

# NOTE

## How States Can Take a Stand Against Prison Banking Profiteers

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### ABSTRACT

*In recent years, state corrections departments have faced pressure to provide better prison conditions while simultaneously cutting costs. Many critics have touted the emergence of privatized prison services as a cost-effective resolution. However, those services shift the costs on to some of the poorest and most vulnerable consumers—prisoners and their families. This Note explores how private companies providing prison banking services to state correctional facilities use unfair practices to increase profits. The umbrella of prison banking services includes deposits into inmate trust accounts, which allow prisoners to purchase necessities, and prepaid debit release cards, which are used to return money to prisoners upon release. This Note describes how certain private companies retain a monopoly on these services, and are awarded contracts based on the amount of commission paid to state correctional facilities.*

*As a result of paying those commissions and having no incentive to cut costs, private companies drive up their prices and charge consumers exorbitant rates to make deposits or to utilize prepaid cards. These practices disproportionately affect prisoners' families who provide their incarcerated loved ones with monetary support, and released inmates struggling to get back on their feet post-incarceration. Statistically, both of these groups are more likely to be low-income and least able to manage additional financial strain. This*

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*Note proposes state-level legislation to better protect consumers from these abuses and outlines five key provisions that, if adopted, will serve to prevent private companies from unreasonably increasing their profit margins at the expense of vulnerable consumers.*

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## INTRODUCTION

There are more individuals behind bars in the United States than in any other developed country.<sup>1</sup> To put this in context, “the United States has less than five percent of the world’s population. Yet we have almost twenty-five percent of the world’s total prison population.”<sup>2</sup> Put differently, approximately one in one hundred people in this country are currently behind bars.<sup>3</sup> Accordingly, massive sums of money are directed toward correctional spending. In the 2014 fiscal year alone, states spent approximately \$55 billion on housing and feeding prisoners, as well as maintaining state correctional facilities.<sup>4</sup> Yet taxpayers do not bear these costs equally. Increasingly, the family members of prisoners are being forced to bear the financial burdens of incarceration.<sup>5</sup> Statistically speaking, those same families are more likely to be low-income and already struggling to make ends meet.<sup>6</sup>

Pat Taylor is just one example. Ms. Taylor works as a housekeeper while her son, Eddie, currently serves a twenty-year prison sentence.<sup>7</sup> Like many other families, Ms. Taylor provides financial support to an incarcerated loved one so that he can afford the things

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1 PEW CHARITABLE TRS., *ONE IN 100: BEHIND BARS IN AMERICA* 2008, at 5 (2008), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/onein100pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf) (describing how the United States not only outpaces other countries in the number of people it incarcerates, but also the rate at which it does so).

2 Hillary Clinton, Keynote Address at Columbia University’s David N. Dinkins Leadership and Public Policy Forum (Apr. 29, 2015), <http://www.c-span.org/video/?325657-1/hillary-clinton-remarks-criminal-justice-reform>.

3 PEW CHARITABLE TRS., *supra* note 1, at 5.

4 NAT’L ASS’N OF STATE BUDGET OFFICERS, *STATE EXPENDITURE REPORT: EXAMINING FISCAL 2013–2015 STATE SPENDING* 54–55 (2015), [https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/State%20Expenditure%20Report%20\(Fiscal%202013-2015\)S.pdf](https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/State%20Expenditure%20Report%20(Fiscal%202013-2015)S.pdf) (“Even though overall state populations have decreased, state spending on corrections continues to grow.”).

5 Daniel Wagner, *Prison Bankers Cash in on Captive Customers*, CTR. FOR PUB. INTEGRITY, <http://www.publicintegrity.org/2014/09/30/15761/prison-bankers-cash-captive-customers> (last updated Nov. 11, 2014, 10:07 AM).

6 See generally Bruce Western et al., *Crime, Punishment, and American Inequality*, in *SOCIAL INEQUALITY* 771, 771–91 (Kathryn M. Neckerman ed., 2004) (discussing how the criminal justice system exacerbates social and economic inequity).

7 Wagner, *supra* note 5.

he needs while serving his sentence.<sup>8</sup> She sends her son money every other week so that he can make purchases from the prison commissary for basic needs like toothpaste.<sup>9</sup> Ms. Taylor herself does not have much money nor does she maintain a high-paying job.<sup>10</sup> Other families may not send money weekly, but instead provide financial support to help loved ones get back on their feet upon release, when they may not yet have gainful employment but likely still have financial obligations.<sup>11</sup> These responsibilities alone—providing funds for daily living and helping loved ones get back on their feet upon release—place a heavy burden on families.

Of greater concern, however, is that thousands of these families across the United States are being forced to pay *extra* to cover the exorbitant fees charged by private companies managing certain prison services. For example, private companies often charge fees when families deposit money into inmate trust accounts.<sup>12</sup> Ms. Taylor faces a decision each week whether to send her son needed money for basic expenses or make the visit.<sup>13</sup> To deposit fifty dollars into Eddie's inmate trust account, Ms. Taylor is charged an additional \$6.95.<sup>14</sup> According to Ms. Taylor, once these extra fees are factored in, she cannot afford to both send money and visit, forcing her to choose between offering financial or emotional support.<sup>15</sup> Even upon release, prisoners and their families are still plagued by private companies' excessive fees. For many released prisoners, the only way they can access their leftover funds from their trust accounts is through prepaid debit cards. These cards carry massive fees. Fees that prisoners often have no choice but to accept. Fees that eat away at their minimal funds and force recently released prisoners to continue relying on family members for financial support.<sup>16</sup>

This Note highlights some of the larger issues surrounding privatization of state prisons by focusing on specific instances of consumer abuse within this model. It focuses primarily on one category of

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638, 639 (2015).

<sup>12</sup> See *infra* notes 101–03 and accompanying text.

<sup>13</sup> Wagner, *supra* note 5.

<sup>14</sup> *Id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *infra* Section I.B.2.

prison-related services, prison banking,<sup>17</sup> to illustrate how inflated fees charged by private companies, and compulsory consumer contracts, amount to unfair and abusive consumer treatment. Currently, the fees charged to low-income families attempting to financially support their loved ones are unregulated.<sup>18</sup> For example, the protections that prevent most consumers from being charged unreasonable rates for deposit or card-swipe services do not exist for private prison banking services.<sup>19</sup>

To address the legal and policy concerns raised by these abusive and unfair practices, this Note first articulates how the rise of privatization in state correctional systems has led to private contracts for prison banking services. Part I also discusses how these prison banking services work in practice. Part II elucidates how private companies harm consumers by retaining a virtual monopoly, charging unfair rates, and pushing compulsory contracts onto consumers. Part III discusses the lack of recourse currently available for those facing such consumer abuses by identifying shortcomings in both litigation and regulation, and describes why a more targeted solution is needed. Part IV then articulates a comprehensive proposal for reintegrating consumer choice into the correctional system and regulating future abuses. This solution proposes creating state legislation that incorporates five key provisions: (1) an explicit limit on the amount of commission state correctional facilities may receive from private companies; (2) a mandated competitive bidding process for private contracts; (3) the creation of a consumer review panel; (4) a requirement that all consumer fees accurately reflect the true costs of processing; and (5) a threshold level of consumer choice for each contract. State legislation that incorporates each of these provisions will

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17 For the purposes of this Note, prison banking services will encompass only inmate trust accounts and prepaid debit release cards.

18 See Prison Policy Initiative, Comment Letter on Proposed Amendments to Regulation E 11–12 (Mar. 18, 2015), <http://static.prisonpolicy.org/releasecards/CFPB-comment.pdf> (calling on the Consumer Financial Protection Bureau (“CFPB”) to “conduct a further rulemaking proceeding to address the widespread problems in the correctional facility financial services market” including the trust account kickbacks).

19 See, e.g., Amirah Al Idrus, *Debit Cards Slam Released Prisoners with Sky-High Fees, Few Protections*, CTR. FOR PUB. INTEGRITY, <http://www.publicintegrity.org/2014/09/30/15768/debit-cards-slam-released-prisoners-sky-high-fees-few-protections> (last updated Oct. 2, 2014, 7:32 AM) (“Prison release cards appear to fall between the cracks of existing consumer protection rules.”); German Lopez, *How Private Bankers Cash In on Released Prisoners*, VOX (Nov. 3, 2015, 9:00 AM), <http://www.vox.com/explainers/2015/11/3/9661554/prison-bank-prepaid-card> (“[P]repaid prison cards are by and large ignored by regulators like the Consumer Financial Protection Bureau.”).

provide relief for consumers, while also retaining an inherent flexibility so that states can adapt to regulate any future abuses that may arise.

## I. RISE OF PRIVATIZATION IN THE CORRECTIONAL SYSTEM

### A. *Early Development of Prison Privatization*

The idea of privatizing the correctional system is not entirely novel. In fact, its beginnings trace back to the early republic when “government-appointed jailers ran jails for profit” by charging prisoners for their services.<sup>20</sup> Later, many correctional systems utilized private leasing contracts, also known as convict leases, where they agreed to lease out prisoners for different forms of labor for a set period of years, either to private companies or to public works projects such as railroad construction.<sup>21</sup> This was especially prevalent in the South.<sup>22</sup> Edmund Richardson, a successful cotton plantation owner, has been credited with earning much of his wealth as a result of convict leases in Mississippi.<sup>23</sup> Eventually the use of convict lease agreements declined, but the operation of correctional facilities by the government quickly faced other criticisms: monumental costs were being incurred as prison overcrowding and other prison conditions worsened.<sup>24</sup> As pressure mounted on the government to improve conditions while decreasing costs, the idea of privatization reemerged.<sup>25</sup>

Privatization of prisons has become widespread in this country. Today, both the federal government and the majority of states have

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20 David Yarden, Book Note, *Prisons, Profits, and the Private Sector Solution*, 21 AM. J. CRIM. L. 325, 326 (1994) (reviewing *PRIVATIZING CORRECTIONAL INSTITUTIONS* (Gary W. Bowman et al. eds., 1993)).

21 See A.E. Raza, *Legacies of the Racialization of Incarceration: From Convict-Lease to the Prison Industrial Complex*, 2011 J. INST. JUST. & INT’L STUD. 159, 163–65.

22 See *id.*

23 MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928*, at 132 (1996) (noting Richardson’s plantations produced cotton “valued at half a million dollars per year” for which “his ‘appetite for prison labor could hardly be satisfied.’”).

24 In 2006, for example, California Governor Arnold Schwarzenegger “ordered emergency measures to control a ballooning state-prison population. Prisons were so overcrowded that hundreds of inmates were sleeping in gyms.” Stephanie Chen, *Larger Inmate Population is Boon to Private Prisons*, WALL STREET J. (Nov. 19, 2008, 12:01 AM), <http://www.wsj.com/articles/SB122705334657739263>. For further discussion of prison overcrowding in U.S. prisons and whether the Eighth Amendment prohibition on cruel and unusual punishment should apply to such conditions, see Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009).

