

## PRISON BANKING

*Abstract*

People in prison have no choice but to use the banking systems that prisons operate. Rather than use any outside bank account or have family or friends meet their daily needs directly, people in prison must rely on what are often called “inmate trust accounts” to pay for goods and services within the prisons. These accounts have long been vulnerable to asset seizure by the prisons that run them. The money in these accounts comes from prison wages and deposits by friends and family members of incarcerated people, and prisons take this money in a variety of ways: Prisons impose fees for a wide variety of services (like making a phone call, receiving mail, participating in educational programming or treatment, or even using the banking system itself), sell commissary items at highly marked up prices, impose fines as punishment for disciplinary infractions, divert the money at the behest of courts and criminal system agencies to pay other fines and fees, and collect the interest from the pooled accounts. Sometimes prisons seize large portions of a person’s inmate trust account balance under the rationale that the individual owes the prison system for their daily room and board. Sometimes, the money simply disappears as a result of embezzlement or error.

In 2021, the problems inherent in prison management of individuals’ money became apparent when COVID stimulus checks intended for incarcerated people began disappearing from their accounts. Prisons and jails offered a variety of rationales, and some individuals raised legal challenges, but few questioned the basic authority of prisons to disburse money to themselves and other government entities, or the legitimacy of the prison banking system overall.

Prison systems have a significant conflict of interest in managing these banking systems, and the accounts are subjected to little transparency and oversight. Statutory and administrative regulation of these accounts is minimal, compared to the tightly controlled regulation of money management in the free world. Given the direct access that prisons have to these accounts, and the ease with which they can seize funds, prison bank accounts are a site of substantial wealth extraction, often with the blessing and penological deference of the courts.

This article examines the history and legal status of inmate trust accounts and the vulnerability of these funds. The article places prison banking within the broader landscape of racialized wealth extraction through the criminal system and challenges the assumption that prisons and jails should be permitted to operate a low-transparency banking system over which they have exclusive control, are subjected to little regulation, and act with a high degree of conflict of interest.

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PRISON BANKING  
by Anna VanCleave<sup>1</sup>

“It is the duty of the master of a work-house to furnish a prisoner therein with food; and the earnings of such prisoner are a fund in the hands of the master for his remuneration.”

-Washburn v. Belknap, Connecticut Supreme Court (1821)<sup>2</sup>

I. Introduction

When federal lawmakers passed the CARES Act and the government sent stimulus checks to 162 million Americans,<sup>3</sup> the recipients included people in prison.<sup>4</sup> Despite efforts by federal officials to claw back checks sent to people in prison,<sup>5</sup> a federal district court ordered the IRS to continue making those payments to incarcerated people and to take steps to facilitate the process.<sup>6</sup>

On purely economic grounds alone, sending stimulus checks to people in prison made sense. People in prison, despite being in a physically closed and isolated environment, are deeply intertwined with the economy. They receive financial support from family and friends on the outside, and they constitute a captive market for the prison vendors that provide—usually at highly inflated charges—their food, their medical care, their phone calls,

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<sup>2</sup> 3 Conn. 502, 502 (Conn. 1821).

<sup>3</sup> Internal Revenue Service, *SOI Tax Stats – Coronavirus Aid, Relief, and Economic Security Act (CARES Act) Statistics: First Round Economic Impact Payment Statistics* (June 15, 2022) (available at <https://www.irs.gov/statistics/soi-tax-stats-coronavirus-aid-relief-and-economic-security-act-cares-act-statistics#EIP3>).

<sup>4</sup> Rebecca Boone, *U.S. Inmates Got Virus Relief Checks, and IRS Wants Them Back*, PBS NEWS HOUR (June 24, 2022, 2:21PM), <https://www.pbs.org/newshour/economy/u-s-inmates-got-virus-relief-checks-and-irs-wants-them-back> (noting that the law did not explicitly exclude people in prison).

<sup>5</sup> *Id.* See also Jordan Michael Smith, *Prisoners Face “Undue Punishment” as the IRS Claws Back Their Stimulus Checks*, THE APPEAL (June 8, 2020), <https://theappeal.org/prisoners-stimulus-checks/>.

<sup>6</sup> *Frequently Asked Questions About CARES Act Relief for Incarcerated People*, LIEFF, CALABRASER, HEIMANN & BERNSTEIN LLP, [https://www.lieffcabraser.com/pdf/CARES\\_CASE\\_FAQ.pdf](https://www.lieffcabraser.com/pdf/CARES_CASE_FAQ.pdf).

their internet access, their soap, their clothes, their radios, their deodorant, and even, sometimes, their water.<sup>7</sup> Families go into debt to pay costs and support the daily needs of relatives in prison,<sup>8</sup> and financial support to incarcerated people therefore translates to much-needed economic relief for their families. In short, like individuals who received stimulus payments across the country, people in prison are economic actors as consumers and household members, and like much of the country, they are chronically in need of money to meet their daily needs.<sup>9</sup>

But unlike many recipients of CARES Act payments and the two stimulus checks that followed, people in prison had little choice about where or how to deposit and manage these funds. Prison policies make it virtually impossible to store money or make purchases without relying on what are known as “inmate trust accounts.”<sup>10</sup> These accounts look something like bank accounts to people in prison: Their prison wages are deposited in these accounts, and when family members “put money on the books” for loved ones, the funds go directly into these inmate trust accounts; people in prison draw on these accounts to buy commissary items, pay for prison medical care, make phone calls, and more.<sup>11</sup> But unlike bank accounts, inmate trust accounts operate under the authority of prison administrators.<sup>12</sup> While non-incarcerated individuals control the funds in their own bank accounts or in their own cash reserves, people in prison must rely on the use of trust accounts over which they have little control except that which is granted to them under prison policies.<sup>13</sup>

Legally, the governmental entities overseeing prisons are tasked with administering these government-run accounts.<sup>14</sup> Practically, it is the individuals within departments of corrections and jail administrations, at all levels of these agencies—from correctional officers to staff members who run commissary and prisoner accounts offices to the sheriffs, directors, and commissioners making decisions and setting policies about the use of the

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<sup>7</sup> Stephen Raher, *Since You Asked: Should Incarcerated People Be Receiving Stimulus Payments?*, PRISON POLICY INITIATIVE (May 18, 2020), <https://www.prisonpolicy.org/blog/2020/05/18/checks/>.

<sup>8</sup> One study found that more than one-third of families with relatives in prison go into debt to support them and pay for phone calls and visits. *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CENTER FOR HUMAN RIGHTS, (September 2015), <https://www.whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf>.

<sup>9</sup> See *id.*

<sup>10</sup> “The funds are held by the correctional facility in a pooled deposit account, typically referred to as an “inmate trust account.” Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L. J. 3, 11 (2020); Sean Kolkey, *People over Profit: The Case for Abolishing the Prison Financial System*, 110 CAL. L. REV. 257, 269 (2022).

<sup>11</sup> N.Y. DEP’T OF CORR. & COMM’Y SUPERVISION, ACCOUNT DEPOSITS, <https://doccs.ny.gov/account-deposits>.

<sup>12</sup> See *infra*, Section II.b.

<sup>13</sup> See *infra* Section II.

<sup>14</sup> See *infra* Section II.b.

funds, fees for services, and contracts with vendors—who control when, how, and to what degree people in prison can access and spend their money.<sup>15</sup> Unlike bank accounts or trust accounts in the free world, inmate trust accounts are not highly regulated, they receive little external oversight, and they are not managed by individuals who act with a fiduciary obligation toward the people for whom these accounts exist.<sup>16</sup>

It should not have been surprising then that the large volume of economic stimulus funding to people in prison resulted in large-scale seizures by state and local governments.<sup>17</sup> Across the country, stimulus funds intended for people in prison simply disappeared before hitting their inmate trust accounts.<sup>18</sup>

The justifications for seizing and diverting funds varied. For example, although the CARES Act, on its face, clearly allowed for payments to people in prison, “the State of Arkansas did not consider that a wise use of federal taxpayer funds.”<sup>19</sup> Within weeks, Arkansas legislators passed a law permitting the state to seize the entirety of the federal relief checks<sup>20</sup> sent to prisons, divert any funds owed for “court fines, fees, costs, or restitution,”<sup>21</sup> and retain the rest to be deposited in equal amounts into an “inmate welfare fund” and the prison’s general operating fund.<sup>22</sup> In March 2022, a federal court ruled that the seizure of funds to pay court fines, fees, costs, and restitution was lawful but that diverting the remaining funds into prison accounts violated the Takings Clause of the Constitution.<sup>23</sup>

Other states found legal loopholes for seizing funds. In Michigan, for example, prisons seized entire checks to satisfy “institutional debts” to the

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<sup>15</sup> See IDAHO DEP’T OF CORR. STANDARD OPERATING PROCEDURE 114.03.03.011 2-7 (2016) (listing individuals involved in processing inmate trust account transactions, including administrative financial officers, mailroom officers, financial technicians, and receptionists).

<sup>16</sup> See Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L. J. 1385, 1415-1417 (2022).

<sup>17</sup> *Justice-Involved Individuals and Marketplace*, CONSUMER FIN. PROT. BUREAU (Jan. 31, 2022), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_jic\\_report\\_2022-01.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf); Joseph Neff & Keri Blakinger, *Prisoners Won the Right to Stimulus Checks*, MARSHALL PROJECT (October 21, 2020, 3:00PM), <https://www.themarshallproject.org/2020/10/21/prisoners-won-the-right-to-stimulus-checks-some-prisons-are-standing-in-the-way>.

<sup>18</sup> CONSUMER FIN. PROT. BUREAU, *supra* note 17; Asher Stockler & Daniel Moritz-Rabson, *Prisons Are Skimming Chunks Off Cares Act Stimulus Payments*, THE INTERCEPT (Feb. 17, 2021, 11:57AM), <https://theintercept.com/2021/02/17/stimulus-checks-cares-prisons-skimming-irs/>; Joseph Neff & Keri Blakinger, *supra* note 17.

<sup>19</sup> *Hayes v. Graves*, No. 4:21-CV-00347-LPR, 2022 WL 822881, at \*2 (E.D. Ark. Mar. 16, 2022).

<sup>20</sup> The law applied to subsequent federal stimulus payments as well, and so checks distributed under the Consolidated Appropriations Act, Pub. L. 116-260, 134 Stat. 1182 (2020) and the American Rescue Plan Act, Pub. L. 117-2, 135 Stat. 4 (2021) were also seized. See *Hayes v. Graves*, No. 4:21-CV-00347-LPR, 2022 WL 822881, at \*3 (E.D. Ark. Mar. 16, 2022).

<sup>21</sup> *Hayes*, 2022 WL 822881 at \*2.

<sup>22</sup> *Id.* The “inmate welfare fund” is defined as “a special fund to be administered and used ... for the general benefit of the inmates....” *Id.*

<sup>23</sup> *Id.*

prison itself.<sup>24</sup> One individual filed suit, alleging that prison officials had convinced him to apply for stimulus funds but then took the check that he planned to use to pay for “medical co-pays, hygiene products, clothing, over-the-counter medications, stamps, pens, pencils, paper, and supplemental food.”<sup>25</sup> But under Michigan law, “institutional debts” include a per diem cost of incarceration itself, and everything that entails—prison buildings, staff, food, medical care, transportation, and more.<sup>26</sup> In other words, people in Michigan prisons owe the entire per capita cost of their incarceration, and so for most or all prisoners, recovering that debt could deplete entire savings—and certainly an entire federal stimulus check.<sup>27</sup> Unlike the Arkansas law, Michigan’s seizure of payments was at least ostensibly intended to cover a prison debt. A federal court therefore upheld the practice.<sup>28</sup>

Arkansas and Michigan were not alone in their efforts to seize stimulus money. Prisons and jails across the country withheld significant sums of money from the checks sent directly to the prisons. In many circumstances, prisons and jails justified taking funds on the grounds that the individuals owed money for fees incurred for services and products while in prison, for fines and fees associated with the individuals’ convictions, or, as in Michigan, to reimburse the government for the cost of incarceration.<sup>29</sup> One public defender described a stack of about fifty letters from people in prison with complaints about garnishment. She told a reporter that, on average, people were seeing about 50 or 60 percent of their stimulus checks taken by the prison or jail.<sup>30</sup>

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<sup>24</sup> Moore v. Washington, No. 1:20-CV-1184, 2021 WL 508304, at \*4 (W.D. Mich. Feb. 11, 2021). See also Angie Jackson, *Why Michigan Is Trying to Take Some Prisoners’ Stimulus Checks*, DETROIT FREE PRESS, Apr. 14, 2021, <https://www.freep.com/story/news/local/michigan/2021/04/14/michigan-prisoner-stimulus-checks-covid-coronavirus/4818300001/>. Although Michigan law does not specifically permit direct seizure from an inmate trust account and the state Attorney General indicated that garnishments were occurring through a judicial process, Moore’s complaint suggests that the funds were taken directly from his inmate trust account. See Complaint, Moore v. Washington, No. 1:20-CV-1184, 2021 WL 508304, at \*3 (W.D. Mich. Dec. 10, 2020) (“Payment were garnished, recouped by design by M.D.O.C. using a policy directive to reimburse in 100% percent [sic] for debts to further his destitute state. . .”).

<sup>25</sup> Moore v. Washington, No. 1:20-CV-1184, 2021 WL 508304, at \*1 (W.D. Mich. Feb. 11, 2021).

<sup>26</sup> See MICH. COMP. LAWS ANN. § 800.401a(b) (West).

<sup>27</sup> See Jackson, *supra* note 24 (quoting incarcerated person who said, “The amount of money that they’re going after in my case is like peanuts. . . . [I]t’s not like I’m holding money in the Cayman Islands.”).

<sup>28</sup> Moore, 2021 WL 508304 at \*4.

<sup>29</sup> Stockler & Daniel Moritz-Rabson, *Prisons Are Skimming Chunks Off Cares Act Stimulus Payments*, THE INTERCEPT (Feb. 17, 2021, 11:57AM), <https://theintercept.com/2021/02/17/stimulus-checks-cares-prisons-skimming-irs/>.

<sup>30</sup> Tom Banse, *Prisoners Eligible for Stimulus Checks, but Getting Payout Behind Bars Is Complicated*, OR. PUB. BROAD. (March 3, 2021, 9:23PM), <https://www.opb.org/article/2021/03/03/prison-stimulus-checks-inmate-relief-money-oregon/>.

There was often little transparency with regard to how and why some prisoners' funds disappeared.<sup>31</sup> The current system of prison banking is so opaque that it can be difficult or impossible to figure out what the rationales were for withholding portions of the stimulus checks, whether the withheld funds were actually used to satisfy a creditor (as in the case of court debt), or even the authority under which the prisons and jails claimed to exert control over an account such that they could simply take money out and reserve it to themselves or hand it to other governmental agencies.<sup>32</sup>

In some of the public commentary over the practice of seizing and diverting stimulus funds from incarcerated people, experts opined that the federal provisions that produced the stimulus payments simply failed to expressly restrict or prohibit garnishment by prisons and that the prisons and jails were—legally—exploiting the oversight.<sup>33</sup> But this position depends on the idea that, as a starting point, prisons are allowed to seize funds belonging to others, with little or no oversight, regulation, or transparency into how they are carrying out these seizures. In the highly regulated arena of non-carceral bank accounts or trust accounts, the seizure of funds to satisfy supposed debts with so little public accounting would be unthinkable.

Prisons' garnishment of inmate trust account funds is not a new phenomenon, and questions have long circulated about the property interests, rights, and obligations that attach to these accounts.<sup>34</sup> The intersection of prisons and money regulation, and the tangle of rights and obligations that arise, have deep historical roots. In 1821 a Connecticut court puzzled through the case of Harvey Belknap, incarcerated at a county workhouse, and the issue of whether the warden could sue for the cost of feeding him. For whatever reason, Belknap had not worked and earned wages at the workhouse, and the warden had not forcibly compelled him to do so.<sup>35</sup> Had Belknap earned money while in jail, the court ruled, those earnings would have been "a fund in the hands of the master of the workhouse."<sup>36</sup> But without easy and immediate access to such a fund, the warden

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<sup>31</sup> Some states have legislatively authorized certain deductions from inmate trust accounts to satisfy certain debts, though prisons may not make these policies transparent to people in prison or to the individuals making the deposits. Mary Fainsod Katzenstein & Maureen Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638, 642 (September 2015).

<sup>32</sup> See *McKinley v. Frentz*, No. 17-CV0243-CAB, 2017 WL 2670996, at \*4, \*5 (S.D. Cal. June 21, 2017).

<sup>33</sup> The second and third stimulus payments were passed with restrictions on the ability of governments to garnish the checks to satisfy debts, but some prisons and jails have ignored the restriction or applied an unsupported and narrow interpretation to the provision. See, e.g., *Beal v. Davids*, No. 1:21-CV-522, 2021 WL 2934835, at \*4 (W.D. Mich. July 13, 2021).

<sup>34</sup> See, e.g., *Cumbey v. State*, 699 P.2d 1094, 1097 (Okla. 1985).

<sup>35</sup> *Washburn v. Belknap*, 3 Conn. 502, 506 (Conn. 1821).

<sup>36</sup> *Id.* at 506.

had no right to demand such a payment.<sup>37</sup> In other words, funds received by the individual while incarcerated had a very different legal status than any he might have earned outside of jail.

In the two centuries that followed, courts, governments, and prison administrators have failed to offer a coherent legal framework for the management of funds belonging to incarcerated people. In the absence of a rights framework, prison bank accounts have become vulnerable to substantial abuse. Prison banking has a complex history that runs through the post-Civil War racialized financial penalties and debt bondage of formerly enslaved people and the rise of mass incarceration in the twentieth century. It also has roots in the expansion of privatized prison services and the economic policies that have left prison systems to fill their own budget gaps. Against this backdrop, prison-based asset seizure has become a feature, not a bug, of a broader system of wealth extraction.<sup>38</sup>

This article examines and challenges the assumption that prisons and jails should be authorized to operate a low-transparency banking system over which they have exclusive control, are subjected to little oversight, and act with a high degree of conflict of interest. The large-scale seizure of COVID funds from people in prison offers a lens into a broader phenomenon: the long-standing, widespread practice of diverting money from prison bank accounts to public coffers and private companies. People in prison are, by and large, indigent, their account balances are low, and the seizure of funds from inmate trust accounts has received little attention.<sup>39</sup> The influx of cash to incarcerated people during the pandemic made the problems of the prison banking system apparent to many, simply because of the scope and scale of the money seizures.<sup>40</sup> But the public still has little insight into how prisons manage the funds of others, as well as the degree to which governments are continuing to siphon off the savings of people in their custody every day and in smaller increments.<sup>41</sup>

Part II of this article provides an overview of inmate trust accounts, how prison systems have implemented and justified them overtime, and the current statutory and regulatory frameworks that govern them. This part situates inmate trust accounts against two historical backdrops: the 2008

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<sup>37</sup> *Id.* at 507.

<sup>38</sup> See *infra*, Section III.a and III.b.

<sup>39</sup> Some media have suggested that, at least at the federal level, prisons are exercising too little control over inmate trust accounts. See Devin Barrett, *Prosecutors Urged to More Aggressively Seize Funds Owed to Crime Victims*, WASH. POST (Dec. 5, 2022), <https://www.washingtonpost.com/national-security/2022/12/05/justice-dept-prisoner-money-victims/>.

<sup>40</sup> The unequal bargaining power of people in prison makes the lack of oversight all the more troubling. See Stephen Raheer, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L. J. 3, 9–10 (2020).

<sup>41</sup> “Correctional banking is big business. A rough extrapolation based on a small dataset (from four states) suggests that the principal amount of fund transfers to people in state prison systems could be around \$1 billion a year.” *Id.* at 20.



Great Recession, which squeezed state and local budgets, including correctional systems, and created incentives for governments to increase revenues through criminal system fees and private contracts; and a longer history of racialized wealth extraction in the criminal system. Part III examines the ways in which prison systems extract money from inmate trust accounts, and the problematic features of prison banking that enable these practices. Part IV explores two paths forward for undoing the abuses of prison banking: (1) increasing regulation and oversight of inmate trust accounts, and (2) taking banking out of prisons.

## II. What Are Inmate Trust Accounts?

The legal status of inmate trust accounts is murky, as is the purpose for which they exist. They have features of actual bank accounts, in that they offer a place for prisons to deposit wages for incarcerated people and for loved ones to transfer funds. Incarcerated people draw on them to pay for goods and services.<sup>42</sup> They also have features of trust accounts, in that prisons act as administrators of the funds, which are to be used in specific ways for incarcerated people.<sup>43</sup>

But while inmate trust accounts look and function like bank accounts or trust accounts, the regulation and oversight look very different. Bank accounts are governed by a vast network of state and federal statutes and regulations that offer a number of protections: Banking law protects customers against dubious creditors,<sup>44</sup> conflicted self-dealing by financial institutions,<sup>45</sup> disclosures of private transaction information,<sup>46</sup> and human

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<sup>42</sup> Selena Maranjian, *The Inmate Trust Fund – Explained*, THE MOTLEY FOOL (July 5, 2017, 2:50PM) <https://www.fool.com/investing/2016/08/03/the-inmate-trust-fund-explained.aspx>.

<sup>43</sup> A trust “is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.” RESTATEMENT (THIRD) OF TRUSTS § 2 (2003). “The term “trust” also includes public funds and public and private pension-fund arrangements in trust form” but may be subject to “the frequent influence of state or federal legislation and special circumstances in limiting the applicability of rules governing private and charitable trusts as stated in this Restatement.” RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. a (2003).

<sup>44</sup> See, e.g., Fair Debt Collection Practices Act, Pub. L. 95-109; 91 Stat. 874 (1977) (amended 2010).

<sup>45</sup> See, e.g., 12 C.F.R. 9.5(c) (2023) (“Fiduciary Activities of National Banks”).

<sup>46</sup> In 1999, Congress passed the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (1999). Several agencies, including the Federal Reserve, implemented its provisions with regulations that accompanied the act. BD. OF GOVERNORS OF THE FED. RESERVE SYSTEM, DIV. OF CONSUMER & CMTY. AFFAIRS, CONSUMER COMPLIANCE HANDBOOK, Reg. P (2023), <https://www.federalreserve.gov/boarddocs/supmanual/cch/consumer.pdf>. The National Credit Union Administration implemented its provisions via 65 Fed. Reg. 31722 (May 18, 2000) (codified at 12 C.F.R. pt. 716, 741). The Board of Governors of the Federal Reserve

error.<sup>47</sup> Moreover, agencies provide substantial oversight over depository institutions, and these agencies themselves are under heavy government regulation.<sup>48</sup> The federal government's Office of the Comptroller of the Currency, for example, oversees national banks and ensures that they comply with laws and regulations that protect bank account holders.<sup>49</sup> Under the OCC, national banks are audited extensively by independent entities and have special rules governing fiduciary activities.<sup>50</sup> The OCC assesses banks' activities to ensure the banks do not have conflicts of interest.<sup>51</sup> Together with the Consumer Financial Protection Bureau, the

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System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency implemented provisions via 65 Fed. Reg. 35162 (June 1, 2000) (codified at 12 C.F.R. pt. 40, 216, 332, 573). *See also* 15 U.S.C.A. § 6803 (West) (requiring disclosure of privacy information).

<sup>47</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S HANDBOOK, EXAMINATION PROCESS, BANK SUPERVISION PROCESS 12 (Sept. 2019), <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/bank-supervision-process/index-bank-supervision-process.html>.

According to the OCC's Comptroller Handbook:

The OCC examines banks pursuant to the authority conferred by 12 USC 481 (national banks), 12 USC 1463 (FSAs), 12 USC 1464 (FSAs), and the requirements of 12 USC 1820(d). The OCC examines federal branches and agencies pursuant to the authority conferred by 12 USC 3105(c)(1)(C). 12 USC 481 (national banks) and 12 USC 1464(d)(1)(B) (FSAs) authorize OCC examiners to make a thorough examination of a bank, which includes prompt and unrestricted access to a bank's officers, directors, and employees as well as to a bank's books, records, or documents of any type. . . . Banks must receive a full-scope, on-site examination every 12 or 18 months. The required full-scope, on-site examination frequency is known as the supervisory cycle. Refer to table 1 for the eligibility requirements for the 18-month supervisory cycle and to the "Full-Scope Examinations" section of this booklet for the OCC's definition of and requirements for the required full-scope, on-site examination.

(footnotes omitted). The Handbook also contains a detailed appendix describing the full scope of the OCC Examiner's access to a bank's books and account records. *Id.* at App. B.

<sup>48</sup> Agencies that regulate depository institutions include the National Credit Union Administration, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, WHO REGULATES MY BANK?, <https://www.helpwithmybank.gov/who-regulates-my-bank/index-who-regulates-bank.html>; CONSUMER FINANCIAL PROTECTION BUREAU, SUPERVISION, WHAT THE DIVISION DOES, <https://www.consumerfinance.gov/about-us/careers/supervision/#:~:text=The%20CFPB%20has%20primary%20authority,of%20the%20banking%20industry%27s%20assets>.

<sup>49</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, WHAT WE DO, <https://www.occ.treas.gov/about/what-we-do/index-what-we-do.html>.

<sup>50</sup> *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY, SAFETY AND SOUNDNESS, INTERNAL AND EXTERNAL AUDITS (July 2019), <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/internal-external-audits/index-internal-external-audits.html>.

<sup>51</sup> *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY, ASSET MANAGEMENT (AM), CONFLICTS OF INTEREST (Jan. 2015), <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/asset-management/conflicts-of-interest/index-conflicts-of-interest.html>.

OCC regulates excessive, duplicative, and erroneous deductions by banks from consumer bank accounts.<sup>52</sup> Also under the oversight of the OCC, a debt collector, even if the collector is the bank itself, must follow strict rules about their communications with debtors, must give debtors specific and detailed information about the debt owed, must provide debtors an opportunity to object to the debt, and cannot collect any part of a debt “unless it was expressly authorized by the original debt agreement or permitted by law.”<sup>53</sup> The OCC conducts examinations of banks with regard to their payments systems and specifically evaluates them for their internal controls against error and fraud, their systems for ensuring regulatory and legislative compliance, and whether their staffing protocols are sufficient to guard against error and conflicts of interest.<sup>54</sup>

A host of other substantive laws and oversight mechanisms apply to national banks, state banks, credit unions, and commercial payments systems. Under federal law, financial institutions have obligations of

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resources/publications/comptrollers-handbook/files/conflicts-of-interest/index-conflicts-of-interest.html. According to the Handbook:

Conflicts of interest arise whenever a bank engages in self-dealing and in any situation where a bank’s ability to act in the best interests of its account beneficiaries or clients is impaired. Self-dealing occurs when a bank, as fiduciary, engages in a transaction with itself or related parties and interests. Conflicts of interest may also arise when a bank benefits from undisclosed compensation or receives unreasonable compensation, or when a bank or a bank employee engages in unethical conduct. . . Bank fiduciaries are not permitted to receive financial benefit from related parties and interests in exchange for delegating fiduciary activities or purchasing products to support the servicing of fiduciary accounts unless

- the financial benefit is authorized by applicable law,
- the financial benefit is disclosed in accordance with applicable law, and
- the decision to delegate to such parties is based on the best interests of the account.

*Id.* at 1, 7.

<sup>52</sup> See, e.g., Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against Bank of America for Illegally Charging Junk Fees, Withholding Credit Card Rewards, and Opening Fake Accounts (July 11, 2023), <https://www.consumerfinance.gov/about-us/newsroom/bank-of-america-for-illegally-charging-junk-fees-withholding-credit-card-rewards-opening-fake-accounts/>; N.Y. DEP’T OF FINANCIAL SERVICES, CONSUMER FEE PRACTICES IN NEW YORK 10, [https://www.dfs.ny.gov/system/files/documents/2023/07/rpt\\_20230714\\_consumer\\_fee\\_practices\\_nys.pdf](https://www.dfs.ny.gov/system/files/documents/2023/07/rpt_20230714_consumer_fee_practices_nys.pdf) (describing sanctions imposed against Bank of America by OCC and CFPB for assessing multiple fees for the same transactions).

<sup>53</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, FAIR DEBT COLLECTION PRACTICES ACT EXAMINATION PROCEDURES (INTERAGENCY) 8, 10, 11 (Dec. 2022), <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/fair-debt-collection-practices-act/fair-debt-collection-practices-act.html>.

