THE COMPANY STORE AND THE LITERALLY CAPTIVE MARKET: CONSUMER LAW IN PRISONS AND JAILS

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Abstract: *The growth of public expense associated with mass incarceration has led many carceral systems to push certain costs onto the people who are under correctional supervision. In the case of prisons and jails, this frequently takes the form of charges and fees associated with telecommunications, food, basic supplies, and access to information. Operation of these fee-based businesses (referred to here as "prison retailing") is typically outsourced to a private*

firm. In recent years, the dominant prison retail companies have been consolidated into a handful of companies, mostly owned by private equity firms.

This paper explores the practices of prison retailers, with a focus on consumer-law implications. After an overview of the prison-retail industry and a detailed discussion of unfair practices, the paper looks at some potential legal protections that may apply under current law. These protections, however, prove to be scattered and often illusory due to mandatory arbitration provisions and prohibitions on class adjudication. The paper therefore concludes with recommendations on a variety of steps that state, local, and federal governments can take to address the problems inherent in current business models.

Acronyms

ACH .....Automated clearinghouse
ADR .....alternative dispute resolution
CFBP.....Consumer Financial Protection Bureau
EFTA.....Electronic Fund Transfer Act
FCC .....Federal Communications Commission
FTC .....Federal Trade Commission
GLBA.....Gramm-Leach-Bliley Act
GTL.....Global Tel*Link
ICS .....inmate calling service
MACCS.....merchant authorized consumer cash substitute
UCC .....Uniform Commercial Code
UDAAP.....unfair, deceptive, or abusive acts or practices
UDAP.....unfair or deceptive acts or practices
VoIP .....Voice-over internet protocol

I. Background

Since the 1970s, the number of people incarcerated in U.S. prisons and jails has skyrocketed. With approximately 2.3 million adults currently held in correctional facilities,[1] mass incarceration is no longer a fringe issue—it impacts families in every community in the nation. Numerous constituencies, from prison guards to utility companies to construction firms, profit from the current system of incarceration;[2] however, literature on profit-seeking in the carceral economy has disproportionately focused on companies that construct and manage correctional facilities.[3] This preoccupation with facility operators

[1] Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018* (Prison Policy Initiative 2018), available at https://www.prisonpolicy.org/reports/pie2018.html.

[2] *See generally*, Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* ch. 3 (2015).

[3] This focus on for-profit facility operators (such as CoreCivic (f.k.a. Corrections Corporation of America) and the Geo Group (f.k.a Wackenhut Corrections Corp.) has been rightly criticized for over-estimating the political strength of the private prison lobby (in terms of influencing substantive criminal justice policy), while ignoring the dominant position of publicly-run facilities, both in terms of fiscal outlays and number of people held. *See* Ruth Wilson Gilmore, "The Worrying State of the Anti-Prison Movement," Social Justice Blog (Feb. 23, 2015), http://www.socialjusticejournal.org/the-worrying-state-of-the-anti-prison-movement/ ("The long-

ignores the explosion of smaller, privately held firms—such as telecommunications providers, technology companies, commissary operators, and money transmitters—that have sprung up to monetize the basic every-day aspects of life in prisons and jails. These companies, which I refer to as "prison retailers," extract money from incarcerated people and their families in numerous transactions. Despite the small dollar-amount of most purchases, prison-retail firms can command aggregate revenue on par with private prison operators.[4]

The rise of prison retailing is a predictable result of the ways in which the American carceral state has transformed over time. Penitentiaries began as nominally charitable institutions designed to isolate people and put them to work in preparation for an eventual return to the labor force.[5] Prison-based labor was meant either to support the internal needs of a self-sufficient institution or to earn profits on the open market for the financial support of the institution. While the idea of the self-sustaining penitentiary was always partially mythological, today's correctional facilities have abandoned any pretense of paternalistic self-sufficiency, opting instead for a model of extreme austerity, supplemented by the sale of goods and services to those who can afford it.

Prisons represent an expansive use of state power, driven by policymakers of both major political parties who generally claim to support limited government. Thus, the contemporary prison embodies the notion of the "antistate state," developed by geographer Ruth Wilson Gilmore,[6] as well as the concept of "neoliberal penality" espoused by legal theorist Bernard Harcourt.[7] But regardless of the theoretical framework one uses, the dilemma is the same: the size and extent of the nation's carceral infrastructure has grown dramatically at the same time policymakers have delegitimized policies and institutions that were designed to enhance the health and welfare of disadvantaged people. As a result, the current mindset in many carceral

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standing campaign against private prisons is based on the fictitious claim that revenues raked in from outsourced contracts explain the origin and growth of mass incarceration.").

[4] Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration* (Prison Policy Initiative 2017), https://www.prisonpolicy.org/reports/money.html ("Private companies that supply goods to the prison commissary or provide telephone service for correctional facilities bring in almost as much money ($2.9 billion) as governments pay private companies ($3.9 billion) to operate private prisons.").

[5] David J. Rothman, "Perfecting the Prison: United States 1789-1865," in *The Oxford History of the Prison: The Practice of Punishment in Western Society* 100, 105-107 (Norval Morris & David J. Rothman, eds. 1995).

[6] Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* 245 (2007) ("The antistate state depends on ideological and rhetorical dismissal of any agency or capacity that 'government' might use to guarantee social well-being."); *see also* Ruth Wilson Gilmore "Organized Abandonment and Organized Violence: Devolution and the Police" (U. of Calif. Santa Cruz, Nov. 9, 2015), at 14:45, *available at* https://vimeo.com/146450686 (defining the antistate state as "The institutional result of rhetorical, but not real, state shrinkage, with its attendant devolution…of obligations to more local/state levels, or to non-state agencies.").

[7] Bernard E. Harcourt, *The Illusion of Free Markets* 41 (2011) ("The punitive society we now live in has been made possible by . . . [the] belief that there is a categorical difference between the free market, where intervention is inappropriate, and the penal sphere, where it is necessary and legitimate.").

systems is to shift many costs of basic subsistence onto incarcerated people.

Prison retailing also reflects changes in the ways that incarcerated people relate to the carceral state. While American prisons historically strove to isolate people from the outside world and harness their labor for the benefit of the institution, in the twentieth century incarcerated populations no longer represent a potentially valuable source of labor, but rather are surplus labor that must be housed at the state's expense.[8] Seen through this lens, prison retailing is properly understood as a mechanism by which a state liability (i.e., incarcerated people) becomes a potential source of revenue for both public agencies and private firms.[9] Prison retailing also deviates from the neoliberal ideal of the free market, in that incarcerated people are left to purchase essential goods and services in a market that is neither free nor competitive. This seeming paradox is neither surprising nor unique, given that most American "free markets" are in actuality highly structured spaces that are governed by "intricate rules . . . all of which distribute wealth."[10]

This paper begins with an exploration of the types of goods and services sold in prisons, and the companies that dominate the market. A discussion of specific unfair practices follows, with a subsequent analysis of existing laws that may provide relief to consumers. The paper concludes with policy recommendations for addressing and ending the unfair business practices that are prevalent today. Readers should bear in mind that prison retailing is a close cousin to other mechanisms of neoliberal penality that are beyond the scope of this paper, such as the proliferation of fees and fines associated with judicial proceedings, bail, probation, or supervised release,[11] charging incarcerated people for medical care,[12] or making people pay for the basic costs of their own incarceration (so-called "pay to stay" laws).[13]

II. Surveying the Landscape of Prison Retailing

The prison retail industry has grown in an unplanned, idiosyncratic manner. What started as a niche industry occupied by numerous narrowly-focused companies is now dominated by a handful of conglomerates owned by private equity firms. To better understand the players and products in this economic sector, it is helpful to analyze the four essential components that define any prison retail transaction: the end user, the payer, the facility, and the vendor.

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[8] *See generally*, Gilmore, *Golden Gulag*, *supra* note 6 at 70-78.

[9] *See* Lisa Guenther, *Prison Beds and Compensated Man-Days: The Spatio-Temporal Order of Carceral Neoliberalism*, Social Justice, issue 148 (Spring 2017), 31, 42 (The logic of neoliberal penality "does not primarily exploit the labor power of the prisoner, nor does it seek to discipline the subject or redeem their soul; rather, it targets criminalized populations for their potential to be warehoused.").

[10] Harcourt, *supra* note 7 at 185.

[11] Neil L. Sobol, *Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. Colo. L. Rev. 841 (2017).

[12] Wendy Sawyer, "The steep cost of medical co-pays in prison puts health at risk," Prison Policy Initiative Blog (Apr. 19, 2017), https://www.prisonpolicy.org/blog/2017/04/19/copays/.

[13] Lauren-Brooke Eisen, "Charging Inmates Perpetuates Mass Incarceration," Brennan Center for Justice (May 2015), *available at* https://www.brennancenter.org/publication/charging-inmates-perpetuates-mass-incarceration.

A. End Users

Either incarcerated people or their friends and family can be end users, depending on the product or service being sold. Goods sold through a commissary are exclusively sold for use by people inside correctional facilities; whereas telecommunications services are sold for the benefit of the two parties communicating. Financial products can be targeted solely at an incarcerated person (release cards), or can be used to facilitate a two-party transaction (money transfers).

The "customer base" of end users is notable for several prominent demographic trends. People in prisons and jails are disproportionately likely to have low pre-incarceration incomes,[14] low rates of formal education,[15] high rates of unemployment,[16] and high prevalence of mental illness.[17] One might expect policymakers to be receptive to the idea of enhanced protections for a group of consumers with such pronounced disadvantages; however, this is not the case when it comes to incarcerated people. Although families and friends of the incarcerated have made substantial progress in the last two decades, policy debates on the rights of the incarcerated are still dominated by stereotypes and prejudices that stack the deck against the establishment of new rights and safeguards. For example, introduction of computer-tablet programs in prison should raise questions about unfair pricing of digital products;[18] but a common response from legislators is to express "disgust" that people are "receiving gifts that will make their time served easier."[19]

In some ways, the political mischaracterization of prison retailing resembles a new manifestation of the zero-sum fallacy described by criminologist Frank Zimring: a belief that "[a]nything that hurts offenders *by definition* helps victims."[20] Not only is the zero-sum construct logically faulty, but it in the case of prison retailing, it is factually ill-conceived, since it is the

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[14] Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned* (Jul. 2015), https://www.prisonpolicy.org/reports/income.html (finding median incomes of incarcerated men and women to be 52% and 42% (respectively) lower than those of non-incarcerated people).

[15] Becky Pettit, *Invisible Men: Mass Incarceration and the Myth of Black Progress* 15-16 (2012) (finding that 52.7% and 61.8% of white and black males, respectively, in prisons and jails did not complete high school).

[16] *See* Lucius Couloute & Daniel Kopf, "Out of Prison & Out of Work: Unemployment among Formerly Incarcerated People," (Jul. 2018), https://www.prisonpolicy.org/reports/outofwork.html (although data is lacking on pre-incarceration unemployment rates, people released from custody are five times more likely to be unemployed than the general U.S. population).

[17] U.S. Dept. of Justice, Bureau of Justice Statistics, "Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12," NCJ Pub. No. 250612 (June 2017), *available at* https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf (finding prevalence of serious psychological distress among incarcerated people at rates of five times that of the non-incarcerated population).

[18] *See infra* § II.D.4.

[19] *Company Giving Tablets to NY Prisoners Expects to Get $9M from Inmates over 5 years,"* NYUp.com, Feb. 15, 2018, http://s.newyorkupstate.com/oIgNXak (quoting New York Assemblyman Clifford W. Crouch (R-Bainbridge)).

[20] Frank Zimring, "The New Politics of Criminal Justice: Of 'Three-Strikes,' Truth-in-Sentencing, and Megan's Laws," in *Perspectives on Crime and Justice: 1999-2000 Lecture Series* 1, 6, Nat'l Institute of Justice, NCJ Pub. No. 184245 (Mar. 2001).

family members of incarcerated people who often bear the financial punishment of paying for phone calls or commissary items, even though families have not been sentenced to any term of punishment.

B. Payers

Much of the money spent at prison retailers comes from families and friends of the incarcerated, either directly or indirectly. People typically enter prison with little or no money and earn shockingly low wages while incarcerated, to the extent they are employed at all.[21] Historically, this meant limited opportunities to purchase goods or services inside correctional facilities, due to the lack of a viable customer base. But the rising prevalence and falling price of electronic payments have made it increasingly feasible to collect payments (even in small amounts) from non-incarcerated payers (the following discussion uses the term "family member" as shorthand for a non-incarcerated payer, whether it be a child, other relative, friend, or attorney).

Direct payments can take several forms. In the case of telecommunications, the family member can be a party to the transaction being purchased—for example, as the recipient of a collect call. Families can also purchase some tangible goods through prison commissaries, although these purchases are sometimes limited to bundled "care packages."[22] Alternatively, family can pay for specific services by sending an advance payment that is held by the vendor.

Indirect purchasing entails a family member transferring money to an incarcerated recipient who then uses the funds to make a subsequent purchase. The funds are held by the correctional facility in a pooled deposit account, typically referred to as an "inmate trust account."[23] Once the money is in the trust account, the recipient can usually use it for any purpose not prohibited by prison regulations. Assuming that the transferor trusts the recipient to manage his or her own funds, transfers to trust accounts have the benefit of versatility—the money in a trust account can be used for a variety of purposes, and is not restricted to one specific service or vendor, in contrast to prepaid services where payments are locked into a specific vendor and/or service, and are usually nonrefundable and subject to arbitrary expiration provisions.

The benefit of trust-fund versatility is offset in many jurisdictions by mandatory deductions from trust accounts to cover fines, victim restitution, or costs of confinement.[24] These mandatory deductions can have the effect of

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[21] Wendy Sawyer, "How much do incarcerated people earn in each state?" Prison Policy Initiative Blog (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ (national survey finding hourly wages of 14¢ - $1.41 for incarcerated workers).

[22] Taylor Elizabeth Eldridge, "The Big Business of Prisoner Care Packages: Inside the Booming Market for Food in Pouches," *Prison Legal News* v.29, n.10 (Oct. 2018), at 28-30 (profiling major sellers of prison care packages).

[23] *See infra* note 57 and accompanying text.

[24] *See e.g.*, 3 Michael B. Mushlin, *Rights of Prisoners* § 16:20 (5th ed. rev. 2018) (discussing attachment of financial assets held by incarcerated people); "Deductions from Pennsylvania prisoner's trust account require notice," *Prison Policy News* v.29, n.11 (Nov. 2018) (discussing Pennsylvania law); Or. Rev. Stat. § 423.105 (mandatory deductions of 10-15% from all trust account deposits).

steering payers to economically inefficient transactions, such as prepaid phone accounts or care packages, in an effort to avoid loss of funds through mandatory deductions.

C. Facilities

Correctional facilities play two significant roles in prison retailing. First, and most obviously, the facility selects the vendors who sell goods and services, usually under a long-term contract that grants the vendor the exclusive right to sell certain items in the facility. Second, the facility may receive compensation under the contract, thus giving correctional managers a direct financial interest in prison-retail revenue.

Any discussion of facilities must begin with an important distinction that is often overlooked in the popular press: prisons and jails are remarkably different in both their operations and demographics. Prison systems are limited in number (fifty state departments of corrections, plus the federal Bureau of Prisons) and are typically large enough to command certain economies of scale and employ experienced procurement staff.[25] In contrast, the nation's jails consist of a sprawling patchwork of facilities run by approximately 2,850 different jurisdictions.[26] Many jails are small with limited resources—over one-third of people in jail are held in facilities with total populations of less than five hundred.[27]

The size of a correctional system is usually reported in terms of daily population—a snapshot of population on a given day. This metric disguises population turnover, most notably the significant amount of "jail churn." State prison systems hold approximately 1.3 million people on any given day, compared to 615,000 people held in local jails;[28] however, nine to ten million individuals are sent to jail every year, compared to roughly 600,000 prison admissions.[29] In the eyes of a prison-retail firm, the numerous people entering or leaving jails, and the family members with whom they communicate, add up to a broad and lucrative pool of captive customers.

Many facilities have a financial interest in prison retailing because they receive consideration from vendors. Such consideration can come in the form of a "site commission" (a predetermined percentage of sales revenue) or other types of monetary or in-kind payments. Defenders of the prison-retail sector often attempt to justify vendors' monopolist privileges by arguing that prices are subject to market competition when facilities solicit and evaluate bids.[30]

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[25] The smallest state prison system (North Dakota) housed approximately 1,700 people in 2014, but two-thirds of the states ran prison systems with populations over 10,000. U.S. Dept. of Justice, Bureau of Justice Statistics, "Prisoners in 2014," NCJ Pub. No. 248955, tbl. 2 (Sept. 2015), *available at* https://www.bjs.gov/content/pub/pdf/p14.pdf.

[26] U.S. Dept. of Justice, Bureau of Justice Statistics, "Jail Inmates in 2016," NCJ Publication No. 251210, tbl. 4 (Feb. 2018), *available at* https://www.bjs.gov/content/pub/pdf/ji16.pdf.

[27] *Id.*

[28] Wagner & Sawyer, *supra* note 1.

[29] *Id.* at n.2 and accompanying text (discussing jail churn); U.S. Dept. of Justice, *supra* note 25, tbl. 8.

[30] GTL, Securus, and CenturyLink all made this argument in the FCC's 2013 rulemaking. *See* Reply Comments of Stephen A. Raher, *In the Matter of Rates for Interstate Inmate Calling*

Although this theory is becoming increasingly dubious in light of industry consolidation,[31] it was never on strong ground to begin with, because a facility's interest in increasing commission revenue operates to drive end-user prices higher.

After conducting an extensive economic review of the inmate calling service ("ICS") industry, the Federal Communications Commission ("FCC") found that competition in the procurement process did not result in competitive or fair rates for end users.[32] Shortly before the FCC revived its previously moribund ICS rulemaking in 2012, a nationwide survey of prison phone contracts found commission rates of up to 60%, with an average nationwide rate of 42%.[33] Based on a review of confidential carrier financial data, the FCC determined that governments collected site-commission revenue of over $460 million in 2013.[34] In 2015, after years of study, the FCC sought to rein in commissions by declaring that such payments to facilities were not recoverable costs for purposes of ICS rate setting.[35] Although this regulation was eventually invalidated by an appellate court,[36] in the interim, the industry quickly discovered new ways of providing valuable consideration to facilities without invoking the formal label of a site commission.[37] One trend in new compensation structures is for a vendor to avoid commissions expressed as a percentage of sales, and instead negotiate a fixed lump-sum or recurring payment to the facility based on anticipated revenue.[38] Securus's 2016 financial statements indicate that the company is obligated to make over $84 million in such guaranteed payments to facilities over the following five years.[39]

Services, WC Docket No. 12-375, at 5, n.21 (Apr. 22, 2013) (collecting citations), *available at* https://www.fcc.gov/ecfs/filing/6017320127.

[31] *See infra* § IV.D

[32] *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking [hereinafter "First Report & Order"] ¶ 40, 28 FCC Rcd. 14107, 14128-14129 (Sept. 26, 2013) ("While the process of awarding contracts to provide ICS may include competitive bidding, such competition in many instances benefits correctional facilities, not necessarily ICS consumers—inmates and their family and friends who pay the ICS rates, who are not parties to the agreements, and whose interest in just and reasonable rates is not necessarily represented in bidding or negotiation.").

[33] John E. Dannenberg, "Nationwide *PLN* Survey Examines Prison Phone Contracts, Kickbacks" *Prison Legal News*, v.22, n.4., at 1-3 (Apr. 2011).

[34] *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking [hereinafter "Second Report & Order"] ¶ 122, 30 FCC Rcd. 12763, 12821 (Nov. 5, 2015).

[35] *Id.* at ¶ 118, 30 FCC Rcd. at 12819 ("After carefully considering the evidence in the record, we affirm our previous finding that site commissions do not constitute a legitimate cost to the providers of providing ICS.").

[36] *See infra*, text accompanying notes 187-196.

[37] Peter Wagner & Alexi Jones, *State of Phone Justice* (forthcoming 2019).

[38] *See Pearson v. Hodgson*, No. 18-cv-11130-IT, 2018 WL 6697682, * (D. Mass. Dec. 20, 2018) (2011 contract between Securus and county jail provided 47% site commission, but was amended in 2015 to replace commission with a flat $820,000 payment to county in exchange for a four-year extension of the contract).

[39] Securus Technologies Holdings, Inc. and Subsidiaries, "Consolidated Financial Report: December 31, 2016" at 26 (RSM US, LLP, independent auditor) (Feb. 28, 2017) (on file with author).

As facilities explore new ways to profit from prison retailing, the number and type of potential conflicts-of-interest has dramatically increased. For example, when facilities receive commissions from an electronic messaging system,[40] they may boost commission revenue by either banning postal mail[41] or implementing policies that make mail cumbersome and impractical.[42] Or if a facility receives a commission from a tablet-based e-book program, it might prohibit books from being sent to incarcerated people through the mail.[43] Such conflicts will only become more pronounced as the prevalence of prison retailing grows.

D. Vendors

The final component of any prison retail transaction is the company that sells goods or services, and reaps the profits therefrom. Historically, these firms were niche companies that focused on a particular product, such as telephone service. These legacy companies have largely been absorbed by and consolidated into conglomerates that sell a variety of products pursuant to bundled contracts with facilities. Most of these new conglomerates (see Table 1) are owned by private equity firms.[44] The prevalence of private equity ownership is not surprising given the tendency of prison-retail firms to enjoy

[40] Stephen Raher, *You've Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation* at 11-12 (Jan. 2016), https://www.prisonpolicy.org/messaging/report.html (discussing common commission structures).

[41] Jails in at least thirteen states have banned all incoming mail except for postcards. *See* Prison Policy Initiative, "Protecting Letters from Home," https://www.prisonpolicy.org/postcards/ (accessed Jan. 4, 2019).

[42] Some facilities have striven to make mail slower and less personal by requiring all incoming mail to be scanned and either reprinted or distributed electronically through tablets), often citing dubious security concerns. *See e.g.*, Samantha Melamed, "'I Feel Hopeless': Families Call New Pa. Prison Mail Policy Devastating," *Pittsburg Post-Gazette* (Oct. 17, 2018), https://www.post-gazette.com/news/politics-state/2018/10/17/sci-pennsylvania-prison-mail-policy-families-devastating/stories/201810170130 (new policy of scanning and reprinting incoming mail, based on allegations of drug smuggling, results in "missing pages, misdirected letters, weekslong delays, and copies so poor as to be illegible"); Katie Meyer, "Pennsylvania Prison Officials Change Mail Handling after Drug-Related Illnesses," *National Public Radio* (Sep. 5, 2018), https://www.npr.org/2018/09/05/644973472/pennsylvania-prison-officials-ban-inmate-mail-in-response-to-drug-related-illnes (discussing questionable evidence of drug-smuggling through the mail); WINK, "Charlotte County Jail Introduces Inmates to New Communication Tablets" (Dec. 4, 2017), https://www.winknews.com/2017/12/04/charlotte-county-jail-introduces-inmates-new-communication-tablets/ (incoming mail to be scanned and distributed electronically on tablets).

[43] Samantha Melamed, "One Review of Pa. Prisons' Pricey Ebooks: 'Books That Are Available For Free, That Nobody Wants Anyway,'" *Philadelphia Inquirer* (Sept. 21, 2018), http://www.philly.com/philly/news/pennsylvania-department-corrections-books-through-bars-philly-new-jim-crow-malcolm-x-20180921.html?__vfz=medium%3Dsharebar. The Pennsylvania Department of Corrections receives a 30.5% commission on all e-book sales. Contract Between Commw. of Penn. Dept. of Corr. and Global Tel*Link, Contract No. AGR-346 [hereinafter "Pennsylvania-GTL Contract"], appx. D (Cost Matrix, revised Dec. 14, 2012) (on file with author).

[44] As a rough indicator of company value, Platinum Equity purchased Securus in 2017, it told regulators that it had arranged a loan of "up to an aggregate principal amount of $2.6 billion" to fund the transaction. *See* Letter to Connecticut Public Utilities Regulatory Authority from Raechel K. Kummer (counsel for Abry) and Catrina C. Kohn (counsel for Platinum Equity), Dkt. No. 00-12-20 (Jun. 15, 2017) (on file with author) (one of several identical disclosures filed with state public utility commissions concerning the Securus acquisition).

high barriers to entry (long-term exclusive contracts with facilities, high capital requirements in the form of network build-outs, and increasing use of patents), dependable revenue streams (incarcerated customers and their families will prioritize paying for essential items like phone calls or basic hygiene items), and the potential for substantial revenue growth (as facilities become more receptive to allowing new fee-based services, like tablets). The following sections describe the basic contours of four major subsectors of prison retailing: telecommunications, commissary sales, financial services, and computer tablets.

