CHALLENGING PROSECUTORIAL USE OF A PRETRIAL DETAINEE'S ELECTRONIC COMMUNICATIONS

JAMES P. MCLOUGHLIN, JR.*
FIELDING E. HUSETH*
CATHERINE R. PRATER*

TABLE OF CONTENTS

I. INTRODUCTION 90
II. THE FOUNDATIONAL ANALYSES: THE CONSTITUTION, JAILS, AND PRETRIAL DETAINEES 92
  A. PRETRIAL FIFTH AMENDMENT AND SIXTH AMENDMENT RIGHTS IN THE VINDICATION OF TRIAL PREPARATION RIGHTS AND THE PRIVACY OF JAIL COMMUNICATIONS 92
  B. SHORT HISTORY OF FOURTH AMENDMENT EAVESDROPPING JURISPRUDENCE AND THE "EXPECTATION OF PRIVACY" 94
  C. THE FOURTH AMENDMENT EXPECTATION OF PRIVACY IN DETENTION FACILITIES..95
  D. THE INCONSISTENT APPROACH TO COMMUNICATIONS OF DEFENDANTS ON PRETRIAL RELEASE AND THE DISTINCTION BETWEEN THE PRE-CONVICTION DETAINEE AND THE CONVICTED..102
III. THE STATUTORY FRAMEWORK: TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 AND THE EXCEPTIONS THAT SWALLOWED THE RULE...111
  A. THE FICTION OF CONSENT IN TITLE III AND THE CONSTITUTIONAL ANALYSIS..113
  B. LANGUAGE BARRIERS AND THE THEORY OF IMPLIED CONSENT...117

* Messrs. McLoughlin and Huseth are members of Moore & Van Allen PLLC. Mr. McLoughlin is admitted to the New York, North Carolina, and District of Columbia Bars with extensive federal and international experience. Mr. Huseth is admitted to the New York and North Carolina Bars. They focus their practices on white-collar, regulatory, and complex business matters.

* Ms. Prater is a litigation associate at Moore & Van Allen PLLC. Her practice includes white-collar criminal matters and matters assigned under the Criminal Justice Act.

C. LIMITING TITLE III'S "LAW ENFORCEMENT" EXCEPTION AND FOURTH AMENDMENT JAIL PRECEDENTS TO FACILITY SECURITY..118
D. DERIVATIVE USE AND TITLE III SECTION......................122
IV. CONCLUSION..124

I. INTRODUCTION

Pretrial detention imposes unreasonable burdens on a defendant's ability to prepare for trial. One such burden is that the prosecution often gains access—without a warrant—to the defendant's telephone calls because the pretrial detention facility typically records telephone calls and it is generally assumed it may share the recordings at will.[1] Some courts hold that the facility may also record and share recordings of the defendant's in-person communications.[2] The defendant may, therefore, be unwilling or unable to speak freely to witnesses who may testify on their behalf in pretrial proceedings or at trial. Others who may be able to assist the defense may be unwilling to speak openly knowing communications can be recorded and shared with prosecutors. The unwitting inmates and witnesses, meanwhile, may share critical trial strategies or disclose important information during their calls, and as a result, the prosecution can gain a direct view into the defendant's strategy and evidence.

On the other hand, a defendant free on bail does not face these burdens and risks absent an express imposition of call monitoring as a condition of release.[3] The prosecution must first secure a warrant to intercept a defendant's calls or other electronic communications—a requirement of the Fourth Amendment and the Federal Wiretap Act. The difference in pretrial detention status among defendants, however, should be irrelevant to the prosecution's burden for accessing their intercepted

---

[1] *See, e.g.*, Memorandum from Richard L. Shiffrin, Deputy Assistant Att'y Gen., Off. of Legal Couns. to John C. Keeney, Acting Assistant Att'y Gen., Crim. Div., Bureau of Prisons Disclosure of Recorded Inmate Telephone Conversations (Jan. 14, 1997) [hereinafter Shiffrin Memo] (on file with author) ("[N]either the Fourth Amendment nor Title III limits or otherwise conditions disclosure [of intercepted jail calls] to outside law enforcement officials.").

[2] *See* United States v. Harrelson, 754 F.2d 1153, 1169–70 (5th Cir. 1985) (finding no reasonable expectation of privacy for an in-person communication in a prison facility); United States v. Hearst, 563 F.2d 1331, 1344–47 (9th Cir. 1977) (approving the taping of visitor-detainee communications without notice and the sharing of these tapes for purposes related to prosecution). *But cf.* United States v. DePonceau, No. 05-CR-6124L, 2008 U.S. Dist. LEXIS 6106, at *19–26 (W.D.N.Y. Jan. 24, 2008) (finding a reasonable expectation of privacy in a detention facility when a notice of monitoring was not posted and no persons were nearby to overhear the detainee's communications).

[3] *See generally* United States v. Scott, 450 F.3d 863 (9th Cir. 2006) (discussing how defendants on pretrial release do not waive their Fourth Amendment rights if they consent to pretrial release conditions, and thus, searches must be justified under the Fourth Amendment).

communications. A court's pretrial finding that the detainee is a flight risk or danger to the community is often made with little opportunity for the defendant to prepare. Instead, such a finding requires only proof by a preponderance of the evidence or is based on a statutory presumption. Pretrial release may be denied because the defendant is unable to meet court-set release conditions. These factors have no legitimate bearing on whether a defendant should be subject to a warrantless search and seizure.[4]

As prosecutors increasingly seek pretrial detention of defendants,[5] and as the period from charge to trial lengthens, particularly in complex cases,[6] pretrial detainees' ability to communicate freely with witnesses and others is more and more an issue well worth an effort to protect. Defendants and their counsel should not be resigned to accepting the prosecution's unfettered access to their calls and in-person communications while in jail. However, if pretrial detainees and witnesses or others who can aid the defense know they can speak without fear that their communications might be used against them in criminal proceedings, the dynamics change materially in favor of the detainees. The federal judiciary has little appetite to endorse challenges to the rationales long employed to justify these practices—preservation of the detention facility's security and the express or implied consent of the detainee. Focusing on the federal courts, we address the history and current state of Fourth Amendment law on detainees' rights, arguments against the warrantless monitoring of a pretrial detainee's communications, and possible strategies to curtail the use of intercepted communications beyond the jail.

Under the Bail Reform Act of 1984, there are two principal requirements for detention: first, the individual must be charged with a crime and second, the court must find by a preponderance of the evidence that the person is a flight risk or a danger to the community.[7] These predictions of future conduct are employed to justify pretrial detention, but, we argue, cannot extend to justify the ubiquitous warrantless monitoring of the pretrial detainee's communications for any purpose, especially not trial

---

[4] *Id.*

[5] *See* Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 FED. PROB. J. 13, 13–15 (2018). In 1988, approximately 30% of defendants were in custody pending trial. In 2008, it was fewer than 50% of defendants. In 2018, it was nearly 75%.

[6] *See United States District Courts – National Judicial Caseload Profile*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2023.pdf [https://perma.cc/BZX7-YCGF]. The median time from filing to disposition in criminal felony cases within a twelve-month period ending on June 30, 2018 was 7.2 months, whereas it was eleven months within a twelve-month period ending on June 30, 2023. In several districts, the time to resolution was far above the median: for example, in the U.S. District Court for the Eastern District of New York, it was 21.6 months in 2018 and 30.2 months in 2023. In the Northern District of California, it was 21.2 months in 2023.

[7] 18 U.S.C. § 3142(a), (e).

preparation calls.[8] We argue for a more concerted effort from the defense bar to push back on this practice because the justifications rely on an intellectually dishonest and legally flawed theory of express or implied consent and the judicially unquestioned but statistically unsupported connection to jail security, the latter of which should justify no more than the severely proscribed use of communication intercepts by the jail personnel to ensure such security. Further, we argue that the courts' practice of conflating the permissible restrictions on the pretrial detainees' rights with those imposed on the convicted should be challenged more often. We also address the impact of the Wiretap Act (or "Title III"), 18 U.S.C. §§ 2510–23, and the need to assert foundational Fourth, Fifth, and Sixth Amendment rights as the basis to challenge the federal judiciary's over-generous reading of the statute's exceptions to the protection of the privacy of communications.

Whether courts approve the interception of jail communications based on the law enforcement and consent exceptions to Title III or the jail security and consent rationales found in Fourth Amendment cases, the same conundrum arises regarding the derivative use of a monitored call. When monitored not for the direct purpose of investigating the pretrial detainee's alleged criminality, but rather for the purpose of facility security, a monitored communication may nonetheless disclose information the prosecution would like to have—whether it be evidence of wrongdoing or insights into the defense strategy, such as a discussion with family about prospective witnesses or a discussion with a prospective witness. Judicial decisions permit derivative use by the prosecution under the analysis that the communication was obtained without violation of the Wiretap Act or the Fourth Amendment, so the facility is free to make unrestricted use of the intercepted communication. Analogies to prosecutorial use of incriminating evidence found incident to a search of a defendant made for purposes of ensuring the safety of the arresting officers[9] illustrate the broader constitutional dilemma: limitation on derivative use based on the purpose of the communication and the use is essential to a pretrial detainee's response to prosecutorial use of their communications.[10]

---

[8] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2543 (2019) (Sotomayor, J., dissenting) ("The warrant requirement is not a mere formality; it ensures that necessary judgment calls are made 'by a neutral and detached magistrate,' not 'by the officer engaged in the often competitive enterprise of ferreting out crime.'" (quoting Schmerber v. California, 384 U.S. 757, 770 (1966))).

[9] *See generally* Chimel v. California, 395 U.S. 752 (1969) (finding a constitutionally valid search incident to arrest limited to the person of the individual arrested and the area within their reach); Riley v. California, 573 U.S. 373, 401, 403 (2014) (holding that a search of cell phone incident to arrest violated the Fourth Amendment).

[10] We focus on telephonic communications in this article, but the analysis presented here applies equally to communications of any form, such as email or face-to-face interactions.

II. THE FOUNDATIONAL ANALYSES: THE CONSTITUTION, JAILS, AND PRETRIAL DETAINEES

A. PRETRIAL FIFTH AMENDMENT AND SIXTH AMENDMENT RIGHTS IN THE VINDICATION OF TRIAL PREPARATION RIGHTS AND THE PRIVACY OF JAIL COMMUNICATIONS

One must begin with foundational principles. We start with a brief reprise of the impact of the First, Fifth, and Sixth Amendments on an accused's right to develop a defense with the premise that the pretrial detainee, who is presumed to be innocent, cannot constitutionally be denied those rights based on detention status because pretrial detention cannot be equated with post-conviction detention. We then move to the Fourth Amendment as it applies to eavesdropping in the jail context.

The practical reality is that the Fourth Amendment decisions in the jail context have not given pretrial detainees sufficient protection of their communications. For the near term, the reality is that protection must rely also on the Fifth and Sixth Amendments and additionally on the First Amendment. Together, a defendant's Fifth Amendment right to due process and Sixth Amendment right to compulsory process are essential to enable the accused to defend against the government's case. "Fifth Amendment due process and Sixth Amendment compulsory process are closely related, for the right 'to call witnesses in one's own behalf ha[s] long been recognized as essential to due process.'"[11] Sixth Amendment jurisprudence recognizes that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive."[12] Likewise, federal courts have recognized that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."[13] Federal courts have explained that "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense."[14] As a corollary, there should be no disputing an accused's right to make personal, meaningful contact with persons necessary to their defense, whether directly or through relatives or others, and without the filter of a lawyer who may not have the time, resources, or trust of the sources to accomplish the task, because direct personal contact is necessary for the exercise of the accused's constitutional right to present a defense. The government can claim that under *Shaw v. Murphy*, however, an

---

[11] United States v. Beyle, 782 F.3d 159, 170 (4th Cir. 2015) (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)).

[12] United States v. Moussaoui, 382 F.3d 453, 471 (4th Cir. 2004) (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)).

[13] *Chambers*, 410 U.S. at 302.

[14] *Moussaoui*, 382 F.3d at 471 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

argument directed to the purpose of the communication warranting particular protections is not the law.[15] However, *Shaw* deals with inmates assisting inmates with legal challenges so this claim must be evaluated in its context.

Even under current case law, the pretrial detainee maintains an important degree of constitutional rights, most particularly Fifth and Sixth Amendment rights, which we argue should include the related right to communicate without disclosure of those communications to the prosecution.[16] Indeed, the pretrial detainee is, as a matter of constitutional presumption and protection, innocent of any crime and under preparation to defend their innocence. Access to a telephone and in-person communications is a constitutional right.[17] The monitoring, recording, and disclosure to prosecutors of electronic communications, including telephone calls or visitation conversations, inhibit the pretrial detainee's ability to have meaningful contact with persons important to the gathering of documents and development of testimony; but, it is the derivative disclosure to the prosecution separate from the interest in facility security that is the critical problem.

