

# The Exploitation of a Captive Market Through the Prison Telecommunication Industry

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## I. Introduction

Despite the abolition of slavery, the 13<sup>th</sup> Amendment exempted prison labor and allowed the states to benefit from involuntary servitude.

<sup>1</sup> And although prison labor still exists<sup>2</sup> there has been a shift in terms of the value of incarcerated people. Private companies have identified a captive market<sup>3</sup> and have contracted to reap the benefits of their confinement. Through contracting with either public or private prisons, these companies have identified various avenues for profit through medical and food services, commissary items, furniture, phones and other forms of electronics.<sup>4</sup> However, contrary to the free market, the incarcerated consumer is not afforded the same rights and safeguards as other consumers. Simply due to their incarceration, people in prison and their families are exploited under the guise of legitimate penological interests.<sup>5</sup> Thus, this paper addresses how introducing market factors and consumer protection can be an effective form of legal recourse for incarcerated people subject to a captive market.

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<sup>1</sup> U.S. CONST. amend. XIII.

<sup>2</sup> Lakshmi Singh, *Serving Time and Fighting California Wildfires*, NPR (Nov. 18, 2018, 5:48 PM), <https://www.npr.org/2018/11/18/669088658/serving-time-and-fighting-california-wildfires-for-2-a-day> (explaining how for 2 dollars a day and 1 dollar an hour while helping to combat the wildfires, inmates “volunteer” to help authorities combat wildfires. Volunteers are afforded reduced prison sentences as well as more comfortable prison accommodations. Using inmates to fight the wildfire saves the state a 100 million a year). *See also* Victoria Forester, *New York Is Making Its Own Hand Sanitizer Using Inmate Labor to Fight the Coronavirus Outbreak*, FORBES (Mar. 9, 2020, 12:39 PM), <https://www.forbes.com/sites/victoriaforster/2020/03/09/new-york-is-making-its-own-hand-sanitizer-using-inmate-labor-to-fight-the-coronavirus-outbreak/#44c9ba83bace> (discussing how the sanitizer is manufactured by Core craft Products which is run by the Department of Correctional Services which uses inmate labor for a substantive part of the job. The company claimed this labor helps instill good work ethic and valuable work skills).

<sup>3</sup> Drew Kukorowski, *The price to call home: state-sanctioned monopolization in the prison phone industry*, PRISON POL’Y INITIATIVE (Sept. 11, 2012), [https://www.prisonpolicy.org/phones/report.html#\\_ftn4](https://www.prisonpolicy.org/phones/report.html#_ftn4).

<sup>4</sup> Eric Markowitz, *Making Profits on the Captive Prison Market*, NEW YORKER (Sept. 4, 2016), <https://www.newyorker.com/business/currency/making-profits-on-the-captive-prison-market>.

<sup>5</sup> *Infra* Section III (B).

First, I lay out how a captive market was created. Next, I provide a brief overview of the prison telephone industry and other technologies that have been introduced into prison. The telephone industry is unique to the extent that courts have failed to acknowledge it as a necessity but have acknowledged the positive impacts that communication with family and friends can afford.<sup>6</sup> Furthermore, due to the monopoly that private telephone companies have created, regulating this market is often met with legal barriers. The next section addresses the new frontier of technology that is also exploiting a captive market. Lastly, I conclude with alternative arguments to prevent incarcerated people from being exploited.

## **II. Creating the Captive Market**

A captive market is defined as, “[A] group of consumers who are obliged through lack of choice to buy a particular product, thus giving the supplier a monopoly.”<sup>7</sup> Captive markets exist in other industries such as cruise lines, movie theaters, or even airports, all of which charge consumers more than the average market prices. However, a consumer can choose between different cruise lines or movie theaters with the price of the items in mind. Prisoners are not afforded that choice and due to their confinement, they are exploited and forced to overpay.<sup>8</sup> I can choose to go to the movies but can say, “no” to the candy bar because it is not a necessity. But if I were at the airport with no cellphone and had to contact my family, I would pay a higher price to communicate. Prisoners are in the same predicament and thus are a captive market.

However, their dependency on the market is drastically different and raises significant legal and social issues. Because there is not the same factor of choice in the prison context, prison

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<sup>6</sup> *Procunier v. Martinez*, 416 U.S. 396, 426 (1974).

<sup>7</sup> *Captive market*, Collins English Dictionary, <https://www.collinsdictionary.com/us/dictionary/english/captive-market> (last visited Oct. 1, 2020).

<sup>8</sup> Kukorowski, *supra* note 3 (explaining inelastic demand and how despite the change in the products price the consumers demand remains the same).

industries depend on continued and consistent confinement which severely disadvantages prisoners and impinges on fundamental rights.<sup>9</sup> Thus, the rise of the prison population addresses a notable stage of growth that made prisons a desirable target. But despite the later decline in the population,<sup>10</sup> prisoners' vulnerability and dependency on these products continue to generate profits.

### ***A. The Rise of the Prison Population***

The United States incarcerates more people than any other nation in the world.<sup>11</sup> In the early 1980s, the prison population was around 300,000 people.<sup>12</sup> Similarly, the jail population in the early 1980s was around 220,000 people.<sup>13</sup> However, both populations soon quadrupled due to political and social pressures for criminal justice reform.<sup>14</sup> As the prison population was increasing, private companies capitalized on the state's need for more prison facilities. With the increase of prisoners came greater demand for prison facilities and the market acted as expected, with private companies competing for federal and state contracts. By 2000, 264 private facilities were operating under contract with federal and state governments and companies like Correction Corporation of America were dominating the industry.<sup>15</sup>

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<sup>9</sup> Peter R. Shults, Note, *Calling the Supreme Court: Prisoners' Constitutional Right to Telephone Use*, 92 B.U. L. REV. 369, 380 (explaining how the Circuits are split on whether prisoners have a constitutional right to use telephones); see also *infra* Section III (B) (explaining the first amendment arguments, equal protection arguments and more).

<sup>10</sup> Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, SENT'G PROJECT (Sept. 17, 2019), <https://www.sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/> (discussing how in 2009, the US reached peak prison population but in 2017 it declined by 7%).

<sup>11</sup> James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 10, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

<sup>12</sup> BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ-76803, PRISONERS IN 1980, at 2 (1981) <https://www.bjs.gov/content/pub/pdf/p80.pdf>

<sup>13</sup> Press Release, Prison Pol'y Initiative, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth* (May 31, 2017), [https://www.prisonpolicy.org/reports/jailovertime.html#fig\\_1](https://www.prisonpolicy.org/reports/jailovertime.html#fig_1).

<sup>14</sup> Cullen, *supra* note 11.

<sup>15</sup> Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, 22 CRITICAL STUD. MEDIA COMM'N 263, 267 (2005). See also Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 437-39 (2005) (noting how private prisons lack the element of perfect competition and thus creates a level of dependency with the state or local prison that can lead to contracting abuses without any remedies); Anne C. Jefferson, Note, *Rehabilitating Prison Contracting: States Must Reclaim Prison Management*

Legislation was also passed that curbed the legal resources for prisoners. The Prison Litigation Reform Act (“PLRA”) limited claims that prisoners could bring by requiring them to exhaust all administrative remedies in order to allow claims to be handled internally before rising to a federal case.<sup>16</sup> These tough on crime approaches were intended to punish serious and violent criminals who were “getting off easy”<sup>17</sup> but led to the increase of the prison population. Ultimately, at the height of mass incarceration, there were over 2 million people incarcerated.<sup>18</sup> But to some, those 2 million people were a captive market and private companies were poised to capitalize.

### ***B. Targeting Vulnerable Consumers***

For a company to succeed in a market, there must be an understanding of the target consumer’s demographics but most importantly their income in order to determine their ability to purchase the items.<sup>19</sup> The captive market uses the limited options of the consumer to enable the company to dictate above-market prices.<sup>20</sup> But the captive market in the prison context differs

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*and Emphasize Inmate Rehabilitation through Utilization of Schedule Contracts for State-Run Prison Procurement*, 47 PUB. CONT. L.J. 101, 112 (2017) (arguing that privatization leads to an increase of delegation of discretionary decision which negatively impacts prisoners).

