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Ethics in Criminal Advocacy
30 April 2021

Anything They Say: Will Be Used Against Them

Legal and Ethical Issues with Restricting Pretrial Detainees' *Miranda* and Other Rights

Everyone knows this familiar phrase: "Anything you say can and will be used against you in a court of law," popularized in part by Mariska Hargitay, Christopher Meloni, Ice-T, and Richard Belzer in Law & Order: SVU. Though generations of law students have been inspired by the show since 1999, criminal law has been supported by the notion of Miranda rights since 1966. Miranda rights are treated as constitutional rights, in part because they help uphold use of the Fifth and Sixth Amendments. Arrestees are read their Miranda rights upon arrest. Yet pretrial detainees, who have not been legally proven guilty, are not guaranteed these rights. In fact, anything they say will be used against them.

This paper discusses pretrial detention and the concept that the rights of pretrial detainees may be greater than those of inmates. The privatization of phone services and protection of constitutional rights during pretrial detention cannot coincide, and therefore do not guarantee pretrial detainees' access to their rights. First, phone calls are expensive, and the burden falls on the pretrial detainees and their families to pay the costs. This blocks lower-income persons from accessing their right to communication. Second, the procedure to obtain an unmonitored line for attorney-client calls is vague and difficult, effectively blocking pretrial detainees' access to counsel. In addition, the unclear District Attorney's office procedures for obtaining recorded calls from prisons allows prosecutors to essentially curb pretrial detainees' constitutional rights. These prosecutors are evading Model Rule of Professional Conduct 8.4, which prohibits lawyers from engaging in conduct prejudicial to the administration of justice.

This paper argues that pretrial detainees are prevented from accessing their Miranda rights because they may not have the capacity to understand those rights, as well as a lack of effective notice. Signs and sentences in Handbooks are not enough to put a person on notice that their constitutional rights may be curbed, especially if those "notices" are inconsistent with each

other. Although there are arguments against guaranteeing pretrial detainees broader constitutional rights under the First and Fourth Amendments, protection of individual rights outweighs curbing those rights because of perceived concerns for public safety. In addition, international law mandates the protection of and emphasizes humanitarian arguments for preserving individuals' rights.

This paper argues for multiple solutions to this issue. One solution is using consistent, plain English and providing translations in every language for all forms of notice. Another is to give Miranda warnings and notify the callers that they may be recorded on general phone lines before calls begin. A separate, unrecorded line should be provided only for attorney-client and other confidential calls. A third is to clear up the procedures for attorney-client calls and procedures for prisons turning over any recorded calls to the District Attorney's office. Implementation of these solutions will begin to fix the broken system of justice that pretrial detainees are wrongfully subjected to.

I. Introduction

Pretrial detainees' *Miranda* rights and their right to communicate with the outside world are being violated.¹ Detainees are only given notice of recording in a legalese handbook and on signs pasted to the detention center walls near the telephones. It is unethical to assume that detainees will read and understand the handbook. The lack of *Miranda* warnings on the signs is unethical because they are only told that their conversations will be recorded, not that the recordings will be used for any specific purpose or that the recorded conversations can be used against them. Additionally, it is unethical to use those recordings even if the private telephone companies turn them over to the District Attorney's office. Each group involved should be held to the same standard because they are on the same side of the adversarial justice system.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

It is unethical for pretrial detainees' conversations to be recorded without proper notice that these recordings can be used against them. If private telephone companies can turn over the call recordings for use by prosecutors in court, it should be made abundantly clear to the detainees that the call recordings do not belong to them.

The following paper discusses the rights of pretrial detainees to phone calls under *Miranda v. Arizona*.² Part II explains the relevant law and standards from the Constitution as applied to *Miranda* and pretrial detention. Part III explains the history of phone call privatization, the Inmate Telephone System, phone call expenses, and phone call procedure. Part IV explains the call recording turn-over process, a relevant case, and new prosecutorial obligations. Part V discusses the attorney-client privilege in pretrial detention and the right to effective assistance of counsel. Part VI argues that the current recording notice is insufficient under *Miranda*. Part VII discusses counterarguments. Part VIII discusses a humanitarian perspective on ensuring pretrial detainees' *Miranda* rights. Part IX discusses potential solutions to the current violations of pretrial detainees' *Miranda* rights. To start a more ethical journey, the current federal and New York systems should be required to clarify their current turn-over process, explain the process to the detainees, and keep detainees informed of their *Miranda* rights.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

II. Relevant Law/Standards

A. Constitutional Rights Upon Arrest

When a person is accused of wrongdoing, they will be arrested and charged with the alleged crime. “The charge must tell the time, date and place that the criminal act allegedly took place, the alleged involvement of the accused, and the details of the crime itself.”³ When an accused person is arrested, they must be read their “*Miranda*” rights. These rights, or “*Miranda* warnings”, came about because of the 1966 case of *Miranda v. Arizona*, which involved an analysis of rights from the Fifth and Sixth Amendments.⁴

The Fifth Amendment safeguards the privilege against self-incrimination and due process of law in “any proceeding that denies a citizen ‘life, liberty or property.’”⁵ The Sixth Amendment includes guarantees of the right to counsel and the “right to know who your accusers are and the nature of the charges and evidence against you.”⁶ The Supreme Court has also held that the Sixth Amendment must apply to “‘indirect and surreptitious [undercover] interrogations as well as those conducted in the jailhouse’” to have any force.⁷

The question before the Supreme Court in *Miranda* was whether the Fifth Amendment’s protection against self-incrimination extended to the police interrogation of a suspect and the law of confessions.⁸ The Fifth Amendment requires law enforcement to advise suspects of their right

³ *How Courts Work*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bringingcharge/.

⁴ *Miranda Warning*, Legal Info. Inst., https://www.law.cornell.edu/wex/miranda_warning (Mar. 25, 2021). *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵ *Fifth Amendment*, Legal Info. Inst., https://www.law.cornell.edu/constitution/fifth_amendment (Mar. 25, 2021).

⁶ *Sixth Amendment*, Legal Info. Inst., https://www.law.cornell.edu/constitution/sixth_amendment (Mar. 25, 2021).

⁷ Colum. Hum. Rts. L. Rev., *A Jailhouse Lawyer’s Manual*, ch. 34, 1047 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/46.-Ch.-34.pdf>; *see also* *Massiah v. U.S.*, 377 U.S. 201 (1964).

⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

to remain silent and their right to obtain an attorney during interrogations while in police custody.⁹ The Court reasoned that procedural safeguards were required to protect the privilege.¹⁰

The holding in the case led to today's *Miranda* warning, which may sound something like the following:

- (1) You have the right to remain silent.
- (2) Anything you say can and will be used against you in a court of law.
- (3) You have the right to an attorney.
- (4) If you cannot afford an attorney, one will be appointed for you free of charge.

Do you understand each of these rights I have read to you? Having these rights in mind, do you wish to speak to me?

Some jurisdictions will add on a clarifying statement, so that the suspect who has invoked the right to counsel knows no further questions will be asked unless and until the lawyer is present.¹¹

These rights are to be read by the police to any person who has been taken into custody for a formal interrogation or who has been placed under arrest.¹²

⁹ *Id.*

¹⁰ *Id.*

¹¹ Richard A. Leo, *The Impact of Miranda Revisited*, 86 *J. Crim. L. and Criminology* 621, 628 (1996), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6874&context=jclc>; see Fred E. Inbau et al., *Criminal Interrogations and Confessions* 232 (3d ed. 1986).

¹² *Miranda Rights*, JUSTIA, <https://www.justia.com/criminal/procedure/miranda-rights/> (last updated Apr. 2018). Voluntarily speaking to the police creates a less clear timeline of when the rights are supposed to be read to the person. It should be noted that a quick Google search would suffice to give a proper source to answer this question. However, many of the Google search results for “When are *Miranda* rights read to suspect” led to many websites advertising for attorneys alongside substantive information, some of which did not actually answer the question directly but just re-stated what the rights were without giving the bright-line rule for when they are to be read.

