

# People over Profit: The Case for Abolishing the Prison Financial System

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*The term “mass incarceration” is used to describe a crisis that, to many, is both abstract and distant. But for Black, Latinx, Indigenous, low-income, and other communities whose lives are disproportionately affected by the criminal legal system, the reality of carceral exploitation is as unavoidable as it is harmful. Incarceration has always had economic ramifications, but the modern prison has become an amalgamation of public and private interests that increasingly treat incarcerated individuals and their communities as a source of profit. In a matter of decades, prison finance has become a billion-dollar industry concentrated in the hands of powerful corporate interests, and it overwhelmingly preys on historically marginalized and low-income communities. The advent of the digital economy has opened a new dimension of economic exploitation, typified by fee-laden debit release cards and exorbitant money transfer fees. In light of these increasingly exploitative practices, documenting the full extent of financial exploitation within the prison system is an immensely difficult task. Ending it is even harder.*

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*Despite persistent efforts to reform prison finance through litigation and regulation, the problem is getting worse—not better. This Note argues that the prison financial system is beyond repair and that it must be abolished. To that end, this Note proposes a community-centered alternative to the existing prison financial system that reclaims the economic power seized by the carceral state and relocates it within the communities that mass incarceration has disproportionately impacted. Though it is only one part of the broader project of prison abolition, the proposed alternative addresses an aspect of the criminal legal system that is often overlooked. Doing so represents a concrete step towards the eventual dismantling of the prison industrial complex.*

*A Note About Language: The words that we use to describe people who have come in contact with the criminal legal system play a foundational role in our own conception and, by extension, our society’s treatment of these individuals. While terms like “inmate,” “ex-convict,” and “prisoner” are widely used and recognized, they carry an inseparable connection to physical spaces that many people view with fear and contempt. Though linguistically convenient, this connotation reinforces harmful ideas and attitudes towards some of the most marginalized members of our communities. As such, this Article identifies people who have come in contact with the criminal legal system by their names when possible and in other instances refers to them as “incarcerated” or “formerly incarcerated” individuals.<sup>1</sup>*

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1. For a more thorough discussion, see Victoria Law & Rachel Roth, *Names Do Hurt: The Case Against Using Derogatory Language to Describe People in Prison*, REWIRE NEWS GRP. (Apr. 20, 2015), <https://rewirenewsgroup.com/article/2015/04/20/case-using-derogatory-language-describe-person-prison/> [https://perma.cc/N8K5-Y8WA].

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## INTRODUCTION

Clarence Justin Alred was released from prison in July of 2013.<sup>2</sup> In lieu of cash, the balance of his trust account (a pseudo-bank account used to pay for items within prison) was given to him on a prepaid debit card issued by JPay, Inc., one of the largest providers of prison financial services in the country.<sup>3</sup> Unbeknownst to Mr. Alred, the card that was foisted upon him concealed a predatory secret. Unlike a normal debit card, Mr. Alred's release card carried a vast array of hidden charges and fees, ranging from a \$0.70 surcharge with each purchase to a \$9.95 cancellation fee.<sup>4</sup>

Mr. Alred's story is far from unique. Release cards are just one part of a broader array of services, including money transfers, prison telecommunications, and for-profit prison commissaries, which allow the private sector to harvest money from incarcerated individuals and their communities. These practices

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2. Amirah Al Idrus, *Debit Cards Slam Released Prisoners with Sky-High Fees, Few Protections*, CTR. FOR PUB. INTEGRITY (Oct. 2, 2014), <https://publicintegrity.org/inequality-poverty-opportunity/debit-cards-slam-released-prisoners-with-sky-high-fees-few-protections/> [<https://perma.cc/5N7S-JZ55>].

3. *See id.*; Stephen Raheer, *The Multi-Million Dollar Market of Sending Money to an Incarcerated Loved One*, PRISON POL'Y INITIATIVE (Jan. 18, 2017), <https://www.prisonpolicy.org/blog/2017/01/18/money-transfer/> [<https://perma.cc/5JFW-XDBK>].

4. Al Idrus, *supra* note 2.

have sparked outrage and countless calls for reform,<sup>5</sup> but efforts to mend this broken system have thus far been largely unsuccessful, and private interests continue to develop new ways to exploit their influence for profit.

But imagine instead that Mr. Alred, upon his release, already had a debit card. Imagine that the card, rather than being attached to an account managed by the institution responsible for his imprisonment, was connected to an account at a financial organization managed by and for members of his community. Not only is this scenario possible, but it is a necessary step toward dismantling the prison industrial complex and relocating financial power within the low-income communities and communities of color that shoulder a disproportionate share of the harm mass incarceration has caused.

This Note argues that the systematic abuse perpetrated by the prison financial system cannot be answered by reform—it requires abolition. Part I investigates the roots of the current mass incarceration crisis and the prison industrial complex before examining the resulting financial exploitation of incarcerated individuals through two case studies: exploitative money transfer fees and prison debit release cards. Part II explores three current efforts to reform the prison financial system: litigation under state consumer protection laws and the Electronic Fund Transfer Act, regulation inspired by recent action from the Federal Communications Commission to curb financial exploitation in the prison telecommunications industry, and pilot programs both at home and abroad that seek to increase incarcerated individuals' access to consumer banking. Part III juxtaposes the politics underlying the existing reform efforts with the prison abolitionist movement and proceeds to articulate a concrete non-reformist alternative to the prison financial system: relocating incarcerated individuals' finances within Community Development Financial Institutions.

## I.

### PROFITS OVER PEOPLE: THE JOURNEY TO THE MODERN PRISON SYSTEM

The United States' prison system is distinct from those of other wealthy nations in the Global North for two deeply troubling reasons: first, the United States has by far the highest incarceration rate per capita of any country in the world;<sup>6</sup> and second, the United States has allowed the private sector to take

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5. See, e.g., German Lopez, *How Private Bankers Cash in on Released Prisoners*, VOX (Nov. 3, 2015), <https://www.vox.com/explainers/2015/11/3/9661554/prison-bank-prepaid-card> [<https://perma.cc/Q736-CLW2>]; Ashley Soriano, *Fees, Fees and More Fees: The High Cost of Being a Georgia Prisoner*, ATLANTA J.-CONST. (Sept. 1, 2019), <https://www.ajc.com/news/state--regional/fees-fees-and-more-fees-the-high-cost-being-georgia-prisoner/ldSA2zieAYgMfsefBUas1L/> [<https://perma.cc/U2LU-95S6>].

