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THE DIGITAL PRISON PANOPTICON

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ABSTRACT

The spatial divide between the carceral environment and society has allowed carceral deference to go under-scrutinized and surveillance to become ever pervasive in prisons and jails, all under the guise of maintaining order and security. From the moment an individual walks through the carceral gates, the rule of law changes. Prisoners can be strip searched without reasonable suspicion, their cells randomly searched, their letters torn open and read, books screened for whatever is deemed inappropriate content, phone calls listened to, and every movement monitored by CCTV cameras. But carceral surveillance today does not merely focus on these physical movements or outward expressions within the spatial limitations of the carceral environment. It is much more pernicious. Now, prisons use digital tablets to conduct their surveillance — both of prisoners and their adjacent nonincarcerated social communities.

Although prisoners do not retain a privacy interest in the physical spaces that they occupy within the prison, it is an open question as to whether prisoners retain a privacy interest in their *digital* lives. This Article urges that the answer must be yes. As such, this Article argues that digital tablets challenge the dominant interpretation of prison law because they bridge the divide between the carceral environment and society, dissolving the bright-line rules drawn based purely on these spatial distinctions. Further, traditional carceral surveillance, which courts understood to be limited in temporal scope, is no longer germane to resolving digital regulation questions. The depths and quality of information gathered by digital tablets are now infinite and can be stored well beyond an individual's period of incarceration.

This Article makes three timely and urgent scholarly contributions. First, it provides a novel and descriptive overview on the introduction of digital tablets within prisons by incorporating qualitative stories

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from incarcerated persons on the impact tablets have had on their daily lives. Second, this Article analyzes newly evolving prisoner litigation to demonstrate how the current paradigm misconstrues and obscures the harm that under-scrutinization of tablet regulations has at the carceral level and exposes additional hidden harms at the population level. Third, and critically, this Article provides the first critique of the current prison paradigm based on digital rights, arguing that the dominant interpretation of prison law is functionally limited and obfuscates the important ways in which incarcerated persons are deeply interwoven into the fabric of society.

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I. INTRODUCTION

The dominant interpretation of prison law is premised on one key tenet: once incarcerated, an individual's rights can be disentangled from society. The Supreme Court has traditionally treated prison law as though it were a standalone doctrine, one that is easy to isolate from other constitutional domains based on the spatial differences between

the carceral environment and society.[1] As a result, the constitutional test applied in prisons deviates from baseline conceptions of scrutiny and instead increases deference to prison administrators at the expense of safeguarding prisoners' rights.[2] This aurora of exceptionalism further shrouds the cognizable harms that happen to nonincarcerated family members[3] when devaluing prisoners' rights.[4] But prison law's institutional favoritism suffers from a functional limitation that has been hiding in plain sight: the law itself is also confined to the prison walls.

The spatial divide between the carceral environment and society[5] has allowed carceral deference to go under-scrutinized and surveillance to become ever pervasive in prisons and jails,[6] all under the guise of maintaining order and security.[7] From the moment an individual walks through the carceral gates, the rule of law changes. Prisoners can be strip searched without reasonable suspicion,[8] their cells randomly searched,[9] their letters torn open and read,[10] books screened for whatever is deemed inappropriate content, phone calls listened to,[11] and every movement monitored by CCTV cameras. But carceral surveillance today does not merely focus on these physical movements or outward expressions within the spatial confines of the carceral environment. It is much more pernicious. Now, prisons use digital

1. *See* Zina Makar, *The Absence of Dignity in Prison Law*, 84 MD. L. REV. 387, 389–92.

2. There is a rich body of scholarship critiquing the Supreme Court's "reasonable restriction" test, which is applied in the majority of constitutional challenges arising within the carceral environment. *See, e.g.*, Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 536–39 (2021); *see also infra* Section II.C (discussing the "reasonable restriction" test).

3. A note on terminology: This Article uses the term "prisoner" to refer to someone who is detained and under the care of the state, including pretrial detainees and those serving time for a conviction. The term prisoner is used as a reminder that citizens have been incapacitated by the state and that the state owes an affirmative obligation of care to those within its charge. This Article will also use the term "incarcerated individual" interchangeably. Further, this Article also uses the term "prisoner-adjacent" or "carceral-adjacent" to describe individuals who are a part of the prisoner's immediate community and who are impacted by a prisoner's incarceration though they themselves are not incarcerated, such as friends, family, religious leaders, etc. These terms are used to center the prisoner and demonstrate the impact that the carceral system has on broader society by using the incarcerated individual to expand the carceral panopticon.

4. *See infra* Section II.A.

5. The term "society" is used to describe individuals in society who are not incarcerated.

6. The term "prison" typically refers to detention facilities that incarcerate individuals serving longer convictions whereas the term "jail" refers to detention facilities that incarcerate pretrial detainees as well as individuals serving sentences of a year or less. This Article uses the term "prison" as an umbrella term for all detention facilities unless specified otherwise.

7. *See generally* Turner v. Safley, 482 U.S. 78 (1987) (noting that the prison's interest in maintaining order and security is a legitimate penological interest).

8. Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 566 U.S. 318, 326–39 (2012).

9. Hudson v. Palmer, 468 U.S. 517, 530–36 (1984).

10. Procunier v. Martinez, 416 U.S. 396, 404–14 (1974).

11. United States v. Amen, 831 F.2d 373, 379–80 (2d Cir. 1987).

tablets to conduct their surveillance — both of prisoners and their adjacent nonincarcerated social communities.[12]

Although prisoners have never retained privacy interests in the physical spaces that they occupy within the prison,[13] it is an open question as to whether prisoners retain a privacy interest in their *digital* lives. This Article urges that the answer must be yes. As such, this Article argues that digital tablets disrupt the dominant interpretation of prison law because they bridge the divide between the carceral environment and society, dissolving the bright-line rules drawn based purely on these spatial distinctions. Further, traditional carceral surveillance, which is limited in temporal scope, is no longer germane to resolving digital regulation questions.[14] The depths and quality of information gathered by digital tablets are now infinite and can be stored well beyond an individual's period of incarceration.

Prisons have historically been cellular dead zones — a space where cellular use was prohibited and cellphones and tablets were classified as contraband because unmonitored access could pose potential security concerns.[15] But today, cellphone-like prison tablets are embraced by both prisoners and correctional officers.[16] Today's prison tablets afford prisoners with significantly greater opportunities to make calls, conduct video visits, and send text messages.[17] The tablets also include apps for purchasing music, movies, and educational programs.[18] Technologically speaking, prison tablets are many generations behind the smartphones and tablets that are currently available to the general public. Prison tablets generally only have the capabilities of early era cellphones: screens that have low touch sensitivity, spotty Wi-Fi connectivity, and limited options on their app stores.[19]

Nevertheless, the tablets provide many promises, both to prisoners and correctional officers. For instance, prisoners report enjoying a greater array of opportunities to connect with family and friends in a

12. *See infra* Part III.

13. *See Hudson*, 468 U.S. at 525–26.

14. *See infra* Part II.

15. *See Contraband Wireless Devices,* FED. COMMC'NS COMM'N (Oct. 3, 2024), https://www.fcc.gov/wireless/bureau-divisions/mobility-division/contraband-wireless-devices [https://perma.cc/LU6Y-EGHS] (describing the FCC's efforts to trace contraband cellphone usage).

16. Mike Wessler & Juliana Luna, *Prison Banned Books Week: Books Give Incarcerated People Access to the World, but Tablets are Often Used to Wall Them Off*, PRISON POL'Y INITIATIVE (Sept. 16, 2024), https://www.prisonpolicy.org/blog/2024/09/16/prison_banned_book_week/ [https://perma.cc/XK4F-YAJG] (noting an increase in tablet programs from 2024, where forty-eight prison systems reported making prison tablets available for use compared to 2019, where tablets were only available in twelve states).

17. *See infra* Section II.A.

18. *See infra* Section II.B.

19. *See infra* Section II.B.

more holistic manner.[20] Correctional officers, who maintain the day-to-day order of the prison, purportedly face fewer security concerns that might involve screening visitors and more peaceful environments where prisoners are engaging with their tablets.[21]

Even more, funneling daily life experiences through one platform without meaningful alternatives has consequences. Tablets can outsource many of the more costly or time-intensive day-to-day services that correctional officers oversee, like screening mail for contraband, listening to phone calls, or helping to reduce in-person visits.[22] But the ability to physically hold a photograph, smell a letter sprayed in a loved one's perfume, or give someone a hug during an in-person visit all go towards our core interiority of humanness.[23] Accommodating these experiences has always been seen as a costly administrative burden by prisons,[24] but that does not mean that they can or should be replaced.

As described above, the benefits of bringing prisons into the digital space are vast and the opportunities they provide prisoners are significant. But taken too far, digitizing the entire prison experience has deeply entrenching consequences for prisoners and their adjacent non-incarcerated social networks. Unlike traditional forms of carceral surveillance that were limited by the capacity of human oversight, never before has the government had license to capture and analyze data from such a large population of society.[25] Now, armed with technology, such

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20. Prison tablet programs vary from prison to prison. Some programs offer prisoners the opportunity to purchase or rent their own tablets whereas other prisons provide the tablets to prisoners free of charge. Under both schemes, prisoners are typically saddled with the cost of paying to use the communication features (calling, texting, and video), as well as other apps associated with entertainment (downloading books, movies, music, etc.). Prices of tablet services and apps vary from jurisdiction to jurisdiction based on contracts between the tablet service provider and the prison. *See* Valerie Surrett, *The High Costs of Free Prison Tablet Programs*, APPEAL (Mar. 27, 2024), https://theappeal.org/the-high-costs-of-free-prison-tablet-programs-books-through-bars/ [https://perma.cc/2BWK-EWDF]; *Tablets*, COMMONWEALTH PA., https://www.pa.gov/agencies/cor/resources/inmates/tablets.html [https://perma.cc/BV5P-4BSB]; Mack Finkel & Wanda Bertram, *More States are Signing Harmful "Free Prison Tablet" Contracts*, PRISON POL'Y INITIATIVE (Mar. 7, 2019), https://www.prisonpolicy.org/blog/2019/03/07/free-tablets/ [https://perma.cc/J7QC-MVR6] (reporting on the various tablet provider contracts and identifying a wide variety of fee structures).

21. *See generally* Finkel & Betram, supra note 20 (explaining some of the benefits of tablets in prisons).

22. *See infra* Section III.A.

23. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1979) (1977) (explaining how prisons dehumanize prisoners); DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE (2004) (describing the reductive and imprecise nature of quantifying digital lives).

24. *Cf.* Turner v. Safley, 482 U.S. 78, 90 (1987) (permitting prisons to consider the "ripple effects" that accommodating a right has on prison administration).

25. *See, e.g.*, Complaint for Declaratory and Injunctive Relief, Schmidt, et. al. v. City of Norfolk, No. 24-cv-00621 (E.D. Va. Oct. 21, 2024) (arguing that the Fourth Amendment

as CCTV, to surveil prisoners' physical activity, prisons can also surveil and regulate prisoners' interiority, capturing an essence of their individuality.[26] This form of surveillance arguably exceeds the prisons' scope of control that is limited by penological interests.[27]

Thus looms the question of consent to the inevitable privacy consequences inherent to a *digital* prison life.[28] Those in society have made the decision to give up some aspects of their privacy to embrace a digital world, but in prisons, where technology is being used to replace virtually all other alternatives (mail, paper books, in-person visits, etc.),[29] would prisoners, and those adjacent to them, really consent to these privacy intrusions if they knew what their private information was being used for?

This phenomenon reveals something more than just carceral surveillance, which I term "digital capture." "Capture" is intended to reflect two core concerns unique to the carceral panopticon: (1) the indiscriminate collection and retention of nonpublic data and biometric information with no particularized penological interest and (2) the use of a captive population (prisoners and prisoner-adjacent communities) who lack the choice to meaningfully consent to sharing such information because they lack alternatives to access fundamental liberty interests.

Current prison law precedent is functionally limited and obscures the harm of digital capture, both at the carceral- and population-levels, to a fault. Under the current prison paradigm, security and control are the keystones of prison law.[30] As long as a prison has a rational security interest in regulating an activity or access to a right within the carceral environment, its regulation is deemed to be a reasonable restriction on the prisoners within its charge.[31] Surveillance serves a security function, but not all surveillance furthers a particularized security interest.[32] If security interests are the limiting principle, can a prison legitimately

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prohibits Norfolk's use of a private technology company, Flock Safety, from tracking residents' daily movements and storing that data for thirty days); Barry Friedman & Danielle Keats Citron, *Indiscriminate Data Surveillance*, 110 VA. L. REV. 1351, 1373-74 (2024).

26. *See infra* Sections II.A–B.

27. *See infra* Sections II.A–B.

28. *See infra* Section III.B.

29. *See, e.g.*, Moira Marquis, *This Technology Was Supposed to Help People in Prison. It's Backfiring in a Big Way.*, SLATE (Sept. 17, 2024), https://slate.com/news-and-politics/2024/09/prison-censorship-tablets-book-bans.html [https://perma.cc/TP5A-4JAN] (describing prison policies that banned paper literature or physical mailings citing to contraband concerns and identifying tablets as a sufficient alternative for accessing reading matters and text-based communications); Class Action Complaint & Demand for Jury Trial, S.L. v. Sheriff Christopher Swanson, No. 2024-120601-CZ (7th Cir. Genesee Cnty. Ct. Mar. 15, 2024) (challenging a prison's policy of replacing all in-person visits with video callings).

30. Turner v. Safley, 482 U.S. 78, 92–93 (1987)

31. *Id.* at 89–91 (articulating the four-factor "reasonable restriction" test).

32. *See* Friedman & Citron, *supra* note 25, at 1357 (discussing the interconnection between generalized security interests and the need for bulk data collection through surveillance).

authorize the digital capture of an entire population of prisoners? Surely it cannot authorize such surveillance of individuals in society.[33] But what about prisoner-adjacent individuals who communicate with the prisoner?[34] Digital tablets uniquely blur the spatial lines between prisons and society, demanding that the dominant interpretation evolve to reflect the inextricable connection between prisoners and broader society.

This Article makes several timely and urgent scholarly contributions. First, it provides a novel and descriptive overview on the introduction of digital tablets within prisons by incorporating qualitative stories from incarcerated persons about the impact tablets have had on their daily lives.[35] Second, this Article analyzes newly evolving prisoner litigation through the lens of digital capture to demonstrate how the current paradigm misconstrues and obscures the harm that underscrutinization of tablet regulations has at the carceral level and further exposes the hidden consequences of digital capture at the population level.[36] Third, and critically, this Article provides the first critique of the current prison paradigm based on digital rights, arguing that the dominant interpretation is functionally limited and obfuscates the important ways in which incarcerated persons are deeply interwoven in the fabric of society.[37]

This Article proceeds in three parts. Part II begins by providing an overview of prisoners' experiences with tablets ranging from communication capabilities, educational offerings, and entertainment options to demonstrate how prisoners use and value digital tablets and continues on to describe the technology that tablet service providers utilize. Part II then provides an overview of the dominant prison paradigm and how the Supreme Court has positioned this domain as a standalone doctrine that was intended only to respond to constitutional claims arising within the carceral environment. Part III discusses the immediate carceral-level issues likely to arise from the day-to-day regulation of tablets in prisons and where the consequences of digital capture are misconstrued at this level. Part III also identifies potential long-term consequences of digital capture that amplify the expansion of the carceral panopticon at the population-level. Part III concludes by critiquing the dominant doctrine governing prisoners' constitutional claims and refutes the doctrine's applicability, arguing that it is a doctrine that

33. *See, e.g.*, Complaint for Declaratory and Injunctive Relief, Schmidt, et. al. v. City of Norfolk, No. 24-cv-00621 (E.D. Va. Oct. 21, 2024) (arguing that the Fourth Amendment places restrictions on police enforcement in public spaces).

34. *See generally* Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012) (discussing potential issues raised by the Fourth Amendment's dominant approach to parolees and probationers and its impact on associated individuals).

35. *See infra* Section II.A.

36. *See infra* Part III.

37. *See infra* Parts II–III.

is functionally limited and inaccurately premised on the conception that prisoners' rights can be extricated from those in the free world. Finally, Part IV provides original and robust interventions and urges courts, legal advocates, and agency regulators to address and safeguard against the harms of digital capture while this domain remains in its nascent stages.

II. THE DIGITAL PRISON DIVIDE

Part II details how the current prison paradigm is based upon an isolated view of prisons that is functionally limited and incapable of conceptualizing how digital technology impacts rights at the carceral and population levels. Section II.A sets the stage by focusing on the prisoner experience and synthetizes qualitative stories from prisoners on how integrating digital tablets changed their daily lives. Section II.B discusses the carceral surveillance technologies that the tablet service providers patented to demonstrate how tablets changed the nature and scope of information that can be captured and shared with prison officials. With this framing, Section II.C concludes with an overview of the current prison paradigm comprised of the dominant interpretation of prisoners' rights jurisprudence and the day-to-day disciplinary governance model used to maintain order and security within prisons.

Together, these three sections reveal a quiet shift within prison governance — from a spatially limited security-focused governance model to a deeply powerful and pernicious surveillance state that extends to the larger population, revealing the limitations of prison doctrine.

A. The Digital Life

The idea of a prisoner laying on their bed in a cell, playing videos games or watching movies as their sentence ticks by might be what comes to mind for most people when they think of individuals using digital tablets in prisons. That image may be partially true in some sense, but tablets provide much more than just a video game or movie: they provide a platform to access many of the core day-to-day experiences for our human interiority and being. As this Section discusses, tablets are the platform that is quickly replacing other alternatives for accessing rights, transforming the conception of the existing prison paradigm and implicitly questioning what quality of life society owes prisoners and their communities.

Prison tablets are designed to provide individuals with three key functions: (1) access to communication (including text, call, and video), (2) entertainment (including music, streaming, and video games), and

(3) education (including apps such as KA Lite by Khan Academy).[38] This Section addresses each of these functionalities by providing a brief collection of stories from the perspective of currently and formerly incarcerated individuals who use or have chosen to forgo prison tablets.[39] This Section does not provide an exhaustive summary of all possible uses of tablets, but rather serves to provide a foundation for understanding the depth at which tablets can become inextricably intertwined, and central, to a prisoner's daily life and their access to fundamental rights.

1. Communication

Prison tablets have transformed access to communication beyond the prison walls. With multiple options — text, phone, and video — the idiosyncrasies of prison life (like a prison-wide lockdown) are less likely to disrupt consistent communication.[40] Prison policies vary, but generally, many allow for prisoners to use their tablets between set hours of the day — such as 6 AM to 11 PM — and in nearly any location on the prison grounds — in the cell, in the communal dayroom, or even in the yard.[41]

Instead of phone calls made at inconsistent intervals, prisoners can communicate in real-time.[42] By sharing messages about the simplicities of life, prisoners maintain a semblance of closeness and connection that was hard to establish with sporadic phone calls that might often amount

38. Though many tablets are currently designed with these three key features in mind, not all tablets are designed equally. For example, some providers prioritize communication, making the user experience for streaming videos more difficult, or some tablets are designed to promote access to educational apps, making communication platforms less intuitive for a novice user. *See, e.g.*, Brian Hindson, *My New Tech Cost Two Months' Salary*, PRISON JOURNALISM PROJECT (Mar. 1, 2023), https://prisonjournalismproject.org/2023/03/01/new-prison-tablet-offers-entertainment-options/ [https://perma.cc/Q7UH-3QVT] (discussing how his Keefe Score Tablet is predominantly used as an MP3 player).

39. This Section predominantly highlights the experiences shared and reported on by incarcerated journalists who share their stories on public media such as the Prison Journalism Project. This Section also includes the work of journalists Mia Armstrong-López and Charlotte West who have interviewed many prisoners for Slate's Future Tense project highlighting the burgeoning changes in prisons in real time. *See generally* PRISON JOURNALISM PROJECT, https://prisonjournalismproject.org/ [https://perma.cc/2DE5-ZEHU]; *Future Tense*, SLATE, https://slate.com/technology/future-tense [https://perma.cc/3TZV-4K2D].

