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DATA PRIVACY IN CARCERAL SETTINGS: THE DIGITAL PANOPTICON RETURNS TO ITS ROOTS

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ABSTRACT—Jeremy Bentham's panopticon has enjoyed a resurgence as a topic of discourse in the modern age due to the omnipresent surveillance most people now face in the era of Big Data. Analogizing modern digital surveillance to the famous eighteenth-century prison designed to facilitate pervasive monitoring and observation has helped define several organizing principles of the present movement for data privacy; however, relatively little attention is paid to the collection and usage of personal data in actual prisons and jails. Building on the author's public interest advocacy work and previous publications, this Article addresses this gap in the literature by surveying the rapid growth of consumer technology in correctional facilities and analyzing related issues of surveillance and privacy.

Until quite recently, incarcerated people in the United States were reliant on postal mail and voice telephone service for communication with the outside world. But digital technologies have taken the correctional industry by storm, with video calling, electronic messaging, digital money transfers, and handheld tablets all becoming the norm in the last ten years. Now that such technologies have been deployed on a widespread basis, the companies providing these services are embarking on a new line of business: monetizing the involuntary collection, sharing, and analysis of data collected from captive consumers. If the emergence of closed platforms on the Internet is frequently analogized to a walled garden, then the comparable experience of correctional technology users can be described as a digital prison yard—one that ensnares not just incarcerated people, but their friends, families, and correspondents as well.

After reviewing the historical evolution of carceral communications channels, this Article provides insight into the data practices of contemporary correctional technology companies as revealed by contracts,

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bid proposals, litigation, and news accounts. In light of the grave concern about consumer privacy revealed by current corporate practices, the Article concludes by examining existing law (which provides a patchwork of protections for users of consumer-facing carceral technologies) and outlines a proposal to define consumer privacy rights in this growing and largely unregulated industry.

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INTRODUCTION

In 1792, British prison reformer Jeremy Bentham embarked on a multidecade campaign to construct and operate a new style of prison—the panopticon—which was ideologically and spatially designed around the concept of an all-seeing monitor.[1] While Bentham never completely implemented his vision, the panopticon's surveillance model has lived on, influencing prison architecture and management to varying degrees as its popularity ebbed and flowed with waves of penological reform and counter-reform.[2]

Outside the prison walls, the panopticon has enjoyed a recent resurgence as a topic of discourse due to the omnipresent surveillance most people now face in the era of Big Data. Analogizing modern digital surveillance to Bentham's panopticon has helped define several organizing principles of the present movement for data privacy.[3] However, relatively little attention is paid to the collection and usage of personal data in actual prisons and jails. In part, this is because carceral facilities were late to the digital communications game: until quite recently, incarcerated people in the United States were reliant on postal mail and "plain old telephone service" for communication with the outside world.[4]

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[1] THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 85, 274 (Norval Morris & David J. Rothman eds., 1998).

[2] *E.g.*, RUTH WILSON GILMORE, *Prisons and Class Warfare: An Interview with Clément Petitjean/Période* (2018), *in* ABOLITION GEOGRAPHY: ESSAYS TOWARDS LIBERATION 335, 344 (2022) (explaining how late twentieth century architectural design of California prisons incorporated pervasive surveillance as a means of preventing the type of in-prison organizing that occurred in the 1960s); Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. STATE U.L. REV. 149, 163–64 (2010) (citing Bentham's work as foundational to the utilitarian justification of punishment, which has contrasted with retributive theories over the history of Anglo-American criminal law); WILLIAM G. NAGEL, THE NEW RED BARN: A CRITICAL LOOK AT THE MODERN AMERICAN PRISON 37 (1973) (describing closed-circuit video surveillance in prisons as an echo of Bentham's panopticon).

[3] *E.g.*, Electronic Frontier Foundation, EFF Submission to the OHCHR Consultation on the Practical Application of the United Nations Guiding Principles on Business and Human Rights to the Activities of Technology Companies, at 8 (Feb. 22, 2022), https://www.eff.org/document/eff-submission-ohchr-consultation-practical-application-united-nations-guiding-principles [https://perma.cc/8SC8-YH7R] (discussing the potential of "smart glasses" to create "a kind of surveillance panopticon—including the ever-present knowledge that one could be observed at any moment in public or semi-public spaces."); Thomas McMullan, What Does the Panopticon Mean in the Age of Digital Surveillance?, THE GUARDIAN (July 23, 2015), https://www.theguardian.com/technology/2015/jul/23/panopticon-digital-surveillance-jeremy-bentham [https://perma.cc/EBB3-P9V9] (early review of expansive data capture and surveillance as an evolution from Bentham's panopticon); Jennifer Shkabatur, A Global Panopticon? The Changing Role of International Organizations in the Information Age, 33 MICH. J. INT'L. L. 159, 187–96 (2011) (discussing personal data monitoring in the context of international health organizations).

[4] "Plain old telephone service" (POTS") is telecommunications shorthand for the voice calling using the public switched telephone network, wherein a customer's call is routed via a connection to the local

In the last ten years, though, digital technologies have taken the correctional industry by storm, with video calling, electronic messaging, digital money transfers, and handheld tablets all becoming the norm. Now that such technologies have been deployed on a widespread basis, the companies providing these services are embarking on a new line of business: monetizing the collection, analysis, and sharing of data collected from a new class of consumers—incarcerated people and their families who use these technologies.

This Article seeks to build on the author's earlier work[5] by documenting how data is collected from users of carceral technology services and how those consumers' interests might be protected under existing or new bodies of law. The discussion begins with a historic analysis of how carceral communications options have evolved from the use of open public networks to a new world of proprietary platforms which create a kind of digital prison yard. It follows with a brief overview of current practices concerning the collection and use of consumer data. Finally, it surveys potential sources of consumer protection and proposes a framework for comprehensive consumer protection.

I. THE EVOLUTION OF CORRECTIONAL COMMUNICATIONS: FROM OPEN PUBLIC NETWORKS TO A DIGITAL PRISON YARD

Historically, incarcerated people have communicated with the outside world via postal mail, phone calls, and in-person visits. These traditional channels all, to some degree, operated as (or relied on) public networks that were regulated under a common carrier theory.[6] Today, however, these channels are increasingly supplanted by specialized technological offerings that only operate in correctional settings. As this section will show, these proprietary technologies confine incarcerated people in digital prison yards marked by expensive rates and poor service quality. In turn, they create an inferior class of communications and consumer technology to which incarcerated people and their confidants are relegated.

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telephone company's switch. POTS is distinguished from *Internet*-enabled calling, which can replicate traditional voice calls, but which uses internet protocol to route calls and easily integrates with additional functions such as video calling and electronic messaging.

[5] Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3 (2020).

[6] Under Anglo-Saxon common law, a common carrier is an entity that holds itself out to the public for hire on general terms. In American practice, common carriers are private firms that are closely monitored by a regulatory agency "to ensure that they provide[] services in standardized packages at standardized prices to all similarly situated end-users and to ensure that those services were reliable." Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1325 (1998).

Tracing the development of communications in carceral settings requires going back to the birth of the modern U.S. penitentiary following the Civil War. The new model penitentiary of the nineteenth century saw an abandonment of the previous emphasis on strict isolation from larger society. Instead, new penal institutions favored a liberalized approach to connections with the outside world—often using such contact as a tool in a system of rewards and punishments applied for purposes of behavior modification.[7]

During the first half of the twentieth century, new theories of penology allowed communications to and from incarcerated people on public networks (namely, the postal system, wireline telephone networks, and intercity bus service) that were used by incarcerated and nonincarcerated customers on general terms. Various government agencies regulated these networks to provide universal, nondiscriminatory service at fair and reasonable rates for the public at large. While the incarcerated user wasn't given unfettered access, due to security concerns, they and their contacts were treated economically like any other user. For example: mailing a letter to your sister in Chicago was essentially the same as mailing a letter to your brother incarcerated in Joliet. Yes, the prison mail room would open and inspect the letter, but the cost and terms of service imposed by the delivery network were the same for either transaction.

The technical methods and economics of such communications channels changed dramatically in the late twentieth century, due both to larger societal trends as well as the dynamics of mass incarceration. As incarceration rates began to spike, policies and legal structures related to postal, telecommunications, and transportation systems were being reshaped as the result of a broad deregulatory turn. Meanwhile, new technologies that have become ubiquitous in daily life have gradually been introduced to carceral settings. Incarcerated people—just like their counterparts in the free world—are waking up to find that it is often impossible to exist in the world without using a proprietary digital service to communicate, learn, or transact business. If the emergence of closed platforms on the Internet is frequently analogized to a walled garden,[8] then the comparable experience of correctional technology users can be described as a digital prison yard—one that ensnares not just incarcerated people, but their friends, families, and correspondents as well.

The following sections consider the origins and development of incarcerated peoples' communications options by reference to the three

[7] Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, *in* THE OXFORD HISTORY OF THE PRISON (Norval Morris & David J. Rothman, eds.) at 150 (1998).

[8] *See, e.g.*, *What is a Walled Garden?*, TECHSLANG, https://www.techslang.com/definition/what-is-a-walled-garden/ [https://perma.cc/CF7V-6RPE] (defining a walled garden).

traditional channels noted above: postal mail, telephones, and in-person visitation.

A. Postal Mail

1. Origins

Working- and middle-class people only began using the mail for correspondence in the mid-nineteenth century when Congress overhauled postal laws to provide affordable rates.[9] By the early twentieth century, both incarcerated people and prison administrators advocated for widespread access to postal mail for people in the nation's prisons.[10] In a trio of cases decided between 1974 and 1989, the Supreme Court held that incarcerated people have a constitutional right to send and receive mail, but that right is subject to the broad power of prison officials to inspect and restrict mail for "valid penological interests."[11] Thus, broad societal use of mail for personal communication developed concurrent with a rehabilitative turn in correctional philosophy, resulting in widespread acceptance of written correspondence as a lifeline for incarcerated people. Over time, postal mail became the most cost-effective method of accruing the rehabilitative benefits of maintaining family contact.[12]

2. Modern Developments

Congress created the U.S. Postal Service (USPS) to provide prompt, reliable, and efficient services to patrons in all areas to bind the nation together through the personal, educational, literary, and business

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[9] DAVID M. HENKIN, THE POSTAL AGE: THE EMERGENCE OF MODERN COMMUNICATIONS IN NINETEENTH-CENTURY AMERICA 21–34 (2006).

