MANDATORY ARBITRATION AND PRISON SERVICES CONTRACTS:
How Private Companies Exploit the Incarcerated and Consumers to Reject Meaningful Accountability

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Abstract

This Comment considers a previously unexamined, and particularly vile, consequence of the movement towards consumer arbitration clauses: their impact on incarcerated people and their families. Incarceration is physically, emotionally, and financially ruinous for both the incarcerated and for families who are routinely forced to subsidize their loved one's incarceration through paying for things like phone calls and basic needs that prisons fail to meet. The burden on families has only increased as governments have contracted various aspects of correctional systems out to private companies that charge exorbitant prices for basic services, knowing full well that consumers have no choice but to comply if they want to provide for and stay connected to incarcerated loved ones. This system would be inhumane enough without the added element of forced arbitration. This Comment hopes to shine a light on how mandatory arbitration clauses make an already exploitative situation all the worse. Not only are families of the incarcerated charged outrageous and illegal prices to communicate with and protect their loved ones, but mandatory arbitration ensures that they have no real ability to hold responsible companies accountable.

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Introduction

There are more than two million incarcerated people in the United States.[1] Once these individuals' friends and families are taken into account, the scale of incarceration's impact is even more daunting. This impact is undoubtedly physical and emotional—incarceration ends careers, it keeps parents from children, and it subjects millions of Americans to habitually cruel and unconstructive prison conditions.[2] Frequently overlooked, however, is the very real financial impact of incarceration.

1. Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020 (2020).
2. *See generally* Matt Ford, *The Everyday Brutality of America's Prisons*, The New Republic (Apr. 5, 2019), https://newrepublic.com/article/153473/everyday-brutality-americas-prisons [https://perma.cc/M23N-UDZT]; Christopher Zoukis, *U.S. Prisoners the Least Rehabilitated in the World*, Huffington Post (Sept. 16, 2017, 12:00 PM), https://www.huffpost.com/entry/us-prisoners-the-least-rehabilitated-in-the-world_b_59bd49eae4b06b71800c39d7 [https://perma.cc/UN42-NTWS].

The financial consequences of imprisonment are difficult to overstate.[3] Incarcerated people lose wages throughout their detention, while making pennies through prison employment. They may still have expenses in the outside world, such as mortgages, car payments, or child support, and these might be suddenly supplemented by prison-imposed housing, transportation, and medical costs.[4] Meanwhile, families are forced manage the loss of a member of their household while simultaneously subsidizing their loved one's incarceration by paying for basic needs that prisons often fail to meet. Families routinely pay for food products, clothing, and sanitary necessities, all while dealing with charges for things like visitation and phone calls.

These costs are compounded by the massive role that private companies now play in the prison system. State correctional systems have outsourced nearly every possible aspect of prison systems, giving private companies incredible control over the lives of incarcerated people. These companies, often owned by private equity firms, woo state governments with the promise of massive commission payments, and then reap their own enormous profits by charging vulnerable inmates and their families exorbitant prices for ordinary services like phone calls.

Too often, these companies take advantage of their defenseless clientele—charging unlawfully high rates or else imposing confusing and confiscatory fees. Inmates and families, however, have extremely circumscribed opportunities for legal recourse, because private prison services providers regularly force consumers to agree to mandatory arbitration. Forced arbitration strips consumers of their right to challenge private prison companies' practices in court, and stops them from filing class action lawsuits, which are particularly important tools for vulnerable communities.

This Comment attempts to shine a light on the role of forced arbitration in prison consumer contracts. These clauses make an already exploitative situation all the worse. They ensure that families of the incarcerated are charged outrageous prices to communicate with and protect their loved ones, and that families have no real ability to hold responsible companies accountable. Consequently, companies have fewer incentives to respect the legal rights of their consumers—a particularly glaring problem when one considers companies that primarily serve vulnerable and stigmatized communities, like the incarcerated and their families.

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3. *See generally* Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S.*, (Concordance Inst. for Advancing Soc. Just., Working Paper No. CI072016, 2016), https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf.

4. *See* Lauren-Brooke Eisen, Charging Inmates Perpetuates Mass Incarceration (2015); Jean Trounstine, *Fighting the Fees that Force Prisoners to Pay for Their Incarceration*, Prison Legal News (Nov. 6, 2018), https://www.prisonlegalnews.org/news/2018/nov/6/fighting-fees-force-prisoners-pay-their-incarceration [http://perma.cc/4Y45-424G]; *see also* Brennan Ctr. for Just., Is Charging Inmates to Stay in Prison Smart Policy? (2019).

This Comment proceeds as follows: The first Part gives an overview of the incredible cost borne by the families of the incarcerated. The second Part explains the role of privatization in increasing these costs, and shows that private companies have been able to reap incredible profits at the expense of incarcerated people and their loved ones. The third and fourth Parts outline the role of mandatory arbitration clauses in protecting companies and harming prison services consumers. The fifth Part demonstrates that attempts to fight prison services arbitration clauses in court, while occasionally successful, are unlikely to offer longterm solutions for the prison community or for litigants hoping to hold companies accountable. The final Part calls on the Consumer Financial Protection Bureau to take action to protect incarcerated people and their loved ones from exploitation by companies, by limiting the use of mandatory arbitration clauses in prison services contracts.

I. Prison is Exceptionally Expensive for Inmates and Their Loved Ones

Incarceration is a financial nightmare for the vast majority of inmates and their families. Most incarcerated people are already experiencing financial insecurity before prison: In 2014, "incarcerated people had a median annual income of $19,185 prior to their incarceration, which is 41 percent less than non-incarcerated people of similar ages."[5] Even those who are relatively well-off when they enter a prison, however, are often quickly unseated from fiscal security as their debts go unpaid and their assets are drained by high legal and correctional fees.[6]

Incarcerated people are unable to pay their debts because they have essentially no opportunity for fair wages while in prison. While many incarcerated people have jobs, either with the state or with private companies that contract with the government, very few of them make anything close to a living wage. According to the Federal Bureau of Prisoners, federal inmates make between twelve to forty cents an hour for jobs within a prison, and between twenty-three cents and $1.15 an hour for more selective jobs in factories run by the federal government.[7] State prisons are not any better, with an in-prison average of between fourteen

5. Bernadette Rabuy & Daniel Kopf, Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned (2015).

6. Marc Wilson, who served seven years in prison, was a well-paid nurse prior to his arrest. After losing his income source upon incarceration, he was unable to pay his mortgage, and consequently lost eight years of equity in his home. He also saw $20,000 in savings disappear as they went towards legal fees. Assets that otherwise would have been transferred to his family and subsequent generations were extinguished. *See* Courtney Collins, *How Prison Steals Wealth from Future Generations*, KERA News (Oct. 1, 2019), http://stories.kera.org/price-of-prison/2019/10/01/how-prison-steals-wealth-from-future-generations [http://perma.cc/K8BK-2ZD4].

7. Charles Decker, *Time to Reckon with Prison Labor*, Yale Inst. for Soc. and Pol'y Stud. (Oct. 3, 2013), https://isps.yale.edu/news/blog/2013/10/time-to-reckon-with-prison-labor-0 [http://perma.cc/H5US-VA2L]

and sixty-three cents an hour.[8] In some states, workers are not paid at all.[9] To make matters worse: incarcerated people are paid on average less today than they were in 2001. Inmates rarely even receive their trivial wages due to deductions for things like court costs, fees, and mandatory savings accounts for use after release.[10] The Prison Policy Initiate, an organization that focuses on mass incarceration, estimates that these deductions routinely leave inmates with less than half of their paycheck, routinely reducing $1 a day to 50 cents.[11]

Even while they make pennies, however, incarcerated people are expected to pay fees and fines to the state and to correctional services. These extensive, mandatory fees can easily overwhelm an already limited income. An estimated 50 percent of state correctional systems charge "pay-to-stay" housing fees, and others charge for things like transportation, security, and even clothing.[12] Inmates also pay medical copays, which are sometimes as high as $6 for a single medical visit—a price that may sound low, but is potentially an entire month's wages for an inmate, and an even more egregious price for inmates who are not paid at all for their work.[13] In addition, inmates are expected to pay court fees and are often subject to unexpected fees like paying for copies of dental or medical records.[14]

As inmates are drowned in costs—which often haunt them long after their incarceration[15]—their loved ones are forced to pay to keep them healthy and connected to the outside world while in prison, even while dealing the potential loss of a salary as their family member is incarcerated.[16] Prisons rarely provide inmates with the necessities they need

8. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, Prison Pol'y Initiative (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages [http://perma/cc.7BTN-8QKH].
9. *Id.*
10. *Id.*
11. *Id.*
12. Eisen, *supra* note 4; Trounstine, *supra* note 4; Brennan Ctr. for Just., *supra* note 4.
13. Sawyer, *supra* note 8 ("In West Virginia, a single visit to the doctor would cost almost an entire month's pay for an incarcerated person who makes $6 per month. For someone earning the state minimum wage, an equivalent copay that takes the same 125 hours to earn would cost an unconscionable $1,093").
14. Trounstine, *supra* note 4.
15. *See* Jessica Lussenhop, *The US Inmates Charged Per Night in Jail*, BBC News (Nov. 9, 2015), https://www.bbc.com/news/magazine-34705968 [http://perma.cc/JB92-PYS6]; Chandra Bozelko & Ryan Lo, *You've Served Your Time. Now Here's Your Bill.*, Huffington Post (Sept. 16, 2018, 9:00 AM), https://www.huffpost.com/entry/opinion-prison-strike-labor-criminal-justice_n_5b9bf1a1e4b013b0977a7d74; [http://perma/cc/GXR6-T9SX]; Decker, *supra* note 7 ("As sociologists Bruce Western and Becky Pettit have written, a prison stay decreases annual wages by as much as 40 percent for the average male prisoner, all else equal."); *see also* McLaughlin et al., *supra* note 3 ("Incarceration reduces a person's lifetime earnings between ten and forty percent.").
16. In a survey of more than seven-hundred incarcerated people, the Ella Baker Center for Human Rights found that more than one in three families went into

to stay healthy and safe while in prison, and loved ones are consequently forced to pay for clothes, food, and hygiene products, like soap and toothpaste, through prison commissaries. One woman, Kat Boone, says she spends $100 a month on toiletries and food for her boyfriend, Charles, who is incarcerated for failing a drug test while on parole.[17] Paying for basic necessities for Charles is a struggle, and Boone even had a car repossessed because of the strain of sending money to prison each month.[18]

Loved ones are also forced to pay to keep in contact with incarcerated people—paying to open accounts, by the minute for phone calls, and even for emails.[19] The Prison Policy Initiative estimates that incarcerated peoples' families and friends spend $2.9 billion a year on commissary goods and phone calls.[20]

The costs foisted on family and friends are always significant and often exorbitant, partially because states are increasingly outsourcing control of their commissaries and phone services to private companies that charge extremely high rates and fees.

II. Private Companies Contracted with the Government are Driving Up Costs for Families

Prison privatization is a relatively well-discussed and reported on phenomenon.[21] Private prisons are notorious for cutting corners and mistreating the inmates housed within them.[22] States and the federal

debt while covering phone and visitation fees, and one in five families reported taking out a loan to cover incarceration-related costs. *See* Ella Baker Ctr. for Human Rights, Who Pays?: The True Cost of Incarceration on Families 7 (2015).

17. Nicole Lews & Beatriz Lockwood, *The Hidden Cost of Incarceration*, The Marshall Project (Dec. 17, 2019, 5:00 AM), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration [http://perma.cc/7KMB-64NV]. Boone further explains that she needs to send the money because Charles is never given enough soap to get him through the week.
18. *Id.*
19. Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email*, Wired (Aug. 3, 2018, 7:00 AM), https://www.wired.com/story/jpay-securus-prison-email-charging-millions [https://perma.cc/B7FV-WDCM].
20. Peter Wagner & Bernadette Rabuy, Following the Money of Mass Incarceration, Prison Pol'y Initiative (2017).
21. *See, e.g.*, Editorial, *MSNBC's Stephanie Ruhle Highlights How Private Prison Companies are "Cashing in" on Trump's Immigration Policies*, Media Matters for Am. (June 22, 2018, 10:36 AM), https://www.mediamatters.org/msnbc/msnbcs-stephanie-ruhle-highlights-how-private-prison-companies-are-cashing-trumps-immigration [https://perma.cc/8854-WUK8]; Media Matters Staff, *MSNBC's Ali Velshi Points Out that the Two Largest Private Prison Companies Donated Hundreds of Thousands of Dollars to the Trump Campaign*, Media Matters for Am. (Jan. 11, 2018, 5:00 AM), https://www.mediamatters.org/donald-trump/msnbcs-ali-velshi-points-out-two-largest-private-prison-companies-donated-hundreds [http://perma.cc/PHV8-S6LW].
22. German Lopez, *A Federal Report Just Confirmed it: For-profit Prisons Are More Dangerous than Public Ones*, Vox (Aug. 12, 2016, 1:00 PM), https://www.vox.

government began contracting with private companies to run facilities in the 1980s as prison populations soared.[23] Since then, more than two-dozen states, and the federal government, have utilized them to house some portion of the inmate population.[24] While it once seemed that private prisons were on their way out (at least at the federal level), the Trump administration renewed their use.[25]

Privately run facilities aren't the only aspect of prison privatization, however. A less discussed, but similarly nefarious, issue is states' use of private companies to run many aspects of prisons, even when the facilities themselves are run by state governments. Correctional departments routinely outsource health care, transportation, and food services, along with other necessary amenities.[26] In some sectors, most notably, communication services, commissary accounts and the distribution of "release" debit cards, companies, often controlled by private-equity firms, are able to reap massive profits by passing high costs on to incarcerated people and their families.[27]

A. *Prison Communication Services*

Prison phone services constitute a $1.2 billion industry that is dominated almost entirely by two private companies, Securus Technologies and Global Tel Link. Between the two, the companies control more than seventy percent of the prison phone market.[28] In order to win lucrative government contracts, the companies routinely resort to offering extremely high commissions to jails and prisons.[29] Unfortunately, prom-

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com/2016/8/12/12454410/private-prisons-violence-investigation [http://perma.cc/6UAU-S3H6].

23. Madison Pauly, *A Brief History of America's Private Prison Industry*, Mother Jones (July 2016), https://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline [http://perma.cc/8QNW-QGZN].
24. Kara Gotsch & Vinay Basti, Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons, The Sentencing Project (2018).
25. Oliver Laughland & Jon Swaine, *US Private Prison Program Rebooted by Trump Administration*, The Guardian (Feb. 23, 2017, 7:10 PM), https://www.theguardian.com/us-news/2017/feb/23/trump-revives-private-prison-program-doj-obama-administration-end [http://perma.cc/D4A3-8RWR].
26. Tim Requarth, *How Private Equity Is Turning Public Prisons Into Big Profits*, The Nation (Apr. 30, 2019), https://www.thenation.com/article/archive/prison-privatization-private-equity-hig [http://perma/cc/8ACD-6VRN]; *see also U.S. For-profit Privatized Correctional Services*, Prison Legal News (June 5, 2016), https://www.prison legalnews.org/media/publications/Other%20privatized_1.pdf.
27. *Id.*
28. Steve Horn, *The Prison Phone Industry Has Quietly Become Even More of a Duopoly*, Prison Legal News (July 1, 2018), https://www.prisonlegalnews.org/news/2018/jul/1/prison-phone-industry-has-quietly-become-even-more-duopoly [http://perma.cc/MT8W-BWSH].
29. Peter Wagner & Alexi Jones, *On Kickbacks and Commissions in the Prison and Jail Phone Market*, Prison Pol'y Initiative (Feb. 11, 2019), https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions [http://perma.cc/KGY3-MGVG]. Companies hoping to win over correctional systems have also been

ised commissions can be so high—in one case, a company offered 100 percent commissions—that companies rely almost entirely on consumer fees to profit.[30]

In a monopolistic market that relies heavily on consumer fees, companies have little incentive to adopt fair consumer practices. In the past, Global Tel Link has reportedly charged $25 just for a 15-minute-call,[31] but even under more reasonable rates, families may be drowned in "fees to open an account, have an account, fund an account, close an account, get a refund, receive a paper bill, or other charges that are made on a per-call basis, such as charges for 'regulatory compliance' or 'validation.'"[32] Families have no choice but to bear these costs in order to keep their loved one connected to the outside world.[33]

One woman, Allison McAllister, recounted the experience of trying to keep in touch with her fiancé while he was incarcerated in a Wisconsin prison. The prison used ICSolutions to run phone services, and while she was told the telephone rate would decrease under ICSolutions, the company overwhelmed her with "never disclosed" fees.

