

COMMENT

CELL “BLOCK” SILENCE: WHY CONTRABAND
CELLULAR TELEPHONE USE IN PRISONS WARRANTS
FEDERAL LEGISLATION TO ALLOW
JAMMING TECHNOLOGY

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Inmate use of contraband cellular telephones in correctional facilities has led to increased prison violence, witness intimidation, and, in at least one case, murder. This Article examines the growing use of contraband cell phones in correctional facilities, and available options to stop this widespread problem. This Article also examines federal communications law controlling this issue. Because the Communications Act of 1934 currently prohibits its use, prison officials are prevented from employing jamming technology, and market incentive to innovate in this field is lacking.

Congressional action is necessary to allow state and local law enforcement a narrow exception under the law. Additional testing, improved technology, and careful implementation would address concerns regarding possible wireless interference caused by prison jamming. The current legislative proposal, as passed by the U.S. Senate, imposes a heavier regulatory burden on potential applicant agencies than is favored by jamming proponents. However, the bill provides a starting point from which to encourage innovation and responsible implementation, and tackle the threat that contraband cell phone use poses to our justice system.

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INTRODUCTION

In 2007, Maryland resident Carl Lackl was gunned down outside his home while his two children stood helplessly nearby.¹ Mr. Lackl died eight days before he was scheduled to testify against defendant Patrick Byers in a murder trial.² Investigators later determined that Byers ordered Lackl’s murder from inside the Baltimore City Detention Center with the help of a cellular telephone.³ During Byers’s trial for Lackl’s murder, prosecutors revealed that prison officials caught him attempting to intimidate a different witness with yet another illegal cell phone after being charged for calling out the hit on Lackl.⁴

In October 2008, Texas Senator John Whitmire, Chairman of the Senate Criminal Justice Committee, received a troubling phone call.⁵ The call was from two-time convicted murderer and death row inmate Richard Tabler, who contacted the Senator to complain about prison-housing conditions.⁶ Senator Whitmire was shocked to learn that Tabler knew the names, ages, and addresses of his children.⁷ Tabler threatened to have Senator Whitmire killed after the legislator began to investigate how he was able to acquire a cellular telephone while on death row.⁸

1. Michael Drost, *O’Malley Asks for Prison Jamming*, WASH. TIMES, June 17, 2009, at A15; see also *Today Show: Today Investigates: Inmates Using Smuggled Cell Phones to Commit Crimes from Behind Bars* (NBC television broadcast May 12, 2009) [hereinafter *Today Show: Today Investigates*].

2. Drost, *supra* note 1.

3. *Id.*

4. Tricia Bishop, *Cell Phone Presence in Prisons Provokes Calls to Jam Signals*, BALT. SUN, Apr. 13, 2009, at 1A [hereinafter Bishop, *Cell Phone Presence*].

5. See Carrie Wells, *Senate Takes Up Measure to Jam Cell Phones in Prisons*, KNIGHT RIDDER WASH. BUREAU, July 15, 2009. Senator Whitmire is not the only state legislator to have been called by an inmate on a contraband phone. Maryland State Senator Ed DeGrange also received calls. See *All Things Considered: Inmates Smuggle in Cell Phones with Ease* (National Public Radio broadcast Oct. 12, 2006) [hereinafter *All Things Considered*] (report by Laura Sullivan). John Moriarty, Inspector General of the Texas Prison System, once received a call from an inmate’s mother. *Id.* The woman called to complain that the cellular phone she purchased for her incarcerated child was not getting adequate wireless service inside the prison. *Id.*

6. *Contraband Cell Phones in Correctional Facilities: Public Safety Impact and the Potential Implications of Jamming Technologies: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. 4 (2009) (statement of Sen. John Whitmire) [hereinafter Whitmire]; Wells, *supra* note 5.

7. Wells, *supra* note 5.

8. *Id.*; see also Alex Johnson, *Prison Officials Looking to Hang Up on Inmates*, MSNBC.COM (Dec. 8, 2008), <http://www.msnbc.msn.com/id/28055424/>.

As a result of the Senate Criminal Justice Committee's investigation, Texas Governor Rick Perry ordered a lockdown of the entire state prison system on October 20, 2008.⁹ The Governor ordered a cell-by-cell search of each of the state's 112 correctional facilities and the approximately 160,000 inmates.¹⁰ The search yielded hundreds of contraband cell phones and components.¹¹ Three were found on death row within the first 24 hours.¹² At the end of the lockdown, more than nineteen cell phones or cell phone parts were found inside Texas's death row facilities.¹³ At the time of the lockdown, only 22 of the state's 112 prisons had large-scale metal detectors installed.¹⁴ The rest of the facilities did have metal detection wands but, until a change in policy after the lockdown, not all prison employees were searched for contraband with the wands.¹⁵ While the lockdown brought publicity to the issue, the problem of contraband cell phones in Texas continues. Between the end of the Texas lockdown in November 2008 and May 2009, 310 additional contraband phones were found,¹⁶ including 4 on death row.¹⁷

Some policymakers and correctional officials have proposed wireless signal "jamming" or "blocking" technology as a solution to the contraband cellular telephone problem in prisons.¹⁸ They contend that the use of contraband phones poses dire consequences for the nation's justice system in the form of increased risk to victims, witnesses, jurors, and judges.¹⁹ Officials also fear a rise in successful

9. Vince Beiser, *Deadly Weapon*, WIRED, June, 2009, at 132.

10. Whitmire, *supra* note 6, at 4; *see also* Beiser, *supra* note 9.

11. Beiser, *supra* note 9.

12. Lisa Sandberg, *Whitmire: Jam Phone Signals in Prisons*, HOUS. CHRON., Oct. 22, 2008, at A1.

13. *Id.*

14. *Id.*

15. *Id.* Guard unions in some states have resisted the imposition of additional security measures such as requiring guards to pass through metal detectors. *See* Torsten Ove, *Bars of Trouble: Cell Phones in Jail*, PITT. POST-GAZETTE, Oct. 10, 2008, at A1.

16. Beiser, *supra* note 9.

17. *Id.*

18. *Contraband Cell Phones in Correctional Facilities: Public Safety Impact and the Potential Implications of Jamming Technologies: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. 23 (2009) (statement of John Moriarty, Inspector Gen., Tex. Dep't of Criminal Justice) [hereinafter Moriarty]; Whitmire, *supra* note 6, at 5; Press Release, U.S. Senate Comm. on Commerce, Sci., & Transp., Sen. Hutchison Introduces Bill to Prevent Cell Phone Use in Prison (Jan. 15, 2009) [hereinafter Press Release, Hutchison Introduces Bill], <http://www.commerce.senate.gov/public>.

19. Press Release, Hutchison Introduces Bill, *supra* note 18; *see also* Whitmire, *supra* note 6, at 5.

escapes, prison riots, and further illegal activity conducted by incarcerated persons.²⁰

Contraband cellular phones may even pose a risk to national security.²¹ One issue preventing closure of the Guantanamo Bay detention facility is the possibility that terrorists transferred to correctional facilities within the continental United States would have access to cellular phones.²² Jamming proponents argue that current contraband prevention and detection efforts are incapable of solving the problem, and that federal legislation to allow signal blocking in prisons is warranted to protect the public.²³

At first glance, the use of cellular jamming technology in prison facilities appears to be a common sense solution to a growing problem. However, cellular jamming is controversial. The wireless industry²⁴ and some public-safety officials²⁵ oppose cell phone jamming due to public safety and consumer inconvenience concerns.²⁶ In spite of these concerns, federal policymakers have introduced legislation that would create a regulatory structure under which correctional facilities and supervisory agencies could petition the Federal Communications Commission (FCC) for permission to operate wireless jamming devices in correctional facilities.²⁷

After discussing the risks and benefits of allowing cellular jamming technology in prisons, this Comment concludes that, while the current legislative proposal may cause officials to seek jamming authorization in facilities with only the most egregious problems, it provides a much-needed starting point from which to solve this problem. Part II provides background information regarding the use of cell phones in prisons and the federal prohibition on intentional signal interference. Part III analyzes the positive and negative aspects of

20. S. REP. NO. 111-79, at 1 (2009).

21. See Mike Elgan, *Legalize Cell Phone Jammers?*, COMPUTERWORLD (Feb. 21, 2009), http://www.computerworld.com/s/article/9128351/Elgan_Legalize_cell_phone_jammers_.

22. *Id.*

23. See Whitmire, *supra* note 6, at 7.

24. CTIA-The Wireless Association (The Cellular Telecommunications Industry Association) has been the dominant voice of the wireless industry on this issue. For more information, see generally *Contraband Cell Phones in Prisons*, CTIA ADVOCACY, <http://www.ctia.org> (last modified Oct. 2010).

25. The Association of Public-Safety Communications Officials (APCO) International has spoken publicly on behalf of its membership of public-safety organizations. For more information, see generally *About APCO*, APCO (2008), <http://www.apcointl.org>.

26. CTIA, CONTRABAND CELL PHONES IN PRISONS: JAMMING V. DETECTION 2-4 [hereinafter, CTIA, CONTRABAND CELL PHONES].

27. Safe Prisons Communications Act of 2009, S. 251, 111th Cong.

cellular jamming compared to other methods of cellular contraband prevention and detection. Part IV explores proposed federal legislation to establish a process by which state departments of correction or individual correctional facilities may petition the FCC for permission to employ jamming equipment. Part V concludes that, while federal legislation is necessary to curb prisoner use of contraband cell phones, the current bill as passed by the Senate may discourage the use of jamming technology in all facilities but those that pose the absolute highest risks. Despite this drawback, however, the proposed legislation provides a starting point from which to address this issue and an incentive to innovate jamming technology that is even more effective.

I. CONTRABAND USE AND CELLULAR JAMMING BACKGROUND

Contraband cell phone use in prison facilities is a growing problem. Underlying causes include ease of handset access, expensive legitimate prison communications, and the opportunities cell phones provide inmates to continue criminal activity while incarcerated. This section provides readers with the basics of cellular jamming technology and the legal reasons why jamming has not been implemented.

A. Cellular Telephone Use in Prisons

The wireless market has seen tremendous growth in the last several years, and so too has the use of contraband cell phones in correctional facilities across the nation.²⁸ Decreasing cell phone sizes make smuggling handsets and their components easier.²⁹ The availability of less expensive wireless devices is also a contributing factor, as cellular phones are within financial reach of more inmates.³⁰

The rise of “smart phone” capabilities such as in-phone digital photography, email, and internet access pose additional risks.³¹ In January 2010, Texas officials confirmed that a death row inmate convicted of killing a law enforcement officer submitted a photo of himself to an inmate correspondence website.³² Access to photography

28. The number of wireless subscriber connections increased to 292.8 million in June 2010 from 194.4 million in June 2005 and 97 million in June 2000. *See U.S. Wireless Quick Facts*, CTIA MEDIA, http://www.ctia.org/media/industry_info/index.cfm/AID/10323.

29. *See* S. REP. NO. 111-79, at 1 (2009).

30. Bishop, *Cell Phone Presence*, *supra* note 4, at 135.

31. Beiser, *supra* note 9.

32. Mike Ward, *Photo from Death Row a Sign of Inmates Online*, AUSTIN AM.-STATESMAN (Austin, Tex.), Jan. 27, 2010, at B01.

poses obvious security and escape problems, and officials have noted particular concern about inmates' unsecure access to the internet.³³

States with large prison populations, such as Texas and California, have seen the most significant rise in contraband phone use.³⁴ Statistics show that the problem is growing rapidly.³⁵ California correctional staff found 6,995 contraband cellular phones in 2009.³⁶ Prior to that, in 2008, California officials confiscated more than 2,800 cellular phones; more than twice the number found in 2007.³⁷ In 2008, officials also found approximately 1,800 contraband cell phones or cell phone parts in South Carolina prisons,³⁸ and 1,861 in Mississippi.³⁹ Officials found 1,623 contraband cell phones in federal prison facilities across the nation.⁴⁰ Between January 1, 2009 and July 15, 2009, Texas officials found 775 contraband cell phones.⁴¹ In the three-year period between 2007 and 2009, Maryland correctional officials confiscated 3,635 cell phones.⁴² 741 of those phones were found in 2007, and that number jumped to 1,658 in 2009.⁴³

These numbers, while sobering, are not even fully representative of the seriousness of this problem. In fact, some may question whether finding 6,995 cellular phones in a state like California, with 173,670 inmates,⁴⁴ is truly a national concern. However, the aforementioned statistics reflect only the handsets that are *found*, and despite detection efforts, it remains unclear how many devices are actually used. Also, each contraband phone is used by multiple inmates and makes

33. *Id.*

34. Moriarty, *supra* note 18, at 22 ("The larger the number of inmates incarcerated the larger the illegal wireless communication device problem.").