6. See Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/GXB6-P9ZZ>].

unprecedented control of its criminal legal system.<sup>7</sup> These two problems show few signs of abating. Mass incarceration is an ongoing crisis that disproportionately targets poor, Indigenous, Latinx, and especially Black communities, and the prison industrial complex continues to exert outsized influence on the carceral state in search of new sources of profit. While this Note ultimately seeks to articulate how one of these exploitative profit streams can be challenged and dismantled, it also attempts to humanize the people impacted by the violence of the carceral state. In order to fully understand why the prison financial system has fallen under the control of the private sector and how it can be reclaimed, it is necessary to first grapple with the history of mass incarceration and its disproportionate impact on Black people and Black communities.

#### A. *Tracing the Roots of Mass Incarceration*

The unprecedented size of the United States' incarcerated population is increasingly being recognized as a national crisis.<sup>8</sup> Now totaling almost 2.3 million people,<sup>9</sup> the United States imprisons and jails a population greater than that of its three least populous states combined.<sup>10</sup> Though everyone feels the harm of mass incarceration, it is far from equally dispersed. The prison system disproportionately affects the lives and livelihoods of Black people, who constitute 40 percent of the incarcerated population despite making up only 13 percent of the United States' population.<sup>11</sup> While the immediate crisis is largely the result of the racially discriminatory penological reforms of the 1970s and 1980s, the outsized impact of those reforms on Black communities is rooted in a far older and longstanding prejudice.

The institutionalized anti-Black racism that fueled generations of enslavement in the United States did not vanish in the wake of the Civil War,

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7. Though the United States is not the only country that has privatized certain aspects of its prison system, other wealthy countries that also cede carceral power to the private sector, such as Australia and New Zealand, do so with contracts that incentivize lower recidivism rates as opposed to higher occupancy rates. See Lauren-Brooke Eisen & Rebecca Autrey, *A Critical Look at Private Prisons Overseas*, BRENNAN CTR. FOR JUST. (May 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/critical-look-private-prisons-overseas> [https://perma.cc/K636-BMMP] (“[Foreign] contracts revolve around performance metrics, as opposed to occupancy rates which are the center of so many private prison contracts in the United States. The companies running the prisons will, for example, receive bonuses from the government if individuals who are incarcerated there do not end up back in prison.”).

8. See, e.g., *Sunday Reading: America's Incarceration Crisis*, NEW YORKER (Nov. 18, 2018), <https://www.newyorker.com/books/double-take/sunday-reading-americas-incarceration-crisis> [https://perma.cc/L2PM-ZZYZ].

9. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (March 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [https://perma.cc/AT5A-UT5W].

10. See *Resident Population of the U.S. in 2020, by State (Including the District of Columbia)*, STATISTA (Jan. 20, 2021), <https://www.statista.com/statistics/183497/population-in-the-federal-states-of-the-us/> [https://perma.cc/CKK8-P76R].

11. Sawyer & Wagner, *supra* note 9.

and it is witnessed to this day in many aspects of American life, including the modern prison system. In 1865, Frederick Douglass proclaimed that slavery “steadily exerted an influence upon all around it favorable to its own continuance”<sup>12</sup> and that it was “so strong that it could exist, not only without law, but even against law.”<sup>13</sup> His words proved prescient. In the immediate aftermath of the Civil War, Southern states seized on the Thirteenth Amendment’s Exceptions Clause, which expressed approval of enslavement “as a punishment for crime whereof the party shall have been duly convicted.”<sup>14</sup> Rather than ending chattel slavery as an institution, the Thirteenth Amendment instead translated the underlying power dynamic that had fueled generations of subjugation into the language of the criminal legal system.<sup>15</sup> The South set about creating a “criminal justice system that could legally restrict the possibilities of freedom for newly released slaves,”<sup>16</sup> and those efforts would successfully recreate many of the abusive hallmarks of enslavement.

The system devised by Southern states took as its starting point the Slave Codes that governed Black life in the years before the Civil War.<sup>17</sup> These reintroduced “[B]lack [C]odes” criminalized seemingly commonplace behaviors such as vagrancy—broadly defined to include routine circumstances such as unemployment<sup>18</sup>—and were selectively enforced against Black people.<sup>19</sup> Black labor, once claimed outright by enslavers, was seized and sold by the state through the convict leasing system, whereby prison operators sold incarcerated individuals’ labor to fuel the economic resurgence of the “New South.”<sup>20</sup> Though the first systems of convict labor that had originated in colonial America largely faded from view by the time of the American Revolution, the post-war South proved fertile ground for their reemergence.<sup>21</sup> The practice reproduced the inhumane treatment that had defined chattel slavery and, in some cases, exposed Black people to conditions that were arguably worse than what they or their ancestors had experienced as enslaved people.<sup>22</sup> The practice also demonstrated

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12. Frederick Douglass, *Reconstruction*, ATLANTIC (Dec. 1866), <https://www.theatlantic.com/magazine/archive/1866/12/reconstruction/304561/> [<https://perma.cc/5DUR-KMJE>].

13. *Id.*

14. U.S. CONST. amend. XIII, § 1.

15. See Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1580 (2019); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1470–72 (2019).

16. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 11 (2003).

17. See *id.* at 11–12.

18. See Pope, *supra* note 15, at 1479.

19. See DAVIS, *supra* note 16, at 11.

20. TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH 66–67 (Heather Ann Thompson & Rhonda Y. Williams eds., 2015).

21. See *id.* at 65.

22. See DAVIS, *supra* note 16, at 13 (“Slave owners may have been concerned for the survival of individual slaves, who, after all, represented significant investments. Convicts, on the other hand,

that the privatization of the penal system had the potential to offer immense wealth to those who controlled the tools of incarceration, be they private parties or the carceral state.<sup>23</sup> Though convict leasing was largely abolished by 1927,<sup>24</sup> the anti-Black attitudes that were empowered and entrenched by the Black Codes and the convict leasing system continue to influence the United States' penological policies.<sup>25</sup>

The racist institutions established in the South in the wake of the Civil War—many of which had analogous counterparts in the North<sup>26</sup>—have had a lasting impact on the relationship between carceral politics and Black communities. Not only did the Black Codes dramatically reshape the demographic character of southern penitentiary systems from primarily White institutions to overwhelmingly Black ones, but they also seeded the view that Black people, and by extension Black communities, were inherently criminogenic.<sup>27</sup> This misperceived connection between Blackness and crime helps to explain how, decades later, efforts to “reform” the prison system resulted in the disproportionate imprisonment of Black people.