Table 1. Dominant Prison Retail Firms

Company	Products/Services	Subsidiaries (not comprehensive)	Ownership
Global Tel*Link/GTL	Telecom, tablets, correctional banking	TouchPay Holdings (correctional banking)	American Securities (purchased GTL in 2011, from Veritas & Goldman Sachs Direct, which jointly owned the company for two years).
Securus Technologies	Telecom, tablets correctional banking	JPay (correctional banking) Satellite Tracking of People (non-prison electronic monitoring) Cara Clinicals (electronic health records)	Platinum Equity (purchased Securus in 2017 from Abry Partners, which acquired the company from Castle Partners in 2013).
Trinity Services Group	Commissary, telecom, correctional banking	Keefe Group (commissary) ICSolutions (ICS) Access Corrections (correctional banking)	H.I.G. Capital
Union Supply Group	Commissary	unknown	unknown

1. Telecommunications

Any discussion of prison retailing must begin with telecommunications, given the comparatively long history of the ICS industry. Since the mid-twentieth century ascendance of the public switched telephone network, incarcerated people have typically had three methods of communication: letters, in-person visitation, and telephone.[45] These different channels were historically insulated from naked rent-seeking. Postal rates were set to cover the broad costs of the postal network with its universal service mandate.[46] In-person visiting often entailed outlays of time and money on the part of the visitor, but did not produce significant revenue for facilities or private sector firms. Finally, telephone rates were set by state and federal agencies who oversaw the highly regulated industry dominated by the Bell

[45] Stephen Raher, *Phoning Home: Prison Telecommunications in a Deregulatory Age*, *in* 2 Prison Privatization: The Many Facets of A Controversial Industry (Byron E. Price & John C. Morris, eds.) 215, 219-220 (2012).

[46] Richard B. Kielbowicz, *Preserving Universal Postal Service As A Communication Safety Net: A Policy History and Proposal*, 30 Seton Hall Legis. J. 383, 400-411 (2006).

System and smaller independent operators.[47] Phone pricing changed gradually but dramatically following the break-up of the Bell System and the subsequent passage of the Telecommunications Act of 1996, which led to a proliferation of new companies in the ICS space, attracted by the prospects of high call volumes and unchecked rates.[48]

The contemporary ICS industry is dominated by two non-facilities-based telecommunications carriers that use VoIP-based platforms operating on lines leased from local exchange carriers. These companies—Securus and GTL—have collectively absorbed dozens of competitors since the 1990s.[49] The FCC determined that Securus, GTL, and a third company, Telmate, controlled 85% of the ICS telephone market (measured by revenue) in 2013.[50] In 2017, GTL acquired Telmate.[51]

Securus and GTL are aggressively pursuing new revenue sources, both in terms of emerging telecommunications technology and non-telecom business lines. As for the former category, so-called "video visitation" and electronic messaging are the latest newcomers. Video visitation allows incarcerated customers to communicate in real-time video with callers in the free world. Although this technology holds great promise, in that it allows for audio-visual communication across great distances, these benefits have been overshadowed by high rates and the efforts of some providers to couple video visitation with prohibitions on in-person visiting.[52] Electronic messaging allows for the exchange of written messages (sometimes two-ways, other times only on an incoming basis), somewhat like email, but without many of the technical features that free-world users have come to take for granted. Like video visitation, electronic messaging is potentially beneficial technology, but is known for high prices and unfair terms (such as stingy character limits on messages).[53]

2. Commissary

Commissaries generally make money by acting as the only authorized vendor of items that are necessary for a comfortable existence, but which are not provided by prison facilities. Commissary inventories typically focus on food (to supplement meager cafeteria meals), healthcare items, hygiene products, letter-writing supplies, religious items, and basic staples of everyday life like eating utensils, extension cords, and cleaning supplies.

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[47] Raher, *supra* note 45, at 217-218.

[48] *Id*. at 218.

[49] Wagner & Jones, *supra* note 37.

[50] Second Report & Order, *supra* note 34 at ¶ 76, 30 FCC Rcd. 12801.

[51] Peter Wagner, "Prison Phone Giant GTL Gets Bigger, Again," Prison Policy Initiative Blog (Aug. 28, 2017), https://www.prisonpolicy.org/blog/2017/08/28/merger/.

[52] Bernadette Rabuy & Peter Wagner, *Screening Out Family Time: The For-Profit Video Visitation Industry in Prisons and Jails* (Jan. 2015), https://www.prisonpolicy.org/visitation/report.html.

[53] *See generally* Raher, *supra* note 40.

The size of the prison commissary industry is difficult to estimate, but likely exceeds $1.6 billion in annual revenue.[54] Average purchases per customer vary widely by correctional facility (due to different regulations concerning allowable property and fluctuations in prices), but are often $600-900 annually.[55] While there are likely more commissary operators in the field than telecommunications firms, there has still been a wave of consolidation,[56] with two companies dominating the commissary market—Union Supply Group, Inc. and private-equity owned Keefe Group. Unlike ICS, there seem to be a greater number of small fringe competitors in the commissary industry, perhaps because of lower capital requirements.

3. Money Transmitters, Correctional Banking, and Release Cards

As previously discussed, incarcerated people rely largely on outside friends and relatives for the funds necessary to purchase goods and services inside. This structure has led to the proliferation of companies that profit from facilitating such transfers. Money transfers come in two varieties: transfers to inmate trust accounts, and payments for goods or services.

Inmate trust account is a term of art (specific terminology varies by jurisdiction) describing a deposit account held by a governmental entity for the benefit of an incarcerated person.[57] Historically, inmate trust accounting has been a mundane subspecialty of government accounting: agencies collected funds in the possession of people who come into custody, received deposits (i.e., wages earned during incarceration or money orders received from families), issued checks or money orders for miscellaneous purchases, and ensured that account balances were disbursed to the accountholder upon his or her release from custody. Now, many agencies wish to outsource the management of such accounts, often bundling the straightforward tasks of trust fund accounting with other "correctional banking" services.

Traditionally, a family member would deposit funds to an trust account by sending a money order to the facility. While this funding method requires time for mailing, it has the benefit of allowing transferors to choose among a variety of money-order issuers operating in a competitive market.[58]

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[54] Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, n.3 and accompanying text (May 2018), https://www.prisonpolicy.org/reports/commissary.html.

[55] *Id*.

[56] Stephen Raher, "Paging Anti-trust Lawyers: Prison Commissary Giants Prepare to Merge," Prison Policy Initiative Blog (Jul. 5, 2016), https://www.prisonpolicy.org/blog/2016/07/05/commissary-merger/.

[57] *See e.g.*, Cal. Penal Code § 5008 (Dept. of Corrections and Rehabilitation Secretary "shall deposit any funds of inmates in his or her possession in trust with the Treasurer"); Tex. Gov't Code Ann. § 501.014 ("The department shall take possession of all money that an inmate has on the inmate's person or that is received with the inmate when the inmate arrives at a facility to be admitted to the custody of the department and all money the inmate receives at the department during confinement and shall credit the money to an account created for the inmate."); *see also* N.Y. Correct. Law § 187(3) (statute establishes trust accounting system, but only for wages earned).

[58] *See* U.S. Postal Serv., Ofc. of Inspector General, *Modernizing the Postal Money Order*, Rpt. No. RARC-WP-16-007, at 8-10 (Apr. 2016) (summarizing the market of money-order issuers).

Contractors that hold correctional banking contracts tend to steer transferors away from low-cost money orders, in favor of an array of electronic or in-person payments, all of which carry high fees. Oddly, automated clearing house ("ACH") transfer is the one common payment channel that is hardly ever an option for trust-fund transfers, which can be an inconvenience for some customers.[59] It remains unclear why vendors do not accept ACH payments (especially given the security advantages of ACH compared to payment cards[60]), although one possibility could be a desire to avoid security-related investments that are required of online ACH originators.[61]

As prison retailing opportunities grow, controlling access to the trust account begins to look more like an essential facility. Incarcerated people are increasingly expected to spend money on various goods and services. But to engage in such transactions, money must typically be transferred into the purchaser's trust account. Placing exclusive access to trust account deposits in the hands of one firm looks like a bottleneck monopoly,[62] hurting both family members and prison retailers who are not affiliated with the bottleneck provider.

[59] Trust fund transfers via a credit card will most likely incur cash advance fees. *See e.g.*, Visa Core Rules and Visa Product & Service Rules at 838 (Oct. 2018) (defining "quasi-cash transaction" as a sale of "items that are directly convertible to cash," including deposits and money orders). Payments by debit card can avoid cash-advance fees, but 10% of checking account holders do not have a debit card. Claire Greene & Joanna Stavins, "The 2016 and 2017 Surveys of Consumer Payment Choice: Summary Results," Fed. Reserve Bank of Boston Research Data Rpt. No. 18-3, at tbls. 1 and 3 (May 2018) (91.8% of respondents reported having a checking account, but only 81.4% had debit cards).

[60] Payment-card transactions are associated with substantially higher rates of fraudulent payments than ACH transfers. Bd. of Governors of the Fed. Reserve System, *Changes in U.S. Payments Fraud from 2012 to 2016: Evidence from the Federal Reserve Payments Study*, figs. 8 and 14 (Oct. 2018) (finding a fraud rate of 0.48 (by number of transactions) for ACH debit transfers, versus 16.33 basis points for card-not-present transactions).

[61] *See* Nat'l Automated Clearinghouse Ass'n, Operating Rule § 2.5.17.4 (2018) (additional warranties required for online ACH origination). Vendors that accept payment cards are likely expected, directly or indirectly, to comply with the Payment Card Industry Data Security Standards, but these rules are largely focused on protecting confidential payment information in possession of a merchant, or during transmission. *See Generally*, "PCI Security Standards Council, Requirements and Security Assessment Procedures," ver. 3.2.1 (May 2018), https://www.pcisecuritystandards.org/documents/PCI_DSS_v3-2-1.pdf. In contrast, ACH security requirements are more focused on identity verification and fraud detection.

[62] *See generally* James McAndrews, "Antitrust Issues in Payment Systems: Bottlenecks, Access, and Essential Facilities," *Fed. Reserve Ban of Philadelphia: Business Review* 3 (Sept. 1995).

The other common type of money transfer is a payment directly to a vendor. These payments may be contemporaneous payments for goods or services; but, companies are increasingly encouraging customers to prepay, often subject to confusing and abusive terms of service. While prepayments are most common in the telecommunications subsector,[63] commissary companies have also begun experimenting with prepayment options, possibly as a way to boost frequent small-dollar purchases of digital content. Although Keefe Group prominently states that its prepaid option is not the same as a trust-account deposit, Access Corrections does not (see Figure 1), leaving the possibility that some customers may use Access's prepayment option under the mistaken assumption that they are sending money to a trust account.

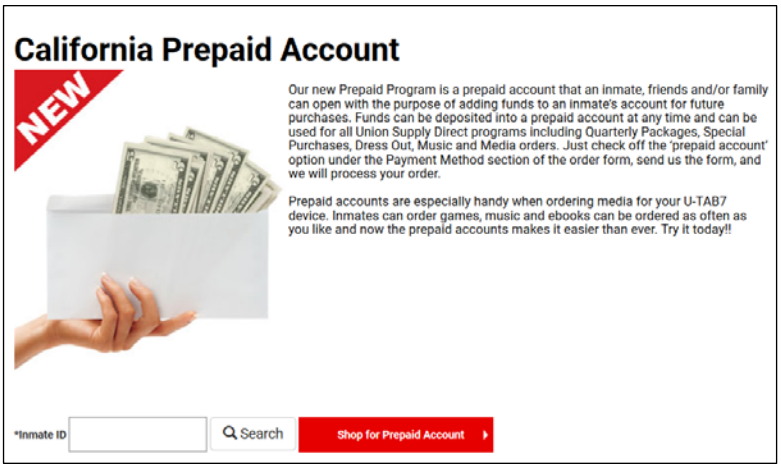

Figure 1. Union Supply Group Prepayment Ad.
Source: CaliforniaInmatePackage.com

The final financial transaction associated with a term of incarceration comes when a facility owes money to a person upon his or her release. Typically this money consists of the final balance of an inmate trust account, although in the case of jails, it could simply be a refund of money that the releasee had in their possession at the time of arrest. The "release card" is a specialized payment product that has arisen specifically for this type of disbursement. Release cards are open loop prepaid debit cards (typically branded as a MasterCard) which facilities use to make required payments to people upon their release. While there is nothing *per se* impermissible about making such payments via prepaid debit card, problems arise when facilities are unwilling to pay the costs of such a system. Under most release-card contracts, the correctional agency pays nothing and the card issuer makes money by charging cardholders a panoply of exorbitant fees.[64] Making matters worse, most facilities that utilize release cards do not give people an option to receive release payments via a different method.

Correctional banking is big business. A rough extrapolation based on a small dataset (from four states) suggests that the principal amount of money transfers to people in state prison systems could be around $1 billion a year.[65]

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[63] *See infra* § III.A.

[64] Comments of Prison Policy Initiative, *Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)*, Dkt. No. CFPB-2014-0031 (Mar. 18, 2015), *available at* https://static.prisonpolicy.org/releasecards/CFPB-comment.pdf.

[65] Stephen Raher, "The multi-million dollar market of sending money to an incarcerated loved one," Prison Policy Initiative Blog (Jan. 18, 2017), https://www.prisonpolicy.org/blog/2017/01/18/money-transfer/.

Another indicator of the profits that can be extracted from correctional banking comes from Securus's 2015 acquisition of JPay. There is no public evidence of how much Securus paid, but the 2017 acquisition of Securus by private equity firm Platinum Equity provides a clue. The 2017 deal document discloses Securus's liability on an earnout provision from its 2015 acquisition of JPay. Specifically, the disclosure suggests that by 2017, Securus would likely owe JPay's founder and other original owners about $20 million under the earnout clause (of course, this is on top of whatever money the founders received in 2015 when the sale actually closed).[66]

4. Tablets: The New Frontier

The newest products to gain traction in the prison retail market are specialized computer tablets that provide communications, education, and entertainment functions, usually operating on a closed wireless network, but never with internet connectivity.[67] Reviewers have found these tablets to be the technological equivalent of already-obsolete early-model handheld devices.[68] But tablets promise to help correctional staff by managing populations that suffer from chronic boredom.[69] At the same time, the devices help prison retailers dramatically expand revenue opportunities. Many tablet programs, particularly in prison systems, provided tablets to users for free, but most features and content can only be accessed for a fee.[70] Such fees tend to dramatically exceed free-world prices, and there is no obvious cost-based reason for such pricing.[71] In facilities where tablets are not provided for "free," customers must either purchase a tablet (prices can range from $40-160) or pay a rental fee that can be between $5 and $150 per month.[72]

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[66] Stock Purchase Agreement between Securus Investment Holdings, LLC, Connect Acquisition Corp., and SCRS Acquisition Corp. § 6.3 (Apr. 29, 2017) (on file with author).

[67] As a general rule, incarcerated people are entirely unable to access the internet, either as a matter of agency policy or state law. *See generally*, Titia A. Holtz, Note, *Reaching out from behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 Brook. L.Rev. 855, 859-866 (2001-02) (surveying laws prohibiting internet access in correctional facilities).

[68] Jason Koebler, "A Clear Plastic Tablet for Prisoners: The Motherboard Review," Vice.com (Dec. 15, 2014), https://motherboard.vice.com/en_us/article/pgav3m/a-clear-plastic-tablet-for-prisoners-the-motherboard-review ("Technology in prisons is dismal, and the JP4 [JPay tablet] looks and feels like a Game Boy Advance. It's clunky and it's old and it's not at all that intuitive to use. But when your options are limited, I suppose you'll take whatever you can get.").

[69] Without citing any evidence, GTL claims that its tablets produce "[s]ignificant decreases in inmate-on-inmate assaults, inmate-on-officer assaults, and rule and behavior code violations." GTL, "Inspire Tablet Program Facility Benefits," http://www.gtl.net/wp-content/uploads/2018/05/GTL-Facility_Benifits.pdf.

[70] *See generally*, Wanda Bertram & Peter Wagner, "How to spot the hidden costs in a 'no-cost' tablet contract," Prison Policy Initiative Blog (Jul. 24, 2018), https://www.prisonpolicy.org/blog/2018/07/24/no-cost-contract/.

[71] *See infra*, text accompanying notes 98-109.

[72] Tablet pricing varies widely by facility and vendor. Some examples are: GTL's $147 price tag for tablets in the Pennsylvania prison system. *See infra* note 105 and accompanying text. JPay's tablet prices have been reported as ranging from $40 to $160. *See infra* note 134. Union Supply Group sells a tablet for $159. *See infra* note 136. As for rented tablets, Securus's website lists eighteen county jails and one state prison system that allow month-to-month rentals, at prices ranging from $5 to $30 per month. Securus Technologies, Inc. "Order the SecureView Tablet for your loved one," https://www.securustablet.com/#/plans/start (accessed Dec. 2, 2018). The jail in

Prison tablet programs are nearly universal in their offering of video games. No one has articulated the troublesome dynamic of encouraging video-game usage among incarcerated populations more persuasively than an unnamed resident of the Colorado Department of Corrections who told Denver's *Westword* newspaper:

> The average prisoner will play games and music 8-10 hours a day, just like any kid in America. Only they aren't kids; they are men and women who need rehabilitation and education. This buys a lot of safety for prison staff, but what a waste of time for the prisoners. If they provided education, it would be marvelous. Prisoners might just learn something useful and not come back.[73]

There is also something unsettling about promoting a product that could plausibly lead to addiction and dependency[74] among a population with disproportionate rates of substance abuse.[75]

Tablets do have potential to assist in educational programming, but only if adequate resources are invested in content and instruction. Technology by itself is not a solution. Although tablet providers are eager to hype educational uses, evidence of actual effective, salient, and high-quality content is lacking. To the extent that facilities are providing educational technology without also investing in instructors and curriculum, the educational potential will never be realized, for lack of socially-mediated pedagogy.

To illustrate the confusion about educational offerings, one need only visit JPay's main webpage for family members, which includes a prominent banner ad touting the educational promise of its JP5 tablet (see Figure 5). Following the link, however, reveals that the tablet only provides access to an educational *platform*; content and instruction are apparently the responsibilities of others.[76] Following yet another link brings the user to the webpage for JPay's education program, which features stock images of graduation ceremonies, an emotionally manipulative video advertisement, vague statements about innovation and "leading-edge technology," but absolutely no discussion of how facilities have obtained content and instruction, what facilities use the platform, or quantifiable outcomes.[77]

The versatility of tablets is both their major selling point and a wellspring of potential conflicts of interest. When a facility stands to financially profit from tablet usage, the opportunities for mischief are

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Knox County, Tennessee rents tablets for $4.99 per day, which can result in a monthly rate of approximately $150. *See infra* note 111 and accompanying text.

[73] Alan Prendergast, "Colorado prisoners getting 'free' electronic tablets—with a catch," *Westword* (Feb. 15, 2017), *available at* http://www.westword.com/news/colorado-prisoners-getting-free-electronic-tablets-with-a-catch-8795689.

[74] World Health Org., "Management of Substance Abuse: Gaming Behaviour," http://www.who.int/substance_abuse/activities/gaming_disorders/en/ (Sept. 2018).

[75] U.S. Dept. of Justice, Bureau of Justice Statistics, *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2017-2009*, NCJ Rpt. No. 250546 (Jun. 2017) (58% and 63% of residents of state prisons and jails, respectively, meet diagnostic criteria for drug dependence or abuse, compared to 5% of the general population).

[76] JPay, Inc., "Education," https://www.jpay.com/education.aspx (accessed Nov. 27, 2018).

[77] JPay's Lantern, main page, http://jpayslantern.com/education/ (accessed Nov. 27, 2018).

numerous: in-person visits can be prohibited in favor of video visitation;[78] prison libraries or donated books can be cut off and replaced with e-books for purchase;[79] postal mail can be restricted in order to increase electronic messaging usage;[80] and educational programs can be curtailed to redirect students to online-only courses.[81]

III. Unfair Industry Practices

Prison retailing is not only built on a generally inequitable business premise, but current industry leaders also use specific practices that are unfair, deceptive, or abusive. Some of these practices are potentially unlawful, while others are unseemly but legal. It can be difficult, however, to pin down company practices because of the pervasive lack of transparency that characterizes the entire correctional sector.[82] Bureaucratic hostility to transparency can result in information asymmetry that causes some consumers to spend money without fully understanding the terms of the transaction. Others who do understand the vendor's terms are nonetheless unable to avoid them.

Unfair practices that are publicly-known are highly structured, bespeaking corporate cultures dominated by greed. When plaintiffs challenging ICS rates and practices referenced the greed of the industry, Circuit Judge Richard Posner dismissed the characterization by remarking that the prison system is "said to be motivated by greed, but greed that is institutional rather than personal. Far from being mere agents of the phone companies, the prisons are in the driver's seat, because it is they who control access to the literally captive market constituted by the inmates."[83] On the one hand, Posner is correct in pointing out the power exercised by correctional agencies, and his framing of the issue seems to be a defense of public budgeting decisions—a normative matter that many would agree is subject to judicial review only for the limited purpose of ensuring compliance with applicable constitutional or

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[78] Matt Lakin, "Point, Click, But No Touch: Debate Shapes up over Video Visitation at Knox Jail," *Knoxville News Sentinel* (Nov. 24, 2018), https://www.knoxnews.com/story/news/crime/2018/11/25/jail-video-visitation-knox-county-face-face/2027042002/ (county jail received $79,000 over four years in commissions from video visitation after prohibiting in-person visits); Steve Horn & Iris Wagner, "Washington State: Jail Phone Rates Increase as Video Replaces In-person Visits," *Prison Legal News* v.29, n.10 (Oct. 2018), at 1.

[79] *See infra* note 103 and accompanying text.

[80] *See supra*, notes 41-42.

[81] Although the author did not find any documented cases of online fee-based courses replacing in-person instruction, as a general matter, total prison spending on education decreased on a nationwide basis by 6% between 2009 and 2012. Lois M. Davis, et al., "Correctional Education in the United States: How Effective Is it, and How Can We Move the Field Forward," RAND Corp. (2014), at 3.

[82] *See Confronting Confinement: A Report of the Commission on Safety & Abuse in America's Prisons* 102 (John Gibbons & Nicholas Katzenbach, co-chairs) (Jun. 2006) ("The prevailing view of correctional facilities as shrouded and unknowable reflects the shortage of meaningful and reliable data about health and safety, violence and victimization; ignorance about what information is available; and the difficulty of accessing and interpreting much of the data that corrections departments collect but do not widely disseminate or explain.").

[83] *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001).

statutory requirements. Nonetheless, this pat formulation ignores the very real greed on the part of private equity companies that have built a business model based on using the coercive power of the state to extract revenue from poor people, in the form of exorbitant prices for phone calls or junk food.[84] Of course, greed is not necessarily illegal. It can, however, motivate companies to use particular practices that are unlawful. This section discusses common types of unfair practices, while the subsequent section explores potential legal remedies.

A. Masquerading as Cream: Inflated Prices and Inefficient Payment Systems

Things are seldom what they seem
Skim milk masquerades as cream

—*H.M.S. Pinnafore*, act II, scene 1[85]

The leading complaints from prison-retail customers focus on high prices and payment mechanisms that are inefficient, confusing, or otherwise unfair. Although prison retailers are likely to make vague claims of security in response to such complaints, these arguments often do not hold up under scrutiny and it is difficult to see prison-retail prices as anything other than premium rates charged for inexpensive, run-of-the mill goods or services. Moreover, while vendors are quick to point out the security features which add to their costs, they conveniently gloss over expenses incurred by free-world retailers that are inapplicable in a prison setting (such as advertising and operating a brick-and-mortar retail network).

Unlike other prison retail subsectors, the factual record concerning ICS prices is robust thanks to the multi-year rulemaking conducted by the FCC. The Commission's involvement with the industry dates back to 1993, when ICS carriers asked the FCC to deregulate payphone rates in correctional facilities. The FCC ultimately granted the request mere days before the entire telecommunications industry changed with the enactment of the Telecommunications Act of 1996.[86] As part of Congress's sweeping reorganization of wireline phone service, section 276 of the 1996 Act directed the FCC to ensure that payphone operators were "fairly compensated," while also classifying all "inmate telephone service in correctional institutions" as *per se* "payphone service."[87] Armed with this provision, ICS carriers quickly took

[84] It is difficult to overstate the disadvantage that the public has in not being able to gain a clear picture of vendor finances. Securus, for example, markets itself to facilities as a "partner" that puts facilities ahead of its own profits, as supposedly evidenced by Securus's below-market EBITDA. Securus RFP Response, *infra* note 154, at 13. While Securus's healthy EBITDA ratio of 27.9% may be lower than some publicly-traded telecommunications carriers, Securus's audited financial statements provide no detail on how much the company pays to its parent, Platinum Equity, in monitoring fees. This is a critical piece of information, since monitoring fees can be sizeable amounts that are arguably equity dividends disguised as expenses. *See* Eileen Appelbaum & Rosemary Batt, "Fees, Fees, and More Fees: How Private Equity Abuses Its Limited Partners and U.S. Taxpayers," Ctr. for Econ. & Policy Research (May 2016), at 26-29.

[85] W.S. Gilbert, *H.M.S. Pinafore, or The Lass That Loved A Sailor* (1878).

[86] Pub. L. 104-104, 110 Stat. 56 (1996); *see* Raher, *supra* note 45, at 231.