The Court also held that “[e]vidence obtained as a result of interrogation was not to be used against a defendant at trial unless the prosecution demonstrated the warnings were given, and knowingly and intelligently waived.”¹³

B. Pretrial Detention

1. Overview

After an arrestee is processed, they are entitled to a “detention hearing” in which they first appear before a judge.¹⁴ During the hearing, the judge will set bail, which is usually a monetary payment or a bond (a debt promised to the court).¹⁵ The hearing judge focuses on (1) the likelihood that the person will appear for trial, and (2) whether the person will pose a significant threat to the community’s safety if they are released.¹⁶ The default rule is either bail or release on your own “recognizance.”¹⁷ Pretrial detention is used by courts to ensure that arrested persons will not flee for the purpose of evading prosecution.¹⁸ If the judge finds no condition or combination of conditions will satisfy the two factors, the judge must order detention before trial.¹⁹ But some detainees with access to bail nevertheless cannot meet the bail amount set by the judge. So, they remain in pretrial detention, even though they have not been convicted of any crime yet.

¹³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁴ Colum. Hum. Rts. L. Rev., A Jailhouse Lawyer’s Manual, ch. 34, 1049 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/46.-Ch.-34.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1048.

¹⁹ *Id.*

2. Rights in Pretrial Detention

Persons in pretrial detention have not been proven legally guilty yet, so although they are in prison facilities, they retain constitutional rights.²⁰ These rights include freedom of religion and speech under the First and Fourteenth Amendments, the right to be free from unreasonable searches and seizures under the Fourth Amendment, the right to not be discriminated against on the basis of race under the Equal Protection Clause of the Fourteenth Amendment, and the right to communicate with the outside world.²¹ Even though the law is unclear on whether the Fourteenth and Fifth Amendments give pretrial detainees a higher level of constitutional protection than convicted prisoners, the Supreme Court has held that pretrial detainees have at least the same constitutional rights as convicted prisoners.²²

Some courts have found that pretrial detainees may enjoy greater rights than convicted prisoners.²³ Under *Bell v. Wolfish*, pretrial detainees retain the clear right to not be punished without the due process of law.²⁴ In other words, pretrial detainees cannot be punished for the crime they were arrested for, called the “underlying crime.”²⁵ Punishing pretrial detainees who have not been convicted of a crime would violate the Due Process Clauses of the United States Constitution.²⁶ The Due Process Clause of the Fifth Amendment protects pretrial detainees in

²⁰ *People v. Johnson*, 51 N.E.3d 545 (N.Y. 2016). The court ruled that, because defendant failed to identify a statutory right violated by the Department of Correction as a threshold matter, suppression of the recording excerpts could not be warranted.

²¹ Colum. Hum. Rts. L. Rev., *A Jailhouse Lawyer’s Manual*, ch. 19, 643 (12th ed. 2021), <http://jlm.law.columbia.edu/files/2021/02/26.-Chapter-19.pdf>; *see also* Colum. Hum. Rts. L. Rev., *A Jailhouse Lawyer’s Manual*, ch. 34, 1060 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/46.-Ch.-34.pdf>.

²² The Fourteenth Amendment addresses citizenship and its rights and guarantees “equal protection of the laws.”

²³ U.S. Const. amend. XIV. *See also* Colum. Hum. Rts. L. Rev., *A Jailhouse Lawyer’s Manual*, ch. 34, 1059 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/46.-Ch.-34.pdf>.

²⁴ Colum. Hum. Rts. L. Rev., *A Jailhouse Lawyer’s Manual*, ch. 34, 1060 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/46.-Ch.-34.pdf>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

federal facilities, while the Due Process Clause of the Fourteenth Amendment protects pretrial detainees in state facilities.²⁷

There is a difference between discipline and punishment, but there is little guidance on how to distinguish the two.²⁸ If a pretrial detainee commits an infraction, or breaks prison rules, they will be disciplined.²⁹ Pretrial detainees can be placed in administrative detention or isolation, have privileges removed, and be held in handcuffs or other restraining devices.³⁰ However, because pretrial detainees are not yet legally guilty, they are entitled to procedural protections when discipline occurs or additional restraints are imposed.³¹ So, when officials subject pretrial detainees to additional restraints, they must follow certain procedures consistent with the due process of law.³²

Pretrial detainees have at least the same rights under these respective Due Process Clauses as convicted prisoners do under the Eighth Amendment.³³ Convicted prisoners often contest prison conditions as violating the Eighth Amendment's prohibition on "cruel and unusual punishment."³⁴ So, pretrial detainees may use cases involving Eighth Amendment violations when arguing that their rights were violated.³⁵ The reasoning is that the pretrial detainee's Fifth or Fourteenth Amendment rights were violated because what happened was bad enough that if they were a convicted prisoner, their Eighth Amendment rights would have been violated.³⁶

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Colum. Hum. Rts. L. Rev., A Jailhouse Lawyer's Manual, ch. 34, 1060 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/46.-Ch.-34.pdf>; see also Petition for Writ of Certiorari at 2, *Taylor v.*

Pretrial detainees may also have a greater right of access to counsel under the Sixth Amendment than convicted prisoners.³⁷ This right includes the right to meet and communicate with their attorney during pretrial detention.³⁸ If the conditions of the pretrial detention interfere with the detainee's ability to meet with or communicate in private with their attorney to discuss their case, then the detainee's right to counsel may be violated.³⁹ Interference with this right includes regulations and conditions limiting detainees' telephone conversations with attorneys, inadequate privacy during such telephone conversations, inadequate or inadequately private space in which to meet with their attorneys, and prison regulations that create substantial and unpredictable delays when your attorneys come to meet with you.⁴⁰

Riojas, 141 S. Ct. 52 (U.S. 2020) (No. 19-1261). (The case facts indicate that there was a clear Eighth Amendment violation, but because there was no precedent for the exact violation, the court upheld the corrections officers' qualified immunity.)

³⁷ Colum. Hum. Rts. L. Rev., A Jailhouse Lawyer's Manual, ch. 34, 1044 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/46.-Ch.-34.pdf>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ “[U]nder [*Lewis v. Casey*, 518 U.S. 343, 349 (1996)], if you claim that your right of access to the courts has been interfered with, you must show that the denial of this right has caused ‘actual injury’ to your case. But, in [*Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001)], the Second Circuit said that the right of access to the courts is different from the right to counsel for pre-trial detainees. The Second Circuit said that, if you assert that there were barriers to accessing your counsel, in violation of the Sixth Amendment, then you do not need to show that your case was actually harmed by these barriers.” The rights of convicted prisoners with respect to attorney access are less strictly guaranteed because they have been found legally guilty. It is unclear whether pretrial detainees have a right to higher standards than those of convicted prisoners for (1) food and housing, (2) medical care, and (3) protection from assault. Colum. Hum. Rts. L. Rev., A Jailhouse Lawyer's Manual, ch. 34, 1069-1070 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/46.-Ch.-34.pdf>.

III. History of Prison Phone System Privatization

Until the early 1970s, inmates were limited to one collect call placed on staff telephones every three months, after filing written requests to use the telephone and receiving approval.⁴¹ In the mid-1970s, a new BOP program statement directed its institutions to establish a telephone access program, to provide inmates *at least* one call every three months, and to establish call monitoring procedures to preserve internal prison security.⁴² Afterwards, the BOP installed pay telephones in most of its institutions, and by 1976 most of the inmates in BOP institutions could place their own collect calls instead of relying on staff.⁴³ When the pay telephones were first installed, there were no restrictions on the number of calls inmates could make.⁴⁴ The calls were “generally listened to on a ‘sampling’ basis by correctional officers at each institution if time permitted.”⁴⁵ Sometimes, “specific calls of concern” were recorded on “primitive” recording equipment.⁴⁶

The use of the pay telephone system was abused by inmates and subsequently restricted.⁴⁷ Abuses of the system included nuisance, fraudulent calls, arranging of murder contracts, and threatening calls to judges and other government officials.⁴⁸ In the 1980s, the

⁴¹ The Federal Bureau of Prisons (BOP) claims that inmates’ access to telephones “furthers important objectives such as maintaining family and community ties” as well as personal development of the inmates. Off. of. Inspector Gen., CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS’ MANAGEMENT OF INMATE TELEPHONE PRIVILEGES (1999). The BOP further claims that telephone access facilitates societal reintegration of inmates upon release and reduces recidivism. In any case, it seems that these aims are set aside in favor of profit. Off. of. Inspector Gen., CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS’ MANAGEMENT OF INMATE TELEPHONE PRIVILEGES (1999).