40. Mia Armstrong, *Life Has Moved to Zoom. Can Prison Visitation Do the Same?*, SLATE (Apr. 28, 2022), https://slate.com/technology/2020/04/zoom-video-communication-prison-pandemic.html [https://perma.cc/877Z-W3AX] (discussing Pennsylvania's pilot program to provide access to communication services during the COVID-related lockdowns).

41. Benjamin Frandsen, *Free Wi-Fi Tablets Change Prison Dynamics*, PRISON JOURNALISM PROJECT (Jan. 14, 2022), https://prisonjournalismproject.org/2022/01/14/free-wi-fi-tablets-change-prison-dynamics/ [https://perma.cc/MB52-62EE].

42. Phillip Vance Smith II, *My Girlfriend and I Used to Rely on Letters to Communicate. Then, "Texting" Came to My Prison.*, SLATE (Dec. 13, 2023), https://slate.com/technology/2023/12/e-messaging-prison-gettingout-romantic-relationships.html [https://perma.cc/Y35Y-BJ3M].

to providing only essential information.[43] Missed calls become less of a concern, alleviating worry from both the prisoner and nonincarcerated individual because they anticipate the ability to supplement the conversation with a text message saying "I'm available to speak now" or "Can we speak tomorrow at 5 PM instead?"[44]

Phillip Vance Smith II recounts how critical this new avenue of communication has been in terms of communicating with his girlfriend, Faye:

> We've been communicating off and on for 10 years while I've been serving life without parole. We used to rely on weekly letters, because a 15-minute phone call cost nearly $2. But in 2019, my prison launched a tablet pilot program which gave us access to e-messaging.
>
> Now, Faye and I text three or four times a day through the app. She messages me to vent about difficult patients, brag about cash saved with coupons, and grieve about the struggles of being a single mom seeking financial stability. Even though I've been in prison for 22 years, messaging Faye offers me the illusion of being a part of her life in the free world. I hear about the most important details of her days in real time, and I can play an active role in her life when she needs me most.[45]

But this level of connection can come at a cost, one that varies from state to state and prison to prison.[46] Lyle May, who is currently incarcerated in Central Prison in North Carolina, is required to use GettingOut,[47] the (purportedly unironic) name for the communications app developed by ViaPath, one of two main communications providers that supply tablets to prisons and jails.[48] In North Carolina, ViaPath charges

43. *Id*.
44. *Id.*
45. *Id.*
46. *Id.* (discussing the pricing variances between tablet providers across states). *See generally* Surrett, *supra* note 20.
47. Lyle C. May, *The Impossible Math Behind Pay-Per-Minute Prison Messaging*, SLATE (June 19, 2023), https://slate.com/technology/2023/06/prison-messaging-cost-gettingout-gtl-viapath.html [https://perma.cc/F6DY-DASA].
48. The two primary tablet providers for the U.S. prison industry include ViaPath (formerly known as GTL) and Securus. ViaPath services thirty-seven percent of prison and jail markets and brought in $157.8 million in revenue between FY 2022–23. Securus, the other leading tablet provider, services forty-two percent of the market. *See* Peter Wagner & Wanda Bertram, *State of Phone Justice 2022: The Problem, the Progress, and What's Next*, PRISON POL'Y

incarcerated users by the minute to access anything on GettingOut, which includes reading, typing, and viewing photos.[49] May expressed frustration with the ability to profit off of every minute of a prisoners' right to communicate:

> The GettingOut app doesn't make it cost-effective to look at a photo of a family member, reread messages from my friends, or feel closer to my parents. The bigger question is why a private company is profiting off the emotional pain of our confinement. What if I want to keep returning to the picture of a sunset in the Rocky Mountains, a deceased family member, or a friend's dog? As long as I keep accessing these photos and messages — and long after someone on the outside paid 25 cents to send them — ViaPath will continue to profit from my quest for emotional connection.[50]

Another significant grievance regarding communication through the tablets is that the tablets themselves are outdated. The tablets lack fast processing speeds making typing errors common,[51] and the interface is not intuitive, which can hinder usability for individuals with disabilities or who are simply not the most tech-savvy.[52] Connectivity is also inconsistent, which creates lag times between messages, creating possible stressors for prisoners waiting to hear from a loved one.[53]

2. Education

So much of everyday life for those in society is held in a cellphone or a computer. And technological advancements are made rapidly. For prisoners who spend long stretches incarcerated, upon release they enter into a world that they are completely unfamiliar with. The ability to

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INITIATIVE (Dec. 2022), https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html [https://perma.cc/6LRZ-SSKK]; *see also* Ellen Schneider, *Prison-Phone Firm ViaPath's Quarterly Earnings Lag Projections*, BLOOMBERG (Aug. 21, 2023), https://www.bloomberg.com/news/articles/2023-08-21/american-securities-s-prison-phone-firm-viapath-s-earnings-lag-projections [https://perma.cc/WT7Q-KRL5].

49. May, *supra* note 47.

50. *Id.*

51. Tue Kha, *The Pros and Cons of California's New Prison Tablets*, PRISON JOURNALISM PROJECT (Apr. 4, 2023), https://prisonjournalismproject.org/2023/04/04/new-california-prison-tablets-ok/ [https://perma.cc/AJK2-3SLX].

52. Charlotte West, *How People in Prisons Really Use Tablets*, SLATE (Sept. 28, 2023), https://slate.com/technology/2023/09/prison-tech-survey-viapath-securus.html [https://perma.cc/H4CE-D7LV].

53. *Id.*

use tablets — even the most outdated — serves its own educational end as a societal reintegration tool.[54]

Beyond allowing prisoners to gain technological skills, tablets also offer a wider array of educational courses. Prior to tablets, for prisons to provide educational opportunities, prisons were required to employ teachers for specific subject matter courses, ensure classroom space, and provide materials such as books or writing utensils.[55] In sum, traditional classrooms are costly to implement in prisons because they require a large number of resources, space, and time — and a greater variety of courses inevitably increases those resource needs exponentially.[56] Enrollment in prison educational programs is optional, though it continues to rise, likely due to the increased modality options now available to incarcerated students via virtual learning.[57]

Educational programs within prisons provide sustainable metrics for reentry[58] and tablets can temper the resource, space, and time constraints associated with traditional classroom settings.[59] Tablets also provide a greater variety of classes that can accommodate the divergent interests of each individual.[60] The digital learning programs allow learning at one's own pace and the ability to pick up where one left off

54. *See, e.g.*, Press Release, Maryland Governor's Office of Crime Prevention and Policy, Maryland to Expand Program to Provide Electronic Tablets to Inmates (July 16, 2018), https://goccp.maryland.gov/maryland-to-expand-program-to-provide-electronic-tablets-to-inmates/ [https://perma.cc/P6NX-PNWR].

55. *See, e.g.*, Kurtis Tanaka & Danielle Miriam Cooper, *Advancing Technological Equity for Incarcerated College Students: Examining the Opportunities and Risks*, ITHAKA S+R (May 7, 2020), https://sr.ithaka.org/publications/advancing-technological-equity-incarcerated-college-students [https://perma.cc/28XW-8QV5] (discussing the difficulty of providing incarcerated students with access to educational materials due to strict security protocols).

56. *See, e.g.*, Elimia Calma & Yesim Sayin, *How Much Would It Cost to Build and Maintain a New DC Prison?*, D.C. POL'Y CENT. (Mar. 8, 2023), https://www.dcpolicycenter.org/publications/cost-new-dc-prison [https://perma.cc/J7QK-6TXT] (citing that it would cost approximately $1,718 per year to provide educational services to a single incarcerated individual).

57. *See* Kate Payne, *New Program Will Help Inmates Earn High School Diplomas with Tablets*, ASSOCIATED PRESS (Sept. 18, 2024), https://apnews.com/article/prison-high-school-education-tablets-d8e8f844611383f86ffab6dd0d48c16e [https://perma.cc/B5J8-D2V2].

58. *See, e.g.*, S. Ruth & T. Sosorburam, *Digital Tablets in Prisons and Jails — Is There Evidence That They Can Help to Reduce Recidivism?*, INTED2022 Proceedings 1181, 1182 (Mar. 8, 2022); *Education and Vocational Training in Prisons Reduces Recidivism, Improves Job Outlook*, RAND (Aug. 22, 2013), https://www.rand.org/news/press/2013/08/22.html [https://perma.cc/CU3J-8537] (finding that individuals who participate in educational programs while incarcerated are forty-three percent less likely to recidivate and individuals who participated in vocational training programs were twenty-eight percent more likely to be employed upon reentry).

59. KA Lite (supported by Khan Academy) is an open-source Python project that is free to download. KA Lite is regularly used on prison tablets because of its ability to be used offline and it offers courses ranging from reading and arithmetic to GED exam prep. *Use Case: Correctional Facilities*, KHAN ACADEMY (June 26, 2024), https://www.khanacademy.org/khan-for-educators/resources/out-of-school-time-programs/out-of-school-programs-case-studies/a/use-case-correctional-facilities [https://perma.cc/E6QY-P8EW].

60. *See* Payne, *supra* note 57.

at almost any interval during the day when a prisoner has free time.[61] But issues about resource allocation are not universally moot. Tablets can provide preliminary instruction, but they cannot supplement vocational learning that requires many more materials and hands-on practice — like welding, electrical work, etc.[62] Due to the costs and resources necessary to provide vocational programs, the availability of these educational opportunities are directly tied to government funding and political will.[63]

Tablets provide promise but still leave much to be desired in terms of their execution. For many incarcerated individuals the issue is not about the lack or variety of courses, but more about the ability to meaningfully learn. Users like Atif Rafay and H.L. Tapia have reported a host of technology glitches that take away from the educational experience and force users instead to focus on the failings of the technology.[64] Rafay reports that the tablets lack basic copy and paste functions and the ability to save drafts — which becomes particularly problematic if the tablet goes offline.[65] Tapia adds that switching from one educational app to another app can take anywhere between thirty seconds to five minutes and requires a multistep security process involving logging out/in, facial recognition, and accepting a series of terms of service agreements.[66] Seemingly minor, these impediments add up and leave much to be desired from the digital educational experience.[67]

3. Entertainment

Tablets also provide an outlet for creative thinking and some semblance of enjoyment to help pass the time in a meaningful way. Beyond the communication services and educational apps, prisoners can download podcasts, music, and, sometimes, videos.

Brian Hindson, an incarcerated writer for the Prison Journalism Project in Texas, questions whether tablets are the "great pacifier."[68] Though the cost of using apps on a tablet can be steep, he has few

61. Jenny Gathright, *Tablets Offer Educational Opportunities in Prison, but Quality Varies*, NPR (Jan. 2, 2022), https://www.npr.org/2020/01/02/793134372/tablets-offer-educational-opportunities-in-prison-but-quality-varies [https://perma.cc/24LF-Y28S].

62. *Id.*

63. Tanaka & Cooper, *supra* note 55.

64. West, *supra* note 52.

65. *Id.*

66. *Id.*

67. *Cf.* Elana Zeide, *The Structural Consequences of Big Data Driven Education*, 5 BIG DATA 164, 167 (2017) (identifying that digital education platforms can collect personal information from students and teachers, raising significant privacy concerns for users, which FERPA is not well equipped to protect).

68. Brian Hindson, *New Prison Tablet Offers Entertainment Options*, PRISON JOURNALISM PROJECT (Mar. 1, 2023), https://prisonjournalismproject.org/2023/03/01/new-prison-tablet-offers-entertainment-options/ [https://perma.cc/6SZU-A68L].

complaints because now he and fellow prisoners retain greater access to various forms of entertainment.[69] Some tablets, like the Keefe Group Score 7,[70] were created with entertainment in mind — functioning as a gaming device, video and music player, and radio.[71] And although he enjoys using his tablet, Hindson wonders if other prisoners will buy them and remain sedentary — for better or worse — in their bunks, just absorbing the new content.[72]

For those who have been incarcerated longer, like Hindson, and did not grow up using tablets, the new technology is more intriguing and therefore the users are less likely to immediately find flaws with the tablet's limited functionality.[73] But, for newer prisoners who have had access to iPhones and tablets and know their full potential, these tablets are likely frustrating to operate and come with arbitrary oversight given the correctional department's ability to regulate the availability of certain content. For instance, some users complained that the regulation of tablets is becoming too granular and paternalistic with movies limited only to PG or PG-13 ratings.[74] This censorship begs the question: are these regulations necessary to maintaining order and safety within the prison or are they purely implemented to demonstrate control?[75]

* * *

Digital tablets have brought incarcerated individuals a sense of societal connection to their communities that was missing from their everyday lives. The term "societal connection" is not merely intended to convey the ability to have consistent communication with family or friends — something akin to a privilege — but rather a sense of citizenry that is felt through genuinely meaningful access to fundamental rights that gives individuals a sense of belonging in society.[76]

The following Section explores the other side of prison tablets, including their surveillance capabilities and the scope of access that service providers and correctional officers have to prisoners and their adjacent communities.

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69. *Id.*

70. Keefe Group's product information reports that their tablets provide educational, communication, and entertainment services. *Secure Commitment to Offender Re-entry and Enablement*, KEEFE GRP., https://www.keefegroup.com/products/score-tablet/ [https://perma.cc/7BSZ-D637].

71. *See* Hindson, *supra* note 68.

72. *Id.*

73. *Id.*

74. *See* West, *supra* note 52.

75. *See infra* Section II.C.3 (discussing how conceptions of order and safety are incorporated in prison law jurisprudence).

76. *See, e.g.*, Makar, *supra* note 1, at 430–31.

B. Carceral Surveillance Technologies

What ViaPath, Securus, and other private tablet providers have patented is not just an alternative to traditional forms of carceral surveillance that are spatially and temporally limited. Rather, these companies have patented "digital capture": the aggregation and analysis of data sourced from incarcerated individuals and their adjacent communities without consent and without a particularized penological purpose.[77]

A prisoner's privacy and day-to-day movements were already severely limited prior to the introduction of tablets. Prison guards reviewed their mail for contraband, monitored phone calls, and restricted the types of books they could order from publishers.[78] None of these limitations changed with the introduction of tablets. Nevertheless, tablets have the ability to change the status quo of prison administration and prison jurisprudence.

From the user's perspective, the tablet technology is outdated, making tablets functionality limited and causing them to suffer from significant connectivity issues.[79] But from the perspective of the service provider and the prison, the technology is more advanced than the seemingly bulky brick lets on. These tablets operate on proprietary networks and the ability to draw out different information beyond the manual processes of reviewing mail or listening to phone calls.[80] The technology behind these tablets significantly amplifies the nature, scope, and reach of the information they capture even where the activity conducted (communication through text or call) remains relatively unchanged.[81] Theoretically, technology is intended to expand one's ability to engage without limits,[82] but here, the technology restricts the

77. *See infra* Section III.B.2 (discussing the dehumanizing effects of data discrimination).

78. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 404–14 (1974) (holding that prisons can implement censorship and safety policies burdening prisoners' right to receive mail).

79. *See supra* Section II.A.

80. *See* Securus Technology, Location Based Services White Paper (Feb. 21, 2018) (on file with author, provided by Sen. Wyden's Office) (describing an investor paper on product features including geolocation, geofencing, and on-demand location searching capabilities) [hereinafter Location Based Services White Paper].

81. *See, e.g.*, Beryl Lipton & Cooper Quintin, *The Catalog of Carceral Surveillance: Voice Recognition and Surveillance*, ELEC. FRONTIER FOUND. (Sept. 10, 2021), https://www.eff.org/deeplinks/2021/09/catalog-carceral-surveillance-voice-recognition-and-surveillance [https://perma.cc/AZ65-AD29] (describing voice-detection technologies used by service providers that have the capability of identifying and profiling any voice that passes through their technology).

82. Technological benefits have come with significant privacy tradeoffs. Public-private partnerships have come under scrutiny as government actors push the limits of the law and attempt to supplement surveillance efforts through social media platforms. *See, e.g.*, Hannah Bloch-Wehba, *Content Moderation as Surveillance*, 36 BERKELEY TECH. L.J. 1297, 1300–02 (2021) (arguing that content decision making by social media platforms affects police officers' ability to investigate crimes).

users' boundaries by casting a broad sphere of surveillance over prisoners *and* carceral-adjacent communities.[83]

One way of explaining the capabilities of this technology is by looking at the patents that the tablet companies obtained. Securus, part of the "big two" service providers, maintains thirty-six patents across the U.S. and internationally, all of which focus on monitoring, tracking, and identifying instances of tampering.[84] The following four examples demonstrate the nature of the information Securus can gather and share with third-parties or correctional officers.[85]

First, Securus has patents for robocalling family members once an individual is booked and entered into their system to set up a pre-paid phone account.[86] This information is then sold off and shared with bail bondsmen who might also contact the listed numbers (likely families related to the incarcerated individual) offering predatory bond payment plans to assist in securing their release prior to trial.[87] Robocalling is quite common — many marketing companies use this feature — but we should not assume that Securus's application of this marketing scheme is inconsequential. This marketing plan is merely evidence of how far these companies can cast a net of surveillance stemming from the incarcerated individual.

Second, beyond robocalling, Securus also maintains a patent that monitors family communications and access by a family counseling provider who can then contact the prisoner and follow up as needed.[88] It is unclear when this information is shared with the family counselor,

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83. *Id.*

84. *Patents*, SECURUS MONITORING, https://securusmonitoring.com/about-us/patents/ [https://perma.cc/7D32-MYJA].

85. The examples of patents discussed in this Section are not intended to provide an exhaustive list of all tablet capabilities. For example, recent complaints filed against tablet providers have also referenced other programs such as Threads or VoiceIQ that can convert physical mail or voice calls into searchable text. *See infra* notes 276, 352–56.

86. *See* U.S. Patent No. 9,026,468 B2 (filed May 5, 2015), https://www.eff.org/files/2015/11/24/us_patent_no._9026468.pdf [https://perma.cc/7Y8C-FX3Q]; *see also* Daniel Nazer, *Stupid Patent of the Month: Infamous Prison Telco Patents Asking Third-Parties for Money*, ELEC. FRONTIER FOUND. (Nov. 24, 2015), https://www.eff.org/deeplinks/2015/11/stupid-patent-month-infamous-prison-telco-patents-asking-third-parties-money [https://perma.cc/B5U4-P7WF] (including commentary questioning the approval of the patent for failing to comply with *Alice v. CLS Bank* and failing to identify any new technological innovation).

87. *See* Letter from U.S. Sen. Ron Wyden to Federal Communications Commission (May 8, 2018), https://s3.documentcloud.org/documents/4457320/Wyden-Securus-Location-Tracking-Letter-to-FCC.pdf [https://perma.cc/6KUS-59U3].

88. *See* U.S. Patent No. 9,667,763 (May 20, 2023); *see also Securus Technologies Granted Additional Eight (8) Patents for Law Enforcement and Corrections*, BUS. WIRE (Oct. 18, 2017), https://www.businesswire.com/news/home/20171018006633/en/Securus-Technologies-Granted-Additional-Eight-8-Patents-for-Law-Enforcement-and-Corrections [https://perma.cc/CZW4-T9FN].

how it is used, and if it has the potential to impact parent custodial rights.[89]

Third, Securus received patent approval for technology that tracks data generated by a nonincarcerated user who communicates with a prisoner and for monitoring the nonincarcerated person's recent e-commerce history prior to or immediately following contact with the incarcerated individual.[90] This patent includes e-commerce purchases made using the associated "outside" phone number (for example, a purchase made on Airbnb right before or after calling an incarcerated person can be traced through their database).[91]

As a final example, Securus maintains patents for electronic speech detection technology used for voice identification.[92] This technology verifies that the person speaking on the other end of the phone is the authorized individual on the prisoners' call list.[93] This technology also uses large-language models to identify certain terms used in dialogue and identify the affect of each speaker based on tone.[94]

This type of surveillance is all-encompassing and is arguably illegitimate, and likely to violate basic Fourth Amendment protections.[95] As a workaround, Securus utilizes consent waivers incorporated in the terms of service and end-user agreements to provide additional legal coverage for justifying the surveillance of noncarceral information.[96]

These patents are just a sample of the technology developed for carceral surveillance via prison tablets, yet they unambiguously reveal the growing dark side of technology.[97] It is worth remembering that individuals in society do consent to sacrifice privacy for a digital life. But the difference here is the proximity to state control and the fact that

89. *C.f.* S. Lisa Washington, *Time and Punishment*, 134 YALE L. J. 536, 604 (2024).