To the extent the detention facility claims it must maintain safety and security measures that include eavesdropping on a pretrial detainee's communications, the practice is, as a practical matter, not subject to successful challenge—"jail officials are entitled to . . . promote internal security by placing restrictions on pretrial detainees" as long as it is "rationally related to a legitimate governmental purpose."[18] Thus, the defense's objective must be to limit eavesdropping to facility security and

---

[15] Shaw v. Murphy, 532 U.S. 223, 230 (2001) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)) ("To increase the constitutional protection based upon the content of a communication first requires an assessment of the value of that content. But the *Turner* test, by its terms, simply does not accommodate valuations of content. On the contrary, the *Turner* factors concern only the relationship between the asserted penological interests and the prison regulation."). *Turner* does not permit an increase in constitutional protection when a prisoner's communication includes legal advice.

[16] *See Turner*, 482 U.S. at 84–91 (listing factors in the analysis of restrictions on prisoners' constitutional rights); Hause v. Vaught, 993 F.2d 1079, 1081–82 (4th Cir. 1993) (recognizing that "pretrial detainees retain constitutional protections despite their confinement" (citing Bell v. Wolfish, 441 U.S. 520, 545 (1979))).

[17] *See* Wolfish v. Levi, 573 F.2d 118, 126 (2d Cir. 1978), *rev'd on other grounds*, *Bell*, 441 U.S. at 520.

[18] Williamson v. Stirling, 912 F.3d 154, 176 (4th Cir. 2018); *Shaw*, 532 U.S. at 223; *see Turner*, 482 U.S. at 89 (concluding that a prison regulation is constitutionally valid when "reasonably related to legitimate penological interests"); *see also* United States v. Friedman, 300 F.3d 111, 123 (2d Cir. 2002) (quoting United States v. Willoughby, 860 F.2d 15, 21 (2d Cir. 1988) ("[W]here a facility provides some notice to inmates that calls may be monitored, the facility's 'practice of automatically taping and randomly monitoring telephone calls of inmates in the interest of institutional security is not an unreasonable invasion of the privacy rights of pretrial detainees.'")).

to preclude distribution and use of communications outside the facility. There is supporting precedent for this approach: for example, in *United States v. Cohen*, the Second Circuit held that a search of a pretrial detainee's cell phone directed by a federal prosecutor without a warrant—though conducted by prison officials—violated the Fourth Amendment.[19] As the court noted, "no iron curtain separates prisoners from the Constitution," and "the loss of such [constitutional] rights is occasioned only by the *legitimate* needs of institutional security."[20] However, the cases generally rely on the explanation or excuse that the intercept was necessary for jail security or made with consent, and once intercepted for those reasons the intercept can be used for any law enforcement purpose.[21] As a result, only those few searches expressly instituted to aid the prosecution outside the ordinary course of the facility's monitoring practices are invalidated.[22]

B. A Short History of Fourth Amendment Eavesdropping Jurisprudence and the "Expectation of Privacy"

The federal courts, including the Supreme Court, have struggled to develop a workable Fourth Amendment jurisprudence for eavesdropping.[23] The Supreme Court's fraught history with eavesdropping begins in 1928 with *Olmstead v. United States*, in which the Court ruled that interception of a telephone call without entry into the defendant's home or office was not prohibited by the Fourth Amendment because there was no physical trespass to real property.[24] It was not until 1961, in *Silverman v. United States*, the Court held for the first time that eavesdropping by federal agents via a spike mike "accomplished by means of an unauthorized physical penetration into the premises" violated the occupant's Fourth Amendment right.[25] But again, the Court focused on trespass theory.

Two rulings in 1967 issued in June and December respectively, *Berger v. New York*[26] and *Katz v. United States*,[27] changed the language of

---

[19] United States v. Cohen, 796 F.2d 20, 24 (2d Cir. 1986).

[20] *Id.* at 23; Procunier v. Martinez, 416 U.S. 396, 413–16 (1974) (invalidating censorship of prisoner mail on First Amendment grounds that it was greater than was necessary to protect a legitimate government interest since the prison's regulations were broadly written and invited prison guards to exercise their own prejudices and opinions).

[21] *See* Shiffrin Memo, *supra* note 1.

[22] *See* discussion *infra* at Section III.C.

[23] *See* Carpenter v. United States, 138 S. Ct. 2206, 2236–47 (2018) (Kennedy, J., dissenting) (providing a brief historical survey).

[24] *See* Olmstead v. United States, 277 U.S. 438, 464–66 (1928).

[25] Silverman v. United States, 365 U.S. 505, 509 (1961); *see also* Wong Sun v. United States, 371 U.S. 471, 485 (1963).

[26] *See generally* Berger v. New York, 388 U.S. 41 (1967).

[27] *See generally* Katz v. United States, 389 U.S. 347 (1967).

the debate. In *Berger*, the Supreme Court struck down New York's wiretap statute for a lack of sufficiently rigorous authorization standards consistent with the Fourth Amendment.[28] In *Katz*, the Supreme Court implicitly overruled *Olmstead*, holding that wiretapping a call made from a public telephone booth "violated the privacy upon which [the petitioner] justifiably relied while using the telephone booth."[29] Unable to rely directly on trespass theory, the Court famously shifted to announce that the Fourth Amendment "protects people, not places" as defined by protection of a person's reasonable expectation of privacy.[30] In his concurring opinion, Justice Harlan set out what would become the standard for the reasonable expectation of privacy, again relying on the concept of trespass. While acknowledging the Court's ruling that the Fourth Amendment protects people, not places, Justice Harlan questioned "what protection it affords to those people" and reasoned that "the answer . . . requires reference to a 'place.'"[31] The test he offered was "first[,] that a person have exhibited an actual (subjective) expectation of privacy and[] second, that the expectation be one that society is prepared to recognize as 'reasonable,'" tying the reasonableness of expectations to the place.[32] The test was distilled down to one factor: the courts' assessment of the objective reasonableness of the expectation of privacy.[33]

C. THE FOURTH AMENDMENT EXPECTATION OF PRIVACY IN DETENTION FACILITIES

In the 1962 case *Lanza v. New York*, forecasting *Katz*, the Supreme Court stated in dicta that a prisoner has no reasonable expectation of privacy in a jail's visiting rooms.[34] Mr. Lanza visited his brother in jail. Six days

---

[28] *Berger*, 388 U.S. at 63–64.

[29] *Katz*, 389 U.S. at 353.

[30] *Id.* at 351.

[31] *Id.* at 361.

[32] *Id.*; *see also* Peter Winn, Katz *and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1, 9–10 (2009).

[33] *See* Orin S. Kerr, *"*Katz*" Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 122 (2015); *see also generally* Nadine Strossen, *Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988).

[34] Lanza v. New York, 370 U.S. 139 143–44 (1962) ("In prison, official surveillance has traditionally been the order of the day. Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, there is no claimed violation of any such special relationship here."). *Lanza* was decided based on New York law, and the Court found that it did not need to reach the Fourth Amendment issue to decide the case: therefore, the Fourth Amendment privacy discussion is dicta. *See, e.g.*, United States v. Houston, No. 1:13-cr-37-HSM-WBC, 2015 U.S. Dist. LEXIS 30428, at *14 (E. D. Tenn. Feb. 18, 2015) (noting that the *Lanza* court's discussion regarding the Fourth Amendment is dicta).

later, his brother was released from custody by order of a member of the state's parole commission under circumstances that prompted an investigation of possible corruption within the commission. Mr. Lanza, despite a grant of immunity, refused to testify and was convicted under state law. He argued that the jail conversation that was the basis of the questions he refused to answer was electronically intercepted and unconstitutionally recorded: hence, his conviction violated the Fourth Amendment. In the process of rejecting his claim, the Supreme Court stated that in the visitor's room of a jail, a facility in which "official surveillance has traditionally been the order of the day" and that shares none of the characteristics of a home, office, or other venue that warrants Fourth Amendment protection, the interception and use of the call did not violate Mr. Lanza's Fourth Amendment rights.[35] The expectation of privacy analysis was tied to the place, not his activity—a conversation with his brother. It was also not tied to his status—a visitor who had not done anything dangerous or in patent violation of facility security rules to warrant reducing his Fourth Amendment protection against governmental eavesdropping.[36]

The continued anchoring of the Fourth Amendment analysis to a place is evident in the 1984 case *Hudson v. Palmer*.[37] Mr. Palmer, a convicted prisoner, was charged under the prison's disciplinary procedures with destroying state property based on a "'shakedown' search" of his cell and locker.[38] He was found guilty and penalized.[39] Writing for the majority, Chief Justice Burger determined that the first question to answer was whether Mr. Palmer had a right of privacy in his prison cell entitling him to Fourth Amendment protection.[40] He acknowledged that a majority of the circuit courts of appeal found that a prisoner retained "at least a minimal degree of Fourth Amendment protection in his cell,"[41] and prisoners retained certain constitutional rights "not inconsistent with [their] status as . . . [prisoners] or with the legitimate penological objectives of the corrections system."[42] Nonetheless, the ruling followed quickly that "to accommodate a myriad of 'institutional needs and objectives' of prison facilities,"[43] certain rights had to be curtailed: "[C]onstraints on inmates, and in some cases the complete withdrawal of certain rights, are 'justified

---

[35] *Lanza*, 370 U.S. at 143.
[36] *Id.* at 143–44.
[37] *See generally* Hudson v. Palmer, 468 U.S. 517 (1984).
[38] *Id.* at 519–20.
[39] *Id.* at 520.
[40] *Id.* at 522.
[41] *Id.* at 522 n.5 (citing cases).
[42] *Id.* at 523 (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)); *see also* Wolff v. McDonnell, 418 U.S. 539, 555 (1974).
[43] *Id.* at 524 (quoting *Wolff*, 418 U.S. at 555).

by the considerations underlying our penal system.'"[44] Chief among the "institutional needs and objectives" of prison facilities is internal security.[45] Chief Justice Burger wrote that "these restrictions or retractions [of rights] also serve, incidentally, as reminders that, under our system of justice, deterrence and retribution are factors in addition to correction."[46] How deterrence of crime and retribution for past crimes legitimately impact the Fourth Amendment analysis is not explained. Relying on the *Katz* analysis, the Court answered the determinative question of whether a prisoner has a "justifiable" expectation of privacy with an emphatic "no."[47] The Court held that "[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order": further justification was found on the premise that "it is accepted by our society that '[loss] of freedom of choice and privacy are inherent incidents of confinement.'"[48] However, Chief Justice Burger then went beyond issues of prison security to support the holding with a profile of the nation's prison population, thus bringing status into the equation:

> Prisoners . . . have a demonstrated proclivity for anti-social criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.[49]

---

[44] *Id.* at 524 (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).

[45] *Id.* (citations omitted).

[46] *Id.*

[47] *Id.* at 525–26 ("[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.").

[48] *Id.* at 527–28 (quoting Bell v. Wolfish, 441 U.S. 520, 537 (1984)). Justice O'Connor wrote a separate concurrence, in which she joined with the majority, but went further to conclude that "the government's compelling interest in prison safety, together with the necessarily ad hoc judgments required of prison officials, make prison cell searches and seizures appropriate for categorical treatment," concluding that all searches of prison cells were reasonable. *Id.* at 538 (O'Connor, J., concurring) (citing Wayne R. LaFave, "*Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. Ct. Rev. 127, 141–145). Justice O'Connor also concluded that arrest and incarceration "abate[] all legitimate Fourth Amendment privacy and possessory interests in personal effects." *Id.* (citing Lanza v. New York, 370 U.S. 139, 143 (1962)). She was surely deliberate in going no further.

[49] Hudson v. Palmer, 468 U.S. 517, 526 (1984).