<sup>16</sup> 42 U.S.C.S. § 1997e (LexisNexis 2020); *Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding that a failure to exhaust all administrative remedies is an affirmative defense however prisoners are not required to specifically plead or demonstrate exhaustion in their complaints); *see Porter v. Nussle*, 534 U.S. 516 (2002); *see also* 42 U.S.C.S. § 1997e(e) (LexisNexis 2020) (barring monetary damages for suits based on mental or emotional injury without any physical injury).

<sup>17</sup> James P. Lynch & William J. Sabol, *Did Getting Tough on Crime Pay?*, URBAN INST. (Aug. 1, 1997), <https://www.urban.org/sites/default/files/publication/70411/307337-Did-Getting-Tough-on-Crime-Pay-.pdf>.

<sup>18</sup> BUREAU OF JUST. STATS., U.S. DEP’T. OF JUST., NCJ252156, PRISONERS IN 2017 (2019). [https://www.bjs.gov/content/pub/pdf/p17\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/p17_sum.pdf) (explaining how the prison population is decreasing, in 2017 there were 1,489,400 prisoners); *see also*, *Criminal Justice Reform*, EQUAL JUSTICE INITIATIVE, <https://eji.org/criminal-justice-reform/> (last visited Oct. 1, 2020) (“The U.S. has 5% of the world’s population but nearly 25% of its incarcerated population”).

<sup>19</sup> Steve Olenski, *5 Factors That Can Make Or Break Your Marketing Strategy*, FORBES (Dec. 12, 2017, 1:48 PM), <https://www.forbes.com/sites/steveolenski/2017/12/12/5-factors-that-can-make-or-break-your-marketing-strategy/#9ee517351e4c>.

<sup>20</sup> Angela S. Bergantino & Claudia Capozza, *Airline pricing strategies in captive markets: Which factors really matter*, Department of Economics and Mathematics Faculty of Economics University of Bari, Working Paper (Mar. 15 2012) (It.) (discussing the airline industry addresses how monopolist companies can set and maintain higher prices).

because a majority of prison consumers are low income.<sup>21</sup> Instead of focusing on their ability to purchase, the focus is on the necessity of the item. Thus, in this context, the consideration is not whether the prisoners will pay for this, but rather how much they will pay. So, it becomes advantageous for companies to remain in this market and find new avenues for profit.

Captive markets rely on the consumer's dependency on the product. Commissary sales in prisons highlight this level of dependency on products that are often essential. But commissary operators contract to be the only authorized vendor for items such as hygiene products, food, religious items and more,<sup>22</sup> thus exercising another monopolistic hold. And eliminating typical market factors that regulate prices.<sup>23</sup> As an estimated 1.6 billion dollar industry, companies profit from prisoners purchasing these basic necessities.<sup>24</sup> Although commissary prices can reflect real world prices, prisoners are not making the same income as the average American. Thus a 12.5-ounce shampoo bottle costing \$1.38 no longer seems reasonable for a prisoner only making 14 cents per hour.<sup>25</sup>

The vulnerability of this market of consumers should justify more regulation; however, companies often cite the efficiency of privatization.<sup>26</sup> But efficiency in the prison context differs from market efficiency. Here, the most notable factor is confinement which leads to a lack of choice. It is easy to classify something as cost-efficient when you create the need, dictate the cost

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<sup>21</sup> Press Release, Prison Pol'y Initiative, Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned (Jul. 9, 2015), <https://www.prisonpolicy.org/reports/income.html> (“in 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages”).

<sup>22</sup> Stephen Raheer, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3, 17–18 (2020).

<sup>23</sup> Press Release, Prison Pol'y Initiative, The Company Store: A Deeper Look at Prison Commissaries (May 2018), <https://www.prisonpolicy.org/reports/commissary.html> [hereinafter Press Release, Prison Pol'y Initiative, Company Store] (“commissary operators have a legal monopoly, so they don't have to worry about price competition, and thus do not incur costs associated with special sales or discounts”).

<sup>24</sup> *Id.* (necessities including, shower sandals, toilet paper, vitamins etc.).

<sup>25</sup> *Id.*

<sup>26</sup> Dolovich, *supra* note 15, at 441.

and justify the cost through security concerns. Some proponents of privatization have rationalized these payments because it alleviates the burden on taxpayers.<sup>27</sup> However, the argument for a transfer of cost raises a different consideration regarding the purpose of prison. It compounds the nature and extent of punishment by requiring a monetary payment. Additionally, it overlooks some of the rehabilitation functions of prison.<sup>28</sup> With a captive market and a vulnerable consumer base, the private takeover of prison communications has been at risk for exploitation. So, for many of these companies, efficiency often fronts as a justification to continue monopolizing the prison market and allowing private companies to benefit from the prisoner's confinement.<sup>29</sup>

### III. The Prison Telecommunication Industry

Despite their confinement, prisoners still have a right to communicate with the outside world. But as letters become an outdated form of communication, prisoners, like most of us, depend on the use of telephones to communicate. Various scholars and researchers have cited the importance of prisoners maintaining communication with family and friends to curb recidivism.<sup>30</sup>

The telephone is a lifeline for prison families, who are overwhelmingly low income and largely come from communities of color, far from the rural areas where most prisons are located. Without a car, visiting is often impossible and for too many, the telephone is their only link to a loved one in jail. Prisoners need a voice from the outside world to help them maintain their humanity in a brutal environment.<sup>31</sup>

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<sup>27</sup> Madeleine Severin, Note, *Is There a Winning Argument Against Excessive Rates for Collect Calls from Prisoners?*, 25 CARDOZO L. REV. 1469, 1473 (2004).

<sup>28</sup> Jefferson, *supra* note 106 (noting that rehabilitation programming is essential in curbing recidivism).

<sup>29</sup> Jefferson notes: An incarceration model that rewards private entities for keeping inmates in prison and making them more likely to return to prison once released is fundamentally incompatible with justice and undercuts the legitimacy of the criminal justice system. A significant threat to accountability and rule of law arises when corporations with a profit motive make decisions about inmates' lives, liberty, and property: "[u]nder these circumstances, the quality and character of public services will depend on the ad hoc judgments of private actors, who may or may not be motivated by public concern." *Id.* at 113.

<sup>30</sup> Brittni Downs, Note, *A Decade-Long Cry for Help Answered: The FCC Lowers the Rates of Interstate Prison Phone Calls*, 22 COMM. LAW CONSPECTUS 131, 146 (2013).

<sup>31</sup> Bonita Tenneriello & Elizabeth Matos, *The Telephone Is A Lifeline For Prison Families. And Calls Are Outrageously Expensive*, WBUR (Jan. 27, 2020), <https://www.wbur.org/cognoscenti/2020/01/27/cost-of-phone-calls-prison-bonita-tenneriello-elizabeth-matos>.

But recent studies have shed light on the astronomical price<sup>32</sup> of phone calls within the county- and city-run jails.<sup>33</sup> The telecommunication industry is perhaps the most egregious exploiter of the prison market to the extent that it targets a prisoner's ability to communicate with the outside world through exorbitant phone prices. For example, in 2019 a 15-minute phone call from a New York City jail averaged \$7.54.<sup>34</sup> However, an average phone plan costs from \$65 to \$75 per month, which often includes unlimited text, talk and data.<sup>35</sup> Thus, assuming someone has only spent two weeks in a local jail it amounts to over \$100 just communicating. Although, as will be discussed below, the Supreme Court disagrees that a first amendment right to free speech has been violated<sup>36</sup>, it remains pertinent to address how companies began and continue to exploit the inmate market and how other legal arguments have been framed.

