
The Criminal System Under Racial Capitalism

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In 2021, major segments of the business lobby converged around a consensus for criminal system reform. As the United States experienced historic levels of labor market tightness, business groups argued for removing “barriers” to employment that system-involved people face. Just a few months later, the orientation of business to the criminal system was decidedly more mixed. By March 2022, the U.S. Chamber of Commerce, the country’s most powerful business lobby, had stepped to the forefront of the national moral panic around retail theft, launching a vigorous campaign to defend and even strengthen criminal punishment across the country.

Anchoring its analysis in the concept of racial capitalism, this Article argues that these disparate pictures, together, illustrate the criminal system’s constitutive role in the U.S. political-economic order. The criminal system plays such a role, I argue, by serving as both a labor governance institution and as a staging ground for struggles around how the U.S. political economy should work, and for whom.

The Article proceeds as follows. Part I develops the concept of racial capitalism to anchor the analysis that follows. Part II surveys the leading scholarly accounts of the criminal system’s labor governance functions. I then

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reconstruct and supplement these accounts to develop a new theoretical framework. I argue that the criminal system should be understood as rationing total available employment, and channeling and sorting system-involved people into precarious work. In these respects, the system functions as a foil to the idea of a federal job guarantee, which labor and civil rights groups struggled for unsuccessfully in the 1970s. This theoretical groundwork leads into a critique of the business community's consensus around reform, which is better understood as part of a multilayered strategy to preserve an imbalance of power between workers and employers. Part III develops an account of the prison-industrial-complex to explain how its structural foundations, rooted in state and local balance sheets, prime the criminal system to serve as a staging ground for broader political-economic struggle. While recent scholarship has focused on the critiques and demands of abolitionist and other left social movements to illustrate this function, I look in the other ideological direction. I analyze how the U.S. Chamber of Commerce has used the issue of retail theft to simultaneously strengthen the criminal system across the country, as well as to defend its idea of "American free enterprise." This case study shows how racialized state violence and anti-state ideas about free enterprise are joined together in a project of mutual justification. Part IV concludes. Given the overall picture this Article develops, I argue that we should revisit the idea of a federal job guarantee, as a path not taken, and potential program for the future. But whether the criminal system ceases to function as a major labor governance institution any time soon will depend, in part, on whether labor movements recognize its constitutive role in the broader political economy and oppose it. The business lobby, on the other hand, has already made the connection.

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INTRODUCTION

*“The United States Chamber of Commerce, the National Association of Manufacturers, and similar groups representing industry and financial interests, are rendering a disservice to the American people in their attempts to frustrate the organization of labor and in their refusal to accept collective bargaining as one of our economic institutions. These groups are encouraging a systematic organization of vigilante groups to fight unionization under the sham pretext of local interests. They equip these vigilantes with tin hats, wooden clubs, gas masks and lethal weapons and train them in the arts of brutality and oppression.”*¹

In her 2023 *State of American Business* address, Suzanne Clark stressed the need to strengthen the “rule of law” to face “the scourge of crime sweeping American cities.”² According to Clark, stronger criminal law enforcement would “underpin the freedom and safety that allow[] businesses to grow and communities to thrive.”³ As CEO of the U.S. Chamber of Commerce, the country’s preeminent business lobby,⁴

¹ John L. Lewis, *Labor and the Nation* (Sept. 3, 1937), <https://www.americanrhetoric.com/speeches/johnlewisrightsoflabor.htm> [<https://perma.cc/9BT3-6K9Z>].

² Suzanne Clark, President and CEO, U.S. Chamber of Com., 2023 *State of American Business Remarks* (Jan. 12, 2023), <https://www.uschamber.com/improving-government/suzanne-clarks-2023-state-of-american-business-remarks> [<https://perma.cc/6K5F-YEKZ>].

³ *Id.*

⁴ The Chamber spent nearly \$70 million towards lobbying activities in 2023, outspending the next closest organization by almost \$20 million. See Alexandra Chaidez, *Groups Spent Record \$4.2 Billion in 2023 Lobbying Federal Lawmakers, Report Says*, CNBC

Clark's words carry outsized weight. Indeed, over the course of the year, the Chamber successfully pushed for stronger criminal laws across the country, tying these efforts to a national moral panic around retail theft.

Whatever one thinks about Clark's pointed rhetoric, a commonsense intuition underlies it: the economy has some relation to the criminal system.

This Article challenges the predominant way this relation is presumed to exist. I argue that the criminal system plays a *constitutive role* in the ordering of our racialized political economy.

By contrast, consider the notion that today's reform efforts should involve greater attention to economic "root causes of crime."⁵ Such emphases on *root* causes tend to treat the economy as "analytically prior"⁶ to the criminal system. The two domains interact, yet a boundary line exists between them, one that gives priority to the economy.

Clark's *State of American Business* speech preserves this boundary but reverses the causal arrow: criminal law enforcement produces a baseline of public safety, which is a precondition to economic prosperity, allowing citizen-consumers to spend and businesses to flourish. Without that baseline, crime intrudes upon the orderly operation of markets.

Critiques of profit motives are another way relations between the economy and criminal system commonly enter reform-oriented

(Jan. 27, 2024, 4:00 A.M.) <https://www.nbcnews.com/investigations/lobbyists-spent-record-42-billion-2023-federal-lawmakers-rcna135943> [<https://perma.cc/M87Q-H8HW>].

⁵ Ram Subramanian, Lauren-Brooke Eisen, Taryn A. Merkl, Leily Arzy, Hernandez D. Stroud, Taylor King, Jackie Fielding, Alia Nahra & Michael Waldman, *A Federal Agenda for Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (Dec. 9, 2020), <https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform> [<https://perma.cc/2AR3-ARQX>] (arguing for "the creation and scaling of diversion strategies that focus on dealing with the root causes of crime"). The idea of "root causes" in the context of criminal law enforcement has a long, varied history. See generally ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME* (2016) (discussing how the Johnson administration understood root causes of crime and, relatedly, poverty).

⁶ Noah D. Zatz, *The Carceral Labor Continuum: Beyond the Prison Labor/Free Labor Divide*, in *LABOR AND PUNISHMENT: WORK IN AND OUT OF PRISON* 167 (Erin Hatton ed., 2021) [hereinafter Zatz, *The Carceral Labor Continuum*] (suggesting "a weakness in theories that relate carceral institutions to labor market dynamics but that treat labor market conditions as analytically prior to their carceral implications").

discourse.⁷ While some of these critiques reveal the extractive and subordinating nature of the system and its alignment with private interests,⁸ the focus on profit-making reinscribes a boundary line. Profits belong in the domain of the ordinary economy. Their undue influence in the criminal system distorts the separate domain of justice.⁹

We can see this critique deployed in reverse as well. Consider the notion that collateral consequences of criminal punishment impose excessive economic barriers, preventing system-involved people from getting good jobs.¹⁰ Here, criminal punishment extends itself too far. It distorts the ordinary operation of the economy by over-administering justice.

These ideas around root causes, public safety, and distortions that run in each direction, share a basic conceptual framework. The “economy” and criminal system exist as analytically separate domains, even as each produces consequences for the other. This analytical separation has several shortcomings: it permits mischaracterization of the social processes embedded in our punitive society; it insulates the economy against a powerful source of critique and politicization; and it drastically understates the role of the criminal system in structuring and *constituting* the economy.

⁷ Private prison and police technology companies are often criticized on this basis. Beyond these more common examples, a recent Consumer Financial Protection Bureau report maps how private profit-making has pervaded virtually every step of the criminal legal process. See CFPB, JUSTICE-INVOLVED INDIVIDUALS AND THE CONSUMER FINANCIAL MARKETPLACE 3-4 (2022), https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf [<https://perma.cc/P3PU-HTH3>].

⁸ See, e.g., COLOR OF CHANGE & WORTH RISES, POLICY BLUEPRINT FOR ENDING CARCERAL PROFITEERING (2023), https://colorofchange.org/wp-content/uploads/2023/02/23-02_BearingTheCost_FINAL_v3.pdf [<https://perma.cc/SCV7-JMRW>] (describing corporate exploitation in the carceral system and proposing policy).

⁹ See, e.g., Laura Appleman, *Big Capital and the Carceral State*, 75 HASTINGS L.J. 913 (2024) (making this argument).

¹⁰ This is a common focus of progressive critique. See, e.g., Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010) (describing how professional licensing and background screening rules limit job opportunities for the formerly incarcerated); Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment> [<https://perma.cc/5BBY-9A89>] (same).

This Article uses the concept of racial capitalism to challenge this analytical separation. Today's criminal system, I argue, plays a *constitutive role* in the ordering of our racialized political economy. It does so in at least two ways.¹¹ First, the system functions as a major labor governance institution, stabilizing, reproducing, and legitimating the patterned processes of our political economy. This reality stands in stark contrast to notions of a liberal, free market economy, whose primary pathology is weak social welfare provision. Second, the system has given rise to a prison-industrial-complex ("PIC"). The PIC serves as an economic center of gravity, forming a key terrain of political-economic struggle, where both material and ideological contestation takes place. This combined image casts the criminal system as a constitutive feature of the U.S. political-economic order. It cannot be set aside to the margins — or outside the boundaries — of conceptions of the economy.

Others have challenged this analytical separation before. Ruth Wilson Gilmore provides the paradigmatic example in *Golden Gulag*, where she describes the "prison fix" that restructured California's economy.¹² Many of today's social movements, meanwhile, have insisted on connecting struggles for racial and economic justice, combining abolitionist aspirations with critiques of capitalism.¹³ And in legal scholarship, Noah Zatz has developed an account of a "carceral labor continuum."¹⁴ Zatz's account explains how the criminal system stretches deeply into what is traditionally thought of as the free economy, giving a carceral character to supposedly free-world labor.

¹¹ I do not mean to suggest that these are the criminal system's *only* political-economic functions. Rather, my aim is to establish the minimum, threshold claim that the criminal system plays this constitutive role.

¹² RUTH WILSON GILMORE, *GOLDEN GULAG: PRISON, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 87-127 (2007).

¹³ Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 *STAN. L. REV.* 821, 851 (2021) (noting the many campaigns, experiments, and struggles committed to an "intersectional politics of antiracism, antipatriarchy, anticapitalism . . . and economic democracy"); Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 *YALE L.J.* 2497, 2512 (2023) [hereinafter Akbar, *Non-Reformist Reforms*] (explaining that today's left social movements "invoke both racism and capitalism as the target of their work").

¹⁴ Zatz, *The Carceral Labor Continuum*, *supra* note 6, at 133.

Building on these insights, this Article contributes to ongoing scholarly discourse around reform, racial capitalism, and labor struggle. In recent years, the concept of non-reformist reforms has pervaded law school classrooms, legal scholarship, and public intellectual work.¹⁵ My use of the racial capitalism frame here facilitates the sort of analysis a non-reformist reform framework demands, rendering intelligible criminal law's relation to the patterned process of our political economy, to expand our understanding of "where law takes shape and in relation to what."¹⁶ For example, I examine the criminal system's convergence with the politics of full employment, analyzing the increased attention business groups and private prison companies have directed towards the reentry space.¹⁷ As reform-minded alternatives to incarceration proliferate, the racial capitalism frame illuminates how the criminal system nevertheless structurally subordinates through labor.

This Article also builds on still-nascent law and racial capitalism scholarship.¹⁸ Prominent accounts tend to focus on how law facilitates racialized exploitation and domination through illustrative, and perhaps

¹⁵ See, e.g., Amna Akbar, *A Horizon Beyond Legalism: On Non-Reformist Reforms*, LPE PROJECT (Nov. 13, 2023), <https://lpeproject.org/blog/a-horizon-beyond-legalism-on-non-reformist-reforms/> [<https://perma.cc/Y8YJ-QL6U>] (kicking off a symposium on non-reformist reforms); *Non-Reformist Reforms*, INQUEST, <https://inquest.org/tag/non-reformist-reforms/> (last visited Nov. 21, 2023) [<https://perma.cc/SAX7-266U>] (collecting work on non-reformist reforms).

¹⁶ Akbar, *Non-Reformist Reforms*, *supra* note 13, at 2563.

¹⁷ See *infra* Part II.C.

¹⁸ See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 455-56 (2018) (noting "criminal law scholarship has not yet had a straightforward confrontation with capitalism" and that while some "[c]ritical race scholars have considered the relationship between law and racial capitalism . . . much work remains to be done"); Tonya L. Brito, Kathryn A. Sabeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1246 (2022) ("Racial capitalism is a relatively new concept in legal academia."). In 2013, Nancy Leong provided an earlier, prominent use of the term racial capitalism. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013). However, Leong's specific use of "racial capitalism" focuses on how elite institutions commodify diversity, without reference to the main body of racial capitalism scholarship in the social sciences, and thus doesn't fit with that broader body of literature.

overlooked, examples.¹⁹ In contrast, I use racial capitalism to think about where race-making legal institutions and capitalist economic dynamics converge in *systemically significant* ways, to *simultaneously* (1) govern patterns of social wealth production and (2) produce key sites of political-economic contestation.

My analysis also challenges the boundaries of legal scholarship focused on contemporary labor struggle. Such scholarship, including work that applies a political economy lens, has largely ignored the relevance of the criminal system.²⁰ This is a critical oversight.²¹ The expansive social fields of the criminal system and work overlap considerably and demand greater attention from legal scholars. Some segments of organized labor, like retail and service workers unions in Alabama, meanwhile, have begun to identify the existential threat the criminal system poses to their collective power.²²

This Article proceeds as follows. Part I briefly develops the concept of racial capitalism, to anchor the analysis that follows. I use the concept

¹⁹ See, e.g., Brito et al., *supra* note 18 (showing how state civil courts serve as instruments of racial capitalism by focusing on debt collection); Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127 (2022) (cataloguing examples of how law facilitates profit-making and race-making, two key mutually supporting, structural features of racial capitalism).

²⁰ See, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016) (not mentioning the criminal system); Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391 (2023) (same). Even historical work that examines the labor governance functions of criminal law seems to accept more rigid boundary lines for today's purposes. See Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924*, 75 U. COLO. L. REV. 667, 669 (2004) (“[C]ontemporary labor law and criminal law are fundamentally distinct fields, characterized by different structures, functions, and conceptual bases.”). Understanding “criminal law as a social-structuring mechanism,” Benjamin Levin has challenged this orientation and has described how “criminal statutes remain a component of the legal web that structures labor markets,” focusing on how criminal law functions as a “weapon[] for union opponents.” Benjamin Levin, *Criminal Labor Law*, 37 BERKELEY J. EMP. & LAB. L. 43, 46 (2016); see also Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2266 (2018).

²¹ Prominent scholarship focused on the criminal system has also understood the intersection with labor to be less important today. See, e.g., Joshua Page & Joe Soss, *The Predatory Dimensions of Criminal Justice*, 374 SCIENCE 291, 291 (2021) (arguing “the center of gravity in criminal legal predation [has] shifted from labor to finance”).

²² See *infra* Part II.C.

to consider how the criminal system and capitalism mutually support one another, while simultaneously structuring racialized class struggle.

Part II describes the criminal system as a labor governance institution. I begin by reviewing three leading critical accounts of the system's labor governance functions. I then reconstruct and supplement these accounts to develop a new theoretical framework. I argue that the criminal system functions to *ration* total available employment, as well as *channel* and *sort* system-involved people into precarious work. Taken together, the system provides decentralized planning and coordination fit for the labor markets of a punitive society. This becomes especially apparent when the system is seen as a foil to the idea of a federal job guarantee, which civil rights and labor groups fought for in the 1970s but never realized. I conclude this Part by using the concept of interest convergence to critique the business lobby's new consensus around reform, which focuses on removing "barriers" to employment system-involved people face. I argue, rather, that these reformist aspirations are better understood as part of a multilayered strategy to maintain an imbalance of power between workers and employers.

Part III describes the structure and prevailing economic ideologies around the PIC. I contrast the PIC with the military-industrial-complex to clarify its most structurally salient feature, which is the PIC's existence on state and local government balance sheets. I also identify the economic justifications that underlie the PIC's development across a rural-urban continuum. These features help explain why the criminal system continues to serve as a staging ground for broader struggles around how the economy should work, and for whom. While recent scholarship has tended to consider the critiques and demands of abolitionist and other left social movements to illustrate this, I look in the other ideological direction. I focus on how the U.S. Chamber of Commerce has been at the forefront of the national moral panic around retail theft. The Chamber has used the panic to simultaneously defend *both* the criminal system — well beyond the boundaries of the narrow issue of retail theft — *and* the Chamber's own vision of "American free enterprise." In other words, the Chamber's ideas about how the economy should work, and who its protagonists are, have been linked to a punitive status quo. An anti-state vision of free enterprise and

racialized state violence are bound together here in a project of mutual justification.

Part IV concludes. This analysis provides a new angle from which to revisit the idea of a federal job guarantee as a path not taken, and potential program for the future. But whether the criminal system ceases to function as a major labor governance institution any time soon will depend, in part, on whether labor movements recognize its constitutive role in the broader political economy and oppose it. The business lobby, on the other hand, has already made the connection.

I. DEFINING RACIAL CAPITALISM

In the United States, scholars generally associate the term racial capitalism with Cedric Robinson, who argued that processes of racialization preceded capitalism's historical emergence.²³ According to Robinson, the resulting racial hierarchies structured the development of capitalism in fundamental ways, assigning lower status and worth to particular peoples and spaces, leaving them more vulnerable to exploitation, expropriation, and domination.²⁴ While Robinson provides perhaps the dominant conception of racial capitalism, competing theories exist.²⁵ This Article proceeds from a place of basic agreement among theorists: that racism and capitalism, as a matter of historical record, are “mutually supporting.”²⁶

²³ Robin D. G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, BOS. REV. (Jan. 12, 2017) (explaining Robinson's argument that “capitalism emerged within the feudal order and flowered in the cultural soil of a Western civilization already thoroughly infused with racialism”).

²⁴ CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 9 (3d ed. 2020); see also Brito et al., *supra* note 18, at 1260 (explaining Robinson's argument that “racism was a structuring logic of capitalism”).

²⁵ Consider, for example, Stuart Hall's conception of racial capitalism. See Marcel Paret & Zachary Levenson, *Two Racial Capitalisms: Marxism, Domination, and Resistance in Cedric Robinson and Stuart Hall*, 56 *ANTIPODE* 1802, 1803-05 (2024).

²⁶ Olúfẹ́mi O. Táíwò, *A Framework to Help Us Understand the World*, HAMMER & HOPE (Winter 2023), <https://hammerandhope.org/article/issue-1-article-8> [<https://perma.cc/TYL7-ABLD>].

The criminal system, of course, plays a prominent role in the social construction of race.²⁷ Racial disparities show up at each level, from surveillance to sentencing,²⁸ producing profoundly uneven political, social, and economic consequences, which reinforce racial subordination.²⁹

While this may be indisputable, it doesn't necessarily follow that the criminal system plays a constitutive role in the broader U.S. political economy. Indeed, if one narrowly considers profits that private companies extract,³⁰ or even adds in markets that integrate prison

²⁷ For an important account of a social constructivist view of race, see KAREN E. FIELDS & BARBARA J. FIELDS, *RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE* 25-75 (2012). For a more recent account, see Lily Hu, *What is "Race" in Algorithmic Discrimination on the Basis of Race?*, 21 J. MORAL PHIL. 1, 9-16 (2023), and see also Wendy D. Roth, Elena G. van Stee & Alejandra Regla-Vargas, *Conceptualizations of Race: Essentialism and Constructivism*, 49 ANN. REV. SOCIOLOGY 39, 41-42 (2023), for a comparison of race essentialism to a constructivist view of race.

²⁸ See Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/26EK-CL3T>]; Leah Wang, *Updated Data and Charts: Incarceration Stats by Race, Ethnicity, and Gender for All 50 States and D.C.*, PRISON POLY INITIATIVE (Sept. 27, 2023), https://www.prisonpolicy.org/blog/2023/09/27/updated_race_data/ [<https://perma.cc/8QBE-9MHG>] (finding that "every state locks up Black people at a rate at least double that of white people — and, on average, at six times the rate of white residents").

²⁹ See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2182 (2013); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 76, 102-10 (2020); Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race — Class Subjugated Communities*, 20 ANN. REV. POLIT. SCI. 565, 579-80 (2017).

³⁰ John F. Pfaff, *The Incentives of Private Prisons*, 52 ARIZ. ST. L.J. 991, 991 (2021) ("All told, only about 8% of prisoners in the United States are held in privately run facilities."). The organizations Worth Rises and Color of Change estimate that private companies with links to carceral services generate \$80 billion in revenue each year. COLOR OF CHANGE & WORTH RISES, *supra* note 8, at *Foreword*. To the extent many of the corporations included in the analysis have other significant business segments, that is, without links to the criminal system, this figure is likely an overestimate. (Moreover, the reference is to "revenue" rather than "profits." This \$80 billion revenue figure represents 0.3% of U.S. GDP, assuming a GDP of \$27.36 trillion in 2023.) Of course, there's no doubt that profit motives shape how actors try to influence the development of the criminal system.

labor,³¹ one might comfortably conclude that the criminal system plays only a marginal role. Such a focus, however, reflects only a shallow understanding of capitalist economic dynamics.

This Part, in contrast, describes three overlapping features of capitalism — unequal social relations, market dependence, and investment for profit — to anchor the analysis that follows. The criminal system then moves from the edges to the core of the U.S. political economy.

A. *Unequal Social Relations*

Capitalism involves the unequal division of power over the production and distribution of social wealth, with more power residing with owners, financiers, and managers of business, and less with workers, caregivers, and the poor.³² This division necessarily implicates the state and law, which privilege certain forms of social coordination over others.³³ This unequal sharing of power arises out of, creates anew,

³¹ A recent report estimates that prison labor produces \$11 billion in value, most of which goes into reproducing carceral settings, a small slice of the economy. Dani Anguiano, *US Prison Workers Produce \$11bn Worth of Goods and Services a Year for Pittance*, GUARDIAN (June 15, 2022), <https://www.theguardian.com/us-news/2022/jun/15/us-prison-workers-low-wages-exploited> [<https://perma.cc/8DJL-26UV>]; see also Adam Reich, *From Hard Labor to Market Discipline: The Political Economy of Prison Work, 1974 to 2022*, 89 AM. SOCIO. REV. 126, 126 (2024) (noting “[t]he market for the products of prison labor has declined dramatically, and incarcerated people, on average, are working less than ever before”); Ruth Wilson Gilmore & James Kilgore, *Some Reflections on Prison Labor*, BROOKLYN RAIL, <https://brooklynrail.org/2019/06/field-notes/Some-Reflections-on-Prison-Labor> (last visited date) [<https://perma.cc/456N-FQGC>] (“While some companies do make profits by super-exploiting incarcerated workers, such employers are few and far between.”). We may nevertheless underappreciate how thoroughly prison labor supports the supply chains for many consumer goods, even if only in narrow ways. Robin McDowell & Margie Mason, *Prisoners in the US are Part of a Hidden Workforce Linked to Hundreds of Popular Food Brands*, AP NEWS (Jan. 29, 2024), <https://apnews.com/article/prison-to-plate-inmate-labor-investigation-c6foeb4747963283316e494eadf08c4e>.