25 Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1392–93 (2003).

outsourced at least some aspect of their correctional programs to private companies.<sup>26</sup> The growth has been incremental. Initially, only discrete services like medical care or maintaining commissaries were contracted out to private companies.<sup>27</sup> Eventually this process of contracting out expanded so that now some prisons are run entirely by private contractors.<sup>28</sup> Before long, entrepreneurs were looking for new ways to capitalize on this privatization trend.

During the initial rise of privatized services, private vendors began to come up with creative ways to appeal to correctional facilities and obtain contracts. One successful method was to offer a monetary commission to prisons.<sup>29</sup> In order for this to work, certain services were provided at higher cost to consumers (i.e., prisoners or their families) which allowed private vendors to offer monetary commissions to correctional departments to retain their contracts while still making a profit.<sup>30</sup>

One of the most highly publicized, and strongly criticized, of those services were phone rates for calls made from prisoners to their families. These rates were charged to those outside the prison. Consequently, family members and friends of inmates, rather than the inmates themselves, were forced to bear the cost of excessively high rates.<sup>31</sup> Moreover, if family members wanted to have any communication with their incarcerated loved ones, short of visiting in person (which many were unable to do because of long distances and work schedules) or writing letters,<sup>32</sup> they had no choice but to use prison-

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26 Lucas Anderson, Note, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113, 115 (2009). For a list of states that have explicitly authorized private prison contracts by statute, see *id.* at 136–39.

27 See *id.* at 118.

28 See *id.* The Obama Administration announced in 2016 that the federal government would phase out its use of private for-profit prisons. See Charlie Savage, *U.S. to Phase Out Use of Private Prisons for Federal Inmates*, N.Y. TIMES (Aug. 18, 2016), <http://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html>. Many prisoners' rights advocates celebrated this news and called on states to follow suit. See *id.*

29 See DREW KUKOROWSKI ET AL., PRISON POLICY INITIATIVE, PLEASE DEPOSIT ALL OF YOUR MONEY: KICKBACKS, RATES, AND HIDDEN FEES IN THE JAIL PHONE INDUSTRY 3 (2013), [https://static.prisonpolicy.org/phones/please\\_deposit.pdf](https://static.prisonpolicy.org/phones/please_deposit.pdf) (describing how phone companies are often awarded contracts based on the amount of commission paid to state correctional departments).

30 *Id.*

31 See Paula Acevedo, *Private Prisons: Profiting from Families, Controlling Inmates' Fates*, PUB. PURPOSE (Jan. 20, 2016), <http://thepublicpurpose.com/2016/01/20/private-prisons-profiting-from-families-controlling-inmates-fates/>.

32 See Brittini Downs, Note, *A Decade-Long Cry for Help Answered: The FCC Lowers the Rates of Interstate Prison Phone Calls*, 22 COMM'LAW CONSP'CTUS J. COMM. L. & TECH. POL'Y 131, 148 (2014).

provided phone services because of the increased security required for these phone calls.<sup>33</sup> After years of public outcry and involvement of advocacy groups, the Federal Communications Commission (“FCC”) implemented limited regulations for prison phone service providers in 2013.<sup>34</sup>

However, back in 2002, one man discovered a market that remained untapped by private vendors—prison banking services.<sup>35</sup> This man, Ryan Shapiro, is now the CEO and founder of JPay, Inc., the leading provider of these services.<sup>36</sup>

## *B. Modern-Day Privatization of Prison Banking Services*

Shapiro first focused his attention on the correctional system when he thought of an idea to change the existing system for making deposits into inmate trust accounts into what he viewed as a more efficient one.<sup>37</sup> Instead of relying solely on money orders sent by mail, which had previously been the primary way to deposit funds, Shapiro proposed an electronic system where funds would be deposited into inmate accounts by using debit cards.<sup>38</sup>

### *1. Prisoners Access Money Using Inmate Trust Accounts*

In most states, prisoners are required to pay for some expenses with their own money while behind bars—personal items from commissary,<sup>39</sup> certain medical expenses,<sup>40</sup> and in limited states, even rent and meals.<sup>41</sup> Moreover, prisoners are expected, if not required, to

<sup>33</sup> See *id.* at 138.

<sup>34</sup> Press Release, FCC, FCC Bars High Rates for Long Distance Phone Calls in Jails and Prisons Nationwide (Aug. 9, 2013), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-322749A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-322749A1.pdf). The FCC issued further rate caps for local and long-distance inmate calls on August 4, 2016. However, those caps have been stayed pending judicial review, leaving only the interim rate caps for interstate long-distance calls in effect as of November 2016. *Inmate Telephone Service*, FCC, <https://www.fcc.gov/consumers/guides/inmate-telephone-service> (last updated Nov. 8, 2016).

<sup>35</sup> See Wagner, *supra* note 5.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* (“Shapiro was the first entrepreneur to see how financial services might provide another stream of revenue. . . . [H]e offered to deliver cash in ways that saved time and effort for corrections agencies . . .”).

<sup>38</sup> See *id.*

<sup>39</sup> See, e.g., Pa. Corr. Indus., Commissary Listing for Male General Population, PA. DEP’T CORRECTIONS, <http://www.cor.pa.gov/Inmates/Commissary%20Catalogs/Male%20General%20Population.pdf> (last updated Apr. 10, 2017).

<sup>40</sup> Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 321 (2014).

<sup>41</sup> Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 58–59 (2013) (describing “pay-to-stay” programs as a growing trend that involves charging inmates for rent and some of the



make other payments while incarcerated, including fines, child support, restitution, and court costs.<sup>42</sup> In order to make such payments, prisoners need access to money. In many states, prisoners are not allowed to keep cash while incarcerated,<sup>43</sup> but do have access to special prison bank accounts known as inmate trust accounts.<sup>44</sup>

Money can be added to an inmate trust account in several ways. First, excluding money that is the fruit of illegal activity,<sup>45</sup> any cash that comes in with a prisoner during his initial booking may end up in his account.<sup>46</sup> Second, a prisoner may deposit funds earned from a prison job into the account.<sup>47</sup> However, prisoners earn mere cents an hour so this typically does not amount to much.<sup>48</sup> Third, individuals on the outside, such as friends and family, can deposit money in an inmate's trust account.<sup>49</sup> This is the most common way for prisoners to receive money.<sup>50</sup> Without such deposits, many prisoners would be unable to purchase necessary personal items or meet financial obligations.<sup>51</sup> Lack of deposits from outside sources can even impair communication with loved ones—stamps must be purchased at commissary,<sup>52</sup> and popular inmate messaging services, set up like email,

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other costs of their incarceration); *see also* Laura Bauer, *Some Inmates Pay for Their Crimes and Jail Stays*, KAN. CITY STAR (Apr. 24, 2009) (on file with author) (noting that Maricopa County, Arizona, charges inmates \$1.25 a day for meals).

42 Kirsten D. Livingston & Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 CLEARINGHOUSE REV. 187, 188–91 (2007).

43 Isaac Colunga, *An Alternative Look at the Takings Clause and Inmate Trust Accounts*, 39 U. TOLEDO L. REV. 791, 792 (2008).

44 *See, e.g., Frequent Questions: Inmate Finances*, S.D. DEP'T CORRECTIONS, <https://doc.sd.gov/about/faq/finances.aspx> [<https://perma.cc/NH3M-CKP3>] (last visited May 12, 2017); *Frequently Asked Questions Regarding Inmate Funds*, FLA. DEP'T CORRECTIONS, <http://www.dc.state.fl.us/oth/inmates/funds.html> [<https://perma.cc/F3CK-GQ6N>] (last visited May 12, 2017); *Inmate Account Deposits*, SHERIFF'S OFF., WASH. COUNTY, OR., <http://www.co.washington.or.us/Sheriff/Jail/HelpInmate/inmate-account-deposits.cfm> [<https://perma.cc/ZV9J-JKTY>] (last visited May 12, 2017).

45 *See generally* Michael A. DiSabatino, Annotation, *Evidence Considered in Tracing Currency, Bank Account, or Cash Equivalent to Illegal Drug Trafficking so as to Permit Forfeiture, or Declaration as Contraband, Under State Law—Explanation or Lack Thereof*, 4 A.L.R.6th 113 (2005) (noting that cash on an arrestee at the time of arrest may be subject to forfeiture if it is determined to be connected to an illegal drug transaction).

46 *See* Max Reinhart, *What Can Inmates Buy in Jail?*, NEWS-HERALD (Aug. 5, 2012, 12:01 AM), <http://www.news-herald.com/article/HR/20120805/NEWS/308059970>.

47 *See* Katzenstein & Waller, *supra* note 11, at 642, 650 n.77.

48 *See id.* at 642.

49 *See id.*; Reinhart, *supra* note 46.

50 *See* Katzenstein & Waller, *supra* note 11, at 639, 642–43.

51 *See id.* at 639, 648, 650 n.45.

52 *See id.* at 639, 642.

are also paid for directly through inmate account funds.<sup>53</sup> As a result of the structure of the prison system, it has long been the reality that those on the outside, usually family members of those behind bars, are forced to bear the cost of their loved one's incarceration.<sup>54</sup>

Electronic deposit of funds into an inmate trust account cuts down on the amount of time it takes for funds to arrive in the account, but it necessarily adds processing fees. In order to obtain business, Shapiro proposed to enter into profit-sharing agreements with state correctional facilities whereby the state would receive ten percent of the revenues paid by inmates.<sup>55</sup> The result of these agreements was that consumers would be charged higher rates.<sup>56</sup> This commission-based system incentivizes correctional facilities to contract out to JPay for these services.<sup>57</sup> However, the rates being charged to consumers by private companies are currently unregulated, and those rates reach as high as forty-five percent per deposit in some states.<sup>58</sup> Similar transactions, such as paying traffic tickets online, usually carry substantially lower fees. For example, in Florida, the fee is only 3.5% to pay a traffic ticket, and in Virginia the fee is 4%.<sup>59</sup>

Although consumers may technically still use money orders and save on processing fees, they are no longer necessarily the financially feasible and convenient option they were in the past. Many complain that it has become increasingly inefficient and can take over a week for the money to show up in their loved one's account.<sup>60</sup> This delay can occur because money orders are now processed by private companies through a centralized business location, which often involves money orders being sent out of state and back in, prolonging the time

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<sup>53</sup> See Dina Gusovsky, *The Big Business of Selling Apps to Prison Inmates*, CNBC (Oct. 1, 2014, 12:21 PM), <http://www.cnbc.com/2014/10/01/the-big-business-of-selling-apps-to-prison-inmates.html#> (noting that JPay provides email services that are now available in sixteen states); Wagner, *supra* note 5 (explaining that JPay offers "pay-per-page e-messaging," which inmates can pay for with the money from their accounts).