35. Wells, *supra* note 5.

36. Kevin Johnson, *Prisons' New Fight: Cellphone Smuggling*, USA TODAY, June 28, 2010, at 3A.

37. *Id.*

38. Annemarie Mannion, *You Do Not Have the Right to Phone Calls*, AM. CITY & COUNTY, Oct. 1, 2009, at 24.

39. Press Release, Sen. Barbara A. Mikulski, Mikulski Insists Commerce Secretary, FCC Chairman Respond to Request for Cell Phone Jamming Test Without Further Delay (Oct. 29, 2009) [hereinafter Press Release, Mikulski Insists].

40. Press Release, PR Newswire, The Bloodhound Cell Phone Detector 'Sniffs Out' Contraband Cell Phones in Correctional Facilities and Prisons (Dec. 14, 2009), <http://www.prnewswire.com>.

41. Ruben Rosario, *Prison Cell Phone Proposal Needs Review of Call Rates*, ST. PAUL PIONEER PRESS, July 15, 2009.

42. Sarah Abruzzese, *Prisons Chief Pursues Use of Mobile Phones*, WASH. TIMES, Dec. 18, 2009, at A16.

43. *Id.*

44. U.S. Dep't of Justice, *Prisoners in 2008*, OFF. JUST. STAT. BULL., Dec. 2009, at 18.

thousands of calls.⁴⁵ Taken together, these factors help to provide a context for the true scope of this widespread problem.

1. METHODS AND COSTS OF SECURING CONTRABAND CELLULAR TELEPHONES

Cell phone smuggling is difficult to prevent because the devices are brought into correctional facilities in a myriad of ways. Inmates coordinate smuggling efforts with corrupt correctional facility workers,⁴⁶ visiting family members,⁴⁷ or fellow gang members.⁴⁸ Smugglers often throw handsets over facility walls or conceal them in packages sent to the prisons.⁴⁹ One facility in Texas reported finding seventy-five cell phones hidden in an air compressor.⁵⁰ Smugglers opened the metal tank, hid the phones and chargers with some narcotics, and then welded the tank shut.⁵¹ Officials found the phones when drug-sniffing dogs detected the narcotics.⁵²

The *San Francisco Chronicle* reported that “more than half the phones in prisons come from staff at the facilities - including guards, cooks, [and] health care workers.”⁵³ Correctional facility staff is familiar with the facilities in which they work, and, in some cases, undergo less stringent security requirements than visitors.⁵⁴ In 2009, 300 California correctional employees were disciplined for suspected cell phone smuggling.⁵⁵ 150 more have been disciplined in 2010.⁵⁶ One California correctional officer told officials that he made more than \$100,000 in one year by smuggling cell phones.⁵⁷ Since 2007, 230

45. Wells, *supra* note 5.

46. Rosario, *supra* note 41.

47. Bishop, *Cell Phone Presence*, *supra* note 4.

48. Whitmire, *supra* note 6, at 6 (noting that gang members from the Texas Syndicate, Aryan Brotherhood, and the Crips had made cell phone calls while imprisoned in Texas facilities).

49. Rosario, *supra* note 41 (noting that, in one instance, officials reported that smugglers used carrier pigeons to deliver the contraband telephones); *see also* Wells, *supra* note 5.

50. Moriarity, *supra* note 18, at 22; *see also* Beiser, *supra* note 9, at 136.

51. Telephone Interview with Brian Hendricks, Republican General Counsel, U.S. Senate Comm. on Commerce, Sci. & Transp. (Dec. 21, 2009).

52. *Id.*

53. Wyatt Buchanan, *Bill to Outlaw Cellular Phones in State Prisons Goes to Senate*, S.F. CHRON., Apr. 30, 2009, at A1.

54. *See Ove*, *supra* note 15; Sandberg, *supra* note 12.

55. Johnson, *supra* note 36.

56. *Id.*

57. Beiser, *supra* note 9, at 136.

Texas correctional facility employees have been disciplined for “cell phone-related infractions.”⁵⁸

Family members are also often culprits. Richard Tabler’s mother and sister allegedly assisted him in procuring the cellular phone he used to call Senator Whitmire.⁵⁹ They were later indicted on charges of assisting an inmate to obtain a contraband cell phone.⁶⁰

The cost to procure a cell phone on the black market varies widely depending on prison location and an inmate’s level of security, but is within reach for criminals continuing to engage in profitable criminal enterprises. On the high end, Texas death row inmate Tabler paid \$2100 for his contraband cell phone.⁶¹ California officials note that contraband cell phones can be purchased for between \$100 and \$400 each.⁶² Family or gang members often cover the initial financial outlay and subscription rates.⁶³

In addition to wreaking havoc outside prison walls, contraband cell phones also pose a threat within correctional facilities. Even one contraband cell phone can have a tremendous negative impact by encouraging the development of a black market within the facility.⁶⁴ Inmates who lack the means or motivation to obtain their own cell phones may still benefit from another’s contraband device. As such, contraband cell phones, like other contraband items, are a source of income for inmates who possess them.⁶⁵

Many different inmates used Texas inmate Richard Tabler’s cell phone to make more than 2,800 calls in the month before it was discovered.⁶⁶ Nine of those inmates were on death row.⁶⁷ Investigators found that Maryland convicted murderer Patrick Byers made more than 1,000 calls from his contraband phone, and likely allowed others to use

58. Johnson, *supra* note 36.

59. Whitmire, *supra* note 6, at 5.

60. *Id.*

61. Wells, *supra* note 5.

62. Buchanan, *supra* note 53.

63. See, e.g., *All Things Considered: Inmates Smuggle*, *supra* note 5.

64. Professor Walter Dickey noted that contraband materials of any sort within a correctional facility become contraband for exchange. These items, including cell phones, are then used to manipulate and coerce other inmates. See interview with Walter Dickey, George H. Young Chair, Univ. of Wis. Law Sch., former Dir. of Wis. Div. of Corr., in Madison, Wis. (Feb. 17, 2010). He further emphasized that correctional officers must take all possible steps to limit the introduction of contraband and limit inmate control over other inmates. *Id.*

65. Abruzzese, *supra* note 42.

66. Wells, *supra* note 5.

67. *Id.* The presence of contraband phones in death row facilities is particularly concerning given that many inmates have violent histories and that they have little or nothing to lose by perpetrating further crimes.

it as well.⁶⁸ Thus, the growing problem of contraband cell phone use has far-reaching consequences both inside and outside prison walls.

2. REASONS BEHIND CONTRABAND CELLULAR TELEPHONE USE IN PRISONS

There are two primary motivations driving contraband cell phone use in prisons. First, the high cost of legitimate, wireline prison telecommunications incentivizes inmates and their families to procure contraband cellular phones. Second, cell phones provide inmates with the ability to carry on criminal enterprises while incarcerated.

a. The high cost of legitimate prison calling

Many inmates use contraband cell phones due to the high costs incurred by them and their families for the use of traditional wireline-telephone services. Inmates in some state prisons are only allowed to make expensive collect calls.⁶⁹ Prison calling can cost upwards of \$0.89 per minute, plus a connection fee of up to \$4.00.⁷⁰ In most cases, inmates' families, not the inmates themselves, pay for the calls.⁷¹ A typical telephone bill for one of these families, traditionally a low-income population, could easily be over \$500 per month.⁷²

Citizens United for Rehabilitation of Errants (CURE), an advocacy organization for inmates and their families, believes that the majority of contraband phones are used by inmates to stay in touch with family and friends.⁷³ For instance, the majority of death-row inmate Richard Tabler's illegal calls were to his mother and sister, who allegedly procured the phone for him.⁷⁴ CURE contends that prison telephone

68. Melanie R. Holmes, *Senate Approves Cell Phone Jamming*, 118 BALT. AFRO-AMERICAN, Oct. 17-23, 2009, at A1; *see also Today Show: Today Show Investigates*, *supra* note 1.

69. Madeleine Severin, Note, *Is There a Winning Argument Against Excessive Rates for Collect Calls from Prisoners?*, 25 CARDOZO L. REV. 1469, 1469 (2004).

70. *H.R. 1147, H.R. 1133, and H.R. 1084: Hearing Before the Subcomm. on Comm'n's, Tech., & the Internet of the H. Comm. on Energy & Commerce*, 111th Cong. 1 (2009) (statement of Chairman Rick Boucher); *see also* Ben Iddings, Comment, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?*, 8 N.C. J.L. & TECH. 159, 176 (2006).

71. Severin, *supra* note 69, at 1473.

72. *See* Iddings *supra* note 70, at 160-61 (discussing two families with average monthly telephone bills of over \$700).

73. Rosario, *supra* note 41 (quoting CURE).

74. Beiser, *supra* note 9, at 137.

policies are responsible for much of the contraband because many prison systems charge very high rates for phone calls.⁷⁵

The costs of providing prison telephone services are higher than the costs of those offered to a regular customer base,⁷⁶ because economies of scale are lacking in prison systems.⁷⁷ Additional technological mechanisms to trace and record calls and block call forwarding capabilities are also required to protect public safety.⁷⁸ It is questionable, however, whether states should recoup those costs directly from inmates’ families. In her comprehensive article on the topic, Madeleine Severin noted that “the cost to state prisons of maintaining visitor facilities and visit-related security appear to be far greater than those of telephone security features, and such costs are only indirectly, if ever, passed on to visitors.”⁷⁹

State and department contracting procedures are another reason for the high cost of prison calling.⁸⁰ Telephone services are usually offered by a single vendor to an individual correctional facility or an entire correctional department on a contract basis.⁸¹ Over time, the system has evolved to require competing service providers to include “repayment” of a certain percentage of revenues—a kickback of sorts.⁸² States negotiate exclusive contracts with prison telecommunications-service providers.⁸³ These contracts generate a large number of expensive calls and, in exchange, states receive commissions of anywhere from 18–60 percent of the providers’ revenue.⁸⁴ These commissions, in turn, drive

75. Rosario, *supra* note 41 (quoting CURE).

76. Severin, *supra* note 69, at 1475–76.

77. *See id.* at 1476–77.

78. H.R. 1133 the ‘Family Telephone Connection Protection Act of 2009’ on Behalf of Securus Technologies, Inc.: Hearing Before the Subcomm. on Commc’ns, Tech., & the Internet of the H. Comm. on Energy & Commerce, 111th Cong. 4 (2009). Curtis L. Hopfinger stated:

The inmate telephone system is . . . equipped with technology to prevent the forwarding of calls to a third number and the setting up of three-way calls in which neither the phone system nor correctional authorities can know who is the third party on the call. These protections require the development, installation, and maintenance of special hardware and software that establishes a secure calling environment.

Id. Hopfinger also stated “the inmate calling system requires all inmate calls to be recorded and stored according to the inmate’s unique identification number.” *Id.* at 5. For additional discussion, see also Severin, *supra* note 69, at 1476.

79. Severin, *supra* note 69, at 1476.

80. *Id.* at 1469.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

up telephone costs for inmates' families. Monthly telephone bills of up to \$700⁸⁵ make a one-time procurement fee and monthly cell phone payment quite attractive. However, such use is not innocuous just because some inmates use contraband phones only to contact friends and family. One contraband phone is likely to be used by many inmates for multiple purposes.⁸⁶

The high cost of traditional prison calling is a long-standing problem of which the rise in contraband cell phone use is an unintended consequence. Many of the states advocating for the right to jam signals in their correctional facilities have contributed to the problem by entering into contracts that provide services at highly inflated rates and impose a hardship on inmates' families.⁸⁷ Advocating for federal legislation to allow prison jamming without also challenging decision-makers to examine state contracting-procedure reform to address this issue seems unwise. The need for reform, while not widely researched, has been discussed in previous scholarly work⁸⁸ and is beyond the scope of this article.

b. Cellular telephones allow inmates to continue to perpetrate crimes

The other, perhaps more intuitive, reason inmates seek to use cell phones in prison is that the devices allow them to continue to perpetrate crimes while incarcerated. Even if traditional wireline-prison-telephone services were provided free of charge to inmates, some inmates would continue to seek cell phones because they are useful, convenient, widely available, relatively inexpensive, and not subject to the monitoring safeguards imposed on legitimate prison telephone service.