³² See Jodi Melamed, *Racial Capitalism*, 1 CRITICAL ETHNIC STUD. 76, 77 (2015) (“Capital can only be capital when it is accumulating, and it can only accumulate by producing and moving through relations of severe inequality among human groups . . .”).

³³ See Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 382-84 (2020).

and sustains political inequality, which is why capitalism sits in persistent tension with democracy.³⁴

This rampant inequality requires stabilization, which can be accomplished through racialized difference.³⁵ As economists studying social stratification explain, racial categories serve the “instrumental purpose” of “differentially distribut[ing] access to wealth, power, and information,” mapping onto the unequal division of power over production and distribution of wealth under capitalism.³⁶ Ruth Wilson Gilmore makes the point more succinctly, noting that “capitalism requires inequality and racism enshrines it.”³⁷ Race, here, plays a functional role, helping capitalist social orders reproduce themselves.

Scholars often point to W.E.B. Du Bois’s *Black Reconstruction* to illustrate this point.³⁸ During the economic revolution that was Reconstruction, Du Bois explained that, even in the midst of other contending and antagonistic forces, there was a real opportunity for labor movements to fundamentally alter the patterns and relations of economic life in the United States.³⁹ This of course never happened, as racial divisions among labor proved intractable.⁴⁰ Instead of solidarity

³⁴ See JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* 230 (2022) (“From the start, we have encountered this basic axiom of constitutional political economy: Capitalist wealth has an inevitable tendency to convert economic into political domination.”); Brishen Rogers, *Capitalist Development, Labor Law, and the New Working Class*, 131 *YALE L.J.* 1842, 1859 (2023).

³⁵ Liam Kofi Bright, Nathan Gabriel, Cailin O’Connor & Olúfémi Táíwò, *On the Stability of Racial Capitalism* (forthcoming) (explaining why race, in particular, has helped the global capitalist social order maintain itself).

³⁶ PATRICK L. MASON, *THE ECONOMICS OF STRUCTURAL RACISM: STRATIFICATION ECONOMICS AND US LABOR MARKETS* 19 (2023); see also Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020* (Nat’l Bureau Econ. Rsch., Working Paper No. 30101, 2022) (tracing the racial wealth gap from 1860 to 2020).

³⁷ Ruth Wilson Gilmore, *The Worrying State of the Anti-Prison Movement*, *SOC. JUST.* (Feb. 23, 2015), <http://www.socialjusticejournal.org/the-worrying-state-of-the-anti-prison-movement/>.

³⁸ See Gonzalez & Mutua, *supra* note 19, at 131.

³⁹ W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 346-47, 353 (1935).

⁴⁰ See ROBINSON, *supra* note 24, at 229 (explaining that Du Bois argued that the “ideologies of racism, and, to a lesser extent, individualism,” as “historical forces,” “precluded the emergence of a powerful labor movement in the United States”); Gonzalez & Mutua, *supra* note 19, at 131 (“Racial stratification, as Du Bois famously

with Black laborers, low-wage white laborers accepted both the “public and psychological wage” associated with the broader white racial coalition’s place in the social hierarchy, as well as many “tangible relative benefits that readily could be assigned monetary values.”⁴¹ Similar dynamics persisted in the leadup to the civil rights movement, where white laborers initiated “hate strikes” to protest the gains of Black workers, thereby accepting limits to the power of labor more broadly.⁴²

These racialized patterns of class stabilization have an even longer history. Beginning in the nation’s earliest days, social and economic conflicts among those recognized as members of the community were frequently resolved through external subordination.⁴³ For example, as populations grew and the supply of land dwindled, regular expropriation of Native land temporarily relieved anxieties among members of the Anglo settler ingroup worried about the “lack of access to land and the fear of rural tenancy,” that is, the possibility that they themselves would become vulnerable to exploitation.⁴⁴

suggested, stabilizes capitalism by dividing the working class, allowing non-elite white workers to perceive their interests as aligned with those of white owners of capital.” (internal citations omitted)).

⁴¹ William A. Darity Jr., Darrick Hamilton, Patrick L. Mason, Gregory N. Price, Alberto Dávila, Marie T. Mora & Sue K. Stockly, *Stratification Economics: A General Theory of Intergroup Inequality*, in *THE HIDDEN RULES OF RACE: BARRIERS TO AN INCLUSIVE ECONOMY* 41 (2017). The authors explain that this “implicit intraracial contract” continues to exist in the United States today, where “whites of all social classes and education levels” enjoy better social and economic outcomes. *Id.*; see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1734, 1758-61 (1993) (discussing the rights to use and enjoyment that attach to whiteness, and the persistence of whiteness as a valued social identity).

⁴² See Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786, 798 (1988); see also DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 169 (2007). There are, however, scattered historical examples of anti-racist unionism and racial solidarity among workers. See, e.g., RICHARD HALPERN, *DOWN ON THE KILLING FLOOR: BLACK AND WHITE WORKERS IN CHICAGO’S PACKINGHOUSES, 1904-54* (1997) (discussing the organization of workers in Chicago’s packinghouses across racial lines).

⁴³ See AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 14-15 (2010).

⁴⁴ *Id.* at 130 (describing this “particularly intense commitment to Indian expropriation”).

By limiting the power of labor movements and preserving a social structure through state-sanctioned and extra-legal violence, race stabilized class relations. As argued below, the criminal system now serves this function.

B. *Market Dependence*

People generally depend on the “market” to survive under capitalism.⁴⁵ In particular, most people must work to live.⁴⁶ They enter the market to exchange their labor for wages, which they use to acquire basic needs.⁴⁷

There is of course variety in how groups and spaces are integrated into the many social fields of patterned economic activity, governed by differing laws and norms, which we call markets. Racialized difference, in particular, shapes these varied experiences of market dependence.⁴⁸ A brief tour of U.S. history points to the persistent importance and often violent incorporation of racialized difference into stratified labor

⁴⁵ Tim Barker, *Transition Theory*, PHENOMENAL WORLD (Dec. 3, 2020), <https://www.phenomenalworld.org/reviews/commercial-capitalism/> [<https://perma.cc/MH9R-FV2Z>] (describing Ellen Meiksins Wood’s theorization of the origins of capitalism, “that the historically specific core of capitalism is market dependence (people cannot access the means of their subsistence without going through the market)”). People also depend on the market to flourish. Profit-driven businesses dominate production, which they undertake for exchange in general (in other words, for markets). SAMUEL A. CHAMBERS, *CAPITALIST ECONOMICS* 43-44 (2022) (explaining production *for* markets — for exchange in general — as a core feature of capitalism, and “that prior to the sixteenth century, no social order had ever been based on a mode of production oriented primarily toward market exchange”).

⁴⁶ See Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 179-80 (2021) (explaining that the U.S. political-economic system creates a social hierarchy whereby “most people are compelled to submit themselves to others who already have more assets than they do”). Here, I allude to STEVEN ATTEWELL, *PEOPLE MUST LIVE BY WORK: DIRECT JOB CREATION IN AMERICA, FROM FDR TO REAGAN* (2018).

⁴⁷ Such markets are often contrasted with the idea of a commons. See ASTRA TAYLOR, *THE AGE OF INSECURITY* 60-61 (2023).

⁴⁸ Market competition “creates differentiation” and involves strategic interactions, where “economic power . . . may be a necessary requirement to successfully compete.” MASON, *supra* note 36, at 53; see also Lillian Cicerchia, *Why Does Class Matter?*, 47 SOC. THEORY & PRAC., 603, 621 (2021) (“Class is a racialized, gendered group because market competition is a process of social differentiation and the norms that are functional to it and adapted by its practitioners are constitutive of that process.”).

processes: from slavery;⁴⁹ to convict leasing;⁵⁰ to Chinese labor on railways and the related conquest of Native territory;⁵¹ to the Bracero Program initiated during World War II;⁵² to racialized exceptions in New Deal and post-war social programs linked to work;⁵³ to prison labor in the era of mass incarceration;⁵⁴ to today's migrant labor;⁵⁵ and to innovation in the digital economy.⁵⁶ These dynamics also have a gendered dimension.⁵⁷

Today's criminal system mediates the experience of market dependence for an extraordinary number of individuals.⁵⁸ Through ways direct and indirect, the system pushes people towards precarious work, urging them along the way to embrace market-oriented subjectivities. In other words, it serves as a key institutional channel, providing both material and ideological infrastructure, to subordinate labor. Additionally, even as the system disciplines those who fail the test of market dependence (by sweeping up individuals experiencing economic insecurity) and constrains the power of broader labor movements

⁴⁹ See, e.g., ERIC WILLIAMS, *CAPITALISM & SLAVERY* (3d ed. 1944) (explaining how slavery drove capitalist economic development).

⁵⁰ See, e.g., DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* (2008) (examining the role of convict leasing in the post-Reconstruction South).

⁵¹ See, e.g., MANU KARUKA, *EMPIRE'S TRACKS* (2019) (exploring how expropriation of Native land and exploitation of Chinese workers, together, played critical roles in the development of the U.S. political economy).

⁵² Bracero Program, BRITANNICA, <https://www.britannica.com/event/Bracero-Program> (last visited Nov 21, 2024) [<https://perma.cc/9B27-V2ER>].

⁵³ See, e.g., IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* (2005) (describing the racial boundary lines along which New Deal programs were drawn, excluding racial groups from state support).

⁵⁴ See, e.g., Heather Ann Thompson, *The Prison Industrial Complex: A Growth Industry in a Shrinking Economy*, 21 *NEW LAB. F.* 38 (2012) (arguing the carceral state significantly affects labor more broadly) [hereinafter Thompson, *The Prison Industrial Complex*].

⁵⁵ See Gonzalez & Mutua, *supra* note 19, at 155-58.

⁵⁶ See, e.g., Daria Roithmayr, *Racism Pays: How Racial Exploitation Gets Innovation Off the Ground*, 28 *MICH. J. RACE & L.* 145 (2023) (explaining how recent innovations in the digital economy have depended on racial exploitation).

⁵⁷ Nina Banks, *Black Women's Labor Market History Reveals Deep-seated Race and Gender Discrimination*, *ECON. POL'Y INST.* (Feb. 19, 2019, 2:11 PM), <https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination/> [<https://perma.cc/4DGW-8PGP>].

⁵⁸ See *infra* Part II.B.

(which might challenge how the norm of market dependence operates), it also provides a source of direct job creation. It is in these numerous, complementary, and conflicting ways that the criminal system is inextricably linked to the experience of market dependence.

C. *Investment for Profit*

Capitalist processes depend on investment — the advancing of money to initiate production. Those with money to spare, or access to credit, undertake such investment based on their expectations about demand and, in turn, the potential profits they will receive.⁵⁹ The state can play varying roles here, from adopting a laissez-faire posture, to offering “bribes to capital”⁶⁰ to encourage investment, to undertaking more assertive interventions of its own.⁶¹

⁵⁹ CHAMBERS, *supra* note 45, at 119 (“[T]he continued running of the capitalist system depends not only on the actions and choices of entrepreneurs (to use their money to initiate production) but also on the expectations entrepreneurs have about the possible realization of value (sales of commodities) at the end of the process.”). Because the future presents uncertainty, there is a psychological element to this investment activity, the “animal spirits” Keynes famously wrote about. STEPHEN A. MARGLIN, RAISING KEYNES 360 (2021) (describing Keynes’ conception of “animal spirits” as the “optimism or pessimism of the investor herself”); see YAIR LISTOKIN, LAW AND MACROECONOMICS 27 (2019); see also Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMPAR. ECON. 315, 316 (2013).

⁶⁰ Tim Barker, *From Keynes to the Keynesians: Socialised Investment and the Spectre of Full Employment*, VERSO (Dec. 4, 2020), <https://www.versobooks.com/blogs/news/4936-from-keynes-to-the-keynesians-socialised-investment-and-the-spectre-of-full-employment> [<https://perma.cc/D68Y-CC8Q>] (attributing the phrase “bribe to capital” to economist Paul Samuelson).

⁶¹ Law, meanwhile, provides essential foundations for all this activity, with property, contract, corporate, bankruptcy, tax, and other law structuring and channeling investment activity towards particular ends, encouraging and protecting certain forms of wealth creation. See JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924) (examining how law structures capitalist economic activity); KATHARINA PISTOR, CODE OF CAPITAL 3 (2019); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 627-28 (1943); David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 652-61 (2014); Sanjukta Paul, *On Firms*, 90 U. CHI. L. REV. 579, 581 (2023).

This mode of investment presents a persistent source of instability.⁶² Overall economic activity depends significantly on the decisions of private actors to undertake investment based on their expectations of profit. Because such decisions are made under conditions of uncertainty, they “rely on some combination of hunch and convention” and may be “subject to sudden and violent disruption,” which ultimately “means that a capitalist economy is subject to ups and downs” in levels of production and employment.⁶³ The economy may even settle at an “unemployment equilibrium” if market mechanisms are simply left to themselves.⁶⁴

Today’s criminal system serves to legitimize, obscure, and distribute the pain of this structural dynamic. Above all, this is evident in the system’s rationing function.⁶⁵

State social spending may complement this unstable mode of investment, so long as such spending does not threaten the dominant position of private capital. A theory of racial capitalism predicts race will play a key role in determining the permitted boundaries of this state social spending. In particular, the state may bolster race-making institutions like the criminal system.⁶⁶

This preference for criminal system spending takes shape in different ways across a rural-urban continuum. Jail and prison construction becomes a development strategy for economically distressed rural and semi-rural areas. In urban and suburban settings, meanwhile, law enforcement spending provides the basic security deemed necessary for market activity to occur. The Chamber of Commerce’s recent efforts to strengthen the criminal system across the country provide a powerful

⁶² See HYMAN P. MINSKY, *STABILIZING AN UNSTABLE ECONOMY* 18 (2008); Hyman P. Minsky, *Capitalist Financial Processes and the Instability of Capitalism*, 14 *J. ECON. ISSUES* 505, 516 (1980).

⁶³ MARGLIN, *supra* note 59, at 35; *see also* JOAN ROBINSON, *INTRODUCTION TO THE THEORY OF EMPLOYMENT* 91-94 (2d ed. 1964).

⁶⁴ MARGLIN, *supra* note 59, at 160.

⁶⁵ *See infra* Part II.B.

⁶⁶ Institutions that tend to threaten the status quo, on the other hand, may be negatively racialized. Consider the raced and gendered critiques of welfare provision during the Reagan years. *See* Mary A. Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 *U.C. DAVIS L. REV.* 195, 223 (2020).

illustration of this latter dynamic.⁶⁷ Those efforts also reflect the criminal system's role as a site of ideological contestation around fundamental questions of political economy.

II. LABOR THEORIES OF CRIMINAL PUNISHMENT

In 1978, President Jimmy Carter signed the Humphrey-Hawkins Full Employment Act into law. Absent from the bill's final text was a federal job guarantee, a key demand borne out of civil rights, labor, and Black freedom struggles spanning several decades.⁶⁸ Supporters, like Coretta Scott King, aimed to achieve this guarantee through the creation of a legally enforceable right to a job and the development of national planning mechanisms to make such a right a reality.⁶⁹ But faced with intense business opposition, led by the Chamber of Commerce,⁷⁰ and deep skepticism among leading economists of the day,⁷¹ the final legislation arrived as a severely watered-down compromise.

A true job guarantee would have significantly altered the balance of power between labor and capital.⁷² Instead, the 1970s concluded with

⁶⁷ See *infra* Part III.B.

⁶⁸ DAVID STEIN & IRA REGMI, ROOSEVELT INST., *THE CIVIL RIGHTS STRUGGLE FOR TRUE FULL EMPLOYMENT* 4, 7-8 (2024), https://rooseveltinstitute.org/wp-content/uploads/2024/04/RL-Civil-Rights-Struggle-for-True-Full-Employment-Brief_202404.pdf [<https://perma.cc/4QGT-BUNP>].

⁶⁹ Scott King viewed “the struggle for the franchise [as] indissolubly tied to the struggle for economic well-being and material flourishing,” and participated in grassroots efforts to shape national legislation providing for a job guarantee. David Stein, *Why Coretta Scott King Fought for a Job Guarantee*, BOS. REV. (May 17, 2017), <https://www.bostonreview.net/articles/david-stein-why-coretta-scott-king-fought-job-guarantee/> [<https://perma.cc/DG6N-BS4X>].

⁷⁰ See Edward Cowen, *Carter Endorse Modified Version of Humphrey-Hawkins Jobs Bill*, N.Y. TIMES (Nov. 15, 1977), <https://www.nytimes.com/1977/11/15/archives/carter-endorses-modified-version-of-humphreyhawkins-jobs-bill.html> [<https://perma.cc/4BK6-MBYK>] (noting the Chamber's opposition to the bill, which “seemed to be a signal of strong opposition from the business community”).

⁷¹ See JEFFERSON COWIE, *STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS* 275 (2012).

⁷² We see a less radical rebalancing of power when the economy moves closer to full employment, when even the most marginalized workers may see gains in their social position thanks to a tighter labor market. See MASON, *supra* note 36, at 52 (“Persistent full employment is an important first step for eradicating structural racism.”). However,

the start of the “Volcker shock,” ushering in a devastating period of high unemployment, particularly for Black workers.⁷³ The modern criminal system emerged through this history, with mass incarceration accelerating in the 1980s.⁷⁴

In the decades since, the criminal system has developed into a major labor governance institution. This Part begins by reviewing three important accounts of the system’s labor governance functions. As we move through these accounts, analytical separation between the “economy” and criminal system begins to break down. The warehousing account, which refers to the idea that prisons “warehouse” surplus populations for whom capitalist production has little need, emphasizes separation between the economy and criminal system. In contrast, the prison labor-free labor divide, which highlights the competitive threat prison labor poses to so-called free labor, emphasizes interaction between the domains. Finally, the idea of a carceral labor continuum, which explains how the criminal system is deeply implicated in an increasing number of supposedly free-world labor arrangements, emphasizes convergence across the two spheres.

I reconstruct and supplement these accounts to develop a new theoretical framework. The criminal system, I argue, should be understood as *rationing* total available employment, as well as *channeling* and *sorting* system-involved people into subordinated labor positions. On the whole, the system provides decentralized planning and coordination fit for the labor markets of a punitive society.

In this regard, the criminal system functions as a foil to the idea of a job guarantee. First, although the criminal system provides a modest

some groups, like formerly incarcerated people, continue to struggle significantly under such conditions. See Talmon Joseph Smith, *Ex-Prisoners Face Headwinds as Job Seekers, Even as Openings Abound*, N.Y. TIMES (July 6, 2023), <https://www.nytimes.com/2023/07/06/business/economy/jobs-hiring-after-prison.html>; Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People’s Employment Reveal Labor Market Injustices*, PRISON POL’Y INITIATIVE (Feb. 8, 2022), <https://www.prisonpolicy.org/blog/2022/02/08/employment/> [<https://perma.cc/4YME-EFD9>].

⁷³ See MASON, *supra* note 36, at 97-101; Stein & Regmi, *supra* note 68, at 9-11.

⁷⁴ *Incarceration Statistics*, VERA, <https://www.vera.org/ending-mass-incarceration/causes-of-mass-incarceration/incarceration-statistics> (last visited Sept. 25, 2024) [<https://perma.cc/6XRC-SWQ3>] (noting “[t]he number of people incarcerated in jails in prisons has increased dramatically since 1980”).

amount of direct job creation, those jobs depend on the *continuation* of economic insecurity, rather than its *elimination*. Second, rather than creating institutions that allow the state to act as *employer-of-last-resort*,⁷⁵ the criminal system functions as the institutional channel through which *workers-of-last-resort* join the expansive market for precarious labor, especially as labor markets tighten. Thus, rather than providing a check against the power of employers, the system ultimately constrains the power of workers. Third, whereas demands for a job guarantee grew from recognition that unemployment was an enduring, *structural* phenomenon (i.e., a labor market norm),⁷⁶ the criminal system treats economic insecurity as the problem of *individuals*, maintaining a determined blindness to market structure. Finally, the two foils embody radically different notions of equality. The job guarantee reflects a vision of equality grounded in *positive* economic rights that promise a baseline of material security. The criminal system, at best, reflects a *negative* vision, subordinating liberty and equality to what the market has on offer.⁷⁷

To illustrate these dynamics, this Part concludes by analyzing how business groups have engaged with the criminal system in recent years, in the context of historically tight labor markets.

A. From the Warehouse to a Continuum

We might criticize the invisibility of the two million-plus incarcerated people in our labor force statistics for a number of reasons.⁷⁸ For one,

⁷⁵ See Hiba Hafiz, *A Federal Job Guarantee to Combat Geographic Inequality*, ROOSEVELT INST. 1, 13 (Nov. 2023), https://rooseveltinstitute.org/wp-content/uploads/2023/11/RI_A-Federal-Job-Guarantee-to-Combat-Geographic-Inequality_Brief_202310.pdf [<https://perma.cc/RXS9-EFNW>] (describing the federal government’s “employer of last resort” function in the context of a job guarantee to address geographic inequality).

⁷⁶ See Stein & Regmi, *supra* note 68, at 5.

⁷⁷ See Olúfẹ̀mí O 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/H6CM-4VKT>] (discussing the familiar distinction between positive and negative liberty).

⁷⁸ See Lauren Melodia, *How 2.3 Million Incarcerated People are Currently Excluded from the Aspiration of Full Employment*, ROOSEVELT INST. (May 17, 2021), <https://rooseveltinstitute.org/2021/05/17/2-3-million-incarcerated-people-excluded-from-aspiration-of-full-employment/> [<https://perma.cc/FFH8-W3J5>] (“[P]eople in prison

many of these people work. Another reason is that over 600,000 of them return to the community each year from their prison stays.⁷⁹ When we react to changes in the national unemployment rate, this group is not included in the basic calculations. This statistical erasure symbolizes the idea that prisons are spaces for “surplus” populations, people who are not needed in ongoing capitalist processes of production and consumption.⁸⁰

Scholars who emphasize this specific penal function have described the prison as a “warehouse.”⁸¹ This notion marks a historical break from past forms of racialized social control, because the “warehouse” prison “does not carry out a positive economic mission.”⁸² Rather, “it serves only to warehouse the precarious and deproletarianized fractions of the black working class.”⁸³ This account explains much of what prisons have done since their period of rapid growth beginning in the 1970s and 1980s, up to the present. Most of the people ensnared in these institutions have historically struggled in the labor market and have experienced unemployment.⁸⁴ And their labor, while in prison, has mainly been dedicated towards reproducing the prison system itself, not towards market production.⁸⁵ That picture of prison labor persists

comprise roughly half of the institutionalized population that is excluded from the government’s definition of the labor force.”).

⁷⁹ Wendy Sawyer, *Since you Asked: How Many People are Released From Each State’s Prisons and Jails Every Year?*, PRISON POL’Y INITIATIVE (Aug. 25, 2022), <https://www.prisonpolicy.org/blog/2022/08/25/releasesbystate/> [<https://perma.cc/Y8AD-57VB>].

⁸⁰ See GILMORE, *supra* note 12, at 70 (describing the “surplus” population of “workers at the extreme edges, or completely outside, of restructured labor markets”).

