Pinkerton Guards and Debtors' Prisons: The Historical Precursors to the Modern Practice of Restitution Exploitation

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ABSTRACT

This Article explores the use of criminal courts and prosecutors' offices to criminalize civil debt disputes and the relationship between the current criminalization regime and the historical use of debtors' prisons to punish individuals from lower socioeconomic status backgrounds and control Black Americans. It documents the rise of civil imprisonment, the creation, reform, and abolition of debtors' prisons in England and the early United States, and the retention of quasi-debtors' prisons in the post-Civil War United States as a mechanism of white supremacy. The Pinkerton guards of the Gilded Age were the precursor to modern private security forces. Modern shifts in criminal law and procedure have expanded the scope of the law of theft and authorized the use of criminal prosecutions to recover financial damages for victims. These new property offenses, and the state regulation of restitution that they authorize, operate as a class-based system to reinforce power structures, which bolsters the dominance of corporations and the powerlessness of impoverished individuals who lack the resources to fight it. There are distinct parallels between the traditional system of debtors' prisons and the modern system of using criminal prosecutions to secure restitution for corporate victims, which render them particularly prone to abuse. Restitution has become a way for corporate victims to use the coercive power of the State to extract sometimes wildly unreasonable "damages" from criminal defendants without having to prove the basis for those damages and that these prosecutorial restitution practices ultimately serve to redistribute wealth upwards, from poor defendants to rich corporate entities, deepening class inequalities.

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I. INTRODUCTION

> Punishment is neither a simple consequence of crime, nor the reverse side of crime, nor a mere means which is determined by the end to be achieved. Punishment must be understood as a social phenomenon freed from both its juristic concept and its social ends.[1]
>
> George Rusche & Otto Kirchheimer

A young black woman slips a pair of shoes into her handbag and heads, nonchalantly, toward the front of the store. The shoes cost about eighty dollars. It is possible that she is going to pay for them before leaving, but unlikely. She is intercepted near the cash registers by a private security guard. The guard is not a law-enforcement officer. He is a private citizen employed by a corporation, but he is wearing a uniform that is designed to mimic a police uniform (badge, insignia, weapon belt). He issues commands to the woman using language, tone, volume, and body posture that suggest that compliance with his "requests" is not optional. He places his hands roughly on her elbow and steers her forcefully to a security "substation" at the rear of the establishment. Her purse is seized and rifled through. The shoes are retrieved. She claims that she was going to pay for them. She starts to cry.

The security guard interrogates her, gets a confession, memorializes her confession in writing, and insists that she sign a form. The form includes not only her confession but an agreement to pay "restitution" to the store for its loss, which cannot be the value of the shoes because the security guard has

[1] GEORGE RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 5 (1939).

recovered them unharmed. She is trapped in a windowless room in the rear, employees-only section of the store. She has not been warned of her rights to silence and counsel. She does not have to be. The security guard is a private individual who is possibly making a legal citizen's arrest (depending on the law of the State in which this has occurred),[2] or engaging in false imprisonment.[3] False imprisonment is particularly likely if the woman's detention and interrogation were induced using intentional deception suggesting state authority or physical force.[4]

The woman is released. Her case is "referred" to the local prosecution office for enforcement. It is charged as a misdemeanor, so her case is processed rapidly. She may not even be entitled to court-appointed counsel if the State is not seeking jail time.

She will quickly be given a plea offer: admit her attempted theft and she will be given "bench probation," a form of technical probation that involves no reporting or supervision, just a list of conditions, the violation of which would give the court the jurisdiction to jail her or impose additional sanctions or conditions.[5] One of the conditions is making $3000 "restitution" to the store's corporate parent company. This amount is based on expenses like the cost of CCTV surveillance, the security guard's salary and benefits, a percentage of the company's total losses from shoplifting that year, and even the corporation's labor costs incurred while cooperating with her prosecution. These are amounts that the prosecution would have a very hard time defending in a contested adversarial hearing at which it would be required to show a sufficient causal link between her actions and the resulting loss. But this is a settlement agreement, being offered in the shadow of a threat of imprisonment as the alternative, not to mention the stress, hardship, and lost wages of a protracted criminal trial process. Even if she is lucky enough to have a lawyer, that lawyer will likely define success in terms of keeping her out of jail or off supervised probation and may therefore recommend that she agree to the restitution amount in exchange for the certainty that she will not be incarcerated. She signs the deal, knowing that she does not have any reasonable ability to pay $3,000.

Cases like this play out in courtrooms across the United States. They tend to be initiated by corporate "loss-prevention officers" who act as complaining witnesses in criminal cases, charge debtors and other individuals

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[2] *See, e.g.,* CAL. PENAL CODE § 837 (authorizing private individuals to arrest any person who commits a public offense in their presence or whom they have probable cause to believe has committed a felony in fact).

[3] *See* Wallace v. Kato, 549 U.S. 384, 388–89 (2007); RESTATEMENT (SECOND) OF TORTS §§ 35, 41 (AM. L. INST. 1965).

[4] The Supreme Court recently held that any application of physical force to the body of a suspect to apprehend or detain them—even a "mere touch"—constitutes an arrest. Torres v. Madrid, No. 19-292, slip op. at 4–10. (Mar. 25, 2021). An arrest also occurs any time that a person's liberty is restrained by a show of authority. *See* California v. Hodari D., 499 U.S. 621, 626 (1991); Terry v. Ohio, 392 U.S. 1, n. 16 (1968).

[5] *See, e.g.,* OR. REV. STAT. § 137.540 (8).

with whom their corporations have monetary disputes with theft-related criminal offenses,[6] and require debt repayment as a condition of supervision or a form of "restitution" for those crimes. Sometimes, these private security guards are off-duty police officers working in their official police uniforms.[7] Often, the corporations on whose behalf prosecutors are collecting this "restitution" are far better resourced than the prosecutors' offices, who are not only overworked and under-resourced, but funded by taxpayers for what is supposed to be a public service in the name of community safety.[8]

The relationship between the corporations who seek compensation and the prosecutorial offices who seek to assist them by collecting their "restitution" resembles a client/lawyer relationship. Prosecutors seek more damages than that to which the corporate victims are entitled, which would violate consumer-protection laws[9] and possibly even constitute fraud or extortion[10] if a civil lawyer representing the corporation were to engage directly in the same conduct. Because a public prosecutor is seeking the damages as "restitution," however, prosecutorial immunity protects the practice. As Daryl Levinson has documented, prosecutors have different reward structures and different relationships to injured victims than private lawyers have to private litigants.[11]

Much has been written about the imposition of criminal fines and court costs in misdemeanor cases to fund local government operations, especially court and police functions, and the related cycle of debt, probation viola-

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[6] This Article uses "theft" in a broad, general sense, which includes fraud, conversion, larceny, and embezzlement. *See* People v. Gonzales, 392 P.3d 437, 442 (Cal. 2017).

[7] *See, e.g.,* State v. Phillips, 520 S.E.2d 670, 674 (W. Va. 1999).

[8] The imbalance in investigatory resources between large corporations and prosecutors' offices has been documented in the "too big to jail" literature regarding prosecution of large-scale corporate crime. *See, e.g.,* JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 269 (2014).

[9] *See, e.g.,* Complaint at 17, Federal Trade Commission v. National Landmark Logistics, No. 0:20-cv-2592 (D.S.C. July 13, 2020) (F.T.C. Guide/Report) (charging National Landmark Logistics with illegal debt-collection practices and seeking $12 million in fines, alleging that the defendants pretended to be from a law firm and threatened legal action to induce debtors to pay debts that the defendants had no right to collect); Stipulated Order for Permanent Injunction and Monetary Judgment & Default Judgment, Federal Trade Commission v. Campbell Capital, No. 1:18-cv-01163-LJV-MJR (W.D.N.Y. Feb. 7, 2020) (F.T.C. Guide/Report) (banning the defendants from debt collection after they were charged with illegal debt-collection practices, including falsely claiming that debtors were going to be arrested); Stipulated Final Judgment, Consumer Financial Protection Bureau v. Douglas MacKinnon, No. 1:16-cv-00880-FPG-HKS (W.D.N.Y. July 15, 2019), (F.T.C. Guide/Report) (banning the defendants from debt collection after they were charged with illegal debt-collection practices for falsely threatening consumers with legal action).

[10] *See, e.g.,* United States v. Adrianzen, No. 1:19-cr-20658 (S.D. Fla. November 21, 2019), 2020 WL 5884583 (F.T.C. Guide/Report) (convicting Adrianzen of conspiracy to commit fraud for claiming to be a lawyer and threatening victims if they failed to pay for consumer products).

[11] *See* Daryl J. Levinson, *Framing Transactions in Constitutional Law,* 111 YALE L.J. 1311, 1329–34 (2002); *see also* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs,* 67 U. CHI. L. REV. 345 (2000).

tions, and imprisonment that can follow.[12] Civil sanctions have been largely ignored despite potentially representing a more serious injustice and flouting the law of recovery. This Article explores the commodification of criminal courts and the exploitation of debtors' disempowerment by prosecutors' offices to criminalize civil debt disputes. The Article critiques current policies on restitution enforced through the criminal justice system. In the process, it poses a critical question: whose interests do these publicly funded prosecutions serve, and what can they tell us about social relations and power in neoliberal capitalist societies?

This Article concludes that these debt prosecutions should be reconceptualized as corporate profit-making strategies with direct lineage traceable back to the debtors' prisons of the Middle Ages in Europe and colonial period of the United States and the Pinkerton guards in the Gilded Age. In doing so, it advances two related arguments: first, that the expansion of criminal fines and restitution is rooted in broader processes of neoliberalization that have been embedded in our economic culture; and second, that these criminal justice wealth transfers coerce "agreement" from vulnerable individuals who are faced with the untenable choice of prison or "voluntary" payment of restitution to their corporate "victims."

The first part of this Article is historical. Section II traces the history of: (1) the rise of civil imprisonment, (2) the creation, reform, and abolition of debtors' prisons in England and the early United States, and (3) the retention of quasi-debtors' prisons in the post-Civil War United States as a mechanism of white supremacy. Section III explores the rise of private security forces in the Gilded Age and the phenomenon of "Pinkertonism:" the role of private security forces in class struggle.

The Article's second part is descriptive and doctrinal. Section IV outlines modern shifts in criminal law and procedure, including the expanded scope of the law of theft and the authorization of the use of criminal prose-

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[12] *See, e.g.,* Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty,* 12 OHIO ST. J. CRIM. L. 445, 450 (2015); Alexandra Natapoff, *Misdemeanor Decriminalization,* 68 VAND. L. REV. 1055, 1059 (2015) (describing how criminal fines for misdemeanors ensnare poor and disadvantaged defendants in a cycle of debt and incarceration); Alexandra Natapoff, *Misdemeanors,* 85 S. CAL. L. REV. 1313 (2012) (describing how poor defendants of color get swept up into the criminal justice system through the institutional gateway of misdemeanor convictions that result in heavy fines and incarceration); Whitney Benns & Blake Strode, *Debtors' Prison in 21st-Century America,* THE ATLANTIC (Feb. 24, 2016), https://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378// [https://perma.cc/69SU-VN72]; Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation,* N.Y. TIMES (July 3, 2012), https://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html [https://perma.cc/5ABR-6PXF]; Justin Wm. Moyer, *More Than 7 Million People May Have Lost Driver's Licenses Because of Traffic Debt,* WASH. POST (May 19, 2018), https://www.washingtonpost.com/local/public-safety/more-than-7-million-people-may-have-lost-drivers-licenses-because-of-traffic-debt/2018/05/19/97678c08-5785-11e8-b656-a5f8c2a9295d_story.html?noredirect=ON&utm_ term=.3337c91a7707 [https://perma.cc/G8P9-9JX9]; Emily Yoffe, *Innocence is Irrelevant,* THE ATLANTIC, (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171// [https://perma.cc/UJ4X-SCR2].

cutions to recover financial damages for victims. It explores the two primary constitutional limitations on criminal fines—the proportionality principle and the requirement of the present ability to pay—and explains how they fail to protect criminal defendants from excessive and unfair restitution orders, especially when those orders are secured through coercive plea agreements.