[87] 47 U.S.C. § 276(b)(1) and (d).

aim at a handful of states that had set caps on intrastate calling rates in prisons and jails. In 1996, a coalition of ICS carriers petitioned the FCC to preempt state regulation of intrastate ICS rates, citing the newly enacted § 276.[88] Not only did the FCC decline this request, but incarcerated people and their families went on the offensive, filing the landmark class action *Wright v. Corrections Corporation of America* in federal court in 2000, challenging the rates charged for phone calls from certain privately operated prisons.[89] The district court referred the matter to the FCC under the doctrine of primary jurisdiction,[90] but the Commission took no immediate action. Finally, after nearly a decade of inaction, the FCC issued a notice of proposed rulemaking in 2012.[91]

When the FCC issued interim rate caps as part of the *Wright* rulemaking, it required ICS carriers to submit detailed accounting data itemizing the functional expenses of providing service to incarcerated customers.[92] At the outset of the rulemaking, the Commission had discovered rates ranging up to $1.15 per minute.[93] Upon reviewing the expense data collected under the interim rule, the FCC concluded in 2015 that permanent rate caps of 11¢ per minute would allow ICS providers to cover their costs and be fairly compensated.[94] The final 2015 rules also allowed the imposition of some ancillary fees in addition to the per-minute rate, but the type and amount of such fees were strictly limited, in an effort to restrain the carriers' "ability and incentive to continue to increase such charges unchecked by competitive forces."[95] Importantly, even though the rate caps lowered the per-minute revenues collected by carriers, the new rates allowed customers to place more calls, thereby offsetting lower per-call profit margins. In mid-2015, Securus told potential investors in a private briefing that the interim caps had "neutral to . . . modestly positive EBITDA impact including some positive elasticity of demand," and the company expected the same result under the yet-to-be-issued final rate caps.[96]

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[88] Raher, *supra* note 45, at 232-233.

[89] Complaint, *Wright v. Corr. Corp. of Am.*, No. 00-cv-293-GK (D.D.C. Feb. 16, 2000), ECF No. 1.

[90] *Wright v. Corr. Corp. of Am.*, No. 00-cv-293-GK (D.D.C. Aug. 22, 2001), ECF No. 94 (order dismissing case under the doctrine of primary jurisdiction); *id.*, ECF No. 105 (order modifying order of dismissal, and staying case pending FCC rulemaking); *see also infra* note 227 and accompanying text.

[91] 78 Fed. Reg. 4369 (Jan. 22, 2013).

[92] First Report & Order, *supra* note 32, ¶¶ 124-126, 28 FCC Rcd. at 14171-72.

[93] *Id.* ¶ 35, 28 FCC Rec. at 14126.

[94] Second Report & Order, *supra* note 34, at ¶ 58, 30 FCC Rcd. at 12792 (The FCC imposed an 11¢-per-minute rate cap on calls from prisons, while using a three-tiered system of higher per-minute rates for calls from jails (varying based on facility population). In justifying the rate caps, the FCC stated that even the *lowest* rate cap of 11¢ "is greater than the average per minute cost of each of the more efficient reporting providers.").

[95] *Id.* ¶¶ 144-147, 30 FCC Rcd. at 12838-40.

[96] Securus Technologies, Inc., "Public Lender Presentation" at 25 (Apr. 15, 2015), *published as appx. 1 to* Comments of Prison Policy Initiative, *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (Mar. 10, 2016), *available at* https://www.fcc.gov/ecfs/filing/60001498735 (discussing the increasing use of bundled contracts by large ICS carriers).

Once the FCC signaled its intent to regulate calling rates, ICS companies focused on identifying new unregulated sources of revenue.[97] New communications channels and computer tablets offer ICS carriers numerous opportunities to charge inflated prices and collect the resulting profits. Electronic messaging systems charge rates from 5¢ to $1.25 per message, although most facilities tend to set rates around 50¢.[98] Messages sent on these systems are text-only, and subject to character limits, ranging from 1,500 to 6,000 characters.[99] Some systems allow users to attach photos or videos, or send e-cards, but these features inevitably cost extra.

Figure 2. Example of JPay Electronic Message Pricing
Source: https://www.jpay.com/Facility-Details/Colorado-State-Prison-System/Arkansas-Valley-Correctional-Facility.aspx

Why should a plain-text message cost 50¢ per message when email is free to practically everyone outside of prison? Vendors typically argue that there are costs to running the system. Setting aside the question of whether these costs should be borne by incarcerated people and their families, there is no compelling evidence to suggest that end-user prices are reasonably related to vendor costs. Messaging prices typically hover around the cost of a first-class postage stamp (JPay even goes so far as to denominate its prices in numbers of "stamps" – see Figure 2), yet postal rates are set to cover the costs of a universal system of delivering mail to every address in the country—an expense structure totally unrelated to the cost of running a closed proprietary text messaging platform.[100]

Inflated prices are also evident in sales of electronic music or books. Under a 2016 contract with the Colorado Department of Corrections (since cancelled), GTL was allowed to charge up to $19.99 per month for a digital music subscription.[101] This price, which is twice the rate for free-world services like Spotify or Google Play, is even less justifiable when one considers that GTL's music catalog appears to be about one-tenth the size of Spotify or Apple.[102] In 2014, the Pennsylvania Department of Corrections awarded a contract to GTL to operate a tablet program, including an e-book feature. After the program started, the Department attempted to prohibit people from

[97] *See infra* text accompanying note 217.

[98] Raher, *supra* note 40, at 13-14.

[99] *Id.* at 20.

[100] Raher, *supra* note 40, at 14-15.

[101] *See generally*, Stephen Raher, "The Wireless Prison: How Colorado's Tablet Computer Program Misses Opportunities and Monetizes the Poor," Prison Policy Initiative Blog (Jul. 6, 2017), https://www.prisonpolicy.org/blog/2017/07/06/tablets/.

[102] *Id.*

receiving purchased or donated books from any other source.[103] Although the book ban was quickly repealed,[104] the e-book program is still in place, with prices that consistently exceed free-world prices by a wide margin. The Pennsylvania program does not provide free tablets, so a customer must first purchase a tablet for $147 plus tax.[105] After that substantial outlay, a tablet user must still purchase e-books from a list of roughly 8,800 titles.[106] The author's analysis of fifty randomly selected titles indicates that GTL charges $3-6 for public-domain titles that are available for free as Kindle e-books on Amazon.com; remaining titles are priced at an average rate of 130% over the Kindle price.[107]

Non-cost-based pricing also appears when examining prices for "premium" add-ons. For example, Securus charges one "stamp" to send a text-only electronic message.[108] *Before* sending a message, a non-incarcerated user must decide whether to prepay (one additional stamp) for the recipient's reply (if no reply is sent, then this additional amount is simply wasted). The non-incarcerated user may also attach up to five photographs, for an additional stamp. Assuming Securus is economically rational, the typical 50¢ base price for a text-only message would be adequate to cover the overhead of operating the electronic messaging network. Thus, the marginal cost of adding photos to a message would consist of the additional storage capacity necessary to store the additional files. Assuming that a customer attaches the maximum five photographs, at the maximum allowed size (3 megabytes per photo), this would require Securus to store 15 megabytes of data, which entails storage costs of less than one-tenth of a cent.[109] Even if one were to add some additional amount to allow Securus to recoup the cost of developing or licensing the software to receive and transmit such digital files, it is hard to imagine a

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[103] Wanda Bertram, "*Philadelphia Inquirer* exposes Pennsylvania's complicity in cutting off incarcerated people's access to books," Prison Policy Initiative Blog (Sept. 21, 2018), https://www.prisonpolicy.org/blog/2018/09/21/pennsylvania-ebooks/.

[104] Samantha Malamed, "Under Pressure, Pa. Prisons Repeal Restrictive Book Policy," *Philadelphia Inquirer* (Nov. 2, 2018), http://www.philly.com/philly/news/pennsylvania-book-ban-doc-books-through-bars-wetzel-20181102.html.

[105] Penn. Dept. of Corr., "Tablets," https://www.cor.pa.gov/Inmates/Pages/Tablets.aspx (accessed Nov. 29, 2018).

[106] "GTL E-book Availability List," https://www.cor.pa.gov/Inmates/Documents/master-ebook-list.pdf (accessed Nov. 29, 2018).

[107] Using a randomized process, the author selected fifty titles from the GTL e-book list and searched for Kindle versions on Amazon.com. Four titles were discarded from the sample because they were not available on Amazon, and an additional title was discarded because it existed in multiple editions. Of the forty-five titles that are available from both sources, eight are public domain works which are available for free on Amazon, but for which GTL charges $2.99 (three titles) or $5.99 (four titles). The remaining thirty-seven works were available for an average price of $9.40 from Amazon versus an average of $17.15 from GTL. GTL's prices exceeded Amazon's by an average of 130%, ranging from a low premium of 30% ($20.99 for a book sold on Amazon for $15.99) to a high of 808% ($8.99 for a book sold on Amazon for 99¢).

[108] Securus Technologies, "eMessaging," https://securustech.net/emessaging (accessed Jan. 3, 2019).

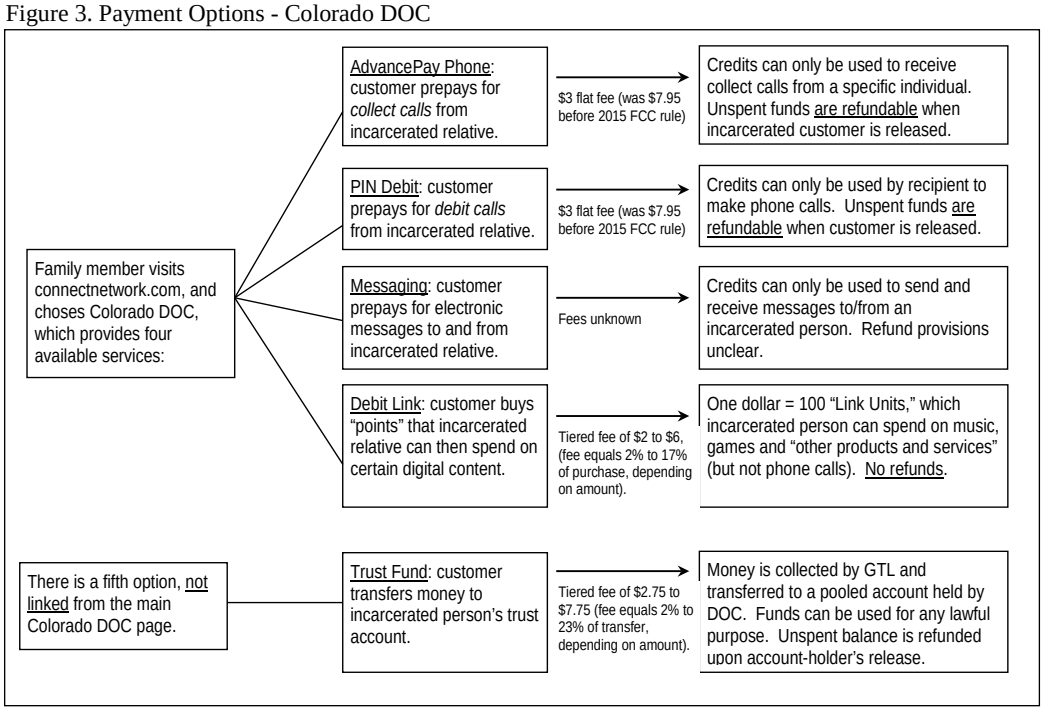
[109] Pricing information was obtained from Andy Klein, "Hard Drive Cost Per Gigabyte," https://www.backblaze.com/blog/hard-drive-cost-per-gigabyte/ (Jul. 11, 2017), which quotes pricing from Seagate of $49.99 for a 1 terabyte drive, yielding a cost of 5¢ per gigabyte. Given the maximum attachment size of 15 MB (or 0.015 GB), Securus's approximate marginal cost is calculated as follows: 5¢ x 0.015GB = 0.075¢.

situation where such recovery would justify charging 50¢ to send five digital photos. But in facilities that have implemented mandatory mail-scanning policies,[110] such electronic systems are the only way for families and friends to share pictures with incarcerated correspondents.

Sometimes vendors are able to charge customers premium prices for the privilege of avoiding problems that are created by the vendor itself. For example, Securus provides video visitation and electronic messaging in the Knox County, Tennessee jail, but customers often complain about having to wait in line for a fifteen minute session at a kiosk in a crowded unit. To avoid the hassle and lack of privacy that comes with using a shared kiosk, customers can access the same features on an individual tablet, for which they must pay $4.99 per day *plus* regular messaging fees.[111]

In addition to prices that are unjustly high, consumers are also confronted by confusing or inefficient payment options which can hinder informed decision-making. To begin, the number of potential payment options can be bewildering, because vendors often encourage customers to make advance payments for specific types of services. But even if one vendor operates a facility's phone system and electronic messaging system, prepayment for one type of communication often cannot be later redirected to a

Figure 3. Payment Options - Colorado DOC



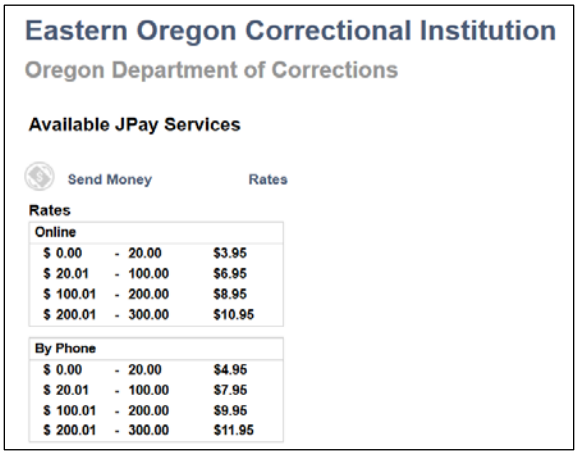
Source: Stephen Raher, "The Wireless Prison: How Colorado's Tablet Computer Program Misses Opportunities and Monetizes the Poor," Prison Policy Initiative Blog (Jul. 6, 2017), https://www.prisonpolicy.org/blog/2017/07/06/tablets/.

different service offered by the same vendor. For example, depending on the type of service someone is seeking to purchase, a relative of someone in the Colorado prison system must choose between five different payment options, which differ in terms of transaction fees and refund provisions (see Figure 3).

[110] *See supra* note 42.

[111] Lakin, *supra* note 78.

Even if a consumer can decipher payment options, the associated terms can make it nearly impossible to determine what payment method is the most economically rational. To the extent that processing fees are high, one might assume that making fewer prepayments in larger amounts is the most rational course. But this type of prepayment can be disadvantageous when vendor terms and conditions provide for forfeiture of prepaid amounts in various situations. For example, Securus—like all electronic messaging providers—requires prepayment for messages. Not only are such prepayments non-refundable, but they also expire 180 days after the date of purchase.[112] Given that people in prison can lose access to electronic messaging as a disciplinary measure, it is not hard to imagine situations where family members could prepay for a large quantity of electronic messages, only to lose the money when their relative is subject to disciplinary sanctions. Securus allows refunds for video visitation sessions in some limited circumstances,[113] but the refund is only issued in the form of an account credit, which itself expires after 90 days.[114] Anecdotal evidence also indicates that prepayment forfeiture can be a problem when a correctional facility changes ICS carriers without a provision for transfer of prepaid balances.


Eastern Oregon Correctional Institution

Oregon Department of Corrections

Available JPay Services

Send Money Rates

Rates

Online		
$ 0.00	- 20.00	$3.95
$ 20.01	- 100.00	$6.95
$ 100.01	- 200.00	$8.95
$ 200.01	- 300.00	$10.95

By Phone		
$ 0.00	- 20.00	$4.95
$ 20.01	- 100.00	$7.95
$ 100.01	- 200.00	$9.95
$ 200.01	- 300.00	$11.95

Figure 4. Typical JPay fee schedule
Source: https://www.jpay.com/PAvail.aspx

Even if prepayment methods are not particularly confusing, they can nonetheless be unfair or inefficient if, for example, a prepaid account can only be used to call a specific phone number. GTL's most common payment method is the "Advance Pay" system, which allows outside payers to prefund phone calls from incarcerated friends or family. Yet the Advance Pay "account" can only be used to place calls to one specific telephone number.[115] Thus, an incarcerated customer who wants to use Advance Pay to call two different relatives (or one relative who happens to use two different phone numbers), would have to establish two different prepaid accounts.

Finally, fees charged for sending money to a trust account are reliably high, without any readily apparent cost-based justification. Neither Access Corrections nor TouchPay (owned by GTL) publish their fees, but JPay routinely charges fees that equate to 20-35% for smaller deposits (Figure 4). When a plaintiff incarcerated in Kansas challenged deposit fees, that state's

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[112] Securus Technologies, Inc., "Friends and Family Terms and Conditions" (dated Oct. 19, 2018) [hereinafter "Securus T&C"], Emessaging Terms §§ 6 and 9, https://securustech.net/web/securus/terms-and-conditions (accessed Nov. 30, 2018, and archived at http://www.webcitation.org/74KHOK53W).

[113] *See infra*, notes 127-129 and accompanying text.

[114] Securus T&C, *supra* note 112, Secure Video Visitation Service Terms.

[115] *James v. Global Tel*Link*, No. 13-cv-4989, 2018 WL 3727371, *10 (D.N.J. Aug. 6, 2018).

supreme court noted that the plaintiff's mother incurred monthly fees of $11.40 to deposit $45 into his trust account (a 25% markup).[116]

Prison-retail vendors price their products as if they are selling cream, when in fact they are trafficking in skim milk. In normal markets, such behavior is mitigated by competition and consumer choice, but not so inside prison walls.

B. What Law Applies?

When evaluating the rights and remedies of a party to a commercial transaction, the first task is to determine what law applies. In the case of prison retailing, this poses some unique challenges. To begin, a frequent hurdle facing incarcerated people who seek to vindicate contractual rights is determining the text of the contract. The terms of more and more consumer contracts are available exclusively online. To the extent that a contract is exclusively available on the internet, an incarcerated customer is simply unable to access the document;[117] on the other hand, if the customer agrees to "browser wrap" terms and conditions displayed on a kiosk or tablet, he may well be unable to save, study, or share this text with a friend or advisor, for lack of email or a printer. Incarcerated people also face challenges that are familiar to many free-world consumers, such as dense terms written in impossibly small print. In fact, when formerly incarcerated people in Georgia filed a class action complaint challenging the legality of release cards, the court declined to rule on the enforceability of the cardholder agreement until the card-issuer filed a reformatted version in typeface that was large enough for the court to read.[118]

Once a customer determines the terms of the contract governing a purchase, the next analytical step is to compare the provisions of the consumer-facing contract to the terms of the contract between the vendor and the correctional facility. The facility-vendor contract often contains more detail and is typically a negotiated agreement, in contrast to the adhesive terms presented to end users on a take-it-or-leave-it basis. In a typical telecommunications contract, for example, Securus warrants to a county jail that its delivery of video visitation service will be performed in a good and workmanlike manner.[119] In sharp contrast, family members signing up to use Securus's video visitation product are required to assent to terms and conditions that purport to disclaim all warranties, express, implied, or statutory.[120]

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[116] *Matson v. Kan. Dept. of Corr.*, 301 Kan. 654, 659-660 (2015) (

[117] *See supra* note 67 and accompanying text.

[118] *Regan v. Stored Value Cards*, No. 14-cv-1187-AT, ECF No. ___ (order directing defendants to file a reformatted or retyped version of the cardholder agreement in 13-point font) (N.D. Ga. May 29, 2014).

[119] *E.g.*, Master Services Agreement between Securus Technologies, Inc. and Fort Bend County (Texas) (dated Feb. 6, 2018), Exh. C. at 16 (on file with author) ("[Securus] warrants that the services it provides as contemplated by this Schedule [including video visitation] will be performed in a good and workmanlike manner consistent with industry standards and practices.").

[120] Securus T&C, *supra* note 112, General Terms § 8(A) (service "is provided on an 'as is' and 'as available' basis. Securus and its suppliers, licensors, and other related parties, and their respective officers, agents, representatives, and employees expressly disclaim all warranties of any kind, whether express, statutory or implied, including, but not limited to, the implied

Although such discrepancies serve to illustrate unfair practices on the part of the vendors who draft adhesive consumer contracts, it is unlikely that customers can directly avail themselves of the provisions in the vendor-facility contract. Not only do vendor-facility contracts invariably contain express disclaimers of third-party beneficiaries, but common law doctrine is particularly hostile to third-party beneficiary status in the context of government contracts.[121] There is, however, a possibility that unreasonable discrepancies between a vendor-facility contract and an end-user contract could form the basis for a UDAP claim.[122]

Finally, in the telecommunications context, it is important to determine whether a given service is covered by a publicly-filed tariff. Telecom providers often use tariffs to defend against rate litigation, by invoking the filed-rate doctrine.[123] But the possibility remains that end-users may sometimes be able to use the doctrine offensively. Because website terms and conditions are so exculpatory,[124] a tariff reviewed and approved by a regulatory may well provide greater customer relief by, for example, allowing claims based on the carrier's gross negligence, willful neglect, or willful misconduct. Under the filed-rate doctrine, the terms in the tariff would be binding, because a carrier cannot "employ or enforce any classifications, regulations, or practices . . . except as specified in [a filed tariff]."[125]

C. Terms of Service: Carrying a Bad Joke Too Far[126]

As alluded to in the previous section, terms and conditions thrust onto prison-retail consumers are unfairly one-sided. While contracts of adhesion have become commonplace in consumer transactions, the extremity of some prison-retail terms of service raise questions about what, if anything, a customer is actually purchasing. The terms for Securus's video visitation product begin with a cheerful declaration that the service "allows users to avoid the time, expense and hassle of travelling to and from a correctional facility," but a subsequent provision specifies that "Securus makes no representations or guarantees about the ability of the service to work properly, completely, or at all."[127] All fees are "pre-paid and non-refundable," but Securus will, in "limited situations," consider issuing a discretionary refund, although it will not issue refunds "for disconnects initiated by the correctional facility, or disconnects due to Internet connection or hardware malfunctions."[128] Indeed, the same policy

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warranties of merchantability, fitness for a particular purpose, title, accuracy of data and non-infringement" (emphasis deleted)).

[121] Restatement (Second) of Contracts § 313 (1981).

[122] *See infra* § IV.C.

[123] *See infra* notes 228-239 and accompanying text.

[124] *See infra* § III.C.

[125] *Am. Tel. & Tel. Co. v. Central Ofc. Tel.*, 524 U.S. 214, 221-222 (1998).

[126] The title of this section is admiringly borrowed from Peter Alces and Jason Hopkins' masterful analysis of U.C.C. § 4-103(a), *Carrying A Good Joke Too Far*, 83 Chicago-Kent L. Rev. 879 (2008).

[127] Securus T&C, *supra* note 112, Prod. Terms & Conditions § 6 and Gen'l Terms & Conditions § 9.

[128] *Id.*, Prod. Terms & Conditions § 6.

states that discretionary refunds will only be issued in situations where "Securus cancels a paid Video Visitation session *before the session begins*,"[129] which indicates that the company's policy is to never issue a refund for a disconnected session, even if the disconnect was caused by a failure of Securus's own network.

Unsurprisingly, mandatory arbitration provisions and class-action prohibitions are ubiquitous in prison retail terms. GTL includes a broad arbitration and class-action ban in its terms, although it fails to identify an arbitral forum,[130] thus raising questions about enforceability. JPay publishes separate terms and conditions for its various services and computer hardware, all of which provide for mandatory arbitration before JAMS.[131] Although prison retailers are not always successful in enforcing arbitration agreements, the industry (like others) presumably learns from its missteps and engages in ongoing efforts to fashion more ironclad contractual provisions.[132] The major failure in terms of arbitration provisions has been release cards, because courts have largely found that cardholders were given no other way to obtain their money, and therefore any agreement to arbitrate was not voluntary.[133]

As computer tablets become more prevalent inside correctional facilities, so too does the relevance of consumer warranty law. Prison retailers' contractual terms governing the sales of goods are replete with questionable provisions. The most noticeable problem is the appallingly short warranty periods covering expensive computer tablets. JPay tablets can cost up to $160,[134] but the devices are "not warranted to operate without failure" and are covered only by a warranty against "material defects in design and manufacture" lasting ninety days from the first time of use.[135] Commissary company Union Supply sells tablets in the California state prison system. Although Union Supply's warranty period is nominally 180 days, any warranty claims made after the ninetieth day require payment of a $50 "non-refundable administrative and processing fee" (an amount equal to nearly one-third of the device's purchase price).[136] The Union Supply contract further makes the

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[129] *Id.* (emphasis added).

[130] GTL T&C, *supra* note **Error! Bookmark not defined.** § R.

[131] *E.g.*, JPay, Inc., "Payments Terms of Service," https://www.jpay.com/LegalAgreementsOut.aspx (accessed Dec. 6, 2018).

[132] For example, GTL lost a motion to compel arbitration as to most of the named plaintiffs in a New Jersey class action because most of the plaintiffs had created their accounts through GTL's automated interactive voice recognition system, and had not taken any affirmative steps to demonstrate acceptance of the arbitration provision. *James v. Global Tel*Link Corp, et al.*, No. 13-4989, 2016 WL 589676, at *4-7 (Feb. 11, 2016).

[133] *See infra* notes 296-297 and accompanying text.

[134] Victoria Law, "Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email," Wired (Aug. 3, 2018), https://www.wired.com/story/jpay-securus-prison-email-charging-millions/ (citing prices ranging from $40 to $160, depending on the prison system).

[135] JPay Inc., "Player Purchase Terms and Conditions and Warranty Policy" (dated Dec. 5, 2017) https://www.jpay.com/LegalAgreementsOut.aspx) (accessed Dec. 6, 2018).