⁸¹ JONATHAN SIMON, *GOVERNING THROUGH CRIME* 141 (Oxford University Press 2007) (discussing imprisonment’s “increasingly warehouse-like” quality); Loïc Wacquant, *From Slavery to Mass Incarceration*, 13 *NEW LEFT REV.* 41, 53-54 (2002).

⁸² Wacquant, *supra* note 81, at 53.

⁸³ *Id.*

⁸⁴ Marc-Andre Pigeon & L. Randall Wray, *Can Penal Keynesianism Replace Military Keynesianism? An Analysis of Society’s Newest “Solution” for the Hard to Employ and a Proposal for a More Humane Alternative*, 27 *SOC. JUST.* 148, 149 (2000); see also FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 134 (1991) (discussing the relationship between unemployment and incarceration rates).

⁸⁵ See Pigeon & Wray, *supra* note 84, at 152. *But see* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment*

today. A recent report notes that of the \$11 billion in “value” produced by prisoners annually, \$9 billion is in the form of services that go to maintaining prisons themselves.⁸⁶ Historian Dan Berger puts the point this way: “Idleness is a feature, not a bug, of American punishment.”⁸⁷ Referring to the “warehouse prison,” he adds that “carceral expansion is a form of political as well as economic repression aimed at managing worklessness among the Black and Brown (and increasingly white) working class for whom global capitalism has limited need.”⁸⁸

Under this warehouse conceptualization, the prison is “an appendage.”⁸⁹ It represents an add-on institution, sitting isolated outside the fringes of labor markets and the broader economy. This understanding emphasizes separateness and exclusion between the criminal system and “normal” economic processes, rather than interaction and permeability. If the criminal system plays a constitutive role in the political economy here, it’s because it is necessary to absorb and manage the unemployed in this way to avoid more severe social crises. This is an important starting point for our analysis, but it remains incomplete. It understates the criminal system’s role as it relates to the broader political economy of labor, and it reifies analytical boundary lines between criminal punishment and the economy.⁹⁰

Other accounts emphasize the relationality between prison labor and so-called “free” labor. Prisoners, here, represent “an alternative source of cheap, subordinated labor power,”⁹¹ whose exploitation impacts the

Relationships, 61 VAND. L. REV. 857, 892-93 (2008) [hereinafter Zatz, *Working at the Boundaries*] (challenging this market versus non-market boundary drawing).

⁸⁶ ACLU & THE UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 6 (2022) [hereinafter CAPTIVE LABOR].

⁸⁷ Dan Berger, *How Prisons Serve Capitalism*, PUB. BOOKS (Aug. 17, 2018), <https://www.publicbooks.org/how-prisons-serve-capitalism/> [<https://perma.cc/7JPZ-9PHB>].

⁸⁸ *Id.*

⁸⁹ Wacquant, *supra* note 81, at 54.

⁹⁰ See Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AMER. HIST. 703, 716 (2010) (arguing that mass incarceration was a “historical phenomenon that — like deindustrialization and white flight — *itself* caused collapse in America’s inner cities”) [hereinafter Thompson, *Why Mass Incarceration Matters*].

⁹¹ Zatz, *The Carceral Labor Continuum*, *supra* note 6, at 133.

broader “American working class,”⁹² which faces downward wage pressure and job losses because of this separate labor source. While the warehousing account emphasizes enforced idleness, scholars who highlight this relationality have argued that the “turn to mass incarceration adversely impacted the American labor movement.”⁹³

Historian Heather Thompson describes how in the postwar period, “when private and public employers managed to secure, and then began regularly to exploit [prison labor], the American labor movement was undermined, the economic security of the free-world working class was compromised, and income as well as racial inequality was actively exacerbated.”⁹⁴ Even if it was not strong enough to affect “general markets,” the turn to prison labor strongly impacted specific geographies.⁹⁵ From post-industrial Illinois, to tech manufacturing in Austin, Texas, to laundry services in Eugene, Oregon, there are numerous examples of “free-world wages [having] been cut and jobs [having] been eliminated as a result of prison labor in the later postwar period.”⁹⁶

Beyond wages and jobs, the legal regime surrounding prison labor has also contributed to broader deterioration in working conditions. As a baseline, prevailing judicial interpretation of the Thirteenth Amendment to the U.S. Constitution permits coerced labor “as a punishment for crime.”⁹⁷ Additionally, Eighth Amendment doctrine accommodates a high degree of disregard for the safety and well-being of prisoners, including the conditions under which they work.⁹⁸ Prisoners are also excluded from most of the fundamental workplace protections set forth in federal statutes, such as the Occupational Safety and Health Act, the Fair Labor Standards Act, and the National Labor

⁹² Thompson, *The Prison Industrial Complex*, *supra* note 54, at 45.

⁹³ Thompson, *Why Mass Incarceration Matters*, *supra* note 90, at 716.

⁹⁴ *Id.*

⁹⁵ *Id.* at 721.

⁹⁶ *Id.* at 722.

⁹⁷ U.S. CONST. amend. XIII.

⁹⁸ See CAPTIVE LABOR, *supra* note 86, at 62; see also Sandeep Singh Dhaliwal, *Investing in Abolition*, 112 GEO L.J. 1, 39-43 (2023) (describing the Eighth Amendment as providing a right to credit); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 889 (2009); Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANN. REV. OF CRIMINOLOGY 153, 164 (2022).

Relations Act, as well as many state level statutes.⁹⁹ Collectively, this body of law serves to increase prisoners' "competitive threat to free-world workers in the same industries"¹⁰⁰ and depress working conditions on the outside, as employers can save on health, safety, and other workplace protections through prison labor.¹⁰¹

But organized labor has historically contested this competitive threat. For much of the twentieth century, laws restricting sales of goods produced by prisoners, even criminalizing the interstate transportation of such goods, offered some protection to free labor.¹⁰²

Such protection, however, was always partial, taking shape in predictable ways along lines of race and gender. In particular, the "state use" exception, "under which government entities could freely purchase and use goods manufactured by incarcerated people," preserved "prison labor while attempting to separate it from the market."¹⁰³ That supposed separation operated in racialized ways. Laws that barred the use of prison labor on federally funded state road projects, for example, opened opportunities for private contractors and their white workforces.¹⁰⁴ And whereas it was legal to use prison labor for agricultural production, strong restrictions applied to manufactured goods, mirroring "the pattern of New Deal employment laws that focused on protecting workers in sectors dominated by and associated with white men."¹⁰⁵

Legislative changes in the aftermath of the civil rights movement would unsettle this arrangement. According to Thompson, federal laws passed in 1979 "dramatically weakened New Deal-era restrictions on the

⁹⁹ CAPTIVE LABOR, *supra* note 86, at 61. Recently, however, the Washington Supreme Court held the state's minimum wage law applied to civil immigration detainees held in a private facility. See *Nwauzor v. The GEO Group, Inc.*, 530 P.3d 93, 104-05 (Wash. 2023).

¹⁰⁰ Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1451 (2022).

¹⁰¹ See Thompson, *Why Mass Incarceration Matters*, *supra* note 90, at 722 ("Prison labor was attractive to American employers for more reasons than lower wages; they also did not have to deal with sick days, unemployment insurance, or workman's compensation claims, and they had few liability worries when it came to toxins or accidents in prison workplaces.").

¹⁰² See Zatz, *The Carceral Labor Continuum*, *supra* note 6, at 143.

¹⁰³ *Id.* at 144.

¹⁰⁴ *Id.* at 144-45.

¹⁰⁵ *Id.* at 146.

sale of prison-made goods and the use of prison labor.”¹⁰⁶ The timing is notable. Inflation had picked up, commanding outsized political attention.¹⁰⁷ During this period, business and industry groups successfully agitated for anti-labor legislation,¹⁰⁸ including expanding access to prison labor. By the end of the twentieth century, “thirty-six states granted private companies complete access to prison labor.”¹⁰⁹ Another change to federal law in 1996 expanded the “state use” exception to permit sales to nonprofit and nongovernmental organizations.¹¹⁰

In sum, this dynamic interaction between prison and free labor across the twentieth century often tracked broader political-economic struggle and change. Yet, a focus on this divide as the *main* labor story still depends on analytical separation between the economy and criminal system, even as it emphasizes interaction. What’s more, such a focus misses the mark empirically. It captures what one might consider a systemically *insignificant*, or marginal, scale of activity.¹¹¹

In a more recent account, Noah Zatz challenges the neatness of the prison labor–free labor divide altogether. Zatz describes the emergence of a “carceral labor continuum,” to capture the broader category of labor performed under the threat of punishment, which stretches beyond prison walls.¹¹² Such labor includes work formerly incarcerated people perform while on parole or work release, to pay off carceral debt or other legal financial obligations (like child support), or as an alternative to incarceration.¹¹³

This account provides a more expansive view of the criminal system’s role in facilitating “subordination *through* labor,” rather than simply

¹⁰⁶ Thompson, *Why Mass Incarceration Matters*, *supra* note 90, at 720.

¹⁰⁷ See COWIE, *supra* note 71, at 288.

¹⁰⁸ See *id.* at 293–96.

¹⁰⁹ Thompson, *Why Mass Incarceration Matters*, *supra* note 90, at 720.

¹¹⁰ Zatz, *The Carceral Labor Continuum*, *supra* note 6, at 147.

¹¹¹ See Reich, *supra* note 31. There are numerous reasons for this relatively small scale, including the resistance of incarcerated people themselves (making them less desirable targets for “efficient” exploitation), and federal legislative changes requiring incarcerated people be paid prevailing wages (making certain work programs less attractive to private companies). See *id.* at 133, 143.

¹¹² Zatz, *The Carceral Labor Continuum*, *supra* note 6, at 134.

¹¹³ See *id.* at 149–62.

managing exclusion from labor markets, or interaction between separate domains.¹¹⁴ Workers experience a profound form of disempowerment as the threat of criminal punishment acts as an anchoring force in their work relationships. The threat of “get to work or go to jail” means these workers, who tend to already be vulnerably positioned in labor markets, “cannot afford to refuse a job, quit a job, or challenge their employers — and they can even be forced to work for free.”¹¹⁵ These additional subordinated forms of labor similarly depress labor standards and diminish worker power.¹¹⁶

The threat of “get to work or go to jail” is indeed real. The requirement to maintain employment is a standard probation or parole condition, and “[o]n any given day, roughly 9,000 people nationwide are incarcerated for violating” such a requirement.¹¹⁷ For the rest of the sizable population under some form of community supervision, struggling to avoid this result, the work itself may be punishment. Studying the experiences of formerly incarcerated workers, sociologist

¹¹⁴ *Id.* at 139.

¹¹⁵ Noah Zatz, Tia Koonse, Theresa Zhen, Lucero Herrera, Han Lu, Steven Shafer & Blake Valenta, *Get to Work or Go to Jail: Workplace Rights Under Threat*, UCLA LAB. CTR. 1, 1 (2016).

¹¹⁶ *Id.* at 3-4.

¹¹⁷ *Id.* at 2; see also Dallas Augustine, *Coerced Work During Parole: Prevalence, Mechanisms, and Characteristics*, 61 CRIMINOLOGY 546, 551 (2023) (explaining parole conditions involve either direct or indirect requirements that parolees obtain employment, including the “broad discretion” parole agents have in connection with the standard “condition requiring parolees to obey all [] instructions from their parole agents,” which “makes coerced work possible even in jurisdictions like California without formal employment mandates”). Fines and fees generate similar dynamics. See Elizabeth Jones, *Racism, Fines and Fees and the US Carceral State*, 59 RACE & CLASS 38, 40 (2017) (documenting examples of individuals imprisoned for failure to pay fines). The way fines connect with expectations about work is that a duty to pay a fine is, in effect, an expectation to work (to earn enough money to pay the fine). In the case of restitution centers, such as those in Mississippi, the connection between fines and work is more direct. See, e.g., Anna Wolfe & Michelle Liu, *Think Debtors Prisons are a Thing of the Past? Not in Mississippi*, MARSHALL PROJECT (Jan. 9, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/01/09/think-debtors-prisons-are-a-thing-of-the-past-not-in-mississippi> [<https://perma.cc/5596-ATN5>] (“Mississippi appears to be the only state where judges lock people up for an indefinite time [at restitution centers] while they work to earn money to pay off court-ordered debts.”).

Gretchen Purser argues that “mass incarceration should be recognized not simply as a ‘barrier to good jobs’ but as an ‘enforcer of bad ones.’”¹¹⁸

There are parallels between these dynamics and those migrants experience as they face the threat of detention and deportation, which often pushes them to endure deeper forms of labor exploitation.¹¹⁹ Punitive immigration laws and their intersection with the criminal system don’t simply operate to exclude people from the United States, but also *include* them on a socially unequal basis, especially as highly exploitable labor.¹²⁰

B. Rationing, Channeling, and Sorting

This Section reconstructs and supplements the above accounts, to develop the criminal system’s constitutive role, as a labor governance institution, in the broader social structure of U.S. racial capitalism. The system, I argue, is deeply implicated in *rationing* total available employment, and *channeling* and *sorting* groups into precarious work. Overall, the system provides decentralized planning and coordination fit for the labor markets of a punitive society — a foil to the planning mechanisms envisioned in the 1970s struggles for a job guarantee.

1. Rationing

We do not live in a dependably full employment economy, nor in a world with a job guarantee, despite the determined efforts of civil rights and labor groups. Involuntary joblessness, rather, is a “labor market norm”;¹²¹ total available employment is *always* being rationed.¹²² Beginning with this macro picture helps illuminate the structural

¹¹⁸ Gretchen Purser, “You Put Up with Anything,” in *LABOR AND PUNISHMENT: WORK IN AND OUT OF PRISON* 230 (Erin Hatton ed., 2021).

¹¹⁹ See Shirley P. Leyro & Daniel L. Stagemen, *Crimmigration, Deportability and the Social Exclusion of Noncitizen Immigrants*, 15 *MIGRATION LETTERS* 255, 257 (2018).

¹²⁰ See Desiree Lim, *Low-Skilled Migrants and the Historical Reproduction of Immigration Injustice*, 24 *ETHICAL THEORY & MORAL PRAC.* 1229, 1235 (2021) (“[C]rimmigration effectively sustains the social subordination of undocumented Latino/a/x migrants, giving employers extraordinary power to exploit and underpay them.” (internal citation omitted)).

¹²¹ MASON, *supra* note 36, at 47.

¹²² See *id.* at 51.

position of the criminal system. The system is not best understood as imposing “barriers” to quality jobs. Rather, it participates in the necessary and ongoing rationing of available employment, helping facilitate, legitimize, and obscure the fact that there aren’t enough (good) jobs to go around under U.S. racial capitalism.

Even in legal scholarship, the argument that structural racism endures in the absence of persistent full employment goes far back.¹²³ In a 1945 article, Pauli Murray argued it was “obvious” that “job discrimination based upon racial or religious prejudice is subsidiary to the more pressing issue of full employment.”¹²⁴ “When jobs are plentiful,” Murray explained, “all kinds of economic discrimination are minimized.”¹²⁵ But when they are not, some basis of social differentiation among workers facilitates and legitimates the rationing of limited employment opportunities.

A racialized criminal system serves this purpose today, in at least two significant ways. The first relates directly to the unemployed. Unemployment is often a precursor to criminal system involvement, and people with criminal histories remain disproportionately unemployed.¹²⁶ Even in a tight labor market, formerly incarcerated people tend to “have remarkably high jobless rates.”¹²⁷ Through stigmatization, temporary erasure from labor force statistics, and an emphasis on individualized rehabilitation, criminal punishment of this

¹²³ See *id.* at 52.

¹²⁴ Pauli Murray, *The Right to Equal Opportunity in Employment*, 33 CAL. L. REV. 388, 432 (1945).

¹²⁵ *Id.*

¹²⁶ See STEIN & REGMI, *supra* note 68, at 9. This is the primary way Katherine Beckett and Bruce Western focus on the criminal system as a “labor market institution” in their pathbreaking article. See Bruce Western & Katherine Beckett, *How Unregulated is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOCIO. 1030, 1032 (1999).

¹²⁷ Smith, *supra* note 72. Those jobless rates are significantly higher for formerly incarcerated Black men and women. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/56GL-ZMKN>]; see also Greg Iacurci, *64% of Unemployed Men in Their 30s Have Criminal Records, a Barrier to Landing a Job*, CNBC (Feb. 22, 2022, 8:30 AM), <https://www.cnbc.com/2022/02/22/64percent-of-unemployed-men-in-their-30s-have-criminal-records-a-barrier-to-landing-a-job.html> [<https://perma.cc/VP4Q-9ASJ>].

population blurs and softens the enduring structural reality of unemployment.

But even critiques of the criminal system, which often focus on “barriers” to “labor market participation,” may obscure this more fundamental issue.¹²⁸ The focus on barriers can suggest that the criminal system distorts otherwise well-functioning markets. The system occasionally produces bad information (e.g., in the form of a criminal history) which leads to unfair discriminatory treatment, rather than a more genuine evaluation of potential job performance. If we can remedy this information problem (e.g., through “clean slate” or “ban-the-box” legislation), then formerly incarcerated people can have fair and equal experiences of the market. Because of their market-favoring pedagogical effects (markets just need the “right” information), such diagnoses of the problem aid in the ongoing legitimation and reproduction of U.S. racial capitalism. They miss how the criminal system supports its more fundamental structure.¹²⁹

The second way the criminal system rations available employment is through direct job creation. Police, prosecutors, corrections officers, parole officers, court personnel, administrative staff, and others comprise this jobs program. But these jobs should be thought of relationally. They depend on a steady supply of joblessness and other forms of economic insecurity, to produce subjects for criminal punishment and control. In this way, the criminal system offers a striking example of direct job “creation” which, when considered from a macro perspective, is better seen as rationing limited available employment.

The ultimately modest, austere nature of this jobs program underscores the point. According to the Bureau of Labor Statistics, “justice, public order, and safety” activities employ around 2.6 million

¹²⁸ See, e.g., Ifeoma Ajunwa & Angela Onwuachi-Willig, *Combating Discrimination Against the Formerly Incarcerated in the Labor Market*, 112 NW. U. L. REV. 1385, 1385 (2018) (discussing “legislative and contractual means” of removing such barriers).

¹²⁹ This becomes clear if we consider *when* the removal of such barriers is likely to be supported by the business class. See *infra* Part II.C.

people.¹³⁰ This is not a particularly impressive number when considered against other industry categories.¹³¹ This reality is most striking in regions where the criminal system purports to supply an economic lifeline. In many rural and semi-rural regions, for example, jail and prison projects have been billed as economic development and revitalization strategies.¹³² Such responses to deindustrialization and globalization, however, have been largely underwhelming in their ability to create jobs. Consider Kentucky, where cages are understood to have substituted for a declining coal industry. In 1949, Kentucky's coal industry employed over 75,000 people, which is "more than ten times the number of prison and jail workers in the state today."¹³³

The relationality of this direct job creation also operates in another important way. Maintaining this rationed, austere jobs program depends on denying formal recognition of incarcerated people's labor (e.g., for purposes of determining the applicability of minimum wage laws). Such labor (involving cooking, cleaning, and other daily maintenance tasks) is necessary to reproduce jail and prison settings, keeping the system churning by way of expropriation.¹³⁴ Additionally,

¹³⁰ *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/cps/cpsaat18.htm> (last modified Jan. 26, 2024) [<https://perma.cc/M9H9-B9Y6>].

¹³¹ For example, the category of "Personal and Laundry Services" employs over 2.7 million people. *Id.* Of course, the high unionization rate within the former category creates a powerful political constituency that favors the continuation of this jobs program. Though, recent analyses suggest police and correctional staff numbers have declined in recent years. See TaLisa J. Carter, *Why Does No One Want to Be a Correctional Officer?!*, URB. INST. (June 3, 2022), <https://www.urban.org/urban-wire/why-does-no-one-want-be-correctional-officer> [<https://perma.cc/M4GX-6JLF>]; Alana Semuels, *Private Security Guards Are Replacing Police Across America*, TIME (May 2, 2023, 8:00 AM), <https://time.com/6275440/insecure-private-security-replacing-police/> [<https://perma.cc/TG25-7GGT>].

¹³² See Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (ed. Marc Mauer & Meda Chesney-Lind) (2002), <https://www.prisonpolicy.org/scans/building.html> [<https://perma.cc/DC2T-HJM9>].

¹³³ JUDAH SCHEPT, *COAL, CAGES, CRISIS* 15 (2022).

¹³⁴ Incarcerated people themselves challenge this reality when they initiate a labor strike, invoking the language of workers. See Sam McCann, *What You Need to Know About the Alabama Prison Strike*, VERA (Oct. 27, 2022), <https://www.vera.org/news/what-you->

the use of incarcerated people’s labor to shore up critical and competing public functions, like fighting wildfires,¹³⁵ and more generally to cheaply supply goods and services for “state use,”¹³⁶ further underscore the austerity through which formal recognition of labor is rationed. Thus, direct job “creation” here rests not only on the widespread economic insecurity which produces subjects for criminal punishment, but also on an immediate and extreme form of economic coercion.¹³⁷

Keeping in view the macroeconomic whole clarifies the criminal system’s multifaceted and contradictory roles as rationer of available employment. Unemployment and underemployment are labor market *norms* rather than aberrations. The system not only operates *through* this set of fundamental constraints (i.e., by absorbing the unemployed and creating a necessarily limited number of jobs), but also *in service of* those constraints (i.e., by legitimizing and obscuring basic structural conditions), thus reinforcing the foundations of U.S. racial capitalism.

need-to-know-about-the-alabama-prison-strike [https://perma.cc/2454-RTQK] (discussing the Alabama prison strike in 2022).

¹³⁵ See, e.g., Sam McCann, *From Fighting Wildfires to Digging Graves, Incarcerated Workers Face Danger on the Job*, VERA (Jul. 26, 2023), <https://www.vera.org/news/from-fighting-wildfires-to-digging-graves-incarcerated-workers-face-danger-on-the-job#:~:text=The%20work%20is%20as%20dangerous,the%20effects%20of%20smoke%20inhalation> [https://perma.cc/4VGA-8NVN] (explaining that in California “incarcerated firefighters are deployed with as little as three weeks of training. In exchange for this incredibly dangerous work, incarcerated firefighters earn between \$2.90 and \$5.12 a day . . . Upon their release from prison, they face a slew of barriers to putting their hard-won expertise into practice as professional firefighters”); see also CAPTIVE LABOR, *supra* note 86, at 17 (“At least 30 states explicitly include incarcerated workers as a labor resource in their state-level emergency operations plans.”); Christina Carrega, *Nearly 100 Prison Inmates in NY to Produce 100K Gallons of Hand Sanitizer Weekly*, ABC NEWS (Mar. 10, 2020, 12:29 PM), <https://abcnews.go.com/Health/prison-inmates-ny-produce-100k-gallons-hand-sanitizer/story?id=69501815> [https://perma.cc/2XLE-PCSA].

¹³⁶ See CAPTIVE LABOR, *supra* note 86, at 39-41.

¹³⁷ The legal and economic status of this “prison housework” has parallels with the treatment of certain social reproductive labor within the “family” or “home.” Zatz, *Working at the Boundaries*, *supra* note 85, at 864, 870.