[10] *Mail Restriction in Prisons*, *in* PRISON REFORM: TOGETHER WITH A DISCUSSION OF THE PRISON OF THE FUTURE 102, 102–04 (Corinne Bacon ed., 1917) (petition to the U.S. Congress from the residents of the Arizona State Penitentiary, extolling the educational and rehabilitative virtues of that state's new liberalized mail policy); Thomas J. Hanlon, *The Deputy Warden's Contribution to Successful Management*, PROCEEDINGS OF THE ANN. CONG. AM. PRISON ASS'N 69, 74–76 (1938) (stating the rehabilitative and security-related benefits of postal communication).

[11] 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 14:2 (5th ed. rev. 2020); Thornburgh v. Abbott, 490 U.S. 401, 418 (1989).

[12] *See* Leah Wang, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families*, PRISON POL'Y INITIATIVE BLOG (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/ [https://perma.cc/S54L-57VX] (summarizing research on the beneficial effects of family contact); Florida House of Representatives, Justice Council Committee on Corrections, *Maintaining Family Contact When a Family Member Goes to Prison*, 30 (Nov. 1998) (finding that 45% of families of people incarcerated in the Florida state prison system reported writing to their incarcerated relative at least once a week and 52% reported receiving mail from the relative at least weekly).

correspondence of the people.[13] Even so, from the outset, Congress hobbled the new agency by curtailing its ability to raise revenue from new operations, thereby putting mail service on a long-term path of deterioration.[14]

In more recent years, incarcerated postal customers have faced dual attacks from outside and inside the prison. Externally, the USPS won the ability to raise rates while the Postmaster General weakened service standards—a double punch that particularly impacts incarcerated people who have to pay 68¢ to mail a first-class letter while earning, on average, 13¢ to 52¢ per hour for prison-based jobs (assuming they are even fortunate enough to have a paying position).[15] Inside prisons and jails, facility administrators are increasingly impatient with mail service because of alleged security concerns.[16] This administrative disdain has resulted in policies that either degrade the value of postal mail or coerce the use of electronic alternatives. Degradation of mail utility can take the form of postcard-only policies (used in some jails),[17] or systems of scanning and destroying original mail pieces and distributing digital images (used mostly in prison systems).[18]

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[13] Richard B. Kielbowicz, *Preserving Universal Postal Service as a Communication Safety Net: A Policy History and Proposal*, 30 SETON HALL LEGIS. J. 383, 387 (2006) (citing 39 U.S.C. § 101(a), enacted by the Postal Reorganization Act, Pub. L. 91-375, 84 Stat. 719 (1970)).

[14] In 2001, the General Accounting Office added the USPS to its "high risk" list of government programs in danger of imminent collapse. The agency has remained on the list ever since, with the exception of a two-year reprieve in 2007–08. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-271, HIGH-RISK SERIES: AN UPDATE 4 tbl. 2 (2009); U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-119SP, HIGH-RISK SERIES: DEDICATED LEADERSHIP NEEDED TO ADDRESS LIMITED PROGRESS IN MOST HIGH-RISK AREAS 79 (2021).

[15] *See* Stephen Raher, *Comments to Postal Regulatory Commission Regarding Rate Increases for Market-Dominant Products* (July 29, 2022), https://static.prisonpolicy.org/scans/2022-07-29_PRC_stakeholder_comments.pdf [https://perma.cc/PQB8-AUPE] (citing average prison labor wages from a 2022 survey conducted by the University of Chicago Law School and the ACLU); Stephen Raher, *Warning: A Painful Road Ahead for Postal Customers*, PRISON POL'Y INITIATIVE BLOG (Feb. 20, 2021), https://www.prisonpolicy.org/blog/2021/02/20/postalrates/ [https://perma.cc/FB9D-LWRA] (in a bitter irony, the USPS won the ability to raise rates faster than the Consumer Price Index based in part on decreases in network density (i.e., a growing number of dispersed delivery points), meaning that incarcerated people must pay higher postage even though they send and receive mail from correctional facilities, which are some of the densest delivery points imaginable).

[16] *E.g.*, David M. Reutter, *Pennsylvania DOC's New Mail Policy Robs Prisoners of the Personal Touch; Lawsuits over Legal Mail Settle*, PRISON LEGAL NEWS (Sept. 9, 2019), https://www.prisonlegalnews.org/news/2019/sep/9/pennsylvania-docs-new-mail-policy-robs-prisoners-personal-touch-lawsuits-over-legal-mail-settle/ [https://perma.cc/6NGJ-7B6L] (prison system cites largely unsubstantiated "exposures to unknown substances" in the mail as justification for photocopying incoming mail).

[17] *See* Leah Sakala, *Postcard-Only Mail Policies in Jail*, PRISON POL'Y INITIATIVE (Feb. 7, 2013), https://www.prisonpolicy.org/postcards/report.html [https://perma.cc/7VC8-L2PJ].

[18] Leah Wang, *Mail Scanning: A Harsh and Exploitative New Trend in Prisons*, PRISON POL'Y INITIATIVE (Nov. 17, 2022), https://www.prisonpolicy.org/blog/2022/11/17/mail-scanning/ [https://perma.cc/A5QM-B645].

Electronic alternatives to postal mail have promise but are plagued by high costs and poor functionality.[19] These systems are often referred to as "email." though this is a misnomer because the electronic messaging platforms do not interconnect with standard email. In other words, one cannot use their Gmail account to send or receive mail from an incarcerated correspondent; instead, consumers must use a proprietary closed platform that keeps their data (usually indefinitely) without allowing the user to assert ownership over (or even export a copy of) their own correspondence.[20]

B. Telephones

1. Origins

Relying in part on lessons learned from the era of the telegraph, the federal government established a national policy for the new telephone system in 1910 when Congress classified telephone networks as common carriers subject to jurisdiction of the Interstate Commerce Commission. A few years later, the Bell System acquiesced to further regulatory oversight in order to settle antitrust litigation.[21] Thus, the regulatory framework for the next seven decades was established: phone service was operated on a monopoly basis by private companies while government oversight aimed to promote universal service, nondiscriminatory treatment, and reasonable rates.

Telephone usage in prisons lagged behind the free world[22] until the mid-twentieth century when phones became commonplace in prisons, as did rules regulating incarcerated persons' phone privileges.[23] So it came to pass that

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[19] *See* Mike Wessler, *SMH: The Rapid & Unregulated Growth of E-Messaging in Prisons*, PRISON POL'Y INITIATIVE (Mar. 2023), https://www.prisonpolicy.org/reports/emessaging.html [https://perma.cc/4GM8-AA39].

[20] Stephen Raher, *You've Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation*, PRISON POL'Y INITIATIVE, 12 (Jan. 21, 2016), https://www.prisonpolicy.org/messaging/report.html [https://perma.cc/D4J7-UV7T] (discussing problematic terms of service that assert ownership over user contents).

[21] RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS 343–63 (2010).

[22] Notably, facility siting in distant locations (*see*, *infra* note 31 and accompanying text) meant that the relatives that incarcerated people wanted to call would be outside of the local dialing area of the prison, requiring an expensive long-distance call.

[23] Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, 22 CRIT. STUD. MEDIA COMM'CNS 263, 267–68 (2005) (In 1973 the federal Bureau of Prisons increased access to phone calls (up from a limit of one call every three months), citing the rehabilitative effects of family contact. Many state systems followed suit.)

phone access, to varying degrees, became standard in prisons and jails.[24] The behemoth Bell System was under a public interest mandate to provide public telephone service in numerous locations. Thus, when payphones were common throughout the land, the relatively small number of payphones in prisons and jails provided fairly insignificant corporate revenue in the context of the larger national network. Meanwhile, for incarcerated people and their families, the telephone represented a comparatively cost-efficient way to maintain real time communications across significant spatial distance.[25]

2. Modern Developments

Few regulated industries experienced as profound of a deregulatory process in the late twentieth century as the telecommunications sector. Beginning with the judicial breakup of AT&T in 1983 and culminating in the Telecommunications Act of 1996, Congress tossed out the regulated monopoly of the Bell System in favor of market competition. In the new competitive landscape, capital flowed to telecom companies that served niche markets with high call volumes which enabled carriers to charge rates significantly higher than costs.[26] Thus the "incarcerated people's communications services" (IPCS) industry was born, wherein service

[24] By the 1970s, telephone access in U.S. prisons and jails was practically universal, but the terms of which such service was offered varied (and continue to vary to the present day). Some facilities allow unlimited calling (at least for those who can afford it), while others have limits on the number of weekly calls and/or the length of each individual call. Other access restrictions can include rules governing who an incarcerated person can call or tying phone access to one's individual disciplinary record. An empirical study found that the percentage of prisons allowing incarcerated people to speak on the phone for longer than three minutes at a time increased from 87% in 1971 to 100% in 2005. Heath C. Hoffman, George E. Dickinson & Chelsea L. Dunn, *Communication Policy Changes in State Adult Correctional Facilities from 1971 to 2005*, 32 CRIM. JUST. REV. 47, 53–54 (2007).

[25] Phone calls from carceral institutions often provided an affordable alternative to in-person visitation; however, such calls were usually more expensive than an "ordinary" phone call. Although there was no unique pricing structure imposed simply because a call originated from a correctional facility, up until the end of the twentieth century most calls from incarcerated people had to be placed as collect calls. Collect calls were subject to higher rates, based largely on the historical labor-intensive process of using live operators. Stephen Raher, *Phoning Home: Prison Telecommunications in a Deregulatory Age*, *in* PRISON PRIVATIZATION: THE MANY FACETS OF A CONTROVERSIAL INDUSTRY 223 (Byron Eugene Price & John Charles Morris, eds.) (2012); *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Order on Remand & Notice of Proposed Rulemaking 9, 17 FCC Rcd. 3248, 3252 (2002) (as of that date, "virtually all inmate phone calls must be collect; there can be no coin calls or credit card calls.").

