

# ARTICLES

## Investing in Abolition

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*This Article situates the prison within a broader macro-financial trend, what I call “community capture.” As private equity firms have consolidated the market for carceral services, they have also gained control over other essential social infrastructure, like housing and healthcare. By layering debt, fees, and aggressive profit expectations over companies or assets that provide for basic needs, their strategies intensify the economic pressures communities face. These strategies rely on various forms of coordination and legal protection from contestation. To demonstrate this process in the context of mass incarceration, this Article tells the story of Securus, a dominant carceral service company that had four different private equity owners in a six-year period.*

*This Article also explains the legal and political foundations of the carceral services market, which similarly demonstrate illuminating continuities, rather than differences, with the broader political economy. It offers a novel expression of how courts interpret what the Eighth Amendment demands of the state in terms of provisioning to prisoners: the provisioning of basic needs as credit. The proliferation of so-called “pay-to-stay” fees supports this interpretation in particular. This creditor–debtor relationship ultimately compels prisoners to work to support the carceral system. In this sense, the Eighth Amendment represents an added constitutional layer that accommodates forced carceral labor. Meanwhile, austerity politics and notions of family responsibility help legitimize market-based provisioning in prisons. The ways in which debt and family responsibility operate in the wider economy find similar expression here. How it works “on the outside” tends to legitimize coercive dynamics “on the inside.”*

*This combined picture underscores the urgency of an abolitionist project that understands broader political–economic transformation as*

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*necessary to shrink the carceral state. This Article’s final Part explores what it means to “invest in abolition,” stressing the importance of a national focus that taps into federal monetary power.*

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## INTRODUCTION

[T]he only way to guarantee the well-being of prisoners is to get them out of prison.<sup>1</sup>

Under this system . . . “[d]emand” implies money expenditure, not desire or need. No matter how great a man’s need may be for goods to feed and clothe and amuse him, he cannot make it worth anyone’s while to produce them for him unless he has money to pay, and need does not constitute “demand” unless it is accompanied by expenditure.<sup>2</sup>

America’s prisons are extensions of its political economy.<sup>3</sup> The project of abolition thus requires political–economic transformation.<sup>4</sup>

As a way to shrink the carceral state, abolition calls for substantial, reparative, and community-directed investments that support people’s basic needs and promote their flourishing. This requires constructing new possibilities out of a political economy that is often shifting, even as it produces familiar, profoundly uneven results.

Contending with such shifts, this Article explores the prison as the site of an ongoing macro-financial trend, what I call “community capture.” The agents driving this trend are private equity firms, managers of pooled investment vehicles, who have burst onto the global financial scene over the last two decades. “Capture” here refers to the financialization of essential, or unavoidable, social infrastructure—the layering of financial claims in the form of debt, fees, and expected profits over spheres integral to communal life. These spheres generate consistent payment streams—the targets of capture.

In the prison context,<sup>5</sup> private equity firms have consolidated the market for carceral services.<sup>6</sup> Because of that consolidation, a small group of companies now provides most of the services to prisons across the country. They sell food and hygiene products, facilitate communication and payments, and assist in medical treatment, all as they surveil their “customers,” collecting considerable data

1. Ruth Wilson Gilmore, Robin Kelley & Olufémi Táíwò, *DIG*, at 1:06:52 (Sept. 10, 2022), <https://thedigradio.com/podcast/ruth-wilson-gilmore-robin-kelley-and-olufemi-taiwo/> [https://perma.cc/TXJ8-C9B6].

2. JOAN ROBINSON, *INTRODUCTION TO THE THEORY OF EMPLOYMENT 2* (reprint. 1964) (1937).

3. See David Garland, *Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism*, 22 *PUNISHMENT & SOC’Y* 321, 322 (2020) (arguing that “America’s exceptional levels of punishment” should be understood as an “outcome[] of America’s distinctive political economy”); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L.J.* 2176, 2178 (2013) (explaining that “prison is for the poor” because “in American criminal justice, poor people are losers”); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 70 (2007) (describing a surplus population of “workers at the extreme edges, or completely outside, of restructured labor markets” facing greater risk of exposure to the criminal legal system).

4. See *infra* Part IV.

5. Throughout the Article, I use “prison” to also cover jails and other detention facilities.

6. See generally Jacob Swanson & Mary Fainsod Katzenstein, *Reflection, Turning Over the Keys: Public Prisons, Private Equity, and the Normalization of Markets Behind Bars*, 19 *PERSPS. ON POL.* 1247 (2021) (describing private equity’s control over the carceral services industry).

from them and their communities.<sup>7</sup> In addition to limited government budgets, these companies depend on steady payment streams from prisoners and their communities—groups generally lacking financial slack. It’s no surprise, then, that many families go into debt to pay for some of these essential goods and services.<sup>8</sup>

Many critics describe the private equity–carceral services nexus in exceptional terms. They see it as the hyper-financialization of a “captive” market.<sup>9</sup> This Article builds on such work but contends that this frame undersells the exceptional nature of this investment strategy. What is remarkable is how *ordinary* this phenomenon looks today. Captivity to intense economic pressure is pervasive.

Private equity firms now play increasingly significant roles along unavoidable paths to obtaining critical goods and services. Various forms of insecurity (housing, health, financial) leave individuals captive to intense economic pressure, forced to travel such paths. Limited housing stock, from single-family rentals<sup>10</sup> to multi-family apartment buildings<sup>11</sup> and mobile home parks,<sup>12</sup> is increasingly under private equity control, much of which is concentrated in areas hit hardest by the 2007–2009 foreclosure crisis.<sup>13</sup> Nursing homes,<sup>14</sup> hospitals,<sup>15</sup> and other

7. See generally Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3 (2020) (providing meticulous accounting of this market).

8. See SANETA DE VUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, WHO PAYS?: THE TRUE COST OF INCARCERATION ON FAMILIES 30 (2015), <https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-FINAL.pdf> [<https://perma.cc/59JQ-A3Z9>].

9. See Raher, *supra* note 7, at 13; ACLU & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 17 (2022), [https://www.aclu.org/sites/default/files/field\\_document/2022-06-15-captivelaborresearchreport.pdf](https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf) [<https://perma.cc/4NV7-AX9Y>] (describing incarcerated people as a “captive consumer base”). Journalistic accounts adopt this frame, too. See, e.g., Eric Markowitz, *Making Profits on the Captive Prison Market*, NEW YORKER (Sept. 4, 2016), <https://www.newyorker.com/business/currency/making-profits-on-the-captive-prison-market> [<https://perma.cc/D3FT-LDYK>]; Isaac Scher, *A Captive Market*, JACOBIN (Jan. 25, 2020), <https://jacobin.com/2020/01/prison-services-firms-technology-books-commodification-gtl> [<https://perma.cc/YV4S-UKGH>].

10. Francesca Mari, *A \$60 Billion Housing Grab by Wall Street*, N.Y. TIMES MAG. (Oct. 22, 2021), <https://www.nytimes.com/2020/03/04/magazine/wall-street-landlords.html>.

11. Heather Vogell, *When Private Equity Becomes Your Landlord*, PROPUBLICA (Feb. 7, 2022, 10:25 AM), <https://www.propublica.org/article/when-private-equity-becomes-your-landlord> [<https://perma.cc/A9GR-SKR7>].

12. See Last Wk. Tonight, *Mobile Homes: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 7, 2019), <https://www.youtube.com/watch?v=jCC8fPQOaxU&ab>; Michael Casey & Carolyn Thompson, *Rents Spike as Big-Pocketed Investors Buy Mobile Home Parks*, AP NEWS (July 25, 2022, 7:32 PM), <https://apnews.com/article/mobile-home-parks-rent-investors-8badf3f9a33faddb06abc980b046176> [<https://perma.cc/2VJV-4C6M>].

13. See Memorandum from the Fin. Servs. Comm. Majority Staff to the Members of the Comm. on Fin. Servs. (June 23, 2022), <https://democrats-financialservices.house.gov/uploadedfiles/hhrg-117-ba09-20220628-sd002.pdf> [<https://perma.cc/GHX2-TPLK>].

14. Robert Tyler Braun, Hye-Young Jung, Lawrence P. Casalino, Zachary Myslinski & Mark Aaron Unruh, *Association of Private Equity Investment in US Nursing Homes with the Quality and Cost of Care for Long-Stay Residents*, JAMA HEALTH F., Nov. 19, 2021, at 1, 2.

15. Sarah Jane Tribble, *Buy and Bust: When Private Equity Comes for Rural Hospitals*, KFF HEALTH NEWS (June 15, 2022), <https://khn.org/news/article/private-equity-rural-hospitals-closure-missouri-noble-health/> [<https://perma.cc/3PXC-WWSR>].

healthcare providers<sup>16</sup> have become lucrative private equity assets, as healthcare debt soars for many Americans.<sup>17</sup> The massive global remittance economy, which millions of U.S. immigrants participate in to provide financial support and express affinity across borders,<sup>18</sup> has become an acquisition target.<sup>19</sup> Subprime consumer debt-based businesses are found in more and more private equity portfolios,<sup>20</sup> as “access to credit” substitutes for public investment.<sup>21</sup> The layering of additional financial claims over these spheres, core to the private equity model, intensifies already widespread economic pressure.

Law and politics help encase such investment activities from contestation.<sup>22</sup> Securities laws and regulations shield private equity firms from public disclosure and reporting obligations.<sup>23</sup> This has facilitated controversial investment strategies, including participation in mass incarceration. Importantly, this relative secrecy is not just a resource for individual firms. The growth of the industry necessarily widens the sphere within which firms can realize value while remaining insulated against contestation. In other words, private equity firms increasingly have the option to deal only with one another to enter and exit their

16. See generally Eileen Appelbaum & Rosemary Batt, *Private Equity Buyouts in Healthcare: Who Wins, Who Loses?* (Ctr. for Econ. & Pol’y Rsch., Working Paper No. 118, 2020) (explaining how and why private equity firms have invested nearly \$1 trillion in the healthcare industry since 2000); LAURA KATZ OLSON, *ETHICALLY CHALLENGED: PRIVATE EQUITY STORMS US HEALTH CARE* (2022) (explaining private equity secondary buyouts within the healthcare industry).

17. See Noam N. Levey, *100 Million People in America Are Saddled with Health Care Debt*, KFF HEALTH NEWS (June 16, 2022), <https://khn.org/news/article/diagnosis-debt-investigation-100-million-americans-hidden-medical-debt/> [<https://perma.cc/8HFV-H3FK>].

18. See Stephen Lee, *The Economic Dimensions of Family Separation*, 71 DUKE L.J. 845, 851 (2022).

19. See Press Release, MoneyGram, MoneyGram Nears Completion of Merger Transaction with Madison Dearborn Partners (Dec. 21, 2022, 4:01 PM), <https://www.prnewswire.com/news-releases/moneygram-nears-completion-of-merger-transaction-with-madison-dearborn-partners-301708485.html> [<https://perma.cc/JAY7-DJ8D>].

20. See Abbye Atkinson, *Commodifying Marginalization*, 71 DUKE L.J. 773, 793–98 (2022).

21. Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1104 (2019); see *id.* at 1103–04.

22. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1807 (2020) (explaining how law and politics “encas[e] economic and other structural forms of inequality”); see K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 80 (2016) (explaining various forms democratic contestation can take against concentrated or diffuse economic power).

23. See EILEEN APPELBAUM & ROSEMARY BATT, *PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET* 55 (2014) (explaining that because of limited disclosure and reporting obligations, “[private equity]-owned companies remain shielded from public attention and accountability”); JEFFREY C. HOOKE, *THE MYTH OF PRIVATE EQUITY: AN INSIDE LOOK AT WALL STREET’S TRANSFORMATIVE INVESTMENTS* 39 (2021) (discussing the “secretive nature of the industry’s operations”); *id.* at 158, 172 (explaining that “accounting authorities comply with the [private equity] industry’s penchant for secrecy” and that journalists face challenges critically covering firms because of “[t]he secrecy of the buyout industry, the expense of investigative work, and the risk of alienating information sources”); William Magnuson, *The Public Cost of Private Equity*, 102 MINN. L. REV. 1847, 1861–62 (2018) (“Because private equity companies are not subject to comprehensive public-company disclosure regulations, information about their performance is difficult to come by, and firms have incentives to disclose favorable information while concealing unfavorable information, thus skewing the data.”).

investments. The horizontal relations between firms become a *shared space* for the protected circulation of value. This space further obscures the social relations such investment strategies fundamentally depend on.

The story of Securus, a telecommunications company serving corrections facilities, will help illustrate the mutually supporting relations among private equity firms. In a six-year period, as Securus grew into *the* predominant prison telecom company (and much more), four different private equity firms controlled it.<sup>24</sup> The company largely avoided critical attention until it came to dominate the industry. Facing that scrutiny, Securus has tried to construct a new image for itself. This Article tells that story to demonstrate the dynamic nature of contesting profit-seeking activities in a system of racial capitalism.<sup>25</sup>

But this is more than a story of concentrated private power. Law and politics condition the very possibility of this carceral services market and provide bases upon which private companies may legitimize their activities. In fact, it is the Eighth Amendment's prohibition against cruel and unusual punishment that serves as the key foundation of the market, allowing it to take the form that it does. By prohibiting certain deprivations, the Eighth Amendment imposes affirmative obligations on the state to provide for a prisoner's basic needs. Legal interpretation of the Amendment's protection thus explains much of a prisoner's "baseline entitlements,"<sup>26</sup> setting an initial boundary line between state and possible market-based provisioning. Those protections, unsurprisingly, are minimal. But what's more, they only require that the state meets basic needs *in the form of credit*.<sup>27</sup> In other words, as the state discharges its minimal obligations under the Eighth Amendment, the prisoner becomes its debtor. This in turn compels prisoners to perform labor to sustain the carceral system. At some point, now or later, they must repay the debt. The possibility of more generous provisioning is left to politics, not the Constitution.

Some jurisdictions are not as bad as others. Overall, however, austerity politics and notions of family responsibility have helped legitimize the expansion of market-based provisioning of goods and services in prisons. The private actors who undertake such activities will only do so for sufficient monetary reward. The ways in which debt and family responsibility operate in the wider economy find similar expression in the legally and politically constructed market for carceral

24. See *infra* Part II.

25. See Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1259–68 (2022) (explaining the concept of racial capitalism); see also Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 153–54 (2022) (discussing a variety of profit-making strategies associated with mass incarceration).

26. BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 211 (1st Harv. Univ. Press paperback ed., 2001) ("Talk of coercion as a freestanding moral problem thus merely distracts attention from what is the real issue: what baseline entitlements and duties we wish to establish, as a moral or legal matter."); see *id.* at 212.

27. See *infra* Section III.A. As I describe in this Section, the pervasiveness of so-called "pay-to-stay" fees supports this interpretation.



services. In this case, how it works “on the outside” tends to legitimize coercive dynamics “on the inside.” Carceral service companies provide what states supposedly can’t (efficiently), won’t (politically), and aren’t required to do under the Constitution.

In drawing out this fuller picture, this Article describes a “structural” dynamic that challenges the carceral/free economy divide,<sup>28</sup> while identifying specific agents (private equity firms) that may play outsized roles in social domination. Those agents’ intentional acts produce, amplify, or entrench structures that constrain freedom and enable coercion.<sup>29</sup> Here, focusing on human agency helps demystify the dynamic, coordinated processes of capture.<sup>30</sup> At the same time, examining the legal and political foundations of the carceral services market shows the contingency and ongoing sociopolitical construction of economic value. Ultimately, I draw this picture to expand the “space” for thinking through the “positive project of proliferating social and regulatory alternatives” to the carceral system’s monopoly power over addressing social problems.<sup>31</sup>

The task of rethinking investment—challenging and transforming its institutional forms—is urgent. A far more equitable distribution of resources can provide the material security necessary to shrink the carceral state. The distribution and accumulation of resources, however, depends on institutionalized processes, which operate through concrete historical conditions and their attendant power relations. In the 1970s, as mass incarceration began its rapid ascent, the Democratic Party platform expressed that good jobs, education, and affordable housing provided alternatives to crime.<sup>32</sup> Fifty years ago, then, the idea that greater social support could limit the carceral system’s expansion was commonplace. But that period also produced a failed policy experiment to radically expand Black homeownership—an example of how investment can lead to “predatory inclusion” “creat[ing] the conditions for continued extraction” when its institutionalized forms fail to grapple in fundamental ways with the conditions and power relations of the time.<sup>33</sup>

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28. See Noah D. Zatz, *The Carceral Labor Continuum: Beyond the Prison Labor/Free Labor Divide*, in *LABOR AND PUNISHMENT: WORK IN AND OUT OF PRISON* 133, 156 (Erin Hatton ed., 2021) (discussing fines and fees as an example of “how the criminal justice/economy boundary is breached”).

29. See Lillian Cicerchia, *Structural Domination in the Labor Market*, 21 *EUR. J. POL. THEORY* 4, 4–5 (2022) (expounding *both* a structural and agential theory of domination).

30. *Id.* at 22 (explaining that “[r]adical critiques of capitalist markets often appeal to how complex, obscure, or all-encompassing they are” but “that despite such intuitions, and against the odds, working people have consistently de-mystified this social process and fought back time and again . . . [b]y placing human agents and their struggles at the center of the analysis”).

31. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1208 (2015).

32. See NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 115 (2014).

33. KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* 254–55 (2019); *accord id.* at 254 (explaining that “larger dynamics created by residential segregation” were not addressed by changes to U.S. housing policy in the late 1960s); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 1 (1993) (noting that “segregation” “disappeared

Aware of such histories, abolitionists see the confrontation with mass incarceration as a “long game” of inescapably “connected struggles.”<sup>34</sup> Abolitionist thought differs from reformist critiques of mass incarceration in its diagnosis that more radical social transformation is needed to build a just society.<sup>35</sup> The challenge of providing communities the resources they need is linked to the challenge of developing institutional configurations and capacities that allow people to relate to, value, and care for one another differently.<sup>36</sup>

This Article’s final Part is a reflection on this ongoing project of abolition that builds on abolitionist thought both in and outside of legal scholarship. The image presented of private equity firms as a sort of connective tissue, stringing together various forms of insecurity, isn’t simply to polemicize. Rather, this image highlights a pattern of coordinated financial activity cutting across community domains—itself a positive project that homogenizes social life through the financial logics of risk and return as it naturalizes material insecurity for marginalized groups. By beginning its criticism with the brutality of police and prisons, the positive, counterinstitutional project of abolition produces a different political and moral urgency around this challenge.<sup>37</sup>

Reports of dehumanizing conditions in detention facilities across the country were commonplace in 2022.<sup>38</sup> New York City’s notorious Rikers Island complex remained in crisis after the federal monitor overseeing the facility “called [2021] ‘the most dangerous year’” since taking on the role in 2015.<sup>39</sup> Deaths spiked in facilities in Oklahoma City, Oklahoma; Seattle, Washington; Pittsburgh, Pennsylvania; Louisville, Kentucky; and statewide in California, Texas, and

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from the American vocabulary” in the 1970s and 1980s, including among “government officials responsible for administering the nation’s social programs”); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 713 (2020) (explaining that the War on Poverty’s “failure stems in large part from the deliberate retreat from more radical visions of grassroots, community assertions of control over city planning, zoning, and investment decisions”).

34. Ruth Wilson Gilmore & James Kilgore, *The Case for Abolition*, MARSHALL PROJECT (June 19, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/19/the-case-for-abolition> [https://perma.cc/36JQ-5VKQ].

35. See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 104 (2020); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1614 (2019) (describing the abolitionist platforms of social movements as demanding “invest[ment] in new forms of more equitable and just coexistence” (emphasis added)).

36. See Sunita Patel, *Embedded Healthcare Policing*, 69 UCLA L. REV. 808, 867–75 (2022) (discussing care provisioning consistent with an “abolitionist ethic”); see also Olúfemi Táíwò, *Who Gets to Feel Secure?*, AEON (Oct. 30, 2020), <https://aeon.co/essays/on-liberty-security-and-our-system-of-racial-capitalism> [https://perma.cc/672T-AEJV] (describing a collaborative concept of security).

37. See McLeod, *supra* note 31, at 1208, 1210.

38. See Keri Blakinger, *Why So Many Jails Are in a ‘State of Complete Meltdown,’* MARSHALL PROJECT (Nov. 4, 2022, 1:00 PM), <https://www.themarshallproject.org/2022/11/04/why-so-many-jails-are-in-a-state-of-complete-meltdown?> [https://perma.cc/ZJC9-7HW4] (citing dangerous conditions in facilities in California, Georgia, Missouri, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, and West Virginia).

39. Jullian Harris-Calvin & Sam McCann, *New Yorkers Can’t Afford Another Year of Death in Our Jails*, VERA (Jan. 10, 2023), <https://www.vera.org/news/new-yorkers-cant-afford-another-year-of-death-in-our-jails> [https://perma.cc/QV93-D7Y9].



Georgia.<sup>40</sup> In Alabama, thousands held in state prisons coordinated a strike to call attention to desperate and deadly conditions.<sup>41</sup> Less covered in the media is the day-to-day disablement and debilitation these conditions produce and worsen,<sup>42</sup> itself a form of underrecognized violence. This situation reflects the system's profound and enduring tolerance for human suffering. The need for more immediate legal and political resistance remains.<sup>43</sup> Thinking about the prison as a site of interconnected struggles, a lens through which to critique a broader political economy, is a partner to that resistance.

This Article proceeds as follows. Part I gives a brief history of private equity and develops the concept of community capture. Part II tells the story of Securus, describing how a network of private equity firms facilitated the rapid expansion of its footprint and technological capacities. Part III shifts the focus to the legal and political foundations of the carceral services market. Part IV considers what it means to “invest in abolition,” focusing on the concept of “community control” and the invest–divest framework.

### I. PRIVATE EQUITY'S PATH

What do private equity firms do exactly? In short, they raise money from investors. They use that investor money, together with debt, to buy companies or other assets. They later sell those assets. Their business model depends on fees and gains.<sup>44</sup> They collect ongoing fees both from investors whose capital they raise and from the companies they acquire. Then they participate in certain gains realized upon the sale of a company or other assets.<sup>45</sup>

To be more specific, private equity firms establish and control investment funds, which are separate legal entities afforded favorable regulatory status, including fewer public disclosure and reporting requirements, under the

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40. Shaila Dewan, *Jail Is a Death Sentence for a Growing Number of Americans*, N.Y. TIMES (Nov. 22, 2022), <https://www.nytimes.com/2022/11/22/us/jails-deaths.html>.

41. Sam McCann, *What You Need to Know About the Alabama Prison Strike*, VERA (Oct. 27, 2022), <https://www.vera.org/news/what-you-need-to-know-about-the-alabama-prison-strike> [<https://perma.cc/W3K4-FUPW>].

42. See LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 28–31 (2020); Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 978–79 (2019); Laurin Bixby, Stacey Bevan & Courtney Boen, *The Links Between Disability, Incarceration, and Social Exclusion*, 41 HEALTH AFFS. 1460, 1460 (2022).

43. See generally, e.g., Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385 (2022) (arguing for robust application of “free-world” regulatory law to prisons as a strategy to improve conditions).

44. See Brett Christophers, *Value Models: Finance, Risk, and Political Economy*, 1 FIN. & SOC'Y, Dec. 2015, at 1, 7–12 (discussing value models of fees and gains).

45. More specifically, they are entitled to some of the returns generated beyond a “hurdle rate” as “carried interest.” James Chen, *Carried Interest Explained: Who It Benefits and How It Works*, INVESTOPEDIA (July 28, 2022), <https://www.investopedia.com/terms/c/carriedinterest.asp> [<https://perma.cc/UDH8-2WPR>].

Investment Company Act of 1940.<sup>46</sup> That status generally requires that only certain institutional investors—like pensions, sovereign wealth funds, university endowments, and wealthy individuals—invest in those funds.<sup>47</sup> Firms sell their services to these investors as a way to “beat the stock market.”<sup>48</sup>

The main strategy private equity firms use to acquire companies is the leveraged buyout (LBO).<sup>49</sup> In an LBO, the acquired company takes on substantial debt to pay out the former owners (about 70% of the purchase price), while the private equity fund commits much less in cash, taking on no responsibility for the new debt.<sup>50</sup> Often, the strategy begins with the acquisition of a “platform” company, followed by LBOs of related companies, which are called “add-on” acquisitions.<sup>51</sup> The firm then attempts to sell the bundle of assets (exit the investment) within three to five years. This is the strategy private equity firms used to consolidate the carceral services market. The rest of this Part contextualizes that development with a brief history of private equity’s dramatic expansion and growing political power.