2. Channeling

The criminal system also plays a significant role in facilitating “subordination *through* labor.”¹³⁸ Emphasizing a prison labor-free labor divide limits one’s understanding of this dynamic. Importantly, many workers participate in ostensibly free-world labor markets *with* a history of criminal system-involvement. Those encounters with the system shape paths of possibility within a broader political-economic context. In today’s context, they *channel* system-involved people toward precarious work.¹³⁹

Beginning with a basic statistical picture gives a sense of the criminal system’s sheer scale as a labor governance institution. As noted, each year, over 600,000 people return to the labor market after being released from prison. And on any given day, nearly 4 million adults in the United States are under some form of community supervision.¹⁴⁰

¹³⁸ Zatz, *The Carceral Labor Continuum*, *supra* note 6, at 139.

¹³⁹ Sociologists, economists, and legal scholars have used the term “channel” to describe the various ways in which economic activity is pushed in certain directions or toward certain ends through legal and social arrangements. Most directly related, sociologists have used that or similar language to describe the ways in which system-involved people are pushed towards precarious work. *See, e.g.*, Susila Gurusami, *Working for Redemption: Formerly Incarcerated Black Women and Punishment in the Labor Market*, 31 GENDER & SOC’Y 433, 440 (2017) (explaining how the “specific labor market context for formerly incarcerated black women . . . serve[s] to funnel [them] into particular types of labor that is low-level, task-oriented, or in service industries”); Gretchen Purser, “*Still Doin’ Time: Clamoring for Work in the Day Labor Industry*,” 15 J. LAB. & SOC’Y 397, 408 (2012) (“Just as former welfare-recipients have been channeled into the ranks of the temporary workforce, so, too, have formerly incarcerated individuals been channeled into the precarious waters of the labor pools.” (internal citations omitted)). Economists have noted how the “mechanism” of racial discrimination more broadly “operates to channel” individuals into low-paid work, which helps explain past racialized employment patterns “in janitorial and domestic services.” Donald J. Harris, *The Black Ghetto as Colony: A Theoretical Critique and Alternative Formulation*, 2 REV. BLACK POL. ECON. 3, 25-26 (1972). Legal scholars, meanwhile, increasingly link antitrust law to the idea of “channeling” competition. Sanjukta Paul, *Methodological and Normative Elements of the New Antitrust*, 11 J. ANTITRUST ENF’T 253, 254 (2023) (“The second foundational analytic element of the new antitrust thinking is the recognition that competition is essentially channelled in particular directions by legal and institutional rules and practices.”).

¹⁴⁰ Evangeline Lopoo, Vincent Schiraldi & Timothy Ittner, *How Little Supervision Can We Have?*, 6 ANN. REV. CRIMINOLOGY 23, 24 (2023).

These individuals are often subject to work requirements, behind which lies the threat of reincarceration, pushing them to accept lower quality jobs. An even broader population, totaling over 10 million each year, return to their communities from shorter term jail stays, facing pressures to rapidly reenter the labor force following their dislocation.¹⁴¹ Women increasingly comprise this population (now at almost 2 million each year), navigating reentry services that are even less adequately designed than for men.¹⁴² More difficult to measure, but no doubt significant, has been the proliferation of criminal system fines and fees, which produce their own pressures to accept precarious work.¹⁴³

While individuals move in and out of the statuses of reentering or being subject to community supervision, other statuses have more permanence. It is estimated that over 24 million people have a felony record, and an estimated 80 million (perhaps millions more) have some form of recorded criminal history.¹⁴⁴ These statuses disqualify

¹⁴¹ See Sawyer, *supra* note 79. This dynamic has become more important in recent years, as “[t]he number of people incarcerated pretrial has more than doubled over the last fifteen years, even as incarceration has otherwise begun to decline.” JOCELYN SIMONSON, *RADICAL ACTS OF JUSTICE* 18-19 (2023).

¹⁴² See Wendy Sawyer, *Who’s Helping the 1.9 Million Women Released From Prisons and Jails Each Year?*, PRISON POL’Y INITIATIVE (July 19, 2019), <https://www.prisonpolicy.org/blog/2019/07/19/reentry/> [<https://perma.cc/FCA3-L4YU>]. There are also ongoing court processes, occurring during normal working hours, where generally poor defendants face pressures to miss work or find non-ideal solutions to caregiving obligations, to avoid “failure[s] to appear” and having a bench warrant issued. Ethan Corey & Puck Lo, *The “Failure to Appear” Fallacy*, APPEAL (Jan. 9, 2019), <https://theappeal.org/the-failure-to-appear-fallacy/> [<https://perma.cc/8N5M-YVLZ>]; Brian Nam-Sonenstein, *High Stakes Mistakes: How Courts Respond to “Failure to Appear,”* PRISON POL’Y INITIATIVE (Aug. 15, 2023), <https://www.prisonpolicy.org/blog/2023/08/15/fta/> [<https://perma.cc/JWW9-52N6>].

¹⁴³ See Zatz et al., *supra* note 115, at 6-7, 13-14. See generally *The Clearinghouse*, FINES & FEES JUST. CTR., <https://finesandfeesjusticecenter.org/clearinghouse/> (last visited Sept. 23, 2024, 2:00 PM) [<https://perma.cc/WX5Z-5297>] (collecting research around fines and fees). These labor pressures from fines and fees may converge with community supervision, as in the case of fees associated with electronic monitoring. See *Electronic Monitoring Fees: A 50-State Survey of the Costs Assessed to People on E-Supervision*, FINES & FEES JUST. CTR. (Sept. 14, 2022), <https://finesandfeesjusticecenter.org/articles/electronic-monitoring-fees-a-50-state-survey-of-the-costs-assessed-to-people-on-e-supervision/> [<https://perma.cc/5G8Y-GYBR>].

¹⁴⁴ Leah Wang, *Guilty by Association: When Parole and Probation Rules Disrupt Support Systems*, PRISON POL’Y INITIATIVE (Nov. 8, 2023), https://www.prisonpolicy.org/blog/2023/11/08/association_restrictions/ [<https://perma.cc/RN6M-PH3F>].

individuals from many jobs and occupational licenses. Of the over 44,000 collateral consequences under federal and state law, about seventy percent relate to employment.¹⁴⁵ Where there are not outright bars to work, there is often a disqualifying background check.¹⁴⁶ And other common collateral consequences, like loss of a driver's license, limit mobility, narrowing the geographic space where one may find work.

Then there are more complex relations. Criminal and immigration law¹⁴⁷ intersect to push millions¹⁴⁸ of immigrants without work authorization towards precarious work as independent contractors, a status that lacks standard employment protections.¹⁴⁹ These labor relations are embedded in a deeply unequal global order. Laws that translate prevailing ideas about state sovereignty permit states to *exclude* migrants seeking admission out of economic desperation.¹⁵⁰ Though deep inequality and histories of colonialism do not provide legal justification for this “economic migration,”¹⁵¹ such migration persists.

¹⁴⁵ U.S. COMM'N CIV. RIGHTS, COLLATERAL CONSEQUENCES 35 (2019).

¹⁴⁶ See *id.* at 41-47; see also Sarah Lageson, *Criminally Bad Data: Inaccurate Criminal Records, Data Brokers, and Algorithmic Injustice*, 2023 U. ILL. L. REV. 1771, 1774-75 (discussing the ubiquity of background checks and criminal record errors). So-called “ban-the-box” laws may be inadequate to deal with this issue. Sadé Lindsay, *Damned if You Do, Damned if You Don't: How Formerly Incarcerated Men Navigate the Labor Market with Prison Credentials*, 60 CRIMINOLOGY 455, 474 (2022) (“[R]outine job application and interview questions can work to maintain ‘the box,’ especially absent of policies applicable to private employers and the implementation of accountability structures to prevent employer noncompliance.” (internal citations omitted)).

¹⁴⁷ Katherine Beckett and Naomi Murakawa place aspects of immigration law within a broader category of what they call the “shadow carceral state.” Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 222 (2012).

¹⁴⁸ See Jeffrey Passel & D'Vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession*, PEW RSCH. CTR. (Nov. 3, 2016), <https://www.pewresearch.org/hispanic/2016/11/03/size-of-u-s-unauthorized-immigrant-workforce-stable-after-the-great-recession/> [<https://perma.cc/K9DG-87VL>].

¹⁴⁹ See Jacob Hamburger, *Hybrid-Status Immigrant Workers*, 73 DUKE L.J. 737, 742-43 (2024).

¹⁵⁰ See E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1529-31 (2019).

¹⁵¹ *Id.* at 1531.

What criminal law does, then, is facilitate the *inclusion* of this set of migrants as a distinct group of vulnerable workers.¹⁵²

A sketch of the broader labor market helps situate the tens of millions whose labor experiences the criminal system shapes. In the United States today, among an estimated 161 million active workers in the labor force¹⁵³ (of which there are an estimated 133 million full-time employees¹⁵⁴), low-wage and other precarious forms of labor have become increasingly pervasive.¹⁵⁵ Even with recent “historic wage

¹⁵² See *Exceptions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/exceptions> (last visited Sept. 21, 2024) [<https://perma.cc/E7UC-3LTH>] (noting employers do not need to verify work authorization for independent contractors, which means undocumented immigrants can avoid fraudulently claiming work authorization by working as independent contractors). Another important set of relations involves the approximately 1-2 million sex workers in the United States, and the ways criminal law structures those relations and labor conditions. See AMIA SRINIVASAN, *THE RIGHT TO SEX* 150-79 (2021); Danielle A. Sawicki, Brienna N. Meffert, Kate Read & Adrienne J. Heinz, *Culturally Competent Health Care for Sex Workers: An Examination of Myths That Stigmatize Sex-Work and Hinder Access to Care*, 34 *SEX REL. THERAPY* 355, 356 (2019); *Is Sex Work Decriminalization the Answer? What the Research Tells Us*, ACLU (Oct. 16, 2020), <https://www.aclu.org/report/sex-work-decriminalization-answer-what-research-tells-us> [<https://perma.cc/524C-QNTP>].

¹⁵³ *Total Employment and the Unemployment Rate in the United States from 1980 to 2023, with Projections Until 2029*, STATISTA, <https://www.statista.com/statistics/269959/employment-in-the-united-states/> (last visited Sept. 21, 2024) [<https://perma.cc/KM3R-DKY8>].

¹⁵⁴ *Monthly Number of Full-Time Employees in the United States from May 2022 to May 2024*, STATISTA, <https://www.statista.com/statistics/192361/unadjusted-monthly-number-of-full-time-employees-in-the-us/> (last visited Sept. 21, 2024) [<https://perma.cc/4TXF-RXBV>].

¹⁵⁵ See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 1 (2014); Hafiz, *supra* note 75, at 6 (noting “it is a struggle for the estimated 50.5 million Americans living in distressed communities to find decent work” and that “[o]ver half of Americans living in distress are people of color”); Rogers, *supra* note 34, at 1851 (arguing that “changes in our political economy and labor law as the postwar order entered a period of crisis . . . reinforced trends toward greater economic inequality and precarity”); Kwang-Yeong Shin, *Precarious Work: A Global Perspective*, *SOCIO. COMPASS* 1, 3 (2023) (discussing increasing prevalence of non-standard employment relations, self-employment, and allocation of risks onto workers through the removal of social and legal protections in the Global North); Bryan L. Sykes, Meghan Ballard, Daniela Kaiser, Vicente Celestino Mata, J. Amanda Sharry & Justin Sola, *Barred: Labor Market Dynamics and Human Capital Development among People on Probation and Parole*, 701 *ANNALS AM. ACAD. POL. & SOC. SCI.*

growth, low-wage workers continue to suffer from grossly inadequate wages” that are “insufficient for individuals and families working to make ends meet,” a situation which disproportionately affects “women and Black and Hispanic workers.”¹⁵⁶ (In fact, the labor share of national income has continued to decline, despite this wage growth.¹⁵⁷) And though labor militancy and union organizing have also recently increased, union density remains near record lows.¹⁵⁸ This ongoing “[d]eunionization, the individualization of employment, fissuring, and other mechanisms of wage suppression have been, in large part, legal projects.”¹⁵⁹ These trends have overlapped with the expansive growth of the criminal system.

Collisions between these two forces over time have necessarily shaped labor markets, facilitating the formation and reproduction of subordinated labor relations. Increasingly, today, individuals occupy a social position that straddles the broad social field the criminal system touches on the one hand, and forms of precarious labor on the other.¹⁶⁰

28, 32, 35 (May 2022) (explaining that “in recent decades, the availability of ‘quality jobs’ . . . has sharply declined” and that “[t]he gig economy now employs approximate one in three U.S. workers”); Kathleen Thelen, *The American Precariat: U.S. Capitalism in Comparative Perspective*, 17 PERSPS. ON POL. 5, 14-15 (2019).

¹⁵⁶ Elise Gould & Katherine deCourcy, *Low-Wage Workers Have Seen Historically Fast Real Wage Growth in the Pandemic Business Cycle*, ECON. POL’Y INST. 1, 2, 10 (Mar. 23, 2023), <https://www.epi.org/publication/swa-wages-2022/> [<https://perma.cc/UB4U-ZYWQ>].

¹⁵⁷ See Michael Sainato, *‘We Deserve More’: US Workers’ Share of the Pie Dwindles*, THE GUARDIAN (May 6, 2024), <https://www.theguardian.com/us-news/article/2024/may/06/workers-income-labor-> [<https://perma.cc/AFJ2-AH62>].

¹⁵⁸ See *Union Membership Rate Fell by 0.2 Percentage Point to 10.1 Percent in 2022*, U.S. BUREAU OF LAB. STAT. (Jan. 24, 2023), <https://www.bls.gov/opub/ted/2023/union-membership-rate-fell-by-0-2-percentage-point-to-10-1-percent-in-2022.htm> [<https://perma.cc/95UJ-J4DV>].

¹⁵⁹ Rogers, *supra* note 34, at 1876-77; see also Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Entities*, 105 CAL. L. REV. 65, 80-104 (2017) (explaining the legal history behind the production of precarious forms of work).

¹⁶⁰ Recent empirical work highlights that “the criminal justice population is disproportionately engaged in self-employment” and “disproportionately self-employed in construction, ‘other services’ (e.g., automotive repair, hair salons), and waste management [compared with] the general population.” Keith Finlay, Michael Mueller-Smith & Brittany Street, *Criminal Justice Involvement, Self-Employment, and Barriers in Recent Public Policy*, 42 J. POL’Y ANALYSIS & MGMT. 11, 12 (2023); see also LAUREN RUTH, CONN. VOICES FOR CHILD., ROLLING BOULDERS UPHILL: RETHINKING REENTRY WAGE AND

While this dynamic has developed in different ways across diverse political-economic geographies, Detroit's experience illustrates the overall trend in stark terms. By 2010, there were "more Detroiters under correctional supervision than there were holding union jobs in the city's auto plants."¹⁶¹ This statistic encapsulates the corresponding rise of the criminal system and decline of labor power.

In sum, the idea of channeling captures a general push: a legal architecture grounded in the criminal system pushes populations towards the precarious labor that permeates our historically specific political-economic order. Incarceration interrupts work, or the search for work, generating the challenge of market reintegration; collateral and other social consequences foreclose certain employment opportunities but, importantly, leave open others; and threats made through criminal supervision, or indirectly through fines, encourage rapid acceptance of low-quality jobs. The idea of channeling sees the criminal system, together with the ongoing formation and reproduction of relations of production, as part of *cumulative* processes of social stratification. Put differently, the criminal system is "coextensive" with labor markets.¹⁶² This view allows us to reinterpret the idea that the criminal system creates "barriers" to employment. Rather, these barriers are among the system's features that provide a means of social

POLICY BARRIERS WILL BENEFIT CONNECTICUT'S COMMUNITIES AND ECONOMY 31 (2023) (finding that most people returning from the criminal system in Connecticut cannot access jobs that pay living wages); Kristin Bumiller, *Bad Jobs and Good Workers: The Hiring of Ex-Prisoners in a Segmented Economy*, 19 THEORETICAL CRIMINOLOGY 336, 351-52 (2015) (exploring linkages between the segmentation of the economy and the precarious employment of ex-prisoners, noting that employers offering the least desirable jobs tend not to discriminate against ex-prisoners); Sykes et al., *supra* note 155, at 32 (explaining that system-involved people "apply to less desirable jobs, including those considered temporary or precarious" and that "[t]hese jobs are found in the formal and informal labor markets" and include "construction, retail, maintenance, and warehouse work"); Alex Traub, *An Ex-Convict Got a Construction Job, but Not Everyone Was Happy*, N.Y. TIMES (Aug. 9, 2019), <https://www.nytimes.com/2019/08/09/nyregion/construction-union-hudson-yards.html> (discussing formerly incarcerated people finding employment with nonunion construction firms).

¹⁶¹ Thompson, *Why Mass Incarceration Matters*, *supra* note 90, at 708.

¹⁶² Studying reentry processes in New Orleans, Shreya Subramani describes carceral institutions as "coextensive with the city's labor market." Shreya Subramani, *Productive Separations: Emergent Governance of Reentry Labor*, 47 FORDHAM URB. L.J. 941, 962 (2020).

differentiation, shaping paths of possibility within a broader political-economic tapestry, and ultimately encouraging the movement of large groups towards devalued work.

An important macroscale subjectivity formation accompanies this push. The many individuals channeled into precarious work through the criminal system are less likely to engage in collective action (e.g., attempting to organize a union), strengthening employer power over a substantial segment of the workforce.¹⁶³ This necessarily affects how today's markets for subordinated labor reproduce themselves.

3. Sorting

Whereas channeling involves a general push, sorting involves more precise intermediation. The concept of *linking institutions* helps explain this difference. These institutions provide direct bridges between the criminal system and traditional notions of the “economic” sphere, playing a more immediate role in the coordination that constructs markets for precarious labor and relations of subordination.¹⁶⁴ These links provide both material and ideological infrastructure to stabilize patterns of activity under U.S. racial capitalism: they intensify when employers feel pressure in a tight labor market, helping maintain broader worker disempowerment; and, as distinct social spheres, they reinforce market-oriented norms.

¹⁶³ See Adam Reich & Seth Prins, *The Disciplining Effect of Mass Incarceration on Labor Organization*, 125 AMER. J. SCI. 1303, 1340 (2020); see also Reich, *supra* note 31 (arguing that market-oriented ideas of price, competition, and choice circulate within carceral settings, influencing subjectivity formation); Eric Seligman & Brian Nam-Sonenstein, *10 Ways That Mass Incarceration is an Engine of Injustice*, Prison Pol'y Initiative (Aug. 27, 2024), https://www.prisonpolicy.org/blog/2024/08/27/economic_justice/ [<https://perma.cc/9B6E-S6ZU>] (noting that “in neighborhoods where incarceration is more common, workers — formerly incarcerated or not — are more inclined to play it safe at work than risk unemployment and incarceration” and that incarceration has a “suppressing effect on the community networks and institutions where labor organizing often takes place”).

¹⁶⁴ The abuse of vagrancy laws represents perhaps the closest historical analogue to this sorting function. See Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CAL. L. REV. 1637, 1676-83 (2021) (explaining how vagrancy laws played a critical role in reasserting racialized patterns of labor expropriation in the post-Reconstruction South); see also BLACKMON, *supra* note 50, at 52-55; White, *supra* note 20, at 674.

Two key linking institutions are reentry and parole. By reentry institutions, I mean formalized, work-focused arrangements that provide support to system-involved people returning to the labor market.¹⁶⁵ Both public and private entities may comprise such arrangements. I distinguish parole from “reentry institutions” because of parole’s broader role in community supervision, involving its own standard conditions and threats of sanction, including reincarceration. But parole institutions, too, concern themselves with work, and often operate in tandem with other reentry institutions.

A typical sequence might look like this: a parole officer sends an individual to a reentry organization, which in turn steers that individual to prospective employers.¹⁶⁶ In New York, such linkages have caused frustration for unionized construction workers.¹⁶⁷ A 2019 *New York Times* article details the story of Andre Chesson, whose parole officer referred him to the nonprofit reentry organization Center for Employment Opportunities, which introduced Chesson to Trade Off Construction Services, a nonunion firm.¹⁶⁸ Chesson’s story offers a window into a broader dynamic, the scaling up together of reentry organizations and certain employers that rely on precarious labor.¹⁶⁹ Unionized workers have expressed concerns around the competitive threats these processes pose, arguing that “[y]ou’re cutting pay, cutting benefits, and you’re using an easily exploitable model — which is the re-

¹⁶⁵ For a more general description of what “reentry policy” entails, see Marina Bell, *Abolition: A New Paradigm for Reform*, 46 L. & SOC. INQUIRY 32, 34-35 (2021). Reentry institutions have proliferated, even as the incarcerated population has stabilized. Jonathan J. B. Mijs, *The Missing Organizational Dimension of Prisoner Reentry: An Ethnography of the Road to Reentry at a Nonprofit Service Provider*, 31 SOCIO. F. 291, 294 (2016).

¹⁶⁶ See, e.g., Bell, *supra* note 165, at 48 (describing such a process whereby parole refers an individual to a reentry organization which steers them towards “employment in manual labor fields, primarily street cleaning jobs”).

¹⁶⁷ See Traub, *supra* note 160.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (“The CEO and Trade Off partnership represents a broader trend. Officials at the Fortune Society and the Osborne Association, two other large nonprofits that do reentry employment in New York, said that in recent years they, too, began to find more laborer openings for formerly incarcerated people. According to data provided by each nonprofit, nonunion firms account for roughly 95 percent of placements they make in construction.”).

entry population — to do it.”¹⁷⁰ This example illustrates how the criminal system constructs relations across a carceral labor *continuum*, generating competitive threats to organized labor which extend further into our stratified society than a prison — free labor binary imagines. Importantly, however, organized labor’s identification of this alternative labor pool as an unfair *threat*, and not as a group to be included and empowered, maintains divisions among labor that tend to stabilize relations under racial capitalism.

In other cases, reentry organizations have more transparently participated in stratification. For example, Homeboy Industries, a prominent reentry nonprofit, pushed for an exception to a Los Angeles city ordinance that raised the minimum wage, carving out “transitional employment programs aimed at formerly incarcerated people, allowing them to pay substantially sub-minimum wages.”¹⁷¹ The Doe Fund, another reentry nonprofit, has operated with more complexity to pay sub-minimum wages.¹⁷² It treats formerly incarcerated workers as “clients” of its workforce development program, charging these worker-clients a weekly fee, which comes out of their paychecks.¹⁷³

More generally, when structural conditions favor labor, employers may look to strengthen relationships with reentry institutions.¹⁷⁴ So, when labor markets are tight, employers turn to such institutions as an alternative cheap labor source.¹⁷⁵ This means these employers can avoid

¹⁷⁰ *Id.*

¹⁷¹ Zatz, *The Carceral Labor Continuum*, *supra* note 6, at 164. For another example of a nonprofit paying subminimum wages to formerly incarcerated workers, see Dale Chappell, *Former Prisoners Making Less Than Minimum Wage Working for Nonprofit Doe Fund*, PRISON LEGAL NEWS (Jan. 1, 2021), <https://www.prisonlegalnews.org/news/2021/jan/1/former-prisoners-making-less-minimum-wage-working-nonprofit-doe-fund/> [<https://perma.cc/T6N3-KKAW>].

¹⁷² See Chappell, *supra* note 171.