<sup>54</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, SAFETY AND SOUNDNESS, PAYMENT SYSTEMS 62, 67, 70, 87 (Oct. 2021), <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/payment-sys-funds-transfer-activities/index-payment-systems-funds-transfer-activities.html>.

privacy,<sup>55</sup> and protections against garnishment of federal benefits<sup>56</sup> and garnishment of substantial portions of wages.<sup>57</sup> The Electronic Fund Transfer Act and its implementing regulations set limits on certain fees for money transfers and outlines an error resolution process for disputed deductions.<sup>58</sup>

If inmate trust accounts were regulated in the same manner as free-world trust accounts, oversight and regulation would also be substantial. If the prison had the fiduciary obligations of a trustee, it would be “under a duty not to profit at the expense of the other,” and “if the fiduciary enters into a transaction with the other and fails to make full disclosure of all relevant circumstances known to the fiduciary, or if the transaction is unfair to the other, the transaction can be set aside by the other.”<sup>59</sup> The trustee would be required to “collect[] and protect[] trust property,”<sup>60</sup> and would be bound by duties of prudence,<sup>61</sup> loyalty,<sup>62</sup> impartiality and the duty to further “income productivity.”<sup>63</sup> The duty of loyalty alone would impose requirements on prisons that would bar many of their current activities: Prisons would be required to administer the “trust solely in the interest of the beneficiaries,”<sup>64</sup> and could not “engag[e] in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.”<sup>65</sup>

But courts and lawmakers have determined that the carceral setting displaces sources of law that might otherwise regulate inmate trust accounts.<sup>66</sup> The provisions relating to prison banking exist largely in the statutes and regulations that govern prisons, and outside of other areas of

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<sup>55</sup> See generally OFFICE OF THE COMPTROLLER OF THE CURRENCY, Privacy of Consumer Financial Information (Oct. 2011), <https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/privacy-consumer-financial-info/index-privacy-of-consumer-financial-information.html>.

<sup>56</sup> See generally, OFFICE OF THE COMPTROLLER OF THE CURRENCY, GARNISHMENT OF ACCOUNTS CONTAINING FEDERAL BENEFIT PAYMENTS (Apr. 2014), <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/garnishment-of-accts/index-garnishment-accts-containing-fed-benefit-payments.html>.

<sup>57</sup> NATIONAL CONSUMER LAW CTR., HOW TO PROTECT WAGES AND BENEFITS FROM CREDITORS (Nov. 12, 2019), <https://library.nclc.org/article/protecting-wages-benefits-and-bank-accounts-judgment-creditors>.

<sup>58</sup> Electronic Fund Transfer Act, Pub. L. No. 95-630 §2001, 92 Stat. 3728 (1978); 12 C.F.R. 1005 (2023); CONSUMER FIN. PROT. BUREAU, ELECTRONIC FUND TRANSFERS FAQ, <https://www.consumerfinance.gov/compliance/compliance-resources/deposit-accounts-resources/electronic-fund-transfers/electronic-fund-transfers-faqs/>.

<sup>59</sup> RESTATEMENT (THIRD) OF TRUSTS § 2 cmt b (2003).

<sup>60</sup> *Id.* at 76.

<sup>61</sup> *Id.* at § 77.

<sup>62</sup> *Id.* at § 78.

<sup>63</sup> *Id.* at § 79.

<sup>64</sup> *Id.* at § 77.

<sup>65</sup> *Id.* at § 77.

<sup>66</sup> See generally Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L. J. 1385 (2022).

money regulation.<sup>67</sup> As a result, the regulatory oversight of such accounts has been, in many cases, no more specific than the broad application of other areas of law, like procedural due process.<sup>68</sup> The Texas Supreme Court, for example, has found that the process required for TDCJ to withdraw funds was simply to provide notice to the prisoner.<sup>69</sup> Under the three-part *Mathews v. Eldridge* test, the court considered the risk of erroneous deprivation and cited in a footnote a string of cases that exemplify the problem of the lack of regulation, citing cases in which a court order to pay fees specified one amount or none at all, and there was simply no explanation or justification for the prison system's later seizure of much larger sum of money from the prisoner's account in order to satisfy the court debt.<sup>70</sup> Despite what appeared to be a pattern of financial mismanagement, the court merely imposed a notice requirement so minimal that the procedures available would offer no relief to the individuals who truly were defrauded out of hundreds or thousands of dollars or more.<sup>71</sup> Despite the documented mismanagement of inmate trust accounts, courts regularly reject procedural due process claims on the ground that there is little risk of error.<sup>72</sup>

As a creature of state statutes and regulations that govern prison administration, inmate trust accounts defy straightforward categorizations. However, some general principles apply. The National Consumer Law Center has explained that, “[a]lthough inmate trust accounts are typically held in some kind of depository account, the incarcerated person with equitable title to the money has no direct customer relationship with the depository institution.”<sup>73</sup> Similarly, one researcher has described inmate trust accounts as “a term of art (specific terminology varies by jurisdiction) describing a deposit account held by a governmental entity for the benefit of an incarcerated person.”<sup>74</sup> In other words, people in prison do not primarily

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<sup>67</sup> See *infra* Section II.b.

<sup>68</sup> “Regulatory violations do not necessarily offend the Constitution, which treats free-world standards – thresholds for toxic particulates, say – more as safe harbors than as floors.” *Id.* at 1389 (2022).

<sup>69</sup> *Harrell v. State*, 286 S.W.3d 315, 320 (Tex. 2009).

<sup>70</sup> *Id.* (citing examples).

<sup>71</sup> See *Sickles v. Campbell Cnty., Kentucky*, 501 F.3d 726, 730 (6th Cir. 2007).

<sup>72</sup> See *id.* at 730–31. See also *Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 253–54 (4th Cir. 2005); *Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410, 422 (3d Cir.2000); *Taylor v. Sebelius*, 189 Fed. Appx. 752, 761 (10th Cir. 2006).

<sup>73</sup> Ariel Nelson, Brian Highsmith, Alex Kornya, & Stephen Raheer, *Commercialized (In)Justice Litigation Guide: Applying Consumer Laws to Commercial Bail, Prison Retail, and Private Debt Collection*, NAT'L CONSUMER L. CTR. 40 (June 2020) [https://www.nclc.org/wp-content/uploads/2022/09/WP\\_Litigation\\_Guide.pdf](https://www.nclc.org/wp-content/uploads/2022/09/WP_Litigation_Guide.pdf). The depository institution may just be a regular, federally insured bank. See, e.g., Nev. Rev. Stat. Ann. § 209.248 (West).

<sup>74</sup> See Stephen Raheer, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L. J. 3, 18–19 (2020). (noting that, “[h]istorically, inmate trust accounting has been a mundane subspecialty of government fiscal administration: agencies collected funds in the possession of people who come into custody, received deposits”).

interact with the government's treasury in accessing their funds but rather go through the prison administration itself or a financial technology firm that contracts with the prison or jail system.<sup>75</sup>

The prisons, therefore, mediate the relationship between incarcerated people and the entities that hold their money. Inmate trust accounts offer a means for people in prison to purchase a variety of goods and services, but those purchases are limited to a small universe of vendors/providers and are often subjected to fees assessed by prison systems and inflated prices for goods.<sup>76</sup>

These descriptions of inmate trust accounts say little about how courts, prison administrators, and incarcerated people should understand the rights and obligations that govern access to the money. This Section lays out the reasons for this murkiness: First, there are multiple competing historical accounts of why inmate trust accounts exist and what goals they advance. Second, the statutory and administrative rules in place today say little about what they are, who has a right to access the money, and under what circumstances they may do so.

a. Descriptions, Justifications, and Purposes of Inmate Trust Accounts

Prison banking goes back at least as far as the early days of the republic.<sup>77</sup> In fact, any prison that tracked the debts of incarcerated people or held the pocket money that an individual had upon arrest and saved it for their release could be said to engage in a rudimentary form of today's prison banking.<sup>78</sup> As more formal systems of account-keeping developed in the

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<sup>75</sup> Such firms include familiar vendors like JPay, which now provide fee-based services not only for prison banking but also for phone fees, tablets, internet access, and e-messaging. See *Id.* at 18. For a detailed survey of prisons' e-messaging practices, and the complex and often arbitrary pricing structure, see Mike Wessler, *SMH: The Rapid and Unregulated Growth of E-messaging in Prisons*, PRISON POLICY INITIATIVE (March 2023) <https://www.prisonpolicy.org/reports/emessaging.html>.

<sup>76</sup> *Id.* at 10.

<sup>77</sup> ORLANDO FAULKLAND LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS 1776-1845 WITH SPECIAL REFERENCE TO EARLY INSTITUTIONS IN THE STATE OF NEW YORK* 31 (Prison Association of New York 1922). Some form of prison banking seems to be an almost inherent feature of early jails' laws requiring people to pay for their own incarceration. See Brittany Friedman et al., *Who Pays for the Welfare State Austerity Politics and the Origin of Pay-to-Stay Fees as Revenue Generation*, 63 SOCIO. PERSP. 921, 922 (noting that "county-level pay-to-stay fees for jail detention date back to colonial America with British antecedents").

<sup>78</sup> The origins of these practices predate American prison history. See Laura I. Appelman, *Bloody Lucre: Carceral Labor and Prison Profit*, 2022 WISC. L. REV. 619, 626 (2022) ("As early as 1555, however, the British tried to lower the expense of such incarceration by sending such prisoners to private workhouses, where prisoners worked to offset the cost of their confinement and helped supplement the jailer's salary").

twentieth century,<sup>79</sup> the descriptions, justifications and purposes of such accounts have varied, even within a jurisdiction during a given period in time.<sup>80</sup> But the rationales and descriptions cluster around some common themes. Throughout US history, prison accounts have functioned as ledgers to track wages and debts; as government accounting devices to track property, sometimes treating the accounts as true trusts, with prisons acting as fiduciaries; as necessary vehicles for an efficient commissary system; as pooled assets for the general welfare; as a means of maintaining security and control; and, often, with overlapping versions of some or all of these rationales.

□ *Prison accounts as ledgers to track wages and debts.*

As described below, many justifications for prison control of personal money are grounded in the idea that the accounts are simple innovations to solve basic administrative problems. But older historical sources tell a different story, in which wage accounting for imprisoned people is bound up in concepts of indentured servitude. The clear purpose of this accounting was not to allow for better tracking of property or to pool funds for a general inmate welfare purpose but rather to repay the government for the costs of incarceration out of the personal funds and low-wage labor of incarcerated people.<sup>81</sup> The case of Harvey Belknap in 1821 upheld the principle that the account holding the workhouse wages of those in custody was there for the taking by a warden who otherwise would have no right to recover for carceral debts.<sup>82</sup> A 1936 note in the *Yale Law Journal* discussed ways that the first prison systems could recoup costs of incarceration, noting that “[a] few states a century ago tried a system of individual accounting with each prisoner, charging him with maintenance costs and crediting his account with the proceeds of his labor, any adverse balance remaining a charge upon his property after his release.”<sup>83</sup>

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<sup>79</sup> The Bureau of Prisons created a formal banking system in 1930 when the Department of Justice issued a set of circulars detailing how money should be handled; Congress approved the creation of a “Prisoner Trust Fund” and a “Commissary Fund” in 1932. U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, PROGRAM STATEMENT 4500.12, 15 (March 14, 2018).

<sup>80</sup> See *infra* Section II.a. Just as the rationales for inmate trust account policy have shifted to serve various policy objectives, recent scholarship has explored how shifting—and often unfounded—assumptions have similarly driven constitutional prison law. Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 516, 542–66 (2021).

<sup>81</sup> “In the colonial era, the penal system required incarcerated persons to perform labor without compensation, and sometimes to pay monetary sanctions, both as part of the punishment and as debt repayment.” Brittany L. Deitch, *Estate to State: Pay-to-Stay Statutes and the Problematic Seizure of Inherited Property*, 95 U. Colo. L. Rev. 4 (2023) (forthcoming) (citing Brittany Friedman, *Unveiling the Necrocapitalist Dimensions of the Shadow Carceral State: On Pay-to-Stay to Recoup the Cost of Incarceration*, 37 J. CONTEMP. CRIM. J. 66, 69 (2021)).

<sup>82</sup> *Washburn v. Belknap*, 3 Conn. 502, 502 (Conn. 1821).

<sup>83</sup> *Id.*

Several accounts of early prison labor as a form of remuneration to the state framed the practice as rehabilitative, claiming that it was an advancement over the barbarism of earlier prison management.<sup>84</sup> The Walnut Street Prison, which operated in Philadelphia from the 1790s to the early 1800s,<sup>85</sup> charged for costs of incarceration but also offered an option to earn wages at a level equivalent to what the individual could earn on the outside, and the prison maintained a kind of ledger account to keep track of the balance.<sup>86</sup> Some individuals ended their prison terms with a surplus and were handed the overage as they departed; others sustained a debt and remained incarcerated until it was paid for through their labor.<sup>87</sup>

The 1922 account described this early “reformer” vision and the process of crediting and debiting the accounts, noting that incarcerated people “carried their accounts in little books” so that “the convicts might know both their earnings and their obligations. . . .”<sup>88</sup> The wage-and-accounting system in place, according to this early account, offered a strong motivation to incarcerated people and was therefore a useful tool in prison management.<sup>89</sup>

This reformist picture diverges sharply from the reality for many people, particularly in the southern states, where wage-and-debt accounting became a tool for continuing slavery practices long after Civil War. In his seminal book, *Slavery by Another Name*, Douglas Blackmon recounted the story of Green Cottenham, a Black man arrested in 1908 Alabama on vague accusations of vagrancy.<sup>90</sup> Sentenced to thirty days at hard labor, he was charged an array of fees for the costs of convicting him—“fees to the sheriff, the deputy, the court clerk, the witnesses.”<sup>91</sup> With no means to pay, his sentence became a year, the time it would take to achieve a zero balance on his debts.<sup>92</sup>

- *Prison accounts as a simple government budget line item to track property.*

As prisons and jails expanded in the twentieth century and grew into more formal and regulated entities, the administrators running them needed a better system of tracking property. Simply locking cash in an office made

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<sup>84</sup> ORLANDO FAULKLAND LEWIS, *supra* note 77; Appleman, *supra* note 78, at 627.

<sup>85</sup> Appleman, *supra* note 49, at 627.

<sup>86</sup> ORLANDO FAULKLAND LEWIS, *supra* note 77, at 31.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 1 (2008).

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*



less sense with larger state prisons and municipal jails.<sup>93</sup> Budget reports that included lines for inmate trust accounts appear as early as 1899,<sup>94</sup> and at some point, facilities began depositing these funds in formal bank accounts.<sup>95</sup> In 1930, the federal government established its inmate trust account for the Bureau of Prisons with a two-fold purpose: partly, as explained below, to “provide inmates the privilege of obtaining merchandise not provided by the [prison] or of a different quality,” but also simply “[t]o maintain inmates’ monies.”<sup>96</sup> The federal Bureau of Prisons was not alone in setting up funds like this to track money. States also began using inmate trust accounts as devices used for the straightforward administrative task of keeping track of the money a person had on them when they entered prison and any prison wages earned.<sup>97</sup>

- *Prison accounts for purposes of setting up an efficient commissary system.*

One purpose of the inmate trust accounts is to enable a system for purchasing commissary items without relying on cash.<sup>98</sup> The federal

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<sup>93</sup> While incarceration rates ebbed and flowed until sharp increases in the 1970s, see Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1228 (2010), the sheer number of people in prison rose dramatically in the earlier part of the twentieth century. See *Prisoners 1925–81*, U.S. Dep’t Just.: Bureau Just. Stat. (Dec. 1982) <https://bjs.ojp.gov/content/pub/pdf/p2581.pdf> (finding that state and federal prison population rose from about 91,000 in 1925 to about 220,000 in 1961).

<sup>94</sup> See, e.g., REPORT ON STATE CHARITIES: OUTSTANDING INDEBTEDNESS IS NEARLY ALL PAID DURING PAST QUARTER, MARENGO BEACON/REPUBLICAN-NEWS (Marengo, IL) (Aug. 31, 1899) ((providing accounting of all deposits by family and friends into inmate accounts); STATE DOES WELL: BOARD REPORT SHOWS GOOD CONDITION OF AFFAIRS, ALTON EVENING TELEGRAPH (Alton, Illinois) (Nov. 27, 1908) (same).

<sup>95</sup> In 1911, a newspaper recounted that Illinois officials were considering setting up depository account for inmate trust funds. *Committee and the Press at Variance*, COMMERCIAL APPEAL 3 (Mar. 22, 1911). News reports about bank failures in the 1930s indicated that inmate trust funds were held in some of the failed banks. See, e.g., *Cannot Use Contingent Fund for Purpose*, FREEPORT J. STANDARD 7 (Feb. 9, 1933). Today prisons hold inmate trust account funds in a depository institution. See, e.g., NEV. REV. STAT. ANN. § 209.248 (West).

<sup>96</sup> Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund, 19 Op. Off. Legal Counsel 129 n.1 (1995) (quoting U.S. Dep’t of Just., Fed. Bureau of Prisons, Trust Fund Management Manual, Program Statement 4500.3, Ch. 4501 (1989)). For discussion of the role of inmate trust accounts in facilitating a commissary system, see *infra* Section II.a.

<sup>97</sup> Stephen Raheer, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L. J. 3, 18–19 (2020).

<sup>98</sup> On grounds of both efficiency and security. Outside of prisons, payment systems fall into two categories: closed loop and open payment systems. CAROL COYE BENSON, SCOTT LOFTESNESS, & RUSS JONES, PAYMENTS SYSTEMS IN THE US: A GUIDE FOR THE PAYMENTS PROFESSIONAL 4–7 (3d ed. 2017). Inmate trust accounts are paradigms of the closed loop payment system, controlling and allowing surveillance of every purchase and expenditure by an entirely captive market. See Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 2 (2013).

government established multiple federal trust funds at the same time in the early 1930s, one of which was a prison commissary fund that pooled the proceeds of commissary purchases, and a separate fund was established solely to maintain the depository accounts of incarcerated people.<sup>99</sup> The two funds were inextricably linked. “The Commissary was created to provide a bank-type account for inmate monies” and “for the procurement of articles not regularly issued as part of the institution administration.”<sup>100</sup> Specifically, the federal government established an inmate trust account at each federal prison and simultaneously set up a commissary system for the purchase of items “such as toothpaste, soap, stamps, arts and crafts, newspapers and magazines.”<sup>101</sup> The idea was that “[w]hen purchasing articles from the commissaries, inmates were required to have their Inmate Trust Fund accounts debited in the amount of such articles.”<sup>102</sup> The government created a budget category called the Commissary Fund, which was used to purchase goods in the commissary and to pay the salaries of commissary employees.<sup>103</sup>

In 1934, Congress passed the Permanent Appropriation Repeal Act, which listed a number of trust accounts held by the Treasury, including both the Commissary Fund (set up to run the commissaries) and the Prisoners’ Trust Fund (set up to run individual prison accounts).<sup>104</sup> According to a recent BOP program statement, little has changed since these accounts were created, and the purpose of the inmate trust account remains the same as it did in the 1930s: “To maintain inmates’ monies (Deposit Fund) while they are incarcerated” and “[t]o provide inmates the privilege of obtaining merchandise and services either not provided by the Bureau or of a different quality than that provided by the Bureau.”<sup>105</sup>

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<sup>99</sup> See U.S. Dep’t of Just., Fed. Bureau of Prisons, Program Statement 4500.12 (March 14, 2018). See also Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund, 19 Op. Off. Legal Counsel 128 (1995).

<sup>100</sup> U.S. Dep’t of Just., Fed. Bureau of Prisons, Program Statement No. 4500.12, Trust Fund/Deposit Fund Manual, 15 (March 14, 2018) (citing Dep’t of Justice, Circular No. 2126, Rules Governing the Control of Prisoner’s Funds at the Several Penal and Correctional Institutions (August 1, 1930)).

<sup>101</sup> Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund, 19 Op. Off. Legal Counsel 128 (1995) (citing Dep’t of Just., Circular No. 2126, ¶¶9–11 (Aug. 1, 1930)). See also Daniel Wanger, *Center for Public Integrity, Megabanks Have Prison Financial Services Market Locked Up*, CTR. PUB. INTEGRITY (Oct. 2, 2014), <https://publicintegrity.org/inequality-poverty-opportunity/megabanks-have-prison-financial-services-market-locked-up/>.

<sup>102</sup> Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund, 19 Op. Off. Legal Counsel 130 (1995) (discussing background of inmate trust accounts).

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

<sup>104</sup> See Permanent Appropriation Repeal Act, ch. 756, § 20(a), 48 Stat. 1224, 1233 (1934) (originally codified at 31 U.S.C. § 725s(a) (1934)).

<sup>105</sup> U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 4500.12, TRUST FUND/DEPOSIT FUND MANUAL, 15 (March 14, 2018). More recently, media and Congress have raised questions about whether BOP’s simultaneous operation of the commissary fund and

State systems followed suit, sometimes setting up dual accounts, one for commissary purchases and proceeds, and one for individual funds, or, alternatively, establishing an inmate trust account along with a commissary coupon system.<sup>106</sup> Under this latter regime, incarcerated people would write negotiable checks against their accounts in exchange for commissary vouchers to purchase items at the prison store.<sup>107</sup>

Today, there is little transparency over how prisons operate commissaries, the pricing and markup, and the quality of items sold.<sup>108</sup> Moreover, people in state and federal prisons pay for far more than just traditional commissary items. They pay for essentials, like food to supplement inadequate meal portions, basic hygiene items like toilet paper, medical copays, and over-the-counter medicines, as well as a vast array of other fees for services like phone calls, tablets, e-messaging, video chats, and music.<sup>109</sup> They may even pay to use electricity.<sup>110</sup> In some places, they pay for in-person social visits with loved ones.<sup>111</sup> The incentive for prisons to invent fees and impose high markups, therefore, is substantial. Increasingly, prisons are entering contracts with vendors to scan postal mail and let people see only the digital version of the letters and photos that people send to them.<sup>112</sup> In these facilities, incarcerated people no longer have the ability to hold and reread letters as often and for as long as they like. Instead they pay per minute to look at letters and photos.<sup>113</sup>

Prison banking and commissary services have always been interdependent on each other, but today inmate trust accounts and

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the Prisoners' Trust Fund (now referred to as the Deposit Fund) raises a conflict of interest. See Chuck Grassley, Letter to Collette Peters (Aug. 1, 2022), at [https://www.grassley.senate.gov/imo/media/doc/grassley\\_to\\_bureau\\_of\\_prisons\\_-\\_commissary\\_trust\\_fund.pdf](https://www.grassley.senate.gov/imo/media/doc/grassley_to_bureau_of_prisons_-_commissary_trust_fund.pdf).

<sup>106</sup> See *Big Shortage Is Revealed by Auditor*, CLINTON DAILY NEWS 1 (Dec. 12, 1947) (describing canteen coupon system in account of embezzlement).

<sup>107</sup> *Id.*

<sup>108</sup> This low transparency stands in contrast to how the federal government has operated military commissaries, which have a dedicated federal agency called the Defense Commissary Agency, and have been the subject of congressional inquiries and a two-volume, 800-page history co-written by a dedicated historian at the agency. See PETER D. SKIRBUNT, *THE ILLUSTRATED HISTORY OF AMERICAN MILITARY COMMISSARIES, VOL. 1 THE DEFENSE COMMISSARY AGENCY AND ITS PREDECESSORS, 1775-1988* (2008) and PETER D. SKIRBUNT, *THE ILLUSTRATED HISTORY OF AMERICAN MILITARY COMMISSARIES, VOL. 2 SINCE 1989* (2008).

<sup>109</sup> See Beth Schwartzapfel, *Prison Money Diaries: What People Really Make (and Spend) Behind Bars*, THE MARSHALL PROJECT (Aug. 4, 2022), <https://www.themarshallproject.org/2022/08/04/prison-money-diaries-what-people-really-make-and-spend-behind-bars>.

<sup>110</sup> See ALASKA STAT. ANN. § 33.30.017 (West).

<sup>111</sup> See, e.g., Chesa Boudin, Trevor Stutz, & Aaron Littman, *Prison Visitation Policies: A 50-State Survey*, 32 YALE L. & POL'Y REV. 149, 176 (2013).

<sup>112</sup> Lyle C. May, *The Impossible Math Behind Pay-Per-Minute Prison Messaging*, SLATE (June 19, 2023, 12:30PM), <https://slate.com/technology/2023/06/prison-messaging-cost-gettingout-gtl-viopath.html>.

<sup>113</sup> *Id.*

privatized goods and services are ever more deeply intertwined.<sup>114</sup> Inmate trust accounts exist to support far more than just a commissary payment system and are, instead, integral to a system that requires payment for a whole host of regular activities and everyday items. Moreover, the same vendors that operate prison banking often provide telecom services, tablets, and the commissary.<sup>115</sup> Private vendors like Trinity Services Group, Securus Technologies, and Global Tel\*Link/GTL don't simply facilitate an efficient and secure commissary system; they now incentivize prisons to expand the range of things that people in prison must pay for, which makes inmate trust accounts completely indispensable for incarcerated people.

□ *Prison accounts as a means of maintaining security and control.*

Prison administrators are concerned about money flows in prison and potential threats to security and orderliness if cash or an equivalent is available to people in prison.<sup>116</sup> According to one court, "The purpose of requiring prisoner funds to be held in trust by prison authorities is to prevent prisoners in [state] custody from possessing quantities of cash that can be used for illicit purposes."<sup>117</sup>

Under a mid-twentieth century canteen voucher system in one prison, officials complained that "as much as \$1,000 a day is checked out of the prisoner trust fund for whisky, gambling, narcotics, and sex perversion."<sup>118</sup> More recent literature on the risks posed by cash in prisons is scarce, so it is difficult to assess how necessary inmate trust accounts are to prison security and whether cash-free substitutes, like free-world cashless banking options, might address the concerns of prison officials.<sup>119</sup> But regardless of the precise

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<sup>114</sup> See Stephen Rahe, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L. J. 3, 9-10 (2020) (footnotes omitted). See also Jazmen Howard, *Unjustly Enriched Prisons: The Problem with Capitalizing on Captivity*, 72 FL. L. REV. 127, 136 (2020) ("The commissary system is a prisoner banking service that acts as an automated teller machine between incarcerated individuals and their 'outside' contacts").

<sup>115</sup> See Rahe, *supra* note 114, at 16.

<sup>116</sup> See, e.g., *Schneider v. Cal. Dep't of Corr. (Schneider II)*, 151 F.3d 1194, 1195 (9th Cir. 1998).

<sup>117</sup> *Harris v. Ryker*, No. 11-CV-133-JPG, 2011 WL 5244682, at \*2 (S.D. Ill. Nov. 2, 2011). See also *Grubbs v. Bradley*, 552 F. Supp. 1052, 1101 (M.D. Tenn. 1982) ("The use of free world money is generally disdained among corrections experts because of the difficulty in controlling activities such as gambling, extortion and the sale of contraband. Officials prefer to use either special "scrip" or computerized accounts which allow greater control of inmates' funds.").

<sup>118</sup> BILLS PLANNED ON FINANCE CODE, PRISON CONTROL, MUSKOGEE DAILY PHOENIX 5 (Feb. 23, 1957).

<sup>119</sup> State regulations give some sense of the specific concerns. A Michigan statute, for example, flags certain scenarios in which the prison can freeze an inmate trust account, such as "when the prisoner is involved in any of the following situations:

- (a) Is incurring heavy indebtedness to other prisoners.
- (b) Is a victim of extortion by other prisoners.

nature of the security risk, inmate trust accounts enable prisons to operate a closed economy that does not depend on cash.

Beyond eliminating the need for cash transactions, inmate trust accounts allow for a more total surveillance and control of daily activities and media content. Prisons can control a person's broad purchasing power, beyond a limited selection of commissary items, simply by creating an in-prison cost for basic activities that can be paid only with the inmate trust account and mandating that all purchases, deposits, and withdrawals are subject to approval by prison administrators with broad discretion.<sup>120</sup> Some prisons even establish rules that incarcerated people are not allowed to maintain outside bank accounts.<sup>121</sup> In New Jersey, incarcerated people can only have outside bank accounts if all other debts have been paid; but since people in prison are liable for all costs of medical care and costs of incarceration, that debt is likely never to be extinguished for most people.<sup>122</sup> In Nevada, failing to deposit all incoming funds into the prison accounts is a misdemeanor.<sup>123</sup>

Prisons grant themselves wide discretion to determine what people can and cannot purchase out of their inmate trust accounts. For example, the Bureau of Prisons' manual for use of the inmate trust account requires that any request by an incarcerated person to withdraw money for purposes of paying an outside entity must be approved by the prison, but there are no policies explaining when approval may or may not be withheld.<sup>124</sup> The effect is that the BOP has wide discretion to prevent people from paying for all kinds of goods and services that they need or want, and from sending cash to family members, and instead directing them to pay for prison-operated commissary items and services.<sup>125</sup>

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(c) Is using the institutional medium of exchange or store purchases to exploit or corrupt other prisoners.

(d) Is setting up his or her own store.

(e) Is stockpiling store merchandise in his or her cell.

MICH. COMP. LAWS ANN. § 791.6639(5) (West).

<sup>120</sup> See, e.g., ALASKA STAT. ANN. § 33.30.201(d) (West).

<sup>121</sup> See, e.g., N.Y. Dep't. Corr. & Comm'y Supervision, Directive 2798, Inmate Accounts (Nov. 29, 2017). Prisons can also control post-release purchasing power by equipping people on parole with debit cards that have geographical and purchasing constraints, in order to limit travel and to surveil and control activities while on parole. See Keefe Commissary Network, LLC, *Original Technical Proposal*, W. VA. DEP'T CORR., 44 (April 10, 2014, 1:30PM) <https://www.prisonpolicy.org/contracts/documents.html?text-search-fields=facility-and-remarks&q=&q-state=&q-document-type=&q-service=inmate-banking-software&q-vendor=&sort=state#search-form>.

<sup>122</sup> N.J. STAT. ANN. § 30:4-16.4 (West).

<sup>123</sup> NEV. REV. STAT. ANN. § 209.241(1) & (2) (West).