<sup>54</sup> Katzenstein & Waller, *supra* note 11, at 641.

<sup>55</sup> See Wagner, *supra* note 5.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *id.* (describing how a flat rate for funds transfers can be a large percentage of a small transfer amount that is often typical for low-income family members).

<sup>59</sup> *How to Pay Traffic Tickets and Other Offenses*, VA.'S JUD. SYS., <http://www.courts.state.va.us/caseinfo/tickets.html> [<https://perma.cc/RR5N-JH2H>] (last visited May 12, 2017); *Traffic Citations*, MYFLORIDACOUNTY.COM, [https://www.myfloridacounty.com/traffic\\_tickets/faq.html](https://www.myfloridacounty.com/traffic_tickets/faq.html) (last visited May 12, 2017) (on file with author).

<sup>60</sup> See M. Scott Carter, *Prison Bankers Exact Fees, Profits from Families*, OKLA. WATCH (Feb. 17, 2015), <http://oklahomawatch.org/2015/02/17/prison-bankers-exact-fees-profits-from-families/>; Wagner, *supra* note 5.

it takes for money to arrive in prisoner accounts.<sup>61</sup> Although there are several private vendors that operate in this sphere, JPay retains a virtual monopoly.<sup>62</sup> Currently, JPay operates in thirty-two states and faces little competition.<sup>63</sup>

Moreover, after the dizzying financial success JPay saw with inmate trust accounts, the company quickly expanded its range of services. Another area in which JPay now operates is the prepaid debit release card.<sup>64</sup>

## 2. *Prisoners Receive Leftover Funds on Prepaid Debit Release Cards*

When an inmate is released from prison, the released individual is entitled to the funds remaining in his or her inmate account, whether from job earnings or leftover deposits from family members.<sup>65</sup> Today, instead of checks, many correctional systems are utilizing prepaid debit cards (“release cards”) with the remaining funds preloaded.<sup>66</sup> Inmates are often given no choice about how to receive these funds and accordingly, no choice to opt out of the related fees<sup>67</sup> that can have a devastating effect on their financial position. Separate fees for balance inquiries, ATM withdrawals, card maintenance, and closing the account can add up quickly and leave a newly released inmate with greatly diminished funds.<sup>68</sup> Gregg Cavaluzzi, a former prisoner, attests to that: “I left prison with \$120. Because of the fees I was only able to use about \$70 of it.”<sup>69</sup> In essence, for correctional systems that

<sup>61</sup> See Carter, *supra* note 60.

<sup>62</sup> See Gusovsky, *supra* note 53; Wagner, *supra* note 5.

<sup>63</sup> Wagner, *supra* note 5 (describing how JPay and its main competitor serve most states under a single master agreement).

<sup>64</sup> Amadou Diallo, ‘Release Cards’ Turn Inmates and Their Families into Profit Stream, AL JAZEERA (Apr. 21, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/4/20/release-cards-turn-inmates-and-their-families-into-profit-stream.html> (quoting Carl Takei of the ACLU) (noting that JPay provides release cards to fifteen state corrections agencies).

<sup>65</sup> 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, 227 (2013).

<sup>66</sup> Diallo, *supra* note 64.

<sup>67</sup> Human Rights Defense Center, Comment Letter in Response to JPay’s Comment on Proposed Amendment to Regulation E 3, 5–6 (Sept. 10, 2015), <https://www.humanrightsdefensecenter.org/media/publications/CFPB%20response%20to%20JPAY%20Ex%20Parte%20comment%20with%20attachments%209-10-15%20FINAL.pdf> (emphasizing, in their comment to CFPB, that “the compulsory nature of release debit cards” is the central issue and that there is “no circumstance in which exploitation of a vulnerable, impoverished population that has no choice in their exploitation is appropriate”).

<sup>68</sup> Diallo, *supra* note 64.

<sup>69</sup> *Id.*

utilize the prepaid cards, the consumer is forced to enter into a compulsory contract if they want to receive any of the funds to which they are entitled.<sup>70</sup>

The privatization of prison banking services, specifically the inmate trust account and the prepaid debit release card, has a negative impact on consumers.<sup>71</sup> Because incarceration has a disproportionate impact on low-income minority communities,<sup>72</sup> consumers who are the most negatively affected by these privatized services are already operating at a financial disadvantage.<sup>73</sup>

## II. PRIVATE CONTRACTS CAUSE HARM TO CONSUMERS

Privatized prison banking services provided to correctional facilities harm consumers in several ways. First, certain companies retain a virtual monopoly for these services, which eliminates competitive bidding for contracts and leads to extremely high pricing.<sup>74</sup> Second, the high rates charged by private contractors for deposits into trust accounts and the use of prepaid debit cards are unfair—appearing to be above the rates needed to ensure profit and not subject to the same regulations intended to prevent such abuses in other areas.<sup>75</sup> Finally, a lack of viable alternatives and the necessity of these services lead consumers to enter into compulsory contracts to receive their own funds, forcing them to accept the undesirable and unfair terms.<sup>76</sup> Part II elaborates on the problems raised by each of these concerns in turn: existence of a monopoly, unfair rates, and the compulsory nature of these contracts.

### A. Private Companies Retain a Monopoly

A monopoly exists when an entity has “the power to control prices or exclude competition.”<sup>77</sup> This power generally becomes problematic when wielded in a predatory way,<sup>78</sup> furthering the “evils of

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<sup>70</sup> See Human Rights Defense Center, *supra* note 67, at 4.

<sup>71</sup> See *infra* Part II.

<sup>72</sup> Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 28 (2009); see PEW CHARITABLE TRS., *supra* note 1, at 6 (showing that one in nine black men ages twenty to thirty-four are incarcerated).

<sup>73</sup> See generally Western et al., *supra* note 6.

<sup>74</sup> See *infra* Section II.A.

<sup>75</sup> See *infra* Section II.B.

<sup>76</sup> See *infra* Section II.C.

<sup>77</sup> Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 813 (2000) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)).

<sup>78</sup> See *id.* at 810.

monopoly” such as higher prices and reduced incentives for cost-cutting measures.<sup>79</sup> JPay and the few other companies that offer prison banking services obtain contracts through a noncompetitive bidding process and then, in the absence of any cost-cutting incentives, keep costs high.<sup>80</sup> Ultimately, this monopolistic behavior harms consumers.<sup>81</sup>

### 1. *Noncompetitive Bidding Process*

The usual result of a competitive bidding process is that the qualified entity that can offer the best price is granted the contract.<sup>82</sup> However, in the situation presented here, the correctional departments that enter into profit-sharing arrangements with private companies are incentivized to contract with the company that can return the highest amount of money to them.<sup>83</sup> Moreover, this incentive is increased by the large amounts of money states are currently spending on corrections.<sup>84</sup> The Florida Department of Corrections highlighted this reality, stating that “[t]he Department will make an award, by Region, to the responsive, responsible bidder submitting the highest percentage commission.”<sup>85</sup> Companies that were pioneers in this field had the capacity to provide revenue in the form of kickbacks when they first contracted with correctional institutions and have the ability to keep their commissions to states high. As a result, those few companies have all but taken over this area of prison banking services, retaining a virtual monopoly.<sup>86</sup>

JPay described its own market dominance in a proposal to the State of Nevada: “Today, JPay contracts with over 21 state correc-

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<sup>79</sup> Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 3 (2004).

<sup>80</sup> See *infra* Sections II.A.1–2.

<sup>81</sup> See, e.g., *infra* Section II.A.2.

<sup>82</sup> See 3 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 22:10, Westlaw (database updated October 2016).

<sup>83</sup> Stephanie Clifford & Jessica Silver-Greenberg, *In Prisons, Sky-High Phone Rates and Money Transfer Fees*, N.Y. TIMES (June 26, 2014), <http://www.nytimes.com/2014/06/27/business/in-prisons-sky-high-phone-rates-and-money-transfer-fees.html>.

<sup>84</sup> See *supra* note 4 and accompanying text.

<sup>85</sup> Katzenstein & Waller, *supra* note 11, at 643 (quoting Contract Between Fla. Dep’t of Corr. and Keefe Commissary Network, L.L.C. 7 (Sept. 3, 2013), <http://www.dc.state.fl.us/business/contracts/12-DC-8388-a.pdf>).

<sup>86</sup> Currently operating in thirty-two states, JPay has a near monopoly on the market. Gusovsky, *supra* note 53. Other competitors include Keefe Group, Western Union, and Global Tele-Link. Marcia Heroux Pounds, *J Pay Connects Families with Prisoners*, SUNSENTINEL (July 27, 2014), [http://articles.sun-sentinel.com/2014-07-27/business/fl-prisoners-money-transmitter-20140727\\_1\\_money-transfer-western-union-mobile-app](http://articles.sun-sentinel.com/2014-07-27/business/fl-prisoners-money-transmitter-20140727_1_money-transfer-western-union-mobile-app).

tional agencies and numerous county jails and private prison operators. This translates to a footprint of over 1.2 million inmates, half the nation's inmate population."<sup>87</sup> When a company has a monopoly, there is nothing stopping it from continuing to raise consumer prices because there is no competitor seeking to underbid it and take its business.<sup>88</sup> In this case, JPay has even further cut off the competitive bidding process by procuring a multistate contract.<sup>89</sup> Under this multistate agreement, "[p]articipating states can simply sign on to the deal . . . without the hassle of separately determining the best company for the job."<sup>90</sup> This type of automatic award further bypasses a competitive bidding process and shields private companies from market forces.<sup>91</sup> Unfortunately, this problem may continue to grow because many state statutes that authorize private contracts for prison-related services do not explicitly mandate or describe a competitive process for procuring these contracts.<sup>92</sup>

## 2. *No Cost-Cutting Incentives*

Use of the commission system has the effect of further driving up prices. JPay's CEO even conceded in an interview with the *New York Times* that "the commission system should be modified" because there is a clear link between the commission system and the costs charged to consumers.<sup>93</sup> Accordingly, in order to maximize profit, companies will continue to raise prices.<sup>94</sup> The commission system causing sky-high prices is nothing new; privatized phone contracts led to the same problem, where "in order to collect revenue to make up the money lost to commissions, prison telephone companies add[ed] hefty charges through multitudes of extra fees," which drove "the telephone bills charged to people with incarcerated loved ones to astronomical levels."<sup>95</sup>

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<sup>87</sup> JPay Technical Proposal, Request for Proposal No. 1901 5 (May 3, 2011), [https://muckrock.s3.amazonaws.com/foia\\_files/2015/08/20/RFP\\_1901\\_JPay\\_Technical\\_Proposal.pdf](https://muckrock.s3.amazonaws.com/foia_files/2015/08/20/RFP_1901_JPay_Technical_Proposal.pdf).