[26] *See* Raher, *supra* note 25, at 215–18; *see also* Marleen Marra, Nathan H. Miller & Gretchen Sileo, *The Price that Inmates Pay*, at *3 (Nov. 4, 2022), http://www.nathanhmiller.org/prisonphones.pdf [https://perma.cc/6JPF-CEBE] (using an empirical model to determine that prison phone rates are "well above" providers' costs, due to an oligopolistic markup and the impact of site commission payments to correctional facilities).

providers enjoy exclusive contracts and often split profits with the facility responsible for awarding the contract.[27] An industry once cluttered with numerous small companies has consolidated over the years and is now dominated by two firms: Securus Technologies (Securus) and Global Tel*Link (GTL), both owned by private equity firms.[28]

Since 2015, advocates for incarcerated people and their families have scored meaningful victories at the Federal Communications Commission (FCC) and in Congress. The FCC has capped calling rates and payment fees for incarcerated people.[29] The biggest obstacles to additional FCC action had been lack of jurisdiction over intrastate calling and unclear jurisdiction over newer technologies; but, as the result of a long-running campaign by a broad coalition of activists, the 117th Congress enacted legislation clarifying the FCC's jurisdiction over intrastate services and IPCS video calling.[30] While the regulatory and legislative progress achieved by activists is rightly celebrated, the prospect of unregulated data harvesting looms like a storm cloud over these accomplishments.

C. In-Person Visitation

1. Origins

Prisons have frequently been built in locations that are distant from the population centers from which incarcerated people come.[31] Locating prisons in remote locations meant that families had to travel long distances to visit incarcerated relatives. Families with private automobiles could drive on a

[27] The Federal Communications Commission originally referred to such services under the term "inmate calling services" (ICS). In response to calls from advocates for "people first" terminology, the Commission recently announced a change to the IPCS label. *See In the Matter of Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act*, WC Dkt. No. 23-62, Notice of Proposed Rulemaking and Order 11, n.37 (rel. Mar. 17, 2023).

[28] Both Securus and GTL have attempted recent rebranding, sometimes going under the names Aventiv Technologies and ViaPath, respectively. This Article uses the names Securus and GTL, which both remain attached to the corporate entities that conduct IPCS activities.

[29] Raher, *supra* note 5, at 46–51.

[30] Martha Wright-Reed Just and Reasonable Communications Act of 2022, Pub. L. No. 117-338, 136 Stat. 6156 (Jan. 5, 2023).

[31] In the early days of westward expansion, newly admitted states tended to use the siting of state institutions as a tool of pork barrel politics, which sometimes resulted in prisons being built in remote areas that happened to be represented by politically savvy operators. During the prison building boom of the 1980s–90s, new prisons were usually built in economically depressed rural areas as an economic development strategy. Rebecca Thorpe, *Urban Divestment, Rural Decline and the Politics of Mass Incarceration*, 23 GOOD SOC'Y 17, 19–25 (2014); Susan E. Blankenship & Ernest J. Yanarella, *Prison Recruitment as a Policy Tool of Local Economic Development: A Critical Evaluation*, 7 CONTEMP. JUST. REV. 183, 184–85 (2004); SARAH LAWRENCE & JEREMY TRAVIS, THE NEW LANDSCAPE OF IMPRISONMENT: MAPPING AMERICA'S PRISON EXPANSION 2–3 (2004); Ryan S. King, Marc Mauer & Tracy Huling, *Big Prisons, Small Towns: Prison Economics in Rural America*, THE SENT'G PROJECT, 1 (Feb. 2003).

publicly constructed highway network but everyone else had to rely on intercity bus service. These buses were regulated under the Federal Motor Carrier Act for the purpose of ensuring reasonable charges "without unjust discrimination, undue preferences, or advantages and unfair or destructive practices."[32] Thus, while actual communications *during* a face-to-face visit are not mediated by a communications network, many families have historically tended to rely on regulated transportation services to physically access prison visiting rooms.

2. Modern Developments

Advocates for the successful deregulation of transportation industries proposed such policies as a pro-consumer move;[33] however, the decline in intercity bus service had unforeseen consequences on how low-income families access distant prisons for in-person visitation. The Bus Regulatory Reform Act of 1982 slashed oversight of the intercity bus industry (at that time dominated by Greyhound and Trailways) and left it to the free market to sort out competition among and between transportation options.[34] A scant eleven years later, Congress received testimony that between 1968 and 1992, the number of cities with intercity bus service had declined from approximately 17,000 to 5,700.[35] The trend of route abandonment has continued relentlessly in the years since.[36] While general bus service declined in the face of deregulation and competition from private auto travel, specialized prison bus and van service proliferated. Several scholar-activists have focused on the prison bus as its own type of carceral space in which family members (mostly poor, black or brown, and female) travel long distances from urban areas to various rural prisons in an attempt to maintain relationships with incarcerated loved ones.[37]

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[32] John J. George, *Federal Motor Carrier Act of 1935*, 21 CORNELL L. REV. 249, 253 (1936).

[33] *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 9–12 (Eric Stano, updated 2d ed. 2011).

[34] William E. Thoms, *Unleashing the Greyhounds—The Bus Regulatory Reform Act of 1982*, 6 CAMPBELL L. REV. 75, 86–99 (1984).

[35] *Oversight of the Intercity Bus Industry: Hearing Before the Subcomm. On Surface Transp. of the Comm. On Com., Sci., and Transp.*, 103d Cong. 25 (1993).

[36] Leoneda Inge, *Greyhound Eliminates Hundreds of Stops*, NPR (Jul. 25, 2005, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=4769694 [https://perma.cc/3BLQ-KLSE].

[37] *See* BRETT STORY, PRISON LAND: MAPPING CARCERAL POWER ACROSS NEOLIBERAL AMERICA, 105–35 (2019) (examining New York prison bus service); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 1–4 (2007) (California prison bus service). The services described by Story and Gilmore are simply offered as a fee-based transportation service operated by a for-profit firm without government mediation. For many years the New York prison paid private bus companies to offer free service from New York city to prisons in rural upstate New York (for a time this service was funded with profits from the prison phone system); when the service was

IPCS video calling represents both a potentially beneficial tool and a threat to in-person visitation. Video calling can be a useful tool for family members who are geographically distant from their incarcerated loved one, but the utility is often hampered by poor service quality and high rates.[38] While prison systems largely offer video calling as an *alternative* to in-person visitation, some local jails seek to boost video revenue and cut operating costs by *replacing* in-person visitation with video calling.[39] Facility attempts to cease in-person visitation subsided somewhat after press coverage of some particularly ham-handed attempts to pair video calling with elimination of visiting rooms in the 2010s. However, the COVID-19 pandemic saw a resurgence of visitation bans, some of which continue even after the epidemiological justification has faded.[40] Ultimately, while technology can be helpful in bridging the gap when in-person visitation is infeasible, it comes with a notable price tag in the form of foregone privacy, as discussed in the following section.

II. OVERVIEW OF CURRENT SERVICES AND RELATED SURVEILLANCE

The previous section illustrates how incarcerated peoples' communications options have gradually transitioned from broad public networks into proprietary digital prison yards operated by a handful of private-equity backed firms. This transition is often characterized by reference to the high rates and poor service quality that incarcerated people

eliminated in 2011, private companies stepped in to provide rides at an average price of $50–70 per person. Elana Confino-Pinzon, *Locked Up Far Away From Home: The Problem of Distance in New York State Prisons*, BROWN POL. REV. (Mar. 30, 2019), https://brownpoliticalreview.org/2019/03/locked-far-away-home-problem-distance-new-york-state-prisons/ [https://perma.cc/V2W4-5MAV]; *see also* Fla. House of Rep, *supra* note 12, at 54–55 (describing the financing mechanism for New York's bus service).

[38] *See* PETER WAGNER & WANDA BERTRAM, STATE OF PHONE JUSTICE 2022: THE PROBLEM, THE PROGRESS, AND WHAT'S NEXT, tbl. 2 and accompanying text (Dec. 2022) (surveying video-calling prices in three states); Order Instituting Rulemaking to Consider Regulating Telecommunications Services Used by Incarcerated People, Calif. Pub. Utils. Comm'n Dkt. R.20-10-002, Opening Testimony of the Office of the Public Advocate, ch. 2 (Sept. 19, 2022) (surveying video-calling service quality problems in California prisons and jails), https://docs.cpuc.ca.gov/PublishedDocs/SupDoc/R2010002/5543/497343633.pdf [https://perma.cc/J6X8-FUX9].

[39] Bernadette Rabuy & Peter Wagner, *Screening out Family Time: The For-Profit Video Visitation Industry in Prisons and Jails*, PRISON POL'Y INITIATIVE 11–13 (Jan. 2015), https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf [https://perma.cc/E8BC-9SR4]; *see also* Chesa Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 149, 186 n.162 (2013) (discussing elimination of in-person visitation in favor of video calling in the District of Columbia jail and the Northern Oregon Regional Correctional Facility).

[40] A 2015 report found that 74% of jails banned in-person visits after implementing video visitation, while no state prison systems adopted comparable policies. *See* Boudin, Stutz & Littman, *supra* note 39, at 186 n. 162. This practice declined in prevalence due to public outcry, only to be revived during the early days of the COVID-19 pandemic.

are forced to endure. While the high-cost/low-quality dilemma is important, an even more dangerous mode of profit-making is already taking shape: massive data collection and analysis.