Note also that prisons and jails both experience these exploitative tactics, but the most significant difference is often noted in the price of phone calls. For example, phone calls from jail cost over three times more than phone calls from state prisons.<sup>37</sup> The price disparity is often due to bad contracting.<sup>38</sup> Due to size and sometimes political pressures, state-run prisons are in a better bargaining position to contract for better rates.<sup>39</sup> But despite this advantage, state-run prisons still engage in profit sharing agreements and reap the benefits from commissions discussed below.

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<sup>32</sup> PRISON PHONE JUST., <https://www.prisonphonejustice.org/> (Analyzing the cost of intrastate phone calls throughout the United States. Kentucky is ranked 51st in terms of call affordability with a 15-minute phone call costs \$5.70 compared to New Hampshire where a 15-minute phone call costs .20. However, prison justice also factors in "kickback costs" which are the commission to prisons, and in 2017 New Hampshire paid 360,000 in kickbacks).

<sup>33</sup> Press Release, Prison Pol'y Initiative, State of Phone Justice: Local Jails, State Prisons and Private Phone Providers (Feb. 2019), [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice.html](https://www.prisonpolicy.org/phones/state_of_phone_justice.html) [hereinafter Press Release, Prison Pol'y Initiative, State of Phone Justice].

<sup>34</sup> *Id.*

<sup>35</sup> Bree Fowler, Consumer Reports checks out the latest from AT&T, Sprint, T-Mobile, and Verizon, Consumer Reports, <https://www.consumerreports.org/cell-phone-service-providers/best-low-cost-cell-phone-plans/> (last visited Apr. 8, 2020).

<sup>36</sup> *Infra* note 101.

<sup>37</sup> Press Release, Prison Pol'y Initiative, State of Phone Justice, *supra* note 33.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

### ***A. Monopolizing the Market***

The Inmate Telephone Service or Inmate Calling Services (“ICS”) are telephone services provided by private companies that allow inmates to communicate in correctional facilities. In 1973, the federal Bureau of Prisons expanded the telephone access program citing the importance of communication as well as the benefits in reducing recidivism.<sup>40</sup> Until 1984, AT&T was the only provider of telecommunication within prisons.<sup>41</sup> But Congress passed the 1984 Consent Decree which broke up AT&T and allowed for other telecommunication companies to take over these payphone contracts with the prisons.<sup>42</sup> Congress recognized that further oversight was needed in telecommunications and passed the Telecommunication Act of 1996<sup>43</sup> which revised rules in the payphone industry.<sup>44</sup> Furthermore, Section 276 of the Act highlights that the goal is to promote competition among payphone providers.<sup>45</sup> However, despite attempts to open the market, payphone providers reverted to monopolizing the market. After submitting bids to correctional facilities, companies would obtain exclusive contracts to be the sole provider of telecommunication services within the prisons.<sup>46</sup> To justify their monopolistic hold, companies

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<sup>40</sup> Jackson, *supra* note 15, at 267.

<sup>41</sup> *Id.* at 268. “Such studies have found that a powerful predictor of re-offending is the failure to maintain family and community contact while incarcerated. As this body of work demonstrates, a reliable way of increasing the likelihood that prisoners will reoffend is to break all ties with the outside world and then place them back on the street years later, with little reentry support, in a community to which they have become a stranger”.

<sup>42</sup> *Id.*

<sup>43</sup> Steven Aronowitz, *Brand X Internet Services v. FCC: The Case of the Missing Policy Argument*, 20 BERKELEY TECH. L.J. 887, 887, 891 (2005) (Prior to the passage of the Act, Bell telephone held a monopoly on the telecommunication industry through exclusive networks where consumers could only communicate with other Bell consumers).

<sup>44</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (allowed communications business to compete in any market against other companies).

<sup>45</sup> 47 U.S.C. § 276.

<sup>46</sup> Negheen Sanjar, *Global Tel\*Link v. FCC, 859 F.3d 39 (D.C. Cir. 2017)*, 69 FED. COMM’NS. L.J. 321, 322 (2018); see Peter Wagner & Alexi Jones, *Best practices for phones RFP’s*, PRISON POL’Y INITIATIVE (Feb. 7, 2020), [https://www.prisonpolicy.org/phones/rfp\\_guidance.html](https://www.prisonpolicy.org/phones/rfp_guidance.html) (arguing that instituting multiple Requests for Proposals would eliminate hidden costs. Phone companies often bundle contracts for phone, video calling, electronic law libraries and online banking which appear convenient but allow the companies to shift profits and hide the real cost of the services.).

often cite security concerns and costs.<sup>47</sup> Some states have even justified the monopolistic hold under a theory of contestable markets.<sup>48</sup> This theory holds that a competitive bidding process helps approximate the price that would be charged in a competitive market.<sup>49</sup> So although there was an increase of competition with new companies entering the market, the exclusive contracts led to unchecked phone rates; and, combined with a failure of oversight, companies with superior bargaining power were able to dictate the prices.<sup>50</sup>

Currently, the three primary telephone providers of ICS are Global Tel\*Link (“GTL”), Securus and Telmate.<sup>51</sup> County, state and federal officials enter into profit sharing agreements with these ICS providers.<sup>52</sup> A common feature amongst all these contracts is the incentives through commissions.<sup>53</sup> Commissions are the monies generated from the inmates using the phone provider’s service.<sup>54</sup> Commissions are contracted for resulting in ranges between 20% and 63% of the profit,<sup>55</sup> and some phone companies have even contracted for the prisons to receive almost

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<sup>47</sup> Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 FED. COMM’NS. L.J. 391, 394 (2002).

<sup>48</sup> *Id.* at 395.

<sup>49</sup> *Id.* at 395–96 (Carver goes on to debunk this theory by first noting that for this to work efficiently the bidding process would have to be renewed in order to incentivize price competition. Next, the theory of contestability is often based on cost/ quality of service but here the bidding processing is most often determined based on the amount of the commissions. Ultimately, there is no incentive to compete and thus not in accordance with the economic theory of contestability).

<sup>50</sup> Press Release, Prison Pol’y Initiative, Company Store, *supra* note 23.

<sup>51</sup> *In re Rates for Interstate Inmate Calling Servs.*, 30 FCC Rcd. 12763, 12801.

<sup>52</sup> Jackson, *supra* note 15, at 269. “Under such conditions, the incentives of price competition have worked in precisely the opposite direction, with companies offering the highest bids (in terms of rates and commissions) routinely awarded contracts, the costs of which are passed on to the (literally) captive market. The net result of deregulation and competition in the prison phone industry, then, has been a dramatic rise in prices even as consumer rates available elsewhere in the American telecommunications landscape have plummeted.”

<sup>53</sup> Peter Wagner & Alexi Jones, *On kickbacks and commissions in the prison and jail phone market*, PRISON POL’Y INITIATIVE (Feb. 11, 2019), <https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions/>.

<sup>54</sup> *Glob. Tel\*Link v. FCC*, 866 F.3d 397, 404 (D.C. Cir. 2017).

<sup>55</sup> *Id.* An ICS provider paid 460 million in site commission annually.

100% of the commission.<sup>56</sup> But if companies are receiving profits and prisons are receiving commissions, the loser in this equation undoubtedly becomes the prisoner.<sup>57</sup>

As might be expected, this raised serious legal concerns. In February of 2000, Martha Wright, along with the Center for Constitutional Rights (“CCR”), filed a class action lawsuit on behalf of her grandson and other incarcerated people to challenge the high rates of the ICS providers.<sup>58</sup> Wright argued that the exclusive agreements between the Correction Corporation of America and the telephone companies were unconscionable and in violation of civil rights.<sup>59</sup> Although the judge acknowledged the civil rights concerns, she referred the case to the Federal Communication Commissions (“FCC”) under the doctrine of primary jurisdiction.<sup>60</sup> The case continued through a mediation process with the FCC.<sup>61</sup> In March of 2007, the CCR filed an alternative rulemaking proposal requesting the FCC establish a benchmark for interstate rates.<sup>62</sup> In response, the FCC underwent a notice and comment procedure in accordance with Administrative Law.<sup>63</sup> During the FCC’s rulemaking procedure, through notice and comment, it was found that the ICS rates were of serious concern.<sup>64</sup> In response, in 2015, the FCC capped intrastate calls to

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<sup>56</sup> Leah Sakala, *CenturyLink and Pay-Tel offer a peek down the rabbit hole the prison phone industry*, PRISON POL’Y INITIATIVE (Sept. 2, 2014), <https://www.prisonpolicy.org/blog/2014/09/02/rabbit-hole/> (CenturyLink willing to pay 96% commission in Escambia County, Florida).