In addition to providing phone services, Securus, and JPay, which Securus recently acquired,[34] have a virtual monopoly over all other communication options for inmates, including email services and video call kiosks.[35] Securus and JPay are massive companies with incredible con-

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known to host extravagant conventions and parties in an effort to court potential clients. In 2012, JPay, a communications and money transfer company that is discussed at length below, threw an "END OF THE WORLD PARTY" at a convention of the American Correctional Association. The company billed the party as "about you, and your inalienable right to the unbridled enjoyment of food and wine," and promised "tequila, hand-rolled cigars, [and] a live mariachi band." *See* Daniel Wagner, *Meet the Prison Bankers Who Profit From the Inmates*, Time Magazine (Sept. 30, 2014, 6:00 AM), https://time.com/3446372/criminal-justice-prisoners-profit [http://perma.cc/8DC2-GS9D].

30. *Id.*; Peter Wagner, *The Prison Phone Industry's New Business Model: Fee Harvesting*, Prison Pol'y Initiative (June 18, 2015), https://www.prisonpolicy.org/blog/2015/06/18/feeharvesting [http://perma.cc/GZD3-Q9AS].
31. Requarth, *supra* note 26.
32. Wagner, *supra* note 30.
33. *See* Michael Sainato, *'They're Profiting Off Pain': The Push to Rein in the $1.2bn Prison Phone Industry*, Guardian (Nov. 26, 2019, 5:02 PM), https://www.theguardian.com/us-news/2019/nov/26/theyre-profiting-off-pain-the-push-to-rein-in-the-12bn-prison-phone-industry [https://perma.cc/3Y92-H7PT] (quoting one incarcerated man discussing the cost of phone services: "The phone rates caused a strain between my family and I. . . . my family lives out of state. Not being able to talk to them as frequently as necessary to maintain our family ties created space, distance between us.").
34. Securus itself is owned by the private equity firm Abry Partners. *See* Stephen Raher, *The Multi-Million Dollar Market of Sending Money to an Incarcerated Loved One*, Prison Pol'y Initiative (Jan. 18, 2017), https://www. prisonpolicy.org/blog/2017/01/18/money-transfer [https://perma.cc/DF88-Q5QU].
35. Beryl Lipton, *Meet JPay, the Company that Controls Prisoners' Access to Technology*, VICE (Sept. 24, 2015, 11:38 AM), https://www.vice.com/en/article/wnjwjz/meet-jpay-the-company-that-controls-prisoners-access-to-technology [https://

trol over the lives of incarcerated people. JPay handles money transfers, email communications, and video visitation for more than 1.4 million inmates in thirty-five states,[36] and Securus operates in close to half of the country's jails, prisons, and federal penitentiaries.[37]

JPay requires that incarcerated people, or more often their families, put money onto a "debit account" that can be used to buy "stamps" for emails, and to fund other communication services, like video chat. Each "stamp" covers only one page of writing and varies in cost across prison systems.[38] In Texas jails, JPay charges $.49 for a stamp (adding an attachment doubles the cost).[39] But the real moneymaker is once again fees: refilling an inmate's debit account can cost nearly an additional $8 per transaction.[40] In 2015, Securus attempted to woe potential investors by stating that JPay made $53 million in fees on transfers of $525 million.[41] This computes to an average fee of 10 percent.[42]

While email and video options may seem advantageous for incarcerated people desperate to keep connected to the outside world, they often lead to restrictions on traditional prison services that, in turn, further benefit companies like JPay.[43] After contracting with JPay to provide virtual communication options, some correctional systems have banned things like physical greeting cards, telling families to send an email instead.[44] Thus, even after the initial injury of forcing loved ones to buy "virtual stamps," these companies have added further insult by precluding families from using real ones to send meaningful physical mail. Local jails, and some prison systems, including in Texas, have at times banned

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perma.cc/N3E8-8WWU]. It is also worth noting that a big part of JPay's current business model is offering cheaply made "tablets" to inmates, and then charging high fees for things like email, music, and books. A monthly music subscription might cost $25, while on the outside services like Spotify go for $10. JPay makes millions off of inmate purchases. Activists, however, worry about the strain that extra fees put on families: "Every time you turn around, it's another policy that just compromises the strengthening and maintaining of family ties," says Soffiyah Elijah, director of the Alliance of Families for Justice, a New York nonprofit. *See* Tonya Riley, *"Free" Tablets Are Costing Prison Inmates a Fortune*, Mother Jones (Oct. 5, 2018), https://www.motherjones.com/politics/2018/10/tablets-prisons-inmates-jpay-securus-global-tel-link [https://perma.cc/KQ4U-WXLD].

36. Nick Leiber, *JPay Working to be Apple of Prison System*, SFGATE (Aug. 20, 2012, 8:33 PM), https://www.sfgate.com/business/article/JPay-working-to-be-Apple-of-prison-system-3802432.php [https://perma.cc/L8C7-HYUP].
37. Lipton, *supra* note 35.
38. Law, *supra* note 19.
39. Lipton, *supra* note 35.
40. *Id.*
41. Raher, *supra* note 34.
42. *Id.*
43. Wagner, *supra* note 29 ("When states offer [JPay's] music players and tablet computers for sale to inmates, they often confiscate radios that people already own, according to inmates in Ohio. This leaves inmates dependent on JPay's music downloads, which can cost 30 to 50 percent more than the same songs on iTunes, inmates say.").
44. Law, *supra* note 19.

in-person visitation altogether in favor of paid video-visitation through private companies.[45] Online interactions are clearly imperfect and impersonal substitutes for a birthday card signed by one's child or for seeing one's loved ones in person. Companies like JPay, however, have been able to reap massive profits off of the recognition that incarcerated people and their communities will pay anything to stay connected.

B. *Money Transfers and Commissary Accounts*

JPay's near-monopolistic hold on prison-services does not just cover communication, however, but commissary purchases, as well. While commissaries themselves have been less successfully privatized than other aspects of the prison system,[46] incarcerated people are routinely reliant on funds from loved ones in order to purchase anything—and this usually requires that friends and families send money transfers into a prison "debit account." JPay claims that it provides money transfers for nearly seventy percent of the inmates in U.S. prisons, totaling more than 1.7 million incarcerated people.[47]

In a similar model to phone services, JPay pays correctional systems big-money in commissions, and relies on jacked-up prices, and especially fees, in order to turn a profit.[48] One woman, Pat, whose son is serving a twenty-year sentence at a medium-security prison in Virginia, explained that before her son's prison system contracted out money-transfer services to JPay, she was able to send him money to spend at the commissary for less than $2 by purchasing a money order at the post-office and mailing it to the prison.[49] After privatization of transfer-services, however, Pat is forced to pay JPay $6.95 in order to put $50 in her son's account. This roughly 14 percent fee may increase up to 35 percent if she is able to send more money—in some states, JPay fees approach 45 percent.[50] Pat has no choice but to accept the consequences of the system's decision to outsource to JPay; her son needs the money to afford necessities like toothpaste and winter clothes.[51] The exploitation of families and

45. Lipton, *supra* note 35; Matt Stroud & Joshua Brustein, *Expensive 'Prison Skype' Is Squeezing Out In-Person Visitation*, Bloomberg (Apr. 27, 2015, 8:07 AM), https://www.bloomberg.com/news/articles/2015-04-27/expensive-prison-skype-is-squeezing-out-in-person-visitation [https://perma.cc/S399-3EEZ].

46. Great data about commissary privatization is difficult to come by, but the information that is available suggests the privatization in this area is not as ubiquitous as in phone or money transfer services. A 2013 study conducted by the Association of State Correctional Administrators, asked every state to describe the level of privatization in their commissary system. Of the thirty-four that answered the survey, only twelve reported some level of commissary privatization. *See* Stephen Raher, *Paging Anti-trust Lawyers: Prison Commissary Giants Prepare to Merge*, Prison Pol'y Initiative (July 5, 2016), https://www.prisonpolicy.org/blog/2016/07/05/commissary-merger [https://perma.cc/ML9S-4CCE].

47. Wagner, *supra* note 29.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

incarcerated people does not end after JPay fees are paid, of course. Incarcerated people are often charged hyperinflated prices and given low-quality products.[52]

C. *"Release" Cards*

Incarcerated people are unfortunately not saved from the relentless costs of prison privatization just because they have been released. Private companies, like JPay and Keefe Commissary Network, have successfully contracted with state and local governments to administer and control "release" cards, which formerly-incarcerated people must rely on in order to access their own money. These cards function much like debit cards and are usually handed to incarcerated people upon their release containing a balance of the money that was in their commissary or other accounts, any wages they have managed to save, and any money in their possession when they were initially arrested (this last category is only relevant in jails). For many newly-released people, this money is all they have to start a new life, perhaps after years or decades behind bars.