Dissenting in part and concurring in part, Justices Stevens, Brennan, Marshall and Blackmun objected to the categorical approach taken by the majority. They argued that Mr. Palmer may have had no expectation of privacy in most of his property, but he was not wholly without Fourth Amendment protection of his possessory interest because his property was protected by the search clause and his possessory interest was protected by the seizure clause.[50] Also important here, the minority did not accept the majority's "hypothesis that all prisoners fit into a violent, incorrigible stereotype," arguing the size of the prison population itself belies the stereotype.[51] In addition, the fact that "thousands upon thousands of former prisoners are now leading constructive law-abiding lives" was inconsistent with what Justice Stevens described as "[t]he nihilistic tone of the Court's opinion."[52] To the extent the Court made status relevant, arguably, it should be relevant for all purposes: a detainee not convicted of the charges has a more powerful claim to the protection of their communications. Critical to the interplay of the Fourth, Fifth, and Sixth Amendments in the pretrial detention context and the argument that there are constitutional limits on the license that facility security provides, the dissent faulted the majority's "eagerness" to enshrine "what it believes to be wise penal administration" resulting in the sacrifice of constitutional principles to expediency.[53] The minority described the Fourth Amendment principles as "fundamental law beyond the reach of governmental officials or legislative majorities" that "represent[] a value judgment that unjustified search and seizure so greatly threatens individual liberty that it must be forever condemned as a matter of constitutional principle."[54]

After *Katz*, *Lanza*, and *Hudson*, the inevitable question is tied to place: What is a pretrial detainee's reasonable expectation of privacy as to their communications in detention? However, one could also ask: What is the reasonable expectation of privacy as to communications made by a person accused, but not convicted of a crime, particularly communications made in connection with their defense? There is a persuasive argument that the expectation of privacy analysis in *Katz* and *Hudson*, but less so in *Lanza*, is dependent on the characteristics of a very small physical space: the cell and a room, both within a detention facility in which contraband can be hidden, property can be damaged, or physical harm can be committed. The argument that prison officials must, therefore, be able to enter and control that space is far less persuasive with respect to an electronic

[50] *Id.* at 543–44.
[51] *Id.* at 553.
[52] *Id.* at 553–54.
[53] *Id.* at 556.
[54] *Id.*

communication. Just as the Supreme Court struggled with the transition of Fourth Amendment principles from their historical anchor in a physical place violated by a physical trespass to a person's privacy expectations and rights in their communications, when the expectation of privacy analysis and the weighing of the societal interest are undertaken independently for an electronic communication, particularly when the communication is in the course of activity protected by the Fifth and Sixth Amendments and is "endowed with particularized confidentiality" that should "receive unceasing protection" before one is convicted of any offense, the courts began to demonstrate a regrettable commitment to the status quo.[55] In *Katz*, the Court ostensibly rejected the premise that the relevant question under the Fourth Amendment was whether a physical space was violated:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[56]

Justice Harlan's limitation of that protection by relying on place to define the reasonableness of the expectation of privacy was an effort that continues today and excludes a host of other factors that should be relevant to reasonable expectations, including the purpose of the communication or the status of the participant—convicted or presumed innocent. First Amendment case law, discussed below, evidences the challenges of expanding the list of factors.[57]

The Fourth Amendment jurisprudence generally reveals the struggle to develop a cohesive set of principles that can keep up with surveillance technology and the practices facilitated by that technology.[58]

---

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

[56] Katz v. United States, 389 U.S. 347, 351 (1967) (internal citations omitted).

[57] *See* discussion *infra* notes 59–62. There is an argument to be made that in addressing First Amendment claims and reaching a unitary standard, discussed below, the Supreme Court took the detainee's expectations, reasonable or not, out of the equation. However, the further one gets from issues of prison administration and security, the more one can argue that such expectations are relevant.

[58] Decisions in recent years struggle to develop the Fourth Amendment principles beyond trespass and expectation of privacy, and in some ways, have reverted to those concepts. *See generally*, *e.g.*, United States v. Jones, 565 U.S. 400 (2012) (finding that a tracking device attached to an automobile violates the Fourth Amendment); *see also generally* Riley v. California, 573 U.S. 373 (2014) (holding that a search of cell phone incident to arrest violates the Fourth Amendment); *see also generally* Grady v. North Carolina, 575 U.S. 306 (2015) (concluding that satellite tracking of a sex offender using a tracking device worn by the individual is subject to the Fourth Amendment);

The Supreme Court has an apparent fear that drawing boundaries will be impossible without a physical manifestation of an invasion of privacy linked to the origins of the Fourth Amendment, which might result in decisions that would impede law enforcement.[59] Of course, it is the very object of the Fourth Amendment to impede law enforcement when necessary to protect the privacy interests within the ambit of the Fourth Amendment. Nonetheless, that concern is not reflected in the development of the jurisprudence.

The Supreme Court announced in *Katz* that "whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention" from what the Court viewed as the primary factor: whether and how an individual seeks to preserve something as private, even in an area accessible to the public.[60] This is trenchant in the pretrial detention context, in which the detainee is powerless to preserve the privacy of their communications in the facility. However, place and specifically, the institutional security imperatives of jails, trump status. In deciding whether pretrial detainees had superior Fourth Amendment rights to those of convicted prisoners, the Supreme Court ruled in *Bell v. Wolfish* that "[t]he fact of confinement as well as the legitimate goals and policies of the penal institution limits [the] retained constitutional rights" of any prisoner, whether convicted or not.[61] Although pretrial detainees have not been adjudicated guilty of the crimes for which they have been charged, the Court believed that in terms of prison security there was no basis to conclude that pretrial detainees pose a lesser risk to security than convicted inmates.[62]

While the Supreme Court was willing to assume that inmates, pretrial and post-trial, retained some undefined Fourth Amendment rights, the Court nonetheless imposed no restriction on cell searches or strip and body cavity searches.[63] The Supreme Court went on in *Hudson* to make clear that "the Fourth Amendment has no applicability to a prison cell" such

see also generally Carpenter v. United States, 138 S. Ct. 2206 (2018) (finding that an expectation of privacy in cell tower records of one's calls makes securing such records from cellular providers subject to the Fourth Amendment); *see also generally* United States v. Miller, 425 U.S. 435 (1976) (finding no enforceable expectation of privacy in financial records held by a bank); *see also generally* Smith v. Maryland, 442 U.S. 735 (1979) (finding no expectation of privacy in the records of dialed telephone numbers held by a telephone company).

[59] *See, e.g.*, Brief for Respondent, Olmstead v. United States, 277 U.S. 438 (1928) (Nos. 493, 532, 533), 1928 U.S. LEXIS 694, at *22–24.

[60] *Katz*, 389 U.S. at 351–60 ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.") (citing Rios v. United States, 364 U.S. 253 (1960); *Ex parte* Jackson, 96 U.S. 727, 733 (1878)).

[61] Bell v. Wolfish, 441 U.S. 520, 546 (1979) (citing Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 125 (1977)).

[62] *See* United States v. Cohen, 796 F.2d 20, 22–23 (2d Cir. 1986) (describing the Supreme Court's holdings in *Bell*, *Hudson* and related cases).

[63] *Bell*, 441 U.S. at 558.

that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[64]

In 1967, the reasonable expectation test was a practical and philosophical expansion of the Fourth Amendment's zone of protection test.[65] However, an inherent weakness in the test is first, its dependence on the Court's view of what a reasonable expectation should be: a question of law, not fact, that subjects the standard to the biases of the sitting judges—biases on display in cases like *Hudson*.[66] Second, like the trespass construct, the test is heavily influenced by the physical environment in which the question of the privacy expectation arises, which leads to rulings that nothing on the premises of a detention facility—even the telephone booth in the intake room—should carry an expectation of privacy.[67] As a result, the cases demonstrate a reliance on location to decide what is reasonable without sufficiently considering other factors.[68] Third, the test does not easily accommodate a policy discussion about what privacy interests society should protect regardless of location—for example, the right to have confidential communications with prospective witnesses and others in aid of Fifth and Sixth Amendment rights, as well as First Amendment rights to communicate with the wider world of family, friends, and even the press, regardless of the location from which the communication originates and regardless of detention status. The decisions about what is reasonable are driven more by nonspecific references to security, government behavior, past practice, and the view reflected in *Hudson*'s majority opinion that detainees and prisoners have fewer rights, not by fundamental principles of what is the scope of a detainee's rights to communicate and appropriate privacy.[69] The majority of lower federal courts ruled that convicted prisoners and pretrial detainees have no reasonable expectation of privacy in their electronic communications, whether by telephone or email, because

---

[64] Hudson v. Palmer, 468 U.S. 517, 526, 536 (1984).

[65] *See Katz*, 389 U.S. at 347.

[66] *See Hudson*, 468 U.S. at 517.

[67] *See Bell*, 441 U.S. at 556–57.

[68] *See generally Hudson*, 468 U.S. 517; *see also generally Katz* 389 U.S. 347.

[69] *See generally*, *e.g*., Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994) (holding that prisoners have a First Amendment right to communicate by telephone); *see also generally* Johnson v. California, 207 F.3d 650 (9th Cir. 2000). *But see generally* Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001) (holding that prisoners have no First Amendment right to telephone use); *see also generally* United States v. Footman, 215 F.3d 155 (1st Cir. 2000); Pape v. Cook, No. 3:20-cv-1324(VAB), 2021 U.S. Dist. LEXIS 101942, at *16 (D. Conn. May 28, 2021)("[R]estrictions on telephone usage do not infringe on inmates' First Amendment rights if alternate means of communicating with others outside of prison are available."). This is generally the rule within the Second Circuit.

the government monitors them: existing practice becomes the answer without due regard to whether that practice is constitutionally problematic.[70]

It is in two First Amendment cases, *Turner v. Safley*[71] and *Shaw v. Murphy*,[72] that the Supreme Court most clearly comes to a unified standard for analyzing infringements on detainees' rights. In *Turner*, the Court ruled that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[73] Four factors are determinative: "First and foremost, 'there must be a "valid, rational connection" between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it.'"[74] The remaining factors are "the existence of 'alternative means of exercising the right' available to inmates; 'the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;' and 'the absence of ready alternatives' available to the prison for achieving the governmental objectives."[75] As a result of these factors, to have a reasonable chance of success, any challenge to the monitoring, recording, and disclosure of a detainee's communications must rely on an objection against admissibility for the purpose of prosecuting past conduct. The argument is that there could be no impact on jail security or the listed factors from pre-incarceration conduct. Additionally, a successful challenge might also highlight how the detainee has no alternative means reasonably available to exercise their right to communicate without the government's use of that communication in regards to past conduct and trial.[76] There is an argument that in addressing First Amendment claims and reaching a unitary standard, the Supreme Court took the detainee's expectations, reasonable or not, out of the equation of what their constitutional rights to privacy are.[77] However,

---

[70] *See, e.g.*, Harrison v. Thaler, No. 4:11-CV-695-A, 2012 U.S. Dist. LEXIS 56559, at *50 (N.D. Tex. Apr. 23, 2012) (noting that the pretrial detainee "failed to present any basis for concluding that he had a legitimate expectation of privacy when making telephone calls from the jail telephone" (citing *Bell*, 441 U.S. at 546; United States v. Friedman, 300 F.3d 111, 123 (2d Cir. 2002); United States v. Sababu, 891 F.2d 1308, 1329 (7th Cir. 1989)); *Hudson*, 468 U.S. at 527–28; *see also* United States v. Johnson, No. 3:14-CR-02, 2014 U.S. Dist. LEXIS 111616, at *8 (N.D. W. Va. Aug. 13, 2014) (noting that "prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches does not apply 'in prison cells'") (citing *Hudson*, 468 U.S. at 530); *see also generally* United States v. Houston, No. 1:13-cr-37-HSM-WBC, 2015 U.S. Dist. LEXIS 30428 (E.D. Tenn. Feb. 18, 2015).

[71] *See generally* Turner v. Safley, 482 U.S. 78 (1987).

[72] *See generally* Shaw v. Murphy, 532 U.S. 223 (2001).

[73] *Turner*, 482 U.S. at 89.

[74] *Shaw*, 532 U.S. at 229 (quoting *Turner*, 482 U.S. at 89).

[75] *Id.* at 230 (quoting *Turner*, 482 U.S. at 90).

[76] *See generally Turner*, 482 U.S. 78; *see also generally Shaw*, 532 U.S. 223.