⁴² Off. of. Inspector Gen., CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS’ MANAGEMENT OF INMATE TELEPHONE PRIVILEGES (1999).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

BOP installed monitoring equipment in all its institutions so that personnel could listen to calls in real time.⁴⁹ A BOP task force evaluated the telephone use program and issued a report with a recommended “four-pronged strategy” to prevent inmate telephone abuse.⁵⁰ The strategy was written as follows:

1. Increase the recording and monitoring of telephone calls, including assigning a full-time telephone monitor in larger institutions and prohibiting calls that are not in English unless authorized by staff;
2. Restrict access to telephones, including limiting the number of telephones available and their hours of use, establishing supervised telephone rooms, and making telephones inoperative unless under the direct supervision of a telephone monitor or other designated staff;
3. Reduce the frequency of calls to one ten-minute collect call every two weeks; and
4. Increase disciplinary sanctions for telephone abuse from a “low moderate” violation to a “high” violation, resulting in more serious disciplinary measures for telephone abuse.⁵¹

The BOP rejected the first prong of the strategy because it required too much staff and increased inmate movement within institutions, and it rejected the second prong of the strategy because the frequency of the calls was not at issue.⁵² However, the BOP did install monitoring technology to record all non-attorney phone calls, and some calls were monitored by live staff at “fixed posts,” such as correctional officers located in remote monitoring locations.⁵³

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

In 1988, the federal prison system developed the Inmate Telephone System (ITS), which permits only direct-dial calling.⁵⁴ The system uses a computer, telephone switch, hardware, and software that controls and records data of the telephone calls.⁵⁵ Another reason ITS was developed was to shift the burden of payment for inmate calls as per the BOP management's change in philosophy.⁵⁶ The original collect call-only system placed the financial burden of the call on the receiving party.⁵⁷ The BOP decided that the ITS would do away with collect calling to emphasize inmates' financial responsibility and reduce the burden on inmates' families caused by the collect calls.⁵⁸ Each inmate has a "phone access code" (PAC) which, in theory, permits staff to identify which inmate made the calls and how many without visually seeing the call.⁵⁹ The ITS software allows the BOP to "debit inmates' commissary accounts for the cost of their calls."⁶⁰

At the time, inmates were charged between 15 and 31 cents per minute for calls within the continental United States, depending on the call distance.⁶¹ Inmates were charged a flat 50-cent fee for local calls, without regard to the call length.⁶² The first minute of an international call cost between 18 cents and \$7.06 for the first minute, then additional minutes were priced at a slightly lower rate.⁶³ If the balance in an inmate's commissary account was insufficient to pay for a three-minute telephone call, the ITS would not allow the call to go through.⁶⁴ The ITS

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* Additionally, ITS is compatible with a software called AIMS, which is used to search and analyze records of inmate calls.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

brought a net income of about \$71.5 million between October 1991 to June 1998, which was placed into the Inmate Trust Fund.⁶⁵ This fund is only used by the BOP to “pay for services or activities that benefit the inmate population as a whole.”⁶⁶

The original ITS was never fully implemented because a class action lawsuit, claiming that it violated all inmates’ right to free speech under the First Amendment by limiting their ability to communicate with family and friends, was filed on behalf of all federal inmates.⁶⁷ The settlement from this case led to three types of telephone systems in use at BOP institutions.⁶⁸ The first type had unlimited collect calling, where ITS was not installed; the second type had debit calling, where ITS was installed; and the third type had both debit and collect calling, where a modified version of ITS was installed.⁶⁹

A newer version of ITS, called “ITS II,” was developed in the 1990s to increase restrictions and control over inmate access to prison telephones.⁷⁰ ITS II is a centralized system, meaning that the BOP can “access inmate telephone information from all BOP institutions simultaneously.”⁷¹ Centralization replaced the former ITS self-contained system, which only

⁶⁵ Off. of. Inspector Gen., CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS’ MANAGEMENT OF INMATE TELEPHONE PRIVILEGES (1999); *see also Funding*, Fed. Bureau of Prisons: TRULINCS Topics <https://www.bop.gov/inmates/trulincs.jsp> (Apr. 26, 2021).

⁶⁶ *Id.*

⁶⁷ *Washington v. Reno*, 35 F.3d 1093 (6t Cir. 1994); *see also* Off. of. Inspector Gen., CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS’ MANAGEMENT OF INMATE TELEPHONE PRIVILEGES (1999).

⁶⁸ Off. of. Inspector Gen., CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS’ MANAGEMENT OF INMATE TELEPHONE PRIVILEGES (1999).

⁶⁹ *Id.* It should be noted that inmates in the debit calling institutions can only place calls to the 30 numbers on their approved telephone lists. However, inmates at collect calling institutions are not required to file telephone calling lists because there was no technology to limit collect calls to pre-approved numbers.

⁷⁰ *Id.*

⁷¹ *Id.*

allowed each individual BOP institution to access the information from themselves and was incapable of sharing data through a central database.⁷²

Information on a current ITS or ITS II has not been made publicly available. It can be presumed that whatever systems are used are determined by whatever telephone company is used by each prison or jail facility. The BOP has revealed that no taxpayer dollars are used for the Trust Fund Limited Inmate Computer System (TRULINCS) service; it is paid for by the Inmate Trust Fund.⁷³ However, contract facilities do not operate TRULINCS, so the information about any type of ITS is still unknown.⁷⁴

What is known is that the telephone companies are contracted by prison facilities. Such contracting has led to the privatization of the prison system. Privatization built the United States punishment system and continues to support its expansion.⁷⁵ Donations to tough-on-crime political candidates, shifting costs onto the targeted and subsequently detained individuals, offering profitable partnerships to agencies, and recruiting former government officials are just some ways that allow the punishment system's expansion to continue.⁷⁶

The jails also demand kickbacks from the phone providers, which incentivizes the latter to raise the prices. But the largest impact on the prices of phone calls is the profit-seeking

⁷² *Id.*

⁷³ *Funding*, Fed. Bureau of Prisons: TRULINCS Topics <https://www.bop.gov/inmates/trulincs.jsp> (Apr. 28, 2021).

⁷⁴ *Id.*

⁷⁵ *The Prison Industry: Mapping Private Sector Players*, Worth Rises, <https://worthrises.org/theprisonindustry2020> (last viewed Apr. 28, 2021).