The third part of the Article is normative. Section V explains how the criminalization of conduct that previously would have been remedied through a civil suit in tort or alleging a breach of contract is now swept into an expanded definition of theft and remedied with fines and restitution at criminal sentencing. It argues that this trend must be understood in the context of the broader political and economic dynamics of the neoliberal restructuring of economics, politics, and social relations. It argues that these new property offenses, and the State regulation of restitution that they authorize, operate as a class-based system of power, which bolsters the dominance of corporations and the powerlessness of impoverished individuals who lack the resources to fight it. It asserts that these prosecutions contribute to the profitability of their corporate "victims" by shifting the ordinary costs of business risks onto the unfortunate few who get caught—or even merely accused of—stealing from corporations. Section VI argues that there are distinct parallels between the traditional system of debtors' prisons, the Gilded Age phenomenon of Pinkertonism, and the modern system of using criminal prosecutions to secure restitution for corporate victims, which render them particularly prone to abuse. It describes how both systems are inherently coercive, suffer from a third-party decision-maker problem, and give the appearance of procedural fairness while advancing substantive unfairness. Section VII argues that fines and civil restitution selectively expand the reach of the criminal justice system by furthering the criminalization of conduct that used to be considered civil in nature and discriminating in their application.

Section VIII concludes that the use of criminal prosecutions to recover civil damages, particularly when that recovery is exploited by corporations at the expense of poor and vulnerable defendants in the absence of meaningful procedural fairness, is a form of social control. It explains the problem that arises when a system originally designed primarily to help the victims of personal crimes recover the costs of their injuries is coopted and corrupted by corporate victims. It concludes that restitution has become a way for corporate victims to use the coercive power of the State to extract sometimes wildly unreasonable "damages" from criminal defendants without having to prove the basis for those damages and that these prosecutorial restitution practices ultimately serve to redistribute wealth upwards, from poor defendants to rich corporate entities, deepening class inequalities.

II. The History of Debtors' Prisons

Restitution as a criminal sanction for corporate losses has parallels with, and by implication roots in, the traditional system of debt imprison-

ment as a tool of civil recovery, which originated in thirteenth-century England and was subsequently exported to its North American colonies. Civil imprisonment is a longstanding and controversial practice. In England and the United States, debtors' prisons were created, reformed, and then abolished, except in the post-Civil War United States, where *de facto* debtors' prisons were retained as a mechanism of white supremacy. Awareness of the historical injustices surrounding debtors' prisons should be more readily understood to illuminate the errors of modern reforms to the law of restitution.

A. The Origins and Development of Civil Imprisonment

In the Middle Ages, arrest for "civil offenses" and imprisonment as a punishment for failure to pay debts were the norm, a way to protect the credit of the landed elite at the expense of their typically poorer creditors.[13] Early Roman law authorized the arrest and imprisonment of debtors.[14] In the Middle Ages, fines and forfeitures were part of the punishment imposed for serious offenses across Europe.[15] These laws authorized the indefinite imprisonment of debtors until their debts were paid, with no requirement that the creditor demonstrate the debtor's culpability, the debtor be notified or provided with a right to dispute the claim, or that the creditor show that the debtor had the present ability to pay the debt.[16]

Even though the Magna Carta required that economic sanctions be "proportioned to the wrong" and "not . . . so large as to deprive" a defendant of their "livelihood,"[17] the imposition of excessive fines as criminal punishment persisted. Prior to the reign of Edward I, only the King had the right to have his debtors arrested and imprisoned if they defaulted on their debts.[18] During the reigns of the Stuarts, the fines imposed by the royal courts were notoriously excessive and subject to abuse.[19] Individuals who were unable to pay their taxes were arrested and imprisoned indefinitely until their debts to the government were paid in full, along with continually accruing fines arising out of their imprisonment, regardless of their ability to

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[13] *See* Matthew J. Baker et al., *Debtors' Prisons in America: An Economic Analysis,* 84 J. Econ. Behav. & Org. 216, 217 (2012); *see also Torres,* No. 19-292, at 11–12.

[14] *See* Baker et al*., supra* note 13, at 217.

[15] *See* 1 William Blackstone, Commentaries on the Laws of England 290–92 (1765); Matthew Hale, History of the Pleas of the Crown 420–24 (1st ed. 1847); Oliver Wendell Holmes, Jr., The Common Law 10–27 (1963); William Sharp McKechnie, Magna Carta 337–39 (2d ed. 1958).

[16] *See* House of Commons, Sessions Papers, Vol. 22 at 236 (1833); Report from the Committee Appointed to Enquire into the Practice and Effects of Imprisonment for Debt, 47 *Journals of the House of Commons* (April 1792) [hereinafter "Commons Report"] at 641–43.

[17] *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

[18] Pamela Nightingale, Enterprise, Money and Credit in England Before the Black Death 1285–1349 (2018).

[19] *See* Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 267 (1989); *see also* R. v. Manning, 92 E.R. 1236 (K.B. 1738).

pay.[20] In 1640, the Long Parliament passed a statute authorizing that anyone unable to pay their taxes "be taken and attached there to remaine without baile or mainprise untill he have paid the said Sum or Sums that such person for himselfe or for any other by this Act shall bee [sic] chargeable or ought to be charged withall."[21] When James II was overthrown in the Glorious Revolution, the English Bill of Rights reaffirmed the Magna Carta's guarantee by providing that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."[22]

Beginning in the thirteenth century, English law extended this right to private creditors, subjecting debtors who defaulted on private debts to imprisonment until their debts were paid.[23] The new statutes made it simple for creditors to arrest and imprison their debtors. Increasingly, debtors found themselves imprisoned indefinitely by ever-increasing debts to both their creditors and their jailers, as they were generally also ordered to pay the expense of their imprisonment.[24] Even debtors able to pay off the original debt could continue to be held based on their unpaid costs of imprisonment.[25]

The British colonies in North America imported the practice, and their use of debtors' prisons was widespread.[26] "By the end of the seventeenth century the debtors' prison had become an established colonial institution."[27] In many parts of the colonies, debtors comprised the majority of the prison population.[28] As William Hogeland explains: "Common practices of America's earliest lending industry sent families throughout colonial America in droves from their farms and shops to prisons or poorhouses, losing land, livestock, and possessions."[29] "Arrests in civil suits were still common in America" at the time of the founding of the United States.[30]

After the American Revolution, however, the new American states also imported the prohibitions against excessive fines in the English Bill of

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[20] *See* Brett A. Hudson, *"Printed in the Seventh Year of the Authors Oppression": Debt, Imprisonment, and the Radicalization of Henry Adis,* 35 SEVENTEENTH CENTURY 55, 59–60 (2020); *see also* Helen Carrel, *The Ideology of Punishment in Late Medieval English Towns,* 34 SOC. HISTORY 301, 313 (2009).

[21] 5 STATUTES OF THE REALM, 1628–80 (John Raithby, ed., 1819) [hereinafter "STATUTES OF THE REALM"] 79.

[22] An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689, 1 W. & M. c. 2 (Eng.). *See generally Timbs,* 139 S. Ct. at 688.

[23] *See* Baker, *et al., supra* note 13, at 216; *see, e.g.,* Statute of Acton Burnell 1283 & Statute of Merchants 1285 in 1 STATUTES OF THE REALM, *supra* note 21, at 98–100.

[24] *See* Commons Report, *supra* note 16, at 643; *see also* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 389 (1956).

[25] *See* Commons Report, *supra* note 16, at 3.

[26] *See* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900 247 (1999).

[27] *Id.* at 249.

[28] *See* Baker et al., *supra* note 13, at 217.

[29] WILLIAM HOGELAND, FOUNDING FINANCE: HOW DEBT, SPECULATION, FORECLOSURES, PROTESTS, AND CRACKDOWNS MADE US A NATION 31 (2012).

[30] Long v. Ansell, 293 U.S. 76, 83 (1934).

Rights. For example, the Virginia Declaration of Rights, on which much of the federal Bill of Rights is based, prohibited "excessive fines."[31] This marked the beginning of an era of reform of the debtors' prisons.

B. The Reform and Abolition of Debtors' Prisons

By the sixteenth century, the number of imprisoned debtors in England had risen alarmingly, with thousands of people being imprisoned for debt.[32] In 1576, the Privy Council attempted to address the expansion by establishing a royal commission to review claims of injustice, but it had little effect in stemming the tide of imprisonment.[33]

Following the Restoration, the English Parliament attempted to rein in the worst excesses of debtor imprisonment.[34] In 1729, Parliament passed (and subsequently renewed) the Lord's Act, which authorized the release of indigent debtors owing only small debts,[35] but the Act proved to be ineffective and was seldom enforced. By the beginning of the nineteenth-century, imprisonment for debt remained an oppressive, regular occurrence in England and Wales.[36] Like in the United States, in England, debtors were the most numerous of those incarcerated in this era.[37] In the late eighteenth century, Parliament enacted a series of Insolvent Debtor Relief Acts, which authorized the relief of debtors whose debts were small, who had been in prison for a minimum length of time, or who met certain conditions of release (typically turning over all their property to the creditor and promising to continue to do so until and unless the debt was fully paid).[38] In 1813, Parliament enacted Redesdale's Act, which created the Court for the Relief of Insolvent Debtors, which was authorized to release debtors from perpetual confinement.[39] Parliament finally abolished imprisonment for debt in the Debtors Act 1869, except in cases involving fraud or contempt of court.[40]

In the United States, by the beginning of the nineteenth century, the States had begun to enact reforms of their systems of debtors' prisons, largely in response to the humanitarian concerns that underlay a broader movement to curtail cruel punishments.[41] As James Whitman notes: "Debtors were certainly imprisoned in the eighteenth century . . . Debtors remained theoretically subject to imprisonment in the United States

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[31] *Timbs,* 139 S. Ct. at 688.

[32] *See* AMANDA BAILEY, OF BONDAGE 118 (2013).

[33] *See* John P. Dawson, *The Privy Council and Private Law in the Tudor and Stuart Periods,* 48 MICH. L. REV. 410, 415–16 (1950).

[34] *See* PLUCKNETT, *supra* note 24, at 387.

[35] *See* Lord's Act, 33 Geo. 3 c. 5 (1729) (Eng.).

[36] *See* Gustav Peebles, *Washing Away the Sins of Debt: the Nineteenth-Century Eradication of the Debtors' Prison*, 55 COMPAR. STUD. IN SOC'Y & HIST. 701, 702–03.

[37] *See* BAILEY, *supra* note 32, at 118.

[38] *See* An Act for the Relief of Insolvent Debtors, 5 Geo. III c. 41 (1765) (Eng.).

[39] *See* Redesdale's Act, 53 Geo. 3 c. 102 (1813) (Eng.).

[40] *See* Debtor's Act, 32 & 33 Vict. c. 62 (1869) (Eng.).

[41] *See* Baker et al., *supra* note 13, at 217–23.

throughout the century . . . But careful study shows that true imprisonment for debt was in fact rare."[42]

Reform moved to abolition.[43] "Between 1811 and the end of Reconstruction most of the Eastern states gradually prohibited the imprisonment of defaulters except in cases of fraud and in damage suits for alimony, child support, and wrongful behavior."[44] Newgate Prison in Greenwich Village was the first to reject debtors and house only convicted offenders.[45] After the Civil War, Congress ratified the Thirteenth Amendment, which outlawed slavery and other forms of involuntary servitude.[46] By the middle of the nineteenth century, the majority of states and the federal government had abolished debtors' prisons.[47] Congress formally abolished private peonage, a form of private debt servitude, in 1867.[48]

C. The Authorization of Citizens' Arrest and the Retention of Quasi-Debtors' Prisons as Mechanisms of White Supremacy

Notwithstanding the Excessive Fines Clause, following the Civil War, Southern states enacted Black Codes to oppress newly-freed slaves by authorizing massive fines for vague offenses like vagrancy.[49] When newly-freed slaves could not pay the levied fine, states instead required involuntary labor.[50] The Southern States relied upon servitude as a substitute for formal imprisonment for defaulting debtors.[51]

This public debt servitude existed alongside private peonage arrangements. There is a direct line from the institution of slavery and the expansion of debtors' prisons and private peonage for newly emancipated Black Americans in the post-Civil War segregation era.[52] Penitentiaries engaged in forced

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[42] JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 179 (2005).

