PRIVATE PRISON TELECOM CORPORATIONS AND STATE ACTION: HOW THIS ONE TRICK WILL ALLOW PLAINTIFFS TO DISRUPT AN $8 BILLION INDUSTRY

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I. INTRODUCTION

For incarcerated people, the telephone is a lifeline. Many people behind bars rely on it as the primary means of communication, especially for those who are incarcerated in out-of-state facilities, far away from their families. The COVID-19 pandemic has only increased the importance of phone access: many facilities suspended or ended visits in early 2020 to curb the spread of the virus and, as of January 2021, those visits have not resumed.1

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Over the past three decades, correctional facilities have almost entirely privatized the provision of telephone services. Nearly every correctional agency in the country charges incarcerated individuals for phone calls, and most contract with just a handful of niche telecom corporations that cater to the correctional market. In exchange for exclusive contracts to provide telephone service to everyone incarcerated in a given facility, the prison telecom corporations offer correctional agencies kickbacks—known as “commissions”—on the cost of each phone call.

As a result of this dynamic, the cost of a call for someone behind bars reached as high as $25 for a 15-minute phone call. And, because incarcerated people are often paid just pennies an hour for work, their families and friends are usually responsible for paying for the cost of these calls. The burden of paying for communication falls hardest upon Black and Brown women that are already living with the experience of having a loved one in prison or jail. But, the industry’s harms stretch beyond just the cost of telephone calls: prison telecom corporations are notorious for employing deceptive billing practices, promoting ever-widening

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3. Id. at 269 (noting that, by 1995, 90% of all correctional agencies derived a profit from phone calls); Michael Sainato, ‘They’re Profiting Off the Pair’: The Push to Reign 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 (discussing the two corporations that control 70% of the market).


surveillance of incarcerated people and their families, and spying on confidential attorney-client phone calls.

The industry’s harms have been recognized for decades. Activists, news outlets, and federal and state regulators have all attempted to expose and challenge the exploitative prison telecom model. During the surge of Black Lives Matter uprisings and protests in the summer of 2020, demonstrators incorporated “Prison Phone Justice” into their broader calls for justice and abolition. However, these efforts have frequently run into a business model that ensures widespread resistance to even the slightest measure intended to provide relief to families.

Through the cost of calls, the prison telecom industry siphons off countless resources from communities of color, compounding the damage caused by racist over-policing and systemic underinvestment. Corporations share about 50% of their telephone charges with correctional agencies through kickbacks called “site commissions.” These payments have become huge sources of revenue for many small-town jails and sheriffs’ departments. As a result, the industry and law enforcement march in lockstep against any legislative or regulatory reform.

Unsurprisingly, these forces have led to a legal landscape that is hostile to plaintiffs. People wronged by this industry often have no legal recourse, even if

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they are subjected to corporate behavior that would be unimaginable for many in the free world.\textsuperscript{15} At the federal level, the industry has used legal challenges to water down attempts to lower the cost of calls nationwide.\textsuperscript{16} Recently, activists have begun to bring suits against prison telecom corporations under a variety of different causes of action.\textsuperscript{17} But, courts have rejected many of these challenges, often due to the providers' unique role as private vendors within a public system.\textsuperscript{18}

One reason why prison telecom corporations are so rarely sued in court is because judges have largely refused to entertain constitutional claims against them.\textsuperscript{19} For the most part, constitutional claims have failed after judges conclude that plaintiffs cannot meet the “state actor” requirement.\textsuperscript{20} But, while telecom providers may be private corporations, they are increasingly exercising an enormous amount of coercive power over incarcerated people and their families.\textsuperscript{21} In many facilities, prison telecom corporations operate massive surveillance systems, often without a warrant.\textsuperscript{22} And, with almost no oversight by courts or regulators, abuses are common.\textsuperscript{23}

Still, judges find that corporations are not state actors for a variety of reasons. Many suits are filed pro se, and judges are historically particularly hostile to incarcerated self-represented plaintiffs.\textsuperscript{24} Moreover, given the litany of decisions denying that prison telecom corporations are state actors, many resource-strapped


\textsuperscript{16} See generally 30 F.C.C. Rcd. 12763.


\textsuperscript{18} Id.

\textsuperscript{19} See cases cited infra note 120.

\textsuperscript{20} See discussion infra Section II.A.ii.

\textsuperscript{21} See discussion infra Section IV; see also George Joseph & Debbie Nathan, Prisons Across the U.S. Are Quietly Building Databases of Incarcerated People’s Voice Prints, INTERCEPT (Jan. 30, 2019, 9:00 AM), https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus/.

\textsuperscript{22} See infra pp. 632–33 nn. 172-175.


social justice lawyers and advocates may choose to devote their time and energy to litigation that is more likely to succeed.\textsuperscript{25}

However, even under the current law, prison telecom corporations are state actors.\textsuperscript{26} They gather evidence for criminal trials, perform warrantless wiretaps—and even provide the majority of the funding for some corrections agencies.\textsuperscript{27} Under any definition—legal or common sense—these corporations have become inexorably intertwined with corrections agencies.

And, the failure to recognize that they are state actors has implications that reach beyond just the telecom industry. It impacts the entire U.S. prison system. Nearly every service has been privatized and commodified.\textsuperscript{28} In many facilities, corporations have entirely taken over the day-to-day operation of incarceration from government agencies.\textsuperscript{29} And, as judges refuse to hold corporations responsible for constitutional violations, it means that meager constitutional rights are disappearing. It also means that, due to the Prison Litigation Reform Act’s screening requirements,\textsuperscript{30} corporations do not have to even lift a finger to defend against allegations of wrongdoing.\textsuperscript{31}

In this Article, I will examine why the law currently fails to address the harms of the prison telecom industry. First, I will provide a brief history of the industry and its formation during the era of mass incarceration. Second, I will illustrate some of the industry’s effects on individuals, communities and the law. Third, I will examine why courts have been so hostile to suits brought against the industry and propose several key reforms that could end this exploitation for good.

