems to be a reasonable solution in light of the *Turner* test.[194] Software that monitors phone lines for keywords that indicate threats to institutional security is closely connected with the neutral government interest of operating safe and secure detention centers, and it is appropriate in light of the inadequacy of alternative modes of communication or monitoring protocol. While this software would likely bear installation and management costs, it would allow detention centers to allocate their staff toward the more hands-on tasks involved in jail management. The only calls that would need to be screened by humans would be those flagged for security risks, saving substantial time and increasing the likelihood that a threat will be detected in a timely manner. Moreover, because the existing software is available to one of the state's telecommunications companies, it stands to reason that many of South Carolina's detention centers will not have to enter into new contracts with another company. The solution may be as simple as requesting an additional service. Finally, the use of extant artificial intelligence seems to be a proportionate response to unchecked technological encroachments upon defendants' rights.

Over time, this technology will likely follow the trend of other technological advancements and become substantially cheaper.[195] Given that it is also more capable of responding promptly to the needs of jail safety than are individuals, who cannot listen to all phone calls as they take place,[196] there is no legitimate excuse for indefinitely continuing with the status quo. In the near future, all calls need not be recorded. Those calls in which defendants reveal nothing more harmful than trial strategy or information that could be leveraged against them should only be heard by the intended listener.

---

an output device in the instance of a "predefined event," i.e. some communication that represents a security threat).

193. 797 Patent, *supra* note 192; *Telephone Calls*, *supra* note 19.

194. *See* Turner v. Safley, 482 U.S. 78, 78–79 (1987). *See also supra* text accompanying notes 47–67.

195. Matt Rosoff, *Every Type of Tech Product Has Gotten Cheaper over the Last Two Decades—Except for One*, BUSINESS INSIDER (Oct. 14, 2015, 2:20 PM), https://www.businessinsider.com/historical-price-trends-for-tech-products-2015-10.

196. 797 Patent, *supra* note 192.

C. Bail Reform

Bail reform strategies could also be considered to limit the impact of the call-recording practice by reducing the size of the population affected; when fewer pretrial detainees exist, fewer phone calls will be subject to monitoring by solicitors' offices. This solution may fail on the last factor of the *Turner* test as an exaggerated response to the scope of the issue posed by prosecutorial call monitoring.[197] Neither is bail reform sufficient in and of itself to address the harms of prosecutorial call monitoring, as not all criminal defendants are granted or even eligible for pretrial release.[198] Regardless, bail reform is well justified in its own right,[199] and it would drastically decrease the number of people impacted by prosecutorial call monitoring. As such, it should be considered as a complementary remedy alongside any other measures taken.

Some such reforms should include the implementation of a fact-based pretrial assessment protocol to determine which individuals should be released on their own recognizance, denied bail altogether, or granted release under restricted conditions like GPS monitoring or house arrest.[200] Indeed, properly designed and implemented assessment protocols provide proof that most arrestees can safely be released on their own recognizance.[201] South Carolina currently has no such protocol; there is no list of factors that must be considered in bond determinations, nor is there any indication of the weight that should be given to any factor that a judge may take into account.[202] South

---

197. *Turner*, 482 U.S. at 78–79.

198. *See* RABUY & KOPF, *supra* note 153, at 1 (noting that four percent of all criminal defendants are denied bail altogether). *See also* S.C. CODE ANN. § 17-15-10 (2018).

199. *See, e.g.*, Ofer, *supra* note 32.

200. PRETRIAL JUSTICE INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA 5 (2017).

201. *Id.*

202. Stephan Futeral, *Making Bail—All About Bond Hearings in South Carolina*, FUTERAL & NELSON, LLC (June 3, 2014), https://www.charlestonlaw.net/bond-hearing-bail-south-carolina (noting that judges frequently consider defendants' community ties, work histories, and tendencies toward violence). The risk of a defendant's failure to appear is often the primary factor in considerations of whether to release him on bond and the amount of bond necessary to incentivize his return to court. Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 688–89 (2018). This is in spite of the fact that failure to appear is comprised of three distinct risks: actual flight, local absconding, and mere nonappearance. *Id.* at 683. The latter category of nonappearance is much more preventable and correctible than the former two. *Id.* Nevertheless, it is considered as an equal risk for the purposes of bail determinations in South Carolina. S.C. CODE ANN. § 17-15-30(A) (2018). Those who fall in the latter camp can safely be released into their communities as they await trial, and additional safeguards can be implemented to ensure their appearance. For example, courts may simply remind defendants of their court dates a few days in advance. Where they have been used, court date reminders have increased the rate at which defendants appear for their hearings. CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM

Carolina's bail eligibility determinations make the process of depriving defendants of their liberty before trial—and creating another avenue through which their defenses can be compromised—much more arbitrary than in other states, despite the best efforts of judges to remain fair and impartial.