<sup>124</sup> U.S. Dep't of Just., Fed. Bureau of Prisons, Program Statement No. 4500.12, Trust Fund/Deposit Fund Manual, 87-97 (March 14, 2018).

<sup>125</sup> Statutes and regulations often include a catchall provision that allows prison officials to withhold approval for withdrawals for any reason they deem appropriate. See, e.g., ALASKA STAT. ANN. § 33.30.201(d) (West).

The idea that prisons can use inmate trust accounts to control the activities of incarcerated people is not new. One early critique of the Massachusetts State Prison complained about the flow of money from contracted prison labor in the facilities. Despite strict limitations on spending, the critic asserted, incarcerated people were spending money on disfavored activities, even spending funds to retain “legal counsel and other persons to obtain pardons for them, and sometimes in employing lawyers to obtain or prevent the passage of criminal or penal laws, which the convicts liked or disliked.”<sup>126</sup> People in prison might even purchase “infidel books.”<sup>127</sup>

On some occasions, incarcerated people did use their funds to bribe officers.<sup>128</sup> More commonly at Massachusetts State Prison, however, the wages were used “to procure luxuries such as tea, coffee, tobacco, milk, crackers, fresh fish, butter, cheese, cider and apples.”<sup>129</sup>

A broad array of reforms at the Massachusetts State Prison<sup>130</sup> included increased restrictions on the flow of money. The administration achieved greater control over money and purchasing by creating a library, restricting its content, and funding it through prison wages.<sup>131</sup> Both before and after the reforms, the money of incarcerated people was used to buy books, and the difference was simply who got to select the content. Individual purchases for musical instrument and reading material were permitted only if the warden made the actual purchase.<sup>132</sup>

Today, prisons maximize their ability to monitor and control money transfers and purchases with the help of financial technology. Firms like JPay, the technology firm owned by Platinum Equity Partners that has largely overtaken phone, e-messaging, video visitation, tablet technology, and finances in prison systems across the country, and a corporate entity called Keefe Group promote their capacity to surveil financial activity as part

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<sup>126</sup> ORLANDO FAULKLAND LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS 1776-1845 WITH SPECIAL REFERENCE TO EARLY INSTITUTIONS IN THE STATE OF NEW YORK* 159 (Prison Association of New York 1922).

<sup>127</sup> *Id.* at 167. The author does not explain what this term means.

<sup>128</sup> *Id.* at 157.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 160-167.

<sup>131</sup> *Id.* at 169.

<sup>132</sup> *Id.* at 169.

of their bids for contracts with corrections.<sup>133</sup> Data supporting the need for such monitoring, however, is lacking.<sup>134</sup>

□ *Prison accounts as pooled assets for the general welfare.*

In some cases, prison bank accounts were not set up to operate as regular bank accounts for individuals in prison but were established as pooled assets to be used for the general welfare of people in prison. For example, in Hawaii, incarcerated people sold hobbycraft items at an annual Mother's Day sale and generally did not collect proceeds for themselves; around 1950 the policy shifted and the proceeds were placed in an "inmate trust fund," and an "inmate council" could, by a majority vote, spend that fund on items intended to benefit the collective.<sup>135</sup>

Prison systems today commonly oversee funds that are labeled "inmate welfare funds" or "general welfare funds" or something similar.<sup>136</sup> But for the most part, these funds are distinct from the kind of prison accounts that receive earnings and deposits belonging to individual people. In other words, prisons today do not manage individual people's money by pooling accounts for collective purchases, but this idea of an account for collective benefit does still exist in the form of "welfare funds."

Today's welfare funds and inmate trust accounts do share some features of the kind of pooling of individual assets that existed in Hawaii in the middle of the century. First, welfare funds often contain money from individual incarcerated people, just not directly from wages and deposits by

<sup>133</sup> See Keefe Commissary Network, LLC, *Original Technical Proposal*, W. VA. DEP'T CORR. 64 (April 10, 2014, 1:30PM) <https://www.prisonpolicy.org/contracts/documents.html?text-search-fields=facility-and-remarks&q=&q-state=&q-document-type=&q-service=inmate-banking-software&q-vendor=&sort=state#search-form> (discussing "data mining" activities and investigative capacity, which includes twelve investigators who monitor 27 percent of activities).

<sup>134</sup> In August 2021, news outlets reported that US Department of Justice Deputy Attorney General Lisa Monaco had issued a directive to the Bureau of Prisons to enhance monitoring of inmate trust accounts, noting that they were ripe for abuse and corruption. However, the sole allegation about past misuse appeared to be that certain high-profile individuals like Larry Nasser had large sums of money in their accounts but had been paying only small amounts of restitution. None of the reports detailed any actual criminal activity being conducted with the inmate trust accounts, and in fact Justice Department officials "cautioned there is nothing inherently wrong with an inmate holding large sums of money in their accounts." Michael Balsamo, *Justice Department Bolsters Monitoring of Federal Inmate Accounts*, ASSOC. PRESS (Aug. 19, 2021, 2:30PM), <https://apnews.com/article/sports-428a4c18819103cb9acd1f37ae1d8d45>.

<sup>135</sup> Virgil McDorman, *The Inmate Council*, PAAHAAO PRESS, September-October 1951, at 6, 23 (describing the function of the Inmate Trust Fund from the perspective of a prison newspaper).

<sup>136</sup> There has been some overlap in the concepts of individual accounts and general welfare accounts. See, e.g., *Urbano v. Bd. of Managers of New Jersey State Prison*, 415 F.2d 247, 249 (3d Cir. 1969) (explaining that New Jersey's welfare fund was partially funded by prison wages until 1968).

friends and family. For example, welfare funds can contain the profits from commissary purchases,<sup>137</sup> cost-of-incarceration payments by people in prison (often involuntarily drawn from individual accounts), and site commissions from private service providers like JPay,<sup>138</sup> hobbycraft sales.<sup>139</sup> The principal funds in an individual's account are, in other words, diverted directly to welfare accounts in the form of commissary proceeds and phone services and the like.<sup>140</sup>

Moreover, while people in prison may think of their own individual inmate trust account as being theirs alone, the fact is that the money from the individual deposits has, for a long time, been pooled into a government account.<sup>141</sup> An individual's account balance is really just a ledger for the prison system to keep track of who can spend what within the overall pooled inmate trust account.<sup>142</sup>

But the differences between today's inmate welfare funds and inmate trust accounts are telling as well. Specifically, there are different rules about how prisons can spend the money in the two accounts. Although prisons cannot directly spend money out of an inmate trust account to cover its own administration costs, they often have the authority to do so with the inmate welfare funds.<sup>143</sup> In contrast to the early Hawaiian model of allowing incarcerated people to determine themselves what welfare activities they fund—movie night, recreation, for example—today's inmate welfare funds are managed almost entirely by prison administrators.<sup>144</sup> Moreover, virtually every expenditure can count as promoting “inmate welfare,” including administrative prison costs, salaries, and capital projects. While these funds might look like they support things like movie nights, recreational activities, and other “extras,” they are often used instead for

<sup>137</sup> The Federal Bureau of Prisons, for example, directs a portion of its Commissary Fund proceeds to a “Welfare Fund.” See Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund, 19 Op. Off. Legal Counsel 128 (1995).

<sup>138</sup> *Inmate Welfare Fund Account*, SUTTER CNTY. SHERIFF, CA, <https://www.suttersheriff.org/divisions/jail-division/corrections-section/inmate-custody-services/welfare-fund-account#:~:text=The%20Inmate%20Welfare%20Fund%20holds,used%20by%20inmates%20while%20incarcerated.>

<sup>139</sup> As in California, see CAL. PENAL CODE § 5006.

<sup>140</sup> See, e.g., N.J. ADMIN. CODE § 10A:31-29.3(a); Erick Roeser, *Internal Audit: Sonoma County Sheriff's Office Inmate Welfare and Jail Store Trust Funds*, SONOMA CNTY. (October 30, 2020), [https://sonomacounty.ca.gov/Ektron%20Documents/assets/Sonoma/Sample%20Dept/Sample%20Dept/Divisions%20and%20Sections/Auditor-Controller/Services/Fee%20Based%20Audit%20Reports/\\_Documents/Sheriff\\_s%20Office%20Inmate%20Welfare%20and%20Jail%20Store%20Trust%20Funds.pdf](https://sonomacounty.ca.gov/Ektron%20Documents/assets/Sonoma/Sample%20Dept/Sample%20Dept/Divisions%20and%20Sections/Auditor-Controller/Services/Fee%20Based%20Audit%20Reports/_Documents/Sheriff_s%20Office%20Inmate%20Welfare%20and%20Jail%20Store%20Trust%20Funds.pdf).

<sup>141</sup> See e.g., WASH. DEP'T OF CORR. POLICY 200.000 I.a. (2022); Cal. Penal Code § 5008 (West).

<sup>142</sup> Thomas U. Gage, *Not So Trustworthy: What You Should Know About “Inmate Trusts”*, INTERROGATING JUST. (Sept. 29, 2022), <https://interrogatingjustice.org/ending-mass-incarceration/not-so-trustworthy-what-you-should-know-about-inmate-trusts/>.

<sup>143</sup> See, e.g., CAL. PENAL CODE § 4025.

<sup>144</sup> *But see* Miss. Code. Ann. § 47-5-158(7)(a) (West) (requiring that one member of the nine-member Inmate Welfare Fund Committee be a relative of an incarcerated person).



basic operational costs of running the prisons. For example, in West Virginia, a state statute limits the types of expenditures that can be made out of its “Inmate or Resident Benefit Fund,” and lists expenditures like cable TV, movie rentals, and Christmas gift certificates.<sup>145</sup> But buried in the list of permissible expenditures, at number 14 out of 16 listed expenses, is “[a]ny expense for improvement of the facility which will benefit the inmate or resident population that is not otherwise funded,” a broad category that could cover nearly any conceivable cost of running a prison.<sup>146</sup> In 2022, an audit report to the Montana legislature analyzed the state’s use of the prisons’ welfare funds, which is comprised almost entirely of phone fees and canteen markup.<sup>147</sup> The audit unearthed several unauthorized expenditures out of the fund, as well as several “questionable” expenditures that may technically comply with policy but logically should have been covered by the prisons’ general operating fund, like hygiene items for indigent individuals and legal research materials.<sup>148</sup>

In short, if one simply traces the money, from inmate trust accounts, which are used to pay phone fees and commissary items and other fees, which then are deposited into general welfare fund revenues, the welfare fund can easily convert the deposit by a loved one into operations spending by the prison.

□ *Prison accounts as tools for teaching financial responsibility.*

Another theme that emerges in the regulation of inmate trust accounts is that the accounts themselves and the prisons’ control of these accounts exist to teach incarcerated people personal fiscal responsibility.<sup>149</sup> Under this rationale, prison systems maintain that taking money out of these accounts to satisfy various debts, including payments to the prisons themselves, is rehabilitative in and of itself.<sup>150</sup> In other words, compelling people in prison to cede control of their own money is actually for their own benefit.<sup>151</sup>

For example, the BOP controls inmate trust accounts through a program called the Inmate Financial Responsibility Program (IFRP). The stated goal

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<sup>145</sup> W. VA. CODE §15A-4-10.

<sup>146</sup> W. VA. CODE §15A-4-10(14).

<sup>147</sup> LEGISLATIVE AUDIT DIVISION, MONTANA LEGISLATURE, INMATE WELFARE FUND DEPARTMENT OF CORRECTIONS 1 (June 2022), <https://leg.mt.gov/content/Committees/Administration/audit/2021-22/Meetings/June-2022/22P-03.pdf>.

<sup>148</sup> *Id.* at 3–6.

<sup>149</sup> *See, e.g.*, Inmate Financial Responsibility Program: Procedures, 88 Fed. Reg. 1331 (proposed Jan. 10, 2023) (to be codified at 28 C.F.R. § 545.11(b)-(d)).

<sup>150</sup> *Id.*

<sup>151</sup> According to BOP program statement: “The management of inmate funds and the operation of the Trust Fund are designed primarily for the benefit of inmates.” U.S. Dep’t of Just., Fed. Bureau of Prisons, Program Statement No. 4500.12, Trust Fund/Deposit Fund Manual (March 14, 2018).

of the IFRP is “to encourage federal inmates in Bureau facilities to pay financial obligations; and to support federal inmates in developing financial planning skills.”<sup>152</sup> To that end, the IFRP allows prisons to (1) divert funds from inmate trust accounts to pay a variety of debts, including state and federal court fees and fines,<sup>153</sup> victim restitution, and – most problematic – the debt each person has to the prison itself for their own incarceration,<sup>154</sup> while precluding certain types of spending for the remaining funds;<sup>155</sup> and (2) impose a forced savings plan, in which prison officials encumber a portion of the funds to be saved until the individual’s release, which could be decades away or otherwise unnecessary for the particular individual’s situation.<sup>156</sup>

A number of states also have forced savings requirements similar to the one in the IFRP. These plans segregate a portion of the inmate trust account that the individual cannot access at all, even to cover basic necessities and non-frivolous purchases, and even when the individual’s release is years or decades into the future. In Wisconsin, an individual litigated to get access to his funds to pay a filing fee that Wisconsin claimed he had no right to access because it was encumbered.<sup>157</sup> The court granted him access, but only because Wisconsin had transported him out of state to a Tennessee prison, and the court determined that Tennessee law should apply.<sup>158</sup> In Kansas, a court rejected a challenge to the prisons’ mandatory savings plan where the individual was serving a life sentence and would never be able to access the saved funds.<sup>159</sup> In Nevada, all individuals must divert funds to a savings account for their release, even if they are serving life sentences,<sup>160</sup> and, upon release, the prison can seize savings account funds to cover certain institutional debts.<sup>161</sup> This means that incarcerated individuals may never be able to use any of the funds that they are forced to save: Either they are never

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<sup>152</sup> Inmate Financial Responsibility Program, *supra* note 149.

<sup>153</sup> The withdrawal of money to satisfy state court debts is particularly problematic given the poor record-keeping of state entities with regard to criminal system debt and the often-uncertain nature and amount of court debt.

<sup>154</sup> Inmate Financial Responsibility Program, *supra* note 149.

<sup>155</sup> *Id.* (describing one IFRP goal as “to support federal inmates in developing financial planning skills.”).

<sup>156</sup> In some states, even a person serving a sentence of life without parole must maintain a forced savings account. *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-237 (West).

<sup>157</sup> Doty v. Doyle, 182 F. Supp. 2d 750, 751 (E.D. Wis. 2002).

<sup>158</sup> Doty v. Doyle, 182 F. Supp. 2d 750, 754 (E.D. Wis. 2002); *WI Release Fund Can Be Used to Pay Filing Fee*, PRISON LEGAL NEWS (May 15, 2007), <https://www.prisonlegalnews.org/news/2007/may/15/wi-release-fund-can-be-used-to-pay-filing-fee/#case-5440>.

<sup>159</sup> Ellibee v. Simmons, 32 Kan. App. 2d 519, 523, 85 P.3d 216, 219 (2004).

<sup>160</sup> Nev. Rev. Stat. Ann. § 209.463(7) (West).

<sup>161</sup> STATE OF NEVADA GOVERNOR’S FINANCE OFFICE DIVISION OF INTERNAL AUDITS, AUDIT REPORT, NEVADA DEPARTMENT OF CORRECTIONS (Feb. 22, 2022), <https://budget.nv.gov/uploadedFiles/budgetnvgov/content/IAudits/About/AuditRpts/DIA%2022-05.pdf>

released and the funds revert to the state, or they are released with an institutional debt that they must pay with their release savings funds.<sup>162</sup>

Like the federal BOP, state prison systems justify their control of inmate trust accounts on the grounds that such controls teach financial responsibility. In Kansas, one court found that prisons can deduct per diem incarceration costs because the goal of teaching “fiscal responsibility” is rationally related to the state’s legitimate interest.<sup>163</sup>

□ *Prison accounts as ... ?*

Prison banking systems can have features one or all or some of the categories above, and prison systems can justify their existence on one or more of these grounds simultaneously. But whatever the multiple shifting descriptions of prison banking, courts have only occasionally applied legal categories that exist to protect money outside of prison. Sources of protection for free-world property interests in money—for example, laws governing trust accounts, bank accounts, custodianships, bailments, or other legal frameworks for money that is not in the immediate physical possession of a clear owner—simply do not apply to inmate trust accounts.<sup>164</sup> The sheer murkiness and resistance to existing legal categories leaves these accounts open to abuse.

Different rationales for prison bank accounts give rise to very different understandings of what the legal status of that money is. If the idea is to repay the state for its costs, then it follows that the holder of the account has no (or only minimal) legal interest in or right to access that money. The account itself is a mechanism for repayment of the cost of incarceration. But if the account exists exclusively for the benefit and use of the person in prison—whether as their own personal money to be spent at their direction, or as pooled assets of multiple people to fund movie nights or other desirable activities—then it follows that the state has no legal interest in the money and only a limited right to control it.

Using inmate trust accounts to simply store and track funds belonging to individuals raises several questions about the legal status of the accounts and the rights and duties of incarcerated people and prison systems in maintaining and accessing the accounts: Are these accounts true trust

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<sup>162</sup> A Nevada audit showed that one formerly incarcerated individual had an outstanding balance of \$189,000. *Id.*

<sup>163</sup> *Elliott v. Simmons*, 100 F. App’x 777, 780 (10th Cir. 2004).

<sup>164</sup> *See, e.g., Minsky v. City of Los Angeles*, 11 Cal. 3d 113, 117, 520 P.2d 726, 730 (1974) (finding that city acts as bailee in taking money from an arrested person). A Washington statute specifically makes the Secretary of the Department of Corrections the “custodian” of the money belonging to people in prison, WASH. REV. CODE ANN. § 72.11.020 (West), but the Washington Supreme Court has found that role consistent with the department’s practices of seizing money from the accounts to pay itself for general costs of incarceration. *In re Pierce*, 173 Wash. 2d 372, 390, 268 P.3d 907, 915 (2011).

accounts, accompanied by the restrictions on conflicts of interest and the obligations of a fiduciary? Do they constitute some form of bailment, custodianship, or something else? A government fund that may have some characteristics of some of these other categories?<sup>165</sup>

If the goal of early inmate trust accounts was simply to hold and account for the money of others, and if the common name for these accounts as they developed in the federal system and across states was a “trust,” then it follows that these accounts, are, in fact, true trust accounts. The federal government’s more recent analysis of the status of federal inmate trust accounts, after all, adopts the 1930s idea behind for the creation of the accounts – that the money belongs to the incarcerated person and the prison simply holds it for them.<sup>166</sup> Memos from the Department of Justice have repeatedly affirmed that the funds belonging to people in federal prisons constitute a true trust and that the federal government has a fiduciary obligation in holding these funds.<sup>167</sup> The federal Bureau of Prisons has adopted this view in the program statement for its manual governing trust funds,<sup>168</sup> and the Court of Federal Claims has agreed with it.<sup>169</sup>

Other courts have recognized that incarcerated people have a property interest in their own money but have not offered a legal category that could help define the contours of that interest.<sup>170</sup> Texas courts, despite the term

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<sup>165</sup> See, e.g., *Fiduciary Activities*, GOV’T ACCT. STANDARDS BD., <https://gasb.org/page/PageContent?pageId=/projects/fiduciary-activities.html#section-3>.

<sup>166</sup> *Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund*, 19 Op. Off. Legal Counsel 137–38 (1995).

<sup>167</sup> *Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund*, 19 Op. Off. Legal Counsel 137–38 (1995).

<sup>168</sup> *Davis v. United States*, No. 20-1071, 2022 WL 1618052, at \*3 (Fed. Cl. May 20, 2022)

<sup>169</sup> U.S. Dep’t of Just., Fed. Bureau of Prisons, Program Statement No. 4500.12, Trust Fund/Deposit Fund Manual (March 14, 2018); see also *Davis v. United States*, No. 20-1071, 2022 WL 1618052, at \*3 (Fed. Cl. May 20, 2022); *Davidson v. Fed. Bureau of Prisons*, No. CV 5: 15-351-JMH, 2017 WL 1217168, at \*15 (E.D. Ky. Mar. 31, 2017), aff’d, No. 17-5429, 2017 WL 8897005 (6th Cir. Nov. 29, 2017) (finding no fiduciary duty for the commissary fund but contrasting that fund with the fund holding individuals’ monies).

<sup>170</sup> See, e.g., *Schneider v. California Dep’t of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1998) (“We need not attempt to mark out with any precision the contours of property’s “core” meaning.”); *Elliott v. Simmons*, 100 F. App’x 777, 779 (10th Cir. 2004) (finding that “although Plaintiff possesses a protected property interest in his prison trust account, prison grievance procedures provide sufficient post-deprivation proceedings to satisfy procedural due process”); *Ross v. Myrick*, 817 F. App’x 499, 500 (9th Cir. 2020); *Sperry v. Roberts*, No. 21-3151, 2022 WL 2798994, at \*7 (10th Cir. July 18, 2022); *Martinez v. Sumner*, 9 F.3d 1552 (9th Cir. 1993) (finding “no question that [Martinez]’s interest in the funds in his prison account is a protected property interest,” but that he did not have “unlimited access to those funds.”); *Maydak v. United States*, 630 F.3d 166, 174 (D.C. Cir. 2010) (applying principles of trust law to the determination of whether plaintiffs had standing as beneficiaries of the trust); *Abdul-Wadood v. Bayh*, 85 F.3d 631 (7th Cir. 1996) (court identifies DOC as trustee and incarcerated people as beneficiaries but conclude that the property interest extends only so far as state statutory law regulating inmate trust accounts grants rights; because state law diverted accrued interest to a different fund, plaintiffs had no right to it); *Harris v. Ryker*, No. 11-CV-133-JPG, 2011 WL 5244682, at \*3 (S.D. Ill. Nov. 2, 2011).

“inmate trust account,” deny that the fund is a “trust” at all but simply maintain that it is an “account.”<sup>171</sup> In keeping with the idea that the fund occupies a space that is neither a trust nor a true bank account, Texas courts decline to apply traditional procedural safeguards against unlawful garnishments of assets, noting that applying such procedures would be expensive: “Faced with this cost-benefit tradeoff, TDCJ would likely opt not to seek recoupment at all, thus subverting the Legislature's goal of efficient cost-collection.”<sup>172</sup>

Many courts adjudicating issues involving the funds simply do not place the funds into any property category.<sup>173</sup> This failure by the courts to identify a proper legal framework for money that is held and maintained by the government for the benefit and use by another leaves it unprotected. Few<sup>174</sup> would argue that any money deposited in an inmate trust account or earned by incarcerated people simply belongs to the government to do what it likes with it.<sup>175</sup> It must, therefore, be qualitatively different from other segregated government funds, where they may be called a “trust” but are not true trusts and are, instead, simply a government accounting device to allocate funds that the government indisputably owns.<sup>176</sup>

In the absence of a singular, consistent description and purpose behind the creation of inmate trust accounts, we get a kitchen sink of legal interpretations about the status of the money. In one version, Michigan’s and Arkansas’s endeavors to take entire stimulus checks to repay themselves for running prison systems looks a lot like the 1821 idea that an incarcerated person’s account is “a fund in the hands of the master for his remuneration.”<sup>177</sup> In another version, the money in the accounts belongs to the incarcerated individuals, and the “inmate trust fund” serves purely administrative purposes: to allow for easy commissary purchases through

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<sup>171</sup> *Randolph v. State*, 323 S.W.3d 585, 586 (Tex. Ct. App. 2010) (“They are simply inmate accounts. While there may be a custodial relationship between the Department and the inmate as to the money in the account, an issue not decided by us today, there is certainly no trustee/beneficiary relationship wherein the Department is burdened with all the duties of a trustee with regard to the inmate's money.”). *But see* *Matson v. Kansas Dep't of Corr.*, 301 Kan. 654, 657, 346 P.3d 327, 330 (2015) (“But we have no difficulty finding the plain language of the applicable statutes establishes the inmate trust fund is, in fact, a trust subject to the KUTC.”).

<sup>172</sup> *Randolph v. State*, 323 S.W.3d 585, 587–88 (Tex. Ct. App. 2010).

<sup>173</sup> *See, e.g., Young v. Wall*, 642 F.3d 49, 54 (1st Cir. 2011).

<sup>174</sup> Except Arkansas. *See supra* notes 19–22 and accompanying text.

<sup>175</sup> Several courts have stated that incarcerated people have a property interest in the money in their own inmate trust accounts. “It is clear beyond hope of contradiction that an inmate has a property interest in the balances held in his accounts.” *Young v. Wall*, 642 F.3d 49, 53 (1st Cir. 2011). *See also* *Burns v. PA Dep't of Corr.*, 544 F.3d 279, 281 (3d Cir. 2008); *Scott v. Angelone*, 980 F.2d 738 (9th Cir. 1992); *In re D.L.D.*, 374 S.W.3d 509, 514 (Tex. Ct. App. 2012).

<sup>176</sup> *See* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 *YALE L. J.* 165, 167 (1997) (describing the tendency of governments to appropriate the term trust to refer to simple government budget line items).

<sup>177</sup> *Washburn v. Belknap*, 3 Conn. 502, 502 (Conn. 1821).

secure means and to set that money aside from other government coffers.<sup>178</sup> In another version, common across jurisdictions, the money may belong to the person incarcerated but prisons assert that it must be subject to strict control and limited access for security reasons.<sup>179</sup>

Financial technology has made it even more difficult to describe what prison banking is supposed to do and what legal category applies. In 2002, prison financial services provider JPay entered into its first correctional contract.<sup>180</sup> In short order, JPay and its competitors secured contracts with prison and jail systems across the country. Financial technology firms advertised their products as a boon to incarcerated people and their families,<sup>181</sup> but with the arrival of these products, people in prison lost even more control and access to their funds.<sup>182</sup> Today, three financial technology firms dominate the money-transfer market for prisons.<sup>183</sup> Most states offer individuals only one choice.<sup>184</sup>

Until the arrival of financial technology, family and friends of people incarcerated in BOP were able to make cost-free deposits into their loved one's prison accounts, and the US Treasury held the funds for the individual.<sup>185</sup> In 2002, Bank of America entered the picture and took over prison banking for people in federal facilities, and financial technology firms across the country began contracting with state prison systems to manage the funds belonging to incarcerated people.<sup>186</sup> At the federal level, Bank of America's role in managing the Inmate Trust Fund has not changed the legal status of the funds<sup>187</sup> or the federal government's fiduciary obligation to

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<sup>178</sup> See *Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund*, 19 Op. Off. Legal Counsel 137–38 (1995) (citing Dep't of Just., Circular No. 2126, ¶¶9–11 (Aug. 1, 1930)).

<sup>179</sup> See, e.g., *Burns v. PA Dep't of Corr.*, 544 F.3d 279, 280, 285–291 (3d Cir. 2008) (recognizing individual's cognizable property interest as well as prison's strong interest as judgment creditor).

<sup>180</sup> *Banking and Financial Services*, INVESTIGATE, <https://investigate.afsc.org/tags/banking-and-financial-services>.

<sup>181</sup> See, e.g., Joe Musco, *Automating Inmate Trust Account Funding Saves Time and Money for Correctional Facilities*, AM. JAILS, November-December 2005, at 83.

<sup>182</sup> See Daniel Wanger, Center for Public Integrity, *Megabanks Have Prison Financial Services Market Locked Up*, Ctr. Pub. Ineq. (Oct. 2, 2014), <https://publicintegrity.org/inequality-poverty-opportunity/megabanks-have-prison-financial-services-market-locked-up> (describing high fees, delayed money order transactions, and difficulty reaching customer service).

<sup>183</sup> CONSUMER FIN. PROT. BUREAU, *JUSTICE-INVOLVED INDIVIDUALS AND THE CONSUMER FINANCIAL MARKETPLACE* 18 (2022).

<sup>184</sup> *Id.*

<sup>185</sup> Daniel Wanger, *Megabanks Have Prison Financial Services Market Locked Up*, CTR. PUB. INTEGRITY (Oct. 2, 2014), <https://publicintegrity.org/inequality-poverty-opportunity/megabanks-have-prison-financial-services-market-locked-up/>.

<sup>186</sup> *Id.*

<sup>187</sup> See Keefe Commissary Network, LLC, *Original Technical Proposal*, W. VA. DEP'T CORR. 18 (April 10, 2014, 1:30PM) <https://www.prisonpolicy.org/contracts/documents.html?text-search-fields=facility-and-remarks&q=&q-state=&q-document-type=&q-service=inmate->

manage them.<sup>188</sup> In state systems, however, financial technology firms have caused courts a great deal of confusion as they try to sort out exactly where the property interest lies when loved ones deposit money into an account intended for the benefit of an incarcerated person, while both the private fintech firm and the prison have what seems to be direct access to the funds.<sup>189</sup>

In practice, the various deductions from prison bank accounts can add up to look increasingly close to what Michigan and Arkansas set out to do. After all, taking small amounts of money from low-balance accounts across massive prison populations can be quite lucrative.<sup>190</sup> And in practice, the larger asset seizures authorized under a cost-of-incarceration rationale are more common than the public may think; the seizure of stimulus checks simply put a spotlight on the practice because the problems were so widespread and sudden, and the seizures applied to larger sums of money.<sup>191</sup>

Without a clear or singular rationale behind inmate trust accounts, supposed creditors have easy access and little oversight in accessing the money. Many courts find that prison systems can unilaterally seize money from a person's account on the grounds that the individual owes a debt—to the prison, to a victim, to a government restitution fund, or to a court, for example—with very little process, even though they would never be able to do the same with a person's personal bank account.<sup>192</sup> For some courts, it is not even clear whether litigation involving an inmate trust account is a criminal or civil matter.<sup>193</sup> While there is some support for the idea that, from an accounting perspective, inmate trust accounts are simply a line item in a government budget that sets the money aside for a specific purpose and has

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banking-software&q-vendor=&sort=state#search-form). See also Mehra Baradaran, *Rethinking Financial Inclusion: Designing an Equitable Financial System with Public Policy*, ROOSEVELT INST. 2 (April 2020).