90. *See* U.S. Patent No. 10,904,297 B1 (filed Jan. 26, 2021), https://patents.google.com/patent/US10904297B1/en [https://perma.cc/QR5B-3MNV]; *see also* Cooper Quintin & Beryl Lipton, *The Catalog of Carceral Surveillance: Monitoring Online Purchases of Inmate's Family and Friends*, ELEC. FRONTIER FOUND. (Sept. 7, 2021), https://www.eff.org/deeplinks/2021/09/prison-surveillance-catalog-monitoring-online-purchases-inmates-family-and-friends [https://perma.cc/5P6W-DP43].

91. '297 Patent.

92. *See* U.S. Patent No. 10,902,054 (filed Jan. 26, 2021), https://uspto.report/patent/grant/10,902,054 [https://perma.cc/3TKA-P26Z].

93. George Joseph & Debbie Nathan, *Prisons Across the U.S. are Quietly Building Databases of Incarcerated People's Voice Prints*, INTERCEPT (Jan. 30, 2019), https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus/ [https://perma.cc/ZA2J-6CJ2].

94. *Id.*

95. *See infra* Section II.C (discussing privacy rights in the carceral space).

96. Orin S. Kerr, *Terms of Service and Fourth Amendment Rights*, 172 U. PA. L. REV. 287, 287–88 (2024) (arguing that Terms of Service mistakenly links and illegitimately waives Fourth Amendment rights because terms of service "define relationships between private parties, but private contracts cannot define Fourth Amendment rights"). *See also infra* Section III.B.1 (discussing consent as a Fourth Amendment waiver).

97. Location-tracking technologies are used in promotional marketing by companies like Securus to retain investor funding. *See* infra Part I (discussing data privacy).

"consent" is predicated on the fact that the incarcerated individual has few, if not any, alternatives.

The following Section II.C interrogates the current prison paradigm to assess whether current legal precedent remains relevant and capable of addressing the fundamental changes in carceral surveillance today.

C. The Prison Paradigm

The current prison model creates a dichotomy between those within the prison and those outside of it.[98] Within the prison environment, heightened deference is afforded to correctional officers at the expense of individual liberties and privacy interests to ensure security within prisons. But infringements to prisoners' liberty and privacy interests have a population-level impact on nonincarcerated individuals who also enter the prison sphere, even temporarily. Thus far, carceral deference has gained its power and legitimacy by regulating the spatial carceral environment, and infringements on nonincarcerated individuals are permitted because they have been limited in temporal proximity.

Digital tablets challenge this model in two key ways. First, tablets are built with the intention of allowing prisoners to reach beyond the walls of the prison and connect with broader society, forcing us to scrutinize the legitimacy of the spatial barrier between prisons and society.[99] Second, the inverse also occurs — tablets draw society closer to prisons, severely constricting the rights of nonincarcerated individuals in unprecedented ways that cannot be temporally limited as it was when the spatial barrier existed.

The following Section provides a brief overview of the dominant approach that the Supreme Court has taken in three core areas of prison law — privacy rights, liberty interests, and disciplinary deprivations — that will impact the regulation of digital tablets going forward and how these domains originally implicated carceral-level and population-level rights.

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98. This model is sustained by the day-to-day disciplinary structure that correctional officials enforce to ensure order within prisons and further legitimized by the case law that takes a hands-off approach to prison administration. *See, e.g.*, Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. 302, 306 (2022) (describing deference to prison officials as dispositional favoritism). *See generally* Danielle C. Jefferis, *Carceral Deference: Courts and their Pro-Prison Propensities*, 92 FORDHAM L. REV. 983 (2023) (discussing the role that carceral deference plays within the prison structure and criminal law's punishment paradigm).

99. *See, e.g.*, Kwaneta Harris, Sara Kielly & Heather C. Jarvis, *What 24 Hours Looks Like in Three Prisons*, SLATE (Dec. 14, 2023), https://slate.com/technology/2023/12/prison-tech-diaries-texas-ohio-new-york.html [https://perma.cc/JV86-9XCT] (detailing the tech-diaries of three women incarcerated in three different states over the course of one 24-hour period).

1. Privacy in Prisons

Digital rights are grounded in privacy interests that raise Fourth Amendment concerns.[100] But the Fourth Amendment rarely comes up in the prison context because current precedent has made the issue moot. In 1984, the Court held in *Hudson v. Palmer*[101] that prisoners retained no reasonable expectation of privacy in their cells from unreasonable searches.[102] In *Palmer*, officers conducted a random "shakedown" search for contraband within Russell Palmer's cell, during which time Officer Ted Hudson allegedly destroyed Palmer's personal property.[103] Palmer argued that the purpose of the search was to harass him and sought relief under the Fourth Amendment, challenging the reasonableness of the search.[104]

The *Palmer* Court focused on the spatial difference between prisons and society, stating that prisons are wholly different from the physical spaces of a home, an office, or a hotel room.[105] The Court justified upholding the prison's randomized search policy on the basis that such a policy is rationally related to the penological interest of ensuring security *within* the prison, stating:

> A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security.[106]

Following *Palmer*, in *Florence v. Board of Chosen Freeholders of the County of Burlington*, the Court upheld the strip search of a pretrial detainee who was admitted to the general population.[107] Albert Florence was arrested based upon a system error that falsely reported an outstanding warrant for failure to pay a fine that should have been removed from the warrant database.[108] Upon intake at the jail, Florence

100. *See infra* Section II.C.2 (discussing how privacy infringements also impact First Amendment rights).

101. 468 U.S. 517, 517 (1984).

102. *Id.*

103. *Id.* at 520.

104. *Id.*

105. *Id.* at 527 ("A prison 'shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.'") (quoting Lanza v. New York, 370 U.S. 139, 143–44 (1962)).

106. *Id.* at 527–28.

107. 566 U.S. 318, 325, 340 (2012).

108. *Id.* at 323.

was subjected to an invasive strip search that included revealing his genitalia, giving rise to his Fourth Amendment challenge.[109]

Although the Court expressed how unfortunate Florence's circumstances were, it upheld the search based upon the spatial and security rationales discussed in *Palmer*.[110] Florence was a pretrial detainee — someone who is legally innocent. However, his legal status was of no more consequence to the Fourth Amendment analysis than if he were convicted. Instead, the Court focused on the prison environment and how the admission of a new individual posed a security risk *within* the general population.[111]

By stripping prisoners of their privacy interests in their cells and their persons, *Palmer* and *Florence* give correctional officers substantial power to subordinate and control prisoners within the *carceral* environment.[112] But the Court has never spoken on what expectation of privacy is owed to prisoners in a *digital* environment.

Palmer and *Florence* reveal a legally relevant spatial dichotomy between the carceral environment and society. In the carceral environment, while deeply intimate and intrusive, searches are finite and as a result, only limited amounts of information can be learned about an incarcerated individual. Digital tablets store more personal information than traditional carceral searches.[113] And like modern technology, digital tablets can also reveal how one uses language, their values or affiliations based on information accessed.[114]

Tablets shrink the spatial barrier between those incarcerated and not incarcerated. To be sure, *Palmer* and *Florence* were only intended to impact carceral-level rights, and reasonable suspicion is still required to search a nonincarcerated individual who enters the carceral environment, even for a brief time.[115] Now, new data points about carceral-adjacent individuals are captured on the prisoners' tablet. Due to their limiting dichotomy, *Palmer* and *Florence* are functionally irrelevant when asking whether a prisoner's tablet — where infinite amounts of information can be captured, saved, and used for non-penological

109. *Id.* at 323–24.

110. *Id.* at 332.

111. *Id.* at 340 (Alito, J., concurring) (noting that the Court's holding is limited to entries within the general population that pose a risk to greater numbers of individuals as opposed to admission into a single occupancy holding cell).

112. *See* Makar, *supra* note 1, at 414–17 (discussing the devaluation of prisoners' dignity interests by removing evidentiary burdens on the state).

113. *Cf.* Riley v. California, 573 U.S. 373, 385 (2014).

114. *Cf.* Carpenter v. United States, 585 U.S. 296, 311 (2018) ("[D]ata provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'") (citing United States v. Jones, 565 U.S. 400, 415 (2012)).

115. *See, e.g.*, Spear v. Sowders, 71 F.3d 626, 630 (6th Cir. 1995) (holding that nonincarcerated visitors retain a privacy interest upon entering a carceral facility and that reasonable suspicion is required to conduct a strip or cavity search of a visitor).

purposes — can be randomly searched,[116] and further, whether such a search can extend to those outside of prisons.

Of course, incoming prison mail[117] and phone calls have long been susceptible to monitoring, so tablet surveillance at the population level may appear facially analogous and unchanged at first blush.[118] The following Section II.C.2 discusses *Turner v. Safley*[119] and how the Supreme Court regulates communication at the carceral and population levels to address where existing precedent faces functional limitations.

2. Civil Liberties in Prisons

Three years after *Palmer*, the Court in *Turner v. Safley* articulated a four-part test, which I refer to as the "reasonable restriction" test.[120] This test is applied to analyze almost all constitutional claims raised by prisoners and has been cited in 15,068 cases to-date.[121] *Safley* was a class action lawsuit brought by prisoners and nonincarcerated individuals challenging the Missouri Division of Corrections' regulations limiting prisoner-to-prisoner correspondence to immediate family and preventing prisoners from marrying with the exception of permission from the warden (which was only given when compelling reasons for the marriage existed).[122]

In analyzing these regulations, the Court drew upon prior prison law precedent to establish the four-factor test indicating that no single factor is dispositive, but that courts may consider the following: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest, (2) whether alternative means or other avenues are available for the prisoner to exercise the right being restricted, (3) the burden any accommodation will have on

116. *See infra* Section III.B.1 (arguing that the correct inquiry is not about the reasonable expectation of privacy but rather whether a search is tailored to meet a particularized penological interest).

117. Thornburgh v. Abbott, 490 U.S. 401, 401 (1989) (clarifying that courts must apply *Turner v. Safley*, which affords greater deference to prison administrators when analyzing restriction on incoming mail due to the security concerns within the jail, but that courts must apply intermediate scrutiny as provided in *Procunier v. Martinez* with regard to outgoing mail because less of an immediate security risk applies).

118. *Id.* at 378–79. Appellate courts have held that notice can satisfy consent where prison regulations and handbooks indicated the prisoners' calls were subject to monitoring and signs next to unit phones indicated that monitoring would be taking place. *See e.g.*, U.S. v. Amen, 831 F.2d 373, 379 (2d Cir. 1987), *cert. denied,* 485 U.S. 1021 (1988) (holding that prisoners impliedly consented to have their phone conversations monitored where they had received notice of the surveillance and continued to use the prison telephones).

119. 482 U.S. 78, 89–91 (1987).

120. Makar, *supra* note 1, at 394 n.29.

121. Westlaw search of cases citing "Turner v. Safley" last conducted on February 14, 2025.

122. Turner v. Safley, 482 U.S. 78, 78 (1987).

the correctional institution, and (4) whether there is an absence of ready alternatives to the prison regulation.[123]

In response to the challenges raised by the plaintiffs and after applying its newly minted test, the *Safley* Court held that the prison's policy regulating incoming correspondence was a reasonable restriction based on the prison's security concerns.[124] However, the Court also held that the marriage regulation was not a reasonable restriction.[125]

Justice Stevens's dissent critiqued the Court's inconsistency in holding one regulation as constitutional and the other as unconstitutional, stating:

> The Court inexplicably expresses different views about the security concerns common to prison marriages and prison mail. In the marriage context expert speculation about the security problems associated with "love triangles" is summarily rejected, while in the mail context speculation about the potential "gang problem" and the possible use of codes by prisoners receives virtually total deference.[126]

Justice Stevens is not wrong — the Court adds little clarity on when to deem one purported security concern legitimate over another. Perhaps the outcome is less incoherent than it facially appears. One argument is that the regulation on incoming prisoner correspondence is based purely on the spatial environment. Pre-*Safley*, in *Procunier v. Martinez*,[127] the Court applied intermediate scrutiny when analyzing regulations regarding outgoing prison mail. To reconcile the differences between the *Martinez* and *Safley* mail standards, the Court in *Thornburgh v. Abbott*[128] stated that "[t]he implications of *outgoing* correspondence for prison security are of a categorically lesser magnitude than the implications of *incoming* materials."[129] By permitting prison regulations on incoming mail to be subjected to the more deferential *Safley* test and requiring regulations on outgoing mail to be subject to *Martinez*'s intermediate scrutiny, the Court recognized the importance of tailoring scrutiny based on the spatial differences inside versus outside of prisons.[130] On this theory, one reason that the marriage restriction failed even the reasonable restriction test is because it has a

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 113 (Stevens, J., concurring in part, dissenting in part).
127. 416 U.S. 396, 397 (1989).
128. 490 U.S. 401, 413 (1989).
129. *Id.* (emphasis added) (discussing the distinction between *Procunier v. Martinez* and *Turner v. Safley*).
130. *Id.*

direct and nontemporal population-level impact which would normally trigger strict scrutiny. Further, the concept of marriage itself does not physically invade the carceral environment in the same way that mail does nor does it carry an imminent security risk.

Consider *Overton v. Bazzetta*,[131] which was decided using *Safley*'s reasonable restriction test. Prisoner-plaintiffs brought a suit with their prospective visitors challenging the Michigan Department of Corrections' blanket ban against visits by minors who were not immediate family members (e.g., nieces and nephews) and its full ban on all visitors for two years, with the exception of the clergy or counsel, if the prisoner had two substance abuse violations.[132] The Court upheld the ban as a reasonable restriction on the basis that the regulation was intended to combat against contraband entering the facility and drug abuse by its prisoners.[133]

This regulation reveals both carceral and population-level impacts. For example, though ignored by the Court, the restriction impacts non-incarcerated individuals' rights to family integrity.[134] But again, unlike the marriage regulation in *Safley*, this restriction was legitimized based purely on spatial limitations — visitors physically entering the prison — and did not ban communication in its entirety, such as phone calls or mail.[135] The restriction was also temporally limited. To be sure, the Court qualified its holding to state that if the prison had instead instituted a blanket ban against all visitations, such a policy may violate *Safley*.[136]

Though this seems like a minor concession, *Safley*'s spatial and temporal limitations as well as its inability to inquire into population-level impacts, like in *Bazzetta*, place real constraints on prisons law's ability to navigate a digital environment. For example, digital tablets make communication rapid — incoming and outgoing messages can be sent within seconds and phone calls occurring with more regularity can contain more intimate details about a person's life, creating questions about the temporal scope of a search. Further, traditional carceral surveillance was prone to human review, resulting in under-regulation.[137]

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131. 539 U.S. 126, 126 (2003).

132. *Id.*

133. *Id.* at 133 ("To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable.").

134. *Cf.* Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 267 (2021) (arguing that children can assert their right to family integrity in legal proceedings).

135. *Bazzetta*, 539 U.S. at 135.

136. *Id.* at 134 ("And if faced with evidence that MDOC's regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation.").

137. *Cf.* Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 160–86 (2022) (describing the ways in which electronic monitoring of individuals on parole is more invasive

Now, digital surveillance technology does not miss a single word and can go beyond to capture other attributes about the word, such as one's inflection when a particular word is spoken.[138] Retention capabilities are also amplified, giving correctional officers the ability to use biometric data collected later for an unknown non-penological purpose.[139] And tablets capture all of this not just for the prisoner using the tablet, but also the carceral-adjacent individual who communicates with a prisoner.

Following the *Martinez-Safley* line of logic, it would be nonsensical, if not impossible, to apply intermediate scrutiny to one outgoing text message and the reasonable restriction standard to the subsequent incoming text message, over and over again. When sized up to more complex digital surveillance issues, it becomes clear that these distinctions in scrutiny were established around the physical space solely to preserve First Amendment protections while being conscientious of contraband concerns. Now, the question is whether words stored in a digital space present the same spatial-based security concerns that either *Martinez* or *Safley* contemplated? It is much less likely.[140]

In both the privacy and liberty context, heightened institutional deference is supposed to be spatially limited to the carceral environment. As a result, these cases obfuscate the impact that limitations on prisoners' rights had on carceral-adjacent rights because such limitations appeared temporally limited[141] despite the fact that nonincarcerated individuals filed as co-plaintiffs.[142] This interpretative approach has gotten by when prison regulations were limited to a physical space but appear less authoritative when unpacked and applied to the digital space.

The following Section II.C.3 considers the disciplinary regime in prisons and how the integration of tablets poses a deeper question of what quality of life prisoners and prisoner-adjacent communities are owed.

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and restrictive than traditional parole or probations schemes that lacked digital surveillance technologies).

138. *See supra* Section II.B.

139. *See, e.g.*, Smith v. Wolf, et al., No. 3:19-CV-0711, 2020 WL 4551229, at *1 (M.D. Pa. Aug. 6, 2020).

140. *Cf.* Riley v. California, 573 U.S. 373, 387 (2014) ("Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape.").

141. Makar, *supra* note 1, at 397 (arguing that many of the Supreme Court's own decisions that it casts as holding prisoner-only implications equally affect the rights of nonincarcerated individuals — including family members and journalists).

142. *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 130 (2003) (filing suit including nonincarcerated and incarcerated plaintiffs); *see also infra* Section IV.B, for a discussion on the value of prisoner-adjacent litigation.

3. Discipline as Prison Governance

The current prison governance model is designed as a hierarchical structure centered around maintaining order and safety within a controlled environment.[143] To implement this structure, day-to-day operations are typically run on a privileges and punishments scheme.[144] For example, if a prisoner talks back or is purportedly recalcitrant with a correctional officer (the undesirable behavior), a correctional officer may revoke the prisoner's yard time hours (the privilege) to discourage future uncooperative behavior.[145] Or, if a prisoner has shown exemplary behavior, such as regularly following orders and performing prison jobs satisfactorily, they may be given better housing

143. *See generally* FOUCAULT, *supra* note 23 (describing a theory of prisoner surveillance). This structure is reinforced through legislation which allows for unquestioning deference of prison officials. For instance, the Prison Litigation Reform Act ("PLRA") requires prisoners to exhaust all claims through the prison adjudicative processes prior to filing a claim in court. 42 U.S.C. § 1997e (1996); *see* Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 317 (2007). The PLRA has substantially reduced the number of cases appearing before courts, and consequently, leaves courts with fewer opportunities to scrutinize the day-to-day operations of the prison. *See, e.g.*, Dolovich, *supra* note 98, at 325 (2022); Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 487 (2012); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1649–54 (2003). Even when a prisoner satisfies the PLRA's exhaustion requirements, courts are often ungenerous in construing *pro se* claims liberally, demonstrating a general judicial disinterest in oversight. *See, e.g.*, Johnson v. Prentice, 144 S. Ct. 11 (2023) (Sotomayor, J., dissenting) (arguing that the prisoner satisfied the motion to dismiss standard and that the lower court failed to construe the *pro se* claim liberally).