As discussed, convicted criminals have used contraband cell phones to intimidate witnesses and occasionally harm them.⁸⁹ They have also used the phones to plan escapes,⁹⁰ or run ongoing illegal enterprises through organized crime and gangs.⁹¹ While some incidents have made headlines, the number of crimes perpetrated through the use

85. See *supra* notes 70–72 and accompanying text.

86. See *supra* notes 19–21, 63–67 and accompanying text.

87. See Severin, *supra* note 69, at 1469–74.

88. See generally Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 FED. COMM. L.J. 391 (2002); Iddings, *supra* note 70; see also Nicholas H. Weil, *Dialing While Incarcerated: Calling for Uniformity Among Prison Telephone Regulations*, 19 WASH. U. J.L. & POL'Y 427 (2005); Severin, *supra* note 69.

89. See *supra* notes 1–4, 19 and accompanying text.

90. Buchanan, *supra* note 53.

91. See Chris Megerian, *Prisons Go After Cell Phones to Keep Inmates Out of Touch*, STAR-LEDGER (Newark, N.J.), Sept. 16, 2009, at 19.

of contraband phones is difficult to estimate. For security reasons, prison officials are often reluctant to publicly release details of breaches that occur.⁹²

In April 2009, members of the Black Guerilla Family prison gang were indicted on federal conspiracy charges after being accused of conducting business among several Maryland prisons using contraband cell phones.⁹³ Four of the individuals indicted were correctional officers.⁹⁴ Similarly, New Jersey officials prosecuted incarcerated Blood gang members who held conference calls between multiple facilities using contraband cell phones.⁹⁵ In Massachusetts, officials say that an inmate used a contraband cell phone in an attempt to coordinate his escape and order a correctional officer’s murder.⁹⁶ In addition, an escape plot in Tennessee, aided by a contraband cellular phone, led to the death of a prison guard.⁹⁷ Finally, South Carolina officials note that inmates have used contraband cell phones to perpetrate credit card fraud and drug smuggling while incarcerated.⁹⁸

Prison officials are also concerned that inmates can coordinate prison riots using contraband cell phones.⁹⁹ In fact, a prison gang leader in Oklahoma attempted to use a cell phone to coordinate violence throughout five correctional facilities.¹⁰⁰ Regardless of why inmates choose to use contraband cellular phones, the phenomenon poses a significant threat to the security of our justice system. This threat affects our court system, correctional facilities, and the public at large.

B. The Basics of Cellular Telephone Jamming Technology

Jamming technology blocks the transmission and reception of radio signals necessary for cell phones to function.¹⁰¹ Jammers emit

92. In re Authorization of CMRS Jamming Within Correctional Institutions in Order to Improve Public Safety Under Conditions that Protect Legitimate CMRS Users, No. 09-30 (F.C.C. Aug. 11, 2009), *available at* www.doc.sc.gov/news/news.jsp [hereinafter Petition for Rulemaking] (Petition for Rulemaking of South Carolina Department of Corrections).

93. Drost, *supra* note 1.

94. *Id.*

95. See Beiser, *supra* note 9, at 135; see also Beth DeFalco, *State Tests Ways to Curb Cell Phone Use Among Inmates*, DAILY J. (Vineland, N.J.) Sept. 16, 2009.

96. Bishop, *Cell Phone Presence*, *supra* note 4.

97. Beiser, *supra* note 9, at 135.

98. Bishop, *Cell Phone Presence*, *supra* note 4.

99. Buchanan, *supra* note 53.

100. Bishop, *Cell Phone Presence*, *supra* note 4.

101. S. Robert Carter, III, *The Sound of Silence: Why and How the FCC Should Permit Private Property Owners to Jam Cell Phones*, 28 RUTGERS COMPUTER & TECH. L.J. 343, 349 (2002).

electromagnetic white noise on the same frequency as cellular signals in a particular area, and at a sufficient power level to cause the jamming signals to collide with the cellular signals and render them useless.¹⁰² If a cell phone's signal encounters interference from a jammer, the handset owner will be unable to make or receive calls and texts.¹⁰³ The user's experience is similar to situations in which reception is too weak for the handset to function properly.¹⁰⁴

1. CURRENT CAPABILITIES AND LIMITATIONS OF JAMMING TECHNOLOGY

Though prison cell phone jamming is a technologically viable option used in other nations,¹⁰⁵ it is a complicated and imperfect science.¹⁰⁶ Blocking cell phone signals tends to be more difficult than jamming other radio signals because phones operate at multiple frequencies.¹⁰⁷ Cellular phones are able to "spectrum hop" within a frequency to avoid interference.¹⁰⁸ Also, jammers must operate at a high enough power to block cellular signals within a desired range, but not so high that the jamming signals "leak[]" outside a particular area and cause disruptions to commercial wireless service or public-safety communications.¹⁰⁹

2. ONLY THE FEDERAL GOVERNMENT CAN JAM CELLULAR TELEPHONE SIGNALS

The FCC, and therefore the wireless industry, has interpreted the Federal Communications Act of 1934 to prohibit intentional interference with any wireless signal:¹¹⁰ "[T]he [marketing, sale or operation] of transmitters designed to prevent, jam or interfere with the operation of cellular and personal communications service . . .

102. *Id.*

103. *Id.* at 350.

104. *Id.*

105. The use of jamming technology in prisons is legal and widely used in many countries outside the U.S. Countries include Canada, Mexico, New Zealand, Norway, and Turkey. *See* Elgan, *supra* note 21.

106. Carter, *supra* note 101, at 350.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 344; *see also* CTIA, CONTRABAND CELL PHONES, *supra* note 26, at 4.

telephones . . . is unlawful” under Section 333 of the Act.¹¹¹ The statute also prohibits the manufacture, import, sale, marketing, or use of devices inconsistent with this section.¹¹² The federal government is exempted from this prohibition due to national defense and security requirements,¹¹³ but the exemption does not apply to state and local entities.¹¹⁴

Under federal law, the National Telecommunications and Information Administration (NTIA) is responsible for managing the federal government’s use of the radio frequency spectrum.¹¹⁵ NTIA has approved federal use of jamming equipment in certain homeland-security-related situations. For instance, it has approved the FBI’s domestic use of cellular-jamming technology against any potential radio-controlled improvised explosive devices.¹¹⁶ NTIA has also granted jamming authority to the U.S. Secret Service in certain situations.¹¹⁷ The Secret Service jammed local signals during President Obama’s inauguration on January 20, 2008 in order to counter possible detonation of remote-controlled explosives.¹¹⁸

111. Public Notice, Sale or Use of Transmitters Designed to Prevent, Jam or Interfere with Cell Phone Communications Is Prohibited in the United States, 20 FCC Rrd. 11134 (June 27, 2005); *see also* Communications Act of 1934, 47 U.S.C. § 333 (2006).

112. 47 U.S.C. § 302(b) (2006). For a first offense, fines can range as high as \$10,000 for each violation or imprisonment for up to one year. The device used may also be seized and forfeited to the U.S. government. §§ 501–10.

113. *See* §§ 302(c), 305(a).

114. S. REP. NO. 111-79, at 2 (2009).

115. Congress originally designated responsibility for federal radio communications to the President. *See* 47 U.S.C. § 305. Executive Order 12046 created the NTIA in 1978. *See A Short History of NTIA*, NAT’L TELECOMM. & INFO. ADMIN., <http://www.ntia.doc.gov/opadhome/history.html> (last visited Sept. 25, 2010). NTIA’s Office of Spectrum Management is responsible for the federal government’s radio spectrum use. *See Office of Spectrum Management (OSM)*, NAT’L TELECOMM. & INFO. ADMIN., <http://www.ntia.doc.gov/osmhome/Osmhome.html> (last visited Oct. 27, 2010). The FCC regulates the spectrum use of nonfederal operated radio stations, common carriers, and private organizations or individuals. *See* 47 U.S.C. §§ 302(d)–(f).

116. *Contraband Cell Phones in Correctional Facilities: Public Safety Impact and the Potential Implications of Jamming Technologies: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. 11 (2009) (prepared statement of Richard A. Mirgon, President-Elect, Association of Public-Safety Communications Officials (APCO) International) [hereinafter Mirgon Statement].

117. Henri E. Cauvin, *Hard Line on Inmate Cellphones*, WASH. POST, July 3, 2009, at B1.

118. *Id.*

Despite a likely ability to do so, NTIA has not granted similar jamming authority to the Federal Bureau of Prisons.¹¹⁹ It is possible that, given an NTIA waiver, the Federal Bureau of Prisons could jam signals in federal correctional facilities under current law. Why NTIA has not exercised this authority remains unclear. Of course, NTIA's authority to grant waivers to allow cellular jamming technology extends only to federal entities.¹²⁰ This is not helpful to state correctional agencies and necessitates the federal legislation later discussed.¹²¹

3. THE FCC HAS DENIED MOST REQUESTS TO HOLD JAMMING DEMONSTRATIONS

Jamming system manufacturer CellAntenna¹²² conducted a jamming demonstration on November 21, 2008 at South Carolina's Lieber Correctional Institution without federal permission.¹²³ The demonstration went forward despite efforts by the wireless industry, represented by CTIA, to convince South Carolina Governor Mark Sanford to cancel the test.¹²⁴ Press reports indicated that the test was a success.¹²⁵ Officials noted that cellular signals were blocked inside the maximum-security prison but no interference was detected outside the prison.¹²⁶

Since the South Carolina demonstration, both CellAntenna and other states have expressed interest in conducting similar tests.¹²⁷ In January 2009, the FCC approved a request by the District of Columbia

119. Telephone Interview with Brian Hendricks, Republican General Counsel, U.S. Senate Comm. on Commerce, Sci. & Transp. (Jan. 6, 2010).

120. See 47 U.S.C. §§ 302(c), 305(a) (2006).

121. See *infra* Part IV.A.

122. CellAntenna is not unknown to the FCC, nor is its record unblemished. The Commission first sent a letter of inquiry to CellAntenna in 2005 regarding a complaint that the company had marketed, sold, or otherwise provided cell phone jamming equipment to non-federal government entities. Letter from Kathryn S. Berthot, Deputy Chief, Spectrum Enforcement Div., FCC Enforcement Bureau, to CellAntenna Corp. (Aug. 24, 2005). The investigation was later closed, and no disciplinary action was taken. Letter from Joseph Casey, Chief, Spectrum Enforcement Div., FCC Enforcement Bureau, to Mr. Howard Melamed, CellAntenna Corp. (Oct. 26, 2005).

123. Drost, *supra* note 1; see also S. REP. NO. 111-79, at 2 (2009); Op-Ed., *Jam Cell Phones in Prisons*, POST & COURIER (Charleston, S.C.), Dec. 8, 2008, at A6.

124. *Cell-Jamming Company Promises to Break in to Prisons Around U.S.*, TELECOM A.M., Sept. 8, 2009. For more information on CTIA, see *supra* note 24.

125. Tim Smith, *State Officials Seek OK to Jam Cell-Phone Signals in Prisons*, GREENVILLE NEWS (Greenville, S.C.), Nov. 21, 2008.

126. *Id.*; see also Howard Buskirk, *Cell Jamming Company Plans Series of Demonstrations Across the U.S.*, COMM. DAILY (D.C.), Nov. 25, 2008.

127. S. REP. NO. 111-79, at 2-3.

Department of Corrections.¹²⁸ After granting its approval, the FCC later expressed concern regarding the test.¹²⁹ District officials cancelled the demonstration after CTIA filed a writ of mandamus with the U.S. Court of Appeals for the District of Columbia seeking a reversal or stay of the order.¹³⁰ The FCC has since denied similar requests from CellAntenna to conduct demonstrations in other locations, including Louisiana’s Pine Prairie Correctional Center.¹³¹

On June 15, 2009, Maryland Governor Martin O’Malley and U.S. Senator Barbara Mikulski submitted a petition to the NTIA requesting permission to hold a cellular jamming demonstration at a Baltimore prison.¹³² NTIA responded to Maryland’s request by stating that the agency would coordinate a response with the FCC and follow up.¹³³ By mid-October 2009, the agencies had not responded to the request.¹³⁴

After continued urging by state and federal elected officials, and considerable media attention, NTIA did eventually conduct the test on February 17, 2010 at a federal correctional facility in Cumberland, Maryland.¹³⁵ The Cumberland test marked the first government-sanctioned use of jamming equipment at a correctional facility.¹³⁶ Anecdotal reports from those present during the testing, including Governor O’Malley, indicated that cellular service in the area around the facility was not disrupted.¹³⁷

128. *See id.* at 3.