II. A PRIMER ON THE PRISON TELECOM INDUSTRY

A. History

Until the mid-1980s, phone calls in correctional facilities functioned like payphones in the free world.\textsuperscript{32} At that time, AT&T dominated local telephone service and payphones alike, and this control of the market included control over payphones in prisons and jails.\textsuperscript{33} Then, after the Reagan administration broke up

\textsuperscript{25} See Stephen Raher, The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails, 17 Hastings Race & Poverty L.J. 3, 40, 46 (2020) (noting that, although “litigation and regulatory advocacy have produced victories, such efforts are unlikely to result in comprehensive protections” without legislative action).

\textsuperscript{26} See infra Section IV.

\textsuperscript{27} See discussion infra Section IV.

\textsuperscript{28} See WORTH RISES, supra note 15 (discussing the U.S. prison system as a “vast matrix of public-private partnerships,” comprised of thousands of companies).

\textsuperscript{29} See generally id. (discussing twelve different sectors that have been privatized in prisons and jails).


\textsuperscript{31} See infra note 130.

\textsuperscript{32} See Jackson, supra note 2, at 268.

\textsuperscript{33} See WORTH RISES, supra note 15, at 48.
the AT&T monopoly, the market was flooded with a proliferation of new regional providers. This trend carried over to prisons and jails, which began to contract with a wider variety of prison telecom providers.

This diversification was accompanied by a shift in how prison telephone service was viewed. It ceased to be treated like a utility—like running water—that people deserved to access freely. Instead, it became a service that could be commodified and sold to incarcerated individuals and their families. Within a decade of the end of the AT&T monopoly, nearly every correctional facility in the country had switched to private telecom provider for phone service. Unsurprisingly, these private corporations exploited their captive market. At the time, a 15-minute call in some facilities cost $20, just for a local call.

The prison telecom industry did not grow in a vacuum. The same racist, hateful policies that created the modern prison state fostered the growth of privatized correctional services by creating the conditions for private telecom corporations to thrive. More people incarcerated for longer terms, in more isolated facilities—separated from their communities and support networks. The lucrative market soon attracted outside investment from private equity firms, who acquired a foothold in the market, which then rapidly consolidated.

Today, the prison telecom industry is dominated by just two corporations, each owned by high-profile private equity firms. The largest, GTL (formerly known as Global Tel Link), controls contracts for telephone services in facilities with about a million incarcerated individuals. The second largest corporation, Securus, provides services for over 850,000 incarcerated people across hundreds of facilities. Together, the two corporations control at least 90% of the prison telecom market by most measures.

B. The Impact of the Industry

Prison telecom corporations like GTL and Securus have exploited their power over the market to charge exorbitant rates for phone calls. This business

34. See Jackson, supra note 2, at 268.
35. Id. at 268 (noting that, after the breakup of AT&T, new entrants to the market included “AT&T rivals MCI and Sprint, followed closely by a series of dedicated start-ups”).
36. See WORTH RISES, supra note 15, at 49.
37. See Jackson, supra note 2, at 264.
38. A.E. Raza, Legacies of the Racialization of Incarceration: From Convict-lease to the Prison Industrial Complex. 11 J. INST. JUST. INT’L STUD. 159 (discussing in general how racist attitudes drive attempts to monetize the carceral system).
40. See WORTH RISES, supra note 15, at 49.
41. See id. at 52.
42. Id.
43. Id.
The cost of telephone calls places an enormous financial burden on incarcerated people, who already face a system of overlapping forces that effectively prevent them from ever obtaining financial stability. Due to decades of racist policies and systemic disinvestment in communities of color, people convicted of crimes have disproportionately less wealth than people without criminal-legal system contact. Then, after being convicted, many incarcerated individuals are often saddled with mountains of fines and fees imposed by the criminal-legal system. Finally, once they are actually in prison, incarcerated individuals can be forced to work for just a few cents an hour. At that rate, someone in a North Carolina prison would have to work for sixty hours to pay for a single 15-minute in-state call, due to GTL’s rates.

Since incarcerated people cannot afford the cost of calls, the burden overwhelmingly falls upon their families. Women—and Black and Brown women, in particular—make up the vast majority of people responsible for paying these costs. In a study conducted of people visiting San Quentin State Prison in California, researchers found that most women spent “as much as one-third of their income” on phone calls for incarcerated family members.


49. Sawyer, supra note 6.


51. See generally de Vuono-Powell et al, supra note 7.

52. Id. at 30.
annual income to maintain contact. This extends to entire families, leading nearly one in three families with an incarcerated loved one goes into debt just to pay for the cost of staying in touch.

By placing phone calls beyond the reach of many people behind bars, prison telecom corporations isolate people from their support networks. This isolation has an immeasurable negative impact on people’s wellbeing, especially individuals with mental illness. Beyond the physical separation of prison walls, this communication gap predictably drives people to despair. This does not just lead to desperation in prisons, it prevents people from developing the bonds needed to succeed upon their release. For instance, without easy access to phone calls, people cannot plan where they are going to live or work, and they cannot keep in touch with family members that are necessary for support. The cost of these severed bonds, multiplied by the millions of people that enter the U.S. prison system each year is unimaginable.