[43] *See id.* at 217–19.

[44] COLEMAN, *supra* note 26, at 256; *see also* Baker et al., *supra* note 13, at 219.

[45] *See* WHITMAN, *supra* note 42, at 174.

[46] *See* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction").

[47] *See* Baker et al., *supra* note 13, at 219.

[48] Peonage Abolition Act of 1867, ch. 187, §1, 14 Stat. 546, 546 (codified at 42 U.S.C. § 1994 (2012)).

[49] *See Timbs,* 139 S. Ct. at 688.

[50] *See id.* at 689.

[51] *See, e.g.*, COLEMAN, *supra* note 26, at 243; *cf.* Baker et al., *supra* note 13, at 220.

[52] *See generally* MILFRED FIERCE, SLAVERY REVISITED: BLACKS AND THE SOUTHERN CONVICT LEASE SYSTEM, 1865–1933 88 (1994) ("Southern Blacks were trapped in [a] penal quagmire in excessive numbers and percentages of the total prison population of each southern state. For the victims, many of whom were ex-slaves, this predicament represented nothing short of a revisit to slavery"); MATTHEW MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928 (1996) ("[F]or a half-century after the Civil War, the Southern states had no prisons to speak of and those they did have played a peripheral role in those states' criminal justices system. Instead, persons convicted of criminal offenses were sent to sugar and cotton plantations, as well as to coal mines, turpentine farms, phosphate beds,

labor practices and inflicted types of punishment previously associated with slavery.[53] As Whitman notes, "[b]y the time of the Thirteenth Amendment the identification of prisoners with slaves effectively became a part of American constitutional law."[54]

While the Thirteenth Amendment abolished slavery, it explicitly excepted "punishment for crime whereof the party shall have been duly convicted" from its reach.[55] As Whitman explains: "The result was that prisoners could be effectively enslaved for life—a fate that befell thousands of southern blacks . . . well into the twentieth century."[56]

After slavery was abolished in the United States, many Southern states replaced the labor of the formerly enslaved by authorizing prisons to "lease" prisoners on chain gangs, at low cost, to private industries for arduous tasks, primarily picking cotton on large plantations.[57] A majority of the prisoners on these work gangs were Black, and this new form of forced labor helped to bridge the gap between slavery and the sharecropping system that would replace it.[58] As James Whitman explains: "Imprisonment took on a distinctly *low-status* color, and indeed the status-color of slavery."[59] He continues:

> [H]istorians have demonstrated at length that early American penitentiaries were colored by an association with slavery. Prisons were akin to plantations: The "overseer" resided in the penitentiary as well as the plantation, and he supervised the performance of "hard labor" by inmates as well as slaves. Inmates and slaves were both distinguished from the free community by . . . the color and quality of their garb. And the most resonant symbol of the slave plantation—the clanking of chains—echoed just as loudly from within the prison walls. Just as masters demanded that slaves address them in submissive tones, whenever it is necessary for [a convict] to speak to a Keeper, [he must] do it with a humble sense of his degraded condition. Convicts were to be reduced to a

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brickyards [and] sawmills"); Benns & Strode, *supra* note 12; Angela Davis, *Racialized Punishment and Prison Abolition, in* A Companion to African-American Philosophy 363 (Tommy L. Lott & John P. Pittman eds., 2003) ("The abolition of slavery thus corresponded to the authorization of slavery as punishment. In actual practice, both Emancipation and the authorization of penal servitude combined to create an immense black presence within southern prisons and to transform the character of punishment into a means of managing former slaves as opposed to addressing problems of serious crime").

[53] *See* Whitman, *supra* note 42, at 174.

[54] *Id.*

[55] U.S. Const. amend. XIII.

[56] Whitman, *supra* note 42, at 177.

[57] *See* Davis, *supra* note 52, at 364 ("Southern prison populations not only became predominantly black in the aftermath of slavery, penitentiaries were either replaced by convict leasing or they were restricted to white convicts").

[58] *See id.* ("During the last three decades of the nineteenth century, southern criminal justice systems were profoundly transformed by their role as a totalitarian means of controlling black labor in the post-Emancipation era").

[59] Whitman, *supra* note 42, at 174.

> state of humiliation and discipline. Slavery was to be the lot of American convicts.[60]

Mississippi's Parchman Farm, which was modeled after a slave plantation, is still an active prison with a predominantly Black population.[61] Despite formal abolition, Southern Black men continued to be ensnared in exploitive peonage and sharecropping arrangements into the 1940s.

The imposition and severe enforcement of criminal fines has become another tool, along with Black Codes, restrictive zoning ordinances, redlining, stop-and-frisk policing, mass evictions, and debt-collection lawsuits, to keep Black Southerners in check.[62] There is a direct line between the punitive post-emancipation treatment of the formerly enslaved to the modern practices of criminalization and sentencing. David Oshinsky explains how criminal punishment replaced slavery in the South, noting: "Throughout the South, thousands of ex-slaves were being arrested, and convicted for acts that in the past had been dealt with by the master alone. . . . An offense against [the master] had become an offense against the state."[63] Angela Davis explains how this history has led to the modern regime of mass incarceration:

> In the contemporary era, the tendency toward more prisons and harsher punishment leads to gross violations of prisoners' human rights and, within the US context, it summons up new perils of racism. The rising numbers of imprisoned black and Latino men and women tell a compelling story of an increasingly intimate link between race and criminalization.[64]

Similarly, State legislatures initially adopted many of the statutes authorizing citizen's arrests, upon which store security guards and risk-prevention officers rely when apprehending the suspects who get caught up in these modern restitution cases. In the wake of the Civil War, these statutes were a justification for lynchings in the post-War era.[65] The modern restitution practices of prosecutors' office may have their roots in this history of discrimination, and they continue to be implemented in racially disparate ways.[66]

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[60] *Id.* at 175–76 (citations omitted).

[61] *See* DAVID OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

[62] *See* Benns & Strode, *supra* note 12; Davis, *supra* note 52, at 363; Alexes Harris, Heather Evans, & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States,* 115 AMER. J. SOCIO. 1753, 1757 (2010).

[63] OSHINSKY, *supra* note 61, at 28.

[64] Davis, *supra* note 52, at 367.

[65] *See Georgia Moving to Repeal Citizen's Arrest After Arbery Death,* THE REPUBLIC (Mar. 5, 2021), http://www.therepublic.com/2021/03/05/us-georgia-citizen-arrest/ [https://perma.cc/V7JG-BYQ5].

[66] *See* Benns & Strode, *supra* note 12 (documenting the "racially homogenous" nature of the modern "debtors' prisons" created by the punishment of imprisonment for failure to pay court fines and fees).

III. The Pinkerton Guards and the Gilded Age

The use of private security forces to secure corporate wealth has an equally ignominious history. In the Gilded Age, private security forces began to play an increasingly central role in the suppression of class struggle.

In 1850, Allan Pinkerton founded the National Detective Agency as a form of private police, initially serving primarily the security interests of the banks, railroads, and cattle barons of the Wild West.[67] His "Pinkerton guards" tracked down counterfeiters, investigated embezzlement, and protected corporate property.[68] They chased train robbers and cattle rustlers.[69] Eventually, however, the Pinkerton guards became best known for their strikebreaking services.[70]

Like corporate loss-prevention officers today, the Pinkerton guards performed a quasi-official role. Even though they were acting on behalf of private interests, they "still seemed to carry the weight of official authority."[71] As S. Paul O'Hara notes: "The state, at the federal and local level, not only refused to limit the scope and power of the agency but also actively legitimized the Pinkertons by hiring and deputizing the agents."[72] For example, during the Civil War, Pinkerton guards provided private security for President Lincoln and went undercover to infiltrate Confederate militias and provide military intelligence to the Army of the Potomac.[73] The Pinkerton guards became synonymous with plutocratic power, "a pivotal institution in the formation of American monopoly capitalism."[74] As O'Hara explains:

> In an age of new market discipline and territorial expansion, Pinkertons served as a quasi-official extension of the state where the state had little other representation. As rapid industrialization triggered bloody labor conflict, the agency became, for all intents and purposes, capital's private army. It was the muscle of industry at a time when industry tried to crush dissent and consolidate its control.[75]

In sum, they were "the shock troops of industrial order."[76]

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[67] *See* S. Paul O'Hara, Inventing the Pinkertons; or Spies, Sleuths, Mercenaries, and Thugs: Being a Story of the Nation's Most Famous (and Infamous) Detective Agency 3–4 (2016).
[68] *See id.* at 3.
[69] *See id.* at 4.
[70] *See id.*
[71] *Id.*
[72] *Id.* at 3.
[73] *See id*.
[74] *Id.* at 2–3.
[75] *Id.* at 2.
[76] *Id.* at 9.

In 1886, American workers took to the streets in a national general strike to demand the creation of the eight-hour workday.[77] A private association of Chicago industrialists responded by hiring the Pinkerton detectives to root out "worker radicalism" in the city.[78] Late in the evening on May 3, dozens of police officers swarmed, guns drawn, into a peaceful meeting being organized by anarchists to protest police brutality, near Haymarket Square, and ordered the crowd to disperse.[79] When the police descended on the protest meeting, an unidentified individual threw a homemade bomb into the police cordon, killing five police officers and injuring dozens more.[80] The police responded by firing indiscriminately into the crowd, and a gun battle ensued, killing protestors and additional police officers.[81] Pinkerton guards joined the melee and escalated the violence.[82]

The "Haymarket riot" sparked the first American "red scare."[83] The State of Illinois claimed that the Haymarket rally had been organized to lure the police into an ambush.[84] At trial, an undercover Pinkerton detective named Andrew Johnson testified that he had infiltrated the "anarchist organization," learned about the anarchists' plan, and led the police to a stockpile of explosives that he claimed belonged to the anarchists.[85] The jury believed the testimony of the Pinkerton detectives and convicted seven defendants of a conspiracy to foment revolution.[86] They were sentenced to death, and four were hanged in the Cook County Jail.[87] Eventually, the Governor of Illinois pardoned the remaining three, who had been languishing for years in Joliet Prison awaiting their executions.[88] The Pinkerton guards were the precursors to today's private loss-prevention officers—the Blackwater to the Gilded Age's Halliburton.

IV. The Modern Building Blocks of Coerced Debt-Profit

A series of modern doctrinal elements that expose criminal defendants to excessive and unfair restitution orders, often secured through coercive plea agreements, has arisen out of this inglorious history.

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[77] *See* Timothy Messer-Kruse, The Haymarket Conspiracy: Transatlantic Anarchist Networks 1 (2012).
[78] *See* O'Hara, *supra* note 67, at 1.
[79] *See id.*; *see also* Messer-Kruse, *supra* note 77, at 1.
[80] *See id.*
[81] *See* O'Hara, *supra* note 67, at 1; *see also* Messer-Kruse, *supra* note 77, at 1.
[82] *See* O'Hara, *supra* note 67, at 1.
[83] *See* Messer-Kruse, *supra* note 77, at 4.
[84] *See* O'Hara, *supra* note 67, at 1.
[85] *Id.*; *see* Messer-Kruse, *supra* note 77, at 1.
[86] *See* O'Hara, *supra* note 67, at 1.
[87] *See* Messer-Kruse, *supra* note 77, at 4; *see also* O'Hara, *supra* note 67, at 1.
[88] *See* Messer-Kruse, *supra* note 77, at 4.