Technology now allows for pervasive data collection and analytics with respect to all methods of correctional communications. Jurisprudence governing the rights of carceral communications users has not kept pace with these developments. Judicial decisions allowing surveillance of prison communications come from a time when such monitoring was done by a human opening individual pieces of mail and scanning the contents for signs of illegal activity.[41]

Today, an incarcerated person may depend on the mail to receive necessary updates from home; however, someone who mails a letter to that person may discover years later that the contents of have been digitized and stored in a database that is accessible to public and private entities throughout the country with little, if any, oversight. This lack of protection leads to a chilling effect on free speech that contravenes the enhanced duties that a government assumes (or should assume) when it takes absolute control of the lives of incarcerated people.[42] These duties are recognized in other bodies of law that, for example, protect incarcerated people from scientific exploitation[43] or impose explicit fiduciary duties on prison administrators.[44]

To further the policy debate around this issue, the following section considers recent technological developments, the impact of additional financial data into the correctional data universe, what we know about current data analysis and sharing practices, and likely developments on the horizon.

A. Communications: The Age of Convergence

Modern telecommunications are characterized by the phenomenon of convergence: the coming together of different technologies to provide

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[41] The three U.S. Supreme Court decisions that define an incarcerated person's constitutional rights to engage in correspondence were all issued before 1990. Procunier v. Martinez, 416 U.S. 396 (1974); Turner v. Safley, 482 U.S. 78 (1987); and Thornburgh v. Abbott, 490 U.S. 401 (1989).

[42] *See, e.g.*, *Principles of the Law, Data Privacy* [hereinafter "Data Privacy"] § 6, cmt. b (2020) ("Trust develops through experience, reciprocity, and implicit or explicit social cues. And information can be disclosed to digital platforms under the same expectations of trust as in face-to-face relationships.").

[43] National Research Service Award Act of 1974, Pub. L. 93-348, 88 Stat. 342, 349 § 202(a)(2) (1974) (directing the newly created National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research to promulgate ethical guidelines for informed consent by "children, prisoners, and the institutionalized mentally infirm" and honoring "the competence and the freedom of the persons to make a choice for or against involvement in [scientific] research.").

[44] Memorandum Op. for the Assistant Atty. Gen. Civ. Div., 19 Op. O.L.C. 127 (May 22, 1995) (explicating the federal Bureau of Prisons' fiduciary duty to hold incarcerated peoples' funds in trust).

similar services, typically on an information platform controlled by a monopolist provider.[45] The same dynamic is occurring in correctional facilities: communications channels that have traditionally been discrete are converging onto unified platforms.[46] These platforms typically take the form of a limited-function computer tablet that provides electronic messaging, voice or video calling, e-books, music, movies, apps, and (in a recent development) access to a small number of strictly curated websites.

Public discourse often mischaracterizes this new technology as either a benevolent gift to incarcerated people (as framed by administrators) or an unwarranted luxury bestowed on an undeserving population (in the eyes of some lawmakers and opinion leaders eager to stoke the passions of tough-on-crime constituencies).[47] But this framing misses the mark—correctional tablets actually represent the ascendence and consolidation of the private, exploitative networks discussed in the previous section. In the digital prison yard, criminalized people are reliant on a designated piece of equipment (and the companies and networks that feed that equipment) to communicate, read, request medical care, enforce their legal rights, and spend or receive money. In other words, correctional tablets are becoming the high-tech reification of carceral citizenship.[48]

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[45] JONATHAN E. NUECHTERLEIN & PHILIP J. WEISSER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 16–27 (2007). A familiar contemporary example of technological convergence is an iPhone, which facilitates point-to-point communications (e.g., phone calls, SMS messages), consumption of broadcast content (e.g., streaming, podcasts), and Internet access. As a result of market demand, not all content on an iPhone is produced by Apple, but Apple's influence on the user experience is nonetheless pervasive (via choice of default software, App Store control over other software options, and direct content provision through iTunes and AppleTV).

[46] *See, e.g.*, *In the Matter of Incarcerated People's Communications Services*, FCC WC Dkt. No. 23-62, Opening Comments of Securus Technologies, LLC at 2 (May 8, 2023), https://www.fcc.gov/ecfs/document/10509775016702/1 [https://perma.cc/7N9V-W6DA] ("Today, multifunctional devices, including new types of terminals and tablets that can or do enable voice calling, video calling and access to curated content, are proliferating [in correctional facilities].").

[47] For example, when the Colorado prison system announced a pilot program to offer computer tablets, the *Denver Post* editorial board praised it an "opportunity to reform the many inmates *susceptible* to change" while a news article in the same paper quoted a pro-law enforcement advocate as characterizing the tablets as "something that will give [incarcerated people] an opportunity to continue their criminal enterprises in prison." *Tablet Computers Could Prove Valuable in Helping Reform Inmates*, THE DENVER POST (May 15, 2017, 2:01 PM), https://www.denverpost.com/2017/05/15/tablet-computers-could-prove-valuable-in-helping-reform-inmates/ [https://perma.cc/S3JY-C9EU] (emphasis added); Stephen Raher, *The Wireless Prison: How Colorado's Tablet Computer Program Misses Opportunities and Monetizes the Poor*, PRISON POL'Y INITIATIVE, (Jul. 6, 2017), https://www.prisonpolicy.org/blog/2017/07/06/tablets/ [https://perma.cc/BWS3-DPSL].

[48] *See* Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291, 295 (2016) ("The power of criminalization does not necessarily strip citizenship to the point of statelessness . . . but it does *strip and differentiate rights among citizens*." (quoting Jenna M. Loyd, *Carceral Citizenship in an Age of Global Apartheid*, OCCASION: RACE SPACE SCALE 1, 5 (2015)).

A few illustrations can show the profound impact of prison tablets:

1. Data Collection and Retention

While all prison communications have been previously subject to some level of surveillance, new digital platforms go further in retaining all communications for lengthy periods of time.[49] Users—both incarcerated and not—are forced to consent to adhesive terms of service that rarely describe data privacy with any meaningful level of precision.[50] Securus, for example, requires users to agree to a privacy policy that allows the company to share the contents of communications with "law enforcement personnel and/or correctional facilities and certain third parties" for any use "in connection with and in support of law enforcement activities."[51] Of greatest concern, Securus' terms allow for access by *any* "law enforcement" agency, regardless of whether it has a nexus to the facility in which the incarcerated customer resides.

GTL's terms are even worse, forcing users to consent to the company's sharing of information "for any . . . business purposes that are not inconsistent with the terms of this Privacy Statement." Since the statement provides that GTL may share information with any law enforcement personnel "upon their request" as well as "service providers who . . . analyz[e] data," essentially any imaginable sharing is "consistent with" the terms of the policy.[52] This degree of surveillance far exceeds earlier methods in scope, extent, and transparency—the scope is enhanced because tablets now have the ability to function as the sole means of communications (other than in-person visitation); the extent is unprecedented because communications are not simply monitored at a point in time, but instead stored indefinitely; and, transparency is diminished because data collection and retention has been outsourced to a profit-driven third-party contractor.

2. Monetization

Tablets frequently charge users for use on a *per-minute* basis, penalizing those who are slow readers or who have a voracious appetite for information. While voice calling rates are subject to some level of regulation,

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[49] Kentrell Owens, Camille Cobb & Lorrie Faith Cranor, *"You Gotta Watch What You Say": Surveillance of Communication with Incarcerated People*, presented at CHI '21 (May 2021), https://homes.cs.washington.edu/~kentrell/static/papers/FMIP/Owens_CHI_2021_camera_ready.pdf [https://perma.cc/ZR2G-Q3YS]; Jeanie Austin, *Mechanisms of Communicative Control (and Resistance): Carceral Incorporations of ICT and Communication Policies for Physical Mail*, 24 FIRST MONDAY 3 (2019), https://doi.org/10.5210/fm.v24i3.9657 [https://perma.cc/ZTK3-F7KG].

[50] Raher, *supra* note 5, at 33–35, 40–46.

[51] Aventiv Tech., *Privacy and Data Processing Policy* (May 10, 2022), [https://perma.cc/9JND-6F4F].

[52] Global Tel*Link Corp., *Privacy Policy* (Jan. 4, 2022), [https://perma.cc/9L34-HUM4].

rates for electronic messaging and content streaming are not, and appear to be based on profit-maximization rather than actual costs.[53] High consumer price tags—combined with notoriously low earning capability for incarcerated people—leads to increased reliance on money-transfer services (which are discussed in a subsequent section).[54]

3. Loss of Free Services

Prison libraries are in dire threat of being replaced by fee-based tablets.[55] This involves not only financial concerns, but also grave issues about the control of information. For tablets offering limited internet access, the IPCS carrier is able to pick a few dozen approved websites. Such websites typically focus on news, education, or religion. Why does a tech company have the power to pick the one website to provide information on a given religion? If a news outlet publishes critical stories on the telecom company, is it likely to be selected as one of the approved news sites? While a traditional library could theoretically be replaced by a well-designed electronic system that takes the needs of users into account and provides necessary user training, how many for-profit companies are willing to undertake this hard work when they can instead offer a low-cost, poorly-designed platform on a take-it-or-leave it basis to a customer base with no other options?

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[53] As discussed below, Congress has recently granted the FCC jurisdiction over "any audio or video communications service used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held, regardless of technology used." 47 U.S.C. § 153(1)(E), as amended by Pub. L. 117-338); *see infra*, text accompanying notes 95 through 99. While the new law clarifies the FCC's jurisdiction over real-time video calling, the applicability to other services such as streaming content, voicemail, and prerecorded video messages is contested and currently the subject of an active rulemaking. *See In the Matter of Incarcerated People's Communications Services*, FCC WC Dkt. No. 23-62, Reply Comments of Stephen A. Raher at 2–4 (July 12, 2023), https://www.fcc.gov/ecfs/document/107121129101385/1 [https://perma.cc/KDA2-HPUV].