¹⁷³ *Id.*

¹⁷⁴ See Ben Casselman, *As Labor Pool Shrinks, Prison Time Is Less of a Hiring Hurdle*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/business/economy/labor-market-inmates.html> (discussing this dynamic with examples from Wisconsin and Minnesota).

¹⁷⁵ See, e.g., Drew Favakeh, *Georgia Department of Labor Commissioner Launches Re-Entry and Jobs Program*, SAVANNAH NOW (Nov. 11, 2023), <https://www.savannahnow.com/story/news/local/2023/11/11/ga-dept-of-labor-commissioner-launches-reentry-and-jobs-program/71516871007/> [<https://perma.cc/4FHX-F3M5>] (discussing employers in

competing for workers by raising wages or improving working conditions. Thus, the links reentry institutions provide intensify with the business cycle. They are, in a sense, *reverse* automatic stabilizers.¹⁷⁶ They constrain broader worker empowerment during periods of economic expansion to maintain the status quo, reinforcing the social structure of racial capitalism.¹⁷⁷ In contrast to the government acting as an employer-of-last-resort through a job guarantee, providing a backstop for workers, the criminal system here provides workers-of-last-resort, backstopping the profit share of business.

These linking institutions do more than respond to shifting material conditions. They are social settings where institutional actors, like judges, parole officers, and reentry staff, exercise authority. The links that tend to emerge indicate a certain legibility to these actors, that is, an alignment with the norms, ideologies, and expectations that guide these actors' conduct. In critiquing mainstream reentry institutions, Marina Bell notes such institutions have "a very low standard and

Georgia struggling to find workers prepared to take advantage of new reentry programming); Jaden Edison, *Prioritizing Reentry From Prison Will Boost CT's Economy, Report Says*, CT MIRROR (Aug. 22, 2023), <https://ctmirror.org/2023/08/22/ct-reentry-prison-jobs-economy-workforce-shortage/> [<https://perma.cc/ZCD4-VYXQ>] (discussing similar dynamics in Connecticut). Work-release programs can play this role too. See Michael Wetzels, *Work-Release Inmates Helping Fill Holes in Tight Alabama Labor Market*, CORRECTIONS 1 (July 25, 2022), <https://www.corrections1.com/work-release-1/articles/work-release-inmates-helping-fill-holes-in-tight-alabama-labor-market-bNdJQ6CznAdQS4Sk/> [<https://perma.cc/3HDT-ARQT>] ("[F]ast food and other restaurants, construction companies, and manufacturing plants are the top employers using work-release inmates in the county.").

¹⁷⁶ See Vivien Lee & Louise Sheiner, *What Are Automatic Stabilizers?*, BROOKINGS (July 2, 2019), <https://www.brookings.edu/articles/what-are-automatic-stabilizers/> [<https://perma.cc/9N9J-MP69>].

¹⁷⁷ See Bumiller, *supra* note 160, at 351 (concluding that, for "companies known for hiring persons with criminal records," "[p]erhaps the most powerful factor in decision making was the perceived importance of labor market constraints"). Conversely, government agencies might rely on such links more generally, or countercyclically in a downturn, taking advantage of cheap labor when tax revenues fall. See Augustine, *supra* note 117, at 564 (describing one organization that "functions as a staffing agency contracting [parolee] employees to governmental organizations" who "labor[] in physically hazardous conditions . . . without any of the legal protections they otherwise should have been afforded").

expectation for the quality of life” for their participants.¹⁷⁸ These low expectations support links with precarious forms of labor.

In practice, these institutional actors tend to operate under more specific (raced and gendered) normative assumptions. Studying the reentry experiences of Black women in Los Angeles, Susila Gurusami explains that what counts as “recognizable employment” depends on the subjective assessments of parole officers.¹⁷⁹ Gurusami provides examples of officers viewing certain pursuits of education as “lazy” and pressuring women away from work that is sensitive to their particular histories of trauma and would better fit their family circumstances.¹⁸⁰ Another article recounts an individual telling a New Orleans reentry court judge he aspires to be an entrepreneur.¹⁸¹ The judge’s dismissive response¹⁸² reflects “a normative assumption that there are specific developmental stages to move [through] from vocational laborer to managerial role to entrepreneur/innovator.”¹⁸³ Within these opaque institutional settings, system-involved people encounter norms that reinforce their acceptance of devalued work.

Criminal system actors, however, often view such work as having inherent social value, because of work’s presumed rehabilitative effects.¹⁸⁴ For parole officers, “work remains the most legible shorthand for ‘rehabilitation’ even when compared with other activities like educational pursuits or participation in therapeutic interventions.”¹⁸⁵ Reentry organizations (and increasingly other carceral service

¹⁷⁸ Bell, *supra* note 165, at 40. Consistent with these low expectations, “the findings from evaluative research show that [reentry] programs have no effect on subsequent incarcerations or other criminal legal measures.” Augustine, *supra* note 117, at 570.

¹⁷⁹ Gurusami, *supra* note 139, at 445-46.

¹⁸⁰ *Id.* at 445-47. Some entities, like temporary staffing agencies, may recognize their legibility to parole officers and resulting advantage in recruiting formerly incarcerated workers. See Purser, *supra* note 139, at 407.

¹⁸¹ Subramani, *supra* note 162, at 954.

¹⁸² *Id.* (“Did you walk to the door? Or do you float to the door? Because let me tell you, you sound like you think you can float to the door, but you have to crawl before you walk, you have to walk before you can run.”).

¹⁸³ *Id.* at 955.

¹⁸⁴ See Augustine, *supra* note 117, at 547.

¹⁸⁵ *Id.* at 568.

providers), market themselves as having rehabilitative aims.¹⁸⁶ This institutionally embedded understanding of work, as presumptive evidence of rehabilitation, translates the performance of precarious labor into a success story.¹⁸⁷

Interestingly, courts have historically relied on a logic of rehabilitation to treat prison labor as “noneconomic,” and thus *outside* the bounds of market institutions and standard labor protections.¹⁸⁸ Here, in the reentry context, the inherent rehabilitative value of *integration into* the market is used to justify and celebrate the limited nature of what parole and reentry institutions can accomplish.¹⁸⁹ In both cases, the logic of rehabilitation reinforces an apparent boundary between the criminal system and the “economy.” In the former case, work that has rehabilitative aims places one outside the market. In the latter, attachment to the market itself is rehabilitative, something intrinsically good. This places the market and what it can offer beyond reproach, at least from the perspective of the criminal system.

The market here, in the minds of many reentry actors, exists as something analytically prior to the criminal system. Shreya Subramani recounts one such actor in New Orleans reflecting on a reentry participant’s firing, remarking that it “resulted from a natural up and down of the market,” which was not something the reentry institution could “account for.”¹⁹⁰ Despite this clear statement about structural constraints affecting reentry, the broader reentry space insists on an ethos of individual responsibility.¹⁹¹ There is a logic to this,

¹⁸⁶ See, e.g., *id.* at 571 (discussing a nonprofit that “presents itself as a rehabilitative reentry employment organization while functioning like a temp agency”); Dhaliwal, *supra* note 98, at 31 (discussing a carceral technology company that introduced a multi-year initiative “expressing a commitment to supporting rehabilitation and reentry”).

¹⁸⁷ See Zatz, *The Carceral Labor Continuum*, *supra* note 6, at 163 (“Once work — divorced from job quality — becomes an end in itself, then working for pennies per hour under brutal conditions can seem a policy success.”).

¹⁸⁸ Zatz, *Working at the Boundaries*, *supra* note 85, at 909.

¹⁸⁹ See Megan T. Stevenson, *Cause, Effect, and the Structure of the Social World*, 103 B.U. L. REV. 2001, 2027, 2031-32 (2023) (discussing the limited impacts of job-training programs for formerly incarcerated people).

¹⁹⁰ Subramani, *supra* note 162, at 954.

¹⁹¹ See, e.g., Augustine, *supra* note 117, at 569 (noting how “personal responsibility rhetoric absolve[s] parole agents” and “completely obscures the harsh realities of the

contradictory as it seems. It simultaneously insulates the market against critique as it enforces market dependence.

C. *Full Employment and Interest Convergence*

This Section critiques the business lobby's case for criminal system reform. That case focuses on barriers to employment system-involved people face. Drawing on interest convergence theory, and with attention to the political aspects of full employment, I argue that these reformist aspirations are better understood as part of wider efforts to maintain racialized labor subordination. Any interest convergence here is narrow and ultimately tolerant of a violent status quo. But beginning from the perspective of capital further illustrates the criminal system's central role today as a labor governance institution.

In 2021, as U.S. labor markets tightened,¹⁹² business groups reached a consensus regarding the criminal system's overreach. The U.S. Chamber of Commerce, for example, issued a report arguing the "business case for criminal justice reform."¹⁹³ The report highlighted ways to address the problem of "barriers to [labor market] entry for those with criminal convictions."¹⁹⁴ Earlier that year, the Business Roundtable¹⁹⁵ led a group of leading private-sector firms in forming the "Second Chance Business

contemporary job market"); Bell, *supra* note 165, at 38 (discussing "[p]rogram emphasis on personal responsibility").

¹⁹² See *Job Openings and Quits Reach Record Highs in 2021, Layoffs and Discharges Fall to Record Lows*, U.S. BUREAU OF LAB. STAT. (June 2022), <https://www.bls.gov/opub/mlr/2022/article/job-openings-and-quits-reach-record-highs-in-2021.htm> [<https://perma.cc/PV4P-87WZ>].

¹⁹³ U.S. CHAMBER OF COM., *THE BUSINESS CASE FOR CRIMINAL JUSTICE REFORM: SECOND CHANCE HIRING 1* (2021), <https://www.uschamber.com/workforce/education/the-business-case-criminal-justice-reform-second-chance-hiring> [<https://perma.cc/ZTD7-94XM>] [hereinafter U.S. CHAMBER OF COM., *THE BUSINESS CASE*]. The Chamber would continue contributing institutional resources to spread this idea into the next year. See Stephanie Ferguson, *Data Deep Dive: The Workforce Impact of Second Chance Hiring*, U.S. CHAMBER OF COM. (May 25, 2022), <https://www.uschamber.com/workforce/data-deep-dive-the-workforce-impact-of-second-chance-hiring-3> [<https://perma.cc/G4C8-S2AK>].

¹⁹⁴ U.S. CHAMBER OF COM., *THE BUSINESS CASE*, *supra* note 193, at 1.

¹⁹⁵ The Business Roundtable is another powerful business lobby which represents the CEOs of major U.S. companies.

Coalition.”¹⁹⁶ The Coalition’s stated aim was “to lower barriers to employment” for people with a criminal history.¹⁹⁷ As Chair of the Coalition, Jamie Dimon (also CEO of JPMorgan) later published a *New York Times* op-ed arguing that many such “barriers” should be removed, so that people with criminal histories could more easily “fill the millions of job openings across the country.”¹⁹⁸ About a month after this Coalition formed, another powerful business lobby, the National Association of Manufacturers (“NAM”), launched its own second chance hiring program, noting the “significant barrier” to employment a criminal history poses.¹⁹⁹ Still in the aftermath of historic racial justice uprisings, the business community had apparently coalesced around its own program for change.

Interest convergence theory, however, urges skepticism around this business case for reform.²⁰⁰ The theory predicts that reforms aimed at racial justice often depend on their convergence with the interests of dominant groups. Racial justice ultimately remains elusive, as reforms tend to rest on a “narrow common ground.”²⁰¹

To an extent, business groups have been transparent about their convergent interests here. As the Coalition put it, “[w]ith labor markets tight and employers struggling” to hire, “new sources” of workers were needed.²⁰² The sizable population of workers with criminal histories

¹⁹⁶ *Major U.S. Employers Commit to Advancing Second Chance Employment*, SECOND CHANCE BUS. COAL. (Apr. 26, 2021), <https://secondchancebusinesscoalition.org/press-releases/major-u-s-employers-commit-to-advancing-second-chance-employment> [<https://perma.cc/78F6-ZHY3>].

¹⁹⁷ *Id.*

¹⁹⁸ Jamie Dimon, *If You Paid Your Debt to Society, You Should Be Allowed to Work*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/08/04/opinion/clean-slate-incarceration-work.html>.

¹⁹⁹ *Second Chance Hiring Strengthens Manufacturing*, NAT’L ASS’N OF MFRS., (May 20, 2021), <https://nam.org/second-chance-hiring-strengthens-manufacturing-13843/> [<https://perma.cc/ZDX4-DF5C>].

²⁰⁰ See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 528, 533 (1980) (developing interest convergence theory in the context of school desegregation efforts).

²⁰¹ Fanna Gamal, *What Does Critical Race Theory Teach Us About Non-Reformist Reforms?*, LPE PROJECT (Nov. 29, 2023), <https://lpeproject.org/blog/crt-non-reformist-reforms/> [<https://perma.cc/8PZJ-CSXF>].

²⁰² SECOND CHANCE BUS. COAL., *supra* note 196.

could, as Dimon suggested, “fill the millions of job openings across the country.”²⁰³ An optimistic narrative effortlessly emerged around this plan. The business community’s coordinated efforts to constrain the criminal system’s excesses would benefit *both* vulnerable workers *and* employers.

A political conflict theory of full employment²⁰⁴ complicates and challenges this optimistic narrative. As an economy marches toward full employment, workers tend to make gains and grow emboldened to shift the balance of power between labor and capital. Employers, on the other hand, aim to avert this shift and restore discipline in the workplace. Together, interest convergence theory and the conflict theory of full employment would predict that this was not a true reckoning with racial injustice. Rather, the problem business groups sought to solve was how employers could navigate historically tight labor markets without empowering workers and while preserving, or even expanding, their profit shares. Seen this way, the reforms business groups advocated aimed to reproduce the social structure of U.S. racial capitalism, while cloaking those efforts in the mantles of justice and progress.²⁰⁵

Such a conclusion reflects continuity with the broader history of business opposition to labor, and the histories of these three business lobbies in particular. The Chamber, Roundtable, and NAM have driven political mobilization to undermine labor before. Historian Kim Phillips-Fein has described how they each provided vital organizational infrastructure in a decadeslong struggle by business to weaken the labor-friendly legal and political settlements achieved in the New Deal era.²⁰⁶ In the late 1970s, these three business lobbies successfully led opposition to labor law reform, dealing a crushing blow to the labor movement.²⁰⁷ And the Chamber, notably, led business opposition

²⁰³ Dimon, *supra* note 198.

²⁰⁴ M. Kalecki, *Political Aspects of Full Employment*, 14 POL. Q. 322, 322 (1943).

²⁰⁵ As another sort of interest convergence, business support for this set of reforms, together with other reformist proposals, may also have had a more general pacifying effect on mobilizations for radical change, preserving the political-economic status quo.

²⁰⁶ KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN’S CRUSADE AGAINST THE NEW DEAL* (2010); *see also* BENJAMIN WATERHOUSE, *LOBBYING AMERICA: THE POLITICS OF BUSINESS FROM NIXON TO NAFTA 3* (2014) (examining the roles of the Chamber, Roundtable, and NAM in the political mobilization of business).

²⁰⁷ COWIE, *supra* note 71, at 293.

against even a watered down version of the federal job guarantee bill.²⁰⁸ This historical backdrop, reflecting these organizations' strategic commitment to defending the structural primacy of employers, flows through our present. (This can be readily observed today in business opposition to an aggressive Federal Trade Commission, a labor-friendly National Labor Relations Board, the Protect the Right to Organize ("PRO") Act, and limits to the independent contractor model.²⁰⁹) However, given shifts to the U.S. political economy, that commitment looks different today in certain important respects. These shifts include not only the weakened position of organized labor and the ascendance of neoliberal ideology, but also the criminal system's emergence as an expansive labor governance institution. Today, the millions of workers moving through its social field provide a cushion to employers and a check on labor power at a systemically significant scale. Naturally, this structural reality has drawn the attention of the nation's leading business lobbies.

The business community's continued support for punitive and violent elements of the criminal system underscores the narrowness of this recent interest convergence. Just months after Dimon's *New York Times* op-ed, and less than a year after the formation of the Coalition, Dimon and several other chief executives of the Coalition's member companies rallied to support New York City Mayor Eric Adams' public safety blueprint.²¹⁰ The blueprint included plans to resurrect a notorious plainclothes police unit and expand pretrial incarceration.²¹¹ Support for

²⁰⁸ Cowen, *supra* note 70 (noting "the bill was condemned by the United States Chamber of Commerce" and that the Chamber's chief economist's criticisms signaled "strong opposition from the business community").

²⁰⁹ *Major Initiatives*, U.S. CHAMBER OF COM., <https://www.uschamber.com/major-initiatives> [<https://perma.cc/M64Q-GKRS>] (Each of these areas represents a "major initiative" at the Chamber.).

²¹⁰ *Over 230 Business, Labor and Civic Leaders Show Broad Support for Mayor Adams' Efforts to Reduce Crime*, P'SHIP FOR N.Y. CITY (Jan. 31, 2022), <https://pfnyc.org/news/over-200-business-labor-and-civic-leaders-show-broad-support-for-mayor-adams-efforts-to-reduce-crime/> [<https://perma.cc/YDR3-XZDE>] (signed by leaders of Bank of America, Con Edison, Deloitte, Macy's, NBCUniversal).

²¹¹ Ginia Bellafante, *The Mayor's Crime Plan Is Loathed by Liberals. But It Might Work.*, N.Y. TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/01/28/nyregion/eric-adams-crime-gun-violence.html>.

ratcheting up these features of the criminal system came as a well-documented humanitarian crisis raged on at Rikers,²¹² where hundreds of incarcerated people were staging a hunger strike.²¹³ A few months later, the Chamber of Commerce would throw its formidable weight into the national moral panic around retail theft, pushing to strengthen criminal punishment across the country.²¹⁴

There is, of course, no necessary contradiction between reinforcing the iron fist of the criminal system and facilitating work opportunities for system-involved people, especially in ways that lighten pressures on employers. These can be complementary projects. The criminal system's development over the last decades has in fact turned this abstract possibility into a concrete reality. Today, the system's sheer scale, its emergent institutional configurations, and its growing capacity to serve as a site of economic coordination, together, make it possible to *channel* and *sort* system-involved people in ways that shape the balance and trajectories of power in the workplace. This is especially the case in a full employment context.

Indeed, the prison-industrial-complex has shapeshifted to accommodate this greater role in labor subordination.²¹⁵ For example, according to the public disclosures of CoreCivic and GEO Group, two notorious private prison companies, each company has shifted its focus

²¹² Jonah Bromwich, *Hundreds at Rikers Protest Conditions, Citing Covid and the Cold*, N.Y. TIMES (Jan. 11, 2022), <https://www.nytimes.com/2022/01/11/nyregion/rikers-island-hunger-strike.html>; Dana Rubinstein & Jonah E. Bromwich, *As Deaths Rise in N.Y.C. Jails, Oversight Board Fails to Raise Alarm*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/11/08/nyregion/jails-rikers-oversight-correction.html>; Michael Wilson & Chelsia Rose Marcus, *16 Men Died in New York City Jails Last Year. Who Were They?*, N.Y. TIMES (Jan. 28, 2022), <https://www.nytimes.com/2022/01/28/nyregion/rikers-island-prisoner-deaths.html>.

²¹³ Sahalie Donaldson, *A Timeline on the Closure of Rikers Island*, CITY & STATE (July 29, 2024), <https://www.cityandstateny.com/politics/2024/03/timeline-closure-rikers-island/376662/> [<https://perma.cc/DG9T-VN7Y>].

²¹⁴ *Infra* Part III.B.

²¹⁵ Katie Rose Quandt, *Out of Prison, Into Alt-Prison*, IN THESE TIMES (Apr. 15, 2020), <https://inthesetimes.com/article/prison-reentry-halfwayhouse-incarceration-parole-geo-corecivic> [<https://perma.cc/NUA4-YCHZ>] (noting the Act “encouraged public-private partnerships to carry out a \$375 million expansion of reentry services”). Federal funding made available through the First Step Act has encouraged some of this shift.

to their reentry business in recent years.²¹⁶ CoreCivic has even emphasized to its shareholders the relentless reentry-focused lobbying the company has undertaken across the country. At least twenty reentry bills supported by CoreCivic have been signed into law.²¹⁷

Local chambers of commerce have also played important roles in institutionalizing links between the criminal system and labor markets. In 2022, Kentucky launched its “Prison-to-Work-Pipeline,” which established an ongoing partnership between the state’s prisons and jails and the Kentucky Chamber of Commerce.²¹⁸ When the Chamber assumed the role of coordinating between businesses and corrections, Kentucky was experiencing historic job growth and record-low unemployment.²¹⁹ Additionally, states that recently received “Pathway Home” grants from the Department of Labor, which fund reentry services, regularly report attending local chamber of commerce meetings as a strategy to build partnerships among jails, prisons, and prospective employers.²²⁰ In each of these cases, local chambers are

²¹⁶ THE GEO GRP., INC., 2023 ANNUAL REPORT 18 (2024) <https://investors.geogroup.com/static-files/ff46c763-807d-4ccb-924c-73ffc83e1f3> [<https://perma.cc/ZAM8-JM87>] (“With respect to our reentry services, electronic monitoring services, and community-based services business, we are currently pursuing a number of business development opportunities. Related to opportunities for community-based reentry services, we are working with our existing federal, state, and local clients to leverage new opportunities for both residential reentry facilities as well as non-residential day reporting centers.”).

²¹⁷ CORECIVIC, 2022 ANNUAL REPORT 5, 10 (2023) <https://ir.corecivic.com/static-files/d5cfae6e-5f62-4683-87a6-af4f6a4f7abf> [<https://perma.cc/8J9K-JBB8>] (“Since launching our public policy advocacy initiative in 2017, we have sent nearly 3000 letters to federal and state officials in support of 111 bills or policies aimed at helping people succeed in their communities after incarceration. As of the writing of this letter, 20 reentry bills that we supported have been signed into law.”).

²¹⁸ *Supporting Successful Workforce Reentry for Justice-Involved Individuals*, NAT’L GOVERNORS ASS’N (Mar. 23, 2023), <https://www.nga.org/meetings/supporting-successful-workforce-reentry-for-justice-involved-individuals/> [<https://perma.cc/NXQ8-6ZK7>].

²¹⁹ *Gov. Beshear Launches Programs to Boost Workforce Participation by Helping Inmates Find Jobs*, KENTUCKY.GOV (Nov. 7, 2022), <https://www.kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=1574> [<https://perma.cc/JK3A-MRDS>].

²²⁰ Armando Yañez, Benjamin Christensen & Sonoi Omwenga, *Pathway Home Evaluation Brief: Establishing Reentry Services to Support People After Release*, CHIEF EVALUATION OFF., U.S. DEP’T OF LAB. (Aug. 2023), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/PathwayHomeEarlyImplementation_SupportAfterRelease_

positioned as non-ideological, technocratic experts of business and workforce development needs.