129. Cauvin, *supra* note 117; *see also* Letter from James D. Schlichting, Acting Chief, FCC Wireless Telecomms. Bureau, to Devon Brown, Dir., D.C. Dep’t of Corr. (Feb. 18, 2009).

130. S. REP. NO. 111-79, at 3.

131. Letter from James D. Schlichting, Acting Chief, Wireless Telecomms. Bureau, to Mr. Howard Melamed, CEO, CellAntenna Corp. 1 (Mar. 17, 2009); *see also* S. REP. NO. 111-79, at 3; Drost, *supra* note 1.

132. Press Release, Mikulski Insists, *supra* note 39. Maryland officials petitioned NTIA in order to seek a waiver under the federal government exemption under 47 U.S.C. § 302a(c) (2006), relying on the fact that several Maryland correctional facilities accommodate federal inmates. Press Release, Mikulski Insists, *supra*. Requests for authorization pursuant to this exception are administered by NTIA. *See* 47 U.S.C. §§ 305(a), 902(b)(2)(A), 902(b)(2)(K); Exec. Order No. 12046, 3 C.F.R. 158 (1979); U.S. Reorganization Plan No. 1 of 1977, 3 C.F.R. 167 (1978), *reprinted in* 3 U.S.C. § 21 (2006), *and in* 91 Stat. 1633 (1977); *see also* Cauvin, *supra* note 117.

133. Press Release, Mikulski Insists, *supra* note 39.

134. *Id.*

135. Michael A. Sawyers, *Cell Phone Jamming Equipment in Place at Local Federal Prison*, CUMBERLAND TIMES-NEWS (Md.), Feb. 18, 2010.

136. Press Release, Sen. Barbara A. Mikulski, Joint Statement from Senator Barbara A. Mikulski and Governor Martin O’Malley on Nation’s First-Ever Cell Phone Jamming Test at a Prison Held Today in Maryland (Feb. 19, 2010).

137. Sawyers, *supra* note 135.

The NTIA released official test results from both inside and outside of the prison in May 2010.¹³⁸ Jamming proponents declared victory,¹³⁹ while detractors expressed lingering concern about the possibility for cellular service disruptions outside the prison walls.¹⁴⁰ The report noted that jammer power was measurable at outdoor locations where jamming was not intended at distances up to 127 meters from the building.¹⁴¹ The presence of jamming signals outside of the prison indicates some signal leakage. However, NTIA went on to state that the “potential for harmful interference, if any, of the jammer emissions that were observed outside the jamming zone was beyond the scope of [the] report.”¹⁴²

Congress has tasked NTIA, in coordination with the FCC, the Federal Bureau of Prisons, and the National Institute of Justice, to develop a plan “to investigate and evaluate how wireless jamming, detection and other technologies might be utilized for law enforcement and correctional applications in federal and state prison facilities.”¹⁴³ On the same day that NTIA released its reports on the Cumberland prison-jamming test, the agency released a Notice of Inquiry seeking comment on technical approaches to preventing contraband cell phone use in prisons.¹⁴⁴ NTIA requested that comments be submitted on or before June 11, 2010, but has not yet released additional findings or information.¹⁴⁵ As a part of these congressionally mandated investigatory efforts, the FCC’s Public Safety and Homeland Security Bureau hosted a public workshop to discuss contraband cellular phone

138. FRANK H. SANDERS & ROBERT T. JOHNK, U.S. DEP’T COMMERCE, EMISSION MEASUREMENTS OF A CELLULAR AND PCS JAMMER AT A PRISON FACILITY, at xi (2010).

139. U.S. Senator Mikulski and Maryland Governor O’Malley noted that the test “showed no interference of the jamming technology with federal operations of the prison within the testing area.” Press Release, Gov. Martin O’Malley & Sen. Barbara A Mikulski, Senator Barbara Mikulski, Governor Martin O’Malley Urge Congressional Action on Cell Phone Jamming Legislation Following Results of Prison Test (May 12, 2010).

140. Comments of Sprint Nextel Corporation, *In re Preventing Contraband Cell Phone Use in Prison*, No. 100504212-0212-01 (N.T.I.A June 11, 2010), available at <http://www.ntia.doc.gov/comments/100504212-0212-01/attachments/SprintJammerComments%20-%20061110final.pdf>.

141. SANDERS & JOHNK, *supra* note 138, at xi.

142. *Id.*

143. *Contraband Cell Phone Use in Prisons*, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, <http://www.ntia.doc.gov/osmhome/contrabandcellphones/index.html> (last visited Oct. 21, 2010); see also H.R. REP. NO. 111-366, at 619 (2009) (Conf. Rep.).

144. Preventing Contraband Cell Phone Use in Prisons, 75 Fed. Reg. 26733, 26733-38 (May 12, 2010).

145. *Contraband Cell Phone Use in Prisons*, *supra*, note 143.

use in prisons.¹⁴⁶ The workshop included representatives from the National Institute for Justice and the Association of State Correctional Administrators.¹⁴⁷

The South Carolina Department of Corrections, along with thirty-two state and regional prison systems, has petitioned the FCC to initiate a rulemaking to permit jamming of cellular signals within correctional institutions.¹⁴⁸ Petitioners' regulatory proposal would require strict eligibility and licensing processes, coordination with local cellular service providers, and prevention of interference with cellular and non-cellular wireless services.¹⁴⁹ The proposal also calls for stringent technical standards and authorization procedures for jamming equipment, and tightly controlled sale of jamming systems to eligible entities.¹⁵⁰ These proposals mirror several sections of the proposed federal legislation discussed below.¹⁵¹ The FCC has not yet issued a ruling, but may do so in the near future.¹⁵²

The South Carolina petition is proponents' second attempt to seek administrative or legal changes to the jamming moratorium. CellAntenna filed a 2006 lawsuit challenging FCC regulations on jamming in the Southern District of Florida.¹⁵³ The district court dismissed the suit for lack of subject matter jurisdiction.¹⁵⁴ CellAntenna appealed to the Eleventh Circuit Court of Appeals in November 2006, where the court determined that the petition for review was not ripe because the company had not yet petitioned the FCC.¹⁵⁵ Subsequent to

146. Public Safety and Homeland Security Bureau to Hold Workshop/Webinar on Contraband Cell Phone Use in Prisons, DOC-301424A1 (F.C.C. Sept. 13, 2010) (public notice).

147. *Id.*

148. See Petition for Rulemaking, *supra* note 92, at 1; see also Op-Ed., *Cut Off Prisoners' Cell Phones*, POST & COURIER (Charleston, S.C.), Oct. 14, 2009, at A12.

149. See Petition for Rulemaking, *supra* note 92, at 2-3.

150. *Id.* at 3.

151. See *infra* Part IV.A.

152. See Telephone Interview with Robert Kenny, Dir. of Media Relations & Commc'ns, FCC Pub. Safety & Homeland Security Bureau (Oct. 28, 2010).

153. Order Granting Motion to Dismiss, *CellAntenna Corp. v. FCC*, No. 06-60430-CIV-HUCK/SIMONTON, 0:06-cv-60430-PCH (S.D. Fla. Oct. 18, 2006) (PACER).

154. *Id.* at 1.

155. *CellAntenna Corp. v. FCC*, No. 06-16116 (11th Cir. Feb. 8, 2007); see also Telephone Interview with Robert Kenny, *supra* note 152; Marguerite Reardon, *Company Challenges FCC Rules on Cell Phone-Jamming Gear*, CNET NEWS.COM (Dec. 1, 2006), http://news.cnet.com/Company-challenges-FCC-rules-on-cell-phone-jamming-gear/2100-1036_3-6139854.html. CellAntenna initially filed the lawsuit instead of filing a petition for rulemaking with the FCC in order to avoid what it expected to be an overly time-intensive process. *Id.* 4

that court ruling, in June 2007, CellAntenna filed a petition for rulemaking with the FCC requesting amendment of section 2.807 of the Commission's rules to allow state and local law enforcement agencies to use jamming equipment.¹⁵⁶ The FCC has not taken action on that petition to date.

III. CELLULAR JAMMING TECHNOLOGY IS THE MOST EFFECTIVE WAY TO STOP CONTRABAND CELLULAR TELEPHONE USE

Despite attempts by correctional facilities to prevent handset smuggling, contraband cellular-telephone-use rates are increasing. State statutes criminalizing smuggling, possession, and use of contraband phones have proven ineffective. Traditional and technical detection methods have not been able to stem the flow of contraband phones in prisons and pose greater risks to correctional personnel than jamming. Detection efforts and emerging managed-access technologies¹⁵⁷ are both subject to misuse and are often more expensive than jammers. The availability of cellular jamming technology along with these methods will yield better results than jamming alternatives alone.

A. Current Legislation Is Ineffective

Several states have proposed and passed legislation intended to prevent smuggling and use of cell phones in correctional facilities.¹⁵⁸ These statutes have created a number of different felony and misdemeanor offenses. Such legislation will likely fail to deter the use of phones already smuggled into facilities or the introduction of new contraband.

Though well intended, many states lack the necessary resources to prosecute and enforce laws targeting the introduction or use of

156. See Petition for Rulemaking, *supra* note 92, at 1; see also Press Release, CellAntenna, Cell Phone Jamming Test Called Successful: Firm Plans to Petition FCC (Nov. 21, 2008), <http://www.cellantenna.com/index.php?id=article1>.

157. Managed-access systems are also known as "cell capture" technology. See Public Safety and Homeland Security Bureau, FCC, *Workshop on Contraband Cell Phone Use in Prisons*, REBOOT.FCC.GOV (Sept. 30, 2010), <http://reboot.fcc.gov/video-archives> (follow hyperlink for title under Previous Live Events, September 2010) [hereinafter *Workshop*] (testimony of James A. Barnett, Jr., Public Safety and Homeland Security Bureau Chief, Federal Communications Commission, Thomas R. Kane, Asst. Dir. Information, Policy & Public Affairs, Federal Bureau of Prisons, and Jon Ozmint, Director, South Carolina Department of Corrections) (using the terms "managed access" and "cell capture" interchangeably).

158. Cauvin, *supra* note 117.

contraband cellular phones.¹⁵⁹ A 2009 legislative proposal pending in California would impose misdemeanor penalties on both contraband-cell-phone smugglers and inmate users.¹⁶⁰ Legislative leaders in the state are not backing bills creating new felonies because of prison overcrowding.¹⁶¹ State budget shortfalls, particularly during the current recession, have forced legislators to make tough choices regarding criminal-justice funding.¹⁶² Maryland’s state law prohibiting inmate possession of cellular phones is a misdemeanor.¹⁶³ State officials admit that prosecution is unlikely, though they note that targeted prosecution may be used in an attempt to make an impact.¹⁶⁴ With limited available resources, and both overcrowded and understaffed prison facilities,¹⁶⁵ it is not at all clear that officials will be able to improve this problem legislatively.

Another underlying reason for the ineffectiveness of these statutes is that an additional misdemeanor, or even felony, charge against already incarcerated inmates is unlikely to have much of a deterrent effect.¹⁶⁶ This is particularly true for inmates on death row, who have little to lose in the form of chances for parole or reductions in privileges. Some states, including New Jersey and Florida, have made smuggling phones a felony.¹⁶⁷ New Jersey’s law against inmate possession of cell phones carries a maximum punishment of five years

159. Petition for Rulemaking, *supra* note 92, at 1–2 (“[S]ome correctional systems have insufficient funding to fulfill their core mission.”).

160. S.B. 434, 2009 S. (Cal. 2009) (amended Jan. 25, 2010); *see also* Buchanan, *supra* note 53.

161. Buchanan, *supra* note 53.

162. Jim Siegel, *Bigger Budget Problems Loom*, COLUMBUS DISPATCH (Ohio), Dec. 27, 2009, at 01B; *see also* Op-Ed., *The Scene Behind the Bars*, ANNISTON STAR (Ala.), Dec. 21, 2009.