[136] Union Supply Group, Inc., "Rules and Regulations," https://californiainmatepackage.com/Catalog/MenuCatalogPages/ManageStaticPage.aspx?pageid=Rules (accessed Dec. 6, 2018). Union Supply does not publicly reveal prices, but other sources have reported that the tablets cost $159 when the program was introduced. Malik Harris, "New

dubious claim that tablets are "customized" goods and therefore buyers may not obtain a refund under any circumstances (even if a buyer mistakenly purchases a tablet for someone housed in a facility that does not allow tablets)[137]—a provision that is likely unenforceable as an unreasonable restriction on a buyer's right to inspect and reject purchased goods.[138]

In summary, the terms and conditions propagated by prison retailers serve as a concrete reminder that no one is protecting the interests of consumers in this sector. Correctional procurement staff appear to be entirely uninterested in what terms are imposed on consumers. Left to their own devices, vendors draft terms that are so one-sided it is difficult to call them contracts. While some onerous provisions may well be unenforceable under applicable consumer protection statutes, customers are left to figure out this legal puzzle on their own; and, of course, a customer's ability to exercise their legal rights may be hindered or extinguished entirely given the frequent use of arbitration provisions and class adjudication prohibitions.

D. Advertising, Consumer Perceptions, and Behavioral Economics

Incarceration, for many people, is a prolonged, slow-motion disruption of normal life, punctuated by periods of unpredictable violence. Certain aspects of incarceration can be analogized to being trapped in a natural disaster: you are cut off from loved ones, physical harm is a constant threat, and the future is full of unknowns. Many areas of the law provide special protection for people who must procure critical goods or services in stressful situations: price-gouging statutes prevent unfair fuel pricing in a natural disaster,[139] the Federal Trade Commission prohibits exploitation of grieving relatives purchasing funeral services,[140] and countless occupations (from hearing aid salespeople[141] to pawnbrokers[142]) are subject to wide-ranging regulatory systems designed to protect consumers whose ability to pursue the best bargain may be impaired. In the case of prison retailing, however, there is a dramatic lack of structural safeguards against exploitation.

Policy Allows Prisoner to Purchase Tablets," *San Quentin News* (Jan. 1, 2016), https://sanquentinnews.com/new-policy-allows-prisoner-to-purchase-tablets/.

[137] *Id.* The claim of custom-made status is based on the fact that Union Supply asks purchasers to select electronic content during the purchase process, and that content is then installed on the device that is shipped. The legal relevance of this so-called customization is unclear. As a practical matter, the content loading does not have any impact on the seller's ability to re-sell the device, because—according to Union Supply's own terms of service—content is loaded onto a removable SD card.

[138] *See* Uniform Commercial Code §§ 2-513 (buyer's right to inspect tendered goods) and 2-601 (buyer's rights on improper delivery). *See also* U.C.C. § 2-719(1) and cmt. 1 (parties may contractually modify remedial provisions of U.C.C. Article 2, but "they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.").

[139] Nat'l Consumer Law Ctr., *Unfair and Deceptive Acts & Practices* § 4.3.11.2 (9th ed. 2016).

[140] 16 C.F.R., pt. 453.

[141] John C. Williams, Annotation, *Validity and Construction of State Statutes Regulating Hearing Aid Fitting or Sales*, 96 A.L.R.3d 1030 (1979).

[142] Tracy Bateman Farrell, *Validity of Statutes, Ordinances, and Regulations Governing Pawn Shops*, 16 A.L.R.6th 219 (2006).

Meanwhile, prison retail companies (likely motivated by dual desires to increase sales and disguise the greed that shapes their business models) use advertising to portray themselves as caring providers who hold the precious keys to comfort (commissary items), normalcy (communication with family members), or post-incarceration survival (educational opportunities). Given the monopoly position enjoyed by most prison retailers, it can be difficult to imagine why these companies would spend money on consumer-facing ads, except to manipulate consumer opinion in a manner that boosts sales. The industry's advertising practices raise questions about the unchecked power—both persuasive and coercive—of prison retail vendors.

The simplest type of misleading advertising is a mere promise of hope based on incomplete facts. For example, non-incarcerated customers who want to send money or an electronic message through JPay must go to the company's homepage, where a prominent banner ad cycles through various messages immediately next to the sign-up form. One such message (Figure 5) tells

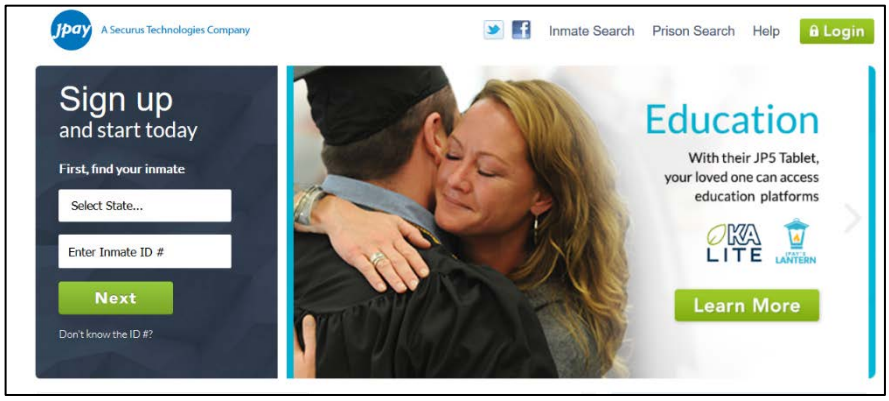

Figure 5. JPay website advertisement. Source: www.jpay.com.

customers that "your loved one can access education platforms" via the JPay tablet. The reference to "educational platforms," accompanied by images of the formal trappings of academia, evokes thoughts of intellectual engagement and increased earning potential. In actuality, the platforms referenced in the ad consist of "KA Lite" and "JPay's Lantern." The ad does not mention the limitations of the two platforms. KA Lite is a collection of open-source videos that JPay has acquired, presumably for free, and makes available for "self-guided learning."[143] Lantern, meanwhile, is not a universal education program, but is simply a platform that each facility can choose to utilize or not.[144] While JPay has clearly invested in a slick marketing campaign, it does not appear to adequately disclose the limitations of its product.

[143] JPay, *supra* note 76.

[144] *See supra* notes 76-77 and accompanying text. JPay's education page claims that "Tens of thousands of incarcerated students have earned college credits, studied for their GEDs, and participated in other educational activities through JPay's Lantern." JPay, *supra* note 76. The lack of details raises immediate questions about the meaning of this claim, along with the vast difference between earning college credit and "participating in other educational activities."

A series of advertisements by Securus illustrate how marketing can raise concerns about consumer privacy. The campaign, which uses the tag-line "Connecting to what matters," features extensive excerpts from what appear to be actual video visitation sessions with incarcerated fathers and their minor children.[145] The videos use unsettling intimate footage, featuring men using

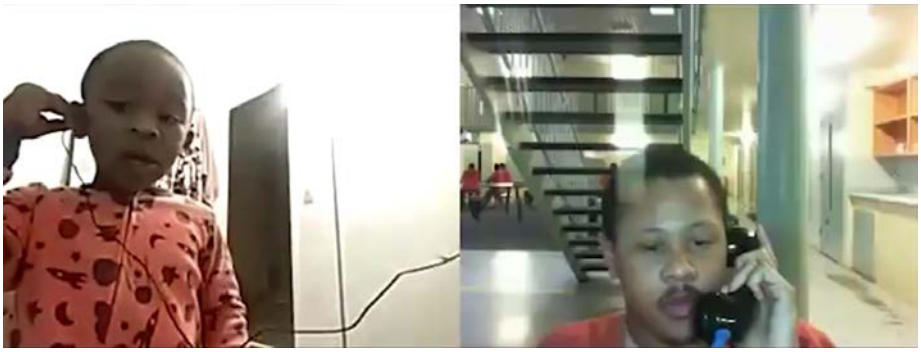

Figure 6. Images from Securus's advertisement "Be There," available at https://www.ispot.tv/ad/Axgw/securus-technologies-video-visitation-celebrating-christmas
Author's note: Using this ad image presents an ethical challenge. On the one hand, an image is worth the proverbial thousand words. On the other hand, it is awkward to criticize the exploitation of families and then use a screenshot of a child who may not have consented to the use of his likeness. In the end, I have erred on the side of transparency, but not without second thoughts.

video visitation to see their children engaged in normal childhood activity like homework or celebrating holidays (see Figure 6). It is not clear whether the people in the ads are actors or actual customers, but given the lack of a disclaimer, one would assume the footage depicts actual users.[146] Even though Securus's privacy policy warns customers that they should have no expectation of privacy, the policy only speaks of call content being used for law

[145] "Connected," https://www.ispot.tv/ad/AXF1/securus-technologies-connected (2016); "Homework," https://www.ispot.tv/ad/AxS1/securus-technologies-homework (2016).

[146] The FTC's advertising endorsement rules require disclosure when actors are used to portray customers. 16 C.F.R. § 255.2(c) ("Advertisements presenting endorsements by what are represented, directly or by implication, to be 'actual consumers' should utilize actual consumers . . . or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product."). Although the consumers in the Securus ads do not make any express statements concerning the video visitation product, their presence in the advertisements still constitutes an "endorsement" under the FTC's expansive definition. *See* 16 C.F.R. § 255.0(b) and example 5.

enforcement purposes, with no mention of marketing activities.[147] To the extent that the individuals in the videos are not actual customers, then the lack of a disclaimer likely constitutes a deceptive advertising practice, since their reactions do not accurately reflect those of real users. Alternatively, to the extent that the ads do depict actual customers, one wonders whether the customers were compensated for use of their images, and if so, what they received? Was separate compensation paid to the children in the ads, and were non-incarcerated parents consulted? Even if Securus complied with all applicable laws, the use of children in these ads evidences a disturbing willingness to disregard customer privacy and exploit the very personal pain that children of incarcerated parents frequently experience.[148]

Not all deceptive marketing practices involve advertising. Free-world users of JPay, for example, may receive automated emails identified as coming from a specific incarcerated correspondent (Figure 7). The message, written in the first person, states "I wanted to let you know that my Media Account balance is running low. . . . Your support is appreciated, and it's really easy to fund my Media Account." Money transfer instructions then follow. Only at the end of the message is there a disclaimer (partially cut off on an iPhone 6, which has a healthy screen height of 5.43 inches) stating "This email was sent by JPay on behalf of your loved one."

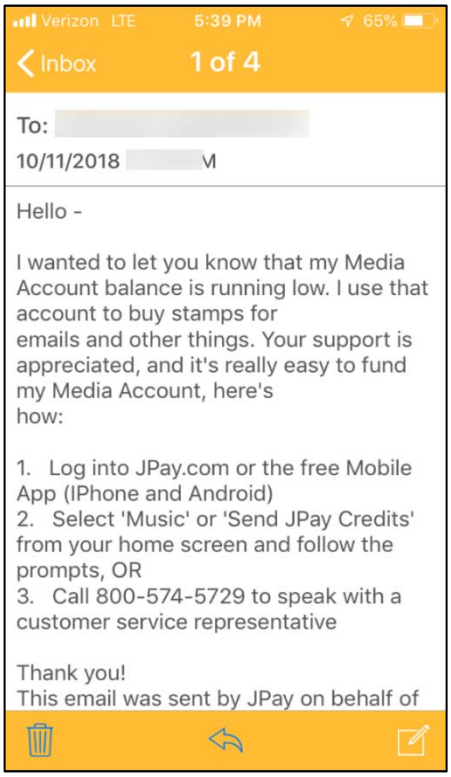

Figure 7. Automated JPay account funding message

The danger of marketing communications in the prison-retail setting is that no one appears to monitor the contents for accuracy and fairness. In many markets, deceptive advertising can be identified and addressed by competitors But in prison, marketing can mislead and manipulate family members—eager to help an incarcerated relative—into buying overpriced products based on an unchecked misperception that a certain product or service represents the key to rehabilitation.

[147] *See infra* notes 152-153 and accompanying text.

[148] *See* Justice Strategies, *Children on the Outside: Voicing the Pain and Human Costs of Parental Incarceration* 5 (2011) ("Unlike children of the deceased or divorced who tend to benefit from society's familiarity with and acceptance of their loss, children of the incarcerated too often grow up and grieve under a cloud of low expectations and amidst a swirling set of assumptions that they will fail, that they will themselves resort to a life of crime or that they too will succumb to a life of drug addiction.").

E. Data Insecurity

Given the large amounts of data that prison retailers (particularly ICS carriers) collect from customers, data privacy should be front and center in policy debates about the rights of the incarcerated. Instead, such issues are rarely discussed and are governed by vague provisions buried in one-sided privacy policies. The reach of "big data" should be of particular concern to anyone with direct or even indirect involvement in the justice system, because of the numerous ways in which police, courts, probation systems, and correctional facilities are using data to make decisions about individuals' lives. The danger of poorly-planned algorithms is that they can shape policing strategies, investigative outcomes, and sentencing decisions in ways that too often penalize people either for being poor or for maintaining relationships with people who have criminal records. By collecting more data to feed into such uncritical systems, ICS carriers play an active role in justifying a deeply flawed status quo.[149]

ICS carriers collect a wealth of information about customers, which comes from at least four sources. First, companies hold payment data, both in the form of payment-card information and transaction histories. Second, some services require a non-incarcerated user to verify their identity by uploading copies of government identification documents.[150] Third, carriers record and store the actual content of communications (phone calls, written messages, or video chats) which are transmitted on their platforms.[151] Finally, some carriers collect geolocation information from cell-phone users.

People who communicate with incarcerated friends or relatives are typically advised by an automated system that their communications will be monitored, yet the nature and extent of such monitoring is neither transparent nor intuitive. Take Securus's privacy policy regarding its video visitation product, which states that users must consent to call data being "accessed, reviewed, analyzed, searched, scrutinized, rendered searchable, compiled, assembled, accumulated, stored, used, licensed, sublicensed, assigned, sold transferred and distributed" by "Law Enforcement."[152] Someone communicating with a relative in the California prison system may reasonably expect the reference to "law enforcement" to refer to the California state prison system and probably the state police. Instead, the defined term in Securus's contract is much broader—law enforcement is defined as "personnel *involved*

[149] Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* 98 (2016) (Prison systems "[a]ll too often . . . use data to justify the workings of the system but not to question or improve the system.").

[150] Securus's video visitation system, for example, directs users to upload "a copy of your government issued photo ID and a photo of yourself" when creating an account.

[151] In addition to communications that are actually initiated on a specific network, vendors can also end up capturing and storing communications that were initially sent as private communications through the U.S. mail, when facilities hire contractors to scan and reprint incoming mail. *See supra*, note 42. Attorneys have expressed particular concern about such systems, which can effectively destroy a lawyer's ability to securely and confidentially communicate with incarcerated clients. *See* Zuri Davis, "Pennsylvania's New $4 Million Prison Mail System Brings Privacy Concerns," Hit & Run Blog (Oct. 10, 2018), https://reason.com/blog/2018/10/10/pennsylvanias-4-million-prison-mail-scan.

[152] Securus T&C, *supra* note 112, Privacy Policy § II(J).

in the correctional industry (federal, state, county and local), *investigative (public and private)*, penological or public safety purposes and specifically including the Department of Homeland Security and any other anti-terrorist agency (federal, state and local)."[153] The reason for this broad (if grammatically fractured) definition is that Securus offers its law enforcement customers a product marketed under the name "Threads."[154] Threads aggregates data from correctional facilities throughout the country and shares it with other participating facilities.[155] Securus markets Threads by proclaiming that "digital evidence is everywhere."

Securus's unquenchable thirst for data does not seem to be accompanied by a commitment to protect customers' privacy. In 2014, hackers obtained call records and access to call recordings for over 70 million phone calls on the Securus system, including privileged calls between clients and attorneys. The details of the data breach were revealed in press reports in November 2015.[156]

Securus has also been exposed for improperly recording privileged attorney-client conversations. Following a 2016 federal indictment in Kansas, concerning illegal activity in a privately operated federal correctional facility, defense attorneys discovered that the U.S. Attorney had obtained recordings of privileged phone calls made by their clients.[157] The district court appointed a special master to investigate the extent of improper recording and the U.S. Attorney's use of such evidence.[158] In an interim report, the master reported that even when prison staff properly designated a phone number as belonging to an attorney, Securus's system nonetheless recorded such calls to such numbers on numerous occasions, and the recordings had been accessed by law enforcement dozens of times.[159] In response, the court ordered further investigation, which has become mired in litigation since the U.S. Department of Justice ceased cooperating with the special master.[160]

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[153] *Id.* (emphasis added).

[154] Securus's marketing materials and contracts actually refer to the product as "THREADS™." For ease of readability, and because the name does not appear to be an acronym, it is referred to here with the more reader-friendly capitalization "Threads." Securus describes Threads as "[s]ystems that merge big data, voice biometrics, and pattern identification, providing early detection and alerts for investigators, attorneys, courts and criminal justice systems." Securus Technologies, Inc., Response to Request for Proposals RFP 18-021 (Fort Bend County, Texas) (Oct. 17, 2017), at 261 (on file with author).

[155] Master Services Agreement, *supra* note 119, at 5 ("THREADS™ offers an optional 'community' feature, which allows member correctional facilities to access and analyze corrections communications data from other correctional facilities within the community and data imported by other community members.").

[156] Jordan Smith & Micah Lee, "Not So Securus," *The Intercept* (Nov. 11, 2015), https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/.

[157] *U.S. v. Black, et al.*, No. 16-CR-20032-JAR, at 1-3 (D. Kan. Jan. 12, 2018) ECF No. ___ (memorandum and order on United States' motion to terminate special master).

[158] *Id.* at 5-6.

[159] Report of Special Master Regarding Other Issues Related to Recordings at CCA-Leavenworth, *U.S. v. Black, et al.*, No. 16-CR-20032, at 20-24 (D. Kan. Mar. 16, 2017), ECF No. 214.

[160] *See generally*, Special Master's First Status Report Regarding Phase III Investigation, *U.S. v. Black, et al.*, No. 16-CR-20032 (D. Kan. Oct. 20, 2017), ECF No. 298.

While the 2014 and 2016 incidents impact parties utilizing Securus's calling products, other incidents have implicated the privacy rights of everyone with a cell phone, including people who have never placed or received a call involving Securus's network. Securus offers (or at least, offered until recently[161]) a free add-on product referred to as "location based services" ("LBS"), which allows law-enforcement staff to obtain "a mobile device user's approximate geographical location."[162] This service is not restricted to cell phones used to make calls to people in facilities under contract with Securus. Rather, Securus's LBS uses data provided by the major wireless carriers, and can provide location information for virtually *any* U.S. cell phone.[163] Although agencies using LBS are supposed to ensure that they have proper authorization (such as a warrant or court order) to obtain phone location information, Securus's contract with facilities disclaims any responsibility on Securus's part for ensuring compliance with applicable law.[164] A 2017 civil complaint accuses a Missouri Sheriff of using "false paperwork" to improperly obtain cell-phone information regarding law enforcement personnel in other agencies and a state judge.[165] The plaintiffs in the Missouri case have only named the sheriff as a defendant, and it remains unclear whether Securus could be subject to liability for mishandling private call information, but there is a suggestion that the FCC is conducting an enforcement investigation concerning Securus's use of LBS.[166]

In a new privacy policy published in January 2019, GTL reveals that it tracks the geographic location of any cell phone that receives a call on its ICS platform, both when the call is connected *and for sixty minutes afterward*. GTL's privacy policy misleadingly states that customers can "opt out" of this location tracking, but actually the ability to opt out is limited to the sixty-minute trailing period. The only way to opt out of location tracking entirely is to not use GTL's services.[167]

Telecommunications companies are not the only prison retailers who compile customer data that could be put to other unexpected uses. Correctional banking firms amass substantial transactional data that can also form the grist

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[161] It is difficult to ascertain the current status of LBS services in general. After the original story broke, the large wireless carriers made claims of increased privacy protections that now look to have been false. *See* Joseph Cox, "Sprint to Stop Selling Location Data to Third Parties after Motherboard Investigation," *Motherboard* (Jan. 16, 2019), https://motherboard.vice.com/en_us/article/qvqgnd/sprint-stop-selling-location-data-tmobile-att-microbilt-zumigo.

[162] Master Services Agreement, *supra* note 119, at 6.

[163] Jennifer Valentino-DeVries, "Service Meant to Monitor Inmates' Calls Could Track You, Too," *New York Times* (May 10, 2018), https://www.nytimes.com/2018/05/10/technology/cellphone-tracking-law-enforcement.html.

[164] Master Services Agreement, *supra* note 119, at 6.

[165] Complaint, *Cooper, et al. v. Hutcheson*, No. 17-cv-073 (E.D. Mo. May 9, 2017), ECF No. 1.

[166] Wright Petitioners' Reply to Joint Opposition to Petition to Deny, *In the Matter of Joint Application of TKC Holdings, ICSolutions, and Securus Technologies for Grant of Authority*, WC Dkt. No. 18-193, at 6 (July 30, 2018) ("It is understood that an enforcement inquiry is underway to determine whether Securus in fact violated Section 222 of the Act and the Commission's rules related thereto.").

[167] Global Tel*Link Corp., "Privacy Policy," http://www.gtl.net/privacy-policy-en/ at ¶ 1(D) (accessed Jan. 17, 2019).

for law enforcement datasets. Notably, the Federal Bureau of Prisons in 2015 proposed an amendment to its commissary regulations that would have required senders of money to consent to the Bureau's "collection, review, use, disclosure, and retention of, all related transactional data, including the sender's personal identification information."[168] The rule would have also allowed the same use of data by "service providers." After advocacy groups objected to the new rule as a violation of the Right to Financial Privacy Act ("RFPA"),[169] the Bureau appears to have abandoned the proposal;[170] however, the RFPA provides limited protections because it applies only to collection of transactional information by the federal government.[171] The terms of privacy policies impart little information about how the vendor will use customers' financial data. For example, TouchPay (a GTL subsidiary) states that it may share customer information with "third party . . . service[] providers who provide services . . . on our behalf, such as . . . analyzing data."[172] Such open-ended provisions provide no meaningful information on data usage, specifically any usage that may make the vendor a data furnisher for purposes of the Fair Credit Reporting Act.[173]

Perhaps the most troublesome data-related practice by prison retailers is a seeming unwillingness to seriously comply with most of the commonly accepted data security frameworks. As Professor William McGeveran has shown in his analysis of fourteen leading systems of data security, a generally accepted legal duty of data security has begun to emerge from various sources of public and private law.[174] As entities become more attuned to data security, many of these accepted principles become enforceable duties through the force of contractual agreements.[175] But with correctional administrators apparently unconcerned about the security of prison-retail data, there does not appear to be growing use of contractual commitments to enforce security standards, thus leaving legislative action as the last apparent line of defense.

IV. Potential Sources of Protection

Most problems facing consumers in the prison retail-sector can be traced back to one fundamental shortcoming: on both the state and federal levels, no entity has been tasked with protecting the interests of incarcerated

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[168] U.S. Dept. of Justice, Bureau of Prisons, Proposed Rule, Inmate Commissary Account Deposit Procedures, 80 Fed. Reg. 38658, 38660 (Jul. 7, 2015) (proposed 28 C.F.R. § 506.3).

[169] 12 U.S.C. § 3401, *et seq*.

[170] *See* Comments and Petition for Further Rulemaking, RIN 1120-AB56 (Sept. 1, 2015), *available at* https://www.regulations.gov/contentStreamer?documentId=BOP-2015-0004-0003&attachmentNumber=1&contentType=pdf. Although the Bureau of Prisons has never formally rescinded the proposed rule, it is now listed as "inactive" on the Office of Information and Regulatory Affairs' Fall 2018 unifed agenda of federal regulatory actions. *See* https://www.reginfo.gov/public/do/eAgendaInactive.

[171] 12 U.S.C. §§ 3401(3), 3402.

[172] TouchPay Holdings, LLC, "Privacy Statement" at ¶ 5(B) https://www.gtlfsonlinepay.com/portal/includes/privacy.html (accessed Jan. 17, 2019).

[173] *See* 15 U.S.C. §1681s-2.

[174] William McGeveran, *The Duty of Data Security* 102 Minn. L.Rev. (forthcoming 2019) (manuscript at 42).

[175] *Id*., manuscript at 36-42.

people or their families, either in a regulatory setting or during the procurement process. As discussed in this section, some laws do provide protections to prison-retail customers, but these provisions tend to be piecemeal, outdated, and not drafted with incarcerated people in mind. Without a regulatory agency specifically focused on fairness and equity in the prison retailing sector, advocacy groups have been pursuing increasingly sophisticated strategies to fill in the gaps in consumer protection. While litigation and regulatory advocacy have produced victories, such efforts are unlikely to result in comprehensive protections without laws that are intentionally designed to provide *ex ante* consumer protections to incarcerated people.

A. Telecommunications Law

As noted previously, the landmark *Wright* rulemaking grew out of a 2000 lawsuit challenging ICS rates.[176] When referring the matter to the FCC under the doctrine of primary jurisdiction, the district court specifically cited two statutory grants of jurisdiction that allowed the Commission to address the plaintiffs' concerns. First, the court pointed to the FCC's powers over common carriers, contained in title II of the Communications Act, specifically the mandate to ensure that carriers' "charges, practices, classifications, and regulations" are "just and reasonable."[177] In addition, the court cited the 1996 Act's payphone provision, § 276, which directs the FCC to ensure competition and "fair compensation" in the payphone industry while also classifying all "inmate telephone service" as payphone service.[178]

In 2015, when the FCC issued its final ICS rules, it relied on both title II and § 276 for jurisdiction.[179] The final rule imposed rate caps on all ICS calls (both inter- and intrastate) and capped ancillary fees.[180] Significantly, the FCC reaffirmed its earlier finding that site commissions were not a legitimate cost of providing communications services for purposes of regulatory accounting.[181] Two commissioners dissented from the final rule. Commissioner Michael O'Rielly's dissent appears to be motivated in party by antipathy toward incarcerated people,[182] but then-Commissioner (now Chairman) Ajit Pai wrote a more analytical dissent that accurately presaged the outcome of the ICS industry's petition for review to the U.S. Court of Appeals for the District of Columbia Circuit. The Pai dissent criticized two aspects of the final rule. First, Pai expressed doubt that the FCC had jurisdiction to regulate intrastate rates and charges. In making this argument, he conceded that many of the protections in the rule could be validly enacted as to interstate calls

[176] *See supra* note 89 and accompanying text.