<sup>88</sup> Cf. Piraino, *supra* note 77, at 814 (describing how monopolies "can price products in excess of the level that would prevail in a competitive market").

<sup>89</sup> See Wagner, *supra* note 5.

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

<sup>91</sup> Cf. *id.*

<sup>92</sup> See, e.g., NEV. REV. STAT. ANN. § 209.141 (LexisNexis 2013); TEX. GOV'T CODE ANN. § 495.001(a) (West 2012). But see VA. CODE ANN. § 53.1-262 (2013).

<sup>93</sup> Clifford & Silver-Greenberg, *supra* note 83.

<sup>94</sup> Cf. Piraino, *supra* note 77, at 814.

<sup>95</sup> KUKOROWSKI ET AL., *supra* note 29, at 2.

Although some states use funds earned by the commission to ultimately compensate victims or improve prison services,<sup>96</sup> that does not address the problem of shifting costs onto the backs of consumers, i.e., prisoners' families. As Carl Takei of the American Civil Liberties Union articulates, "if we're incarcerating so many people that the prisons . . . are unable to finance that incarceration without funding it on the backs of prisoners' families then there's something wrong with the system."<sup>97</sup> By nature of a few companies monopolizing the industry and having no incentive to cut costs, rates charged by companies like JPay remain high. But more than that, these rates are also unfair.

### *B. Consumers Are Charged Unfair Rates*

The rates private companies charge for both deposits into inmate trust accounts and the use of prepaid debit release cards constitute unfair and abusive consumer treatment. The Consumer Financial Protection Act of 2010 ("CFPA")<sup>98</sup> defines unfair practices as those "caus[ing] or . . . likely to cause substantial injury to consumers which is not reasonably avoidable by consumers[] and [which] . . . is not outweighed by countervailing benefits to consumers or to competition."<sup>99</sup> Additionally, the CFPA defines an abusive practice as one that

materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or takes unreasonable advantage of—[] a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;[] the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or [] the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.<sup>100</sup>

Because the rates for deposits and transfers into inmate trust accounts inevitably impact the amount of commission JPay (or other private companies) can offer state and local correctional facilities, private companies are incentivized to increase these rates in order to increase their profit margin.<sup>101</sup> Although JPay's founder reported to the Center for Public Integrity that his company only charges the minimum to

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<sup>96</sup> Clifford & Silver-Greenberg, *supra* note 83.

<sup>97</sup> Diallo, *supra* note 64.

<sup>98</sup> Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1955 (codified in scattered sections of 12 U.S.C.).

<sup>99</sup> 12 U.S.C. § 5531(c)(1) (2012).

<sup>100</sup> *Id.* § 5531(d).

<sup>101</sup> *Cf.* Clifford & Silver-Greenberg, *supra* note 83.

“maintain a razor-thin profit margin,”<sup>102</sup> that same organization discovered that other companies, such as NIC Inc., charge a flat fee of only \$2.40 for all deposits into inmate accounts.<sup>103</sup> This disparity in fees seems to suggest that JPay is charging much more than necessary for its services.

Furthermore, outside the correctional system, debit card transaction fees appear to be more regulated, and much lower, than these fees charged to prisoners’ families. To protect consumers, the Durbin Amendment of the Dodd-Frank Act<sup>104</sup> includes a provision requiring the Federal Reserve to make sure debit card processing fees charged to retailers accurately reflect the actual cost of processing those transactions.<sup>105</sup> This ultimately protects consumers because otherwise, retailers would be incentivized to keep raising the price of merchandise to offset fees charged by the banks.<sup>106</sup> The Federal Reserve rule has currently capped these debit card processing or interchange fees at twenty-one cents, a positive change for retailers who were previously paying approximately forty-four cents per transaction.<sup>107</sup> No comparable cap exists to limit processing fees charged by a private company directly to the consumer when depositing funds via debit card into an inmate’s account.<sup>108</sup> In some states the markup percentage consumers are paying to deposit funds can reach forty-five percent.<sup>109</sup> For example, according to JPay’s website, it might cost \$6.70 to transfer \$25 to a prisoner at the Skyline Correctional Center in Colorado.<sup>110</sup> It costs \$6.95 to transfer the same amount of money to a prisoner at the Leath Correctional Institution in South Carolina.<sup>111</sup> These rates have cer-

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<sup>102</sup> Wagner, *supra* note 5.

<sup>103</sup> *Id.*

<sup>104</sup> 15 U.S.C. § 1693o-2 (2012).

<sup>105</sup> *Id.* § 1693o-2(a)(2).

<sup>106</sup> Cf. James R. Hood, *Appeals Court Reinstates “Swipe Fee” Rules for Debit Card Transactions*, CONSUMERAFFAIRS (Mar. 21, 2014), <http://www.consumeraffairs.com/debit-cards-charges-and-fees>.

<sup>107</sup> Robert Schmidt & Timothy R. Homan, *Federal Reserve Approves 21-Cent Cap for Debit Swipe Fees*, BLOOMBERG (June 29, 2011, 6:54 PM), <http://www.bloomberg.com/news/articles/2011-06-29/fed-officials-weigh-21-cent-cap-on-debit-card-fees-up-from-12-cent-plan>.

<sup>108</sup> See Prison Policy Initiative, *supra* note 18, at 11 (stating that vendors “never even mention compliance with” the applicable regulations).

<sup>109</sup> Wagner, *supra* note 5.

<sup>110</sup> Skyline Correctional Center, JPAY, <https://www.jpay.com/Facility-Details/Colorado-State-Prison-System/Skyline-Correctional-Center.aspx> [https://perma.cc/T6ZM-56H6] (last visited May 12, 2017).

<sup>111</sup> Leath Correctional Institution, JPAY, <https://www.jpay.com/Facility-Details/South-Carolina-State-Prison-System/Leath-Correctional-Institution.aspx> [https://perma.cc/S7B2-REEB] (last visited May 12, 2017).



tainly ensured a profit for companies like JPay, which reported over \$50 million dollars in revenue in 2013 alone, according to the Center for Public Integrity.<sup>112</sup>

Similarly, the fees private companies charge on prepaid release cards are also unfair for a number of reasons. First, there are many fees attached to these cards, including separate fees for services such as balance inquiry and withdrawal.<sup>113</sup> The trouble with these fees is that a consumer has no opportunity to negotiate lower fees or opt out altogether.<sup>114</sup> These fees tend to be higher than other prepaid debit cards on the market—largely due to the fact that the consumer has no choice or ability to shop around and compare rates.<sup>115</sup> The numerous fees attached to these cards add up and substantially decrease the funds available to consumers.<sup>116</sup> In addition to these unfair charges, another issue at the core of these privatized service contracts is their compulsory nature.

### C. Consumers Are Forced to Enter Compulsory Contracts

Many of these contracts are compulsory because they involve “necessities,” and consumers only have one option to choose from. As discussed above, when family members send money to inmate trust accounts, it is frequently to enable their loved ones to purchase simple, daily necessities. Similarly, for individuals being released, the money on their prepaid release cards is crucial for both self-support and to pay off debts they incurred while incarcerated.<sup>117</sup> Faced with a dearth of other options and the necessity of these services, consumers are compelled to accept the terms of these contracts without an opportunity to negotiate the terms themselves or choose a different provider.<sup>118</sup>

In many state and local correctional systems, the other option for depositing money in inmate accounts, a money order, does not seem like a real option.<sup>119</sup> For these reasons, consumers are often forced to

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<sup>112</sup> Wagner, *supra* note 5.

<sup>113</sup> Diallo, *supra* note 64.

<sup>114</sup> See Human Rights Defense Center, *supra* note 67, at 6.

<sup>115</sup> Compare Prison Policy Initiative, *supra* note 18, at 4 tbl., with Eli McCormick *The Best Prepaid Debit Cards of 2017*, TOP TEN REVIEWS, <http://prepaid-debit-cards-review.toptenreviews.com/> [<https://perma.cc/QCE6-UDXL>] (last visited May 20, 2017).

<sup>116</sup> See Human Rights Defense Center, *supra* note 67, at 3, attachments B–C.

<sup>117</sup> See Livingston & Turetsky, *supra* note 42, at 188, 191.

<sup>118</sup> Human Rights Defense Center, *supra* note 67, at 4, 6.

<sup>119</sup> See Wagner, *supra* note 5 (describing the length of time it takes for money orders to actually land in an inmate’s account).

deposit money using the debit system and incur whatever charges the private companies dictate.

Similarly, the use of prepaid cards for released inmates to receive money owed to them is compulsory.<sup>120</sup> As a result, the associated fees are unfair.<sup>121</sup> Although not all correctional systems currently utilize these cards, their popularity is on the rise.<sup>122</sup> For those systems that do use these cards, a prisoner cannot opt out and receive his remaining funds a different way. “The current reality is that the vast majority of prisoners have no choice in the matter. They simply have debit cards foisted on them whereby private companies charge exorbitant fees to access their own money.”<sup>123</sup> These practices violate a basic tenet of contract law that contracts result from voluntary and informed choice.<sup>124</sup> Indeed, the absence of choice by consumers in these contracts may even rise to the level of unconscionability.

In *Williams v. Walker-Thomas Furniture Co.*,<sup>125</sup> the court defined unconscionability to include “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”<sup>126</sup> The court looked to the context of the transaction to decide whether the terms of the contract were unreasonable, and speculated that a contract with an “obscure provision” that would allow a storeowner to repossess all items if a purchaser defaulted on the payment of just one item was likely unreasonable.<sup>127</sup> The court viewed the combination of the storeowner’s knowledge of the woman’s circumstances (the woman was living off public welfare and caring for multiple children) and the unreasonable contract term as potentially unconscionable.<sup>128</sup> Here, the fact that the majority of those incarcerated and their families are low-income,<sup>129</sup> coupled with the absence of any meaningful choice in accepting the terms of the prepaid debit cards, poses a similar situation. The use of these compulsory prepaid debit cards, with their associated excessive

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<sup>120</sup> Human Rights Defense Center, *supra* note 67, at 4.

<sup>121</sup> See Prison Policy Initiative, *supra* note 18, at 5.

<sup>122</sup> See ASS’N STATE CORR. ADM’RS., USE OF DEBIT CARD FOR INMATE RELEASE FUNDS (2014), <http://web.archive.org/web/20160204214524/http://www.asca.net/system/assets/attachments/7555/Use%20of%20Debit%20Cardsformatted%20Sheet1.pdf?1412189576>.