### III. THE LEGAL LANDSCAPE

The prison telecom industry is governed by a patchwork of regulations and laws at both the federal and state level. Nationwide, corporations are predominantly regulated by the Federal Communications Commission (FCC). Although there have been recent attempts by left-leaning legislators to pass laws to lower the cost of phone calls using federal legislation, these have not yet been successful. However, the COVID-19 pandemic has increased the urgency of these legislative campaigns, and some long-standing phone justice legislation has made

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53. Id.

54. See id. at 9.


its way into relief legislation like, the HEROES Act.61 On the state level, regulation is inconsistent. In many states, the prison telecom industry is effectively unregulated,62 although some states with particularly active utility regulators have taken action to lower costs and increase transparency in the industry.63

A. Federal Regulations and State Laws

At the federal level, the FCC is responsible for regulating any telecommunications provider, including prison telephone corporations.64 The FCC’s authority to regulate the cost of prison telephone calls, and telephone calls more broadly, stems from the Communications Act of 1934.65 That Act requires the Commission to ensure that telephone calls are “just, reasonable, and fair” to the “general public.”66 In general, however, the FCC may only regulate interstate communication services, and must leave the regulation of purely intrastate communications to individual states.67 But, a series of reforms included in the 1996 Telecommunications Act eroded the barrier against the FCC regulation of intrastate


communication.\(^6^8\) Specifically, Congress commanded the FCC to take action “to promote competition among payphone service providers” including “inmate telephone service in correctional institutions, and any ancillary services.”\(^6^9\)

Despite this legislative mandate, the Commission did not take any meaningful action on the cost of prison phone calls. In fact, the Commission only acted on the issue because of a nearly decade-long campaign by advocates and families of incarcerated people.\(^7^0\) In 2000, a group of incarcerated people and their families filed a lawsuit against a private prison operator and a group of prison telecom corporations, alleging that the corporations signed exclusive contracts that led to unfair rates for telephone calls.\(^7^1\) The named plaintiff in that case, Martha Wright-Reed, was a 74-year-old Black woman who had spent nearly $1,000 a year paying for phone calls with her incarcerated grandson.\(^7^2\) Although the federal judge hearing the case acknowledged that her case might have merit, she ultimately decided that the FCC had primary jurisdiction over the matter and referred the case to the Commission.\(^7^3\) The FCC was silent on the issue for over a decade.\(^7^4\)

In 2012, the FCC issued its first significant rulemaking over the prison telephone industry.\(^7^5\) After years of public pressure,\(^7^6\) deliberation and rulemaking,\(^7^7\) the FCC announced a set of sweeping reforms.\(^7^8\) Most notably, the

\(^{68}\) Raher, supra note 25 (discussing attempts by the industry to preempt state regulation using the newly passed Communications Act).


\(^{74}\) Id. See Case Timeline.


\(^{76}\) See, e.g., Case Timeline, supra note 74.

\(^{77}\) See, e.g., id. at 20; see also Raher, supra note 25 (noting that the Commission waited nearly ten years to issue regulations).

FCC announced a set of rate caps that would limit the cost of all local and long-distance calls from prisons at 11 cents per minute. In addition, the FCC sought comment on a number of other planned reforms, like supplemental caps on hidden fees and secondary charges of calls. These new rate caps would immediately ease the burden of paying for calls for countless incarcerated people and their networks. In some jurisdictions, the cost of a 15-minute call would drop from $17 to just $1.65.

Beyond the immediate savings to consumers, the FCC’s regulations were a significant expansion of the agency’s authority to regulate the industry. Interstate calls—calls from an incarcerated person in one state to a recipient in another state—constitute only a tiny fraction of the total number of calls from prisons and jails. Local calls—those made and received within the same state—make up roughly 80% of calls. So, beyond the dramatic cut in the cost of calls, these rate caps represented a significant change in the legal landscape of the prison telecom industry.

However, these rate caps were immediately challenged before they could go into effect. The providers (along with several state and local corrections agencies) claimed that, by capping both local and long-distance calls, the FCC had overstepped its authority to regulate interstate communications. While the

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80. Id.


84. Id.


86. See Glob. Tel Link v. FCC, 866 F.3d 397, 401–02 (D.C. Cir. 2017); see also Global Tel Link, Global Tel Link Expresses Grave Concern with Proposed FCC Decision on Inmate Calling Services, PR NEWSWIRE (Oct. 22, 2015), https://www.prnewswire.com/news-releases/global-tel-link-expresses-grave-concern-with-proposed-fcc-decision-on-inmate-calling-services-300164830.html (condemning the regulations as "disastrously short-sighted").
Commission initially aggressively defended the legality of these caps, the agency’s stance changed dramatically after the 2016 presidential election. Then President Donald J. Trump appointed Ajit Pai—a former lobbyist for the prison telecom industry and vocal opponent of the FCC’s previous regulations—as the Chairman of the FCC. Within weeks of his appointment, the FCC announced that it would no longer defend the rate caps in court because “the current Commission does not believe that the agency has the authority” to implement them.

Unsurprisingly, this move doomed the FCC’s regulations. In 2017, the Court of Appeals for the D.C. Circuit struck down the caps on local phone calls and vacated many of the proposed reforms. The Court concluded that the FCC did not have the authority to impose rate caps on purely intrastate phone calls, even if they were unfairly priced. After the GTL decision, Democrat legislators introduced several bills intended to explicitly grant the FCC authority over local phone calls. These efforts gained renewed urgency in the movement due to both the pandemic and the surge of protests following the killings of George Floyd, Breonna Taylor, and other Black and Brown people in 2020. To date, Congress has yet to pass any legislation specifically addressing the cost of calls for incarcerated people.