The Second Chance Business Coalition’s “Community Partners Map” provides a partial, yet by itself impressive, image of the growing set of linking institutions. The Coalition’s network alone includes over 800 organizations spread across “76 of the top job markets in the United States.”²²¹ By constructing this network, the Coalition aims to “facilitate partnerships between employers and workforce organizations that open doors to new talent pools.”²²²

The relative importance of these expanding institutional configurations can be seen within the broader constellation of labor struggle. In Tennessee, for example, a great majority of the 5,000 workers at a Volkswagen plant in Chattanooga recently voted to join the United Auto Workers union.²²³ This was a historic victory in the intensely union-resistant American South, a genuine sign of the labor movement’s strength. National media coverage noted how Republican state officials, including the Governor, tried to put a foot on the scale, hoping to defeat the union drive.²²⁴ Tennessee’s criminal system, however, has not received similar attention for its capacity to help maintain a subordinated workforce, despite its considerable scale relative to the Chattanooga plant. GEO Group, for example, operates in the state, and it alone has provided reentry programming to at least

Nov2023.pdf [<https://perma.cc/259G-RTEE>]. These Pathway Home grants, authorized by the Workforce Innovation and Opportunity Act, have directed tens of millions of dollars toward the reentry space in just the last year alone. Press Release, U.S. Dep’t of Labor, Department of Labor Awards Over \$56M in Grants to Help Justice-Involved People Get Needed Job Training, Prepare Them for Return to Communities (Jul. 2, 2024), <https://www.dol.gov/newsroom/releases/eta/eta20240702> [<https://perma.cc/2L8J-48CG>].

²²¹ *Community Partners Map, About This Map*, SECOND CHANCE BUS. COAL., <https://secondchancebusinesscoalition.org/find-partners> [<https://perma.cc/N4Q7-K66H>].

²²² *Id.*

²²³ Abby Vesoulis, *UAW Triumphs in Tennessee Volkswagen Union Vote*, MOTHER JONES (Apr. 21, 2024), <https://www.motherjones.com/politics/2024/04/uaw-triumphs-in-tennessee-volkswagen-union-vote/> [<https://perma.cc/TGS5-JBRH>].

²²⁴ Neal Boudette, *VW Workers in Tennessee Start Vote on U.A.W., Testing Union Ambitions*, N.Y. TIMES (Apr. 17, 2024), <https://www.nytimes.com/2024/04/17/business/economy/volkswagen-united-auto-workers-union.html>.

5,000 workers.²²⁵ And the state government now advertises to employers that the annual reentry population of 15,000-plus Tennesseans can help solve labor shortages while “increas[ing] profitability” for business.²²⁶ According to the state-developed *Employer Guide for Hiring Justice-Involved Tennesseans*, these workers “bring a sense of gratitude, loyalty, and work ethic to their roles,” making them a “more engaged and committed workforce.”²²⁷ Such claims signal, without explicitly stating, that system-involved people are less likely to organize in their workplaces or otherwise challenge employers.²²⁸ They tend not to threaten the balance of power, thus stabilizing class relations. Many of these 15,000 workers comprise the 75,000 Tennesseans who are under some form of correctional supervision at any given time, facing intense pressures to accept whatever work they can get.²²⁹ For temporary staffing agencies operating in the state, like EmployBridge, they represent the ideal sort of vulnerable workers to draw on.²³⁰

²²⁵ *Tennessee Recidivism Rate Drops, GEO Reentry Assists with Innovative Community Treatment*, GEO REENTRY SERVS. (Nov. 9, 2023), <https://www.georeentry.com/tennessee-recidivism-geo-reentry-innovative-community-treatment/> [<https://perma.cc/K4UJ-FWQQ>].

²²⁶ *Employer Guide for Hiring Justice-Involved Tennesseans*, DEP’T OF LAB. & WORKFORCE DEV. (2023), https://www.tn.gov/content/dam/tn/workforce/documents/reentry/Employer_Guide.pdf [<https://perma.cc/Y922-FLQF>].

²²⁷ *Id.*

²²⁸ See Reich & Prins, *supra* note 163, at 1.

²²⁹ *Department Overview*, TENN. DEP’T OF CORR. (Jan. 2024), <https://www.tn.gov/correction/about-us/department-overview.html> [<https://perma.cc/K6X9-5XBH>].

²³⁰ Emily Corwin, *A Tax Credit Was Meant to Help Marginalized Workers Get Permanent Jobs. Instead It’s Subsidizing Temp Work.*, PROPUBLICA (Aug. 23, 2022), <https://www.propublica.org/article/work-opportunity-tax-credit-temp-permanent-employment> [<https://perma.cc/9Y6D-4N94>]. Reentry institutions that rely on certain grant funding may be incentivized to partner with temporary staffing agencies and other precarious work providers because their receipt of grant funding depends on job placement rates. *Id.* (“The rules governing federal grants to organizations that serve formerly incarcerated people also promote temp work. To receive federal grants for employment services, reentry nonprofits must show high job-placement rates. Because they needn’t specify whether those jobs are permanent positions or if they include benefits, some advocates say, nonprofits rely on temp agencies to keep their numbers up.”).

In Alabama, where the UAW recently experienced a defeat,²³¹ the picture looks more extreme in some respects, and quite ordinary in others. There, service and retail workers unions have identified Alabama's expansive work-release program as an existential threat. The Union of Southern Service Workers and the Retail, Wholesale and Department Store Union joined ten current or formerly incarcerated workers in their class action lawsuit against several Alabama officials and the private employers participating in a work-release program.²³² The plaintiffs argue that state officials have conspired to reproduce a system of modern-day convict leasing.²³³ They have achieved this through their maintenance of horrific prison conditions, threats of disciplinary action, including for refusing to work, and routine denials of parole.

Beyond this blockbuster lawsuit are more mundane machinations. As Alabama has faced historically tight labor markets of its own,²³⁴ it too has expanded its emphasis on reentry institutions,²³⁵ including by partnering with GEO Group.²³⁶ Business groups have also synchronized

²³¹ Michael Wayland, *Mercedes-Benz Workers in Alabama Vote Against UAW Union Membership*, CNBC (May 17, 2024, 3:48 PM), <https://www.cnbc.com/2024/05/17/uaw-vote-mercedes-benz-alabama.html> [<https://perma.cc/4C6N-CL3A>].

²³² Kim Kelly, *Lawsuit: Alabama Is Denying Prisoners Parole to Lease Their Labor to Meatpackers, McDonalds*, IN THESE TIMES (Apr. 19, 2024), <https://inthesetimes.com/article/alabama-slavery-prison-labor-incarcerated-company-exploit-capitalism-lawsuit> [<https://perma.cc/58R2-HHZ8>].

²³³ Complaint at 11-13, 38-39, *Council v. Ivey*, No. 23-00712 (M.D. Ala. Dec. 12, 2023).

²³⁴ Alexander Willis, *'The Crisis is Getting Worse,' Labor Shortage Commission Seeks Solutions to Workforce Struggles*, ALA. DAILY NEWS (Oct. 31, 2023), <https://aldailynews.com/the-crisis-is-getting-worse-labor-shortage-commission-seeks-solutions-to-workforce-struggles/> [<https://perma.cc/G93B-774W>] (Alabama has experienced extraordinarily tight labor markets in recent years and in 2023 formed a "Labor Shortage Commission" to study and recommend solutions).

²³⁵ OFF. LT. GOVERNOR ALA., LT. GOVERNOR'S COMM'N ON 21ST CENTURY WORKFORCE: ALABAMA WORKFORCE DEVELOPMENT PLAN 2-6 (2024), <https://ltgov.alabama.gov/wp-content/uploads/2024/01/Lt.-Governors-Commission-on-21st-Century-Workforce-Alabama-Workforce-Development-Plan.pdf> [<https://perma.cc/FV4W-R5ZU>] (the Lieutenant Governor's recent Workforce Development Plan highlights the reentry population as "a largely untapped population that is ripe for employment and eager to work.").

²³⁶ Alexander Willis, *Alabama Kicks Off New Initiative to Train Inmates, Cut Recidivism in Half*, ALA. DAILY NEWS (Oct. 8, 2023), <https://aldailynews.com/alabama-kicks-off-new->

with the criminal system in simpler ways. The Community Corrections Board, for example, now houses one of its reentry programs in a building in downtown Tuscaloosa owned by the local Chamber of Commerce.²³⁷ The building, in a more literal sense, is a concrete manifestation of a capital-driven interest convergence.

III. STRUCTURE AND IDEOLOGY IN THE PRISON-INDUSTRIAL-COMPLEX

A racial capitalism lens directs one to reconsider what and who to count among the key sites, forms, and agents of political-economic struggle.²³⁸ It demands, for instance, attention beyond the factory floor. Most famously, Du Bois's notion of the "general strike," which identified slaves in the American South as workers in a labor system and architects of their own emancipation, reflects this reorientation.²³⁹

initiative-to-train-inmates-cut-recidivism-in-half/ [https://perma.cc/9344-FNX2] (discussing GEO Group's reentry services partnership in Alabama).

²³⁷ Eliza Witherspoon, 'A Way Out': How These Local Groups are Preparing Alabama Prisoners for Reentry, *CRIMSON WHITE* (Mar. 24, 2021), <https://thecrimsonwhite.com/81166/news/a-way-out-how-these-local-groups-are-preparing-alabama-prisoners-for-reentry/> [https://perma.cc/3TH2-8EVX]. Apparently, the labor needs of the auto manufacturing industry have "motiv[at]ed employers to find creative hiring solutions like these prison reentry programs." *Id.* Other local chambers have similarly gotten involved in reentry. *See, e.g., Workforce Opportunities for Returning Citizens*, KAN. CITY CHAMBER OF COM., <https://www.kcchamber.com/what-we-do/workforce-strategies/worc> [https://perma.cc/6VHQ-8AWX] (describing an initiative which "aims to connect the resources of the second chance ecosystem to businesses").

²³⁸ *See, e.g.,* Paret & Levenson, *supra* note 25 (identifying domination and resistance as the two sides of a racial capitalism analysis).

²³⁹ DU BOIS, *supra* note 39, at 55; *see also* JAMES BOGGS, *THE AMERICAN REVOLUTION: PAGES FROM A NEGRO WORKER'S NOTEBOOK* 52 (1963), <https://www.historyisaweapon.com/defcon1/amreboggs.html> [https://perma.cc/KFR5-TCLD] (describing the "outsiders, the workless people," as important agents in class struggle); DOMENICO LOSURDO, *CLASS STRUGGLE: A POLITICAL AND PHILOSOPHICAL HISTORY* (2016) (identifying racial, decolonial, anti-imperial, national, and other emancipatory struggles as specific forms class struggle may take); Charisse Burden-Stelly, *Modern U.S. Racial Capitalism*, *MONTHLY REV.* (July 1, 2020), <https://monthlyreview.org/2020/07/01/modern-u-s-racial-capitalism/> [https://perma.cc/8P6A-THMX] (explaining that "Black women's triple oppression resulted in their responsibility as partial or sole breadwinner, their maltreatment in the labor market, and, consequently, their active participation in the social, political, and economic life of the Black community" and that their "structural realities primed them to vehemently challenge modern U.S. racial capitalism").

In this same vein, today's criminal system serves as a key terrain of political-economic struggle. Over the last decade in particular, the system has increasingly staged contestation around the enduring structures of U.S. racial capitalism. This has been most prominent nationally in the Movement for Black Lives.²⁴⁰ But other examples abound: from abolitionist movements making demands for a democratic political economy;²⁴¹ to bail funds and people's budgets challenging extraction and austerity in favor of collective care;²⁴² to struggles against the proliferation of jails, which are transforming local economies and environments across the country.²⁴³

By developing an account of the prison-industrial-complex ("PIC"), this Part describes key structures and ideological formations around the criminal system. This explains how the criminal system sits at the

²⁴⁰ *Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/> (last visited Oct. 8, 2024) [<https://perma.cc/7DGR-EJQE>]; see also BERNARD E. HARCOURT, COOPERATION: A POLITICAL, ECONOMIC, AND SOCIAL THEORY 156-57 (2023) (noting we can "conceptualize the movement for Black lives as the contemporary instantiation of class struggle"); Walter Johnson, *To Remake the World: Slavery, Racial Capitalism, and Justice*, BOS. REV. (Feb. 1, 2017), <https://www.bostonreview.net/forum/walter-johnson-to-remake-the-world/> ("The Movement for Black Lives proposal, 'A Vision for Black Lives,' insists on a relationship between the history of slavery and contemporary struggles for social justice. At the heart of the proposal is a call for 'reparations for the historic and continuing harms of colonialism and slavery.' Indeed, the ambient as well as the activist discussion of justice in the United States today is inseparable from the history of slavery.").

²⁴¹ Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 117 (2020) (discussing social movement organizations that "aim to build democratic power and a democratic political economy in a mutually constitutive way. These demands posit an alternative to the neoliberal carceral state"); 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").

²⁴² SIMONSON, *supra* note 141, at 32-36, 135-42.

²⁴³ See, e.g., JACK NORTON, LYDIA PELOT-HOBBS & JUDAH SCHEPT, *THE JAIL IS EVERYWHERE: FIGHTING THE NEW GEOGRAPHY OF MASS INCARCERATION* (2024) (describing and analyzing various campaigns against expanding jails); Jeremy Levenson & Shamsheer Samra, *Organized Care as Antidote to Organized Violence: An Engaged Clinical Ethnography of the Los Angeles County Jail* SYSTEM 1 (2023), <https://link.springer.com/article/10.1007/s11013-023-09827-3> [<https://perma.cc/6SDX-AWW5>] (describing the experience of a clinician working in an LA County jail who joined organized efforts to oppose the construction of a new jail).

material and ideological center of U.S. racial capitalism, not at its margins. I begin by contrasting the PIC with the military-industrial-complex to clarify its most structurally salient feature: the PIC's existence on state and local government balance sheets. I also identify the economic justifications that underlie the PIC's development across a rural-urban continuum and, relatedly, examine the Chamber of Commerce's involvement in the moral panic around retail theft. Rather than describe abolitionist and other radical political-economic demands made in opposition to the criminal system, I focus on *defenses* of the system which marshal their own idealized notions of how the economy should work. Such defenses are equally important evidence (as compared to the demands of left social movements) of the criminal system's function as a key site of political-economic contestation. Finally, I consider how recent expenditures of extraordinary federal stimulus complicate my structural analysis and possibly represent a sign of shifts to come.

A. *From Military to Penal Keynesianism?*

Perhaps more than any other, the concept of the PIC paints the criminal system as an economic center of gravity. Critical Resistance describes the PIC as

the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems. Through its reach and impact, the PIC helps and maintains the authority of people who get their power through racial, economic and other privileges.²⁴⁴

In a recent article, Benjamin Levin asks “[i]f the ‘prison industrial complex’ just becomes a shorthand for the dominant political economy or for structures of subordination across lines of race and class, is that shorthand useful?”²⁴⁵ Referencing Critical Resistance's oft-cited definition and accompanying visualization, Levin argues the concept

²⁴⁴ *What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, <https://criticalresistance.org/mission-vision/not-so-common-language/> (last visited Oct. 8, 2024) [<https://perma.cc/B5TM-T6RZ>].

²⁴⁵ Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899, 938 (2023).

risks “over-inclusivity,” even boundlessness.²⁴⁶ This is a fair concern. But Levin’s analysis itself suggests another angle from which we can approach the idea of the PIC, beginning with its historical predecessor: the *military-industrial complex*.²⁴⁷ Importantly, that concept emerged out of a post-war economic order upheld, in significant part, through “military Keynesianism.” A simple sketch of military Keynesianism will serve as a useful backdrop to consider the criminal system against. An initial question we can ask is whether a similar sort of *penal Keynesianism* has emerged, and how that compares to military Keynesianism. This basic comparison highlights stark but productive differences that help us think more carefully about the nature of the PIC.

The military Keynesianism of the post-war era involved extraordinary federal expenditures, which we can understand in two primary ways. First, its sustained military spending was a strategy “to stabilize the economy over a period of decades,” providing protection against depressions through an enlarged public sector.²⁴⁸ Second, military Keynesianism was a strategy to “prime the pump,” providing, when necessary, *additional* economic stimulus in the form of military spending, whose effects would “multiply” to increase aggregate demand and move the economy towards full employment.²⁴⁹ From the end of World War II through the early 1970s, this strategy was a dominant feature of U.S. policy,²⁵⁰ linking job creation and macroeconomic stabilization to the interests of U.S. empire and the industries that flourished alongside it.

Immediately, we encounter an obvious, but crucial, difference. Military Keynesianism involved substantial federal spending, whereas today’s criminal system spending is mainly a state and local budgetary

²⁴⁶ *Id.* at 935-36.

²⁴⁷ *Id.* at 932-33.

²⁴⁸ Tim Barker, “Don’t Discuss Jobs Outside This Room”: *Reconsidering Military Keynesianism in the 1970s*, in *THE MILITARY AND THE MARKET* 135, 135-36 (Jennifer Mittelstadt & Mark R. Wilson eds., 2022).

²⁴⁹ *Id.* at 136.

²⁵⁰ James M. Cypher, *The Origins and Evolution of Military Keynesianism in the United States*, 38 *J. POST KEYNESIAN ECON.* 449, 449 (2015) (“[M]ilitary expenditures . . . accounted for as much as 25 percent of gross domestic product — including their induced multiplier effects.”).

phenomenon.²⁵¹ More rigid spending constraints mean states and cities, even collectively, can replicate neither the scale²⁵² nor aggregate effects²⁵³ of military Keynesianism. These jurisdictions simply cannot deficit spend as the federal government does. On top of this, most states and units of local government face balanced budget requirements, which mandate their spending follow from their revenue.²⁵⁴

These more constrained economic powers actually heighten the *political* stakes and salience of criminal system spending. Facing tighter budgetary constraints, such spending more directly conflicts with other forms of social spending, implicating other everyday institutions where people readily identify their interests.²⁵⁵ Economic downturns

²⁵¹ To illustrate, consider that, in 2021, state and local governments spent \$135 billion on police, \$87 billion on corrections, and \$52 billion on courts. *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures> (last visited Oct. 8, 2024) [<https://perma.cc/HVB6-3PZ7>]. In contrast, one of “the largest federal grant programs for local policing,” the Community Oriented Policing Services program has provided approximately \$14 billion in grants overall since its inception in 1994. *Police Departments in the US: Explained*, USA FACTS (Apr. 28, 2021), <https://usafacts.org/articles/police-departments-explained/> [<https://perma.cc/49AJ-5MYV>]; *Grants*, U.S. DEP’T OF JUSTICE, <https://cops.usdoj.gov/grants> (last visited Dec. 19, 2023) [<https://perma.cc/M95H-ATXM>]; see also Roger Michalski & Stephen Rushin, *Federal (De)Funding of Local Police*, 110 GEO. L.J. ONLINE 54, 54 (2021); Rick Su, Anthony O’Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1197 (2022).

²⁵² Tara Copp, *Defense Budget Speeds Toward \$1 Trillion, with China in Mind*, AP (Mar. 13, 2023), <https://apnews.com/article/pentagon-trillion-defense-china-budget-d5ae4061b047291ef124257e24c7ecob> [<https://perma.cc/WM8M-B623>] (Indeed, even a reduced annual defense budget (by historical standards) is marching towards \$1 trillion.); see also *Military Expenditure (Current USD) — United States*, WORLD BANK GRP., <https://data.worldbank.org/indicator/MS.MIL.XPND.CD?locations=US> (last visited Oct 8, 2024) [<https://perma.cc/N8TT-B6AF>] (showing military spending falling as a percentage of GDP over time but still far larger than criminal system spending).

²⁵³ Pigeon & Wray, *supra* note 84, at 155.

²⁵⁴ LISTOKIN, *supra* note 59, at 34, 103.

²⁵⁵ Pigeon & Wray, *supra* note 84, at 153 (“[M]ost spending on prisons occurs at the state level, where budgetary constraints are more severe than at the federal level. This means increased spending on the justice system has probably forced cutbacks in other state programs. For example, some studies conclude that education spending has suffered cuts at the expense of greater spending on prisons.”); see *How Much Do America’s Biggest Counties Spend on Police?*, USA FACTS (Oct. 4, 2023),

exacerbate this issue. As government revenues fall, states and cities will tend to cut spending, “reducing aggregate demand at the worst time.”²⁵⁶ Compounding this challenge, in times of financial distress, the Federal Reserve’s history of emergency lending suggests an unwillingness by the Fed to aggressively intervene to support state and municipal funding as compared to corporate funding.²⁵⁷ With criminal system spending concentrated inside these destabilizing dynamics, political constituencies, like police unions and the increasing number of private entities with a stake in the system,²⁵⁸ will mobilize to avoid sharing in this downward spiral equally, in effect insisting that schools, libraries, parks, and other social services share more of that burden.²⁵⁹ As a local budgetary phenomenon, criminal system spending is more immediately antagonistic to other shared institutions than its military counterpart. These antagonisms are made more obvious, and perhaps more intense, through the proliferation of criminal system fines and fees, an ineffective and regressive source of revenue generation.²⁶⁰

Most readers will have encountered the idea that police, prisons, and criminal courts now compete to serve as “catch-all” solutions to social problems. But this idea can actually downplay the significance of these features of the criminal system, understanding them as poor policy

<https://usafacts.org/articles/police-funding-local-governments/> [<https://perma.cc/ZQD3-J8PM>]. The share of budgets devoted towards criminal system spending was already substantial before Defund demands took off in 2020.

²⁵⁶ LISTOKIN, *supra* note 59, at 103.

²⁵⁷ Max Moran, *The Fed’s Municipal Lending Failed Black Public-Sector Workers*, REVOLVING DOOR PROJECT (Aug. 19, 2021), <https://therevolvingdoorproject.org/the-feds-municipal-lending-failed-black-public-sector-workers/> [<https://perma.cc/D7GY-G98E>].

²⁵⁸ COLOR OF CHANGE & WORTH RISES, *supra* note 8; Bocar A. Ba, Roman Rivera & Alexander Whitefield, *Market Response to Racial Uprisings*, NAT’L BUREAU OF ECON. RSCH. (Aug. 2023), <https://www.nber.org/papers/w31606> [<https://perma.cc/A5S7-8ZPS>].

²⁵⁹ See Emma Fitzsimmons, *Eric Adams Slashes Budgets for Police, Libraries and Schools*, N.Y. TIMES (Nov. 16, 2023), <https://www.nytimes.com/2023/11/16/nyregion/nyc-budget-cuts-schools-police-trash.html>.