[54] Rates for voice calling have actually come down in recent years, thanks to FCC action. *See* Wagner & Bertram, *supra* note 38. Video-calling rates are reliably high, *id.*, but are difficult to comprehensively analyze because many industry leaders refuse to even publish their prices. *See In the Matter of Incarcerated People's Communications Services*, FCC WC Dkt. No. 23-62, Opening Comments of Stephen A. Raher at 17–19 (May 8, 2023), https://www.fcc.gov/ecfs/document/10509037027510/1 [https://perma.cc/V4MN-X3BQ]. Electronic messaging rates range from free to 50¢ per message, with an average cost of roughly 30¢ per message; however, messages must sometimes be sent from tablets that incarcerated users must pay to use on a per-minute basis. *See* Wessler, *supra* note 19.

[55] This has already happened on a large scale with prison law libraries, which many correctional facilities have eliminated in favor of all-electronic alternatives. *See* Stephen Raher & Andrea Fenster, *A Tale of Two Technologies: Why "Digital" Doesn't Always Mean "Better" for Prison Law Libraries*, PRISON POL'Y INITIATIVE BLOG (Oct. 28, 2020) https://www.prisonpolicy.org/blog/2020/10/28/digital-law-libraries/ [https://perma.cc/LFH8-QGJT]. Additionally, some prison technology companies advertise on their ability to replace libraries. *See* Raher, *supra* note 47 (quoting American Prison Data Systems' business model as "eliminat[ing] cost centers such as libraries.").

4. A New Frontier: Financial Services

Financial services imposed on incarcerated people and their families are a relatively new development. As austerity regimes have relentlessly reduced budgets for prison food service, medical care, and education, incarcerated people are left to pay for more of their basic subsistence with their own funds.[56] But because incarcerated people have very little ability to earn meaningful wages, they are largely dependent on money transfers from friends and family on the outside.[57] The companies that operate these high-cost, low-quality money-transfer services tend to be IPCS providers (including Securus and GTL) or correctional commissary contractors.[58] Other specialized financial services imposed on correctional populations include prepaid debit cards for people released from custody, bail financing, and collection systems for various legal financial obligations.[59]

Similar to the consumer experience with telecommunications, users of correctional financial services typically pay high prices and are subject to extensive and unavoidable collection of sensitive personal data. Most disturbingly, as discussed in the following section, correctional technology companies are expressly promising to incorporate financial transaction information into data collection and surveillance systems.

B. The Scope of Data Collection

Gaining insight into the actual data practices of correctional technology companies is challenging, but information can be gleaned from contracts, bid proposals, and news accounts of data breaches. These sources indicate that while data *collection* is broad, data *analysis* is currently on the

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[56] Tiana Herring, *For the Poorest People in Prison, It's a Struggle to Access Even Basic Necessities*, PRISON POL'Y INITIATIVE BLOG (Nov. 18, 2021), https://www.prisonpolicy.org/blog/2021/11/18/indigence/ [https://perma.cc/34K5-TSV6].

[57] Tommaso Bardelli, Zach Gillespie & Thuy Linh N. Tu, *"You Need Money to Live in Prison": Everyday Strategies of Survival in the American Neoliberal Prison*, 121 S. ATL. Q. 838, 841 (Oct. 2022); Ariel Nelson & Stephen Raher, *Captive Consumers: How Government Agencies and Private Companies Trap and Profit Off Incarcerated People and Their Loved Ones*, HARV. L. INQUEST BLOG (Mar. 19, 2022), https://inquest.org/captive-consumers/ [https://perma.cc/RZT3-3VG9]; Anna VanCleave, *Prison Banking*, 113 CALIF. L. REV. (forthcoming 2024).

[58] *See generally* Stephen Raher & Tiana Herring, *Show Me the Money: Tracking the Companies that Have a Lock on Sending Funds to Incarcerated People*, PRISON POL'Y INITIATIVE BLOG (Nov. 9, 2021), https://www.prisonpolicy.org/blog/2021/11/09/moneytransfers/ [https://perma.cc/3WZ3-DBJH] (showing that Securus and GTL hold significant market share in the correctional money-transfer industry).

[59] *See* CONSUMER FIN. PROT. BUREAU, JUSTICE-INVOLVED INDIVIDUALS AND THE CONSUMER FINANCIAL MARKETPLACE (Jan. 2022), https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf [https://perma.cc/5FGJ-4DF7].

unsophisticated side.[60] But recall that the major players in this industry are owned by private equity firms, meaning that ownership could change at any time and an enterprising new owner may acquire a company specifically to conduct novel and far-reaching types of data mining. Correctional consumer data is also primed for use as source material in the more established analytics systems that have been used for years by both police agencies and nongovernmental actors that are "deputized" to varying extents to carry out law-enforcement functions.[61] What's more, new surveillance methods and techniques that are developed in carceral settings on a trial basis can be adapted for use in other populations in the future.

As new technologies are adopted in prisons and jails, the technology providers behind these services increasingly try to capitalize on scant prison resources by pitching facilities on the vendor's ability to provide multiple products under a single bundled contract. Commonly bundled services include telecommunications (i.e., audio/visual transmissions), written communications (both electronic messaging and mail digitization), tablets, financial services, and facility-facing security services (e.g., call recording, keyword searching, AI-driven pattern analysis).[62] In addition to the economic profits that vendors reap from bundled contracts, they also enjoy access to an enormous trove of data regarding the communications, personal struggles, medical issues, social networks, and financial transactions of incarcerated people.

Securus and GTL, the two dominant companies in this space, both market AI-driven data analytics and surveillance products under the brand names THREADS and Data IQ, respectively. These services do not just allow correctional agencies to monitor communications within their own facilities, but also allow agencies throughout the country to access data from *all* participating facilities across multiple jurisdictions (see **Figure 2**). Thus, the data sharing services pedaled by Securus and GTL benefit from a network effect: the larger a company's captive customer base is, the more

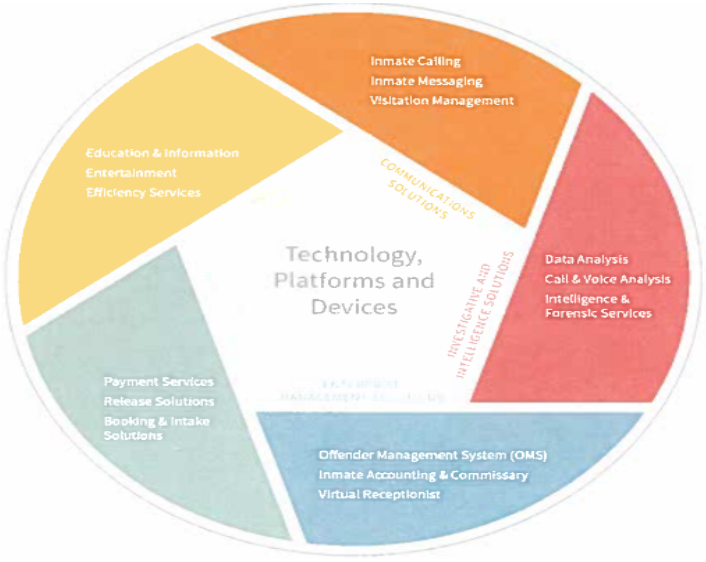
[60] The "sources" referenced in this sentence include contracts, bid proposals, and news accounts that I have reviewed in recent years in connection with my work in this field. Many contracts and bidding documents can be found in Prison Policy Initiative's "Correctional Contracts Library," available at https://www.prisonpolicy.org/contracts/documents.html.

[61] *See generally* BRIAN JEFFERSON, DIGITIZE AND PUNISH: RACIAL CRIMINALIZATION IN THE DIGITAL AGE 129–163 (2020) (noting that "web technology allows the police to mobilize the public as sentinels for surveillance and the courts to highlight those whom they convict to employers, landlords, schools, and the public at large.").

[62] Nelson & Raher, *supra* note 46; *see also In the Matter of Rates for Interstate Inmate Calling Services*, FCC WC Dkt. No. 12-375, Comments of Worth Rises on Fourth Report and Order and Sixth Further Notice of Proposed Rulemaking (Dec. 15, 2022), https://www.fcc.gov/ecfs/document/1215291967059/1 [https://perma.cc/NU9X-FCY4] (describing security and surveillance-related services bundled in communications contracts).

that company can point to its trove of unregulated consumer data as a marketing asset. Figure 1, below, contains a marketing graphic from GTL's proposal to the Barnstable County Sheriff's Office that illustrates this dynamic.[63]

FIGURE 1:



Note. GTL states that its "products and services from each solution family meld to form a comprehensive range of offerings that meets the needs of correctional facilities." Source: GTL Proposal to Barnstable County, Massachusetts (2017).

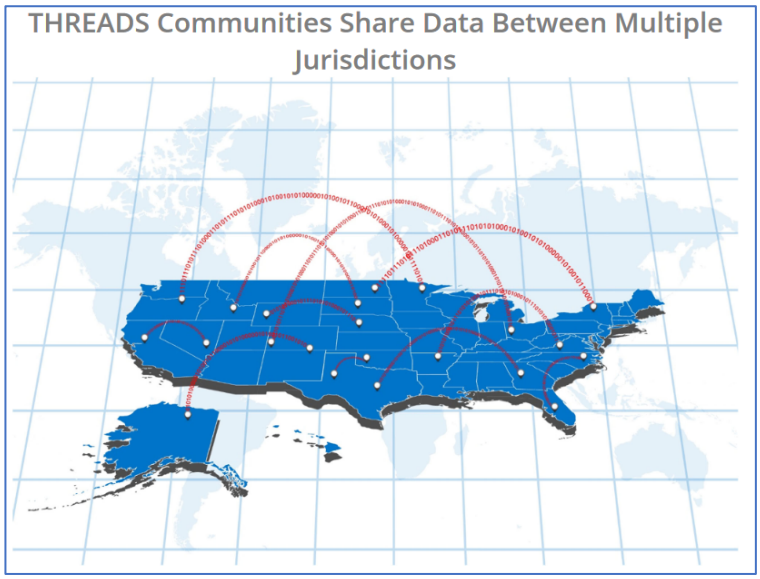
Both dominant IPCS companies emphasize the breadth of their data harvesting when marketing their services. Securus describes its THREADS product as a "powerful data analytics engine" that "analyzes multiple types of facility data . . . to automatically generate focused leads for investigators," further claiming that the system can use data from "inmate communication records, public phone records, billing name and address, data from confiscated cell phones, financial data, and more . . . ." [64] The cross-

[63] GTL Proposal to Barnstable County Sheriff's Office, at 17 (July 25, 2017), https://www.prisonpolicy.org/contracts/file.php?document_id=446&name=BarnstableMA_GTL_Proposal%20part%201.pdf.