<sup>57</sup> Carver, *supra* note 47, at 411–12 (in analyzing game theory in the telecommunication contracting context Carver argues that the optimal strategy for telecommunication companies is always to offer high commissions despite the marginal possibility of telecommunication companies being better off if they chose to cooperate).

<sup>58</sup> Complaint at 2, *Wright v. Corr. Corp. of Am.*, No. 1:00-CV-00293(GK) (D.D.C. Feb. 16, 2000).

<sup>59</sup> *Martha Wright v. Corrections Corporation of America (FCC Petition)*, CTR. FOR CONSTITUTIONAL RTS. (July 6, 2009), <https://ccrjustice.org/home/what-we-do/our-cases/martha-wright-v-corrections-corporation-america-fcc-petition>.

<sup>60</sup> *Id.*; *see also*, *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) (explaining doctrine of primary jurisdiction).

<sup>61</sup> *Martha Wright v. Corrections Corporation of America (FCC Petition)*, *supra* note 59.

<sup>62</sup> *Id.*

<sup>63</sup> Administrative Procedure Act, 5 U.S.C. § 553.

<sup>64</sup> *Global. Tel\*Link v. FCC*, 866 F.3d 397, 404–05 (D.C. Cir. 2017); *see also* Lynn Stanton, *FCC Seeks Input on Barring Inmate Site Commissions*, C-SPAN (Oct. 24, 2014), <https://www.c-span.org/video/?c4498571/lynn-stanton-telecommunications-reports-senior-editor> (Commissioner Clyburn stating, “In my 16 years as a regulator, this is the clearest, most egregious case of market failure that I have seen. Instead of getting better, rates and fees for consumers are getting more onerous. Thus, it is imperative for us to move quickly to adopt an Order for total reform”).

about 21 cents per minute.<sup>65</sup> The rate cap lowered the cost for all calls from prisons (out-of-state and in-state) to 11 cents a minute and lowered the cost of calls from jails ranging from 14 to 22 cents a minute depending on the size of the institution.<sup>66</sup>

However, telephone companies challenged the rate cap. GTL argued that the rate cap was beyond the FCC's rulemaking authority.<sup>67</sup> Specifically, they argued that the cap was arbitrary and capricious because it failed to consider key evidence in the record that would support previous costs.<sup>68</sup> The petitioners noted that ICS had a higher operating cost when they factored in the cost of site commissions, which they justified as part of doing business.<sup>69</sup> Ultimately, in 2017 with the change in federal administration, the counsel for the FCC informed that court that the FCC did not believe it had the authority to cap intrastate rates, and the court agreed.<sup>70</sup>

Despite the restriction on intrastate rates, companies are still profiting from ancillary fees<sup>71</sup> and questionable billing practices.<sup>72</sup> For example, MoneyGram fees spent to refund a user's account can cost up to \$11.95, apart from the cost of the phone call.<sup>73</sup> Similarly, JPay, a subsidiary of Securus Technologies, charges inmate families fees to transfer money into their inmate's trust accounts.<sup>74</sup> In addition, companies like Securus steer customers to pay for phone calls individually

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<sup>65</sup> *Global Tel\*Link*, 866 F.3d at 405; see also Press Release, Prison Pol'y Initiative, State of Phone Justice, *supra* note 33 (City and county run jails continued to upcharge with a national average cost of a 15-minute call amounting to \$5.74).

<sup>66</sup> Peter Wagner & Alexi Jones, *Timeline: The 18 year battle for prison phone justice*, PRISON POL'Y INITIATIVE (Dec. 17, 2018), [https://www.prisonpolicy.org/blog/2018/12/17/phone\\_justice\\_timeline/](https://www.prisonpolicy.org/blog/2018/12/17/phone_justice_timeline/).

<sup>67</sup> Sanjar, *supra* note 46, at 323.

<sup>68</sup> Zachary Fuchs, *Behind Bars: The Urgency and Simplicity of Prison Phone Reform*, 14 HARV. L. & POL'Y REV. 205, 220 (2019).

<sup>69</sup> *Global Tel\*Link*, 859 F.3d 397 at 412–13.

<sup>70</sup> *Id.* at 406, 412.

<sup>71</sup> Press Release, Prison Pol'y Initiative, State of Phone Justice, *supra* note 33 (rates are “what you pay per minute” versus fees which account for the services such as opening and the continuation of funding the account).

<sup>72</sup> Carver, *supra* note 47, at 398-99 (billing fees include programming phones to start billing before the recipient accepts the call, imposes excess surcharges, failing to discount calls made during off peak times and charging for unauthorized calls).

<sup>73</sup> *Id.*

<sup>74</sup> Stephen Raher, *The multi-million dollar market of sending money to an incarcerated loved one*, PRISON POL'Y INITIATIVE (Jan. 18, 2017), <https://www.prisonpolicy.org/blog/2017/01/18/money-transfer/> (explaining how in 2015

rather than creating prepaid accounts that would be cheaper.<sup>75</sup> These predatory tactics serve no public safety goals nor do they enhance prison security.<sup>76</sup> Despite these tactics, courts have failed to recognize the plight of the prisoner.

### ***B. Barriers to Legal Recourse***

The Supreme Court has stated that imprisonment does not strip away a prisoner's constitutional rights.<sup>77</sup> However, the courts have determined that “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform” and thus afford great deference to the prison administration.<sup>78</sup> As a remedy, the Court created the Turner Test, in which the prisoners' claims are weighed against the government's interest.<sup>79</sup> The test outlines four factors,

(1) whether there is a valid, rational connection between the regulation and legitimate governmental interests put forward to justify it; (2) whether alternative means of exercising their rights remain open to the prisoners; (3) whether accommodation of the asserted rights will trigger a “ripple effect” on fellow inmates and prison officials; and (4) whether a ready alternative to the regulation would fully accommodate the prisoners' rights at de minimis cost to the valid penological interest.<sup>80</sup>

The prison must assert that some, if not all, of these factors, have been met to justify the prison regulation as a legitimate penological interest. But considering how the first factor requires a “rational connection,” one can imagine the ease of justifying a rational connection with most prison regulations. For example, in *Beard v. Bank* a Pennsylvania prison had a policy that denied newspapers, magazines and photographs to, especially dangerous inmates.<sup>81</sup> Respondent argued

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JPay made 53 million dollars in fees. With state prison transfers averaging 995 million a year and companies on average receiving 10% companies can potentially make 99 million in fees every year).

<sup>75</sup> Press Release, Prison Pol'y Initiative, State of Phone Justice, *supra* note 33.

<sup>76</sup> *Id.*

<sup>77</sup> *Turner v. Safley*, 482 U.S. 78, 84 (1987).

<sup>78</sup> *Id.* (quoting, *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

<sup>79</sup> *Id.* at 96.

<sup>80</sup> *Id.*

<sup>81</sup> *Beard v. Banks*, 548 U.S. 521, 524–25 (2006).

that this violated his First Amendment rights.<sup>82</sup> The majority reasoned that the prison officials had a legitimate penological interest in order to curb violent behavior and provide for incentives for better prison behavior.<sup>83</sup> The Court found that there were legitimate safety and rehabilitative concerns that justified the denial of prisoners having access to newspapers, magazines and photographs.<sup>84</sup> In dissent, Justice Ginsburg noted that the materials they were seeking were less dangerous than the materials they were given upon entry to the more secure level in the prison.<sup>85</sup> Moreover, despite the second factor of the Turner Test which encourages the prison to consider alternatives,<sup>86</sup> the court often dismisses the prisoner's entire claim on the basis that the restriction serves a legitimate penological interest. Thus, one can see the already formidable battle prisoners face in bringing claims regarding constitutional violations.