163. Abruzzese, *supra* note 42.

164. *Id.*

165. *See generally* *The Scene Behind the Bars*, *supra* note 162.

166. *See* Andrew D. Leipold, *The War On Drugs and the Puzzle of Deterrence*, 6 J. GENDER RACE & JUST. 111, 119 (2002). In discussing the deterrent effect of drug possession sentences, Leipold notes:

[B]ecause for many people the mere fact of arrest and a criminal charge can have such significant consequences, many drug possessors are likely to be more concerned with the probability of apprehension than the degree of sanction (within reason) if caught. No matter how severe the penalty, if the risk of arrest and conviction is vanishingly small, then we can continue to increase incrementally the length of prison stay without making an appreciable dent

Id. In cases of inmate use of contraband cellular phones, the perpetrators have already been caught and convicted of more serious crimes, thus reducing the deterrent effect of anti-contraband statutes.

167. S. REP. NO. 111-79, at 2 (2009).

in prison and a \$15,000 fine.¹⁶⁸ In September 2009, New Jersey Attorney General Anne Milgram announced charges against thirty-five inmates, twenty-five of whom were gang members.¹⁶⁹ While this action indicates a willingness to prosecute, it is unclear what sort of actual disincentive the law provides. This is particularly true in light of the increasing rates of contraband cell phone use discussed earlier.¹⁷⁰

State statutes prohibiting contraband cellular phones are also unlikely to deter prospective gang-member smugglers seeking to carry on profitable enterprises with incarcerated colleagues. In addition to already being involved in criminal activities like the sale of illegal drugs and weapons, gangs who participate in cellular phone smuggling are highly organized and benefit greatly from such involvement.¹⁷¹ Family members who wish to speak to their relatives without incurring crushing costs are similarly unlikely to be deterred. The monetary incentives for these groups, both in gains and savings, are simply too strong.

In line with state efforts, recently passed federal legislation will prohibit the possession or use of cell phones and similar wireless devices by federal inmates.¹⁷² Specifically defining cellular phones as contraband in federal prisons, and imposing punishments on those who engage in such behavior, *is* an important step as it serves to recognize the far-reaching effects of this growing problem. Like similar state statutes that prohibit use or possession of contraband phones, however, the legislation does nothing to remove or stop the use of those already in the prisons and is unlikely to provide significant deterrence.

B. Jamming Technology Is More Effective Than Alternative Methods Alone

Jamming technology is widely recognized as an effective and efficient technique to prevent the use of cell phones.¹⁷³ Jamming is a

168. DeFalco, *supra* note 95.

169. *Id.*

170. *See supra* Part I.A.

171. *See supra* Part I.A.2.b.

172. Cell Phone Contraband Act of 2010, Pub. L. No. 111-225, 124 Stat. 2387. Senator Feinstein (D-CA) introduced the legislation as S. 1749 on October 5, 2009. President Barack Obama signed the bill into law on August 10, 2010. *See Bill Summary & Status 111th Congress (2009-2010) S. 1749 Major Congressional Actions*, LIBRARY OF CONGRESS, <http://www.thomas.gov/home/LegislativeData.php> (enter "S. 1749 in search box, click on "Major Congressional Actions" hyperlink) (last visited Oct. 24, 2010).

173. The use of jamming technology in prisons is legal and widely used in many countries outside the United States, including Canada, Mexico, New Zealand,

legitimate solution to the contraband cell phone problem because it is effective, poses less of a threat to correctional facility personnel, and is less likely to be compromised by prison personnel. In many cases, jamming is also less expensive than other methods of prevention and detection.

1. CELLULAR JAMMING TECHNOLOGY IS EFFECTIVE

Cellular jamming is a technologically effective method of preventing contraband cell phone use.¹⁷⁴ The current statutory prohibition on jamming has prevented the accumulation of an extensive body of statistical research on jamming systems’ efficacy in U.S. prisons.¹⁷⁵ However, prison jamming in other nations and the few available tests on U.S. soil have been successful.¹⁷⁶ University of Maryland Professor Anthony Ephremides contends that precision jamming in prisons is possible.¹⁷⁷ He also notes that testing, experimentation, and caution are necessary for systems to keep pace with new technology.¹⁷⁸

Current jamming systems, in concert with additional detection and prevention methods, provide an excellent starting point to combat contraband cell phone use. Jammer manufacturers have expressed confidence that current technology is capable of jamming contraband calls in prisons without blocking wireless communication in the surrounding areas.¹⁷⁹ Even more effective systems would likely evolve if the federal prohibition on jammers, a significant market-entry barrier, was loosened to encourage innovation. Correctional officials

Norway, Turkey, and Nepal. *See* Elgan, *supra* note 21; *see also Prisons to Have Cell Phone Jammers*, HIMALAYAN TIMES, Aug. 18, 2010.

174. *Cf.* Cauvin, *supra* note 117 (discussing that cellular jamming technology has the potential to be a precise means of fighting contraband cell phone use).

175. Telephone interview with Brian Hendricks, *supra* note 119.

176. The NTIA conducted jamming tests at its lab in Boulder, Colorado in December 2009. The report released in February, 2010 indicates that unwanted jammer interference can be reduced at particular settings and with appropriate filtering. The highly technical results of these tests will likely inform Congressional and FCC decisions on this issue. *See* FRANK H. SANDERS ET. AL, NAT’L TELECOMM. & INFO. ADMIN., U.S. DEP’T COMMERCE, NTIA REPORT NO. TR-10-465, EMISSION MEASUREMENT RESULTS FOR A CELLULAR AND PCS SIGNAL-JAMMING TRANSMITTER 1, 66-67 (2010); *see also cf.* Paul Kirby, *NTIA Releases Cell Jamming Report*, TR DAILY, Feb. 26, 2010.

177. Cauvin, *supra* note 117.

178. *Id.*

179. Op-Ed., *Jam Cell Phones in Prisons*, *supra* note 123.

believe that, once approved, jamming systems could be put in place in two years.¹⁸⁰

Jamming detractors contend that the technology is immature and subject to “over or under performance.”¹⁸¹ If a jamming unit is not technically capable of jamming the desired area, or not properly installed and maintained, the jammer could “over perform” and block off-property cellular signals.¹⁸² This leakage could disrupt regular cellular coverage in an area, and pose risks to public safety and first responder communications.¹⁸³ If the jammer “under performs,” there may be areas within a correctional facility from which inmates could make calls.¹⁸⁴ Correctional officers *do* admit that blocking contraband cell phone use in inmates’ outdoor living space poses problems.¹⁸⁵ Jammer configuration is more difficult without prison walls to delineate boundaries.

Though concerns regarding the current technical limitations of jamming technology are legitimate, it is unfortunate that detractors have used them to stifle knowledge and innovation in this arena.¹⁸⁶ Jamming detractors argue that the technology is not ready, and, at the same time, oppose further testing that could fully demonstrate jamming efficacy and provide the knowledge necessary to improve jamming capabilities.¹⁸⁷ Additional testing and innovation may render current concerns unnecessary.

Also, because cellular jamming is per se illegal, there has not been a market for such technology. As such, product development and investment has been slow.¹⁸⁸ Proposed federal legislation¹⁸⁹ allowing limited use of jamming in prison facilities would protect against harmful interference with public safety and commercial communications, and at the same time create a more robust market for such technology by spurring the creation of more innovative and advanced products.

180. Op-Ed., *Cut Off Prisoners’ Cell Phones*, *supra* note 148.

181. CTIA, *CONTRABAND CELL PHONES*, *supra* note 26, at 2.

182. *Id.*

183. *Id.*

184. *Id.*

185. Op-Ed., *Jam Cell Phones in Prisons*, *supra* note 123.

186. S. REP. NO. 111-79, at 3 (2009) (noting FCC denial of subsequent wireless jamming tests).

187. *See id.* (discussing provisions that would allow testing to be carried out legally, but with ample protections to guard against detractors’ concerns).

188. Telephone interview with Brian Hendricks, *supra* note 119.

189. *See* discussion about the Safe Prisons Comm. Act of 2009 (S. 251) *infra* Part IV.

2. CELLULAR JAMMING TECHNOLOGY IS THE BEST AVAILABLE OPTION

Prison facilities have long employed contraband detection methods such as manual searches, detection dogs, metal detectors, and x-ray machines. More recently, technological cellular-detection methods and body-orifice security scanners¹⁹⁰ have also been introduced, and managed-access systems are being developed. While these methods are important to facility security, they have not been able to adequately address the use of contraband cellular phones.¹⁹¹ They also pose risks to correctional personnel. By themselves, they are less effective than when coupled with jamming technology.

a. Detection methods and managed-access systems are less effective

Though traditional and technological detection methods serve an important role in maintaining prison security, they are subject to serious limitations. Those opposed to cell phone jamming in prisons, including the powerful wireless-industry lobby, contend that cellular detection and managed-access technologies provide the benefits of jamming without the risks.¹⁹² However, jamming proponents believe detection methods and managed access to be more expensive and less effective than jamming.¹⁹³

Detection technology allows prison officials to locate cellular phones within a facility and identify the associated wireless service provider.¹⁹⁴ Technological detection’s most significant limitation, however, is that the systems are able to detect cell phones only while they are in use.¹⁹⁵ They are incapable of such detection when the phones are turned off.¹⁹⁶

Proponents state that detection systems offer prison officials the opportunity to wiretap contraband phones.¹⁹⁷ Wiretapping can provide officials with valuable intelligence regarding planned illegal activities and the identities of both inmates and prison staff who may be

190. Body-orifice security scanners are also known as BOSS Systems. Cauvin, *supra* note 117.

191. *See supra* notes 36–43 and accompanying text (noting the number of contraband cell phones found in state prisons).

192. CTIA, CONTRABAND CELL PHONES, *supra* note 26, at 3.

193. Op-Ed., *Let Prisons Silence Cell Phones*, POST & COURIER (Charleston, S.C.), July 25, 2009, at A8.

194. S. REP. NO. 111-79, at 2 (2009).

195. Op-Ed., *Let Prisons Silence Cell Phones*, *supra* note 193.

196. *Id.*

197. CTIA, CONTRABAND CELL PHONES, *supra* note 26, at 7.

involved.¹⁹⁸ Insight into the illegal activities of non-incarcerated gang members and correctional employees who are “on the take” would certainly be valuable. It is questionable, however, whether the benefit of this information outweighs the damage contraband cellular phones can cause both inside and outside of correctional facilities.

Proponents also note that detection technology is currently legal under the 1934 Communications Act, and poses no threat of signal disruption.¹⁹⁹ As a result, unlike jammers, detection systems are legal products. Correctional officials wishing to implement detection technology have a number of options from which to choose. One of the newest systems is the Bloodhound handheld detection system introduced by Berkeley Varitronics Systems, Inc.²⁰⁰ Handheld detection systems like the Bloodhound may prove to be less expensive and more easily put in place than older detection system models because they do not require permanent installation.²⁰¹

However, the Bloodhound is subject to the same detection limitation as its counterparts: the need for constant surveillance.²⁰² In its criticism of jamming technology, CTIA notes that jammers must be used twenty-four hours per day to prevent illegal calls from contraband cell phones.²⁰³ If a jammer is not being used, illicit calls can be made. CTIA fails to note that the same can be said for detection technology. In order to detect all cell phones in use within a facility, detection systems also must run twenty-four hours per day. Contraband phones that are turned off while detection scanners are in operation will remain hidden. If detection systems are only run at certain times, inmates may be tipped off by prison staff and simply turn the phones off for the designated period.

Body orifice scanners are another technological detection method. As with other types of contraband material, smugglers have hidden cellular phones and phone parts in body orifices in order to sneak them into correctional facilities undetected.²⁰⁴ To combat this, New Jersey and Maryland have implemented use of noninvasive body orifice scanner chairs.²⁰⁵ Texas also plans to use them as a part of its post-lockdown, legislature-mandated increase in prison security.²⁰⁶

198. *Id.*

199. *Id.* at 4.

200. Press Release, PR Newswire, *supra* note 40.

201. *Id.*

202. *Id.*

203. CTIA, CONTRABAND CELL PHONES, *supra* note 26, at 4.

204. DeFalco, *supra* note 95.

205. *Id.*; *see also* Abruzzese, *supra* note 42.