144. In *Sandin v. Conner*, the Court limited the instances in which a prison regulation could create a protected liberty interest for prisoners. 515 U.S. 472, 487 (1995). The Court only entitled prisoners to the protections of due process when a deprivation imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" or "will inevitably affect the duration of his sentence." *Id.* For example, where a deprivation impacts good-time credits that can be applied towards early release, due process is required. *See id.* Counterintuitively, placement in solitary confinement, like that which occurred in *Conner*, is not deemed a *de facto* atypical or significant hardship. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 220 (2005) (holding that indefinite solitary confinement and the revocation of good-time credits created a protected liberty interest); Perry v. Spencer, 94 F.4th 136 (1st Cir. 2024) (holding that solitary confinement greater than ninety days is considered atypical); Johnson v. Ryan, 55 F.4th 1167, 1197 (9th Cir. 2022) (holding that a prisoner had a liberty interest in avoiding a return to maximum custody once he attained a close-custody phase of program). A decade after *Conner*, the Court in *Wilkinson v. Austin* went on to elaborate that the liberty-interest inquiry articulated in *Conner* was a shift from considering the language of the prison regulation to one focused on the "nature of the deprivation" relative to an ordinary prison life. 545 U.S. 209, 222 (2005). *See generally* Jan Maarten Elbers, Esther F.J.C. van Ginneken, Paul Nieuwbeerta, Miranda Boone & Hanneke Palmen, *The Effects of Reward Systems in Prison: A Systematic Review*, 71 INT'L J. OF L., CRIME AND JUST. 1 (2022).

145. *But see* Brian Nam-Sonenstein & Nell Haney, *Bad Behavior: How Prison Disciplinary Policies Manufacture Misconduct*, PRISON POL'Y INITIATIVE (2025), https://www.prisonpolicy.org/reports/discipline.html [https://perma.cc/CWN5-YW2A]; A. Mitchell Polinsky, *Deterrence and the Optimality of Rewarding Prisoners for Good Behavior*, 44 INT'L REV. L. & ECON. 1, 2 (2015) (demonstrating that it is often socially desirable to reward prisoners for good behavior).

accommodations that are less restrictive or more comfortable (the privilege) to continue to encourage the desired behavior.[146]

If something is categorized as a privilege it can be taken away without due process as a form of discipline.[147] However, if something is considered a protected liberty interest or results in an "atypical and significant hardship," due process is required before the prison can deprive the individual of that interest.[148] Privileges are typically anything above what would be considered the constitutional floor for minimally adequate care (e.g., providing prisoners with three meals a day).[149] Privileges directly impact one's life within prison and can include, but are not limited to, less restrictive housing, additional recreational time, television access, commissary access, and less labor-intensive jobs.[150] Privileges can also include one's life outside of prison, such as access to communication like phone calls and in-person visitation.[151]

This scheme is intended to maintain security and order within the carceral environment. One can imagine that many things fall under this broad umbrella of security and order. Some of the most common infractions include possessing contraband.[152] But it gets fairly nuanced quickly. Different types of contraband can pose different security issues. For example, possession of gum can be used to jam a cell lock.[153] Paper can be soaked with synthetic drugs, such as mojo, and then later burned and smoked.[154] Possession of an unauthorized hardcover book can be used to conceal dangerous substances within the book casing posing a potential of creating physical harm.[155] The possession of currency can create power imbalances and undue influence and could be used to bribe correctional officers, distorting the order of the prison.[156]

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146. *See id.*

147. *See Conner*, 515 U.S. at 487.

148. *See id.*

149. *See* Farmer v. Brennan, 511 U.S. 825, 832 (1994).

150. *See, e.g.*, Chesa Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 149 (2013) (describing the variances in prison vitiation policies as privileges).

151. *See* Elbers et al., *supra* note 144, at 8.

152. *See, e.g.*, 28 C.F.R. § 541.3 (1996).

153. *See, e.g.*, N.Y. DEP'T CORR. & CMTY. SUPERVISION, HANDBOOK FOR THE FAMILIES AND FRIENDS OF NEW YORK STATE DOCCS INMATES 32 (2019), https://doccs.ny.gov/system/files/documents/2020/01/family-handbook-english-final-12.2019-002.pdf [https://perma.cc/F49A-8F5D].

154. *See* Gilcrease v. Prator, No. 20-cv-1322, 2022 WL 2196592, at *6 (W.D. La Mar. 30, 2022) (supporting the conclusion that scanning paper mail to read on tablets reduces less detectible forms of contraband such as paper-soaked drugs from entering the facility).

155. *See* Shannon Heffernan & Andrew Rodriquez Calderón, *Prisons are Restricting Books in the Name of Combatting Drug Smuggling*, ABA J. (Oct. 20, 2023), https://www.abajournal.com/news/article/prisons-are-restricting-books-in-the-name-of-combatting-drug-smuggling [https://perma.cc/V3YY-HXFW].

156. *See* Richard Davies, *From Pecan Pralines to 'Dots' as Currency: How the Prison Economy Works*, GUARDIAN (Dec. 7, 2021), https://www.theguardian.com/us-news/2019

As Justice Stevens succinctly summed it, plausible security concerns are often subject to the "imagination of the warden."[157]

Electronic tablets have been a response to some of the contraband concerns by preventing certain types of contraband from physically entering the prison. For example, correctional officials argue that tablets can reduce the amount of paper coming into the prison that could be drug-soaked or the opportunities for books to conceal weapons.[158] But contraband keeps up with the times and evolves. Prisoners may try to bribe correctional officers to bring in hotspots in order to access restricted online content.[159] If caught with a modified (aka jailbroken) tablet[160] the consequences are severe — incarcerated users risk indefinite loss of privileges, solitary confinement, loss of good-time credits which impact parole, and additional consequences that can affect prison transfers.[161]

But what is the harm of unmonitored access to the internet? If Sam Bankman-Fried were given a tablet, perhaps the prison might be worried about his ability to trade crypto-currencies — the crime he was convicted for. The prison may similarly be concerned by an individual engaging in a new illegal act or that they can reengage in the same act for which they were convicted, like cyberstalking or viewing child pornography. Penalizing access to an unmonitored electronic tablet can be seen as a preventative security measure.[162] But it is not always clear whether the penological interest is in preventing a security breach or a *surveillance* breach.[163]

/aug/30/prison-economy-informal-markets-alternative-currencies [https://perma.cc/4756-XGF2].

157. Turner v. Safley, 482 U.S. 78, 100–01 (1987) (Stevens, J., concurring in part and dissenting in part).

158. *See* Diana Kruzman, *In U.S. Prisons, Tablets Open Window to the Outside World*, Reuters (July 19, 2018), https://www.reuters.com/article/world/us/in-us-prisons-tablets-open-window-to-the-outside-world-idUSKBN1K813A/ [https://perma.cc/93RK-J5V7].

159. *See* Ryan M. Moser, *Jailbreaking in a Broken Jail*, SLATE (Dec. 14, 2023), https://slate.com/technology/2023/12/prison-tablet-jailbreaking-incarceration-connectivity.html [https://perma.cc/NJ3K-FEYR] ("A $25 T-Mobile hot spot on Amazon can fetch around $250 on the prison black market — officers often accept Venmo or other cash apps.").

160. *See id.*

161. *Id.*

162. Punishment can also be incurred for simply not following the rules — i.e., jeopardizing order within the facility. *See Safley*, 482 U.S. at 93. Regardless, the capaciously vague penological interests of maintaining order and security within the prison create a moving target that makes it difficult for a plaintiff to litigate or a court to ascertain the true motive for the prison's policy or punishment. *See id.* at 100–01 (Stevens, J., concurring in part) ("Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation.").

163. Friedman & Citron *supra* note 25, at 1418–23 (observing that at the most basic level, constitutional law prevents governmental actors from acting without a legitimate public purpose).

Digital tablets serve as a centralizing platform that funnels most day-to-day experiences to the digital realm. When tablet usage is restricted, prisoners are not claiming a superficial right to text or a right to watch movies (like a *privilege*), but a deeper right that goes towards the expression of one's humanness. Tablets are becoming the sole platform for accessing fundamental rights for prisoners. This shift in prison life alone poses a broader question about the core purposes that incarceration is intended to serve — such as whether incarceration intended to be rehabilitative in order to ensure reentry into civic life, or whether it is intended to be a purely miserable and punitive experience that is subject to the arbitrary whims of correctional officers for the sake of subordination and control.[164]

Part III applies our foundational understanding of digital tablets and the current prison paradigm to analyze newly evolving cases that challenge prisons' authority to regulate digital tablets.

III. A DIGITAL PANOPTICON IN THE MAKING

Philosopher Jeremy Bentham developed a theory of prison control through an institutional design known as the Panopticon in 1785.[165] The panopticon is structurally designed to host a center tower from which correction officers monitor prisoners, whose cells encircle the central tower.[166] The premise behind this model was to create the sociological effect that correctional officers are omnipresent and watching a prisoner's every move.[167] As a result, prisoners would never be sure whether they were being viewed, and the institutional design would encourage self-discipline without the need for physical intervention.[168] Michael Foucault expanded upon Bentham's theory that the panopticon is not just a physical institutional structure, but a symbol of social control that extends to and controls society through external laws and authority that become deeply internalized and self-regulating, even without the presence of authority to enforce the law.[169]

Digital tablets serve a centralizing function and complete the panopticon that Bentham and Foucault theorized. Surveillance is no longer a possibility, but a certainty. With the nature of surveillance neither spatially nor temporally limited, there is a significant concern that the unique features that comprise one's interiority can be learned through

164. This is not a question that can be answered in this paper alone. The question of what a *digital* prison life should look like unearths larger questions about the purposes of incarceration and the significance that space, specifically carceral space, plays in larger conceptions of punishment.

165. JEREMY Bentham, THE PANOPTICON WRITINGS (London: Verso ed., 1995) (1787).

166. *Id.*

167. *Id.*

168. *Id.*

169. *See* FOUCAULT, *supra* note 23.

budding AI technology. It follows that if we accept Foucault's theory that the individual is a byproduct of power structures that externally influence them, then this complete panopticon has the capability to develop levers of control against individuals at the carceral-level and against broader communities that are adjacent to prisoners at the population level.

This Part analyzes the carceral and population-level impact of digital tablets in prisons today. Section III.A discusses a representative sample of current litigation brought by prisoner-plaintiffs focused on access to tablets. Because tablet usage in prisons is in its nascent stages, the first wave of litigation occurs at the individual, carceral level. In other words, these are the harms that immediately and directly impact prisoners' day-to-day lives. This Section shows that even at the carceral level, the harms of digital capture can be obfuscated when standard prison law doctrine is applied. Section III.B reveals the more invasive, yet unseen population-level consequences that impact communities on a large scale by analyzing the collective harms of involuntary consent, data discrimination, and financial exploitation. Finally, Section III.C follows with a reflection on the failings of the current prison paradigm in relation to the carceral- and population-level impacts of digital capture discussed in Sections II.A–B.

A. Carceral-Level Impact

This Section focuses on the immediate harms incarcerated individuals face by previewing current litigation that reflects the most common constitutional claims brought by prisoner-plaintiffs on tablet-related issues.[170] These claims include First Amendment challenges based on content moderation, censorship, lack of meaningful access, and procedural due process claims where tablets were confiscated as a form of disciplinary action. On the surface, these claims may look like traditional claims where the prison restricts access to a privilege based upon a penological need to ensure security.[171] Though generalized security concerns may be a partial motive to regulate tablet usage, indiscriminate surveillance for no particular penological purpose has the potential to chill basic First Amendment values. In other words, standard prison law avoids the deeper question: whether a prison's policies can infringe upon a prisoner's *digital* privacy interests where no particularized

170. To obtain this representative sample, I conducted a generalized Westlaw search that included the search terms "advanced: (prisons & tablets)." This search yielded 1,168 federal cases and 101 state cases. Of these cases, I performed a brief review to identify the most common causes of action, listed above. The term "prison tablet" is not a universally used term and may go by other names (for example, digital tablet or electronic tablet). This search is likely to be overinclusive and may include references to drug-related tablets as opposed to digital tablets. This search was last conducted on March 26, 2025.

171. *See infra* Section III.A.1.

penological interests exist and there is no immediate concern threatening the carceral space.

1. Content Moderation and Censorship

Challenges to content moderation and censorship are particularly frequent[172] in prisons and are poised to grow as tablets become more prevalent. Moderation or censorship can appear in various contexts and the harm that prisoners and nonincarcerated individuals alike experience can be misconstrued by courts.

Content moderation is one of the downstream consequences of digital acceptance in prisons where review is farmed out to AI tools. In prisons, content moderation has always occurred, such as through prescreening personal mail (conducted manually by prison guards)[173] or censoring reading materials through banned book lists.[174] But content moderation takes on a different form when using automated tools. Prison tablets are preprogramed to include screening software which utilizes an algorithm that reviews incoming and outgoing text messages (including photographs). Prisoners have reported that terms such as "piece" — which could potentially refer to a gun — or "black" and "white" — which could potentially refer to color based on race — get flagged by the algorithm, significantly delaying messages, some of which are never even delivered to the recipient.[175] Of course, piece could mean a number of things: it could refer to a portion of cake eaten at a birthday party or a synonym for discussing an article.[176] Similarly, black and white could be a mode of describing a binary situation or simply a color scheme that has no racial association. Nevertheless, because the decision to flag messages is farmed out to automated tools, those decisions can be arbitrary and fail to take context into account.[177] Evelyn Douek explains that the problems associated with the overbreadth of automated surveillance is a result of the industrial approach to content moderation when conducted by large platforms, like prison

172. *Cf.* Evan Bianchi & David Shapiro, *Locked Up, Shut Up: Why Speech in Prison Matters*, 92 ST. JOHN'S L. REV. 1, 4 (2018) (discussing the significance of "prison speech" and how it permeates through many aspects of prison life).

173. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 400 (1974) (discussing the prison employee screening policy).

174. Keri Blakinger, *The Books Banned in Your State's Prisons*, MARSHALL PROJ. (Feb. 23, 2023), https://www.themarshallproject.org/2022/12/21/prison-banned-books-list-find-your-state [https://perma.cc/2MJ8-V6BM].

175. Mia Armstrong-López, *For Years Prison Law was Isolated from Tech. Now Tech is Beginning to Define It.*, SLATE (Dec. 12, 2023), https://slate.com/technology/2023/12/time-online-how-technology-is-changing-prison.html [https://perma.cc/5NBY-FBSA].

176. *Id.*

177. *Cf.* Bloch-Wehba, *supra* note 82, at 1300 (describing how government actors use automated tools to enforce their rules at a larger scale).

tablets.[178] Theoretically, this creates some separation between private information shared and the state, having the potential to preserve individual and community privacy interests. But there is nothing to suggest that prison officials do not have unrestricted access to the data stored.[179]

Content moderation through digital technology can also unveil new privacy concerns that traditional modes of surveillance never impacted. Consider, for example, *Smith v. Wolf*.[180] Plaintiff Kareem Smith raised a First Amendment claim regarding the alteration of his mail by Smart Communications, a third-party company contracted by the prison to receive, scan, and upload incoming mail onto the recipient's digital tablet.181 The prison's mail policy allowed Smart Communications to check mail for contraband, scan it, copy, and store it in their database for seven years, but they could destroy the original mail after fifteen days.182 Smith raised two primary claims. First, Smith claimed that his mail had been improperly altered because the original pictures that his family sent were sent in color and the scanned copies appeared on his tablet in black and white.[183] Second, and critically, he argued that the prison neither had a penological interest in destroying his incoming mail nor in "storing [his] family information in a computer database . . . without the permission from the Plaintiff, or his family members."[184]

The U.S. District Court for the Middle District of Pennsylvania ultimately dismissed Smith's claims pursuant to a motion to dismiss.[185] The court held that the prison's new mail policy was rationally related to the penological goal of limiting the entry of contraband into the prison.[186] Further the court found that a *copy* of the original mail was sufficient to satisfy *Safley*'s "alternative means" factor.[187] In other words, the district court signaled that as long as Smith was not barred from communicating with his family, the fact that he received a digital copy as opposed to the original physical mailing was not constitutionally relevant.

The district court's reasoning misconstrued Smith's larger concerns in three keys ways. First, the court misunderstood the nature of harm posed to Smith. Not only is Smith alleging that important mail, in this case pictures, that represents a sentimental and meaningful

178. Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 537 (2022).

179. *See* Stephen Raher*, Best Practices for Prison and Jail Tablet Procurement*, PRISON POL'Y INITIATIVE, July 3, 2024, https://www.prisonpolicy.org/messaging/rfp_guidance.html [https://perma.cc/7LZ3-9E8S].

180. No. 19-CV-0711, 2020 WL 4551229, at *1 (M.D. Pa. Aug. 6, 2020).

181. *Id.*

182. *Id.* at *2.

183. *Id.*

184. *Id.* at *3.

185. *Id.* at *8.

186. *Id.* at *6.

187. *Id.* at *16.

connection to his family had been altered,[188] but that mail also included personal biometric information, such as the facial depictions of his family, that were stored by a third-party without his consent.[189]

Second, through a cursory application of *Safley*, the district court accepted the prison's mail policy as rationally related to the penological interest of reducing contraband by removing access to physical mailings.[190] In doing so, the court failed to appreciate how digital technology creates an issue of first impression, missing the totality of the harm , which includes the privacy interests that both Smith and his family share about the storage of personal photographs.

Third, and again a reflection of *Safley*'s limitations, the court confused broader associational rights to communicate and the mere ability to communicate.[191] Integrated in our conception rights to association and the right to communicate includes the ability to communicate with some reasonable privacy safeguards.[192] This example reveals the dangers of an overly simplistic constitutional test that can hollow the First Amendment's protections by stripping away one of its central tenants: privacy.

Smith's claims raise critical questions that the *Safley* factors were never designed to address: What penological interest is served by storing a family's photographs? What information can photographs reveal about an individual's associations? Could photographs be used to create a facial recognition repository? Are there alternatives for individuals like Smith and his family to opt-out?

Content censorship can also result in retaliatory actions, and it is made easier through AI-surveillance. Consider an example of a prisoner-adjacent individual who was censored from communicating with incarcerated individuals due to her reform efforts. In *Bailey v. Federal Bureau of Prisons*,[193] Pamela Bailey, co-founder of "More than Our Crimes," brought a lawsuit against the Federal Bureau of Prisons ("BOP") for blocking her access to speak with prisoners at seven BOP

188. *See* Leah Wang, *Mail Scanning: A Harsh and Exploitive New Trend in Prisons*, PRISON POL'Y INITIATIVE (Nov. 17, 2022), https://www.prisonpolicy.org /blog/2022/11/17/mail-scanning/ [https://perma.cc/7UK9-BLKN] (describing the importance that the sentimental value of physical mail provides prisoners for maintaining mental health and improving recidivism).

189. Smith v. Wolf, No. 19-CV-0711, 2020 WL 4551229, at *3 (M.D. Pa. Aug. 6, 2020).

190. *Id.* at *1.

191. The court summed up Smith's concerns by stating "there is nothing about the current mail policy that prevents Smith from meaningfully corresponding with whomever he chooses, including his family. Pursuant to the current mail policy, Smith's family can meaningfully correspond with him if they choose to do so." *Id.* at *8.

192. *See generally*, Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000) (discussing the limitations of First Amendment doctrine as applied to information privacy speech restrictions).

193. No. 24-CV-1219, 2024 WL 3219207 (D.D.C. June 28, 2024).

facilities.[194] Bailey is a prisoners' rights advocate who publicly disseminates stories shared by incarcerated individuals on their experiences in prisons in order to bring awareness to and create prison reform.[195] Bailey presented evidence that the BOP's censorship of her e-messaging account was retaliatory when the BOP learned of her successful efforts to establish a prisoner hotline where incarcerated individuals could report civil rights abuses regarding the conditions of their confinement.[196] Bailey's lawsuit was successful and she won preliminary injunctive relief pursuant to her First Amendment censorship claim with respect to six of the seven BOP facilities that blocked her access.[197]

In sum, *Safley*'s limitations are becoming quickly obvious to lower courts as they grapple with the appropriate test to apply in the digital space. In the context of e-mail communications, which predate tablet text messaging systems, a circuit split has already developed regarding whether courts should apply the heightened *Martinez* standard or the more-deferential *Safley* test when analyzing prison regulations of e-mails.[198] Recall that *Martinez* requires courts to analyze outgoing mail policies with intermediate scrutiny because outgoing mail poses less of a security risk to spatial prison environments, whereas incoming mail polices are reviewed under the deferential "reasonable restriction" test due to concerns of contraband entering the prison.[199] In some ways, e-mail seems more analogous to outgoing mail because nothing is physically entering the prison, thus justifying the case for applying *Martinez*. But prisons may also identify a different penological interest associated with the speed of real-time communication, an issue that courts will soon be required to scrutinize.