The parameters of proper judicial functions also pose legal barriers for prisoners. Courts have determined that they are "inherently unsuited"<sup>87</sup> to determine the terms of sale a carrier has filed with an agency.<sup>88</sup> The Supreme Court rationalized this decision on the basis that carriers must first file their rates with the FCC to prevent unreasonable and discriminatory charges.<sup>89</sup> Thus, pursuant to the filed rate doctrine, once a carrier has filed its rates with the FCC, the rates become law and the carrier is bound by the rates unless it is found by the Commission to be unreasonable.<sup>90</sup>

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<sup>82</sup> *Id.* at 525.

<sup>83</sup> *Id.* at 530.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 543–44 (Stevens, J., dissenting) (quoting *Banks v. Beard*, 399 F.3d 134, 143 (3d Cir. 2005)) (“[I]nmate is given a jumpsuit, a blanket, two bedsheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, several envelopes, carbon paper, three pairs of socks, three undershorts and three undershirts, and may at any point also have religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup. Many of these items are flammable, could be used [to start fires, catapult feces, or to create other dangers] as effectively as a newspaper, magazine or photograph, and have been so used by . . . inmates.”), *rev'd*, 548 U.S. 521 (2006).

<sup>86</sup> *Turner v. Safley*, 482 U.S. 78, 96 (1987).

<sup>87</sup> *Arsberry v. Illinois*, 244 F.3d 558, 562–63 (7th Cir. 2001) (explaining the doctrine of primary jurisdiction which allows a court to refer an issue to an agency that is more knowledgeable).

<sup>88</sup> Communications Act of 1934, 47 U.S.C. § 203 (explaining the schedule for filing rates with the commission).

<sup>89</sup> *Am. Tel. & Tel. Co. v. Centraloffice Tel.*, 524 U.S. 214, 221–22 (1998).

<sup>90</sup> *Id.* at 222.

But the customer is also barred from challenging rates that would alter the previously filed rate.<sup>91</sup> Despite one of the primary purposes of the filed rate doctrine being the prevention of discriminatory practices, prisoners are disadvantaged from rate protection.<sup>92</sup> Ultimately, despite the statute outlawing discriminatory and preferential services,<sup>93</sup> some courts have still dismissed claims on the grounds that customers are presumed to know the rates despite any deceptive conduct by the carrier.<sup>94</sup>

Similarly, in *Arsberry*, the Court first analyzed the plaintiffs' (prisoners and family members) claim on the basis of the filed rate doctrine.<sup>95</sup> To avoid the jurisdictional bar, the plaintiffs argued that they were challenging the deal that the correctional company entered into with the phone carriers rather than the rate itself.<sup>96</sup> The plaintiffs crafted their argument on the basis that the carrier and the prison conspired to increase rates.<sup>97</sup> Thus, they were not arguing on the rate itself, but rather asking the court to regulate an environment that would make rates more favorable to customers.<sup>98</sup> The Court dismissed this argument because the agreement did not amount to a conspiracy.<sup>99</sup> Rather, Illinois had the right to rent out pieces of the market to phone companies; and, similar to airports, the companies' fees on the captive market were "not the business of federal courts."<sup>100</sup> Ultimately, the Court went on to dismiss the rest of their arguments,

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<sup>91</sup> Gallivan v. AT&T Corp., 124 Cal. App. 4th 1377, 1382 (2004) (quoting *Evanns v. AT&T Corp.* 229 F.3d 837, 840 (9th Cir. 2000)).

<sup>92</sup> *Id.*

<sup>93</sup> 47 U.S.C.A. § 202 (Westlaw through Pub. L. 101-239).

<sup>94</sup> *Guglielmo v. Worldcom, Inc.*, 808 A.2d 65, 71-72 (N.H. 2002).

<sup>95</sup> *Arsberry v. Illinois*, 244 F.3d 558, 561 (7th Cir. 2001).

<sup>96</sup> *Id.* at 562.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 566.

<sup>100</sup> *Id.*

including the First Amendment argument,<sup>101</sup> the argument in regards to kickbacks,<sup>102</sup> the equal protection argument<sup>103</sup> and the antitrust claims.<sup>104</sup>

Despite the legal setbacks, prisoners were determined to try other avenues. In *McGuire*, prisoners again raised claims against the prison's telephone contracts.<sup>105</sup> Prisoners and family members first argued on equal protection grounds.<sup>106</sup> The court similarly dismissed these claims because inmates could not be treated the same as non-inmates.<sup>107</sup> To state a valid claim, plaintiffs would have to argue that "they were being treated differently than other groups of persons who receive collect calls from prison inmates".<sup>108</sup> The plaintiff's still raised other claims. In Count VII, they argued that the contracts were in violation of the Contract Clause,<sup>109</sup> and in Count IX they raised a Sherman Antitrust Claim.<sup>110</sup> The Court dismissed the Contract Clause claim on the grounds that the plaintiffs did not have a contractual expectation that they would be able to contract for rates at their choice.<sup>111</sup>

Regarding the Sherman Antitrust Claim, plaintiffs argued that phone companies were monopolizing the market and thus subjecting people in prison and family members to these rates.<sup>112</sup> Antitrust claims have continuously made their way to the forefront of many claims against

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<sup>101</sup> *Id.* at 564 (determining that there was no suggestion of a scheme to limit the plaintiff's free speech).

<sup>102</sup> *Id.* at 565 (determining that a tax is not an impairment of a contract within the meaning of the constitution and thus the high price for the phone calls did not amount to an unjust taking of the plaintiff's property).

<sup>103</sup> *Id.* at 561 (determining that requiring the comparison of rates for inmates and non-inmates is the role of the regulatory agency).

<sup>104</sup> *Id.* at 566 (determining that the prisoners antitrust claim lacked evidence that the defendants were acting "jointly and in concert").

<sup>105</sup> *McGuire v. Ameritech Servs.*, 253 F. Supp. 2d 988, 992 (S.D. Ohio 2003).

<sup>106</sup> *Id.* at 998.

<sup>107</sup> *Id.* at 1001.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1005.

<sup>110</sup> *Id.* at 1006; *see also* 15 U.S.C.A. § 1 (Westlaw through Pub. L. 108-237) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.")

<sup>111</sup> *McGuire*, 253 F. Supp. 2d at 1006.

<sup>112</sup> *Id.*

prison telecommunications companies and understandably so. Recall, many of these private companies have consolidated and thus monopolize the market in restraint of trade, but the courts have continued to carve out exceptions for the private companies.<sup>113</sup> The former Chairman of the Federal Trade Commission (“FTC”) even noted that, “the offense of monopolization requires not only the possession of monopoly power in the relevant market, but also ‘the willful acquisition or maintenance of that power as *distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.*’”<sup>114</sup> So in the prison context although these companies held a monopoly, courts are constantly distinguishing it from a monopoly that acts in restraint of trade and instead of finding various justifications in the law. Thus, in *McGuire*, the Court dismissed the claims based on the state action doctrine,<sup>115</sup> reasoning that because the immunity extends to the state it can also extend to the private party.<sup>116</sup>

Because the Supreme Court had not ruled on these specific issues, prisoners in different states continued to raise federal and state claims against ICS providers. In *Matter of Walton*, petitioners unsuccessfully attempted to argue that the telephone charges allocated as a commission

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<sup>113</sup> John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REGUL. 269, 273 (2003) (explaining a unilateral governmental restraint where public officials determine the consumer injury although the decisions are effectuated through the actions of private companies. Compared to hybrid restraints where the government specifically empowers private actors and allows them to exercise their own discretion. Such conduct more closely resembles an antitrust violation, however is immune).