The GTL decision remains a significant hurdle for any FCC regulation today. Without the ability to regulate local calls, the FCC cannot touch the vast majority of

87. Shepardson, supra note 85 (quoting an FCC filing as saying that the regulations were a “firmly grounded exercise of the FCC’s statutory authority”).


91. See Glob. Tel Link, 866 F.3d at 406; see also Cecilia Kang, Court Strikes Obama-Era Rule Capping Cost of Phone Calls from Prison, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/technology/fcc-prison-phone-calls-regulations.html (noting that the agency switched positions after Pai became Chairman).


93. Glob. Tel Link, 866 F.3d at 410 (rejecting the “conclusion that § 276 authorizes the Commission to cap intrastate rates pursuant to ‘just, reasonable and fair’ ratemaking.”); NELSON ET AL., supra note 18, at 39.


96. Id. (discussing obstacles to the bill in congress).
the industry. In September 2020, the FCC announced that it was lowering the cost of long-distance calls, while reaffirming the Commission’s belief in the validity of the GTL decision by calling on state regulators to take action on local calls.97

However, after the 2020 election, it is possible that a new FCC Commissioner could renew the agency’s efforts to extend its authority over all calls from correctional facilities.

Regulation at the state and local level remains inconsistent. Very few states have passed meaningful regulation of the industry.98 A handful of states, like Illinois, have passed rate caps for calls from state prisons, while leaving the cost of calls from jails untouched.99 In the past few years, some cities and counties have sought to lower the cost of calls as an issue of racial justice. For instance, New York City and San Francisco have all passed laws to provide free or low-cost calls to people in jail,100 while Dallas renegotiated its contract to charge less than one cent per minute, after a campaign by activists.101

B. Prison Telecom Litigation

Like regulators and legislators, courts have also failed to exercise meaningful oversight over the prison telecom industry. A mix of statutes and common law ideas at the federal and state level create difficulties for plaintiffs attempting to hold the industry accountable in court. Judges have long declared that prison telecom corporations, unlike many other actors in correctional facilities, cannot be sued for constitutional violations, blocking the vast majority of claims.102 Federal law also


102. See discussion supra Section II.B.i.
does not create a viable cause of action, and FCC regulations do not create a cause of action either. Although some plaintiffs have brought successful tort actions in state courts, these victories have been infrequent. The result is that prison telecom corporations can act with impunity.

i. Litigation in Federal Courts and Why It Fails

Historically, advocates have not had much success using federal statutes to challenge the prison telecom industry. There have been a few attempts to file suit under the Communications Act requirement that rates be “just and reasonable,” but judges have generally referred any challenge involving the cost of phone calls to the FCC, which has historically waited years before acting on the claims. As a result, many suits brought under federal law are never even heard by a judge.

Federal law does technically allow people to file claims against prison telecom corporations, but other doctrines effectively limit their use. In theory, the Communications Act of 1934 provides consumers with a private right of action to sue telecom providers that do not provide “just and reasonable” telephone rates. Indeed, the Wright plaintiffs brought claims under the Communications Act, in addition to other constitutional and anti-trust claims. However, a set of common law doctrines prevents most of these suits from being heard in court, instead transferring them to the FCC. The first concept is the doctrine of primary jurisdiction, which allows a court to refer claims to an administrative agency if a claim falls within their area of expertise. For instance, in the Wright case, the judge refused to hear the claims under the Communications Act because the FCC had primary jurisdiction over the review of the cost of

103. See discussion supra Section II.B.i.
107. 47 U.S.C. § 206 (stating that providers that violate the Act “shall be liable to the person or persons injured” for money damages); 47 U.S.C. § 207 (allowing individuals harmed by violations of the Act to bring suit in federal district court).
interstate phone calls. The plaintiffs then had to navigate a years-long FCC mediation process that concluded without a settlement, before proceeding to file a petition for the FCC to issue new regulations.

A second common law idea, the filed rate doctrine, performs a similar function. Utility providers, including telephone companies, are required to submit their rates to government regulators, who are then responsible for ensuring that consumers actually pay the posted rate. The filed rate doctrine prevents consumers from claiming that a rate is unreasonable if that rate is on file with a regulator. Although advocates have argued that the filed rate doctrine should not apply to prison telecom industry, courts continue to dismiss claims that challenge the reasonableness of telephone rates.

ii. Constitutional Claims

Similarly, constitutional claims against prison telecom corporations at the federal level are usually unsuccessful. Although constitutional litigation is responsible for some dramatic reforms of the U.S. prison system, courts have largely rejected constitutional claims against prison telecom corporations. Most of these suits, brought under Section 1983, die at the hands of the “state actor” doctrine. Further, many judges have simply concluded that there is no constitutional right to telephone calls. As a result, successful constitutional litigation against prison telecom corporations is basically non-existent.
Constitutional litigation is particularly important for people behind bars. By turning to federal courts, incarcerated people and advocates have won court orders that lead to significant changes in the legal landscape for incarcerated people.\textsuperscript{118} Some victories have led to significant tools for incarcerated people to expose the inhumane conditions, like \textit{Bivens}, which opened the door to federal claims for money damages against certain types of officials.\textsuperscript{119} Other lawsuits have led to symbolic statements of the human rights of incarcerated people, like the Supreme Court’s decision in \textit{Estelle v. Gamble}, now a fundamental piece of the Supreme Court’s 8th Amendment jurisprudence and the prisoners’ rights movement alike.\textsuperscript{120}

Unsurprisingly, the vast majority of lawsuits filed by incarcerated people are based on constitutional claims.\textsuperscript{121} Constitutional claims have historically been one of the most common—if still immensely difficult and time consuming—avenues to receive money damages for rights violations.\textsuperscript{122} In addition, legal advocates often produce materials that focus on constitutional claims above statutory or state-level remedies.\textsuperscript{123} Presumably, these materials are easier to standardize to a broader audience and simpler to explain than complex state statutes and causes of action.