[77] *See generally Turner*, 482 U.S. 78; *see also generally Shaw*, 532 U.S. 223.

the further one gets from the effects on prison administration and security, the more one can argue that such expectations are relevant.[78]

D. The Inconsistent Approach to Communications of Defendants on Pretrial Release and the Distinction Between the Pre-Conviction Detainee and the Convicted

Outside the jail context there would seem to be little issue—compelling a person charged with a crime to consent to the monitoring, recording, and publication of their communications to other government authorities as a condition of their release to avoid the government's cutting off of their access to a telephone or email while they work to defend against the charges cannot be reconciled with the voluntariness as defined in the coerced consent cases.[79] Without such consent, First, Fifth, and Sixth Amendment rights all come in to play to prohibit such conduct by the government. No wiretap or other interception of the detainee's communications is permitted without a court order or warrant.[80] The defendant is free to contact witnesses without the prosecution obtaining a recording of the conversation, at least absent an order prohibiting such contact.[81]

Contrasting a pretrial detainee with a defendant granted pretrial release illustrates the logical and constitutional circularity of the arguments employed to justify intercepting and publishing detainees' communications. One may ask why a detainee's expectation of the right to have unfettered discussions with a witness or other person who can aid their defense without fear that those conversations will be intercepted and shared with the prosecutors should be so materially different simply due to place.[82]

---

[78] *See generally Turner*, 482 U.S. 78; *see also generally Shaw*, 532 U.S. 223.

[79] *See infra* note 123.

[80] *See* Commonwealth v. Norman, 142 N.E.3d 1, 10 (Mass. 2020) (holding that the imposition of GPS monitoring as a condition of pretrial release violated the accused's Fourth Amendment rights). *But see* United States v. Hunt, No. 20-cr-10119-DJC, 2021 U.S. Dist. LEXIS 182993, at *6, *8 (D. Mass. Sept. 24, 2021) (holding that the imposition of GPS monitoring was not a search for Fourth Amendment purposes, but if it was, it would be reasonable when imposed as a condition of pretrial release); Commonwealth v. Johnson, 75 N.E.3d 51, 61 (Mass. App. Ct. 2017); United States v. Clay, No. 4:12-CR-735-03, 2013 U.S. Dist. LEXIS 121599, at *7 (S.D. Tex. May 6, 2013).

[81] *See generally* United States v. Vasilakos, 508 F.3d 401, 410–11 (6th Cir. 2007) (noting that 18 U.S.C. § 3142(c)(1)(B)(v) authorizes no contact orders); United States v. Speed Joyeros, 204 F. Supp. 2d 412, 437 (E.D.N.Y. 2002) ("The need for a general policy of release has remained the same: With narrow exceptions, defendants should be released in order to be able to adequately prepare their defense.").

[82] The comparison finds some support in the case law. *See* Pell v. Procunier, 417 U.S. 817, 825 (1974) (finding "unimpressive" the availability of alternatives to the prison's limitations on

In following the Supreme Court's emphasis on place, the lower courts' analyses ignore critical distinctions between physical space and telephone or electronic communications that might protect the pretrial detainee's communications.[83] For example, in *United States v. Johnson*, Mr. Johnson challenged the government's efforts to impeach him with calls that he made while in pretrial detention.[84] The court rejected Mr. Johnson's challenge solely in reliance on *Hudson*'s holding that a prisoner has no reasonable expectation of privacy in their prison cell without further analysis of the differences between a prison cell and a telephone call and of other factors that might outweigh place.[85] Importantly, there are factors that can overcome the expectations the courts anchored in place. There are, for example, cases that distinguish between searches intended at the time to ensure jail security from searches intended at the time to facilitate a prosecution, illustrating a third factor that influences Fourth Amendment decisions: government purpose.[86]

To escape from the circular argument, one starts with an assessment of the purpose of the search. Searches and seizures of a detainee's cell and belongings are presumably valid and necessary for jail security and universally recognized as not requiring a search warrant.[87] When the purpose is irrefutably not for security, some courts have acted based on purpose. For example, in *State v. Stott*, the prosecutor's office searched the defendant's hospital room without a warrant after receiving a tip that the defendant was selling drugs.[88] The New Jersey Supreme Court held the defendant had a reasonable expectation of privacy even though the hospital staff had access to his space for "hospital-related" safety reasons.[89] The court highlighted that the government intrusion was not "hospital-related," but rather was "police conduct . . . within the framework of a criminal investigation."[90] For these reasons, the court held that the warrantless search

communications "if they were submitted as justification for governmental restriction of personal communication among members of the general public"). However, it is not enough to defeat the deference given to rules in support of facility security. *See generally* Block v. Rutherford, 468 U.S. 576 (1984) (reversing the lower court's limit on a facility's policy that prohibited contact visits for pretrial detainees).

[83] *See generally* United States v. Johnson, No. 3:14-CR-02, 2014 U.S. Dist. LEXIS 111616 (N.D. W. Va. Aug. 13, 2014).

[84] *Id.* at *7.

[85] *Id.* at *9 (resolving the Title III challenge by relying on the law enforcement exception and on Johnson's implied consent based on the facility's practice of playing a pre-recorded notice that calls were recorded).

[86] *See generally* Hudson v. Palmer, 468 U.S. 517 (1984); *see also generally* State v. Stott, 794 A.2d 120 (N.J. 2002); *see also generally* United States v. Cohen, 796 F.2d 20 (2d Cir. 1986).

[87] *See, e.g.*, *Hudson*, 468 U.S. at 522 n.5, 536.

[88] *Stott*, 794 A.2d at 123–24.

[89] *Id.* at 131–32.

[90] *Id.* at 132.

violated the defendant's Fourth Amendment rights. Similarly, in *United States v. Cohen*, the Second Circuit held that a search of a defendant's cell phone without a warrant directed by a prosecutor—even though conducted by prison officials—violated the Fourth Amendment.[91] As the Second Circuit noted: "[N]o iron curtain separates prisoners from the Constitution," and "the loss of such [constitutional] rights is occasioned only by the *legitimate* needs of institutional security."[92] Accepting that a pretrial detainee has no greater Fourth Amendment rights than a convicted prisoner, the Second Circuit held nonetheless that a prosecution-motivated search that was untethered to facility security violated the detainee's Fourth Amendment rights.[93] However, the Second Circuit and other federal courts subsequently refused to extend the protections of the *Cohen* decision to convicted prisoners.[94]

Other courts similarly concluded that a pretrial detainee retains Fourth Amendment rights, even under a "reasonable expectation of privacy" analysis, that are violated when the government targets the detainee with the purpose of facilitating the prosecution. In *McCoy v. State*, the court held that a detainee awaiting trial had a legitimate expectation that he was protected from a search of his cell for incriminating evidence.[95] The government conceded that no probable cause existed for the search and the purpose of the search conducted on the eve of Mr. McCoy's re-trial was to obtain incriminating statements written by the detainee.[96] The jail security officer who conducted the search described going through trial preparation materials, including depositions, witness transcripts, offense reports, and the detainee's notes.[97] He seized copies of depositions of four state witnesses, "copious handwritten notes," and a letter.[98] The court found that the search was "not initiated by institutional personnel and [was] not even colorably motivated by concerns about institutional security."[99] Similarly, in *Lowe v. State*, the Court of Appeals of Georgia held that a warrant was necessary for a "prosecutor instituted search [meant] not to maintain

---

[91] *Cohen*, 796 F.2d at 24.

[92] *Id.* at 23.

[93] *Id.* at 24.

[94] *See* Willis v. Artuz, 301 F.3d 65, 66 (2d Cir. 2002); *see also* Cotterman v. Creel, No. 4:14cv642-MW/CAS, 2015 U.S. Dist. LEXIS 156708, at *22–24 (N.D. Fla. Oct. 19, 2015) (discussing the Second and Eleventh Circuit courts' treatment of *Cohen*).

[95] McCoy v. State, 639 So. 2d 163, 166 (Fla. Dist. Ct. App. 1994); *see also* State v. Neely, 462 N.W.2d 105, 112 (Neb. 1990) (finding that a pretrial detainee retained a reasonable expectation of privacy in luggage in the jail's secure storage).

[96] *McCoy*, 639 So. 2d at 164.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 166.

security and discipline in the prison, but to further the State's effort to obtain a conviction against a pre-trial detainee."[100]

The search of a detainee's person or physical space in a jail, whether to find contraband or evidence of conduct in the facility that might affect the security of the facility, is too well-accepted and tied to an assumed probability of affecting security in the facility to permit a successful challenge. The issue is the extension to justify disclosure to investigators or prosecutors pursuing criminal charges against the detainee for conduct not related to facility security on the assumption that a communication evidencing a threat to facility security is so directly a consequence of a legitimate monitoring of a communication that no probability of success can reasonably be expected.

Many federal decisions refuse to distinguish between pretrial detainees and the convicted in Fourth Amendment rights analyses, deferring to facility administrators as to what is necessary to maintain security and order.[101] However, some courts correctly recognize that a pretrial detainee maintains certain specific rights that a convicted prisoner loses: for example, the Second Circuit's decision in *Wolfish v. Levi*, a litigation over the deficiencies in New York's Metropolitan Correction Center, provides a trenchant summary of the rationale for treating pretrial detainees differently from the convicted and an underpinning for challenges to the interception and use of jail calls for any purpose not directly and entirely limited to facility security:

> Fundamental to the Anglo-American jurisprudence of criminal law is the premise that an individual is to be treated as innocent until proven guilty by a jury of his or her peers. We have demonstrated our belief in this basic principle by according to pretrial detainees the rights afforded unincarcerated individuals, including, *inter alia*, rights to free speech, and freedom of religion. Accordingly, it is not enough that the conditions of incarceration for individuals awaiting trial merely comport with

[100] Lowe v. State, 416 S.E.2d 750, 752 (Ga. Ct. App. 1992) (finding that a pretrial detainee had a reasonable expectation of privacy in papers in his cell: the search was unrelated to facility security and was intended to secure evidence to support his prosecution).

[101] *See generally* Bell v. Wolfish, 441 U.S. 520 (discussing how pretrial detainees and convicted prisoners are subject to the same limits on Fourth Amendment rights for the purposes of prison administration); *see also* Block v. Rutherford, 468 U.S. 576, 590–92 (finding that security concerns justify equal search treatment of pretrial detainees and convicted prisoners); Ortiz v. City of New York, No. 12 Civ. 3118 (HB), 2012 U.S. Dist. LEXIS 176216, at *20 (S.D.N.Y. Dec. 12, 2012) ("While, in general, the restraints imposed upon a pretrial detainee's constitutional rights are less severe than those imposed upon incarcerated inmates, this distinction is less meaningful in the context of Fourth Amendment claims where a facility's institutional security stands as a competing consideration.").

> contemporary standards of decency prescribed by the cruel and unusual punishment clause of the eighth amendment. Time and again, we have stated without equivocation the indisputable rudiments of due process: pretrial detainees may be subjected to only those "restrictions and privations" which "inhere in their confinement itself or which are justified by compelling necessities of jail administration." This standard of compelling necessity is neither rhetoric nor dicta. And we have made it clear that deprivation of the rights of detainees cannot be justified by the cries of fiscal necessity, administrative convenience, or by the cold comfort that conditions in other jails are worse.[102]

One of the critical contrasts when challenging consent is the intellectually irreconcilable treatment of Fourth Amendment rights and consent to the waiver of those rights between the indicted individual given pretrial release and the indicted individual held in detention before trial. The Ninth Circuit's indecisiveness on this issue is illustrative. Its decision in *United States v. Scott*[103] is in stark contrast with its decision in *United States v. Van Poyck*, among others, in which the court relied on place to define reasonable privacy expectations, refusing to distinguish between pretrial detainees and convicted prisoners.[104]

The Ninth Circuit's finding in *Scott* that it is a violation of the Fourth Amendment to drug test individuals charged but not detained pretrial violates the Fourth Amendment offers another persuasive answer to the collapse of pretrial and post-conviction statuses. Mr. Scott failed a drug test administered in his home while on release pending trial on a drug possession charge. To secure his release, Mr. Scott was required to agree to certain conditions of release, including random drug testing at any time of the day or night by an officer without a warrant. These were standard conditions of release not based on fact-finding particular to Mr. Scott. Mr. Scott challenged the waiver as coerced. The panel majority acknowledged that the "government's interest in preventing crime by arrestees is both legitimate and compelling," but no more so than preventing crimes by

---

[102] Wolfish v. Levi, 573 F.2d 118, 124 (2d. Cir. 1978) (citations omitted).

[103] *See generally* United States v. Scott, 450 F.3d 863 (9th Cir. 2006).