<sup>114</sup> Deborah Platt Majores, Chairman, Fed. Trade Comm’n, Remarks at the Tokyo American Center Distinguishing Unilateral Conduct from Aggressive Competition 2–3 (April 3, 2006) (quoting *United States v. Grinnell*, 384 U.S. 563, 571 (1966)), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/distinguishing-unilateral-conduct-aggressive-competition/060403tokyoamericancenter\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/distinguishing-unilateral-conduct-aggressive-competition/060403tokyoamericancenter_0.pdf).

<sup>115</sup> *State Action*, WOLTERS KLUWER BOUVIER L. DICTIONARY, (“State action is an action that deprives a person of a federally protected right because of some relationship between the action and the state. The element of state responsibility or involvement or authorization of the act makes the act state action.”).

<sup>116</sup> *McGuire*, 253 F. Supp. 2d at 1006; *see also* Lopatka & Page, *supra* note 113, at 271 (“That doctrine protects the state from liability for its anticompetitive acts and protects private parties from liability for actions undertaken pursuant to a clearly articulated state policy and actively supervised by the state”); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 97 (1980) (Standards for antitrust immunity require that “the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the State itself.”).

to the Department of Corrections (“DOC”) constituted a tax.<sup>117</sup> The majority disagreed with this characterization and argued that this was a “permissible...governmental activity”.<sup>118</sup> The Court agreed with the argument that the owner of the property is entitled to some form of “reasonable compensation” regardless of whether the payphone is in a public or private place.<sup>119</sup> The dissent even noted that the majority overlooks the distinction that people who use phones in public or private places are not prevented from leaving by armed guards.<sup>120</sup> But despite the Courts noting that the prisoners’ confinement limits their options,<sup>121</sup> they still justified the excessive charges on the existence of alternatives.<sup>122</sup>

In another notable attempt to differentiate a prisoner’s legal rights, in *Holloway* inmate Winston Holloway brought suit against the Arkansas Department of Correction (“ADC”) alleging that the commissions paid to the prisons, which resulted in elevated phone charges, violated his first amendment rights to free speech.<sup>123</sup> Here, GTL was the exclusive provider of phone services in the prison and, based on their contract, ADC was given 45% of GTL’s gross revenue.<sup>124</sup> Holloway argued that if the prison was not given a commission, there would be “real market competition” and in turn, the rates would fall and he would be able to call his family more often.<sup>125</sup>

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<sup>117</sup> *Walton v. N.Y. State Dep't of Corr. Servs.*, 921 N.E. 2d 145, 147 (N.Y. 2009) (also argued the charges were an unlawful taking and they violated the equal protection clause).

<sup>118</sup> *Id.* at 151.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 162.

<sup>121</sup> *Id.* at 155; *see also*, Corey Frost, *Protecting Written Family Communications in Jails: A 50 State Survey*, PRISON POL'Y INITIATIVE (May 19, 2016), <https://www.prisonpolicy.org/postcards/50states.html> (some jails are banning letters from home and only allowing postcards).

<sup>122</sup> Paul R. Zimmerman & Susan M.V. Flaherty, *Location Monopolies and Prison Phone Rates*, 47 Q. REV. ECON. FIN. 261, 262 (2007) (arguing that letters and emails are not an equivalent substitute to phone calls considering the high rate of illiteracy in prisons).

<sup>123</sup> *Holloway v. Magness*, No. 5:07CV00088, 2011 U.S. Dist. LEXIS 6190, at \*23 (E.D. Ark. Jan. 21, 2011).

<sup>124</sup> *Id.* at \*4.

<sup>125</sup> *Id.* at \*23.

The majority ruled that Holloway failed to show a significant infringement on his right to communicate with the outside world.<sup>126</sup>

### ***C. New Forms of Revenue but Still No Protection***

As we have seen there is money to be made in the prison industry; and, coupled with a captive market, private companies are continuously looking for new ways to capitalize. Thus, digital sales have become the new frontier. Some prisons have introduced “free” tablets<sup>127</sup> with no upfront cost but significant fees for use.<sup>128</sup> The technological advancements in prison communication are a reflection of society’s advancement but equally reflect the dependency on communication through technology. But if the prisons are introducing widely used forms of technology, one could assume that it could be more difficult to overcome the second factor of the Turner Test (reasonable alternatives). Because the prisons should not be able to have it both ways, they should not justify introducing new technology with higher prices than society would pay, but then flip the script and argue that prisoners are not forced to pay for the new technology because there are other alternatives. If the prison is willing to introduce these technological changes for efficiency, security and safety, it should follow that some of these benefits in a reduction of cost should be reaped by the prisoner.<sup>129</sup> Furthermore, one could hope with these cost saving measures prisoners can create a new argument to reduce the cost of this technology for there to be reasonably

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<sup>126</sup> *Id.* at \*40.

<sup>127</sup> Tonya Riley, “Free” Tablets Are Costing Prison Inmates a Fortune, MOTHER JONES (Oct. 5, 2018), <https://www.motherjones.com/politics/2018/10/tablets-prisons-inmates-jpay-securus-global-tel-link/> (discussing how GTL offers tablets to 350,000 inmates across the United States).

<sup>128</sup> Stephen Rahe, *The Wireless Prison: How Colorado’s tablet computer program misses opportunities and monetizes the poor*, PRISON POL’Y INITIATIVE (July 6, 2017), <https://www.prisonpolicy.org/blog/2017/07/06/tablets/> (explaining how in Colorado GTL contracts with the local prison and installs Wi-Fi and provides tablets to all prisoners. The tablets have various functions such as making calls, sending electronic messages, playing games and listening to music. However, subscriptions of calls can be as much as \$19.99 a month compared to nearly free music streaming in the outside world).

<sup>129</sup> Ananya Bhattacharya, *This is the tablet prisoners use*, CNN BUS. (July 23, 2015, 8:37 AM), <https://money.cnn.com/2015/07/23/technology/jpay-prison-tablet/> (explaining how in North Dakota, Deputy Warden noted safety and economic benefits of introducing tablets into the prison).

priced communication as well as access to other amenities on these digital devices. Unfortunately, incarceration continues to double the price tag.

The technological market in prison continues to expand.<sup>130</sup> For example, some tablets offer prisoners a subscription for streaming music and ebooks.<sup>131</sup> However, the prices are far from the “fair” commissary prices. A single song can cost up to \$1.85.<sup>132</sup> Additionally, some of these tablets also offer text message services; however, a single text can range from 5 cents to 1.25 per message.<sup>133</sup> Companies even charge for sending emails, and activists have noted that this is just a way to monetize human contact.<sup>134</sup> But, vendors argue that the costs are justified in order to securely run the programs.<sup>135</sup> However, there is a lack of compelling evidence to suggest that the prices are reasonably related to the costs.<sup>136</sup> Unfortunately, because there is a lack of regulation in the industry, companies continue to dictate the fees. Thus, similar to the telephone commissions (or kickbacks), some contracts even guarantee the Department of Corrections a portion of the tablet revenue.<sup>137</sup>

Although it may be beneficial to have this form of technology, apart from the cost, some prisoners are disadvantaged by these digital devices. Pennsylvania attempted to eliminate book

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<sup>130</sup> *Prison Inmates Offer Captive Market for Gadget Makers*, NBC NEWS (June 23, 2014, 3:59 AM), <https://www.nbcnews.com/business/business-news/prison-inmates-offer-captive-market-gadget-makers-n134191> (noting how in 2014 U.S. prisoners purchased an estimated \$750 million in clear electronics).

<sup>131</sup> Press Release, Prison Pol’y Initiative, *The Company Store: A Deeper Look at Prison Commissaries* (May 2018), <https://www.prisonpolicy.org/reports/commissary.html> [hereinafter Press Release, Prison Pol’y Initiative, *The Company Store*] (“commissary operators have a legal monopoly, so they don’t have to worry about price competition, and thus do not incur costs associated with special sales or discounts”); *see also*, Mack Finkel & Wanda Bertram, *More states are signing harmful “free prison tablet” contracts*, PRISON POL’Y INITIATIVE (Mar. 7, 2019), <https://www.prisonpolicy.org/blog/2019/03/07/free-tablets/> (explaining how the tablets do not come with internet access and most are cheaply made).