Perhaps because of these materials, many incarcerated people have attempted to file constitutional claims against prison telecom corporations or against correctional agencies that work with them.\textsuperscript{124} These have almost been uniformly unsuccessful.\textsuperscript{125} In fact, the vast majority of them are dismissed at the screening stage that every incarcerated plaintiff must overcome before they can even make it into federal court.\textsuperscript{126}

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\textsuperscript{121} See Margo Schlanger, \textit{Inmate Litigation}, 116 HARV. L. REV. 1555, 1575 (2003) (explaining that incarcerated people file federal civil suits thirty-five times more frequently than the general population).

\textsuperscript{122} Id. at 1573 n. 52.


\textsuperscript{125} See Rosenfeld, supra note 120.

IV. THE STATE ACTION DOCTRINE: WHY CONSTITUTIONAL CLAIMS FAIL

Federal judges have dismissed these claims for two key reasons. First, many have concluded that private telecom corporations cannot be sued in constitutional suits because they are not state actors. Second, even when suits are allowed to proceed, judges have quickly concluded that there is no constitutional right to cheap telephone calls.

Most incarcerated people that file lawsuits do so bring suits in federal court. 127 Many of these claims are “Section 1983” claims, 128 which allow people to win money damages for claims of federal rights violations perpetuated by state actors. 129 These claims are usually said to have two elements: first, there must be a deprivation of a right created by the Constitution or another federal law, and second, the deprivation must be made under color of state law. 130 This second element usually poses the problem for people trying to sue prison telecom corporations.

To date, the Supreme Court has repeatedly interpreted the Fourteenth Amendment’s Due Process Clause to protect against constitutional infringements by state actors. 131 On the other hand, the Court has generally refused to extend this protection against so-called “private conduct, no matter how discriminatory or wrongful.” 132 However, private parties can find themselves liable for constitutional violations if the rights violations are “fairly attributable to the State” because the private party is acting while “clothed with the authority of state law.” 133

Even by Supreme Court standards, the Court’s decisions on this issue have been particularly vague and, at times, contradictory. 134 As a result, circuit courts have relied on a number of different tests to determine what constitutes state action. In general, however, courts apply four tests: the state compulsion test, the public function test, the nexus test, and the joint action test. 135

127. See Schlanger, supra note 121, at 1573 n.52 (estimating that about 25% of lawsuits filed by incarcerated people are in state court).


132. Id. at 50.


The state compulsion test finds state action if a state law or policy requires a private party to undertake a certain action.\textsuperscript{136} Significantly, courts have concluded that compulsion requires an “significant encouragement,” beyond a private party complying with a state regulatory scheme, no matter how detailed.\textsuperscript{137} Rather, the state must compel the private party to take a certain action, not just react to their actions.\textsuperscript{138} For instance, in \textit{Blum v. Yaretsyk}, the Supreme Court held that there was no state action when New York lowered Medicaid benefits for nursing home residents that were transferred to lower levels of care.\textsuperscript{139} In the Court’s view, there was no compulsion because the state merely adjusted the benefits in response to the decision of the residents’ physicians—who were private parties.\textsuperscript{140}

Another potential test is the public function test, which asks whether a private party performing a function that is “traditionally and exclusively” reserved to the state.\textsuperscript{141} Although this test would appear to encompass a wide range of government functions that, under a common sense view, are traditional and exclusive, the Supreme Court has repeatedly sought to limit this category.\textsuperscript{142} In the prison context, this narrow focus has led to head-scratching decisions by circuit courts that rely on strained dives into historical records. For instance, in \textit{Holly v. Scott}, the Fourth Circuit declared that “the operation of prisons is not a ‘public function,’” citing examples of private individuals operating prisons in the 19th century.\textsuperscript{143}

The third option, the nexus test, seeks to determine whether there is a “sufficiently close nexus” between a private party and the state, such that the private party’s actions can be considered state actions.\textsuperscript{144} Some circuit courts consider a fourth test, the joint participant test, that asks whether state and the private parties are so interdependent that they should be recognized as “joint participant[s]” in the alleged rights violation.\textsuperscript{145} Like the state compulsion test, this test requires courts to embark on a highly fact-specific “totality of the


\textsuperscript{137} Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 1974 (concluding that the “mere fact that a business is subject to state regulation does not by itself convert its action into that of the State,” even if the regulation is “extensive and detailed”).


\textsuperscript{139} Blum, 457 U.S. at 1011.


\textsuperscript{142} See Brown, supra note 136, at 565.

\textsuperscript{143} Holly v. Scott, 434 F.3d 287, 293 (4th Cir. 2006); see also Richardson v. McKnight, 521 U.S. 399, 405 (1997).

\textsuperscript{144} Howard, supra note 135, at 230.

circumstances” analysis. For instance, in *West v. Atkins*, the Supreme Court held that a contract physician working in a state prison was a state actor because the state had authorized him to be the exclusive provider of medical care to incarcerated people. The *West* court noted that the physician’s contract or nature of his employment was irrelevant—it is the function that is key.

Many Section 1983 suits brought against prison telecom corporations have been dismissed under the “state actor” doctrine. Many of these lawsuits are filed pro se by incarcerated people without the help of an attorney. Although judges ostensibly provide more leeway to pro se plaintiffs, they have repeatedly dismissed cases against prison telecom corporations at the earliest stage for a failure to provide a detailed analysis of the state actor doctrine. These dismissals show why this doctrine, above all else, is the fundamental obstacle to constitutional litigation against the prison telecom industry.