[64] *See* Securus Proposal in Response to Dallas County RFP No. 2019-064-6828, at 55 (Oct. 21, 2019), https://www.prisonpolicy.org/contracts/file.php?document_id=315&name=Securus_RFP%20No.%202019-064-6828_Dallas%20County.pdf [https://perma.cc/GRU9-9KND].

jurisdictional nature of this data collection is illustrated in Figure 2, below, which depicts a marketing image from Securus's proposal to Dallas County, Texas.[65]

FIGURE 2:



Note. Securus promises cross-agency data sharing as part of its THREADS product. Source: Securus Proposal to Dallas County, Texas (2019).

GTL claims that its Data IQ services use financial and communications records to "turn[] data into information providing investigators with actionable intelligence relative to suspicious activities."[66] The company also states that Data IQ "was designed to handle large volumes of data coming from multiple, disparate sources" thereby "enabl[ing] correctional facilities to easily review and analyze the networks, relationships, and connections associated with their inmate population."[67]

While Securus and GTL dominate the market, other fringe competitors are also active in this space. Smart Communications is a smaller company that digitizes incoming postal mail and offers both telecommunications and

[65] Securus Proposal in Response to Dallas County RFP No. 2019-064-68, at 57 (Oct. 21, 2019), https://www.prisonpolicy.org/contracts/file.php?document_id=315&name=Securus_RFP%20No.%202019-064-6828_Dallas%20County.pdf [https://perma.cc/GRU9-9KND].

[66] GTL Proposal in Response to West Virginia Purchasing Division RFP COR61609, at 35 (Mar. 11, 2014) (emphasis omitted), https://www.prisonpolicy.org/contracts/file.php?document_id=24&name=GTL%20Bid_reduced.pdf [https://perma.cc/8QVE-4SHN].

[67] *Id.* at 36.

financial services to correctional facilities.[68] Smart Communications' AI investigative product is called "SmartLink," which the company describes as "incorporat[ing] the POLE [persons, objects, locations, events] data model and advanced graphing technology to permit manual or automated analysis of related events and people."[69] Smart Communications states that SmartLink assimilates data "from all aspects of our broad network of information including inmate communications through phone calls, messaging, visitation, and even financial transactions, connected friends and family, incarceration and release dates, and housing assignments along with other elements . . . to predict possible future activities using advanced AI techniques."[70]

Another small company, LEO Technologies, sells a patented service that allegedly uses automated systems to generate transcripts of voice calls using audio recordings and "metadata information."[71] The company's patent states that its system "generates and provides analytic information on . . . the semantic content of the calls, and the connections between callers and phone numbers called, which can aid analysts in detecting patterns of behavior"[72] and its marketing materials claim that the technology "provides constant insight into the emotional, psychological, and social well-being of all inmates . . . ."[73]

C. What Could Possibly Go Wrong?

Analyzing potential harms that can result from surveillance and data collection in the digital prison yard is challenging due to the constant evolution of the industry. Some problems have already occurred and been documented, while others may not exist now but are probable in the future. This section briefly considers both current and potential problems.

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[68] Smart Communications Proposal in Response to Washoe County RFP ##3160-21, at 2 (Aug. 20, 2021) [https://perma.cc/V7P6-3CVK].

[69] *Id.* at 131.

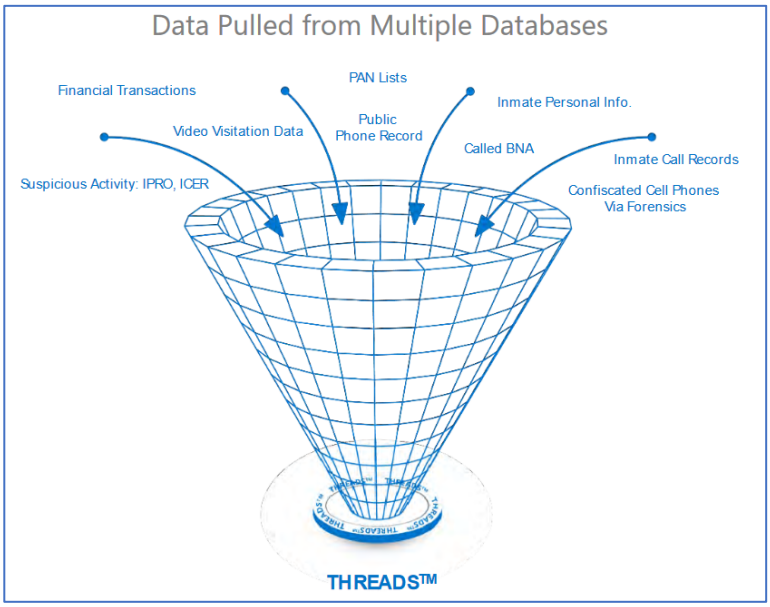
[70] *Id.*

[71] Automated Speech-to-Text Processing and Analysis of Call Data Apparatuses, Methods and Systems, U.S. Patent No. 10,742,799 (filed Feb. 25, 2019) (issued Aug. 11, 2020).

[72] *Id.*

[73] LEO Technologies, "Verus in action," https://leotechnologies.com/verus/ [https://perma.cc/K3YD-MGG8].

FIGURE 3:



Note. Securus advertises THREADS as "bring[ing] the power of Big Data Analytics to the investigative capabilities of correctional facilities." Source: Securus Proposal to Klamath County, Oregon (2021).

Securus currently claims it enjoys a competitive advantage because of the comprehensive level of data collection under its THREADS product, which allows correctional agencies to access data not just from their own population, but from agencies across the country.[74] This broad access purportedly allows correctional agency customers to "leverage the resources of other agencies to understand the breadth of their investigations . . . ."[75] Figure 3, above, includes a graphic representation of this claim, as set forth in a marketing image from Securus's proposal to Dallas County.[76] Reports also indicate that Securus uses recordings of consumer calls to compile a database of biometric "voice print" data.[77] Securus subsidiary JPay, which focuses on financial services, markets an ill-defined "intelligence" function

[74] *Id.* at 54–61.

[75] *Id.* at 57.

[76] *See* Securus Proposal in Response to Dallas County RFP No. 2019-064-6828, at 54 (Oct. 21, 2019), https://www.prisonpolicy.org/contracts/file.php?document_id=315&name=Securus_RFP%20No.%202019-064-6828_Dallas%20County.pdf [https://perma.cc/GRU9-9KND].

[77] George Joseph & Debbie Nathan, *Prisons Across the U.S. Are Quietly Building Databases of Incarcerated People's Voice Prints*, THE INTERCEPT (Jan. 30, 2019, 11:00 AM), https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus/ [https://perma.cc/CHC6-FCLD].

that tracks customer names, phone numbers, mailing addresses, IP addresses, and mobile device identifiers.[78] When such sweeping data collection is combined with poor systems design, it leads to the documented problems that have surfaced thus far and sounds an alarm for problems yet to come.

The universe of known problems is probably under-inclusive because IPCS customers who have suffered privacy harms generally have no meaningful recourse under the oppressive terms of service that are forced upon them. Moreover, incarcerated people have such limited access to information that they are unlikely to know about problems in the first place—a type of information asymmetry that is only compounded by technology providers' lack of transparency. Indeed, the FTC has recently made uncontested allegations that GTL exposed over 600,000 customers' personally identifiable information (including identity documents, payment information, geolocation data, demographic information, correspondence, and legal documents) to hackers, yet when the company was notified by security researchers that this information had appeared on the "dark web," it failed to provide an accurate notice to the impacted customers.[79]

Other known cases have arisen in the context of criminal prosecutions where an injured consumer can seek remedies through the criminal discovery process or a motion to suppress improperly obtained evidence. For example, defense attorneys in Kansas used a motion to return property to expose Securus' routine practice of allowing prison administrators to record privileged attorney calls with incarcerated clients and share such recordings with the U.S. Attorney's Office.[80] Securus also exposed over 70,000,000 call recordings (including recordings of privileged attorney calls) in a 2014 data breach[81] and allowed law enforcement clients to improperly use location-tracking information to carry out personal vendettas.[82]

One of the more unusual civil cases involving improper disclosure of personal information occurred when former professional football player Aaron Hernandez sued Securus for allowing an authorized user to

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[78] JPay letter to Penn. Dept. of Corr., attach. at 3 (June 15, 2015), https://www.prisonpolicy.org/contracts/file.php?document_id=29&name=Jpay%20Contract%202015.pdf [https://perma.cc/9MJP-4FMM].

[79] *In the Matter of Global Tel*Link Corp., et al.*, FTC File No. 212-3012, Complaint 24-41 (Nov. 16, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2123012-global-tel-link-corporation [https://perma.cc/2N6W-9Z4Q]; *see also* 88 Fed. Reg. 81081, Proposed Consent Agreement; Request for Comment (Nov. 21, 2023). The FTC subsequently adopted the proposed order without opposition. *See* Press Release: FTC Finalizes Order with Global Tel*Link over Security Failures that Led to Breach of Sensitive Data (Feb. 23, 2024), *available at* https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-finalizes-order-global-tellink-over-security-failures-led-breach-sensitive-data.

[80] *See* Raher, *supra* note 5, at 42–43.

[81] *Id.* at 42.