206. *See* Mike Ward, *Cell Phone Smuggling to Inmates Still on Rise*, AUSTIN AM.-STATESMAN (Austin, Tex.), Oct. 12, 2009, at A1.

Nontechnical, more traditional methods of cell phone detection include the use of random searches and detection dogs. Random searches are, perhaps, the most intuitive contraband detection method. Correctional officers search inmates’ cells, personal effects, and bodies to ensure that no prohibited material is present. These searches are a tremendously important tool to prevent use of all contraband.²⁰⁷ However, history has shown that random searches are nowhere near 100 percent effective.²⁰⁸ As old hiding spots are found, new ones emerge.

More recently, correctional departments have used specially trained K-9 police dogs to find wireless devices. Maryland pioneered the technique.²⁰⁹ Since 2008, Maryland’s cell phone sniffing dogs have found 229 contraband cell phones.²¹⁰ In New Jersey, cell phone sniffing dogs have found handsets and handset components in toilet bowls, light sockets, and books.²¹¹ Each of these dogs receives 400 hours of training.²¹² In 2009, the dogs found 130 cell phones in just one of New Jersey’s high security prisons.²¹³ The state has trained 6 of these dogs and intends to train more.²¹⁴ Florida, Virginia, Tennessee, and California also use them.²¹⁵

While the dogs are helpful, officials warn that they are not infallible. Peter Anderson, head trainer of the Maryland prison system’s K-9 unit, notes that the scent signature of the phone is small and requires the dogs to get quite close.²¹⁶ Even the best-trained dogs with excellent handlers do not always find cleverly hidden contraband.²¹⁷

207. See Beiser, *supra* note 9, at 135.

208. *Id.* at 136.

209. Bishop, *Cell Phone Presence*, *supra* note 4.

210. Press Release, Maryland Department of Public Safety and Correctional Services, Fewer Cell Phones Finding Their Way into State Prisons (July 27, 2010), available at www.dpsscs.state.md.us/publicinfo/pdfs/pressreleases/20100727a.pdf.

211. *CNN: American Morning* (CNN television broadcast Oct. 16, 2009).

212. *Id.* Such extensive training is costly. Tennessee officials estimate that the training necessary for one cell phone sniffing dog and handler could be \$7000 or more. See Op-Ed., *Block Inmate Phones*, LEAF-CHRON. (Clarksville, Tenn.), July 27, 2010, at A5.

213. See *CNN: American Morning*, *supra* note 211.

214. DeFalco, *supra* note 95.

215. S. REP. NO. 111-79, at 2 (2009); see also Op-Ed., *Block Inmate Phones*, *supra* note 212.

216. Beiser, *supra* note 9, at 136.

217. *Id.*

The wireless industry has also favored the use of managed-access systems, instead of jammers, to deter contraband cell phone use.²¹⁸ Like jammers and detectors, managed-access systems are an emerging technology. These systems work like a “cloud” over a correctional facility, and allow only previously authorized wireless phones to make and receive calls.²¹⁹ Though the effects of these systems on unauthorized handsets are similar to jammers, they are not subject to the federal jamming prohibition.²²⁰ Despite these positive attributes, this technology is not without drawbacks. Managed-access systems, like detection methods, are subject to sabotage and more expensive than jamming technology. Also, though managed-access systems do not jam signals, they *are* capable of causing interference with legally operating cellular phones in the vicinity of a correctional facility that are not authorized in the system.²²¹ Like jammers, managed-access systems can cause passerby interference.

b. Emergency response capabilities can be preserved

One of the most compelling arguments against the use of jamming technology is that it would interfere with public-safety communications both inside and outside of a correctional facility. Public-safety officers and first responders have expressed concern that jamming technology may prevent prison officials from communicating with outside assistance in the event of an emergency.²²² Some are also concerned that, if jamming causes interference with commercial wireless communications outside of the prison, it may prevent citizens from contacting emergency response services like 911.²²³ In testimony to the

218. *Contraband Cell Phones in Correctional Facilities: Public Safety Impact and the Potential Implications of Jamming Technologies: Hearing on S. 251 Before the S. Comm. on Commerce, Science & Technology*, 111th Cong. 17–18 (2009) (prepared statement of Steve Largent, President & CEO, CTIA-The Wireless Association), available at http://files.ctia.org/pdf/Testimony_CTIA_Largent_Contraband_Cell_Phones_7_15_09.pdf [hereinafter Largent statement].

219. Tricia Bishop, *No Bars Behind Bars*, BALT. SUN, Sept. 4, 2009, at 1A; see also Telephone interview with Brian Hendricks, *supra* note 119.

220. Matthew Harwood, *Hearing Weighs Pros and Cons of Cell Phone Jamming Inside Prisons*, SEC. MGMT. (July 15, 2009), <http://www.securitymanagement.com/news/hearing-weighs-pros-and-cons-cell-phone-jamming-inside-prisons-005891>.

221. See *Workshop*, *supra* note 157 (testimony of Thomas R. Kane, Asst. Dir. Information, Policy & Public Affairs, Federal Bureau of Prisons, and Jon Ozmint, Director, South Carolina Department of Corrections).

222. Largent statement, *supra* note 218, at 16–17; see also Mirgon statement, *supra* note 116, at 10.

223. Largent statement, *supra* note 218, at 17; see also Mirgon statement, *supra* note 116, at 10.

Senate Commerce Committee, representatives of the wireless industry and the public-safety sector recommended that the Committee consider options such as cellular detection and additional traditional security methods.²²⁴ In his testimony, APCO International²²⁵ President Elect Richard Mirgon stated that APCO will not support cellular jamming “until such time that the vendors and user[s] of this technology can prove that there will be NO negative impact on public-safety networks and access to 9-1-1 by legitimate users and that all other viable alternative[s] have failed.”²²⁶

While the organization’s concern about interference with public-safety communications is understandable, this position is unwise. It seems unlikely, if not impossible, for jamming manufacturers and vendors to conclusively prove that their products will not negatively impact emergency communications when they are not even permitted to test their products. Outside of the federal government, there is no legal American market for the products at this time, and product demonstrations have been thwarted at nearly every turn.²²⁷ Requiring product vendors to prove unequivocal product safety without providing any legal opportunities to do so, and therefore any investment incentives for product improvement, is a tall order.

APCO also states that it will not support jamming technology until it is clear that all viable alternatives have failed.²²⁸ It seems apparent from press reports that alternatives to jamming such as manual searches and technological detection methods have not succeeded in solving the contraband phone problem.²²⁹ The use of contraband cellular phones in correctional facilities is a relatively new, and rapidly growing, problem that will likely only become more difficult to solve as wireless-communications technology progresses. As the contraband cellular phone problem grows in many states, the nation cannot wait to implement jamming technology until *all* viable alternatives have proven ineffective.

224. Largent statement, *supra* note 218, at 9; *see also* Mirgon statement, *supra* note 116, at 10-11.

225. The Association of Public-Safety Communications Officials (APCO) International is the largest public-safety communications organization in North America. Mirgon statement, *supra* note 116, at 9. For more information, see ASSOCIATION OF PUBLIC-SAFETY COMMUNICATIONS OFFICIALS–INTERNATIONAL, <http://www.apcointl.org> (last visited Oct. 11, 2010).

226. Mirgon statement, *supra* note 116, at 9.

227. *See* S. REP. NO. 111-79, at 3 (2009); *see also* Drost, *supra* note 1.

228. Mirgon statement, *supra* note 116, at 9.

229. *See* Beiser, *supra* note 9, at 136; *see also* Press Release, Maryland Department of Public Safety, *supra* note 210.

Despite concerns, many prison officials are willing to work with the possible limitations imposed by cellular blocking. Some prisons have already prohibited staff from possessing cellular phones within the facility.²³⁰ At the FCC's Workshop regarding Contraband Cell Phone Use in Prisons, Director of the South Carolina Department of Corrections Jon Ozmint noted that there are *no* legal cellular phone calls made from any correctional institution in South Carolina.²³¹ Nobody, including prison staff, is allowed to bring cellular phones on prison property.²³² Staff members instead use radios to communicate,²³³ as the radios are not affected by cellular jamming signals.²³⁴ Ozmint noted that prison systems have plenty of emergency-communication mechanisms in place, and that preserving emergency-communication capabilities alongside jammers is not a concern.²³⁵ As California Department of Corrections official Richard Subia notes, "[w]e ran the largest prison system in the world before cell phones came into play We would just have to adjust to do business as we used to."²³⁶

It is unlikely that Mr. Subia and his colleagues will have to go so far as to stop using cellular phones entirely, though some prison systems like South Carolina have chosen to do so. Jamming systems can be calibrated to only jam in certain locations of a prison.²³⁷ Similarly, structural impediments can be installed to redirect jamming signals that would otherwise leak outside the desired jamming area.²³⁸ In addition, proposed legislation would suspend or revoke jamming authorization within a correctional facility upon notice that interference has occurred.²³⁹ While jamming in prisons would certainly require cautious and careful implementation, it has the potential to alleviate far more emergencies than it may cause.

230. Sawyers, *supra* note 135.

231. *See Workshop, supra* note 157 (testimony of Ozmint).

232. *Id.*

233. Sawyers, *supra* note 135.

234. *See id.*

235. *Workshop, supra* note 157 (testimony of Ozmint).

236. Buchanan, *supra* note 53. Mr. Subia is the California Department of Corrections and Rehabilitation Associate Director for the Division of Adult Institutions. *Id.*

237. *See Carter, supra* note 101, at 350-51.

238. *Id.* at 360-61.

239. Safe Prisons Communications Act of 2009, S. 251, 111th Cong. §333A (d)(2)(A) (2009).

c. Traditional and technological detection methods pose a greater risk to correctional personnel

As previously discussed, correctional facilities use random searches and cell phone sniffing dogs to find contraband phones. The problem with these methods is that they repeatedly put officers in close physical proximity with inmates, posing serious risks to personnel. While the need for manual searches will never be completely eliminated, without the additional assistance that cellular jamming can offer, the risks posed by contraband-cell phone use will burden the system and make frequent searches necessary.²⁴⁰

Even technological detection systems pose a greater risk than jamming. Detection systems alert correctional officials to a location in the facility where a contraband phone is being used.²⁴¹ Officials must then retrieve the phone, putting them in close proximity to an inmate that has put time, effort, and money into procuring a phone and does not want it confiscated.²⁴² Newer handheld detection systems could pose even greater risks than their stationary counterparts as officials move about a facility while scanning. Former Pennsylvania Department of Corrections official John Shaffer notes that the “downside” of handheld detection devices is that officials must “be within several inches of the [cell phone] to find it.”²⁴³ If inmates’ use of contraband phones within a facility is widespread, there is little to prevent them from using the phones to coordinate a potentially dangerous response to officers’ detection efforts.

Jamming systems are usually operated from one centralized location,²⁴⁴ and would remove most of the need for manual searches for contraband phones. System security procedures to prevent jammers from being compromised or seized must be considered carefully, and

240. The Texas lockdown, discussed earlier involved a cell-by-cell search of each of Texas’s 112 correctional facilities. *See* Beiser, *supra* note 9, at 135.

241. *Id.*

242. *See* George Dery III, *Remote Frisking Down to the Skin: Government Searching Technology Powerful Enough to Locate Holes in Fourth Amendment Fundamentals*, 30 CREIGHTON L. REV. 353, 353–54 (1997) (discussing how the close proximity necessary to frisk individuals poses risks to police officers, and how remote frisking technology may minimize such risks and improve police relations with the public). The same principle is at work in the case of manual- and technical-cellular detection methods. Implementation of jamming technology would remove some of the need for close proximity between officers and prisoner, thus decreasing the risk. Of course, jammers used in prisons do not pose the same Fourth Amendment concerns as remote frisking technology.

243. James Queally & Mike Frassinelli, *In State’s Jails: Waging a War on Smuggling of Cell Phones*, STAR-LEDGER, (Newark, N.J.), Aug. 2, 2010, at 1.

244. *See* Carter, *supra* note 101, at 349.

are addressed in the pending proposed legislation on this issue, discussed later.²⁴⁵ While jamming systems will never completely eliminate the need for manual searches, the technology could reduce the growing number of searches that contraband cellular phone use has caused.

d. Jamming systems are less likely to be compromised by correctional personnel

One of the greatest risks to any facility's contraband detection and prevention efforts is the potential for compromise by prison personnel.²⁴⁶ Prison staff members introduce approximately half of the cellular phones brought into prison facilities.²⁴⁷ The financial benefits wrought by smuggling cellular phones may simply be too much for many correctional staff to resist. Most prison staff members are not corrupt, but those that are threaten prevention and detection methods designed to thwart the introduction and use of contraband phones.