In a not-so-shocking twist, however, card balances are subject to a number of predatory fees imposed by the private companies that administer the accounts. These fees can include: "balance inquiry fees, transaction fees, account maintenance fees, closing fees for transferring the balance to a bank account, and even inactivity fees for not using the card."[53] Thus, when Gregg Cavaluzzi finished his five-year prison sentence with nothing but the $120 on his release card, he was devastated to discover that only $70 of it would be accessible to him after the required fees.[54] Cavaluzzi was not told about the any of the associated costs when the card was given to him. Release card fees make the already harrowing task of re-integration even more impossible for the formerly incarcerated, all while benefiting the corporations charging them exorbitantly to access their own money.

III. Legal Recourse for Unlawful Treatment by Private Companies Is Often Out of Reach

Although inmates and families are recurrently subjected to unjust costs and unsanitary or poor-quality products, they often have little hope

52. Ramen, for example, one of the most popular products in prison commissaries is sometimes sold for $0.70, while it generally costs between $0.10 to $0.25 at a grocery store. *See* David Reutter, *Prison Food and Commissary Services: A Recipe for Disaster*, Prison Legal News (Aug. 2018), https://www.prisonlegalnews.org/news/2018/aug/4/prison-food-and-commissary-services-recipe-disaster [https://perma.cc/SK44-27HT].

53. German Lopez, *How Private Bankers Cash in on Released Prisoners*, Vox (Nov. 3, 2015, 9:00 AM), https://www.vox.com/explainers/2015/11/3/9661554/prison-bank-prepaid-card [https://perma.cc/Q736-CLW2].

54. Amadou Diallo, *'Release Cards' Turn Inmates and Their Families into Profit Stream*, Al Jazeera (Apr. 20, 2015, 5:00 AM), http://america.aljazeera.com/articles/2015/4/20/release-cards-turn-inmates-and-their-families-into-profit-stream.html [https://perma.cc/V2T8-52XM].

of recourse.[55] Prison populations disproportionality stem from minority and low-income communities, groups that have been traditionally left out and mistreated by the American legal system, and thus, may not view it as a means of refuge.[56] Even when they are willing to sue over company negligence or unfair practices, incarcerated people and their families may be unable to afford legal counsel, partially because of the exhausting expense of incarceration. Incarcerated populations have previously and masterfully relied on strikes or boycotts to shine a light on their mistreatment,[57] but media often fails to report on these actions[58] and due to stigma, incarcerated populations may lack the social capital to inspire a mass movement around their issues.

Even when incarcerated people and their communities are able to find legal counsel—and there have been impressive suits on behalf of incarcerated communities largely on a pro bono basis[59]—there remains a

55. Paul Egan, *More Problems for State's Prison Food Contractor: Maggots Found in Chow Served to Inmates*, Detroit Free Press (Nov. 6, 2017, 6:00 AM), https://www.freep.com/story/news/local/michigan/2017/11/06/maggots-food-cotton-prison-jackson-michigan-trinity-services/825834001 [https://perma.cc/923V-7N4P].

56. Nathaniel Lewis, *Mass Incarceration: New Jim Crow, Class War, or Both?*, People's Pol'y Project (Jan. 30, 2018), https://www.peoplespolicyproject.org/2018/01/30/mass-incarceration-new-jim-crow-class-war-or-both [https://perma.cc/5AMQ-L8Y2]; Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, Sent'g Project (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/#II.%20Overall%20Findings [https://perma.cc/GYC3-ATJF]. *See generally* Sara Sternberg Green, *Race, Class, and Access to Civil Justice*, 101 Iowa L. Rev. 1263 (2016).

57. For example, in July 2017, a group of women incarcerated in the Arizona state prison system boycotted commissary purchases after repeated hikes in the cost of commissary products like tampons. The women explained their needs in a statement:

> "We get one roll of toilet paper per week and *12* pads a month. Everything else comes out of our pockets, including [non-cafeteria] food. We make between $*0.10*-$*0.45* an hour. *20* percent of our wages go to restitution and we get charged $*2* a month for electricity . . . . With so little, we already struggle to make ends meet—often being left to choose between buying a bar of soap, which is now $*1.50*, or making a phone call home at $*0.20* a minute. Now we're expected to pay *70* percent more for staple items, like peanut butter."

Throughout the boycott, the only purchase was a single $0.06 toothbrush. Reutter, *supra* note 52.

58. Grace Bennett, *Cable News Coverage of a National Prison Strike was Pathetic*, Media Matters for Am. (Sept. 10, 2019, 5:07 PM), https://www.mediamatters.org/msnbc/cable-news-coverage-national-prison-strike-was-pathetic [https://perma.cc/9D99-33Z2]; Pam Vogel, *Mainstream Outlets Have Not Covered A Major Nationwide Prison Strike*, Media Matters for Am. (Oct. 12, 2016, 1:28 PM), https://www.mediamatters.org/new-york-times/mainstream-outlets-have-not-covered-major-nationwide-prison-strike [https://perma.cc/3CAM-ZBFD].

59. *See, e.g.*, Charles Toutant, *Judge Approves $25M Settlement of Class Suit Over Prisoners' Pricey Phone Calls*, Law.com (Oct. 30, 2020, 4:24 PM), https://www.law.com/njlawjournal/2020/10/30/judge-approves-25m-settlement-

massive obstacle in the way of legal vindication: the use of forced arbitration clauses in prison-company contracts.

A. *Companies Frequently Impose Mandatory Arbitration in Prison Consumer Contracts*

As is likely evident from the discussion so far, private prison services contracts are almost entirely dominated by a small group of companies that hold near or complete monopolies in their service areas, and are often controlled by private equity firms.[60] Many of the seemingly-independent companies at work in the prison services industry are actually owned by this same handful of companies.[61] The high-degree of consolidation means that incarcerated people across the country generally rely on the same few companies for connection, nourishment, and necessary products while they are in prison. A corollary to this common reliance is that incarcerated people, or more often their families, are subject to same companies' oppressive terms and conditions. Chief among the tools used to control and oppress consumers is the forced arbitration clause, which is relied upon across consumer services to ensure that any plausible legal claim must be taken to an arbiter and cannot form the basis of a class action.

IV. How Mandatory Arbitration Hurts Consumers

Arbitration clauses and class action waivers allow companies to avoid costly litigation, and often discourage any legal action at all, all while requiring that consumers forfeit their fundamental right to adjudication of their rights in a courtroom.

Consumers are almost never aware that they have relinquished their right to court,[62] and once they realize that their only option is arbitration, they may be less likely to bring suit.[63] Even when consumers do recognize a forced arbitration clause within a contract, many still believe

of-class-suit-over-prisoners-pricey-phone-calls [https://perma.cc/2XAP-QCLQ].

60. Requarth, *supra* note 26 ("[I]n practice, only a few companies dominate a given sector, enjoying monopoly-like conditions.").

61. *See* Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, Prison Pol'y Initiative (Feb. 2, 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html [https://perma.cc/2L2Q-JU6V] (noting that "GTL and Securus have, over time, gobbled up many of their competitors" in the prison phone industry).

62. *Study Shows that Consumers are Unaware of and Do Not Understand Forced Arbitration Clauses*, Nat'l Ass'n Consumer Advoc. (Jan. 22, 2015), https://www.consumeradvocates.org/blog/2015/study-shows-consumers-are-unaware-and-do-not-understand-forced-arbitration-clauses [https://perma.cc/L2RJ-3CNQ].

63. Joe Valenti, *The Case Against Mandatory Consumer Arbitration Clauses*, Ctr. for Am. Progress (Aug. 2, 2016, 9:01 AM), https://www.americanprogress.org/issues/economy/reports/2016/08/02/142095/the-case-against-mandatory-consumer-arbitration-clauses [htttps://perma.cc/E2H3-TXWG] ("In just one example demonstrated by a *New York Times* analysis of 57 million Sprint customers nationwide, only six customers sought arbitration between 2010 and 2014. It is unlikely that so few customers would pursue a complaint against a large company.").

they have the ability to sue in court.[64] Even if prison-services consumers recognize and fully understand these clauses, the reality remains that they have little choice but to agree to them. While arbitration clauses are valid only where both parties are deemed to have consented to them,[65] there are real questions about whether the families of incarcerated people are truly "consenting" to prison services contacts.[66] In prison systems that rely on private companies, consumers who do not agree to the terms set out by those companies will be unable to telephone their incarcerated family members or to send them money for necessary goods and food.