#### A. BRIEF HISTORY

The first widely acknowledged LBO happened in 1982.<sup>52</sup> William Simon, former Treasury Secretary during the Nixon Administration, together with an associate, bought the greeting card company Gibson Greetings for \$80 million.<sup>53</sup> The duo put up \$1 million of their own money and made Gibson borrow the rest.<sup>54</sup> Just eighteen months later, Simon and his associate took the company public where it would be valued at \$290 million, despite Gibson’s productivity matching what it had been under its previous owners.<sup>55</sup> This spectacular windfall to Simon—who a decade earlier as Treasury Secretary was lamenting that proponents of “free

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46. 15 U.S.C. § 80a–1 to –64. These funds are often referred to as 3(c)(1) or 3(c)(7) funds for the specific exemptions from investment company status that they rely on. *See id.* § 80a–3.

47. Registered investment companies and other publicly traded companies, by contrast, have greater public disclosure and reporting requirements because they market their securities to a broader “public,” including retail investors. *See The Laws That Govern the Securities Industry*, SEC (Oct. 1, 2013), <https://www.sec.gov/about/about-securities-laws> [<https://perma.cc/FG3T-9BSJ>] (providing a general description of securities laws, and noting, for example, that their application and associated disclosure obligations turn on whether the securities are “being offered for public sale” or whether a company’s securities are “publicly traded”).

48. HOOKE, *supra* note 23, at 188.

49. *Id.* at 21 (noting that LBOs “represent about 65 percent of the [private equity] business”).

50. *See id.*

51. APPELBAUM & BATT, *supra* note 23, at 34.

52. Ann Crittenden, *Reaping the Big Profits from a Fat Cat*, N.Y. TIMES (Aug. 7, 1983), <https://www.nytimes.com/1983/08/07/business/reaping-the-big-profits-from-a-fat-cat.html>. LBOs predated this one, but this acquisition would be first to attract broad public attention. *See HOOKE, supra* note 23, at 18.

53. Crittenden, *supra* note 52.

54. *Id.*

55. *Id.*

enterprise” were being “caricatured as . . . car[ing] only about fattening the golden calf of big business”<sup>56</sup>—would spark an LBO boom.<sup>57</sup>

However, the boom was short-lived. By the early 1990s, struggling to meet their growing debt burdens, LBO companies filed for bankruptcy in record numbers and the 1980s LBO model was “discredited and viewed as dead.”<sup>58</sup> This set the stage for a comeback. Among other conditions, corporate and financial crises in the 2000s would create an opening for private equity firms to revive, expand, and transform their strategies.

First came the scandals of Enron and other global corporations in the early 2000s.<sup>59</sup> After Congress hastily intervened, the public corporation’s moment of crisis became the private equity firm’s opportunity. The Public Company Accounting Reform and Investor Protection Act of 2002, commonly known as Sarbanes-Oxley,<sup>60</sup> imposed a range of new reporting and other requirements on public companies which pushed some public companies to go private and incentivized private companies to stay private.<sup>61</sup> This was welcome news for the managers of pools of capital looking to invest in private companies. Between 2002 and 2007, private equity-deal volume increased 500%, reaching an extraordinary peak in 2007.<sup>62</sup>

Then came the financial crisis of 2008, when the surging deal activity would collapse altogether before rebounding modestly in 2010.<sup>63</sup> The important point is that private equity demonstrated resiliency in this pivotal moment, even as it waned much like the rest of the economy. This was a different institutional climate than in the early 1990s when private equity (back then, LBO<sup>64</sup>) suffered its brief “death.” Adaptation was both imaginable and possible. A mixed strategy of holding investments longer than normal, increasing secondary buyouts,<sup>65</sup> and expanding into new investment areas not only kept private equity firms afloat but brought them success.<sup>66</sup> Structural conditions even became advantageous. For instance, the Federal Reserve’s policy of quantitative easing<sup>67</sup> helped private equity firms access credit to finance transactions, as investors went searching for

56. William E. Simon, U.S. Sec’y of Treasury, *Restoring Our Prosperity* (Mar. 18, 1975) (transcript available at <https://www.k-state.edu/landon/speakers/william-simon/transcript.html> [<https://perma.cc/JR7Y-8TA7>]).

57. See HOOKE, *supra* note 23, at 18.

58. APPELBAUM & BATT, *supra* note 23, at 28.

59. *Id.* at 16, 30.

60. Pub. L. No. 107-204, 116 Stat. 745 (2002).

61. See APPELBAUM & BATT, *supra* note 23, at 16, 30.

62. HOOKE, *supra* note 23, at 35; see also APPELBAUM & BATT, *supra* note 23, at 96.

63. See APPELBAUM & BATT, *supra* note 23, at 96.

64. See Robert Kuttner, *The Private-Equity Time Bomb*, AM. PROSPECT (May 2, 2010), <https://prospect.org/culture/private-equity-time-bomb/> [<https://perma.cc/SDF8-LLGG>] (noting that “when the LBO business crashed and burned, . . . LBO operators rebranded their industry as ‘private equity’”).

65. A secondary buyout is when one private equity fund sells a portfolio company to another private equity fund. APPELBAUM & BATT, *supra* note 23, at 106.

66. *Id.* at 103–25.

67. Quantitative easing refers to monetary policy operations where a central bank conducts large-scale asset purchases to encourage more lending and investment. See The Investopedia Team, *What Is*

higher yield (riskier) investment opportunities, which meant greater investor interest in both private equity funds themselves and the riskier debt issuances of private equity-controlled portfolio companies.<sup>68</sup>

Importantly, the industry was prepared to deal with the increased political scrutiny of the entire financial system that would lead up to and follow passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>69</sup> As of 2007, private equity had a formidable lobbying arm, the Private Equity Council (PEC), which would rebrand twice in a short period, first to the “Private Equity Growth Capital Council” before settling on the “American Investment Council.”<sup>70</sup> “Private equity” itself was a rebrand of “LBO” after the LBO model was discredited.<sup>71</sup> Testifying on behalf of PEC’s twelve member firms (today, there are 111<sup>72</sup>) before the House Financial Services Committee in 2009, the PEC president explained that “private equity is poised to play a constructive role in the economic recovery” with the industry’s more than \$450 billion in committed capital waiting to be invested.<sup>73</sup> This lobbying arm also commented extensively on Dodd-Frank Act rulemakings, urging regulation that would not seriously interrupt the private equity model.<sup>74</sup> Ultimately, both Congress and the regulators charged with implementing Dodd-Frank applied a light touch to the industry, imposing modest new reporting requirements on private fund advisers and limiting the ability of banks to invest in private equity funds.<sup>75</sup>

After evading stringent regulation, the private equity industry flourished. In the first half of 2021, private equity had its “busiest six months since records began four decades ago, striking deals worth more than \$500 [billion] and helping to propel global mergers and acquisitions activity to an all-time high.”<sup>76</sup> The salaries

*Quantitative Easing (QE), and How Does It Work?*, INVESTOPEDIA (Aug. 3, 2022), <https://www.investopedia.com/terms/q/quantitative-easing.asp> [<https://perma.cc/CB3U-HPFD>].

68. See Abdullah Aryoubi, Marie Hildebrand & Michael Meser, *Quantitative Easing and Its Implications on Private Equity in the Euro Area*, 8 J. INT’L BUS. & ECON., Dec. 2020, at 1, 1 (discussing the link between quantitative easing and private equity).

69. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

70. *Private Equity Growth Capital Council Updates Mission; Changes Name to American Investment Council*, AM. INV. COUNCIL (May 10, 2016), <https://www.investmentcouncil.org/private-equity-growth-capital-council-updates-mission-changes-name-american-investment-council/> [<https://perma.cc/NRP2-2M37>].

71. *Supra* note 64 and accompanying text.

72. See *About the AIC*, AM. INV. COUNCIL, <https://www.investmentcouncil.org/about-the-aic/#our-members> [<https://perma.cc/9E2C-YWG5>] (last visited August 28, 2023).

73. Douglas Lowenstein, President, Priv. Equity Council, Testimony Before the House Financial Services Committee (July 17, 2009) (transcript available at <https://www.investmentcouncil.org/testimony-of-douglas-lowenstein-president-of-the-private-equity-council-before-the-house-financial-services-committee-july-17-2009/> [<https://perma.cc/AS9K-CDEA>]).

74. See, e.g., Priv. Equity Growth Cap. Council, Comment Letter in Advance of Notice of Proposed Rulemaking Implementing the Private Funds Portion of the Volcker Rule (May 10, 2011), <https://www.sec.gov/comments/s7-01-23/s70123-20161727-330618.pdf> [<https://perma.cc/325Y-RNWN>].

75. APPELBAUM & BATT, *supra* note 23, at 31–32; 12 U.S.C. § 1851(a)(1)(B).

76. Ortenca Aliaj & Kaye Wiggins, *Private Equity Breaks 40-Year Record with \$500bn of Deals*, FIN. TIMES (July 1, 2021), <https://www.ft.com/content/cd9571a3-726c-4995-9954-23a8dcf12b19>.

of private equity professionals now “dwarf” those of investment bankers,<sup>77</sup> and private fund advisers now manage over \$25 trillion in assets.<sup>78</sup>

This remarkable expansion has meant increased political contestation. The details of the investment terrain are essential to understand. In addition to those areas mentioned in the Introduction, private equity’s reach now encompasses student housing,<sup>79</sup> newspapers,<sup>80</sup> weapons manufacturing,<sup>81</sup> higher education,<sup>82</sup> fossil fuels,<sup>83</sup> water utilities,<sup>84</sup> and more. A recent Bloomberg headline perhaps put it best: “Everything is Private Equity Now.”<sup>85</sup> This entanglement with many sensitive areas of society is cause for scrutiny on its own. We can add to it private equity’s often antagonistic relationship with workers, who may face layoffs, wage cuts, or worse working conditions following a takeover.<sup>86</sup>

Since this explosive growth, lawmakers in Congress<sup>87</sup> as well as the Federal Trade Commission,<sup>88</sup> the Department of Justice,<sup>89</sup> and other agencies have taken

77. Antoine Gara, *Pay at Private Equity Firms ‘Dwarfs’ Sums on Offer to Investment Bankers*, FIN. TIMES (Feb. 15, 2022), <https://www.ft.com/content/df74c731-4d50-4420-8380-c83205c4c055>.

78. Rachel Shin, *The \$25 Trillion Sector that Includes VC, PE, and Hedge Funds Is Battling New Rules that Would Shine a Light on What They’re Actually up to. The Clock is Ticking*, YAHOO! FIN. (Aug. 8, 2023), <https://finance.yahoo.com/news/25-trillion-sector-includes-vc-110000569.html> [<https://perma.cc/ZSE2-FBH7>].

79. See Konrad Putzier, *Blackstone Bets on Campus Housing with \$13 Billion Acquisition*, WALL ST. J. (Apr. 19, 2022, 5:42 PM), <https://www.wsj.com/articles/blackstone-bets-on-campus-housing-with-13-billion-acquisition-11650366000>.

80. See generally Michael Ewens, Arpit Gupta & Sabrina T. Howell, *Local Journalism Under Private Equity Ownership* (Nat’l Bureau of Econ. Rsch., Working Paper No. 29743, 2022), [https://www.nber.org/system/files/working\\_papers/w29743/w29743.pdf](https://www.nber.org/system/files/working_papers/w29743/w29743.pdf) [<https://perma.cc/CRB5-RDQ9>].

81. See Jesse Barron, *How America’s Oldest Gun Maker Went Bankrupt: A Financial Engineering Mystery*, N.Y. TIMES MAG. (May 1, 2019), <https://www.nytimes.com/interactive/2019/05/01/magazine/remington-guns-jobs-huntsville.html>.

82. See generally Charlie Eaton, Sabrina T. Howell & Constantine Yannelis, *When Investor Incentives and Consumer Interests Diverge: Private Equity in Higher Education*, 33 REV. FIN. STUD. 4024 (2020).

83. See Hiroko Tabuchi, *Private Equity Funds, Sensing Profit in Tumult, Are Propping Up Oil*, N.Y. TIMES (Nov. 13, 2021), <https://www.nytimes.com/2021/10/13/climate/private-equity-funds-oil-gas-fossil-fuels.html>.

84. See Lee Harris, *Eyeing Federal Infrastructure Windfall, Private Equity Courts Public Utilities*, AM. PROSPECT (July 22, 2021), <https://prospect.org/infrastructure/federal-windfall-private-equity-courts-public-utilities/> [<https://perma.cc/GLZ6-2A78>].

85. *Everything is Private Equity Now*, BLOOMBERG NEWS (Oct. 8, 2019, 4:10 PM), <https://www.bloomberg.com/news/features/2019-10-03/how-private-equity-works-and-took-over-everything>.

86. See Mehrsa Baradaran, *The Neoliberal Looting of America*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/07/02/opinion/private-equity-inequality.html>.

87. See Atkinson, *supra* note 20, at 838 (discussing the introduction of the Stop Wall Street Looting Act in 2019).

88. Memorandum from Lina M. Khan, FTC Chair, to Comm’n Staff and Comm’rs, FTC 3 (Sept. 22, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1596664/agency\\_priorities\\_memo\\_from\\_chair\\_lina\\_m\\_khan\\_9-22-21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf) [<https://perma.cc/FVY7-WY5E>] (“[T]he growing role of private equity and other investment vehicles invites us to examine how these business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations. Evidence suggests that many of these abuses target marginalized communities, and combating practices that prey on these communities will be a key priority.”).

89. See James Fontanella-Khan, *Private Equity Moves into the Antitrust Spotlight*, FIN. TIMES (May 23, 2022), <https://www.ft.com/content/f222e618-dc96-4204-8a27-00e0a9316236>.

notice. In 2022, the Securities and Exchange Commission (SEC), the industry's primary regulator, proposed new rules aimed at increasing transparency and protection for fund investors,<sup>90</sup> a weakened version of which the SEC adopted as final rules in August 2023.<sup>91</sup>

This necessarily incomplete history serves two related purposes. The first is to give a sense of the rapid pace at which private equity moved from relative obscurity, even a state of “death,” to being a pervasive player in U.S. and global finance. The second is to suggest that this pervasiveness can also be thought of as entrenchment. The political, legislative, and regulatory challenges and stakes concerning the industry are radically different than they were when the LBO model took off in the 1980s. Efforts to tame the industry, or launch counterinstitutional projects (for example, different mechanisms for channeling investment), face serious challenges with private equity increasingly organized to defend its interests and engrained in much more of society—producing “gains” for an increasing number of pension funds (a critical source of claims to legitimacy<sup>92</sup>) through investments ranging from retail to critical social infrastructure.

#### B. SECRECY AND SOPHISTICATION

Law shields private equity firms from even the most minimal prerequisites for democratic contestation. Over a century ago, Justice Brandeis stressed the importance of public disclosure as a legal and regulatory technology necessary to check concentrated economic power, memorably writing that “[s]unlight is said to be the best of disinfectants” and thus “publicity” a way to “remedy . . . social and industrial diseases.”<sup>93</sup> Securities laws and the SEC's regulatory philosophy contain some of this spirit but mainly as it applies to public funds, securities, and markets. Private funds face far less disclosure and regulation.<sup>94</sup> Much turns on this artificial public–private distinction. “Everything [Being] Private Equity Now”<sup>95</sup> suggests that the distinction is increasingly untenable.

“Sophisticated” institutional investors, assumed capable of fending for themselves, have historically justified private equity's relative secrecy.<sup>96</sup> More recently, the SEC has observed that “private fund investments are often opaque”

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90. Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, 87 Fed. Reg. 16886 (Mar. 24, 2022) (to be codified at 17 C.F.R. pt. 275).

91. See Press Release, SEC, SEC Enhances the Regulation of Private Fund Advisers (Aug. 23, 2023), <https://www.sec.gov/news/press-release/2023-155> [<https://perma.cc/HK33-LXSG>].

92. See Am. Inv. Council, Comment Letter on Proposed Rules Regarding Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (Apr. 25, 2022), <https://www.sec.gov/comments/s7-03-22/s70322-20126669-287340.pdf> [<https://perma.cc/C6DF-DU9R>].

93. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

94. See EVA SU, CONG. RSCH. SERV., R47053, PRIVATE EQUITY AND CAPITAL MARKETS POLICY 14 (2022), <https://sgp.fas.org/crs/misc/R47053.pdf> [<https://perma.cc/G8LM-TGUN>].

95. BLOOMBERG NEWS, *supra* note 85.

96. DIV. OF INV. MGMT., SEC, PROTECTING INVESTORS: A HALF CENTURY OF INVESTMENT COMPANY REGULATION 110 (1992), <https://www.sec.gov/divisions/investment/guidance/icreg50-92.pdf> [<https://perma.cc/8L6T-TVBW>] (explaining that “an exception for funds owned by sophisticated investors would be premised on the theory that such investors can adequately safeguard their interests in a pooled investment vehicle without extensive federal regulation”).



and that “[w]ithout sufficiently clear, comparable information, even sophisticated investors would be unable to protect their interests or make sound investment decisions.”<sup>97</sup> This opacity is “abetted by the lack of transparency in [private equity firms’] famously private business dealings” and “provides opportunities for self-dealing that are utilized by some private equity firms to profit even as their portfolio companies spiral into bankruptcy.”<sup>98</sup> State laws and accounting rules further “cloak[]” the industry’s notorious fee arrangements “in an undertone of mystery.”<sup>99</sup>

From the beginning, the SEC’s 2022 proposed rulemaking around private funds was of limited democratic value. That’s because the SEC’s rulemaking authority here comes from the Investment Advisers Act, which doesn’t give the SEC the authority to regulate in the “public interest” unless such regulation is also necessary for investor protection.<sup>100</sup> Thus, though the proposal represented a significant step towards more stringent regulation of private equity, it required increased disclosure *to investors* and not the broader public.<sup>101</sup> What’s more, even the “public interest” that is accounted for in this context is taken to mean “efficien[cy]” and “capital formation,”<sup>102</sup> limiting possible attention to other public concerns. The industry, meanwhile, was poised to challenge any final rules on exactly those bases of efficiency and capital formation,<sup>103</sup> which would turn this rulemaking into a struggle of whose economists have the better cost–benefit analysis.<sup>104</sup>

Before this could happen, private equity firms won a significant initial victory in delaying any final rulemaking. In a 2022 omnibus spending bill, Congress directed the SEC “to redo a 100-plus-page economic analysis” in its rulemaking

97. Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, 87 Fed. Reg. 16886, 16888 (Mar. 24, 2022) (to be codified at 17 C.F.R. pt. 275).

98. Appelbaum & Batt, *supra* note 16, at 8.

99. HOOKE, *supra* note 23, at 120.

100. *E.g.*, 15 U.S.C. § 80b–4(b)(3)(H) (providing SEC authority to require the disclosure of information “necessary and appropriate in the public interest *and* for the protection of investors” (emphasis added)).

101. Note that the limited information related to private funds confidentially provided by investment advisors to the SEC through Form PF is aggregated into industrywide statistics (to help assess systemic risk). Those aggregates are shared with the public. *See, e.g.*, DIV. OF INV. MGMT., SEC, PRIVATE FUND STATISTICS: FIRST CALENDAR QUARTER 2022, at 1 (2022), <https://www.sec.gov/files/private-funds-statistics-2022-q1.pdf> [<https://perma.cc/4U23-BSQV>].

102. Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, 87 Fed. Reg. at 16890 (“[T]here is a need to enhance the regulation of private fund advisers to protect investors, promote more efficient capital markets, and encourage capital formation. The Commission believes that many of the practices it has observed are contrary to the public interest and protection of investors and that these practices, if left unchecked, would continue to harm investors.”); *see also* 15 U.S.C. § 80b–2(c) (linking “public interest” to “efficiency, competition, and capital formation”).

103. *See* Paul Kiernan, *Wall Street Rails Against Costs of Chairman Gary Gensler’s Regulatory Agenda at SEC*, WALL ST. J. (Aug. 27, 2022, 5:30 AM), <https://www.wsj.com/articles/wall-street-rails-against-costs-of-chairman-gary-genslers-regulatory-agenda-at-sec-11661592600>.

104. Industry has won such battles before. *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (finding the SEC failed under its statutory responsibility to “adequately . . . assess the economic effects” of a new rule upon efficiency, competition, and capital formation).

to “adequately consider the disparate impact on emerging minority and women-owned asset management firms,” significantly delaying any final regulation.<sup>105</sup> Some may have viewed this apparent commitment to diversity, equity, and inclusion in a positive light. The idea of “elite capture” offers a more compelling explanation: treating private equity regulation (here, mainly enhanced disclosure to investors) as a threat to racial and gender inclusion allows the “subgroup of people with power over and access to the resources used to describe, define, and create political realities . . . [to] forc[e] people to coordinate on a narrower social project that disproportionately represents elite interests.”<sup>106</sup> This is just one recent instance of private equity flexing its political muscle. A few months before this, in the context of hawkish inflation politics, the industry was able to resist modest tax increases introduced in the Inflation Reduction Act.<sup>107</sup>

Eventually, the SEC adopted a weaker version of the proposal as final rules in August 2023.<sup>108</sup> The rules will take effect within 12 or 18 months of their publication in the Federal Register, depending on the particular provision.<sup>109</sup> The ultimate effect this “pared back”<sup>110</sup> version of the rules will have on the industry remains deeply uncertain. Just one week after the rules were adopted, several major trade associations representing the industry sued the SEC, arguing that it had overstepped its legal authority in promulgating the final rules, even in their pared back, investor-protection-focused form.<sup>111</sup> More generally, even as the rules are implemented, the SEC faces the ever-present challenge of enforcement,<sup>112</sup> as legal boundaries are tested, innovated around, or evaded altogether. For these reasons, the final rules—with their emphasis on disclosure to this narrow class of sophisticated investors, reflective of the rules’ ultimately modest ambition—may be watered down further in actual practice.

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105. Theo Francis & Thomas Gryta, *Key Business Provisions of the \$1.65 Trillion Omnibus Spending Bill*, WALL ST. J. (Dec. 22, 2022, 10:05 AM), <https://www.wsj.com/articles/key-business-provisions-of-the-1-65-trillion-omnibus-spending-bill-11671721535>.

106. OLÚFÉMI TÁÍWÒ, *ELITE CAPTURE: HOW THE POWERFUL TOOK OVER IDENTITY POLITICS (AND EVERYTHING ELSE)* 32 (2022).

107. Pub. L. No. 117-169, 136 Stat. 1818 (2022); accord Brian Croce, *Senate Democrats Nix Private Equity Tax in Climate, Prescription Drug Bill*, PENSION & INVS. (Aug. 8, 2022, 3:07 PM), <https://www.pionline.com/legislation/inflation-reduction-act-doesnt-include-carried-interest-private-equity-tax-provisions> [<https://perma.cc/GF23-RKDG>].

108. See Press Release, SEC, *supra* note 91; David Dayen, *Long-Awaited Rules on Private Equity Mostly Involve Disclosure*, AM. PROSPECT (Aug. 25, 2023), <https://prospect.org/economy/2023-08-25-private-equity-rules-mostly-involve-disclosure/> [<https://perma.cc/PVK6-Y9VP>] (noting that the final rules are “watered down from the initial proposal”).

109. See SEC, *PRIVATE FUND ADVISER REFORMS: FINAL RULES 3*, <https://www.sec.gov/files/ia-6383-fact-sheet.pdf> [<https://perma.cc/STX6-EF5H>] (last visited Sept. 20, 2023).

110. Chris Cumming, *Even Pared Back, SEC’s Private-Fund Rules Mean Hard Adjustment for Industry*, WALL ST. J. (Aug. 23, 2023, 7:58 PM), <https://www.wsj.com/articles/even-pared-back-secs-private-fund-rules-mean-hard-adjustment-for-industry-f1f7888>.

111. Paul Kiernan, *Private Equity, Hedge Funds Sue SEC to Fend off Oversight*, WALL ST. J. (Sept. 1, 2023, 5:34 PM), <https://www.wsj.com/finance/regulation/private-equity-hedge-funds-sue-sec-to-fend-off-oversight-345ce372>.

112. HOOKE, *supra* note 23, at 164–65 (discussing the SEC’s lack of enforcement capacity and noting that “PE enforcement actions are few and far between”).