²⁶⁰ Matthew Menendez & Lauren-Brooke Eisen, *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [<https://perma.cc/C377-B3CM>] (“Since 2008, almost every state has increased criminal and civil court fees or added new ones, and the categories of offenses that trigger fines have been expanded.”).

responses. Rather, these features — policing in particular — have come to define how many communities experience *governance* in more profound ways.²⁶¹ Through its everyday operation, and its embeddedness in social welfare and public provisioning,²⁶² the criminal system fundamentally shapes understandings of citizenship and

²⁶¹ Soss & Weaver, *supra* note 29, at 576 (arguing that police today represent the key governing and political institution in many race-class subjugated communities, shaping how those communities experience and understand citizenship and politics); *see also* Jonathan Ben-Menachem & Kevin T. Morris, *Ticketing and Turnout: The Participatory Consequences of Low-Level Police Contact*, 117 AM. POL. SCI. REV. 822, 822 (2023) (describing recent analyses which indicate that lower-level police contacts (like traffic stops) operate as an important form of “political socialization,” reducing turnout among registered voters, and mobilize alternative, nonvoting political activities); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 805-07 (2021) (discussing how the “everyday practices of policing preclude poor people of color from being full democratic subjects”); Hannah Walker, *Targeted: The Mobilizing Effect of Perceptions of Unfair Policing Practices*, 82 J. POL. 119, 119 (2020); Jamelle Bouie, *Where American Democracy Isn’t Very Democratic*, N.Y. TIMES (Feb. 3, 2023), <https://www.nytimes.com/2023/02/03/opinion/police-violence-democracy.html> (“In their power and authority and reach and influence in so many neighborhoods across the country, the police are the government.”); Hassan Kanu, *Police Are Not Primarily Crime Fighters, According to the Data*, REUTERS (Nov. 2, 2022), <https://www.reuters.com/legal/government/police-are-not-primarily-crime-fighters-according-data-2022-11-02/> [<https://perma.cc/ZUM6-3TAV>] (explaining more broadly, as democratic institutions continued to be hollowed out, whether due to money in politics or a Supreme Court hostile to the administrative state, political action for many may increasingly come in the form of protest or other disruptive acts, which often leads to encounters with the police).

²⁶² *See, e.g.*, Barbara Fedders, *The End of School Policing*, 109 CAL. L. REV. 1443, 1443 (2021) (describing the policing of public schools); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 643 (2009) (describing the criminalization of welfare and overlap between the criminal and welfare systems); Alexis Karteron, *When Stop and Frisk Comes Home: Policing Public and Patrolled Housing*, 69 CASE WESTERN L. REV. 669, 669 (2019) (discussing intrusive policing practices around public housing); Sunita Patel, *Embedded Healthcare Policing*, 69 UCLA L. REV. 808, 808 (2022) (describing how policing is embedded within veterans’ healthcare institutions); Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646, 2647 (2021) (describing policing of the emergency room). Dorothy Roberts has argued that differential access to welfare and public provisioning across raced and gendered lines distinguishes “subjects” from “citizens.” “Citizens” are those who can access forms of welfare that enable self-rule (like Social Security), while “welfare for subjects enables the government to rule them.” Dorothy Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1572-77 (1996).

politics. From this view, it is easier to see why struggles around criminal system spending, already heightened due to the antagonisms rooted in budgetary constraints, involve critiquing and reimagining (or defending and legitimizing), a broader political-economic order.

We can further specify how criminal system spending diverges from military Keynesianism across a rural-urban divide to better understand the system's supporting ideological formations. Penal Keynesianism exists primarily as a rural phenomenon, centered around jail and prison construction. "Between 1980 and 2000, 350 new prisons were built in rural counties in the United States," with construction clustered in the "particularly economically distressed regions" of "the west Texas plains, the Mississippi Delta, south-central Georgia, and Central Appalachia."²⁶³ As Judah Schept describes, a broad network of actors understood this buildup of "local carceral capacity" as a mechanism "for both rural job creation and revenue generation."²⁶⁴ They believed that such carceral investment would have multiplier effects, helping other parts of the regional economy grow.

The unique federal funding available for some of these projects, which understands them as essential public infrastructure, reflects this logic. As of 2019, the U.S. Department of Agriculture had provided \$365 million in loans and grants to rural communities to finance jail construction through its Community Facilities Direct Loan and Grant Program.²⁶⁵ Under the Program, rural jails qualify as "essential

²⁶³ SCHEPT, *supra* note 133, at 2. Scholars studying a range of rural areas, including in Arkansas, Arizona, California, Colorado, Florida, New York, Indiana, Pennsylvania, Texas, Oregon, Washington, Montana, and Idaho, have shown how "the prison is used materially to respond" to crises arising out of deindustrialization, structural joblessness, and revenue shortages. *Id.* at 10.

²⁶⁴ *Id.* at 14; *see also id.* at 137 (describing how, in 1994, a Virginia prison began housing prisoners from other states at per-diem rates); Jack Norton & Jacob Kang-Brown, *If You Build It: How the Federal Government Fuels Rural Jail Expansion*, VERA (Jan. 10, 2020), <https://www.vera.org/in-our-backyards-stories/if-you-build-it> [<https://perma.cc/NFM2-DYAP>] (discussing per-diems jails receive from other counties and ICE).

²⁶⁵ U.S. Department of Agriculture *Investments in Local Jails*, VERA (Sept. 2020), <https://www.vera.org/downloads/publications/usda-fact-sheet.pdf> [<https://perma.cc/Z92U-3KQE>].

community facilities,” which are “public improvements requisite to the beneficial and orderly development of a community.”²⁶⁶

This regional development and stabilization strategy remains politically salient. In 2022, a small California town received national media attention after its residents sued to prevent the closure of a prison — the town’s economic center of gravity.²⁶⁷ Several other states, meanwhile, have attempted to steer American Rescue Plan Act (“ARPA”) State and Local Fiscal Recovery funds towards jail and prison construction, which ACLU lawyers have argued violates Treasury regulations restricting the use of such funds.²⁶⁸ Alabama, for example, decided to put \$400 million of these emergency federal funds towards a new \$1.3 billion prison project.²⁶⁹

It’s worth clarifying some distinctions between this detention-centered penal Keynesianism and military Keynesianism. For one, the immense scale of military Keynesian spending was able to achieve a tenuous “industrial peace” for limited periods, temporarily harmonizing interests between labor and capital.²⁷⁰ This came at a time when organized labor wielded greater power, thus “peace” between labor and capital was not a given. In contrast, a weaker penal Keynesianism only

²⁶⁶ See 7 C.F.R. § 3570.53 (2024).

²⁶⁷ Tim Arango, ‘Nothing Will Be the Same’: A Prison Town Weighs a Future Without a Prison, N.Y. TIMES (Jan. 10, 2022), <https://www.nytimes.com/2022/01/10/us/susanville-california-prison-closing.html>. The lawsuit was ultimately dismissed.

²⁶⁸ Press release, ACLU, ACLU Urges U.S. Treasury to Investigate State Use of ARPA Funds to Illegally Build, Expand Prisons and Jails (Jan. 18, 2023, 4:45 PM), <https://www.aclu.org/press-releases/aclu-urges-us-treasury-investigate-state-use-arpa-funds-illegally-build-expand> [<https://perma.cc/C9CE-CDC3>] (arguing ARPA funds are being misappropriated in Alabama, Arizona, Arkansas, Iowa, Indiana, Louisiana, Minnesota, Missouri, and Oklahoma to illegally build and expand prisons and jails). Treasury has described those ARPA funds as “the resources needed to respond to the pandemic and its economic effects and to build a stronger, more equitable economy during the recovery.” Coronavirus State and Local Fiscal Recovery Funds, 88 Fed. Reg. 64986 (Sept. 20, 2023) (codified at 31 C.F.R. pt. 35).

²⁶⁹ Kim Chandler, *Cost Estimate on New Alabama Prison Jumps \$300 million*, AP NEWS (Mar. 15, 2023, 3:30 PM), <https://apnews.com/article/alabama-prison-construction-pandemic-funds-221f9873495e4d89a5e96934f6e27b3d>.

²⁷⁰ Tim Barker, *Cold War Capitalism: The Political Economy of American Military Spending, 1947-1990* 8 (May 6, 2022) (Ph.D. dissertation, Harvard University) (on file with author).

emerged in full force after the labor movement had been crushed in the 1970s. This difference is evident in the relative sparsity of jobs penal Keynesianism has produced (there was no “industrial peace” necessary to produce).²⁷¹ Penal Keynesianism has instead aimed at a tenuous *social* peace; one that accepts persistent economic precarity, denies recognition of incarcerated people’s labor, and necessarily fails to supply an adequate number of quality jobs.

Both of these Keynesian programs, however, were similarly built around racialized violence. Military Keynesianism *exported* this violence. This produced devastating consequences for people in Korea and Vietnam, as two examples.²⁷² Penal Keynesianism, on the other hand, has involved the buildup and redistribution of state capacity for racialized violence domestically.²⁷³ The Department of Defense’s 1033 program, which permits the Secretary of Defense to loan excess military property to domestic law enforcement²⁷⁴ (so far, over \$7 billion of military property has been transferred under the program²⁷⁵), encapsulates this ongoing redistribution best. Ultimately, at the foundation of both development strategies lies state violence deployed against racialized groups and spaces.

²⁷¹ See SCHEPT, *supra* note 133, at 15 (“[I]n 1949, the coal industry employed 75,707 people in Kentucky, or more than ten times the number of prison and jail workers in the state today.”).

²⁷² Barker, *supra* note 270, at 254 (“The Korean War wrought nearly incomprehensible destruction. In three years, over 3 million Koreans died, including at least 1.5 million civilians (out of a population of around 30 million). By comparison, Japan had lost 2.3 million people in the Pacific War. The U.S. dropped more tons of bombs on Korea than it had dropped in the Pacific Theater of WWII, or about as many as the RAF dropped on Germany.”).

²⁷³ The technology transfers from the military to police departments are one example of this redistribution. See, e.g., Rashawn Ray, *How 9/11 Helped to Militarize American Law Enforcement*, BROOKINGS (Sept. 9, 2021), <https://www.brookings.edu/articles/how-9-11-helped-to-militarize-american-law-enforcement/> [<https://perma.cc/E43B-SGS8>] (arguing that the increased militarization of policing is related to U.S. foreign policy).

²⁷⁴ *Frequently Asked Questions Relating to the 1033 Program*, DEF. LOGISTICS AGENCY, <https://www.dla.mil/Disposition-Services/Offers/Law-Enforcement/Program-FAQs/> (last visited Sept. 22, 2024, 12:11 PM) [<https://perma.cc/V7PL-2UXN>].

²⁷⁵ This figure is based on the original acquisition value of the property. *Id.*

The nature of, and economic justifications for, criminal system spending shift considerably as we move towards the urban end of the spectrum. Consider what City of San Jose Mayor Matt Mahan recently expressed, after he joined a police foot patrol and spoke with business owners in San Jose's downtown, concerned about the local commercial hub's economic revitalization:

There's a lot happening, but of course, foundational to it, is safety. If you don't feel safe, it's hard to want to spend time, money, or invest and bring in a new business or building the housing that we need. That's why I've made improving safety one of our big three priorities.²⁷⁶

In nearby Oakland, the owners of an upscale Mexican restaurant that recently shuttered its doors said increased crime in the area was to blame.²⁷⁷ A few months earlier, they had joined an action alongside other local restaurants and businesses to criticize Oakland's handling of crime, calling for added law enforcement.²⁷⁸ (The restaurant has had a tumultuous last few years, settling a class-action lawsuit in 2022 brought on behalf of hundreds of its employees alleging wage theft.²⁷⁹)

Instead of a development strategy, we find in these illustrative examples a blend of "folk economic"²⁸⁰ wisdom backed up by faith in markets, which together support the idea that public safety and order through criminal law is a necessary precondition to market-based prosperity. (Recall Suzanne Clark's *State of American Business* address.)

²⁷⁶ *San Jose Mayor Banks on Downtown Police Presence to Boost Business*, CBS NEWS (May 4, 2023), <https://www.cbsnews.com/sanfrancisco/news/san-jose-mayor-banks-on-downtown-police-presence-to-boost-business/> [<https://perma.cc/S264-PS2U>].

²⁷⁷ Zak Sos, *Upscale Mexican restaurant Calavera closes under weight of Oakland crime*, KTVU (Jan. 6, 2024), <https://www.ktvu.com/news/well-known-oakland-eatery-calavera-shutters-under-weight-of-crime> [<https://perma.cc/9Q5G-M2LJ>].

²⁷⁸ *Id.*

²⁷⁹ Amanda Bartlett, *Buzzy yet Controversial Oakland Restaurant Calavera Closes for Good*, SFGATE (Jan. 7, 2024), <https://www.sfgate.com/food/article/calavera-oakland-restaurant-closure-18594739.php>.

²⁸⁰ See Tressie McMillan Cottom, *Crypto and the Power of Folk Economics*, N.Y. TIMES (Feb. 7, 2022), <https://www.nytimes.com/2022/02/07/opinion/crypto-nfts-folk-economics.html> ("Folk economics refers to the very human impulse to describe complex economic processes in lay terms.").

This is no doubt an intuitive, even compelling, perspective. The criminal system's distinctive derisking capabilities allow businesses to thrive.²⁸¹ This is essentially what an influential group of New York City business elites recently expressed. "New York cannot recover from the devastating impacts of the pandemic without first restoring the sense of personal security that every resident, worker, visitor, and community in our city has the right to expect,"²⁸² argued the group, backing a criminal system-reliant "public safety" plan put forward by Mayor Eric Adams, who had campaigned on a pro-business and assertively anti-crime platform.²⁸³

This has not been an exhaustive account of the PIC. Rather, I have emphasized its main structural condition of possibility: the PIC emerges out of state and local spending. Given budgetary constraints, this basic condition of possibility involves inherent antagonisms with other shared institutions. To resolve this, supportive ideological formations dealing with questions of economy help defend and justify criminal system spending. At the rural end of the spectrum, jail and prison construction is understood to function as a development strategy, setting the tempo and direction of regional economies. At the urban end, criminal system spending allows basic market activity to take place. As a theory of racial capitalism predicts, in neither setting is social spending on the criminal system seen as challenging the dominant position of private enterprise. This is the case even though for jail and

²⁸¹ There is a long political history behind this belief. See BERNARD HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 203 (2011) (noting there is "a lengthy track record, going back to Barry Goldwater and Richard Nixon at least, of presidential and gubernatorial campaigns that explicitly exploit the neoliberal combination of free-market ideology and tough-on-crime politics").

²⁸² Katy Feinberg, *Over 230 Business, Labor, and Civic Leaders Show Broad Support for Mayor Adams' Efforts to Reduce Crime*, P'SHIP FOR N.Y. CITY (Jan. 31, 2022), <https://pfnyc.org/news/over-200-business-labor-and-civic-leaders-show-broad-support-for-mayor-adams-efforts-to-reduce-crime/> [<https://perma.cc/2A38-F7ZH>].

²⁸³ Katie Glueck & Dana Rubinstein, *Eric Adams Vows to 'Welcome Business,' Calling New York 'Dysfunctional'*, N.Y. TIMES (Sept. 13, 2021), <https://www.nytimes.com/2021/09/13/nyregion/eric-adams-business-crime.html> (noting Adams' position that "public safety must be at the center of the economic recovery efforts" and that Adams's "main focus" on combating crime "also happened to be a primary concern of the city's business elite").

prison construction to be seen as a development strategy, one necessarily assumes that the state can be effective at economic planning.

The next Section focuses on the Chamber of Commerce's use of the moral panic around retail theft to strengthen the criminal system across the country. This case study further illuminates the criminal system's relation to dominant economic ideologies.

B. *The Chamber of Commerce's Moral Panic*

In 2022, the U.S. Chamber of Commerce, the country's most powerful business lobby, launched a vigorous campaign to strengthen the punitive capacities of the criminal system. The Chamber's sweeping advocacy provides compelling evidence that pro-business and market ideologies lend crucial support to today's criminal system. But the Chamber's actions can also be read another way. Defending the legitimacy of the criminal system was as much about supporting the Chamber's own vision of American free enterprise. This reflects a deeper relation between the sets of practices and ideologies of this business lobby and a punitive criminal system. Each appears to play a justificatory role for the other.

The campaign began amidst a moral panic that has since been discredited.²⁸⁴ In March 2022, the Chamber wrote to Congress, the National Governors Association, the National Conference of State Legislatures, and the National District Attorneys Association

²⁸⁴ See Eduardo Medina, *Retail Group Retracts Startling Claim About 'Organized' Shoplifting*, N.Y. TIMES (Dec. 8, 2023), <https://www.nytimes.com/2023/12/08/business/organized-shoplifting-retail-crime-theft-retraction.html>; see also Amanda Mull, *Retailers Locked Up Their Products — and Broke Shopping in America*, BLOOMBERG (Aug. 1, 2024, 5:00 AM), https://www.bloomberglaw.com/bloomberglawnews/white-collar-and-criminal-law/X8V0HUHGo00000?bna_news_filter=white-collar-and-criminal-law#jcite [<https://perma.cc/L7V8-3SPN>] (noting that “retailers’ and analysts’ ability to assess these things tend to be largely vibes-based” and that “[a]cross American retailers, average shrink — the industry term for inventory lost for any reason, expressed as a percentage of total sales — has remained relatively steady at around 1.5% for years”); Thea Sebastian & Hanna Love, *Retail Theft in US Cities: Separating Fact from Fiction*, BROOKINGS (Mar. 6, 2024), <https://www.brookings.edu/articles/retail-theft-in-us-cities-separating-fact-from-fiction/> [<https://perma.cc/U6XZ-AUFF>].

demanding swift action to combat supposedly spiraling retail theft.²⁸⁵ After sending this letter, the Chamber established a new “major initiative” of “combatting organized retail theft.”²⁸⁶ This cemented the criminal system as part of its ongoing policy agenda. Building on its national advocacy, the Chamber began coordinating with state and local chambers to press the issue regionally.²⁸⁷ Three months later, Missouri’s Governor announced a new statewide public safety initiative, which the Missouri Chamber of Commerce had in fact created.²⁸⁸ The plan called,

²⁸⁵ U.S. Chamber Letter on Organized Retail Crime and Retail Theft, U.S. CHAMBER OF COM. (Mar. 29, 2022), <https://www.uschamber.com/economy/us-chamber-letter-on-organized-retail-crime-and-retail-theft> [<https://perma.cc/B6NJ-YMJN>] (arguing for lower felony thresholds around retail theft and that “innocent consumers, employees, local communities, and business owners and shareholders bear the costs of rising retail theft.”). The Business Roundtable, National Association of Manufacturers, and other similar groups also participated in similar advocacy, although with less sustained and significant commitment. RETAIL INDUS. LEADERS ASS’N, NAT’L ASS’N OF MFR., U.S. CHAMBER OF COM., BUS. ROUNDTABLE & NAT’L RETAIL FED’N, *Joint Business Community Letter Expressing Support for Including INFORM Consumers Act in Bipartisan Innovation and Competitiveness Legislation* (June 6, 2022), <https://www.businessroundtable.org/joint-business-community-letter-expressing-support-for-including-inform-consumers-act-in-bipartisan-innovation-and-competitiveness-legislation> [<https://perma.cc/F7TZ-7KZX>].

²⁸⁶ *Major Initiatives*, U.S. CHAMBER OF COM., <https://www.uschamber.com/major-initiatives> (last visited Sept. 22, 2024, 1:52 PM) [<https://perma.cc/8F6F-DW7K>].

²⁸⁷ Tom Wickham, *Organized Retail Theft 101: What Is It and What Can Be Done About It?*, U.S. CHAMBER OF COM., <https://www.uschamber.com/economy/organized-retail-theft-101-what-is-it-and-what-can-be-done-about-it> [<https://perma.cc/6WRJ-A999>] (noting the Chamber has “engaged with state and local chambers to raise awareness on the issue and advocate in their respected regions”). In addition, the Chamber launched a broader media strategy. Its “Retail Crime Data Center” became “a widely cited resource with 1,000+ media mentions in 2023, highlighting the serious impact of criminal organizations on American business and society.” U.S. CHAMBER OF COM., 2023 ANNUAL REPORT 7, <https://www.uschamber.com/assets/documents/2023-Chamber-Annual-Report.pdf> [<https://perma.cc/E2H6-HXU6>]. The Data Center (and other examples of the Chamber’s advocacy) regularly conflate “organized retail theft” with “theft” or “shoplifting” more generally, which further suggests that the available data does not support the narrative that Chamber has constructed about spiraling theft driven by “the rise in highly organized criminal groups.” U.S. CHAMBER OF COM., *Retail Crime Data Center*, <https://www.uschamber.com/economy/retail-crime-data-center> (last visited Nov. 20, 2024, 7:20 PM) [<https://perma.cc/UA5A-JAYM>] (emphasis added).

²⁸⁸ Greg Payne, *Governor Announces ‘Safer Missouri, Stronger Missouri’ Initiative*, KCTV5 (June 27, 2022, 5:04 PM), <https://www.kctv5.com/2022/06/28/governor->

in part, for more funding for police and harsher criminal penalties.²⁸⁹ This local chamber-led shift in the direction of policy was an early indicator of the business-driven reforms that would soon sweep across the country.

In a remarkable October 2023 report titled *Crime Risk to Business*, the Chamber celebrates the “states fighting back” against the “national crisis” of retail theft but concludes that “more must be done.”²⁹⁰ The report notes that since the Chamber launched its initiative, at least twenty states have passed laws to purportedly combat retail theft through the criminal system.²⁹¹ These laws, for example, increase penalties for theft, including by lowering felony thresholds, and allow for aggregation of separate offenses over time periods as long as ninety days.²⁹²

But the report also reflects more general aspirations. It suggests that “local officials and business organizations can join forces” by establishing anti-crime associations to direct policy.²⁹³ These could be housed within local chambers of commerce, as recently happened in New Mexico and Ohio.²⁹⁴ Most extraordinary, however, is the report’s

announces-safer-missouri-stronger-missouri-initiative/ [https://perma.cc/AP7T-6BZS]. In 2024, the Missouri Chamber opposed a statewide ballot initiative that would raise the minimum wage and mandate paid sick leave, providing a local illustration of the anti-labor advocacy being complemented by support for strengthening criminal punishment. MO. CHAMBER OF COM., *Missouri Chamber Opposes Ballot Measure Placing New Mandates on Businesses* (Sept. 18, 2024), <https://mochamber.com/news-archive/missouri-chamber-opposes-ballot-measure-placing-new-mandates-on-businesses/> [https://perma.cc/7EU7-6WKZ].

²⁸⁹ Payne, *supra* note 288.

²⁹⁰ U.S. CHAMBER OF COM., *CRIME RISK TO BUSINESS: 2023*, at 2-3 (2023), https://www.uschamber.com/assets/documents/Crime-Risk-to-Business-Report_Rev.pdf [https://perma.cc/99X3-PWXM] [hereinafter U.S. CHAMBER OF COM., *CRIME RISK TO BUSINESS*].

²⁹¹ *Id.* at 4.

²⁹² *Id.*

²⁹³ *Id.* at 9.

²⁹⁴ *Id.*; Jim Nelson, *Ohio Chamber of Commerce Launches Crime Task Force to Protect Retailers and Consumers*, CLEVELAND 19 (Aug. 2, 2023, 8:20 PM), <https://www.cleveland19.com/2023/08/03/ohio-chamber-commerce-launches-crime-task-force-protect-retailers-consumers/> [https://perma.cc/GP22-29AS]. We might trace the historic lineage for these sorts of collaborations as far back as the 1920s, in the “crime commission movement.” See, e.g., Nora C. Krinitsky, *The Politics of Crime*

repeated criticism of insufficiently carceral prosecutors. It notes that “[l]ocal prosecutors with lax policies on bail, charging, and release practices are worsening the crime problem.”²⁹⁵ The report calls on states “to hold such prosecutors accountable by aligning with the business community to advance legislation that helps reduce backlogs in cases.”²⁹⁶ It even argues that states should “seriously consider mechanisms for the removal of prosecutors who refuse to prosecute certain classes of crime,” pointing to twenty-four bills introduced across sixteen states that would make it easier to remove “underperforming prosecutors.”²⁹⁷ Earlier in April, the Chamber hosted an event in Washington, D.C., on “America’s Crime Wave.” Speakers, who included a New York congressional representative and Virginia’s Attorney General, discussed “how prosecutors not prosecuting harms businesses across the country.”²⁹⁸ The sweeping nature of these recommendations indicates that the retail theft panic was an entry point through which the Chamber could mount a more robust defense of a punitive status quo.