<sup>123</sup> Human Rights Defense Center, *supra* note 67, at 4.

<sup>124</sup> Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 197 (2009).

<sup>125</sup> 350 F.2d 445 (D.C. Cir. 1965).

<sup>126</sup> *Id.* at 449.

<sup>127</sup> *Id.* at 447.

<sup>128</sup> See *id.* at 448, 450.

<sup>129</sup> See Mushlin & Galtz, *supra* note 72, at 31.

fees, is precisely the type of “sharp practice and irresponsible business dealing[]” the court in *Walker* condemned.<sup>130</sup> Moreover, the use of these cards and their fees has a disparate impact on low-income individuals, perpetuating the cycle of poverty and doing little to decrease recidivism.<sup>131</sup> Consumers need to be protected from these types of exploitive practices, but unfortunately they are not.

### III. EXISTING CONSUMER PROTECTION MECHANISMS ARE INADEQUATE

Individuals seeking redress from the harm caused by privatized prison services have largely been unsuccessful. Existing consumer protection mechanisms, such as litigation and regulation, are plagued with obstacles to relief. Part III elaborates in more detail on these barriers to litigation and regulation that leave consumers with limited protection against unfair practices.

#### A. *Barriers to Litigation Make It Difficult to Vindicate Rights*

The Supreme Court has recognized that access to the courts is a fundamental right.<sup>132</sup> People bring suits each year to vindicate any number of rights, from constitutional violations of equal protection, to tort claims in personal injury lawsuits. However, judicial access is not always without obstacles. The deck is stacked against prisoners and their families who attempt to bring claims against private contractors for unfair and abusive practices. From procedural issues like lack of standing to statutory barriers that impose threshold requirements, prisoners face roadblocks at every turn.

##### 1. *Failure to State a Claim and Other Procedural Barriers*

Vindication of rights through litigation has proven difficult for prisoners who attempt to bring claims, as well as families or other individuals on the outside affected by unfair practices. Although prisoners lose some rights by nature of being incarcerated or convicted of a crime,<sup>133</sup> constitutional rights do not disappear.<sup>134</sup> As the Supreme

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<sup>130</sup> *Walker-Thomas Furniture Co.*, 350 F.2d at 448 (quoting *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (1964)).

<sup>131</sup> See Lopez, *supra* note 19 (“If [prisoners] face enormous barriers once they’re out, they’re going to be more likely to reoffend.”).

<sup>132</sup> *Bounds v. Smith*, 430 U.S. 817, 821 (1977).

<sup>133</sup> See generally, e.g., Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & C.R. L. REV. 71 (2003) (discussing prisoner disenfranchisement laws in the United States).

<sup>134</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

Court recognized in *Wolff v. McDonnell*,<sup>135</sup> “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.”<sup>136</sup> However, despite this guarantee of access to the courts, procedural barriers, such as failure to state a claim or lack of standing, often prevent prisoners or their families from bringing a lawsuit regardless of the merits of the suit or the nature of the injustice.

Under Federal Rule of Civil Procedure 12(b)(6), courts may dismiss a case at the pleading stage for “failure to state a claim upon which relief can be granted.”<sup>137</sup> In the context of prisoner and other pro se litigation,<sup>138</sup> this pleading-stage dismissal often occurs because laypersons either do not understand the legal system or have limited knowledge of the applicable laws (and thus have difficulty articulating how the law was violated).<sup>139</sup> For example, prisoners may know or learn from their own research that they are entitled to bring claims under the Due Process Clauses of the Fourteenth and Fifth Amendments, as well as under the Eighth Amendment.<sup>140</sup> However, a claim related to unfair rates and practices does not fall into this category of protected constitutional rights.<sup>141</sup> Rather, it constitutes an unfair, deceptive or abusive act, which is prohibited by statute, rather than the Constitution.<sup>142</sup> Because of a prisoner’s failure to find the correct packaging for his claim, it is likely to be dismissed. In *Evans v. Department of Corrections*,<sup>143</sup> a prisoner sought to bring a claim that his rights were being violated by having money orders processed by a third party, rather than directly by the Department of Corrections.<sup>144</sup> Regardless of whether the inmate had a colorable claim, his case was

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<sup>135</sup> 418 U.S. 539 (1974).

<sup>136</sup> *Id.* at 555–56.

<sup>137</sup> FED. R. CIV. P. 12(b)(6).

<sup>138</sup> See *infra* Section III.A.3 (discussing why so many litigants represent themselves).

<sup>139</sup> See David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281, 289 (1990) (explaining that “a pro se indigent litigant[] may have no idea where to look for evidence or how to deal with it when it is found”); Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners’ Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 278–79 (2010) (noting that “the limited resources available within prisons themselves are often inadequate to allow prisoners to represent themselves effectively”).

<sup>140</sup> See Douglas W. Dunham, Note, *Inmates’ Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1481 (1986).

<sup>141</sup> See *Evans v. Dep’t of Corr.*, No. 1:10-CV-1377, 2010 WL 4942232, at \*8 (M.D. Pa. Oct. 15, 2010) (holding plaintiff failed to state a claim upon which relief could be granted because there is no constitutional right to have money orders processed directly by the Department of Corrections).

<sup>142</sup> See 12 U.S.C. § 5531(a) (2012).

<sup>143</sup> No. 1:10-CV-1377, 2010 WL 4942232 (M.D. Pa. Oct. 15, 2010).

<sup>144</sup> See *id.* at \*1.

dismissed at the pleading stage because he attempted to frame it as a violation of a constitutional right.<sup>145</sup> The Court noted there is “no constitutional right to dictate to the Department of Corrections how it should process money orders mailed to inmates.”<sup>146</sup>

Moreover, even if courts liberally construe pleadings, prisoners face other personal barriers that might lead to dismissal under 12(b)(6) for failure to state a claim. Prisoners are more likely to be illiterate or lack formal education.<sup>147</sup> Even the Supreme Court noted in *Johnson v. Avery*<sup>148</sup> that “[j]ails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited.”<sup>149</sup> Illiteracy and poor education often hinder prisoners from being able to articulate their claims in a legally cognizable way.<sup>150</sup> This perpetuates the cycle of dismissal at the pleading stage and serves as a procedural barrier to vindicating rights through the judicial system.

Another common procedural barrier to prisoner litigation, whether in federal or state court, is a lack of standing. “Even if a plaintiff alleges harm to a legally protected interest, there is no guarantee that she will have standing.”<sup>151</sup> Standing requires a particularized injury to the party seeking judicial review.<sup>152</sup> If a prisoner wanted to bring a claim against the private entity in charge of his inmate trust account for charging exorbitant rates to his family members who deposited money, he would likely not have standing because he cannot show that he himself is aggrieved.<sup>153</sup> For example, in *Mitchell v. Department of Corrections*,<sup>154</sup> the court found that the mere potential of harm to the prisoner’s family did not meet the standing requirement.<sup>155</sup> This procedural barrier has special significance for these

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<sup>145</sup> See *id.* at \*8.

<sup>146</sup> *Id.*

<sup>147</sup> Robbins, *supra* note 139, at 279–80.

<sup>148</sup> 393 U.S. 483 (1969).

<sup>149</sup> *Id.* at 487 (citing Note, *Constitutional Law: Prison “No-Assistance” Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343, 347–48, 360–61).

<sup>150</sup> See *infra* Section III.A.3.

<sup>151</sup> Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1078 (1994).

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

<sup>153</sup> See *Mitchell v. Dep’t of Corr.*, No. 687 M.D. 2010, 2011 WL 10843800, at \*2 (Pa. Commw. Ct. May 4, 2011) (holding that plaintiff prisoner lacks standing because he “is not aggrieved as his only contention regarding the [prison’s] exclusive use of J-Pay is the *potential* harm it will cause his family and friends”).

<sup>154</sup> No. 687 M.D. 2010, 2011 WL 10843800 (Pa. Commw. Ct. May 4, 2011).

<sup>155</sup> *Id.* at \*2.

claims because prisoners are not depositing money into their own accounts. They are instead relying on family members to do so.

These barriers are often difficult to recognize, let alone avoid, for someone who is inexperienced with the legal system. Yet the procedural barriers discussed here are not the only barriers to litigation.

## 2. *The Prison Litigation Reform Act*

Federal and state legislation has created additional—in some cases, insurmountable—barriers to litigation. In 1996, Congress passed the Prison Litigation Reform Act of 1995 (“PLRA”).<sup>156</sup> Although the PLRA was intended to deter frivolous lawsuits by prisoners, it places numerous restrictions on prisoners and has the effect of making it more difficult for them to “vindicat[e] their legal rights in court.”<sup>157</sup> The PLRA mandates that prisoners go through an internal administrative grievance process before they can file a lawsuit in federal court.<sup>158</sup> This exhaustion requirement applies “even where a prisoner seeks remedies that cannot be provided by a prison’s internal grievance procedure.”<sup>159</sup> The PLRA also penalizes prisoners for filing lawsuits when they have filed past suits that have been dismissed.<sup>160</sup> Although the PLRA applies to prisoners filing suit in federal court, many states have adopted similar provisions.<sup>161</sup> In fact, in some instances, state statutes impose stricter requirements on prisoners. For example, a prisoner who violates a three strikes provision in South Carolina may be subject to an additional year of imprisonment on top of his current sentence.<sup>162</sup> These statutory restrictions not only present barriers to court access, but in many cases, such as the three strikes provision, disincentivize prisoners from bringing claims at all.

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<sup>156</sup> Prison Litigation Reform Act (PLRA) of 1995, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321. Although 1995 is in the title of the statute, it was actually enacted in 1996. *McGore v. Wigglesworth*, 114 F.3d 601, 603 (6th Cir. 1997).

<sup>157</sup> David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1454–55 (2010).

<sup>158</sup> *Ferri v. Pa. Dep’t of Corr.*, No. 4:10-CV-1706, 2010 WL 3701386, at \*2 (M.D. Pa. Sept. 14, 2010).

<sup>159</sup> Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1218 (2014).

<sup>160</sup> 28 U.S.C. § 1915(g) (2012).

<sup>161</sup> See, e.g., ARK. CODE ANN. § 16-68-607 (2005); DEL. CODE ANN. tit. 10, § 8804(f) (2013); TENN. CODE ANN. § 41-21-807(c) (2014).

<sup>162</sup> S.C. CODE ANN. § 24-27-300 (2007).