Just as the process of determining a defendant's fitness for pretrial release should be revised, so too should the process of determining the amount of bail demanded of defendants deemed fit for release. While bail amounts may be low for indigent defendants, it is too often the case that a defendant's ability to pay the required amount is not considered.[203] South Carolina could follow in the steps of New Jersey and eliminate money bail altogether,[204] or it could take the more moderate step of simply enforcing the requirement that a defendant's actual ability to pay be considered in bail determinations.[205] The Supreme Court has held that it is a violation of the Fourteenth Amendment to imprison someone on the basis of their inability to pay a fine for their release, and therefore, courts must determine whether the failure of a defendant to pay bail was willful and whether there are alternative means to achieve the state's interests.[206] If magistrates were to strictly adhere to this obligation in making bail determinations, significantly fewer defendants would find themselves detained before their trials and subjected to prosecutorial call monitoring.

VII. CONCLUSION

Once again, imagine yourself in jail. You have just spoken with your lawyer. You call your wife. You tell her about what happened the night before and about the plea deal your lawyer suggested. After you hang up, you call the friend who invited you over the day before. You tell him that, if anyone asks, you need him to say that you only had a few drinks in the hours before

---

16 (2016) (citing Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado FTA Pilot Project and Resulting Court Date Notification Program*, 48 COURT REV. 86 (2012); WENDY F. WHITE, CT. HEARING CALL NOTIFICATION PROJECT (2006)). Courts may also combat the risk of mere nonappearance by providing assistance to individuals who need rides to court. This could be achieved by sending a deputy to escort the defendant to the courthouse, or even by requesting a rideshare or providing bus fare to defendants who lack reliable transportation. While this would pose an additional expense, it would undoubtedly cost less than the $59.61 that the state would expend on the defendant each day she would otherwise remain behind bars before trial. *Frequently Asked Questions*, S.C. DEP'T CORR., http://www.doc.sc.gov/faqs.html (last visited Apr. 15, 2019).

203. *See* CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 202, at 10 (citing RABUY & KOPF, *supra* note 153).

204. PRETRIAL JUSTICE INST., *supra* note 200, at 8.

205. *See* CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 202, at 8.

206. *Id.* (citing Bearden v. Georgia, 461 U.S. 660, 672–73 (1983)).

the arrest. You are hoping to ensure that he can corroborate the events as they happened, but if a jury hears, it may sound like witness tampering.

The solicitor never hears these conversations. You continue to consider the plea deal. Your wife comes to your bond hearing, and you leave with her. Before entering into plea negotiations, your lawyer watches the video from the officer's dashboard camera. The case against you for failure to stop for blue lights is weak; you may not have stopped immediately, but it is clear that you were not trying to flee. The video also shows that the officer improperly conducted the field sobriety test, so it cannot be used against you. The solicitor drops these charges, and the only ones remaining are minor traffic violations. You agree to pay the tickets. You have only spent one night in jail.

To the degree that it permits solicitors to catch defendants implicating themselves in crimes they have committed, prosecutorial call monitoring appears to be a worthwhile practice. And to the extent that these call recordings are admitted into evidence against defendants, it makes sense that the practice has gone unchallenged for so long. However, solicitors have the benefit of the full resources of the state on their side, [207] and they are able to approach cases from the impersonal perspective as agents of the state. On the other hand, a criminal case is always personal for the defendant, who faces the deprivation of life, liberty, property, or a combination of the three. It is unjust to grant solicitors unrestricted access to information they can use to coerce vulnerable defendants into plea deals and to undermine the strategy of those defendants who choose to exercise their constitutionally-guaranteed right to trial.

The problems with call monitoring by solicitors implicate—and arguably violate—the First, Fourth, and Sixth Amendments of the Constitution. The practice undermines the duties that defense attorneys are ethically bound to fulfill for their clients and bypasses traditional discovery limitations. And it is primarily impoverished communities who bear the brunt of the practice. Poor defendants are less likely than their counterparts with greater means to be able to get out of jail before trial. Defendants who remain incarcerated in advance of trial are more likely to be convicted. Solicitors, acting rationally, will continue to use the information available to them to vigorously build cases against the defendants whom they are more likely to convict. [208] This cycle of disproportionately prosecuting and incarcerating the poor may be unintentional, but the current system perpetuates it. Limiting the tools solicitors may use to bolster their cases against the most vulnerable defendants will disrupt that cycle.

---

207. *See* Waller, *supra* note 159, at 292.
208. *About SCCID*, *supra* note 161.

The alternatives available to prosecutorial call monitoring are varied, and they are equally well- if not better-suited to ensuring that detention centers remain safe for inmates and personnel. Regardless of the means by which this end is achieved, solicitors should no longer be permitted to monitor inmates' calls directly. After all, the costs of the status quo are too high to be borne by defendants, and the expenses of solutions are too low to justify maintaining prosecutorial call monitoring in its current form.