<sup>132</sup> Press Release, Prison Pol’y Initiative, *The Company Store*, *supra* note 131.

<sup>133</sup> Raheer, *supra* note 22, at 26.

<sup>134</sup> Diana Kruzman, *In U.S. prisons, tablets open window to the outside world*, REUTERS (July 18, 2018, 6:24 AM), <https://www.reuters.com/article/us-usa-prisons-computers/in-u-s-prisons-tablets-open-window-to-the-outside-world-idUSKBN1K813D>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Press Release, Prison Pol’y Initiative, *The Company Store*, *supra* note 131 (states like New York, Colorado and Missouri receive ranging commissions).

donations in favor of requiring prisoners to use e-books.<sup>138</sup> Similarly, in South Dakota, the prison eliminated the use of paralegals as well as access to law libraries after tablets became available.<sup>139</sup> In response, a prisoner brought suit alleging that the library closures deprived him of important legal advice.<sup>140</sup> Also in North Dakota, another prisoner brought suit claiming that the tablets were defective requiring constant repair thus leaving them without legal advice.<sup>141</sup> Scholars have further noted that if incarcerated people cannot read and write, the tablets are ultimately useless.<sup>142</sup> But recall, the Courts have justified the prices of telecommunications based on alternatives<sup>143</sup>, however, if the prisons themselves are eliminating these alternatives for more advanced technology the Court will eventually have to intervene (if plaintiffs can make it past the threshold of high costs of calls serving no penological interest).

Prisoners have brought first amendment claims, equal protection arguments, Sherman Antitrust arguments and more. However, it appears that at every turn the court is willing to carve out exception after exception to justify the prison's and company's actions. The next section discusses how the courts may not be the only alternative. However, I also consider how the prisoner's constitutional rights can be viewed through the lens of religion and consumer protection to provide possible judicial relief.

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<sup>138</sup> Samantha Melamed, *Under Pressure, Pa. Prisons Repeal Restrictive Book Policy*, PHILA. INQUIRER (Nov. 2, 2018), <https://www.inquirer.com/philly/news/pennsylvania-book-ban-doc-books-through-bars-wetzel-20181102.html> (discussing how the policy was repealed after significant outcry. The Pennsylvania prisons however noted that the purpose of the ban was to eliminate the smuggling of drugs into prisons. On previous occasions the department of correction staff discovered paper soaked in synthetic cannabinoids).

<sup>139</sup> Derek Gilna, *Lawsuits Filed Over South Dakota Replacing Prison Law Libraries with Tablets*, PRISON LEGAL NEWS (Jan. 8, 2019), <https://www.prisonlegalnews.org/news/2019/jan/8/lawsuits-filed-over-south-dakota-replacing-prison-law-libraries-tablets/>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; *see also*, *Maday v. Dooley*, No. 4:17-CV-04168-KES, 2018 U.S. Dist. LEXIS 109551, at \*24 (D.S.D. June 7, 2018) (arguing that the tablets would often glitch because the Lexis app was not designed for tablets).

<sup>142</sup> Gilna, *supra* note 139.

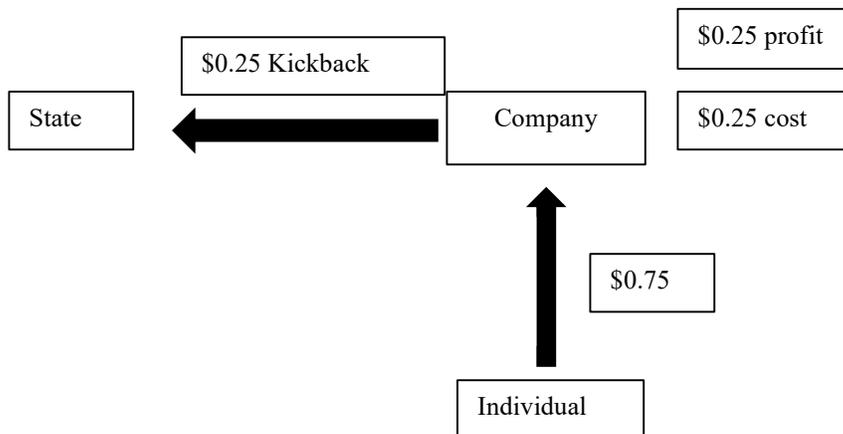
<sup>143</sup> Zimmerman & Flaherty, *supra* note 122, at 262 (arguing that letters and emails are not an equivalent substitute to phone calls considering the high rate of illiteracy in prisons).

#### IV. Different approaches to legal recourse for the captive market

##### A. Introducing Competition into the Telecommunication Industry

A prominent issue in the prison telecommunication industry is a lack of competition. As previously mentioned, states and private companies have cited efficiency as their justification for the lack of competition.<sup>144</sup> But, a highly concentrated industry with few competitors limits any benefits for innovation or cost reduction.<sup>145</sup> Companies can benefit from competition in the industry. In *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, Carver presents various scenarios in which competition can be beneficial.<sup>146</sup> Carver first lays out the current contracting scheme. Figure 1 explains the present contract. Here, the telephone call costs the individual .75 cents.<sup>147</sup> The state is given .25 in commission and the telephone company retains .50 cents, .25 is the cost of providing the service, and .25 is the profit they receive by exercising a monopoly.<sup>148</sup>

**Figure 1. Diagram of Present Contracts<sup>149</sup>**



<sup>144</sup> Ryan Nunn, *On the Economics of Private Prisons*, BROOKINGS INST. (Feb. 17, 2017), <https://www.brookings.edu/podcast-episode/on-the-economics-of-private-prisons/>.

<sup>145</sup> *Id.*

<sup>146</sup> Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 FED. COMM'N. L.J. 391, 394 (2002).

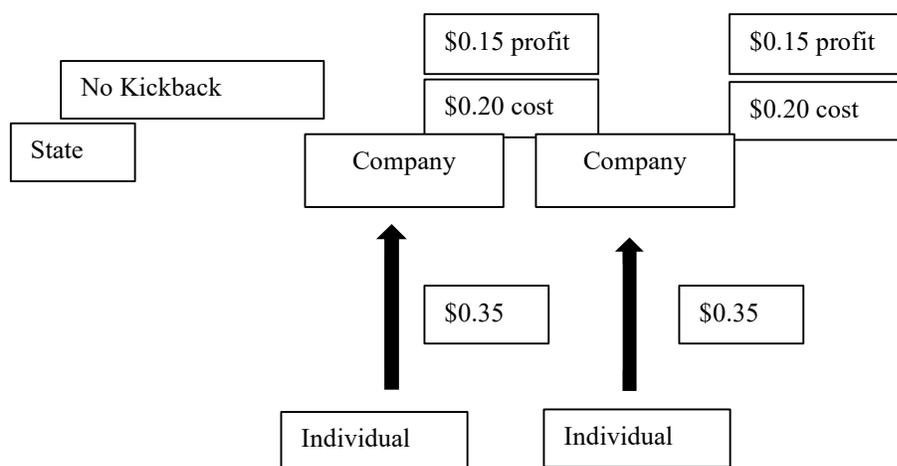
<sup>147</sup> *Id.* at 414.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

In contrast, Figure 2 analyzes a situation where there are no kickbacks and companies are competing for contracts. In this scenario, profits do decrease by ten cents but the cost of providing the service decreases to \$0.20, however most notably, the price of the call decreases from \$0.75 to \$0.35.<sup>150</sup>