[104] *See* United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996) (citing Lanza v. New York, 370 U.S. 139 (1962); Hudson v. Palmer, 468 U.S. 517 (1984)) (finding that an expectation of privacy in communications is not reasonable in a prison regardless of the detainee's status); *see also* United States v. Gangi, 57 F. App'x 809, 814 (10th Cir. 2003) (adopting *Van Poyck*'s holdings regarding a pretrial detainee's reasonable expectation of privacy and the Wiretap Act).

anyone else.[105] Ensuring detainees appear in court, however, was a goal the government demonstrated was sufficiently connected to drug use.[106]

With *Scott* and *Wolfish v. Levi* as context, the Ninth Circuit's decision in *Van Poyck* that no detainee has a reasonable expectation that their telephone calls would be private and therefore, protected by the Fourth Amendment, points to an inherent flaw. This logic, traceable to *Lanza*, *Bell*, and *Hudson*, and the Court's application of trespass and physical location theories of the Fourth Amendment to physical spaces and people that informs the origin of the reasonable expectation of privacy test, break down when dealing with a telephone call or other electronic communication. It is reasonable for a pretrial detainee to expect that a detention facility permits him access to communications with the "outside world" free from government monitoring when such communications are in furtherance of his defense. It is also reasonable absent reliable, objective data demonstrating that such monitoring improves facility security. The argument that a long-time practice of violating Fourth Amendment rights is a justification for continuing to do so because a detainee should, as a result of the practice, expect their rights to be violated is, or should be, unpersuasive. In *Scott*, when addressing the malleability of the expectation of privacy analysis that is central to the justification of monitoring, the Ninth Circuit gives one of several persuasive rebuttals:

> By assenting to warrantless house searches and random, warrantless urine tests, Scott destroyed his subjective expectation of privacy, and this in turn made his searches no longer searches, depriving him of Fourth Amendment protection altogether. But the Supreme Court has resisted this logic, recognizing the slippery-slope potential of the *Katz* doctrine:
> [I]f the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects . . . . In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a

[105] *Scott*, 450 F.3d at 870 (internal quotation marks omitted).
[106] *Id.* at 871.

> "legitimate expectation of privacy" existed in such cases, a normative inquiry would be proper.[107]

While the dissent in *Scott* argued that pretrial detainees could and should be treated the same as those convicted of a crime, the majority skewered their argument: "The dissent's inability to see a 'constitutionally relevant' distinction . . . between someone who has been convicted of a crime and someone who has been merely accused of a crime but is still presumed innocent, overlooks both common sense and our caselaw."[108]

Further, the *Scott* majority effectively rebutted the argument that the government had no duty to grant Mr. Scott's pretrial release and was therefore free to attach conditions, an argument effectively indistinguishable from the argument that the government has the power to deny a pretrial detainee access to telephone or other electronic communications:[109]

> It may be tempting to say that such transactions--where a citizen waives certain rights in exchange for a valuable benefit the government is under no duty to grant--are always permissible and, indeed, should be encouraged as contributing to social welfare. After all, Scott's options were only expanded when he was given the choice to waive his Fourth Amendment rights or stay in jail. But our constitutional law has not adopted this philosophy wholesale. The "unconstitutional conditions" doctrine[] limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary. … Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections. Where a constitutional right "functions to

107 *Id.* at 867 (quoting Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979)).

108 *Id.* at 873.

109 The rejection of consent theory with respect to other matters related to prison security versus monitored telephone calls has been played out in a number of federal circuit courts in other contexts. *Compare* Blackburn v. Snow, 771 F.2d 556, 568 (1st Cir. 1985) (Consent to strip search as a condition to visiting a prisoner is ineffective and unenforceable as a matter of law even assuming that the visitor does not have a constitutional right to visit the prisoner because the "government may not condition access to even a gratuitous benefit or privilege it bestows upon the sacrifice of a constitutional right."), *with* United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000) (finding that consent to monitoring of jail calls is effective and enforceable and distinguishing *Blackburn* on the grounds that (1) "[p]risoners have no per se constitutional right to use a telephone," (2) prison inmates are different from visitors, and (3) Footman did not raise a constitutional claim, but only one challenging his consent under Title III's consent exception).

> preserve spheres of autonomy . . . [u]nconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands.[110]

Of course, the premise that the government is under no duty to grant pretrial release is itself false, which the majority noted.[111] The analysis must be anchored to a normative inquiry to avoid the trap of eviscerating privacy expectations and therefore, Fourth Amendment protections, based on a history of self-fulfilling rulings by the courts that deny pretrial detainees their private electronic communications without a constitutionally sufficient justification.

Again, the Supreme Court's deference to the administrative complexities and security concerns of operating a detention facility, regardless of whether the detainees are pretrial or post-trial, looms large. However, the Court's test was adopted and endorsed by the slimmest of margins, and given the relative weight of the security interests in those cases, advocating for change is not irrational, particularly considering how the Court was considering a jail's blanket prohibition on contact visits and practices of conducting random searches of cells in the absence of the cell occupants as seen in *Block*, "double-bunking," the prohibition of inmates from receiving books that are not mailed directly from the publisher, conducting body-cavity searches of inmates following contact visits with persons from outside the institution, and requiring that pretrial detainees remain outside their rooms during routine inspections as seen in *Bell*.[112]

In *Block v. Rutherford*, Justice Burger summarized the holding in *Bell v. Wolfish*, in which the Court for the first time considered the rights of pretrial detainees and balanced the administrative complexity of running a detention facility and most especially, institutional security, against the rights of pretrial detainees.[113] The *Bell* Court held that "the dispositive inquiry is whether the challenged condition, practice, or policy constitutes punishment, '[for] under the Due Process Clause, a detainee must not be

---

[110] *Scott*, 450 F.3d at 866–67 (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1492 (1989)); *see id.* at 1489–1505; Richard A. Epstein, *Foreword* to Richard A. Epstein & Stephen L. Carter, THE SUPREME COURT 1987 TERM, 102 HARV. L. REV. 4, 21–25 (1988).

[111] The *Scott* court acknowledged its assumption that releasing Scott on his own recognizance was a discretionary decision but went on to note that under the Excessive Bail Clause, "the Government's proposed conditions of release or detention [must] not be 'excessive' in light of the perceived evil [sic]." *Scott*, 450 F.3d at 866, n.5 (quoting United States v. Salerno, 481 U.S. 739, 754 (1987)) (citing Schilb v. Kuebel, 404 U.S. 357, 365 (1971); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 284 (1989) (O'Connor, J., dissenting in part)).

[112] *See generally* Block v. Rutherford, 468 U.S. 576 (1984).

[113] *See generally* Bell v. Wolfish, 441 U.S. 520 (1979).

punished prior to an adjudication of guilt in accordance with due process of law.'"[114] The five-judge majority rejected the premise that pretrial detainees can be or should be treated differently from the convicted—at least in regards to issues of security.[115] The Court adopted the intentionally simplistic and deferential principle that "[i]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment."[116]

In both *Bell* and *Block,* the plurality and minority respectively objected to the deference given to facility officials and more importantly, to the Court's failure to adopt a standard that considered the weight of the detainee's constitutional interest. In *Bell*, a majority adopted the standard. Justice Powell concurred with the four judge plurality as to some practices but dissented with respect to body cavity searches, arguing that the seriousness of the intrusion on the detainee's privacy should require probable cause.[117] In his dissenting opinion, Justice Marshall challenged the plurality's failure to consider the weight of the detainee's constitutional interest.[118]

In *Block*, three Justices dissented and a fourth, Justice Blackmun, concurred in the judgment, finding that neither the contact visitation policy nor the cell search policy at issue violated the detainees' rights, but objected to the majority's blind deference to the decision-making of prison administrators.[119]

One can argue that the reach of both opinions should be confined to cases that directly involve prison security and should not extend to instances in which prison security is not the paramount issue. Indeed, both cases deal directly with physical security inside the facility when deference to the facility administrators is at its zenith. There has been some increased analysis of detainees' Fourth Amendment rights with a split as to whether pretrial detainees have greater rights than convicted prisoners to challenge searches when the purpose is not security, but rather to gather evidence.[120]

---

[114] *Block*, 468 U.S. at 583 (quoting *Bell*, 441 U.S. at 535) (footnote omitted in original).

[115] *Id.* at 587 ("[A]s we observed in *Wolfish*, in this context, '[the]re is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates.' . . . Indeed, we said, 'it may be that in certain circumstances [detainees] present a greater risk to jail security and order.'") (citation omitted) (citing *Bell*, 441 U.S. at 546, n.28).

[116] *Id.* at 584 (internal quotation marks omitted) (quoting *Bell*, 441 U.S. at 539).

[117] *Id.* at 563 (Powell, J., concurring in part and dissenting in part).

[118] *Id.* at 596–97 (Marshall, J., dissenting).

[119] *Id.* at 592–93 (Blackmun, J., concurring in judgment).

[120] *See generally* United States v. Colbert, No. 09-411, 2011 U.S. Dist. LEXIS 85288 (W.D. Pa. Aug. 3, 2011) (denying a motion to suppress evidence seized from pretrial detainees' cells despite claims that the purpose of the search was to gather evidence); Tinsley v. Giorla, No. 05-2777,

Furthermore, the test adopted in *Bell* is subject to compelling criticisms reflected in the dissenting opinions. An argument should be made that monitoring of a pretrial detainee's calls and more particularly, the publication of those calls to prosecutors, should be evaluated under a standard that gives greater weight to the detainee's First, Fourth, Fifth, and Sixth Amendment rights. Later cases regarding prisoners generally give more latitude for these arguments, but the results of the challenges indicate that the window is a small one.[121]

In sum, the distinction between the pretrial detainee and the convicted prisoner under the current case law does not impact the detention facility's power to intercept and monitor communications for security. The distinction may become relevant when deciding whether to disclose those communications for a use other than security.

III. THE STATUTORY FRAMEWORK: TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 AND THE EXCEPTIONS THAT SWALLOWED THE RULE

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, better known as the "Wiretap Act,"[122] covers interception of communications "through the use of any electronic, mechanical, or other device," including a telephone.[123] Title III was passed because "[p]rotecting the privacy of individuals who use the specified means of communication 'was an overriding congressional concern.'"[124] The congressional

---

2008 U.S. Dist. LEXIS 26397, at *28 n.3 (E.D. Pa. Apr. 1, 2008) (rejecting a claim that the legal papers were seized in violation of the Fourth Amendment with no relation to facility security). *But c.f.* United States v. Cohen, 796 F.2d 20 (2d Cir. 1986) (holding that a pretrial detainee "retains an expectation of privacy within his cell sufficient to challenge the investigatory search ordered by the prosecutor"). *But see* Willis v. Artuz, 301 F.3d 65, 67–69 (refusing to extend *Cohen* to convicted prisoners); United States v. Colbert, No. 89-310, 1990 U.S. Dist. LEXIS 707, at *3 (D.N.J. Jan. 23, 1990) (suppressing evidence obtained in a cell search that was conducted by outside authorities and unrelated to security).

[121] *See, e.g.*, Shaw v. Murphy, 532 U.S. 223, 228 (2001) (declining to hold that inmate-to-inmate correspondence that includes legal assistance would receive more First Amendment protection than correspondence without any legal assistance); Turner v. Safley, 482 U.S. 78, 89–91 (1987) (setting forth a four-factor test for determining the reasonableness of a prison restriction); Overton v. Bazzetta, 539 U.S. 126, 131–32 (2003) ("We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests."); Beard v. Banks, 548 U.S. 521, 535 (2006) (noting the possibility that "[a] prisoner may be able to marshal substantial evidence that, given the importance of the interest, the [p]olicy is not a reasonable one.").

[122] 18 U.S.C. §§ 2510–23.

[123] 18 U.S.C. § 2510(4).

[124] Abraham v. Cnty. of Greenville, 237 F.3d 386, 389 (4th Cir. 2001) (quoting Gelbard v. United States, 408 U.S. 41, 48 (1972)).

committee reports[125] on Title III "reflect deep dissatisfaction with the contemporary protection of individual privacy interests" and the desire to provide for "strict regulation of all highly intrusive forms of surveillance."[126] There was a belief that the Supreme Court's vague articulations of the restrictions on the government's use of electronic surveillance in *Berger*[127] and *Katz*[128] were inadequate.[129] Originally, the Wiretap Act applied only to wiretaps; in 1986, however, the statute was amended to include all electronic data.[130] One purpose of the amendment was to create an integrated regime for limiting electronic surveillance.[131]

The Wiretap Act safeguards an individual from all forms of wiretapping absent a specific statutory exception.[132] The prohibitions of the Wiretap Act are found in 18 U.S.C. § 2511 ("section 2511") and apply in interstate commerce or otherwise within federal jurisdiction.[133] The government generally invokes two Title III exceptions when intercepting communications in a detention facility and then using them against a detainee: the "consent" and "law enforcement" exceptions. We will address each in turn. Most importantly, we will address how, given the deference given to any measure employed in the name of facility security, Title III

---

[125] *See* S. REP. NO. 90-1097, at 36–47 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2153–63.