⁷⁶ *Id.* See also *Telephone Service for Incarcerated Individuals*, F.C.C.: CONSUMER GUIDES <https://www.fcc.gov/consumers/guides/telephone-service-incarcerated-individuals> (last updated Oct. 27, 2020); Christopher Zoukis, *Inmate Telephones*, ZOUKIS CONSULTING GROUP: COMMUNICATION INSIDE A FEDERAL PRISON, <https://www.prisonerresource.com/prison-life/communication/inmate-telephones/#wordproof> (last updated Dec. 13, 2020).

behaviors of the phone providers themselves, especially where they charge facilities high rates but give low commissions. High rates are not necessary to bring facilities substantial revenue.⁷⁷

1. Phone Call Expenses

Private telephone companies win profitable monopoly contracts by offering “kickbacks,” or commission to the prison and/or jail systems they serve.⁷⁸ Kickbacks are “based on a percentage of the gross revenue generated by prisoners’ phone calls.... [The] commissions dwarf all other considerations and are a controlling factor when awarding prison phone contracts.”⁷⁹ High kickbacks mean that a company is more likely to win the prison’s contract, but it also means higher phone rates for inmates and their family members.⁸⁰ In addition, some of the companies may provide the call terminals for free, but will take a cut of the call revenue.⁸¹ For example, Securus Technologies paid a Massachusetts sheriff’s office \$1.7 million in exchange for an exclusive inmate phone service contract, as well as a lump sum of \$820,000 to cover 2016 to 2020.⁸²

Phone call expenses vary by state and also depend on whether the person is held in a federal, state, or local facility.⁸³ Some local jails are not run by the state, but are run by individual cities and counties, which means that the prices of phone calls can be raised to

⁷⁷ Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons, and Private Phone Providers*, PRISON POLICY INITIATIVE, (Feb. 2019) https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

⁷⁸ Liliana Segura, *With 2.3 Million People Incarcerated in the U.S., Prisons are Big Business*, THE NATION, (Oct. 1, 2013) <https://www.thenation.com/article/archive/prison-profiters/>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Kieren McCarthy, *Want to Visit Your Loved One in Jail? How About Skype Instead?*, THE REGISTER, (July 25, 2017) https://www.theregister.com/2017/07/25/jail_video_conferencing/.

⁸² Maria Cramer, *Lawsuit Challenges the High Cost of Calling From Jail*, BOSTON GLOBE, (May 3, 2018) <https://www.bostonglobe.com/metro/2018/05/03/lawsuit-challenges-high-cost-calling-from-jail/q17v1CL0bZBhxOXd9qOBRP/story.html>.

⁸³ Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons, and Private Phone Providers*, PRISON POLICY INITIATIVE, (Feb. 2019) https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

exorbitant amounts. Telephone service contracting is approached differently by each one, and so phone providers approach each type of facility differently. The local jails are also usually run by elected officials, which means that those in charge are influenced by the political will of the majority at any given time.⁸⁴ Jail facilities also tend to be smaller than prisons, with a higher inmate turnover rate, which causes providers to pay more for opening new accounts and other certain types of overhead costs, which in turn causes each minute of phone use in a jail facility to be slightly more expensive than in a prison.⁸⁵ But people are also charged rates, which refers to the amount paid per minute, “including any higher charge for the first minute of the call.”⁸⁶ Then there are fees, which cover any call-related “services,” including receiving a paper bill, opening an account, maintaining the account, and more.⁸⁷ While rates may be stabilized or capped by the state, fees are not, which allows phone providers to continue to price gouge while abiding by the regulations in place.⁸⁸

In 2015, the Federal Communications Commission passed rules to cap the cost of jail phone calls to \$1.65 for a 15-minute call, but only for interstate long distance calls, not local, international, or in-state long distance calls.⁸⁹ Some jails charge \$14 for the same call, which is about 28 times as high as the cost for an ordinary citizen outside of jail.⁹⁰ Securus Technologies, which operates in jails across the United States, charged between \$5.95 and \$7.99 for a 20-minute call.⁹¹ Other fees included a \$2 for “paper bill fees,” a maximum \$3 for automated

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Kieren McCarthy, *Want to Visit Your Loved One in Jail? How About Skype Instead?*, THE REGISTER, (July 25, 2017) https://www.theregister.com/2017/07/25/jail_video_conferencing/.

⁹⁰ *Id.*

⁹¹ Alexander J. Martin, *Prison Telco Recorded Inmates' Lawyer-Client Calls, Hack Reveals*, THE REGISTER, (Nov. 13, 2015)

https://www.theregister.com/2015/11/13/prison_telco_hacked_for_recordings_of_inmates_attorneyclient_privileged

payments, and \$5.95 for payments with a “live agent.”⁹² These fees vary depending on the institution, and it is hard to pinpoint exactly what these fees are because of a lack of transparency in the prison system.⁹³

Most people being incarcerated in local jails are being held for pretrial detention.⁹⁴ Forcing pretrial detainees to pay for the phone calls takes away the constitutionally protected presumption of legal innocence until proven guilty.⁹⁵ Furthermore, many of the people who are incarcerated or who have a family member incarcerated are living in poverty.⁹⁶ This class of people is the least likely to be able to pay for exorbitant phone calls.⁹⁷ When further pressure is placed on those in poverty, crime may be the only feasible solution to financial problems, and if the people are caught, leads to either increasing numbers of newly incarcerated people or recidivism.⁹⁸

In addition, despite the high rates inmates are charged for phone calls and use of phone services, the technology is not secure and the private companies are unethical.⁹⁹ In 2015, an anonymous hacker leaked materials that showed Securus Technologies was violating inmates’

calls; see also Thomas Claburn, *U.S. Prison Telco Accused of Selling Your Phone’s Location to the Cops*, THE REGISTER, (May 11, 2018) https://www.theregister.com/2018/05/11/prison_comms_co_accused_of_sharing_location_data_for_us_phone_users/.

⁹² Kieren McCarthy, *Want to Visit Your Loved One in Jail? How About Skype Instead?*, THE REGISTER, (July 25, 2017) https://www.theregister.com/2017/07/25/jail_video_conferencing/.

⁹³ *Id.*

⁹⁴ Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons, and Private Phone Providers*, PRISON POLICY INITIATIVE, (Feb. 2019) https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Alexander J. Martin, *Prison Telco Recorded Inmates’ Lawyer-Client Calls, Hack Reveals*, THE REGISTER, (Nov. 13, 2015) https://www.theregister.com/2015/11/13/prison_telco_hacked_for_recordings_of_inmates_attorneyclient_privileged_calls/.

constitutional rights.¹⁰⁰ At least 14,000 inmate-attorney conversations were recorded by the company, which breaches attorney-client privilege at the least.¹⁰¹ “The Sixth Amendment is not violated just because the state receives incriminating statements ‘by luck or happenstance.’”¹⁰² This situation is neither. The fact that a hacker was able to break through any technological security of the phone provider shows that not only are monitored phone calls unsecure, but so are unmonitored phone calls.¹⁰³ This was also not the first time that Securus Technologies’ prison calls platform, with its “‘high level of security,’” had been breached.¹⁰⁴

B. Phone Call Procedure

The prison warden must, in accordance with federal statutes, put BOP facilities inmates on notice that their telephone calls may be monitored.¹⁰⁵ The BOP only allows inmates to make calls in 15-minute intervals, at which time the call will be disconnected; the inmates must then wait 15 to 60 minutes to make another call.¹⁰⁶ The telephones should have an outgoing message notifying the inmates that their calls are being monitored.¹⁰⁷ All BOP facilities must allow

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Colum. Hum. Rts. L. Rev., *A Jailhouse Lawyer’s Manual*, ch. 34, 1046 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/46.-Ch.-34.pdf>.

¹⁰³ Alexander J. Martin, *Prison Telco Recorded Inmates’ Lawyer-Client Calls, Hack Reveals*, THE REGISTER, (Nov. 13, 2015) https://www.theregister.com/2015/11/13/prison_telco_hacked_for_recordings_of_inmates_attorneyclient_privileged_calls/.

¹⁰⁴ Alexander J. Martin, *Prison Telco Recorded Inmates’ Lawyer-Client Calls, Hack Reveals*, THE REGISTER, (Nov. 13, 2015) https://www.theregister.com/2015/11/13/prison_telco_hacked_for_recordings_of_inmates_attorneyclient_privileged_calls/; *see also* Thomas Claburn, *U.S. Prison Telco Accused of Selling Your Phone’s Location to the Cops*, THE REGISTER, (May 11, 2018)

https://www.theregister.com/2018/05/11/prison_comms_co_accused_of_sharing_location_data_for_us_phone_users/. (Securus Technologies was accused of selling phone location data to law enforcement.)

¹⁰⁵ Brandon P. Ruben, *Should the Medium Affect the Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 FORDHAM L. REV. 2131 (2015).

¹⁰⁶ *Connect With an Inmate: Federal Inmate Phone Calls Explained*, DONOTPAY <https://donotpay.com/learn/federal-inmate-phone-calls/> (Apr. 28, 2021).