<sup>188</sup> See *supra* note 168–69.

<sup>189</sup> As Laura Appleman has pointed out, fintech firms like JPay have described their products as streamlining prison banking, but in fact it replaced a system that was simple to administer and straightforward—deposits by money orders into an existing account—into one that is maddeningly opaque and expensive for incarcerated people and their families. See Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579, 602 (2022). See also Jazmen Howard, *Unjustly Enriched Prisons: The Problem with Capitalizing on Captivity*, 47 FL. L. REV. 127, 137 (2020)

<sup>190</sup> This author was not able to find any reported account of the actual balance of inmate trust funds across any prison system.

<sup>191</sup> See *supra* Section III.b.

<sup>192</sup> Civil garnishment procedures can require more process than seizure of inmate trust account funds. In *Ex parte Reno*, 360 So. 3d 1112, 1114 (Ala. Crim. App. 2022), attorneys for the state seeking to seize an incarcerated person's stimulus check moved to amend an early motion to "garnish" the funds. Realizing that civil garnishment procedures would provide more process, they amended the order to simply enforce a criminal court's restitution order. *Id.*

<sup>193</sup> See *Johnson v. Tenth Jud. Dist. Ct. of Appeals at Waco*, 280 S.W.3d 866, 874 (Tex. Crim. App. 2008) (laying out the split of authority and finding that the litigation is a civil matter).

no greater legal significance,<sup>194</sup> that position seems to defy logic; virtually no one<sup>195</sup> argues that people in prison have no legal right at all to the money that they and their family and friends have deposited in their account and that it belongs exclusively to the government.<sup>196</sup>

Even on the federal side, where there is a documented history that appears to clearly establish that inmate trust accounts are just that—trust accounts where the government’s sole interest is as fiduciary—the Bureau of Prisons still manages to exercise coercive control of the accounts to divert money to itself and other entities. The Inmate Financial Responsibility Program (IFRP) is voluntary in theory, but if a person refuses to participate, the BOP informs the Parole Commission of their refusal, bars them from furlough eligibility, precludes them from certain wage benefits and work assignments, restricts their commissary purchases, denies them certain release gratuities like civilian clothing and money for transportation, and takes away other early release and financial benefits.<sup>197</sup> Although the IFRP purports to teach “financial planning skills,”<sup>198</sup> in effect, the program simply means that the BOP takes people’s money and leaves them with less of it. The BOP has produced no evidence that the IFRP actually improves financial planning skills,<sup>199</sup> or that there are program benefits for the particularly low-income population of those recently released from prison.<sup>200</sup> These two components of the fiscal responsibility narrative—taking money out of the accounts to pay down a variety of court and criminal system debts and imposing a forced savings plan—simply means less liquid cash for a population of people that is already mostly destitute.

As of the date of this writing, the BOP is considering a rule change that would exact an even greater percentage of a person’s account balance (75

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<sup>194</sup> See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L. J. 165, 167 (1997) (describing the tendency of governments to appropriate the term trust to refer to simple government budget line items).

<sup>195</sup> Arkansas perhaps being the exception. See *supra* notes 19–22.

<sup>196</sup> Even the state statutory schemes that authorize large deductions to cover overall costs of incarceration mandate that some portion remain in the individual’s account. See Conn. Gen. Stat. 18-85b(b) (up to 50 percent of incarcerated person’s inheritance is subject to lien; Nev. R.S. Ann. 209.2475(1) (requiring that director set minimum balance); Nev. Rev. Stat. Ann. § 209.463(3)(a) (West); Nev. Rev. Stat. Ann. § 209.247(3)(a) (West) (Director may not make deductions for debts that are more than 50 percent of wages or 25 percent of deposits, but the amounts within that 50 percent or 25 percent are up to the Director to determine).

<sup>197</sup> Inmate Financial Responsibility Program: Procedures, 88 Fed. Reg. 1331 (proposed Jan. 10, 2023) (to be codified at 28 C.F.R. § 545.11(b)-(d)).

<sup>198</sup> *Id.*

<sup>199</sup> See *Comment to the Bureau of Prisons Regarding Proposed Changes to the Inmate Financial Responsibility Program*, SENT’G PROJECT PROJECT (March 14, 2023), <https://www.sentencingproject.org/advocacy-letter/comment-to-the-bureau-of-prisons-regarding-proposed-changes-to-the-inmate-financial-responsibility-program/>.

<sup>200</sup> See Brittany L. Deitch, *Rehabilitation or Revolving Door: How Parole Is A Trap for Those in Poverty*, 111 GEORGETOWN L. J. ONLINE 47, 51 (2022) (“In the first year after release, only twenty percent earn more than \$15,000.”).



percent) to pay these other entities.<sup>201</sup> Despite its historical assurances that the BOP acts as a fiduciary, therefore, the federal system, like many state prisons and jails, is regularly siphoning off the money earned by incarcerated people and their friends and family to pay itself and other criminal system actors.

b. Statutory and Regulatory Frameworks and Failures

Courts have addressed a variety of concerns around the management of inmate trust accounts, such as whether the government gets to keep the interest,<sup>202</sup> what kind of process is required,<sup>203</sup> whether deductions are waivable for indigency,<sup>204</sup> whether certain funds are immune from garnishment,<sup>205</sup> and more. But the caselaw often nibbles around the edges of the larger conceptual questions: Whose money is it, and under what legal authority and regulatory framework do prisons operate these accounts?

One federal appeals court, presented with a challenge concerning the legal status of a prison bank account, described the question as a “Hohfeldian issue” around which it had to puzzle through the various rights and duties among the relationship between the incarcerated individual and the prison officials.<sup>206</sup> While the court found that the prison’s mere threat to seize funds implicated the individual’s property interest (because it constituted a money judgment that reduced the value of the security of the funds), the court curiously found that the excessive control exercised by prisons over individuals’ accounts actually strengthened the prison’s legal interest in the money rather than triggering additional procedural protections for the individual with the actual property interest in the funds:

To the extent that the Department of Corrections’ assessment interest differs from that of a traditional Judgment Creditor, those differences show that the Department of Corrections’ interest is actually the stronger and more readily collectable legal right.<sup>207</sup>

This analysis, and other efforts by courts to puzzle through the contemporary legal status of prison bank accounts, raise more questions than answers. Presumably, at least some of the answers should lie in state

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<sup>201</sup> See Inmate Financial Responsibility Program: Procedures, 88 Fed. Reg. 1331 (proposed Jan. 10, 2023) (to be codified at 28 C.F.R. § 545.11(b)-(d)).

<sup>202</sup> See *Schneider v. California Dep't of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1998) (incarcerated people have a property interest in the accrued interest on their accounts); *but see Young v. Wall*, 642 F.3d 49, 51–52 (1st Cir. 2011).

<sup>203</sup> *Harrell v. State*, 286 S.W.3d 315, 321 (Tex. 2009); *In re Doyle*, No. 06-08-00094-CV, 2008 WL 4329041, at \*2 (Tex. App. Sept. 24, 2008).

<sup>204</sup> *Wheeler v. McDonough*, 957 So. 2d 94, 95 (Fla. Dist. Ct. App. 2007).

<sup>205</sup> *In re Doyle*, No. 06-08-00094-CV, 2008 WL 4329041, at \*2 (Tex. App. Sept. 24, 2008).

<sup>206</sup> *Burns v. PA Dep't of Corr.*, 544 F.3d 279, 280, 285–291 (3d Cir. 2008).

<sup>207</sup> *Id.* at 288–89 (footnote omitted).

statutes and regulations that govern inmate trust accounts. Unlike the federal statute that sets aside inmate trust accounts as true trusts,<sup>208</sup> state statutes and regulations governing inmate trust accounts are housed under sections of statutory and administrative codes that deal exclusively with correctional authority rather than with any aspect of finance or property regulation.<sup>209</sup> The statutes governing inmate trust accounts are often vague<sup>210</sup> or nonexistent.<sup>211</sup> Mississippi statutes include only a provision that the Department of Corrections establish “a cashless system.”<sup>212</sup> While Mississippi law describes how contraband funds should be deposited in a fund for prison operations, it says nothing about what kind of accounting system should be established for the day-to-day earnings, savings, and deposits of all of the individuals in its custody.<sup>213</sup>

Where state statutes and administrative codes are silent on the administration of inmate trust accounts, the rules around them exist informally—possibly in an internal regulation, a prison handbook, or on a website. Rhode Island, for example, has no state statutes addressing inmate trust accounts, and only a few administrative provisions mention inmate trust accounts tangentially.<sup>214</sup> The prison handbook fills the gaps and sharply curtails spending rights, ensuring that most of an individual’s inmate trust account balance will be spent on prison commissary items. The handbook specifies only a few instances in which individuals may spend the funds in an inmate trust account beyond spending within the market of

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<sup>208</sup> The federal statute was passed in 1930 as part of a Congressional reworking of Treasury authority, and a small number of funds, including the inmate trust account, were set aside as being out of reach of the Treasury Department. *See* Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund, 19 Op. Off. Legal Counsel 130 (1995)

<sup>209</sup> Every state that has statutes and regulations addressing inmate trust funds houses these provisions in the corrections section of the statutes and administrative code. *See, e.g.,* ARK. CODE ANN. § 004.00-841-VI; CAL. PENAL CODE § 1029; CONN. GEN. STAT. § 18-101; CONN. GEN. STAT. ANN. § 18-85; DEL. CODE ANN. tit. 29 § 8903; DEL. CODE ANN. tit. 11 § 6534 (West); FL. STAT. § 944.516; FLA. ADMIN. CODE ANN. r. 33-203.201; IDAHO CODE ANN. § 20-209H (West); CH. 75 ILL. COMP. STAT. 125/20 ¶ 120; 4 IND. ADMIN. CODE § 24-6-9; ME. REV. STAT. tit. 34-A, § 3039; WASH. REV. CODE ANN. § 72.09.480. In other cases, however, provisions related to how different entities might recover debts from people in prison are scattered throughout non-correctional statutes and rules. *See, e.g.,* CAL. CIV. PROC. CODE § 704.090; COLO. REV. STAT. ANN. § 13-17.5-106 (West).

<sup>210</sup> *See, e.g.,* ARK. CODE ANN. § 004.00-841-VI (stating that a “system must exist to provide for inmate property control” and identifying topics that the system must address, without including actual rules about access and authority); IDAHO CODE ANN. § 20-209H (West) (requiring that “state board of correction shall establish an account in the name of each inmate” and allowing deductions for restitution); ME. REV. STAT. tit. 34-A, § 3039(1).

<sup>211</sup> For example, Alabama and Connecticut have no general statute establishing inmate trust accounts, and Colorado and Mississippi have no official regulations that govern inmate trust accounts.

<sup>212</sup> MISS. CODE ANN. § 47-5-194(6) (West).

<sup>213</sup> MISS. CODE ANN. § 47-5-194 (West).

<sup>214</sup> *See, e.g.,* 222 R.I. Code R. 10-00-1.4(B)(9)(d); 222 R.I. Code R. 10-00-1.4; 222 R.I. Code R. 20-00-1.16(D)(7).

prison goods and services; no expenditures permitted except with approval from the Warden for the following: “publishers of appropriate approved magazines, periodicals, newspapers, and books;” “For subsistence of members of his immediate family (including validated common law spouse) or to persons on inmate’s approved visiting list;” or bail.<sup>215</sup> Payments to “other entities or exceptions” are allowed only with written approval from the Warden, and the handbook contains no limits on the Warden’s discretion to approve or deny such permission.<sup>216</sup>

As a consequence, state statutes largely fail to offer a coherent property rights framework that clearly identifies the inmate trust account according to a category within which the rights and obligations to the money can be determined. Despite the most common term used for the accounts — “inmate trust accounts” or “inmate trust funds” — state statutes often do not explicitly label them as such,<sup>217</sup> sometimes using general terms like “safekeeping” to describe the role of the prison or jail official in maintaining accounts for incarcerated people.<sup>218</sup> In some states, the statute or policy or court interpretation may use a term like custodianship or bailment, but then treat the accounts in ways directly contrary to those terms.<sup>219</sup> Almost all states, however, are silent on the nature of the property interest.<sup>220</sup>

Caselaw addressing the challenges by prisoners to seizures of their inmate trust accounts suggests that the property interest is poorly regulated and hard for incarcerated people to litigate in court. In a Ninth Circuit case about the nature of the property interest in inmate trust accounts, the court noted that incarcerated people at common law had no property interest at all in their earnings, and so found that any property interest was derived from state statute.<sup>221</sup> This meant, of course, that where the state statute gave rights, it could also take away rights.<sup>222</sup> In other words, the state could define its own right to these funds.

State statutory provisions, however, often raise more questions than they answer. For example, in Alabama, there is no state statute that governs inmate trust account administration, aside from a set of local laws that apply to county jails,<sup>223</sup> and no administrative code provisions regulate inmate trust accounts. The bulk of the policy, therefore, is developed in internal

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<sup>215</sup> R.I. DEP’T OF CORR., INMATE RULE BOOK 38 (2013).

<sup>216</sup> *Id.*

<sup>217</sup> *Cf.* Cal. Penal Code § 5008 (West) (specifying that funds are held “in trust”).

<sup>218</sup> *See, e.g.*, COLO. REV. STAT. ANN. § 17-26-125 (West).

<sup>219</sup> *See, supra* note 164.

<sup>220</sup> *See supra* note 217.

<sup>221</sup> *Ward v. Ryan*, 623 F.3d 807, 811 (9th Cir. 2010).

<sup>222</sup> *See id.*

<sup>223</sup> *See, e.g.*, ALA.CODE 1975 § 45-8-232.20 (West) (regarding work release and the deposit of wages in Calhoun County); ALA.CODE 1975 § 45-31-231.23 (West) (regarding work release, deposit of wages, and deductions from wages in Geneva County); ALA.CODE 1975 § 45-36-231.07 (West) (requiring that interest revert to the sheriff in Jackson county).

corrections directives,<sup>224</sup> and handbooks disseminated to people in prison.<sup>225</sup> But even these low-level policies and handbook rules only superficially address the administration of these accounts, and do not specify particular limits on the department's ability to access funds and make deductions or the extent of the individual's property interest in these accounts.<sup>226</sup>

The states that do have detailed statutory provisions often give minimal guidance other than to provide direction on specific transactions or to claim broad authority to approve or deny specific transactions.<sup>227</sup> Alaska has minimal specific statutory and administrative regulation, but its policies claim broad discretion on the part of the warden to control inmate trust accounts. Specifically, Alaska statutes say very little about its "prisoner account fund" except that prison wages are deposited into the accounts after the state makes any authorized deductions for various costs or debts; that the commissioner has complete authority to approve or deny expenditures based on what the commissioner "commissioner considers appropriate;" and that the prison wages are held there for the "primary purpose of being available to the prisoner at the time of release."<sup>228</sup>

Even in states with more comprehensive and detailed statutory provisions, regulations, and policies, the rules may be incoherent. Arizona's statute gives broad authority to the director of corrections to establish and regulate "prisoner spendable accounts,"<sup>229</sup> and the department has made publicly available a detailed manual that explains its handling of inmate trust accounts.<sup>230</sup> The handbook helpfully includes a list of allowable deductions.<sup>231</sup> Still, the intersection of rights and obligations is unclear. The manual specifically requires that the Department act as a fiduciary,<sup>232</sup> but the

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<sup>224</sup> See, e.g., ALA. DEP'T OF CORR. ADMIN. REG. 101 (2023) (governing internal audits by the Alabama Department of Corrections, which does not directly refer to inmate trust accounts, though it addresses evaluation of "financial management systems" more broadly); ALA. DEP'T OF CORR. ADMIN. REG. 110 (2023) (governing an "institution contingency fund," a form of inmate welfare fund that draws its funds from sources that include commissary profits and interest on inmate trust funds); ALA. DEP'T OF CORR. ADMIN. REG. 112 (2023) (authorizing withdrawals from inmate trust funds for court debt).

<sup>225</sup> See, e.g., ALA. DEP'T OF CORR., MALE INMATE HANDBOOK 24 (2017) (specifying that "ADOC will hold and administer funds belonging to you" and laying out specific procedures for withdrawals, ban on accessing and operating outside accounts, and procedures for deposits).

<sup>226</sup> See generally ALA. DEP'T OF CORR., MALE INMATE HANDBOOK (2017); ALA. DEP'T OF CORR. ADMIN. REG. 101 (2023); ALA. DEP'T OF CORR. ADMIN. REG. 110 (2023); ALA. DEP'T OF CORR. ADMIN. REG. 112 (2023).

<sup>227</sup> See, e.g., CODE ARK. R. 004.03.1-109(I) and (VI); A.R.S. § 31-230(a) (West) (authorizing director to set policies but setting some parameters around withdrawals for court-ordered restitution and specifically authorizing certain fees). See also *Anderson v. State, Dep't of Corr.*, 159 Wash. 2d 849, 856-57, 154 P.3d 220, 224 (2007) (explaining statutory scheme of mandatory and prisons' discretion to impose other deductions).

<sup>228</sup> ALASKA STAT. § 33.30.201(d).

<sup>229</sup> ARIZ. REV. STAT. ANN. § 31-230 (West).

<sup>230</sup> ALA. DEP'T OF CORR., MALE INMATE HANDBOOK (2017).

<sup>231</sup> *Id.* at App'x A.

<sup>232</sup> *Id.* at 1.

Department nevertheless creates many costly fees that it collects for itself, and the description of the Department as a fiduciary seems at odds with a court's characterization of the property interest as being defined solely by Arizona statute.<sup>233</sup>

The Texas Department of Criminal Justice tries to give some sense of rights and limitations on the rights to the funds, but its effort to do so is confusing. The website describes its inmate trust account as an account that "provides safekeeping of an offender's funds, to which the offender may have access to, but not physical control of, during their confinement."<sup>234</sup> But the distinction between access and physical control makes little sense: Individuals with bank accounts have no more physical control over the actual money currently held in a bank account than individuals in prison; they simply have access to it. What the TDJC apparently means is that the access—not physical control—is restricted. The policy further states that funds may be used to purchase items in commissary, but it fails to mention that those items may be purchased only by maintaining funds in the inmate trust account.<sup>235</sup>

Without providing much of a rights framework or a property category for inmate trust accounts, the statutes and regulations that do exist regulate around the fringes: authorizing particular fee payments by the prison to itself or to other government entities,<sup>236</sup> barring people from holding other accounts,<sup>237</sup> reserving for prison officials the broad discretion to restrict access to funds by incarcerated people,<sup>238</sup> establishing forced savings accounts,<sup>239</sup> and even diverting funds to a corporation running a prison labor program.<sup>240</sup> Other provisions address basic ministerial issues, like where

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<sup>233</sup> See *Ward v. Ryan*, 623 F.3d 807, 811 (9th Cir. 2010).

<sup>234</sup> *Business & Finance Division: Commissary and Trust Fund Department*, TEX. DEP'T CORR., [https://www.tdcj.texas.gov/divisions/bfd/comm\\_trust\\_inmate\\_trust.html](https://www.tdcj.texas.gov/divisions/bfd/comm_trust_inmate_trust.html).

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

<sup>236</sup> See, e.g., CAL. PENAL CODE § 2085.5 (a) and (b)(West); COLO. REV. STAT. ANN. § 17-24-119(2)(a)-(d) and (3) (West); CONN. GEN. STAT. ANN. § 18-101(a) (West) (allowing disbursements from prison wages); IDAHO CODE ANN. § 11-108(2) (West); LSA-R.S. 15:874(4)(b), (d), (e), and (g); ME. REV. STAT. tit. 34-A, § 3032(5-A) (restitution) and (5-B) (monetary sanctions); MICH. COMP. LAWS ANN. § 791.220h(1) (West) (restitution); MICH. COMP. LAWS ANN. § 801.253 (West) (costs of food); MICH. COMP. LAWS ANN. § 801.4b(2) (West) (fee for being admitted to jail); WASH. REV. CODE ANN. § 72.09.480(2)(e) (West) (deducting for cost of incarceration); WASH. ADMIN. CODE 137-28-410(3); WASH. REV. CODE ANN. § 72.09.480(2)(a), (c), (d), and (f).

<sup>237</sup> See, e.g., N.Y. DEP'T OF CORR. & COMM'Y SUPERVISION, DIRECTIVE 2798.II (2016).

<sup>238</sup> See 22 ALASKA ADMIN. CODE 05.105(c) (confers right to withdraw funds for "family members" but all other withdrawals are at the discretion of the commissioner); CONN. AGENCIES REGS. 18-81-33(a) and (b).

<sup>239</sup> See, e.g., ARIZ. REV. STAT. ANN. § 31-237 (West); LSA-R.S. 15:874(4)(c); MISS. CODE ANN. § 47-5-579(6)(c) (West); WASH. REV. CODE ANN. § 72.09.480(2)(b); WASH. REV. CODE ANN. § 72.09.480(2)(b)l.

<sup>240</sup> MISS. CODE ANN. § 47-5-579(6)(b)(ii) (West)

and how prison wages are deposited, and record-keeping.<sup>241</sup> Finally, several states have statutes that allocate the interest from the accounts.<sup>242</sup>

State statutes only rarely create specific rights for incarcerated people with regard to their accounts. Maine specifically permits individuals to transfer funds from their inmate trust account into outside investment accounts.<sup>243</sup> Another provision under Maine's regulations, however, makes it a disciplinary violation for an individual to earn, inherit, or otherwise be credited with funds that they fail to deposit into their inmate trust account.<sup>244</sup>

In a regulatory vacuum, prisons can easily assert control that is not expressly given to them. Connecticut, for example, has passed statutes governing specific transactions, with provisions addressing how hobbycraft proceeds and prison wages are deposited<sup>245</sup> and how the prison prioritizes debts to be disbursed from the prison wages that are in the account.<sup>246</sup> Connecticut regulations allow limited disbursements for educational programming and ten percent of all deposits to cover costs of incarceration.<sup>247</sup> But there is no general statute creating or granting prison officials control over the money belonging to incarcerated people. Connecticut prison officials nevertheless exercise authority to freeze individuals' entire accounts, blocking incarcerated people from making even small commissary purchases for necessary items, when it initiates proceedings to seize some portion of the account to cover costs of incarceration.<sup>248</sup> In other words, when Connecticut officials believe that the state has a right to some fraction of an individual's money, they freeze the entire account to prevent any purchases or withdrawals.

Such regulatory minimalism gives rise to a basic question: If people in prison have a property interest in their own money,<sup>249</sup> how can prisons create so many reasons for taking that money when not specifically authorized by law? In other words, why should prisons be allowed a default rule that they can impose any cost not otherwise prohibited, rather than a rule that they can impose only those costs specifically permitted?

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<sup>241</sup> See, e.g., LA. REV. STAT. ANN. 15:874(1)–(2) (West).

<sup>242</sup> LA. REV. STAT. ANN. 15:874(5) (West); ME. REV. STAT. tit. 34-A, § 3039(2) (allocating interest to maintenance of inmate trust accounts and to general welfare fund).

<sup>243</sup> ME. REV. STAT. tit. 34-A, § 3039(1) (requiring commissioner to allow individuals to withdraw from inmate trust fund and transfer to outside investments).

<sup>244</sup> CODE ME. R. tit. 03-201 Ch. 10, Subs. 20.1, § VII(F).

<sup>245</sup> CONN. GEN. STAT. ANN. § 18-88(i) (West); Conn. Gen. Stat. Ann. § 18-101(a) (West).

<sup>246</sup> CONN. GEN. STAT. ANN. § 18-85(b) (West).

<sup>247</sup> CONN. AGENCIES REGS. 18-85a-4(a) and (b).

<sup>248</sup> See *Williams v. Murphy*, No. 3:13-CV-01154 (MPS), 2018 WL 2016850, at \*5 (D. Conn. Mar. 29, 2018), *aff'd sub nom. Williams v. Marinelli*, 987 F.3d 188 (2d Cir. 2021). See also, e.g., IDAHO CODE ANN. § 20-209H (West) (offering no clear definition or set of rules for inmate trust accounts but specifying that restitution payments may be deducted); IDAHO CODE ANN. § 11-108(2) (West) (specifying civil judgments can be drawn from inmate trust accounts).

<sup>249</sup> "It is clear beyond hope of contradiction that an inmate has a property interest in the balances held in his accounts." *Young v. Wall*, 642 F.3d 49, 53 (1st Cir. 2011).

One answer is, simply, that they cannot. In *Vance v. Barrett*,<sup>250</sup> the Ninth Circuit addressed a claim by two incarcerated individuals that the Nevada Department of Prisons (NDOP) violated their constitutional rights by attempting to coerce them to sign a “fiscal agreement” authorizing NDOP to deduct a variety of costs from their inmate trust accounts and retain accrued interest, and then withholding work assignments when they refused.<sup>251</sup> The agreement would have conferred on NDOP broad discretion to deduct virtually the entirety of most people’s inmate trust accounts because the debt included “any costs incurred by NDOP connected with an inmate’s release, and “the cost of any expense incurred by NDOP on [the inmate’s] behalf, whether [the inmate] incurred the expense voluntarily or involuntarily.”<sup>252</sup> Because such expenses could encompass virtually any cost associated with running the prisons, those who signed the agreements would put their entire accounts at risk.<sup>253</sup>

The *Vance* court indicated that NDOP could not impose costs without either legislative authority or the fiscal agreement, stating in passing that “[n]one of these deductions were authorized by law.”<sup>254</sup> The court cited Nevada’s statute governing the “Prisoners’ Personal Property Fund,” which allowed only specified deductions from the individual’s account.<sup>255</sup> In particular, the court noted the language of the statutory provision that the “interest and income earned on the money in the [overall] fund, after deducting any applicable charges, must be credited to the fund.”<sup>256</sup> The court then determined that, “Without a statutory mandate, prison officials had no authority to confiscate inmates’ property,”<sup>257</sup> and split its analysis into two parts: costs that were specifically authorized by statute would be analyzed under the Takings Clause, and costs that were not authorized by statute would be evaluated as *ultra vires* acts by the prison under the Due Process Clause.<sup>258</sup> Because the court reasoned that “applicable charges” referred to the charges associated with maintaining the inmate trust account, and because reasonable user fees for government services are permissible, those deductions passed muster.<sup>259</sup> Any other charges, however, lacked statutory authority.<sup>260</sup>

If the *Vance* court was so clear that an agency could not seize funds without statutory authority, how are prisons regularly depleting inmate

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<sup>250</sup> *Vance v. Barrett*, 345 F.3d 1083 (9th Cir. 2003).

<sup>251</sup> *Id.* at 1086–87.

<sup>252</sup> *Id.*

<sup>253</sup> The agreements also would have required the individuals to cede all control over the accrued interest in the accounts, despite the clear. *Id.* at 1087.

<sup>254</sup> *Vance v. Barrett*, 345 F.3d 1083, 1087 (9th Cir. 2003).

<sup>255</sup> NEV. STAT. Ann. § 209.241 (1993).

<sup>256</sup> *Vance v. Barrett*, 345 F.3d 1083, 1086 (9th Cir. 2003) (citing NEV. STAT. 16 § 209.241(2)(c)).

<sup>257</sup> *Vance v. Barrett*, 345 F.3d at 1089.

<sup>258</sup> *Id.* at 1089.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 1090.

trust accounts, and how did entire stimulus payments disappear? The next Part begins by situating inmate trust accounts within a longer history of racialized wealth extraction in the criminal system and, more specifically, through prison coercion. It then outlines the various ways that prisons seize funds from inmate trust accounts on a daily basis and the myriad barriers that people face in challenging these asset seizures in court.

### III. Problems with the Current System: Legal and Illegal Abuses

#### a. Prison Banking and Its Historical Contexts

This complex prison banking infrastructure has evolved against the backdrop of a broader phenomenon. Prison banking is just one way that governments have used criminal systems to extract money from mostly poor criminal defendants, and it is part of a massive and complex fine-and-fee system that has expanded significantly alongside the rise of mass incarceration.<sup>261</sup>

Just as prisons impose costs, so too do police departments,<sup>262</sup> courthouses,<sup>263</sup> prosecutors,<sup>264</sup> public defenders,<sup>265</sup> probation and parole departments,<sup>266</sup> and all the various private profiteers that partner with them

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<sup>261</sup> See generally, US COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS (2017), [https://www.usccr.gov/files/pubs/2017/Statutory\\_Enforcement\\_Report2017.pdf](https://www.usccr.gov/files/pubs/2017/Statutory_Enforcement_Report2017.pdf); ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS A PERMANENT PUNISHMENT FOR THE POOR (2016).

<sup>262</sup> See, e.g., John Archibald, *Police in This Tiny Alabama Town Suck Drivers into Legal 'Black Hole'*, AL.COM (Jan. 20, 2022, 3:00 PM), <https://www.al.com/news/2022/01/police-in-this-tiny-alabama-town-suck-drivers-into-legal-black-hole.html>.