The confusion around what these clauses require is compounded by varying rules in different jurisdictions, and the ability for companies to set their own arbitration requirements within contracts. One arbiter has described the process as "a little bit like the Wild West."[67] Arbitration often imposes heavy up-front costs, which may preclude suits by consumers, especially families and loved ones of the incarcerated who are likely overburdened already by the substantial costs of incarceration.[68] This is especially impactful when coupled with class action waivers. While arbitrating individual claims will likely cost money—generally hundreds of dollars—joining a class action is usually free.[69] Individual claims against companies in the prison services industry are often relatively low,[70] and

64. Nat'l Ass'n Consumer Advoc., *supra* note 62.

65. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) ("[A] party plainly cannot be bound by an arbitration clause to which it does not consent."); BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1213 (2014) (Sotomayor, J. concurring).

66. Scholars have raised concerns about the use of forced arbitration clauses in the context of "boilerplate" consumer contracts because of the obvious lack of consent on the part consumers who almost never read the terms they are agreeing to. *See* Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013). The same issue exists in the context of prison services consumers, but it is exacerbated by these consumers' inability to refuse the product. While scholars can argue over the practicality of foregoing an iPhone in the modern world (and thus avoiding giving consent to Apple's terms), most people would agree that it is much more unrealistic to ask that people forgo communication with their loved ones if they do not want to agree to certain terms and conditions.

67. Alexia Fernández Campbell, *The House Just Passed a Bill that Would Give Millions of Workers the Right to Sue Their Boss*, Vox (Sept. 20, 2019, 11:30 AM), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act [https://perma.cc/HTW5-M78G].

68. *Mandatory Arbitration Clauses Are Discriminatory and Unfair*, Pub. Citizen, https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair [https://perma.cc/XZX6-Q5KZ].

69. Heidi Shierholz, *Correcting the Record: Consumers Fare Better Under Class Actions than Arbitration*, Economic Pol'y Inst. (Aug. 1, 2017), https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration [https://perma.cc/PU2W-P45G].

70. Consider, for example, a plaintiff who charges that a prison services company charged unlawfully high rates on telephone calls. The excessive rates may have led to a loss of $500 over the relevant period. This is a significant amount of money for families, but it is likely not worth it to spend another hundred dollars

while they would be worthwhile to pursue in a class action, it generally makes little sense for litigants to spend money up front on uncertain and relatively small claims, especially when that money could be spent on an incarcerated loved one's continued care.

Additionally, arbitration itself lacks many of the safeguards inherent to the court system—plaintiffs usually are not able to conduct discovery, arbiter decisions are subject to extremely minimal judicial review, and arbiters usually do not have to publish a public record.[71] The lack of a public record combined with most arbitration clauses' requirement of confidentiality limits public discussion of company transgressions.[72] Thus, corporate misdeeds go unnoticed, and companies are often able to escape accountability and continue profit-driven activities at the expense of consumers' rights.

The clauses themselves can establish rules that make the proceedings even less just. As discussed below, one of the titans in the prison services industry, JPay, requires that any arbitration take place in Miami and as a rule requires the unsuccessful party bears the full cost of the arbitration. The venue selection clause is preclusive for the vast majority of potential plaintiffs who lack the capital necessary to travel to and conduct arbitration proceedings in Florida. Once again, this is especially impactful for the financially overstrained loved ones of the incarcerated. The cost provision is even more limiting—especially since arbitration results overwhelmingly favor companies.[73] How can underprivileged people be expected to take massive financial risks in proceedings they will most likely lose?

All of this leads to a system that benefits companies immensely at the expense of the consumer: it allows corporations to avoid costs and to adopt business practices that the threat of litigation and especially class action suits might otherwise financially preclude. The rest of this Part examines the arbitration requirements among the three major companies discussed in this Comment so far—Global Tel Link (GTL), Securus, and JPay. Each of the companies constitute a giant in prison contracting.

A. *Global Tel Link (GTL)*

GTL, which primarily provides communication services to correctional systems, but also offers money transfer services and other prison-based "solutions," operates in some capacity across all fifty states,

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or so for the (small) possibility of winning that money back in arbitration.

71. Scott Medintz, *Forced Arbitration: A Clause for Concern*, Consumer Reports (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern [https://perma.cc/ZT3U-DSV5]; Pub. Citizen, *supra* note 68.

72. Public Citizen, *supra* note 68.

73. Kate Hamaji, Justice for Sale: How Corporations Use Forced Arbitration to Exploit Working Families 3 (2017), https://populardemocracy.org/sites/default/files/Forced-Arbitration_web%20%283%29_0.pdf [https://perma.cc/JP4P-V6YM].

and has direct contracts with twenty-nine state departments of corrections.[74] More than 1.6 million incarcerated people are forced to rely on their services, equivalent to more than seventy percent of the U.S. inmate population.[75]

Like other private prison services providers, GTL requires that incarcerated people, or more often their families, deposit money into a company account to pay for things like phone calls. The company's website directs visitors to "[c]reate [an] account to fund and communicate with your loved one," and requires account creators to check a box agreeing to the terms and conditions, which include a strict arbitration policy.[76] Users can also create and fund an account via telephone call, where they are played an automated message attempting to bind them to the terms.[77]

GTL requires that all legal claims be "settled by binding arbitration . . . subject to the Federal Arbitration Act."[78] Before a claimant is even allowed to initiate arbitration, however, the parties are required to "use their best efforts to settle any dispute, claim, question, or disagreement directly through consultation and good faith negotiations."[79]

The terms also include a class action waiver, requiring the claimants submit to arbitration on an individual basis. The company does allow an exception for claims brought in small claims court, and additionally gives parties the option to opt-out of both the arbitration and the class action waiver provisions. Both of these exceptions, however, seem much more helpful at first glance than in practice.

Small claims court carve outs may seem like corporate gifts to consumers, but it is more likely that companies include them to protect their own interests. Studies have repeatedly found that companies are much more likely to file small claims suits against consumers than individuals are to file claims against companies.[80] This is because companies fre-

74. *GTL Leadership by the Numbers*, GTL, https://www.gtl.net/about-us/gtl_by_the_numbers [https://perma.cc/G9UC-2GJY].

75. *Id.*

76. *Create account to fund and communicate with your loved one*, GTL, https://web.connectnetwork.com/welcome-gtl/?utm_source=gtl.net%20Header%20Deposit%20Button&utm_medium=Web&utm_campaign=Deposit%20Funds%20Now%20to%20Choice%20Page [https://perma.cc/5FP5-4SWJ]; *Terms of Use*, GTL Connect Network, https://web.connectnetwork.com/terms-of-use [https://perma.cc/MU3K-QQT3].

77. The message is as follows: "Please note that your account and any transaction you complete with GTL or its affiliates are governed by the terms of use and the privacy statement posted at www.connectnetwork.com. The terms of use and the privacy statement were most recently revised on January 15, 2019." The risks of automated messages are discussed in a later section.

78. *Terms of Use*, *supra* note 76.

79. *Id.*

80. *See, e.g.*, John A. Goerdt, *Small Claims & Traffic Courts: Case Management Procedures, Case Characteristics, and Outcomes*, in 12 Urban Jurisdictions (Nat'l Ctr. for State Courts ed. 1992) (finding that corporate suits against individuals constituted 53 percent of all suits in twelve small claims courts, while individual-initiated suits were only 13 percent of suits); Suzanne E. Elwell & Christopher

quently rely on small claims suits to collect individually owed debt.[81] This is of particular importance in the prison services context, where consumer-families are disproportionately poor and spending significant sums on communicating with an incarcerated loved one. Thus, companies include the carve outs to ensure that they can bring small claims suits (which are usually cheaper than forcing consumers to arbitrate). When consumers file small claims suits themselves, companies may rely on creative lawyering in attempting to force arbitration regardless.[82] Even if they are forced to accept some small claims suits, however, their arbitration clauses continue to protect them from class actions, which in the prison services context, are particularly worrisome.

The opt-out provision is unhelpful for consumers. It is exceptionally unlikely that most consumers will ever even see the opt-out provision. Very few consumers actually read terms and conditions, and GTL makes this even less likely by not requiring consumers to scroll through the terms and conditions themselves, but instead only requiring they click "I Accept" next to a link to the terms (or simply listen to an automated telephone message).[83] GTL users are perhaps even less likely than the average consumer to peruse the terms, as opening a GTL account often corresponds to the emotionally overwhelming and frightening experience of trying to communicate with a newly-incarcerated loved one.