### 3. *Financial Instability*

Even assuming prisoners or their families can get past any procedural or statutory barriers to litigation, financial instability and lack of resources may place them at a disadvantage and, in some cases, prevent them from accessing the courts at all. First, prisoners and their families are more likely to be low-income, and as a result, unable to afford counsel.<sup>163</sup> Civil litigants do not have a constitutional right to counsel in civil cases,<sup>164</sup> but litigants in civil cases do have a statutory right to represent themselves in both federal and state court.<sup>165</sup> However, “most pro se litigants also lack the resources and expertise necessary to succeed in their claims.”<sup>166</sup> In order to even access the judicial system, litigants must have the financial ability to file a lawsuit and pay for service and any other court costs that arise.<sup>167</sup> Furthermore, additional costs arise in order “to make an effective presentation of one’s case once filed.”<sup>168</sup>

Costs related to effective representation may include obtaining a lawyer, compiling evidence, or, in some cases, retaining an expert witness.<sup>169</sup> In cases like these, an expert witness may be required to estimate damages by giving an estimate of what a reasonable processing charge might be compared to the actual cost of processing.<sup>170</sup> Because this may not be information a prisoner or family member knows or has the resources to find,<sup>171</sup> it can affect the outcome of a case. Yet paying for an expert, an attorney, or access to evidence can be expensive. In the aggregate, these costs may be prohibitive to a pro se litigant. Additionally, the private entities that families would be litigating against possess far greater resources to defend against such suits or to settle quickly.<sup>172</sup>

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<sup>163</sup> See generally Western et al., *supra* note 6.

<sup>164</sup> *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26–27 (1981).

<sup>165</sup> See Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 660–61 (1988).

<sup>166</sup> Robbins, *supra* note 139, at 275–76.

<sup>167</sup> See Medine, *supra* note 139, at 281–82.

<sup>168</sup> *Id.* at 282.

<sup>169</sup> *Id.*

<sup>170</sup> Cf. *id.* at 281 (discussing how an expert witness may be needed to calculate damages in a case concerning breach of warranty of habitability).

<sup>171</sup> *Id.* at 289.

<sup>172</sup> For example, JPay, a leading provider for these prisoner money transfers, received \$50 million in revenue in 2013. See Wagner, *supra* note 5. Recently, JPay was acquired by another company, Securus Technologies, for \$250 million. Human Rights Defense Center, *supra* note 67, at 1.

All of these factors present barriers to litigation. Even if litigants have a chance to see the inside of the courtroom, the disparity in resources may lead to unfavorable results. As Justice Black once said: “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>173</sup>

#### 4. Access to Information

Even if families ultimately choose to proceed as pro se litigants and manage to get past financial and procedural barriers, they may have difficulty obtaining necessary information to bring a suit or allege sufficient facts in their complaint. Frequently, information retained by private entities is not as readily available as publicly-held information.<sup>174</sup> Although there are state laws that require disclosure of some information held by publicly run organizations, “[o]nce a private company takes over a formerly public function,” information is often harder to obtain.<sup>175</sup> This means that private contractors, such as JPay, are not subject to the same disclosure laws as government entities.<sup>176</sup> Families may be unable to uncover information from private entities about the true costs of processing deposits into inmate trust accounts, or the specific commission arrangements between correctional facilities and private companies, and thus may have difficulty presenting a strong case.<sup>177</sup>

Given all of the barriers outlined here, it is not surprising that litigation has failed to provide an effective way for prisoners and their families to vindicate their rights.<sup>178</sup> Private companies will continue forcing prisoners and their families to pay exorbitant rates for their services unless consumer protection mechanisms are put into place. Unfortunately, regulation—another possible avenue of redress—also fails to sufficiently protect consumers.

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<sup>173</sup> Griffin v. Illinois, 351 U.S. 12, 19 (1956).

<sup>174</sup> Eleanor J. Bader, *Secret Plans and Clever Tricks: How Information About Public Contracting Is Hidden from the Public*, TRUTHOUT (Feb. 21, 2014), <http://www.truth-out.org/news/item/21991-secret-plans-and-clever-tricks-how-information-about-public-contracting-and-privatization-is-hidden-from-the-public>.

<sup>175</sup> *Id.*

<sup>176</sup> *See id.*

<sup>177</sup> *See id.*

<sup>178</sup> A pending District of Oregon case, *Brown v. Stored Value Cards, Inc.*, shows potential progress for litigants bringing claims of unfair practices related to prison banking. No. 3:15-cv-01370-MO, 2016 WL 4491836 (D. Or. Aug. 25, 2016). In this case, Danica Love Brown, on behalf of a purported class action, brought claims against NUMI, a company that provides prepaid debit cards to prisons. *See id.* at \*4–5. Notably, the federal district court denied defendant’s motion to dismiss on two state law grounds: conversion and unjust enrichment. *See id.*



*B. Gaps in the Existing Regulatory Scheme Leave Consumers Unprotected*

In general, regulation serves to protect consumers from many problems in the marketplace. For example, the Food and Drug Administration monitors food and medicine to promote health and safety.<sup>179</sup> The Transportation Security Administration works to make sure transportation systems are running safely and effectively.<sup>180</sup> Consumers also need protection from unfair and abusive practices by commercial entities. In 2010, after the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),<sup>181</sup> which created the Consumer Financial Protection Bureau (“CFPB”).<sup>182</sup> The CFPB has the power to prohibit and regulate “unfair, deceptive, or abusive acts or practices.”<sup>183</sup>

The CFPB has already created regulations in categories that are similar to the prison banking services discussed in this Note. For example, the CFPB has passed regulations for debit card processing fees charged to retailers to prevent cost shifting onto consumers.<sup>184</sup> However, to date, the CFPB has not regulated the prison banking services described here, and it is likely that even if the CFPB conducts a rulemaking on this issue, it would only provide inadequate or incomplete relief for consumers affected by the unfair practices described in Part II. Uniform CFPB regulation would be unable to meet the individualized needs of fifty states and would only offer a piecemeal solution.

*1. Uniform Federal Rules Cannot Account for State Differences*

The rulemaking process involves passing a public notice of rulemaking, providing an opportunity for the public to submit comments on a proposed rule, and publishing the rule before it becomes effective.<sup>185</sup> This process is not only time consuming, but presents other problems as well. To illustrate exactly how lengthy and frustrat-

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<sup>179</sup> Food and Drug Administration, OFF. FED. REG., <https://www.federalregister.gov/agencies/food-and-drug-administration> (last visited May 21, 2017).

<sup>180</sup> Transportation Security Administration, OFF. FED. REG., <https://www.federalregister.gov/agencies/transportation-security-administration> (last visited May 21, 2017).

<sup>181</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376; Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 322 (2013).

<sup>182</sup> 12 U.S.C. § 5491(a) (2012).

<sup>183</sup> *Id.* § 5531.

<sup>184</sup> See *supra* Section II.B.

<sup>185</sup> Levitin, *supra* note 181, at 348.

ing this process can be, it is helpful to look at how a different federal agency, the FCC, conducted rulemaking on the analogous issue of high prison phone rates. Back in 2001, Martha Wright, a concerned consumer, petitioned the FCC to conduct a rulemaking, arguing that rates charged by private companies to make collect calls from prison were exorbitant and unfair.<sup>186</sup> It took over a decade for the FCC to pay attention and address Wright's concerns.<sup>187</sup> In 2013, the FCC finally opened a rulemaking and enacted rate caps on phone calls similar to those suggested by Wright.<sup>188</sup>

Not only did the FCC take years to finally intervene and place a ceiling on the price charged for these interstate phone calls, it has still failed to address other related issues affecting consumers.<sup>189</sup> In August 2016, the FCC made further reforms to the prison phone industry.<sup>190</sup> These regulations were supposed to go into effect in December 2016.<sup>191</sup> However, before this could take place, a lawsuit was filed alleging that the FCC exceeded its statutory authority to prevent unfair practices by passing these regulations, and the rates were stayed by a court order, pending judicial review.<sup>192</sup> In February 2017, the Republican-led FCC decided not to defend the agency's prior action with respect to the intrastate calling cap.<sup>193</sup>

The allegations that the FCC failed to consider the responsibilities of prisons and jails highlights another issue with uniform federal regulation that would apply to regulation for prison banking services as well: it is almost impossible for a federal agency to account for the individual state needs of all fifty states when creating uniform regulations such as rate caps. Applied to the prison phone context, one argument against FCC regulation was that uniform rate caps "do not recognize economies of scale at play," such as the size or complexity of a facility.<sup>194</sup> That same argument is true for prison banking services. States have different needs; they may differ in the number or size of

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<sup>186</sup> See Maxwell Slackman, Comment, *Calling from Prison: Economic Determinants of Inmate Payphone Rates*, 10 J.L. ECON. & POL'Y 515, 523 (2014).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See Clifford & Silver-Greenberg, *supra* note 83.

<sup>190</sup> *Inmate Telephone Service*, FED. COMM. COMMISSION, <https://www.fcc.gov/consumers/guides/inmate-telephone-service> [<https://perma.cc/AG7Z-BA32>] (last updated Nov. 8, 2016).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Jon Brodtkin, *Republican-led FCC Drops Court Defense of Inmate Calling Rate Cap*, ARS TECHNICA (Feb. 1, 2017, 4:40 PM), <https://arstechnica.com/tech-policy/2017/02/republican-led-fcc-drops-court-defense-of-inmate-calling-rate-cap/>.

<sup>194</sup> Slackman, *supra* note 186, at 534.

correctional facilities, or their budgets may be allocated differently. Accordingly, uniform regulation would fail to provide states the flexibility they need to regulate on their own terms.

Finally, it is worth noting that although the CFPB rulemaking process includes public input, it is unlikely that the CFPB would receive comments directly from those consumers who are most affected by these privatized prison contracts. Comments tend to come from savvy individuals who are aware of the correct “authority” to which one should complain.<sup>195</sup> Those who are most affected—prisoners and their families—are unlikely to know where to direct their complaints. Moreover, they may also face personal barriers that would prevent them from aiding the CFPB in its rulemaking.<sup>196</sup>

## 2. CFPB Regulation Is Not the Answer

Regulation is also inadequate as a consumer protection mechanism because it typically occurs in a piecemeal manner, addressing specific practices as they arise. Some nonprofits and advocacy groups have recognized this piecemeal progress and tried to remedy it. For example, in a recent comment to the CFPB regarding the prepaid release cards discussed above, the Human Rights Defense Center called on the CFPB to regulate financial issues affecting prisoners and their families (including the unregulated fees charged for deposits and money transfers to inmate accounts).<sup>197</sup> However, it would require a great deal of time to open and conduct a separate rulemaking on all of the specific issues within this broad area of privatized prison services. Accordingly, even if the CFPB ultimately passes regulations restricting the current practices, they are unlikely to be enough to prevent future injustices. An illustrative example: In the wake of FCC prison phone regulations that would limit the amount of money charged for calls, Securus Technologies, a large provider of prison phone services, recently acquired JPay for \$250 million.<sup>198</sup> Securus presumably acquired JPay to extend its business reach into different, unregulated

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<sup>195</sup> See Katherine Porter, *The Complaint Conundrum: Thoughts on the CFPB's Complaint Mechanism*, 7 BROOK. J. CORP. FIN. & COM. L. 57, 59, 80 (2012) (“Consumers who are less connected to the government because of age, immigration status, race, religion, or other demographic qualities may be significantly less likely to complain.”).