¹⁰⁷ Ruben, *supra* note 105.

inmates to place unmonitored legal phone calls.¹⁰⁸ The prison warden is also supposed to notify inmates about the proper procedures to have unmonitored telephone conversations with an attorney.¹⁰⁹ It should be noted that there is no information in the Inmate Handbook as to the procedure for obtaining an unmonitored telephone call with an attorney.¹¹⁰ However, federal courts have held that calls from inmates placed to attorneys on lines that the inmate knows to be monitored are not privileged.¹¹¹

IV. Process of Phone Calls and Other Such Recordings Being Turned Over to the District Attorney's Office

A. Procedure of Obtaining Recorded Phone Calls

According to the headnotes in *People v. Johnson*, “[t]he New York City Department of Correction only monitors on a needs basis, meaning a staff member listens to the recorded call when a situation ‘prompts’ review.¹¹² The Department has identified the types of calls that trigger monitoring as those involving institutional and public safety and security.¹¹³ The recordings are confidential and not available to the public, but New York City’s District Attorneys’ Offices may request a copy of an inmate’s recorded call.¹¹⁴ Such requests are decided within three business days by the Department’s Deputy Commissioner for Legal

¹⁰⁸ See 28 C.F.R. § 540.102 (2012)

<https://www.govinfo.gov/content/pkg/CFR-2010-title28-vol2/pdf/CFR-2010-title28-vol2-sec540-102.pdf>.

¹⁰⁹ See 28 C.F.R. § 540.102 (2012)

<https://www.govinfo.gov/content/pkg/CFR-2010-title28-vol2/pdf/CFR-2010-title28-vol2-sec540-102.pdf>.

¹¹⁰ *Inmate Information Handbook*, FEDERAL BUREAU OF PRISONS,

https://www.bop.gov/locations/institutions/spg/SPG_aohandbook.pdf (last updated Nov. 2012).

¹¹¹ Ruben, *supra* note 105.

¹¹² *People v. Johnson*, 51 N.E.3d 545 (N.Y. 2016).

¹¹³ *Id.*

¹¹⁴ *Id.*

Matters, although the Operations Order does not explain the criteria for granting or denying such requests.¹¹⁵ Upon approval of a request, the copy of the recording is turned over to the District Attorney’s representative, who signs a form indicating receipt.”¹¹⁶

Dozens of recordings of the defendant in *People v. Johnson* were used in court against him.¹¹⁷ The excerpts played included “several incriminating statements and [the repeated use of] offensive and vulgar language to discuss the victim and other individuals involved in the robbery.”¹¹⁸ While one may agree that offensive language against persons involved in the alleged crime is morally wrong to use, and probably not a good idea if the user is the detained person, it is not illegal.¹¹⁹ Furthermore, it most likely does not fall under the Operations Order standard, which triggers monitoring when the calls “[involve] institutional and public safety and security.”¹²⁰ The opinion did not give the actual language, but there is no indication that it should have triggered monitoring.¹²¹ If this is so, then the recordings never should have been turned over in the first place.¹²²

The court in *People v. Johnson* found that “Defendant’s Sixth Amendment right to counsel was not violated ... because the NYC Department of Corrections did not serve as an agent of the State when it recorded the calls it turned over to the district attorney’s office.”¹²³ Putting an inmate on notice that calls can be recorded and turned over to the District Attorney’s

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* This is assuming it is not classified as hate or other such speech. It was not clarified in the opinion.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

Office, to then be used in trial, cannot be at all clear if the criteria itself is unclear.¹²⁴ The lack of criteria in the Operations Order can also lead to arbitrary rulings, which in turn will either save some inmates from further prosecution or become a catch-all, where almost every inmate's recorded calls are made to be fodder for the prosecution to use against them.¹²⁵

Additionally, although the provision of phone services is privatized, sending the phone call recordings to law enforcement without using procedure implies that the phone company is working for the District Attorney's office. The more incarcerated people there are, the more prison phone calls are needed. This gives the companies an incentive to continue this practice because they are making money off the prison phone call system. They will look the other way to keep their contracts. The lawsuits that have been filed have not enforced strong, if any, legal repercussions against the phone companies, which does not provide an incentive to cease unethical practices.¹²⁶

B. Prosecutorial Duties & Obligations

Under a new 2020 law, New York prosecutors "must automatically hand over relevant information in a timely fashion."¹²⁷ Defense counsel no longer has to file a written request for relevant information, which now includes electronic recordings, such as 911 calls.¹²⁸ This law seems to, at least partially, cover the gap between automatically handing over the recorded calls

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Alexander J. Martin, *Prison Telco Recorded Inmates' Lawyer-Client Calls, Hack Reveals*, THE REGISTER, (Nov. 13, 2015) https://www.theregister.com/2015/11/13/prison_telco_hacked_for_recordings_of_inmates_attorneyclient_privileged_calls/.

¹²⁷ Rebecca C. Lewis, *What to Know About New York's New Discovery Laws*, CITY AND STATE NY: CRIM. JUST., (Feb. 10, 2020) <https://www.cityandstateny.com/articles/policy/criminal-justice/what-know-about-new-yorks-new-discovery-laws.html>.

¹²⁸ *Id.*

to the District Attorney's Office. Assuming the prosecutor complies with the law and turns over the recordings, then defense counsel would be able to mitigate any damage stemming from the conversation between the inmate and the person on the other end of the call. Even though BOP staff may not monitor an inmate's properly placed call to an attorney, the call may still be monitored if a prison official is with the inmate when the calls are made. calls made from unmonitored lines may not and should not be recorded, they can still be monitored if a prison official is with the inmate when the calls are made.¹²⁹ It follows that prison officials should be banned from listening to inmate-attorney phone calls, as prison officials are an arm of the District Attorney's office and prosecutors cannot listen to inmate-attorney phone calls.¹³⁰

Additionally, although federal courts have no uniform approach to regulating prosecutors' behavior, individual states do have professional conduct codes.¹³¹ Federal courts can apply state ethics rules to regulate prosecutorial conduct, even if it would be otherwise lawful, under the McDade Amendment or by utilizing rulemaking authority expressly granted by Congress.¹³² Under Model Rule of Professional Conduct 8.4(d), "[i]t is professional misconduct for a lawyer to: ... engage in conduct that is prejudicial to the administration of justice."¹³³ Using the recordings against inmates, without clear procedure and without maintaining inmates' constitutional rights, is unethical and directly violates the Model Rule.¹³⁴

¹²⁹ *Connect With an Inmate: Federal Inmate Phone Calls Explained*, DONOTPAY <https://donotpay.com/learn/federal-inmate-phone-calls/> (Apr. 28, 2021); See 28 CFR 540.102 (2012); <https://www.govinfo.gov/content/pkg/CFR-2010-title28-vol2/pdf/CFR-2010-title28-vol2-sec540-102.pdf>.

¹³⁰ Ruben, *supra* note 105.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*; MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N)

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/.

¹³⁴ Ruben, *supra* note 105.