[82] *Id.* at 43–44.

improperly access and disclose recordings of calls between himself and his fiancée.[83] After Mr. Hernandez's death by apparent suicide, a Massachusetts state court dismissed his three privacy claims as not having survived his death. In a particularly instructive holding, the court also dismissed the two remaining breach of contract claims after finding that Securus's only contractual duties concerning the handling of consumer data were imposed by the contract between Securus and the correctional facility—Hernandez, as the incarcerated person, was not an intended beneficiary of that agreement.[84]

The current harms suffered by IPCS consumers are devastating but conceptually simple: data is collected on a broad scale, and improper dissemination sometimes occurs. Potential future uses of such data, however, may give rise to a broader array of more complex injuries. It is not difficult to imagine, for example, that someday in the not-too-distant future someone could find their insurance premium increased or a job application denied based on the contents of an electronic message exchange between themselves and an incarcerated relative. While current IPCS systems are unlikely to support such wide-ranging use, obfuscatory terms of service and enticing economic incentives make such scenarios probable in the future.

Indeed, IPCS companies' marketing materials portend such developments. GTL claims to have developed a kind of predictive analytics, alleging that its Data IQ product can "expose 'behavior' based on the patterns detected" and help investigators "identify[] potential trouble spots."[85] But after pumping up its ability to use AI to detect wrongdoing, GTL backpedals and concedes that "closer examination of some links might reveal no untoward activity; for example, a relative making deposits to multiple family members located at different facilities or a single phone number dialed by multiple inmates might belong to an attorney representing each of those inmates."[86] Figure 4, below, shows GTL's characterization of its DataIQ service, as found in a proposal to the West Virginia state prison system.[87]

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[83] Stephen Raher, *Phone Tag to Computer Hack: Securus Puts Privacy at Risk*, PRISON POL'Y INITIATIVE BLOG (Apr. 24, 2017), https://www.prisonpolicy.org/blog/2017/04/24/securus-privacy/ [https://perma.cc/X97S-APW8].

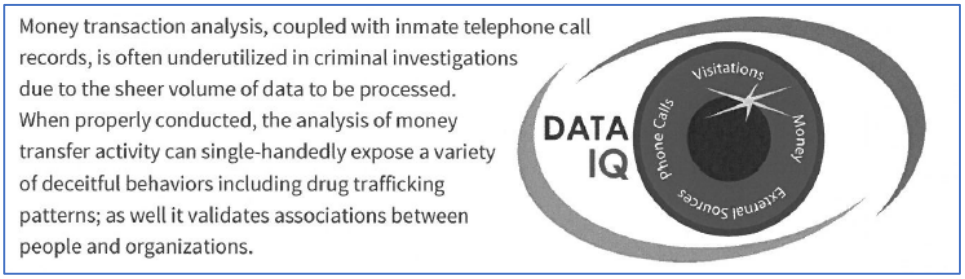
[84] Hernandez v. Securus Tech., Memorandum of Decision and Order on Motion to Dismiss, Case No. 1684CV3586 (Mass. Super. Ct., Suffolk Cnty., Nov. 2, 2017).

[85] GTL Proposal, *supra* note 66, at 37.

[86] *Id.* at 36.

[87] GTL Proposal in Response to West Virginia Purchasing Division RFP COR61609, at 35 (Mar. 11, 2014) https://www.prisonpolicy.org/contracts/file.php?document_id=24&name=GTL%20Bid_reduced.pdf [https://perma.cc/8QVE-4SHN].

FIGURE 4:



Note. Excerpt from GTL's proposal to the West Virginia prison system.

GTL's marketing materials foreshadow future uses of consumer data that could lead to all manner of problematic applications. Notably, nothing prevents GTL or other companies from using the data of *nonincarcerated* customers for such purposes.[88] Using Citron and Solove's typology of privacy harms,[89] it does not take much effort to anticipate the myriad injuries that could result from future IPCS surveillance and predictive analytics. As the amount of harvested data grows, future data breaches can reasonably be anticipated to lead to reputational harm and emotional distress through the improper release of private details. But even authorized use consistent with terms of service can lead to various autonomy harms—forcing consumers to relinquish all meaningful control over the contents of their communications with a loved one raises issues of coercion, thwarted expectations, lack of control, and chilling effects, all of which have been recognized in various contexts as actionable legal harm.[90]

III. ENVISIONING A PATH FORWARD

This section surveys existing law governing incarcerated peoples' use of communications technologies and then considers potential improvements.

[88] As a practical matter, IPCS providers *as currently constituted* likely have little interest in developing surveillance products that target activity outside of correctional facilities, even though some law enforcement customers have used IPCS security products for just such purposes. *See supra* note 82 and accompanying text.

[89] Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U.L. REV. 793, 830–61 (2022). Citron and Solove's typology is presented as a response to various judicial rulings that have foreclosed privacy-related claims for lack of a concrete injury. The typology defines numerous privacy-related harms (including, physical, economic, reputational, psychological, autonomic, discriminatory, and relational) that may be sufficient to support an actionable claim in tort or contract.

[90] *Id.* at 845–54.

A. Current Law

Existing law provides certain protections for users of consumer-facing carceral technologies, but as revealed here, the patchwork of legal regimes is not up to the challenge of addressing the sprawling reach of today's technological systems.

1. Constitutional Provisions

The Fourth Amendment protects the privacy and security of people's "houses, papers, and effects . . . ."[91] While incarcerated people still retain some vestigial constitutional rights, years of case law—augmented by the Prison Litigation Reform Act—have seriously impaired their ability to vindicate these rights.[92] But unincarcerated people also use these correctional technologies in their houses (in the case of video calling) and to transmit or store their papers and effects (in the case of written correspondence). Courts have indicated that Fourth Amendment protections are available even in the context of new technologies.[93] Thus, the digital format of electronic messages, call recordings, and scanned mail should not defeat constitutional claims. Likewise, an intrusion into one's home via streaming video can also violate the Fourth Amendment.[94] Correctional technology companies working under contract with state and local correctional agencies may be susceptible to a Fourth Amendment claim via 42 U.S.C. § 1983, although such claims may invoke attendant questions of qualified immunity and supervisory liability.

2. Communications Act

Until recently, the FCC's jurisdiction over emerging correctional telecommunications technology was unsettled. Although the FCC received persuasive arguments in favor of exercising jurisdiction over video calling, it studiously avoided taking a position—having previously lost in the D.C. Circuit for failure to adequately explicate its jurisdiction over video products.[95] However, in December 2022, Congress passed the Martha Wright-Reed Just and Reasonable Communications Act (Wright–Reed

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[91] U.S. CONST. amend. IV, cl. 1.

[92] *See* ANDREA FENSTER & MARGO SCHLANGER, SLAMMING THE COURTHOUSE DOOR: 25 YEARS OF EVIDENCE FOR REPEALING THE PRISON LITIGATION REFORM ACT (2021), https://repository.law.umich.edu/other/173 [https://perma.cc/ABA2-L9CM].

[93] *See, e.g.*, Carpenter v. United States, 585 U.S. 296, 304–305 (2018) (discussing instances of applying the Fourth Amendment to new technologies).

[94] Ogletree v. Cleveland State Univ., Case 1:21-cv-00500 (N.D. Ohio Aug. 22, 2022) (compelling student to conduct a video "room scan" of his bedroom prior to a take-home exam violates Fourth Amendment); *see also* Kyllo v. United States, 533 U.S. 27, 39 (2001) (warrantless thermal scanning of home violates Fourth Amendment).

[95] Global Tel*Link v. FCC, 866 F.3d 397, 415–16 (D.C. Cir. 2017).

Act),[96] which classifies all "audio or video communications service used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held" as an "advanced communication service" under the Communications Act.[97] The Wright–Reed Act requires the FCC to issue implementing regulations by January 2025[98] and a spirited debate is currently underway as part of the rulemaking process.[99]

3. FTC Act

In August 2022, the Federal Trade Commission (FTC) announced the beginning of a rulemaking to address privacy and security concerns related to the "wide range of personal information" that consumers surrender on a regular basis, "including their movements, prayers, friends, menstrual cycles, web-browsing, and faces, among other basic aspects of their lives."[100] Given the stated scope of the FTC's rulemaking, correctional consumer data privacy issues will likely be addressed in the forthcoming final rule.

4. Financial Services Statutes

At least three authorities potentially allow for oversight of correctional money transmitters' data practices. First, the Dodd-Frank Act grants the Consumer Financial Protection Bureau (CFPB) the authority to prohibit "unfair" practices when it finds that the practice causes substantial unavoidable injury to consumers, which injury is not outweighed by countervailing benefits to consumers or to competition.[101] Second, the CFPB is also tasked with implementing the Fair Credit Reporting Act and has cited that authority in a recent request for information regarding patterns and practices in the data brokering industry.[102] Finally, when correctional money-transmitters share transaction information with agencies other than the prison in which the recipient is located, this appears to be a disclosure of nonpublic personal information to a nonaffiliated third party for purposes of the Gramm-Leach-Bliley Act, which requires that financial service providers

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[96] Pub. L. 117-338, 136 Stat. 6156 (2023).

[97] *Id.* § 2(b) (amending 47 U.S.C. § 153(1)).

[98] *Id.* § 3(a).

[99] *In the Matter of Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act*, FCC Docket No. 23-62.

[100] Fed. Trade Comm'n, Advance Notice of Proposed Rulemaking, 87 Fed. Reg. 51273, 51273 (Aug. 22, 2022).

[101] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat 1376, 2006 § 1031(c)(1) (2010) (codified as 12 U.S.C. § 5531(c)(1)).