This defense arrived in the aftermath of historic racial justice uprisings that intensely politicized the criminal system. Within that context, we can understand the Chamber’s initiative to be as much about defending its own vision of how the economy should work. Today’s Chamber is the product of institutional development over many decades. During the 1970s, Chamber leadership began to transform the institution into a “social movement for capitalism,” to defend the

Control: Race, Policing, and Reform in Twentieth-Century Chicago 136 (2017) (Ph.D. dissertation, University of Michigan) (“The establishment of the Chicago Crime Commission marked the advent of the crime commission movement, as businessmen and members of the professional class across the country formed private organizations to improve the operation of urban law enforcement and protect the interests of business and capital.”).

²⁹⁵ U.S. CHAMBER OF COM., CRIME RISK TO BUSINESS, *supra* note 290, at 11.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 8, 11.

²⁹⁸ U.S. Chamber of Commerce Event Spotlights Lack of Prosecution Harming Business Community, U.S. CHAMBER OF COM. (Apr. 17, 2023), <https://www.uschamber.com/economy/u-s-chamber-of-commerce-event-spotlights-lack-of-prosecution-harming-business-community> [<https://perma.cc/F9UC-82CT>].

American idea of free enterprise.²⁹⁹ This “politicized and ideological model of organizing business” involved not only challenging what the Chamber saw as excessive government intervention in the economy, but also promoting conservative cultural values, which many believed would “create a political climate favorable for business.”³⁰⁰ The Chamber ultimately “helped to build a bridge between the social backlash against the civil rights, gay rights, feminist, and antiwar movements and the business backlash against regulation and the welfare state.”³⁰¹ This history provides a lens through which to assess the Chamber’s increased research, policy, and lobbying efforts around the criminal system today. These undertakings likely reflect more than an interest in establishing technically sound conditions for business activity (especially given that the data does not suggest retail theft reflects anything close to the “national crisis” the Chamber claims to be combatting). Rather, they indicate the Chamber’s perceived political threats to the legitimacy of U.S. racial capitalism (i.e., what the Chamber would call American free enterprise), emerging through contestation around the criminal system. At the same time, they indicate that the Chamber has identified a crucial opening, a chance to defend its vision for the economy by harnessing the lingering backlash to the 2020 racial justice uprisings.³⁰²

The retail theft moral panic serves this defensive purpose well. It of course supports the generic story that public safety, delivered through the criminal system, is a precondition to a *necessarily* market-based prosperity. Beyond this, the panic provided business-friendly interventions and explanations around the moment’s most pressing economic concerns. As an extended period of historically low unemployment saw workers building power and public approval of labor

²⁹⁹ PHILLIPS-FEIN, *supra* note 206, at 202.

³⁰⁰ *Id.* at 203-06.

³⁰¹ *Id.* at 205.

³⁰² Perhaps the clearest evidence of this link to the broader backlash to the racial justice uprisings is the Chamber’s repeated emphasis on reformist prosecutors as the source of increasing crime and social disorder. See Jeremy B. White, *Progressive Prosecutors Contend with Backlash Politics*, POLITICO (Aug. 16, 2023; 7:00 PM), <https://www.politico.com/newsletters/politico-nightly/2023/08/16/progressive-prosecutors-contend-with-backlash-politics-00111510> (discussing “backlash” against prosecutors who have been “buoyed by a racial justice reckoning” and who are now part of what supporters have described as “a new era in criminal justice”).

unions growing, the Chamber and its allies linked retail theft to the shuttering of businesses. This was a way to reinsert the value-laden notion of “job creators”³⁰³ into the national conversation. The job losses flowing from business closures reasserted the received wisdom that business investment and profitability drive employment, making employers the primary protagonists of economic progress. More significantly, the panic also spoke to inflation. From the very beginning of its advocacy through to this year, the Chamber argued that retail theft explained rising consumer prices.³⁰⁴ In an atmosphere where businesses were increasingly seen as driving inflation, this explanation was especially important to introduce. Popular media outlets, for example, spread the idea of “greedflation,”³⁰⁵ while a more sophisticated notion of “sellers’ inflation”³⁰⁶ gained traction in academic and policy circles. At a more fundamental level, the moral panic could counter the idea that market instability was inherent to U.S. racial capitalism. Some combination of the pandemic, global supply chain shocks, inflation, rising interest rates, major bank failures, affordability crises (e.g.,

³⁰³ See *Fighting Back on Rising Crime with Legislation*, U.S. CHAMBER OF COM. (Apr. 20, 2023), <https://www.uschamber.com/on-demand/economy/fighting-back-on-rising-crime-with-legislation> [<https://perma.cc/8RZ3-MWCK>] [hereinafter U.S. CHAMBER OF COM., *Fighting Back*].

³⁰⁴ *Small Retailers Report Increases in Retail Theft, Raise Prices to Offset Losses*, U.S. CHAMBER OF COM. (Sept. 22, 2022), <https://www.uschamber.com/economy/small-retailers-report-increases-in-retail-theft-raise-prices-to-offset-losses> [<https://perma.cc/BBN3-9JEB>]; see also U.S. CHAMBER OF COM., *Fighting Back*, *supra* note 303 (“As businesses struggle to make ends meet, an act of crime and theft can lead them to raise prices on consumers in an attempt to recoup losses and keep their doors open.”); Tom Wickham, *Three Ways to Combat Retail Crime in 2024*, U.S. CHAMBER OF COM. (Jan. 23, 2024), <https://www.uschamber.com/economy/three-ways-to-combat-retail-crime-in-2024> [<https://perma.cc/43NQ-GPGF>] (“Retail crime creates higher prices for consumers, results in stores having to close their doors, and communities left without vital goods and services.”).

³⁰⁵ See, e.g., Nicholas Nehamas, Jim Tankersley & Kellen Browning, *Whose Fault Is Inflation? Liberals Want Biden to Blame Big Business.*, N.Y. TIMES (June 6, 2024), <https://www.nytimes.com/2024/06/06/us/politics/biden-inflation-greedflation-economy.html> (discussing the idea of “greedflation,” which attributes inflation to corporate pricing practices).

³⁰⁶ See, e.g., Isabella M. Weber & Evan Wasner, *Sellers’ Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, 11 REV. KEYNESIAN ECON. 183, 186 (2023) (developing the concept of sellers’ inflation).

housing and healthcare), escalating trade conflicts, and the increasing economic impacts of climate change might lead one to draw such a conclusion. The retail theft moral panic, on the other hand, offered a more neatly packaged and familiar explanation of instability. The disorder felt among businesses, consumers, workers, and whole communities originated in the “national crisis” of crime.³⁰⁷ Accordingly, to stabilize faith in markets, the Chamber pushed to intensify today’s main machinery of racialization and racial subordination, reinforcing the structural foundations of U.S. racial capitalism.³⁰⁸

C. *The Federal Backdrop to Defund*

This Section discusses the federal stimulus that surrounded defund movements and directed increased federal spending towards both the criminal system and other social infrastructure in recent years. While a stable trend has not yet been established, I bring attention to this recent shift as it complicates my argument that the PIC is rooted in state and local balance sheets. Here, we can see federal spending backstopping the criminal system and deflating the social crises around it. If this trend continued, perhaps as a form of social spending capable of winning durable bipartisan support, it might also alter how and to what extent the criminal system serves as a site of broader political-economic contestation.

³⁰⁷ See Wickham, *supra* note 304 (“Communities and businesses large and small across the United States are struggling to stay afloat amid an historic wave of retail crime.”).

³⁰⁸ The Chamber’s orientation to labor issues makes this especially clear. *Supra* Part II.C. Like military spending, the Chamber has found spending on the criminal system less offensive to its interests. Rather than competing with or undermining business, the criminal system is understood to be among the limited forms of social spending that tend to complement business interests. The Chamber reached this conclusion with respect to defense spending as early as 1958, lending its important support to President Eisenhower’s call for expanded defense appropriations that same year. See Barker, *supra* note 270, at 293. Of course, this is meant to be a broad generalization, as defense spending and national security interests have also clashed with private business interests. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the President did not have authority to seize and operate steel mills which were private property).

Scholars have offered competing and complementary histories of the defund movement in recent years. In one prominent account, Rachel Barkow has emphasized the dynamic of “backlash.” Calls to defund the police, and other radical abolitionist demands, Barkow explains, gave rise to robust counter-movements that ultimately hardened the criminal system.³⁰⁹ Naomi Murakawa agrees with the basic empirical picture, that police budgets tended to grow rather than shrink,³¹⁰ but stresses that some outlet was needed to absorb movement energy. According to Murakawa, radical demands like defund were laundered through a reinvigorated “politics of victims’ rights,” resulting in reformist reforms.³¹¹ Amna Akbar, on the other hand, argues that the outcomes of defund campaigns should be evaluated within a broader context of sustained struggle and “social insurgency.”³¹² From that view, defund campaigns represent just one piece of the “messy, non-linear dynamics of social change.”³¹³

To these accounts I would like to add another, to emphasize the extraordinary federal stimulus that surrounded the intersecting social crises in which defund campaigns were embedded. As the pandemic struck, state and local governments suddenly faced the severe challenge of navigating rising expenditures (e.g., on unemployment insurance and other income-based transfers), falling tax revenues, and balanced budget requirements, which together demanded cuts from other parts of their budgets.³¹⁴ In other words, the inherent antagonisms among the

³⁰⁹ Rachel Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 292, 298 (2023) (noting “calls to Defund the Police seem to have led to an even greater investment in police departments as politicians scrambled to disassociate themselves from the movement’s calls” and that backlash “is a significant risk of abolitionist arguments”).

³¹⁰ Naomi Murakawa, *Say Their Names, Support Their Killers: Police Reform After the 2020 Black Lives Matter Uprisings*, 69 UCLA L. REV. 1430, 1446-48 (2023).

³¹¹ *Id.* at 1435.

³¹² Amna Akbar, *Social Insurgency and Law Reform*, 1, 4-5 (Feb. 28, 2024) (draft).

³¹³ *Id.* at 5.

³¹⁴ See Eric Van Nostrand, Laura Feiveson, & Tara Sinclair, *State and Local Governments in the Post-COVID Recovery*, U.S. DEP’T OF TREAS. (Mar. 11, 2024), <https://home.treasury.gov/news/featured-stories/state-and-local-governments-in-the-post-covid-recovery> [<https://perma.cc/N6L4-4PXS>] (“State and local governments faced acute expenditure needs in the wake of the pandemic. State and local spending on

shared social institutions that rely on state and local budgets had heightened dramatically.

To counteract this budgetary crisis, the federal government passed a series of extraordinary stimulus packages, including the American Rescue Plan Act (“ARPA”), which provided for \$362 billion in payments to state, local, tribal, and territorial governments.³¹⁵ This federal spending did more than restore the status quo. It delivered historic levels of stimulus in an astoundingly socially equitable manner. Recent census data, for example, shows that in 2022 public school spending saw its greatest year-over-year percentage increase in over two decades, thanks to this federal stimulus.³¹⁶ Thus, as police spending increased, so did spending on other social infrastructure. This stimulus also contributed to nearly every region in the country seeing its unemployment rate significantly reduced, with regions that “typically face higher unemployment [seeing even] bigger improvements.”³¹⁷ Workers across the country thus saw gains right alongside police departments that saw their funding increase. This broader context complicates the prevailing narratives around defund. It is possible police needed the lifeline of extraordinary federal stimulus to withstand the historic movements seeking to radically transform or abolish pieces of the carceral state. Of course, how defund campaigns would have played out under the counterfactual of no (or significantly reduced) federal stimulus is difficult to calculate with any confidence, but it is safe to say the scene would look quite different today.³¹⁸ Even if fundamental challenges and exclusions remained, many saw their situation (temporarily) improve and this no doubt contributed to deflating the acute social crises of the moment.

unemployment insurance, other public assistance, and health and hospitals rose to \$230 billion above trend in 2021.”).

³¹⁵ GRANT A. DRIESSEN, CONG. RSCH. SERV., GENERAL STATE AND LOCAL FISCAL ASSISTANCE AND COVID-19: ELIGIBLE PURPOSES, ALLOCATIONS, AND USE DATA 10 (2021).

³¹⁶ See Kaylee Anesta, *Largest Annual Spike in Public School Spending in Over 20 Years*, U.S. CENSUS BUREAU (Apr. 25, 2024), <https://www.census.gov/library/stories/2024/04/public-school-spending.html> [<https://perma.cc/4A89-PTBE>].

³¹⁷ Van Nostrand et al., *supra* note 314.

³¹⁸ Given the bare majorities that passed ARPA in the House and Senate, this counterfactual was not far off from reality.

At the same time, these stimulus packages marked an important, even if temporary, rebalancing of the criminal system and PIC onto the federal government's balance sheet. As of March 2024, over \$15 billion in ARPA funds had been committed to "preventing crime and reducing violence," which the White House claimed was the "largest federal investment in advancing public safety and preventing violence in our history."³¹⁹ This figure is approximately half of what the Law Enforcement Assistance Administration ("LEAA") awarded throughout its entire existence from 1968 to 1981, which is often understood as a high watermark for federal spending on state and local law enforcement.³²⁰ Private companies have since taken advantage of these ARPA funds, validating investments in the production of long range tasers, fully body scanners, advanced surveillance technology, and other police and prison equipment.³²¹ SoundThinking (formerly ShotSpotter) had even advertised to its potential government customers that it could help them navigate accessing "historic" ARPA funds to purchase its services.³²² Since 2021, the company also added a paragraph to its disclosure of material risks to shareholders regarding federal funding, inserting specific mention of the importance of federal stimulus flowing out of the pandemic to its business.³²³

³¹⁹ *The American Rescue Plan (ARP): Top Highlights from 3 Years of Recovery*, WHITE HOUSE (Mar. 11, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/11/the-american-rescue-plan-arp-top-highlights-from-3-years-of-recovery/> [<https://perma.cc/W2EG-S5M9>].

³²⁰ See HINTON, *supra* note 5, at 2 (noting \$25 billion in expenditures in 2016 dollars, which is approximately \$33 billion in 2024 dollars, according to the Bureau of Labor Statistics inflation calculator). Additionally, the LEAA's "single most ambitious project" totaled to around just \$1 billion in today's dollars. *Id.* at 159.

³²¹ See Anastasia Valeeva, Weihua Li & Susie Cagle, *Rifles, Tasers and Jails: How Cities and States Spent Billions of COVID-19 Relief*, THE MARSHALL PROJECT (Sept. 7, 2022), <https://www.themarshallproject.org/2022/09/07/how-federal-covid-relief-flows-to-the-criminal-justice-system> [<https://perma.cc/35MS-QMGS>].

³²² *The American Rescue Act Can Help Fund Important Technology*, SOUNDTHINKING (Aug. 4, 2021), <https://www.soundthinking.com/blog/the-american-rescue-act-can-help-fund-important-technology/> [<https://perma.cc/4L5N-XFCV>].

³²³ ShotSpotter, Inc., 2020 Annual Report (Form 10-K) 30 (Mar. 29, 2021), <https://ir.soundthinking.com/sec-filings/annual-reports##document-730-0001564590-21-016134-1> [<https://perma.cc/3D6H-HHYE>].

This rebalancing may represent more than a temporary shift. In May 2024, President Biden repeated a call to Congress to invest \$37 billion “to support law enforcement and crime prevention,” even while acknowledging a “record decrease in violent crime.”³²⁴ The trendline is clear. This would be a marked increase in federal spending on local law enforcement, even under ARPA standards.

Though it remains to be seen what sort of political foothold this or a similar plan ultimately achieves, the potential movement of spending *upstream* in the governing chain would track other responses to struggles around the criminal system. For example, in Memphis, Tennessee, the Governor and state legislature recently pushed through a bill that effectively prevents cities and other local jurisdictions from enacting a host of policing reforms.³²⁵ The bill was apparently passed in retaliation to Memphis’s adoption of several laws restricting local police. These included an ordinance that aimed to prevent pretextual stops like the one that led to the police killing of Tyre Nichols.³²⁶ A similar dynamic can be seen in the ways state level officials have tried to undermine local prosecutors seen as too “progressive.”³²⁷ Or, most relevant here, in the ways states have moved to preempt the defunding of local law enforcement.³²⁸

If the military-industrial-complex offers any basic lesson, it’s that the PIC would grow more resilient by moving further onto the federal government’s balance sheet. Freed (to some extent) of state and local budgetary constraints, such a shift would reshape the terrain of struggle. Of course, domestically, the criminal system represents a very different

³²⁴ *Statement from President Joe Biden on Record Decrease in Violent Crime in 2024*, WHITE HOUSE (May 3, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/03/statement-from-president-joe-biden-on-record-decrease-in-violent-crime-in-2024/> [<https://perma.cc/8L7S-VYWE>].

³²⁵ Sarah Jaffe, *Tennessee’s Governor Subverted Police Reforms After the Killing of Tyre Nichols*, IN THESE TIMES (May 28, 2024), <https://inthesetimes.com/article/tennessee-governor-memphis-police-reforms-tyre-nichols> [<https://perma.cc/4CHD-JKQR>].

³²⁶ *Id.*

³²⁷ See, e.g., Gary Fineout, *DeSantis Suspends Another Elected Prosecutor in Move Derided as ‘Politically Motivated’*, POLITICO (Aug. 9, 2023, 10:25 AM), <https://www.politico.com/news/2023/08/09/desantis-suspends-state-attorney-worrell-00110445> (describing an example of a state level official exerting control over a local prosecutor).

³²⁸ See Su et al., *supra* note 251, at 1214-17.

sort of everyday institution than does the military-industrial-complex. It is possible that such a shift in spending could thus increase mobilizations, political education, and demands targeted at the federal budget and the greater fiscal power it represents.

CONCLUSION

Analytical separation between the criminal system and the “economy” allows for a distinct colorblindness to take root. One can express reservation about or critique the criminal system, including its racially disparate impacts, without identifying its complicity in the reproduction of our deeply unequal, racialized political economy. By preserving this analytical boundary, the economy can continue to present questions that are primarily technical in nature, rather than political or moral. This protects status quo economic arrangements against powerful sources of critique and politicization, channeled through opposition to the criminal system.

A proper accounting of the criminal system, through the lens of racial capitalism, rejects such a boundary. This distinctly *political* system, charged with administering *justice*, functions as a sprawling, decentralized labor governance institution. This view upends the notion of free markets. By rationing available employment and channeling and sorting individuals into precarious work, the criminal system performs decentralized economic planning and coordination. It is a punitive, subordinating invisible hand.

This account identifies the criminal system as a foil to the visions of economic planning expressed in the 1970s struggles for a job guarantee. That path not taken, dismissed by leading economists of the day,³²⁹ should be revisited in light of the devastating planning and coordination mechanisms that have emerged in its wake. In this way, the job guarantee should be understood as a *legal* system of its own, equally concerned with questions of justice. The guarantee would of course require its own legal architecture, to establish the substance of the right to a job, guide administrative practices, and adjudicate unresolved tensions. This would not be without historical and international precedent to draw on. From the New Deal era Works Progress

³²⁹ COWIE, *supra* note 71, at 274-75.

Administration, to contemporary international programs, there are numerous examples from which to think about implementation and legal construction.³³⁰ Still, basic questions, like what sorts of jobs would be created and prioritized, would remain open to democratic deliberation. As she advocated for a job guarantee, Coretta Scott King famously said the United States “has never honestly dealt with the question of a peacetime economy,” implying that her vision of a guarantee rejected reliance on direct job creation through militarism and defense spending.³³¹

Ultimately, whether the criminal system ceases to serve these expansive labor governance functions any time soon will depend, in part, on the extent to which emergent labor movements see the criminal system’s punitive excesses as part of a shared struggle. That is, whether they understand the system as playing a constitutive, as opposed to marginal, role in the broader political economy. While there are recent instances of formerly incarcerated people organizing themselves into unions and pushing for changes to labor market regulation, such examples are few and far between and limited in their scale.³³² This only makes sense given that the criminal system channels and sorts individuals into precarious work, where they are isolated, disempowered, and vulnerable to reincarceration. Connections to the broader labor movement continue to be necessary. It’s possible, however, that we are seeing signs of such shifts today. For example, during the intense 2023 New York State budget negotiations around bail reform, New York City’s largest labor union, representing 250,000 public employees, remarkably opposed Governor Kathy Hochul’s efforts to strengthen bail laws.³³³ The union saw bail reform as a working-class

³³⁰ See OLIVIER DE SCHUTTER, *THE EMPLOYMENT GUARANTEE AS A TOOL IN THE FIGHT AGAINST POVERTY: REPORT OF THE SPECIAL RAPporteur ON EXTREME POVERTY AND HUMAN RIGHTS* (2023), <https://documents.un.org/doc/undoc/gen/g23/071/64/pdf/g2307164.pdf> [<https://perma.cc/2UML-7H48>].

³³¹ STEIN & REGMI, *supra* note 68.

³³² See, e.g., Bernard Callegari & Han Lu, *Building Worker Power*, INQUEST (May 23, 2023), <https://inquest.org/building-worker-power/> [<https://perma.cc/6V7D-XEXU>] (describing successful organizing and policy advocacy efforts among formerly incarcerated people working at body shops).

³³³ Shantel Destra, *Labor Weighs in on Bail, ‘Good Cause,’ Health Care in New York Budget*, CITY & STATE (Apr. 5, 2023), <https://www.cityandstateny.com/politics/2023/04/>

issue for the many “living paycheck to paycheck.”³³⁴ Of course, this instance, together with examples like the lawsuit in Alabama, brought jointly by unions and incarcerated people,³³⁵ fall short of establishing any reliable pattern of solidarity. The challenge of constructing more stable collective formations remains.³³⁶

Much of the business community, on the other hand, appears to understand the criminal system’s constitutive role quite well. This is most evident in the Chamber of Commerce’s remarkable defense of the system in recent years, together with its ultimately narrow critique of “barriers” to employment. There is a commitment to the free flow of labor in a political-economic context where much of the work on offer is precarious. Joining this commitment is support for criminal punishment, which apparently upholds the orderly functioning of markets, a precondition to prosperity. These contested ideas around freedom, punishment, safety, and flourishing lie at the core of U.S. racial capitalism.

labor-weighs-bail-good-cause-health-care-new-york-budget/384850/ [https://perma.cc/NYK7-HFTK].

³³⁴ *Id.*

³³⁵ *See supra* Part II.C.

³³⁶ Perhaps one reason for optimism is that over the decadeslong period of deunionization, unions have grown significantly more diverse, which may mean their members are more interested in advocacy around issues of racial justice. Paul Frymer, Jacob M. Grumbach & Thomas Ogorzalek, *Unions Can Help White Workers Become More Racially Tolerant*, in *THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY* 192 (eds. Angela B. Cornell & Mark Barenberg) (2022).