**Figure 2. Diagram of Competition without Kickbacks<sup>151</sup>**



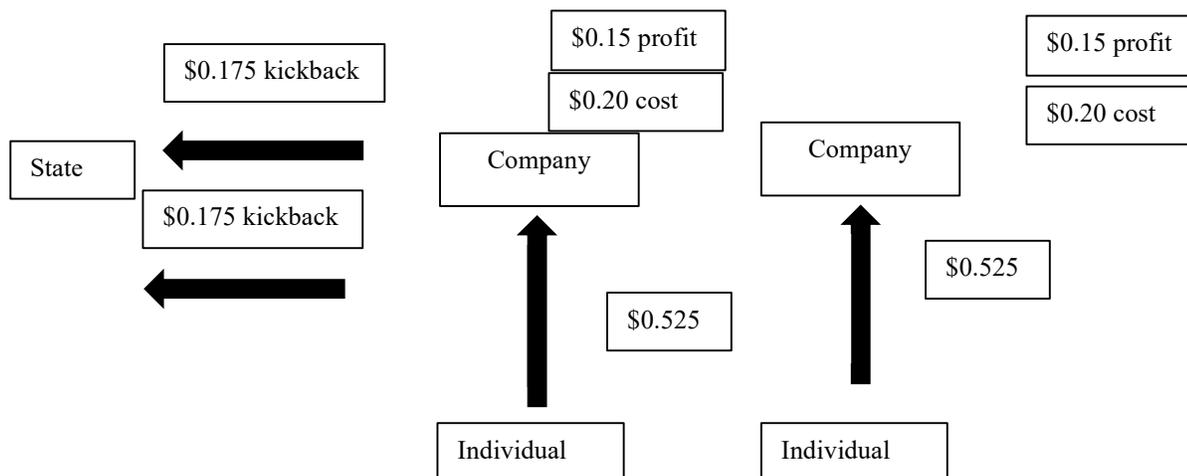
In Figure 3, Carver introduces incentives but maintains competition.<sup>152</sup> Here, although the prisoner must pay a bit more for the call, it is cheaper than a call without competition. In this scenario, the incentives are maintained but decreased because of competition. And thus, for states that argue commissions are used to benefit the prisons, the introduction of competition would still serve that purpose.

<sup>150</sup> *Id.* at 415.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

**Figure 3. Diagram of Competition with Kickbacks<sup>154</sup>**



Ultimately, Carver notes that this form of competition is actually more in line with the directive of the Telecommunication Act of 1996 in terms of removing barriers of entry as well as providing just, reasonable and affordable rates.<sup>155</sup> Thus, to maintain a lack of competition in a captive market further barred by their confinement arguably serves no penological interest.

***B. The Consumer Protection Argument***

From telephones to tablets, to commissary purchases and even paying to stay, the American prisoner is constantly purchasing goods. The normal market economy is driven by supply and demand. A prudent supplier identifies a product that consumers are willing to buy. In this calculation, they must factor in the cost of the product which is offset by the price the consumers are willing to pay. Thus, if suppliers have identified a product with high demand, they have more control over the price. To prevent suppliers from monopolizing, states enact antitrust legislation. But if the states justify these monopolies consumers are left with no recourse. Consumers are undoubtedly empowered by choice but when a supplier has identified a crucial need with no other

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

options the consumers become subject to the supplier and thus subject to price.<sup>156</sup> Prisoners are consumers; and suppliers have identified, capitalized and exploited the inmate market.<sup>157</sup> But due to their incarceration status, they are best described as involuntary consumers limited in choice and thus forced into the consumption of these goods and services.<sup>158</sup> Like any other consumer, prisoners should be afforded legal protections.<sup>159</sup>

The FTC is empowered to declare unfair methods of competition affecting commerce and resulting in unfair<sup>160</sup> or deceptive acts or practices unlawful.<sup>161</sup> States have particularized their form of protection through Unfair Deceptive Acts Practices (“UDAP”). UDAP statutes are an innovative form of legal recourse in an attempt to hold the company liable for their consumer violations. Although states may differ, these statutes serve to prohibit unfair and deceptive practices. As noted earlier, prisoners’ claims are analyzed under the Turner Test.<sup>162</sup> However, the Turner Test determines whether the prison’s action satisfies a legitimate penological interest based on the prison’s policies. The consumer protection argument differs because with the increase of

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<sup>156</sup> Drew Kukorowski, *The price to call home: state-sanctioned monopolization in the prison phone industry*, PRISON POL’Y INITIATIVE (Sept. 11, 2012), <https://www.prisonpolicy.org/phones/report.html> (explaining inelastic demand).

<sup>157</sup> Kukorowski makes the case that: “Markets for goods and services work best when consumers have the freedom to select the best seller. In the prison phone market, though, the consumers have no choice as to which telephone company to use. That choice is made for them by the state prison system. But state prison systems cannot be expected to advocate for lower phone rates because they don’t have consumer interests in mind. And prison telephone companies have little incentive to provide reasonable rates to their customers because they do not answer to those customers.” *Id.*

<sup>158</sup> Alex Kornya et al., *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L. L. REV., 107, 112 (2019).

<sup>159</sup>“Consumer protection law exists, after all, to ensure justice and fairness in the marketplace, and to help correct vast inequalities in bargaining power, wherever that market may be. It is difficult to imagine a situation where consumer protections are more important than in the criminal legal context, where the power of the state can be leveraged by private companies to create onerous terms of service that individuals and their desperate families are compelled to accept.” *Id.* at 113.

<sup>160</sup> “Unfairness occurs when: (A) an act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.” 12 U.S.C.S. § 5531(c)(1) (LEXIS through Pub. L. No.116-182).

<sup>161</sup> A “deceptive act” is one that is likely to materially mislead the targeted consumer acting reasonably under the circumstances. 15 U.S.C.S. § 45(n) (LexisNexis 2020).

<sup>162</sup> *Turner v. Safley*, 482 U.S. 78, 96 (1987).

prison retailing the prisoner is the consumer.<sup>163</sup> And so under the UDAP statutes, consumers are afforded legal protections.

One avenue for legal recourse using the consumer protection argument can be through a company's deceptive claims in its advertisement and promotional materials.<sup>164</sup> Some companies advertise that tablets have certain functions that they lack in reality.<sup>165</sup> Furthermore, a company's false advertising of phone rates can also be actionable under UDAP statutes.<sup>166</sup> Lastly, the consumer protection approach is more cognizant of the prisoner's predicament and elevates their status to that of any other consumer.<sup>167</sup> Previous arguments have always confined the prisoners' argument to their status and always required a penological interest. With this mindset, courts have barred prisoners from legal recourse by extending immunity to private companies acting in accordance with government authorization.

## **V. Conclusion**

Incarceration is a legal punishment, but a punishment that exposes incarcerated people to exploitation is unjust. With the massive increase in the prison population, private companies identified a captive market and exploited their vulnerability. Through telecommunication, private companies targeted prisoners' ties to their community and exploited their need to communicate. But despite this kind of exploitation, prisoners who sought remedies were met with legal barriers. Technological advancements made their way behind bars, and again private companies identified a profitable market.

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<sup>163</sup> Raher, *supra* note 22, at 60.

<sup>164</sup> *Id.* at 67.

<sup>165</sup> *Id.* at 60.

<sup>166</sup> "Prison-retail customers often have actionable claims for unfair or unconscionable practices because of their inability to avoid injury: prison retailers sell essential goods (food, clothing) or services (communication with family) through state-created monopolies, and if these vendors employ unfair tactics, customers have no alternative. As one court found, families who pay exorbitant phone rates do so "out of sheer desperation for contact with their loved ones." *Id.*

<sup>167</sup> *Id.*

The Court's unwillingness to legally protect incarcerated people based on the filed rate doctrine and other jurisdictional bars has left incarcerated people vulnerable to exploitation by private companies. To remedy these tactics, the court should recognize the consumer rights of incarcerated people. Furthermore, they should introduce competition into the industry to regulate the prices of phone calls, but more recently, technology. Ultimately, companies will continue to profit off of the incarceration of people until the courts intervene. People behind bars are punished through confinement and the limitation of some rights. But allowing them to be exploited under the guise of legitimate penological interest through private companies goes beyond punishment and is unjust.