A. The Expanded Law of Theft

There is already critical literature regarding the over-criminalization of previously civil wrongs.[89] It focuses on the substantive definitions of these crimes and the reach of the criminal-justice system into areas that used to be exclusively the province of private dispute resolution.[90] This Article focuses on a different aspect of this expansion of criminal liability: the fines and restitution that have become the standard punishment for violating these sweeping theft laws.

Historically, property crimes were created to prevent violence, not to protect property. The common-law property offenses primarily involved significant risks of violence. Common-law burglary criminalized breaking *into an occupied dwelling at nighttime* (with a felonious intent).[91] Robbery criminalizes the taking of property *by force*.[92] Common-law arson criminalized the intentional burning of *a dwelling*. Even larceny, at common law, required that stolen property be taken *from the person* of the owner.[93] These acts were criminalized to protect the King's peace, not to protect the property being taken or damaged.[94] Other unlawful takings—those that were not from the person of the owner, not by force or fire, not located in an occupied home—were largely left to the civil law for actions in conversion and trespass, with replevin or compensatory damages (not criminal punishment) as

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[89] *See* John C. Coffee, Jr., *From Tort to Crime: Reflections on the Criminalization of Fiduciary Duties and the Problematic Line Between Law and Ethics,* 19 AM. CRIM. L. REV. 117 (1981); William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH, L. REV. 505, 516–17 (2001).

[90] *See* DOUGLAS N. HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008); Gregory Jones, *Over-Criminalization and the Need for a Crime Paradigm,* 66 RUTGERS L. REV. 931 (2014); Murat C. Mungan, *Stigma Dilution and Over-Criminalization,* 18 AM. L. & ECON. REV. 88 (2016); *see also* Dennis J. Baker, *Treason Versus Outraging Public Decency: Over-Criminalisation and Terrorism Panics,* 84 J. CRIM. L. 19 (2020); Isabel Grant, *The Over-Criminalization of Persons with HIV,* 63 TORONTO L.J. 475 (2013); Sarah Kendall, *Australia's New Espionage Laws: Another Case of Hyper-Legislation and Over-Criminalization,* 38 QUEENSLAND L. REV. 125 (2019); Erik Shaver, *The Over-Criminalization and Inequitable Policing and Sentencing of Latin@s Within the Judicial System of the United States: The Latin@ Addition to the School-to-Prison Pipeline,* J. LATINOS & EDUC. 1 (2020).

[91] *See* SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN 63 (1817).

[92] *See, e.g.*, Crimes Act 1961, s 234 (N.Z.); Theft Act 1968, § 8 (UK).

[93] *See* Alex Steel, *The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft*, 31 U.N.S.W. L.J. 712, 727–28 (2008); *see, e.g.*, Larceny Act 1916 § 1(1) (Eng.), (defining the *actus reus* of larceny as "tak[ing] and carr[ying] away"); *see also* Croton v. The Queen (1967) 117 CLR 326 (Austl.); A.P. Simester & G.R. Sullivan, *On the Nature and Rationale of Property Offences, in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 181 (R.A. Duff & Stuart Green eds., 2005) ("Larcenous incidents had implications for safety and security . . . .").

[94] *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 31 (1978).

the remedy.[95] "It was the element of violence that differentiated the taking [in larceny or robbery] from the later emerging tort of trespass."[96]

Over time, the scope of criminal property offenses has expanded. The common law crimes have been extended by statute, and new property-based offenses have been created.[97] The theft-related offenses codified now include takings not directly from the person of the owner;[98] and the crimes of burglary and arson include entering and burning buildings, vehicles, and other places that are not residential.[99] New theft-related offenses have been created to protect emerging forms of digital and other intangible property,[100] where there is no element of conversion and neither the use value nor the exchange value of the "property" are even affected by the "theft," such as theft of utilities or theft of intellectual property (for example, the criminalization of downloading copyrighted music without paying royalties).[101] "Cybertheft" crimes often consisting solely of unauthorized access to computer systems, regardless of damage or the taking of any tangible item of value.[102] This increasing scope of the criminal law has created a wider net in which to ensnare defendants in the ropes of fines and restitution.

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[95] Even common-law fraud (or false pretenses) was narrower in scope than modern statutory formulations. The classical elements were: "(1) a false representation of a material present or past fact (2) which causes the victim (3) to pass title to (4) his property to the wrongdoer, (5) who (a) knows his representation to be false and (b) intends thereby to defraud the victim." WAYNE R. LAFAVE & AUSTIN W. SCOTT, 2 SUBSTANTIVE CRIMINAL LAW 382–83 (1986).

[96] Steel, *supra* note 93, at 726.

[97] *See, e.g.*, CAL. PENAL CODE § 466 (criminalizing the possession of burglary tools, including screwdrivers and crowbars).

[98] *See, e.g.*, Crimes Act 1961, s 219 (N.Z.); Insolvency Act 2006, s 426 (N.Z.) (criminalizing the flight from the jurisdiction of a bankrupt individual with assets valued at $1,000 or more); Theft Act 1968, § 5(4) (UK) (criminalizing failure to repay a restitution debt).

[99] *See, e.g.*, Crimes Act 1961, s 267 (N.Z.); Theft Act 1968, § 9 (UK).

[100] *See* Alex Steel, *Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property*, 30 SYDNEY L. REV. 575 (2008); *see, e.g.*, Theft Act 1968, § 4(1) (UK) (defining property for the purpose of theft-related crimes to include "money and all other property, real or personal, including things in action and other intangible property").

[101] *See, e.g.*, 18 U.S.C. § 1001 (criminalizing the conduct of anyone who "knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact"); 18 U.S.C. § 1346 (criminalizing "scheme[s]" or "artifice[s]" to deprive others of "the intangible right of honest services"); *see also* United States v. Frost, 125 F.3d 346 (6th Cir. 1997) (upholding the conviction of Frost, a university professor, under 18 U.S.C. § 1346, for awarding degrees to students who performed poorly and sometimes plagiarized graduate work on the theory that, in doing so, he violated his fiduciary duty to the university to grade students fairly and honestly); United States v. Granberry, 908 F.2d 278 (8th Cir. 1990) (upholding Granberry's criminal fraud conviction for lying about his criminal conviction history on a school-bus-operator permit). *See generally* Ellen S. Podgor, *Do We Need a "Beanie Baby" Fraud Statute?*, 49 AM. U. L. REV. 1031 (2000) (considering new fraud statutes that Congress could pass).

[102] *See* Mary W.S. Wong, *Cyber-Trespass and "Unauthorized Access" as Legal Mechanisms of Access Control: Lessons from the US Experience*, 15 INT'L. J. L. & INFO. TECH. 90 (2007); *see also* R. v. Todorovic, [2008] NSWCCA 49.

B. The Expansion of Criminal Fines, Restitution, & "Civil Compromises"

Fines and restitution have both punitive and remedial aspects. They reflect the general expansion—and return—of unpaid debt as a form of criminal liability and punishment. Requiring offenders to pay criminal fines and costs has longstanding historical roots. At common law, English judges could impose fines and fees without limitation.[103] This common law practice has been explicitly authorized in modern sentencing statutes. Legislatures have increasingly authorized, and courts have enthusiastically imposed, fines, fees, restitution, and punitive forfeitures, along with reimbursement of court and supervision fees, as part of criminal sentences.[104] Courts can impose fines and restitution either as standalone punishments or as a condition of probation or other supervision.[105] These statutes facilitate corporations' ability to use criminal charges to enforce what traditionally have been considered to be civil property rights.

These days, many States also authorize "civil compromises" of criminal charges, pursuant to which the State will dismiss, or decline to file, criminal charges against a defendant if the defendant agrees to pay civil damages to the victim.[106] Civil compromise procedures result in the defendant paying

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[103] *See* JEREMY S. WILLIAMS, THE LAW OF SENTENCING AND CORRECTIONS 90 (1974).

[104] *See* Nicholas Kristof, *Is It a Crime to Be Poor?,* N.Y. TIMES (June 11, 2016) https://www.nytimes.com/2016/06/12/opinion/sunday/is-it-a-crime-to-be-poor.html [https://perma.cc/4XL8-LBLZ] ("In the last 25 years, as mass incarceration became increasingly costly, states and localities shifted the burden to criminal offenders with an explosion in special fees and surcharges"); *see, e.g.,* Sentencing Reform Act of 1984, Criminal Fine Enforcement Act of 1984, Criminal Fine Enforcement Act of 1987 (codified at 18 U.S.C. § 3571(d)) (authorizing fines as a punishment for conviction of federal offenses); *see also* United States Sentencing Guidelines § 5E1.2 (d) ("The amount of fine should always be sufficient to ensure that the fine . . . is punitive"); United States v. Francies, 945 F.2d 851 (5th Cir. 1991). *See generally* American Bar Association, Standards for Criminal Justice § 18-3.22 (a) (3rd ed. 1994) ("The legislature may provide than an offender may be charged with reasonable court costs and, in an appropriate case, with reasonable costs associated with a correctional program or sanction included in that offender's sentence. The legislature should characterize such assessments as separate from offenders' sentences.").

[105] *See* 18 U.S.C. §§§ 3551, 3571, & 3623.

[106] *See, e.g.,* CAL. PENAL CODE § 1377 ("When the person injured by an act constituting a misdemeanor has a remedy by a civil action, the offense may be compromised . . . ."); CAL. PENAL CODE § 1378 ("If the person injured appears before the court in which the action is pending at any time before trial, and acknowledges that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom . . . . The order is a bar to another prosecution for the same offense."); CAL. CODE OF CIV. P. § 33 (authorizing prosecutors to enter into civil compromises instead of filing charges in certain enumerated types of felony cases, including burglary, forgery, and arson); OR. REV. STAT. § 135.703(1) ("When a defendant is charged with a crime punishable as a misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised . . . ."); OR. REV. STAT. § 135.705(1)(a) ("If the person injured acknowledges in writing, at any time before trial on an accusatory instrument for the crime, that the person has received satisfaction for the injury, the court may, in its discretion, on payment of the costs and expenses incurred, enter a judgment dismissing the accusatory instru-

the victim restitution either in lieu of criminal charges or in exchange for dismissal of existing charges that are "coextensive" with the civil injury.[107] The purpose of these civil compromises is to promote the "public interest by checking rather than encouraging criminal prosecutions of cases which are in reality of a private rather than public nature, although they are technically labeled as public offenses."[108] This is because "the public interest in those cases is best served by requiring the accused to make restitution directly and immediately to the individual victim instead of subjecting him to criminal sanctions for the welfare of society in general."[109]

Companies seeking to use criminal restitution to insure against corporate losses develop ties to prosecutors' offices and use them to lobby for debt collection as a form of criminal sentencing. Malcolm Feeley has documented how "entrepreneurs. . . create demand for and then supply new forms of social control."[110] As Feeley notes, "the history of innovation in the criminal justice system is in large part the history of the experience of private entrepreneurs. It is also the history of institutions designed for one purpose that are subsequently adapted for other purposes. Indeed, this is the genius of successful entrepreneurs generally."[111]

Some of the most common corporate victims to use these restitution mechanisms are trade associations for movie and music producers, including the Recording Industry Association of American ("RIAA") and the Motion Picture Association of America ("MPAA"), who are notoriously aggressive in using the criminal-justice system to enforce their copyrights. The case of *People v. Garcia*[112] is an example. Hector Garcia and Martin Avila were movie and music pirates.[113] They were arrested with thousands of pirated DVDs and counterfeit music CDs.[114] They pleaded guilty to criminal trademark counterfeiting.[115] At their sentencing hearing, the State of California agreed to a sentence of probation but sought and was granted a restitution order requiring Garcia and Avila to pay more than $235,000 in restitution to the MPAA and RIAA.[116]

The restitution amount was based on the testimony of private investigators, hired by the RIAA and the MPAA, who "assisted police with the iden-

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ment."); OR. REV. STAT. § 135.707 ("A judgment entered under ORS 135.705 . . . is a bar to another prosecution for the same crime.").