<sup>263</sup> See, e.g., Kevin Tampone, *Which Town and Village Courts Collect the Most Fines and Fees in NY and CNY?* Syracuse.com (May 16, 2023, 6:02 PM), <https://www.syracuse.com/data/2023/05/which-town-and-village-courts-collect-the-most-fines-and-fees-in-ny-and-cny.html>.

<sup>264</sup> See, e.g., Brett Kelman, *They Confessed to Minor Crimes. Then City Hall Billed Them \$122K in 'Prosecution Fees'*, DESERT SUN (April 26, 2018, 6:29 PM), [https://www.desertsun.com/story/news/crime\\_courts/2017/11/15/he-confessed-minor-crime-then-city-hall-billed-him-31-k-his-own-prosecution/846850001/](https://www.desertsun.com/story/news/crime_courts/2017/11/15/he-confessed-minor-crime-then-city-hall-billed-him-31-k-his-own-prosecution/846850001/).

<sup>265</sup> See Devon Porter, PAYING FOR JUSTICE: THE HUMAN COST OF PUBLIC DEFENDER FEES, ACLU OF SO. CAL. (June 2017), <https://law.yale.edu/sites/default/files/area/center/liman/document/pdfees-report.pdf>; Williams v. Marinelli, 987 F.3d 188, 192 (2d Cir. 2021) (noting that state sued incarcerated person for nearly \$50,000 for the cost of his public defender).

<sup>266</sup> See generally Sharon Brett, Neda Khoshkhoo, & Mitali Nagrecha, PAYING ON PROBATION: HOW FINANCIAL SANCTIONS INTERSECT WITH PROBATION TO TARGET, TRAP, AND PUNISH PEOPLE WHO CANNOT PAY, CRIM. J. POL'Y PROG., HARV. L. S. (June 2020), [https://mcusercontent.com/f65678cd73457d0cbde864d05/files/f05e951e-60a9-404e-b5cc-13c065b2a630/Paying\\_on\\_Probation\\_report\\_FINAL.pdf](https://mcusercontent.com/f65678cd73457d0cbde864d05/files/f05e951e-60a9-404e-b5cc-13c065b2a630/Paying_on_Probation_report_FINAL.pdf) (discussing fees imposed by



to offer services, impose punishments, collect debts, or simply keep these agencies running.<sup>267</sup> But unlike the way these other agencies assess costs and collect debts, prisons have direct and immediate access to the actual savings of the debtors.<sup>268</sup>

Today's fine-and-fee revenue systems have both a short and a long history, and both of these historical narratives offer important contexts for prison banking. The starting point for the more recent history of criminal fines and fees is the 2008 recession, when the fiscal squeeze on state and local budgets led many governments to look for replacement revenue in new fees, higher fines, and private contractors who would take over expensive government functions, impose their own high costs, and offer site commissions to the governments in return.<sup>269</sup>

The result was a surge in fines and fees imposed on the people least likely to be able to pay.<sup>270</sup> Although some litigants, activists, and scholars had long been raising the issue of widespread criminal debt and its implications for a new form of debtors' prisons,<sup>271</sup> the protests in Ferguson, Missouri, following the death of Michael Brown brought national attention to the issue.<sup>272</sup> After community activists in Ferguson pointed to the entrenched fine-and-fee system as a major driver of incarceration and abusive control by police and municipal courts,<sup>273</sup> the Department of Justice

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probation departments and probation's role in enforcing payment of monetary sanctions as a condition of probation); FINES & FEES J. CENT. & REFORM ALLIANCE, 50 STATE SURVEY: PROBATION & PAROLE FEES: A STATE-BY-STATE LOOK AT THE SCOPE OF PROBATION AND PAROLE FEES AND THE CONSEQUENCES FOR FAILURE-TO-PAY (2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/05/Probation-and-Parole-Fees-Survey-Final-2022-.pdf>.

<sup>267</sup> See, e.g., FINES & FEES JUST. CENT., ELECTRONIC MONITORING FEES: A 50-STATE SURVEY OF THE COSTS ASSESSED TO PEOPLE ON E-SUPERVISION (2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/09/FFJC-Electronic-Monitoring-Fees-Survey-2022.pdf> (discussing fees for electronic monitoring).

<sup>268</sup> See *supra* Section III.b.v.

<sup>269</sup> See T. V. Le & M. M. Young, *Regressive Revenue Sourcing by Local Governments*, 60 URB. STUD., 811 (2023), <https://doi.org/10.1177/00420980221124456>; FINES AND FEES J. CENT. & CENT. ON BUDGET AND POL'Y PRIORITIES, IT'S TIME TO REJECT FINES AND FEES AS A SOLUTION TO BUDGET PROBLEMS (May 14, 2021), <https://finesandfeesjusticecenter.org/2021/05/14/ffjc-cbpb-op-ed-its-time-to-reject-fines-and-fees-as-a-solution-to-budget-problems/>; Cortney Sanders & Michael Leachman, STEP ONE TO AN ANTIRACIST STATE REVENUE POLICY: ELIMINATE CRIMINAL JUSTICE FEES AND REFORM FINES, CENT. ON BUDGET AND POL'Y PRIORITIES 3 (Sept. 17, 2021), <https://www.cbpp.org/sites/default/files/9-17-21sfp.pdf>.

<sup>270</sup> Le & Young, *supra* note 269, at 811; Sanders & Leachman, *supra* note 269.

<sup>271</sup> See, e.g., Kary L. Moss, *Debtors' Prison in Michigan: The ACLU Takes Up the Cause*, MICH. B.J., 40, 44 (July 2010); Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455 (2011); Complaint, *Thomas v. City of Gulfport*, No 1:05-CV-349-LG-RHW (S.D. Miss. July 2005).

<sup>272</sup> See Joseph Shapiro, *In Ferguson, Court Fines And Fees Fuel Anger*, NPR (Aug. 25, 2014), <https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger>;

<sup>273</sup> ArchCity Defenders Municipal Ct. White Paper (August 12, 2014), [https://cdn0.vox-cdn.com/uploads/chorus\\_asset/file/3459956/ArchCity\\_Defenders\\_Municipal\\_Courts\\_Whitepaper.0.pdf](https://cdn0.vox-cdn.com/uploads/chorus_asset/file/3459956/ArchCity_Defenders_Municipal_Courts_Whitepaper.0.pdf)

investigated and issued a comprehensive report on the systematic abuses by courts and law enforcement and the high-pressure incentives on government workers at every level to maximize fine and fee revenue through the criminal system.<sup>274</sup> In the wake of this work by community groups and the Department of Justice, one community after another across the country began raising the profile of the problem in their own areas.<sup>275</sup> An emerging picture emerged: Across the country and at all sub-national levels of government, criminal systems and governments were being funded by poor criminal defendants whose massive court debts kept them cycling in and out of prisons and jails for nonpayment.<sup>276</sup>

For policymakers, using fines and fees to keep governments running seemed to be an attractive solution to budget shortfalls.<sup>277</sup> A small fee increase—say, \$35 for a public defender<sup>278</sup> or \$25 simply for being arrested<sup>279</sup>—seemed inconsequential on paper but looked like it could fill big budget gaps when imposed on a large number of people.<sup>280</sup> But while the

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<sup>274</sup> U.S. DEP'T OF J. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42-78 (March 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>275</sup> See, e.g., Press Release, Lawyers' Comm. For Civ. Rts. San Francisco, Not Just a Ferguson Problem - How Traffic Courts Drive Inequality in California (April 9, 2015), [https://lccrsf.org/pressroom\\_posts/not-just-a-ferguson-problem-how-traffic-courts-drive-inequality-in-california/](https://lccrsf.org/pressroom_posts/not-just-a-ferguson-problem-how-traffic-courts-drive-inequality-in-california/); Raven Rakia, *It's Not Just Ferguson*, THE NATION (March 5, 2015), <https://www.thenation.com/article/archive/its-not-just-ferguson/>. For an analysis of how the problems identified in Ferguson are endemic to communities across the country, see Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93 (2016).

<sup>276</sup> Sanders & Leachman, *supra* note 269, at 3-5.

<sup>277</sup> See, e.g., STATUTORY COURT FEE TASK FORCE, ILLINOIS COURT ASSESSMENTS: FINDINGS AND RECOMMENDATIONS FOR ADDRESSING BARRIERS TO ACCESS TO JUSTICE AND ADDITIONAL ISSUES ASSOCIATED WITH FEES AND OTHER COURT COSTS IN CIVIL, CRIMINAL, AND TRAFFIC PROCEEDINGS 1, 13-15 (June 1, 2016), <https://www.ilga.gov/reports/special/statutory%20court%20fee%20task%20force%20report.pdf>; CARL REYNOLDS, ET AL., A FRAMEWORK TO IMPROVE HOW FINES, FEES, RESTITUTION AND CHILD SUPPORT ARE ASSESSED AND COLLECTED FROM PEOPLE CONVICTED OF CRIMES: INTERIM REPORT 1 (2009), <https://csgjusticecenter.org/wp-content/uploads/2020/02/2009-CSG-TXOCA-report.pdf>.

<sup>278</sup> See, e.g., Roopa Patel, *Louisiana's Public Defender Fees are Poor Fiscal and Legal Policies*, BRENNAN CENT. FOR J. (Apr. 12, 2012), <https://www.brennancenter.org/our-work/analysis-opinion/louisianas-public-defender-fees-are-poor-fiscal-and-legal-policies>.

<sup>279</sup> See, e.g., Adam Liptak, *Charged a Fee for Getting Arrested, Whether Guilty or Not*, NY TIMES (Dec. 26, 2016), <https://www.nytimes.com/2016/12/26/us/politics/charged-a-fee-for-getting-arrested-whether-guilty-or-not.html>.

<sup>280</sup> During the Great Recession, state and local governments turned toward small fees to fill large budget gaps across government services, not just in the criminal system, with the idea that small fee increases would be lucrative in the aggregate. See David Segal, *Cities, States Turn to Fees to Fill Budget Gaps*, NBCNEWS.COM (April 11, 2009 8:52 AM), <https://www.nbcnews.com/id/wbna30162245>. In the context of criminal system fees, however, the fee increases did not always prove beneficial, and often governments did no cost-benefit analysis at all. See, e.g., Roopa Patel, *Louisiana's Public Defender Fees are Poor Fiscal*

on-paper cost seemed small, the effects were powerfully felt in low-income communities across the country.<sup>281</sup>

Despite the shallow pockets of the people charged, fine-and-fee revenue appeared to solve some governments' short-term budget problems. Although overall enforcement costs were high and, in many places, exceeded the revenues that came in,<sup>282</sup> many criminal systems were often still heavily incentivized to continue to impose them. Each of the criminal system entities that imposed fees, after all, had its own budget to balance, and the costs of collecting the fee-based debts are often borne by a different entity than the entity that imposes it.<sup>283</sup> If a courthouse needs to pay its bills and fund its judges and staff, the threat of incarceration could be an effective mechanism, and when people fail to pay on schedule, the courthouse does not bear the bulk of the costs—prisons and jails do.<sup>284</sup> So a courthouse or judicial district or municipality or police department may find it quite lucrative to impose fees, even though collecting that debt is expensive for the criminal system as a whole.

Prisons and jails, however, have been the backstop enforcers of the debt and do not have the same ability to pass costs of enforcement onto other criminal system actors.<sup>285</sup> They can hardly threaten to incarcerate the incarcerated people that they want to charge. But in the years following the 2008 recession, available state tax revenue across the criminal justice system declined.<sup>286</sup> In many places, however, corrections spending did not decline, suggesting that criminal justice systems either had to increase the proportion of their existing revenues for corrections or find other ways of funding

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and *Legal Policies*, BRENNAN CENT. FOR J. (Apr. 12, 2012), <https://www.brennancenter.org/our-work/analysis-opinion/louisianas-public-defender-fees-are-poor-fiscal-and-legal-policies>.

<sup>281</sup> See, e.g., U.S. DEP'T OF J. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 79–90 (March 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>282</sup> Matthew Menendez, et al., *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties*, BRENNAN CENTER, BRENNAN CENT. FOR J. 5 (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>.

<sup>283</sup> See Mathilde Laisne, Jon Wool & Christian Henrichson, *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans I* (VERA INSTITUTE I 2017).

<sup>284</sup> See *People v. Cameron*, 929 N.W.2d 785, 786 (Mich. 2019) (McCormick, C.J., Conc.).

<sup>285</sup> Matthew Menendez, et al., *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties*, BRENNAN CENTER, BRENNAN CENT. FOR J. 9–10 (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>.

<sup>286</sup> Peter K. Enns & Delphia Shanks Booth, *The Great Recession and State Criminal Justice Policy: Do Economic Hard Times Matter?*, Russell Sage Found. Great Recession Brief 2 (Dec. 2015), <https://inequality.stanford.edu/sites/default/files/great%20recession%20criminal%20justice.pdf>.

prisons and jails.<sup>287</sup> Prison bank accounts, and the site commissions that come with them, offered one revenue stream.<sup>288</sup>

In many ways, the timing of the budget squeeze was lucky for prisons: The emergence of financial technology in free-world banking gave prisons the opening they needed.<sup>289</sup> Inmate trust accounts had long been vulnerable to abuse, but the recession, its impact on prisons, and the sudden ready availability of growing fintech firms that were increasingly taking over many aspects of prison life gave prisons an easier way to siphon off savings and convert it to prison budget revenue.

Getting an aggregate picture of the scale of revenues from inmate trust accounts is practically impossible. Corrections annual budgets generally do not include these revenues.<sup>290</sup> Moreover, the types of deductions are widely varied, the money deducted goes into different pots of government revenues, and various government budget documents may not clearly identify where the money is going. But some budget documents can paint a partial picture. In Kansas, incarcerated people are charged an array of fees and fines that are deducted from their inmate trust account.<sup>291</sup> One fee among many is a payment to a crime victim compensation board.<sup>292</sup> In fiscal year 2021, that one fee produced \$584,587 from prison wages for the victim compensation fund, and another \$334,160 from a combination of parole supervision fees and administrative fees assessed to incarcerated people “for maintenance of their trust accounts.”<sup>293</sup> Given the vast array of fines and fees charged to people in Kansas, the overall revenues for the state are certainly significant.

Despite its heavy impacts, the 2008 recession did not give birth to the fine-and-fee system so much as it fueled a system already in place. In other

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<sup>287</sup> See *id.* (noting that the relationship between state tax revenues and corrections spending has declined, in contrast to past recessions during which decreased state tax revenues more strongly correlated with decreased corrections spending).

<sup>288</sup> See Stephen Raheer, *The Multi-Million Dollar Market of Sending Money to an Incarcerated Loved One*, PRISON POL’Y INITIATIVE (Jan. 2017), <https://www.prisonpolicy.org/blog/2017/01/18/money-transfer/>.

<sup>289</sup> See Lindsey Sain Jones & Goldburn P. Maynard, Jr., *Unfulfilled Promises of the Fintech Revolution*, 111 CAL. L. REV. 801, 801 (2023).

<sup>290</sup> See *infra* note 398.

<sup>291</sup> Kansas law grants prison directors wide latitude to assess a variety of fees. KAN. STAT. ANN. § 75-52,139 (West).

<sup>292</sup> KAN. STAT. ANN. § 75-5211 (West).

<sup>293</sup> KAN. ADMIN. REGS. 44-5-115, KANSAS ATTORNEY GENERAL, CRIME VICTIMS COMPENSATION BOARD ANNUAL REPORT, KANSAS FISCAL YEAR 2021 6 (May 2022), [https://ag.ks.gov/docs/default-source/reports/cvcb/fy-2021-cvc-annual-report.pdf?sfvrsn=eafca01a\\_4](https://ag.ks.gov/docs/default-source/reports/cvcb/fy-2021-cvc-annual-report.pdf?sfvrsn=eafca01a_4). It is unclear why the fee assessed against inmate trust accounts is labeled as an administrative fee to cover maintenance of the accounts when clearly the funds are going toward the victim compensation fund instead. This labeling suggests that there may be no actual costs of administering the inmate trust accounts. Kansas contracts with Access Corrections to provide money transfer services. KANSAS DEP’T OF CORR., NOTICE TO FRIENDS AND FAMILY (Nov. 2022), <https://www.doc.ks.gov/facilities/inmate-banking/accesscorrectionsnovember2022/view>.

words, the fee-based wealth extraction that followed the recession was not a new phenomenon. The longer history of criminal debt began well before the recent rise of mass incarceration:

Monetary sanctions can be traced to the colonial era with multiple rationales, such as punishment for a crime, repayment of a debt, a tool to hold criminalized persons responsible as users of court resources and a strategy to restrict movement by coercing the poor and working classes, and black and Indigenous communities into a cycle of enslaved and indentured labor.<sup>294</sup>

Criminal systems have long been a source of revenue and profitable labor for public and private entities, and criminal punishment became a critical tool for the preservation of white economic interests with the enactment of the Black Codes after the Civil War.<sup>295</sup> Laws against offenses like vagrancy were used to preserve racial subjugation by imposing steep fines for minor or vaguely worded offenses.<sup>296</sup> Systems of convict leasing served private economic interests in ways that mirror some privatized prison labor practices today<sup>297</sup> and was critical to American economic growth. “Revenues from the neo-slavery poured the equivalent of tens of millions of dollars into the treasuries of Alabama, Mississippi, Louisiana, Georgia, Florida, Texas, North Carolina, and South Carolina. . . .”<sup>298</sup> Labor profit depended on continued incarceration, and continued incarceration depended on a system of wage-and-debt accounting that constantly charged individuals for costs of incarceration that kept them in indefinite bondage.<sup>299</sup>

These short and long histories are the context in which the prison banking system arose and now exists. In other words, prison banking does not represent an isolated case of institutional mismanagement in need of a basic correction, but is instead part and parcel of a massive, multi-

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<sup>294</sup> Brittany Friedman et al., *Who Pays for the Welfare State Austerity Politics and the Origin of Pay-to-Stay Fees as Revenue Generation*, 63 SOCIO. PERSP. 921, 923 (citations omitted). See also Alexis Harris, Natasha Hicks & Cortney Sanders, *A Pound of Flesh*, INQUEST, INSTITUTE TO END MASS INCARCERATION (May 2022), <https://inquest.org/a-pound-of-flesh/>.

<sup>295</sup> *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019).

<sup>296</sup> See Beth A. Colgan, *The Burdens of the Excessive Fines Clause*, 63 WM. & MARY L. REV. 407, 426 (2021); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 53 (2008).

<sup>297</sup> See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 908 (arguing that the “preservation of the practice of slavery through its transformation into prison labor means that socially, legislatively, and judicially, we have come only to reject one form of discrimination-antebellum slavery-while distinguishing it from the marginally remunerated and totally unremunerated prison labor that courts legitimate.”).

<sup>298</sup> DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 7-82 (2008).

<sup>299</sup> See *id.* at 66.

generational extraction of wealth from over-criminalized communities and a transfer of that wealth to the state and private profiteers.

This background is critical to understanding the distinct features of prison-based asset seizure and challenges for abolition or reform. While transparency and oversight are far from perfect when it comes to criminal debt outside of prison, it is nearly impossible to get accurate and complete information about what is actually happening with asset seizures from prison bank accounts.

Moreover, the low transaction costs of prison-based asset seizure not only make the environment ripe for abuse but also mean that the system will be even more change-resistant. The progress made on fines and fees in many spaces depends on convincing stakeholders that fine-and-fee systems are either revenue-neutral or are costing taxpayers more to enforce than the revenue that was being raised, or that an alternative revenue stream is available.<sup>300</sup> The reason fines and fees are not lucrative for many state and local governments is that the enforcement costs are extremely high; significant government resources were and are being devoted to tracking the debt, sending notices to debtors, issuing arrest warrants for nonpayment, conducting hearings for nonpayment, and arresting and incarcerating individuals for nonpayment.<sup>301</sup> To the extent that prosecutors, city attorneys, public defenders, judges and court personnel are involved at any of these stages, the costs are even higher.<sup>302</sup>

By contrast, taking money out of a prison bank account requires little more than a few keystrokes of a computer. Commissaries pay for themselves and more, as do fintech contracts.<sup>303</sup> To the extent courts are involved, it is often to dismiss pro se prisoner lawsuits on procedural grounds.<sup>304</sup>

#### b. Inmate Trust Accounts Today: Forms of Asset Seizure

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<sup>300</sup> See WHAT WOULD IT TAKE FOR STATES TO REFORM LOCAL FINES AND FEES? TAX POL'Y CENTER, URB. INST. & BROOKINGS INST. (Sept. 2022), <https://www.taxpolicycenter.org/feature/what-would-it-take-states-reform-local-fines-and-fees>.

<sup>301</sup> See Matthew Menendez, Lauren-Brooke Eisen & Michael Crowley, *If We Only Knew the Cost: Scratching the Surface on How Much it Costs to Assess and Collect Court Imposed Criminal Fees and Fines*, 2020 UCLA CRIM. J. L. REV. 165, 169-170 (2020).

<sup>302</sup> See *id.*

<sup>303</sup> See, e.g., NEVADA'S DEPARTMENT OF CORRECTIONS' PRACTICES EXPLOIT STRUGGLING FAMILIES FOR PROFIT, FINES AND FEES JUSTICE CENTER (Feb. 2023), <https://finesandfeesjusticecenter.org/content/uploads/2023/02/Nevada-NDOCs-Commissary-Pricing-1-Pager-2023.pdf> (detailing Nevada Department of Corrections' high markup and kickbacks).

<sup>304</sup> See, e.g., *Shropshire v. Fajota*, No. 315CV00164RCJWGC, 2016 WL 5346958, at \*5 (D. Nev. Aug. 18, 2016), *report and recommendation adopted*, No. 315CV00164RCJWGC, 2016 WL 5339667 (D. Nev. Sept. 22, 2016), *aff'd*, 698 F. App'x 466 (9th Cir. 2017); *Simpson v. Martin*, No. CIV-20-985-C, 2021 WL 3478214, at \*9 (W.D. Okla. June 30, 2021), *report and recommendation adopted*, No. CIV-20-985-C, 2021 WL 3476613 (W.D. Okla. Aug. 6, 2021), *aff'd*, No. 21-6104, 2022 WL 1087139 (10th Cir. Apr. 12, 2022). See also *supra* Section III.d.4.

Inmate trust accounts, therefore, are easy targets for seizure by prison administrators and other government officials. When budgets tighten and governments have exhausted other means to extract fine-and-fee revenue from poor criminal defendants, prison bank accounts offer an easy and accessible revenue stream.<sup>305</sup>

Asset seizures come in many forms, some of them legal,<sup>306</sup> some of them obviously illegal,<sup>307</sup> and many of them somewhere in between.<sup>308</sup> Prison systems seize funds from inmate trust accounts in the following ways:

□ ***Unilaterally establishing prison costs for goods and services and deducting these costs from individual accounts.***

Some of the in-prison costs that are charged to inmate trust accounts may not seem out of the ordinary: costs for commissary items like candy, extra clothes, paper and pens, and radios or tablets. But many costs are for items that people might assume are provided free of charge in a prison: water,<sup>309</sup> toilet paper, deodorant, essential clothing items, and more.<sup>310</sup> Because many prisons do not provide sufficient calories in their cafeteria portions, the largest category of commissary purchases is for food, at inflated prices.<sup>311</sup> Prisons also charge co-pays for every medical request, including for something as simple as a headache that requires over-the-counter pain

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<sup>305</sup> See Mary Fainsod Katzenstein & Maureen Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13:3 PERSP. ON POL. 638, 642 (September 2015). For example, a 2009 report by the Council of State Governments and the Texas Office of Court Administration noted that “efforts to tap inmates’ accounts to satisfy fines and court costs proved to be quite successful.” CARL REYNOLDS, ET AL., A FRAMEWORK TO IMPROVE HOW FINES, FEES, RESTITUTION AND CHILD SUPPORT ARE ASSESSED AND COLLECTED FROM PEOPLE CONVICTED OF CRIMES: INTERIM REPORT 17 (2009). The idea of drawing on inmate trust accounts to satisfy debts had started in one county, with judges issuing 1,522 orders for withdrawals that resulted in \$65,000 in fine/court cost revenue to the state. *Id.* at 17 n.26. This report recommended that the Texas legislature amend its garnishment statute to clarify that prison administrators could divert funds from inmate trust accounts only pursuant to a valid civil judgment. *Id.* at 44. To date, the Texas legislature has not followed this recommendation. TEX. CIV. PRAC. & REM. CODE ANN. § 63.007(a).

<sup>306</sup> See Fainsod Katzenstein & Waller, *supra* note 305.

<sup>307</sup> See, *infra* footnotes 381–90.

<sup>308</sup> Somewhere between embezzlement and seizures that withstand legal challenge are the seizures that prisons justify on some legal ground, however shaky, and the legal challenge is successful. In other words, in this third category, prisons may claim legal authority to make the deductions, but they either lose the lawsuit or the source of the authority is unclear. See, e.g., *Williams v. Murphy*, No. 3:13-CV-01154 (MPS), 2018 WL 2016850, at \*5 (D. Conn. Mar. 29, 2018), *aff’d sub nom. Williams v. Marinelli*, 987 F.3d 188 (2d Cir. 2021) (prison froze inmate trust account without authority to do so).

<sup>309</sup> Scott Tong & Paul Flahive, *Texas prisons raise prices of bottled water for inmates amid ongoing heat wave*, WBUR (July 26, 2023), <https://www.wbur.org/hereandnow/2023/07/26/texas-prisons-water-bottles#>.

<sup>310</sup> See Stephen Raheer, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL’Y INITIATIVE (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>.

<sup>311</sup> See *id.*

reliever.<sup>312</sup> While prisons may say they do not deny care to individuals with \$0 account balances, the debt is recorded and is repaid as soon as they have funds in their accounts.<sup>313</sup> When it comes to necessary commissary and medical costs in particular, prisons have a powerful incentive to add a significant markup.<sup>314</sup> They have a captive market that offers purchasers no alternative spending options.<sup>315</sup>

Outside of medical payments and commissary purchases, there are many other ways that in-prison costs can accumulate. Some prisons assess fines and restitution payments for disciplinary infractions that occur in prison.<sup>316</sup> Other costs are for opportunities that the public may assume are made universally available, like social visits with family, and some prisons are now scanning all incoming mail and charging people for the time they spend reading it.<sup>317</sup>

One of the clearest examples of the ways that prisons can invent or inflate fees for services is in the management of inmate trust accounts themselves. People in prison have no option but to deposit their money in an inmate trust account, given that there is no other means of purchasing basic necessities. But prisons can impose fees simply for the management of those funds.<sup>318</sup> In a chicken-and-egg-type conundrum, the prisons are creating the means for paying costs and then charging costs for the creation of this means.

Prisons and jails have also begun using prisoners' assets to turn a profit for themselves by converting individuals' money into pre-paid debit cards upon release, rather than giving them the cash they need and should be

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<sup>312</sup> See, e.g., STATE OF AL. DEP'T OF CORRS., INMATE CO-PAYMENT FOR HEALTH SERVICES (June 1, 2013), <https://doc.alabama.gov/docs/AdminRegs/AR703.pdf>; N.J. Admin. Code § 10A:16-1.5 (authorizing medical co-payments and medication co-payments).

<sup>313</sup> For an overview of prison medical copay policies, see *State and federal prison co-pay policies and sourcing information*, PRISON POL'Y INITIATIVE (April 13, 2017), [https://www.prisonpolicy.org/reports/copay\\_policies.html](https://www.prisonpolicy.org/reports/copay_policies.html).

<sup>314</sup> See Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>.

<sup>315</sup> See *id.*

<sup>316</sup> "These costs of incarceration and state disbursements are not being drawn from the general revenue and spread across all taxpayers. They are being borne, specifically, by the mostly low-income families of prisoners." Mary Fainsod Katzenstein & Maureen Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638, 640 (September 2015). In one case, where a prison imposed medical costs on an individual alleged to have assaulted another incarcerated person, the court noted that the prison is in an unusual position compared to other judgment creditors, because it "controls the process through which the amount of medical expenses will be determined." *Burns v. PA Dep't of Correction*, 544 F.3d 279, 288 (3d Cir. 2008).

<sup>317</sup> Boudin, et al., *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 150, 176 (2013), available at [https://law.yale.edu/sites/default/files/area/center/liman/document/prison\\_visitation\\_policies.pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/prison_visitation_policies.pdf).

<sup>318</sup> See *Vance v. Barrett*, 345 F.3d 1083, 1089–90 (9th Cir. 2003).



entitled to.<sup>319</sup> The cards may carry monthly fees, usage fees and activation fees, as well as fees to check the balance or to attempt a declined transaction.<sup>320</sup> One company, JPay, is under a court order for charging unauthorized fees and for its repeated misrepresentation of fee amounts.<sup>321</sup> For people with small amounts of money that they need in order to leave prison and recover financially, the money they had in savings while in prison simply dissipates.<sup>322</sup>

Prisons impose in-prison fees and costs in two ways: (1) The prison itself establishes and collects costs, with proceeds going directly into prison revenues, and (2) the prison privatizes goods and services and imposes costs through the corporate entity. The first category of charges has traditionally included commissary items in a prison-run store and medical co-pays where the health system itself is operated by the prison. But as prisons increasingly privatize their services, this category of in-prison charges is getting smaller.<sup>323</sup> The majority of in-prison costs are now charged directly by the private companies with contractual agreements about price-setting.<sup>324</sup> Prisons and companies engaged in this price-setting are both incentivized to reserve as many profits for themselves as bilateral parties to a contract, and the third-party incarcerated person—not a party to the contract itself so much as a beneficiary—bears the brunt of the price increases. So long as family and friends are depositing money in the accounts, prisons and their corporate partners have every reason to create new costs or increase existing ones.