[177] *Wright v. Corr. Corp. of Am.*, No. 00-cv-293-GK, slip op. at 6-7 (D.D.C. Aug. 22, 2001), ECF No. 94 (citing 47 U.S.C. § 201(b))

[178] *Id.* at 8.

[179] Second Report & Order, *supra* note 34 at ¶ 3, n.12 and accompanying text, 30 FCC Rcd. at 12766.

[180] *Id.* ¶ 9, 30 FCC Rcd. at 12769.

[181] *Id.* ¶ 118, 30 FCC Rcd. at 12819.

[182] *Id.*, Dissenting Stmt. of Comm'r Michael O'Rielly, 30 FCC Rcd. at 12971 ("Despite the intentions of supporters, it is highly probable that the end result of the changes in this item will lead to a worse situation for prisoners and convicts, to which I am only so sympathetic.").

under the commission's title II authority, but he found the intrastate rate caps to be insufficiently authorized by title II or § 276.[183] Pai's second point of dissent addressed the Commission's calculation of the rates caps, which he argued did not allow ICS carriers to recoup their costs.[184]

The FCC issued its final rule in late 2015 and the ICS industry immediately petitioned for review in the D.C. Circuit. On January 31, 2017, shortly before the court held oral arguments, the FCC General Counsel filed a notice with the court citing a change in the Commission's membership, and stating that the new majority had directed counsel to no longer defend the Commission's regulation of intrastate rates or the method for calculating the 2015 rate caps.[185] Although the Wright Petitioners, along with numerous advocacy groups, had intervened in the litigation and continued to defend the final rule, the FCC's partial withdrawal still held legal significance, because the majority of the appellate panel concluded that the regulatory provisions that the Commission no longer defended were not entitled to *Chevron* deference.[186]

A split panel of the D.C. Circuit vacated several parts of the FCC's 2015 rules, in an opinion written by Judge Harry Edwards. The majority forcefully disagreed that the Commission had broad jurisdiction to regulate intrastate rates, and therefore vacated the rate caps and limits on ancillary fees, as applied to intrastate calls.[187] While the Commission had cited 47 U.S.C. §§ 201 and 276 as jurisdictional bases for regulating intrastate rates, the majority focused on § 152(b)'s presumption against FCC regulation of intrastate communications. The Commission, of course, had addressed this and relied on § 276 when capping intrastate rates.[188] The majority acknowledged, as it had to, that § 276 allowed the Commission to preempt state regulations; however, the majority went on to find that § 276's requirement that payphone providers be "fairly compensated" allowed the Commission to require minimal adequate compensation, but did not allow it to limit unfairly high compensation.[189]

Dissenting, Judge Cornelia Pillard wrote that the meaning of the fair-compensation provision depended on "whether the word 'fairly' implies an ability to reduce excesses, as well as bolster deficiencies, in the compensation that payphone providers would otherwise receive." Because the FCC had adopted the expansive meaning after developing a thorough record as part of notice-and-comment rulemaking, Judge Pillard argued that the Commission's

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[183] *Id.*, Dissenting Stmt. of Comm'r Ajit Pai, 30 FCC Rcd. at 12960-64.

[184] *Id.*, 30 FCC Rcd. at 12965-69.

[185] Letter from David M. Gossett, Deputy Gen. Counsel, *Global Tel*Link v. Fed. Comm'cns Comm'n*, No. 15-1461 (D.C. Cir. Jan. 31, 2017), ECF No. ___.

[186] *Global Tel*Link v. Fed. Comm'cns Comm'n*, 866 F.3d 397, 407-408 (D.C. Cir. 2017). Although the court issued a subsequent clarifying statement (*id.* at 416-419) claiming that the intrastate rate regulation and rate-cap methodology would have failed even under *Chevron* review, Judge Pillard's dissent deftly points out why these provisions can be justified as one of several plausible interpretations of the Telecommunications Act, which is precisely the type of situation that *Chevron* is designed to address.

[187] *Id.* at 402.

[188] Second Report & Order, *supra* note 34 ¶¶ 108-109.

[189] *Global Tel*Link*, 866 F.3d at 408-412.

interpretation was entitled to *Chevron* deference and could be reversed only by the agency through a new rulemaking.[190]

Although the court was hostile to the Commission's regulation of intrastate matters, the majority echoed one of the more surprising aspects of Commissioner Pai's dissent, finding that the limits on ancillary fees associated with interstate calls were proper under the Commission's title II powers.[191] The practical problem, however, is how to determine whether any given account fee (e.g., a fee for making a prepayment) is related to inter- or intrastate calls, when the account is used for both types of communications.[192]

As for the Commission's interstate rate caps, the ICS carriers challenged the FCC's methodology, not jurisdiction. The court was largely sympathetic to the ICS industry, finding that the FCC's exclusion of site commissions from recoverable costs was arbitrary and capricious, and further finding the use of industry-wide cost averages as a basis for rate caps was legally improper.[193] Again parting ways with her colleagues, Judge Pillard criticized the majority's finding that site commissions are "obviously" costs of providing communications.[194] She argued that a commission "might, in some sense, be 'related' to the provision of payphone services . . . but it is not 'reasonably' related because acceding to such preexisting contractual relationships is inconsistent with the statutory scheme [of 'fair compensation']."[195]

One of the only substantive portions of the D.C. Circuit's opinion that received unanimous approval from the panel was the holding vacating the Commission's rule requiring annual reporting of ICS carriers' revenues and costs related to video visitation services. The court noted that the Commission had not explained how video visitation was a "communication by wire or radio," as required for the exercise of title II jurisdiction.[196]

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[190] *Id.* at 420-421.

[191] *Id.* at 415 ("Contrary to Petitioners' contentions, the *Order*'s imposition of ancillary fee caps in connection with *interstate* calls is justified. The Commission has plenary authority to regulate interstate rates under § 201(b), including 'practices . . . for and in connection with' interstate calls.").

[192] *Id.* at 415 (upholding FCC's jurisdiction to limit ancillary fees for interstate calls, but remanding because "we cannot discern from the record whether ancillary fees can be segregated between interstate and intrastate calls."); *see also Mojica v. Securus Tech.*, No. 14-cv-5258, 2018 WL 3212037, *5-6 (W.D. Ark. Jun. 29, 2018) (discussing methodological difficulties of allocating fees between inter- and intrastate calls).

[193] *GTL*, 866 F.3d at 412-415.

[194] *Id.* at 413.

[195] *Id.* at 424.

[196] *Id.* at 415.

Table 2. Current Status of FCC ICS Rules

Citation (47 C.F.R.)	Substance	Judicial Challenge	Result
64.6010(a)	Prepaid call rate caps – jails (tiered)	Yes – two-part challenge: (1) rate caps challenged to the extent applicable to intrastate calls; (2) intra- and interstate rate-caps challenged for not allowing carriers to recover costs.	No jurisdiction under §§ 201 or 276 to require just and reasonable rates for intrastate calls. Exclusion of site commissions held arbitrary and capricious. Rate caps based on industry-wide cost averages not lawful; remanded for further proceedings.
64.6010(b)	Prepaid call rate cap – prisons		
64.6010(c)	Collect call rate cap – jails (tiered)		
64.6010(d)	Collect call rate cap – prisons		
64.6020	Ancillary service charge caps	Challenged as exceeding FCC jurisdiction	Limits on fees ancillary to interstate calls expressly upheld. Limits related to intrastate calls vacated.
64.6040	Rate caps for TTY calls	No	
64.6060	Annual data reporting requirement	Yes	Reporting rules related to video visitation vacated; remaining reporting requirements upheld.
64.6070	Mandatory tax provision	No	Effective, as amended August 2016 (see 31 FCC Rcd. 9300).
64.6080	Prohibition on per-call or per-connection charges	No	
64.6090	Prohibition on flat-rate calling	No	
64.6100	Prepaid account balance requirements	No	
64.6110	Rate disclosure requirements	No	

The current status of the FCC's ICS rules are summarized in Table 2, and have led to a period of uncertainty. As for call rates, the D.C. Circuit vacated the rate caps in the FCC's 2015 order, which means interstate ICS rates are now subject to the higher rate caps contained in the FCC's 2013 interim order, and intrastate rates are subject only to regulation by state public utilities commissions.[197] At the same time, ICS carriers have sought to escape regulation in some jurisdictions by citing their use of VoIP technology, which is sometimes exempt from state regulation.[198] This leads to the possibility of wholly unregulated intrastate rates, which is of particular concern in jails, where incarcerated people are more likely to have ties to the local area and therefore are more likely to make intrastate calls.

Ironically, the Court of Appeals reinforced the jurisdictional importance of intra- and interstate calling at a time when even ICS carriers acknowledge that there is no material difference in cost based on the intra/interstate distinction.[199] Moreover, ICS carriers have already lost their

[197] The 2013 order capped interstate rates at 21¢ per minute for prepaid calls and 25¢ for collect calls, and also created "safe harbor" rates of 12¢ and 14¢ (for prepaid and collect calls, respectively), which are presumed to be reasonable. First Report & Order, *supra* note 32 at ¶¶ 60 and 73, 28 FCC Rcd. at 14140, 14147.

[198] *See infra* notes 239 and 240.

[199] *See* Comments of Securus Technologies, Inc., *In the Matter of the Amendment of ARM 38.5.3401, 38.5.3403, and 38.5.3405, the Adoption of New Rule I and the Repeal of ARM 38.5.3414 Pertaining to Operator Service Provider Rules*, Montana Pub. Serv. Comm'n, at 5

fight to prohibit non-incarcerated users from using VoIP routing to engage in a type of pro-consumer regulatory arbitrage.[200] In 2009, Securus challenged the ability of consumers to route ICS calls to a VoIP number assigned to the same local dialing area as a distant prison in order to take advantage of lower prices in jurisdictions that have capped intrastate rates.[201] The FCC rejected Securus's challenge and some consumers can now use this technology to take advantage of any favorable disparities in inter- and intrastate ICS rates. Once again, however, the potential salutary effects of VoIP routing illustrates the differences between customers in prisons and jails. The family of someone incarcerated for a prolonged period in a distant prison is likely to have the time and financial incentive to set up a local-dial VoIP number if it allows for significant savings over the long term. But the family of someone who unexpectedly lands in jail and must make an emergency call does not realistically have the ability to leverage such technology for their benefit.

Although the regulatory future of the ICS industry is unclear for a variety of reasons, there are three prominent trends that can be gleaned from recent experience: statutes that lag behind technology, the ascendency of bundled services and cross-subsidies, and the importance of activism.

1. Technology Has Outpaced the Regulatory Framework

As is the case in many areas of telecommunications, the law governing ICS carriers has not kept pace with technology. This is most notable in the context of § 276, a statute of diminishing relevance outside of correctional facilities, as payphones disappear from the landscape.[202] But the disconnect between statutory language and technological reality becomes even more prominent as ICS carriers rely increasingly on emerging technologies like video visitation and electronic messaging to drive revenue. While legislation clarifying the FCC's powers over these new services would be welcome, the Commission need not wait for congressional action, since existing law already provides sufficient regulatory jurisdiction. There are strong arguments in favor of regulating non-telephone communications services under either title II of the Communications Act or § 706 of the 1996 Act.

Section 706 of the 1996 Act expressly directs the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[203] Electronic messaging and video

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(Sept. 19, 2017) ("[The VoIP technology] used by most ICS providers today means the 'distance' between the origination and termination points of an ICS call has little to no effect on the transport costs of an ICS call.").

[200] *In the Matter of Petition for Declaratory Ruling of Securus Tech.*, WC Dkt. No. 09-144, Declaratory Ruling & Order, 28 FCC Rcd. 13913 (Sept. 26, 2013).

[201] *Id.* ¶¶ 5-6, 28 FCC Rcd. at 13914-95.

[202] *See generally*, Nathaniel Meyersohn, "There are still 100,000 pay phones in America," CNN Money (Mar. 19, 2018), https://money.cnn.com/2018/03/19/news/companies/pay-phones/index.html (accessed Dec. 11, 2018).

[203] 47 U.S.C. § 1302(a).

conferencing are both classified as "advanced communications services" under the Act. and thus fall within the scope of § 706.[204] The D.C. Circuit has characterized § 706 as a grant of authority,[205] and the FCC relied on this jurisdiction when issuing its 2015 Open Internet Order.[206] Even during the brief period when the FCC had reclassified internet service as a title II service, the Commission nonetheless eschewed rate regulation and other heavy-handed intervention in favor of substantial regulatory forbearance, consistent with the policy expressed in § 706.[207] Unlike broadband internet access, for which there is a competitive (if highly concentrated) market, the FCC has already found that ICS markets are not competitive and need regulation to correct market failures.[208] Indeed, § 706's reference to making advanced communications available to "all Americans" should be interpreted for the benefit of incarcerated people, since Congress clearly had incarcerated users in mind when drafting the inmate phone provision of § 276, which was part of the same legislation that enacted § 706. Accordingly, the FCC already has statutory authority to impose price caps on new ICS technologies like video visitation and electronic messaging.

Advanced technologies are also susceptible to regulation as a telecommunications service under title II of the Act. ICS carriers make the self-interested argument that ICS offerings are information services, because federal policy (both before and after enactment of the 1996 Act) has been to avoid regulation of such services.[209] But the FCC already determined that ICS telephone service is not an information service, and the same reasoning should be applied to advanced technologies. The essential defining characteristic of telecommunications service is "the transmission of information between or among points with *no* 'change in the form or content.'"[210] The mutually-exclusive category of information service encompasses products that store,

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[204] 47 U.S.C. § 153(1).

[205] *Verizon v. Fed. Comm'cns Comm'n*, 740 F.3d 623, 637 ("The question, then, is this: Does the Commission's current understanding of section 706(a) as a grant of regulatory authority represent a reasonable interpretation of an ambiguous statute? We believe it does.").

[206] *In the Matter of Protecting and Promoting the Open Internet*, GN Dkt. 14-28 at ¶ 273-282 (Feb. 26, 2015), 30 FCC Rcd. 5601, 5721-5724; *but see In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Declaratory Ruling, Report and Order, and Order ¶¶ 267, 33 FCC Rcd. 311, 470 (Jan. 4, 2018) ("We find that provisions in section 706 of the 1996 Act directing the Commission to encourage deployment of advanced telecommunications capability are better interpreted as hortatory rather than as independent grants of regulatory jurisdiction.").

[207] *Open Internet*, *supra* note 206, at ¶¶ 434-542, 30 FCC Rcd. at 5804-5867.

[208] *See supra* note 32 and accompanying text.

[209] The categories "communications service" and "information service" were first developed in the FCC's *Computer Inquiries*, and subsequently enacted as statutory definitions as part of the 1996 Act. *See* 47 U.S.C. §§ 153(24), (50), and (53) (definitions); *Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs*, 545 U.S. 967, 975-977 (2005) (legislative history). During the Wright rulemaking, GTL, Securus, and Telmate (an erstwhile competitor since acquired by GTL) all explicitly argued that emerging technologies are information services. *See* Comments of Prison Policy Initiative, *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, at 4, n.19 (Feb. 8, 2016) (collecting citations), *available at* https://www.fcc.gov/ecfs/filing/60001394099.

[210] Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* § 12.2.3 (2d ed. rev. 2018) (quoting 47 U.S.C. § 153(50)).

retrieve, and process information.[211] Of course, ICS telephone service involves extensive computer storage, retrieval, and processing of information, but in denying the carriers' requests to classify ICS as an information service, the FCC concluded that such features were merely used to support the provision of telecommunications service, and therefore should not be treated as information services.[212] The same can be said for emerging technologies: the end-user pays to transmit an un-modified message (either text-based or video) from point to point. The carrier's use of information services is incidental to the provision of telecommunications service, and the facility's use of extensive computerized security features (which may qualify as information services) is an entirely separate product.

Although the FCC has assiduously avoided regulating new technologies under title II, market analysis should lead to a different result in the case of service in correctional facilities. Even Chairman Pai, who objected to the extent of the FCC's new ICS rules, admitted that the ICS market is riddled with failure and cannot be left to the whims of monopoly carriers.[213] Title II and § 706 allow the FCC to regulate wireline services regardless of the specific technology utilized, and the Commission can use these powers (informed by the court's decision in the *Global Tel*Link* case) to craft a regulatory regime that is not artificially limited to only one technology.

2. The New Cross-Subsidies

Modern regulatory theory generally favors unbundling of services.[214] Yet bundled contracts that combine regulated and unregulated services are common in the ICS sector,[215] giving rise to a new twist on the longstanding problem of cross-subsidies. Historically, U.S. telecommunications law has focused on one type of cross-subsidy: an incumbent provider using revenues from regulated services to subsidize unregulated services and charge below-market rates, thereby undercutting competition.[216] The probable cross-

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[211] 47 U.S.C. § 153(24).

[212] *In the Matter of Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, Declaratory Ruling at ¶¶ 28-32, 11 FCC Rcd. 7362, 7374-7377 ("[E]nhanced services do not include the functionality between the subscriber and the network for call set-up, routing, cessation, caller or calling party identification, or billing and accounting.").

[213] First Report & Order, *supra* note 32, Dissenting Stmt. of Comm'r Ajit Pai, 28 FCC Rcd. at 14217 ("I believe that the government should usually stay its hand in economic matters and allow the price of goods and services to respond to consumer choice and competition. But sometimes the market fails. And when it does, government intervention carefully tailored to address that market failure is appropriate. The provision of inmate calling services (ICS) is one such market. . . . [W]e cannot necessarily count on market competition to keep prices for inmate calling services just and reasonable.").

[214] Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323, 1340 (1998) ("Under the new paradigm, . . . carriers are required to unbundle . . . end-to-end service into constituent parts in order to allow end-users to mix and match different service elements to suit their own needs and tastes.").

[215] *See* Comments of Prison Policy Initiative, *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (Jan. 19, 2016), *available at* https://www.fcc.gov/ecfs/filing/60001379538 (discussing the increasing use of bundled contracts by large ICS carriers).

[216] *In the Matter of Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Dkt. No. 86-111, Report & Order [hereinafter "Joint Cost Order"] ¶

subsidies in the current ICS market are different: carriers are most likely using excess revenues from *un*regulated video and electronic messaging service to compensate for the rents they can no longer collect through phone rates. This dynamic is not merely hypothetical—Securus has pitched potential investors by touting the fact that 65% of its 2015 corporate revenues came from unregulated business lines in 2015, up from 0% in 2007.[217]

The dynamics of the new cross-subsidies are novel, but they are not unheard of. In his categorization of cross-subsidies, economist D.A. Heald acknowledged that regulated activities could be subsidized by competitive products, but characterized such an arrangement as "uncommon."[218] This type of cross-subsidy cannot be sustained in the long term, to the extent that the "economy outside the regulated sector is competitive."[219] Of course, because unregulated prison communication services are offered on a monopoly basis, the unregulated market is *not* competitive, and this unusual breed of cross-subsidy can likely be perpetuated indefinitely.

When the FCC designed rules to prevent incumbent local exchange carriers from cross-subsidizing unregulated services, the Commission framed the issue as one of ensuring that regulated rates remained just and reasonable.[220] The same concerns apply to the new type of ICS cross-subsides, even though the flow of funds is inverted. The FCC set ICS rate caps in reference to carrier costs. Although the underlying cost data are confidential, the FCC calculated the 2015 rate caps with the goal of allowing carriers to operate profitably. Assuming this means net revenues roughly in line with the overall telecommunications industry,[221] and using purely hypothetical

Table 3. Hypothetical Revenues (Phone Only)

Revenue	1,000
Fixed costs (network)	(700)
Marginal costs	(140)
Net revenue	160
Profit margin	16%

Table 4. Hypothetical Revenues (Bundled)

	Phone	E-Messg	Video	TOTAL
Revenue	1,000	500	850	2,350
Network (redistributed)	(300)	(100)	(300)	(700)
Product-specific fixed costs	--	(10)	(20)	(30)
Marginal costs	(140)	(20)	(120)	(280)
Net revenue	560	370	410	1,340
Profit margin	56%	74%	48%	57%

33, 2 FCC Rcd. 1298, 1304 (Feb. 6, 1987); *see also* Peter Temin, *The Fall of the Bell System: A Study in Prices and Politics* 179-190 (1987) (discussion of Congressional action to address cross-subsidization in the Bell system).

[217] Securus Lender Presentation, *supra* note 96, at 26 ("By investing in businesses that are not regulated by the FCC / PSC / PUCs, Securus has successfully decreased its exposure to potential rate of return regulation.").

[218] D.A. Heald, *Public Policy Towards Cross Subsidy*, 68 Annals of Pub. & Cooperative Economics 591, 600 (1997).

[219] *Id.*

[220] Joint Cost Order, *supra* note 216 at ¶ 37, 2 FCC Rcd. at 1303 ("We reaffirm that protecting ratepayers from unjust and unreasonable interstate rates is the primary purpose behind the accounting separation of regulated from nonregulated activities, just as it is the purpose behind all of our accounting and cost allocation rules. Our commitment to cost-based rates demands close attention to the manner in which the costs a company uses to support its [regulated offerings] are separated from the other costs of the company.").

[221] For illustrative purposes, Prof. Aswath Damodaran of the Stern School of Business at New York University reports that after-tax unadjusted operating margin for the telecommunications

numbers, a carrier's profitability for a given contract could look something like the data shown in Table 3, and the profit margin can be considered reasonable and just. But if that contract was actually awarded on a bundled basis for phone service, electronic messaging, and video visitation, then the carrier's profit under the contract—including all revenue and redistributed fixed network costs—could resemble Table 4. Under this scenario, it is difficult to say that the telephone rates are just and reasonable when they are an integral, indispensable part of a contract that yields profits over three times the industry average.

The FCC can easily head off this problem by regulating rates charged for new technologies, as advocated in the previous section. In the absence of this preferable resolution, any attempts to regulate telephone rates will prove to be illusory unless accompanied by robust data collection that covers all bundled services. Although the D.C. Circuit invalidated the FCC's attempts to collect data on video visitation revenue and costs,[222] the court did so based on an inadequate record, not on an outright lack of jurisdiction, thus leaving the door open for a renewed attempt at comprehensive, technology-neutral regulation of communications service in correctional facilities.

3. Advocacy and Activism

The ICS advocacy campaign that has deservedly garnered the most attention is the *Wright* rulemaking.[223] One positive byproduct of the FCC's years of inaction is that by the time the Commission finally promulgated rules, a broad coalition of organizations who found common cause with the Wright petitioners had joined in the calls for reform. In addition to numerous advocates for the rights of incarcerated people, comments were submitted by religious communities, disability-rights activists, the American Bar Association, immigrant communities, the Minority Media and Telecommunications Counsel, and the National Association of State Utility Consumer Advocates.[224] The critically important work in the telecommunications realm has encompassed litigation, regulatory advocacy, and legislative campaigns, and has laid the groundwork for the next round of the fight for fair telecom rates.

Title II of the Communications Act requires "just and reasonable" rates, and provides consumer with a private cause of action to sue for violations.[225] But exercising this private right can be difficult. Many courts (including, most obviously, the district court that heard the *Wright* case[226]) have invoked the

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services sector is 16.59% (as of January 2018). *See* Margins by Sector, http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html (accessed Dec. 11, 2018).

[222] *See supra*, text accompanying note 196.

[223] *See supra* § III.A.

[224] Second Report & Order, *supra* note 34, appx B, 30 FCC Rcd. at 12926.

[225] 47 U.S.C. §§ 201(a) and 207; *Global Crossing Telecomm'cns v. Metrophones Telecomm'cns*, 550 U.S. 45, 53-54 (2007) (explaining private cause of action).

[226] *See supra* notes 89-90 and accompanying text.

doctrine of primary jurisdiction when faced with challenges to rates.[227] While this doctrine does not necessarily bring about the conclusive end of a legal challenge, it can result in decades of delay, as the Wright Petitioners can attest.

Another common roadblock to litigation is the "filed-rate" doctrine, a rule that has clearly outlived its purpose, at least in the case of interstate ICS rates.[228] In its classic form, the filed-rate doctrine "is a court-created rule to bar suits against regulated utilities involving allegations concerning the reasonableness" of rates contained in a filed tariff.[229] Courts have used the doctrine to dispose of litigation against ICS carriers, although applicability of the doctrine depends greatly on the specific cause of action. In *Daleure v. Kentucky*[230] plaintiffs challenged ICS rates and procurement practices under various theories including 42 U.S.C. § 1983 and the Sherman Antitrust Act. The district court dismissed the plaintiffs' damages claims under the filed-rate doctrine, but allowed the claims for injunctive relief under the Sherman Act to proceed.[231] Offering some guidance to plaintiffs' counsel is *Arsberry v. Illinois*,[232] which also involved § 1983 and Sherman Act claims concerning rates and procurement. The district court in *Arsberry* had dismissed all claims under the filed-rate doctrine, but the Seventh Circuit found this application of the doctrine too broad. While some of the plaintiffs' claims did challenge high rates, others simply challenged the fundamental fairness of the system by which the rates were set.[233] Writing for a unanimous panel, Judge Posner found that the latter class of claims should not have been dismissed under the filed-rate doctrine, but that they were nonetheless properly dismissed on the merits.[234]

The larger problem with application of the filed-rate doctrine to ICS litigation is that the basic rationale for the doctrine has mostly disappeared at the federal level. Tariffs for any type of interstate phone service (in- or outside of prison) are no longer required under FCC rule.[235] Instead, non-dominant carriers like ICS providers must publicly disclose rates and terms (confusingly, many providers comply with this obligation by posting a document that they refer to as a "tariff" even though it is governed by the FCC's *de*tariffing

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[227] Madeleine Severin, *Is There a Winning Argument against Excessive Rates for Collect Calls from Prisoners?* 25 Cardozo L. Rev. 1469, 1490-1494 (2004).