During the Civil Rights Movement of the 1950s and 1960s, the rhetoric of “law and order” and calls to get “tough on crime” laid the groundwork for a new era of racially discriminatory penological reforms that ultimately resulted in the pervasive incarceration of Black people.<sup>28</sup> Though little effort was made to conceal the connection between “tough on crime” rhetoric and racism in the early-mid 1960s, changing political winds prompted the adoption of the “racially sanitized rhetoric of ‘cracking down on crime’ . . . that is now used freely by politicians of every stripe.”<sup>29</sup> The political palatability of the newly sanitized rhetoric facilitated the passage of racist sentencing reforms in the ensuing decades, both as part of a broader national shift towards determinate sentencing and through specific policies pursued as part of the War on Drugs.

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were leased not as individuals, but as a group, and they could be worked literally to death without affecting the profitability of a convict crew.”).

23. See LEFLOURIA, *supra* note 20, at 67. Georgia alone made \$250,000 (roughly \$6.5 million today) between 1872 and 1886 as a result of their extensive prison, and convict leasing allowed the state to limit the costs of housing incarcerated individuals. *Id.*

24. Pope, *supra* note 15, at 1526.

25. See Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal-Justice System*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html> [<https://perma.cc/3M39-53KQ>] (“[A] presumption of danger and criminality still follows [B]lack people everywhere. New language has emerged for the noncrimes that have replaced the Black Codes: driving while [B]lack, sleeping while [B]lack, sitting in a coffee shop while [B]lack. All reflect incidents in which African-Americans were mistreated, assaulted or arrested for conduct that would be ignored if they were [W]hite.”).

26. See Pope, *supra* note 15, at 1495.

27. See DAVIS, *supra* note 16, at 12–13.

28. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 42 (2010).

29. *Id.*

In the 1970s, the United States embraced a host of punitive sentencing reforms that dramatically reshaped the carceral landscape. During the preceding decades, indeterminate sentencing guidelines were the norm in both state and federal courts.<sup>30</sup> These sentencing guidelines gave judges a wide range of possible sentencing options that were supposedly sensitive to the environmental and psychological backgrounds of criminal defendants.<sup>31</sup> However, as the United States increasingly favored an explicitly punitive prison system, state legislatures adopted more rigid sentencing schemes that attached stricter punishments to criminal offenses.<sup>32</sup> Jurisdictions that did not embrace a fully determinate sentencing structure employed other tools to limit the individualization of sentencing practices. These tools included restricting or eliminating parole for certain offenses and introducing mandatory minimum sentences.<sup>33</sup> Though indeterminate sentencing was by no means free of racial bias before the 1970s, the new regime eliminated any pretense of flexibility and dramatically increased both the frequency and duration of prison sentences. Together, these reforms contributed to the exponential increase of the incarcerated population during the ensuing decades.<sup>34</sup>

The 1970s also witnessed the beginning of the War on Drugs, an ongoing ideological and political campaign that led to the passage of racially discriminatory sentencing policies under the auspices of protecting public safety. The initial calls for a War on Drugs appeared during the Nixon administration in 1971,<sup>35</sup> and the first of what would be many draconian drug laws—New York’s Rockefeller Drug Laws—was enacted in 1973.<sup>36</sup> Though these early efforts resulted in the disproportionate incarceration of Black and Latinx individuals, the increased usage of crack cocaine in the 1980s caused a public health crisis that ultimately set the stage for some of the most harmful sentencing reforms of the era.<sup>37</sup> The Anti-Drug Abuse Act of 1986 introduced mandatory minimum

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30. See DORIS LAYTON MACKENZIE, NAT’L CRIM. JUST. REFERENCE SERV., SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 6 (2001).

31. See *id.*

32. See *id.* at 9.

33. See *id.* at 18.

34. The total incarcerated population fluctuated between 100,000 and 200,000 from 1925 to the mid-1970s, before growing to 1.4 million between 1976 and 2018. SENT’G PROJECT, TRENDS IN U.S. CORRECTIONS 1 (2020).

35. BETSY PEARL, CTR. FOR AM. PROGRESS, ENDING THE WAR ON DRUGS: BY THE NUMBERS (2018), [https://cf.americanprogress.org/wp-content/uploads/2018/06/EndingTheWarOnDurgs-factsheet.pdf?\\_ga=2.183089826.561918954.1636566377-230970726.1636227739](https://cf.americanprogress.org/wp-content/uploads/2018/06/EndingTheWarOnDurgs-factsheet.pdf?_ga=2.183089826.561918954.1636566377-230970726.1636227739) [https://perma.cc/CE3W-5DSC].

36. Ernest Drucker, Commentary, *Population Impact of Mass Incarceration Under New York’s Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 J. URB. HEALTH 1, 1 (2002). The harsh mandatory sentences mandated by the Rockefeller Drug Laws, coupled with inadequate legal representation, resulted in plea bargains in over 90% of drug cases. *Id.* Ninety-four percent of the individuals imprisoned under the Rockefeller Drug Laws were Black or Latinx. *Id.*

37. See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 309–10 (2016).

sentences for all cocaine distribution but especially punitive sentences for crack cocaine, which by that time had become associated with Black communities.<sup>38</sup> Congress intensified its efforts in 1988, passing another Anti-Drug Abuse Act that imposed five-year mandatory minimum sentences for mere *possession* of crack cocaine.<sup>39</sup> Contrary to their publicly stated goal, punitive drug laws have had little effect on overall drug usage rates, which remained stable throughout the 1990s and 2000s.<sup>40</sup> Instead, the ongoing effects of the War on Drugs are felt in Central and South America, where over a hundred thousand people have lost their lives to drug-related violence,<sup>41</sup> and in Black communities in the United States, which face disproportionate imprisonment for drug offenses.

Despite their alleged colorblindness, the sentencing reforms of the late twentieth century have had an outsize impact on Black communities.<sup>42</sup> Today, Black adults are imprisoned at a rate that is 5.9 times higher than the rate for White adults, and Black children are 4.1 times more likely than White children to come in contact with the juvenile legal system.<sup>43</sup> Racially discriminatory sentencing reforms continue the legacy of the penitentiary as an instrument of Black subjugation. And just as the convict leasing programs of the New South enriched those in control of incarcerated Black labor, the operators of the modern prison system similarly profit off mass incarceration.