For Brandeis, disclosure was just a “necessary first step,” a surveying and charting of the battlefield of interests.<sup>113</sup> Under this view, government institutions should “serve as catalysts, vehicles for democratic political action . . . through . . . [which] individuals, communities, and affected interests can mobilize and be empowered to contest various forms of economic power.”<sup>114</sup> It’s difficult to challenge what you can’t see. Current debate around private equity, then, depends greatly on extraordinary efforts of knowledge production by journalists, activists, and others who try to penetrate the industry’s shroud of secrecy.<sup>115</sup> That critical work shows that public concerns around private equity are far broader than what a limited investor-protection paradigm accommodates.

### C. COMMUNITY CAPTURE

Before the financial crisis, single-family rentals were not an investor asset class. The private equity firm Blackstone changed that. Taking advantage of bulk sales of distressed mortgages and foreclosed properties that followed the crisis, Blackstone became the first private equity firm to acquire a large “inventory” of single-family homes, which would serve as rental units.<sup>116</sup> Through a complex process of securitization,<sup>117</sup> Blackstone sold bonds to investors, giving Blackstone cash to purchase yet more homes to repeat the process.<sup>118</sup> In 2013, there was only one such securitization, but by 2015, there were a total of twenty-one, as many private equity-backed companies sought to mimic Blackstone’s moves.<sup>119</sup> These firms also benefitted from government-sponsored guarantees, lowering their borrowing costs and facilitating the accumulation of more homes,<sup>120</sup> a strategy private equity firms have also used in the multi-family apartment context.<sup>121</sup> Far from a natural outgrowth of market forces, private equity’s entrance into this space was an intensely intricate and coordinated process, involving legal engineering, underwriting banks, debt investors, property management companies, newly established bankruptcy remote entities, and even

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113. BRANDEIS, *supra* note 93, at 92.

114. RAHMAN, *supra* note 22, at 80.

115. See HOOKE, *supra* note 23, at 188 (explaining that “the secrecy of the industry and the complexity of its data have blocked the most intrepid doubting Thomas from confirming suspicions”).

116. See Brett Christophers, *How and Why U.S. Single-Family Housing Became an Investor Asset Class*, 49 J. URB. HIST. 430, 438 (2023).

117. See Meredith Abood, *Securitizing Suburbia: The Financialization of Single-Family Rental Housing and the Need to Redefine “Risk”* 41–44 (June 2017) (M.C.P. thesis, Massachusetts Institute of Technology), <https://dspace.mit.edu/handle/1721.1/111349> [<https://perma.cc/RPW4-LH4U>].

118. See Elora Lee Raymond, *Collateral Cities*, LPE PROJECT (June 23, 2022), <https://lpeproject.org/blog/collateral-cities/> [<https://perma.cc/7NTM-3A5U>] (explaining how institutional investors buy homes then borrow against them to purchase more homes).

119. See Desiree Fields, Rajkumar Kohli & Alex Schafran, *The Emerging Economic Geography of Single-Family Rental Securitization* 3 (Fed. Rsv. Bank of S.F., Working Paper No. 2016-02, 2016).

120. See Lorraine Woellert, *Fannie Mae’s \$1 Billion Blackstone Deal Draws Fire*, POLITICO (Feb. 1, 2017, 12:11 PM), <https://www.politico.com/story/2017/02/fannies-1-billion-deal-with-blackstone-draws-ire-234492> [<https://perma.cc/N6FD-LGFM>].

121. See Vogell, *supra* note 11.

government backing.<sup>122</sup> This dense network was built on top of a straightforward material reality: People paying rent to secure places to live, now and in the future.

In 2021, the House Financial Services Committee sent surveys to the five largest single-family rental owners and operators, three of which had current or recent ties to private equity.<sup>123</sup> The Committee found that these companies tended to acquire properties in neighborhoods with significantly larger Black and single-mother populations.<sup>124</sup> Tenants saw on average a 40% increase in yearly fees, increasingly fell behind on rent, and faced more aggressive eviction practices, including during the national eviction moratorium.<sup>125</sup>

The Committee also found that these owners generally sold acquired homes in bulk sales to *other* institutional investors.<sup>126</sup> This suggests an increasingly self-sustaining investment ecosystem. A growing number of insulated actors agree on the legitimacy of this contentious investment strategy and are willing to trade with one another. Indeed, the ability to exit is essential for any social infrastructure to become a viable investment “asset class.”<sup>127</sup> In this case, a network of institutional investors, once cautious of trampling on the American homeownership “dream,” interpreted the financial crisis as evidence of a “‘natural’ limit of homeownership.”<sup>128</sup> Seen this way, bulk investing in homes to rent (and securitize) “would be to provide an essential service for which there was, and would always be, a healthy and natural demand.”<sup>129</sup>

Perhaps this all sounds complex. At bottom, however, this is still the same fundamental business model, layered over housing. The private equity firm aggressively acquires assets (here, single-family homes). The firm can then borrow against those homes to acquire even more (add-on acquisitions). Collectively, those assets must generate sufficient cash flows (rental payments and the proceeds of bulk sales) to service the debt, pay various fees, and meet profit goals, all for the various actors who layer their operations and expectations on top.

A private equity firm’s approach to acquiring businesses has similar features. The acquired company takes on debt to facilitate the LBO, more debt to finance

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122. See Abood, *supra* note 117, at 41–42.

123. Memorandum from the Fin. Servs. Comm. Majority Staff to the Members of the Comm. on Fin. Servs., *supra* note 13, at 4.

124. *Id.* at 4–5.

125. *Id.* at 5; see also Mari, *supra* note 10 (reporting that a private equity-controlled landlord often means high rents, increased evictions, and poor property maintenance).

126. Memorandum from the Fin. Servs. Comm. Majority Staff to the Members of the Comm. on Fin. Servs., *supra* note 13, at 4.

127. Daniela Gabor, *The Wall Street Consensus*, 52 DEV. & CHANGE 429, 431 (2021) [hereinafter Gabor, *The Wall Street Consensus*] (discussing the need for easy entry and exit into social infrastructure-related financial assets to transform such assets into a new “asset class”); see also Daniela Gabor, *The Wall Street Consensus at COP26*, PHENOMENAL WORLD (Nov. 18, 2021), <https://www.phenomenalworld.org/analysis/cop26/> [<https://perma.cc/D9A7-KXW6>] (explaining that when public goods and social infrastructure are financialized they must “generate cash flows that pay institutional investors”).

128. Christophers, *supra* note 116, at 444.

129. *Id.*

add-on acquisitions,<sup>130</sup> and perhaps even further debt to pay special dividends.<sup>131</sup> There are also numerous fees that the private equity firm may force the company to pay going forward.<sup>132</sup> All this adds pressure to the company's ability to meet ongoing (now growing) cash outflows. If adjustment is needed, this pressure does not operate neutrally. The *tendency* is for this pressure to become the problem of those with less power. Within a company, that's often labor.<sup>133</sup> Perhaps workers will face layoffs or more difficult working conditions. Where companies provide essential (or inescapable) services to the community, this pressure becomes the community's problem,<sup>134</sup> where racial, class, gender, and other hierarchies impact the distribution of burdens.<sup>135</sup>

Healthcare is one such essential sphere.<sup>136</sup> Over the past decade, “[p]rivate equity has poured nearly \$1 trillion into nearly 8,000 health care transactions.”<sup>137</sup> This strategy has accelerated at an extraordinary pace. Between 2000 and 2018, yearly private equity investment in the healthcare sector increased twentyfold.<sup>138</sup> In 2018, private equity firms invested \$100 billion in the sector.<sup>139</sup> Three years later, in 2021, that figure doubled to over \$200 billion.<sup>140</sup>

The debt and fees layered onto hospital operations have had destabilizing effects. Communities experience this instability as lost, disrupted, or lower quality services. For example, in efforts to cut costs to meet debt obligations, hospitals have resorted to layoffs and the closing of departments “that provide low margin

130. APPELBAUM & BATT, *supra* note 23, at 34 (“PE firms have often acquired companies to use as a ‘platform’ to acquire a number of other companies as add-on deals via LBOs.”).

131. *See id.* at 68–71.

132. *See* HOOKE, *supra* note 23, at 123.

133. *See* RAHMAN, *supra* note 22, at 82 (“Within the firm, owners and managers possess disproportionate authority over the livelihood, well-being, and life opportunities of workers . . .”).

134. *See* K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2478 (2018) (discussing a private equity investment in water infrastructure that drove price hikes and a “tripling of liens on houses as households fell behind on bills”).

135. *See* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 180 (2021) (explaining that economic coercion is built on top of and “reinforced by persistent racial hierarchies that have withheld wealth and credit from people of color, gender hierarchies that have withheld compensation for reproductive labor and elder care, status hierarchies that have withheld economic security from immigrants and formerly incarcerated people, and other social hierarchies that make it difficult for most people to protect themselves from domination”).

136. The United States healthcare system produces worse health outcomes compared to its peer countries, while managing to cost more for both households and government. *See* Munira Z. Gunja, Evan D. Gumas & Reginald D. Williams II, *U.S. Health Care from a Global Perspective, 2022: Accelerating Spending, Worsening Outcomes*, COMMONWEALTH FUND (Jan. 31, 2023), <https://www.commonwealthfund.org/publications/issue-briefs/2023/jan/us-health-care-global-perspective-2022> [<https://perma.cc/J4LP-4FVG>].

137. Fred Schulte, *Sick Profit: Investigating Private Equity's Stealthy Takeover of Health Care Across Cities and Specialties*, KFF HEALTH NEWS (Nov. 14, 2022), <https://khn.org/news/article/private-equity-takeover-health-care-cities-specialties/> [<https://perma.cc/Z84M-8DQ6>]. These transactions range from acquisitions of entire hospital systems to much smaller specialty practices.

138. Appelbaum & Batt, *supra* note 16, at 15.

139. *Id.*

140. Schulte, *supra* note 137.

services such as obstetrics and gynecology.”<sup>141</sup> In more extreme situations, some hospitals have closed entirely, and others have entered bankruptcy, like in the case of New LifeCare Hospitals, a long-term care provider with facilities across nine states backed by the private equity firm BlueMountain Capital.<sup>142</sup> That same firm simultaneously owned a prison healthcare provider accused of pervasive medical neglect.<sup>143</sup>

Rural communities are especially vulnerable. A reduction in services at a rural hospital can mean a community has no ready options for certain essential services. A 2022 report found that of the country’s 2,176 rural hospitals, 441 face significant risks of service disruption or closure.<sup>144</sup> Many private equity firms, meanwhile, target such hospitals for their real estate, which they sell and lease back, the proceeds of such sales going to investors as dividends.<sup>145</sup> Real estate companies have even built business models around this private equity activity, standing ready to buy and lease back hospital property.<sup>146</sup> This process provides the private equity firm and its investors with quick returns but adds pressure to the hospital’s operations (more cash outflows in the form of rent), on top of any debt the hospital system takes on in the course of an LBO. The concrete expressions of this pressure might include the closing of a cancer center, dwindling surgical and medicine supplies, and inability to staff an overnight emergency room doctor.<sup>147</sup>

Then there is billing. Congress recently addressed the problem of “surprise medical bills,”<sup>148</sup> but not without resistance. A private equity firm spent almost \$30 million in launching national ad campaigns, including “target[ing] the home districts of 13 vulnerable Republican and Democratic Senators up for re-election,” to stop such a law from passing.<sup>149</sup> The campaigns indicate that the aggressive pursuit of medical debt collection, including through lawsuits against

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141. Appelbaum & Batt, *supra* note 16, at 25.

142. Peg Brickley, *New LifeCare Hospitals Files for Bankruptcy amid Deal Talks*, WALL ST. J. (May 7, 2019, 8:45 AM), <https://www.wsj.com/articles/new-lifecare-hospitals-files-for-bankruptcy-amid-deal-talks-11557233127>.

143. Elizabeth Weill-Greenberg, *Corizon, the Prison Healthcare Giant, Stumbles Again*, APPEAL (Feb. 8, 2019), <https://theappeal.org/corizon-the-prison-healthcare-giant-stumbles-again/> [<https://perma.cc/6LS9-XDDW>].

144. Andrew Cass, *441 Rural Hospitals at Risk of Losing Services or Closing*, BECKER’S HEALTHCARE (May 4, 2022), <https://www.beckershospitalreview.com/finance/441-rural-hospitals-at-risk-of-losing-services-or-closing.html> [<https://perma.cc/9M8P-XWUA>].

145. See Brian Spegele, *A City’s Only Hospital Cut Services. How Locals Fought Back.*, WALL ST. J. (Apr. 11, 2021, 5:30 AM), [https://www.wsj.com/articles/a-citys-only-hospital-cut-services-how-locals-fought-back-11618133400?mod=article\\_inline](https://www.wsj.com/articles/a-citys-only-hospital-cut-services-how-locals-fought-back-11618133400?mod=article_inline); see also Appelbaum & Batt, *supra* note 16, at 25 (discussing private equity firms’ practices of targeting healthcare facilities).

146. See Brian Spegele, *How a Small Alabama Company Fueled Private Equity’s Push into Hospitals*, WALL ST. J. (Feb. 14, 2022, 9:56 AM), <https://www.wsj.com/articles/hospitals-private-equity-reit-mpt-steward-11644849598>.

147. See Tribble, *supra* note 15.

148. See *What is a “Surprise Medical Bill” and What Should I Know About the No Surprises Act?*, CFPB (Feb. 2, 2022), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-surprise-medical-bill-and-what-should-i-know-about-the-no-surprises-act-en-2123/> [<https://perma.cc/VWU6-3NJV>].

149. Appelbaum & Batt, *supra* note 16, at 70–73.



primarily poor patients,<sup>150</sup> has been a key part of private equity’s health sector playbook.

Though housing and healthcare markets each demonstrate distinctive institutional features, they are both spaces of constrained choice, particularly for those on the social, political, and economic margins of society. These margins produce reliable payment streams, the means of obtaining shelter and care, which private equity firms have increasingly sought to capture and then trade.

This examination of housing and healthcare is meant to show that private equity firms’ investments in “captive” prison markets are not singular activities. They are part of a broader phenomenon of *community capture*—the layering of financial claims over essential, or unavoidable, systems of care and social infrastructure. This capture depends on networks of actors coordinating complex financial activities in a manner largely illegible to the public. This process obscures both the social relations that ultimately generate “gains” and troubling circuits of redistribution that private equity firms establish as they rake in fees. For instance, the Texas Permanent School Fund, through its investment in a private equity fund, has a stake in sharply rising rents in Brooklyn, New York.<sup>151</sup> After unsuccessfully petitioning their private equity-controlled property manager, tenants from several apartment buildings wrote to the Texas State Board of Education, expressing “alarm[] that the Texas public school system is being funded through the mass eviction of tenants in Brooklyn.”<sup>152</sup>

New York City’s pension funds invested in the private equity fund which holds Securus. New York City separately contracts with Securus for services at its jails. This circuit of redistribution links the stability of the city’s notorious carceral system to the retirement security of city employees.

## II. TAKING OVER SECURUS

In 2004, twenty years after William Simon took Gibson Greetings public, a private equity firm called HIG Capital quietly acquired two predominant carceral service providers.<sup>153</sup> The two prison telecom companies, Evercom and T-Netix, were joined under a newly formed entity, Securus Technologies, which would immediately bring in more than \$350 million in annual revenues.<sup>154</sup> Over the

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150. See, e.g., Wendi C. Thomas, Maya Miller, Beena Raghavendran & Doris Burke, *This Doctors Group Is Owned by a Private Equity Firm and Repeatedly Sued the Poor Until We Called Them*, PROPUBLICA (Nov. 27, 2019, 1:00 PM), <https://www.propublica.org/article/this-doctors-group-is-owned-by-a-private-equity-firm-and-repeatedly-sued-the-poor-until-we-called-them> [https://perma.cc/C9D5-CJEB].

151. Hannah Levintova, *Real Estate Predators Tried to Cash In on the Pandemic. Then Tenants Fought Back.*, MOTHER JONES (June 2022), <https://www.motherjones.com/politics/2022/05/private-equity-brooklyn-park-slope-greenbrook-nw1-mcnam-schumer/> [https://perma.cc/DN63-EMDV].

152. *Id.*

153. Press Release, H.I.G. Cap., H.I.G. Capital Acquires Evercom Holdings, Inc.-Forms Securus Technologies, Inc. (Sept. 10, 2004) [https://perma.cc/5TBL-A2XV].

154. *Id.*

next two decades, Securus would dramatically expand its footprint, as it changed hands among four different private equity firms.

The financial crisis, however, intervened first, presenting a serious initial test to this investment strategy. But as private equity buyouts and the rest of the economy collapsed in 2007–2009, mass incarceration peaked.<sup>155</sup> So while this meant difficult market conditions would delay HIG Capital’s exit, the carceral services business held steady. In fact, in 2010, while overall unemployment remained at its crisis peak, Securus issued a press release celebrating a 28% increase in its workforce and claimed to operate “the largest sales and customer service organizations in the inmate telephone industry.”<sup>156</sup>

No doubt the press release was meant to generate buzz as HIG Capital geared up to sell Securus. The ostensibly innocuous celebration of “adding jobs” in an economy that was lacking far too many also communicated an exceptionalism about the American carceral services industry—that it operated countercyclically or, even better, was immune to the effects of economic crisis altogether. This growth-in-crisis exceptionalism wouldn’t have surprised those already fighting for prison abolition. For instance, examining the explosive growth of prisons and incarceration in California beginning in the 1980s, Professor Ruth Wilson Gilmore observed that prisons were extensions of “political economic crises”<sup>157</sup>—the outcome of state-organized responses as to what to do with surplus labor, land, and capital.<sup>158</sup>

Still, this moment was revelatory for the investment fund managerial class. In an October 20, 2009 presentation titled “Prisons’ Dilemma” at the Value Investing Congress, the billionaire hedge fund manager Bill Ackman touted the investment opportunities mass incarceration presented.<sup>159</sup> Ackman highlighted recent private company successes at “captur[ing]” prison population growth.<sup>160</sup> One slide says, “Historically, inmate populations in the U.S. have grown regardless of economic factors,”<sup>161</sup> while another highlights the benefits of low cyclical-ity, oligopolistic competition, and locational monopoly power, likening some of those attributes to healthcare provision.<sup>162</sup> At this point, many activists and scholars were familiar with the concept of a “prison industrial complex.”<sup>163</sup> The

155. See LAUREN E. GLAZE, BUREAU OF JUST. STAT., U.S. DOJ, NCJ 236319, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 1–3 (2011), <https://bjs.ojp.gov/content/pub/pdf/cpus10.pdf> [<https://perma.cc/JK56-C2UF>].

156. Press Release, Securus Techs., Inc., Securus Grows by 28% in 2010, Now More Than 800 Associates Strong (Dec. 20, 2010), <https://www.prnewswire.com/news-releases/securus-grows-by-28-in-2010-now-more-than-800-associates-strong-112184769.html> [<https://perma.cc/H5MA-CB2X>].

157. GILMORE, *supra* note 3, at 26.

158. *Id.* at 28–29.

159. BILL ACKMAN, PRISONS’ DILEMMA (2009), <https://www.scribd.com/document/21624762/Bill-Ackman-s-Presentation-on-Corrections-Corp-of-America-CXW-the-Value-Investing-Congress>.

160. *Id.* at 11.

161. *Id.* at 12.

162. *Id.* at 30.

163. See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 86 (Greg Ruggiero ed., 2003). See generally *What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, <https://criticalresistance.org/>

concept suggests a commercial nexus that companies already operating in the space were aware of, but there was still ideological (legitimizing) work to be done among the investor class. Privatization and profit-making weren't what was new here.<sup>164</sup> The challenge was to convince a distinct network of actors—in financial and capital markets—to see carceral service companies as legitimate, tradable portfolio investments.

HIG Capital would exit its investment in 2011, surviving the crisis years and selling Securus to a second private equity firm.<sup>165</sup> At this point, the total incarcerated population was stabilizing.<sup>166</sup> At the federal level, President Barack Obama had signed into law the Fair Sentencing Act of 2010, a modest piece of legislation that, despite its narrow scope, indicated a national shift on mass incarceration.<sup>167</sup> At the least, these circumstances signaled there might not be unending expansion of incarcerated populations (though expanded immigrant detention and the proliferation of other forms of restrictive supervision and surveillance belie that simplistic picture). For a private equity-controlled carceral service provider looking to grow, continued expansion of one business line was not guaranteed.

Beginning in 2012 and up through 2018, Securus would embark on a relentless debt-fueled buying spree, grabbing hold of numerous “complementary” companies—providing for video visitation, GPS monitoring, data analytics, voice biometric analysis, electronic medical recordkeeping, government payment processing, and more<sup>168</sup>—while changing hands among private equity owners two

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mission-vision/not-so-common-language/ [https://perma.cc/LME6-8CW3] (last visited Sept. 2, 2023) (explaining the prison industrial complex).

164. There's a long history of private profit-making associated with American prisons. See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450–62 (2005).

165. Press Release, Castle Harlan, Castle Harlan Acquires Securus Technologies (Nov. 10, 2011), <http://castleharlan.com/component/k2/item/194-castle-harlan-acquires-securus-technologies> [https://perma.cc/GX9V-XPSF].

166. See RICH KLUCKOW & ZHEN ZENG, BUREAU OF JUST. STAT., U.S. DOJ, NCJ 303184, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 – STATISTICAL TABLES 1 fig.1 (2022), <https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf> [https://perma.cc/KEB2-XRW8].

167. Pub. L. No. 111-220, 124 Stat. 2372; accord President Obama Signs the Fair Sentencing Act, WHITE HOUSE BLOG (Aug. 3, 2010), <https://obamawhitehouse.archives.gov/blog/2010/08/03/president-obama-signs-fair-sentencing-act> [https://perma.cc/2Y56-ZCQU].

168. See Press Release, Securus Techs., Inc., Securus Technologies, Inc. Announces Acquisition of Primonics, Inc. (Mar. 19, 2012), <https://www.prnewswire.com/news-releases/securus-technologies-inc-announces-acquisition-of-primonics-inc-143386276.html> [https://perma.cc/C3JE-JTQ4] (video visitation services); Press Release, Securus Techs., Inc., Securus Technologies, Inc. Announces Acquisition of DirectHit Systems, Inc. (THREADS™ Product) (July 3, 2012), <https://www.prnewswire.com/news-releases/securus-technologies-inc-announces-acquisition-of-directhit-systems-inc-threads-product-161229665.html> [https://perma.cc/7AGG-B5TW] (investigative, data analysis tools); Press Release, Securus Techs., Inc., Securus Technologies, Inc. Announces Acquisition of Satellite Tracking of People (STOP), LLC (Dec. 20, 2013), <https://www.prnewswire.com/news-releases/securus-technologies-inc-announces-acquisition-of-satellite-tracking-of-people-stop-llc-236746941.html> [https://perma.cc/GZZ3-BYNB] (GPS monitoring devices); Press Release, Securus Techs., Inc., Securus Technologies, Inc. Announces Acquisition of Telerus (Mar. 3, 2014) [hereinafter Press Release, Securus Acquires Telerus], <https://www.prnewswire.com/news-releases/securus-technologies-inc-announces-acquisition-of-telerus-248195901.html> [https://perma.cc/DT72-UUA2] (voice response systems); Press Release, Securus Techs., Inc., Securus Technologies, Inc. Announces Acquisition of JLG Technologies and Affiliated Companies (June 11, 2014), <https://www.prnewswire.com/news-releases/securus-technologies-inc-announces-acquisition-of-jlg->

more times. In 2013, a third private equity firm acquired Securus for \$700 million, double the value from just two years prior.<sup>169</sup> By 2014, in the middle of its acquisition spree, Securus was describing itself as having “the largest base of inmate audio, video, GPS parolee tracking, big data analysis, and automated information services that the corrections sector has ever seen.”<sup>170</sup> Then, in 2015, Securus made its most significant purchase to date, acquiring JPay, a company that introduced electronic payments, email, and entertainment- and education-related apps to detention facilities.<sup>171</sup> At the time, JPay claimed to operate in facilities that collectively detained over 1.6 million people,<sup>172</sup> which represented nearly three quarters of the total incarcerated population.<sup>173</sup>

Another private equity buyer took notice. In 2017, Platinum Equity purchased Securus (including JPay and its other subsidiaries) for \$1.6 billion.<sup>174</sup> To facilitate

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technologies-and-affiliated-companies-262787501.html [https://perma.cc/2VP7-ZPCD] (voice biometric tools); Press Release, Securus Techs., Securus Technologies Purchases CellBlox - Key Provider of Technology That Limits Contraband Wireless Use in Prisons and Jails (Jan. 14, 2015), <https://www.prnewswire.com/news-releases/securus-technologies-purchases-cellblox-key-provider-of-technology-that-limits-contraband-wireless-use-in-prisons-and-jails-300020657.html> [https://perma.cc/6CKC-N8J6] (Managed Access Systems); Press Release, Securus Techs., Inc., Securus Technologies, Inc. Completes Transaction to Acquire JPay Inc. (July 31, 2015) [hereinafter Press Release, Securus Acquires JPay Inc.], <https://www.prnewswire.com/news-releases/securus-technologies-inc-completes-transaction-to-acquire-jpay-inc-300122095.html> [https://perma.cc/2KUT-2XMS] (electronic payments, email, and apps); Press Release, Securus Techs., Inc., Securus Technologies Purchases Cara Clinicals, Inc. (July 31, 2015), <https://www.prnewswire.com/news-releases/securus-technologies-purchases-cara-clinicals-inc-300121920.html> [https://perma.cc/Y2Z4-DV4R] (electronic medical records); Press Release, Securus Techs., Inc., Securus Technologies Purchases Guarded Exchange, LLC (Oct. 30, 2015), <https://www.prnewswire.com/news-releases/securus-technologies-purchases-guarded-exchange-llc-300169670.html> [https://perma.cc/5VC4-TU6A] (investigations technology and monitoring platforms); Press Release, Securus Techs., Inc., Securus Acquires Jobview to Help Released Inmates Find Jobs – Proven Recidivism Reduction (Dec. 1, 2017), <https://www.businesswire.com/news/home/20171201005587/en/Securus-Acquires-Jobview-to-Help-Released-Inmates-Find-Jobs-%E2%80%93-Proven-Recidivism-Reduction> [https://perma.cc/85F2-N6UX] (employment software); Press Release, Securus Techs., Inc., Securus Technologies Announces Acquisition of GovPayNet (Jan. 4, 2018), <https://www.businesswire.com/news/home/20180104006153/en/Securus-Technologies-Announces-Acquisition-of-GovPayNet> [https://perma.cc/STM8-XX3Z] (government agency payments).