Even if consumers do see the opt-out provision, they may be unlikely to take advantage of it. Users are required to mail a written notice to GTL's company headquarters in Virginia within thirty days.[84] This may not seem like a difficult task, but it presents an archaic roadblock for consumers who may have no idea what "arbitration" is, and who, regardless, probably do not expect that they themselves will ever need to file legal claims against the company. Regardless, the opt-out provision

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D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 Iowa L. Rev. 433 (1990) (finding that individual suits against companies made up only 4 percent of Iowa small claims court suits, whereas company-initiated suits comprised 47 percent of cases).

81. *See Arbitration Study Preliminary Results*, Consumer Financial Protection Bureau 120 (Dec. 12, 2013), https://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [https://perma.cc/2DVY-M34L].

82. *See, e.g.*, Daniel Dempsey, *Tyranny of the Arbitrators*, Medium (Apr. 1, 2015), https://medium.com/@dempsey/tyranny-of-the-arbitrators-5b5526489338 [https://perma.cc/A4ZA-SCSE] (describing in a personal blog post that a bank attempted to force a small claims suit into arbitration despite a small claims carve-out to the arbitration clause).

83. *See* Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 Info., Comm. & Soc'y 128 (2018); Brooke Auxier et al., Americans' Attitudes and Experiences with Privacy Policies and Laws 37 (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-attitudes-and-experiences-with-privacy-policies-and-laws [https://perma.cc/N7TL-4PWD] ("Just 9% of adults say they always read a company's privacy policy before agreeing to the terms and conditions, while an additional 13% say they do this often.").

84. *Terms of Use*, *supra* note 76.

is rendered essentially useless by GTL's reserved ability to terminate a user's account should they choose to opt-out.[85] Should a user opt-out and have their account cancelled, they will almost certainly create a new account and agree to the arbitration policy. As GTL well knows, an account necessary to communicate to loved ones is not remotely optional for most people.

B. *Securus*

Securus, primarily a prison communication services company, serves more than three-thousand correctional facilities (including prisons and jails) across the county, and has contracts in eighteen states.[86] Similar to GTL, the company requires that new users create an account and check a box noting that they have "read and agree" to the terms and conditions. Securus's terms are similar to those imposed by GTL.

Securus's terms inform consumers that "by accessing or using our website or Securus products or services, or by purchasing Securus products or services, you agree to comply with the terms and conditions set forth herein."[87] Similar to GTL, the company requires that "either party asserting a dispute shall first try in good faith to resolve it by providing written notice . . . to the other party describing the facts and circumstances . . . and allowing the receiving party 30 days in which to respond."[88] Providing written notice requires sending written notice by First Class or registered mail to Securus's headquarters. This process must be completed before a claimant can initiate arbitration.

The company then explains its requirement of "binding individual arbitration" as necessary due to the "high cost of legal disputes, not only in dollars but in time and energy."[89] A specific class action waiver is also included.

Securus does allow claims to be brought in small claims court, and the terms and conditions mention an opt-out provision with regards to the arbitration policy. Unfortunately, however, the terms give no information about that process—any consumers interested in opting out would likely need to contact the company and ask what steps they need to take in order to opt-out.

85. *Id.*
86. *Facilities We Serve*, Securus, https://securustech.online/#/facilities-we-serve [https://perma.cc/XE3P-TQT3]; *Securus: Call Rates and Kickbacks*, Prison Phone Just., https://www.prisonphonejustice.org/provider/t-netix [https://perma.cc/RNB7-YZK4].
87. *General Terms and Conditions*, Securus, https://securustech.net/friends-and-family-terms-and-conditions/index.html.
88. *Id.*
89. *Id.*

C. *JPay*

JPay, which is owned by Securus, operates in prisons and jails in forty states.[90] The company offers a variety of services, including email, video visitation, and inmate tablets. It is, however, a particularly prolific provider of money transfer services, as described above. Similar to GTL and Securus, individuals who use JPay's services agree to arbitrate their claims.[91] Additionally, JPay warns consumers that "by entering into this Agreement, you and JPay are each waiving the right to a trial by jury or to participate in a class action or class arbitration."[92]

Unlike GTL and Securus, JPay requires that any arbitration take place in Miami, FL, and says that the entire cost of arbitration proceedings will be "borne by the unsuccessful party," although the arbiter may, at their discretion, pro-rate the cost between the parties.[93] These clauses make it exceptionally difficult and risky for a claimant to even bring an arbitration claim against the company. JPay does not waive the arbitration requirement for small claims, nor do the terms mention any ability for consumers to opt-out of the provision.

V. Prisoner Services Arbitration Agreements in Practice

In practice, arbitration clauses make it exceptionally difficult for incarcerated people and their loved ones to hold companies responsible for legal wrongs. Companies are aware that forcing arbitration offers some protection from expensive and destructive legal consequences. Thus, they are more comfortable taking advantage of consumers, even in ways that may be, or are certainly, illegal.

Prison services litigants have occasionally attempted to fight arbitration. Some plaintiffs have been successful in these efforts on the grounds that there was no mutual assent to form a contract that included the arbitration clause, or else that a company waived their right to force arbitration. These victories, however, probably offer little protection for future litigants.

Corporate efforts to force arbitration on consumers have repeatedly been validated by the United States Supreme Court.[94] While clever lawyers may have been able to find minute loopholes to get their clients

90. *Availability and Pricing*, JPay, https://www.jpay.com/Pavail.aspx [https://perma.cc/T22N-UJPF].
91. *Payments Terms of Service*, JPay, https://www.jpay.com/LegalAgreementsOut.aspx [https://perma.cc/2V7A-FTR8].
92. *Id.*
93. *Id.*
94. The Supreme Court has repeatedly recognized a "liberal federal policy favoring arbitration." AT&T Mobility LLC v. Conception, 563 U.S. 333, 339 (2011) (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). Since the Federal Arbitration Act is meant to "ensure judicial enforcement of privately made agreements to arbitrate," such agreements are "rigorously enforce[d]" by the courts. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219, 221 (1985).

to court in suits against prison services providers, the reality is that these companies learn from legal defeats, quickly strengthening and fortifying their arbitration clauses. As companies get better at writing and enforcing iron-clad clauses, prison services consumers will lose any ability to fight them, and thus, any clear path to court.

A. *Lack of Consent*

Courts have occasionally refused to enforce arbitration clauses in the prison services context where it appears that plaintiffs did not consent to form a contract in the first place. Even where litigants have managed to get their claims to a court, however, their successes will probably be difficult to replicate.

GTL, discussed above, has repeatedly attempted to enforce its arbitration and class waiver clauses against litigants. In re Glob. Tel*link Corp. ICS Litig., Case No. 5:14-CV-5275 (W.D. Ark. 2017) involved a class action in which plaintiffs argued that GTL charged unjust rates, in violation of both the Federal Communications Act, and the common law doctrine of unjust enrichment. In response to the suit, GTL moved to compel arbitration against one plaintiff, Rocky Hobbs. Hobbs argued that GTL had charged him "unjust and unreasonable" prices to communicate with an incarcerated loved one, Mason Hobbs.[95]

This scenario is the exact focus and concern of this Comment. Due to GTL's monopolistic stranglehold over prison communication services in the state where his loved one was incarcerated, Hobbs had no choice but to accept whatever terms and rates GTL set if he wanted to communicate with his son, even if they involved unjust or illegal prices. As soon as he complied with these requirements, however, he agreed, according to the company, to relinquish any legal right to a jury or a judge-determination. Thus, GTL managed not only to commoditize the basic need for family members to communicate—especially when one is in the traumatic and painful position of incarceration—but also to charge excessive rates while strictly limiting options for legal recourse.

Hobbs' lawyers argued that he had never agreed to arbitrate his claims, and fortunately for Hobbs, the court agreed that there had been no mutual assent to the arbitration clause. The court noted that Hobbs had not created his account online, but rather created and funded his GTL account over the phone, where the following automated message was played:

> Please note that your account, and any transactions you complete with GTL or any of its affiliates, are governed by the terms of use and the privacy statement posted at www.connectnetwork.com. The terms of use and the privacy statement were most recently revised on March 30, 2015.[96]

95. In re Glob. Tel*link Corp. ICS Litig., Case No. 5:14-CV-5275, 2017 WL 471571, at *1 (W.D. Ark. Feb. 3, 2017).

96. *Id.* at 5.