For example, the pre-paid debit cards issued upon an individual's release offer lucrative kickbacks to governments for the partnership, effectively draw money from the prisoners' own funds and return it to the prison systems in the form of site commissions or saved costs.<sup>325</sup> The prison

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<sup>319</sup> Stephen Raheer, *Insufficient Funds: How Prison and Jail "Release Cards" Perpetuate the Cycle of Poverty*, PRISON POLY INITIATIVE (May 3, 2022), at <https://www.prisonpolicy.org/blog/2022/05/03/releasecards/>.

<sup>320</sup> See *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 570 (9th Cir. 2020).

<sup>321</sup> Press Release, CFPB Penalizes JPay for Siphoning Taxpayer-Funded Benefits Intended to Help People Re-enter Society After Incarceration, CONSUMER FIN. PROT. BUREAU (Oct. 19, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded-benefits-intended-to-help-people-re-enter-society-after-incarceration/>.

<sup>322</sup> *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 570 (9th Cir. 2020). See also Catherine E. Akenhead, *How States Can Take a Stand Against Prison Banking Profiteers*, 85 GEO. WASH. L. REV. 1224, 1230 (2017).

<sup>323</sup> See Sean Kolkey, *People over Profit: The Case for Abolishing the Prison Financial System*, 110 CAL. L. REV. 257, 269 (2022).

<sup>324</sup> See CONSUMER FIN. PROT. BUREAU, JUSTICE-INVOLVED INDIVIDUALS AND THE CONSUMER FINANCIAL MARKETPLACE 15-17 (2022).

<sup>325</sup> The relationship between the bundled services that private entities now offer prisons is critical to the profit-making structure. Companies have had to compete to offer increasingly attractive site commissions to prisons, to the point of providing nearly all of their

systems enter these contracts with no incentive to bargain for lower fees and in fact are incentivized to do the very opposite—allow the private corporations to draw high fees so that the company is then motivated to provide terms that are profitable for the government agency.<sup>326</sup>

Contracts for privatized goods and services are extremely lucrative for both the prisons and the companies.<sup>327</sup> JPay, for example, is the main service provider for prison phone calls; internet tablets (used for music, phone calls, video calls); and, of course, prison banking services (which come with fees for making deposits, fees for withdrawal, and fees for the use of debit cards distributed to people upon their release with the individual's account balance). JPay charges exorbitant above-market fees for these tech goods and services, kicks back a large sum to the public entity entering the contract, and reserves the rest to itself.<sup>328</sup> Professors Mary Fainsod Katzenstein and Maureen Waller described this “rapacious form of poverty governance” by highlighting the practices in Florida, in which incarcerated people make an estimated average \$.02 per hour and commissary proceeds produce site commissions of between \$31 and 32 million each year.<sup>329</sup>

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telecommunications profits and therefore have to draw their revenue from hidden fees on bundled services, like money transfers, debit release cards, and media purchases. See Peter Wagner & Alexi Jones, *On Kickbacks and Commissions in the Prison and Jail Phone Market*, PRISON POLICY INITIATIVE (Feb. 11, 2019). The Federal Communications Commission has been in attempting to regulate prison phone call rates since 2013. Ann E. Marimow, *FCC Made a Case for Limiting the Cost of Prison Phone Calls. Not Anymore*, WASH. POST (Feb. 5, 2017). It now caps both phone call rates and site commissions and is now implementing new legislation that gives the agency greater control to regulate costs. FEDERAL COMMUNICATIONS COMMISSION, INCARCERATED PEOPLE'S COMMUNICATIONS SERVICES, [https://www.fcc.gov/incarcerated-peoples\\_communications\\_services](https://www.fcc.gov/incarcerated-peoples_communications_services).

<sup>326</sup> A similar contractual arrangement and scheme of perverse incentives exists around prison phone fees. Peter Wagner & Alexi Jones, *On kickbacks and commissions in the prison and jail phone market*, PRISON POL'Y INITIATIVE (Feb. 11, 2019), <https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions/>.

<sup>327</sup> For example, a contract between Dauphin County, PA, and DSI-ITI, Inc. for telecom, internet, and banking services contained a provision granting the county percentages of certain revenues and a minimum monthly guaranteed payment to the county of \$56,533.33; a contract between Calhoun County, TX, and Inmate Calling Solutions, LLC, for integrated banking/commissary software and services granted the county 36 percent of adjusted gross sales; a contract between Kalamazoo County, MI, and Canteen Services, Inc., granted the county 10-32 percent of most commissary sales in an agreement for banking and commissary services; a contract between Miami-Dade County, FL, and granted the county a commission of 47-50 percent of commissary purchases and 8 percent of all banking service fees. Contract Between Dauphin Co., Pa., and DSI-ITI App'x B (Dec. 12, 2018).

<sup>328</sup> See, e.g., Contract Between the State of Tenn., Tenn. Dep't of Corr. and JPay Inc., (December 28, 2012), <https://www.prisonpolicy.org/contracts/documents.html?text-search-fields=facility-and-remarks&q=&q-state=&q-document-type=&q-service=inmate-banking-software&q-vendor=&sort=state#search-form>.

<sup>329</sup> Mary Fainsod Katzenstein & Maureen Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638, 639 (September 2015) (footnotes omitted).

This type of asset seizure is not a direct seizure by the state to put money in its own coffers, but instead routes the money through the private company first. The effects, however, are the same: Money intended for deposit for a loved one is diverted to the prison.

□ ***Collecting interest.***

Most state statutes divert interest from inmate trust accounts into funds owned and operated by the prison systems.<sup>330</sup> When incarcerated people have challenged the practice, courts have come to different conclusions,<sup>331</sup> with some finding that incarcerated people are entitled to use the principal in their accounts but cannot retain the interest,<sup>332</sup> and other courts find that the incarcerated person’s property interest attaches to both.<sup>333</sup>

As some courts have begun to find that prisons cannot keep the interest off of inmate trust accounts, prisons have shifted away from placing inmate trust accounts into interest-bearing accounts altogether. In one opinion addressing the question of who is entitled to the interest on inmate trust accounts, the First Circuit described the manner in which funds once were invested, and returns were allocated to individuals based on their average daily balances.<sup>334</sup> Private vendors persuaded prison officials to “reevaluate the feasibility of paying interest on inmate accounts.”<sup>335</sup> The practice of investing the funds was “scrapped” as a result.<sup>336</sup>

□ ***Charging money for prison disciplinary infractions and restitution.***

In 2022, Louis Dixon, incarcerated at the El Dorado Correctional Facility in Kansas, responded to a reporter’s inquiry about how incarcerated people spend money:

They charge you fines for everything. They’ve got a little ID they make us wear. If you break it or lose it, \$5. If your shirt’s not tucked in, \$20.

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<sup>330</sup> Charlotte Elam, *Taking an Interest in Inmate Trust Accounts*, 73 VAND. L. REV. EN BANC 143, 145 (2020). Jurisdictions may allocate the interest to a “welfare” fund, *see, e.g.*, N.J. STAT. ANN. § 30:4-67.1 (West), but these funds may cover a wide variety of operational costs, *see supra* note 135–48

<sup>331</sup> *Id.* *See also* Young v. Wall, 642 F.3d 49, 54 (1st Cir. 2011); Sperry v. Roberts, No. 21-3151, 2022 WL 2798994, at \*7 (10th Cir. July 18, 2022).

<sup>332</sup> *See* Turnacliff v. Westly, 546 F.3d 1113, 1117n2 (9th Cir. 2008).

<sup>333</sup> Young v. Wall, 642 F.3d 49, 51–52 (1st Cir. 2011). *See generally* Isaac Colunga, *An Alternative Look at the Takings Clause and Inmate Trust Accounts*, 39 U. TOL. L. REV. 791, 794 (2008).

<sup>334</sup> Young v. Wall, 642 F.3d 49, 51–52 (1st Cir. 2011).

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* The opinion signaled a trend. *See* Ariel Nelson, et al., *Commercialized (In)Justice Litigation Guide: Applying Consumer Laws to Commercial Bail, Prison Retail, and Private Debt Collection*, NAT’L CONSUMER L. CTR. 40 (June 2020) [https://www.nclc.org/wp-content/uploads/2022/09/WP\\_Litigation\\_Guide.pdf](https://www.nclc.org/wp-content/uploads/2022/09/WP_Litigation_Guide.pdf).

You spit on the sidewalk, \$20. You walk on the grass, \$20. That's how they do it in here: They give you money and figure out how to take it back from you. It would have helped me a lot to be able to save up some money. Now I'm just going to get out and go to a homeless shelter.<sup>337</sup>

Kansas's administrative code puts few limits on prison officials' ability to impose fines for in-prison disciplinary infractions.<sup>338</sup> Kansas prisons have three classes of disciplinary infractions: Class I is the most serious, class II is the middle category but includes the violation of "disrespect," and class III offenses are more minor and might include "unsanitary practices."<sup>339</sup> Fines can be imposed for any of these offenses.<sup>340</sup> Fine amounts are capped at \$10, \$15, or \$20 depending on the class of offense, but there are no caps on restitution.<sup>341</sup>

Kansas is not alone.<sup>342</sup> Oregon, for example, assesses fines up to \$200 for disciplinary violations.<sup>343</sup> New Jersey authorizes deductions of half of prison wages for "assessments, restitutions and fines."<sup>344</sup> None of these provisions includes a requirement that the prison assess the individual's ability pay, and their immediate access to the funds means that they can often choose to engage in self-help to recover costs. Moreover, given the broad authority to impose discipline, and the vagueness of the provisions, prisons impose restitution and unilaterally decide the cost of damage to property, even where the damage was other than intentional or due to natural wear and tear. Restitution amounts are withdrawn directly from the inmate trust

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<sup>337</sup> Beth Schwartzapfel, *Prison Money Diaries: What People Really Make (and Spend) Behind Bars*, MARSHALL PROJECT (Aug. 4, 2022), <https://www.themarshallproject.org/2022/08/04/prison-money-diaries-what-people-really-make-and-spend-behind-bars>.

<sup>338</sup> See KAN. ADMIN. REGS. 44-13-610 (addressing assessment of fines but not specifying any limits).

<sup>339</sup> KANSAS DEP'T OF CORR., DISCIPLINARY REPORTS, <https://www.doc.ks.gov/victim-services/information/disciplinary-reports>. Although the corrections website indicates that class II offenses would be misdemeanors in criminal courts, there is no such misdemeanor of "disrespect" in Kansas's criminal code, nor would such a crime likely be constitutional.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* See also N.J. Admin. Code § 10A:2-7.1 (restitution allowed as sanction).

<sup>342</sup> N.J. Stat. Ann. § 30:4-16.4 (West) (specifying that state can deduct restitution, fines, or penalties, as well as any medical costs for care provided to individual)

<sup>343</sup> OFFICE OF THE SECRETARY OF STATE, TEMPORARY ADMINISTRATIVE ORDER, PROHIBITED CONDUCT AND PROCESSING DISCIPLINARY ACTIONS, DOC 16-2022 (Nov. 22, 2022), <https://www.oregon.gov/doc/Documents/291-105-prohibited-conduct-and-processing-disciplinary-actions.pdf>.

<sup>344</sup> N.J. Stat. Ann. § 30:4-91.4(a), (b), & (c) (West). The same provisions allow assessments for the "cost of maintenance related to the prisoner's confinement," and travel expenses to and from the work release program."

account,<sup>345</sup> and jurisdictions may grant prison officials broad discretion to determine the amounts of restitution.<sup>346</sup>

□ *Diverting funds to pay court fines and fees.*

People in prison frequently discover deductions from their account balances and are told that the funds were directed to a debt that they owed in the form of a court fine or fee.<sup>347</sup> In California, half of all inmate trust account deposits are diverted toward restitution<sup>348</sup> and costs to the state arising from the individual's prosecution.<sup>349</sup> Similarly, Oregon diverts 15 percent of deposits to court debt.<sup>350</sup> In Nevada, the prison system unilaterally decided, without apparent statutory authority, to seize 80 percent of all prison wages and deposits and direct those funds toward victim restitution before public outcry led the governor to reduce the seizures to 50 percent.<sup>351</sup> New Jersey authorizes a 10 percent surcharge for all commissary purchases to be deposited into the Victims of Crime Compensation Board Account, apparently without regard to any individual restitution already paid by the incarcerated person or the lack of any victim costs in a particular case.<sup>352</sup>

Sometimes these debts are clearly recorded, and state law authorizes prisons to make deductions from inmate trust accounts to satisfy these debts. But often the process and the authority for making the deductions is less

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<sup>345</sup> N.J. Admin. Code § 10A:2-7.4(a) & (b). Nev. Rev. Stat. Ann. § 209.221(6) (West); Nev. Rev. Stat. Ann. § 209.246 (West) (providing that Director of Department of Corrections shall establish regulations regarding repayment of damaged property, medical costs, costs pursuing an escaped individual or "quelling any riot," funeral costs, costs related to release of individual, monetary sanctions, postage, legal costs, telephone calls, returned checks, clothing and other items required for work).

<sup>346</sup> New Jersey leaves it to each facility to determine processes for determining amount of restitution. N.J. Admin. Code § 10A:2-7.3.

<sup>347</sup> See Mary Fainsod Katzenstein & Maureen Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638, 642 (September 2015) (noting that when family members deposit funds in an inmate's trust or commissary account, in many states, monies are directed to encumbrances, restitution, and other fines and fees).

<sup>348</sup> CONSUMER FIN. PROT. BUREAU, JUSTICE-INVOLVED INDIVIDUALS AND THE CONSUMER FINANCIAL MARKETPLACE 20 (2022).

<sup>349</sup> California's definition of restitution includes a variety of fees, fines, and costs, only some of which go directly to victims. CAL. PENAL CODE § 2085.5(d)–(f).

<sup>350</sup> CONSUMER FIN. PROT. BUREAU, *supra* note 348 (citing OR. REV. STAT. § 423.105).

<sup>351</sup> Dana Gentry, *Sisolak Rejects 80 Percent Seizure from Inmate Accounts in Favor of Half*, NEV. CURRENT (Jan. 25, 2021), at <https://www.nevadacurrent.com/2021/01/25/sisolak-rejects-80-percent-seizure-from-inmate-accounts-in-favor-of-half/>.

<sup>352</sup> N.J. Stat. Ann. § 30:4-15.1 (West)

clear. The debt may not be clearly recorded<sup>353</sup> or clearly legitimate,<sup>354</sup> and even if it is, there may be no specific authority for the prison to seize the asset and pay the debt, particularly if there has been no determination of the person's ability to pay the debt without significant hardship.

In many places, state court debt is surprisingly hard to track, verify, and even pay off. When Florida voters passed a referendum to allow people with criminal convictions to vote, those who wanted to restore their voting rights found it difficult or impossible to verify whether or not they still had outstanding court debt.<sup>355</sup> State court debt is imposed by several different criminal system actors (police, probation, parole, prosecutors, public defenders, and courts, to name a few), notice of the fines and fees is not always delivered to the individual, and state court record-keeping makes it impossible for even criminal system stakeholders to figure out whether debt even exists and in what amounts.<sup>356</sup>

With such poor documentation of court debt, prison administrators are poorly equipped to assess instructions or orders that they receive to garnish funds from inmate trust accounts. Even if the debt is clearly recorded, legitimate, and lawfully deducted, the individual may have no way of determining that the deducted amount was directed to the intended recipient to satisfy the debt.

#### □ *Imposing Per-Diem Costs of Incarceration*

Many prison systems assess a general per diem cost-of-incarceration fee and seize that money directly from individual prison accounts.<sup>357</sup> These charges are designed to cover infrastructure costs, salaries, and all aspects of prison administration and daily imprisonment. The amounts are frequently astronomical for any one individual, and can reach millions of dollars for people with long prison sentences. Although only a small fraction of that

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<sup>353</sup> See, e.g., Jesse Wegman & Damon Winter, *When It Costs \$53,000 to Vote*, NY TIMES Oct. 7, 2021), <https://www.nytimes.com/2021/10/07/opinion/election-voting-fine-felony-florida.html>.

<sup>354</sup> See, e.g., Order, State v. Rena, CC-2008-000251.00 (May 6, 2021) (on file with the author); Motion for Virtual Hearing and to Place a Hold on Economic Impact Payments Deposited into the Inmate's Trust Account, CC-2008-251 State of Alabama v. Darla Rena Jenkins, No. (April 6, 2021).

<sup>355</sup> Wegman & Winter, *supra* note 353.

<sup>356</sup> See, e.g., LA. LEGIS. AUDITOR, THE COLLECTION OF COURT COSTS AND FINES IN LOUISIANA JUDICIAL DISTRICTS 4, 8 (Apr. 2, 2014) (detailing poor recording and data tracking of fine-and-fee assessments and noting that half of responding districts indicated they lacked a case management system capable of recording debts and account balances).

<sup>357</sup> Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), <https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate>; Brittany L. Deitch, *From Estate to State: Pay-to-Stay Statutes and the Problematic Seizure of Inherited Property*, 95 U. COLO. L. REV. 4 (2023).

debt is collectible, some prison systems rely on this massive debt in order to seize significant portions of individual prison account balances.<sup>358</sup>

Although these laws—commonly known as pay-to-stay laws—are only one form of asset seizure, they are particularly pernicious. Given the daily cost of incarceration,<sup>359</sup> the fact that all incarcerated people are involuntary “users” of prisons,<sup>360</sup> the prison systems’ control over how to estimate the daily costs<sup>361</sup> and little transparency into how they do so, cost-of-incarceration laws can give prison systems the ability to simply deplete a person’s saving with the lowest possible transaction costs. With fintech firms like JPay, it takes only a few keystrokes by a prison administrator to move money around.<sup>362</sup> While due process and equal protection require ability-to-pay determinations before courts can order incarceration as a consequence of nonpayment of fines and fees imposed outside of prison,<sup>363</sup> this level of process is rarely afforded to someone before prisons seize funds from prison bank accounts.<sup>364</sup>

Michigan’s pay-to-stay law, after all, made all the difference when an incarcerated person sued over the seizure of his stimulus check.<sup>365</sup> While

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<sup>358</sup> In Connecticut, for example, the state imposes a lien for the cost of incarceration for people convicted of certain crimes, and it draws from prison bank accounts to recoup costs. See *Williams v. Marinelli*, 987 F.3d 188 (2d Cir. 2021).

<sup>359</sup> As much as \$249 per day (the highest rate in the country, set by Connecticut). Brittany Friedman, April Fernandes, Gabriela Kirk, *Forcing People to Pay for Being Locked Up Remains Common*, WASH. POST (May 2, 2022), <https://www.washingtonpost.com/outlook/2022/05/02/forcing-people-pay-being-locked-up-remains-common/>.

<sup>360</sup> “User” is a term of art imported from noncriminal contexts in which government fees are justified as not-taxes on the grounds that they charge simply for the use of a government service and are not collected more broadly to fund government more generally. See Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517, 523–26 (2021). In both criminal and noncriminal contexts fees, user fees are justified on the ground that the market can regulate them, and users can opt out of the specific services if costs run too high. But as more user fees are imposed on broad categories of poor “users”—such as people in prisons—they look increasingly like regressive taxes. See *id.* at 559.

<sup>361</sup> The Federal Bureau of Prisons calculates an annual cost “by dividing the number representing the Bureau of Prisons (Bureau) facilities’ monetary obligation (excluding activation costs) by the number of inmate-days incurred for the fiscal year, and then by multiplying the quotient by the number of days in the fiscal year.” Notice of Annual Determination of Average Cost of Incarceration Fee (COIF), 88 Fed. Reg. 1331 (Sept. 1, 2021), <https://www.federalregister.gov/documents/2021/09/01/2021-18800/annual-determination-of-average-cost-of-incarceration-fee-coif>.

<sup>362</sup> In some states, however, prisons must file a claim in order to seize funds from a prison bank account. See, e.g., April D. Fernandes, et al., *The “Damaged State vs. the “Willful” Nonpayer: Pay-to-Stay and the Social Construction of Damage, Harm, and Moral Responsibility in a Rent-Seeking Society*, 8 RUSSELL SAGE FOUND. J. SOC. SCI. 82, 90 (2022); Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 2 (2013).

<sup>363</sup> *Bearden v. Georgia*, 461 U.S. 660 (1983).

<sup>364</sup> See *Williams v. Murphy*, No. 3:13-CV-01154 (MPS), 2018 WL 2016850, at \*5 (D. Conn. March 29, 2018), *aff’d sub nom.*, *Williams v. Marinelli*, 987 F.3d 188 (2d Cir. 2021).

<sup>365</sup> *Moore v. Washington*, No. 1:20-CV-1184, 2021 WL 508304, at \*4 (W.D. Mich. Feb. 11, 2021).

Arkansas's attempt to seize stimulus checks constituted an illegal taking, despite being authorized by state statute,<sup>366</sup> Michigan's claim to the same funds survived a legal challenge because a slightly different state law characterized the daily cost of incarceration as a debt.<sup>367</sup>

There are many methods by which prisons and jails can recoup daily costs of incarceration: by filing a lawsuit, negotiating in the shadow of a lawsuit, and attaching certain assets like lawsuit proceeds and inheritances. The question of whether prison systems can recoup costs of incarceration by seizing funds from prison bank accounts depends sometimes on what recoupment methods are authorized by state statutes.<sup>368</sup> In some places, prisons actively monitor account levels so that they can be ready to sue or seize funds from an inmate trust account.<sup>369</sup> But when the statute is silent, courts may still find that the mere existence of the debt authorizes the prison to unilaterally, with no prior approval by any court, engage in self-help and simply take the money.<sup>370</sup>

Legality aside, state methods for recouping costs of incarceration can be distasteful. In Michigan, the individual who challenged the state's seizure of his stimulus check had applied for stimulus funds only after urged to do so by DOC staff – only to have his check then seized by the prison.<sup>371</sup> In Connecticut, prison officials have used their cost-of-incarceration statute and easy access to inmate trust accounts to avoid having to pay incarcerated people who successfully sue the Department of Corrections over prison conditions.<sup>372</sup> In one case, a man sued over a brutal assault he suffered at the hands of a prison guard, won a \$300,000 judgment, and the Department simply paid half of the judgment to itself to cover the cost of his incarceration.<sup>373</sup> Also in Connecticut, officials discovered that an incarcerated individual had received a modest sum from a life insurance policy after the death of his mother. Within weeks of her death, state officials froze his entire inmate trust account so that they could prevent him from spending it as they sought to recover the cost of his incarceration.<sup>374</sup>

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<sup>366</sup> Hayes v. Graves, No. 4:21-CV-00347-LPR, 2022 WL 822881, at \*2 (E.D. Ark. Mar. 16, 2022).

<sup>367</sup> Moore v. Washington, No. 1:20-CV-1184, 2021 WL 508304, at \*4 (W.D. Mich. Feb. 11, 2021).

<sup>368</sup> See April D. Fernandes, Brittany Friedman & Gabriela Kirk, *The "Damaged State vs. the Willful" Nonpayer: Pay-to-Stay and the Social Construction of Damage, Harm, and Moral Responsibility in a Rent-Seeking Society*, 8 RUSSELL SAGE FOUND. J. SOC. SCI. 82, 82-105 (2022).

<sup>369</sup> See *id.* at 90.

<sup>370</sup> Ross v. Myrick, 817 F. App'x 499, 500 (9th Cir. 2020).

<sup>371</sup> See *infra* note xx.

<sup>372</sup> See Williams v. Murphy, No. 3:13-CV-01154 (MPS), 2018 WL 2016850, at \*5 (D. Conn. Mar. 29, 2018), *aff'd sub nom.*, Williams v. Marinelli, 987 F.3d 188 (2d Cir. 2021); Williams v. Murphy, No. 3:13-CV-01154 (MPS), 2018 WL 2016850, at \*12 (D. Conn. Mar. 29, 2018), *aff'd sub nom.* Williams v. Marinelli, 987 F.3d 188 (2d Cir. 2021).

<sup>373</sup> *Id.*

<sup>374</sup> *Hearing Before the Joint Comm. On Judiciary*, H.B. 5390, 2021 Leg. Sess. (Conn. 2021) (Testimony of Arthur Liman Center for Public Interest),



These direct seizures from inmate trust accounts to cover costs of incarceration can form a major revenue stream for governments. At least forty-nine states have some version of pay-to-stay laws in place.<sup>375</sup> Over time, as states have experienced a fiscal squeeze, such laws have proliferated,<sup>376</sup> offering an easy source of money to replace government revenues that are lost in an economic downturn.<sup>377</sup> In 2021, after Nevada began seizing 50 percent of account deposits, the legislature proposed a 25 percent cap. The Department of Corrections balked. Because state law required that victim restitution must be paid first out of these accounts, there would be too little left of the 25 percent seizure for the prison system itself. With a cap on how much it could divert funds to cover individuals' cost of incarceration, it would lose \$3 million each year.<sup>378</sup> Moreover, one law enforcement litigation guidance memo instructs prisons that newly promulgated regulations or enacted statutes can be used to seize assets from prison bank accounts retroactively.<sup>379</sup> If a state government wanted to seize nearly all funds in its system-wide inmate trust account, according to this guidance memo, all it would have to do is pass a law that retroactively assesses each person for the entire cost of their incarceration.<sup>380</sup>

□ **Embezzlement and error.** Aside from the many legal or quasi-legal ways to seize money from people in prison, the system of prison banking is fertile ground for embezzlement and error. With so little transparency and oversight, a single prison employee with access to inmate trust accounts can siphon off money for themselves or for other institutional actors, and errors are difficult to catch.<sup>381</sup>

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<https://www.cga.ct.gov/2022/juddata/TMY/2022HB-05390-R000325-Reed-Guevera,%20Mila,%20Professor-Yale%20Law%20School-TMY.PDF>; Digital Advocacy Project, *Repealing the Connecticut Incarceration Lien*, <https://www.youtube.com/watch?v=4Xaqi2BzmmM>.

<sup>375</sup> Brittany Friedman, *Unveiling the Necrocapitalist Dimensions of the Shadow Carceral State: On Pay-to-Stay to Recoup the Cost of Incarceration*, 37 J. CONTEMP. CRIM. JUST. 66, 72 (Feb. 2021).

<sup>376</sup> *Id.* at 71-80.

<sup>377</sup> For an overview of the history of costs-of-incarceration laws, see Brittany L. Deitch, *From Estate to State*, 95 U. COLO. L. REV. \_\_\_\_ (2023); see also Friedman, *supra* note 375, at 71-80.

<sup>378</sup> Michael Lyle, *Prison Systems' Approach to Inmate Money Bewilders Legislators*, NEV. CURRENT (May 20, 2021), <https://www.nevadacurrent.com/2021/05/20/prison-systems-approach-to-inmates-money-bewilders-legislators/>.

<sup>379</sup> *Legal Issues Pertaining to Inmate Funds*, 4 AELE JAIL & PRISON L. SECTION 301, 306 (April 2008).

<sup>380</sup> See Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 68 (2013).

<sup>381</sup> See, e.g., Corey Jones, *Audit: Tulsa Jail Inmate Account Records So Poor Investigators Can't Say How Much Money Is Missing*, TULSA WORLD (Jan. 10, 2017), [https://tulsaworld.com/news/local/crime-and-courts/audit-tulsa-jail-inmate-account-records-so-poor-investigators-cant-say-how-much-money-is/article\\_93b3cac0-37ca-548a-a34b-b738d0ab6874.html](https://tulsaworld.com/news/local/crime-and-courts/audit-tulsa-jail-inmate-account-records-so-poor-investigators-cant-say-how-much-money-is/article_93b3cac0-37ca-548a-a34b-b738d0ab6874.html). See also Catherine Marfin, *Ex-Dallas County sheriff's worker admits embezzling more than \$250K from inmate fund*, DALLAS MORNING NEWS (June 17, 2022, 5:51PM), <https://www.dallasnews.com/news/courts/2022/06/17/ex-dallas-county-sheriffs-worker-admits-embezzling-more-than-250k-from-inmate-fund/>.

Even when individuals identify errors in their own accounts, correcting them may be impossible. One newsletter published by a person incarcerated in Idaho recounted efforts to track and resolve systemic overcharging for medical costs. He described recent reports from other incarcerated people about erroneous charges for health services delivered by Centurion Health. In response, he submitted several health services requests to see what costs hit his account and discovered one duplicate charge and a charge for an appointment that never took place. The reporter and others tried without success to get prison officials to fix the problems. One person filed a grievance after their “trust account was charged as many as fourteen times without explanation.”<sup>382</sup>

Systemic problems in prison accounting have been evident for a long time.<sup>383</sup> For example, one audit of a Tulsa prison account system found that record-keeping was so poor that it was impossible to determine how much money had gone missing over a period of several years, but that it was at least hundreds of thousands of dollars. One correctional employee admitted to having pocketed \$1000 a month for twelve months.<sup>384</sup> In another example, an Oregon state auditor found that basic controls and precautions against fraud and malfeasance were not in place for the administration of inmate trust accounts.<sup>385</sup> Specifically, the auditor found that certain accounting procedures were not in place, the structure of the system might allow fraud to go undetected for long periods of time, and documentation supporting transactions were inadequate to determine whether transactions were

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<sup>382</sup> *First Amend This!: An IDOC Newsletter*, Feb. '22, BOOK OF IRVING #82431 (Feb. 5, 2022).