[107] People v. Moulton, 131 Cal. App. 3d Supp. 10 (Cal. App. 1982).

[108] People v. Stephen, 182 Cal. App. 3d Supp. 14, 19–20 (Cal. App. 1986).

[109] *Id.* at 16.

[110] Malcolm Feeley, *Entrepreneurs of Punishment: The Legacy of Privatization*, 4 PUNISHMENT & SOC'Y 321 (2002).

[111] Malcolm Feeley, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Justice System: An Account of Convict Transportation and Electronic Monitoring,* 17 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 1, 25 (2016).

[112] 194 Cal. App. 4th 612 (Cal. App. 2011).

[113] *See id.* at 614.

[114] *See id.*

[115] *See id.*

[116] *See id.*

tification and cataloging of the suspected pirated merchandise."[117] It was calculated based on the RIAA's claim that it incurred a loss "of the selling price of the items had they been authentic" at the time that the counterfeit CDs were burned[118] and the MPAA's claim that it was entitled to be compensated for its estimated value of the "displacement" of its sales by the counterfeit movies, if Garcia and Avila had been successful in selling them.[119] The RIAA filed a "victim-impact statement" at Garcia and Avila's sentencing hearing in which it claimed:

> [T]he wholesale value of legitimate product should be multiplied by the number of unlawful articles found in the defendant's possession. This is because legitimate retailers must purchase genuine music recordings from authorized wholesale sources in order to offer them for sale. When pirates possess illicit merchandise, their possession constitutes the displacement of what would normally be lawful wholesale purchases. This economic harm at the wholesale level—which occurs irrespective of whether defendant ever succeeds in selling his or her illicit product to a consumer—is the main reason that music piracy costs the United States recording industry more than $5.33 billion per year.[120]

The restitution order also included almost $2,000 that the RIAA and MPAA incurred in "investigation costs" justifying their estimates of their potential lost sales from Garcia and Avila's unsuccessful bootlegging scheme.[121] The MPAA provided a list of DVDs seized and "requested restitution consistent with the value of the product seized and based on the average wholesale value."[122] In reality, the RIAA and the MPAA suffered no actual economic loss from Garcia and Avila's counterfeiting because they were apprehended before they could sell the movies and CDs in their possession.

What is unusual about *Garcia* is that it went to a contested hearing and an appeal. In most cases, defendants are required to agree to the demanded corporate "restitution" for potential lost sales as part of plea agreements, which also require them to waive their right to appeal.[123] In the process, the prosecution forces defendants to choose between agreeing to the full amount of restitution sought or risking prison time. These restitution amounts are sought—and paid—in the absence of any proof of causal connection between the defendants' piracy and actual financial loss by the corporate victims.

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[117] *Id.* at 615.
[118] *Id.*
[119] *See id.*
[120] *Id.* at 620.
[121] *See id.* at 615–16.
[122] *See id.* at 620 n.6.
[123] *See* Yoffe, *supra* note 12.

Also noteworthy about the *Garcia* case is how hard the State of California fought to do the MPAA and the RIAA's dirty work. It not only defended the restitution in the sentencing court, but expended tens of thousands of California taxpayers' dollars defending the award on appeal. Garcia and Avila were represented by court-appointed defenders.[124] The State of California was represented on appeal by then-California Attorney General Kamala Harris,[125] whose office vigorously represented the MPAA and RIAA's sought-after restitution.

The Supreme Court of West Virginia has expressed concern with these widespread practices. In *State v. Orth*,[126] Nancy Orth was a regular gambler at the Wheeling Downs dog track.[127] She frequently placed bets by writing personal checks.[128] Of the first eleven checks that she wrote for amounts totaling $7,350, six of the checks totaling $4,800 were returned by the bank for insufficient funds.[129] Orth repaid the $4,800, and Wheeling Downs allowed her to keep writing checks, with no limits and no verification, so that she would keep betting.[130] Orth kept writing checks with insufficient funds because she believed that eventually she would win big at the track.[131] Over the next month, Orth wrote $5,600 in additional bad checks.[132] When she did not make good on the checks and stopped gambling at the track, Wheeling Downs filed a criminal complaint against her.[133] As the West Virginia Supreme Court explained:

> Wheeling Downs took a not so well calculated risk in continuing to grant the appellant check cashing privileges so that she could continue to gamble. When that risk failed to pay off and the track was unable to collect the money from the appellant, Wheeling Downs pressed criminal charges hoping for an order of restitution.[134]

The track obtained arrest warrants for Orth.[135] The warrants were served on Orth by an off-duty police officer moonlighting as private security for Wheeling Downs.[136] The track pressed charges solely for the purpose of collecting the money that Orth owed.[137]

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[124] *See Garcia,* 194 Cal. App. 4th, at 613.
[125] *See id.*
[126] 359 S.E.2d 136 (W. Va. 1987).
[127] *See id.* at 138.
[128] *See id.*
[129] *See id.*
[130] *See id.*
[131] *See id.* at 139.
[132] *See id.* at 138.
[133] *See id.*
[134] *Id.* at 140.
[135] *See id.*
[136] *See id.*
[137] *See id.*

The prosecution granted the track's wish. The county prosecutor offered Orth an arrangement under which she could pay restitution to Wheeling Downs in lieu of criminal prosecution.[138] The State agreed not to prosecute her as long as she made monthly payments to the track.[139] While Orth made her payments for a few months, she was no longer able to keep up with the payment plan.[140] The State charged Orth with check kiting, the court found her guilty, and Orth appealed.[141]

The court reversed her conviction on other grounds but went on to express its concerns about the use of the criminal process to secure payment for Wheeling Downs, noting:

> The arrangements made in this case have a distinctly unsavory flavor. Wheeling Downs apparently saw the appellant's arrest as the next step in its collection process. The track employed the police officer for its own private purposes, presumably the provision of security services. The security director for Wheeling Downs summoned his employee, the policeman, and had him serve the arrest warrants on the appellant, which is part of a policeman's official duty. Essentially, then, the officer was engaged in privately motivated conduct while clothed with the police power of the state. This use of the official powers of a policeman under the direction of a private party seems to us to be improper. The police power of the State of West Virginia is not for hire.[142]

The court continued:

> The state's role in negotiating the appellant's agreement to repay the track seems to condone the view of the legal system as a part of the debt collection process. The threat of prosecution for failure to make the required payments smacks of the generally discredited practice of imprisonment for debts.[143]

The court concluded: "The prosecutorial services of the state are not for private use in civil debt collection."[144] The concurring justice agreed, noting:

> The assistant prosecutor's arrangement with Orth to forestall presentment of the bad check warrants to the grand jury, so long as Orth made restitution to Wheeling Downs, cannot be disguised as some sort of plea bargaining agreement. The restitution arrange-

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[138] *See id.* at 138, 140.
[139] *See id.* at 138.
[140] *See id.*
[141] *See id.*
[142] *Id.* at 141.
[143] *Id.*
[144] *Id.*

> ment, in fact, constituted debt collection by a government official for a private party and borders on malfeasance in office.[145]

Unfortunately, American courts have gradually lost their outrage at the impropriety of privatizing police and prosecution functions in the name of collecting private debts. In *State v. Wilen*,[146] the Nebraska Court of Appeals found that "a police officer may provide security to a commercial establishment while off duty and make arrests or take other authoritative action in connection therewith."[147] The court explained: "The fact that [police officers] receiv[e] compensation from [their private employer], along with [their] salary from public employment, is of no consequence."[148] The Georgia Court of Appeals similarly reasoned:

> The practice of municipalities which allows law enforcement officers, while off duty and in uniform, to serve as peace-keepers in private establishments open to the general public is in the public interest. The presence of uniformed officers in places susceptible to breaches of the peace deters unlawful acts and conduct by patrons in those places.[149]

These days, apparently the police power of the State is for hire, although it can still be limited constitutionally.

C. Limitations on the Use of Fines as Criminal Punishments

The United States Supreme Court has placed two important constitutional limits on the States' ability to impose monetary fines as a form of criminal punishment: a proportionality requirement stemming from the Eighth Amendment of the United States Constitution and a due process requirement that the defendant have the present ability to pay any fine imposed.

1. The Proportionality Principle

Criminal fines and many forfeitures constitute punishment, regulated by the Eighth Amendment, which dictates: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[150] The Excessive Fines Clause of the Eighth Amendment was taken verbatim from the English Bill of Rights of 1689.[151] It "limits the government's power to extract payments, whether in cash or in kind, 'as punish-

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[145] *Id.* at 142 (Brotherton, J., concurring).
[146] 539 N.W.2d 650 (Neb. Ct. App. 1995).
[147] *Id.* at 658.
[148] *Id.* at 660.
[149] Duncan v. State, 294 S.E.2d 365, 366–67 (Ga. Ct. App. 1982).
[150] U.S. CONST. amend. VIII.
[151] *See Browning-Ferris Indus.,* 492 U.S. at 266–67.

ment for some offense.'"[152] All fifty states have parallel provisions in their state constitutions.[153]

The Supreme Court has held that the imposition of fines and criminal forfeiture penalties that are "grossly disproportionate to the gravity of a defendant's offense" violate the Excessive Fines Clause.[154] *Timbs v. Indiana* is the most recent Supreme Court case to address the Excessive Fines Clause.[155] Tyson Timbs pleaded guilty in an Indiana state court to dealing in a controlled substance for small-scale heroin dealing.[156] At the time of his arrest, the police seized a $42,000 Land Rover that Timbs had purchased with life-insurance proceeds when his father died.[157] The trial court sentenced Timbs to probation and home detention and ordered him to attend drug treatment.[158] The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, arguing that it had been used to transport heroin and was, therefore, an instrumentality of Timbs's crime.[159] The sentencing court declined the State's request on the ground that the value of the Land Rover was more than four times the maximum amount of criminal fines for which Timbs was liable under the criminal statute to which he pleaded guilty, and that forfeiture would therefore be unconstitutionally disproportionate to the gravity of Timbs offense.[160]

The question presented to the Supreme Court was whether the Excessive Fines Clause applied to the States by way of the Due Process Clause of the Fourteenth Amendment.[161] In holding that it did, the Court found that the safeguard was so fundamental that it had to restrain State governments.[162] The Court explained that "[e]xorbitant tolls undermine other constitutional liberties" like freedom of speech and the right to be free from disproportionate punishment.[163]

2. Requirement of the Ability to Pay

The Constitution also precludes the imposition of monetary criminal penalties (fines and punitive forfeiture) on defendants who lack the ability to

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[152] Austin v. United States, 509 U.S. 602, 609–10 (1993) (holding that civil *in rem* forfeitures fall within the protection of the Excessive Fines Clause when they are at least partially punitive).

[153] *See Timbs*, 139 S. Ct. at 689.

[154] United States v. Bajakajian, 524 U.S. 321, 334 (1998); *cf. Austin,* 509 U.S. at 622–23; Alexander v. United States, 509 U.S. 544, 559 (1993).

[155] 139 S. Ct. 682 (2019).

[156] *See id.* at 686.

[157] *See id.*

[158] *See id.*

[159] *See id.*

[160] *See id.*

[161] *See id.*

[162] *See id.* at 686–87.