[228] Not all states have detariffed ICS rates, and in those states that have kept tariffing, the filed-rate doctrine still applies. The doctrine is typically invoked by ICS providers in defending legal challenges to exorbitant prices. *See* Nat'l Consumer Law Ctr., *Access to Utility Service* § 11.5.7.2, n.313 (6th ed. 2018) (collecting cases).

[229] 64 Am. Jur. 2d *Public Utilities* § 62 (2011).

[230] 119 F.Supp.2d 683 (W.D. Ky. 2000).

[231] *Id.* at 690.

[232] 244 F.3d 558 (7th Cir. 2001).

[233] *Id.* at 563 ("If the plaintiffs in this case wanted to get a rate change, the . . . [filed-rate] doctrine . . . would kick in; but they do not, so it does not. *Eventually* they want a different rate, of course, but at present all they are seeking is to clear the decks—to dissolve an arrangement that is preventing the telephone company defendants from competing to file tariffs more advantageous to the inmates.").

[234] *Id.* at 564-566.

[235] *In the Matter of Policy & Rules Concerning the Interstate, Interexchange Marketplace*, CC Dkt. No. 96-61, Second Report & Order, 11 FCC Rcd. 20730 (Oct. 31, 1996).

order).[236] The posting of rates is meant to allow consumers to make informed choices—a concept that is has no relevance in the world of monopoly ICS contracts. When issuing its detariffing rule, the FCC concluded that elimination of tariffs would "eliminat[e] the ability of carriers to invoke the 'filed-rate' doctrine,"[237] but some have argued that the FCC lacks the authority to abolish this judicially-created rule.[238] The confusion has led some courts to apply the doctrine to ICS rate challenges, even though such rates have long been detariffed at the federal level.[239] At the state level, when the prospect of robust regulation threatens to erode profits, ICS carriers have been known to strategically detariff services in order to escape regulatory jurisdiction.[240] Accordingly, it is only fair to provide reciprocal treatment for ratepayers, by eliminating the filed-rate doctrine for detariffed services.

The filed-rate doctrine has not stymied all attempts at litigating ICS issues. The district court in Fayetteville, Arkansas certified a class action against Secruus and GTL in 2017, when plaintiffs challenged the legality of site commissions under title II of the Communications Act and common-law unjust enrichment.[241] But after the D.C. Circuit vacated the FCC's attempts to rein in site commissions, the court decertified the class and dismissed the named plaintiffs' claims.[242]

A similar class action in New Jersey has faired better. Filed in 2013, plaintiffs challenged ICS rates under title II, 42 U.S.C. § 1983, New Jersey's consumer protection act, and a theory of unjust enrichment.[243] The court stayed the case in 2014, pending the outcome of the FCC's rulemaking.[244] After the stay lifted, plaintiffs chose to seek class certification on only two of their claims: violation of the New Jersey Consumer Fraud Act ("CFA"), and violations of the Fifth Amendment Takings Clause (actionable via § 1983). GTL opposed class certification, citing the decertification of the Arkansas class action, but the court dismissed this argument as a red herring. Contrasting the

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[236] *Id.* ¶ 84, 11 FCC Rcd. at 20776.

[237] *Id.* ¶ 55, 11 FCC Rcd. at 20762.

[238] Charles H. Helein, Jonathan S. Marashlian, & Loubna W. Haddad, *Detariffing and the Death of the Filed Tariff Doctrine: Deregulating in the "Self" Interest*, 54 Fed. Comm. L.J. 281 (2002).

[239] *E.g.*, *Daleure v. Commw. of Ky.*, 119 F.Supp.2d 683, 686 (W.D. Ky. 2000) (applying the filed-rate doctrine upon finding "State *and federal* regulatory agencies approved all of the . . . rates" challenged in the complaint (emphasis added)); *but see Antoon v. Sercurus Tech.*, No. 5:17-cv-5008, 2017 WL 2124466 (W.D. Ark. May 15, 2017) (denying motion to dismiss under filed-rate doctrine because Securus utilizes VoIP technology and the Arkansas Public Service Commission lacks jurisdiction over VoIP services or provider).

[240] *See* Complaint, *Pearson v. Hodgson*, No. 18-cv-11130-IT, at ¶¶47-49 (D. Mass. May 30, 2018), ECF No. 1-1 (when Massachusetts Dept. of Telecommunications & Cable imposed intrastate ICS rate caps, Securus withdrew its tariff and charged rates in excess of the new caps, alleging that its service is delivered via VoIP and therefore exempt from state regulation under Mass. Gen. Laws ch. 25C, § 6A).

[241] *In re Global Tel*Link Corp. ICS Litigation*, No. 14-cv-5275, 2017 WL 471571 (W.D. Ark. Feb. 3, 2017), *decertified sub nom. Mojica v. Securus Tech.*, 2018 WL 3212037 (W.D. Ark. Jun. 29, 2018).

[242] *Mojica v. Securus Tech.*, No. 14-cv-5258, 2018 WL 3212037 (W.D. Ark. Jun. 29, 2018).

[243] Complaint, *James et al. v. Global Tel*Link, et al.*, No. 13-cv-4989 (D.N.J. Aug. 20, 2013), ECF No. 1.

[244] *James v. Global*Tel Link*, No. 13-cv-4989, 2014 WL 4425818 (Sept. 8, 2014).

New Jersey CFA claims with the unjust enrichment claims in the Arkansas case, the court noted that the common law of unjust enrichment depends heavily on plaintiffs' individualized circumstances, (contravening the commonality requirement of Federal Rule of Civil Procedure 23(a)(2)), whereas a CFA claim was based on the overall reasonableness of GTL's rates, and did not require adjudication of any facts specific to plaintiffs' specific situations.[245] The New Jersey court also highlighted the differences between the Arkansas plaintiffs' theory that site commissions were *per se* unreasonable under the Communications Act, and the New Jersey plaintiffs' allegations that specific commissions in certain New Jersey facilities violate the Takings Clause.[246] The New Jersey court granted class certification on August 6, 2018, but the case has been largely dormant since that date. While the New Jersey case is arguably the most successful ICS litigation since the *Wright* lawsuit, it is entirely retrospective—in 2016, the New Jersey legislature prohibited site commissions, cracked down on ancillary fees, and capped call rates at 11¢ per minute.[247] Accordingly, the class action only concerns rates charged prior to the 2016 legislative fix.

The history of activism on behalf of families of incarcerated people in the United States is long and storied.[248] Over several decades, activists have gained enough experience in litigating ICS issues that this advocacy work is now paying dividends. While much work remains to be done in the telecommunications area, advocacy organizations should also prioritize litigation and regulatory advocacy in other legal fields, as discussed in the following sections.

B. Financial Services Law, Money Transmitters, and Prepaid Accounts

The legal aspects of correctional banking are odd in that the actual law of banking is mostly implicated at the periphery. Although inmate trust funds are typically held in some kind of depository account, the incarcerated person with equitable title to the money has no direct customer relationship with the depository institution. Indeed, the job of a correctional banking vendor is simple: receive deposits and facilitate payments on behalf of a customer population who are not allowed to use cash, checks, or payment cards. As a non-bank entity that uses technology to facilitate payments by or for the benefit of incarcerated people, correctional banking vendors are a niche type of financial technology (or "fintech") firm.[249] But even in an economic sector

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[245] *James v. Global*Tel Link*, No. 13-cv-4989, 2018 WL 3727371, *11 (D.N.J. Aug. 6, 2018) (opinion re: motion to certify class).

[246] *Id.*

[247] N.J. Stat. § 30:4-8.12.

[248] Ruth Wilson Gilmore, *You Have Dislodged A Boulder: Mothers and Prisoners in the Post Keynesian California Landscape*, 8 Transforming Anthropology 12 (1999) (examining grassroots family responses to mass incarceration).

[249] Adam J. Levitin, "Written Testimony before the U.S. House of Representatives, Comm. on the Fin. Servs., Subcomm. on Fin. Institutions & Consumer Credit" at 4 (Jan. 30, 2018), https://perma.cc/SNH7-PU6G (defining a fintech as a nonbank financial service company that uses "some sort of digital technology to provide financial services to consumers").

generally known for over-hyping its transformative nature,[250] correctional banking fintechs do not provide any type of innovative or valuable service that justifies the high prices imposed on consumers.

One of the few issues in the correctional banking sector to have received extensive judicial attention provides an important illustration of current trends, although for reasons other than those discussed by the courts. Four circuit courts of appeals have addressed the question of whether incarcerated people are entitled to interest earned on their trust account balances,[251] with only one court holding that the beneficiary has a property right to earned interest.[252] Given the small balances in most incarcerated peoples' trust accounts, and today's low interest rates, this may seem like an academic debate. But the most recent appellate opinion to address the issue contains an important factual detail.

Young v. Wall involved a challenge to Rhode Island's 2001 decision to stop paying interest on trust accounts, when the Department of Corrections "decided to outsource management of a wide swath of back-room systems."[253] According to the court, the repeal of the previous interest policy was the result of "[c]omments from prospective vendors" who sought the contract to manage Rhode Island's correctional banking system.[254] The plaintiff in *Young* did not prevail, and the opinion stands as an illustration of the prison retail economy as applied to correctional banking: accounts that had previously been held and invested by the state treasurer (with earned interest remitted to beneficiaries) were now controlled by a vendor and earned interest was retained for the benefit of the DOC.[255] This fact pattern is echoed in many correctional-banking contracts, which seem to prioritize bureaucratic convenience over the best interests of the incarcerated accountholders.

1. Categorizing Prepayments

As alluded to previously, prison retail payments can be sorted into two major types: contemporaneous ("cash") [256] payment, or prepayment. In the case of prepayment, an incarcerated person or their relative transfers funds to a vendor who then creates an "account" that can be charged for future purchases. The use of the term "account" is somewhat misleading, since such prepayments should not be analogized to deposit accounts; rather, they are unsecured

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[250] *Id.* ("[D]espite the regular use of buzzwords like 'transformative' and 'disruptive' in discussions about fintechs, there really isn't anything particularly transformative or disruptive about them.").

[251] *See* Emily Tunink, Note, *Does Interest Always Follow Principal?: A Prisoner's Property Right to the Interest Earned on His Inmate Account under* Young v. Wall, *642 F.3d 49 (1st Cir. 2011)*, 92 Neb. L.Rev. 212, 213 (2013) (discussing circuit split).

[252] *Schneider v. Cal. Dept. of Corr.*, 151 F.3d 1194 (9th Cir. 1998).

[253] *Young v. Wall*, 642 F.3d 49, 52 (1st Cir. 2011).

[254] *Id.*

[255] Joint Stmt. of Facts, *Young v. Wall*, No. 03-220S (D.R.I. Sept. 9, 2005), ECF No. 71.

[256] For purposes of this discussion "cash" is used as an admittedly imprecise shorthand for contemporaneous payment for goods or services. In the prison retail setting, such a payment is typically made by electronic fund transfer from a trust account (if the purchaser is incarcerated) or by payment card or through a money transmitter (if the purchaser is not incarcerated).

contractual obligations of the vendor.[257] Making matters even more confusing for consumers, many correctional banking vendors collect trust account deposits *and* retail-transaction prepayments, which can cause some consumers to confuse the two types of transactions.[258]

Retail prepayments fit into the expansive new category of payment mechanisms sometimes referred to as "merchant-authorized consumer cash substitutes" (or "MACCS").[259] As discussed below, MACCS in the prison-retail setting are riddled with oppressive terms and conditions. Why then, are they so common? Sometimes there is no alternative, but even when there is a cash option, dual forces encourage the use of MACCS by some customers. First, facility instructions or vendor marketing materials may encourage customers to use prepayment options without fully explaining available alternatives. Second, incarcerated people may seek to avoid routing funds through trust accounts in order to avoid levies for fees, fines, restitution, or civil judgments.[260]

Prison-retail prepayments raise the same concerns that are implicated by the wider spectrum of MACCS, specifically merchant insolvency and loss of prepaid funds through forfeiture provisions.[261] Merchant insolvency is a major concern because prison retailers tend to be closely-held firms whose financial health is difficult to gauge. In the event of an insolvency event, customers with prepaid accounts would hold (likely-worthless) unsecured claims. Although banks and licensed money transmitters are subject to regulation that is expressly designed to prevent and/or mitigate a covered-entity's insolvency,[262] there is no comparable regime that covers prison retailers, except to the extent that a company owns a subsidiary that is a licensed money transmitter.

Pernicious forfeiture provisions can result in substantial unfairness to customers, by eating away at prepaid balances through "service" or inactivity fees.[263] Some vendors will refund prepaid amounts upon a customer's release from custody, while others do not. Some vendors have even advertised prepaid products as a way for correctional agencies to avoid unclaimed property laws.[264] These provisions are entirely a creature of private contract and could easily be prevented through the terms of the vendor-facility contract. Thus far, few facilities have shown any interest in protecting consumers by prohibiting such confiscatory practices.

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[257] *See* Eniola Akindemowo, *Contract, Deposit or E-Value? Reconsidering Stored Value Products For a Modernized Payments Framework*, 7 DePaul Bus. & Comm. L.J. 275, 278 (2009) ("[Stored value products] are technology-enabled contractual constructs rather than deposits, and . . . the use of deposit analogies to analyze them is generally inappropriate.").

[258] *See supra* Figure 3.

[259] Norman I Silber & Steven Stites, "Merchant Authorized Consumer Cash Substitutes," Hofstra Payments Processing Roundtable (Mar. 14, 2018), http://ssrn.com/abstract=3161453.

[260] *See supra* note 24.

[261] Silber & Stites, *supra* note 259, at 3 ("One problem universal to MACCS is the merchant insolvency; another is the absence of standard terms in MACCS agreements.").

[262] Akindemowo, *supra* note 257, at 345 (banking regulations); Kevin V. Tu, *Regulating the New Cashless World*, 65 Ala. L. Rev. 77, 92-94 (2013) (money transmitter regulations).

[263] *See supra* note 127-127 and accompanying text.

[264] *See* Prison Policy Initiative, *supra* note 64, at 5, n.22.

2. If You're Dealing with Cash, What Financial Services Laws Apply?

Laws that can potentially apply to cash payments include general trust law, the Electronic Fund Transfer Act ("EFTA"),[265] state money-transmitter statutes, and the Gramm-Leach-Bliley Act ("GLBA").[266] To the extent a transaction involves an inmate trust account, the first step for consumer advocates should be to analyze whether the account is a bona fide trust, and if so, whether the trustee (most likely the correctional system or another government agency) has breached its fiduciary duty by, for example, allowing a vendor to diminish trust property by charging unreasonable fees. The trust determination will depend on the law or administrative policy that creates the inmate trust system. Although the name "inmate *trust* account" by itself is not dispositive, such accounts are often governed by generally applicable trust law.[267] If the general law of trusts applies, beneficiaries may be able to challenge transaction fees to the extent the fees are not commercially reasonable.[268] The determination of commercial reasonableness will be fact-specific and will likely involve a close examination of the purpose of the inmate trust fund, as defined by the enabling statute or other applicable authority.[269] In addition, if a correctional agency acts as trustee of an inmate trust and receives commissions from a third-party administrator, then the agency may be vulnerable to a charge of breaching its duty of loyalty.[270]

The EFTA, as implemented by Regulation E,[271] is likely apply to many transfers of money by family members, but its actual substantive protections are minimal. If a family member pays using a debit card, that transaction will generally be governed by EFTA.[272] On the recipient side, if an inmate trust account is a bona fide trust, then the account (and each individual's beneficial

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[265] 15 U.S.C. § 1693, *et seq.*

[266] Gramm-Leach-Bliley Financial Modernization Act, Pub. L. 106-102, 113 Stat. 1338 (1999) (codified as scattered sections of titles 12, 15, 16, and 18, U.S. Code).

[267] *E.g.*, *Matson v. Kansas. Dept. of Corr.*, 301 Kan. 654 (2015) ("[W]e have no difficulty finding the plain language of the applicable statutes establishes the inmate trust fund is, in fact, a trust subject to the [Kansas Uniform Trust Code].").

[268] *E.g.*, *Upp v. Mellon Bank, N.A.*, 799 F.Supp. 540, 544-545 (E.D. Pa. 1992) (finding a breach of fiduciary duty by trustee who incurred bank fees not justified by cost or results), *vacated for lack of diversity jurisdiction sub nom. Packard v. Provident Nat'l Bank*, 994 F.2d 1039 (3d Cir. 1993).

[269] *See e.g.*, *E. Armata, Inc. v. Korea Commercial Bank of NY*, 367 F.3d 123, 133-134 (2d Cir. 2004) (holding that trustee of statutory trust created by the Perishable Agricultural Commodities Act did not breach fiduciary duties by holding trust funds in a bank account subject to fees because "maintaining a checking account with 'commercially reasonable' terms may facilitate, rather than impede, the fulfillment of a PACA trustee's duty to maintain trust assets so that they are freely available to satisfy outstanding obligations to sellers of perishable commodities" (internal quotation marks and citation omitted)).

[270] Restatement (Third) of Trusts § 78(2) (2007) ("[T]he trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.").

[271] 12 C.F.R. pt. 1005.

[272] 12 C.F.R. § 1005.3(b)(1)(v).

interest therein) is exempt from the EFTA's definition of an "account."[273] In any event, even to the extent that EFTA applies to a particular account transfer, the law is largely concerned with preventing unauthorized transactions, which does not appear to be a widespread problem in prison retailing. Rather, the primary problem is exorbitant fees, but EFTA contains little direct regulation of fees,[274] instead favoring disclosure of costs in the hopes that consumers will make informed choices. In the context of correctional banking, this structure is an ill fit, since consumers have little meaningful choice.

If a contractor facilitates transfers into or out of an inmate trust account, the contractor is most likely governed by state-level money transmitter laws.[275] These laws vary greatly by state,[276] and while there is a Uniform Money Services Act, it has only been adopted by seven states and the Virgin Islands.[277] The Uniform Act covers businesses that "receiv[e] money or monetary value for transmission,"[278] but does not apply to a merchant that collects prepayment for future transactions.[279] While the Uniform Act exempts state and local governments from its coverage, there is no exemption for an agent of a government[280]—a feature that should be retained if calls for a federal money transmitter license are developed.[281]

A final body of law worth mentioning is GLBA. Although this statute is often criticized for its weaknesses, even its slim protections represent an improvement for correctional banking customers. The provisions most relevant to correctional banking are the privacy provisions found in title V of the GLBA. These rules are applicable to entities that engage in "financial activities," including transferring and safeguarding money.[282] As a covered entity that is not overseen by a bank regulator, correctional banking vendors are covered by

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[273] 12 C.F.R. § 1005.2(b)(3) (Regulation E's definition of "account" excludes "an account held by a financial institution under a bona fide trust agreement"); *see also* 12 C.F.R., pt. 1005, appx. B ¶ 2(b)(2), cmt. 1 ("The term 'bona fide trust agreement' is not defined by the Act or regulation; therefore, financial institutions must look to state or other applicable law for interpretation.").

[274] One of the few provisions of the EFTA that directly restricts fees is contained in the gift card provisions in the CARD Act of 2009, which include restrictions on dormancy and service fees. These rules do not apply to prison-retail MACCS, because the statute excludes stored value that is "reloadable and not marketed or labeled as a gift card or gift certificate." 15 U.S.C. § 1693*l*-1(a)(2)(D).

[275] *But see* Prison Policy Initiative, *supra* note 64, at 11, n.54 and accompanying text (discussing JPay's unverified allegation that "few" correctional money services business comply with applicable state regulations).

[276] Tu, *supra* note 262, at 86, n. 44.

[277] Unif. Money Servs. Act, ed. notes, 7A U.L.A. ___ (20__).

[278] *Id.* § 102(14).

[279] *Id.* § 102, cmt. 12 ("[O]nly stored value that consists of a medium of exchange evidence in electronic record would qualify as stored value for purposes of regulation. A medium of exchange needs to be something that is widely accepted. Closed-end systems, as mere bilateral units of account, therefore would be excluded from regulation.").

[280] *Id.* § 103(3); *see also id.* § 201(a)(2) (licenses are not required for an agent of a licensee, but the Act contains no comparable provision for an agent of an exempt entity).

[281] *E.g.*, Levitin, *supra* note 249 at 16 ("A federal money transmitter license, coupled with some sort of federal insurance for funds held by money transmitters . . . would be a simple move that would help reduce unnecessary regulatory burdens.").

[282] 15 U.S.C. § 6809(3); 12 U.S.C. § 1843(k)(4)(A).

the GLBA implementing regulations issued by the FTC.[283] The GLBA privacy provisions that can potentially benefit incarcerated consumers include notification of privacy practices, the ability to opt out of certain information sharing, and data-breach notification requirements.[284] Covered entities must also develop a data security plan, which must include certain elements designated by the FTC.[285] Publicly available evidence suggests that correctional banking vendors give little thought to complying with GLBA.[286] Although noncompliance cannot be addressed through private litigation (GLBA does not include a private cause of action), a consumer who can show injury resulting from a covered entity's failure to comply with the GLBA standards, may be able to bring a UDAP claim on that basis.[287]

3. Legal Issues Related to Release Cards

The area of correctional banking that is most clearly covered by the EFTA is the use of prepaid debit cards ("release cards") to pay amounts due to incarcerated people upon their release from custody.[288] As open-loop stored value cards that can be used on the MasterCard payment network, release cards are considered access devices for purposes of the EFTA.[289] Although the U.S. District Court in Oregon ruled in 2016 that release cards were not covered by the EFTA,[290] that holding has clearly been abrogated by subsequent amendments to Regulation E. Effective April 1, 2018, Regulation E's definition of "account" includes prepaid accounts,[291] and the CFPB's commentary explaining the amended rule specifically cites release cards as a type of prepaid product that is covered by the new definition.[292] While the CFPB's decision to expressly include release cards within the scope of Regulation E is an improvement, it is not a panacea because of Regulation E's lack of direct price regulation.

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[283] 16 C.F.R. § 313.1(b).

[284] *Id.* §§ 313.5 (annual privacy notices), 313.7 (opt-out procedure), and

[285] *Id.* § 314.4.

[286] The one exception is JPay, which briefly mentions GLBA's data protection provisions in its privacy policy. Despite this terse reference to the law, JPay does not appear to address GLBA compliance in its bid proposals, nor is there any mention of the consumer disclosure and opt-out procedures.

[287] Nat'l Consumer Law Ctr., *Fair Credit Reporting* § 18.4.1.14 (9th ed. 2017).

[288] *See supra* note 64 and accompanying text.

[289] 12 C.F.R. § 1005.2(a)(1).

[290] *See Brown v. Stored Value Cards, Inc.*, No. 15-cv-01370-MO, 2016 WL 4491836, at *1-2 (order dismissing EFTA claim) (D. Or. Aug. 25, 2018), *appeal docketed* No. 18-35735 (9th Cir. Aug. 31, 2018). The court concluded that release cards were not covered by EFTA, by citing Regulation E's *gift card* provision that exempts stored value cards that are not "marketed to the general public." *See* 12 C.F.R. § 1005.20(b)(4). In reaching this holding, the court specifically cited the CFPB's staff commentary concerning the scope of the gift card exemption. *Brown*, 2016 WL 4491836 at *2 (citing 12 C.F.R. § 1005.2, Supp. I [*sic* – should be 12 C.F.R. § 1005.20, Supp. I, ¶ 20(b)(4)]).

[291] 12 C.F.R. § 1005.2(b)(3) (2018).

[292] Bureau of Consumer Financial Protection, *Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)*," [hereinafter "Regulation E Amendments"] 81 Fed. Reg. 83934, 83968 (Nov. 22, 2016).

Regulation E prohibits payers from requiring a consumer to use a certain financial institution (including a specific prepaid card) for receipt of wages or government benefits.[293] During the CFPB's last EFTA rulemaking, several advocacy groups requested that the Bureau extend the compulsory-use prohibition to release cards.[294] Although the Bureau declined to adopt the requested changes, it did note that "to the extent that . . . prison release cards are used to disburse consumers' salaries or government benefits . . . such accounts are already covered by § 1005.10(e)(2) and will continue to be so under this final rule."[295] This "clarification" actually creates some uncertainty, because it does not specify whether a payroll disbursement must be contemporaneous with the employee's earning of the underlying compensation. When someone is released from prison, they might receive disbursement of accumulated wages earned during the term of their incarceration. To the extent that the compulsory-use prohibition applies to delayed disbursements of wages, then Regulation E would prohibit mandatory use of release cards to make such payments.