169. Ryan DeZember & Gillian Tan, *American Securities Puts Prison-Phone Operator GTL on Block*, WALL ST. J. (Apr. 17, 2014, 3:05 PM), <https://www.wsj.com/articles/american-securities-puts-prison-phone-operator-gtl-on-block-1397761278>. Before that, in 2012, Securus took on significant additional debt to pay its private equity fund owner a special dividend. Press Release, Moody's Invs. Serv., Moody's Lowers Securus to B3 Following Dividend Re-cap (May 10, 2012), [https://www.moody.com/research/Moodys-lowers-Securus-to-B3-following-dividend-re-cap-PR\\_245439](https://www.moody.com/research/Moodys-lowers-Securus-to-B3-following-dividend-re-cap-PR_245439).

170. Press Release, Securus Acquires Telerus, *supra* note 168.

171. Press Release, Securus Acquires JPay Inc., *supra* note 168.

172. *Id.*

173. See KLUCKOW & ZENG, *supra* note 166, at 4 tbl.1 (estimating that the total incarcerated population in 2015 was 2,172,800, excluding local jails).

174. Davide Scigliuzzo, *Prison Phone Company Securus Is in SPAC Merger Talks*, BLOOMBERG (Oct. 30, 2021, 11:01 AM), <https://www.bloomberg.com/news/articles/2021-10-30/prison-phone-company-securus-is-said-to-be-in-spac-merger-talks#xj4y7vzkg>.

this fourth consecutive private equity-backed LBO, Securus took on \$1.3 billion in new debt.<sup>175</sup>

By this point, a \$75 million acquisition of what was a narrowly focused company in 2004<sup>176</sup> had grown twentyfold in value, and the company itself had grown into a sprawling surveillance and carceral services conglomerate, increasingly monetizing the various ways prisoners connected with their communities on the outside. Seen purely through the logics of financial risk and return, this investment strategy was a resounding success.

#### A. LEGITIMACY AND VALUE CHAINS

Each sale from one private equity firm to another was a critical moment of value realization. Barriers to entry and dependable revenue streams help explain why carceral service companies may represent attractive private equity investments.<sup>177</sup> Steady revenues help accommodate an LBO strategy—a company with steady revenues can more reliably take on additional debt to facilitate a private equity takeover. But private equity firms care as much about *exiting* positions as they do entering and sustaining them. The greatest potential for value realization lies in the sale of a company, as when a second private equity firm acquired Securus for \$350 million then sold it for \$700 million just two years later.

These transactions express a certain normativity. Sociologists explain that “market exchange is saturated with moral meaning,”<sup>178</sup> with markets “play[ing] a powerful moralizing role in practice by defining categories of worth,”<sup>179</sup> providing a sense of socially grounded legitimacy.<sup>180</sup> Because the categorization of worth is socially grounded, boundaries between market and nonmarket, appropriate investments and not, are subject to ongoing contestation and change. But these contests are not open or legible to all of society. Many circuits of exchange are restricted. Depending on the distribution of social and economic power, it may take just a small set of actors to establish the necessary sense of legitimacy.

We can understand this chain of private equity acquisitions as such a restricted circuit. These firms *collectively* legitimized an investment strategy that seeks to “beat the stock market” through participation in mass incarceration. No one firm

175. Press Release, Moody’s Invs. Serv., Moody’s Assigns a B3 Corporate Family Rating to Securus’s LBO Financing Entity, SCRS Acquisition Corporation (May 31, 2017), [https://www.moody.com/research/Moodys-assigns-a-B3-corporate-family-rating-to-Securus-LBO-PR\\_367609](https://www.moody.com/research/Moodys-assigns-a-B3-corporate-family-rating-to-Securus-LBO-PR_367609) [<https://perma.cc/E7LD-6XE3>] (describing how a wholly owned subsidiary of Platinum Equity would take on debt to finance the acquisition and then be merged into Securus).

176. *H.I.G. Capital and American Capital Acquire Securus Technologies*, MERGR [<https://perma.cc/H8Y5-T5YA>] (last visited July 15, 2023).

177. Raher, *supra* note 7, at 15 (explaining that entry barriers, like long-term exclusive contracts with facilities, and reliable revenue from provisioning essential items make these companies attractive private equity investments).

178. Marion Fourcade & Kieran Healy, *Moral Views of Market Society*, 33 ANN. REV. SOCIO. 285, 300 (2007).

179. *Id.* at 301.

180. *See id.*

could accomplish that alone. Securus had substantial “investment value”<sup>181</sup> because this ecosystem of firms provided a “social setting that uph[eld] norms for that mode of valuation.”<sup>182</sup> Each firm may have had distinct reasons for thinking that their strategy was legitimate, but the essential point was they agreed on this threshold question of legitimacy.<sup>183</sup> Of course, the question of legitimacy was worked out in an opaque, shielded space—the horizontal relations between firms with limited disclosure and reporting requirements. In the end, these firms helped one another,<sup>184</sup> making new forms of participation in mass incarceration viable investment strategies. This coordinated process ultimately enabled the rapid expansion of Securus’s footprint and technological capacities.

Not every financial setting supports the circulation of value in this form.<sup>185</sup> Today, *public* capital markets appear inhospitable to carceral service companies. There are only two such publicly traded companies, both private prison operators that went public in 1986 and 1994.<sup>186</sup> In each of these years, major federal crime bills became law: the Anti-Drug Abuse Act of 1986 (which established the infamous crack/powder cocaine sentencing disparity)<sup>187</sup> and the Violent Crime Control and Law Enforcement Act of 1994 (which increased mandatory minimums, expanded capital punishment, and increased funding to state and local law enforcement).<sup>188</sup> There was bipartisan consensus about crime during this period. This led to a “bidding war” between Democrats and Republicans over which

181. Patrik Aspers & Jens Beckert, *Value in Markets*, in *THE WORTH OF GOODS: VALUATION AND PRICING IN THE ECONOMY* 3, 11 (Jens Beckert & Patrik Aspers eds., 2011) (“Investment value of a good . . . derives from the expectation of a monetary gain to be realized.”).

182. ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 12 (1993).

183. See Aspers & Beckert, *supra* note 181, at 14 (“Market coordination presupposes a shared understanding of the qualities of goods.”).

184. See APPELBAUM & BATT, *supra* note 23, at 106 (explaining that private equity firms provide important benefits to one another through secondary buyouts, which “are more easily completed than IPOs or sales to strategic buyers, and they are subject to less scrutiny of the price paid or the wisdom of the deal that comes with bidding on a company not owned by private equity. More importantly, these transactions solve two problems for PE firms: they allow PE funds on the buy side to invest some of their huge overhang of dry powder, and on the sell side PE funds can reduce their large inventory of mature portfolio companies and make distributions to limited partners.”).

185. ANDERSON, *supra* note 182, at 8 (explaining that forms of value may only be set “into circulation within distinct networks of social relations governed by distinct norms”).

186. The two are CoreCivic, which went public in 1986, *Investor FAQs*, CORECIVIC, <https://ir.corecivic.com/investor-faqs> [<https://perma.cc/PNR5-GVRY>] (last visited Sept. 2, 2023), and GEO Group, which went public in 1994, *Geo Group History Timeline*, GEOGROUP, [https://www.geogroup.com/history\\_timeline](https://www.geogroup.com/history_timeline) [<https://perma.cc/KP2S-7RX8>] (last visited Sept. 2, 2023). See Thomas Niel, *These 3 Private Prison Stocks Could Surprise Following Biden’s EO*, NASDAQ (Feb. 10, 2021, 10:00 AM), <https://www.nasdaq.com/articles/these-3-private-prison-stocks-could-surprise-following-bidens-2021-02-10> [<https://perma.cc/NRJ6-9NC9>] (“[S]everal large companies . . . provide telecom and other services to federal and state-level facilities, but none of them trade publicly. Instead, most of them are private-equity owned.”).

187. Pub. L. No. 99-570, 100 Stat. 3207; *accord* Press Release, ACLU, *ACLU Releases Crack Cocaine Report, Anti-Drug Abuse Act of 1986 Deepened Racial Inequity in Sentencing* (Oct. 26, 2006), <https://www.aclu.org/press-releases/aclu-releases-crack-cocaine-report-anti-drug-abuse-act-1986-deepened-racial-inequity> [<https://perma.cc/4EJ2-YV28>].

188. Pub. L. No. 103-322, 108 Stat. 1796; *accord* MURAKAWA, *supra* note 32, at 162 (summarizing the Act’s consequences).



party could claim to be “toughest,”<sup>189</sup> further propelling the rise of mass incarceration and explaining why “the number of crimes punishable by death escalated so dramatically, from only one in 1974, to three in 1988, to 66 by 1994,” even as death penalty abolition was part of the national Democratic Party platform in 1972.<sup>190</sup> These times, then, were ideal for profit-seeking carceral service companies to go public, as a social sphere marked by harsh, punitive politics gave broader legitimacy<sup>191</sup> to such businesses. Since then, no comparable companies have completed initial public offerings.

Private equity firms have filled the void. Indeed, the chain of private equity-backed acquisitions of Securus is not unique. For example, a private equity firm acquired Global Tel\*Link (GTL), Securus’s main competitor, in 2004,<sup>192</sup> after which different private equity buyers would take control in 2009<sup>193</sup> and 2011.<sup>194</sup> More recently, in 2018, HIG Capital (the first private equity firm to own Securus) consolidated two entities into Wellpath, a leading prison healthcare provider.<sup>195</sup> Another group of private equity firms established one of those two entities in 2012 through a “flurry of consolidations.”<sup>196</sup> Another notable prison healthcare provider, Corizon Health (since rebranded to YesCare), was sold from one private equity firm to another in 2020.<sup>197</sup> Sentinel Offender Services, a company that “facilitate[s] the management of offenders on probation and parole” through “electronic monitoring and tracking systems and drug and alcohol testing” was acquired by one private equity firm in 2012<sup>198</sup> and has since expanded its footprint, including through a partnership established in 2022 with a second private equity firm, as part of a broader “strategy to expand within the

189. JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 164 (2017) (describing a “bipartisan bidding war” to raise drug crime penalties).

190. MURAKAWA, *supra* note 32, at 131.

191. See Michèle Lamont, *Toward a Comparative Sociology of Valuation and Evaluation*, 38 ANN. REV. SOCIO. 201, 206 (2012) (explaining that legitimation “refers to recognition by oneself and others of the value of an entity”).

192. Press Release, The Gores Grp., Gores Technology Group, LLC to Acquire Global Tel\*Link Corporation from Schlumberger Technologies, Inc. (July 21, 2004), <https://www.gores.com/wp-content/uploads/2018/01/Press-Release-Gores-Technology-Group-LLC-to-Acquire-Global-Tel-Link-Corporation-from-Schlumberger-Technologies-Inc.pdf> [<https://perma.cc/7TN2-DUWC>].

193. *Crescent Capital Group and Veritas Capital Acquire GTL*, MERGR, <https://mergr.com/veritascapital-acquires-global-tel%252alink> [<https://perma.cc/P4RG-5C26>] (last visited Sept. 2, 2023).

194. Press Release, Am. Sec., American Securities Completes Acquisition of Global Tel\*Link (Dec. 15, 2011), <https://www.american-securities.com/en/press-releases/american-securities-completes-acquisition-of-global-tel-link> [<https://perma.cc/YVC3-W2SW>].

195. Marsha McLeod, *The Private Option*, ATLANTIC (Sept. 12, 2019), <https://www.theatlantic.com/politics/archive/2019/09/private-equitys-grip-on-jail-health-care/597871/>.

196. MICHAEL FENNE, PRIV. EQUITY STAKEHOLDER PROJECT, PRIVATE EQUITY FIRMS REBRAND PRISON HEALTHCARE COMPANIES, BUT CARE ISSUES CONTINUE 5 (2022), [https://pestakeholder.org/wp-content/uploads/2022/11/Wellpath\\_HIG\\_12-2022.pdf](https://pestakeholder.org/wp-content/uploads/2022/11/Wellpath_HIG_12-2022.pdf) [<https://perma.cc/VNJ4-47TX>].

197. *Id.* at 7.

198. Press Release, Pitchbook, Bison Capital Invests in Sentinel Offender Services (June 4, 2012), <https://pitchbook.com/newsletter/bison-capital-invests-in-sentinel-offender-services> [<https://perma.cc/U33F-U67D>].

electronic monitoring market.”<sup>199</sup> Another sizable “electronic people-monitoring” company, at the time “serving hundreds of correctional and law enforcement agencies in 34 countries,” was acquired by a private equity firm in 2017<sup>200</sup> and sold to another in 2022.<sup>201</sup>

With the proliferation of private equity firms, and capital continuously flowing to their funds, questionable investment strategies<sup>202</sup> are increasingly validated within insulated investment ecosystems. Since the financial crisis, secondary buyouts—when one private equity firm sells assets to another—have become ubiquitous.<sup>203</sup> Some firms have taken this to new extremes with what are called “continuation funds.” This involves a private equity firm establishing a new investment fund to buy assets from its older fund. Some have argued such activities resemble “Ponzi schemes.”<sup>204</sup>

Private equity’s investment in the carceral services space, like all investment, is built on a complex set of expectations.<sup>205</sup> Here, one hugely successful exit bolstered the expectations for another, drawing in more interest. But expectations don’t remain fixed. Rather, they are always reshaping, reflecting complex assessments about a dynamic social reality filled with uncertainty.<sup>206</sup> A firm investing in a carceral services company might expect certain attitudes about crime and laws that tolerate vast social insecurity to hold steady. The firm might also be counting on a particular macroeconomic environment or hope to operate with

199. Press Release, St. Cloud Cap., St. Cloud Capital Announces Its 75th Investment Since Its Inception (May 2, 2022), <https://www.prnewswire.com/news-releases/st-cloud-capital-announces-its-75th-investment-since-its-inception-301537555.html> [<https://perma.cc/7XXN-XAS7>].

200. Press Release, Apax, Funds Advised by Apax Partners Complete Acquisition of 3M’s Electronic Monitoring Business (Oct. 3, 2017), <https://www.apax.com/news-views/funds-advised-by-apax-partners-complete-acquisition-of-3m-s-electronic-monitoring-business> [<https://perma.cc/F4X2-RYQU>].

201. Press Release, Allied Universal, Allied Universal Becomes a Global Leader in Electronic Monitoring Through Attenti Acquisition (Apr. 5, 2022), <https://www.prnewswire.com/news-releases/allied-universal-becomes-a-global-leader-in-electronic-monitoring-through-attenti-acquisition-301517899.html> [<https://perma.cc/3P3Y-XEV9>]. Allied Universal is owned by Warburg Pincus, a private equity firm. *Allied Universal*, WARBURG PINCUS, <https://warburgpincus.com/investments/allied-universal> [<https://perma.cc/AUR2-PBM5>] (last visited Sept. 2, 2023).

202. FTC Chair Lina Khan recently expressed alarm at the growing “empirical research showing that private equity acquisitions degrade the lives of ordinary Americans in more tangible ways.” Stefania Palma, Mark Vandeveld & James Fontanella-Khan, *Lina Khan Vows ‘Muscular’ US Antitrust Approach on Private Equity Deals*, FIN. TIMES (Nov. 29, 2022), <https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797>.

203. Jacob Wilder, *How Secondary Buyouts Became Ubiquitous: SBOs as an Exit and Deal Sourcing Strategy*, PITCHBOOK BLOG (Aug. 24, 2018), <https://pitchbook.com/blog/how-secondary-buyouts-became-ubiquitous-sbos-as-an-exit-and-deal-sourcing-strategy> [<https://perma.cc/P736-3CA7>]; see also OLSON, *supra* note 16, at 27, 33 (discussing the pervasiveness of secondary buyouts).

204. See Katie Martin, *Amundi Warns That Parts of Private Equity Market Resemble ‘Ponzi Schemes’*, FIN. TIMES (June 1, 2022), <https://www.ft.com/content/21c6e2e4-6c52-4d13-b3a2-5455d51d9970>.

205. See Alex Williams, “*The Post-Keynesian Worldview in Five Principles*,” CONTINUOUS VARIATION (Mar. 9, 2021), <https://vebaccount.substack.com/p/the-post-keynesian-worldview-in-five> [<https://perma.cc/U78Z-LHS8>] (explaining the role of expectations in explaining economic decisions).

206. Financial actors must regularly “confront the conundrum that knowledge about the future is imperfect.” Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMPAR. ECON. 315, 316 (2013).

a relative degree of anonymity. Firms will adjust to shifts that upset these expectations.

Moreover, insulation from contestation isn't limitless. Serious scrutiny is simply more difficult to generate when law shields the target from making itself legible to the public. But as the industry has consolidated, attention to the practices of carceral services companies has grown. Ironically, while private equity-fueled consolidation strengthened the dominant position of some companies, that centralization of power has also made it possible to focus the spotlight. Prisoners and their allies have broken open these previously closed circuits of exchange to new moral conflict.

#### B. SOCIAL CONTESTATION

Advocates fighting on behalf of prisoners and their families took notice when Platinum Equity acquired Securus in 2017.<sup>207</sup> In 2018, attempting another add-on LBO, Securus went looking for \$350 million in new financing to acquire ICSolutions, the third largest prison telecom company at the time.<sup>208</sup> ICSolutions was then owned by HIG Capital, a now familiar character.<sup>209</sup> In April 2019, the Federal Communications Commission hinted that it would block the deal.<sup>210</sup> Then-Chairman Ajit Pai, generally viewed as sympathetic to industry,<sup>211</sup> said staff concluded the transaction “posed significant competitive concerns and would not be in the public interest,” after reviewing an extensive record that included “arguments and evidence submitted by criminal justice advocates, consumer groups, and other commenters.”<sup>212</sup>

Soon after, in October 2019, Senator Elizabeth Warren and Representatives Mark Pocan and Alexandria Ocasio-Cortez sent letters to Platinum Equity and four other private equity firms, asking that they disclose information about their practices and explain their role in the “consolidation and deterioration of the prison services industry.”<sup>213</sup> They expressed alarm that “[t]hese companies,

207. See Wendy Sawyer, *Detroit Pistons Owner About to Squeeze Fans in a New Way, Buying Securus*, PRISON POL'Y INITIATIVE (May 18, 2017), <https://www.prisonpolicy.org/blog/2017/05/18/securus/> [https://perma.cc/D5WN-AQHL].

208. David Shepardson, *Inmate Calling Services Companies Drop Merger Bid After U.S. Regulatory Opposition*, REUTERS (Apr. 2, 2019, 6:46 PM), <https://www.reuters.com/article/us-fcc-inmate-merger/inmate-calling-services-companies-drop-merger-bid-after-u-s-regulatory-opposition-idUSKCN1RE2L7> [https://perma.cc/66XD-CGAW].

209. *Id.*

210. See Press Release, FCC, Chairman Pai Statement on Decision by Inmate Calling Services Providers to Withdraw Merger Application (Apr. 2, 2019), <https://docs.fcc.gov/public/attachments/DOC-356836A1.pdf> [https://perma.cc/SCG3-M6YA].

211. See Todd Spangler, *Outgoing FCC Chair Ajit Pai Praised by Industry Orgs, Slammed as 'Disastrous' by Critics*, VARIETY (Dec. 1, 2020, 1:36 PM), <https://variety.com/2020/digital/news/fcc-ajit-pai-industry-praise-critics-net-neutrality-1234843052/> [https://perma.cc/56VF-B9YW].

212. Press Release, FCC, *supra* note 210.

213. Warren, Pocan, and Ocasio-Cortez *Investigate Private Equity Firms Profiteering Off Incarcerated People and Their Families*, ELIZABETH WARREN (Oct. 1, 2019), <https://www.warren.senate.gov/oversight/letters/warren-pocan-and-ocasio-cortez-investigate-private-equity-firms-profiteering-off-incarcerated-people-and-their-families> [https://perma.cc/7DHL-YM7R].

responsible for providing medical, food, and phone services to prisons, jails, and detention facilities housing over two million incarcerated people across the country, often deliver low-quality services to incarcerated individuals and their families at exorbitant cost.<sup>214</sup> Many groups contributed to this pressure. For example, the letters cite the work of Worth Rises, an advocacy organization working towards “dismantling the prison industry.”<sup>215</sup> That organization has mounted a sustained campaign against Securus and Platinum Equity, spotlighting the growing entanglement between private equity and carceral services.<sup>216</sup>

This national-level pressure has come in the context of broader changes in attitudes about the criminal legal system. Movement organizations in particular have demanded divestment of institutions fueling or benefitting from mass incarceration.<sup>217</sup> For these groups, investment of huge pools of private capital is not simply an activity for technocrats to consider as part of an independent market sphere; rather, such activity must be open to democratic challenge, for communities to have “a say in how we spend our collective wealth.”<sup>218</sup> These are radical, redistributive aims that integrate an analysis and critique of capitalism into their demands.<sup>219</sup> As a result, the vast resources wrapped up in the criminal legal system, both public and private, have come under sharper scrutiny. Although critiques of the prison industrial complex and of profit motives linked to the criminal legal system are not new, the scale of attention to such issues is a new development, a reflection of persistent organizing and advocacy. The rebellions following the police killing of George Floyd in 2020 also “politiciz[ed] state and city budgets”<sup>220</sup> in new ways, moving collective expectations over what sort of challenges to the administration of the criminal legal system are possible. Government contracts with carceral service providers have become sites of struggle and mobilization.

On the much more modest side, changes in federal law suggest adjustments in mainstream liberal thought around the operation and goals of the criminal legal system. For example, the First Step Act of 2018<sup>221</sup> reflected a bipartisan move away from retribution and incapacitation towards supporting rehabilitation and reentry.<sup>222</sup> We might understand this shift as part of a historically recurrent liberal

214. *Id.*

215. *About Us*, WORTH RISES, <https://worthrises.org/aboutus> [<https://perma.cc/PSU6-989C>] (last visited Sept. 2, 2023).

216. *See, e.g., The Facts*, WORTH RISES, <https://worthrises.org/platinumequityfacts> [<https://perma.cc/RNC5-K3RE>] (last visited Sept. 2, 2023).

217. *See, e.g., Invest-Divest*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/invest-divest/> [<https://perma.cc/8W3J-XWTE>] (last visited Sept. 2, 2023).

218. Akbar, *supra* note 35, at 113.

219. *See id.* at 112–13.

220. Tobi Haslett, *Magic Actions: Looking Back on the George Floyd Rebellion*, N+1, Summer 2021, <https://www.nplusonemag.com/issue-40/politics/magic-actions-2/> [<https://perma.cc/6MYR-LC8E>].