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38. ALEXANDER, *supra* note 28, at 52; The sentencing disparity between powder and crack cocaine was as high as 100:1 prior to the passage of the Fair Sentencing Act in 2010. *Fair Sentencing Act*, ACLU (Nov. 26, 2014), <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act> [<https://perma.cc/CYM8-KUS3>]. The racial disparity in cocaine sentencing resulted in “African Americans serv[ing] virtually as much time in prison for non-violent drug offenses as [W]hites did for violent offenses.” *Id.*

39. See DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 2 (2006), [https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem\\_20061025.pdf](https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf) [<https://perma.cc/9J37-V64B>].

40. See Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. TIMES (July 3, 2012), <https://www.nytimes.com/2012/07/04/business/in-rethinking-the-war-on-drugs-start-with-the-numbers.html> [<https://perma.cc/UA2J-W732>] (“The use of hard drugs, meanwhile, has remained roughly stable over the last two decades, rising by a few percentage points in the 1990s and declining by a few percentage points over the last decade, with consumption patterns moving from one drug to another according to fashion and ease of purchase.”).

41. George P. Shultz & Pedro Aspe, *The Failed War on Drugs*, N.Y. TIMES (Dec. 31, 2017), <https://www.nytimes.com/2017/12/31/opinion/failed-war-on-drugs.html> [<https://perma.cc/SH8Y-SJUG>].

42. See Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 846 (2002) (“African-Americans are admitted to state prison at a rate that is 13.4 times greater than Whites, a disparity driven largely by the gross racial targeting of drug laws. In some states, even those outside the Old Confederacy, [Black people] make up 90% of drug prisoners and are up to fifty-seven times more likely than Whites to be incarcerated for drug crimes.”).

43. SENT’G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf> [<https://perma.cc/4RZL-6HE8>].

*B. The Rise of the Prison Industrial Complex*

Contemporary scholars identify the interweaving of corporate and state interests as the “prison industrial complex,”<sup>44</sup> and it continues to influence policy decisions and impact the lives of incarcerated individuals and their communities. The alarming increase in the incarcerated population since the 1980s and its localized impact on Black communities, viewed in context, are an unsurprising result of the preceding decades’ policy choices and the anti-Black racism entrenched in the criminal legal system.<sup>45</sup> But the corresponding increase in privatized penal responsibilities was not preordained. Though the dramatic spike in incarceration rates quickly outpaced available carceral capacity,<sup>46</sup> it was the failure of public budgets to keep pace with the massively expanded incarcerated population that led prison operators to cede carceral power to the private sector.

The inability of public budgets to respond to the burgeoning mass incarceration crisis is, like the crisis itself, a largely self-inflicted wound. Since the 1970s, many states have adopted property tax caps that limit access to a predictable source of state revenue, forcing state and local budgets to rely instead on more erratic revenue streams such as sales taxes and fees.<sup>47</sup> The policies also place a disproportionate share of the overall tax burden on low-income communities, which have lower home ownership rates.<sup>48</sup> These shortcomings

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44. The term has various definitions. *See, e.g.*, Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC (Dec. 1998), <https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/> [<https://perma.cc/STE4-SNLX>] (defining the prison-industrial complex as “a set of bureaucratic, political, and economic interests that encourage increased spending on imprisonment, regardless of the actual need”); *What Is the PIC? What Is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/#:~:text=PIC%20abolition%20is%20a%20political,alternatives%20to%20punishment%20and%20imprisonment> [<https://perma.cc/7GNB-MLV8>] (“The prison industrial complex (PIC) is a term we use to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems.”).

45. *See* Tara Joy, *The Problem with Private Prisons*, JUST. POL’Y INST. (Feb. 2, 2018), <http://www.justicepolicy.org/news/12006> [<https://perma.cc/LSG6-UDQD>].

46. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 12–13 (2006) (examining the sudden and drastic expansion of the incarcerated population throughout the latter half of the 20th century); German Lopez, *Watch the Number of US Prisons Skyrocket After 1980*, VOX (July 14, 2014), <https://www.vox.com/2014/7/14/5898267/prison-America-mass-incarceration-map-gif> [<https://perma.cc/K4YT-87DF>] (exploring the corresponding expansion of physical prison infrastructure during the same time period).

47. *See* IRIS J. LAV & MICHAEL LEACHMAN, CTR. ON BUDGET & POL’Y PRIORITIES, STATE LIMITS ON PROPERTY TAXES HAMSTRING LOCAL SERVICES AND SHOULD BE RELAXED OR REPEALED (2018), <https://www.cbpp.org/sites/default/files/atoms/files/7-18-18sfp.pdf> [<https://perma.cc/G946-NPH3>].

48. In the fourth quarter of 2020, homeownership rates among households with family income above and below the median family income were 79.4% and 52.3%, respectively. U.S. CENSUS BUREAU, CB21-15, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FOURTH QUARTER 2020, at 10 (2021), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf> [<https://perma.cc/M3FR-UQ3B>].

have frequently left state and local budgets exposed to economic forces that are beyond their control.<sup>49</sup>

While states were unwittingly limiting their future revenue streams, they continued to enact policies that perpetuated mass incarceration and placed increased strain on carceral budgets. For example, California enacted determinate sentencing in 1976 and a Three Strikes Law (mandating enhanced sentences for people convicted of a second and third offense) in 1994.<sup>50</sup> Correspondingly, the number of incarcerated individuals in California expanded from 25,033 in 1970 to 172,528 in 2006 (a 589 percent increase).<sup>51</sup> Despite the sharp increase in the incarcerated population, spending on incarceration as a share of total state expenditures failed to keep pace, rising from 2.9 percent to 10.5 percent (a 262 percent increase) during a similar time period.<sup>52</sup> The disconnect between the incarcerated population and prison funding is by no means unique to California.<sup>53</sup> Across the United States, this divergence has laid the groundwork for the monetary colonization of the prison system.

Rising expenses and shrinking budgets have created a financial incentive for prison operators at the local, state, and federal<sup>54</sup> levels to contract out some or all aspects of their operations to the private sector. With financial survival rather than the supposed public interest serving as their lodestar, prison operators have outsourced duties such as meal preparation, commissary services, telecommunications, and financial management, to name just a few.<sup>55</sup> With an estimated \$1.8 billion transferred into prisons and jails each year by the families

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49. Decreased economic activity during the Great Recession of 2008 resulted in declines in tax revenue totaling more than half a trillion dollars in just a few years. BRIAN HIGHSMITH, NAT'L CONSUMER L. CTR., *COMMERCIALIZED (IN)JUSTICE: CONSUMER ABUSES IN THE BAIL AND CORRECTIONS INDUSTRY* 10 (2019), <https://www.nclc.org/images/pdf/criminal-justice/report-commercialized-injustice.pdf> [<https://perma.cc/PY5N-VAFD>]. Sadly, few lessons were learned in the wake of 2008, and the COVID-19 pandemic once again left public coffers short during a time of crisis. *See generally* CTR. ON BUDGET & POL'Y PRIORITIES, *STATES GRAPPLING WITH HIT TO TAX COLLECTIONS 1–5* (2020), <https://www.cbpp.org/sites/default/files/atoms/files/4-2-20sfp.pdf> [<https://perma.cc/U2AW-JQKC>] (detailing various states' reduced budgets as a result of COVID-19).