[126] United States v. Koyomejian, 946 F.2d 1450, 1454–55 (9th Cir. 1991) (emphasis in original); *see also Abraham*, 237 F.3d at 389 ("Title III represents an attempt by Congress to establish a system of electronic surveillance subject to rigorous safeguards.").

[127] *See generally* Berger v. New York, 388 U.S. 41 (1967).

[128] *See generally* Katz v. United States, 389 U.S. 347 (1967).

[129] *Koyomejian*, 946 F.2d at 1455; United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996); United States v. Feekes, 879 F.2d 1562, 1565 (7th Cir. 1989); United States v. Amen, 831 F.2d 373, 378 (2d Cir. 1987).

[130] The Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. § 2510 *et seq.*, was enacted by the United States Congress to extend restrictions on government wiretaps of telephone calls to include transmissions of electronic data by computers.

[131] *See* S. REP. NO. 95-701, at 68–69 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4037. In 1978, the Foreign Intelligence Surveillance Act of 1978 ("FISA") eliminated the national security exception to the Wiretap Act due to perceived abuse of the exception. 50 U.S.C. §§ 1801–11; *see also Koyomejian*, 946 F.2d at 1456; S. REP. NO. 95-604, at 7 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3908. The Wiretap Act's wire communication definition is broad: "wire communication" means any "aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce." 18 U.S.C. § 2510(1).

[132] *Koyomejian*, 946 F.2d at 1456.

[133] Title III provides a civil remedy against any person who "'intentionally intercepts' another person's wire, oral, or electronic communications." Abraham v. Cnty. of Greenville, 237 F.3d 386, 389 (4th Cir. 2001) (quoting 18 U.S.C. § 2511(1)(a)). Section 4(a) also makes certain violations a felony punishable by a fine and up to five years imprisonment. 18 U.S.C. § 2511(4)(a).

includes a series of express authorizations for derivative disclosure and use of communications intercepted legally under the act.[134]

Just as courts generally assume that a pretrial detainee protected by the presumption of innocence retains some measure of Fourth Amendment protection,[135] it is also theoretically "well accepted" that the protections of Title III[136] apply in the context of detention facilities.[137] Thus, wiretapping is allowed in detention facilities only pursuant to one of the exceptions to the Wiretap Act.[138] However, the reality is that in the context of a detention facility, the efficacy of Title III, most relevantly to derivative use of recorded communications, is eviscerated by the courts' over-generous reading of their law enforcement and consent exceptions. However, there are arguments that can be made that neither exception should be stretched to permit the disclosure of an intercepted communication to investigating or prosecuting authorities who do not obtain a warrant.[139] Given the derivative use provisions of the Wiretap Act, constitutional arguments may be the only effective approach.

---

[134] 18 U.S.C. § 2517(1)–(8).

[135] United States v. Cohen, 796 F.2d 20, 24 (2d Cir. 1986) (holding that the pretrial inmate "retains a Fourth Amendment right . . . tangible enough to mount the attack on this warrantless search"); *see also* Katz v. United States, 389 U.S. 347, 350 (1967) (holding that the "[Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.") (footnotes omitted); United States v. Montgomery, 675 F. Supp. 164, 168 (S.D.N.Y. 1987).

[136] "'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." 18 U.S.C § 2510(2).

[137] United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996) (Title III applies to a prison system); United States v. Amen, 831 F.2d 373, 378 (2d Cir. 1987) ("Title III clearly applies to prison monitoring."); United States v. Paul, 614 F.2d 115, 117 (6th Cir. 1980), *cert. denied*, 446 U.S. 941 (1980); Campiti v. Walonis, 611 F.2d 387, 392 (1st Cir. 1979); United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002).

[138] *See Paul*, 614 F.2d at 116–17 (rejecting the government's argument that Title III does not apply to prisons and requiring that an exception apply); *Campiti*, 611 F.2d at 392.

[139] *Cf.* United States v. Frink, 328 F. App'x 183, 189–90 (4th Cir. 2009).

A. The Fiction of Consent in Title III and the Constitutional Analysis

The consent exception, which is arguably the more critical exception to eliminate or circumscribe the Fourth Amendment's protection of pretrial detainees, is found in Section 2511(2)(c). Section 2511(2)(c) reflects the broader consent exception to the Fourth Amendment often used by courts to legitimize monitoring and using a detainee's communications. Section 2511(2)(c) reads:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.[140]

Numerous lower courts invoked the consent exception or a broader theory of consent to justify intercepting, recording, and sharing electronic communications. These courts did not try to reconcile their holdings with the coercion objections found in the Supreme Court's jurisprudence on consent theory.[141] Almost all detention facilities have warning language in the facilities' rules or detainee handbooks or play a pre-recorded warning at the beginning of any call made by a detainee to inform the detainee that their call is subject to monitoring and recording. Such warnings were deemed sufficient to support a finding of express consent or to impose an irrebuttable inference of implied consent by any detainee who proceeds with a call after receiving such a warning.[142] The sharing of recorded calls with investigators and prosecutors is almost always performed without notice to the pretrial detainee; but the notice, whether by policy, regulation, or pre-recorded message, also does not limit the monitoring and recording to a

---

[140] 18 U.S.C. § 2511(2)(c) (citation omitted).

[141] *See, e.g.*, United States v. Rivera, 292 F. Supp. 2d 838, 844 (E.D. Va. 2003) ("In sum, it is fair and reasonable to conclude that Rivera consented to the monitoring of his telephone calls because it is clear that Rivera chose to proceed with the calls in the face of ample notice that they would be monitored."); United States v. Verdin-Garcia, 516 F.3d 884, 895 (10th Cir. 2008) ("Use of the prison telephone is a privilege, not a right, and we agree with the other circuits having considered the question that where the warnings given and other circumstances establish the prisoner's awareness of the possibility of monitoring or recording, his decision to take advantage of that privilege implies consent to the conditions placed upon it.").

[142] *See Frink*, 328 F. App'x at 189.

particular purpose. As a result, courts typically decline to find that consent is limited to use for facility security.[143]

A principled application of the "consent" exception of Title III (or the Fourth Amendment case law, for that matter) cannot justify the use of a pretrial detainee's communications for a criminal investigative or prosecution purpose or for any other purpose for that matter. Deconstructing the consent theory is a critical step to challenging that theory. Underlying the consent theory is first, the presumption that the government has the power to deny a pretrial detainee any access to a telephone or other electronic communication device other than those used to communicate with their lawyer. While restrictions on time, place, or manner may be constitutionally permissible due to the recognized necessities of facility administration and security, a total denial of the detainee's right to communicate with the outside world implicitly requires an endorsement of the government's power to deny a pretrial detainee of all communications pending trial and absent consent. If a restriction on time, place, or manner is constitutionally permissible exclusively for purposes of administration and security, then consent is not required. Demanding consent to a broader use, such as to share the communication with prosecutors, under the threat of a total ban on communication cannot be justified on the basis of facility administration and security. A second presumption necessary to justify the consent theory is that the detainee's consent is constitutionally valid consent. Both presumptions are properly subject to challenge.

The most straightforward challenge to the theory of express consent begins with the question: "What is constitutionally valid and sufficient consent?" In *Georgia v. Randolph*, Justice Souter, writing for the Court, described the "voluntary consent" exception in the Fourth Amendment context as "jealously and carefully drawn."[144] Consent to the waiver of a Fourth Amendment right must be "freely and voluntarily given," and the consent must be evaluated under the totality of the circumstances.[145]

The current Supreme Court's approach appears to be avowedly textualist, so we start there. Black's Law Dictionary defines "consent" to mean, in relevant part, "voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to

---

[143] *See, e.g.*, United States v. Acklin, 72 F. App'x 26, 27 (4th Cir. 2003) ("Based on the statement in the inmate handbook that Acklin received upon entering the Pitt County Detention Facility and Acklin's signature on an Inmate Medical Screening Report, which provided that, as a condition to using the inmate phone system, the inmate consents to the recording and/or monitoring of his calls, we find no clear error by the district court in finding that Acklin consented."); *see also generally* United States v. Hammond, 286 F.3d 189 (4th Cir. 2002).

[144] Georgia v. Randolph, 547 U.S. 103, 109 (2006) (internal quotation mark omitted) (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

[145] Bumper v. North Carolina, 391 U.S. 543, 548 (1968); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

do something proposed by another . . . [and] supposes . . . a serious, determined, and free use of these powers."[146] We define the term "consent," employed in Title III and the Fourth Amendment cases, its commonly understood meaning.

To determine what conditions might render consent involuntary for purposes of Title III or the Fourth Amendment, we start with *Schneckloth v. Bustamonte*.[147] There, the Court refused to adopt a knowing and intelligent waiver standard for Fourth Amendment consent on the unfortunate view that it is unnecessary because "[t]he protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial."[148] This dynamic has parallels to the debate about consent to monitoring in the pretrial detainee context. The Court made clear again that it is the totality of the circumstances that it must consider to determine whether the consent is voluntary.[149] The Court relied heavily on the coerced interrogation cases to conclude that "the ultimate test" of voluntariness is whether the confession and by extension, the consent, are "the product of an essentially free and unconstrained choice by its maker."[150]

The cases outlining unconstitutional coercion arguably begin with *Garrity v. New Jersey*, in which the Supreme Court held that statements obtained from police officers under threat of termination if they did not consent to investigational interviews were involuntary.[151] Therefore, the statements could not be used against those officers in a criminal trial.[152] The unanimous Court enumerated these principles:

- Coercion can be "mental as well as physical."[153]
- "Subtle pressures may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.'"[154]

---

[146] *Consent*, BLACK'S LAW DICTIONARY (6th ed. 1991).
[147] *Schneckloth*, 412 U.S. 218.
[148] *Id.* at 242.
[149] *Id.* at 227.
[150] *Id.* at 225 (internal quotation marks omitted) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).
[151] *See generally* Garrity v. New Jersey, 385 U.S. 493 (1967).
[152] *Id.*
[153] *Id.* at 496 (internal quotation mark omitted) (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).
[154] *Garrity*, 385 U.S. at 496 (citations omitted) (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)) (citing Leyra v. Denno, 347 U.S. 556 (1954); *see also generally* Haynes v. Washington, 373 U.S. 503 (1963)).

- "[A]s conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary . . . ."[155]
- "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other."[156]
- "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."[157]

The Supreme Court followed with a series of decisions exploring the outline of constitutionally invalid consent.[158] The cases suggest that a detainee who consents when faced with an impossible choice is coerced. Such a choice is characteristic of "duress properly so called."[159]

The government's rebuttal that the detainee's refusal to consent justifies a ban on communication with the outside world likely relies on decisions such as *McKune v. Liles*.[160] In *McKune*, the Supreme Court rejected a convicted prisoner's challenge to a prison program for sex offenders that required him both to confess to the offenses of the conviction and to disclose any uncharged misconduct or suffer from a transfer to a higher security facility and loss of a variety of "benefits."[161] The required

---

[155] *Garrity*, 385 U.S. at 498 (internal quotation mark omitted) (quoting Union Pac. R.R. Co. v. Pub. Serv. Comm'n, 248 U.S. 67, 70 (1918)).
[156] *Garrity*, 385 U.S. at 498.
[157] *Id.* (quoting *Union Pac. R.R. Co.*, 248 U.S. at 70).
[158] Bumper v. North Carolina, 391 U.S. 543, 548 (1968); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 284–85 (1968) (holding that a threat of termination from employment precludes consent to waive constitutional rights); Spevack v. Klein, 385 U.S. 511, 516 (1967) (holding that a threat of loss of license to practice law precludes consent); *see also generally* Lefkowitsz v. Turley, 414 U.S. 70 (1973) (holding that a threat of loss of eligibility to engage government contracts precludes consent); *see also generally* Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (holding that consent was ineffective where one's eligibility to hold political association and right to hold public office were conditioned on a waiver of Fifth Amendment rights).
[159] *Garrity*, 385 U.S. at 498 (internal quotation mark omitted) (citing *Union Pac. R.R. Co.*, 248 U.S. at 70).
[160] *See generally* McKune v. Lile, 536 U.S. 24 (2002).
[161] *Id.* Specifically, Mr. McKune was informed that his privilege status would be reduced from Level III to Level I, which meant visitation rights, prison work earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and other privileges automatically would be curtailed. Moreover, he would be transferred to a maximum security unit, where his movements would be more limited, moved from a two-person to a four-person cell, and placed, he argued, in a potentially more dangerous environment.