221. Pub. L. No. 115-391, 132 Stat. 5194.

222. The First Step Act’s amendments to compassionate release, expansion of good time credits, and mandate to make evidence-based improvements to the Department of Justice’s risk and needs assessment tool reflect this shift. *See* Ashley Nellis & Liz Komar, *The First Step Act: Ending Mass*

law reform project to better “rationalize”<sup>223</sup> the operation of the criminal legal system. The goal is to restore legitimacy through targeted adjustment, with the institution’s core left intact. The image of prison as a site of vast profit extraction disturbs such efforts at rationalization. Financial firms and institutional investors drawing gains from intense economic coercion cuts against the new bipartisan focus on rehabilitation and reentry.

The growing criticism of the private equity–carceral services nexus has led to shifts in business practices that seek to tell a more benign story. In fact, those shifts seem to track the movement in conventional liberal thought around mass incarceration—that it is possible to nudge the system in the direction of rehabilitation and reentry support yet keep its core intact. Such actions should be expected. Firms are always adapting to and influencing a moving institutional landscape, innovating in response to cultural, legal, political, and economic change.<sup>224</sup> Of course, there are reasons to be skeptical.

### C. WHAT TRANSFORMATION?

Securus has indeed moved to reconstruct its image, in ways emblematic of broader shifts in the industry. In October 2019, shortly after its failed merger bid and around the time lawmakers wrote to Platinum Equity, Securus underwent a cosmetic makeover with the establishment of a newly formed entity called Aventiv Technologies.<sup>225</sup> Aventiv is now the ultimate parent company of Securus, JPay, and the many other companies consolidated together through the chain of private equity acquisitions discussed above. In January 2020, Aventiv introduced a new “multi-year transformation initiative,” expressing a commitment to supporting rehabilitation and reentry before doubling down on those commitments in 2021.<sup>226</sup> In 2022, styling itself as “the leading technology company empowering rehabilitative justice,” Aventiv announced its launch of an

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*Incarceration in Federal Prisons*, SENT’G PROJECT (Aug. 22, 2023), <https://www.sentencingproject.org/policy-brief/the-first-step-act-ending-mass-incarceration-in-federal-prisons/> [<https://perma.cc/Q33Q-W8GN>]; *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp> [<https://perma.cc/VE7W-H8GJ>] (last visited Sept. 2, 2023).

223. MURAKAWA, *supra* note 32, at 29, 106 (discussing such historical efforts at “rationalization”); see also Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 409–10 (2018) (contrasting the Vision for Black Lives with the Department of Justice’s Ferguson and Baltimore reports, which represent a more traditional liberal law reform approach).

224. See JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 270 (2019) (“Given rules of engagement, [power] seeks out gaps; confronted with prohibitions, it finds workarounds. Durable countermovements disrupt the rhetorical and institutional logics that power has constructed, but if countermovements prove durable, they also become sources of opportunity and targets for co-optation.”).

225. See Press Release, Aventiv Techs., Dave Abel Named Chief Executive Officer of Aventiv Technologies and Its Corrections Subsidiary Securus Technologies (Jan. 13, 2020), <https://www.aventiv.com/dave-abel-named-chief-executive-officer-of-aventiv-technologies-and-its-corrections-subsidiary-securus-technologies/> [<https://perma.cc/3MEF-VSBU>].

226. Press Release, Aventiv Techs., Aventiv Technologies Announces New Commitments to Continue Driving Ongoing Transformation (Mar. 30, 2021), <https://www.prnewswire.com/news-releases/aventiv-technologies-announces-new-commitments-to-continue-driving-ongoing-transformation-301258060.html> [<https://perma.cc/Y93K-HH52>]. These maneuvers even inspired imitators. In January



advisory board that would be chaired by a formerly incarcerated person.<sup>227</sup> Confirming these aims, Platinum Equity’s website highlights that it “wholeheartedly supports efforts to reform business practices in the corrections services industry” and that they are “driving a comprehensive reform agenda at portfolio company Aventiv and its subsidiary Securus Technologies to make services more accessible and affordable for incarcerated individuals and their loved ones.”<sup>228</sup> In the middle of this ongoing “transformation,” Platinum Equity shopped Securus to Atlantic Avenue Acquisition Corp., a special purpose acquisition vehicle (SPAC).<sup>229</sup> The sides never reached a deal, but considering any talks took place at all suggests some success in remaking Securus’s image, as a deal would have meant far greater public disclosure and reporting requirements.

Aventiv meanwhile has publicly supported a broader shift to a taxpayer-funded model for prison telecom services.<sup>230</sup> Prison phone calls are now free in several states and cities. New York City made calls free in 2018,<sup>231</sup> Connecticut in 2021,<sup>232</sup> and California in 2022,<sup>233</sup> and there are active campaigns to make calls free in more than a dozen states.<sup>234</sup> These laws surely have more to do with prisoners, together with their families and advocates, pushing for change, than they

2022, the private equity firm American Securities announced its portfolio company GTL, a Securus competitor, would rebrand as ViaPath Technologies and “rededicate[] itself to transparency and helping formerly incarcerated individuals acquire successful training and employment.” Press Release, Am. Sec., GTL Becomes ViaPath Technologies, Launches Expanded Reentry Services (Jan. 4, 2022), <https://www.american-securities.com/en/press-releases/gtl-becomes-viath-path-technologies-launches-expanded-reentry-services> [<https://perma.cc/QSU5-QE45>]. For a critique of reentry programs, see Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 47–60 (2021) (comparing traditional approaches to reentry with abolitionist approaches).

227. Press Release, Aventiv Techs., Aventiv Technologies Launches Independent Advisory Board of Experts and Advocates in Reentry, Rehabilitation, Education (Feb. 17, 2022), <https://www.pnewsire.com/news-releases/aventiv-technologies-launches-independent-advisory-board-of-experts-and-advocates-in-reentry-rehabilitation-education-301484972.html> [<https://perma.cc/7E5G-RFQ2>].

228. *Affordability, Accountability, Innovation and Reform*, PLATINUM EQUITY, <https://www.platinumequity.com/securus-transformation> [<https://perma.cc/QY9B-YZ2S>] (last visited Sept. 2, 2023).

229. See Scigliuzzo, *supra* note 174. A SPAC is a publicly listed company that has two years to complete an acquisition, or otherwise face liquidation. Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 YALE J. ON REGUL. 228, 230 (2022).

230. Press Release, Securus Techs., Inc., Securus Technologies Supports Taxpayer-Funded Model for Correctional Communications in San Diego and Across the United States (July 1, 2021), <https://www.pnewsire.com/news-releases/securus-technologies-supports-taxpayer-funded-model-for-correctional-communications-in-san-diego-and-across-the-united-states-301324685.html> [<https://perma.cc/8S3Y-XEKN>].

231. Zoe Greenberg, *Phone Calls From New York City Jails Will Soon Be Free*, N.Y. TIMES (Aug. 6, 2018), <https://www.nytimes.com/2018/08/06/nyregion/phone-calls-free-nyc-jails.html>.

232. Taylor Johnston, *Now Free, Phone Calls in Connecticut Prisons Soar*, NEW HAVEN REG. (Nov. 3, 2022, 2:04 PM), <https://www.nhregister.com/news/article/free-phone-calls-CT-prisons-increased-17553263.php> [<https://perma.cc/EA9U-SKQJ>].

233. Kwasi Gyamfi Asiedu, *Prison Calls Are Wildly Expensive. Gov. Newsom Just Made Them Free in California.*, PROTOCOL (Sept. 30, 2022), <https://www.protocol.com/bulletins/california-free-prison-calls> [<https://perma.cc/V23N-4XL4>].

234. Christie Thompson, *Fighting the High Cost of Prison Phone Calls*, MARSHALL PROJECT (Feb. 25, 2023, 12:00 PM), <https://www.themarshallproject.org/2023/02/25/prison-phone-calls-colorado-biden-securus> [<https://perma.cc/X3BH-DZC8>]; see, e.g., Rachel M. Cohen, *Legislators Push to Make Phone Calls in New York’s Jails and Prisons Free*, N.Y. FOCUS (Oct. 14, 2021), <https://www.nysfocus.com/2021/10/14/free-phone-calls-jails-prisons/> [<https://perma.cc/8USY-ZVER>].



do with corporate social responsibility. But Aventiv’s non-opposition opens the door for more jurisdictions to follow suit.

Despite all this, the basic math of the situation should temper expectations around Aventiv’s ongoing “transformation.” The collective enterprise remains bound by monetary constraints—it must continue to generate cash flows sufficient to meet its payment commitments.<sup>235</sup> For instance, there is debt to service, a considerable amount given the chain of four private equity LBOs, on top of the other costs of maintaining operations. Aventiv’s 2021 financial statements show that it had \$1.7 billion in liabilities, including a \$1.1 billion loan due in 2024,<sup>236</sup> that accumulated goodwill comprises almost half its \$2.1 billion in assets,<sup>237</sup> and that it paid Platinum Equity over \$10 million in yearly “corporate advisory” fees.<sup>238</sup> Aventiv operated at a loss during this period.<sup>239</sup> If the business is unable to generate sufficient cash flows, then Aventiv would have to dip deeper into cash reserves, sell assets, or take on more debt to avoid defaulting on its obligations. Given the importance of exiting the investment to its controlling private equity firm, Aventiv would seek to avoid these signs of financial distress. All this in an increasingly unstable macroeconomic environment where debt-laden companies are likely to face (re)financing difficulties.<sup>240</sup> At a minimum, this picture casts doubt that Aventiv will lean into generosity at a “transformative” scale.

Aventiv’s support of taxpayer funding also deserves critical attention, given the company’s entrenchment in states and localities across the country. It’s unclear if this shift even hurts Aventiv’s bottom line. State and local governments are now guaranteeing some of Aventiv’s profits, as they further cede limited fiscal space to institutions that support mass incarceration.<sup>241</sup> Importantly, Aventiv doesn’t just provide telecom services. From the perspective of law enforcement, Aventiv also provides essential data and surveillance infrastructure,<sup>242</sup> occupying

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235. See Elham Saeidinezhad, *Promises All the Way Down: A Primer on the Money View*, LPE PROJECT (Feb. 28, 2020), <https://lpeproject.org/blog/promises-all-the-way-down-a-primer-on-the-money-view/> [<https://perma.cc/F7MQ-PQJB>].

236. AVENTIV TECHS., CONSOLIDATED FINANCIAL STATEMENTS: DECEMBER 31, 2021 AND 2020, at 4, 18 (available at <https://www.fcc.gov/ecfs/document/107012946100914/3> [<https://perma.cc/9LLY-CZ2B>]).

237. *Id.* at 4. Goodwill is “the premium a company pays when it buys another for more than the value of its net assets,” a contentious accounting concept, particularly for companies that make numerous acquisitions whose value may be overstated and thus reflect a stronger financial position than warranted. Jean Eaglesham, *Goodwill Sparks Deep Division, at Least on Balance Sheets*, WALL ST. J. (Jan. 21, 2020, 8:38 AM), <https://www.wsj.com/articles/goodwill-sparks-deep-division-at-least-on-balance-sheets-11579613906>.

238. AVENTIV TECHS., *supra* note 236, at 24.

239. *Id.* at 5.

240. See Matt Grossman, *Debt-Market Jitters Come for Leveraged Loans*, WALL ST. J. (July 16, 2022, 10:00 AM), <https://www.wsj.com/articles/debt-market-jitters-come-for-leveraged-loans-11657977966>.

241. In Connecticut, for example, phone calls moved from a source of \$7.7 million in yearly revenue for the state to a yearly cost of \$11.4 million. Johnston, *supra* note 232.

242. Securus Threads, for instance, claims to be “the largest centralized data repository available” empowering “unmatched investigative intelligence.” *Threads*, SECURUS TECHS., <https://securus-technologies.tech/investigative/threads/> [<https://perma.cc/W3DY-ZTXU>] (last visited Sept. 3, 2023). Threads is used in combination with NextGen Secure Communications Platform, a

a dominant position in the market for such services. Thoroughly integrated into the day-to-day work of mass incarceration,<sup>243</sup> Aventiv’s technology has staying power beyond the monetary interest law enforcement agencies have in revenue-sharing arrangements. These agencies have an interest in “de-risking”<sup>244</sup> this privately provided data and surveillance infrastructure, not in threatening its continued availability. Law enforcement ultimately depends on a small group of companies with outsized market power. Private equity firms, of course, accelerated those very companies’ consolidation.

What’s more, in a system of informational<sup>245</sup> or surveillance<sup>246</sup> capitalism, new avenues for profit may emerge. Together, the Securus platforms; JPay’s money transmitter, video, email, and e-tablet services; and AllPaid’s government payment processing services (servicing “more than 3,000 agencies across the U.S.”<sup>247</sup>) generate enormous amounts of data. Low-cost, taxpayer-funded, or even free services fit well with data-driven business models.<sup>248</sup> Accumulation of data itself becomes the point, because “[t]he larger and more diverse a data bank, the more information and uses can be derived from it.”<sup>249</sup>

After Connecticut made prison calls free, the number of monthly calls grew from 494,000 to 1,081,000 in just two months, and call durations went up 120%.<sup>250</sup> Those calls are recorded, stored, and analyzed within a broader ecosystem of data. There is a business imperative to expand the uses of such data or develop new combinations across datasets. For example, in 2021, Securus acquired a patent for a method “to capture the phone numbers of everyone a prisoner talks to, including friends and family, and to use that information to scrutinize their

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digital platform that “empowers law enforcement and corrections to solve and prevent crime” by “[c]onsolidat[ing] all incarcerated individual communication services such as calls, video communication and messaging.” *NextGen Secure Communications Platform*, SECURUS TECHS., <https://securus-technologies.tech/corrections/communication/nextgen/> [<https://perma.cc/6UUX-38LZ>] (last visited Sept. 3, 2023).

243. See generally Vincent M. Southerland, *The Master’s Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, 70 UCLA L. REV. 2 (2023) (discussing reliance on surveillance technology in the era of mass incarceration).

244. See Gabor, *The Wall Street Consensus*, *supra* note 127, at 431 (explaining that de-risking involves “reorient[ing] the fiscal and monetary arm of the state . . . to ensure steady cash flows for investors”).

245. See generally COHEN, *supra* note 224.

246. See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019); Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460 (2020) (arguing that Cohen’s framework for understanding “informational capitalism” provides a better account than Zuboff’s “surveillance capitalism,” and supplementing their accounts with an explanation of how recent legal developments further support the concentration of private power).

247. *Who We Are*, ALLPAID, <https://allpaid.com/#/about-us> [<https://perma.cc/6JT3-TDZJ>] (last visited Sept. 3, 2023).

248. See Jathan Sadowski, *When Data is Capital: Datafication, Accumulation, and Extraction*, BIG DATA & SOC’Y, Jan.–June 2019, at 1, 7 (discussing services used as “a means of producing data”).

249. *Id.* at 8.

250. Johnston, *supra* note 232.

e-commerce purchases.”<sup>251</sup> The lack, or incoherency,<sup>252</sup> of privacy rights in prison accommodates the intrusive data collection practices that go into developing these novel capacities. It’s an environment where prisoners, and by extension those they communicate with, enjoy no meaningful privacy protections, except when officials perversely invoke such rights to limit public scrutiny of facility conditions.<sup>253</sup>

I make these observations to emphasize the constraints on possible altruistic action. We don’t need to rely on accusations of greed.<sup>254</sup> Ordinary profit motives represent real constraints on the scope of possible transformation of these institutions. Cash inflows need to support cash outflows. The private equity model, by layering debt and fees onto a company, intensifies those constraints on action. Private equity firms often claim to enhance “operational efficiencies” of companies.<sup>255</sup> In fact, their business model makes improved operational efficiency a more urgent imperative for a company’s continued survival.

We should have these constraints in mind when assessing the efficacy of targeted reforms and the changing justifications firms offer as their operations are opened up to moral conflict. This involves processual thinking, the recognition that one form of exploitation or expropriation may morph into another. As attention to prison phone prices has mounted, Aventiv’s efforts may move further into the “black box”<sup>256</sup> of data mining, software development, and surveillance on behalf of law enforcement. Even shifts to seemingly benign practices, like data-driven approaches to facilitating employment opportunities upon reentry, may produce harmful outcomes for already-marginalized groups.<sup>257</sup> The introduction

251. Cooper Quintin & Beryl Lipton, *The Catalog of Carceral Surveillance: Monitoring Online Purchases of Inmates’ Family and Friends*, ELEC. FRONTIER FOUND. (Sept. 7, 2021), <https://www.eff.org/deeplinks/2021/09/prison-surveillance-catalog-monitoring-online-purchases-inmates-family-and-friends> [<https://perma.cc/VA73-37WT>]. Securus said it would abandon developing such a product after this article was published. *Id.*

252. See Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 553–57 (2021).

253. See *id.* Even if individual-focused data governance regimes applied in prisons, they might still fail to adequately protect against sensitive social and relational privacy concerns at a community level. See Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 583 (2021) (“Data’s capacity to transmit social and relational meaning renders data production especially capable of benefitting and harming others beyond the data subject from whom the data is collected. It also results in population-level interests in data production that are not reducible to the individual interests that generally feature in data governance.”).

254. See Raher, *supra* note 7, at 24.

255. See HOOKE, *supra* note 23, at 92–93.

256. FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 46–48 (2015) (discussing data mining and law enforcement).

257. Mainstream reentry programs often “exacerbate the very problems they attempt to solve” by failing to consider structural issues involved in reentry and by setting low standards for quality-of-life expectations. Bell, *supra* note 226, at 36–41; see also Marion Fourcade & Kieran Healy, *Classification Situations: Life-Chances in the Neoliberal Era*, 42 HIST. SOC. RSCH., 2017, at 23, 26, 34 (discussing situations where people are differentially priced or scored in ways that facilitate market inclusion but have “powerful stratifying effects,” affecting their life chances).

of new, or focus on different, products may also increase, presenting distinct challenges.<sup>258</sup>

As this drama plays out, even ostensibly “progressive” cities may operate as if they have little choice in the matter—they must continue to contract with private equity-controlled carceral service providers and continue to invest in private equity funds. The recent experience in New York offers a cautionary tale. Not long after New York City (NYC) made jail calls free, NYC’s pension fund was criticized for its investment in the Platinum Equity fund controlling Securus.<sup>259</sup> Later, it was revealed that Securus illegally recorded thousands of attorney–client calls as the pandemic and a (still-ongoing) humanitarian crisis struck Rikers Island.<sup>260</sup> Acknowledged as a “clerical error,”<sup>261</sup> Securus’s illegal recording fell within a pattern of similar incidents involving the company in several other states.<sup>262</sup> In 2022, the former Chief Investment Officer of NYC’s pension fund joined Platinum Equity as a managing director, which prompted further criticism about revolving doors and conflicts of interest and led the comptroller’s office to initiate an internal review of whether its ethics rules were followed.<sup>263</sup> Notwithstanding this local scrutiny (in addition to the national-level scrutiny), Securus recently won a contract to provide e-tablets in NYC jails with a mix of free and “premium” services.<sup>264</sup> There is now even a plan to digitize incoming mail (to address a fentanyl problem more readily attributable to correctional staff themselves), making it viewable only on such tablets.<sup>265</sup> This plan would further expand the data and revenue Securus collects.

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258. See Madison Pauly, *A Notorious Prison Tech Giant Is Poised to Cash In on Pell Grants for Incarcerated People*, MOTHER JONES (Feb. 8, 2022), <https://www.motherjones.com/crime-justice/2022/02/aventiv-securus-lantern-college-pell-grants-prisoners/> [https://perma.cc/8G5M-XHYW].

259. Josh Kosman, *Pensions Commit to \$8B Fund of Prison-Phone Magnate*, N.Y. POST (June 19, 2019, 9:55 PM), <https://nypost.com/2019/06/19/pensions-commit-8b-to-fund-of-prison-phone-magnate/> [https://perma.cc/BUX7-ZCV7].

260. See Stephen Rex Brown & Chelsia Rose Marcius, *Investigators at Two NYC Agencies Had Access to Over 1,500 Mistakenly Recorded Calls Between Jail Inmates and Legal Counsel*, N.Y. DAILY NEWS (Mar. 31, 2021, 6:08 PM), <https://www.nydailynews.com/new-york/ny-correction-department-jails-rikers-island-phone-calls-securus-20210331-vb3lc7nwebfenn4lzmdbpirm44-story.html>.

261. *Id.*

262. See *Only Ending Prison Call Surveillance Can Protect Our Constitutional Rights*, WORTH RISES (Dec. 6, 2021), <https://worthrises.org/blogpost/only-ending-prison-call-surveillance-can-protect-our-constitutional-rights> [https://perma.cc/DF8B-UUK8].

263. Robert Steyer, *NYC Systems Launch Review After Former CIO Joins Platinum Equity*, PENSIONS & INVS. (May 11, 2022, 4:05 PM), <https://www.pionline.com/pension-funds/nyc-systems-launch-review-after-former-cio-joins-platinum-equity> [https://perma.cc/YD92-Y3C3]. The Chief Investment Officer is a NYC employee in the comptroller’s office with responsibilities involving pension investments. See *id.*

264. Matt Katz, *NYC Jails Detainees Get Their Tablets Back, but Costs are Undisclosed*, GOTHAMIST (Dec. 14, 2022), <https://gothamist.com/news/nyc-jail-detainees-get-their-tablets-back-but-costs-to-use-premium-services-an-open-question> [https://perma.cc/VN8K-EV32].

265. Akela Lacy, *NYC Jails Want to Ban Physical Mail, Then Privatize Scanning of Digital Versions*, INTERCEPT (Jan. 23, 2023, 4:00 PM), <https://theintercept.com/2023/01/23/nyc-jail-rikers-mail-surveillance-securus/> [https://perma.cc/XH4P-7G7P].

Meanwhile, NYC pension fund's performance has declined significantly, putting pressure on NYC's budget.<sup>266</sup> The current NYC administration consequently has planned nearly \$3 billion in budget cuts spread over two years, including to various social services, but even that won't be enough to offset the expected poor pension fund performance.<sup>267</sup> All this while earlier in 2022, the state legislature and NYC comptroller (a progressive and a vocal critic of Securus) endorsed a bill that would allow pension funds to increase their alternative investment allocations by up to 10%, meaning more investments in private equity funds.<sup>268</sup> This, according to the comptroller, would better "reflect the realities of the modern investment world and . . . [help] maximize our risk-adjusted returns."<sup>269</sup> So, even as NYC moves in the direction of fiscal discipline, cutting social service spending, more money may end up in the hands of private equity firms.<sup>270</sup> Tallying up the score, Securus has increased its footprint in NYC jails in the midst of crisis, as the NYC comptroller advocates for increased pension investments in private equity funds.

This fuller picture strengthens the idea that market logics unduly constrain, or more polemically, "imprison," "our attempts to improve the social world."<sup>271</sup> It explains, for example, why even some critiques that understand racial subordination as an enduring, systemic phenomenon suggest tax incentives to induce private investment into capital-starved areas as the most practicable option.<sup>272</sup> Radical problems are met with modest, inadequate reforms in a context that pairs an "exceptionally liberal market economy" with seemingly weak, non-carceral state capacity.<sup>273</sup> "We uncritically accept what the market provides."<sup>274</sup>

### III. LEGAL AND POLITICAL FOUNDATIONS OF THE CARCERAL SERVICES MARKET

Prisoners, whose wages average fifty-two cents per hour (if they are paid at all), must spend \$3 for toothpaste, which "can take days of work to afford."<sup>275</sup>

266. See Greg David, *Pension Plunge Puts Eric Adams in Future Financial Squeeze*, CITY (Aug. 1, 2022, 5:28 PM), <https://www.thecity.nyc/2022/8/1/23287828/pension-plunge-eric-adams> [https://perma.cc/XH4P-7G7P].

267. Dana Rubinstein, *In New Forecast, New York City Projects \$2.9 Billion Deficit*, N.Y. TIMES (Nov. 16, 2022), <https://www.nytimes.com/2022/11/16/nyregion/budget-deficit-nyc.html>.

268. Robert Steyer, *New York Bill to Hike Alternatives Allocations Clears Legislature*, PENSION & INVS. (June 1, 2022, 1:01 PM), <https://www.pionline.com/pension-funds/new-york-bill-hike-alternatives-allocations-clears-legislature> [https://perma.cc/R93T-CE7Y].