These claims have been dismissed, even when they have alleged seemingly clear-cut instances of unfair or illegal behavior on the part of the corporations. In *Brooks v. SecurusTech.net*, an incarcerated person attempted to sue corrections officials in Suffolk County, New York, as well as Securus, the jail’s telecom vendor. According to the complaint, Securus charged rates as high as $5.00 for a 15 minute phone call, frequently disconnected callers before their time was up, and charged “outrageous” fees. The plaintiff alleged a number of different constitutional claims. First, the complaint claimed that, as a result of the costs, people had no contact with the outside world, in violation of the Eighth Amendment. The complaint also alleged that the dropped calls and flawed system violated the due process rights of pre-trial detainees by preventing them from preparing an adequate defense with their attorneys.

Applying the “nexus” test for state action, a federal judge dismissed the case with prejudice. The judge simply noted that Securus was a privately-held

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146. Howard, supra note 135, at 229.
148. Id. at 56.
149. See *Montgomery*, 2020 WL 3343000, at *7 (collecting cases) (citations omitted).
154. Id. at *2–3.
155. Id.
156. Id. at *2.
157. Id. at *2–3.
158. Id. at 15, 19.
corporation, citing business information on the company’s website.\(^{159}\) The court then concluded that, as a private corporation, Securus was not a state actor, even if it had a contract with Suffolk County or was regulated by the state.\(^{160}\) This decision, with its bare reasoning and failure to actually explore the facts of the case, is emblematic of the caselaw in this area.

V. WHY PRISON TELECOM CORPORATIONS SHOULD BE CONSIDERED STATE ACTORS

However, these decisions are legally flawed and rely on many different faulty assumptions about how the prison telecom industry works. Even under the Supreme Court’s existing murky definition of the term, prison telecom corporations qualify as state actors. The decisions in these cases demonstrate that federal judges are just as susceptible to being fooled by corporate talking points as anyone else. In reality, the prison telecom industry is deeply enmeshed with correctional agencies.

A. Prison telecom corporations assist law enforcement agencies with prosecution and rights violations by recording phone calls, performing biometric surveillance, and phone tapping attorneys.

Prison telecom corporations are not neutral vendors that merely provide a utility to the state. In reality, they wield an enormously powerful set of surveillance technology that law enforcement officials have frequently used to support the prosecution of criminal defendants and punish incarcerated people. And—unsurprisingly, given the complete lack of industry oversight—prison telecom corporations have repeatedly used these tools to violate the constitutional rights of incarcerated people and their families. In effect, they have become an arm of law enforcement.

Prison telecom corporations have recently begun to offer recording and monitoring as part of their telephone services. For instance, Securus’ “Secure Call Platform” claims to monitor every single call made from a correctional agency to outside parties.\(^{161}\) These recordings are then stored on a server, where law enforcement officials can access them.\(^{162}\) Police officers and detectives can use these recordings as vital pieces of evidence in criminal investigations and prosecutions of both the caller and recipient of these calls.\(^{163}\) Through these tools,
prison telecom corporations have enmeshed themselves into one of the quintessential government functions: prosecuting and incarcerating people accused of crimes.\textsuperscript{164}

Prison telecom corporations like Securus have also repeatedly recorded privileged and confidential conversations between incarcerated individuals and their attorneys—and have also provided this ostensibly confidential material to prosecutors.\textsuperscript{165} Securus alone has paid millions of dollars in settlements and fines to settle these allegations,\textsuperscript{166} which the corporation claims occurred as a result of a software glitch. But the frequency with which these recordings occurred—thousands of calls across many different states\textsuperscript{167}—bely any claim that this an innocent mistake. When viewed as a whole, it suggests that the industry plays a crucial role in systemic rights violations that may have impacted countless criminal cases.

The industry also provides surveillance tools that provide warrantless surveillance of anyone who receives a call from an incarcerated person. Securus, through a deal with major cellphone carriers, allowed law enforcement officials to track the locations of any cellphone that received a call from a correctional agency.\textsuperscript{168} Securus provided this information to any officer that claimed to have a warrant and did not actually verify the legality of these searches.\textsuperscript{169} In early 2020, the Federal Communications Commission proposed $200 million in fines for

\begin{footnotesize}
\begin{enumerate}
\item[164.] See Daniel Rudofsky, Modern State Action Doctrine in The Age of Big Data, 71 N.Y.U. ANN. SURV. AM. L. 741, 754 (2017), https://annualsurveyofamericanlaw.org/wp-content/uploads/2017/04/71-4_rudofsky.pdf; Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1140 (9th Cir. 2012) (finding state action where police delegated authority to private security to detain individuals, issue citations, and access police records); see also Lusby v. T.G.& Y. Stores, 749 F.2d 1423, 1430 (10th Cir. 1984) (finding state action where private security was given authority to make arrests and “substitute his judgment for that of the police”).
\item[165.] Tonya Riley, A Private Prison Company Gave 1,300 Recordings of Confidential Inmate Phone Calls to Prosecutors, MOTHER JONES (June 8, 2018), https://www.motherjones.com/crime-justice/2018/06/securus-corecivic-kansas-prison-phone-calls/.
\item[168.] Valentino-DeVries, supra note 162.
\item[169.] Valentino-DeVries, supra note 162 (quoting a letter written by Senator Ron Wyden as saying that “Securus confirmed that it did not ‘conduct any review of surveillance requests’”).
\end{enumerate}
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cellphone carriers’ role in the scheme, but Securus escaped without a scratch. \textsuperscript{170} And what’s more, there has been no accounting of how many people had their rights casually violated by the industry. \textsuperscript{171}