50. *See* SCOTT GRAVES, CAL. BUDGET PROJECT, *STEADY CLIMB: STATE CORRECTIONS SPENDING IN CALIFORNIA* 8 (2011), [https://calbudgetcenter.org/wp-content/uploads/110914\\_Corrections\\_Spending\\_BB.pdf](https://calbudgetcenter.org/wp-content/uploads/110914_Corrections_Spending_BB.pdf) [<https://perma.cc/T6F7-KUWY>].

51. *Id.* at 5.

52. *Id.*

53. *See* HIGHSMITH, *supra* note 49, at 10–11.

54. Budgetary constraints play a less prominent role in the drive towards federal prison privatization, but pervasive privatization at the state and local level has served as a model for private prison lobbyists to successfully pitch their services to the federal government. *See* KARA GOTTSCH & VINAY BASTI, SENT'G PROJECT, *CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS* 11 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/07/Capitalizing-on-Mass-Incarceration.pdf> [<https://perma.cc/89YM-W5DA>] (“[P]rivate prison companies at times have joined with lawmakers, corporations, and interest groups to advocate for privatization . . .”).

55. *See* WORTH RISES, *THE PRISON INDUSTRY: HOW IT STARTED, HOW IT WORKS, AND HOW IT HARMS* 48–75 (2020), <https://worthrises.org/s/The-Prison-Industry-How-It-Started-How-It-Works-and-How-It-Harms-December-2020.pdf> [<https://perma.cc/V2SW-2FF6>].

and friends of incarcerated individuals,<sup>56</sup> and another \$1.4 billion spent within prisons on telecommunication services,<sup>57</sup> these contracts can be immensely profitable for both prison operators and private companies.<sup>58</sup> Budget constraints impose a dual incentive to privatize: not only do prison operators save money by externalizing expensive and time-consuming tasks,<sup>59</sup> but they also receive a share of the revenue, which helps offset the dearth of public funds they receive. In exchange, a handful of private companies are given exclusive control of various aspects of a prison facility, and they quickly establish schemes that extract wealth from incarcerated individuals and their communities.<sup>60</sup>

To be clear, the harmful impacts of mass incarceration would have been just as prevalent even if public budgets had managed to absorb the costs of states' fiscal policy choices. But few can argue that the alternative—the massively increased influence of the private sector—is a better outcome. The prison industrial complex is a uniquely insidious and exploitative manifestation of capitalism, accountable to only a handful of wealthy stakeholders and in constant search of new sources of profit.

As their power and influence have grown, private companies have successfully shifted many of the expenses of incarceration onto the very individuals they incarcerate, along with their loved ones and communities. According to official estimates, the United States still spends approximately \$80.7 billion on prison operations annually,<sup>61</sup> but this figure only tells one part of the story. In addition to publicly supplied funds, families and friends of incarcerated individuals pay over \$3 billion to the private sector just to stay in contact with and provide bare necessities for their loved ones.<sup>62</sup> For people like Kae Boone, sending \$100 per month to her boyfriend, Charles Lee Isaac, has made it possible for him to purchase necessary items such as toiletries and food

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56. *Id.* at 60.

57. *Id.* at 48–49.

58. See HIGSMITH, *supra* note 49, at 11–12 (examining the usage of kickbacks to offset fiscal pressure and generate revenue for the private prison industry); *id.* at 18–19 (exploring some of the abusive schemes implemented by private prison service providers); *id.* at 21–22 (discussing the cost-sharing structure of private prison contracts).

59. For example, one prison in Oregon estimated that accounting for and returning incarcerated individuals' money when they are released costs approximately \$275,000 annually and several hours of labor per week. *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 569 (9th Cir. 2020).

60. See WORTH RISES, *supra* note 55, at 49 (detailing, for example, how prison telecom contracts provide lucrative kickbacks to prison operators by charging incarcerated people and their families “egregious rates” for their services).

61. EMILY D. BUEHLER, U.S. DEP'T OF JUST., NCJ 256093, JUSTICE EXPENDITURES AND EMPLOYMENT IN THE UNITED STATES, 2017, at 4 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jeeus17.pdf> [<https://perma.cc/84CX-76DM>]. The U.S. has a multi-tiered system of incarceration, and expenditures are similarly split between federal (\$7.8 billion), state (\$51.4 billion), and local (\$30 billion) governments. *Id.*

62. This figure is accurate as of 2017, but it notably omits sectors of the corrections industry—including money transfers and release cards—where expenditures total less than \$1 billion. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/83EA-ZR7N>].

from the prison commissary, but the payments have also left her struggling to pay her own bills on time.<sup>63</sup> These are the real costs of the prison industrial complex. Within this new ecosystem, the private sector is perfectly positioned to capitalize on increasingly strained state budgets at the expense of individuals who have any direct or indirect contact with the criminal legal system.

### C. *The Impacts of the Prison Financial System*

Though it is relatively young,<sup>64</sup> the prison financial system has quickly become the site of harmful and extractive practices that have the potential to sap hundreds of millions of dollars from incarcerated individuals and their communities each year.<sup>65</sup> Two practices in particular, exploitative money transfer fees and fee-laden debit release cards, have emerged as the most prominent examples of unchecked financial abuse within prisons and jails.

#### 1. *Exploitative Money Transfer Fees*

The lack of financial regulation within prisons and jails has allowed a handful of corporations to profit off of incarcerated individuals' reliance on prison commissaries for everyday items.<sup>66</sup> For-profit commissaries have become a mainstay within prisons throughout the country, serving as a vehicle for private industry to profit off of prison facilities' increasingly sparse provisions.<sup>67</sup> Increased reliance on purchases made within the confines of the carceral system has spurred the development of a parallel system of prison finance used to manage incarcerated individuals' assets.

Prison operators seldom allow incarcerated individuals to possess cash. Instead, they must access their money through trust accounts controlled by either the prison itself or, as is becoming increasingly common, a private company contracted by the prison facility.<sup>68</sup> These accounts are subject to a host of mandatory deductions that are used to pay court-imposed fees and fines, as well

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63. See Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [https://perma.cc/5WNF-ZGV4].