* * *

Under the dominant interpretation, *Safley* prevents courts from scrutinizing larger harms associated with privacy and community that arise from the use of digital technologies. One reason for this is the uniqueness of *Safley*'s reasonable restriction test that allows courts to isolate and view prisoners' rights in a vacuum. But if digital tablets

194. *See id.* at *2 (providing evidence that the BOP blocked her access to e-message prisoners when she relayed information through the e-messaging system about a phone hotline for prisoners to report civil rights abuses).

195. *Id.* at *1.

196. *Id.* at *8.

197. *Id.*; *see also infra* Section IV.C. for a discussion on prisoner-adjacent litigation.

198. *Compare* Perry v. Sec'y, Fla. Dep't of Corr., 664 F.3d 1359, 1365 (11th Cir. 2011) (applying *Safley* based on the plain language interpretation of *Thornburgh*'s phrase "outgoing correspondence" to actually mean "outgoing mail," which would exclude e-mail) *with* Famiglietti v. Ortiz, No. 19-cv-7433, 2020 WL 5036198, at *3–4 (D.N.J. Aug. 26, 2020) (citing to Third Circuit precedent and applying *Martinez*'s heightened scrutiny to a prisoner's challenge regarding his denial of access to the prisoner email system to send outgoing mail).

199. *See supra* Section II.C.

alleviate some of the core security concerns that previously occurred within the confines of the carceral space, then the justification for content moderation or censorship through digital surveillance seems less grounded in penological interests of security in the carceral environment, making such restrictions harder to justify.

2. Meaningful Access

Prison facilities vary in terms of their policies and resources, so it is no surprise to learn that although some prisons provide their prisoners with almost 24/7 access to their tablets, other prisons are more restrictive.[200] When tablets are prison-provided, resource constraints may materialize in the form of sharing schemes that limit an individual's access to tablets for short durations, stunting many of their purported benefits.[201]

For example, John William Scharnhorst III, a pretrial detainee, filed a claim against the detention center for the denial of access to readings such as literature, news, and religious materials.[202] The detention center claimed that Scharnhorst had access to these reading materials through tablets provided free of use to its detainees.[203] The detention center's policy, however, only allowed tablets to be "checked out for fifteen minutes every three hours, for a maximum of one hour per day."[204] In ruling on a motion for summary judgment brought by the detention center, the U.S. District Court for the Western District of Arkansas held that "[t]here is a genuine, material dispute of fact as to whether inmates can *meaningfully* access any literature at all, given the lack of a functioning book cart, the jail's ban on outside donations of books, and strict limitations on inmate access to electronic tablets, i.e., 'fifteen minutes on a tablet every three hours . . . where the tablet must invariably be shared with an unknown number of other detainees.'"[205] The district court's scrutiny is refreshing because it does not immediately accept resource constrains (the third factor in the *Safley* test) as a sufficient justification for rights deprivations.

Other courts can be less sympathetic to understanding the problem that resource constraints have on prisoners' access to civil liberties. In

200. *See, e.g.*, Scharnhorst v. Denzer, No. 22-CV-5138, 2024 WL 1195542, at *2 (W.D. Ark. Mar. 20, 2024) (discussing a prison's shared tablet policy); Hall v. G.T.L., No. 23-CV-4054, 2024 WL 865839, at *1 (S.D. Ill. Feb. 29, 2024) (referencing that a prisoner had purchased his own tablet for individual use).

201. *See Scharnhorst*, 2024 WL 1195542, at *4.

202. *Compare id.* at *1 (showing prison-defendants claiming that they provided their prisoners with a wide variety of materials available on the tablets) *with Hall*, 2024 WL 865839, at *2 (plaintiff claiming that tablets maintained a limited variety of downloadable materials).

203. *Scharnhorst*, 2024 WL 1195542, at *1.

204. *Id.* at *2.

205. *Id.* at *3 (quoting R. & R. (Doc. 103, p. 18)).

Allen v. U.S. Department of Justice,[206] the plaintiff, Robert Lee Allen, alleged that he lacked a sufficient opportunity to "investigate his claims or the applicable legal rules and standards" where the prison made legal materials available through tablets but limited access from 8:00 AM to 9:00 PM and where twenty-two tablets were allocated across sixty-four prisoners, with only one tablet permitted to be in a cell at a time.[207] The Western District of Pennsylvania dismissed the prisoner's motion to compel claim because the *pro se* litigant did not properly "bring a denial of access to courts claim, nor [did] he allege that his rights have been violated."[208] Perhaps more importantly, the court reiterated that "it is not the [c]ourt's role to direct prisons how to allocate resources."[209]

Resource allocation issues can also be weaponized against certain prisoners for racial or other arbitrary reasons. In *Scruggs v. Pullins*,[210] the District Court for the Northern District of Indiana allowed a claim to proceed where the plaintiff, Christopher L. Scruggs, alleged that prison staff promised to provide him with a tablet as soon as the tablets arrived at the facility, but provided tablets to others who were admitted after him based on what Scruggs alleged to be racial favoritism.[211] Here, the prisoner presented First Amendment and Equal Protection claims for the prison's denial of the right to access information in the same manner that other prisoners access information.[212]

Other critical internal processes can also be stymied by lack of meaningful access, such as grievance processes. As prisons begin using digital tablets as a centralized rights-accessing platform, of immediate concern is the incarcerated individuals' access to grievance processes, including the courts. Prisons that have predominantly shifted over to universal tablet usage have replaced their paper grievance processes and medical reporting forms within online platforms that are accessed through digital tablets.[213]

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206. No. 23-698, 2024 WL 129228, at *2 (W.D. Pa. Jan. 11, 2024) (citing to ECF No. 29 at 4–5).

207. *Id.*

208. *Id.* at *1.

209. *Id.* at *2.

210. No. 22-CV-120, 2023 WL 5368879 (N.D. Ind. Aug. 22, 2023).

211. *Id.*

212. *Id.*

213. Because tablets may not always be provided by a prison and may require prisoners to purchase a tablet, ability to pay becomes a significant concern. Already some grievance programs require the payment of co-pays to file a grievance. For instance, Oklahoma's grievance process requires prisoners to pay a two-dollar co-pay to submit an appeal to the Administrative Review Authority. *See* OKLA. DEP'T OF CORR., INMATE GRIEVANCE PROCESS, § VIII.B.2.a (2022). If a prisoner does not have access to a tablet to file a report — whether medical, or other grievances — or is prohibitively barred from filing due to lack of alternative avenues and inability to pay (whether for the co-pay or the tablet itself), this scheme creates unequal access to the right to affirmative medical care and, relatedly, the right to access the

If integrated with the user in mind, tablets have the potential to enhance meaningful access to some of these key day-to-day processes in unprecedented ways. For example, the County of Santa Clara reported increases in grievances filed electronically.[214] One cited reason for this increase was that their digital grievance process made filing anonymous.[215] As a direct side effect of this increase, the Santa Clara Sheriff's Office also reported that the workload for reviewing grievances increased.[216] But even this small study supports what many scholars have theorized regarding the nature of underreporting conditions of confinement cases.[217]

* * *

In sum, as courts begin to confront prison regulations on tablets, they will inevitably be faced with how to characterize tablets — as providing access to a privilege or a protected interest. Scenarios where distribution of tablets to show favoritism or implicitly punish for no legitimate penological interest, like those alleged in *Scruggs* discussed above, are a reality within prisons and impact meaningful access to rights. At the individualized carceral level, abuses of tablet regulations by correctional officers are amplified because their centralizing capabilities of basic rights afforded to prisoners makes deprivation more consequential.

3. Due Process

As tablets provide prisoners with greater opportunity to access aspects of society, they also make the implementation of correctional officers' disciplinary actions more consequential. Prior to digital integration, where a minor infraction that violated prison regulations may result in a singular impact like yard time being taken away or access to the commissary, now violating the prisons' regulations can be more devastating because *everything* can be seized all at once.[218] In

courts as filing a grievance is the first step of exhaustion. *See* Prison Litigation Reform Act, 42 U.S.C. § 1997e (1996).

214. *See, e.g.*, Letter from Michelle Asban & Joseph Nguyen, County of Santa Clara Office of the Sheriff, to Bob Jonsen, Sheriff (Mar. 23, 2023), https://countysheriff.sccgov.org/sites/g/files/exjcpb406/files/reports/Grievance%20and%20Appeals%20Unit%20-%202022%20Bi-Annual%20Report%20032023.pdf [https://perma.cc/2WV5-RVAB] (finding that anonymity in the e-grievance filing process produced higher numbers of grievance complaints by prisoners).

215. *Id.*

216. *Id.*

217. *Id.* (discussing the underreporting of prison grievances).

218. *See* Justin Iverson, *eCarrots: Prison Control Profits from Correctional Tablets*, 1 NEB J. ON ADVANCING JUST. 6, 22–23 (2025) (discussing how tablets can be used by correctional officers as tools for control).

essence, if a tablet is confiscated as a form of disciplinary action, it is not just the deprivation of one isolated privilege, it is the deprivation of communication, the deprivation of education, the deprivation of legal materials, and the deprivation of any digital property purchased by the incarcerated individual. Taken together and considering what tablets as a platform provide access to, a genuine question arises as to whether digital tablets should be considered as a "rights-accessing platform."[219]

Some jurisdictions have taken the step of legislating away prisoners' property interests in their tablets in order to ensure correctional officers are able to use tablets as behavioral modification tools. Florida law, for example, states that "[p]ossession of a tablet by an inmate is a *privilege* that may be forfeited by any inmate who fails to abide by the rules of the Department or any applicable state or federal law."[220] Similarly, some states have enacted legislation that classifies tablets as "behavioral management tools," which also means prison officials can restrict usage without following the disciplinary procedures that require additional due process.[221] If states provided prisoners with tablets at no charge, this may make sense, but this is not always the case.[222] Even still, whether an individual purchases their tablet or is provided one by the prison does not address how courts should treat the digital property that lives on the tablet.[223] The apps that prisoners download and pay for with their own money, the family photos that they store in text messages (also paid for), or the songs they download have property implications.[224] Whether incarcerated individuals have a due process-protected property interest in the digital materials they purchase and store on their tablets is an issue currently ripe for debate.[225]

In terms of judicial discourse, courts are consistently taking the approach that restrictions on a prisoners' telephone use or visitation and recreation privileges are no different in "degree and duration" than they

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219. Olivia Empson, *Activists 'Fight Against Censorship' in the Largest US Book Bans: Prisons*, GUARDIAN (Sept. 27, 2024), https://www.theguardian.com/us-news/2024/sep/27/prison-banned-books [https://perma.cc/9P36-4AXV].

220. *See* Fla. Admin. Code Ann. R. 33-602.900(5)(b) (2025) (emphasis added).

221. Smith II, *supra* note 42, at 4.

222. Prisons implement various tablet procurement schemes that either allow incarcerated individuals to buy or rent their own tablets or provide the device at no charge and allow prisoners to pay for the apps they wish to access. *See* Raher, *supra* note 179, at 1.

223. *See, e.g.*, Wallace v. Fla. Dep't of Corr., No. 24-CV-14094, 2024 WL 1513463, at *6 (S.D. Fla. Apr. 8, 2024) (identifying a circuit split regarding whether prisoners have a property interest in purchased music).

224. *See id*.

225. *Id.*; *see also* Corbin Robert Kennelly, *The Prisoners' Property Dilemma: The Proper Approach to Determine Prisoners' Protected Property Interests After* Sandin *and* Castle Rock, 47 GA. L. REV. 241, 250–56 (2012) (identifying a circuit split on how to assess prisoners' protected property interests for the purposes of providing pre-deprivation due process).

were before digital tablets.[226] For example, in *Lewis v. Zmuda*,[227] the U.S. District Court for the District of Kansas applied the *Conner* "atypical and significant hardship" test, discussed above,[228] to a plaintiff-prisoner who alleged a due process violation for being deprived access to a tablet that he purchased for two months.[229] Relying on the reasoning that phone use is constituted as a privilege, the district court held that *Lewis* did not have a protected liberty interest in using a tablet and dismissed this cause of action.[230]

The *Lewis* court's approach, and others like it, value tablets as a mechanism for controlling behavior and underappreciates them as a modality for accessing rights.[231] By failing to recognize this as an issue of first impression and classifying access to tablets as a privilege, courts recursively misconstrue the unique and distinct impact that digital tablets have on a prisoner's life within the existing prison paradigm.[232] As previewed above, most legislatures and lower courts have already treated access to tablets as a privilege — meaning that granting use of a tablet does not bestow upon a prisoner a protected liberty or property interest in the tablet.[233] The limitations of standard prison law are revealed again because this analysis treats tablets as though they are only of consequence to the prisoner and not to the individuals adjacent to and communicating with the prisoner.

Section III.B addresses the larger population-level impact of digital tablets and demonstrates how they are not merely a privilege but a critical connection to community.

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226. *See, e.g.*, Lewis v. Zmuda, No. 23-3236, 2023 WL 8005022, at *9–10 (D. Kan. Nov. 17, 2023), *reconsideration denied*, 2024 WL 359332 (D. Kan. Jan. 31, 2024) (denying a prisoner the use of his tablet for two months) (citing *Requena v. Roberts*, 893 F.3d 1195, 1218 (10th Cir. 2018) (quoting *Marshall v. Morton*, 421 F. App'x 832, 838 (10th Cir. 2011) (unpublished))).

227. 2023 WL 8005022.

228. *See* discussion, *supra* note 143.

229. *Lewis*, 2023 WL 8005022, at *9–10.

230. *Id.*

231. *Compare id.* (labeling tablets as privileges) *to* Scharnhorst v. Denzer, No. 22-CV-5138, 2024 WL 1195542, at *9 (W.D Ark. Mar. 20, 2024) (denying a motion to dismiss where a material dispute of fact exists regarding meaningful law library access via tablet).

232. *See*, *e.g.*, Helferty v. Chester Cnty. Prison, No. 24-CV-2269, 2024 WL 3165294, at *5 (E.D. Pa. June 25, 2024) (dismissing plaintiff's claim for failure to state the disciplinary circumstances that led to the deprivation of the tablet regardless of the plaintiff's claim that he had no alternative access to communication or law library once his tablet was confiscated).

233. *See, e.g.*, Burrell v. DOCCS, 655 F. Supp. 3d 112, 129 (N.D.N.Y. 2023) ("[I]nmates do not have a protected liberty interest in tablet use."); Hearns v. Cisnero, No. 22-CV-1033, 2023 WL 5353665, at *7 (E.D. Cal. Aug. 18, 2023), *report and recommendation adopted*, 2023 WL 6446215 (E.D. Cal. Oct. 3, 2023) ("Because Plaintiff does not have a liberty interest in possessing a JPay tablet and its contents, Plaintiff is unable to state a cognizable due process claim. Therefore, granting leave to amend would be futile.").

B. Population-Level Impact

This Section discusses the compounded consequences of increasing datafication of prisoners and carceral-adjacent networks through three key vectors: (1) carceral consent, (2) data discrimination, and (3) financial exploitation. Without vital safeguards, I argue that digitization in prisons has the ability to produce significant population-level consequences that go beyond the individual harms prisoners immediately face, as discussed in Section III.A, and which will continue to perpetuate the subordination of vulnerable populations.

1. Carceral Consent

Most people never read the privacy terms when signing up for a new app — there may be a basic assumption that the app or web-browser is storing and tracking your data through automated tools, but there is also an assumption that data is only collected in the aggregate and your personal data is not singled out.[234] Even still, in theory, law enforcement does not have unrestricted access to individualized personal data that is held by private companies so there is a general expectation that one's unique data will only be shared upon a showing of probable cause via a court issued warrant.[235] That is, unless you consent.[236]

Although carceral technology may aggregate and yield collective information data, its primary function in the prison context is to serve an individualized surveillance function. The Supreme Court has held that prisoners do not have a reasonable expectation of privacy therefore many common Fourth Amendment protections do not extend into the prison walls.[237] And where there might be an argument for an

234. Most apps track location services that may be shared for governmental purposes. For example, X (formerly known as Twitter) states that the company may provide your location data to "comply with a law, regulation, legal process, or governmental request." *X Privacy Policy § 3.3*, X, https://x.com/en/privacy [https://perma.cc/92E6-SN86]. *See also* United States v. Jones, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) ("I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.").

235. *See* Riley v. California, 573 U.S. 373, 386 (2014); Carpenter v. United States, 585 U.S. 296, 311 (2018). *See also* Bloch-Wehba, *supra* note 82, at 1297; Friedman & Citron, *supra* note 25, at 1365 (describing law enforcement use of social media to collect aggregate data).

236. *See, e.g.*, Christopher Slobogin & Kate Weisburd, *Illegitimate Choices: A Minimalist (?) Approach to Consent and Waiver in Criminal Cases*, 101 WASH. U. L. REV. 1913, 1913 (2024) (discussing lack of voluntariness associated with consent waivers); Kerr, *supra* note 96, at 287–88.

237. *See supra* Section II.C.1.

expectation of privacy, like with communications, carceral privacy law operates on consent waivers.[238]

Cellphones are the most analogous device to a prison tablet and, although the Supreme Court has held that a warrant is required to conduct a search of the contents of one's cellphone,[239] given existing prison law precedent, it may seem unlikely that the same protection would extend to the carceral space.[240] Moreover, prison phone calls have long been susceptible to monitoring, so skeptics may hardly see a difference.[241] But assuming as much would be accepting a one-dimensional view of technology which the Court has not embraced.[242]

Tablets are communication devices that implicate the rights of incarcerated and nonincarcerated individuals alike.[243] As a communication device, tablets can track and store cellular data.[244] When a nonincarcerated individual communicates with a prisoner through the prisoner's tablet, the nonincarcerated individual will have to create a messaging account that has a web-based page or an app — one commonly used account is GettingOut[245] (available on ViaPath tablets) — and will be required to accept the company's privacy policy. Here is an excerpt of what an individual must agree to when communicating with an incarcerated individual:

> Information that may be collected by cookies and web beacons when you use the Site may include, without limitation:
>
> - the pages you visit within the Site;
> - the date and time of your visit to the Site;
> - the amount of time you spend using the Site;

238. *See* discussion *supra* note 118.

239. *See* Riley, 573 U.S. at 386.

240. *See supra* Sections II.C.1–2 (discussing the dominant interpretation of prison doctrine).

241. *See Amen,* 831 F.2d at 378–79.

242. *See* United States v. Jones, 565 U.S. 400, 412 (2012); Carpenter v. United States, 585 U.S. 296, 311 (discussing cell site location information as revealing "the privacies of life" (internal citations omitted)); *see also* Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 254 (2006) (arguing that the Supreme Court has maintained "a tradition of light-touch regulation" over the Internet).

243. *See* Neema Singh Gulani & Nathan Freed Wessler, *Company That Handles Prison Phone Calls Is Surveilling People Who Aren't in Prison*, ACLU (May 11, 2018), https://www.aclu.org/news/privacy-technology/Company-handles-prison-phone-calls-surveilling-people-who [https://perma.cc/93Y3-KBG9].

244. *See* Carpenter, 585 U.S. at 300–01.

245. *See* discussion *supra* note 48 (explaining instances where incarcerated individuals used GettingOut to speak with loved ones).

> - the websites you visit before or after visiting the Site;
>
> - the Internet Protocol (IP) address used to connect your computer or mobile device to the Internet;
>
> - geolocation information;
>
> - your computer or mobile device and connection information such as your browser type and version, operating system and platform; and/or
>
> - your purchase history.[246]

Among the stated reasons that ViaPath collects the nonincarcerated individual's location data is "to respond to law enforcement requests and as required by applicable law, court order, or governmental regulations."[247] Most private companies have similar disclosures.[248] But unlike other private companies, the objective of ViaPath and other tablet service providers is to work in partnership with correctional officers and provide real-time surveillance at an *individual*-level.[249] And, at present, there is no indication of a firewall between the private and government actors.[250] Moreover, surveillance tools, like geo-tracking services, have played a key role as marketing tools to gain investors.[251] As discussed above, service providers have filed patents on technology that would track the prisoner-adjacent individual's location data, their e-commerce history, etc.[252] End-user agreement waivers, like the one listed above, serve as a legal justification for collecting and analyzing

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246. *Privacy Statement*, TELMATE, https://legal.telmate.com/privacy/en-us/ [https://perma.cc/UK78-SCQQ].