Prison guards, who both smuggle phones and are assigned to carry out manual or K-9 searches, are incentivized to ignore phones that they find. They may do this, not only to protect themselves from prosecution and punishment, but also to protect the very profitable market in which they participate.²⁴⁸ In addition to simply ignoring phones when they are found, guards with information about when searches will be held can provide that information to inmates. Inmates with contraband phones could then simply "loan" the handset to a contact in a different prison unit or hide the phone outside of the cell and return to it later.

Technological detection methods are likely to be employed by fewer personnel, making infiltration less of a concern. However, personnel assigned to monitor and/or operate detection systems are subject to the same temptation as their counterparts performing random searches. Ignoring detection "hits" on operating cellular phones may prove impossible due to electronic record keeping. However, proponents of detection technology have noted that detection systems need not be operated twenty-four hours per day.²⁴⁹ As such, operators

245. See *infra* Part IV.

246. Policy makers have recognized this reality. The legislative proposal to allow jamming (discussed later Part IV) would require jamming applicants to plan for custody, inspection, and destruction of a jamming device. Jamming devices would also be required to be locked in a secluded place to minimize access. See OFFICE OF SENATOR KAY BAILEY HUTCHISON, SUMMARY OF THE SAFE PRISONS COMMUNICATIONS ACT OF 2009, at 2 [hereinafter HUTCHISON SUMMARY] (on file with author).

247. Buchanan, *supra* note 53.

248. See Beiser, *supra* note 9, at 136.

249. CTIA, CONTRABAND CELL PHONES, *supra* note 26, at 4.

who wish to protect themselves and their income source may choose to warn inmates to turn their contraband phones off during predetermined scanning sessions.

Like technological detection methods, managed-access technology is subject to misuse and infiltration by prison personnel. To implement these systems, operators install a cellular tower that intercepts wireless signals.²⁵⁰ Signals sent to or from authorized telephones are passed through to the network at large, while signals sent to or from unauthorized handsets are not connected.²⁵¹ The technology does nothing to prevent unauthorized users from using authorized phones. As long as the phone is authorized, calls could be made by an inmate just as easily as by an employee.

Also, because of how the managed-access systems function, the list of authorized handsets must be carefully restricted. Questions about which facility personnel would be allowed to carry authorized phones, and who would make such decisions, have yet to be resolved. Systems must also be managed in conjunction with personnel turnover. Outgoing correctional staff members with cell phone privileges would find a ready market for their handsets.

Many of the problems posed by traditional and technological detection methods can be avoided with implementation of cellular jamming. As noted above, cellular-jamming systems must be operated around the clock to maintain effectiveness.²⁵² This eliminates any downtime “windows” or opportunities for prison staff to warn inmates about searches or scans.

Similarly, jamming technology is less subject to compromise than managed-access systems. Managed access allows for too much leeway, given the pervasiveness of handset smuggling by prison personnel. Inmates could gain access to authorized handsets for “one-time” uses, and compromised phone numbers could be surreptitiously placed (or left) on the authorization list.

The fundamental benefit to jamming is that it renders contraband phones useless and leaves inmates without the means to readily communicate with the outside world. Handsets within the designated area simply will not function. As a result, the market for contraband cellular phones will virtually disappear both inside and outside of facilities.

250. Bishop, *No Bars Behind Bars*, *supra* note 219.

251. *Id.*; see also Largent Statement, *supra* note 218, at 17; *iNAC Managed Access*, TECORE NETWORKS, <http://www.tecore.com/solutions/intellinac.cfm> (last visited Oct. 11, 2010).

252. See CTIA, *CONTRABAND CELL PHONES*, *supra* note 26, at 4.

e. Jamming systems can be more cost effective

Aside from its effectiveness, jamming is a more cost-effective option to prevent contraband cell phone use. Howard Melamed, Chief Executive of CellAntenna Corp., says that jamming, using currently available systems, costs approximately \$1 per square foot.²⁵³ Most prisons allocate 250 square feet per inmate.²⁵⁴ A 508-person facility like the Baltimore City Correctional Center would cost about \$127,000 to jam.²⁵⁵ Technological detection systems can cost anywhere from \$20,000 to \$500,000, depending on the type of system and the requirements of a particular facility.²⁵⁶ Since the prison lockdown and contraband search in Texas, the state has spent \$10 million on metal detectors, parcel X-ray scanners, video surveillance, and a body-orifice-scanner chair.²⁵⁷ Participants at the FCC's Workshop on Contraband Cell Phone Use in Prisons expressed concern regarding the high, and at times prohibitive, cost of detection systems.²⁵⁸

Random searches by law enforcement officials and dogs cost states millions of dollars, in addition to the threat they pose to correctional workers.²⁵⁹ It is difficult to quantify the actual costs of traditional detection methods, given that they are likely to vary widely depending on the state, or even facility, in which they are implemented. For instance, Texas has 156,000 inmates, thousands of visitors, and thousands more correctional facility employees.²⁶⁰ Manually searching each of these individuals for contraband phones would not only be astronomically expensive, but also likely impossible. Signal jamming offers an alternative that is less expensive and more practical.

253. Bishop, *Cell Phone Presence*, *supra* note 4.

254. *Id.*

255. *Id.*

256. Beiser, *supra* note 9, at 136.

257. Mike Ward, *Lawmakers Seek Inquiry in Wake of Recent Escape*, AUSTIN AM.-STATESMAN, Dec. 10, 2009, at A1.

258. *Workshop*, *supra* note 157 (testimony of Ozmint and Jack Fox, Chief, Off. of Sec. Tech., Fed. Bureau of Prisons).

259. Petition for Rulemaking, *supra* note 92, at 2 (“Alternatives to jamming like cell phone sniffing dogs or detection equipment can provide only partial relief from the threat created by cell phones, and these alternatives are more expensive and less effective than jamming.”).

260. See Beiser, *supra* note 9, at 135. The Texas Legislature initially sought \$66 million to prevent contraband cell phone use in prisons. See Mike Ward, *\$66 Million Sought for Prison Security*, AUSTIN AM.-STATESMAN (Austin, Tex.), Dec. 4, 2008, at A1. It has spent \$10 million so far, and will likely spend considerably more in the years to come. Ward, *Lawmakers Seek Inquiry in Wake of Recent Escape*, *supra* note 257.

The costs of implementing managed-access technology are also significant. In order to intercept incoming and outgoing calls and then route them appropriately, managed-access systems require installation of a cellular tower.²⁶¹ While the costs of jamming systems vary, jammers do not require extensive exterior infrastructure additions. Public policy experts have expressed concern that the cost of detection or managed-access technology will discourage its use by state and local agencies whose budgets are already tight.²⁶²

The state of Mississippi has found a way to pay for managed access without increasing its budget. Commissioner of the Mississippi Department of Corrections, Christopher Epps, noted that the system negotiated with its wireline-telecommunications service provider to implement managed access as a part of its contract with the department.²⁶³ As discussed earlier, this method of paying for advanced prison telephone services is, at best, unwise and unsustainable.²⁶⁴ During the FCC Workshop, Jon Ozmint noted that a similar agreement for just one of the prison facilities in South Carolina would more than double the average cost per call.²⁶⁵

f. The wireless industry’s “slippery slope” argument is not convincing

One possible drawback to legislation allowing cellular jamming in prisons is that such authority would then be expanded beyond correctional practitioners. The wireless industry lobby has expressed concern that legislation to allow jamming in correctional facilities will lead to a “slippery slope” in which jamming technology will then be allowed in theaters, churches, and restaurants.²⁶⁶ Jamming critics argue that such policies would harm the wireless market, an industry that has seen little regulation and flourished as a result.

This argument fails for a number of reasons. First, the contention that, because jammers are currently illegal in the United States, they are therefore not used at all is unrealistic. Cellular jamming systems *are* legal in many other countries, and systems are available for purchase online.²⁶⁷ The idea that a highly regulated prison-jamming system is

261. Bishop, *No Bars Behind Bars*, *supra* note 219.

262. Telephone interview with Brian Hendricks, *supra* note 119.

263. *Workshop*, *supra* note 157 (testimony of Christopher Epps, Comm’r, Miss. Dep’t of Corr.).

264. *See supra* Section I.A.2.a.

265. *Workshop*, *supra* note 157 (testimony of Ozmint).

266. *See* David Ho, *People Annoyed by Cell Phones Turn to Jammers*, COX NEWS SERV. (N.Y.C.), Feb. 12, 2004.

267. *Id.*; *see also* Carter, *supra* note 101, at 343–44.

more dangerous than the thousands of small, unregulated, illegal personal jammers used in the United States today falls flat.²⁶⁸

Implementation of jamming technology in prison facilities is unlikely to cause us to fall down the slippery slope of allowing cellular jamming in movie theaters, churches, schools, and other public forums. It is in the public interest for individuals to be able to use mobile communication devices effectively. America's economy and security depend on it.²⁶⁹ Lawmakers must answer to their constituents—the same constituents who purchase handsets like the iPhone and Droid by the thousands. It is unlikely that any action to restrict their use, absent a particularly meritorious reason, would be well received.

Cellular phone disruptions in public places do not merit jamming like the use of contraband cellular phones in prisons does. The wireless industry fails to make a convincing case that allowing a narrow exception for cellular jamming in prison facilities will cause lawmakers to rethink the national policies against intentional interference found in the Communications Act.²⁷⁰ Cell phone use in movie theaters or restaurants simply does not pose the same threat of murder or other high-level criminal behavior as does their use in prisons. It is far more likely that allowing cell phone jamming in prisons is a worthy one-time exception.

Cellular jamming is a legitimate tool to prevent the use of contraband cellular phones because it is an effective technology. Traditional and technical detection methods, while important, are not sufficient and have thus far failed to adequately solve the growing problem of contraband cellular phone use. Signal jamming poses fewer risks for law enforcement, is less likely to be compromised, and is more cost-effective than other options.

268. See generally Matt Richtel, *Devices Enforce Cellular Silence, Sweet but Illegal*, N.Y. TIMES, Nov. 4, 2007, at A1.

269. The wireless subscriber connection rate rose 38 percent between 2009 and 2010. During the same period, the number of minutes used increased 150 percent and wireless penetration as a percentage of the total U.S. population increased from 69 to 91 percent. See Preventing Contraband Cell Phone Use in Prisons, 75 Fed. Reg. 26733, 26734 (May 12, 2010) (notice of inquiry). The notice further stated, “[t]hese trends indicate that more people are relying on wireless mobile devices to communicate for their daily business and personal needs.” *Id.*; see also Edward Wyatt, *Broadband Availability to Expand*, N.Y. TIMES, June 28, 2010, at B1 (discussing the financial benefits of expanding wireless broadband).

270. Cauvin, *supra* note 117.

IV. FEDERAL LEGISLATION TO ALLOW CELLULAR TELEPHONE JAMMING IN PRISONS IS WARRANTED

Federal policymakers have proposed legislation in response to the threat posed by inmate use of contraband cell phones.²⁷¹ On October 5, 2009, the U.S. Senate passed the Safe Prisons Communications Act of 2009 (“S. 251”).²⁷² This legislation would provide a regulatory structure under which a state or other supervisory authority of a correctional facility could petition the FCC for permission to operate wireless-jamming devices in correctional facilities.²⁷³ The bill awaits passage by the House of Representatives, where it has been referred for consideration to the House Judiciary and Energy and Commerce Committees.²⁷⁴

A. Provisions of the Safe Prisons Communications Act of 2009

Section 333 of the Communications Act of 1934 currently forbids intentional interference from any entity other than the federal government. S. 251 would provide an exception for correctional facilities²⁷⁵ by inserting Section 333A into the Act, granting the FCC authority to allow correctional facilities to operate jamming systems on their premises to interfere with unauthorized wireless communications by individuals held in the facility.²⁷⁶

S. 251 requires the FCC to enter into two initial rulemaking procedures.²⁷⁷ Within one hundred and eighty days of enactment, the Commission must conduct rulemaking for governing the petition process and for actually installing and operating the jamming system.²⁷⁸

271. Safe Prisons Communications Act of 2009, S. 251, 111th Cong.

272. Press Release, U.S. Senate Comm. on Commerce, Sci., & Transp., Senate Passes Hutchison Bill to Prevent Inmates from Using Smuggled Cell Phones (Oct. 5, 2009), <http://www.commerce.senate.gov> (follow “Press Room” hyperlink; then sort by “October” and “2009”), [hereinafter Press Release, Senate Passes Hutchison Bill].