V. *Pretrial Attorney-Client Privilege and the Right to Effective Assistance of Counsel*

A. **Attorney-Client Privilege**

The attorney-client privilege, as defined by Dean Wigmore and frequently used by federal courts, is a “‘natural,’ ‘unquestioned’ exception to testimonial compulsion.”¹³⁵ The Second Circuit defines the attorney-client privilege as protecting communications “(1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice.”¹³⁶ However, the privilege is not absolute, and “is generally held not to apply if (1) the communication is deemed to have been between a client and someone other than an attorney, (2) the communication was not confidential, or (3) the client sought something other than legal assistance.”¹³⁷ If a client “knowingly discloses information in front of a third party, or fails to take reasonable precautions to guard against a third party overhearing, courts generally find that confidentiality could not have been intended and that the privilege therefore does not attach.”¹³⁸ The privilege will also not attach where a party’s conduct contradicts the party’s intention for a given legal communication to remain confidential; the courts will hold the party’s intention irrelevant in this situation.¹³⁹

Where a client has no knowledge of a third party’s presence, and is discussing confidential legal information with their attorney in a private location, the third party cannot break attorney-client privilege.¹⁴⁰ Inmates have not been put on notice that the recording device

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*; see also Comment, *Abolition of the Eavesdropping Exception to the Attorney-Client Privilege*, 27 Fordham L. Rev. 390 (1958).

is considered a “third party,” so the attorney-client privilege should be preserved and the recordings should not be used against the inmates.¹⁴¹ Yet, even if inmates take all reasonable and available precautions to guard against a third party and the recording system, the phone calls may still be recorded anyway.¹⁴² No one can definitively say that BOP personnel are not recording and listening to all phone calls, regardless of the legal nature of the calls.¹⁴³ If the phone calls can be recorded in violation of inmates’ constitutional rights, and since attorney-client privilege can be broken under the recording device being considered a third party, then inmates’ Sixth Amendment right to counsel and to effective assistance of counsel are infringed on.¹⁴⁴ Inmates are unable to communicate all necessary information in even the most ideal circumstances, and their lawyers cannot competently do their jobs because they have little to no immediate access to the inmates.¹⁴⁵

B. Right to Effective Assistance of Counsel

Under Model Rule of Professional Conduct 1.1, “[a] lawyer shall provide competent representation to a client, [] which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁴⁶ Under Model Rule of Professional

¹⁴¹ Ruben, *supra* note 105.

¹⁴² Ruben, *supra* note 105; see also Alexander J. Martin, *Prison Telco Recorded Inmates’ Lawyer-Client Calls, Hack Reveals*, THE REGISTER, (Nov. 13, 2015), https://www.theregister.com/2015/11/13/prison_telco_hacked_for_recordings_of_inmates_attorneyclient_privileged_calls/.

¹⁴³ Comment, *Abolition of the Eavesdropping Exception to the Attorney-Client Privilege*, 27 Fordham L. Rev. 390 (1958).

<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1606&context=flr>. The use of teams to separate communications (emails) clearly shows that eavesdropping on opposing parties’ legal communications is undesirable behavior.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N)

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/.

Conduct 1.3, “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”¹⁴⁷ Under Model Rule of Professional Conduct 1.4, “(a) [a] lawyer shall (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent ... is required by these Rules; (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information;”¹⁴⁸ In order for an attorney to comply with these requirements, they must have access to the inmate, and vice versa, as well as an unmonitored phone line for communication.

VI. Miranda Notice & Capacity Argument

Persons in pretrial detention are still legally innocent until proven guilty. For a lawyer to be effective, they and their client must know the nature of the charges and evidence against the client, which is guaranteed under the Sixth Amendment.¹⁴⁹ If any incriminating statements made by a pretrial detainee on the phone can be used against them not only for the charges in the present case, but also for future charges, then inmates’ rights are being clearly violated.

It is important to ensure that pretrial detainees understand that they still have the right to remain silent, and that anything they say can and will be used against them in a court of law.

¹⁴⁷ MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS’N).
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/.

¹⁴⁸ MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS’N).
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/; Ruben, *supra* note 105.

¹⁴⁹ *Sixth Amendment*, Legal Info. Inst., https://www.law.cornell.edu/constitution/sixth_amendment (Mar. 27, 2021).

The current system is not effectively giving pretrial detainees the *Miranda* rights that they were entitled to upon the moment of their arrests.

By plain definition, for a person to be on notice about something they must be warned or told about it.¹⁵⁰ However, simply reading an arrestee their *Miranda* rights is not enough to constitute legally sufficient notice.¹⁵¹ The Supreme Court’s 1979 ruling in *North Carolina v. Butler* firmly established the following: that (1) as said in *Miranda*, silence is not enough for a person to waive their *Miranda* rights, and (2) that courts must presume defendants did not waive their rights in the absence of an affirmative “yes” or other clear inference from the interrogated person’s words and actions.¹⁵² The courts can determine whether an interrogated person *knowingly and voluntarily* waived their rights based on the particular facts and circumstances, including the person’s background, experience, and conduct, in the relevant case.¹⁵³

Pretrial detainees have not waived their *Miranda* rights just because they are placed in a detention facility. Under *Edwards v. Arizona*, a presumption was established that once an accused person invokes the *Miranda* right to counsel, and has been held in uninterrupted *Miranda* custody since that first refusal to waive *Miranda* rights, “any waiver of that right in response to a subsequent police attempt at custodial interrogation is involuntary.”¹⁵⁴ Under *Maryland v. Shatzer*, if an accused person is not held in uninterrupted *Miranda* custody for 14

¹⁵⁰ Merriam-Webster Dictionary, Definition of Notice, <https://www.merriam-webster.com/dictionary/on%20notice> (Apr. 27, 2021).

¹⁵¹ *North Carolina v. Butler*, 441 U.S. 369 (1979).

¹⁵² *North Carolina v. Butler*, 441 U.S. 369 (1979); *see also* *Thompkins v. Berghuis*, 2011 U.S. Dist. LEXIS 22876 (E.D. Mich. 2011).

¹⁵³ *North Carolina v. Butler*, 441 U.S. 369 (1979).

¹⁵⁴ *Maryland v. Shatzer*, 559 U.S. 98 (2009) (citing *Edwards v. Arizona*, 451 U.S. 477 (1980)).

days or longer, law enforcement can interrogate them again, but the accused person must be reread their *Miranda* rights.¹⁵⁵

Miranda rights clearly do not end upon pretrial detention.¹⁵⁶ Another example of *Miranda* recognition in pretrial detention is found in email communication procedure.¹⁵⁷ In order to use the TRULINCS email to communicate with their lawyers, inmates are required to sign a form.¹⁵⁸ The form includes a clause stating that the BOP monitors all emails, including legal emails, and the inmate's signature is acknowledgement of this clause.¹⁵⁹ The clause includes the condition that any email sent or received through the TRULINCS system is not protected by attorney-client privilege.¹⁶⁰ If a person's *Miranda* rights automatically ended upon pretrial detention, then the BOP would not require inmates to sign the form, because the inmates still retain the right to counsel, even if it was previously waived. Four courts have actually ruled that this clause makes the emails "fair game" for the prosecution to read and use as evidence against inmates; yet two courts have prevented prosecutors from doing so, pursuant to no clear authority.¹⁶¹ However, there is no such form for phone calls.¹⁶² The only written instruments that address the potential

¹⁵⁵ Paul William, *How Long do Miranda Rights Last?*, Walling & Klarich, <https://www.wklaw.com/how-long-do-miranda-rights-last/> (last viewed Apr. 14, 2021); *Maryland v. Shatzer*, 559 U.S. 98 (2010) (also at <https://www.oyez.org/cases/2009/08-680> and <https://www.law.cornell.edu/supct/html/08-680.ZO.html>).

¹⁵⁶ *Id.*

¹⁵⁷ Brandon P. Ruben, *Should the Medium Affect the Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 FORDHAM L. REV. 2131 (2015); see also Off. of Inspector Gen., CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS' MANAGEMENT OF INMATE TELEPHONE PRIVILEGES (1999).

¹⁵⁸ *Id.*; see also Off. of Inspector Gen., CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS' MANAGEMENT OF INMATE TELEPHONE PRIVILEGES (1999), see also *Funding*, Fed. Bureau of Prisons: TRULINCS Topics <https://www.bop.gov/inmates/trulincs.jsp> (Apr. 28, 2021).

¹⁵⁹ Ruben, *supra* note 157.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

for the inmates' phone call content to be used against them are the signs near the telephones and the BOP Inmate Handbook.¹⁶³

Miranda rights should extend unless and until a pretrial detainee is found guilty by a court for the crime which they have been accused of. *Miranda* was litigated to resolve issues of law enforcement coercing accused persons into confessing, which contradicted their constitutional rights. By listening to all inmates' calls, the BOP is coercing them into confessing past crimes, future crimes, and even hypothetical crimes, meaning crimes that they "say" they will do, but may have no intention of doing, and in fact may never do.