269. *Id.*

270. See Serap Saritas Oran, *Pensions and Social Reproduction*, in SOCIAL REPRODUCTION THEORY: REMAPPING CLASS, RECENTERING OPPRESSION 148, 164 (Tithi Bhattacharya ed., 2017) (explaining that increased financialization of pensions means "the return from pension contributions becomes dependent on the financial markets' profitability").

271. Charles E. Lindblom, *The Market as Prison*, 44 J. POL. 324, 329 (1982).

272. See Barbara Reskin, *The Race Discrimination System*, 38 ANN. REV. SOCIO. 17, 30 (2012).

273. Garland, *supra* note 3, at 331, 336–38.

274. Lindblom, *supra* note 271, at 334.

275. Beth Schwartzapfel, *Prison Money Diaries: What People Really Make (and Spend) Behind Bars*, MARSHALL PROJECT (Aug. 4, 2022, 9:00 AM), <https://www.themarshallproject.org/2022/08/04/prison-money-diaries-what-people-really-make-and-spend-behind-bars> [https://perma.cc/7U6M-AM4H].

After prisoners and their families grow accustomed to communicating through a company's digital platform, the promotional rate might suddenly jump 80%.<sup>276</sup> If family or friends send money to a prisoner's account, a company takes a cut of the transfer—a bigger cut the less money sent, and even more if sent over the phone than online.<sup>277</sup> Companies often provide inadequate medical care, yet prisoners are still hit with copays and fees.<sup>278</sup> In most states, prison phone calls continue to stress family budgets.<sup>279</sup> Low-quality meals drive prisoners to make more expensive purchases at the commissary store.<sup>280</sup> On top of all this, inflationary shocks hit prison markets too.<sup>281</sup> These examples of economic pressure are illustrative, not exceptional. What sort of law and politics gives rise to such a consumer marketplace?

Some of the legal and political foundations of this market are obvious. A sprawling set of legal institutions produce and administer mass incarceration. Without that extraordinary scale, there is no market for carceral services. Then, as scholars who have long studied prisons would point out, the politics of incarceration is quite comfortable with privatization. For example, governments turned to private actors early on in mass incarceration's ascent, mainly to operate prisons and finance new prison construction.<sup>282</sup> Harsh laws and their administration produced scale, the scale stressed government budgets, and so governments enlisted private help. Those private actors operate on profits.

More can be said about the carceral services market. A distinct consideration is its constitutional foundation. The coercive market dynamics described above depend on individuals having weak baseline entitlements. Prisoners are uniquely situated in that they have a constitutional right to have their basic needs met, owing to the Eighth Amendment's prohibition against cruel and unusual

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276. See Patrick Irving, *Prisoners Like Me Are Being Held Hostage to Price Hikes*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/opinion/inflation-prison.html>.

277. See *id.*; *Available JPAY Services*, JPAY, <https://www.jpays.com/Facility-Details/New-York-City-Department-of-Correction/Otis-Bantam-Correctional-Center.aspx> [<https://perma.cc/Q2S6-7YQB>] (last visited Sept. 3, 2023) (showing rates for Rikers Island).

278. See FENNE, *supra* note 196, at 10 (discussing a Texas facility, where a private company provides medical care, that “charges a \$10 health service fee for a nurse sick call; \$15 for referrals to a physician or dentist; and each prescription includes a \$3 charge. Facility patients are still charged \$10 if they choose not to be seen after submitting a sick call.”).

279. See Irving, *supra* note 276; Cid Standifer, *The High Cost of a Conversation from Cuyahoga County Jail*, MARSHALL PROJECT (Feb. 1, 2023, 6:00 AM), <https://www.themarshallproject.org/2023/02/01/cuyahoga-county-jail-phone-call-cost> [<https://perma.cc/5EKV-SZPB>].

280. One prisoner explains that “[t]he food at the chow hall is terrible and of poor quality — it’s not fit for a dog, seriously.” Schwartzapfel, *supra* note 275; see also Michael Capers, *How the Prison Food System Denies People Healthy Choices*, APPEAL (Jul. 5, 2022), <https://theappeal.org/prison-food-system-health/> [<https://perma.cc/Z7ML-6PT5>].

281. Irving, *supra* note 276 (explaining that because of inflation “prices of certain essentials have swelled beyond some prisoners’ ability to pay”).

282. See Dolovich, *supra* note 164, at 457–62. However, the public often has an exaggerated understanding of the scale of private prisons. As of 2020, private prisons held about 8% of the incarcerated population. KRISTEN M. BUDD & NIKI MONAZZAM, SENT’G PROJECT, PRIVATE PRISONS IN THE UNITED STATES (2023), <https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/> [<https://perma.cc/5KQD-VPPV>].



punishment. However, under prevailing judicial interpretation,<sup>283</sup> not only are the Eighth Amendment's protections minimal, but they do not even require the state to provide outright; they only require the state to extend credit. The pervasiveness of so-called "pay-to-stay" fees in particular supports this interpretation. In this sense, all the Constitution requires is that the state meet the basic needs of prisoners (interpreted to be minimal) in the context of a creditor–debtor relationship. This aligns with wider trends in social welfare policy, where low-income households must increasingly turn to credit to meet their basic needs, but at the cost of their own deepening economic insecurity.

Austerity and notions of family responsibility meanwhile provide the necessary political and ideological foundations for the carceral services market. Together, they tend to legitimize private, for-profit provisioning of essential goods and services. The state is presumed incapable of "efficiently" meeting basic needs, and the family is seen as the appropriate social unit to absorb the consequences of financial insecurity.

#### A. CRUEL AND UNUSUAL CREDIT

The Eighth Amendment prohibits cruel and unusual punishment.<sup>284</sup> Deprivation of basic needs like medical care may violate this prohibition.<sup>285</sup> If deprivation of basic needs is a violation, the flipside is a state obligation to meet basic needs. This fundamental principle gives us some reason to think the prison might *not* look like the rest of the economy. Paradoxically, prison is one of the few spaces in our society where the Constitution seems to guarantee some affirmative social and economic rights.<sup>286</sup> If expansively interpreted, it places demands on the state to provide care and services. If narrowly interpreted, it accommodates state neglect. The Eighth Amendment thus gives us a preliminary boundary line between state and market provisioning. Where the government's obligation under the Eighth Amendment ends, the potential for marketization begins.

Coercive market dynamics in turn depend on weak constitutional protections. In this sense, the Eighth Amendment encompasses a key part of a prisoner's "baseline entitlements"<sup>287</sup>—a useful concept for thinking about how people go about meeting their needs, and when they are vulnerable to coercion, in any context.<sup>288</sup> Professor Nikolas Bowie concisely outlines those baseline entitlements in "free" society, explaining that "[t]he United States has no programs that provide people with enough

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283. My aims here are descriptive and offer an account of the current state of the doctrine, however misguided. For a normative critique, see generally Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009).

284. U.S. CONST. amend. VIII.

285. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

286. See Driver & Kaufman, *supra* note 252, at 569 ("This is one of the basic puzzles of prisoners' rights: imprisonment is a deprivation of rights that creates claims to new, positive rights.")

287. See FRIED, *supra* note 26, at 211.

288. For example, Amartya Sen's study of famines explains how legal entitlements, not scarcity, caused certain episodes of widespread hunger and starvation. See generally AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1981).

food, housing, healthcare, debt relief, and childcare such that everyone could live comfortably without seeking a wage,” nor does it “guarantee employment with any democratically accountable employers, such as the government itself,” which means that “unless you’ve already made or inherited enough money that you don’t need to work, there is simply no way to maintain access to the necessities of life except by finding a job.”<sup>289</sup> In other words, this lack of baseline entitlements compels many people to sell their labor.

Unsurprisingly, it turns out that courts have deemed a prisoner’s constitutional entitlements to be minimal. Despite meaningful victories for prisoners in the 1960s and 1970s (and less frequent, scattered victories since<sup>290</sup>), the Eighth Amendment guarantees little today, accommodating dehumanizing conditions in prisons across the country. As Professor Sharon Dolovich explains, the Supreme Court retreated from meaningful constitutional protections at a rapid pace in the 1980s<sup>291</sup> and 1990s, when it “repeatedly had before it defensible doctrinal approaches that would have strengthened prisoners’ constitutional rights and instead opted for less protective rules.”<sup>292</sup> Today, “the weight of the case law . . . exerts a gravitational pull against rigorous protection of people in custody.”<sup>293</sup> These minimal state obligations open the door to provisioning from private actors, who will only offer their services for sufficient monetary gain.

But the Eighth Amendment’s protections are even weaker than this already-bleak picture suggests. It’s not just that the government’s constitutional obligations to meet the needs of prisoners are minimal. As courts interpret it, the Constitution only demands that the government meet those needs in the form of credit. In other words, what the Eighth Amendment minimally requires is not that the government provide prisoners with food, medical care, and other basic needs outright. The government need only provide such goods and services *as credit*.

All but two states have some form of “pay-to-stay” laws.<sup>294</sup> Under such laws, prisoners are “financially responsible for some or all of the basic cost of their own

289. Bowie, *supra* note 135, at 179–80.

290. See, e.g., *Brown v. Plata*, 563 U.S. 493, 502 (2011).

291. Separately, Professor Judith Resnik marks *Rhodes v. Chapman*, 452 U.S. 337 (1981), a case concerning double-celling decided in 1981, as an important turning point in Eighth Amendment jurisprudence. Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665, 698 (2020). She writes that

[i]f the Court had insisted on adequate space for individuals confined for short or for long terms, states would have had to prosecute less, adjust sentencing laws to reduce populations, let out some people, or spend more to house the populations that their criminal justice policies had caused to increase.

*Id.* The decision “placed the costs on the individuals,” rather than the state. *Id.* at 699. Supportive amici filings from 31 states and the federal government in the case showed much of the country was interested in avoiding such costs. *Id.* at 697.

292. Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANN. REV. CRIMINOLOGY 153, 165 (2022).

293. *Id.* at 167.

294. Pat Eaton-Robb, *At \$249 Per Day, Prison Stays Leave Ex-Inmates Deep in Debt*, AP NEWS (Aug. 27, 2022, 11:00 AM), <https://apnews.com/article/crime-prisons-lawsuits-connecticut-074a8f643766e155df58d2c8fbc7214c> [https://perma.cc/MZ53-26RB].

incarceration.”<sup>295</sup> Many consider *Tillman v. Lebanon County Correctional Facility*<sup>296</sup> among the most important and instructive pay-to-stay cases.<sup>297</sup> In *Tillman*, the Third Circuit acknowledged that “when the government takes a person into custody against his or her will, it assumes responsibility for satisfying basic human needs such as food, clothing, shelter, medical care, and reasonable safety.”<sup>298</sup> Yet the court also concluded that it was fine to impose a debt obligation on a prisoner who received those services and that such an obligation did not run afoul of the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>299</sup>

Leonard Tillman, the prisoner who brought suit, had accumulated more than \$4,000 in debt from daily pay-to-stay fees.<sup>300</sup> Mechanically, the fees accumulated like bank overdrafts (so, functionally, extensions of credit). For each day he lacked funds, Tillman’s account would accrue a “negative balance,” and upon his departure the unpaid debt would be turned over to a collection agency.<sup>301</sup> The court deemed this constitutionally acceptable, as Tillman could not “show that basic human needs were left unsatisfied” since “[h]e was never denied room, food, or other necessities, regardless of his failure to pay the fees.”<sup>302</sup>

Some have thus described pay-to-stay fees as a “way of . . . not running afoul of the Eighth Amendment prohibition on denying basic shelter and sustenance to those in state custody,”<sup>303</sup> a strategy to make the funding work. But such fees represent something more significant: Their ubiquity and constitutionality tell us that what (courts think) the Eighth Amendment *minimally* requires is the provision of basic needs *as credit*. This is different from saying this is one “way” of meeting the right, or more generally that “rights have costs.”<sup>304</sup> Here, the provisioning of basic needs, together with its attendant monetary social relations (the creditor–debtor relationship between state and prisoner), *is* the right. That’s what the Constitution guarantees.<sup>305</sup> It’s left to other forms of political struggle to achieve more generous provisioning.

295. Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 59 (2013).

296. 221 F.3d 410 (3d Cir. 2000).

297. See, e.g., Plunkett, *supra* note 295, at 66 n.57; Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 334 (2014).

298. 221 F.3d at 418 (citing *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989)).

299. See *id.* at 419.

300. *Id.* at 413.

301. *Id.* at 414.

302. *Id.* at 419.

303. Plunkett, *supra* note 295, at 64.

304. See Driver & Kaufman, *supra* note 252, at 570. See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999).

305. Using a functional approach to examine Eighth Amendment cases, Professor Daryl Levinson argues that “[t]he only way to see the constitutional right . . . is to look at remedies.” Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 880 (1999). What’s not a remedy also helps us understand the content of a “right.” Not being able to rid oneself of debt in this

This arrangement ultimately compels prisoners to labor to support the carceral system, either while incarcerated<sup>306</sup> or after release. In this sense, the Eighth Amendment represents an added constitutional layer that accommodates forced carceral labor, on top of the Thirteenth Amendment's "anti-abolitionist"<sup>307</sup> codification of slavery to prison. Even as states amend their constitutions to prohibit slavery and involuntary servitude, as four did in 2022,<sup>308</sup> this less obvious form of compulsion remains available, with all its attendant consequences on the life chances of the formerly incarcerated.<sup>309</sup> As Professor Noah Zatz puts it, "[T]he moral weight of indebtedness and conviction, as well as the state's financial incentives for collection, could create a powerful push toward 'any job is better than no job.'"<sup>310</sup> This facilitates finer stratification at the low end of the labor market,<sup>311</sup> pushing justice-involved people into precarious, degrading, or exploitative work.<sup>312</sup>

This Eighth Amendment guarantee, in the form of credit, aligns with wider trends in social welfare provisioning. When the upsurge of pay-to-stay fees began in the 1980s,<sup>313</sup> a larger proliferation of credit was already underway. Credit would become more and more compulsory for low-income households, as economic crises and stagnating wages spurred credit deregulation in the 1970s,<sup>314</sup> and bipartisan welfare retrenchment in the 1980s and 1990s meant low-income households increasingly turned to credit to fill growing gaps between wages and living expenses.<sup>315</sup> Professor Abbye Atkinson thus explains that, over time, credit

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context, and upholding the constitutionality of pay-to-stay fees, necessarily means the basic right is to extensions of credit.

306. In this case, prisoners performing work "essential to the day-to-day operation of the prison" were not subject to the cost recovery program. *Tillman*, 221 F.3d at 414.

307. Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 107 (2019).

308. Aaron Morrison, *Slavery, Involuntary Servitude Rejected by 4 States' Voters*, AP NEWS (Nov. 9, 2022, 6:17 PM), <https://apnews.com/article/2022-midterm-elections-slavery-on-ballot-561268e344f17d8562939cde301d2cbf> [<https://perma.cc/V7PT-9WGE>] (detailing ballot measures approved in Alabama, Oregon, Tennessee, and Vermont).

309. See 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, 78–80 (2021) (explaining that such consequences amount to "civil death").

310. Zatz, *supra* note 28, at 158.

311. See Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 LAW & SOC. INQUIRY 304, 327 (2020) (explaining how by "employing alternative currencies of debt relief," as well as through other mechanisms, legislatures may "place [justice-involved people] outside conventional employment law" and "create a legally second-class tier of work").

312. See, e.g., Gretchen Purser, *The Circle of Dispossession: Evicting the Urban Poor in Baltimore*, 42 CRITICAL SOCIO. 393, 397–98 (2016) (discussing a day labor company's strategic location near "a homeless shelter, a soup kitchen, two methadone clinics and a prisoner re-entry program, all of which provide the company with its underemployed, easily exploitable and entirely African-American labor pool" to carry out evictions of other people struggling through similar forms of insecurity).

313. See Plunkett, *supra* note 295, at 67.

314. Economic crisis in the 1970s spurred credit's deregulation, with both the Supreme Court and Congress playing active roles. Atkinson, *supra* note 21, at 1138–40.

315. *Id.* at 1140–44.

occupied an increasingly important role as “social provision,”<sup>316</sup> even as credit looked less and less up to the task of improving the welfare of marginalized and low-income communities.<sup>317</sup> This only makes sense since “credit often amplifies the underlying circumstances into which it is introduced.”<sup>318</sup>

At a societal level, for some time now, credit has been the primary option on offer in the way of social support. The government’s ability to compel prisoners into creditor–debtor relationships, without running afoul of the Eighth Amendment, looks much more ordinary in this light. The political–economic structure of society compels many more individuals into deeply unequal creditor–debtor relationships.<sup>319</sup> In other words, credit as a means of survival is already pervasive among the same low-income households that face greater risk of exposure to police and prisons.<sup>320</sup> Meanwhile, “evolving standards of decency” set the dividing line between constitutionally authorized punishment and cruelty.<sup>321</sup> As society has moved in a direction where consumer financial products increasingly substitute for state social provision, the constitutional concept of cruelty has moved with it. Both prisoners and consumers enter their respective marketplaces where they seek to meet their basic needs with functionally the same baseline right: A right to credit that tends to reproduce one’s social position in a steep, rigid hierarchy.

#### B. AUSTERITY AND FAMILY RESPONSIBILITY

Eighth Amendment jurisprudence took its current shape in the 1980s and 1990s, in the context of two entangled projects. The first was a racialized project of mass incarceration. The second was a general discrediting of the state’s capacity and responsibility to guarantee basic social support and economic security.<sup>322</sup> The latter

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316. The concept of “social provision” refers to “the range of state policies implemented to improve general welfare.” *Id.* at 1096 n.2.

317. *Id.* at 1134 (“Credit became a placebo for addressing deeply embedded inequities in civil rights; the ‘distributional conflicts’ attendant to wage stagnation and the broader economic decline of the 1970s; the need for supplements to public assistance in the wake of bipartisan dismantling of social provision for the most needy in the 1980s and 1990s, and the ever-widening racial wealth gap in the 2000s.” (footnote omitted)).

318. *Id.* at 1148.

319. See RAHMAN, *supra* note 22, at 164 (explaining that “the financial market as a system represents a form of structural domination”); Fourcade & Healy, *supra* note 257, at 26 (discussing the increasing sophistication of credit scoring, which generates “positions in the credit market that are consequential for one’s life-chances, and that are associated with distinctive experiences of debt”). An ostensibly neutral logic of “risk,” which requires credit to be priced according to an individual’s expected ability to repay, tries to cleanse this image of compulsion and its downstream effects. But as Professor Jackie Wang writes, this “probabilistic ranking of subjects according to risk” is “merely an index of already-existing inequality.” JACKIE WANG, *CARCERAL CAPITALISM* 125 (2018).

320. For an illuminating analysis of the continuities between auto-lending and the carceral system, see generally Julie Livingston & Andrew Ross, *Cars, Debt, and Carcerality*, 121 S. ATL. Q. 846 (2022).

321. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

322. See Julilly Kohler-Hausmann, *Guns and Butter: The Welfare State, the Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87, 89 (2015). The concept of “neoliberal penalty,” the idea that “the government does not belong in the economic sphere, which has

project's combined politics of austerity and family responsibility is key to explaining the emergence and form of the carceral services market.

New York City's teetering on the edge of bankruptcy in the 1970s provided an early dramatic stage to test the political and philosophical turn to austerity. Famously, when NYC officials sought federal aid, directly lobbying President Gerald Ford, they were turned away.<sup>323</sup> Treasury Secretary William Simon, before his experimentation with LBOs, argued to Ford that extending aid would be a mistake because it would legitimize NYC's approach to social services provision.<sup>324</sup> Under this view, the discipline of debt could save the country from an unsustainable welfare state. Indeed, that crisis was "widely understood and described as a turning point—evidence that the old way of organizing social life could not endure," "lead[ing] to the elevation of fiscal responsibility over ideas about social obligation as the final arbiter for thinking about social policy."<sup>325</sup>

In 1975, as NYC was forced into rapid governmental redesign, moving away from redistributive policies and spending on social services, riots broke out on Rikers Island in the face of overcrowding, understaffing, excessive bail practices, and the inadequate provision of medical care<sup>326</sup>—an almost identical string of complaints to those we see in coverage of today's Rikers crisis.<sup>327</sup>

To legitimize and absorb this turn to austerity politics, certain accommodations were needed, Eighth Amendment jurisprudence among them. We can see this in Justice Brennan's strained concurrence in *Rhodes v. Chapman*,<sup>328</sup> a 1981 double-celling case that Professor Judith Resnik points out as pivotal in diminishing Eighth Amendment protections.<sup>329</sup> On the one hand, Justice Brennan wrote that

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its own orderliness, but it has a legitimate role to play outside that sphere, especially in law enforcement," also captures these coupled projects. BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 41 (2011).

323. Kim Phillips-Fein, *The New York City Fiscal Crisis and the Idea of the State*, in *AMERICAN CAPITALISM: NEW HISTORIES* 96, 97 (Sven Beckert & Christine Desan eds., 2018).

324. *See id.* at 105.

325. *Id.* at 97–98; cf. Daniel Kay Hertz, *Municipal Bonds, Race, and the American City*, *PHENOMENAL WORLD* (May 22, 2020), <https://www.phenomenalworld.org/interviews/destin-jenkins/> [<https://perma.cc/5XEU-9LX5>] ("When George Moscone took office as Mayor of San Francisco in 1976, he vowed that his city would not become another New York.").

326. *See* Peter Kihss, *Rikers Island Revolt Ends with Release of Hostages*, *N.Y. TIMES* (Nov. 25, 1975), <https://www.nytimes.com/1975/11/25/archives/rikers-island-revolt-ends-with-release-of-hostages-rikers-island.html>; KIM PHILLIPS-FEIN, *FEAR CITY: NEW YORK'S FISCAL CRISIS AND THE RISE OF AUSTERITY POLITICS* 211 (2017).

327. *See* George Joseph, *Amidst Chaos on Rikers, AOC and Maloney Call on DAs to Ease Up on Bail*, *GOTHAMIST* (Nov. 22, 2021), <https://gothamist.com/news/amidst-chaos-rikers-aoc-and-maloney-call-das-ease-bail> [<https://perma.cc/5WWQ-BCP5>] (noting concerns about excessive bail); Chris Gelardi, *'No B Officer': How an Understaffed Rikers Island Allowed Another Suicide*, *N.Y. FOCUS* (Dec. 22, 2022), <https://nysfocus.com/2022/12/22/rikers-island-suicide-officer-absence> [<https://perma.cc/LU9J-42UC>] (describing crowding and staffing issues); Jonah E. Bromwich, *Medical Care at Rikers Is Delayed for Thousands, Records Show*, *N.Y. TIMES* (Feb. 1, 2022), <https://www.nytimes.com/2022/02/01/nyregion/rikers-island-medical-care.html> (describing medical care issues).

328. 452 U.S. 337 (1981).

329. *See supra* note 291. The year of this case is significant. The case was heard after a decade-long shift towards austerity at a national level in the spheres of fiscal and monetary policy. *See* Andrew Elrod, *Austerity Policies in the United States Caused 'Stagflation' in the 1970s and Would Do So Again Today*,



“courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost,” as he acknowledged the “elusive” challenge of establishing “realistic yet humane standards.”<sup>330</sup> Resolve to protect constitutional rights paired with grim pragmatism. That combination of considerations led Brennan to conclude the district court erred in holding the Ohio detention facility’s conditions to be unconstitutional, even as he remarked that “I have not seen the [facility], nor have I directly heard evidence concerning [its] conditions” and that “I have not the slightest doubt that 63 square feet of cell space is not enough for two men. . . . [E]very major study of living space in prisons has so concluded.”<sup>331</sup>

Going beyond prison, a broader shift in policy was underway to accommodate and legitimize fiscal restraint in favor of market-based provisioning. That shift saw the family unit as responsible for absorbing the pressures of social insecurity and public disinvestment.<sup>332</sup> In 1996, building on President Reagan’s cuts to welfare spending and policy changes aimed at “incentiviz[ing] poor people to become economically self-sufficient” a decade earlier,<sup>333</sup> President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)<sup>334</sup> into law, achieving “the single most dramatic overhaul of the federal welfare system since the New Deal.”<sup>335</sup> PRWORA made “family responsibility the guiding principle of federal welfare law,” achieving a vision for welfare that can be traced to Reagan’s time as Governor of California in the 1970s.<sup>336</sup> The bill wasn’t an elimination of the welfare state, “but rather its reinvigoration as an instrument for imposing work and family obligations on the welfare poor,” whose effect was to “requisition a once redistributive welfare program and repurpose it as an immense federal apparatus for enforcing the ‘private’ responsibilities of family and work.”<sup>337</sup> Thus, families became primarily responsible for guaranteeing the economic security of their households through

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WASH. CTR. FOR EQUITABLE GROWTH (Jan. 11, 2022), <https://equitablegrowth.org/austerity-policies-in-the-united-states-caused-stagflation-in-the-1970s-and-would-do-so-again-today/> [https://perma.cc/8ZEL-FN62]. It was also in the middle of the “Volcker Shock,” the period from 1979 to 1982 when Federal Reserve Chair Paul Volcker contracted the money supply to dramatically raise interest rates, making borrowing more costly and leading to a sharp rise in unemployment. Tim Barker, *Other People’s Blood*, N+1, Spring 2019, <https://www.nplusonemag.com/issue-34/reviews/other-peoples-blood-2/> [https://perma.cc/3CRN-5AWS] (“The experiment—known as the Volcker shock—lasted until 1982, inducing what remains the worst unemployment since the Great Depression and finally ending the inflation that had troubled the world economy since the late 1960s.”). Ohio, where the correctional facility was located, felt intense budgetary pressures as these events unfolded, facing repeated shortfalls and having to resort to painful budget cuts. See Iver Peterson, *Ohio Budget Falls \$1 Billion Short*, N.Y. TIMES (Jan. 31, 1982), <https://www.nytimes.com/1982/01/31/us/ohio-budget-falls-1-billion-short.html>.