<sup>196</sup> See *supra* Section III.A.3 (discussing financial resources).

<sup>197</sup> Human Rights Defense Center, Comment Letter on Proposed Regulation E of the Electronic Fund Transfer Act and Regulation Z of the Truth in Lending Act 10 (Mar. 23, 2015), <https://www.humanrightsdefensecenter.org/media/publications/HRDC%20release%20card%20comment%203-23-15%20with%2068%20sign%20ons.pdf>.

<sup>198</sup> Human Rights Defense Center, *supra* note 67, at 1–2.

prison services.<sup>199</sup> This example demonstrates that because nationwide regulation cannot account for this type of behavior, CFPB regulation is unlikely to prevent future injustices. This trend of private companies finding new ways to profit off of prisoners and their families will likely continue, as there has been a “fairly recent shift within the criminal justice system toward requiring defendants to pay more money for more reasons.”<sup>200</sup>

Another reason that CFPB regulation is not the best solution relates to the current confusion surrounding its status and legitimacy. The constitutionality of the CFPB was recently called into question in *PHH Corp. v. CFPB*.<sup>201</sup> In the court’s majority opinion, Judge Kavanaugh explained:

As an independent agency with just a single Director, the CFPB represents a sharp break from historical practice, lacks the critical internal check on arbitrary decisionmaking, and poses a far greater threat to individual liberty than does a multi-member independent agency. All of that raises grave constitutional doubts about the CFPB’s single-Director structure.<sup>202</sup>

Ultimately, the court found that the CFPB’s structure was unconstitutional; but, instead of completely eliminating the agency, the court severed the for-cause removal provision from the statute.<sup>203</sup> “As a result, the CFPB now will operate as an executive agency. The President of the United States now has the power to supervise and direct the Director of the CFPB, and may remove the Director at will at any time.”<sup>204</sup> The CFPB has challenged the D.C. Circuit’s ruling, but the future of the CFPB remains unclear.<sup>205</sup> This constitutional uncertainty only serves to reinforce the conclusion that the CFPB is not the proper entity to regulate prison banking services.

Finally, even if the CFPB were to ultimately conduct a rulemaking, it would only serve to offer double protection for consumers. The Dodd-Frank Act specifically provides that any regulations passed by

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<sup>199</sup> *Id.*

<sup>200</sup> Plunkett, *supra* note 41, at 68.

<sup>201</sup> 839 F.3d 1 (D.C. Cir. 2016), *vacated, reh’g granted en banc*, No. 15-1177 (D.C. Cir. Feb. 16, 2017).

<sup>202</sup> *Id.* at 31.

<sup>203</sup> *Id.* at 39.

<sup>204</sup> *Id.*

<sup>205</sup> Jonnelle Marte, *CFPB Challenges Court Ruling That Finds Its Structure Is Unconstitutional*, WASH. POST (Nov. 18, 2016), [https://www.washingtonpost.com/news/get-there/wp/2016/11/18/cfpb-challenges-court-ruling-that-found-its-structure-is-unconstitutional/?utm\\_term=.6c81cc71dbd6](https://www.washingtonpost.com/news/get-there/wp/2016/11/18/cfpb-challenges-court-ruling-that-found-its-structure-is-unconstitutional/?utm_term=.6c81cc71dbd6).

the CFPB are meant to coexist with state legislation and not completely supplant it—if the state legislation offers greater protection than that of the CFPB regulation.<sup>206</sup> Moreover, under another provision of the Act, state attorneys general are provided with the authority to pursue enforcement actions under CFPB regulations.<sup>207</sup> This again offers greater protection for consumers, as state attorneys general may choose to enforce provisions under state law, federal regulation, or both—whichever serves to best protect consumers in a given situation.

Without a more comprehensive, proactive approach, the current trend will likely continue. Accordingly, states must take action now to regulate these prison banking services.

#### IV. PROPOSAL

A comprehensive solution is needed to address the shortcomings of litigation and regulation when it comes to protecting consumers from unfair practices of private companies controlling prison banking services. Any adequate solution must have an inherently flexible structure so that states can regulate other, currently untapped private prison services as they develop. In an effort to fill the gaps left by regulation and provide a consumer voice, Part IV of this Note proposes guidelines for individual state legislation. State legislation adopted within these guidelines would provide adequate protection to consumers when state and local correctional facilities enter into contracts with private companies for the provision of various prison-related services. Section A of this Part discusses the need for state action, and Section B presents in detail the key provisions that would allow states to adequately protect consumers from abuses by private prison contractors.

##### A. *Calling on States to Act*

To eliminate the unfair practices employed by private companies that harm prisoners and their families, states must act. States should

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<sup>206</sup> “For purposes of this subsection, a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title.” 12 U.S.C. § 5551(a)(2) (2012) (footnotes omitted).

<sup>207</sup> “[T]he attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State and that has jurisdiction over the defendant, to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law.” *Id.* § 5552(a)(1) (footnotes omitted).

pass legislation and create guidelines for the provision of private services in prisons because they are best equipped to address the problems described in this Note. Individualized state legislation would be more effective than federal legislation or regulation for several reasons. First, the majority of a state's corrections spending comes from the state's budget.<sup>208</sup> As a result, state legislatures are likely in the best position to understand how legislation governing private service contracts will affect a particular state's economic balance. Second, state legislatures are elected by the people and thus are accountable to the people who elect them.<sup>209</sup> Conversely, the CFPB's leaders are appointed and consequently do not have the same incentive to respond to consumer concerns.<sup>210</sup> Third, it is notoriously more difficult to pass legislation at the federal level than at the state level. Fourth, federal legislation could further create unwanted preemption issues. For example, if individual states have already passed laws or regulations targeted at these unfair practices, federal legislation that is not as appropriate for addressing state needs may preempt those state measures, or at the very least, create confusion. Finally, the rates and fees charged by private companies may be different from state to state, certain practices may be more prevalent, or some states may see the need to offer more protection than others. These individual differences can be better accounted for at the state level.

### *B. Key Provisions*

In order to guarantee that consumers are shielded from unfair practices, states should adopt legislation incorporating five general requirements: (1) an explicit limit on the amount of commission state correctional facilities may receive from private companies; (2) a mandated competitive bidding process for private contracts; (3) the creation of a consumer review panel; (4) a requirement that all consumer fees accurately reflect the true costs of processing; and (5) a threshold level of consumer choice for each contract. Each of these provisions will be discussed in turn.

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<sup>208</sup> See PEW CHARITABLE TRS., *supra* note 1, at 15.

<sup>209</sup> See *New York v. United States*, 505 U.S. 144, 168 (1992) (discussing federalism concerns, and noting that "state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people").

<sup>210</sup> See Levitin, *supra* note 181, at 340 ("The CFPB is headed by a single Director appointed by the President.").

### 1. *Limiting Commissions*

First, state legislation should limit the amount of commission that state correctional departments can receive from private service contracts. Even JPay's own CEO acknowledged that the commission system in its current form incentivizes rate inflation to maximize profit, while still offering the highest commission.<sup>211</sup> If state corrections departments were limited in the amount of commission they could take, states would no longer be incentivized to blindly award contracts regardless of the company's practices.<sup>212</sup> Moreover, private companies would also no longer be incentivized to dramatically raise consumer prices to increase their profit margin because they would no longer have to make up for the large commission they promised to get the contract in the first place.<sup>213</sup> Some states have already taken this approach, eliminating the possibility of accepting commissions altogether.<sup>214</sup> The actual percentage cap states choose to place on their allowable commissions may vary and should be determined by the local legislature. Use of an economics expert or consultant to calculate a reasonable commission based on the financial needs of the state correctional department, the actual cost of processing fees, and the average household income of affected consumers may provide a starting point for determining a reasonable limit.

To illustrate how this provision would apply in practice, the following scenario may be helpful. Two companies, Company A and Company B, are bidding on a contract to handle prison banking services for the correctional department in State X. If State X has capped the commission it can accept at three percent, both companies know that they will likely have to agree to the three percent commission to get the contract, but that they must highlight other aspects of the partnership that would make them stand out, such as excellent customer service or a positive track record with consumers. This allows the correctional department to truly consider the better service provider, while still benefiting from some additional revenue.

Opponents of the proposed solution may argue that decreasing the commissions given to the state and local corrections departments

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<sup>211</sup> Cf. Clifford & Silver-Greenberg, *supra* note 83.

<sup>212</sup> Cf. Katzenstein & Waller, *supra* note 11, at 641.

<sup>213</sup> Cf. Clifford & Silver-Greenberg, *supra* note 83.

<sup>214</sup> Alice Miranda Ollstein, *Breaking: Federal Communications Agency Votes to Drastically Lower Prison Phone Rates*, THINKPROGRESS (Oct. 22, 2015), <http://thinkprogress.org/justice/2015/10/22/3715033/prison-phone-rates-vote/>.

will have a negative financial impact on those departments.<sup>215</sup> This objection is ultimately unpersuasive. First, this Note does not advocate for complete abandonment of the commission system; rather, it calls on states to set a limit on the commission and carefully monitor other practices of the private companies that states contract with, rather than awarding a contract based *solely* on commission. Additionally, this may incentivize state corrections departments to come up with creative solutions to problems, such as overcrowding, that lead them to need additional funds in the first place.<sup>216</sup> Finally, even if state corrections would be severely hampered by limiting commissions, public policy concerns still support consumer protection. It is unfair to tax consumers, i.e., prisoners and their families, in order to keep the correctional system functioning. It is the state's responsibility to use transparent means to raise revenue—means that rely on the support of all the state's citizens, not just a select few who are already likely to be financially disadvantaged.

## 2. *Mandated Competitive Bidding*

Second, state legislation should mandate a truly competitive bidding process. Individual states and localities may already have a statute or charter that requires specific procedures for a bidding process.<sup>217</sup> However, this proposal suggests that the requirements for a competitive process outlined here serve only as a floor, and not a ceiling. In that way, states are free to make their processes more restrictive if desired.