[163] *Id.* at 689.

pay them.[164] Doing so violates both guarantees of due process and equal protection.[165] As one California court explains, imposing fines on individuals who cannot pay them is unduly punitive and discriminatory:

> [T]he growing use of . . . fees and similar forms of criminal justice debt creates a significant barrier for individuals seeking to rebuild their lives after a criminal conviction. Criminal justice debt and associated collection practices can damage credit, interfere with a defendant's commitments, such as child support obligations, restrict employment opportunities and otherwise impede reentry and rehabilitation. "What at first glance appears to be easy money for the state can carry significant hidden costs—both human and financial—for individuals, for the government, and for the community at large. . . . Debt-related mandatory court appearances and probation and parole conditions leave debtors vulnerable for violations that result in a new form of debtor's prison."[166]

D. The Lack of Corresponding Limits on Restitution Proceedings

While proportionality and ability to pay impose important limitations on the State's power to collect criminal fines that are disproportionate to criminal wrongdoing, neither applies to restitution or civil compromises, which are deemed to be civil remedies that are simply appended to, or substituted for, a related criminal case for efficiency and enforcement reasons.[167] What this means, as a practical matter, is that the prosecution can constitutionally extract "restitution" from criminal defendants regardless of whether the amount of the restitution is excessive in relation to the crime that generated it or whether the defendant has the ability to pay the restitution.[168] In the process, these prosecutions do a huge favor for corporate victims, who would never waste the resources to bring civil recovery actions for what are

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[164] *See* Bearden v. Georgia, 461 U.S. 660, 674 (1983) (holding that the Constitution forbids States from imprisoning a defendant for the failure to pay a criminal fine or restitution "solely because he lacked the resources to pay it").

[165] *See id.* at 665–66; *see also* Tate v. Short, 401 U.S. 395, 398–99 (1971) (holding, in the case of a traffic offense punishable only by a fine, that it was unconstitutional to convert a fine into a prison term upon nonpayment if the defendant is indigent and without the means to pay); Williams v. Illinois, 399 U.S. 235, 240–41 (1970) (holding that involuntary nonpayment of a fine or cost cannot justify imprisoning a person beyond the maximum period authorized by statute); Ross v. Moffitt, 417 U.S. 600, 608–09 (1974).

[166] People v. Neal, 29 Cal. App. 5th 820, 827 (Ct. App. 2018) (internal citations omitted).

[167] *See* Thomas M. Kelly, *Where Offenders Pay for Their Crimes: Victim Restitution and Its Constitutionality,* 59 Notre Dame L. Rev. 685, 688 (1984); Bradford C. Mank, *The Scope of Criminal Restitution: Awarding Unliquidated Damages in Sentencing Hearings,* 17 Cap. U. L. Rev. 55 (1987).

[168] *See* People v. Carbajal, 899 P.2d 67, 71 (Cal. 1995) (en banc) (holding that there was no requirement that a restitution order be limited to the amount of loss for which the defendant was found culpable or that restitution reflect the amount of damages that might be recoverable in a civil action).

small amounts of money to them (particularly considering lawyers' fees, which are not generally recoverable in tort cases) from individuals who would likely be judgment proof in a civil case.

Courts can order victim restitution as a condition of probation or a suspended sentence and can penalize a defendant's failure to pay restitution by imprisonment, as long as they find that the defendant's failure to pay restitution is willful.[169] While it violates both the Constitution and the United States' international human rights obligations[170] to imprison defendants for failure to pay restitution if they lack the present ability to do so, this prohibition is notoriously honored in its breach.[171]

The constitutional prohibition against penalizing the non-willful failure to pay fines does not extend to a substitute punishment like "community service."[172] Courts commonly "convert" fines to onerous supervision and community-service requirements when defendants lack the ability to pay fines, which themselves can be enforced by penalty of imprisonment. For example, in *State v. Glasscock*,[173] Glasscock was convicted of driving under the influence of alcohol and sentenced to pay $1293.24 in fines.[174] Glasscock failed to pay the fines, and the trial court held a hearing to which he was summonsed to show cause why he should not be held in contempt of court.[175] At the hearing, Glasscock testified that he could not pay the fines because he was unemployed and had no assets.[176] The trial court found that Glasscock lacked the ability to pay the fines and instead ordered him to perform community service to "work off his fine and court fines" at the rate of $30 per day.[177] The Ohio Court of Appeals upheld the substitute sentence, holding that the statute prohibiting the imprisonment of defendants who lacked the ability to pay their fines did not preclude the trial court from ordering them to perform community service instead.[178] The court reasoned that allowing defendants who lacked the ability to pay fines to "totally es-

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[169] *See Bearden*, 461 U.S. at 665; *Tate*, 401 U.S. at 400; *Williams*, 399 U.S. at 242 n.19; *Carbajal*, 899 P.2d at 71. "Willful" means that the defendant can pay the fine but intentionally chooses not to do so. This is one reason why a defendant who lacks the ability to pay fines cannot be punished for failing to do so. The failure is not willful but rather the result of circumstances beyond the defendant's control.

[170] The International Covenant on Civil and Political Rights expressly prohibits imprisonment on ground of inability to fulfil a contractual obligation. *See* International Covenant on Civil and Political Rights, art. 11, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).

[171] *See* Benns & Strode, *supra* note 12 (documenting how courts often fail to inquire into the ability to pay before imposing fines and restitution or imprisoning defendants who fail to pay them).

[172] *See Bearden,* 461 U.S. at 672.

[173] 632 N.E.2d 1328 (Ohio Ct. App. 1993).

[174] *See id.* at 1329.

[175] *See id.*

[176] *See id.* Glasscock testified that he was living with and being fully supported by his parents. *See id.*

[177] *Id.* at 1329–30.

[178] *See id.* at 1331.

cape" the fines imposed would violate the equal protection rights of defendants who were able to pay their fines.[179]

Because the proportionality requirement does not apply to restitution, restitution functions essentially as a civil debt that the defendant owes to the victim of his or her crime, akin to tort damages, unlike fines imposed by the State as punishment. For this reason, the threat of imprisonment for contempt of court or violation of conditions of probation when the defendant-debtors fail to pay restitution has become a new form of civil imprisonment. The criminal justice system has become a collection agency for corporate debts, which uses the threat of criminal penalties to leverage restitution, and prosecutors have become the subcontractors of the corporate victims whose cases they bring.

V. Neoliberalism and the Criminalization of Private Disputes

The outrage that the West Virginia Supreme Court expressed in *Orth* gradually eroded, ultimately resulting in a significant change of tack on the issue of the permissibility of the police officer's moonlighting in private security in *State v. Phillips*.[180] *Phillips* demonstrates the blurring of public/private boundaries and cost shifting of corporate losses to public law-enforcement processes. Donna Phillips and her family went to Wal-Mart late one night to do some Christmas shopping.[181] The Wal-Mart manager told the Phillipses that they could use a payroll check to pay for their purchases if their purchases totaled at least one third of the value of the check.[182] Based on that representation, they shopped for several hours in the Wal-Mart.[183] When they got to the cash register, however, the cashier would not accept the payroll check.[184]

When Phillips "complain[ed] loudly and use[d] profanity," the manager "signaled for Curtis Dytzel, an off-duty Clarksburg police officer working in his official police officer's uniform as a privately-paid security guard for Wal-Mart, to come over to the register."[185] At the time, the Clarksburg Police Department employed Dytzel as a police officer.[186] The manager testified that she called Dytzel over "simply to keep [Phillips] quiet."[187] Dytzel approached the Phillips family and demanded to know, "What the hell is going on here?"[188] Dytzel ordered Phillips to leave the store and threatened to arrest her if she did not, even though no civilian staff had asked her to

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[179] *See id.* at 1331–32.
[180] 520 S.E.2d 670 (W. Va. 1999).
[181] *Id.* at 673.
[182] *See id.*
[183] *See id.*
[184] *Id.*
[185] *Id.* at 674.
[186] *Id.* at 684.
[187] *Id.* at 677.
[188] *Id.* at 674.

leave.[189] When Phillips refused to leave, Dytzel, "as a police officer, made the independent decision to arrest" Phillips.[190] Dytzel grabbed Phillips's arm, then the arm of her disabled fifteen-year-old son when he leapt into the fray to defend her.[191] Dytzel "escorted" Phillips and her son to a police "substation" located in the Wal-Mart store, intending to place Phillips "under arrest."[192] Phillips suffers from multiple sclerosis, has seizures, and uses a cane.[193] While waiting for on-duty police to respond, Dytzel refused to allow Phillips to get her cane.[194] When Phillips tried to tell Dytzel that she was about to have a seizure, he told her to "sit down and shut up."[195] Phillips had a seizure on the floor of the substation while handcuffed.[196]

Phillips was charged with disorderly conduct, assaulting a police officer, and obstructing a police officer, even though Dytzel was off duty and earning a private salary at the time of the alleged assault and obstruction.[197] She was convicted and sentenced to forty days in jail.[198]

The West Virginia Supreme Court upheld Phillips's conviction, but it noted:

> Although we are affirming Appellant's convictions, we are somewhat concerned by the police officer's and Wal-Mart's conduct in this case. . . . [I]t does appear that this police officer and Wal-Mart went just a little overboard in its pursuit of this woman and her family in the criminal system as a result of the fracas that occurred as a result of the frustration level running so high.[199]

While never explicitly acknowledged in the West Virginia Supreme Court's decision, it is clear from the facts of the case that the Phillipses were poor. Phillips and her son were both seriously disabled. The family was shopping at Wal-Mart late at night a few days before Christmas and needed to cash a payroll check to pay for their purchases. At the same time, everything about Dytzel's involvement in the arrest of Phillips and her subsequent prosecution and sentence was a transfer of wealth from the taxpayers of West Virginia to Wal-Mart, one of the world's wealthiest corporations. Dytzel was wearing a state-issued police uniform, which commanded the authority of the police department. The 911 response by the on-duty officers was likely given high priority because it came from a fellow officer. As the West Virginia Supreme Court explained: "an off-duty municipal police of-

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[189] *See id.* at 677.
[190] *Id.*
[191] *See id.* at 674 n.1.
[192] *Id.*
[193] *See id.* at 674 n.2.
[194] *See id.* at 674.
[195] *Id.*
[196] *See id.*
[197] *See id.* at 674–75.
[198] *See id.* at 674.
[199] *Id.* at 681.

ficer employed by a private entity as a security guard retains his or her official police officer status even in the private employment . . . ."[200]

The criminal charges that Phillips faced were only available to the State because Dytzel was treated as a police officer acting in his official capacity, despite being off-duty and "employed privately as a security guard," while being "paid by Wal-Mart" and acting "under the direction of Wal-Mart."[201] The taxpayers of West Virginia paid the bill for Phillips's forty days in jail.

Phillips was charged with violating West Virginia Code § 61-6-1b(a) (disorderly conduct), § 61-2-10b(d) (assault on a police officer), and § 61-5-17(a) (obstructing a police officer). In defining the offense of disorderly conduct, section 61-6-1b(a) specifically requires that the individual must refuse to desist from the conduct in question after being requested to do so by a law-enforcement officer acting in their "lawful capacity." Sections 61-2-10b(d) and 61-5-17(a) require that the assault and obstruction must be committed against a police officer acting in their "official capacity."[202]

The privatization of public police by corporations is not limited to West Virginia. In many cities, uniformed police perform private security roles in the employ of private corporations. In Washington, off-duty police officers work as security guards patrolling downtown Seattle for an organization of businesses.[203] They patrol while armed and in uniform.[204] Similarly, in Rockford, Illinois, an off-duty police officer wore his police uniform while working as a security guard for a grocery store to watch for shoplifters.[205]

In Charlotte, North Carolina, a "duly sworn law enforcement officer with the Charlotte Police Department, was working in a secondary employment capacity for the Red Roof Inn."[206] The officer was "engaged in this secondary employment" and "being paid in accordance with his law enforcement officer status by the Red Roof Inn to provide, as a law enforcement officer, security for the motel, its property and its occupants."[207] He "wore his Charlotte Police Department uniform, which included his department-issued service revolver, his badge of office and his portable hand-held radio."[208] This secondary employment "was approved and regulated by the Charlotte Police Department."[209]

When working in these private gigs, officers perform the exact same duties as on-duty police officers, and their actions are given the same imprimatur of official police actions. In Panama City, Florida, a police officer was

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[200] *Id.*
[201] *Id.* at 676.
[202] W. Va. Code Ann. §§ 61-2-10b(d), 61-5-17(a).
[203] *See* State v. Graham, 927 P.2d 227, 228–29 (Wash. 1996).
[204] *See id.* at 229.
[205] *See* People v. Barrett, 370 N.E.2d 247, 248 (Ill. App. Ct. 1977).
[206] State v. Gaines, 421 S.E.2d 569, 571 (N.C. 1992).
[207] *Id.*
[208] *Id.*
[209] *Id.*

employed "as an off-duty security guard in a Sears department store," apprehending shoplifters.[210]