247. *Id.*

248. Emile Ayoub & Elizabeth Goitein, *Closing the Data Broker Loophole*, BRENNAN CTR. FOR JUST. (Feb. 13, 2024), https://www.brennancenter.org/our-work/research-reports/closing-data-broker-loophole [https://perma.cc/6N35-GZWW].

249. *See infra* Section III.B.2 (discussing data privacy).

250. *See infra* Section III.B.2.

251. Jennifer Valentino-DeVries, *Service Meant to Monitor Inmates' Calls Could Track You, Too*, N.Y. TIMES (May 10, 2018), https://www.nytimes.com/2018/05/10/technology/cellphone-tracking-law-enforcement.html [https://perma.cc/MQ5X-GDRH] ("Securus, founded in Dallas in 1986, has marketed its location service as a way for officials to monitor where inmates placed calls. Securus has said this would block escape attempts and the smuggling of contraband into jails and prisons, and help track calls to areas 'known for generating illegal activity.'"); Private Equity Stakeholder Project, *Private Equity Profits From Incarceration: 2023 Fact Sheet* (2023), https://pestakeholder.org/reports/fact-sheet-private-equity-profits-from-incarceration/[https://perma.cc/32RC-SESC]

252. *See supra* Section II.B.

private information. And lack of market competition removes incentives on private tablet providers to protect its users privacy interests.[253]

Consent — whether express or implied — is used as a basis for waiving Fourth Amendment protections.[254] The notion of consent in this legal context is intended to reflect a voluntary choice that does not come with unconstitutional tradeoffs.[255] But in the context of prisons where contact is already limited and communication alternatives are few and far between, it is hard to say that the choice to share one's information data was made free of coercion.

To date, this Author was not able to find any federal cases brought by a prisoner-adjacent individual where a prison tracked the private data of a nonincarcerated individual through a prison tablet.[256] This result however is not surprising. If a prisoner-adjacent individual's data has been collected and surveilled by law enforcement, and nothing comes of the search, then there is no consequence known to the user.[257] The user will likely only become aware of the search if law enforcement acts upon the information that they discover (however, FOIA requests could be used to foster data transparency).[258] But Fourth Amendment doctrine has created workarounds for this issue — law enforcement will likely be able to identify a warrant exception and provide *post hoc* justifications for the search.[259] In sum, the chances of seeing civil rights claims that raise a Fourth Amendment violation like the one described here are unlikely without greater data transparency,[260] and due to the

253. *See* Raher, *supra* note 179 ("The power to determine whether a tablet program will be exploitative rests with a correctional agency's procurement officials, because they negotiate the contract with the tablet vendor. But it is a daunting task: A contract's most mundane details can lead to financial exploitation for the end user, especially when procurement officials do not fully understand the everyday challenges faced by incarcerated people.").

254. Slobogin & Weisburd, *supra* note 236, at 1915–16.

255. *Id.*

256. *Bailey*, discussed *supra* Section III.A.1, was brought by a prisoner-adjacent individual and is premised on the idea that the BOP was reading the contents of her messages and punitively restricted her access based on her prisoner-advocacy objectives. Bailey v. Fed. Bureau of Prisons, No. CV 24-1219, 2024 WL 3219207, at *1 (D.D.C. June 28, 2024). This case raised First Amendment claims regarding censorship and not a Fourth Amendment privacy infringement claim.

257. Friedman & Citron, *supra* note 25, at 1432 (citing Commonwealth v. McCarthy, 142 N.E.3d 1090, 1104, 1106 (Mass. 2020) as an example of why courts should relax standing rules in data surveillance cases where parties do not have actual knowledge of the surveillance practices but where it can be presumed based on other evidence).

258. *See, e.g.*, Complaint, *Knight First Amend. Inst. at Columbia Univ. v. Fed. Bureau of Prisons*, No. 21-cv-6579 (S.D.N.Y. Aug. 4, 2021) (filing a lawsuit against the Bureau of Prisons seeking records on their mail digitization program).

259. *See* Michael Gentithes, *Suspicionless Witness Stops: The New Racial Profiling*, 55 HARV. C.R.-C.L. L. REV. 491, 523–24 (2020) (discussing how officers may abuse the "reasonable suspicion" test to "*post hoc* justify a stop").

260. *See, e.g.*, Slobogin & Weisburd, *supra* note 236, at 1915–16.

warrant exceptions, successful challenges are even more unlikely — particularly if courts continue to accept consent waivers.[261]

Tablets amplify privacy concerns by creating a complete and absolute panopticon that includes surveillance of carceral-adjacent individuals. Prior to the introduction of tablets, carceral-adjacent loved ones' expectations of privacy were substantially diminished — from having their incoming mail read, their phone calls listened to, and their persons and belongings searched upon prison visits. It simply should not be that when a nonincarcerated individual is associating with an incarcerated individual, they relinquish *all* expectations of privacy.

Consent at the individual-level is the gateway that leads to larger population-level consequences. Scholarly critiques on the voluntariness of consent and its legitimacy of constituting a waiver of individual liberties in the criminal law context can help to contextualize the problem in the carceral sphere. Most recently, Christopher Slobogin and Kate Weisburd propose an alternative approach to consent and waiver in criminal cases that may equally apply in the carceral sphere.[262] Slobogin and Weisburd shift the inquiry away from the individual's voluntariness and argue that where the government seeks to infringe on a liberty interest, the condition proffered by the government must survive strict scrutiny.[263] In the context of Fourth Amendment searches and seizures Slobogin and Weisburd use the example of the "spit and acquit" routine where individuals are charged with low-level crimes and are offered dismissal of their charges in exchange for a DNA sample that can be stored in a local DNA database.[264] Slobogin and Weisburd convincingly argue that strict scrutiny would require the state to demonstrate that the seizure of DNA information is narrowly tailored to achieve the goals of custodial arrest and charging — the state action triggering the waiver of privacy.[265] In sum, their test aims to point out that the reasonableness of the search pursuant to Fourth Amendment standards is unimportant when it conflicts with a choice that involves a deprivation of liberty.[266] The same concerns arise in the context of a prisoner-adjacent individual's right to communicate.

It is already difficult to square the application of digital searches in Fourth Amendment context with existing applications of prison law doctrine. Thus, Slobogin and Weisburd's theory of choice is illuminating and equally applicable to notions of digital capture in the carceral space.[267] Where a prison removes all alternatives to day-to-day

261. *See Bailey*, 2024 WL 3219207, at *1 (suggesting that the First Amendment may be a workaround to challenging privacy concerns implicitly).

262. Slobogin & Weisburd, *supra* note 236, at 1916.

263. *Id.*

264. *Id.* at 1945.

265. *Id.*

266. *Id.* at 1945–46.

267. *See generally id.*

experiences for a prisoner except for the digital tablet, the search (degree of surveillance) must be narrowly tailored to meet a particularized penological goal of security. Inquiries into the legitimacy of choice expose the overbreadth of indiscriminate surveillance which can resolve problems of liberty-depriving prison law applications to carceral-adjacent communities.[268] Existing conceptions of traditional searches, both for the incarcerated and nonincarcerated, are inapplicable when it comes to the realities of the nature and scope of information the technology gathers, how it is being used, and how information can be weaponized.[269]

Even where consent waivers give correctional officers the green light to interfere with individual communications, a blanket license to surveil has the potential to snowball into larger population-level consequences that result in discriminatory impacts, discussed in the following Section.

2. Digital Discrimination

Tablets, like cellphones, can capture extremely invasive and private information about their users. Thus, tablets make the absolute panopticon more invidious than its theorized predecessor. Tablets go beyond geolocation data to voice detection, e-commerce history, language usage, etc. — both for the incarcerated and prisoner-adjacent individual.[270] By using smartphones and other advanced digital devices, those in society consent to some loss of their privacy. But that presumes that constitutional safeguards still protect those in society from governmental intrusions that lack due process and transparency.[271] Here, families and friends of prisoners are asked to sacrifice more than any other individual in society, merely as a consequence of their association with someone convicted of a crime. This surveillance is not merely a collateral consequence.[272] Rather, the surveillance is a form of subordination that is based upon an individual's legal status.[273]

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268. *See generally id*.

269. *Cf*. Procunier v. Martinez, 416 U.S. 396, 425 (1974) (Marshall, J., concurring) ("It is also suggested that prison authorities must read all prison mail in order to detect escape plans. The State surely could not justify reading everyone's mail and listening to all phone conversations on the off chance that criminal schemes were being concocted. Similarly, the reading of all prisoner mail is too great an intrusion on First Amendment rights to be justified by such a speculative concern.").

270. *See supra* Section II.B.

271. *See* United States v. Jones, 565 U.S. 400, 416 (2012).

272. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010).

273. *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1276 (2004) (discussing spatial concentration of incarceration where some of New York City's poorest neighborhoods received

Tablet providers appear to be treating prisons as "testing grounds" for advancing surveillance technology that may be used unjustly to further subordinate individuals charged or convicted with a crime and the communities most adjacent to them.[274] As an example, ViaPath promotes a product named "Call IQ" — an AI tool that generates transcripts of calls and detects keywords to learn and predict the usage of "street terminology" that can decode certain kinds of illicit activities.[275] ViaPath's technology can also detect the affect of a call — identifying where calls begin or end on a positive versus negative tone.[276] Securus also offers similar AI surveillance tools. One product Securus promotes is Threads — which conducts keyword analyses and retains a database of geographic information on everyone who interacts with a prisoner.[277]

The use of concentrated AI technology to aggregate, dissect, and sort data to develop patterns leads to dehumanizing consequences for these vulnerable populations. Scholars such as Salomé Viljoen describe this phenomenon as the illegitimate datafication that flows to unjust social associations beyond individuals resulting in population-level impacts.[278] Daniel Solove describes AI tools as cognitively reductive where a subject's interiority becomes re-defined and limited only to the information that the AI tool was taught to deem as relevant.[279] This functionally limited set of information is then used to make judgments (often legal judgments) about the subject that in turn reduces their humanness.[280]

Here, the AI algorithms are gathering private information from a narrow social group — prisoners and their adjacent networks. This data collection means that risk profiles defined by this social group will recursively identify associations between those who are already incarcerated and those who are in some way connected with an individual who is incarcerated. If the information is repackaged and used as a

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comparatively greater law enforcement presence and surveillance during periods of declining crime rates); *see also* Weisburd, *supra* note 137, at 147 (2022) (describing the punitive effects of electronic surveillance in the parole and probation context).

274. *Cf.* Brandon Hasbrouck, *Prisons as Laboratories of Antidemocracy*, 133 YALE L.J. 1966, 1966 (2024) (describing how prisons have served as "laboratories of antidemocracy to perfect tactics to suppress access to information, protest, and bodily autonomy" beyond prisons and to society).

275. Sarah Stillman, *Do Children Have a "Right to Hug" Their Parents?*, NEW YORKER (May 13, 2024), https://www.newyorker.com/magazine/2024/05/20/the-jails-that-forbid-children-from-visiting-their-parents [perma.cc/5YNS-NE3Z].

276. *See id.*; Complaint, Reid v. N.Y. Dep't of Corr., No. 0806245/2024 (N.Y. Sup. Ct. Apr. 15, 2024) (initiating litigation against the New York Department of Corrections for illegal surveillance of phone calls).

277. *Id.*

278. Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L. J. 573, 631 (2021) (synthetizing and refocusing the problem of datafication as the illegitimate use of data towards unjust social relations).

279. *See generally* SOLOVE, *supra* note 23.

280. *See generally id.*

preventative law enforcement surveillance tool, the data could create social associations with individuals in society who have a similar elocution to an incarcerated individual, who live in similar zip codes as adjacent networks, or who have similar e-commerce patterns — the list goes on.[281] The effect of one person's data — perhaps de minimis in an isolated instance — has exponential impact on wider networks.[282]

Limited datasets, such as the ones here, can lead to AI hallucinations that may result in incorrect judgment calls by prison officials and snowball from there.[283] Given how little we know about the ways in which prison tablet service providers capture data and whether these providers aggregate this data with other sources, it is impossible to know how accurate security responses can be.

As AI is increasingly deployed in various domains — from companies using algorithms in their hiring practices[284] to stores deploying facial recognition software as security measures[285] — the push to regulate and ensure algorithmic fairness is growing.[286] For example, the FTC recently announced an enforcement action against Rite Aid for the company's failure to implement reasonable safeguards to ensure against false positives when using facial recognition technology in stores to identify potential shoplifters.[287] However, the same governance regulations are lacking in the carceral space.[288]

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281. *See supra* Section III.B.

282. Scholars in the privacy and IP fields have similarly referred to this phenomenon as a form of vicarious surveillance. *See, e.g.*, Matthew Sipe, *Covering Prying Eyes with an Invisible Hand: Privacy, Antitrust, and the New Brandeis Movement*, 36 HARV. J.L. & TECH. 359, 371 (2023) (defining vicarious surveillance as "one consumer's low-privacy market choice is externalized onto other persons because of their interactions and connections."). Other scholars have addressed the hidden costs in the compounded use of algorithms that are purportedly neutral yet retain the ability to further racial and socio-economic subordination. *See, e.g.*, Jessica M. Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753, 778 (2023) (discussing the technological costs of algorithmic tools and their impact perpetuating racist structures).

283. *Cf.* Jennifer Valentino-DeVries, *How the Police Use Facial Recognition, and Where It Falls Short*, N.Y. TIMES (Jan. 12, 2020), https://www.nytimes.com/2020/01/12/technology/facial-recognition-police.html [perma.cc/2NJB-EN37] (reporting that the facial recognition technology used by law enforcement led to more false positives when identifying Black women).

284. *See, e.g.*, Lee Rainie, Monica Anderson, Colleen McClain, Emily A. Vogels & Risa Gelles-Watnick, *AI in Hiring and Evaluating Workers: What Americans Think*, PEW RSCH. CTR. (Apr. 20, 2023), https://www.pewresearch.org/internet/2023/04/20/ai-in-hiring-and-evaluating-workers-what-americans-think/ [https://perma.cc/C5BW-637R].

285. *See* Valentino-DeVries, *supra* note 283.

286. *See, e.g.*, Thomas B. Nachbar, *Algorithmic Fairness, Algorithmic Discrimination*, 48 FLA. ST. U. L. REV. 509, 514 (2021) (describing concerns regarding algorithmic fairness).

287. Press Release, Federal Trade Commission, Rite Aid Banned from Using AI Facial Recognition After FTC Says Retailer Deployed Technology Without Reasonable Safeguards (Dec. 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without [https://perma.cc/F9CE-RDMF].

288. *See* Friedman & Citron, *supra* note 25, at 1380 (discussing the Privacy Act of 1974's exemption for criminal databases).

In the carceral context, AI discrimination may already be underway. Mail scanning policy that serves the security purpose of limiting contraband now serves the dual purpose of surveillance.[289] Service providers' ability to surveil and capture *all* data being produced and received through a prison tablet is completely unexplored and can be a potential source of discrimination in the future. With the ability to capture unlimited amounts of information and biometric data from the surveillance of prisoners' tablets — the way a person texts, talks, which apps they use, what zip codes their networks live in, etc. — the panoptical range of carceral surveillance far exceeds prison boundaries and has the potential for further entrenching subordinated populations resulting in greater racial and social stratification.[290]

3. Financial Exploitation

Behind each prisoner is a community that cares deeply about them. Prisons have always been grossly exploitative by charging high prices in commissary shops and paying mere cents on the hour for hard labor.[291] Despite the social contract[292] that states have accepted when incarcerating a member of our society, the price of caring for a loved one in prison has always disproportionately fallen on families, most of whom are already socio-economically vulnerable.[293] For instance, it has been well documented how commissary shops are over-priced — brand-name ramen costs $1.06 in prison where it costs fifty-seven cents in a grocery store.[294] For a prisoner who earns only cents (sometimes nothing) per hour for their labor, the costs often fall on carceral-

289. *See supra* Section III.A.1.

290. *See, e.g.*, Chaz Arnett, *Black Lives Monitored*, 69 UCLA L. REV. 1384, 1388–1400 (2023) (providing examples of technological advances in surveillance used on Black communities outside of prisons); Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. 739, 757–63 (2022) (discussing the impact that democratic exclusion in algorithms has on perpetuating racial subordination); Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917, 919 (2021) (noting the lack of oversight in modern policing due to new policing surveillance technology that "tends to operate in opaque and unaccountable ways").

291. *See, e.g.*, Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (May 2018), https://www.prisonpolicy.org/reports/commissary.html [https://perma.cc/6CGP-8UMU] (detailing the steep prices of foods and goods in commissary shops).

292. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 891 (2009) (discussing society's obligations to prisoners).

293. *See Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR. FOR HUM. RTS. (Sept. 2015), https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-exec-summary.pdf [https://perma.cc/8GZV-MBAT] (discussing the cost of incarceration on communities) [hereinafter *Who Pays?*].

294. Elizabeth Weill-Greenberg & Ethan Corey, *Locked In, Priced Out: How Prison Commissary Price-Gouging Preys on the Incarcerated*, Appeal (Apr. 17, 2024), https://theappeal.org/locked-in-priced-out-how-much-prison-commissary-prices/ [https://perma.cc/QRE6-YQ4W].

adjacent networks to fund commissary accounts for their loved ones.[295] This is often the only way that incarcerated individuals are able to access things like fans in a prison without air-conditioning, or additional food, and other goods.[296]

Tablets present an even greater drain on financial resources and an opportunity for financial exploitation.[297] Introducing tablets means there is another additional payment structure that the families on the outside need to support.[298] For example, GLT offers media subscription services such as music-streaming for $24.99 a month.[299] GLT's music subscription, however, costs double that of Spotify and provides less than one-tenth of the content.[300]

Centralizing and outsourcing many prison operations and functions to a single private provider creates no incentive for market competition, allowing companies to set prices arbitrarily and leaving consumers with no market power to drive down costs.[301] For example the cost of a money transfer itself has been reported to be $12.99 to transfer $100 into a prisoner's commissary account, which produced an estimated $99.2 million for JPay in 2017.[302] Prisoners already lack the ability to make meaningful choices in prison and predatory pricing exacerbates this issue.

Financial arbitrariness is baked into the tablet contracts that prioritize profitable revenue schemes for both the service provider and the prison. The Prison Policy Initiative conducted a study on twelve prison contracts that provided prisoners with "free" tablets and found four common provisions that incentivize profiteering: (1) guaranteeing the department of corrections a portion of the tablet usage revenues, (2) allowing providers to alter the prices of all services — communications, books, movies, money transfers, etc. — without state oversight, (3) allowing providers to terminate services where expected revenues are not satisfied, and (4) exempting providers from replacing broken tablets.[303]

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295. *Id*.

296. *Id*.

297. *See, e.g.*, Surrett, *supra* note 20.

298. Prison wages are out of proportion with the price of tablets and their associated services. *See* Harris, Kielly & Jarvis, *supra* note 99 (detailing the costs of downloading songs, texting, and receiving photos on tablets); *see also Captive Labor: Exploitation of Incarcerated Workers*, ACLU (June 15, 2022), https://www.aclu.org/publications/captive-labor-exploitation-incarcerated-workers [https://perma.cc/PR4V-82HU]. Even where prison tablets are provided by the prison for free, the service providers recoup the cost through additional fees to use the various services and apps. *See* West, *supra* note 52.

299. Surrett, *supra* note 20.

300. *Id.*

301. *See* Raher, *supra* note 179.

302. 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/YU6Z-UCZM].