This proposal requires a competitive bidding process that begins with a public invitation for bids detailing the government's base requirements for the contract.<sup>218</sup> Then, all parties must submit sealed bids (by a certain deadline) that will be publicly opened or posted online at the same time.<sup>219</sup> Finally, the government should "award[] a contract to the lowest responsible bidder whose bid conforms in all material respects to the requirements of the invitation for bids."<sup>220</sup>

In addition to these criteria, states should take care to limit the number of years each service contract can last and not allow for simple extensions or rollovers without reviewing bids from all interested

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<sup>215</sup> See Slackman, *supra* note 186, at 537.

<sup>216</sup> Cf. Chen, *supra* note 24.

<sup>217</sup> 3 MARTINEZ, *supra* note 82; see, e.g., VA. CODE ANN. § 53.1-262 (2013).

<sup>218</sup> 3 MARTINEZ, *supra* note 82.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*



companies.<sup>221</sup> This will help ensure that companies do not retain virtual monopoly through excessively long contracts. It may ultimately be wise to continue an existing contract with the same company because that company is the most cost-effective option or the cost to convert to a new provider would be less advantageous than continuing with a current provider.

In Tennessee, Corrections Corporation of America (“CCA”) was recently awarded a contract to run a correctional facility until 2020.<sup>222</sup> CCA has been running that same facility since 1992.<sup>223</sup> This type of noncompetitive bidding (involving long-term contracts) is exactly the type of situation this provision aims to avoid. When governments open the market to all bidders instead of awarding contracts automatically, the process becomes inherently more transparent. A private company vying for a contract must truly offer a package that makes it stand out from the other bidders, and cannot ignore the quality of service and cost to consumers.

### 3. *Creation of a Consumer Review Panel*

Third, to make sure there is a legitimate review process, states should create a consumer review panel. The job of the consumer review panel would be to review proposed contracts between state and local correctional agencies and private companies to ensure that the bidding process has complied with state legislation, and bring to light any other relevant issues that could adversely affect consumers. The idea of a consumer review panel is not completely novel. For example, a “citizen review panel” has been used in the child welfare context.<sup>224</sup> In the area of child welfare, the citizen review panel reviews practices of the child welfare agency and sometimes even reviews particular cases to make sure the agency is appropriately discharging its responsibilities.<sup>225</sup> Additionally, the panel is charged with “solicit[ing] public outreach and comment in order to assess the impact of current poli-

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<sup>221</sup> This is a common requirement. In *United States v. Microsoft Corp.*, Microsoft entered into a consent decree limiting its length of contract: “Microsoft shall not enter into any License Agreement for any Covered Product that has a total Duration that exceeds one year . . .” CIV. A. 94-1564, 1995 WL 505998, at \*2 (D.D.C. Aug. 21, 1995).

<sup>222</sup> Jen French, *Corrections Corporation of America Locks in \$100 Million Contract to Run MDF*, FOX 17 NASHVILLE (Mar. 27, 2016), <http://fox17.com/news/local/corrections-corporation-of-america-locks-in-100-million-contract-to-run-mdf>.

<sup>223</sup> *Id.*

<sup>224</sup> D.C. CODE § 4-1303.51 (2001).

<sup>225</sup> *Id.*

cies, practices, and procedures of the child welfare system on children and families.”<sup>226</sup>

This Note envisions an analogous structure that would allow the consumer review panel to solicit feedback from the public on how they are impacted by existing contracts so that information can be incorporated into the contract selection process moving forward. The main function of the consumer review panel would be to include consumer insight in the decisionmaking process and bring the public’s voice to the table during contract discussions. For an example of how this might work, it is helpful to return to the anecdote at the beginning of this Note. If the State of Virginia were considering renewing a contract with JPay, they would draft a request for proposals and convene a consumer review panel. Ms. Taylor, if she served on this consumer review panel, might bring to light her experience of having to choose between visiting her son or depositing money in his account. The Virginia legislature—if they find her situation compelling or reasonably believe others like Ms. Taylor are experiencing similar troubles—might consider these issues when drafting its request for bids and when reviewing a potential contract. At the end of the day, the consumer review panel serves as a platform for people like Ms. Taylor—the individuals most heavily impacted by these contracts—to advocate on behalf of themselves.

#### 4. *Fees Must Reflect Actual Cost of Processing*

Fourth, states should adopt language similar to that of the Durbin Amendment of the Dodd-Frank Act<sup>227</sup> that requires all interchange or processing fees charged to a consumer for a provision of a prison service (e.g., a deposit into the inmate trust account) to reflect the actual cost of processing.<sup>228</sup> The language should read similarly to the following:

The amount of any interchange transaction or processing fee that an issuer may receive or charge with respect to any prison-related prison banking transaction, including but not limited to deposits into inmate trust accounts and use of pre-paid debit release cards, shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction.<sup>229</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> 15 U.S.C. § 1693o-2(a)(2) (2012).

<sup>228</sup> *See id.*

<sup>229</sup> This language closely mirrors that of 15 U.S.C. § 1693o-2(a)(2).

A provision like this will serve to protect consumers from the inflated fees private companies charge to increase their profit margins for their shareholders.<sup>230</sup> Also, if the government includes this requirement in its initial request for bids, private companies will be in a better position to estimate how much commission they can offer to retain profit. In that way, this requirement goes hand in hand with the competitive bidding process and the limits on commissions. If it costs only \$2.00 to process a \$50.00 deposit, a \$2.50 total charge is a reasonable price that would reflect the total cost of processing. This type of price regulation would greatly decrease the burden placed on individuals like Ms. Taylor and many others experiencing similar financial distress.

### 5. *Threshold Level of Consumer Choice*

Finally, states should mandate a minimum level of consumer choice for every contract. The problem with many privatized prison banking service contracts, especially the prepaid debit release card, is its compulsory nature.<sup>231</sup> To prevent consumers from being forced into contracts and, as a result, forced to accept the related fees, states should mandate options for consumers. These options do not have to be comparable. For example, a state need not have a contract with two different companies to process a deposit into inmate trust accounts. Rather, consumers should have the option of sending a money order or using an electronic debit system. Similarly, released inmates should have the option of receiving their remaining funds via a prepaid debit release card or by check. Requiring contracts to contain a “standard” or lower-cost option will resolve the issue of compulsory contracts. Although companies like JPay may argue that prepaid debit release cards are a better option because they offer convenience and ease of use, this requirement allows the consumer to make the choice that fits best with his or her needs.

State legislation that embraces these five touchstones will protect consumer rights. The guiding principles behind these requirements are guaranteeing consumers a voice, reintegrating consumer choice, and removing the incentives private companies have to engage in unfair and abusive consumer treatment. Further, because the proposed legislation only establishes five key provisions and allows states to fill in the gaps for themselves, it still provides the inherent flexibility states

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<sup>230</sup> Cf. Clifford & Silver-Greenberg, *supra* note 83 (discussing the excessively high rates private prison companies currently charge consumers).

<sup>231</sup> Human Rights Defense Center, *supra* note 67, at 5–6.

need to address new concerns as they arise. Ultimately, although it is important for state correctional institutions to enter contracts that are administratively and financially workable, no contract should operate by shifting costs to the families of those incarcerated.

#### CONCLUSION

The rise of prison privatization in recent years has resulted in the privatization of many prison-related services. The provision of prison banking services, such as deposits into inmate trust accounts and the use of prepaid debit release cards, is often contracted out to private companies that aim to maximize profits, even at the expense of consumers. In the end, the consumers bearing the costs are prisoners and their families who pay exorbitant, unfair fees, while private companies prosper. This Note advocates entrusting individual states with the responsibility to pass legislation that will regulate prison-related private service contracts and offer protection for consumers. By creating a comprehensive and inherently flexible piece of legislation, states will be able to adapt to new types of contracts that may arise in the future. Moreover, state legislatures will be better able to respond to consumer concerns and can be better held accountable if they fail to do so.

## APPENDIX

Proposed Restatement of the Law:  
State Correctional Agencies Contracting with Private Entities<sup>232</sup>

All contracts between state and local corrections departments and private entities must meet the following five requirements in order to be valid. If a contract has not complied with any of the five requirements, it is deemed to be void.

(1) Limits on Commission

- (a) Any contract between a state or local correctional department and a private entity must specify the maximum amount of commission that can be paid to the correctional department under the contract in accordance with the individual state's limits.
- (b) Individual states should set a limit of commission based on the financial needs of the state correctional department, the actual cost of processing fees as reported by the private vendor, and the ability of consumers in that state to offset any extra cost.
- (c) In no case shall the commission exceed ten percent of the private entity's profits under the contract.

(2) Mandated Competitive Bidding Process

- (a) All contracts between state and local correctional agencies and private entities must be the result of a competitive bidding process. As a minimum requirement, the state or local corrections department must do the following:
  - (i) Solicit bids for services desired by a public invitation that elaborates in detail the state or local correctional department's threshold requirements.<sup>233</sup> Public invitation means either by publication in a newspaper or other comparable means.

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<sup>232</sup> This Proposed Restatement of the Law is meant to serve as a model of what state legislation that incorporates the five key provisions proposed in Part IV might look like.

<sup>233</sup> 3 MARTINEZ, *supra* note 82.

- (ii) Set a deadline by which all parties need to submit their sealed bids.<sup>234</sup> The state should also set a date and time at which those bids will be publicly opened.<sup>235</sup>
  - (iii) Award the contract to the lowest responsible bidder, so long as that bidder meets the state's requirements as set out in the invitation for bids.<sup>236</sup>
- (b) States are free to supplement the standards for competitive bidding listed here.

(3) Creation of a Consumer Review Panel

- (a) States should create a consumer review panel of no less than ten people who represent an accurate cross-section of the state or local population.
- (b) This panel should have the opportunity to review all proposed contracts between a state or local correctional agency and a private entity to make sure the bidding process has been complied with and to voice any other consumer concerns.
- (c) The panel may also make recommendations to the state correctional agencies, but those recommendations are not binding.

(4) Processing Fees Must Reflect Actual Cost of Processing

- (a) Any private entity that desires to enter into a contract with a state or local correctional facility must provide an estimate of the cost of processing any related transactions.
- (b) For any contract between a state or local correctional agency and a private entity that involves fees that may be offset by consumers, the amount of any interchange transaction or processing fee that an issuer may receive or charge with respect to any transaction, including but not limited to deposits into inmate trust accounts and use of prepaid debit release cards, shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction.<sup>237</sup>

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<sup>234</sup> Cf. *id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> This language is based on 15 U.S.C. § 1693o-2(a)(2) (2012).

(5) Threshold Level of Consumer Choice

- (a) For any contract between a state or local correctional facility that purports to replace an existing service with a new or advanced service that would involve charging greater fees to consumers, a standard- or low-fee option must continue to be offered as well.
- (b) If for whatever reason this is not possible, consumers must be provided with adequate notice of the changes and an opportunity to voice their concerns.