disclosures also put Mr. McKune at risk of additional criminal charges.[162] He argued that what he characterized as penalties for declining to participate combined with the risk of prosecution was coercion of a confession in violation of his Fifth and Fourteenth Amendment rights.[163] A divided Court began from the legal premise that "[t]he privilege against self-incrimination does not terminate at the jailhouse door, but the fact of a valid conviction and the ensuing restrictions on liberty are essential to the Fifth Amendment analysis" and ultimately denied Mr. McKune's challenge to what he argued were penalties imposed on him for refusing to confess to the offense of the conviction and disclose any other misconduct.[164] The Court opined that "[a] broad range of choices that might infringe constitutional rights in free society fall within the expected conditions of confinement of those who have suffered a lawful conviction."[165] The decision relies heavily on the complexities of administering prisons as an overarching justification for imposing penalties on Mr. McKune, but relies also on the fact of his conviction. The Court's standard by which the compulsion should be judged is from *Sandin v. Connor*: the "atypical and significant hardship" standard the Court adopted to determine whether a prisoner's punishment violates due process.[166] In the pretrial context, a fundamental pillar of the *Sandin-McKune* theory is missing: the pretrial detainee is not convicted of an offense. The Seventh Circuit signaled that there is a limit to the theories of consent, express or implied.[167] In *United States v. Daniels*, the Seventh Circuit noted that knowledge of monitoring is not the same as consent even though it did not decide the consent issue since Title III's law enforcement exception also applied.[168] Responding to the government's argument that Mr. Daniels consented to monitoring because the Code of Federal Regulations states that federal prisoners' calls may be monitored, the court wrote: "That is the kind of argument that makes lawyers figures of fun to the lay community."[169] Sadly, however, after poking fun at the government, the Seventh Circuit acknowledged that a Second Circuit panel accepted the government's argument.[170]

---

[162] *Id.* at 34.
[163] *Id.* at 38.
[164] *Id.* at 36, 40 (quoting Sandin v. Conner, 515 U.S. 472 (1995)).
[165] *Id.* at 36.
[166] *Sandin*, 515 U.S. at 484.
[167] *See generally* United States v. Daniels, 902 F.2d 1238 (7th Cir. 1990).
[168] *Id.*
[169] *Id.* at 1245.
[170] *Id.* (contrasting United States v. Amen, 831 F.2d 373, 379 (2d Cir. 1987)).

B. LANGUAGE BARRIERS AND THE THEORY OF IMPLIED CONSENT

Implied consent theory should fare no better. The Supreme Court acknowledged that its periodic approval of implied consent theory is not based on de facto consent and so far limits implied consent usage to the imposition of civil penalties (loss of driver's license) or an adverse evidentiary inference (the driver fails a breathalyzer test) when a driver's refusal to take a breathalyzer test conflicts with their implied consent to take the test when accepting a driver's license.[171] The Supreme Court refuses to employ implied consent theory to circumvent Fourth Amendment protections when the penalty is criminal and the privacy violation is highly intrusive: for example, involuntary blood testing that may result in criminal charges if refused cannot be used to circumvent the Fourth Amendment.[172] Such a proportionality analysis precludes the use of intercepted communications in the aid of a federal felony prosecution based on an implied consent theory.[173] However, the federal appellate courts stretched far to apply implied consent theory to justify the interception of jail calls.[174]

A finding of express or implied consent is even more questionable when the pretrial detainee does not speak or read English, and thus an English-only notice is never effective notice. In analogous consent analyses, the courts considered language comprehension.[175]

In summary, consent to the interception, monitoring and recording of jail calls is a fiction that ignores the coercion inherent in the choice given to the detainee. Given the security imperatives recognized by the courts, such consent is unnecessary. Any consent should be limited to use solely

---

[171] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2533 (2019) ("[O]ur decisions have not rested on the idea that these laws [related to implied consent to breathalyzer sobriety testing] do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize.").

[172] Birchfield v. North Dakota, 579 U.S. 438, 476–77 (2016) (differentiating the use of implied consent by contrasting its holding from prior opinions that involve a refusal to consent to breathalyzer testing that may result in civil penalties or "evidentiary consequences" that permit inferences as the result of the refusal to take the test).

[173] *Id.* at 477 ("There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads."). Similarly, there must be a limit to implied consent to monitoring that is exclusively used for purposes of facility security.

[174] *See, e.g.*, United States v. Friedman, 300 F.3d 111, 122–23 (2d Cir. 2002) (holding that a finding of implied consent was justified because a sign posted above the phones in the booking area gave notice that calls to attorneys would not be recorded and was therefore sufficient to give notice that all other call might be recorded).

[175] United States v. Guay, 108 F.3d 545, 549 (4th Cir. 1997) (The defendant's "[l]imited ability to understand English may render a waiver of rights defective.") (citing United States v. Short, 790 F.2d 464, 469 (6th Cir. 1986)); United States v. Montreal, 602 F. Supp. 2d 719, 723–24 (E.D. Va. 2008) (finding that the defendant with "no understanding of the English language" did not waive her Fifth Amendment rights when she signed a statement without knowing what she was signing).

for facility security and should not extend to or otherwise justify any sharing of the monitored communication with prosecutorial authorities. To establish these borders, a statement on the record by counsel is prudent if not essential.

C. LIMITING TITLE III'S "LAW ENFORCEMENT" EXCEPTION AND FOURTH AMENDMENT JAIL PRECEDENTS TO USE FOR FACILITY SECURITY

Courts frequently justify the interception of pretrial detainees' communications and their subsequent use against the pretrial detainees by invoking the Wiretap Act's "law enforcement" exception. 18 U.S.C. § 2510(5)(a) excludes from the Wiretap Act's definition of prohibited interception "equipment . . . being used . . . by an investigative or law enforcement officer in the ordinary course of his duties."[176] An "investigative or law enforcement officer" is "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses."[177] The predicate offenses are enumerated and defined in 18 U.S.C. § 2516.

On the face of the "investigative and law enforcement officer" definition, a prison guard presumably does not have the power to make arrests or to investigate generally.[178] Courts, however, have found virtually universally that the "law enforcement" exception applies when a facility eavesdrops on inmate calls. Those cases unintentionally demonstrate the circularity of the expectations rationale. For example, in *United States v. Hammond*, the Fourth Circuit found that the "law enforcement" exception applied when the Federal Bureau of Prisons "act[ed] pursuant to its well-known policies in the ordinary course of its duties in tap[p]ing the calls."[179] In short, the detainee's Fourth Amendment right was curtailed because a practice is "well-known" and "in the ordinary course." We are not aware of

---

[176] 18 U.S.C. § 2510(5)(a); *see also* United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002) (explaining the law enforcement exception).

[177] 18 U.S.C. § 2510(7) (citation removed). Both federal and state government attorneys may participate in the prosecution of the offenses. *See* 18 U.S.C. §§ 2516(2)–(3).

[178] *See, e.g.*, Thorn-Freeman v. Valdez, No. 20-448 JAP/GJF, 2020 U.S. Dist. LEXIS 163054, at *38 (D.N.M. Sept. 4, 2020) ("New Mexico courts do not consider prison guards and other state corrections officers to be 'law enforcement officers' under the NMTCA.") (citing Callaway v. N.M. Dep't of Corr., 875 P.2d 393, 393 (N.M. Ct. App. 1944); United States v. Cheely, 814 F. Supp. 1430, 1440 n.8 (D. Alaska 1992) (An Alaskan prison guard does not have authority greater than that of a citizen to arrest for a felony or to investigate except as to inmates); Spore v. Gibbons, No. 93 C 1577, 1995 U.S. Dist. LEXIS 15700, at *8 (N.D. Ill. Oct. 17, 1995) (In Illinois, "jail guards have no general powers to arrest or maintain order" outside the jail.) (internal quotation mark omitted) (quoting Arrington v. City of Chicago, 259 N.E.2d 22, 24 (Ill. 1970)).

[179] *Hammond*, 286 F.3d at 192.

any case permitting infringement on a person's Fourth Amendment rights in a non-jail setting on such a basis.[180]

Assuming for the sake of argument that a jail official or guard is an "investigative or law enforcement officer," they appear to act outside "the ordinary course of [their] duties" by sharing intercepted communications with prosecutors concerning the detainee's past conduct unrelated to jail security because the official's core function is to maintain jail security. When the sharing is at the request of a prosecutor or investigator of the detainee's charged conduct, that conduct is further afield from jail administration. When jail personnel use the intercepted call to assist investigators or prosecutors, they are no longer acting in the ordinary course of prison administration, which does not ordinarily include the facilitation of prosecutions.[181] A further disconnect is the fact that generally, federal pretrial detainees are not incarcerated in a federal facility, but rather more often in a local jail in the county or other political subdivision in which the court is located. Investigation of federal offenses already indicted is not within the state statute or other description of jail officials' duties.[182]

When applied to assist in an investigation or prosecution, the "exception" that permits monitoring and recording of detainees' communications for facility security swallows the rule that a search warrant is required to investigate an alleged crime. Given the principles underlying the Fourth Amendment, courts often recognize that the Wiretap Act's exceptions for a particular purpose should be limited to that purpose.[183] The results in these cases trace to the simple propositions that "[w]hen the aim of a search is to uncover evidence of a crime, the Fourth Amendment generally requires police to obtain a warrant,"[184] and that the government must meet a "heavy burden" to justify a warrantless search for purposes of investigating a crime.[185]

When addressing a challenge to a jail security officer's disclosure of a recorded call to investigators who secured the defendant's arrest on suspicion of robbery, the First Circuit in *United States v. Lewis* held that "a recording made pursuant to a routine prison practice of monitoring all

---

[180] *See* Strossen, *supra* note 33, at 1200–02.

[181] *Federal Bureau of Prisons*, U.S. DEP'T OF JUST., https://www.justice.gov/doj/federal-bureau-prisons [https://perma.cc/HVT3-P6LN] (enumerating the major functions of the Federal Bureau of Prisons).

[182] *See, e.g.*, *Ex parte* Dixon, 55 So. 3d 1171, 1176–78 (Ala. 2010) (analyzing a jailer's duties under the state statute for peace officers).

[183] *See, e.g.*, Amati v. City of Woodstock, 176 F.3d 952, 955 (7th Cir. 1999); United States v. Green, 842 F. Supp. 68, 73–74 (W.D.N.Y. 1994); Walden v. City of Providence, 495 F. Supp. 2d 245, 264–65 (D.R.I. 2007).

[184] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2543 (2019) (Sotomayor, J., dissenting) (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)).

[185] Welsh v. Wisconsin, 466 U.S. 740, 742 (1984) (explaining the urgent need exception).

outgoing inmate calls under a documented policy of which inmates are informed does not constitute an interception for Title III purposes."[186] "In other words, the acquisition of the contents of a communication by an investigative or law enforcement officer in the ordinary course of his duties is not an interception for Title III purposes."[187] In reaching its holding, however, the First Circuit emphasized the fact "[t]hat an individual is an investigative or law enforcement officer does not mean that all investigative activity is in the ordinary course of his duties."[188]

The First Circuit in *Lewis* distinguished the case from one in which "prison officials allowed an inmate to place a call specifically because they hoped to catch him making incriminating statements."[189] This illustrates the conflict that arises from 18 U.S.C. § 2015(5)(a) (and as a corollary, the jail security rationale): it proves too much, which the First Circuit recognized: "Investigation is within the ordinary course of law enforcement, so if 'ordinary' were read literally warrants would rarely if ever be required for electronic eavesdropping, which was surely not Congress's intent."[190] The First Circuit opined "[t]hat an individual is an investigative or law enforcement officer does not mean that all investigative activity is in the ordinary course of his duties. Indeed, the premise of Title III is that there is nothing ordinary about the use of a device to capture communications for investigative purposes."[191] The First Circuit in *Lewis* solved the conflict by adding a significant gloss to "ordinary course":

> Since the purpose of [Title III] was primarily to regulate the use of wiretapping and other electronic surveillance for investigatory purposes, 'ordinary' should not be read so broadly; it is more reasonably interpreted to refer to routine noninvestigative [sic] recording of telephone conversations.[192]

The trap in this reasoning is, of course, that once captured by the "ordinary," "non-investigative" wiretap, information can be shared with prosecutors for the purpose of prosecution under the Wiretap Act.