330. *Rhodes*, 452 U.S. at 359, 363 (Brennan, J., concurring).

331. *Id.* at 365–66.

332. See generally MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* (2017).

333. Atkinson, *supra* note 21, at 1141.

334. Pub. L. No. 104-193, 110 Stat. 2105.

335. COOPER, *supra* note 332, at 67.

336. *Id.* at 69.

337. *Id.* at 70–71.

their participation in labor markets, countering the supposed “demoralizing powers”<sup>338</sup> of the old redistributive welfare state. There were of course racist and gendered dimensions to this turn, identifying Black women in particular with the excesses of the welfare state<sup>339</sup> and pathologizing their individual conduct as the cause of social insecurity.<sup>340</sup>

This extraordinary transition in welfare policy overlapped with the continued weakening of prisoner rights. Also in 1996, Congress passed the Prison Litigation Reform Act of 1995 (PLRA),<sup>341</sup> drastically limiting the ability of prisoners to challenge conditions of confinement and other violations of their rights. This too was to absorb austerity. By limiting the abilities of prisoners to challenge conditions and of courts to provide meaningful remedies, the PLRA further facilitated a racialized project of mass incarceration on the cheap.<sup>342</sup>

The dynamics of capture we see in today’s carceral services market, with its distribution of financial pressure across communities, began to emerge at this time. The Eighth Amendment’s weak protections, combined with the PLRA’s limitations on prisoners’ ability to challenge harmful conditions through litigation,<sup>343</sup> left prisoners extraordinarily vulnerable. This opened the door to expanded market-based provisioning that sought to capture, at scale, steady payment streams of not just prisoners themselves and government agencies, but also households—the families and friends of prisoners. Understood in this light, these dynamics reflect convergence with the rest of society, where social insecurity and its financial consequences became a problem of family or personal responsibility.<sup>344</sup> Through their consumption of services, families have (with little choice)

338. *Id.* at 73.

339. See Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER, SOC. POL’Y & L. 247, 259 (2014) (explaining that the public backlash to the welfare state “blamed the behavior of poor, black women for the growing welfare rolls, rather than the structural changes in society and the economy” and discussing Reagan’s attacking welfare recipients as “welfare queens” in the 1980s).

340. See Rosemary Nonye Ndubuizu, *Reagan’s Austerity Bureaucrats: Examining the Racial and Gender Bias of Ronald Reagan’s Housing Vouchers*, 16 DU BOIS REV. 535, 548–49 (2019) (explaining how, in the 1980s, “public housing officials articulated anti-Black women bias through their avoidance of critiques against the structural discrimination and challenges low-income Black mothers experienced” and how the “political rhetoric” of Project Self-Sufficiency, a federal program that combined welfare reform with housing vouchers, “directed attention away from structural challenges like housing discrimination, rising income inequality, and real estate speculation because its principal focus was on monitoring and changing individuals’ personal choices and lifestyle practices”).

341. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in various sections of the U.S. Code); accord Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 167 tbl.6 (2015). The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, was also passed the same year, limiting prisoner access to habeas relief from federal courts.

342. By the end of the 1980s, thirty-seven states were subject to court orders related to crowding, with fourteen operating under court-ordered population caps. Dolovich, *supra* note 292, at 165. The PLRA was in part crafted to constrain such exercises of judicial power. See *id.* at 167.

343. Virtually every state followed up with their own version of the PLRA. *Id.* at 160.

344. See generally JACOB S. HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* (2d ed. 2019).

performed the dual tasks of supporting loved ones while sustaining the carceral state.

Indeed, the first significant carceral service companies to rapidly expand their footprints were telecommunications companies, whose business models necessarily relied on steady household payments originating outside the prison.<sup>345</sup> Community ties, and their expression through regular contact, became revenue streams. A now oft-cited study even found that many individuals, disproportionately women of color, have taken on debt to finance their communication with incarcerated loved ones.<sup>346</sup> Recall also that in 2004, the first of four private equity acquisitions of Securus involved the merger of two prison telecom companies—the “platform” companies that would serve as the base for later add-on acquisitions.

These logics persist in today’s expanded version of the carceral services market, with its new communication and money transfer technologies. In its recent, thorough accounting of the financial challenges individuals face at each stage of the criminal legal system, the Consumer Financial Protection Bureau explains that “[w]hile incarcerated people may work for pay, the earnings are too low to cover expenses related to medical care, food, or communicating with their loved ones,” which means they “must rely on their families and friends to provide funds to help meet these costs.”<sup>347</sup>

A recent study based on interviews with men released from New York prisons confirms that money transfers are critical to prisoners and, necessarily by extension, the larger carceral services market.<sup>348</sup> The “interviewees estimated that they needed at least \$175 per month to get by,” simply to “purchase just enough

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345. See Raher, *supra* note 7, at 16 (“[D]iscussion of prison retailing must begin with telecommunications, given [its] comparatively long history . . .”). These companies took advantage of deregulation in another 1996 bill, the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56; accord Raher, *supra* note 7, at 16. The stated goal of the Telecommunications Act was to ensure a “pro-competitive deregulatory national framework” around the national payphone industry and, with this overarching goal as the backdrop, the Federal Communications Commission would adopt a lax posture towards regulating the prison telecom industry, accommodating a sharp rise in prison phone charges. Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, 22 CRITICAL STUD. MEDIA COMM’N 263, 270 (2005). This is not to say this result was either necessary or inevitable. The Act also “adapted traditional concepts of public utility” to, in theory, ensure just and reasonable rates and to prohibit discrimination. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1648 (2018).

346. See DEVUONO-POWELL ET AL., *supra* note 8, at 30; see also *id.* at 9 (noting that financial and other “impacts hit women of color and their families more substantially than others, deepening inequities and societal divides that have pushed many into the criminal justice system in the first place. Almost one in every four women and two of five Black women are related to someone who is incarcerated.”).

347. CFPB, JUSTICE-INVOLVED INDIVIDUALS AND THE CONSUMER FINANCIAL MARKETPLACE 14 (2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_jic\\_report\\_2022-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf) [<https://perma.cc/TA3M-PYTK>].

348. Tommaso Bardelli, Zach Gillespie & Thuy Linh Tu, *Blood from a Stone: How New York Prisons Force People to Pay for Their Own Incarceration*, PRISON POL’Y INITIATIVE (Oct. 27, 2021), [https://www.prisonpolicy.org/blog/2021/10/27/ny\\_costs/](https://www.prisonpolicy.org/blog/2021/10/27/ny_costs/) [<https://perma.cc/3HNZ-2HNB>].

commissary food to integrate the paltry meals served by the facility, while also having some left to spend on other essentials, such as clothes, personal care products, and a few phone calls to family each month.<sup>349</sup> Yet they earned, on average, only \$31 each month.<sup>350</sup> Almost 80% of the interviewees said they received steady or at least patchy support from family and friends.<sup>351</sup> Over half of those funds went towards communication costs, and about a third went towards commissary purchases.<sup>352</sup> Individuals without connections to these steady household payment streams were forced to put their minimal earnings towards “survival kits” of nutrient-deficient food and “were more likely to report health problems such as gastrointestinal diseases, foodborne illness, and drastic weight loss, as well as frequent headaches and chronic fatigue,” in addition to feelings of isolation and being “stripped of their dignity and humanity.”<sup>353</sup> If family and friends don’t absorb the pressure of insecurity, the individual does, further increasing the chances they experience physical, emotional, and psychological distress. The increased dependence on money transfers, again, necessarily links the market’s continued viability to payment streams originating from households.

The money transfers come with high fees, even in states that contract with multiple providers.<sup>354</sup> More frequent, smaller sized transfers, reflecting instability or the absence of slack in household income, result in the service provider siphoning off even higher percentages of funds.<sup>355</sup> What’s more, this toll collection has two sides. If there are funds left over in an account, the company often transfers such funds to a prepaid debit card upon an individual’s release and monetizes that transfer through card usage and inactivity fees.<sup>356</sup>

As a political project, this market didn’t develop with the same deliberateness as welfare reform, which explicitly sought to shift responsibility onto family units. The point, however, is that the broader logic of family responsibility—as a shock absorber in the “free” economy—also works to normalize market-based provisioning that depends on household payment streams in prisons. If the family is responsible for absorbing the social insecurity that diffuse market forces may generate, then surely the individual together with their family must be responsible for the financial consequences linked to discrete acts coded as criminal. Indeed, Professor Alexes Harris, in an extensive study of criminal legal monetary sanctions in Washington, found that cultural attitudes about “personal responsibility” and “meritocracy” were pervasive among many actors involved in administering the criminal legal system.<sup>357</sup> These basic ideas assimilate the imposition of all

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349. *Id.*

350. *Id.*

351. *See id.*

352. *See id.*

353. *Id.*

354. *See* CFPB, *supra* note 347, at 17–20.

355. *Id.* at 18–19.

356. *Id.* at 27–28.

357. ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 137–44 (2016); *see also* Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor*:

sorts of costs on justice-involved individuals and their families. But even among family members themselves, “[c]riminal justice involvement creates a context in which relatives experience high expectations to care-take.”<sup>358</sup> Often, the best they can do is provide money.<sup>359</sup>

The political principle of “less eligibility” further helps explain how broader market dynamics can entrench parallel dynamics within the carceral system. The idea of less eligibility leads states to “impose on those suffering criminal punishment conditions that . . . convey degradation relative to those marked as ‘law abiding.’”<sup>360</sup> The principle suggests an important relationality between prison and “free” society. State support to justice-involved persons can’t be seen as exceeding support (or opportunities) provided to “law-abiding” citizens.<sup>361</sup> As responsibility for absorbing financial insecurity shifts to families, it becomes more difficult, politically, to resist application of that logic in the carceral system, notwithstanding its many deep injustices and contradictions. We can say something similar about the proliferation of credit as social provision and criminal justice debt. But this convergence in logics actually bolsters abolitionist arguments that more thorough social transformation is necessary to seriously undermine the carceral system’s continued production of coercive economic pressures, which are really extensions of broader political–economic processes.

To summarize, connections between two strands of thought support this legitimating process. Austerity politics reflect beliefs about state incapacity, or at least the inferiority of state provisioning to that which can be accomplished through

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*Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638, 639–40 (2015) (explaining that “families are pressured by government policy to provide financial support both during their loved ones’ incarceration and in the period following release” and that notions of “individual responsibility . . . shap[e] the governance of the poor in increasingly destructive ways”). In another recent study, researchers found that “family members are often coerced by probation officers to pay their relatives’ legal debt.” Daniel J. Boches, Brittany T. Martin, Andrea Giuffrè, Amairini Sanchez, Aubrienne L. Sutherland & Sarah K.S. Shannon, *Monetary Sanctions and Symbiotic Harms*, RSF: RUSSELL SAGE FOUND. J. SOC. SCI., Jan. 1, 2022, at 98, 111. “If families cannot pay, their loved ones may be threatened with force (such as incarceration).” *Id.* at 108. The interviews with those officers reflect their assumption that family members *should* be caught in the web of responsibility. *See id.* at 106.

358. Megan Comfort, “A Twenty-Hour-a-Day Job”: *The Impact of Frequent Low-Level Criminal Justice Involvement on Family Life*, ANNALS AM. ACAD. POL. & SOC. SCI., May 2016, at 63, 73.

359. See Freddy Medina, *Inflation Is Putting Food Out of Reach in New York Prisons*, N.Y. FOCUS (Apr. 11, 2023), <https://nysfocus.com/2023/04/11/prison-package-ban-inflation-hunger/> [<https://perma.cc/W7CC-EUM4>] (interviewing a mother whose son is incarcerated, who explains that “I was out of work until late last year, and now with gas and food prices so high, I barely have the money to cover my rent at the end of the month . . . . But being able to put some money in his books is the only thing that gives me satisfaction. . . . As long as I know I did my best so that my son can eat a couple of good meals, I feel better about myself.” (second omission in original)).

360. Zatz, *supra* note 28, at 133.

361. So-called collateral consequences—ineligibility for public benefits and certain forms of employment, or civic exclusions like disenfranchisement, which attach to criminal convictions—follow this logic, setting up a hierarchy of who is and isn’t entitled to certain benefits and privileges of citizenship, the things that define and separate freedom and punishment. *See generally* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010).

market mechanisms. Indeed, Clinton's welfare reform was an "attempt to 'reinvent government' as more efficient and dynamic, shifting . . . policy to a focus on more efficient service delivery and partnerships with private actors."<sup>362</sup> Under this logic, private companies provide a wider range of carceral services more effectively than government. A complementary emphasis on family and personal responsibility then naturalizes individuals and households as the ultimate bearers of much of those costs and weakens claims against the state for social support, a form of social conservatism that pairs well with neoliberalism.<sup>363</sup> In fact, JPay explicitly operates on this dual logic, noting on its website that its "broad spectrum of funding options provide convenience for friends and families," while "creat[ing] efficiencies for correctional facilities."<sup>364</sup> This message, embodying an implicit sense of legitimacy, ignores the set of fraught, contingent legal and political foundations that condition this market's very possibility.

#### IV. ABOLITIONIST INVESTMENT

Abolition is a framework for thinking and striving towards a world in which police and prisons become obsolete. This necessarily involves collective struggle, experimentation, and revision.<sup>365</sup> The discussion below, therefore, is neither definitive nor exhaustive of how abolitionists think about "investment." Rather, it is a set of reflections that grapple with the combined picture of community capture and the carceral services market laid out above. To ground those reflections, I will first discuss certain concepts and principles which run through abolitionist thought: the invest–divest framework, community control, and democratization. This will give us a sketch of what "investing in abolition" might mean. After developing that sketch, through a discussion of community control and invest–divest, I will argue that a national focus is critical to the abolitionist project.

The invest–divest framework is a good place to start.<sup>366</sup> That framework calls for "redirect[ing] the billions that now go to police departments [and prisons] toward providing health care, housing, education and good jobs."<sup>367</sup> This idea has powerful intuitive appeal. If resources are already being channeled in one direction, why can't we shift those very resources in a different direction, one that

362. RAHMAN, *supra* note 22, at 107.

363. See Jamelle Bouie, *How Conservatives Can Love 'the Family' and 'the Free Market,'* N.Y. TIMES (May 7, 2022), <https://www.nytimes.com/2022/05/07/opinion/conservatives-gop-family-values.html> (discussing Melinda Cooper's work comparing social conservative and neoliberal schools of thought around social welfare).

364. *JPay: A Trusted Name in Corrections.*, AVENTIV, <https://www.aventiv.com/jpay/> [<https://perma.cc/A8UW-XZHE>] (last visited Sept. 3, 2023).

365. See DERECKA PURNELL, *BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM* 276 (2021) ("Activists or abolition-curious people will often ask me, 'What does abolition look like to you?' My answers change all the time during conversation, especially since I believe that the dreaming and practicing should happen together."); see also Charmaine Chua, *Abolition Is a Constant Struggle: Five Lessons from Minneapolis*, 23 THEORY & EVENT S-127, S-141 to 42 (2020).

366. See generally, e.g., MOVEMENT FOR BLACK LIVES, *supra* note 217.

367. Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>.



reduces carceral violence and promotes more widespread human flourishing, which makes *everyone* safer? The straightforward, intuitive nature of the framework makes it attractive in other contexts, such as climate justice.<sup>368</sup> Often, there is overlap among these projects on the “invest” side of the ledger. The framework thus helps identify shared material interests across struggles, making new solidarities possible. It also makes clear that abolition is a constructive project.

A related thread of thinking emphasizes “community control”<sup>369</sup> and local power.<sup>370</sup> The point is to shift power over the distribution of resources to communities where such power has long been withheld.<sup>371</sup> That control matters for its own sake, as a tool in communities’ ongoing struggles for self-determination. This is why charity, however well-intentioned, does “not suffice as a just measure of repair.”<sup>372</sup> Under this view, communities should have control over the resources that enable their freedom and security both as a matter of reparative justice and to limit the arbitrary power of the better resourced.

Focusing on “local” or “community” units, notwithstanding the imprecision of such terms,<sup>373</sup> has several important virtues. First, communities and communal institutions (for example, schools, workplaces, and churches) are often the level at which people most readily identify shared interests and develop common goals.<sup>374</sup> Second, there are epistemic advantages to a local focus. In short, people have advantages in understanding circumstances affecting their own lives and such knowledge should contribute to the formulation of solutions to social problems they face.<sup>375</sup> More fundamentally, such knowledge affects one’s very conception of what the relevant social problem *is* (perhaps it’s underinvestment and not “crime”) or its place in a hierarchy of problems. Third, the local may be the

368. See OLÚFÉMI TÁÍWÒ, RECONSIDERING REPARATIONS 182 (2022).

369. See, e.g., Olúfẹ́mí Táíwò, *Power over the Police*, DISSENT (June 12, 2020), [https://www.dissentmagazine.org/online\\_articles/power-over-the-police](https://www.dissentmagazine.org/online_articles/power-over-the-police) [https://perma.cc/7ENG-JHF4] (discussing community control over policing, in contrast to “community policing,” as consistent with an abolitionist ethos).

370. See McLeod, *supra* note 35, at 1623.

371. See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 803–04 (2021) (developing the “power lens,” which is concerned with “shifting power away from the police and toward the populations who are policed, people who are often poor and Black, Latinx, or Indigenous” so that such groups can develop capacities to “make decisions with observable results,” including “control[ling] the distribution of state resources”).

372. McLeod, *supra* note 35, at 1649.

373. See Rahman & Simonson, *supra* note 33, at 686–87 (explaining there are “dangers in relying on localism as a panacea” and “[e]ven the word ‘community’ is itself fraught, carrying with it associative dangers of vagueness and co-optation”). Professors Rahman and Simonson note that social movement actors are aware of such challenges, and the benefits/drawbacks of this local focus are being worked out in real time. *Id.* at 687.

374. This is also why segregated communities pose formidable challenges to forming shared projects of multiracial, working-class coalitions. See Aziz Rana, *Our Segregation Problem*, DISSENT (Fall 2022), <https://www.dissentmagazine.org/article/our-segregation-problem> [https://perma.cc/EBZ7-9UNM].

375. See Táíwò, *supra* note 106, at 71 (explaining that standpoint epistemology comprises three ideas: “knowledge is socially situated, marginalized people have some advantages in gaining some forms of knowledge, and research programs (and other areas of human activity) ought to reflect these facts”).

place where groups can most readily feel a concrete sense of political agency—that they have the capacity to shape their circumstances in meaningful ways through their political activities—which is necessary for building and sustaining political power.<sup>376</sup>

Finally, the political forms such power expresses itself through matter greatly. Abolitionist and related thought emphasize the need for the radical democratization of political and economic institutions.<sup>377</sup> Investment in and the distribution of resources more generally depend on processes and networks of institutions. Such processes and institutions are potential “targets” for democratization.<sup>378</sup> Proponents of this view see forms of representative democracy essentially reducible to electoral politics as inadequate. In contrast, participatory forms of governance represent one set of approaches that may move institutions towards a preferred sort of democratization.<sup>379</sup>

We now have a sketch of what it might mean to invest in abolition. Invest–divest, community control, and democratization, are a set of working principles—bases for thinking, experimenting, and organizing struggle.<sup>380</sup> The stories of community capture and development of the carceral services market in the preceding Parts reflect a set of constraints and oppositions these working principles must navigate. The remainder of this Part focuses specifically on community control and the invest–divest framework with such challenges in mind. In each case, I argue that a national focus is critical to the project of abolition.

#### A. THE SCALES OF STRUGGLE FOR COMMUNITY CONTROL

In 2014, two weeks after police killed Michael Brown in Ferguson, Missouri, sparking protests across the country, a small group of activists traveled to Jackson Hole in Wyoming,<sup>381</sup> the metropolitan area with the greatest wealth inequality in America.<sup>382</sup> Knowing the Federal Reserve (the Fed) was considering

376. See Rahman & Simonson, *supra* note 33, at 690.

377. See McLeod, *supra* note 35, at 1649 (critiquing projects that fall “short of democratizing the basic economic and political institutions that determine the distribution of life chances”); Akbar, *supra* note 35, at 97 (discussing a “vision of democracy emerging from today’s grassroots movements on the left: where the pursuit of ‘non-reformist reforms’ is one strategy to move us toward a democratic political economy where people possess the agency and power to self-determine the conditions of their lives”).

378. See RAHMAN, *supra* note 22, at 157–58.

379. See Rahman & Simonson, *supra* note 33, at 739 & n.262. A more robust discussion of what democratization might look like is beyond the scope of this Article. However, a focus on the democratic ideal of “political equality” might ground such an analysis. See Bowie, *supra* note 135, at 167, 170 (describing political equality as “a relational theory of equality, one that views everyone as social equals who should have the same power to control community decisions as everyone else,” and arguing that “where political equality ends, so does democratic decisionmaking”).

380. These principles don’t fit together perfectly into a single blueprint for action. For instance, too much participatory democracy could lead to ineffective administration, weakening community power.

381. Binyamin Appelbaum, *Fed Chief Sees Not Enough Data to Raise Rates*, N.Y. TIMES (Aug. 22, 2014), <https://www.nytimes.com/2014/08/23/business/yellen-on-federal-reserve-policy.html>.

382. Kathleen Elkins, *This Is the Most Unequal Place in America in Terms of Income—and It’s Not in New York or California*, CNBC (Aug. 7, 2018, 9:55 AM), <https://www.cnbc.com/2018/07/26/the-most-unequal-place-in-america-is-jackson-wyoming-idaho.html> [<https://perma.cc/8R7C-HBCQJ>].

interest rate hikes, the group, organized by the Center for Popular Democracy, communicated to officials meeting there that the economic “recovery” from the financial crisis had been deeply uneven, with disparities appearing across familiar racial and geographic lines.<sup>383</sup> Two individuals who had been protesting in Ferguson came to join the group.<sup>384</sup> In that empowering expression of solidarity, the group recognized the connected nature of these struggles and, with memories of the Great Financial Crisis still fresh, that power over material security lay largely outside the control of many communities.<sup>385</sup>

Indeed, the “Fed Up” Campaign organizers understood that the struggle for community power is linked to broader financial structures. Those structures reflect long histories of political conflicts and choices, embodied in laws, regulations, and administrative practices that impose constraints on what communities can accomplish on their own.<sup>386</sup>

The Campaign also presented a powerful ideological challenge, a rejection of the orthodox understanding of the Fed’s “dual mandate.”<sup>387</sup> Black unemployment numbers didn’t tell a story of recovery. In 2015, Dawn O’Neal, a teacher’s assistant at a daycare center in Atlanta making \$8.50 an hour, joined the group’s second trip to Jackson Hole.<sup>388</sup> She explained:

I’m going out to Jackson Hole because the Fed is talking about raising interest rates. And they said that the economy is stable enough to be able to handle it. Well, when I look around at the community that I live in, I don’t see the stability in the economy that they’re talking about. . . . I still see people struggling. . . . There’s the jobless. There’s high crime in this community. It’s not a very economically stable community. And so I’m wondering if the people out at Jackson Hole have even taken into account the community that I live in and communities like this across the nation.<sup>389</sup>

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383. Appelbaum, *supra* note 381.