Finally, the industry also expanded into Orwellian surveillance of people’s voices. Using technology developed using Department of Defense funds, the industry has developed tools to create a “voice print” of anyone using a correctional telephone system. \textsuperscript{172} In states like New York, nearly every incarcerated person is forced to submit to this biometric surveillance in order to access the phones. \textsuperscript{173} Telecom corporations provide this data to law enforcement officials, who retain voice prints even after people are released from incarceration. \textsuperscript{174} Even worse, this biometric surveillance is also turned against people who simply receive calls from an incarcerated loved one, without a warrant or even a suspicion that they are involved in criminal activity. \textsuperscript{175}

This mass surveillance alone puts telecom providers into the realm of a state action. By flagging “suspicious” calls, collecting evidence of supported wrongdoing, and organizing it for detectives, prison telecom corporations are engaging in much of the day-to-day work of law enforcement. In some respects, it even appears that correctional officials are simply outsourcing law enforcement to private vendors. By acting as law enforcement—a quintessential public function—prison telecom corporations have become state actors. Further the joint nature of the information sharing, where corrections officers can freely access information surreptitiously gathered by private corporations, suggests a further degree of state action.


\textsuperscript{171} Statement of Commissioner Geoffrey Starks Approving in Part and Dissenting in Part, AT&T Inc., FCC 20-26, No. EB-TCD-18-00027704 (Feb. 28, 2020), https://docs.fcc.gov/public/attachments/FCC-20-26A5.pdf (noting that, even after the investigation “the Commission still has no idea how many consumers’ data was mishandled by each of the carriers”).


\textsuperscript{174} George Joseph & Debbie Nathan, \textit{Prison Tech Company Is Questioned for Retaining ‘Voice Prints’ of People Presumed Innocent}, \textit{The Appeal} (Feb. 12, 2019) https://theappeal.org/jails-across-the-u-s-are-extracting-the-voice-prints-of-people-presumed-innocent/ (finding recordings can be stored of individuals “even if charges are dropped or they are found not guilty”); Worth Rises \textit{supra} note 15, at 46 (discussing how a “person’s voice print lives long beyond their incarceration”).

\textsuperscript{175} Joseph & Nathan, \textit{supra} note 174.
B. Prison telecom corporations shape corrections policies and regulations through bidding, lobbying, and influence.

While corrections agencies set contract terms through request for proposals (RFPs),\(^\text{176}\) the prison telecom industry is not a passive vendor of services that simply acquiesces to government requests.\(^\text{177}\) Rather, corporations have taken an increasingly influential role in dictating correctional policy. The industry exercises its power throughout the bidding process and contractual negotiations,\(^\text{178}\) as well as through direct lobbying,\(^\text{179}\) and informal influence.\(^\text{180}\) In the past few years alone, the industry has succeeded in persuading corrections officials in adopting policies that drive more revenue to corporations, at an immense cost to the people forced to use their products: incarcerated people and their families.\(^\text{181}\)

Prison telecom corporations have used contract negotiations to demand that corrections agencies implement sweeping changes to their policies. The most dramatic example of this can be seen in video calls, an increasingly important source of revenue for prison telecom corporations.\(^\text{182}\) The industry first rebranded video calls as “video visitation,” seeking to push the service—comparable to a stripped down version of Skype or Zoom—as a replacement for in person visits at


\(^{177}\) Peter Wagner & Alexi Jones, \textit{State of Phone Justice}, 	extit{Prison Policy Initiative} (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html (discussing “bundled contracts,” where providers offer phone service combined with other tools to “hid[e] the real costs of each service” and “make[] it more difficult for the facility to change vendors in the future”).


\(^{181}\) See, e.g., Worth Rises, supra note 15, at 49 (describing “burgeoning products” with “exorbitant price tags” that prison telecom corporations have marketed in the past decade).

facilities. Then, for years, corporations like Securus actually required facilities to end in-person visits altogether as part of their contracts. By inserting these clauses into its contracts, Securus used its market power to dramatically curtail incarcerated individuals access to their loved ones. Although Securus never accepted responsibility for the practice, advocates found that as many as 70% of Securus contracts, covering hundreds of facilities, had contained clauses like “Customer will eliminate all face to face visitation.” And corrections agencies agreed, in exchange for a cut of the revenue generated by these new “video visits.” The practice only ended in 2015, after widespread outrage forced the corporation to backtrack. Even when corporations do not force facilities to end in-person visits, nearly three-quarters of facilities with video calling decrease in-person visitation.

Through these restrictions, the industry is able to influence the day-to-day operation of prisons and jails, affecting something as essential as human contact for incarcerated individuals. And, while there is no constitutional right to in-person visits, courts have repeatedly found that state regulations around visitation can create a liberty interest for people affected by them. Thus, the industry’s practices during contract negotiations could have potentially led corrections agencies to violate the due process rights of incarcerated people. Beyond the industry’s power in contractual negotiations, corporations also benefit from a revolving door between corrections agencies and the private sector. Most notably, Ajit Pai, the former chairman of the FCC, represented Securus as a lobbyist in 2011. Then, just a year later, he was appointed as a Commissioner of the FCC. Throughout his tenure, Pai’s FCC repeatedly implemented policies that benefitted

184. Bernadette Rabuy, Securus Ends its Ban on In-Person Visits, Shifts Responsibility to Sheriffs, PRISON POL’Y INITIATIVE (May 6, 2015), https://www.prisonpolicy.org/blog/2015/05/06/securus-ends-ban/.
185. Id.
187. Securus Ends its Ban on In-Person Visits, Shifts Responsibility to Sheriffs, PRISON POL’Y INITIATIVE (May 6, 2015) https://www.prisonpolicy.org/blog/2015/05/06/securus-ends-ban/.
191. Id.
the industry. In fact, one of his first actions as Commissioner was to refuse to defend the agency’s prison telephone rate caps in court—effectively dooming a landmark piece of regulation that advocates had pushed for over decades. Although Pai would later issue a number of decisions that protected consumers against monopolization within the industry, the appearance of influence had already been done.