The terms referenced included an arbitration clause.[97] The court held that this message and Hobbs' subsequent use of the service was insufficient to constitute a contract because a "reasonable person" would not have understood the message to be referring to the terms of a contract.[98]

Similarly, in *James v. Global Tel*link Corp.*, Civ. No. 13-4989 (D.N.J. 2016), the District Court for the District of New Jersey rejected GTL's motion to compel arbitration against plaintiffs who registered for accounts over the phone.[99] The court, however, granted GTL's motion with regards to one plaintiff who created her account online. The James plaintiffs were inmates and their friends and families who had used GTL's services to communicate. The plaintiffs argued that GTL had violated New Jersey consumer-protection law, the Federal Communications Act, and the common law doctrine of unjust enrichment.[100]

The phone-registration plaintiffs were read a similar automated message as the plaintiffs in In re Glob. Tel*link Corp.[101] The court held that the message was insufficient to notify plaintiffs that continued use of GTL's services constituted acceptance of the terms and conditions. A reasonable plaintiff would have no understanding that they were agreeing to be bound by the terms, and thus, a no contract existed.[102]

The court found assent, however, on behalf of the singular plaintiff that created their account online. That plaintiff was presented with the terms and required to click "accept" in order to create an account. This, according to the court, was merely a "clickwrap" contract of the sort accepted by courts every day.[103] Thus, this plaintiff was bound by the contractual terms, including the arbitration clause.

Unfortunately, the occasional successes discussed above,[104] while immensely meaningful for the plaintiffs in these suits, offer little hope for

97. *Id.*
98. *Id.* at 5–6.
99. James v. Glob. Tel*link Corp., Civ. No. 13-4989 (WJM), 2016 WL 589676, at *11 (D.N.J. Feb. 11, 2016), *aff'd sub nom*. James v. Glob. TelLink Corp, 852 F.3d 262 (3d Cir. 2017).
100. *Id.* at *2.
101. *Id.* at *1.
102. *Id.* at *11.
103. *Id.* at *7.
104. There has been similar litigation over mutual assent in the release card context. *See e.g.*, Brown v. Stored Value Cards, Inc., No. 3:15-CV-01370-MO, 2016 WL 755625, at *4 (D. Or. Feb. 25, 2016) ("[Plaintiff] *had* to take the card and *had* to work through the Defendants' system in order to get her money back . . . It is not clear that Plaintiff was presented with a meaningful choice."). *But see* Pope v. EZ Card & Kiosk LLC, No. 15-61046-CIV-MARRA, 2015 WL 5308852 (S.D. Fla. Sep. 11, 2015) (granting motion to compel arbitration against plaintiff who received and used release card). It appears that companies are able to avoid consent issues in this context by giving nominal opt-out options, such as allowing card-recipients to choose checks (like in *Pope*). These options are solely "nominal," however, as they are routinely buried in contractual language handed to newly released incarcerated people with a great deal on their mind other than the legal manipulations of the debit card they have been handed upon release.

future litigants. Having their attempted contracts nullified due to a lack of mutual assent may be embarrassing for companies and their lawyers, but following such a ruling, they are able to quickly alter the presentation of their terms to ensure that the next litigant will be bound.[105]

Convincing a court that consumers have agreed to form a contract and be bound by listed terms is not a difficult feat. In fact, in *In re Glob. Tel*link Corp*, the court essentially provided GTL a blueprint for how to avoid a similar legal outcome in the future. The court noted that the automated message failed to include any words or phrases that might indicate the existence of a "bargain," including words like "contract," "consent," and "agree."[106] Moreover, the message failed to explain that the "terms of use" alluded to were any more than "summations of generally-applicable legal rights and duties."[107] According to the court, however, it would

105. A good example of this in the forced arbitration context is Uber and its struggles to force consumers into arbitration. In 2018, the First Circuit Court of Appeals rejected Uber's motion to compel arbitration in a suit claiming that the company violated a Massachusetts consumer-protection statute. Cullinane v. Uber Techs., 893 F.3d 53, 62–63 (1st Cir. 2018). The Court held that Uber failed to "reasonably notify" consumers of terms and conditions, including the arbitration clause. The Court was particularly unimpressed with Uber's decision to forego the more commonly used method of requiring that consumers check a box agreeing to set terms, instead choosing to "rely on simply displaying a notice of deemed acquiescence and a link to the terms." This manner of presenting the terms was deficient, according to the Court, because the formatting (text size and boldness) and design failed to make the terms conspicuous and did not make clear that a hyperlink was included. Thus, the court found no mutual assent and rejected Uber's motion. In the aftermath of *Cullinane*, legal blogs emphasized how companies could avoid a similar fate. *See* Joshua Dunlap, Cullinane v. Uber Technologies *and Arbitration Clauses in Online Contracts*, JD Supra (June 27, 2018), https://www.jdsupra.com/legalnews/cullinane-v-uber-technologies-and-92782 [https://perma.cc/BUT5-S6H9] ("The court's questionable assessment of how hyperlinks are displayed on mobile apps could have been avoided entirely had Uber required customers to affirmatively acknowledge consent to the relevant terms and conditions by clicking a link or checking a box prior to completing online enrollment."); Martin Krezalek & Jonathon Loeb, *First Circuit Finds Uber's Arbitration Clause to be Unenforceable Because the Hyperlink to the Clause Was Too Inconspicuous*, JD Supra (June 29, 2018), https://www.jdsupra.com/legalnews/first-circuit-finds-uber-s-arbitration-89760 [https://perma.cc/7Y2N-J8QQ] ("*Cullinane* dictates that best practice now require ensuring: (1) that the link to the terms and conditions containing the arbitration clause is very conspicuous in the context of its surroundings (e.g., bold and colorful text is not enough if the rest of the page contains similar or more noticeable text), (2) that the registration, or analogous, process include a clear prompt directing users to read the terms and conditions, and (3) the user is required to unambiguously confirm his acceptance of the terms and conditions containing the arbitration clause by clicking a button"). These blog entries emphasize the simple fixes that companies can rely on.

106. In re Glob. Tel*link Corp. ICS Litig., Case No. 5:14-CV-5275, 2017 WL 831101, at *3 (W.D. Ark. Mar. 2, 2017).

107. *Id.*

have been "very easy for GTL" to tell Hobbs that the company was attempting to form a contract.[108]

Any halfway decent attorney could read this opinion and offer the company any number of ways to ensure that their next attempt at creating a contract was upheld as valid. On the extreme side of things, the company could simply require that accounts be created online—using the same process that was upheld in *James*. Alternatively, the company could easily change the automated message to something like this:

Please note that by creating and funding your account, you have consented to enter a legally binding contract with GTL, to be governed by the terms of use and the privacy statement posted at www.connectnetwork.com.[109]

B. *Failure to Compel Arbitration Expediently*

In another case, *Chruby v. Global Tel*Link Corp.*, Case No. 5:15-CV-5136 (W.D. Ark. 2017), plaintiffs again argued that GTL charged them unlawfully high rates. While the plaintiffs were bound by an arbitration clause in their contract with GTL, the court found that the company had waived its right to arbitrate. Waiver is found where a party "(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts."[110] In this case, all three requirements were met. The litigation at issue here had been ongoing for a year and a half before GTL filed a motion to compel arbitration. In that time, GTL had filed, and plaintiffs had been forced to defend against, multiple motions in the court system. Thus, the court held that GTL had acted inconsistently with its right to arbitrate, and therefore, waived that right.

Unfortunately, future litigants will not be able to consistently rely on a company's waiver as a means of avoiding arbitration. GTL, and other companies, will undoubtedly have learned from this mistake, and in future litigation will take pains to compel arbitration from the start.

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108. *Id.* (emphasis added).
109. *Id.* It is worth noting that GTL has not yet altered their telephone message. The current message reads as follows: "Please note that your account and any transaction you complete with GTL or its affiliates are governed by the terms of use and the privacy statement posted at www.connectnetwork.com. The terms of use and the privacy statement were most recently revised on January 15, 2019." It is entirely possible that a court could once again find a lack of mutual consent. However, one must assume that the company employs lawyers that will soon update the message to protect their arbitration and other contractual requirements.
110. Chruby v. Glob. Tel*Link Corp., No. 5:15-CV-5136, 2017 WL 4320330, at *2 (W.D. Ark. Sep. 28, 2017).

VI. Congress or the CFPB Must Act to Limit Forced Arbitration in Prison Consumer Services

Congress or the Consumer Financial Protection Bureau (CFPB) should take action to ensure that prison services consumers have access to unbiased court proceedings. As described above, litigating against the enforcement of arbitration clauses may be successful on a piecemeal basis, but such efforts are likely to fail, and regardless cannot serve as a complete solution for all litigants. The most worthwhile longterm solutions are legislative action by Congress or else a promulgated rule by the CFPB.