384. Interview with Shawn Sebastian, Former Co-Dir., Fed Up Campaign, in Brooklyn, N.Y. (Oct. 17, 2022).

385. This single direct action sparked press, a national round of popular education, and meetings with each Federal Reserve Bank president. *Id.*

386. See David P. Stein, *Fearing Inflation, Inflating Fears: The End of Full Employment and the Rise of the Carceral State* 101 (Aug. 2014) (Ph.D. dissertation, University of Southern California), <https://www.proquest.com/docview/1622414677?pq-origsite=gscholar&fromopenview=true> [<https://perma.cc/FQY6-NBHK>] (discussing civil rights and labor struggles for a federal job guarantee and those struggles’ intersection with Fed authority and policy).

387. The “dual mandate” refers to the Fed’s understanding of its own statutory mandate to pursue maximum employment and price stability through monetary policy. Lev Menand, *The Fed’s Sole Mandate*, LPE PROJECT (Feb. 10, 2022), <https://lpeproject.org/blog/the-feds-sole-mandate/> [<https://perma.cc/X5EE-TYDS>].

388. Jared Bernstein, *The Federal Reserve and the ‘Fed Up’ Campaign*, WASH. POST (Aug. 27, 2015, 7:00 AM), <https://www.washingtonpost.com/posteverything/wp/2015/08/27/the-federal-reserve-and-the-fed-up-campaign/>.

389. *Id.*

The Campaign, in effect, argued the Fed was making a political choice, an unnecessary one with severe distributional consequences.<sup>390</sup> This was a challenge at the level of ideology, brought by workers who rejected the idea that their unemployment, or even their struggle to live off low wages from a full-time job, was in any way natural, inevitable, or necessary. More importantly, they rejected that remedying such a situation was a responsibility they alone should, or even could, bear.

What this example encapsulates so well is that the pursuit of community control and power depends on struggle at different scales—communal, national, even international.<sup>391</sup> Ideology and culture also represent different dimensions of struggle—the proliferation of credit as social provision, ideas about family responsibility, and more reinforce coercive dynamics and defend the status quo.<sup>392</sup> The takeaway isn't that “bottom-up” change or contestation “from below” are futile; rather, it's that such efforts have an interdependent relationship with struggle at different scales. This basic point can become lost in more narrow debates around the carceral system, which often manifest in intensely local ways. The struggle over federal power, and how it's channeled throughout the economy (through monetary policy, state and local aid, and financial institutions and markets), can't be bypassed.<sup>393</sup>

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390. See Ylan Q. Mui, *This Is How Protesters Plan to Take on the Federal Reserve*, WASH. POST (Aug. 11, 2015, 8:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/08/11/this-is-how-protesters-plan-to-take-on-the-federal-reserve/> (“For inexplicable reasons, the Fed seems primed to intentionally slow down the economy in September,” said Ady Barkan, campaign director for Fed Up. “The real crisis in America is stagnant wages and a lack of good jobs. We are going to Jackson Hole to remind the Fed of this stark reality: slowing the economy down now will leave African-American and Hispanic communities permanently mired in a Great Recession.”); cf. Tim Barker, *Preferred Shares*, PHENOMENAL WORLD (June 24, 2021), <https://www.phenomenalworld.org/analysis/preferred-shares/> [<https://perma.cc/TY2J-H7AF>] (discussing distributional consequences of Fed monetary policy); Menand, *supra* note 387 (arguing that the Fed's “dual mandate” misinterprets the statutory text and history of the Fed's authority).

391. See Rahman & Simonson, *supra* note 33, at 725–27 (developing the concept of the “moment of authority,” or where (upstream vs. downstream) in the policy process power resides, and discussing the relationship between scale and power). In this Fed Up example, the individuals participating in the direct action understood that while their local economies had their own unique dynamics, the Fed's policy decisions at the national level, in the aftermath of intense stresses to the global financial system at the international level, would necessarily impact local conditions.

392. For instance, attitudes about “hustling” reinforce such dynamics. See generally LESTER K. SPENCE, *KNOCKING THE HUSTLE: AGAINST THE NEOLIBERAL TURN IN BLACK POLITICS* (2015); Tressie McMillan Cottom, *The Hustle Economy*, *DISSENT* (Fall 2020), <https://www.dissentmagazine.org/article/the-hustle-economy> [<https://perma.cc/LEG8-J75T>].

393. Federal power may be more or less relevant in different ways across different times. For W. E. B. Du Bois, whose vision of “abolition democracy” today's abolitionists often appeal to, it was apparent during Reconstruction that federal power was necessary to support the sort of political-economic transformation needed to take the project of abolition forward, beyond the formal abolition of slavery. See Quinn Lester, *Whose Democracy in Which State?: Abolition Democracy from Angela Davis to W. E. B. Du Bois*, 102 *SOC. SCI. Q.* 3081, 3082–84 (2021). In the case of Reconstruction, that necessary federal power was the U.S. military, which only briefly supported Black people and the working class in their efforts to remake society. See *id.* at 3084–85 (“As long as military rule backed it up the black suffrage could hang on . . . . Through his analysis, Du Bois shows how his abolition

Fed monetary policy of course isn't the only mechanism that drains away community power. Focusing on San Francisco's postwar experience with municipal debt, Professor Destin Jenkins has shown how "distant institutions and actors place profound constraints on local conditions of possibility."<sup>394</sup> Legal scholar Brian Highsmith has described how a lack of centralized redistributive mechanisms, when combined with economic inequality, segregation, and the deliberate drawing of municipal boundaries, diminishes the capacity of communities to pursue the life-affirming, constructive projects that would displace racialized carceral systems.<sup>395</sup> And well before that, Professor Ruth Wilson Gilmore explained that to fully understand California's prison expansion in the 1980s and 1990s, one needed to situate those events "in the political-economic geography of globalization."<sup>396</sup>

Private equity represents another layer and iteration of this ongoing challenge. We have seen how the industry's control over social infrastructure further concentrates economic pressure.<sup>397</sup> At the same time, the industry's extensive relationships with pension funds<sup>398</sup> present a different political challenge. Private equity firms position themselves as providers of retirement security.<sup>399</sup> By extension, state and local budgets depend on these firms (and global financial markets more generally) to perform well to meet commitments to pensioners, to free up funds for other projects. From the perspective of a single pension fund or isolated fiscal unit, private equity's (disputed)<sup>400</sup> ability to produce outsized returns seems attractive. But again, the private equity model tends to redirect pressure. Insecurity moves elsewhere, often intensifying; success for a part obscures damage to a whole. The normalization of financial indebtedness, and expectations about work and family responsibility, tend to absorb that damage on the backend.

There is no avoiding the need to rebalance public and private economic power. Professors Robert Hockett and Saule Omarova offer a concrete proposal that

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democracy was not in itself a rejection of state violence or even of the state itself, but a different articulation of the state's relationship between coercion and consent, one where state power could be used to empower the powerless . . ."). Importantly, this was an assessment of a particular moment in history, with its own balance of social forces. *See id.* at 3083 ("Du Bois's usage of abolition democracy shows that he was less concerned with it as a definite type of democracy, than as a particular conjuncture of factors across the 19th century that challenged slavery, tried to transform the enslaved into free laborers and citizens, and was ultimately betrayed and crushed by both white labor and capitalists in the North and South.").

394. DESTIN JENKINS, *THE BONDS OF INEQUALITY: DEBT AND THE MAKING OF THE AMERICAN CITY* 4 (2021).

395. *See generally* Brian Highsmith, *The Implications of Inequality for Fiscal Federalism (or Why the Federal Government Should Pay for Local Public Schools)*, 67 *BUFF. L. REV.* 407 (2019).

396. RUTH WILSON GILMORE, *ABOLITION GEOGRAPHY: ESSAYS TOWARDS LIBERATION* 200 (2022).

397. *See supra* Section I.C.

398. *See* AM. INV. COUNCIL, *2022 PUBLIC PENSION STUDY 2* (2022), [https://www.investmentcouncil.org/wp-content/uploads/2022/07/22AIC002\\_2022-Report\\_SA-2226.pdf](https://www.investmentcouncil.org/wp-content/uploads/2022/07/22AIC002_2022-Report_SA-2226.pdf) [<https://perma.cc/X6MR-YFPT>] (showing that 89% of public pension funds in the study have some exposure to private equity).

399. *See id.* at 1; *see also* Heather Gillers, *Retirement Funds Bet Bigger on Private Equity*, *WALL ST. J.* (Jan. 10, 2022, 5:30 AM), <https://www.wsj.com/articles/retirement-funds-bet-bigger-on-private-equity-11641810604> (describing government retirement funds' increased reliance on private equity).

400. *See* HOOKE, *supra* note 23, at 39.

could in fact displace private equity from its increasingly dominant position.<sup>401</sup> Their idea is for the creation of the “National Investment Authority (NIA),” a public institution whose “one especially distinctive feature” would be that it “reverse[s] the usual model of ‘public money, private management’ by drawing freely invested private money to publicly-managed investment vehicles.”<sup>402</sup> More than throwing money at problems through traditional public–private channels vulnerable to capture, the NIA would be designed to *sustain* collective action geared towards provisioning of universal public goods.<sup>403</sup> This project is in line with the sort of “justice reinvestment” Professor Allegra McLeod writes about.<sup>404</sup> Such an effort involves reinvesting “administrative resources” (not just money through any institutional form) to “refocus collective energy on strengthening the social (rather than the criminal) arm of the state.”<sup>405</sup> At a more basic level, the effort to stand up new institutions<sup>406</sup> has two other advantages. First, it requires focus on fundamental questions of system *design* in contrast to a focus on “inclusion,” which might rely on innovation or gap-filling measures to address shortcomings of what are assumed to be “normal” or “natural” market dynamics, and which take system design as given.<sup>407</sup> Second, the process of standing up and implementing a new institution creates an additional “target” for democratic mobilization outside electoral politics, a chance to feel and express political agency by shaping a new set of administrative relations with potentially far-reaching consequences.<sup>408</sup>

As concrete institutional proposals continue to emerge,<sup>409</sup> so do challenges to conventional thought needed to make room for such proposals. In this moment, many are no longer so convinced that “[s]urely one has to pay one’s debts.”<sup>410</sup>

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401. See generally Robert C. Hockett & Saule T. Omarova, *Private Wealth and Public Goods: A Case for a National Investment Authority*, 43 J. CORP. L. 437 (2018).

402. *Id.* at 439.

403. *Id.* at 440; see also SAULE OMAROVA, BERGGRUEN INST., THE NATIONAL INVESTMENT AUTHORITY: AN INSTITUTIONAL BLUEPRINT 15 (2022) [<https://perma.cc/YY8Q-PLDG>] (describing the NIA’s advantages in public infrastructure investment).

404. McLeod, *supra* note 31, at 1225–26.

405. *Id.* at 1225.

406. The NIA is an institution with both historical (New Deal-era Reconstruction Finance Corporation) and modern (various asset managers, including private equity funds) precedents and inspirations. Hockett & Omarova, *supra* note 401, at 458.

407. Mehrsa Baradaran, *Banking on Democracy*, 98 WASH. U. L. REV. 353, 360 (2020).

408. See RAHMAN, *supra* note 22, at 143.

409. For instance, policy proposals organized around the idea of “social housing” have a similarly ambitious scope. See generally AMEE CHEW, CTR. FOR POPULAR DEMOCRACY, SOCIAL HOUSING FOR ALL: A VISION FOR THRIVING COMMUNITIES, RENTER POWER, AND RACIAL JUSTICE (2022), [https://www.populardemocracy.org/sites/default/files/Social%20Housing%20for%20All%20-%20English%20-%20FINAL%203-21-2022\\_0.pdf](https://www.populardemocracy.org/sites/default/files/Social%20Housing%20for%20All%20-%20English%20-%20FINAL%203-21-2022_0.pdf) [<https://perma.cc/ZF5Y-BPFA>]. Another example includes those developing institutional frameworks for a federal job guarantee. See generally, e.g., MARK PAUL, WILLIAM DARRITY, JR. & DARRICK HAMILTON, CTR. ON BUDGET & POL’Y PRIORITIES, THE FEDERAL JOB GUARANTEE—A POLICY TO ACHIEVE PERMANENT FULL EMPLOYMENT (2018), <https://www.cbpp.org/research/full-employment/the-federal-job-guarantee-a-policy-to-achieve-permanent-full-employment> [<https://perma.cc/83FW-3SPX>].

410. DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* 4 (2011).



The common threads between local struggles, like New York City taxi drivers challenging their medallion debt,<sup>411</sup> and national struggles, like the movement to abolish student debt,<sup>412</sup> are apparent. Their successes, though partial, reflect fragility in the ideological underpinnings that normalize coercive relations of indebtedness. Such relations stand in stark contrast to the way private equity firms use debt, without ever becoming responsible for it, to accumulate assets. Those contrasting images are instructive. Credit–debt relationships reflect a contingent set of social power relations and political choices.<sup>413</sup> But with the proliferation of credit as social provision, and through creative organizing by groups like the Debt Collective,<sup>414</sup> debt may also become an “overarching political identity.”<sup>415</sup> The shared quality of indebtedness, from consumer debt to criminal justice debt, becomes an opportunity to form new solidarities that challenge current institutional arrangements.<sup>416</sup>

Similarly, rejecting the idea that there is some “natural” limit to homeownership, tenant organizers have channeled local resistance against laws and development plans that make housing increasingly unaffordable into an organized national campaign for a “Homes Guarantee.”<sup>417</sup> There, too, is the recognition that local struggles are intertwined with national struggles, with localities often lacking the resources to pursue appropriately ambitious projects on their own, without more centralized coordination. Such struggles have deep interdependencies with prison abolition that many organizers are attentive to.<sup>418</sup>

411. Brian M. Rosenthal, *N.Y.C. Cabbies Win Millions More in Aid After Hunger Strike*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/03/nyregion/nyc-taxi-drivers-hunger-strike.html>.

412. *E.g.*, *Campaigns*, DEBT COLLECTIVE, <https://debtcollective.org/what-we-do/campaigns/> [<https://perma.cc/P28Z-8NRH>] (last visited Sept. 20, 2023).

413. *See* Saule T. Omarova, *The People’s Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231, 1256 (2021) (explaining that the Fed’s decision to purchase corporate debt in both primary and secondary markets during the COVID-19 crisis was an “inherently political act” with “distributional consequences”). For an account of the “money as social relation” view and critique of other theories of money, *see generally* GEOFFREY INGHAM, *THE NATURE OF MONEY* (2004).

414. The Debt Collective is a membership-based union of debtors and allies aimed at advancing economic and racial justice through a variety of strategies that center the struggles of debtors. *About Us*, DEBT COLLECTIVE, <https://debtcollective.org/about-us/> [<https://perma.cc/RQ73-D4UX>] (last visited Sept. 4, 2023).

415. Eleni Schirmer, *Life or Debt: What’s Next for the Fight to Abolish Debt?*, LUX MAG. (Winter 2022), <https://lux-magazine.com/article/debt-collective-student-debt/> [<https://perma.cc/T3MF-3BR4>].

416. *See generally* DEBT COLLECTIVE, *CAN’T PAY WON’T PAY: THE CASE FOR ECONOMIC DISOBEDIENCE AND DEBT ABOLITION* (2020).

417. HOMES GUARANTEE, <https://homesguarantee.com/> [<https://perma.cc/FJL2-S22B>] (last visited Sept. 3, 2023); *see also* Conor Dougherty, *The Rent Revolution Is Coming*, N.Y. TIMES (Oct. 15, 2022), <https://www.nytimes.com/2022/10/15/business/economy/rent-tenant-activism.html>.

418. *See* Kamau Walton & Molly Porzig, *Homes Not Cages: Intersecting Movements for Housing Justice and Prison Industrial Complex (PIC) Abolition*, CRITICAL RESISTANCE (June 9, 2022), <https://criticalresistance.org/abolitionist/issue-37-sneak-peek/> [<https://perma.cc/KS8V-MLAQ>]; Norrinda Brown Hayat, *Housing the Decarcerated: Covid-19, Abolition & the Right to Housing*, 110 CALIF. L. REV. 639, 642 (2022).

## B. BEYOND INVEST-DIVEST

Public spending, down to and especially at the municipal level, has come under sharper focus over recent years. For that reason alone, it's premature to attribute any final measurement of success or failure to the slogan "defund the police."<sup>419</sup> That struggle continues in many forms. This is another virtue of the invest-divest framework. It makes exceptionally clear that carceral investments are "choices in governance—choices with clear alternatives."<sup>420</sup>

But invest-divest may suggest a too-simplistic view of our monetary economy. "Shifting resources" or "reallocating funds," phrases commonly associated with the framework, often translate to "take X amount of money away from police and prisons (divestment) and put that into alternative institutions (investment)." A political strength of this model is that it answers the ready question of "how are you going to pay for it?," "it" being the changes needed to shrink the carceral system. A potential shortfall of this thinking is that it tends to lead one to a "household budget" view of our monetary economy.<sup>421</sup> Such a view may be too limiting to accommodate the transformative investments abolition calls for, even in a longer struggle.

Economists<sup>422</sup> and legal scholars<sup>423</sup> advocating Modern Monetary Theory (MMT) have increasingly highlighted that the U.S. federal government doesn't work like a household budget, despite continued political spectacles around deficits and the debt ceiling. States and cities may face constraints in the ways households do—as users of money who must find ways to balance their budgets and limit debt. But the federal government is the sovereign *issuer* of that money, a public resource it *creates* and cannot default on, except willingly.<sup>424</sup> This basic idea suggests the federal government can often spend much more to support life-affirming projects and that transformative investment in constructive projects can even *precede* divestment. This insight is especially important in an "era of fiscal austerity," where private actors exert undue power in local geographies.<sup>425</sup>

419. See Keeanga-Yamahtta Taylor, *Larry Krasner and the Limits of "Law and Order,"* NEW YORKER (Nov. 16, 2022), <https://www.newyorker.com/news/the-political-scene/larry-krasner-and-the-limits-of-law-and-order> [<https://perma.cc/ES6B-G9C7>] (explaining that the demand to "defund the police" has "educated people about the inequality in municipal budgets that privilege police funding above all else").

420. Akbar, *supra* note 223, at 453.

421. See STEPHANIE KELTON, *THE DEFICIT MYTH: MODERN MONETARY THEORY AND THE BIRTH OF THE PEOPLE'S ECONOMY* 15–17 (2020).

422. See *generally id.*; L. RANDALL WRAY, *MODERN MONEY THEORY: A PRIMER ON MACROECONOMICS FOR SOVEREIGN MONETARY SYSTEMS* (2d ed. 2015).

423. See, e.g., Rohan Grey, *Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy*, 109 KY. L.J. 229, 293–98 (2020); Raúl Carrillo, *Predatory Lending and the Predator State*, LPE PROJECT (May 22, 2019), <https://lpeproject.org/blog/predatory-lending-and-the-predator-state/> [<https://perma.cc/69UY-HETR>].

424. See KELTON, *supra* note 421, at 37.

425. Rahman, *supra* note 134, at 2479; see also Garland, *supra* note 3, at 338 ("City governments, in particular, lack the power to undertake elaborate or costly social initiatives, so urban problems are rarely effectively addressed in the absence of state or federal assistance.").

Understanding this, abolitionist thinkers have started to integrate MMT ideas into their praxis.<sup>426</sup>

What this view of our economy helps us see more clearly is that “false financial scarcity” often justifies “subordination.”<sup>427</sup> Recall Justice Brennan’s interpretation of the Eighth Amendment in *Rhodes v. Chapman*,<sup>428</sup> where his commitment to constitutional protections ran into the “elusive” challenge of establishing “humane” yet “realistic” conditions for prisoners sharing cells of just over sixty square feet.<sup>429</sup> The decision reads like a necessary accommodation of financial scarcity. This unwarranted “pragmatism” masks what is judicial authorization of a dehumanizing political choice.

Of course, understanding federal monetary power in this way doesn’t naturally lead to any particular result. What happens depends on struggle, mediated through institutions in their current (sometimes malleable) forms. Indeed, the federal government has increased its spending substantially since the onset of the COVID-19 crisis. Most recently, the American Rescue Plan Act of 2021 (ARPA)<sup>430</sup> provided “the largest infusion of federal funding in local governments in almost 40 years.”<sup>431</sup> But this was in a context where the President emphatically stressed the need to “fund the police,” which many jurisdictions were ready to do, quickly spending tens of billions of federal funds on “projects that mentioned police, law enforcement, courts, jails and prisons.”<sup>432</sup>

Police and the broader prison industrial complex remain potent political power centers. A less likely appreciated point, fundamental to shifting such power, is that how money is spent depends on existing institutional channels and collective capacities. For this reason, when the need was most urgent in the early parts of the COVID-19 crisis, Paycheck Protection Program loans disproportionately went to white-owned businesses “with stronger existing banking relationships

426. See, e.g., Tamara K. Nopper, *Abolition is Not a Suburb*, NEW INQUIRY (July 16, 2020), <https://thenewinquiry.com/abolition-is-not-a-suburb/> [<https://perma.cc/XJY8-G6AD>]; see also David I. Backer & Akira Drake Rodriguez, *Movements at the Fiscal/Monetary Crossroads: Financing a Green New Deal for Schools in Philadelphia*, J. URB. AFFS., Aug. 30, 2023, at 4 (discussing scholarship that analyzes the “interfaces between public and private finance” and “movements that ‘demand a future in which public finance prints “our money,” using money as [Black Lives Matter] activists demanded: to support life, labor, places, and spaces of Black and Indigenous people, people of color, women, LGBTQ and gender-nonconforming people, disabled people, the working and workless poor, and others marginalized by racial capitalism” (alteration in original)).

427. Carrillo, *supra* note 423. Monetary systems are of course complex, reflecting political choices, legal and regulatory design, and financial innovation. See generally Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143 (2017); Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951 (2021).

428. 452 U.S. 337 (1981).

429. See *supra* notes 328–31 and accompanying text.

430. Pub. L. No. 117-2, 135 Stat. 4.

431. Anastasia Valeeva, Weihua Li & Susie Cagle, *Rifles, Tasers and Jails: How Cities and States Spent Billions of COVID-19 Relief*, MARSHALL PROJECT (Sept. 7, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/09/07/how-federal-covid-relief-flows-to-the-criminal-justice-system> [<https://perma.cc/NCV3-32DL>].

432. *Id.*

with larger financial institutions.”<sup>433</sup> Meanwhile, millions in “poor and minority-populated communities[] had to wait for a month or more to receive paper checks from the federal government,” which “brought into sharp relief both the inexcusable lack of a fast retail payments system and the unacceptably high human cost of being ‘unbanked’ in the United States.”<sup>434</sup> Similarly, states and municipalities were quick to distribute ARPA funds to police and prisons because those were the state capacities<sup>435</sup> most ready to make use of such funds. Those funds then validate private investment decisions that allocate capital to the production of “tasers with longer ranges,” firearms, police vehicles, new prisons, shooting ranges, full body scanners, advanced surveillance technology, and more.<sup>436</sup>

Money facilitates this coordinated activity. The question for a project of abolition is how to enable, privilege, and give institutional shape to alternative forms of coordination.<sup>437</sup> A difficult task, yes. But distinguishing real constraints from false ones, by sharpening analysis of how federal and community power relate, opens up new domains to more deliberate struggle. Who coordinates investment, and how, is a more open political question than many of us think. That openness can be a source of power for the project of abolition.

#### CONCLUSION

Abolition is often accused of being utopian. Perhaps it is, and perhaps that’s a good thing. Abolition is also decidedly pragmatic in a key sense: Its ideals and normative aspirations do not conflict with its analysis of material reality. Where and how resources are directed, who directs them, and who reaps rewards, present urgent questions. Answering those questions, and rejecting status quo arrangements as fixed or natural, is essential to a project that aims for security and freedom for everyone.

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433. JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 469–70 (2022).

434. Omarova, *supra* note 413, at 1253.

435. Garland, *supra* note 3, at 337 (“State capacity (which embodies resources, administrative and logistical arrangements, personnel, professionalism, expertise, buildings, institutional routines, relationships, and so on) . . . accumulat[es] slowly over time as the infrastructural product of repeated policy outcomes.”).

436. Valeeva et al., *supra* note 431.

437. Melinda Cooper, *The Last Days of Sound Finance*, PHENOMENAL WORLD (July 28, 2022), <https://www.phenomenalworld.org/reviews/sound-finance/> [<https://perma.cc/N9L9-DB25>] (arguing that left social and political movements need to have “some sense of how to collectivize the process of money and debt creation” and “develop [their] own politics of collective finance”).