Consumer litigation concerning release cards holds great promise. Encouragingly, most courts have held that arbitration provisions in release-card contracts are unenforceable, given the inability of consumers to realistically withhold their consent.[296] The outlier case, where an arbitration agreement was held enforceable, is a case from Florida where the district court found the plaintiff had been given a clear choice of receiving his funds via debit card or check.[297] While class certification for an EFTA claim is currently pending in the Western District of Washington,[298] most class actions that have survived a motion to dismiss or led to an advantageous settlement have relied on other legal theories, such as Fifth Amendment takings, unjust enrichment, conversion, or violations of UDAP statutes.[299]

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[293] 12 C.F.R. § 1005.10(e)(2).

[294] *See* Prison Policy Initiative, *supra* note 64, at 8-9.

[295] Regulation E Amendments, *supra* note 292, 81 Fed. Reg. at 83985.

[296] *Reichert v. Keefe Commissary Network*, No. 17-cv-4848-RBL, 2018 WL 2018452, at *2 (order denying motions to compel arbitration) (W.D. Wash. May 1, 2018) ("All contracts, including those to arbitrate disuptes, must have mutual assent, and Defendants' 'contract' to arbitrate is unenforceable and unconscionable under Washington law."); *Brown v. Stored Value Cards, Inc.*, No. 15-cv-01370-MO, 2016 WL 755625, at *4 (order denying motion to compel arbitration) (D. Or. Feb. 25, 2016) ("[Plaintiff] *had* to take the card and *had* to work through the Defendants' system in order to get her money back. . . . It is not clear that Plaintiff was presented with a meaningful choice, as such I DENY the Motion to Compel."); *see also Regan v. Stored Value Cards, Inc.*, 85 F.Supp.3d 1357 (N.D. Ga. 2015), *aff'd* 608 Fed. Appx. 895 (11th Cir. 2015) (defendants argued that plaintiff had impliedly accepted or ratified the cardholder agreement through his use of the release card; court denied motion to compel arbitration and ordered an evidentiary hearing on whether a contract had been formed; case settled before evidentiary hearing).

[297] *Pope v. EZ Card & Kiosk, LLC*, No. 15-cv-61046, 2015 WL 5308852 (S.D. Fla. Sept. 11, 2015).

[298] Complaint, *Reichert*, No. 17-cv-4848-RBL, at ¶¶ 110-121 (W.D. Wash. Oct. 20, 2017), ECF No. 1.

[299] *See Reichert*, 2018 WL 2018452, at *3 (denying motion to dismiss plaintiff's conversion and unjust enrichment claims, as well as claims under the Takings Clause of the Fifth Amendment (actionable through § 1983) and the Washington Consumer Protection Act); *Brown v. Stored Value Cards, Inc.*, No. 15-cv-01370-MO, 2016 WL 4491836, at *4-5 (Aug. 25, 2016) (denying

C. UDAP Statutes

Statutes in every state prohibit the use of unfair or deceptive acts or practices ("UDAP") in consumer transactions. In the past, UDAP laws have been of limited relevance in prison because incarcerated people engaged in relatively few commercial transactions.[300] With the rise of prison retailing, these laws are becoming increasingly salient, although contractual prohibitions on class adjudication remain a substantial barrier. UDAP statutes allow enforcement by state attorneys general, but also provide a private cause of action.[301] The private enforcement option is critically important because state attorneys general are unlikely to aggressively promote the rights of incarcerated people, since doing so would typically be met with consternation by agencies that are either clients of the attorney general (in the case of state prison systems) or at the very least are ideologically aligned with the state's chief law enforcement officer (in the case of county jails).

Consumers who seek relief under UDAP statutes must be mindful of what specific prong (unfairness or deception) they rely on. As defined by the FTC (and many states that follow the agency's lead), a deceptive practice requires a false or misleading material claim or omission that is likely to mislead a consumer.[302] Businesses that routinely make misleading claims often do so in an effort to lure unsuspecting consumers. Because prison retailers have a captive customer base, they do not have to worry about attracting customers and vendor acts of deception are likely to arise on a case-by-case basis. Indeed, prison-retail terms and conditions often spell out customers' unfair treatment in great detail.

Consumers are more likely to find a viable cause of action under the unfairness prong of a UDAP statute or, in states that recognizes such claims, a claim of unconscionability. Under the FTC Act, a practice is unfair if it is "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[303] The inability of incarcerated consumers to avoid harmful transactions is obvious: prison retailers sell essential goods (food, clothing) or services (communication with family) through state-created monopolies. Doing business with an ICS carrier or

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motion to dismiss plaintiff's claims for conversion and unjust enrichment); First Amended Complaint, *Adams v. Cradduck*, No. 13-cv-05074-PKH (W.D. Ark. May 9, 2013), ECF No. ___ (pleading Fourth and Fourteenth Amendment violations (actionable through § 1983), conversion, and trespass to chattels; a class settlement was subsequently approved (*see* ECF No. ____)).

[300] *E.g.*, *Ellibee v. Aramark Corr. Servs.*, 37 Kan. App. 2d 430, 433 (2007) (dismissing UDAP claim against prison foodservice provider because plaintiff was not a party to the contract); *but see Sisney v. Best, Inc.*, 754 N.W.2d 804, 812 (S.D. 2008) (plaintiff adequately pleaded deceit claim against prison foodservice vendor by alleging that vendor had represented bread to be kosher, even though vendor had admitted under oath that it had not received kosher certification).

[301] *See generally* Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Law*, 81 Antitrust L.J. 911 (2017).

[302] Cliffdale Assocs., Inc., 103 F.T.C. 110, 1984 WL 565319, *37 (1984) ("[T]he Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.").

[303] 15 U.S.C. § 45(n).

commissary vendor is unavoidable. As one court found, families incur exorbitant prices and unfair terms "out of sheer desperation for contact with their loved ones."[304]

Different types of substantial consumer injury are discussed in the following subsections; for now, it is worth noting that the small dollar-amount of most prison retail transactions is not a bar to relief—"substantial" injury for purposes of the FTC Act includes small harms inflicted by a seller on a large number of people.[305] In addition, a seller's intent is irrelevant—a substantial injury is actionable even without malice or culpability on the part of the seller.[306]

1. Prices

Plaintiffs who challenge prices should take care to highlight the aspects of prison retailing that resemble unfair pricing practices that have previously formed the basis for valid UDAP claims—practices such as use of monopoly power to extract excessive fees,[307] or paying kickbacks to the issuer of a government contract.[308] Some jurisdictions may require some type of independent wrongdoing in addition to unreasonably high prices.[309] In a class action, a finding of unconscionable prices need not be made customer-by-customer, but rather can be based on judicial comparison of end-user prices to the seller's average costs.[310]

Consumers have used UDAP statutes to challenge inflated monopoly prices charged by ICS carriers. For example, plaintiffs in Arkansas challenged Securus's intrastate rates under that state's Deceptive Trade Practices Act ("ADTPA").[311] Among other defenses, Securus argued that high prices were not actionable under the ADTPA, but the district court disagreed, citing the

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[304] *James v. Global*Tel Link*, No. 13-cv-4989, 2018 WL 3727371, *2 (D.N.J. Aug. 6, 2018) (opinion re: motion to certify class).

[305] *Am. Fin. Servs. Ass'n v. Fed. Trade Comm'n*, 767 F.2d 957, 972 (D.C. Cir. 1985) ("An injury may be sufficiently substantial, however, if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm." (*quoting* Letter from FTC to Senators Ford & Danforth (Dec. 17, 1980), *reprinted in* H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983))).

[306] *Id.* 982.

[307] *E.g. Ford v. ChartOne, Inc.*, 908 A.2d 72 (D.C. App. 2006) (consumer pleaded a valid claim for unconscionably high prices under the D.C. Consumer Protection Procedures Act, where plaintiff's only way to obtain copies of his own medical records was to pay $6.36 per page to contractor selected by the medical provider).

[308] *Stalker v. MBS Direct*, No. 10-11355, 2011 WL 797981, at *6 (E.D. Mich. Mar. 1, 2011) (plaintiffs properly stated a claim under the Michigan Consumer Protection Act by alleging that 4-11% commissions that book vendor paid to school districts unreasonably inflated cost of textbooks sold to students); *class cert. denied* 2012 WL 6642518 (E.D. Mich. Dec. 20, 2012).

[309] *E.g.*, *Galvan v. Northwest Memorial Hosp.*, 382 Ill. App.3d 259, 265 (2008) ("Charging an unconscionably high price, by itself, is generally insufficient to establish a claim [under the Illinois Consumer Fraud and Deceptive Business Practice Act] for unfairness. Instead, 'the defendant's conduct must [also] violate public policy, be so oppressive as to leave the consumer with little alternative except to submit to it, and injure the consumer.'" (citation omitted)); *Hatke v. Heartland Homecare Servs*, No. 90,117, 2003 WL 22283161 (Kan. App. Oct. 3, 2003) (per curiam) (high price not actionable under Kansas Consumer Protection Act absent deceptive bargaining conduct or unequal bargaining power).

[310] *ChartOne*, 908 A.2d at 90-92.

[311] *Antoon v. Securus Tech.*, No. 5:15-cv-5008, 2017 WL 2124466 (W.D. Ark. May 15, 2017).

ADTPA's residual clause that covers "any other unconscionable, false, or deceptive act or practice in business, commerce, or trade."[312] Specifically, the court found that plaintiffs had adequately pleaded an unconscionable act by alleging that Securus was "improperly exploiting economic leverage resulting from exclusive-provider contracts."[313]

In a still-pending New Jersey class action, the district court rejected GTL's attack against the plaintiffs' allegations of unconscionable rates in violation of the New Jersey Consumer Fraud Act ("CFA") claims.[314] GTL sought dismissal of the CFA claims by arguing that plaintiffs had failed to allege any act of deception. In denying GTL's motion, the court held that deception was not a necessary element and plaintiffs had stated a claim of unconscionability based on the anti-competitive way in which rates were imposed upon a vulnerable population.[315]

Most recently, the district court for Massachusetts denied Securus's attempt to dismiss a class action claim under Massachusetts consumer protection law. The plaintiffs' theory relies on a 2010 state-court opinion that held sheriffs may only impose and collect fees that are specifically authorized by statute.[316] The class action plaintiffs in the current case seek a declaratory judgment that the Bristol County Sheriff has violated that ruling by collecting fees (site commissions) that are not authorized by statute. By assisting the sheriff in this unlawful activity, the plaintiffs argue that Securus has violated Massachusetts' UDAP statute.[317] The court denied Securus's motion to dismiss, finding that the plaintiffs were families of limited means who had no reasonable alternative but to pay prices that Securus had inflated in order to pay commissions to the sheriff.[318]

2. Terms and Conditions

The general terms imposed by prison retailers can be so oppressive as to form the basis for a UDAP claim, especially to the extent that vendors enforce the terms aggressively. Terms and conditions that are so exculpatory it is not clear what, if anything, the vendor is promising to provide may be actionable as unfair or unconscionable.[319] So too, adhesive contracts that

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[312] *Id.* at *6 (citing Ark. Stat. § 4-88-107(a)(10)).

[313] *Id.*

[314] *James v. Global*Tel Link*, No. 13-cv-4989, 2018 WL 3736478 (D.N.J. Aug. 6, 2018 (opinion re: cross-motions for summary judgment).

[315] *Id.* at *7 (Unconscionability claim is "not solely about excessive rates, but also about the manner in which those rates were established—through site commissions and ancillary fees. From the end user's perspective, there was no marketplace. GTL enjoyed a monopoly over individuals *held captive* by a government agency." (citation and internal quotation mark omitted; emphasis in original)).

[316] *Souza v. Sheriff of Bristol County*, 455 Mass. 573 (2010)

[317] Complaint, *Pearson v. Hodgson*, No. 18-cv-11130-IT (D. Mass. May 30, 2018) (originally filed May 2, 2018 in Suffolk Superior Court, and attached as Exhibit A to co-defendant Securus Technologies' notice of removal).

[318] *Pearson v. Hodgson*, No. 18-cv-11130-IT, 2018 WL 6697682, *8-9 (D. Mass. Dec. 20, 2018).

[319] *See supra* note 127-129 and accompanying text; *Goodwin v. Hole No. 4, LLC*, No. No. 2:06-cv-679, 2006 WL 3327990, *8 (D. Utah Nov. 15, 2006) (contract that gave seller the "unilateral ability to defeat the contract (and the [customers]' justified expectations) rings of substantive unconscionability").

contain patently unenforceable terms may run afoul of UDAP statutes.

Other problematic terms and conditions include purported waivers of duties imposed by law. For example, JPay's terms of service for money transfers state that JPay "will not be liable for a Payment sent to the incorrect inmate account."[320] This blanket exculpatory term ignores the numerous situations in which JPay could be liable for an erroneous transfer due to its own negligence.[321] JPay also claims (perhaps as part of its efforts to redirect customers to high-fee electronic payment channels) that it is "not responsible" for money orders that it receives at its designated mailing address, but which do not reach the intended recipient of funds.[322] This provision is on only unfair, but is likely unenforceable as an attempt to evade the common-law duties of a bailee.[323]

Vendors' privacy policies also contain worrisome provisions, especially when it comes to law-enforcement use of customer data. Securus's Threads product collects data from numerous sources for distribution to anyone "connected to" a public law enforcement agency or private investigative firm.[324] Securus apparently has some awareness that such data sharing implicates privacy laws, because participating law enforcement customers must sign a form contract promising to "comply with all [applicable] privacy, consumer protection, marketing, and data security laws and government guidelines."[325] The same contract requires agencies to agree to implement eight specific practices, including restricting access to properly authorized employees, using personal information only for lawful purposes, and limiting the further dissemination of personal information.[326] Yet Securus's customer-facing terms of service require customers to "agree that [communications data] *will be* . . . assigned, sold, transferred and distributed by [law enforcement]" and customers must further "agree that Securus assumes no responsibility for the activities, omissions or other conduct of any member of Law

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[320] JPay, Inc., "Payment Terms of Service" ¶ 2, https://www.jpay.com/LegalAgreementsOut.aspx (accessed Jan. 7, 2019).

[321] Most obviously, a customer paying by credit card could have valid grounds to initiate a chargeback if JPay negligently misdirected deposited funds. *See* MasterCard, *Chargeback Guide* 47, 222 (May 1, 2018) (description of chargeback message reason codes 4853, 53, and 79).

[322] JPay, *supra* note 320 at ¶ 7.

[323] JPay's terms and conditions state that this disclaimer is designed for situations where "there is a problem with the deposit." *Id*. Although a money transfer is not a bailment, in the case of an *attempted* payment by negotiable instrument that cannot be consummated, the recipient most likely holds the instrument as a constructive bailee. *See Bayview Loan Servicing v. CWCapital Asset Management (In re Silver Sands R.V. Resort)*, 636 Fed. Appx. 950, 952 (9th Cir. 2016) (recipient of overpayment held excess funds as constructive bailee); *see also* 8A Am. Jur. 2d *Bailments* § 12 (2009) ("A 'constructive bailment' or 'involuntary bailment' arises where . . . a person has lawfully acquired the possession of personal property of another and holds it under circumstances whereby he or she should, on principles of justice, keep it safely and restore it or deliver it to the owner."). Although parties to a bailment may alter their respective rights and obligations by contract, attempts to eliminate a bailee's liability for loss arising from its own misconduct are typically held void as against public policy. 8A Am. Jur. 2d *Bailments* § 86 (2009).

[324] *See supra*, notes 152-155.

[325] Master Services Agreement, *supra* note 119, at 5, ¶ 1.

[326] *Id*. ¶ 2.

Enforcement."[327] In other words, Securus uses form contracts to require law-enforcement to observe to certain laws, while simultaneously requiring the effected consumers to waive the protections of those same laws. Because the agency-facing contract evidences Securus's knowledge of applicable privacy laws, the company's consumer-facing terms seem particularly vulnerable to a challenge as unfair or unconscionable.

Finally, although it would be novel, a UDAP claim could be brought in cases where vendors have made materially different representations and warranties to facilities versus consumers. As an example, in a typical contract for video visitation, Securus agrees to provide functioning video service, with specified features, and subject to detailed technical specifications.[328] Yet, the customer-facing terms and conditions for the same service provide that Securus does not warrant that the system will work "properly, completely, or at all."[329] Such a stark disparity could form the basis for a claim of unfairness in that the disparity between the vendor-facility contract and the vendor-customer contract reflects the extent to which vendors use their disproportionate power to craft one-sided consumer-facing contracts.

3. Sales of Goods

Sales of goods such as food, toiletries, clothing, and electronic hardware (including tablets) implicate both UDAP statutes and consumers' rights under article 2 of the Uniform Commercial Code ("UCC"). The rights of buyers regarding defective goods is likely to become more relevant to the extent that computer tablets of questionable quality become more common.[330] Because prison retailers tend to offer the most parsimonious express warranties imaginable, consumers will often have to rely on the implied warranty of merchantability available under UCC article 2.[331] The implied warranty of fitness for a particular purpose[332] may also arise in situations where a seller encourages consumer misconceptions, such as leading customers to believe that a tablet performs a specific function, (e.g., accessing educational content), when in fact it does not.

Prison retailers routinely impose terms and conditions that misleadingly purport to "disclaim" *all* implied warranties.[333] The enforceability of such a provision is questionable. About one-third of the states restrict the ability of

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[327] Securus T&C, *supra* note 112, Privacy Policy §§ II(J) & (K).

[328] *E.g.*, Master Services Agreement, *supra* note 119, Exh. A §§ 29 and 33.

[329] *See supra* note 127 and accompanying text.

[330] Although not a consumer-law issue, one tablet user in South Dakota has raised ongoing malfunctioning of computer tablets as a Sixth Amendment issue, since that state removed prison law libraries and replaced it with a tablet-based Lexis Nexis app. *See* Motion for Appointment of Counsel, *Gard v. Fluke*, No. 18-cv-5040-JLV (D.S.D. Jun. 19, 2018), ECF No. 3 ("The tablet program is defective and prone to lockouts and other network and system failures. For a year, promised repairs and updated have not provided petitioner with meaningful access to any legal materials.").

[331] U.C.C. § 2-314.

[332] U.C.C. § 2-315.

[333] *E.g.*, Union Supply Group, "Terms of Use," https://californiainmatepackage.com/Catalog/MenuCatalogPages/ManageStaticPage.aspx?pageid=TermsOfUse (accessed Dec. 28, 2018) (disclaiming "any and all warranties, express or implied, for any merchandise offered"

sellers to disclaim implied warranties, and some of these restrictions may apply to prison-retail transactions.[334] In addition, if a merchant does use a broad disclaimer, they are required to advise consumers that they may have greater rights under state law—a requirement that is routinely ignored by prison retailers.[335] Even if a disclaimer of implied warranty is allowed under state law, it may be unenforceable under the Magnuson-Moss Warranty Act,[336] which prohibits a supplier from disclaiming an implied warranty if it "makes any written warranty to the consumer with respect to such consumer product."[337] Given the FTC's broad definition of a "written warranty," many goods sold in a commissary will fall under this provision.[338]

Although merchants are generally able to limit the duration of warranties, prison retailers frequently use warranty periods that are so short or otherwise oppressive that they may be actionable either under either the Magnuson-Moss Act[339] or the UCC's "manifestly unreasonable" standard.[340] For example, Union Supply Company sells computer tablets that are covered by a three-month warranty.[341] The procedure for invoking one's warranty rights under the Union Supply policy is also troublesome. If a defective item is returned for a warranty claim, it must be accompanied by an *original* receipt and all of the original accessories and packaging.[342] This could be a consumer trap even in a regular free-world transaction, but is particularly onerous for someone in prison, where customers may not even be allowed to keep the packaging. The Union Supply tablets are specifically marketed for people incarcerated in the California prison system, which limits personal property to items on a preapproved list (a list that does not include used packaging) and caps the volume of allowable possessions at six cubic feet per person.[343] After

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[334] Nat'l Consumer Law Ctr., *Consumer Warranty Law* § 5.4.1 (5th ed. 2015).

[335] 16 C.F.R. § 701.3(a)(7), (8), and (9).

[336] Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. 93-637, 88 Stat. 2183, title 1 (codified as 15 U.S.C. § 2301, *et seq.*).

[337] 15 U.S.C. § 2308(a). A "supplier" is broadly defined in the Magnuson-Moss Act to mean "any person engaged in the business of making a consumer product directly or indirectly available to consumers." 15 U.S.C. § 2301(4).

[338] 16 C.F.R. § 701.1(c)(1) (written warranty includes "[a]ny written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time.")

[339] 15 U.S.C. §§ 2308(b) (seller may limit an implied warranty only if the duration is reasonable and the limitation itself is conscionable) and 2310(d) (private cause of action).

[340] U.C.C. § 1-302(b); Nat'l Consumer Law Ctr., *supra* note 334 at § 7.7.4.6 (parties may vary terms such as a warranty duration, by contract, but such variations may not be manifestly unreasonable).

[341] *See supra* note 136 and accompanying text. The warranty period is technically 180 days, but after 60 days, a repair fee is imposed that may prevent many customers from effectively making warranty claims. Notably, although the company's website terms include a description of the warranty coverage, it also states that complete warranty terms are available only in the tablet package, a practice that likely violates of the Magnuson-Moss Act. 15 U.S.C. § 2302(b)(1)(A) (requiring warranty terms to be "made available to the consumer (or prospective consumer) prior to the sale of the product to him.").

[342] Union Supply Group, *supra* note 136.

[343] Cal. Code Regs. tit. 15, § 3190(e); Calif. Dept. of Corr. and Rehabilitation, "Inmate Property Matrix" (rev. Apr. 1, 2014),

imposing intricate and burdensome rules for warranty claims, Union Supply claims to reserve to itself the sole discretion to determine whether a returned item is eligible for warranty service. If it determines a return is ineligible, the company has the sole discretion to decide whether or not to return the item to its owner.[344]

The use of oppressive warranty terms is not unique to Union Supply. The warranty for GTL's tablets lasts twelve months, but repairs can take up to one month to complete (or "21 working days"), and GTL has the sole discretion to determine whether "conditions of the warranty are met."[345] If GTL determines the product is not eligible, the customer has no appeal rights, does not receive the original device back, and his only recourse is "to purchase a new tablet."[346]

Tactics that render warranty coverage illusory can be actionable as either a deceptive or an unfair practice.[347] In addition, the Magnuson-Moss Act allows the FTC or the Attorney General to sue when "the terms and conditions of [a written warranty] so limit its scope and application as to deceive a reasonable individual;"[348] there is not, however, a private cause of action under this provision.

D. Antitrust

Because prison retailers are able to use their market power to inflict harm on consumers, many industry trade practices are potentially subject to a private action under section 4 of the Clayton Act.[349] Specific aspects of prison-retailing that are relevant to such claims include vendor exercise of monopoly power, the oligopoly in the correctional telecommunications market, and collusion between vendors and facilities in setting prices. Due to the specialized nature of antitrust litigation, this paper does not explore such actions in greater depth; however, recent developments in public enforcement do warrant a brief mention.

ICS carrier Inmate Calling Solutions, LLC (doing business as ICSolutions) is a wholly owned subsidiary of commissary company Access Corrections. ICSolutions claims to provide communications service at over 400 facilities, with a captive customer base of approximately 268,000

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https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%202018/APPS-Rev-4-1-14.pdf.

[344] Union Supply Group, *supra* note 136.

[345] Pennsylvania-GTL Contract, *supra* note 43, appx. G at Requirement #103. Even though the tablets are warranted for twelve months, the batteries (which are presumably a critical component) are only warranted to last three months. *Id.* at p. 415 (GTL Genesis 116-PA spec sheet).

[346] *Id.* appx. G at Requirement #103.

[347] *See Roelle v. Orkin Exterminating Co.*, No. 00AP-14, 2000 WL 1664865, *6-7 (Ohio Ct. App. Nov. 7, 2000) (guarantee that promises effective services but is negated by other components of the same contract is a deceptive practice under the Ohio Consumer Sales Practices Act).

[348] 15 U.S.C. § 2310(c).

[349] 15 U.S.C. § 15.

incarcerated people.[350] Based on publicly available data, it appears that ICSolutions is the third largest ICS carrier in the market.[351] In June 2018, Securus filed an application under § 214 of the Communications Act, seeking FCC permission to acquire ICSolutions.[352] The acquisition has been challenged by the Wright petitioners and others, and recent filings indicate concern about market consolidation on the part of the FCC and the Department of Justice. On September 26, 2018, the FCC announced that it was waiving its informal, self-imposed 180-day merger review timeline because Securus had not satisfied the Commission's requests for information, documents, and data.[353] In an October 16, 2018 filing,[354] Securus's counsel revealed that the proposed acquisition is also subject to a "second request" from the Department of Justice's Antitrust Division, pursuant to the Hart-Scott-Rodino Act.[355]

While the internal deliberations of the FCC and the Justice Department are not known at this time, the agencies' decision to seriously question the effect of the transaction suggest concern over the acute consolidation within the ICS marketplace. When the deal was announced, Moody's Investors Service noted that the acquisition was "costly" for Securus, but it would "eliminate[] an aggressive competitor in the smaller facility space comprised of local and county jails." For this reason, Moody's reaffirmed Securus's bond rating, citing the company's "small scale, niche industry focus, aggressive financial policy, and strong competitive pressures *in a largely duopolistic* and mature end market."[356]

The regulatory inquiries regarding the ICSolutions acquisition are an indication that regulators are waking up to the lack of competition in the ICS industry. Yet even if the government were to block the ICSolutions acquisition, it may not be realistic to expect a resurgence of competition in a market that has become consistently less robust over the span of several decades.