273. *Id.*

274. *Id.*; see also *Bill Summary & Status 111th Congress (2009-2010) S. 251 Major Congressional Actions*, LIBRARY OF CONGRESS, <http://www.thomas.gov/home/LegislativeData.php> (enter “S. 251 in search box, click on “Major Congressional Actions” hyperlink) (last visited Oct. 1, 2010).

275. Communications Act of 1934, 47 U.S.C. §333 (2006), *amended by* Federal Communications Commission Authorization Act of 1990, Pub. L. No. 101-396, 104 Stat. 848, 851).

276. S. 251, 111th Cong. § 2 (2009).

277. See generally S. 251 §§ 3–4.

278. S. 251 § 3; see also S. REP. NO. 111-79, at 8 (2009); Hutchison Summary, *supra* note 246, at 1.

The Commission is to consult with NTIA and one or more entities with relevant technical and standards-setting experience.²⁷⁹ The bill directs the Commission to consider all technologically available jamming options, rather than just focusing on one particular jamming method or system.²⁸⁰

The FCC must also establish regulations for the manufacture, sale, importation, and interstate shipment of jamming devices.²⁸¹ To do so, the Commission must consider whether such devices can operate effectively within a correctional facility without causing harmful interference with public safety and commercial wireless communications nearby.²⁸² The regulations must require systems to:

- (1) operate at the lowest technically feasible transmission power that will permit correctional facility staff to prevent, jam, or interfere with wireless communications within the geographic boundaries of a correctional facility by individuals held in the facility;
- (2) be capable of directionalized operation and limited to approved frequencies;
- (3) comply with any other technical standards deemed necessary or appropriate by the Commission to ensure that the device does not create interference to other than the targeted wireless communications;
- (4) be marketed and sold only to correctional facility supervisory authority...authorized by the Commission...to possess and operate such a device; and
- (5) is capable of being shut off from jamming public safety agency communications within and around a correctional facility when a public safety agency is responding to an incident at the facility, such as a fire, explosion, medical emergency, or otherwise.²⁸³

The FCC must also field test proposed devices before determining whether or not to approve them, and is required to issue an approval decision within one hundred-twenty days of receiving an application.²⁸⁴ An up-to-date list of approved devices must be made available on the Commission's website.²⁸⁵

Once the rulemaking process is complete, correctional facilities may begin the process of seeking approval to jam signals within a

279. S. 251 § 3(1); *see also* S. REP. NO. 111-79, at 8; Hutchison Summary, *supra* note 246, at 1.

280. S. 251 § 3(2); *see also* S. REP. NO. 111-79, at 8; Hutchison Summary, *supra* note 246, at 1.

281. S. 251 § 4; *see also* S. REP. NO. 111-79, at 8; Hutchison Summary, *supra* note 246, at 2.

282. S. 251 § 4(a); *see also* S. REP. NO. 111-79, at 8.

283. § 4(a)(1)-(5).

284. § 4(c).

285. § 4(d).

facility. At least thirty days before filing a petition, eligible correctional facilities must first submit a notice of intent to the FCC.²⁸⁶ Within ten days of receiving the notice, the Commission must notify public-safety entities and commercial-wireless service providers in the affected area in order to facilitate consultation between the parties.²⁸⁷

If a public-safety organization or commercial-wireless service provider requests it, prospective petitioners must consult with them regarding the type of equipment currently in use by existing entities, location of towers, and frequencies of use.²⁸⁸ Correctional facilities may, and are encouraged to, consult public-safety organizations and commercial-wireless providers about particular jamming system selection and operation.²⁸⁹ Prospective petitioners must also allow entities access to the outside of the correctional facility upon request so that they are able to test signal strength and the likelihood of interference.²⁹⁰

After initial consultation, correctional facilities may submit a petition to the FCC requesting jamming authority.²⁹¹ The FCC again must provide notice to affected entities in the area, and must act to approve or deny the petition within sixty days.²⁹² In determining whether to approve the petition, the FCC must consider “whether the proposed jamming system would interfere with emergency or public-safety agency communications and the extent to which [it] may cause harmful interference to commercial [wireless] communications” in the area.²⁹³ The agency must also consider whether the petitioner facility is located in an urban or rural area, and what impact the facility’s location may have on possible interference.²⁹⁴

Upon petition approval, public-safety organizations and commercial-wireless service providers may request coordination with the correctional facility.²⁹⁵ The facility has thirty days from the approval date to comply.²⁹⁶ Prior to starting operation of the jamming system, correctional facilities must also grant public-safety

286. § 2(b)(1).

287. § 2(b)(2)(A); *see also* Hutchison Summary, *supra* note 246, at 2.

288. S. REP. NO. 111-79, at 7 (2009); *see also* Hutchison Summary, *supra* note 246, at 1.

289. S. REP. NO. 111-79, at 7.

290. *Id.*

291. S. 251 § 2(c)(1).

292. § 2(c)(4)(A).

293. § 2(c)(4)(B)(i).

294. § 2(c)(4)(B)(ii)-(iii); *see also* S. REP. NO. 111-79, at 7.

295. § 2(c)(5).

296. § 2(c)(5)(C).

organizations and commercial-wireless service providers access to facilitate inspection.²⁹⁷

FCC authorization to jam signals within a correctional facility lasts for a period no longer than five years, though petitioners may seek authorization renewal.²⁹⁸ The FCC may suspend jamming authorization upon written notice that a jammer is causing interference near a prison facility.²⁹⁹ If, upon further investigation, the Commission finds harmful interference that is unable to be remedied, it may revoke jamming authorization.³⁰⁰ The FCC may also revoke authorization for failure to comply with legal or regulatory requirements.³⁰¹

Because unauthorized use of jamming technology poses risks to public-safety, the bill contains language limiting jamming-system transfer and use by other parties.³⁰² It also requires each facility to have a plan for jammer custody, destruction, and inspection.³⁰³ Facilities must install the jamming device in a secure area, and have a documented plan for locking the device to prevent tampering.³⁰⁴ Finally, the bill requires that the Commission maintain an electronic database of each petition received and acted upon.³⁰⁵ The database will not be publicly available, but must be made available to public-safety agencies and commercial service providers upon request.³⁰⁶

*B. The Current Senate Proposal May Discourage the Use of
Jamming Technology*

While S. 251 would be an excellent first step towards providing correctional facilities the ability to block use of contraband cellular phones, changes made to the bill on its journey through the legislative process may render it less useful to correctional personnel than originally intended. The full Senate passed S. 251 by unanimous consent on October 5, 2009, after the Senate Commerce Committee

297. § 2(c)(5)(D); *see also* Hutchison Summary, *supra* note 246, at 1.

298. S. 251 § 2(d)(1).

299. § 2(d)(2)(A); *see also* Hutchison Summary, *supra* note 246, at 1.

300. S. 251 § 2(d)(2)(D); *see also* Hutchison Summary, *supra* note 246, at 1–2.

301. S. 251 § 2(d)(2)(E), 2(d)(3); *see also* Hutchison Summary, *supra* note 246, at 2.

302. S. 251 § 2(e)(1).

303. § 2(e)(2)–(4).

304. § 2(e)(3)(G)–(H).

305. § 2(f).

306. *Id.*

recommended its passage in September.³⁰⁷ However, the bill as passed is quite different from its initial form.³⁰⁸

There were two significant amendments to the legislation that allowed it to pass through Committee over wireless-industry opposition. First, the final bill includes the notice of intent procedure under Section 2(b)(1).³⁰⁹ This addition requires industry notice and consultation prior to petition submission by a correctional facility.³¹⁰ Section 4(c) of the current bill also includes the requirement that proposed jamming equipment be field tested by the FCC, a provision not included in the original bill.³¹¹

There is concern that, if the FCC or outside entities desire, these provisions could be exploited to prevent entities from seeking jamming authority.³¹² Individuals who have been involved in this issue for years, including South Carolina Department of Corrections Director Jon Ozmint, are concerned that the Senate-passed legislation will mean much more time and red tape for state and local correctional workers.³¹³ The addition of two consultation periods, both pre- and post-petition, will add significantly to the time and money spent by facilities seeking a jamming waiver.

In addition, the waiver period was decreased from ten years in the original bill to five in the current version.³¹⁴ This imposition of increased compliance costs and more frequent regulatory “hoops” will impose disincentives on jamming. As a result, it is likely that only facilities with the most egregious contraband cellular phone use rates will see a cost benefit in seeking permission to jam signals. Though correction officials seek to avoid the high price of jamming alternatives discussed above,³¹⁵ costs and frustrations caused by regulatory

307. Press Release, Senate Passes Hutchison Bill, *supra* note 272.

308. The original version of the bill introduced in January of 2009 was eight pages. As referred to the House of Representatives after Senate passage in October, S. 251 is twenty-one pages. *Compare* S. 251, 111th Cong. § 2(b)(1)(B) (as introduced in Senate, Jan. 15, 2009), *with* S. 251, 111th Cong. § 2(d)(1) (as referred to House of Representatives, Oct. 6, 2009).

309. S. 251 § 2(b)(1).

310. *Id.*

311. § 4(c).

312. *Nashville Committee Meeting Highlights*, CORRECTIONS DIRECTIONS (Ass'n of State Corr. Adm'rs), Aug. 2009, at 12.

313. Op-Ed., *Cut Off Prisoners' Cell Phones*, *supra* note 148. Though still a supporter of the bill, Ozmint has noted that concessions were made in bill negotiations at a cost of time and, possibly, lives. *Workshop*, *supra* note 157.

314. *Compare* S. 251, 111th Cong. § 2(b)(1)(B) (as introduced in Senate, Jan. 15, 2009), *with* S. 251, 111th Cong. § 2(d)(1) (as referred to House of Representatives, Oct. 6, 2009).

315. *See supra* Part III.B.2.a.

roadblocks could dim enthusiasm for, and innovation in, jamming technology.

The changes included in the Senate-passed bill may also be a threat to technological innovation in this area. Fewer facilities seeking permission to block signals means that fewer jamming systems will be needed. This, in turn, means that a market with the potential to produce helpful and innovative products may be irreparably stunted.

Not all correctional facilities should jam contraband phones. In fact, few would argue that every correctional facility, particularly small city or county jails, should implement wireless jamming technology. Because these facilities have less to spend on contraband screening than their larger and higher-security counterparts, the costs to implement jamming, even under less stringent legislation, would likely be prohibitive. However, facilities should have a legitimate choice; a choice that, due to red tape and additional costs forced into the bill by jamming detractors,³¹⁶ may be denied them.

Finally, while additions and changes to the bill have caused the most concern, language *not* included in the legislation is also worth mentioning. As passed by the Senate, the bill lacks a provision that would encourage states to address unfair contracting procedures that produce prohibitively high telephone bills for inmates' families. The opportunity to comprehensively address contraband cell phone use and its contributing factors should not be wasted.

CONCLUSION

The use of jamming technology in correctional facilities is not a perfect solution to the problem of contraband cellular phone use. Instead, it should be thought of as one more tool in officials' arsenals, and it should be implemented in coordination with other methods of detection and prevention. Traditional searches and technological detection methods will, of course, continue to be used.

Growth in the telecommunications sector is a challenge in all areas of policymaking. Congress, legislatures, and regulatory agencies have a difficult time keeping up with rapid technological innovation and its effects, both beneficial and negative. However, the negative threats posed to our nation's justice system by contraband cell phone use give policymakers no option but to try.

Use of contraband phones must be fought on all fronts. First, prison telecommunications contracting procedures should be examined as a way to curb the desire of some inmates and their families to smuggle cell phones into prison facilities. Second, current detection and

316. Op-Ed., *Cut Off Prisoners' Cell Phones*, *supra* note 148.

prevention methods must be evaluated for effectiveness. Finally, jamming technology to combat this threat *must* be encouraged and a practical and pragmatic approach *must* be taken.