The BOP Inmate Handbook states clearly and unequivocally that all calls, with the exception of properly placed calls to inmates' attorneys, are monitored.¹⁶⁴ However, it is unknown when the inmates receive the Handbook, the Handbook contains legal jargon that is not defined, and the Handbook is only printed in a limited number of languages.¹⁶⁵ Laypersons cannot be expected to understand legal jargon without explanation and especially cannot be expected to understand this jargon in a language they do not understand. There are also no provisions for emergency situations in which an inmate may need to or must call their attorney.¹⁶⁶

The Operations Order of the New York City Department of Correction outlines the institution's policy and procedures for recording and monitoring inmate telephone calls.¹⁶⁷ Under the Order, the Department "'shall record all inmate telephone calls and retain these recordings,' with the exception of calls to inmates' attorneys and other persons similarly

¹⁶³ *Inmate Information Handbook*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/locations/institutions/spg/SPG_aohandbook.pdf (last updated Nov. 2012).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *People v. Johnson*, 51 N.E.3d 545 (N.Y. 2016).

included in the Department’s ‘Do Not Record List.’”¹⁶⁸ The Order also requires three different notices to advise inmates that their telephone calls may be recorded and/or monitored.¹⁶⁹ One notice is in the Inmate Handbook, which states “[a]ll calls, except for calls with your attorney or other privileged calls, may be monitored and/or recorded by the Department for security purposes. . . . Your use of the telephone in a Department facility constitutes your implied consent to such monitoring.”¹⁷⁰ A second notice is “contained in signs posted near the telephones available for inmate use, and states in English and Spanish that: ‘Inmate telephone conversations are subject to electronic recording and/or monitoring in accordance with Departmental policy. An inmate’s use of institutional telephones constitutes consent to this recording and/or monitoring.’”¹⁷¹ A third notice is “played in English and Spanish at the beginning of each call, and informs the inmate that ‘this call may be recorded and monitored.’”¹⁷² The signs may advise the inmates of the potential for recording and monitoring, but they are inconsistent with each other. The Inmate Handbook and the phone call say that the calls *may* be recorded, while the signs near the telephones say that the calls *are subject to* recording. The notices should all use the same, plain, language. The three notices also do not advise inmates of their *Miranda* rights, and this lack of notice gives way to unintentional, coerced self-incrimination, as well as a pathway for the prosecution to use the inmates’ conversations against them in the case they were arrested for and in new cases.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Inmate Handbook*, N.Y.C. D.O.C.,

https://www1.nyc.gov/assets/doc/downloads/pdf/inmate_hand_book_english.pdf (last updated Dec. 2007).

¹⁷¹ *People v. Johnson*, 51 N.E.3d 545 (N.Y. 2016).

¹⁷² *Id.*

VII. Counterargument

Arguments against guaranteeing pretrial detainees their *Miranda* rights include restrictions for rightful reasons. Some courts refuse to recognize a First Amendment right to telephone access, but even the courts that do recognize such a right agree that the access can be severely limited.¹⁷³ The legality of a prison's limitations on the right to communicate with the outside world are determined by a four-part test, also called the "*Turner* reasonableness standard."¹⁷⁴ Even though inmates have the right to communicate with the outside world, this right is limited to ensure prison security and general public safety, which are legitimate *Turner* standard reasons for restriction.¹⁷⁵ The Court asks whether: "(1) the prison regulation is rationally related to a legitimate government interest, (2) there is an alternative way for the incarcerated person or outside communicator to exercise the right even with the restriction in place, (3) the burden or cost to the prison is too great if the right is accommodated, (4) there are no readily available alternative options that the prison could put in place."¹⁷⁶ However, restrictions outgoing general correspondence and legal mail are not considered under this test because while prison officials may not restrict the right to communicate without reason, they may legally do so when exercising that right may endanger the prison's order or security, or the rehabilitation of incarcerated people.¹⁷⁷ Courts tend to uphold restrictions on telephone use unless the restrictions "eliminate telephone access entirely or get in the way of attorney representation."¹⁷⁸

¹⁷³ Colum. Hum. Rts. L. Rev., A Jailhouse Lawyer's Manual, ch. 19, (12th ed. 2021), <http://jlm.law.columbia.edu/files/2021/02/26.-Chapter-19.pdf>; see also Ruben *supra* note 105 (addresses privacy with attorney conversations only).

¹⁷⁴ Colum. Hum. Rts. L. Rev., A Jailhouse Lawyer's Manual, ch. 19, (12th ed. 2021), <http://jlm.law.columbia.edu/files/2021/02/26.-Chapter-19.pdf>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

Additionally, inmates' Fourth Amendment privacy rights have not been found violated by call monitoring because (1) there is no reasonable expectation of privacy in outbound calls from prison and (2) incarcerated people are considered to have consented to monitoring when they are made aware of the surveillance, either by signs near the telephones or information handbooks.¹⁷⁹ The exception to this general rule is unmonitored phone calls between an incarcerated person and their attorney, so long as the phone calls are arranged in advance.¹⁸⁰ If attorney-inmate calls are not arranged in advance, it can be monitored like any other call.¹⁸¹ The rationale behind monitoring attorney-inmate calls that were not arranged in advance is that inmates have the alternative of using the mail to confidentially correspond with their attorneys.¹⁸²

While prison security and general public safety can be legitimate reasons for restricting rights, they should not outweigh an individual's constitutional rights unless, perhaps, there is a known or reasonable certainty of an immediate threat. Constitutional rights are sacred and should be upheld in every situation possible. Additionally, though an inmate's privacy rights may not be violated by call monitoring, their right to effective attorney representation may be violated.¹⁸³ Inmates should have uninhibited access to their lawyers, because information must be exchanged both ways, and because attorneys are held to strict court deadlines as well as standards of promptness.¹⁸⁴ Delaying inmates' access to their attorneys so that the calls can be

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N).

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/; MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N).

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/; Model Rules of Pro. Conduct (small caps) r. 1.4 (Am. Bar Ass'n [small caps]). https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/.

arranged in advance, with no other unmonitored alternative besides mail, is unconstitutional and impedes lawyers' abilities to do their jobs. Technology has evolved beyond mail, which is one of the slowest forms of communication, notwithstanding the fact that mail must be checked by prison officials before it is sent and received.¹⁸⁵

The concurrence in *People v. Johnson* gives alternate reasons as to why the facility had the right to record the phone conversations, but it also addresses the fact that pretrial detainees are legally innocent until proven guilty.¹⁸⁶ The only purpose of pretrial detention is supposed to be to ensure that accused persons appear at trial. “[T]heir liberty may not be restrained more than necessary to accomplish that result.”¹⁸⁷ People who cannot afford bail should not be stripped of their rights. That becomes economic and class discrimination in a system which is supposed to be equal for all.¹⁸⁸

¹⁸⁵ Colum. Hum. Rts. L. Rev., *A Jailhouse Lawyer's Manual*, ch. 19, (12th ed. 2021).

¹⁸⁶ *People v. Johnson*, 51 N.E.3d 545 (N.Y. 2016).

¹⁸⁷ *People v. Johnson*, 51 N.E.3d 545 (N.Y. 2016); *see also Cooper v. Morin*, 399 N.E. 2d 1188 (N.Y. 1979).

¹⁸⁸ Bail reform has started to solve some instances of this issue.

VIII. Humanitarian Argument

In 2015, a Supreme Court ruling “reinforce[d] the principle that the authorities must protect prisoners in pretrial detention--who are of course innocent of any crime until proven guilty in court.”¹⁸⁹ The Court recognized that ““individuals awaiting trial are particularly vulnerable to government abuse and should not be forced to prove that their alleged abusers intend to harm them in order to claim their rights were violated.””¹⁹⁰ This ruling was partially based on the United Nations Standard Minimum Rules for the Treatment of Prisoners¹⁹¹, also known as the Mandela Rules, which “also clearly and repeatedly state that the prison system shall not aggravate detainee’s [sic] suffering unless justifiable, and, finally, that ‘in no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman, or degrading treatment or punishment.’”¹⁹²

Specifically, Rule 3 of the Mandela Rules states: “Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not, except as incidental to justifiable separation or the maintenance of

¹⁸⁹ Marina Ilminska, *A U.S. Supreme Court Ruling Strengthens Rights of Pretrial Detainees*, OPEN SOC’Y JUST. INITIATIVE, (Jul. 16, 2015) <https://www.justiceinitiative.org/voices/us-supreme-court-ruling-strengthens-rights-pretrial-detainees>.