In Columbus, Ohio, an off-duty police officer was working as a private security guard at a grocery store.[211] He observed a customer shoplift a sausage.[212] The officer stopped him at the exit, displayed his badge, informed him that he was a Columbus police officer, placed him under arrest, and started to escort him to the rear of the store.[213] A scuffle ensued, and the customer was subsequently charged and convicted of resisting arrest.[214]

In Evansville, Indiana, a police officer "was working as a plainclothes security guard" in a Sears department store.[215] He observed Connie Tapp "wrap a pair of children's shoes in a pink baby blanket and put them into her purse."[216] He followed her out of the store, approached her, displayed his badge, and announced, "I am a City Police Officer and you're under arrest for shoplifting."[217] He demanded that she open her purse, and she refused.[218] A scuffle ensued, and Tapp was charged with and convicted of battery of a law-enforcement officer.[219]

In Bellevue, Nebraska, off-duty police officers moonlight for a local restaurant, wearing their full official police uniforms and carrying their sidearms, badges, and police radios.[220] The restaurant hired the off-duty officers "to curtail disorderly and unlawful conduct and to provide security to the restaurant and its patrons"[221] and "on the basis of their official status and the advantages this status would provide in their peacekeeping function."[222] As the Nebraska Court of Appeals acknowledged: "A uniformed individual at the restaurant conveyed to the patrons the presence of law enforcement," which "implies an official status."[223]

This criminalization of what previously was treated as tortious or contractual conduct and the use of public resources for enforcement must be understood in the context of the broader dynamics of the neoliberal restructuring of economics, politics, and social relations. It is the newest iteration of the prison-industrial complex—what Saskia Sassen calls "profit-making or revenue-making circuits developed on the backs of the truly disadvan-

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[210] State v. Hartzog, 575 So.2d 1328, 1329 (Fla. Dist. Ct. App. 1991).
[211] *See* State v. Glover, 367 N.E.2d 1202, 1204 (Ohio Ct. App. 1979).
[212] *See id.*
[213] *See id.*
[214] *See id.*
[215] Tapp v. State, 406 N.E.2d 296, 297 (Ind. Ct. App. 1980).
[216] *Id.*
[217] *Id.*
[218] *See id.*
[219] *See id.*
[220] *Wilen*, 539 N.W.2d at 655, 660.
[221] *Id.* at 660.
[222] *Id.*
[223] *Id.*

taged."[224] The expansion of the reach of the criminal law within the so-called "free market" and the institution of "public" prosecution is one of the ways that neoliberalization has entrenched the boundaries of private property. Feeley has documented how private contractors seek to "harness market forces to develop and supply new forms of social control."[225] As Angela Davis explains, imprisonment was "largely designed to punish and reform white wage-earning individuals who violated the social contract of the new industrial capitalist order by allegedly committing crimes."[226]

The broader implementation of the prioritization of property rights privileges the security of corporate capital over the economic security of most of the population. These new property offenses, and the state regulation of restitution that they authorize, operate as a class-based system of power, which bolsters the dominance of corporations and the powerlessness of impoverished individuals who lack the resources to fight them. As Stephen Gill and Adrienne Roberts explain, "the interests of the wealthy few are protected by the use of state action to socialize their risks in a class-based, highly racialized and gendered politico-economic project."[227]

The "losses" being recouped in these cases are ones that civil law is capable of redressing. For corporations, the use of state-enforced restitution is a profitable strategy of risk reduction, with less expense and a higher likelihood of return than using traditional civil remedies for property disputes. These prosecutions, initiated for the purpose of collecting quasi-legal "debts," have become a tool of social control. The use of criminal prosecutions for the resolution of these property disputes must be viewed in the context of broader global shifts in social and property relationships. These prosecutions contribute to the profitability of their corporate "victims" by shifting the ordinary costs of business risks onto the unfortunate few who get caught—or even merely accused of—stealing from them.

VI. Vulnerability to Abuse

There are distinct parallels between the traditional system of debtors' prisons and the modern system of using criminal prosecutions to secure restitution for corporate victims, which render them particularly prone to abuse.

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[224] Saskia Sassen, *Women's Burden: Counter-Geographies of Globalization and the Feminization of Survival,* 71 Nordic J. Int'l. L. 255, 256 (2002).

[225] Feeley, *supra* note 111, at 1.

[226] Davis, *supra* note 52, at 361.

[227] Stephen Gill & Adrienne Roberts, *Macroeconomic Governance, Gendered Inequality, and Global Crises, in* Questioning Financial Governance from a Feminist Perspective 158 (Brigitte Young et al., eds., 2011).

A. Coercion

First, both systems are inherently coercive. One of the common critiques of the old system of debtors' prisons was that it could coerce alleged debtors into paying debts that they did not owe to avoid, or gain release from, imprisonment.[228] Similarly, defendants in these modern restitution cases are not realistically able to refuse restitution given that their alternative is likely imprisonment. There is already robust literature on prosecutorial "overcharging" and the absence of adequate safeguards to prevent it.[229] Overcharging places pressure on defendants, who often await trial in jail, to accept even unfair plea agreements.[230] Courts gloss over this coercion by embracing a fiction of the "voluntariness" of negotiated plea agreements: the defendants are represented by counsel, and neither police nor prosecutors have made direct threats of physical violence, so courts deem the agreements that result as merely informed choices between known alternatives with rational regard to the consequences of each.[231] In reality, of course, the defendants who accept these conditions have no real alternative, since conviction without a plea agreement could subject them to imprisonment.

Prosecutors play a central role in fostering the context in which exploitive plea agreements requiring the payment of unprovable amounts of restitution can be reached in two ways. First, they bring criminal charges in situations that traditionally would have been the province of the civil law of trespass. Second, they offer "lenient" plea agreements conditioned on defendants agreeing to pay restitution to their "victims" in lieu of imprisonment, regardless of whether they have the ability to make the restitution payments or whether they can prove that the payments themselves are reasonably related to the charged criminal conduct.

While there are regulations limiting prosecutors' discretion to bring and pursue criminal charges (for example, the requirements of probable cause to charge[232] and proof beyond a reasonable doubt to convict[233]), they provide minimal protection and are waived by a negotiated guilty plea. It is mislead-

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[228] *See, e.g.*, Thomas MacDonald, A Treatise on Civil Imprisonment in England 108–11 (1791).

[229] *See, e.g.*, Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices,* 22 Cornell J. L. & Pub. Pol. 53 (2012).

[230] *See* Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases,* 84 S. Cal. L. Rev. 661 (2011).

[231] *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (recognizing that punishing the exercise of constitutional rights violated due process, but finding that the threat of more serious punishment during the "give and take" of plea negotiations did not constitute such punishment); Brady v. United States, 397 U.S. 742, 751 (1970) ("We decline to hold . . . that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.").

[232] *See generally* Leonetti, *supra* note 230.

[233] *See id.* at 685.

ing, considering the coercive power of State prosecution and the threat of imprisonment, to suggest that a defendant could refuse an inequitable and unfair "settlement."

Furthermore, the concern in these restitution cases is not merely the insufficiency of the evidence of guilt, but rather a specific concern with the insufficiency of the evidence in support of the demanded amount of restitution. In the introduction's example, while the defendant is guilty of shoplifting, probably beyond a reasonable doubt, that does not mean that the prosecution could prove that all the "damages" being sought as restitution by the corporate victim of the shoplifting were caused by, or are reasonably related to, the defendant's crime. In the coercive context of plea bargaining, if the defendant is facing imprisonment for theft if she is convicted, and the State offers her a non-prison sentence on the condition that she agree to pay the entire amount of restitution being sought, she has no real option to refuse the restitution and demand that the State prove that the corporate victim is legally entitled to the amount being sought. This is because the amount of restitution is a sentencing issue, not an issue of guilt or innocence on the theft charge, so proof that the value has been overcharged would only be offered at a sentencing hearing after her conviction for an imprisonable offense.[234] Defendants in this situation have no realistic choice but to enter into these plea agreements, even when they include payment of predatory fines and restitution.

For example, in *Morgan v. State*,[235] Morgan pleaded nolo contendere to grand theft in exchange for a sentence of probation with a condition of restitution in an amount to be determined at a subsequent hearing.[236] At the restitution hearing, the court ordered him to pay restitution in the amount of more than $50,000 during his two-year probationary period.[237] The restitution court did not consider whether Morgan had the present ability to pay the amount of restitution.[238] On appeal, the Florida District Court of Appeal held that Morgan had waived his right to raise on appeal the lower court's failure to determine his financial ability to pay the restitution, noting that he did not contest the restitution court's "implicit finding" that he was responsible for theft in the amount of the restitution ordered.[239]

In *State v. Cummings*,[240] Cummings pleaded guilty to burglarizing his former employer after he was "caught in the act and there was no loss to the victim."[241] Prior to sentencing, a presentence report included allegations relating to a prior burglary with which Cummings was never charged and rec-

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[234] *See, e.g.*, State v. Hawthorne, 573 So.2d 330 (Fla. 1991).
[235] 491 So.2d 326 (Fla. Dist. Ct. App. 1986).
[236] *See id.* at 327.
[237] *See id.*
[238] *See id.*
[239] *Id.*
[240] 583 P.2d 1389 (Ariz. Ct. App. 1978).
[241] *Id.* at 1390.

ommended that he be ordered to pay restitution for losses from the burglary that were never pleaded or proven by the state.[242] The court sentenced Cummings to a term of probation with a condition that he make restitution to his employer in the amount of $1,870 for losses arising out of the prior uncharged burglary.[243] The amount of restitution was determined based on the amount of loss "verified by the company's records."[244] On appeal, the Arizona Court of Appeals found that the restitution court had not erred in ordering Cummings to make restitution for the prior burglary.[245] The court explained: "Restitution and reparations are constructive tools of the criminal sentencing process and they are not necessarily confined to 'liquidated,' 'special' or 'easily measurable' damages."[246] It concluded: "It appears only reasonable that an order directing restitution for all losses should have the salutory [sic] rehabilitative effect of forcing the defendant to accept the responsibility for his criminal behavior. It also has the beneficial effect of insuring repayment to the victim for all losses suffered as a result of defendant's criminal behavior."[247] The court noted that if Cummings objected to the amount of restitution being ordered as a condition of his probation, he could have asked "to be incarcerated" instead.[248]

B. Lack of Scrutiny

Second, both systems suffer from a third-party decision-maker problem, in which the person enforcing repayment of the alleged debt has an insufficient interest in accurate determination and therefore subjects the creditors' claims to inadequate scrutiny. In the current system of profligate plea bargaining, the prosecutor is the real decision maker in the criminal justice system.

One of the notorious abuses of the debtors' prison system was its failure to require creditors to prove debtors' willful defaults, or even the existence of their debts in the first instance, as a precondition to having them arrested.[249] Like the judges of King's Bench reviewing claims of default, prosecutors are not subjecting victims' claims of damages to sufficient scrutiny. Presumably, modern theft prosecutions engineered primarily to obtain restitution for their "victims" are the result of bureaucratic decision-making rather than intentional service of corporate masterminds with the purpose of entrenching social inequality, but prosecutors fail to be adequately wary of enforcing unproven demands of the corporate victims in these theft cases.

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[242] *See id.*
[243] *See id.*
[244] *Id.*
[245] *See id.*
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *See generally* Leonetti, *supra* note 230.