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[350] ICSolutions, Response to Request for Proposals for Providing Inmate Communication Services for the Harrison County Jail Facilities, Gulfport, Mississippi, at 1 (Jul. 28, 2017) (on file with author).

[351] Wagner, *supra* note 51, lists ICSolutions' market share as fourth, behind CenturyLink. But CenturyLink is likely not a true independent competitor in the ICS marketplace. CenturyLink, an incumbent local exchange carrier with operations concentrated in western and midwestern states, is a nominal holder of many ICS contracts, but its bid proposals indicate that CenturyLink simply provides transmission lines, while ICS carriers such as Securus or GTL are responsible for all operational details, such as software, billing functions, and customer support. *See e.g.*, CenturyLink, Response to Georgia Dept. of Corrections Solicitation No. 46700-GDC0000669, attch. K (Jun. 9, 2015) (on file with author).

[352] Joint Application, *In the Matter of Joint Application of TKC Holdings, ICSolutions, and Securus Technologies for Grant of Authority*, WC Dkt. No. 18-193 (Jun. 12, 2018).

[353] Letter from Kris Anne Monteith, Chief of Wireline Competition Bureau to counsel for joint petitioners, *In the Matter of Joint Application of TKC Holdings, ICSolutions, and Securus Technologies for Grant of Authority*, WC Dkt. No. 18-193 (Sept. 26, 2018).

[354] Letter from Paul C. Besozzi, counsel for Securus, *In the Matter of Joint Application of TKC Holdings, ICSolutions, and Securus Technologies for Grant of Authority*, WC Dkt. No. 18-193 (Oct. 16, 2018).

[355] *See* 15 U.S.C. § 18a(e).

[356] "Moody's says Securus' ratings unchanged following add-on to term loan," https://www.moodys.com/research/Moodys-says-Securus-ratings-unchanged-following-add-on-to-term--PR_383221 (May 7, 2018) (emphasis added).

V. Policy Recommendations

Although prison-retail customers have some protections, as discussed in the previous section, these scattered *ex post* remedies are inefficient and less-than-comprehensive. True protection must come through a deliberately designed system of *ex ante* regulation that respects legitimate security needs while vigorously protecting the interests of incarcerated people as consumers.

Central to the current lack of consumer protections is the failure of any government agency to take responsibility for broadly protecting the rights of incarcerated people and their families as captive customers. Time and time again, concerns about abusive monopolist business practices are dismissed by policymakers who claim that correctional agencies take these matters into account when awarding exclusive vendor contracts. This is not a sufficient answer, given the agencies' divided loyalties.

This section explores proactive actions that legislatures, regulatory agencies, and correctional facilities can take. Because the majority of incarcerated people are held in state or local facilities, this section begins with state-level policy proposals and then considers potential federal action.

A. State and Local Governments

The basic problem of prison retailing can be summarized as follows: growing prison populations have led to unsustainable correctional budgets, which has led agencies to seek out so-called "no cost" contracts (which, in reality, simply means shifting costs from the public sector to incarcerated people). The ultimate solution to this quandary is for states to reduce the use of incarceration and acknowledge that the state must assume the financial costs when it chooses to incarcerate people. In the absence of this big-picture normative change, consumer rights can be protected through reforms that are more incremental, but which nonetheless creatively change the ways in which society addresses the burdens of incarceration.

1. Reimagine Procurement Practices

Opening up aspects of the procurement process to oversight is one part of a multi-layered approach to addressing the problematic aspects of prison retailing.[357] This can be accomplished through numerous changes, ranging from major overhauls to minor tweaks. To begin, families and representatives of incarcerated people must have a meaningful role in the procurement process. Incarcerated people and their families are increasingly well organized, and as the experience of the Wright petitioners teaches, advocacy groups are entirely qualified to participate in complex regulatory matters, and they contribute substantial value to policy debates when their voices are heard. Accordingly, any panel of reviewers that evaluates bids for prison-retail contracts should include a qualified delegate from an organization that represents the interests of

[357] *See Confronting Confinement*, *supra* note 82, at 78 (The key, many people told the Commission [on Safety and Abuse in America's Prisons], is never to rely on any single mechanism of oversight and accountability, but rather to take what Professor Michele Deitch calls a 'layered approach.'").

people incarcerated by the agency that has solicited bids. Such delegate must have access to all aspects of the bid file, including confidential financial information. Members of bid-review committees routinely preserve the confidence of sensitive data, and this will remain true if consumer advocates are included in the process. Indeed, allowing advocates to sit on review committees is no more revolutionary than the numerous insurance regulatory systems that allow intervention of consumer advocates in ratemaking proceedings.[358]

Corrections agencies should also require that money transmitters protect consumer funds from loss in the event of insolvency. Although money transmitter regulations do help to mitigate that risk to some extent, those regulations do not cover prepaid funds for communications services or commissary items. Insolvency could easily result from a hacking attack on a prison retailer, something that is not inconceivable given that incarcerated customers were able to hack a JPay account system in the summer of 2018.[359] Given the risks posed to consumers, express protections in the event of vendor insolvency should be built into any contract for money transfers, as well as the related customer-facing terms and conditions.[360] Such protections could include segregating prepaid revenue or requiring a surety bond or other security.

There are also numerous more targeted reforms that correctional agencies could achieve simply by modifying the terms of requests for proposals. For example, agencies could:

- Refuse to consider or enter into bundled contracts.
- Allow all incarcerated customers to designate a third party representative (i.e., a trusted non-incarcerated friend or family member) for purposes of accessing account data and interacting with vendor customer-service staff.[361]
- Require all vendors providing financial services to formulate a data protection plan and comply with the consumer data provisions of the GLBA.
- Prohibit vendors from disclaiming the implied warranties of merchantability and fitness for a particular purpose.

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[358] *See* Daniel Schwarcz, "Preventing Capture through Consumer Empowerment Programs; Some Evidence from Insurance Regulation," *in Preventing Regulatory Capture: Special Interest Influence and How to Limit It* 365 (Daniel Carpenter & David A. Moss, eds., 2014).

[359] Steve Horn, "JPay Vulnerability Exploited by Idaho Prisoners for $225,000 in Credits," *Prison Legal News* v. 29, n. 9 (Sept. 2018), at 16 (reporting that residents of an Idaho prison exploited a "software vulnerability" and generated $225,000 in prepaid account value; the hack involved prepaid account balances, not funds in trust accounts); *see also supra*, note 156 and accompanying text (discussing a non-payment related hack of Securus calling records).

[360] *See* Levitin *supra* note 249, at 7 ("Something as pedestrian as a hacking can bring down a payment fintech very rapidly, and without adequate insurance requirements for such fintechs, consumers stand to lose their funds.").

[361] At least part of this third-party authorization system can be modeled after the CFPB's "Consumer Protection Principles: Consumer-Authorized Financial Data Sharing and Aggregation" (Oct. 18, 2017), http://files.consumerfinance.gov/f/documents/cfpb_consumer-protection-principles_data-aggregation.pdf ("Consumers are generally able to authorize trusted third parties to obtain [account-related] information from account providers to use on behalf of consumers, for consumer benefit, and in a safe manner.").

- Require public posting (accessible both in- and outside of prison) of all vendor policies and fees, as well as disclosure of any compensation received by the correctional agency.
- Prohibit forfeiture of prepayments and require that all unused prepayments be refunded upon a customer's release from custody. If any refund cannot be completed, the credit balance should be administered under the state's unclaimed property law.

2. Foster Competition

Part of the reason why retail offerings like commissary and telephone service are delivered through monopoly contracts is that correctional facilities want tight control over the security practices of vendors. This is understandable in the case of tangible goods—it's easy to understand how a box of cereal purchased from the commissary could potentially be used to smuggle contraband. Contrast these legitimate security concerns to the case of digital content delivered via tablets. Companies like Apple and Spotify have spent considerable resources amassing enormous catalogs of music, and developing sophisticated content-delivery platforms. Moreover, these companies have invested substantial money (almost assuredly more than has been invested by prison-retail firms) in designing a secure network that can prevent malicious misuse.

Any computer network used by incarcerated people must be established by the facility, subject to necessary security features. The costs of establishing that network can be funded through correctional budgets or (if necessary) through reasonable user fees. But providing software and content that operates on this closed network need not be the exclusive province of a monopoly provider. Free-world platforms can be modified and offered in prisons, allowing customers to select providers in a truly competitive market. There are two reasonable security concerns about allowing such free-world digital platforms in a correctional facility: (1) potentially objectionable content in books, music, or other digital material,[362] and (2) certain features like user reviews, which could be used to facilitate unauthorized communications. Correctional administrators who are truly committed to innovation could work with technical experts on modifying existing platforms to address these concerns. For example, if facilities want to control the types of songs available (due to violent or sexual content), then how could various corrections departments collaboratively curate and share a database of acceptable songs, while simultaneously providing users explanations of why certain music has been censored? Or if prison administrators balk at iTunes because user reviews allow communication with the outside world, could the software be modified to disable to the review feature for incarcerated users?

[362] Even though it is generally obvious that prisons should have the power to screen out objectionable content, prison officials have repeatedly proven themselves unreasonably overzealous in exercising this power. Perhaps the most notorious example are the numerous books which have been prohibited in prisons for implausible, nonsensical, or obviously pretextual grounds. *See* Books to Prisoners, "Banned Books List," http://www.bookstoprisoners.net/banned-book-lists/ (accessed Jan. 6, 2019) (collecting examples). This is a real problem, but one that is simply beyond the scope of this paper.

Competition is also possible in the communications sector, and has been the subject of advocacy campaigns in the past. A specialized prison platform that coordinates necessary security features, but lets users select a carrier of their choice, is worth exploring. The feasibility of such a competitive framework, however, depends on the proportion of ICS carrier costs that are actually attributable to provisioning and transmitting communications. To the extent that such costs are substantial, then competition could provide benefits for customers. On the other hand, if the majority of carrier costs are attributable to security features (which resembles a natural monopoly), then competition would likely have little effect on end-user rates.

3. Conduct Rulemaking Proceedings to Protect Consumers

Absent Congressional action, some subset of telecommunications services will remain under the supervision of state public utilities commissions ("PUCs"). So long as this regulatory dichotomy continues, it is critical for PUCs to ensure reasonable ICS rates. Intrastate rate regulation is particularly important for people incarcerated in local jails, because they are presumably more likely to make local calls (to family or counsel in the vicinity who can provide immediate help) and do not have the ability to use VoIP routing to obtain the most favorable rates.[363] When setting rates, PUCs must take care to prevent carrier manipulation of cost data by obtaining comprehensive corporate financial information.

UDAP statutes are another critical protection, which can extend to all types of prison retailing, not just telecommunications. Because these statutes prohibit very broad categories of behavior, many states allow attorneys general or consumer-protection agencies to promulgate rules defining certain unfair or deceptive practices in greater detail.[364] UDAP regulations could provide greater clarity by addressing issues specific to prison retailing. The first issue to address is arbitration provisions. Because prison-retail consumers have no ability to choose sellers, their consent to an arbitration clause is not truly voluntary. To mitigate this situation, states should issue regulations making it an unfair trade practice for any prison retailer doing business in that state to impose mandatory arbitration or prohibit class adjudication. States should also conduct other UDAP rulemakings after surveying incarcerated people and their families and identifying the problems most in need of remediation.

4. Provide Protection for Trust Account Balances

As discussed previously, families will sometimes utilize prepayment options with unfair terms in an effort to avoid depositing funds into a trust account where they can be subject to mandatory deductions. Some such deductions can take the form of irregular seizures, such as a writ of garnishment. Other jurisdictions have made mandatory deductions more systematic. For example, a 2017 Oregon law directs the Department of Corrections to deduct 15% of all incoming funds (including wages or gifts), to

[363] *See supra* notes 200-201 and accompanying text.
[364] Nat'l Consumer Law Ctr, *supra* note 139 at § 3.4.4.2.

pay any outstanding compensatory finds, restitution, court-appointed attorney fees, child support, or civil judgments.[365] To illustrate the impacts of this law, consider a hypothetical mother who wishes to support her son in the Oregon prison system. If, every month, the mother wants her son to have enough money to purchase five prepaid mailing envelopes, a months' supply of dental floss, deodorant, a bar of soap, and enough to pay for two 20-minute phone calls, she would need to send $17.65 per month.[366] The impact of the new law is that she now needs to send $20.30 per month for her son to have the same buying power. The increased monthly deposit also increases the applicable transaction fee (charged by Access Corrections) by $3 per month (or $4 in the case of a phone payment).[367] Between increased transfer amounts and applicable fees, the total impact on the mother would be $67-79 per year.

Defenders of such mandatory deductions are quick to emphasize the importance of paying court-ordered financial obligations. But these arguments miss the fact that all states have enacted statutory exemptions for judgment debtors based on the realization that everyone needs minimal financial resources to live. In particular, most jurisdictions exempt a subsistence-level amount of wages from garnishment.

One simple way that states could protect incarcerated people and their families from predatory prepayment schemes would be to exempt a reasonable amount of monthly trust account deposits from seizure under mandatory deduction laws. Despite the predictable counter-arguments that would come from proponents of zero-sum criminal justice, such a policy need not diminish the importance of repaying court-ordered debts. Rather, just like a wage-garnishment exemption, it is an acknowledgment that people in prison are expected to pay for basic necessities, and to do so, they must have some degree of protection from involuntary payments.

5. Develop Independent ADR Systems

Another important issue that should be seriously addressed in prison-retail systems is the existence and structure of customer dispute resolution processes. It is an admitted challenge to design an effective dispute resolution process in a business where most transactions are for small dollar amounts. This is where the experience of e-commerce can prove illuminating, as large companies have developed extensive internal dispute resolution systems that resolve matters quickly and efficiently.[368] These systems are not without problems, and they would have to be modified to work in prison. Yet they represent a potential model of how to resolve consumer complaints in an inexpensive and potentially fair manner. A creative form of alternative dispute resolution ("ADR") in prison retailing is sorely needed. Vendors do not operate in a competitive market and therefore have little incentive to seriously

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[365] Or. Rev. Stat. § 423.105.

[366] The cost of the phone call and postage are based on current rates; all other items are based on a likely outdated 2014 commissary price list available at https://www.oregon.gov/doc/docs/pdf/Commissary%20List.pdf.

[367] Access Corrections, Rate Sheet, https://www.oregon.gov/doc/docs/Access_Corrections.pdf (accessed Jan. 12, 2019).

[368] Rory Van Loo, *The Corporation as Courthouse*, 33 Yale J. Regulation 547, 571-578 (2016).

respond to consumer complaints. Meanwhile, disputes in prisons are typically funneled to grievance systems which are notoriously biased, unfair, and ineffective.[369]

Often the problems with internal grievance systems can be traced to staff skepticism regarding the validity of complaints coming from incarcerated people. In some ways, this is the correctional system's version of *Liebeck v. McDonald's Restaurants* (the "McDonald's hot coffee case"), a highly publicized case that has led to many strongly-held opinions based on misinformation.[370] The equivalent case in the correctional sector was a real lawsuit (many details of which have been lost to the sands of time) involving a purchase of peanut butter from a prison commissary. Senator Bob Dole described it as a suit over "being served chunky peanut butter instead of the creamy variety" during Senate debate of the Prison Litigation Reform Act.[371] The case became a widely-cited example of frivolous prison litigation, and has become a shorthand method of dismissing the complaints of incarcerated people. Yet when Chief Circuit Judge Jon O. Newman unearthed the original complaint from the case, he discovered that Senator Dole's characterization was not entirely accurate: yes, the plaintiff had received the incorrect type of peanut butter, but he filed the suit because he returned the incorrect jar and never received the refund he was promised.[372] As Judge Newman remarked, the $2.50 cost of the peanut butter may seem trivial to some, "but out of a prisoner's commissary account, it is not a trivial loss, and it was for loss of those funds that the prisoner sued."[373]

The mythology of the peanut butter case is representative of many correctional administrators' hostility toward grievances. Accordingly, the best way to ensure an effective and innovative ADR mechanism for prison retail transactions is to remove it from the correctional system entirely. To accomplish this, legislatures should consider creative ways of requiring prison retailers to utilize outside ADR mechanisms. The details of such systems will vary, but should be commensurate with the needs of any given prison-retail operation. The most critical component is an independent evaluator such as an ombudsperson who works outside of the correctional agency, [374] or a contractor who is tasked with adjudicating disputes. Ideally, this can be funded from the labor cost-savings that prison-retailers regularly claim as a benefit of their products. Alternatively, in jurisdictions that continue to impose site

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[369] *See e.g.*, Prison Justice League, *A "Rigged System": How the Texas Grievance System Fails Prisoners and the Public* at 5 (Jun. 2017) (54% of survey respondents reported never having a grievance satisfactorily resolved during their time in Texas prison, 91% reported that the system was not effective); *Confronting Confinement*, *supra* note 82 at 93 ("Nearly every prison and most jails have a procedure for receiving prisoners' grievances. However, the Commission heard that many are ineffective.").

[370] *See* FindLaw.com, "The McDonald's Hot Coffee Case," https://injury.findlaw.com/product-liability/the-mcdonald-s-coffee-cup-case-separating-mcfacts-from-mcfiction.html (accessed Jan. 10, 2019).

[371] 152 Cong. Rec. S14413 (daily ed. Sep. 27, 1995) (statement of Sen. Dole).

[372] Jon O. Newman, "Not All Prisoner Lawsuits Are Frivolous," *Prison Legal News*, v. 7, n.4 (Apr. 1996), at 6.

[373] *Id.*

[374] Arthur L. Alarcón, *A Prescription for California's Ailing Inmate Treatment System: An Independent Corrections Ombudsman*, 58 Hastings L.J. 591 (2006).

commissions, a portion of commission revenue could be used to defray the costs. A new ADR system could utilize technology to obtain necessary information from the consumer, analyze vendor data to identify problematic products or practices, and provide performance data to the correctional agency for use when deciding whether to renew a contract. Such novel solutions will likely require legislative action, because they will be effective only to the extent the ADR neutral has access to transactional details and vendor records—something that vendors will not likely acquiesce to unless required by law.

B. Federal

1. CFPB Regulation of Correctional Banking

Under title X of the Dodd-Frank Act,[375] the CFPB is authorized to prohibit unfair, deceptive, and abusive practices ("UDAAP"). The CFPB should use these powers to comprehensively regulate the entire field of correctional banking. Title X grants the CFPB the authority to prohibit UDAAP by "covered persons," which are defined as persons or entities "engage[d] in offering or providing a consumer financial product or service."[376] Correctional banking vendors transmit funds, provide payment services, accept deposits for the purpose of facilitating transfers, and act as custodians of stored value, all of which are statutorily defined as consumer financial products or services for purposes of title X.[377]

The UDAAP provision in § 1031 of the Dodd-Frank Act includes statutory definitions of the terms "unfair" and "abusive." Unfair practices are defined using the same definition as the FTC Act, requiring a likelihood of substantial injury, unavoidable by the consumer, which is not outweighed by countervailing benefits.[378] Trust fund transfers, prepayment products, and release cards routinely injure consumers by imposing supra-competitive fees and unfair terms and conditions. The customers in these transactions receive no corresponding benefit as a result of these practices, nor do consumers have access to a competitive market.

Section 1031 contains several definitions of abusive practices, one of which is an act or practice that "takes unreasonable advantage of . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[379] Again, correctional banking products easily fit this definition because of the complete lack of consumer choice and the exploitative fees that are levied on vulnerable consumers.

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[375] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[376] 12 U.S.C. § 5481(6)(A).

[377] *Id.* §§ 5481(5), (8)(C), and (15)(A)(iv), (v) & (vii).

[378] *Id.* § 5531(c)(1) (defining unfairness as an act or practice that is "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers," and such injury is not "outweighed by countervailing benefits to consumers or to competition").

[379] *Id.* § 5531(d)(2)(B); *see also* Adam Levitin, "CFPB 'Abusive' Rulemaking?" Credit Slips Blog (Oct. 17, 2018), https://www.creditslips.org/creditslips/2018/10/cfpb-abusive-rulemaking.html (arguing that the abusive prong under the CFPB's enabling statute is basically duplicative of unfairness and deception).

Using its § 1031 powers, the CFPB should conduct an open-ended rulemaking to address common practices in the correctional banking industry. Such a rulemaking should include fee regulation and extension of Regulation E's compulsory-use prohibition to release cards. The Bureau should also directly regulate correctional banking fees. While this level of intervention would be somewhat unusual, even those who lean toward market discipline of fees acknowledge that context matters.[380] In the case of correctional banking, the facility is the party that evaluates bids and awards exclusive contracts. Transaction costs should therefore be internalized and borne by the facility, which is in the best position to minimize such costs.

2. Congressional Action

The most important step that Congress can take is to clarify FCC jurisdiction over emerging technology. This issue is already on the legislative radar screen. In 2017, Senator Tammy Duckworth introduced legislation to clarify the FCC's jurisdiction over ICS telephone service and video visitation, regardless of whether such communications are inter- or intrastate.[381] The bill was assigned to committee and languished without any further action. Due to technological changes in telecommunications, the traditional dichotomy between intra- and interstate communications makes little sense. The Duckworth bill should be reintroduced in the current congress and advocacy organizations should make passage a priority.

3. Wright Petition, Post-Remand

After the FCC took up the matter of ICS rate regulation, the Commissioners fractured on the appropriate regulatory fix. But even Chairman Pai, who led the dissent, admitted that government intervention in the ICS market is appropriate given the documented market failure.[382] Now that the D.C. Circuit has vacated portions of the FCC's 2015 rule, the ball is once again in the FCC's court. Recall, however, that title II's requirement of just and reasonable rates can be enforced via private litigation. The matter ended up before the FCC because courts were receptive to ICS carriers' citation to the primary jurisdiction doctrine. That rule is a prudential doctrine, which some courts have declined to apply in situations where "the agency is aware of but has expressed no interest in the subject matter of the litigation."[383] If the FCC does not promptly take up the Wright rulemaking now that it has been remanded, then courts should interpret this as a lack of agency interest, and decline to invoke the primary jurisdiction doctrine in future cases.

As for the substance of the rulemaking, the FCC should promulgate new price caps for interstate ICS rates using a methodology that will satisfy judicial review. The Commission should also reissue the same restrictions on ancillary fees that were contained in the 2015 rules, but this time specifically

[380] Liran Haim & Ronald Mann, *Putting Stored-Value Cards in Their Place*, 18 Lewis & Clark L. Rev. 989, 1016 (2014) ("In our view, the question of fee regulation [for prepaid cards] should be largely contextual.").

[381] Video Visitation and Inmate Calling in Prisons Act of 2017, S. 1614, 115th Cong. (2017).

[382] *See supra* note 213.

[383] *Astiana v. Hain Celestial Group*, 783 F.3d 753, 761 (9th Cir. 2015).

invoke § 152(b)'s "impossibility exception" as grounds to apply the rules to intrastate calling.[384]

The Commission must also address ICS carriers that invoke their use of VoIP technology to evade state regulation. When vacating the FCC's caps on intrastate rates, the D.C. Circuit relied on § 152 of the Communications Act, which creates a presumption that states will regulate intrastate communications.[385] The purpose of § 152 is to respect the dual sovereignty of federal and state regulators. To the extent that the industry is successful in evading state regulation, then § 152 is no longer in play. The FCC has been willing to use It should certainly exercise its power over the same technology when failure to do so would result in a complete regulatory vacuum.

The Commission should also regulate emerging technologies such as video visitation and electronic messaging. This may seem infeasible given the current political makeup of the FCC, but it should not be. The Commission can maintain a general agenda of deregulation and still recognize the *sui generis* market failure that has occurred in prison telecommunications. The novelty of the products should not obscure the fact that customers are purchasing "mere transmission" of text, voice, or video messages, the hallmark of communications services subject to regulation under title II.[386] Those services suffer from the same market failures that the FCC identified in connection with telephone service in correctional facilities, and basic rate caps restrictions on abusive fees would benefit consumers.

VI. Conclusion

Prison retailing is a predictable result of an age of runaway carceral growth coupled with legislative demands for fiscal austerity. While common business practices in the industry regularly run afoul of existing laws, substantial roadblocks make it difficult for injured customers to exercise what rights they may have. Meanwhile, correctional administrators, who are in the best position to guard against industry abuses, have largely indicated a lack of interest in consumer protection.

As discussed in the previous section, legislative and administrative bodies have numerous tools at their disposal to address the problems of prison retailing. A world without the parasitic companies that dominate the industry is achievable, but given the profitability of current business practices, pushback will be intense as companies defend their ability to extract profits from captive customers. Accomplishing meaningful change will thus require concerted effort by advocates and a willingness on the part of policymakers to see incarcerated people and their families as consumers entitled to the same protections that are enjoyed by most people every day.

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[384] *See e.g., Minn Pub. Utils Comm'n v. Fed. Comm'cns Comm'n*, 483 F.3d 570, 577 (8th Cir. 2007) (impossibility exception "allows the FCC to preempt state regulation of a service which would otherwise be subject to dual federal and state regulation where it is impossible or impractical to separate the service's intrastate and interstate components"); *see also supra* note 192.

[385] *Global Tel*Link v. Fed. Commc'ns Comm'n*, 866 F.3d 397, 409 (D.C. Cir. 2017) ("§ 152(b) of the 1934 Act erects a presumption against the Commission's assertion of regulatory authority over *intrastate* communications.").

[386] *See Restoring Internet Freedom*, *supra* note 206, at ¶ 6, 33 FCC Rcd. at 313 (describing information services as those that "offer more than mere transmission").