303. Finkel & Bertram, *supra* note 20.

This flow of financial harm runs contrary to the idea that prisons are affirmatively obligated to care for and provide for the individuals within their charge.[304] Adding private tablet service providers that provide the sole platform to access rights illegitimately displaces the state's burden of care, and perhaps unconstitutionally, shifts the cost of accessing civil liberties onto the most vulnerable.[305]

C. Failings of the Current Prison Paradigm

After considering the carceral- and population-level harms that can result from the misuse of tablets and indiscriminate data collection, this Section reflects on the failings of the current prison paradigm in the face of digital technologies. Tablets are increasingly more common in jails and prisons across the U.S. As such, this Section serves as an inflection point to recognize the limits of standard prison law before tablets become ubiquitous.

Digital tablets provide a unique platform that interacts with and provides individuals access to some of life's most fundamental connections. Tablets simultaneously provide service providers with an individual's most private information on a limitless scale. As shown by the vast array of legal issues raised by digitizing prison life, tablets serve many roles. Digital tablets inherently erode the traditional spatial and temporal limitations established in precedent, leaving the current prison paradigm incapable of grappling with the digital space. The legal issues discussed above test the principles of prison governance and question the legitimacy of governmental surveillance carte blanche. The broad reach of tablets underscores the deeply woven and inextricable connection incarcerated individuals maintain with those on the outside. This connection demands a reconceptualization of the prison paradigm where existing precedent fails to protect legitimate liberty interests that do not jeopardize penological interests.

In prior work, I have argued that many of the harms suffered by incarcerated individuals are different from nonincarcerated individuals.[306] As a result, incarcerated individuals are often treated differently than nonincarcerated individuals in order to fully grasp the harm they face.[307] For example, for the right to vote, although many incarcerated individuals are eligible to vote and are not affirmatively prohibited from voting, their incapacitation requires affirmative

304. *See* Zina Makar, *Detention, Disenfranchisement, and Doctrinal Integration*, 95 S. CAL. L. REV. 365, 391 (2021) (discussing instances in which the Court has found that the government owes an affirmative obligation to certain groups of individuals particularly where indigency impacts access to guaranteed rights); *see* Dolovich, *supra* note 292, at 892 (identifying the carceral bargain and carceral burden).

305. *See Who Pays?*, *supra* note 293.

306. *See* Makar, *supra* note 304, at 374–75.

307. *Id.* at 406-410.

assistance to access the ballot.[308] This restricted access is realized through a liberty-dignity lens (the integration of substantive due process to claims traditionally viewed through a standalone equal protection lens) that allows for a reconceptualization of the right to vote, as applied to incarcerated voters.[309]

The same applies to digital tablets in prisons. Although access to tablets and smartphones would likely never be deemed a protected interest for nonincarcerated individuals who can access alternatives to what each of these platforms provide, prisoners lack choice in rights-accessing platforms. Incarcerated individuals' inability to consent to their data collection and usage triggers different protections that are unique to their circumstances and legal status as prisoners.

Introducing technology in prisons is only in its nascent stages, so there is time to correct course and protect fundamental rights of prisoners and carceral-adjacent communities. Current scholarship on digital governance is predominantly focused on datafication — the conversion of information from individual data providers to a commodity applied across larger populations.[310] Much of society has already acquiesced to a digital life — embracing automation, collection, and storing personal information at the expense of privacy to benefit from the ease and convenience that accompany technological innovation.[311] But for prisoners, the calculus must necessarily be different. Before addressing problems of datafication within prisons, we must first approach the individual rights concerns that are unique to the digitization of the carceral life.

The following Part IV provides interventions to safeguard prisoners' and carceral-adjacent privacy interests at the carceral level, which have the added benefit of limiting future datafication implications at the population level.

IV. REGULATING DIGITAL CAPTURE

Digital tablets impact many aspects of an incarcerated individual's day-to-day experience with the carceral space. Unchecked, correctional officers are susceptible to weaponizing tablets against the very people the tablets were intended to help. Tablets can be used for surveillance,

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308. *Id.*

309. *Id.*

310. *See, e.g.*, Viljoen, *supra* note 278, at 631 (refocusing the problem of datafication as the illegitimate use of data towards unjust social relations).

311. *See, e.g.*, *Mobile Fact Sheet*, PEW RSCH. CENTER, https://www.pewresearch.org/internet/fact-sheet/mobile/ [https://perma.cc/82H4-88UY] ("nine-in-ten (91%) [of Americans] own a smart phone"); *Social Media Fact Sheet*, PEW RSCH. CENTER, https://www.pewresearch.org/internet/fact-sheet/social-media/ [https://perma.cc/82H4-88UY] (showing eighty-five percent of American adults report using YouTube and seventy percent report using Facebook).

or they can be used as a form of discipline for unrelated bad behavior. At this point, most prisoners, adjacent communities, correctional officers, and service providers would likely agree that banning tablets would be undesirable. This Part offers several interventions intended to address the multi-faceted harms that arise from the integration of digital technology in prisons discussed in Part III. In response to the overbreadth problem inherent in the surveillance of *all* tablet communications, Section IV.A draws upon recent developments in Fourth Amendment scholarship on digital searches to offer an alternative constitutional test that would require a closer fit between the regulation and the particularized penological interest at stake when it comes to digital surveillance. Section IV.B looks toward common law innovations and considers the possibility of adopting supplemental rights unique to prisoners and adjacent communities to limit the harms of capturing data from such a discreet and vulnerable population. Section IV.C considers alternative litigation strategies and proposes that prisoner-adjacent individuals are uniquely situated to serve as plaintiffs (or co-plaintiffs) to raise awareness of and challenge evolving issues stemming from overbroad prison policies. And finally, Section IV.D considers the potential for federal agency interventions where prisoners can be viewed as consumers that warrant a host of cybersecurity protections. This Section offers these interventions by engaging with various disciplines — including law and technology, consumer protections, and cybersecurity — to identify where interests in regulation may converge.

A. Scrutinizing Penological Interests as Applied to Digital Spaces

Unlike traditional searches that occur within the boundaries of the carceral space, there is so much that is unknown about the capabilities of digital surveillance technologies. Supreme Court precedent has identified legitimate penological interests where security or order are jeopardized by the physical entry of something within the carceral space. But even precedent urges there be a legitimate penological interest served through digital surveillance that goes beyond the prison walls. A prison would conceivably argue that surveillance helps to anticipate illicit activity based on communications.[312] But does that interest warrant analyzing *every* word typed or spoken? Does it warrant scanning in photos of family and friends to enter into a facial recognition repository? Does it mandate capturing the essence of one's voice, copying it and learning it? It is difficult to conceive of how these

312. Carceral institutions may have some interest in what happens outside of their walls. Investor white papers by tablet providers, like Securus, promote Location Based Services which includes providing correctional officers with access to real-time location data from a cellular caller. *See* Location Based Services White Paper, *supra* note 80.

forms of capture under the broader umbrella of surveillance pertain to any particularized or even imagined penological interest. Yet these are some of the question courts will soon be confronted with, and the questions can be infinite.

Digital searches in prisons are an issue of first impression for courts. Even if we accept that prisoners do not retain *any* reasonable expectation of privacy, the Supreme Court has always held that a prison must have a penological interest in its regulations[313] — the same must be true for its surveillance. And what of the expectations of privacy of those in society? The Supreme Court has never addressed whether a visitor has a constitutionally protected First Amendment right to privacy in their speech or Fourth Amendment right to privacy in the conversations they have with a prisoner in a prison visitation room.[314]

Fourth Amendment scholarship is rich with critiques of the mismatch between regulating the arbitrary and overbroad gathering of nonpublic information that exists in physical spaces versus the digital realm.[315] For example, Andrew Ferguson, who has written extensively about digital surveillance and privacy law, cast aside the reasonable expectation inquiry and instead proposed a digital "rummaging test" for Fourth Amendment searches.[316] This test is intended to fill holes that the reasonable expectation of privacy test could not contemplate and addresses the unique problems presented by the amplified scope of nonpublic information that can be harvested in digital spaces.[317] Ferguson proposes a simple inquiry to trigger his "rummaging test": is law enforcement seeking secured, nonpublic information in an "unparticularized or [an] overbroad manner?"[318] Though Ferguson does not extend his argument to the prison context, his test is uniquely versatile and resistant to the trappings of the existing prison paradigm and its exceptionalism.[319]

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313. Turner v. Safley, 482 U.S. 78 (1987).

314. *See* Lanza v. New York, 370 U.S. 139, 145 (1962) (setting aside the question of whether visitation rooms in prisons are immunized by the Fourth Amendment from unreasonable searches and seizures).

315. *See, e.g.*, David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 71–72 (2013) (arguing that the threshold Fourth Amendment inquiry should be "whether a technology has the capacity to facilitate broad and indiscriminate surveillance that intrudes upon reasonable expectations of *quantitative* privacy" (emphasis added)). *See generally* SOLOVE, *supra* note 23.

316. Andrew Guthrie Ferguson, *Digital Rummaging*, 101 WASH. U. L. REV. 1473, 1477 (2024) (describing the history of the Fourth Amendment).

317. *Id.*

318. *Id.*

319. As an initial matter, this Article proposes refining how penological interests can be better scrutinized to meet the complex privacy harms raised if courts analyze carceral surveillance as a Fourth Amendment search. Reconceptualizing the scope of First Amendment prisoners' rights protections for the digital space is a significant undertaking and is not within the scope of this Article and will be addressed in future works.

As the digital space reveals, its ability to capture individualized nonpublic information is vast and limitless. As described above, tablet service providers are constantly developing new technologies that will gather biometric data information about one's individuality and interiority — from voice scanning and identification metrics to large language pattern analysis.[320] This surveillance does not stop at the carceral-level but extends the panopticon of carceral surveillance beyond the prison walls to every single person with whom a prisoner communicates. As applied to prisons, Ferguson's initial question would equally remove the physical barrier of the prison wall and force a much more relevant and constitutionally sound question — what actualized penological interest does the prison have in capturing *all* prisoner and prisoner-adjacent data?[321]

An alternative inquiry that tailors the degree and nature of the surveillance to a particularized penological interest in the digital space has several benefits. First, it would not necessarily uproot existing prison precedent, such as *Palmer* or the *Safley* test, but temper its application to more accurately reflect its limitations to the spatial environment. Second, such a test has the ability to create generality in the law, which is an important virtue in itself.[322] For instance, lower courts have admitted their struggle in applying the *Martinez-Safley* dichotomy that permits deference-shifting based on incoming and outgoing messages to the digital space.[323] And finally, it serves a dignitary value because the test would create temporal limitations on how one's incarceration can be used against them and their adjacent networks.

B. Supplemental Rights in the Digital Era

Cynically, it is likely that some degree of data collection and retention will be inevitable, for both prisoners and adjacent individuals. But that does not mean that access to and use of this data should be left unchecked. Section IV.B proposes three prescriptive supplemental dignitary rights that address involuntary digitization at the carceral level and aim to limit population-level impacts. These three

320. *See supra* Section II.B.

321. Privacy and security interests are not mutually exclusive. Hudson v. Palmer, 468 U.S. 517, 542–43 (1984) (Stevens, J., dissenting) (arguing that however small the privacy interest is, it must exist: the difference between no privacy and even the smallest amount is the "difference between slavery and humanity," even for prisoners). The point is that the underlying principles of the Fourth Amendment (and First Amendment) were intended to safeguard individuals from arbitrary and overbroad government intrusion, having no particularized connection with a legitimate penological need.

322. *See, e.g.*, David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1229 (discussing the value of generality in trans-substantive applications of law).

323. *See* discussion *supra* note 198.

prescriptions include the right to know, the right to data erasure, and the right to be offline. These are certainly not the only supplemental rights that could be newly implicated by an expanding carceral panopticon, but they provide a starting point to address the growing privacy harms that are unique to prisoners and adjacent populations.[324] As discussed below, these rights are not intended to replace existing fundamental rights, but to supplement rights where their original application becomes altered and augmented through a digital platform in the carceral environment. Each of these supplemental rights further protects existing fundamental rights and simultaneously provides a direct response to the three key vectors of population-level digital capture discussed above.

1. The Right to Know

Prison tablet providers have access to immense amounts of data, and as discussed above, the data is not limited to the prisoner who uses the tablet but includes everyone who communicates with the prisoner. The collection and storage of prisoner and prisoner-adjacent data may be justified by prison security concerns in various instances.[325] However, legal precedent exacerbates these harms because the precedent suggests that prisoners lack any expectation of privacy, leading tablet providers to assume that prisoner-adjacent data can equally be intercepted and monitored.[326] Undeniably, security is a legitimate concern within prisons. But the proliferation of tablet usage across prisons nationwide makes the tension between generalized surveillance (implicating privacy interests) and genuine security concerns (penological interests) conspicuous, particularly given prisoner's inability to voluntarily consent when tablets are the sole platform for accessing many fundamental rights.

Creating a supplemental right to know counteracts the consequences of carceral consent described in Part III. To the extent that security is a concern, prisoners and carceral-adjacent individuals

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324. *See, e.g.*, Michele E. Gilman, *Five Privacy Principles (from the GDPR) the United States Should Adopt to Advance Economic Justice*, 52 ARIZ. ST. L.J. 368, 412–14 (2020) (discussing how the GDPR's privacy law framework promotes privacy protections for low-income and marginalized communities).

325. *See, e.g.*, Stephen Raher, *Data Privacy in Carceral Settings: The Digital Panopticon Returns to Its Roots*, 119 NW. U. L. REV. ONLINE 73, 90 (2024).

326. *Cf.* Hudson v. Palmer, 468 U.S. 517, 526 (1984) ("[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell.").

deserve a right to access their personal data. This right includes knowing what data has been collected and how it has been used.[327]

One justification for such a supplemental right is ensure consent to potential data collection and use is informed by increasing transparency. If the tablet is the primary platform to access constitutional rights, the right to know would allow incarcerated individuals and adjacent loved ones to make conscious decisions regarding how to protect their privacy interests. For example, some family members may choose to opt-out of video calling for fear of their every facial expression being converted into identifiable data points). A right to know can therefore add accountability to the service providers and carceral institutions by requiring transparency from the provider to prevent illegitimate uses of data that go beyond the providers' stated uses.[328] Further, although data is collected and stored by a private service provider, the information is collected for correctional officers.[329] Simply because a private service provider is involved does not exempt the government from transparency — particularly when dealing with a function as fundamentally public as incarceration.[330] The Freedom of Information Act already obligates government agencies to provide various kinds of information regarding the government's activities to public citizens upon request.[331] Given these democratic values of transparency, incarcerated individuals and their associations should be well within their rights to know how their data is being used by a carceral institution.[332]

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327. This right is somewhat akin to what European scholars suggest as a "right to know" or a "right to know the value of your data." *See generally* Gianclaudio Malgieri & Bart Custers, *Pricing Privacy: The Right to Know the Value of Your Personal Data*, 34 COMPUT. L. & SEC. REV. 289 (2017) (arguing that if individuals are shown the value of their data, they will have agency to protect their nonpublic information).

328. *See* Raher, *supra* note 179. In tracking and studying the uses of prison tablets, the Prison Policy Initiative offers best practices for implementation to address these concurrent security and privacy concerns. The Prison Policy Initiative argues that service providers should be under an obligation to not sell prisoner or prisoner-adjacent user information to third parties. This regulation would further protect privacy interests and prevent illegitimate uses of user data. At the present time, such limitations do not exist. But even if they did, while such a regulation may do something towards addressing privacy concerns, it does little to scrutinize the legitimacy of security concerns.

329. Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 187 (2000) (using the term "private dependence" to describe the government's reliance on private providers to perform essential functions).

330. *Id.* (discussing the function of private prisons).

331. Some scholars have argued that the right to know is synonymous with the first amendment. *See generally* Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"*, 72 MD. L. REV. 1 (2012) (arguing that the right to know is central to a representative democracy).

332. Complaint for Injunctive Relief, Knight First Amend. Inst. at Columbia Univ. v. Fed. Bureau of Prisons, No. 1:12-cv-6579 (S.D.N.Y 2021) (discussing concerns over the BOP's mail surveillance).

Recognizing the right to know as a supplemental right provides a nonburdensome and immediate safeguard to prisoners and their adjacent networks who fear they may be suffering from illegitimate surveillance. Further, public knowledge can be disseminated at the community level which can counteract some of the more subordinating effects of surveillance in already hyper-incarcerated communities.[333]

2. The Right to Data Erasure

As described above, service providers retain many benefits by having a captive population of subjects whose data can be captured for the purposes of AI-learning. This type of learning is not only illegitimately gained at the expense of the prisoner, but also results in data discrimination of prisoners and carceral-adjacent networks.[334] Here, the datafication of their lives is much different in scope and nature from those in society that have choices in the manner in which they interact with technology.[335] A supplemental right to data erasure[336] would therefore restore integral privacy rights in two key ways — (1) temporally limiting the storage of data to one's period of incarceration, and (2) actively restoring privacy protections upon reentry — where a security interest (or other penological interest) no longer exists.

First, using security interests as the relevant penological factor, there must logically come a time when the prison's security concerns become stale. Security concerns are the primary justification for collecting and storing data, but for those who reenter society and are no longer within the charge of the state, the formerly incarcerated individual presumably no longer poses an immediate security concern to the prison.[337] Once the security concern associated with a particular

333. *Cf.* Heidi Kitrosser, *Protecting Public Knowledge Producers*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (2022) (discussing the democratic role public knowledge producers play in the dissemination of information).

334. *See, e.g.*, Viljoen, *supra* note 278, at 581.

335. *Cf.* Jonathan Zittrain, *We Need to Control AI Agents Now*, ATL. (July 2, 2024), https://www.theatlantic.com/technology/archive/2024/07/ai-agents-safety-risks/678864/ [https://perma.cc/W69H-TPJJ] (analogizing the "time to live" concept from the Internet Protocol as a transitive framework that should be applied to the life of an AI agent to determine when the agent's role in passing data becomes stale).

336. The concept of data erasure is similar to the right to be forgotten which targets publicly available information. *See generally* Rosen, *supra* note 34. The problem that incarcerated and carceral-adjacent individuals suffer from is not *publicly* available information, rather information available to government actors, but more specifically, carceral actors. Data erasure is more encompassing than the right to be forgotten and advances the concept of a right to the erasure of all personal data that is unrelated to a penological interest.

337. Data erasure seems the most warranted when an individual reenters society. More difficult questions arise when determining whether individuals who are released (no longer within the spatial confines of a carceral facility) but remain on parole or probation should also

prisoner concludes, so too should the need for their data. It follows then that their data should be erased. Similarly, the application of data erasure should also extend to those who have communicated with a prisoner and whose data has also stored by association.

Second, and again, it is well understood that prisoners do not retain any expectation of privacy within the spatial confines of the carceral environment.[338] But surely the prisoner regains their right to privacy upon reentry into society.[339] The only way to restore the erosion of the right to privacy is to return the prisoner back to the state of privacy before which they entered the prison gates.

Service providers often have retention policies regarding how long they maintain records.[340] But retention can extend longer than the temporal limits of an individual's term of incarceration.[341] Beyond a regulatory retention policy, prisoners and their communities should retain a presumptive supplemental right to erasure to further ensure that their data will not subsequently flow to and result in future unjust social associations.[342]

To be clear, data erasure differs from digital expungement. Scholars have critiqued issues with regard to the limited functionality of expungements, identifying the complicating nature of data, and how even an expungement cannot remove data that makes its way publicly onto the internet.[343] The digital expungement of one's criminal record

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have a right to data erasure. The spatial limitations inherent in prison law would theoretically militate against retaining the information data. As applied to parolees, the Court has held that such individuals have a limited Fourth Amendment expectation of privacy and as a result can be subject to suspicionless searches, ultimately like prisoners. Samson v. California, 547 U.S. 843, 846–47 (2006). Scholars have criticized cases like *Samson* as an illegitimate form of punitive surveillance. *See, e.g.*, Weisburd, *supra* note 137, at 160–86. The status of a parolee or probationer — an individual at liberty but still serving a sentence — presents a unique problem in the context of digital surveillance and raises significant concerns as to the carceral state's ability to continue surveillance into private homes and those who associate with a carceral-adjacent individuals.