[102] CFPB, Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information, 88 Fed. Reg. 16951,16952 (Mar. 21, 2023).

grant consumers the ability to opt out of such sharing.[103] Whether these oversight powers are actually used to address problems in the correctional surveillance industry depends largely on the CFPB's willingness to assert its statutory authority, something that may be tempered by the relentless political and legal attacks on the agency's legitimacy.[104]

5. HIPAA

The privacy rule implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) provides protection for—among other things—health information that is "created or received by a health care provider" and "maintained in electronic media."[105] Thus, correctional facilities that fall under HIPAA's definition of a "health care provider" must comply with the privacy rule's requirements for electronic health information "received by" the facility. This could include actual medical records—such as a request for healthcare services sent via an electronic healthcare "ticketing" app—but it could also encompass more esoteric types of information. Family members' ability to communicate with incarcerated relatives and advocate for their needs within cruelly inefficient correctional healthcare systems can literally be a matter of life and death.[106] With this context in mind, suppose an incarcerated person asks a relative to send them copies of pre-incarceration medical records in order to inform their treatment in prison. If the relative sends those records via mail, but the prison scans and digitizes all incoming mail, then it would appear that the prison has unwittingly created protected health information governed by HIPAA's privacy rule.

6. Common Law Tort and Property Causes of Action

Common law remedies may be available to consumers whose personal information is disclosed either through a breach or nominally authorized—but objectively unreasonable—means. Such disclosures could support tort claims for invasion of privacy, intrusion on personal solitude, or infliction of emotional distress. Alternatively, property-based claims for trespass to

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[103] Financial Service Modernization Act of 1999, Pub. L. 106-102, 113 Stat. 1338, 1437 § 502(b) (codified as 15 U.S.C. § 6802(b)).

[104] *See, e.g.*, Adam Levitin, CFPB v. Community Financial Services of America, CREDIT SLIPS BLOG (Oct. 2, 2023), https://www.creditslips.org/creditslips/2023/10/cfpb-v-cfsa.html [https://perma.cc/87LG-S6D5].

[105] 45 C.F.R. § 160.103 (definitions for "individually identifiable health information" and "protected health information").

[106] *See, e.g.*, Hope Corrigan, *My Dad Was Ill. Could He Survive the Prison Health-care System?*, WASH. POST (Jan. 27, 2024, 7:00 AM), https://www.washingtonpost.com/health/2024/01/27/prison-health-care-fears-risks/ [https://perma.cc/ZV54-6JT6] (firsthand account of medical advocacy on behalf of incarcerated relative).

chattels or breach of an implied bailment may apply to intangible property such as the contents of calls or electronic messages.[107]

7. State Data Privacy Laws

Some states (including California, Colorado, Connecticut, Oregon, Utah, and Virginia) have enacted broad consumer privacy laws, with many details still to be addressed as part of rulemaking processes. These laws provide some hope for consumer users of correctional technology but may also disappoint depending on the scope of exemptions for law enforcement activities.

As shown in this section, existing law does provide some protection to users of carceral communications services, but these bodies of law are not designed with the unique dynamics of the digital prison yard in mind. Even if a generally applicable consumer law does not explicitly exempt incarcerated people, courts are likely to be receptive to arguments that people in prison or jail are implicitly exempt or are otherwise unable to seek relief. The uncertainty so often entailed in applying general consumer protection laws to incarcerated people does not benefit the consumer, the provider, or the correctional agency. Instead, as explored in the following section, a specific body of law is required to address the unique issues of carceral communications and data privacy.

B. Policy Recommendations

It is time for lawmakers to take up the issue of data privacy in the context of carceral consumer technology by clarifying the rights of incarcerated people and those with whom they communicate. Most correctional and criminal justice policy occurs at the state level, but data privacy is uniquely suited for a federal solution due to the interstate nature of the technology used and the specter of unregulated cross-jurisdictional data sharing. In an ideal world, Congress would use its preemptive powers to develop a comprehensive system that addresses the privacy issues related to correctional communications and technology. Rulemaking and enforcement could be housed in a multipurpose federal agency such as the FTC or the Department of Justice. Such activities could be funded by exempting IPCS customers from Universal Service Fund (USF) assessments

[107] *See generally* Jackson Erpenbach, *A Post*-Spokeo *Taxonomy of Intangible Harms*, 118 MICH. L. REV. 471, 483–90 (2019) (discussing theories of standing premised on property and tort causes of action).

and instead charging a significantly smaller user fee to offset the expenses of implementing a new data-privacy regime.[108]

Substantively, a comprehensive data privacy law should include: regulatory oversight of technology providers' terms of service;[109] guidelines on what entities can access consumer data for "law enforcement" purposes and under what conditions;[110] imposition of data protection standards and breach-notification procedures;[111] safeguards against algorithmic bias;[112] an established right to access and correct one's own data;[113] and requirements for data portability standards.[114] Most importantly, any such law should prevent technology providers and correctional authorities from using predispute arbitration provisions in a manner that prevents customers from actually vindicating their rights.

Policy proposals in this area must confront the tension between what protections are actually needed versus what is feasible in the current landscape of carceral revanchism. Accordingly, to the extent that the comprehensive solution outlined above is not practicable, state and local governments can and should seek the same results through more diffused and incremental action—either legislative or administrative. For example, if one forward-thinking correctional agency negotiates a contract that requires inclusion of reasonable data-privacy provisions in the terms of service, then other agencies will be able to negotiate for the same terms. Even better, a state or local legislature can prescribe or proscribe certain practices that correctional agencies within that jurisdiction must respect when deploying communications or financial technology in facilities.

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[108] IPCS users currently pay USF assessments equal to nearly 33% of IPCS charges. Nonincarcerated IPCS users *already* pay USF assessments on their standard mobile or wireline phone bills, and pay a second USF assessment on IPCS bills, resulting in a duplicative user fee that is a particularly bitter pill considering the low incomes of many families with incarcerated relatives. Congress could fund a new privacy agency and reduce consumer costs by exempting IPCS calls from USF assessments and imposing a lower fee on a broader range of IPCS offerings (i.e., not just voice calls, but video calls and electronic messages as well).

[109] *See* Raher, *supra* note 5, at 33–35; Data Privacy, *supra* note 42, at § 5, cmt. e ("Courts and regulatory agencies should be cautious regarding upholding consent that is extracted on the basis of disparities of power and that leads to inequitable results.").

[110] Data Privacy, *supra* note 42, at § 7, cmt. a ("The concept of relevancy of personal data for the initial purpose and further processing means that data shall be tied to the initial use and not used for unrelated purposes.").

[111] *Id.* at § 11.

[112] *See generally* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2122 (2019) (discussing examples of algorithmic bias).

[113] Data Privacy, *supra* note 42, at § 8.

[114] *Id.* at § 9; *see also* 12 U.S.C. § 5533 (Dodd-Frank Act's provision regarding consumer's rights to access their data in a standardized and usable format).

CONCLUSION

When the Supreme Court ended its historical "hands off" approach to vindicating the legal rights of incarcerated people, Justice Thurgood Marshall famously observed: "When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions."[115] Fifteen years later, in *Thornburgh v. Abbott*, the Court reversed course in a case that upheld the federal prison system's ability to withhold mail under the deferential standard of "reasonable relation to legitimate penological interests."[116] When *Thornburgh* was decided, prisons relied on human labor to individually inspect incoming mail and listen to phone calls. This practicality acted as a modicum of self-imposed (albeit highly imperfect) restraint because for a prison to take the effort to monitor someone's communications, someone within the bureaucracy had a reason (legitimate or otherwise) for expending resources on the task. Today, such surveillance can be done on a mass scale, at low cost, and without direct human involvement or particular justification. Most chilling of all, the contents of all communications can be—and are—kept by nongovernmental entities with few restrictions on future use. This new era of carceral life is not a perfect replication of Bentham's panopticon, if for no other reason than Bentham's institution envisioned facilities profiting off of the labor of incarcerated people, whereas prisons and jails in the U.S. today largely hold people whose labor is no longer economically needed.[117] Yet the development of the digital prison yard has disconcerting echoes of the panopticon and is objectionable under contemporary normative concepts of privacy and autonomy.

Ruth Wilson Gilmore, the dean of carceral geography, has established a widely used definition of racism as the "production and exploitation of group-differentiated vulnerability to premature death."[118] She also notes that "racism functions as a limiting force that pushes disproportionate costs of participating in an increasingly monetized and profit-driven world onto those who, due to the frictions of *political* distances, cannot reach the variable

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[115] Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring).

[116] 490 U.S. 401, 404 (1989) (internal citation omitted).

[117] *See* OXFORD HISTORY, *supra* note 1, at 85 (Bentham's business model); Ruth Wilson Gilmore, *Globalization and U.S. Prison Growth: From Military Keynesianism to Post-Keynesian Militarism*, *in* RACE AND CLASS (1998), *reprinted in Abolition Geography: Essays Towards Liberation* 199, 202–21 (2022) (explicating prisons as a refashioning of excess state capacity to address the crisis of surplus labor).

[118] GILMORE, *supra* note 37, at 28.

levers of power that might relieve them of those costs."[119] Modern carceral communications provides evidence of this theory in action: if incarcerated people hope to maintain personal relationships, participate in civic life, or obtain basic information, they and their nonincarcerated allies must subject themselves to sweeping surveillance that brings with it the potential for varied negative consequences, up to and including premature death through barriers and penalties created by governmental and nongovernmental entities, often based on the results of automated processes.

Now that consumer digital services have become commonplace in correctional settings, the time has come to confront issues of data privacy and provide clarity and necessary safeguards to incarcerated and nonincarcerated users. Instead of consigning incarcerated people and their families to a second-class existence in the digital prison yard, lawmakers must ensure that benefits of modern telecommunications and maintenance of family connections across prison walls are not vitiated by a limitless and unaccountable system of surveillance. While this process will inevitably implicate contested issues regarding safety, privacy, law enforcement, and institutional management, ignoring these matters is no longer an option. The concepts and frameworks discussed in this Article are designed to begin the overdue conversation on this important constellation of legal issues.

[119] Ruth Wilson Gilmore, *Race and Globalization*, *in* GEOGRAPHIES OF GLOBAL CHANGE: REMAPPING THE WORLD (R.J. Johnston, et al., eds.) (2002) (emphasis in original), *reprinted in Abolition Geography: Essays Towards Liberation* 107, 114 (2022).