Through contract negotiations and a revolving door of lobbyists, the industry exerts a significant degree of influence over corrections agencies. Under any test, a private corporation should qualify as a state actor if it were effectively setting policies and regulations, like Securus did for years. Further, this saga gives the appearance that both corporations and government agencies worked hand in hand to decrease visitation for incarcerated people in order to drive up revenue from commissions. Either way, the line between state and corporation has become further blurred.

C. Prison telecom corporations return money extracted from incarcerated people and their families to corrections agencies, funding vital government functions.

Prison telecom corporations most directly support correctional agencies by providing them with revenue generated from telephone calls through a contractual kickbacks called “commissions.” These commissions are often the single deciding factor for agencies during the bidding process, and, in some facilities, corporations have offered corrections agencies up to 96% of the revenues generated from phone calls. At such high rates, commission payments can add up to millions of dollars a year for many jurisdictions. And, many smaller counties have come to rely on the money generated by prison phone calls to balance their budgets. For instance, officials in Worcester, Massachusetts pushed back against proposed legislation to lower the cost of calls, claiming that, if the county could no longer


194. See supra discussion note 189.


generate money from prison phone calls, they would have to cut funding for public mental health programs.\textsuperscript{199}

The prison telecom industry does not just dictate policy—it actually raises revenue for government agencies through commissions.\textsuperscript{200} These commissions, then, shift the burden of paying for essential state services onto incarcerated people and their families who have already been preyed upon by the state. It also adds an additional harm, as it makes other core government functions, like mental health services, dependent on the continued exploitation of the prison telephone market. This level of funding stretches far beyond just corrections agencies, turning the prison telecom industry into a reliable source of revenue for many jurisdictions.

D. Corrections agencies write contracts and requests for proposals that often direct every action of providers.

Although prison telecom corporations exercise enormous influence over the industry as a whole, corrections agencies control many aspects of the bidding process itself.\textsuperscript{201} Like other correctional industries, agencies issue “requests for proposals” (commonly known as RFPs) that describe a set of services that a facility requires from a potential telecom vendor.\textsuperscript{202} Then, the different prison telecom corporations bid against each other, often by competing to see who will offer the most commissions to the agency.\textsuperscript{203}

But, in many jurisdictions, these RFPs lay out the exact terms of the services that the prison telecom corporations will provide to the facility, removing any discretion that the corporation may have.\textsuperscript{204} In these instances, corrections agencies are not so much as delegating the authority to a private party, they are simply outsourcing the actual operation of the system to a contractor. With such rigid requirements, the provision of prison telecom services is not just a purely private affair. It is a joint action between a state actor and a corporation such that both are state actors.

VI. LOOKING FORWARD TO A CONSTITUTIONAL RIGHT TO PHONE CALLS

Of course, the state actor requirement is just one requirement for constitutional suits.\textsuperscript{205} Even if courts properly recognized the immense power that

\textsuperscript{199}. Id.
\textsuperscript{200}. See Wagner, On Kickbacks and Commissions, supra note 4.
\textsuperscript{202}. Id.
\textsuperscript{205}. See Brooks, 2014 WL 737683, at *15, 19.
prison telecom corporations have within correctional facilities, incarcerated plaintiffs would still have to demonstrate some constitutional right to phone access. But, by refusing to hear most constitutional suits about the industry, courts have made it unlikely that plaintiffs can ever establish such a right.

Courts have so far declined to find a sweeping constitutional right to telephone access. The core issue for many of these decisions comes down to the Supreme Court’s conclusion in *Turner v. Safley*, which held that correctional officials can infringe upon the constitutional rights of incarcerated people if they can show that it is “reasonably related to legitimate penological interests.” This incredibly low bar means that many judges simply defer to any correctional policy. Several federal appellate courts, like the Ninth Circuit, have held that incarcerated people have at least some right to use the telephone, stemming from the First Amendment right to communicate with others. But, even where judges have accepted the right to communicate, no circuit court has gone so far as to say that there is a right to communicate at affordable rates. And, to date, many courts have been consistently hostile—derisive, even—to the notion of a constitutional right to affordable phone calls.

Like with the state actor doctrine, judges may be making these decisions without a full understanding of how important the telephone is for many incarcerated people and their families. But, in any event, the concept of a constitutional right to communicate with others has broad implications that stretches beyond just the fight for prison phone justice. The movement to end solitary confinement, for instance, bears a number of similarities to the fight for affordable phone calls in the courts. They both depend on a recognition of the right to human contact—a right that judges have so far declined to recognize.

VII. CONCLUSION

Prison telecom corporations’ business is exploitation. And, unless there is drastic legislative reform of the entire industry, families will continue to be forced to choose between paying exorbitant rates for calls or being isolated from their incarcerated loved ones. In the absence of this reform, however, courts can step in to help end this exploitation. However, many judges fail to recognize the symbiotic

206. See, e.g., *Arsberry v. Illinois*, 244 F.3d 558, 564–65 (7th Cir. 2001).
208. See id.
209. See, e.g., *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000).
nature of the industry and correctional agencies. As a result, plaintiffs do not have access to constitutional suits—a powerful tool of reform for incarcerated people over the past few decades. Recognizing that prison telecom corporations are state actors is just a small step—but it is a step towards ending this exploitation for good.