¹⁹⁰ *Id.*

¹⁹¹ Comm’n on Crime Prevention and Crim. Just., 24th Sess., Agenda item 6 (Vienna, 18-22, May 2015) <https://cdn.penalreform.org/wp-content/uploads/2015/05/MANDELA-RULES.pdf>.

¹⁹² Marina Ilminska, *A U.S. Supreme Court Ruling Strengthens Rights of Pretrial Detainees*, OPEN SOC’Y JUST. INITIATIVE, (Jul. 16, 2015) <https://www.justiceinitiative.org/voices/us-supreme-court-ruling-strengthens-rights-pretrial-detainees>.

discipline, aggravate the suffering inherent in such a situation.”¹⁹³ Unintentional, coerced waiver of *Miranda* rights fundamentally aggravates the suffering in incarceration.¹⁹⁴

There is no place for pretrial detainees to safely speak about their situations without accidentally waiving their *Miranda* rights in the current situation. Not only is the trial traumatic, but so is the pretrial detention itself, especially when taken in consideration with the loss of significant rights. Pretrial detainees are denied the comforts of home, family, and connection to other human beings, all without being proven legally guilty. Forcing people into such a situation, with no realistic alternatives for phone calls, is aggravating the suffering that they are already experiencing in incarceration. The decline in inmates’ mental health and the probability of increased prison time both violate the Mandela Rules. Additionally, since pretrial detainees also must pay for their calls, they should have the right to speak freely to persons on the outside world. Some pretrial detainees will not be convicted and will not be incarcerated. No one should be denied basic facets of humanity, no matter their conviction status, and it is unacceptable to treat pretrial detainees in this way. Even though they are not guilty in the eyes of the law, they are not treated much differently from convicted prisoners. Pretrial detainees need uninhibited access to the outside world, and especially to their lawyers.

¹⁹³ Comm’n on Crime Prevention and Crim. Just., 24th Sess., Agenda item 6 (Vienna, 18-22, May 2015) <https://cdn.penalreform.org/wp-content/uploads/2015/05/MANDELA-RULES.pdf>.

¹⁹⁴ *Id.*

IX. Solutions

A separate phone that is always unmonitored is one way to preserve pretrial detainees' constitutional rights. This way, the calls will not have to be arranged in advance, the difficulty in setting up the unmonitored phone calls is minimized, and inmates will have more immediate access to their attorneys.¹⁹⁵ The use of pre-approved calling lists can continue, so that inmates can only call their attorneys from that phone.¹⁹⁶ The BOP would be able to see the phone records if necessary, to ensure that the inmates are only speaking to their attorneys on this phone. At the same time, the inmates' constitutional rights would be protected because the BOP would not have access to an actual recording of the calls to the inmates' attorneys. Technology has evolved beyond what it was when ITS and ITS II were first introduced.¹⁹⁷

If the use of these phone call recordings is going to continue, there should be a system with clear-cut rules, including adequate notice to the detainee and paperwork to be filled out by the prosecutor before the recordings are released. The procedure for receiving the recorded phone calls should be cleared up, and prosecutors should be mandated to adhere to that procedure.¹⁹⁸ Even if there is no federal or state law that changes the procedure, prosecutors' offices should strive to be transparent, to preserve trust in the justice system, and to preserve constitutional rights, which are of the utmost importance in this country. Additionally, the BOP should post *Miranda* warnings under the signs that are near the phones and add the same to the BOP Inmate

¹⁹⁵ Brandon P. Ruben, Should the Medium Affect the Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email, 83 FORDHAM L. REV. 2131 (2015).

¹⁹⁶ Off. of. Inspector Gen., CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS' MANAGEMENT OF INMATE TELEPHONE PRIVILEGES (1999).

¹⁹⁷ *Id.*

¹⁹⁸ *People v. Johnson*, 51 N.E.3d 545 (N.Y. 2016).

Handbook.¹⁹⁹ These can serve as a reminder to pretrial detainees that they are entitled to these rights and will give them a chance to ask for clarification, if needed.

The signs and the BOP Inmate Handbook must also be in plain English, consistent with each other, and readily available once a person is placed in detention.²⁰⁰ The signs and the Handbooks should be available in commonly spoken languages. If a Handbook is unavailable in an inmate's specific language, then an interpreter should be made available as soon as possible to assist the inmate in reading the Inmate Handbook and the signs. This can be accomplished through volunteer organizations, volunteer attorneys, and even volunteer law students. The text of the signs can even be written in the Handbooks, with their locations clearly stated in text and on a map. Legal jargon should be limited, and if its use is necessary, then each term should be clearly defined.

The outgoing message on the calls can also include a *Miranda* warning to help ensure that pretrial detainees are aware of their rights. However, it should be noted that this may not be sufficient to satisfy the actual knowledge part of notice, because someone can hear something and say "yes" but not actually understand what they are agreeing to. There should also be options for the outgoing message to be read in multiple languages and an interpreter on call in case the options do not cover the language a specific inmate speaks.

¹⁹⁹ *Id.*; see also *Inmate Information Handbook*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/locations/institutions/spg/SPG_aohandbook.pdf (last updated Nov. 2012).

²⁰⁰ *Id.*; see also *Inmate Information Handbook*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/locations/institutions/spg/SPG_aohandbook.pdf (last updated Nov. 2012).

X. Conclusion

Using recorded phone conversations against pretrial detainees without sufficient notice violates their constitutional and *Miranda* rights.²⁰¹ The posted signs and Inmate Handbook that are currently used as “notice” are insufficient to warn pretrial detainees that they may be recorded and that anything they say on the phone in a detention facility can and will be used against them. This is unethical on its face. The prosecutors’ use of these recordings, even if the private telephone companies automatically turn the recordings over, is even more unethical because the use is prejudicial to the administration of justice. An unmonitored phone line, the use of plain English, and the warning being used in the outgoing phone message as well are just a few ways to give clear notice and to ensure that pretrial detainees’ constitutional and *Miranda* rights are being protected.

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²⁰¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

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“Some people in our life are like a lighthouse. They guide us to safety as we navigate the coast.”

- Mohammed Sekouty

It truly takes a village to raise a [lawyer]. Thank you to Professor Ellen Yaroshefsky, for your class, which gave me the opportunity to write this paper, for your confidence in me, and for inspiring zealous advocacy. Thank you to all my professors for imparting your knowledge, and your support. To my “law school friends,” who I know will be my “after-law school friends” too: thank you for all the caffeine, edits, moral and transportation support, and the home that you have made with me these past three years. I am forever grateful for every one of you. To my childhood and undergraduate friends: thank you for lighting my way when I was buried in research and textbooks. You mean more to me than you will ever know. A special thank you to Danny Marini, my best friend of 15+ years, who has been my sturdy foundation every time I felt like the sky was falling. To my TAG Crew, Gio(de) Martin, Liam O’Grady, Danny Marini, and Troy Vasilakis: You are the bright spots in every single person’s life you are in, and I am blessed you are in mine. To my extended family: thank you for giving me unlimited love, noshes, and your faith in me. To my family, Mom and Dad (Tina & Anton), Victoria, Serafina, and Lola too: thank you for always challenging me to be better, and for our “mandated” times for fun. Most of all, thank you not only for (sometimes) leaving the stoop light on for me when I return at all hours, but for being my first home and the beacons that guide me. I love you. The joy was, and is, in the journey, for I am at home in more than just one place. I cannot wait to continue finding homes in other places and people.