64. See WORTH RISES, *supra* note 55, at 59–60 (noting that the federal prison system adopted the current financial system in the late 20th century).

65. See *id.* at 60 (“In 2015, the correctional money transfer market was estimated to be worth \$172 million.”).

66. See Daniel Wagner, *Prison Bankers Cash in on Captive Customers*, CTR. FOR PUB. INTEGRITY (Nov. 11, 2014), <https://publicintegrity.org/inequality-poverty-opportunity/prison-bankers-cash-in-on-captive-customers/> [https://perma.cc/YBM5-7KW6] (explaining that “governments increasingly shift the costs of imprisonment from taxpayers to the families of inmates,” forcing them to pay for “basic needs like toothpaste, visits to the doctor and winter clothes,” and in some cases “toilet paper, electricity, even room and board”).

67. See Stephen Rahe, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL’Y INITIATIVE (May 2018), <https://www.prisonpolicy.org/reports/commissary.html> [https://perma.cc/5786-W55M].

68. See Isaac Colunga, *An Alternative Look at the Takings Clause and Inmate Trust Accounts*, 39 U. TOL. L. REV. 791, 792 (2008).

as some of the costs associated with incarceration itself.<sup>69</sup> Incarcerated individuals can use their earned wages to fund trust accounts,<sup>70</sup> but these relatively meager and exploitative earnings are insufficient to pay for even the most essential items, such as basic toiletries and clothing, that aren't provided in sufficient quantities (if they are provided at all) by the prison operator.<sup>71</sup> As a result, family and friends commonly supplement trust accounts through money transfers.<sup>72</sup>

The process through which friends and family are able to fund an incarcerated individual's account leaves well-intentioned community members exposed to exorbitant fees.<sup>73</sup> These financial transactions exist in a regulatory gray area that allows financial service providers to essentially charge whatever they want for transfers into prison facilities.<sup>74</sup> As a result, transfer fees are frustratingly arbitrary. In California, JPay charges a transfer fee of \$1.95 for sums between \$0.01 and \$30, but it charges \$7.95 for a transfer between \$30.01 and \$75.<sup>75</sup> This means that it is cheaper to send two \$30 transfers and a \$15 transfer than it is to send one transfer of \$75.<sup>76</sup> Further, a transfer between \$75.01 and \$200 costs \$9.95,<sup>77</sup> but the fee for a transfer between \$200.01 and \$300 goes back down to \$7.95. These inconsistent fee schedules show that the service is

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69. See Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3, 11 (2020) [hereinafter Raher, *The Company Store*].

70. See Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/9MBH-2WCJ>]. These wages are often painfully low, even for jobs that are incredibly dangerous. For example, incarcerated individuals are often called upon to fight wildfires, yet they are paid only \$1.45 per day for their service. See David Fathi, *Prisoners Are Getting Paid \$1.45 a Day to Fight the California Wildfires*, ACLU (Nov. 15, 2018), <https://www.aclu.org/blog/prisoners-rights/prisoners-are-getting-paid-145-day-fight-california-wildfires> [<https://perma.cc/33PP-JNZF>].

71. See RAHER, *supra* note 67.

72. See Wagner, *supra* note 66.

73. See Stephen Raher, *The Multi-Million Dollar Market of Sending Money to an Incarcerated Loved One*, PRISON POL'Y INITIATIVE (Jan. 18, 2017) [hereinafter Raher, *The Multi-Million Dollar Market*], <https://www.prisonpolicy.org/blog/2017/01/18/money-transfer/> [<https://perma.cc/5BJY-ZH5E>].

74. See Wagner, *supra* note 66 (explaining that “[d]espite its kudzu-like growth, JPay so far has avoided scrutiny by consumer regulators”).

75. *California Department of Corrections & Rehabilitation: Available JPay Services*, JPAY, <https://www.jpays.com/Agency-Details/California-Department-of-Corrections--Rehabilitation.aspx> [<https://perma.cc/5C5W-PVSD>].

76. See *id.* Fees vary widely from state to state and, in some cases, different rates are charged for transfers made online versus over the phone. For example, money transferred to individuals incarcerated by the Washington State Department of Corrections incur fees ranging from \$3.95 for amounts up to \$20 to \$11.95 for sums above \$200. An additional \$1 fee is incurred for transfers initiated over the phone. *Washington State Department of Corrections: Available JPay Services*, JPAY, <https://www.jpays.com/Agency-Details/Washington-State-Department-of-Corrections.aspx> [<https://perma.cc/ZXJ4-CWLU>]. In some jurisdictions, “JPay’s fees approach 45 percent.” Wagner, *supra* note 66.

77. *California Department of Corrections & Rehabilitation: Available JPay Services*, *supra* note 76.

not rooted in any actual costs incurred by JPay, but instead is designed to maximize profit at the expense of incarcerated individuals and their friends and family.

Though electronic money transfers are now the norm, this was not always the case. In the past, paper money orders could be mailed directly to prisons and deposited in an incarcerated individual's account for no more than the cost of postage.<sup>78</sup> However, as more and more prisons contract out their financial systems, this option has become painfully inefficient, leaving fee-laden transfers as the only feasible option.<sup>79</sup> Rosemary Collins, whose son is incarcerated in Alabama's St. Clair state prison, explained that a money transfer mailed to Keefe Group (the exclusive provider of financial services at the institution where her son is housed) takes two weeks to deposit in her son's account.<sup>80</sup> Sadly, many others share Ms. Collins's experience, and this practice is widespread among prison finance operators. When asked for an explanation as to why money transfers take so long to process, Adryann Glenn, a victim of JPay's abusive fee schedules, shared what he believed to be the obvious explanation: "JPay doesn't really want your money order. They want you to use the money transfer."<sup>81</sup> Regardless of whether JPay's actions are deliberate, they present consumers with a difficult choice between long wait times and excessive fees. Yet in other areas of the prison finance industry, incarcerated individuals are given no choice at all.

## 2. *Predatory Debit Release Cards*

For many formerly incarcerated individuals, release from prison involves the mandatory acceptance of a debit release card with excessive fees. These cards have quickly become a common method through which prison operators return the remaining funds in an incarcerated individual's account, but a lack of publicly available data renders it difficult to sketch a complete picture of their usage.<sup>82</sup> A 2014 survey from the Association of State Correctional Administrators revealed that 52 percent of responding agencies used prepaid debit cards to refund account balances, and most of those agencies indicated that

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78. See Wagner, *supra* note 66; Raheer, *The Multi-Million Dollar Market*, *supra* note 73.