<sup>383</sup> See, e.g., *Big Shortage Is Revealed by Auditor*, CLINTON DAILY NEWS 1 (Dec. 12, 1947) (prison official charged after \$157,821.47 in cash and canteen coupons went missing from Oklahoma prison); *GOP Auditor Candidate Questions Transfer Action*, ALBUQUERQUE J. 22 (Sept. 30, 1954) (official accused of pulling funds from inmate trust account to cover penitentiary budget shortage); *Workhouse Fund “Short,” Audit Shows*, DAYTON DAILY NEWS 17 (Jan 23, 1957); *Ruling Declares Warden Liable for Trust Fund*, DESERET NEWS & SALT LAKE TELEGRAM 22 (Mar. 12, 1957); *Jail Bookkeeper Named in Theft*, CHI. TRIB. 18 (Oct. 16, 1970).

<sup>384</sup> Jones, *supra* note 381.

<sup>385</sup> *Audit Faults Oregon Prison Trust Fund System*, PRISON LEGAL NEWS (December 15, 2003), <https://www.prisonlegalnews.org/news/2003/dec/15/audit-faults-oregon-prison-trust-fund-system/>.

legitimate or fraudulent.<sup>386</sup> Similar large-scale problems have been discovered in Arizona,<sup>387</sup> Albuquerque,<sup>388</sup> Toledo,<sup>389</sup> and other places.<sup>390</sup>

c. Impacts of Asset Seizures

These deductions add up. One family member of an incarcerated person testified before the Nevada legislature about the impacts of the state's practices of seizing funds from her loved one's account. "The cost of supporting a loved one in prison is a heavy burden for us, the families and loved ones, to bear," she wrote. "NDOC, and by extension, the state of Nevada, have made us a revenue stream."<sup>391</sup> She listed in detail the various ways that Nevada depleted her monthly deposit of \$550 and wages of \$15 per month. His wages went toward room and board and a state victim fund. While working for the prison, he injured himself and had to pay his own medical copays. Phone calls cost her \$300 each month. When the state entered a new contract for a food provider, the amount provided was so low that her loved one lost 30 pounds and she had to begin sending him \$200 each month to supplement his diet. Her fee to make an online deposit for him was \$9.95. Care package items increased in cost about 10 or 20 percent each quarter, and she paid 30 cents for each email and photo she sent. "This is a very hard thing to wrap my brain around," she wrote. "I use a free email service. I get to send an unlimited number of characters, words, I can include attachments and photos in my emails. . . . Everything adds up. It costs more to send a digital photo than it does to print and send via USPS."<sup>392</sup>

<sup>386</sup> *Id.*

<sup>387</sup> Jimmy Jenkins, *Audit Finds Nearly \$1 Million In Unreconciled Arizona Inmate Trust Accounts*, KJZZ 91.5 (Nov. 3, 2020, 5:52PM), <https://kjzz.org/content/1632470/audit-finds-nearly-1-million-unreconciled-arizona-inmate-trust-accounts>.

<sup>388</sup> Matthew Reisen, *Thousands Stolen from MDC Inmates, Audit Says*, ALBUQUERQUE J. (Nov. 26, 2020), <https://www.abqjournal.com/1521590/thousands-stolen-from-mdc-inmates-audit-says.html>.

<sup>389</sup> Ryan Dunn, *Toledo Woman Charged in Theft from Lucas County Jail Inmate Account*, TOLEDO BLADE (Feb. 12, 2018, 5:06 PM), at <https://www.toledoblade.com/local/police-fire/2018/02/12/Toledo-woman-charged-in-theft-from-Lucas-County-jail-inmate-account/stories/20180212153>.

<sup>390</sup> Ken Childers, *Former Sheriff's Office Secretary Arrested for Embezzlement*, OKEMAH NEWS LEADER (Aug. 1, 2020),

<https://www.okemahnewsleader.com/2020/08/01/former-sheriffs-office-secretary-arrested-for-embezzlement/>; Colleen Wilson, *Former Pawnee County Jail Administrator Accused of Embezzling Inmate's Cash*, OKCFox.

(Aug. 21, 2021), <https://okcfox.com/news/local/former-pawnee-county-jail-administrator-charged-with-embezzlement>.

<sup>391</sup> *Testimony of Amelia Booth*, Hearing Before the Senate Judiciary, SB 416, 82<sup>nd</sup> Leg. Sess. (Apr. 14, 2023),

[https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/ExhibitDocument/OpenExhibitDocument?exhibitId=67391&fileDownloadName=SB416\\_SupportLetter\\_AmeliaBooth.pdf](https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/ExhibitDocument/OpenExhibitDocument?exhibitId=67391&fileDownloadName=SB416_SupportLetter_AmeliaBooth.pdf)

<sup>392</sup> *Id.* at 1–2.

Another family member of an incarcerated person also complained that the small food portions provided by NDOC forced her to pay the high markup on commissary items. “When he described the amount of food served, it was less than a child’s meal, constituting a small ice cream scoop of eggs, a slice of toast, and a tablespoon of peanut butter for breakfast. I send him \$300 a month for food and hygiene, and \$100 a month for the phone. . . . When he was on store restriction, he lost almost 20 pounds. A Ramen soup, 30 cents at a regular store, was \$1 at the commissary. A packet of tuna that is \$1.50 at Walmart is \$4.95 on the store list. I am the sole provider for our household and have three children. Every month it is a struggle, to make sure bills are paid and to send him money.”<sup>393</sup>

Yet another family member, Nicole Williams, testified, “When my husband was sentenced, I thought \$50 to \$100 per month added to our already tight budget would be sufficient in getting him essential items and phone time to call his children, me, his elderly mother and other family members. I was wrong. Food prices are outrageous. 15-minute phone calls go by so fast, and there are fees to add money to your account. . . . Pretty much everything in prison has a cost or fee involved. These include medical co-pays, room and board fees, body retrieval fees that families pay if their loved one passes away in prison, and so on.”<sup>394</sup>

#### d. Problematic Features of Prison Banking Systems

Although asset seizures happen in many different ways, they arise out of a common set of problematic features endemic to prison banking systems. These features are: (1) The prison systems tasked with overseeing individual accounts operate with a high degree of conflict of interest; (2) prison banking systems have little transparency and oversight; (3) the regulation governing the operation of prison bank accounts is minimal; (4) even where a practice violates state law or the constitution, there is little judicial recourse; and (5) unlike the operational costs of many fine-and-fee systems, the transaction costs for governments collecting money from prison bank accounts are exceedingly low.

##### 1. Conflicts of interest

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<sup>393</sup> *Testimony of Crystal Voight*, Hearing Before the Senate Comm. on Finance, SB 416, 82<sup>nd</sup> Leg. Sess. (May 23, 2023), <https://www.leg.state.nv.us/Session/82nd2023/Minutes/Senate/FIN/Final/1208.pdf>.

<sup>394</sup> *Testimony of Nicole Williams*, Hearing Before the Senate Comm. on Finance, SB 416, 82<sup>nd</sup> Leg. Sess. (May 23, 2023), <https://www.leg.state.nv.us/Session/82nd2023/Minutes/Senate/FIN/Final/1208.pdf>.

Prisons arguably operate under a conflict of interest when they control the money of a captive market.<sup>395</sup> If they have any kind of a fiduciary duty with regard to the management of inmate trust accounts, their ability to impose costs and negotiate lucrative contracts that pull money from those accounts interferes with that duty. A prison can, after all, set any cost for a critical necessity (water or medical care, for example), bar people from paying for that necessity out of any fund other than the one the prison controls, and then deduct the full amount from the fund. While the public may balk if prisons charged thousands of dollars for a bottle of water and impose the cost as a lien on the inmate trust account, prisons accomplish the same thing when they collect on general per diem costs of incarceration.

Privatized goods and services offer financial benefits that also conflict with any duty prisons may have to fairly administer inmate trust accounts.<sup>396</sup> The contracts between companies like JPay and prison systems provide large site commissions to the prisons while the private firms have wide latitude to set the highest fees they can—for tablets, phone calls, video visits with family, music downloads, money transfers, and more.<sup>397</sup>

Conflicts of interest may arise in other ways as well. The federal Bureau of Prisons has come under criticism for its self-interested and profit-driven management of inmate trust accounts.<sup>398</sup> Here the allegation is not that the prison is excessively reserving funds for itself but rather that it is not

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<sup>395</sup> John Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?* 114 YALE L. J. 929, 934 (2005).

<sup>396</sup> The problems with fintech and the captive market of prisons have been written about extensively. See Stephen Rahe, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L. J. 3, 11 (2020); Catherine E. Akenhead, *How States Can Take a Stand Against Prison Banking Profiteers*, 85 GEO. WASH. L. REV. 1224 (2017).; Daniel Wagner, *Megabanks have prison financial services market locked up*, CNTR. FOR PUB. INTEGRITY (Oct. 2, 2014), <https://publicintegrity.org/inequality-poverty-opportunity/megabanks-have-prison-financial-services-market-locked-up/>; *Banks/Banking: A Curated Collection of Links*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/records/1394-banks-banking>; Eli Tan, *New York May Drop JPay, The Scandal-Plagued Prison Banking Company*, N.Y. FOCUS (Oct. 21, 2022), <https://www.nysfocus.com/2022/10/21/new-york-may-end-jpay-contract/>; German Lopez, *How private bankers cash in on released prisoners*, VOX (Nov. 3, 2015, 9:00AM), <https://www.vox.com/explainers/2015/11/3/9661554/prison-bank-prepaid-card>; Wanda Bertram, *The CFPB's Enforcement Order Against Prison Profiteer JPay, Explained*, PRISON POL'Y INITIATIVE (Oct. 28, 2021), <https://www.prisonpolicy.org/blog/2021/10/28/cfpb-jpay/>.

<sup>397</sup> See *supra* note 396.

<sup>398</sup> Devlin Barrett, *Prison officials allowed convicted sex abuser Larry Nassar to pay little to victims while spending thousands on himself*, WASH. POST (July 28, 2021, 6:38PM), [https://www.washingtonpost.com/national-security/larry-nassar-prison-bank-account/2021/07/28/abdf6560-ee14-11eb-bf80-e3877d9c5f06\\_story.html](https://www.washingtonpost.com/national-security/larry-nassar-prison-bank-account/2021/07/28/abdf6560-ee14-11eb-bf80-e3877d9c5f06_story.html); Devlin Barrett, *U.S. prison officials resist making inmates pay court-ordered victim fees*, WASH. POST (August 4, 2022, 4:52PM), <https://www.washingtonpost.com/national-security/2022/08/04/federal-prisons-money-victims/>; Devlin Barrett, *Federal inmates would pay more to victims under new Justice Dept. rule*, WASH. POST (Jan. 9, 2023, 12:16PM), <https://www.washingtonpost.com/national-security/2023/01/09/prisoner-accounts-new-rules-victims/>.

proactively diverting funds belonging to incarcerated people to pay victim restitution.<sup>399</sup> Critics argue that the prisons are incentivized not to divert money to victims because the higher account balances in inmate trust accounts give incarcerated people more capacity to spend money in the commissary, and that commissary profits and interest on the commissary fund are used for BOP salaries and other costs.<sup>400</sup>

## 2. *Low Transparency and Oversight*

The public has little insight into how inmate trust accounts are administered, who has access to them, what the balances are, what can be deducted, and whether any internal checks are in place to ensure proper management.<sup>401</sup> Any oversight mechanisms are entirely internal to the prison. At most, inmate trust accounts occupy a single line in a prison budget document.<sup>402</sup> Often, however, a state's annual prison budget will contain line items for commissary funds and welfare funds (often some form of pooled asset for the general welfare of incarcerated people, though that term may be understood as so flexible that the funds can be diverted to general operations), but with no mention of the inmate trust account.<sup>403</sup> The practice may have benign reasons (why include a line item for something that is neither pure revenue nor expenditure?) but it underscores the difficulty of tracking even on a broad scale how large a system's inmate trust account is,

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<sup>399</sup> See *supra* note 398.

<sup>400</sup> Devlin Barrett, *Federal inmates would pay more to victims under new Justice Dept. rule*, WASH. POST (Jan. 9, 2023, 12:16 PM), <https://www.washingtonpost.com/national-security/2023/01/09/prisoner-accounts-new-rules-victims/>; Letter from K. Harne, U.S. Dep't of Justice, to Jason Wojdylo, Fed. Managers Ass'n, U.S. Marshals Service Ch. 373 (July 18, 2022) (responding to Freedom of Information Request).

<sup>401</sup> See Dale Chappel, *BOP Trust Fund Accounts Reportedly Shield Prisoners from Payment Obligations*, PRISON LEGAL NEWS (Dec. 1, 21), <https://www.prisonlegalnews.org/news/2021/dec/1/bop-trust-fund-accounts-reportedly-shield-prisoners-payment-obligations/> (detailing how even some law enforcement agencies are critical of the lack of transparency around prison accounts and how they lack the regulation and oversight of traditional bank accounts, making them susceptible to abuse).

<sup>402</sup> See Catherine E. Akenhead, *How States Can Take a Stand Against Prison Banking Profiteers*, 85 GEO. WASH. L. REV. 1224, 1247 (2017).

<sup>403</sup> *Id.*

For example, California and Texas both issue annual budget reports with line items for commissary and welfare funds but not the inmate trust fund. See CAL. DEP'T OF CORR. & REHAB., 2022-23 STATE BUDGET, <https://ebudget.ca.gov/2022-23/pdf/Enacted/GovernorsBudget/5210.pdf>; TEX. DEP'T OF CRIM. J., AGENCY OPERATING BUDGET 2022 (Aug. 27, 2021), [https://www.tdcj.texas.gov/documents/bfd/FY2022\\_Operating\\_Budget\\_LBB.pdf](https://www.tdcj.texas.gov/documents/bfd/FY2022_Operating_Budget_LBB.pdf).

whether it experiences unusual dips over the years, and, for example, how the fund amount changed (or did not change) with the stimulus checks.<sup>404</sup>

To the extent that high-level data on the aggregate inmate trust account across a system is difficult to find, getting information about individual accounts in order to review historical account balances or any irregularities is nearly impossible. Prisons will disclose information that is specific to individual incarcerated people only with a subpoena or a signed release of information by the holder of the account. But information related to an individual's prison account, purchases, credits, and deductions, is generally not kept as part of an individual's correctional file. Prisons may therefore not release it to anyone, even with a signed release of information.

Fintech firms like JPay complicate this picture even more, because the company may have exclusive access to detailed information about an individual's account. JPay's policy is that it will not release account information about an individual's account, even with a signed release or power of attorney.<sup>405</sup>

### 3. Minimal Regulation

As explained above, state regulation rarely provides the contours of property rights and obligations to the funds and instead creates several paths for prison systems to access funds and few restrictions on that authority. By contrast, state regulation rarely creates enforceable rights of access for individual account holders. State statute may offer a definition of inmate trust accounts that offers no insight into how the fund is managed or is simply tautological,<sup>406</sup> and other statutes are short and vague.<sup>407</sup>

Together, the statutes and regulations offer few parameters on who can access the accounts and for what purpose, what the specific legal relationship between the incarcerated person and the fund, the prison and the fund, and the prison and incarcerated person as individuals in a financial relationship.

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<sup>404</sup> The federal system has a more regularized accounting practice than many states when it comes to inmate trust accounts. *See* U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 4500.12, TRUST FUND/DEPOSIT FUND MANUAL 16 (March 14, 2018) ("The Trust Fund (Treasury Account Symbol 15X8408) and the Inmate Deposit Fund (Treasury Account Symbol 15X6085) are the control accounts for Trust Fund operations. These two appropriation-level accounts and their related general ledger accounts are maintained using Generally Accepted Accounting Principles (GAAP), the automated financial accounting system, the Trust Fund Accounting and Commissary System (TRUFACS), and the Inmate Telephone System (TRUFONE).").

<sup>405</sup> Telephone Call with JPay Representative (March 17, 2023).

<sup>406</sup> *See, e.g.*, TENN. CODE ANN. § 41-21-801.

<sup>407</sup> Massachusetts, by contrast, offers a more comprehensive statutory and regulatory framework that lays out how funds get into the account, how and when deductions can be made, how the fund is managed, oversight mechanisms, and the accrued interest. *See*. 103 MASS. CODE REGS § 405.04, 464.13, 911.08.

#### 4. Lack of Judicial Recourse

Incarcerated people face immense hurdles challenging all the various ways that prisons siphon off their inmate trust account funds in court. Prisons can carry out unauthorized deductions for years without challenge, and even when challenged, the timeframe of litigation can be long. In Kansas, corrections officials implemented a new internal policy imposing a fee for every inmate trust account deposit, where none had existed before.<sup>408</sup> Once a challenge finally reached the Kansas Supreme Court on a procedural issue, one justice raised an alarm about the substantive issue in a concurrence. Noting that the new policy “appears to contradict on its face a properly issued administrative regulation, which had the force and effect of law,” the justice wrote:

If so, the Department of Corrections operated for more than 3 years with a practice that siphoned off someone's money by ignoring its own regulation and depriving both the inmates and the general public of a free-of-cost method for sending and receiving money intended for an inmate's benefit. How can the IMPP trump a lawfully adopted administrative regulation and simply eviscerate it?<sup>409</sup>

There are many reasons that system-wide policy changes can take years to challenge. Before individuals can even file a lawsuit against a prison in federal court, they must exhaust their internal administrative remedies.<sup>410</sup> But the complicated arrangement of public-private management of inmate trust accounts raises the question of who is accountable for any erroneous or otherwise illegal deductions.

This question is harder for incarcerated people and their families than one might imagine. If the individual complains to the prison, the prison administrator may refer them to the corporate firm responsible for the financial transfers, which is often also the firm responsible for whatever item was purchased through the inmate trust account. If an individual wants to complain about a defective product purchased through an inmate trust account, a product never delivered, an erroneous amount charged, or other issues with deductions from their accounts, they may never even get a person from the company on the phone.<sup>411</sup>

Assuming the individual is able to exhaust their administrative remedies, and setting aside the basic logistical challenges of filing any

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<sup>408</sup> *Matson v. Kansas Dep't of Corr.*, 301 Kan. 654, 559–660, 346 P.3d 327, 331 (2015) (Biles, J. conc.).

<sup>409</sup> *Id.*

<sup>410</sup> 42 U.S.C.A. § 1997e (West).

<sup>411</sup> See, e.g., CONSUMER FIN. PROT. BUREAU, JUSTICE-INVOLVED INDIVIDUALS AND THE CONSUMER FINANCIAL MARKETPLACE 18 (2022).



lawsuit in prison, claims are regularly dismissed on sovereign immunity grounds, defects in the pleadings, and failure to pay the filing fees.<sup>412</sup>

Incarcerated people have had little success in arguing for substantive protections for their money that would be available outside of prisons. For example, courts have found that the Federal Debt Collection Practices Act does not apply to prison bank accounts,<sup>413</sup> and some courts have held that the Takings Clause does not prohibit prisons and jails from keeping the interest on such accounts.<sup>414</sup> Common law claims like conversion and unjust enrichment are rarely raised.<sup>415</sup>

Federal courts have inconsistently described the property interest that an individual has in their prison account funds and the substantive due process principles that attach. Federal courts have clearly recognized that people in prison have a property interest in their trust account funds such that the deprivation of funds triggered due process protections,<sup>416</sup> but the Supreme Court's decision in *Sandin v. Connor* upended the framework that would have offered meaningful constitutional protection. With respect to inmate trust accounts, "*Sandin* . . . shift[s] the focus of the inquiry from the language of the regulation to whether the punishment "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."<sup>417</sup> Previous courts' "holding that prisoners have a protected property interest in the funds in their prison trust accounts is no longer good law. . . ." <sup>418</sup>

Similarly, in finding that the Takings Clause did not prohibit the withholding of accrued interest from prisoners, the First Circuit explained in *Young v. Wall*: "It is clear beyond hope of contradiction that an inmate has a property interest in the balances held in his accounts,"<sup>419</sup> but that "[t]he reported decisions of the Rhode Island courts do not offer the slightest indication that the common law creates a property right enabling inmates to

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<sup>412</sup> See, e.g., *Brazier v. California Dep't of Correction & Rehab.*, 523 F. App'x 477, 477-78 (9th Cir. 2013); *McDade v. Thomas*, 174 F.3d 198 (5th Cir. 1999).

<sup>413</sup> *United States v. Diehl*, 848 F.3d 629 (5th Cir. 2017).

<sup>414</sup> See Emily Tunink, *Does Interest Always Follow Principal?: A Prisoner's Property Right to the Interest Earned on His Inmate Account under Young v. Wall*, 642 F.3d 49 (1st Cir. 2011), 92 NEB. L. REV. 212, 218 n.44 (2013) (discussing circuit split). But see *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194 (9th Cir. 1998).

<sup>415</sup> When raised, they have not been successful, though the pro se nature of the litigation may explain the failure of these claims. See, e.g., *Moore v. Washington*, No. 1:20-CV-1184, 2021 WL 508304 (W.D. Mich. Feb. 11, 2021).

<sup>416</sup> See *Gillihan v. Shillinger*, 872 F.2d 935, 938-39 (10th Cir. 1989).

<sup>417</sup> *Clark v. Wilson*, 625 F.3d 686, 690-92 (10th Cir. 2010) (citing *Sandin v. Connor*, 515 U.S. 472, 484) (1995).

<sup>418</sup> *Id.*

<sup>419</sup> *Young v. Wall*, 642 F.3d 49, 53 (1st Cir. 2011) (citing *Reynolds v. Wagner*, 128 F.3d 166, 179 (3d Cir.1997) (collecting cases)). For a detailed look at the complicated nature of prisoners' property rights, see Isaac Colunga, *An Alternative Look at the Takings Clause and Inmate Trust Accounts*, 39 U. TOL. L. REV. 791, 806 (2008).

demand interest on RIDOC-held accounts.”<sup>420</sup> Despite the earlier pronouncement that people in prison have an unequivocal right and interest in their own property, their funds are understood in this opinion as being both held by the Department of Corrections and controlled by the private vendor.

Courts add an overlay of penological deference that not only closes off free-world substantive protections but also insulates prison actions from review. In *Young*, the court found, “The most jagged rent in the fabric of the plaintiff’s argument is his failure to recognize the highly idiosyncratic context that prison presents.”<sup>421</sup> The court emphasized the limited property rights of incarcerated people throughout history but failed to explain how the lesser rights of incarcerated people justified diverting the property to the prisons.

Even when an individual has a substantively strong claim, the path to actually getting into court is narrow and full of obstacles. Many lawsuits alleging mismanagement of prison bank accounts are dismissed for failure to abide by the procedural requirements of the Prison Litigation Reform Act.<sup>422</sup> Once the individual who spots the banking error ascertains whether the prison or the company is responsible, a claimant must exhaust administrative remedies to challenge the seizure.<sup>423</sup> In many places, the process is labyrinthine, with multiple steps, and each denial followed by a quick turnaround time for refileing or appealing.<sup>424</sup> In a case where an individual sued Nevada Department of Corrections for garnishing veterans’ benefits in an inmate trust account fund, in violation of federal law, the Ninth Circuit found that, although the garnishment of such funds was illegal, the fact that the individual had ended the grievance process after the

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<sup>420</sup> *Young*, *supra* note 419, at 54.

<sup>421</sup> *Id.* (omitting citations).

<sup>422</sup> See *McDade v. Thomas*, 174 F.3d 198 (5th Cir. 1999); *Shropshire v. Fajota*, No. 315CV00164RCJWGC, 2016 WL 5346958, at \*5 (D. Nev. Aug. 18, 2016), *report and recommendation adopted*, No. 315CV00164RCJWGC, 2016 WL 5339667 (D. Nev. Sept. 22, 2016), *aff’d*, 698 F. App’x 466 (9th Cir. 2017); *Simpson v. Martin*, No. CIV-20-985-C, 2021 WL 3478214, at \*9 (W.D. Okla. June 30, 2021), *report and recommendation adopted*, No. CIV-20-985-C, 2021 WL 3476613 (W.D. Okla. Aug. 6, 2021), *aff’d*, No. 21-6104, 2022 WL 1087139 (10th Cir. Apr. 12, 2022).

<sup>423</sup> Like other types of prison lawsuits, a large number of suits over inmate trust accounts are dismissed for failure to exhaust administrative remedies. See, e.g., *Beal v. Washington*, No. 1:21-CV-522, 2022 WL 17094179, at \*5 (W.D. Mich. Oct. 18, 2022), *report and recommendation adopted*, No. 1:21-CV-522, 2022 WL 17093505 (W.D. Mich. Nov. 20, 2022).

<sup>424</sup> See *Shropshire v. Fajota*, No. 315CV00164RCJWGC, 2016 WL 5346958, at \*4 (D. Nev. Aug. 18, 2016), *report and recommendation adopted*, No. 315CV00164RCJWGC, 2016 WL 5339667 (D. Nev. Sept. 22, 2016), *aff’d*, 698 F. App’x 466 (9th Cir. 2017) (describing a four-stage grievance process).

third step in a four-stage process and then refiled the grievance meant that he had not exhausted his administrative remedies.<sup>425</sup>

Finally, the doctrine of qualified immunity has kept many inmate trust account claims out of court. Balancing the need for public accountability and to protect corrections officials from “harassment, distraction, and liability when they perform their duties reasonably,” the Supreme Court applied qualified immunity “regardless of whether the government official's error is “a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.”<sup>426</sup> This rule – precluding relief where there is a mistake in law – is especially problematic given the minimal regulation of inmate trust accounts. Because the statutes and regulations are silent on so many of the ways that prisons might seize or divert funds, they have a broad ability to commit many “mistakes of law” through the many forms of asset seizure listed above, leaving people with little recourse for recovering their money.

These barriers to judicial recourse are not entirely accidental. The Association for Effective Law Enforcement is an organization whose goal is to “enhance the criminal justice community and to reduce potential criminal and civil liability of criminal justice professionals and their employers.”<sup>427</sup> It distributes monthly legal memos outlining the limits and scope of law enforcement liability, and in its 2008 memo “Legal Issues Pertaining to Inmate Funds,” it instructs corrections officials that any valid court order for payment permits the prison system to withdraw funds from an individual’s account.<sup>428</sup> Moreover, if an order for payment does not contain a payment schedule, the memo takes the position that the debt is “collectible immediately,” with no mention of an ability-to-pay determination or a processes for determining the legitimacy of the debt.<sup>429</sup> In other words, this law enforcement litigation guide would give prisons carte blanche to take on the role of debt enforcers for any debt that a person in prison may owe, and while the examples listed center on debts related to criminal system involvement, in theory, under the theory offered, prisons can decide to become debt collectors on behalf of all kinds of creditors to people in prison. The memo offers something of a roadmap, detailing the various rationales for seizing funds directly from inmate trust accounts and also identifying asset targets: pension funds belonging to people in prisons<sup>430</sup>, inheritances and life insurance proceeds from deceased loved ones,<sup>431</sup> disability pension

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<sup>425</sup> *Id.* See also *Simpson v. Martin*, No. CIV-20-985-C, 2021 WL 3478214, at \*9 (W.D. Okla. June 30, 2021), *report and recommendation adopted*, No. CIV-20-985-C, 2021 WL 3476613 (W.D. Okla. Aug. 6, 2021), *aff’d*, No. 21-6104, 2022 WL 1087139 (10th Cir. Apr. 12, 2022).

<sup>426</sup> *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009).

<sup>427</sup> *Legal Issues Pertaining to Inmate Funds*, 2008 AELE JAIL & PRISON L. SECTION 301, 306 (2008).

<sup>428</sup> *Id.* at 302.

<sup>429</sup> *Id.* at 306.

<sup>430</sup> *Id.* at 302.

<sup>431</sup> *Id.* at 303.

payments,<sup>432</sup> veterans' disability payments,<sup>433</sup> and already meager prison wages.<sup>434</sup>

A more systematic and structural barrier to accessing the courts is at play as well. In order to sue a prison over its mismanagement of prison bank accounts, an incarcerated individual must pay a filing fee—which must, of course, be deducted out of the prison bank account. Where an individual has stacked debts that leave their prison bank account in the red, prison staff may elect to deprioritize filing fees. When prisons pay other debts out of incoming funds rather than the individual's filing costs, the court can then dismiss the lawsuit for failure to pay the filing fees:

“We note, however, that there is actually a systemic problem in prison lawsuits like [petitioner's]: the law requires the payor (the prison) to process a drawer's request for payment to permit the drawer to sue the payor. No such conflict of interest plagues ordinary commercial transactions. Even assuming that the prison is willing to put the court's order for payment somewhere in the queue of [petitioner's] creditors, it is entirely predictable that the prison will prefer to postpone [petitioner's] ability to pursue litigation against itself.”<sup>435</sup>

While courts may recognize that such a maneuver by prisons derives from a conflict of interest and allow the suit to go forward,<sup>436</sup> it nevertheless requires the individual to devote additional litigation resources and skills that they may not be able to deploy in order to both document the prisons' actions and competently assert their challenges to the filing fee practice.