Despite the Supreme Court's hardline in favor of arbitration, the U.S. Congress could, at any point, pass a law amending or repealing the Federal Arbitration Act, and banning companies outright from including the clauses in consumer and employment contracts. In 2019, the House passed the Forced Arbitration Injustice Repeal Act (FAIR Act), which would just that.[111] The Act asserts that "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute."[112] Although it failed to pass in the Senate during the 2019–2020 session, the bill was reintroduced by Rep. Hank Johnson (GA-04) in February 2021, and has more than one hundred and fifty House sponsors.[113]

Congressional action would be the most comprehensive solution to this crippling problem. The FAIR Act, or a similar bill, would undermine decades of obstructive Supreme Court precedent, and create incredible change almost immediately, ensuring that companies could no longer strip prison services consumers of their right to a jury trial. If Congress fails to act, however, the CFPB must take action to protect incarcerated people and their families.

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) created the CFPB.[114] The Act additionally

111. Alexia Fernández Campbell, *The House just passed a bill that would give millions of workers the right to sue their boss*, Vox (Sept. 20, 2019, 10:30 AM), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act [https://perma.cc/N6C3-GJPV].

112. Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 402(a) (2019).

113. Press Release, Congressman Hank Johnson (GA-04), Chairman of the Judiciary Subcommittee on Courts, *Rep. Johnson Re-Introduces Legislation to End Forced Arbitration & Restore Accountability for Consumers, Workers* (Feb. 11, 2021), https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-re-introduces-legislation-end-forced-arbitration-restore [https://perma.cc/2K2Z-C99H].

114. 12 U.S.C § 5511(a) (2010). The Bureau exists to "implement and enforce Federal consumer financial laws consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that such markets are fair, transparent, and competitive." *See* Consumer Financial Protection Bureau Strategic Place FY 2013–FY 2017, Consumer Fin. Protection Bureau, 1 (2013), http://files.consumerfinance.gov/f/strategic-plan.

mandated that the Bureau conduct a study "on the use of pre-dispute arbitration clauses in consumer financial markets," and gave the Bureau the authority to issue regulations limiting or prohibiting arbitration in certain contexts.[115]

The CFPB spent years conducting a thorough study of the impact of forced arbitration on consumers, and in 2015, it released its findings to Congress. The study found that mandatory arbitration clauses "deny consumers their day in court . . . allow financial services companies to avoid paying out big refunds, and . . . financial services companies will continue harmful practices if consumers cannot do anything to stop the wrongdoing."[116] In response to the study, the CFPB exercised its ability under the Dodd-Frank Act and promulgated an arbitration rule that severely limited financial companies' ability to use "arbitration clauses to deny groups of consumers the ability to pursue their legal rights in court."[117] The rule was celebrated by consumer rights activists, but fiercely opposed by the financial services industry, and by many Republicans.[118]

Soon after the rule's announcement, the Republican-controlled Congress turned to a rarely used process from the Congressional Review Act that allows the body to reject federal rules within sixty days.[119] In largely party-line votes,[120] both the House and the Senate voted to overturn the rule, and President Trump signed the Congressional repeal on November 1, 2017.[121]

Thus, the rule is currently unenforceable. Now that the Senate is under Democratic control, however, the CFPB could, and should, issue a new rule.[122] The Democratically-controlled body is unlikely to oppose

pdf [https://perma.cc/5THZ-9USW].

115. Consumer Financial Protection Bureau Study Finds that Arbitration Agreements Limit Relief for Consumers, Consumer Fin. Prot. Bureau (2015), https://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf [https://perma.cc/ZGR9-FQNW].

116. Joe Muccio, *The CFPB Arbitration Rule: The First Step in Regulating Arbitration*, 37 Rev. Banking & Fin. L. 99, 103 (2017).

117. Richard Cordray, *The Truth About the Arbitration Rule Is It Protects American Consumers*, The Hill (Oct. 16, 2017, 10:00 AM), https://thehill.com/opinion/finance/355562-the-truth-about-the-arbitration-rule-is-it-protects-american-consumers [https://perma.cc/9NUB-VUL4].

118. Muccio, *supra* note 116, at 107–110.

119. *The Congressional Review Act (CRA): Frequently Asked Questions*, Congressional Res. Serv. 1, 5 (Jan. 14, 2020), https://fas.org/sgp/crs/misc/R43992.pdf [https://perma.cc/F3QH-DHLH]; *see also* Dylan Scott, *The New Republican Plan to Deregulate America*, *Explained*, Vox (Apr. 25, 2015, 9:30 AM), https://www.vox.com/policy-and-politics/2018/4/25/17275566/congressional-review-act-what-regulations-has-trump-cut [https://perma.cc/B9L8-6D28].

120. Republican Senators Lindsay Graham and John Kennedy voted against overturning the rule, and Vice President Mike Pence was called on to break the ensuing Senate tie. *See* Muccio, *supra* note 116, at 111.

121. *Id.*

122. The Congressional Review Act disallows new rules that are "substantially the same form" as previously disapproved rules unless Congress specifically authorizes the new rule. Congressional authorization for a new rule is possible if

limits on the use of forced arbitration and class action waivers, nor is President Joe Biden.

Any new CFPB rule on arbitration should cover its use in the prison services context. The CFPB could prohibit the use of forced arbitration clauses to enforce class action waivers and could limit mandatory arbitration itself. As this Comment has repeatedly noted, prison services consumers are particularly vulnerable to financial abuse at the hands of corporations and need specific protection from exploitation.

Various organizations committed to aiding incarcerated communities have already called on the CFPB to take action to protect the vulnerable from the devastation of mandatory arbitration.[123] With a new Democratic administration in office, protecting incarcerated people and their families from corporate abuse should be a priority for the CFPB.

Conclusion

The costs of incarceration are brutal, or even devastating,[124] for families that suddenly find themselves intertwined with the correctional system. These costs have only increased as governments have increasingly contracted various aspects of the correctional system out to private companies that charge exorbitant prices for basic services. Companies are frequently able to take advantage of incarcerated people and their families due to their low social, and generally financial, status. Prison services providers charge unjust prices and impose confusing and hiked-up fees—but consumers have no choice but to comply if they want to provide for and stay connected to incarcerated loved ones. Not only are these consumers forced into paying high rates, but they are generally required to sign away their right to jury or judge adjunction of their rights should they wish to challenge companies' behaviors.

Democrats win back the Senate (or possibly even with the assistance of Republicans like Lindsay Graham who are less enamored by forced arbitration). If Congressional action is impossible, the CFPB must enact a substantially different rule than its 2017 attempt. The Congressional Review Act gives little information on what constitutes a rule that is "substantially the same" as a rejected rule, but it seems like that a rule limiting arbitration specifically in the prison services context would be notably distinct.

123. *See* Letter from NAACP LDF to Legal Defense and Education Fund, Inc., *Forced Arbitration Clauses and Class Action Bans*, (Aug. 22, 2016), https://www.naacpldf.org/wp-content/uploads/LDF-Comment-on-Consumer-Financial-Protection-Bureau-Arbitration-Agreements-1.pdf [https://perma.cc/5NC3-E76Z]; Letter from Prison Policy Initiative to Consumer Financial Protection Bureau, *Proposed Amendments to Regulation E: Curb Exploitation of People Released from Custody*, (Mar. 18, 2015), http://www.regulations.gov/document?D=CFPB-2014-0031-6092 [https://perma.cc/ZHS8-TKMY].

124. A survey of more than seven hundred formerly incarcerated people by the Ella Baker Center for Human Rights found that sixty-five percent of families with an incarcerated member could not meet basic needs. Forty-nine percent were unable to meet food needs and forty-eight percent became housing insecure because of the financial costs of a familial incarceration. Ella Baker Ctr. for Human Rights, Who Pays? The True Cost of Incarceration on Families 7 (2015).

Arbitration clauses in the prison services context allow companies to violate consumer rights with little fear of meaningful ramifications. The clauses are exceptionally difficult to defeat. Thus, we are left with a system wherein the family and friends of incarcerated people are forced to pay high prices to subsidize their loved one's incarceration, and should these rates be unlawful, they are unable to pursue legal action against the responsible private companies in a court. This is an immense restriction on the rights of an already exceptionally mistreated and vulnerable population and deserves renewed public attention.

The criminal justice and correctional systems need vast reform. There are real questions about whether there should be any role at all for private companies in the criminal justice system. It may very well be impossible to pursue rehabilitation simultaneously with profit, but that conversation is outside the purview of this Comment. Regardless of whether private entities have a part to play, however, a pivotal first step is ensuring that where they are involved companies are not able to subject the vulnerable to unjust rates and treatment while severely limiting their options for legal recourse.