338. *See* Hudson v. Palmer, 468 U.S. 517, 525–26 (1984). The Supreme Court has never held whether *Palmer* extends to the digital space and, further, whether prisons can engage in digital capture when no particularized and legitimate security interest can be articulated.

339. *See, e.g.*, Weisburd, *supra* note 137 (describing the punitive nature of surveillance models that exist outside of prisons for those on pretrial release, probation, or parole).

340. *See, e.g.*, STATE OF COLORADO DEPARTMENT OF CORRECTIONS CONTRACT WITH GLOBAL TEL*LINK CORPORATION 6 (July 15, 2015), https://static.prisonpolicy.org/scans/Colorado_DOC_TabletContract.pdf [https://perma.cc/9WCF-FBY9] (establishing a three-year retention period after the termination of the service provider's contract).

341. *Id.*

342. *Cf.* Viljoen, *supra* note 278, at 631.

343. *See, e.g.*, Itay Ravid, *The Right to Social Expungement*, 60 AM. CRIM. L. REV. 347, 347 (2023) (recognizing "the right to social expungement" and arguing that the right to expungement includes the right of individuals "to have stories about their past interaction with the criminal legal system removed from media websites."); Eldar Haber, *Digital Expungement*, 77 MD. L. REV. 337 (2018); Sarah E. Lageson & Alessandro Corda, *Chasing a Clean Slate: The Shifting Roles of Privacy and Technology in Criminal Record Expungement Law and Policy*, 38 HARV. J.L. & TECH. 1, 43 (2024).

only provides a remedial harm at the individual level. A right to data erasure — including one's record and every piece of data associated with that individual while incarcerated — removes key pieces of data that algorithms build their pattern-analysis upon,[344] with the potential to encourage "unlearning" and reverse the effects of subordinating data repositories.

3. The Right to be Offline

If tablets become the predominant platform to access and enjoy civil liberties, then prisoners should be able to elect whether they wish to be "online."[345] At minimum, prisoners and adjacent networks should be able to decide how to express their right to communicate, whether it be by letter, phone, in-person visit, or otherwise. A supplemental right to stay offline uniquely undercuts the monopolistic nature of tablet service providers that act as the sole provider of services.[346] This right also further reduces the harms of shifting the financial burden and exploitation of carceral-adjacent communities that comes with coerced consent.[347]

There are also a number of practical reasons that make alternatives to tablets necessary for prisoners. For example, tablets often break, service providers have connectivity outages, and individuals with disabilities often cannot use the low-grade tablets.[348] Retaining traditional platforms of accessing rights — like paper mail, access to unit phones, physical law libraries, etc. — are essential to prevent against rights infringements.[349]

And finally, there are some individuals who may choose not to use a tablet. Providing meaningful alternatives gives prisoners agency to shape the way their rights are impacted, particularly where the government does not have a legitimate penological interest in regulating those rights.[350]

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344. *See, e.g.*, Matt Burgess & Reece Rogers, *How to Stop Your Data from Being Used to Train AI*, WIRED (Apr. 10, 2024), https://www.wired.com/story/how-to-stop-your-data-from-being-used-to-train-ai/ [https://perma.cc/WFW9-TQ2T].

345. *Cf.* David Gray, *A Right to Go Dark (?)*, 72 SMU L. REV. 621, 625 (2019).

346. *See supra* Section III.B.3.

347. *See* FED. COMMC'N COMM'N, FACT SHEET: IMPLEMENTATION OF THE MARTHA WRIGHT-REED ACT 13 n.79 (June 27, 2024), https://docs.fcc.gov/public/attachments/DOC-403539A1.pdf [https://perma.cc/DG7A-7KK4] (describing the ways in which tablet service providers hold a monopoly over all prisoner communications) [hereinafter IMPLEMENTATION OF THE MARTHA WRIGHT-REED ACT].

348. *See supra* Section II.A.

349. *See* Raher, *supra* note 179 (arguing that existing services must stay in place in the event of tablet failure).

350. *Cf.* Viva R. Moffat, *The Free Exercise of Copyright Behind Bars*, 80 WASH. & LEE L. REV. 741, 741–42 (2023) (describing the right of copyright as intangible, giving prisoners the ability to make decisions regarding what happens to their work).

C. Prisoner-Adjacent Litigation

To the extent that *Safley* remains the law of the land in the digital prisoner space, legal advocates should look towards other modes of litigation and turn their attention to prisoner-adjacent litigants. Though *Safley* has eroded the rights of prisoners in the carceral environment, courts would likely rebuke the idea of extending prison law to broader society, particularly around issues of digital privacy.[351] Changing the narrative lens may help reconceptualize the harm faced both by prisoners and adjacent networks. Some public defense and civil rights organizations have already taken this approach.

For example, the Bronx Defenders filed a seventy-four-page lawsuit against the New York State Department of Corrections ("NYSDC") on April 15, 2024, naming currently incarcerated and nonincarcerated community members who communicated with incarcerated individuals in Rikers as plaintiffs.[352] On behalf of the community members, the lawsuit raised two specific causes of action.[353] The first claimed a violation of the right to be free from unreasonable searches and seizures based on the reasonable expectation to privacy in their data.[354] The second argued that NYSDC violated the community members' civil rights by providing tablet service provider Securus with their voice recordings that generated voiceprints that the tablet provider used for AI-learning.[355]

Similarly, on March 15, 2024, Civil Rights Corps filed an eighty-nine-page complaint against Genesee County, Michigan and GTL (ViaPath's prior name) on behalf of nonincarcerated children within the community who were prohibited from visiting incarcerated parents due to the County's ban on in-person family visits in lieu of virtual visits.[356] Civil Rights Corps refers to this litigation as part of their Right2Hug campaign.[357] Their cause of action is grounded in Michigan's constitutional right to family integrity and familial association.[358] Included in their lawsuit is a claim that the Family Visitation Ban, implemented in concert with GTL, exploits families "desperate to stay

351. *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 134 (2003).

352. Reid v. N.Y. Dep't of Corr., No. 0806245/2024 (N.Y. Sup. Ct. Apr. 15, 2024).

353. *Id.* The lawsuit includes eight causes of action on behalf of either incarcerated individual, community members, or both. The two causes of action referenced here are specific to the community members alone.

354. *Id.*

355. *Id.*

356. Class Action Complaint & Demand for Jury Trial, S.L. v. Sheriff Christopher Swanson, No. 2024-120601 (7th Cir. Ct. Mar. 15, 2024).

357. Civil Rights Corps, *Flint, Genesee County, MI: Right2Hug*, CIV. RTS. CORPS, https://civilrightscorps.org/case/flint-michigan-right2hug./ [https://perma.cc/6MR7-UDU9].

358. Class Action Complaint & Demand for Jury Trial, *supra* note 356, at 6.

in touch with their jailed loved ones" as part of a broader business strategy to increase profit revenues.[359]

Beyond the two examples provided, prisoner-adjacent litigation can serve as a powerful tool for addressing broader issues of information privacy and civil rights in the context of incarceration. By broadening the scope to include nonincarcerated individuals who are affected by carceral systems, legal advocates can challenge the efficacy of tests like *Safley* outside of the carceral space. This approach can help shift the focus from solely protecting prisoners' rights to also defending the privacy and rights of family members, loved ones, and others connected to those incarcerated. Litigation in this space can highlight the economic and social exploitation of families, address concerns about technological abuse, and push for stronger protections in carceral spaces. As harms of tablet abuse become more widely recognized by courts, they have the potential to redefine the scope of prison law.

D. Prisoners as Consumers

Given where prison law precedent lies, perhaps reconceptualizing constitutional scrutiny or recognizing supplemental rights for prisoners may not be a priority for courts and, similarly, prisoner-adjacent litigation might be long and uncertain. Nevertheless, other interventions may exist. Thus far this Article has challenged the dominant premise that prisoners' rights can be disentangled from society. As such, this Article urges that prisoners and society are more connected than the law lets on. And like those who are nonincarcerated, prisoners are also consumers.[360]

As discussed above, through their tablets, prisoners engage in making purchases such as purchasing items for the commissary or purchasing services on their tablets. Simply because the state has embraced and supported prisoners taking on the role of consumers — bringing in private companies that contract with prison, and allowing prisoners to buy their own tablets and pay for books and movies — does not mean that the service provider should be able to walk away without an obligation to its ultimate consumers. As such service providers should be subject to agency regulations.[361]

By contracting with tablet service providers, prisons are stepping into a world of pre-existing agency regulation that does not discriminate against individuals based on their legal status in the same

359. *Id.* at 58.

360. *See, e.g.*, Anna VanCleave, *Prison Banking*, 112 CALIF. L. REV. 1699, 1702 (2024); Stephen Raher, *The Company* Store *and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3 (2020).

361. *Id.*

way that courts have with rights infringements.[362] From FCC oversight that seeks to prevent anticompetitive and unjust calling payment schemes to FTC oversight requiring risk assessments of cyber practices, these agencies have the authority to regulate tablet service providers and curb the consequences of digital capture.

The following describes current agency efforts and proposes novel points of interest that federal agencies may have in overseeing and regulating prisons and tablet service providers in the future.[363]

1. Regulating Telecommunications

Financial exploitation of communications services by tablet providers have recently come under fire by lawmakers and agencies. For example, in 2018, Senator Ron Wyden reported abusive practices by cellular carriers that allowed Securus to pay for location data and provide it to correctional officers.[364] The FCC, which regulates interstate communications, investigated this report and issued fines against AT&T, Verizon, Sprint, and T-Mobile for selling real-time location data to Securus, who then provided the data to law enforcement.[365]

Subsequently, the Martha Wright-Reed Just and Reasonable Communications Act was enacted and expanded the FCC's authority and mandated that the FCC regulate all prison phone and video calls and also authorized the FCC to set reasonable rates for inter- and intrastate communication.[366] Pursuant to this new congressional authority, on July 18, 2024, the FCC unanimously voted to cap *all* pricing across jails and prisons for incarcerated individuals.[367] Prior to the passage of this act, the FCC only regulated twenty percent of phone

362. *Cf.* Friedman & Citron, *supra* note 25, at 22–23 (discussing that the Privacy Act of 1974 created a law enforcement exemption that applied to criminal databases with the understanding that future laws would regulate these specialized databases)

363. This list is not intended to be exhaustive but a mere example of ways in which digital tablets may trigger consumer rights for prisoners.

364. Wyden, *supra* note 87; *see also* Valentino-DeVries, *supra* note 251.

365. FED. COMMC'N COMM'N, FCC FINES AT&T, SPRINT, T-MOBILE, AND VERIZON NEARLY $200 MILLION FOR ILLEGALLY SHARING ACCESS TO CUSTOMERS' LOCATION DATA (Apr. 29, 2024), https://docs.fcc.gov/public/attachments/DOC-402213A1.pdf [https://perma.cc/5TV3-5D6S].

366. Wagner & Bertram, *supra* note 48.

367. FED. COMMC'N COMM'N, FCC CAPS EXORBITANT PHONE & VIDEO CALL RATES FOR INCARCERATED PERSONS & THEIR FAMILIES (July 18, 2024), https://docs.fcc.gov/public/attachments/DOC-404087A1.pdf [https://perma.cc/KGK4-PE29] ("Under the new rules, the cost of a 15-minute phone call will drop to $0.90 from as much as $11.35 in large jails and, in small jails, to $1.35 from $12.10."); *see also* IMPLEMENTATION OF THE MARTHA WRIGHT-REED ACT, *supra* note 347, at 5–13 (discussing reform efforts to existing prison communications pricing schemes).

calls.[368] These regulatory initiatives were also supported by other agencies, including the DOJ.[369]

2. Regulating Data Privacy

Prisoners are also bank customers.[370] Incarcerated individuals are given access to "inmate trust accounts."[371] These accounts are similar to bank accounts which allow third parties to make deposits on behalf of incarcerated individuals in order to pay for apps on their tablets or purchase commissary items.[372] And like a bank account, inmate trust accounts can be held by public or FDIC-insured private financial institutions.[373] As prisons seek to centralize many day-to-day services onto tablets like communication, education, and entertainment, they have also centralized banking services.[374]

Enter the world of e-banking regulations. The Gramm-Leach-Bliley Act ("GLBA") imposes data protection obligations on financial institutions to protect consumers from financial institutions sharing their nonpublic personal information ("NPI") with third parties.[375] GLBA prohibits financial institutions from sharing NPI with non-affiliated third parties unless they first provide the consumers with notice and an opportunity to opt-out.[376] Pursuant to these regulations, GLBA imposes a "Safeguards Rule" that requires the financial institution to conduct a risk assessment of potential threats that may result in the unauthorized access to NPI.[377]

Inmate trust accounts are held in Trust Fund Wide Area Networks ("WAN").[378] Thus, the account custodian can be a local financial

368. Azani Creeks, *American Securities Fails to Sell Prison Telecom Company ViaPath*, PRIV. EQUITY STAKEHOLDER PROJECT (Oct. 23, 2023), https://pestakeholder.org/news/american-securities-fails-to-sell-prison-telecom-company-viapath/ [https://perma.cc/AZ2S-WCQT].

369. *See e.g.*, *Ex Parte Submission Incarcerated People's Communications Services, Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC WC Docket No. 23-62 (Apr. 29, 2024), https://www.justice.gov/opa/media/1349941/dl?inline [https://perma.cc/9FBJ-DWZF].

370. VanCleave, *supra* note 360, at 1699.

371. *Id.* at 1702.

372. *Id.* at 1722.

373. *See, e.g.*, WASH. DEP'T OF CORR. POL'Y, DOC NO. 200.000 I.a. (2024) (requiring that individuals' funds be held at a local bank and that the funds "be maintained in: 1. An authorized Federal Deposit Insurance Incorporation (FDIC) financial institution checking account. 2. Non-interest bearing accounts. 3. The Trust Accounting System (TAS)); Cal. Penal Code § 5008 (authorizing Secretary of the California Department of Corrections and Rehabilitation to pool incarcerated individuals' funds "for the purpose of deposit or investment").

374. VanCleave, *supra* note 360, at 1716–18.

375. *See* CONG. RSCH. SERV., DATA PROTECTION LAW: AN OVERVIEW 9 (2019).

376. *See id.*

377. *See id.* at 9 n.77.

378. Inmate Commissary Account Deposit Procedures, 69 Fed. Reg. 40315, 40315 (July 2, 2004).

institution typically within the spatial proximity of the prison, and as a financial institution it is arguably subject to the regulations of GLBA.[379] It follows then that these financial institutions have a congressionally mandated affirmative obligation to conduct a risk assessment of the tablets used within the prison and their service providers as to what data they capture regarding the prisoner and those who deposit funds on their behalf into the trust accounts.[380] If the service provider can see everything that the prisoner or prisoner-adjacent depositor is doing at all times, that would be a plausible violation of the GLBA safeguarding standard, which is a serious privacy and security breach. Permitting this type of surveillance would be analogous to a bank allowing a third-party vendor to monitor every transaction of a customer without any privacy protections in place, in clear violation of financial privacy laws.[381]

Prisons might argue that they have an interest in monitoring commissary activity for the purposes of illegal funds entering into prisons. It is an open question as to whether prisoners have an absolute or limited protected privacy interest under GLBA. But arguably a prisoner-adjacent individual who deposits funds into a commissary account has a claim under GLBA.

At the least this demonstrates that perhaps courts are not the best venue for taking seriously the concerns raised in the context of digitized prison services, and agencies may be better poised to address the evolving standards of digital safeguarding. Consider *Montgomery v. Conrad*, where the district court dismissed a plaintiff's breach of contract claim when he raised an issue regarding a breach of security and illegal access to his commissary account.[382] The plaintiff alleged that an unauthorized transfer of money had taken place in his commissary account.[383] The plaintiff reported the theft to correctional officials, but the officials refused to investigate or assist in the matter.[384] The court held that prisoners are only third-party beneficiaries of the contract between Securus Technologies and the prison and dismissed the case.[385]

Perhaps the court was not the correct venue for this issue. In this case, and under GLBA, the prisoner could be considered the ultimate consumer to the contract. Instead, a complaint should have been filed

379. VanCleave, *supra* note 360, at 1726 (citing to recent interpretations by the federal government holding that prisoner bank accounts should be treated analogous to real trust accounts, which are accompanied by fiduciary obligation to hold these funds).

380. CONG. RSCH. SERV., *supra* note 375, at 9.

381. *Id.*

382. Montgomery v. Conrad, No. 21-CV-00820, 2022 WL 509111, at *2 (M.D. Tenn. Feb. 18, 2022).

383. *Id.*

384. *Id.*

385. *Id.*

with the FTC or the Consumer Financial Protection Bureau, both of which have investigative obligations under GLBA.[386]

Though it would require a separate paper to catalog the various interests that other agencies may have in regulating tablet use in prisons,[387] it is worth mentioning that the FTC is no stranger to regulating security breaches by tablet service providers. This agency recently finalized an order against GTL and mandated that GTL abide by a specific retention period for which it may store certain data affecting incarcerated persons.[388]

* * *

Although tablets offer a window into accessing existing fundamental rights, their ability to capture, aggregate, and weaponize private data is deeply consequential and uniquely impacts a discreetly vulnerable population. The interventions discussed above are preliminary and are not intended to create an exhaustive list but demonstrate how tablets generate the need for reconceptualizing the current prison paradigm and breaking away from prison law's spatial divide.

V. CONCLUSION

The integration of digital tablets has unlocked a prisoner's ability to reveal their inextricable connection with society — one that has

386. Memorandum, Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority* (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/Y6ZE-DFW3]; CONSUMER FINANCIAL PROTECTION BUREAU, *INVESTIGATORY AUTHORITY*, https://www.consumerfinance.gov/enforcement/investigatory-authority/ [https://perma.cc/5K3S-YJ9B].

387. Other agency regulators may have interests intersecting with the regulation of prison tablet providers. For example, if a tablet provider is a 10-K filer, like Securus, the provider may be subject to the Security and Exchange Commission's new Cyber Security Disclosure Rule that requires disclosures and reporting to customers where there has been a cyber-incident resulting in a data breach. *See* Securus Technologies, Inc., Annual Report (Form 10-K) (Mar. 31, 2006), https://www.sec.gov/Archives/edgar/data/1320051/000095014406003085/g00538e10vk.htm [https://perma.cc/3FRK-ZAR8]; Julia Lapitskaya, Michael Titera & Stephenie Handler, *Cybersecurity Disclosure Overview: A Survey of Form 10-K Cybersecurity Disclosures by S&P 100 Companies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 9, 2025), https://corpgov.law.harvard.edu/2025/01/09/cybersecurity-disclosure-overview-a-survey-of-form-10-k-cybersecurity-disclosures-by-sp-100-companies/ [https://perma.cc/8RXZ-YBRE]. The U.S. Sentencing Commission may similarly wish to administer guidance on how tablets should be used for the purposes of rehabilitation. For additional policy recommendations, *see* Raher, *supra* note 325, at 90 (describing current legal avenues of challenging data privacy including common law tort and property actions).

388. *See generally* Complaint, Global Tel*Link Corp., FTC File No. 2123012 Docket, No. C-4801 (Feb. 23, 2024) (ordering respondents to delete information retained longer than two years and to document legitimate business purpose for the retention of data). As a note, the FTC could plausibly implement a data erasure obligation on tablet providers similar in kind to the supplemental right to data erasure described above. *See supra* Section IV.B.2.

always been present — in an unprecedented way. But it has simultaneously exposed the failings of the current prison paradigm and the ease of which the law has allowed the most vulnerable in our society to be so quickly preyed upon by profiteering private parties. There is still much to learn about how prisons are integrating tablets into their current disciplinary structure. And courts are still in the early stages of grappling with challenges to tablet regulations and understanding the centrality of access to rights that tablets provide for prisoners.

There is still an opportunity to get things right for prisoners and their loved ones. This Article is the first in a longer series and serves as a foundational overview to entice prison, technology, and privacy law scholars as well as regulators and legal advocates to engage with this interdisciplinary domain of law. This project also hopes to provide a basis for courts to seriously reconceptualize the dominant conception of prisoners' rights and view prisoners as one with larger society.