There have been reported instances of fraudulent complaints from witnesses in these theft cases and of law enforcement agents colluding in the fraud by charging the actual victims and enforcing restitution for the perpetrators. The now-infamous Cumberland Farms extortion cases across the Eastern United States serve as an example. Managers at Cumberland Farms, Inc. designed a scheme in which they falsely accused hundreds of lower-level Cumberland employees, over a fourteen-year period, of theft from the company. Loss-prevention officers coerced the accused employees into signing "confessions."[250] The Cumberland managers then presented the coerced false confessions to local county prosecutors, who used them to charge and convict the Cumberland employees before seeking thousands of dollars of court-ordered restitution from each of the employees to the company for their non-existent thefts.[251] The individual prosecutors who charged the innocent employees had no intent to prosecute the innocent or any personal interest in collecting the restitution. They simply failed to adequately scrutinize the behavior of the Cumberland security staff.

C. Procedure at the Expense of Substance

Third, both systems give the appearance of procedural fairness while advancing substantive unfairness. G.R. Rubin critiqued the English Debtors Act 1869 on the ground that its procedural safeguards for debtors, by sorting the putatively deserving (those who were deemed unable to pay) from the undeserving (those who were deemed unwilling to pay), made imprisonment for the latter group of working poor debtors appear as "unsympathetic frauds," deserving of coercive imprisonment to induce payment.[252] The Debtors Act 1869 embraced a construct—the distinction between a very poor person who was unable to pay a debt and a very poor person who could pay the debt but simply chose to default—that justified the continued impris-

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[250] *See* John Conway, *Former Workers Sue Franchise: Cumberland Farms Accused of Forcing Theft Confessions,* ORLANDO SENTINEL (May 29, 1991), https://www.orlandosentinel.com/news/os-xpm-1991-05-29-9105290238-story.html [https://perma.cc/H7PA-AQKP]; Diane Marder, *Suit Brings Grocer's Theft Policy into Question,* CHI. TRIB. (Oct. 7, 1990), https://www.chicagotribune.com/news/ct-xpm-1990-10-07-9003230281-story.html [https://perma.cc/6TRH-7NQB]; *Chain Accused of Staff Shakedown to Cover Losses,* J. TIMES (July 29, 1990), https://journaltimes.com/news/national/chain-accused-of-staff-shakedown-to-cover-losses/article_02a3cec0-3dea-5231-a7d9-9641a918b64e.html [https://perma.cc/RF27-DMJN].

[251] *See* Conway, *supra* note 250; *Chain Accused, supra* note 246. A few law enforcement agencies declined to prosecute the cases, including one Rhode Island police department—which declined to refer several cases for criminal prosecution because the various employees' "confessions" were so identical in form and substance that the investigating officers found them not to be credible, and the Office of the State Attorney for Orange-Osceola County, Florida, which dismissed one case after the defendant had spent several hours in jail. *See* Conway, *supra* note 250.

[252] *See* G.R. Rubin, *Law, Poverty and Imprisonment for Debt, 1869–1914*, *in* LAW, ECON. AND SOC'Y, 1750–1914: ESSAYS IN THE HISTORY OF ENGLISH LAW 241 (G.R. Rubin & David Sugarman eds., 1984).

onment of the latter.[253] That constructed dichotomy further entrenched a system that ensured those least able to pay were forced to bear a disproportionate amount of the risk and precarity from economic downturns.

Similarly, under the modern system, plea agreements through which defendants agree to pay excessive restitution are based on the fiction that they can make the restitution payments, which then justifies punishment (for example, imprisonment for violating terms of probation) for their failure to pay. *Dirico v. State*[254] serves as an example. In 1995, Diane Dirico pleaded guilty to theft and fraudulent use of a credit card pursuant to a plea agreement in which the parties agreed that she would be sentenced to probation in lieu of a suspended sentence of imprisonment.[255] They also agreed, as a condition of her probation, that she would pay $212,500 in restitution to the credit-card company.[256] The plea agreement also specifically provided that Dirico waived her "ability to argue inability to pay" and agreed that her "failure to meet [the] restitution schedule" would "result in the imposition of the suspended sentence."[257] When Dirico failed to make her restitution payments, the court found that she had the ability to pay the restitution and was therefore in violation of her conditions of probation. The court revoked her probation and imposed the suspended sentence of imprisonment.[258] The sentencing court made this finding in the absence of sufficient evidence of Dirico's ability to pay the restitution.[259] On appeal, rather than acknowledging the unconstitutionality of Dirico's sentence, the State prosecutors argued that their failure to prove Dirico's ability to pay was irrelevant because she had waived the right to object to the revocation of her probation even if she lacked the ability to pay the restitution.[260]

VII. Net Widening: Debt Repayment as a Regime of Selective Punishment

Fines and civil restitution are often touted as alternatives to imprisonment. While these restitution arrangements may seem like acts of leniency because they often entail diversion away from harsher criminal punishments like prison, they also significantly expand the reach of the criminal justice system by furthering the criminalization of conduct that used to be considered civil in nature. Like the electronic monitoring that Feeley criticized, "[t]hey are public-private partnerships that expand rather than contract the

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[253] *Cf.* Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 367 (2007) (citing *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991) (describing the purpose of bankruptcy protections as protecting "the honest but unfortunate debtor").

[254] 728 So.2d 763 (Fla. Dist. Ct. App. 1999).

[255] *See id.* at 763.

[256] *See id.*

[257] *Id.*

[258] *See id.*

[259] *See id.*

[260] *See id.*

reach of the state and the reach of the criminal sanction."[261] They entail significant expansions of social control by adding to what Thomas Blomberg calls the "piling up of sanctions."[262]

They are also likely discriminately enforced. In his canonical examination of shoplifting prosecutions in Germany, Erhard Blankenburg demonstrated the highly selective nature of detection and prosecution.[263] Blankenburg found that less than ten percent of shoplifting was detected, only seventy percent of detected shoplifting was reported, and only fifty-five percent of reported shoplifting was sanctioned.[264] The defendants who end up caught in the restitution net, therefore, are a small subset of individuals who commit theft.

VIII. Conclusion

This Article critiques a less-scrutinized aspect of neoliberal criminal-justice reforms: the use of criminal prosecutions to recover civil damages as a form of social control, particularly when that recovery is exploited by corporations at the expense of poor and vulnerable defendants in the absence of meaningful procedural fairness. Greater attention should be paid to the practice of civil damage recovery by corporations, particularly as it relates to the abuse of marginalized and vulnerable minority communities. This practice sits at the intersection of three institutions whose harm is amplified in combination: private security, plea bargaining, and victim restitution.

On the surface, authorizing the prosecution to seek restitution on behalf of crime victims, rather than forcing the victims to bring separate civil charges against the defendant, makes sense. The legal standard of proof in a criminal case—proof beyond a reasonable doubt[265]—is much higher than the legal standard of proof in a civil tort case—a mere preponderance of the evidence.[266] In fact, because of doctrines like *res judicata* and collateral estoppel, the victim would generally be entitled to summary judgment as a matter of law on the issue of liability at any subsequent civil trial.[267] Once a jury has found a defendant guilty of a personal crime, therefore, it is argua-

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[261] Feeley, *supra* note 111, at 1.

[262] Thomas G. Blomberg, *Penal Reform and the Fate of Alternatives*, *in* Punishment and Social Control: Essays in Honor of Sheldon L. Messinger 424 (Thomas G. Blomberg & Stanley Cohen eds., 2003).

[263] *See* Erhard Blankenburg, *The Selectivity of Legal Sanctions: An Empirical Investigation of Shoplifting*, 11 L. & Soc'y Rev. 109 (1976).

[264] *See id.*

[265] *See In re* Winship, 397 U.S. 358 (1970).

[266] *See* Addington v. Texas, 441 U.S. 418, 423 (1979).

[267] *See* Yancey v. Farmer, 472 So.2d 990, 992 (Ala. 1985) ("As a general rule a person's conviction in a criminal case is admissible against him in a civil action to show that he did the act for which he was convicted."); *see, e.g.,* Aubert v. Aubert, 529 A.2d 909 (N.H. 1987) (holding that Aubert's criminal conviction for the attempted murder of her husband after she shot him in the face collaterally estopped her from litigating issues of liability and causation in his tort action against her for damages); Jordan v. McKenna, 573 So.2d 1371 (Miss. 1990) (holding that Jordan's criminal conviction for raping McKenna collaterally estopped him from

bly in the interest of all parties for the sentencing judge to determine restitution, rather than forcing the parties to litigate a second, civil case before the victim of the crime can be made whole. In this way, the case for restitution in lieu of a separate, subsequent criminal case is enticing.

The problem is that a system originally designed primarily to help the victims of personal crimes recover the costs of their injuries has been co-opted and corrupted by corporate victims. In conjunction with the runaway, unchecked nature of plea negotiations, restitution has become a way for corporate victims to use the coercive power of the state to extract sometimes wildly unreasonable "damages" from criminal defendants without having to prove the basis for those damages. Awarding restitution to a victim whose civil injuries are coextensive with the elements of a criminal conviction at the time of sentencing, after a jury has found the defendant guilty based on proof beyond a reasonable doubt, is a far cry from a defendant "agreeing" to pay restitution and forego a criminal trial because of the serious punishment that they face if they are convicted after trial.

The harm principle dictates that the criminal law is only supposed to criminalize conduct that causes harm that is serious enough to justify the use of coercive state intervention and its impact on individual liberty.[268] Otherwise, "regulation may not be a matter for the criminal law—it may suffice for the protection of those interests to rest with civil remedies."[269] This rationale was one of the justifications for both the abolition of debtors' prisons and the creation of civil compromises.

The criminalization of corporate debt collection is part of a broader trend of blurring the lines between private and public through privatization and outsourcing.[270] The use of fines and restitution to criminalize what used to be civil disagreements over private monetary losses has transformed the law of theft from an aspect of public, criminal prosecution to a subset of private dispute resolution, except that this subset exists in a grave imbalance of power between the debtor-defendant and the State as proxy for the corporate victim of loss. The doctrinal bifurcation between "civil" and "criminal" has become meaningless in this context. Like the way that private prisons have converted the State function of punishment to a corporate enterprise, prosecutors working to collect what would otherwise be civil debts for corporations have converted private litigation into a form of criminal punish-

relitigating the facts as found by the jury in McKenna's subsequent civil action against him for assault and battery).

[268] *See* Simester & Sullivan, *supra* note 93, at 169. The harm principle is a principle of criminalization. It dictates that the only purpose for which the state can legitimately intervene the liberty of an autonomous individual is to prevent harm to others. *See generally* JOHN STUART MILL, ON LIBERTY 14 (1859).

[269] Simester & Sullivan, *supra* note 93, at 169.

[270] *See* Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, Democracy,* 46 B.C. L. REV. 989 (2005); *see also* Paul L. Posner, *Accountability Challenges of Third Party Government, in* THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 523 (Lester M. Salamon, ed., 2002); R.A.W. Rhodes, *The New Governance: Governing without Government*, 44 POL. STUD. 652 (1996).

ment. It is the mirror image of privatization: the use of public funds to enforce private contract rights.

By using their formidable discretion and power to extract restitution from defendants without scrutiny, solely because of their power to imprison defendants who refuse, prosecutors are not doing the work of justice, but instead are further entrenching the societal balance heavily tipped in favor of corporations. The restitution that prosecutors seek and obtain on behalf of corporate theft victims allows them to be more profitable at the expense of the poor defendants from whom they extract funds. The terms of these settlements deepen the poverty of these defendants and link them to a form of indentured servitude to their corporate "victims," reproducing the chronic hardships that drive much theft in the first instance. Instead of analyzing restitution as simply one more condition of plea-negotiated sentences of probation, the imposition of these fines and restitution orders should be recognized as a class-based exercise of power. These prosecutorial restitution practices ultimately serve to redistribute wealth upwards, from poor defendants to rich corporate entities, deepening class inequalities.

These corporate restitution policies must be evaluated against the backdrop of the unjust distribution of property generally in the United States. When prosecutors' offices function as debt collectors for corporations, they privilege the values of capital, security, and risk reduction over fairness, justice, and due process. These criminal debt collection practices must be viewed with an awareness of the connection between the law's past and its present. Only an awareness of history's mistakes will permit us to avoid a modern continuation of past discrimination.