79. See Wagner, *supra* note 66 (explaining how companies like JPay would take weeks to deposit money orders in trust accounts).

80. See Amadou Diallo, 'Release Cards' Turn Inmates and Their Families into Profit Stream, AL JAZEERA AM. (Apr. 20, 2015), <http://america.aljazeera.com/articles/2015/4/20/release-cards-turn-inmates-and-their-families-into-profit-stream.html> [<https://perma.cc/7P9V-4KMS>].

81. *Id.*

82. See Andrea M. Lindsey, Daniel P. Mears & Joshua C. Cochran, *The Privatization Debate: A Conceptual Framework for Improving (Public and Private) Corrections*, 32 J. CONTEMP. CRIM. JUST. 308, 311 (2016) ("[T]here do not exist accurate empirical estimates of the use of privatization by local, state, and federal governments and by the type of corrections privatization (e.g., fees, probation, prison), or, by extension, of changes in the use of privatization over time.").

the cards carried usage fees.<sup>83</sup> There is also reason to think that these practices have continued expanding since then. JPay, one of the largest providers of release cards, has continued to grow in recent years, and at least some of its services are now offered in 33 states.<sup>84</sup> Additionally, JPay's parent company, Securus, "offers products that affect more than 1.2 million people incarcerated across 2,200 facilities in 47 states."<sup>85</sup> Though JPay is not the only provider of debit release cards, virtually every purveyor of these financial instruments levies similarly exploitative and harmful fees on their users.<sup>86</sup>

The fees charged by release card issuers for routine usage vary wildly between providers, but they all follow a central theme: they are disproportionately larger than the fees associated with "standard" debit cards, and they serve to extract wealth from unwilling and often unwitting users. Not only do many release card providers assess fees for basic activity such as balance inquires (up to \$1 at an ATM),<sup>87</sup> but some charge weekly account maintenance fees of up to \$3.50,<sup>88</sup> and account closure fees as high as \$30.<sup>89</sup> Stories abound of formerly incarcerated individuals whose money was siphoned away as they sought to reintegrate into their communities. One involuntary release card user, Gregg Cavaluzzi, was only able to spend approximately \$70 of the \$120 he was released with due to fees he was unaware of when he was given the card.<sup>90</sup> And just like the arbitrary money transfer fees, the divergent costs imposed by different providers suggest that they likely are not based on actual expenses incurred by the vendor.<sup>91</sup>

Release cards offer little real utility to their users, regardless of claims to the contrary by release card vendors. The limitations that release cards place on formerly incarcerated individuals far outweigh the relatively sparse benefits that the cards provide. Promoters of release cards tout their convenience to

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83. See Letter from Stephen Raher, Prison Pol'y Initiative, to Richard Cordray, Director, Consumer Fin. Prot. Bureau (Mar. 18, 2015) [hereinafter Raher Letter], <https://static.prisonpolicy.org/releasecards/CFPB-comment.pdf> [<https://perma.cc/QGG2-GGYQ>].

84. Katie Rose Quandt, *Lawsuit Reveals How Tech Companies Profit off the Prison-Industrial Complex*, THINKPROGRESS (Feb. 9, 2018), <https://thinkprogress.org/prison-technology-companies-inmates-9d4242805363/> [<https://perma.cc/H2PZ-3E3D>]. JPay is also just one player in the world of privatized prison finance. Other companies such as Keefe Group, Numi Financial, and Rapid Financial Solutions offer similar services. See *id.*

85. *Id.*

86. See WORTH RISES, *supra* note 55, at 60–64.

87. Debra Cassens Weiss, *Can Jails Return Inmate Cash in the Form of Fee-Laden Debit Cards? 9th Circuit Allows Suit*, A.B.A. J. (Mar. 26, 2020), <https://www.abajournal.com/news/article/can-jails-return-inmate-cash-in-the-form-of-fee-laden-debit-cards-9th-circuit-allows-suit> [<https://perma.cc/Y46A-CXZU>].

88. Raher Letter, *supra* note 83, at 4.

89. *Id.*

90. Diallo, *supra* note 80.

91. See Raher Letter, *supra* note 83, at 5 ("This variation indicates that consumer fees are not cost-based, but instead are merely a profit mechanism that is undisciplined by either regulatory oversight or an efficient marketplace.").

individuals who lack banking access,<sup>92</sup> an especially salient consideration given the overlap between communities that are most frequently unbanked and most frequently incarcerated.<sup>93</sup> Some release card providers even suggest that formerly incarcerated individuals continue to use their release cards in place of a bank account by reloading the cards with additional funds after their initial release money is spent.<sup>94</sup> Though a prepaid debit card may offer some utility to an unbanked individual, the release card provider's suggestion certainly fails to account for the many practical shortcomings release cards pose, such as the inability to pay for critically important expenses such as rent and the continued exposure to abusive fees. Further, the fees associated with the everyday use of a release card can actually make it more expensive than a retail check-casher.<sup>95</sup> Though there may be extremely limited circumstances in which a release card would work to the benefit of a formerly incarcerated individual, those situations are likely rare.

## II.

### THE REFORMIST APPROACH: LITIGATE, REGULATE, AND INCREASE ACCESS TO BANKING

The harm inflicted by the prison financial system has sparked calls for reform, and efforts to ameliorate that harm take many forms. This section will examine three: (A) efforts to use the courts as a tool to recover the funds pilfered from incarcerated individuals and their communities; (B) regulatory efforts modeled after recent actions by the Federal Communications Commission ("FCC") to rein in excessive fees in prison telecommunications; and (C) reforms aimed at increasing banking access for currently and formerly incarcerated individuals.

#### A. *Litigation: Useful Tool for Reform?*

Litigation represents one potential pathway for incarcerated and formerly incarcerated individuals to bring claims against prison operators for exploiting them financially, but it is not without its structural difficulties. While significant progress has been made by using the courts to seek relief from the economic

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92. See *What Is Release Pay?*, RAPID FIN. SOLS. (Oct. 6, 2021), <https://rpdfin.com/releasepay/> [<https://perma.cc/557T-VWDV>].

93. Compare FED. DEPOSIT INS. CORP., 2017 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 69 (2017), <https://www.fdic.gov/householdsurvey/2017/2017report.pdf> [<https://perma.cc/N5UD-YAVZ>] ("Unbanked rates for . . . [B]lack and Hispanic households, remain substantially above the national average."), with ASHLEY NELLIS, SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 14 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/25LV-Z6VX>] ("[Many states] exhibit astounding rates of racial and ethnic disparity: African Americans are incarcerated in state prisons at nearly five times the rate of [W]hites.").