##### 5. *Low transaction costs*

Unlike other fee systems, there are few or no transaction costs incurred when a prison deducts fees from prison accounts and diverts it to itself, because prison officials have full access to the inmate trust accounts.

In 2019, the Brennan Center issued a report from a multi-jurisdictional study of fine-and-fee enforcement and the criminal system costs of recovering fines and fees from criminal defendants, the vast majority of whom are indigent.<sup>437</sup> This long-awaited study confirmed what many had

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<sup>432</sup> *Id.*

<sup>433</sup> *Id.* at 304.

<sup>434</sup> *Id.*

<sup>435</sup> *Sultan v. Fenoglio*, 775 F.3d 888, 890 (7th Cir. 2015).

<sup>436</sup> *Id.*

<sup>437</sup> Matthew Menendez, Lauren-Brooke Eisen & Michael Crowley, *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties*, BRENNAN CENTER, BRENNAN CENT. FOR J. (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>.

long suspected: that “[f]ees and fines are an inefficient source of government revenue.”<sup>438</sup>

The report lays out in detail why recovering criminal debt is so expensive for governments. Many jurisdictions jail people who fail to pay their debts, which imposes significant costs to the system, and other resources are devoted to collections.<sup>439</sup> But the true cost of enforcement is certainly higher and impossible to determine: “Among the costs that often go unmeasured are those of jailing, time spent by police and sheriffs on warrant enforcement or driver’s license suspensions, and probation and parole resources devoted to fee and fine enforcement.”<sup>440</sup> The process for collecting small sums of money from any one person can be time-consuming, requiring multiple hearings to assess payment status (which require the labor of judges, prosecutors, defense attorneys, and court staff), extensions of probation and parole, administrative efforts to set up payment plans, the issuance and execution of arrest warrants for failure-to-pay, and incarceration. It is no surprise that the Brennan Center found that attempting to collect on such debts is, for many jurisdictions, fiscally irrational.

Compare this process with the procedures for collecting court debt or in-prison costs from inmate trust accounts, in which the entity imposing and collecting the fee has immediate electronic access to the funds.<sup>441</sup> With such small transaction costs, there are few brakes in place to stem the imposition and enforcement of a growing array of costs.

#### e. Change Resistance

The current system is change-resistant simply because the practice of managing funds belonging to prisoners defies straightforward legal categorization. In the heavily siloed American legal regime that depends on and reinforces the boundaries between categories of law, courts often address marginal questions of whether one area of law or another applies to a given set of facts. But when it comes to prison bank accounts, whose legal essence is inconsistently defined or undefined altogether, reforming the way they operate means looking to the best practices in place for a legal category

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<sup>438</sup> *Id.* at 5.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* For a thorough explanation of the difficulty of calculating actual costs of enforcement, see Matthew Menendez, Lauren-Brooke Eisen & Michael Crowley, *If We Only Knew the Cost: Scratching the Surface on How Much it Costs to Assess and Collect Court Imposed Criminal Fees and Fines*, 2020 UCLA CRIM. J. L. REV. 165, 169–174 (2020).

<sup>441</sup> See, e.g., CORR. CORP. OF AMER., INMATE/RESIDENT TRUST FUNDS POLICY FOR METRO-DAVIDSON COUNTY DETENTION FACILITY 2-5.1, 2-5.2, 2-5.4 (Dec. 8, 2008), <https://www.prisonlegalnews.org/news/publications/inmate-accounts-policy-metro-davidson-co-detention-facility-cca-2009/> (detailing the role of the facility’s business manager or operations manager in using a computer system called IMS2 to make deductions and withdrawals, some at the request of the incarcerated person and some that are neither requested nor authorized by the incarcerated person).

that simply does not exist. Without a clear legal framework to assign to prison bank accounts, courts revert to a default legal framework that is simply “penology.”<sup>442</sup>

#### IV. The Paths Forward

There are two options for undoing a system that makes the current abuses of prison banking seemingly inevitable: (1) increase regulation, by introducing free-world law and other regulations, oversight, and transparency into prisons, and (2) take banking out of prisons.

##### a. Increasing Regulation, Oversight, and Transparency

The first set of answers comes from basic principles of oversight and regulation that protect people’s ability to maintain and manage money in their daily lives outside of prison: banking, consumer protection, trust principles, and antitrust, for example. To be sure, introducing regulation into prisons meets significant challenges, and efforts to apply non-carceral law to inmate trust accounts have not gained significant traction.<sup>443</sup> But simply illuminating the problems of prison banking can and should invite more sustained attention to regulating it.

Each of the areas of free-world law that could apply to the companies administering inmate trust accounts could be its own area of study, and exploring each is beyond the scope of this project. But we can narrow the focus a little by addressing the precise function of inmate trust accounts: Although banks perform multiple functions, inmate trust accounts really do only one thing, which is to operate as a payments system.<sup>444</sup> Unlike banks, nonbank payment systems offer no access to credit or advisory services<sup>445</sup> (activities that warrant their own layers of regulation), and the intersection of payments system regulation and consumer protection is far narrower

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<sup>442</sup> See *Ellibee v. Simmons*, 32 Kan. App. 2d 519, 523, 85 P.3d 216, 219 (2004) (upholding mandatory savings program to hold funds for release even for individuals serving life sentences).

<sup>443</sup> For a thorough critique of the limits of a litigation or regulatory approach to restrict abuses by private companies providing financial services for prisons, see Sean Kolkey, *People over Profit: The Case for Abolishing the Prison Financial System*, 110 CAL. L. REV. 257, 283–86 (2022). See also Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L. J. 1385, 1424–35 (2021) (describing primary barriers to free-world regulation in prisons).

<sup>444</sup> See U.S. *Payment System Policy Issues: Faster Payments and Innovation*, CONG. RESEARCH SERV. 4–6 (September 2019) (providing overview of regulatory framework), <https://sgp.fas.org/crs/misc/R45927.pdf>.

<sup>445</sup> See Mehrsa Baradaran, *Banking on Democracy*, 98 WASH. U. L. REV. 353, 357 (2020). (“Generally, financial services can be divided into two categories: the payments system and the credit system.”).

than the broader field of consumer law.<sup>446</sup> Looking at payments system regulation alone, therefore, provides some window into how these other free-world areas of law can make inmate trust accounts operate in a fairer way.

The Consumer Financial Protection Bureau is well-positioned to regulate and oversee some discrete aspects of privatized prison payment systems,<sup>447</sup> and in fact has done so. In 2021, CFPB Director Rohit Chopra issued a statement regarding its enforcement action against JPay, announcing penalties for “engaging in unlawful conduct that targeted people released from the corrections system, siphoning off taxpayer-funded benefits and people’s own hard-earned money in the process.”<sup>448</sup> CFPB took enforcement action against JPay because of the company’s requirement that people released from prison receive their unspent inmate trust account funds on debit cards that carried high fees.<sup>449</sup>

CFPB’s action against JPay targeted several problems: the company’s abuse of its market dominance, its manipulation of protected government benefits that people received while in prison and then were forced to transfer to debit cards, imposing fees that violated the cardholder agreements, and misrepresenting debit card fees to as many as 176,000 consumers.<sup>450</sup>

This measure was significant but also illustrates that existing regulations that apply to private companies can only go so far in reining in prison banking abuses.<sup>451</sup> The CFPB relied on the Electronic Funds Transfer Act<sup>452</sup> and the Consumer Financial Protection Act<sup>453</sup> to penalize JPay, but these

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<sup>446</sup> Though narrower than the broader field of money regulation, the intersection of the two fields is not small. See generally, NAT’L CONSUMER L. CENT., CONSUMER BANKING AND PAYMENTS LAW (6th ed. 2018), [www.ncl.org/library](http://www.ncl.org/library).

<sup>447</sup> According to the CFPB itself, “The CFPB wants to ensure any new payment systems are secure, transparent, accessible, and affordable to consumers. The systems should also have robust protections when it comes to fraud and error resolution.” CONSUMER FIN. PROT. BUREAU, *CFPB Outlines Guiding Principles for Faster Payment Networks* (July 9, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-outlines-guiding-principles-for-faster-payment-networks/>.

<sup>448</sup> CONSUMER FIN. PROT. BUREAU, *Statement of CFPB Director Rohit Chopra on the JPay Enforcement Action* (October 19, 2021), [https://files.consumerfinance.gov/f/documents/cfpb\\_jpay-llc\\_director-statement\\_2021-10.pdf](https://files.consumerfinance.gov/f/documents/cfpb_jpay-llc_director-statement_2021-10.pdf).

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

<sup>450</sup> Private vendors agree to be bound by the provisions of the Electronic Funds Transfer Act. See Keefe Commissary Network, LLC, *Original Technical Proposal*, W. VA. DEP’T CORR. 58 (April 10, 2014, 1:30PM) <https://www.prisonpolicy.org/contracts/documents.html?text-search-fields=facility-and-remarks&q=&q-state=&q-document-type=&q-service=inmate-banking-software&q-vendor=&sort=state#search-form>.

<sup>451</sup> See Sean Kolkey, *People over Profit: The Case for Abolishing the Prison Financial System*, 110 CAL. L. REV. 257, 279–80 (2022) (explaining the limitations of CFPB’s regulation of prison financial services providers).

<sup>452</sup> 15 U.S.C. § 1693 et seq.

<sup>453</sup> 12 U.S.C. § 5481 et seq.

laws focus on the private providers of financial products.<sup>454</sup> While companies like JPay are more than willing participants in exploitative prison banking practices, the prisons themselves are the central actors in enabling a system in which JPay can take advantage of a vulnerable and captive market.

Where existing financial regulation falls short, the field of trust law offers promising avenues to target the more structural weaknesses of the current system: prisons' conflicts of interest, minimal transparency and oversight, and easy and direct access to the funds. While other property concepts like custodianships and bailments have surfaced in state law and litigation concerning inmate trust account law,<sup>455</sup> the field that most naturally applies to the structure of prison banking systems is the law of trusts.

It is no accident that the most common term for prison accounts is "inmate trust account." Although the term "trust" can mean different things in different contexts, and the legal definition of a trust is distinct from a trust under government accounting standards, both concepts carry important safeguards for protecting money held for the benefit of another. Inmate trust accounts fit the definition of a legal trust: "a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee."<sup>456</sup> While not all governments will agree *a priori* that a fiduciary obligation exists, at least the federal government has acknowledged that it has a fiduciary obligation toward federal inmate trust accounts.<sup>457</sup> It would be hard to argue in any event that the government has absolutely no protective duty toward the funds in inmate trust accounts and that the funds can be seized at will.

One court has acknowledged that trust law in the free world would prohibit the federal government from administering inmate trust accounts in the manner that it does. The Federal Court of Claims addressed one plaintiff's argument that the prisons' Inmate Financial Responsibility Program violated trust law because it coerced him into making payments

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<sup>454</sup> See Kolkey, *infra* note 451 (highlighting the limitations of the Electronic Funds Transfer Act as a regulatory tool in this context).

<sup>455</sup> See *infra* note 177.

<sup>456</sup> RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

<sup>457</sup> See *infra* notes 123–125. Under government accounting standards, the question of whether a government agrees that the account is a trust raises a chicken-and-egg problem. Government accounting standards require that the government not be a beneficiary of a fiduciary fund, and that requirement is baked into the definition of a fiduciary fund. Governments may well claim not to be bound by standards of accounting when it comes to inmate trust accounts because, when the government self-deals as it does, the account becomes something other than a fiduciary fund. In other words, the point of the accounting standards seems to be, in part, creating accountability around the handling of others' money, and the government's claim over some interest in the money creates the very problem that the accounting standards attempt to solve.



out of his account.<sup>458</sup> The court found that, “[w]hile it would almost certainly be coercive for a private trustee to prevent a beneficiary from spending money from any source, or to interfere with a beneficiary’s ability to secure employment, the loss of such liberties is the point of imprisonment.”<sup>459</sup> The court acknowledged that, “[i]f private trustees were to treat a beneficiary as if he were an inmate, this would undoubtedly be coercive, but that is the starting point of plaintiff’s relationship with the BOP.”<sup>460</sup> The court did not deny that there the government played a “fiduciary role,” but that the prison setting changed the nature of that role.<sup>461</sup> The court did not explain what “fiduciary” could possibly mean in this context, if not that the prison must act in the best interests of its beneficiaries.<sup>462</sup>

The Federal Court of Claims has since reiterated that a fiduciary obligation by BOP exists, but without addressing how this role can coexist with a coercive government program to extract funds from the account to pay itself and others.<sup>463</sup> Other courts have been willing to apply basic trust principles to inmate trust accounts.<sup>464</sup> In North Carolina, an appellate court reviewed a decision of a state commission that adjudicates damages claims against the state, in which the commission found that prison officials had breached their fiduciary duty with regard to inmate trust accounts when it deducted a \$10 administrative fee from the account.<sup>465</sup> Prison officials did not challenge on appeal the commission’s application of trust principles.<sup>466</sup> Similarly, in Wisconsin, a federal court found that both the savings account and the spendable account belonged to the incarcerated person were “trust fund accounts, since the funds in them are held by the prison in trust for Mr. Spence.”<sup>467</sup>

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<sup>458</sup> *Salter v. United States*, 119 Fed. Cl. 359, 367 (2014).

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> The Consumer Financial Protection Bureau explains that, “A fiduciary is someone who manages money or property for someone else. When you’re named a fiduciary and accept the role, you must – by law – manage the person’s money and property for their benefit, not yours.” CONSUMER FIN. PROT. BUREAU, WHAT IS A FIDUCIARY? (June 27, 2023), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-fiduciary-en-1769/>. CFPB’s explanation is directed toward individuals who manage another person’s money, but it offers other examples of fiduciaries, such as in the context of conservatorships, trust law, and social security representative payees.

<sup>463</sup> See *Davis v. United States*, No. 20-1071, 2022 WL 1618052, at \*7 (Fed. Cl. May 20, 2022); *Williams v. United States*, 165 Fed. Cl. 72, 75 (2023) (noting briefly that generally, a “department of corrections acts as a trustee of the account with the inmate as the beneficiary”).

<sup>464</sup> *Matson v. Kansas Dep’t of Corr.*, 301 Kan. 654, 657, 346 P.3d 327, 330 (2015). See also *Doty v. Doyle*, 182 F. Supp. 2d 750, 753 (E.D. Wis. 2002); *Retzlaff v. Deshay*, No. 14-03-00833-CV, 2004 WL 2163173, at \*5 (Tex. App. Sept. 28, 2004). See also Cal. Penal Code § 5008 (West) (stating that money in inmate trust accounts shall be held “in trust with the Treasurer”).

<sup>465</sup> *Lytle v. North Carolina Dep’t of Pub. Safety*, 249 N.C. App. 682, 791 S.E.2d 877 (2016).

<sup>466</sup> *Id.*

<sup>467</sup> *Spence v. McCaughtry*, 46 F. Supp. 2d 861, 862–63 (E.D. Wis. 1999) (citations omitted).

In Kansas, an incarcerated person sued the Kansas Department of Corrections and others over alleged mismanagement of his inmate trust account, specifically disputing certain deductions under the Kansas Uniform Trust Code.<sup>468</sup> On the sole issue of venue, corrections officials argued that Kansas trust law could not apply because the inmate trust account was not a true trust. The Kansas Supreme Court, however, had “no difficulty finding the plain language of the applicable statutes establishes the inmate trust account is, in fact, a trust subject to the KUTC.”<sup>469</sup>

The fact that the trustee is the government should not fundamentally change the character of the trust relationship between prisons, the people in their custody, and their money. Basic trust principles can be and should be applicable to the type of trust accounts that prisons are operating.<sup>470</sup>

Under basic government accounting standards, governments do carry certain fiduciary obligations when it comes to inmate trust accounts, and governments have a structure and a set of accounting standards that would naturally apply.<sup>471</sup> “Fiduciary funds” are a class of funds that governments commonly operate and include such things as pension plans.<sup>472</sup> Governments abide by well-recognized principles governing how fiduciary funds are to operate,<sup>473</sup> and have basic authoritative standards of accounting that should be in place when the government is holding someone else’s money.<sup>474</sup>

The Governmental Accounting Standards Board, which sets non-binding accounting standards for state and local governments, considers inmate trust accounts to fall under a category of fiduciary funds called

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<sup>468</sup> *Matson v. Kansas Dep't of Corr.*, 301 Kan. 654, 657, 346 P.3d 327, 330 (2015).

<sup>469</sup> *Matson v. Kansas Dep't of Corr.*, 301 Kan. 654, 657, 346 P.3d 327, 330 (2015)

<sup>470</sup> “Several bodies of state and federal legislation dealing with various types of charitable, public, or pension (governmental and private) funds expressly or impliedly incorporate rules of the general trust law that is the subject of this Restatement.” RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. a (2003).

<sup>471</sup> GOVERNMENTAL ACCOUNTING STANDARDS BOARD, STATEMENT NO. 84 OF THE GOVERNMENTAL ACCOUNTING STANDARDS BOARD: FIDUCIARY ACTIVITIES 3 (Jan. 2017).

<sup>472</sup> *Id.*; GOVERNMENTAL ACCOUNTING STANDARDS BOARD, IMPLEMENTATION GUIDE NO. 2019-2, FIDUCIARY ACTIVITIES 1-3 (June 2019). The four types of fiduciary funds are post-employment trust funds like pensions, investment trust funds, and private-purpose trust funds. *Id.* at ii.

<sup>473</sup> Non-binding accounting standards are set by the Government Accounting Standards Board for state and local governments and the Federal Accounting Standards Advisory Board for the federal government. For federal standards applicable to fiduciary fund activities, see FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD, STATEMENT OF FEDERAL FINANCIAL ACCOUNTING STANDARDS 31: ACCOUNTING FOR FIDUCIARY ACTIVITIES (Oct. 24, 2006), in FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD, FASAB HANDBOOK OF FEDERAL ACCOUNTING STANDARDS AND OTHER PRONOUNCEMENTS, AS AMENDED (June 30, 2022), at [https://files.fasab.gov/pdffiles/2022\\_%20FASAB\\_%20Handbook.pdf](https://files.fasab.gov/pdffiles/2022_%20FASAB_%20Handbook.pdf). See also Warren Gorham & Lamont, *FASAB Splits “Trust Fund” Project in Two*, in GOVERNMENT ACCOUNTING & AUDITING UPDATES (Oct. 2002), 2002 WL 32121294.

<sup>474</sup> See *supra* note 473.

custodial funds.<sup>475</sup> While the GASB's role is advisory, and it is up to states and local governments themselves to determine how to administer funds as a fiduciary, a primary objective of the GASB is to lay out how governments can "demonstrate accountability" through financial reporting on fiduciary funds.<sup>476</sup>

Beyond the existing sources of regulation that can be found in fields like financial regulations, consumer law, and trusts, advocacy groups are currently working to more closely regulate and limit the authority of governments to seize and divert inmate trust funds. In Nevada, the Fines and Fees Justice Center has targeted an array of fees that made Nevada one of the most expensive prison system for incarcerated people.<sup>477</sup> The Nevada legislature, in its 2023 session, passed measures that eliminated room-and-board fees, medical copays, and commissary markups on hygiene items.<sup>478</sup>

#### b. Abolition

The second set of answers lies in an abolitionist strategy of establishing banking systems for incarcerated people entirely outside of the prison systems. There are two sides of an abolitionist ethic: the dismantling of a punitive infrastructure and the creation of its alternative.<sup>479</sup> While some abolitionist and decarceral efforts get stymied by a lack of political will to create the alternative, in some ways, abolishing inmate trust accounts may be easier. After all, the same financial technology that makes electronic prison banking possible might also render it obsolete.

In other words: What if prisons simply did not have inmate trust accounts? Among the original various rationales for prisons controlling the banking of incarcerated people, only a few remain relevant today: Accounting for work wages, debts, and fee deductions can be accomplished with outside bank accounts, and access to non-carceral financial technology eliminates the need for any cash exchanges in prison. Moreover, tracking debts and garnishment for in-prison and should be distinctly a process governed by courts and judicial processes, in the same manner in which

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<sup>475</sup> GOVERNMENTAL ACCOUNTING STANDARDS BOARD, IMPLEMENTATION GUIDE NO. 2019-2, FIDUCIARY ACTIVITIES 5 (June 2019).

<sup>476</sup> GOVERNMENTAL ACCOUNTING STANDARDS BOARD, WHY GOVERNMENTAL ACCOUNTING AND FINANCIAL REPORTING IS—AND SHOULD BE—DIFFERENT 14 (undated), at [https://gasb.org/document/blob?fileName=White\\_Paper\\_Revised\\_September\\_2017.pdf](https://gasb.org/document/blob?fileName=White_Paper_Revised_September_2017.pdf).

<sup>477</sup> Nick Shepack, *Nevada Ends Exploitative Incarceration Costs While Laying Groundwork for Future Misdemeanor Reform*, FINES & FEES J. CENT. (July 13, 2023), <https://finesandfeesjusticecenter.org/2023/07/13/nevada-ends-exploitative-incarceration-costs-while-laying-groundwork-for-future-misdemeanor-reform/>.

<sup>478</sup> *Id.*

<sup>479</sup> Jamelia Morgan, *Responding to Abolitionist Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1202 (2022) ("The "what" of abolition involves imagining and creating a new world. This act of "building" is a foundational, though often overlooked, aspect of abolitionist thinking and organizing."

debts and garnishments are assessed against non-incarcerated people. Supposed criminal justice debts – whether for court fines and fees, per diem costs of incarceration, in-prison fines and restitution for disciplinary violations, and other debts – should be adjudicated by courts, just as debts are adjudicated for people who are not in prison. In other words, if one of the primary original goals of inmate trust accounts was to create a cashless payment system within prisons, such a thing is now entirely possible without the closed universe of prison banking.

Financial technology makes it possible for individuals and their loved ones to order commissary items with a private online bank account. Costs of other goods and services – email, music, medical, phone calls, mail, tablets, social visits, postal mail, and more – can either be eliminated or paid for with outside accounts. Removing prisons' direct access to the money belonging to incarcerated people will necessarily create a brake in the one-way ratchet of price hikes that exists when prices are set unilaterally by prisons and their corporate partners.

Prisons may yet claim that they need to both surveil and control spending by incarcerated people for security reasons. But surveillance and control are not the same thing, and prison systems must produce evidence of risk to justify both. Prisons and courts have leaned on tropes about the inherent violence of prisons to justify certain coercive measures, but downplay the risk of violence in order to assuage courts that judicial interference is unnecessary in others.<sup>480</sup> "Violence, in short, is real when the state needs it to be."<sup>481</sup>

To the extent that prisons have security concerns about account balances and spending that are not actively and consistently monitored and controlled by prison officials, a more robust conversation and literature about the precise nature of the security threats is necessary to justify the entire prison banking infrastructure. In other words, a small or theoretical risk to security cannot justify the massive, expensive, and harmful infrastructure currently in place, particularly when alternatives have not been explored.

There are reasons to be cynical about abolishing inmate trust accounts. The fintech revolution still leaves many people unbanked, in particular the low-income and at-risk communities that comprise much of the prison population. Eliminating inmate trust accounts altogether, rather than simply making them optional, would leave many incarcerated people without a means to access cost-bearing goods and services in prison. For those with

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<sup>480</sup> Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 516, 569 (2021).

<sup>481</sup> *Id.* Driver and Kaufman emphasize that inconsistent claims about the nature and risk of violence in prisons is not accidental. "The incoherence of prison law is a form of selective empiricism that serves a coherent end: it is a powerful, subtle method to keep rights in check." *Id.* at 570.

the least resources, the option to use outside bank accounts would be purely theoretical.

It remains to be seen, therefore, whether an initial step—eliminating mandatory inmate trust accounts and substituting private online banking for those who have access to such accounts—would be a meaningful one. This question naturally directs us to the other half of the abolitionist ethic, which is to create a system of care in place of the punitive one that is dismantled. The broader problem of financial inclusion remains, whether or not there is regulation of prison banking or banking moves out of prisons. Even if inmate trust accounts coexist as an option alongside a policy allowing people to use and access outside bank accounts, many people will still have no choice but to use inmate trust accounts if cashless purchasing is required.<sup>482</sup>

In other words, abolition of prison banking does not solve the broader problems of financial inclusion when it comes to payment systems and financial technology.<sup>483</sup> After all, when the federal stimulus checks were issued, the fee deductions were not just a problem for people in prison but also for broader groups of unbanked people.<sup>484</sup> True financial inclusion for the broader population of unbanked and underbanked individuals is “a problem requiring structural redesign, rather than market-oriented patch fixes driven by neoliberal ideology.”<sup>485</sup>

As with other abolitionist strategies, moving toward the end goal of abolishing inmate trust accounts requires recognition of systemic barriers both in and out of carceral spaces: Prison banking is an aspect of a more expansive system of financial exclusion in which the payments systems routinely make banking more expensive for poor people.<sup>486</sup>

Other futures are possible, such as community banking<sup>487</sup> and public banking options<sup>488</sup> as alternatives to inmate trust accounts. One proponent of a community banking option for incarcerated people argues that Community Development Financial Institutions offer a viable substitute for inmate trust accounts.<sup>489</sup> Alternatively, a public banking option would allow

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<sup>482</sup> See *Inclusive Banking During a Pandemic: Using FedAccounts and Digital Tools to Improve Delivery of Stimulus Payments: Hearing Before the H. Comm. on Financial Serv.* 116<sup>th</sup> Cong. (2020) (testimony of Mehrsa Baradaran).

<sup>483</sup> See, e.g., Lindsay Sain Jones & Goldburn P. Maynard, Jr., *Unfulfilled Promises of the Fintech Revolution*, 111 CAL. L. REV. 801, 804 (2023).

<sup>484</sup> For people in the free world, the fees related directly to the deposit itself rather than to broader debts that the individual might hold See Mehrsa Baradaran, *Rethinking Financial Inclusion: Designing an Equitable Financial System with Public Policy*, ROOSEVELT INST. 2 (April 2020).

<sup>485</sup> *Id.* at 3.

<sup>486</sup> See Mehrsa Baradaran, *Banking on Democracy*, 98 WASH. U. L. REV. 353, 357 (2020).

<sup>487</sup> Sean Kolkey, *People over Profit: The Case for Abolishing the Prison Financial System*, 110 CAL. L. REV. 257, 260 (2022).

<sup>488</sup> Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L. J. 1385, 1416 n.145 (2022).

<sup>489</sup> Kolkey, *infra* note 489, at 289–95.

individuals to make direct money transfers with an individual account with the Federal Reserve, eliminating fees altogether.<sup>490</sup>

## V. Conclusion

Prison banking is a long-standing and under-examined feature of carceral systems. It has evolved into a profit-driven institution that places substantial economic burdens on poor individuals and the family members and friends who support them.

Whether the solution is a set of regulatory reforms or the elimination of prison banking systems altogether, the Article's first aim is simply to urge courts and policy makers to create and evaluate prison banking systems according to basic principles of money regulation at work in the free world. Instead of asking simply if the practices of prison banking are consistent with penological objectives, courts and policymakers should be asking how to recognize a property interest that incarcerated people have in their own funds. From there, any banking and purchasing system within prisons should be evaluated along the following metrics: Does the system avoid conflicted decision-making by prison officials? Is the system subjected to adequate independent financial regulatory oversight that protects the funds of incarcerated people? Are the banking practices transparent, both to individuals and their families who are using the banking system, and to evaluators on the outside who can review aggregate inmate trust account financial data for a particular prison or a particular system? Are the procedures involved in imposing and assessing prison costs against an individual sufficient to ensure both that prison officials are complying with laws for collecting fees and that the substantive debt is valid? Without these basic inquiries, prisons will continue to devise banking systems that effortlessly convert personal funds into public revenues and impose devastating costs on largely poor family and friends.

By shifting the legal framework away from a purely penological set of questions, this examination of prison banking aims to refocus the conversation on the rights of individuals to access and spend their own money and, until inmate trust accounts are abolished, the obligations of carceral systems to safeguard the money they contain. More broadly, this Article challenges the assumption that prisons should play any role in managing the money of people in their custody.

This Article is modest in its normative reach, neither prescribing a particular path nor describing in greater detail what proponents of public banking and community banking have already suggested. Instead, this Article offers a comprehensive taxonomy of the inherent features that make

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<sup>490</sup> See *Banking the Unbanked: Exploring Private and Public Efforts to Expand Access to the Financial System: Hearing Before the H. Comm. on Financial Serv.* 117<sup>th</sup> Cong. (2021) (testimony of Mehrsa Baradaran).

inmate trust accounts so susceptible to abuse, the categories of problems that ensue, and the histories that have allowed these systems to take shape.

Put bluntly, prisons can quite feasibly make inmate trust accounts optional. But the broader goal of this project is to lay the groundwork for a more ambitious, long-term campaign toward abolishing them altogether and creating a just and equitable substitute outside of the carceral space.<sup>491</sup>

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<sup>491</sup> According to Jamelia Morgan, "Transformative justice is a community-led process developed by activists committed to anti-violence and is therefore something the criminal legal system can simply never provide." Jamelia Morgan, *Responding to Abolitionist Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1204 (2022).