---

[186] United States v. Lewis, 406 F.3d 11, 19 (1st Cir. 2005).
[187] *Id.* at 16 (citing Smith v. U.S. Dep't of Just., 251 F.3d 1047, 1049 (D.C. Cir. 2001); United States v. Van Poyck, 77 F.3d 285, 292 (9th Cir. 1996); United States v. Feekes, 879 F.2d 1562, 1565–66 (7th Cir. 1989); United States v. Paul, 614 F.2d 115, 117 (6th Cir. 1980)).
[188] *Lewis*, 406 F.3d at 18.
[189] *Id.* (citing Campiti v. Walonis, 611 F.2d 387, 390, 392 (1st Cir. 1979)).
[190] *Lewis*, 406 F.3d at 18–19 (quoting Amati v. City of Woodstock, 176 F.3d 952, 955 (7th Cir. 1999)).
[191] *Id.* at 18.
[192] *Id.* at 18–19 (quoting *Amati*, 176 F.3d at 955).

District courts have found that the "law enforcement" exception does not apply merely because the person is detained. For example, in *United States v. Green*, a recording of an inmate's telephone calls fell outside a correctional facility's "ordinary course of business" when government investigators monitored and recorded the inmate's calls "as part of a criminal investigation which was clearly separate from the functions of the facility."[193] The court emphasized "the focus on the calls of one particular prisoner, the extraordinarily long time period in which the taping continued, and the large volume of tapes sent out to other investigative agencies."[194] Thus, the "law enforcement" exception did not apply, even though the facility had a policy of monitoring detainees' calls. The government's purpose became the litmus test for "the ordinary course."

A detention facility may have a universal policy of recording, listening to, transcribing, and presumably, making use of all detainees' telephone calls or visitation conversations in investigations and prosecutions as a matter of the ordinary course of business. To the extent the government's basis for doing so falls outside the limited scope of ensuring the "safety and security" of the jail or prison and seeks to further "a criminal investigation which [is] clearly separate from the functions of the facility,"[195] these practices cannot reconcile with either Title III or the Fourth Amendment.[196] The Seventh Circuit in *Amati v. City of Woodstock*, for example, interpreted "ordinary" to mean "routine non[-]investigative recording of telephone conversations."[197] Thus, the court differentiated "between routine non[-]investigative uses of electronic eavesdropping and its use either as a tool of investigation (which requires a warrant) or as a device for intimidation, suppression of criticism, blackmail, embarrassment, or other improper purposes."[198]

Some courts surmised the purpose of the law enforcement exception: "Congress most likely carved out an exception for law enforcement officials to make clear that the routine and almost universal recording of phone lines by police departments and prisons, as well as other

---

[193] United States v. Green, 842 F. Supp. 68, 73–74 (W.D.N.Y. 1994).
[194] *Id.*
[195] *Id.* at 74.
[196] *See, e.g.*, United States v. Correa, 220 F. Supp. 2d 61, 64 (D. Mass. 2002); Walter v. United States, 447 U.S. 649, 656 (1980) ("When an official search is properly authorized[—]whether by consent or by the issuance of a valid warrant[—]the scope of the search is limited by the terms of its authorization.").
[197] *Amati*, 176 F.3d at 955.
[198] *Id.* at 956 (noting that since the record established that the jail in question gave notice to inmates of its practice of recording all calls, the court did not have to address the issue of whether notice of the recording was required for the exception to apply).

law enforcement institutions, is exempt from the statute."[199] However, apparently in part in acknowledgement of the practice of police departments and prisons, these courts require that in addition to the practice being in the ordinary course and routine, notice of the interception must be given in order for the law enforcement exception to apply.[200] The function of notice is a subject of debate. To the extent courts perceive the continuation of a call or other communication after the detainee has been notified as suggesting the detainee's implied consent to the monitoring, the reality of the fiction of that consent should be confronted.

D. Derivative Use and Title III Section

To justify sharing intercepted communications from jail, the government's first stops are 18 U.S.C. §§ 2517(1)–(3), in particular 18 U.S.C. § 2517(1) ("section 2517(1)"). Section 2517(1) authorizes the "investigative or law enforcement officer" to share intercepted communications with another "investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure."[201] Section 2517(2) authorizes the "investigative or law enforcement officer" who "obtained" an intercepted communication from another "investigative or law enforcement" to use the communication or any evidence derived from it "to the extent such use is appropriate to the proper performance of his official duties."[202] Section 2517(3) permits any person who lawfully receives intercepted communications to "disclose the contents of that communication or such derivative evidence while giving testimony" in a case.[203] Typically, courts interpret section 2517 broadly to allow jails to share intercepted communications with government investigators and prosecutors.

Critically, a jail's power to share a pretrial detainee's intercepted communications with the government has statutory and constitutional limitations. The limitations in sections 2517(1)–(2) on disclosure to another investigative or law enforcement officer and use only to the extent the disclosure is "appropriate to the proper performance of the official duties"

---

[199] United States v. Houston, No. 1:13-cr-37-HSM-WBC, 2015 U.S. Dist. LEXIS 30428, at *25 (E. D. Tenn. Feb.18, 2015) (internal quotation mark omitted) (quoting Adams v. City of Battle Creek, 250 F.3d 980, 984 (6th Cir. 2001)).

[200] *See Houston*, 2015 U.S. Dist. LEXIS 30428, at *25 ("'Ordinary course of business' is not defined in the statute, but it generally requires that the use be (1) for a legitimate business purpose, (2) routine and (3) *with notice*.") (quoting *Adams*, 250 F.3d at 984).

[201] 18 U.S.C. § 2517(1).

[202] *Id.* § 2517(2).

[203] *Id.* § 2517(3).

of the officers making, receiving, or using the intercept[204] are, at least theoretically, a means to limit sharing to facilitate the prosecution of a pretrial detainee when a warrant would otherwise be required to monitor calls (again, one can contrast the Fourth Amendment requirements for an indicted person with those for one who is not detained). Sharing, receiving, or using intercepted communications in a way that infringes on a pretrial detainee's Fourth, Fifth, Sixth, and First Amendment rights would not be "appropriate to the proper performance" of the jail personnel's duties or the prosecutor's duties. Further, Fourth Amendment restrictions should supersede any authorization found in Title III.

Unsurprisingly, the limited current case law is contrary. Courts construe broadly the circumstances in which an officer's sharing of intercepted communications is "appropriate to the proper performance" of their official duties.[205] Those essential words, "appropriate to the proper performance," should have real meaning as a limitation on the sharing of intercepted communications in light of the purpose of Title III, which is to protect against unconstitutional wiretaps. First, an argument can reasonably be made that absent a current or imminent threat to facility security that should be investigated, it is outside the proper performance of a detention facility's official's duties to share an intercepted communication with another government official prosecuting the detainee, when that intercepted communication includes information about defense strategy, communications with a prospective witness in support of the defense of the case, strategy communications regarding the defense, or even information that might support the prosecution, when a warrant is not obtained.

Second, it is arguably outside the "appropriate performance" of an investigating or prosecuting official's duties to use a shared intercept obtained without a warrant for an investigative purpose that would otherwise require a warrant. Requiring that a warrant be obtained is both reasonable and just when a detainee's Fourth, Fifth or Sixth Amendment rights are infringed by the intercept.[206] Outside the jail context, a warrant is required regardless of the intent of the prosecuting officials, and whether a warrant is required in the pretrial detention context should not depend on

---

[204] *Id.* § 2517(1).

[205] *See* State v. Jackson, 214 A.3d 211, 220 (N.J. Super. Ct. App. Div. 2019), *aff'd*, 230 A.3d 216 (N.J. 2020) ("The jail authorities were in the proper performance of their official duties when they recorded the calls, and the Prosecutor's Office was properly performing its official duties by conducting the investigation."); United States v. O'Connell, 841 F.2d 1408, 1417 (8th Cir. 1988) ("The disclosures to the secretaries and intelligence analyst were probably valid under section 2517(2).").

[206] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) ("Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant.") (citing Skinner v. Ry. Lab. Execs. Ass'n, 489 U.S. 602, 619 (1989)).

the prosecuting official's intent. Indeed, the Department of Justice's policy and analysis have recognized that there may be a limit on the sharing of intercepts that occur outside the ordinary course of a jail's practices for the purposes of facilitating a prosecution.[207]

Similarly, when section 2517(2) authorizes an investigative or law enforcement officer to "use such contents [of the intercepted communication] to the extent such use is appropriate in the proper performance of his official duties," one cannot articulate a constitutionally meaningful distinction between section 2517(1) and section 2517(2) on the on the issue of whether sharing or receiving of intercepted communications is "appropriate to the proper performance of the official duties." The jail official's "use" of an intercept obtained for jail security in order to facilitate a prosecution unrelated to jail security does not appear to be within the jail official's ordinary function.[208] This "ordinary function" test should be strictly construed when the "use" imposes on the detainee's Fifth and Sixth Amendment right to facilitate their defense.

While it is clear that, under the Wiretap Act, Congress intended to be broad in the scope of the license given to investigative or law enforcement officers, neither the history of the Wiretap Act—which was motivated most directly by Congress' frustration and the courts' unwillingness to restrict wiretaps—nor the text of the statute support the use of intercepted communications for any purpose that would result in the interference with a detainee's Fourth, Fifth, Sixth, or even First Amendment rights. One can reasonably read sections 2517(1) and 2517(2) to limit the use of a detainee's intercepted communications to the purpose of maintaining facility security, which is at the core of a jail official's "official duties" to the extent the jail official is an investigative or law enforcement officer.[209]

When reading cases in which courts approach these issues, it is difficult to find clear analyses or precisely-articulated questions, which both hinder and facilitate these debates.[210] To protect the rights of pretrial

---

[207] *See* Shiffrin Memo, *supra* note 1.

[208] *See* City of South Bend v. South Bend Common Council, No. 3:12-CV-475 JVB, 2015 U.S. Dist. LEXIS 192682, at *8–9 (N.D. Ind. Jan. 14, 2015) (The law enforcement exception of Title III did not apply when the police chief continued recording an officer's phone line after learning that the phone line was mistakenly recorded. Using the recordings as a "tool to gather evidence on certain people and their conversations" was not a part of the police department's ordinary practice); *see also* United States v. Correa, 220 F. Supp. 2d 61, 67 (D. Mass. 2002); United States v. Conley, No. 07-04-P-H, 2007 U.S. Dist. LEXIS 26753, at *7 (D. Me. Apr. 9, 2007); *see also generally* United States v. Acklin, 72 Fed. Appx. 26 (4th Cir. 2003).

[209] 18 U.S.C. § 2517(1)–(2).

[210] For those cases in which relatively few communications are identified as potentially relevant to a prosecution, the practical implementation of whether a communication can or should be

detainees in this context, cases must be brought after defense counsel makes a record of objecting to the recording and sharing of pretrial detainees' communications.

IV. CONCLUSION

Monitoring pretrial detainees' communications is a thorny practice for the defense counsel of pretrial detainees and for advocates of First, Fourth, Fifth and Sixth Amendment rights. However, when balancing constitutional interests against the reality of the current jurisprudence, the derivative use of intercepted jail communications, particularly in aid of the prosecution of a detainee for any past crimes or a crime not related to facility security, should not outweigh the detainee's Fourth, Fifth, and Sixth Amendment protections.

The rationale adopted by courts that given historical law enforcement practices, a detainee's deemed express or implied consent to monitoring, and statutory permissions found in the Wiretap Act that no detainee can have any reasonable expectation of privacy for their communications, is fundamentally flawed and relies on principles and doctrines that courts reject in other contexts. Challenging the current legal landscape will require defense counsel and others to engage in wholistic strategies to prevent the derivative disclosure and use of such communications. For example, an assertion of objections, when uniformly asserted at the outset of detention, including an objection that any deemed consent is coerced and founded on a false premise that the government has a right to preclude a detainee from communicating absent consent to monitoring, is a foundational first step. Further, it requires an objection to derivative use on the grounds that balancing a detainee's constitutional interests against those of law enforcement to prosecute crimes must be decided in favor of the detained to forbid the use of intercepted communications beyond ensuring facility security. Most critically, it requires a repeated assertion that the interception, monitoring and recording of communications for facility security cannot open the door to any use that is not strictly bound by the necessities of facility security. This can be achieved through a combination of a stricter reading of the Wiretap Act, a recognition that the protection of a pretrial detainee's right to communicate without governmental interception and use continues to be a work in progress, and a more sophisticated analysis of the detainees' rights and the

---

turned over to prosecutors because it evidences a future criminal act should require an additional level of review to determine whether the information is, in fact, disclosable with notice to defense counsel and an opportunity to be heard. Providing such notice and opportunity would not be a significant burden when identifying communications that are "candidates" for disclosure to a prosecution.

constitutional costs to a regime under which limitation of constitutional rights for one selective purpose gives rise to an unrestricted license to use confidential communications for any purposes.