94. See *What Is Release Pay?*, *supra* note 92.

95. See Raheer Letter, *supra* note 83, at 7.

damage caused by release cards, opportunities to challenge exploitative money transfer fees have yet to yield success.<sup>96</sup> Further, mandatory arbitration clauses and class action waivers are nearly always included in release cards' terms of use. Despite these challenges, several lawsuits have successfully recovered excessive release card fees from Bank of America and JPMorgan Chase under state tort and consumer protection laws. Claims are also currently being brought against JPay, Keefe, and Numi Financial, alleging, *inter alia*, violations of the Electronic Fund Transfer Act ("EFTA"). Though litigation has unquestionably yielded material success, its usefulness as a tool for reform is nonetheless limited by restrictive contract provisions and the limitations of state and federal law.

### 1. Contractual Barriers to Recovery

One of the largest legal barriers to challenging release card issuers in court is the near-universal inclusion of mandatory pre-dispute arbitration agreements in the release cards' terms of use. Though some providers, such as Numi, offer users the ability to opt out of the arbitration agreement while still using the card, the concealment of the relatively tedious opt-out procedure within prolix legal writing makes this option inaccessible to the average person.<sup>97</sup> Others, such as JPay, include no such option,<sup>98</sup> instead allowing users to opt out by sending in a written notice and cutting the card in half.<sup>99</sup> This approach presents card users with a false choice: with no alternative means of receiving their money, they can either accept the release cards' terms or forfeit their reentry funds.

The lack of any alternative means through which formerly incarcerated individuals can receive their reentry funds has presented legal advocates with a useful avenue to challenge arbitration clauses in court. Despite some outlying results, this approach has been increasingly successful. Several recent challenges to arbitration clauses in the release card context have yielded positive results, with courts frequently holding that the usage of release cards is not voluntary due to the lack of an alternative means of receiving payment.<sup>100</sup> Yet other adverse

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96. Though at least one lawsuit has sought to challenge excessive money transfer fees, it was unsuccessful. *See* *Fayne v. Clipper*, No. 12 CV 2500, 2013 WL 459895 (N.D. Ohio Feb. 6, 2013) (dismissing case on the pleadings); *see also* *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018) (allowing a claim based on excessive money transfer fees to proceed to arbitration).

97. *See* Raheer Letter, *supra* note 83, Exhibit 3.

98. *See* *Payments Terms of Service*, JPAY (Aug. 18, 2021), <https://www.jpays.com/LegalAgreementsOut.aspx> [<https://perma.cc/69XU-Z3XQ>].

99. *Reyes v. JPay, Inc.*, No. CV 18-315-R, 2018 WL 10811497, at \*1 (C.D. Cal. June 26, 2018).

100. *See* *Reichert v. Keefe Commissary Network*, No. C17-5848, 2018 WL 2018452, at \*2 (W.D. Wash. May 1, 2018) (denying motions to compel arbitration because of a lack of mutual assent); *Brown v. Stored Value Cards, Inc.*, No. 15-cv-01370-MO, 2016 WL 755625, at \*4 (D. Or. Feb. 25, 2016) (denying motion to compel arbitration because "[plaintiff] had to take the card and had to work through the Defendants' system in order to get her money back"); *see also* *Regan v. Stored Value Cards, Inc.*, 85 F. Supp. 3d 1357 (N.D. Ga. 2015), *aff'd*, 608 F. App'x. 895 (11th Cir. 2015) (ordering an evidentiary hearing on whether a contract had been formed after Defendants argued that Plaintiff had implied acceptance or ratified the cardholder agreement through his use of the release card (the case settled before the evidentiary hearing)). Courts' acknowledgment of recently released individuals' lack

outcomes indicate that any emerging consensus is far from universal within the federal courts.<sup>101</sup>

Class action waivers within release cards' terms of use present a further barrier to the successful recovery of formerly incarcerated individuals' release money. At least one major release card provider, JPay, now includes such a provision within its terms of service.<sup>102</sup> Given the relatively small size of individual claims, class actions represent the only realistic chance for formerly incarcerated individuals to challenge release card purveyors in court. Though the enforceability of such clauses is still being tested, the Supreme Court has found them to be increasingly permissible in recent years.<sup>103</sup> As a result, the availability of litigation (or arbitration) as a means of seeking restitution for formerly incarcerated individuals may become more limited in the near future. Despite these barriers, advocates have still demonstrated some degree of success challenging prison financiers in court.

## 2. *Claims Under State Tort and Consumer Protection Statutes*

Some of the most noteworthy release card lawsuits have been class actions brought under various states' tort and consumer protection laws, which provide vehicles for challenging both the release cards' excessive fees and compulsory acceptance. Two cases highlight the potential impact that these claims can have. The first, *Brill v. Bank of America*,<sup>104</sup> involved individuals who were formerly incarcerated by the State of Arizona. The second, *Krimes v. JPMorgan Chase Bank, N.A.*,<sup>105</sup> was brought on behalf of individuals incarcerated in the federal prison system. Both suits resulted in settlements that returned some of the money that the class of plaintiffs had lost to excessive fees, along with a cessation of such practices by both financial institutions.<sup>106</sup> Though these lawsuits remain a

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of choice is underscored by an outlier case in which the court granted a motion to compel arbitration because the plaintiff *had* been given the option to receive his money via check. *Pope v. EZ Card & Kiosk LLC*, No. 15-61046, 2015 WL 5308852, at \*3 (S.D. Fla. Sept. 11, 2015) (“The Jail gave him an option to receive a check, but Plaintiff elected to take the debit card instead. Plaintiff signed a form which provided him with a choice of his refund options.”).

101. See *Reyes*, 2018 WL 10811497 (granting motion to compel arbitration because plaintiff was apprised of the terms of use when he received the release card); *Jones v. NetSpend Card Co.*, No. 17-CV-304, 2018 WL 2427376, at \*2 (W.D. Tex. May 30, 2018) (concluding that “the record demonstrates a valid agreement to arbitrate between the parties” and granting motion to compel arbitration); see also *Oliver v. First Century Bank*, No. 17cv620, 2017 WL 5495092 (S.D. Cal. Nov. 16, 2017) (granting motion to compel arbitration on the question of the arbitration clause’s enforceability).

102. *Payments Terms of Service*, *supra* note 98.

103. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempts state laws prohibiting class action waiver clauses); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (holding that prohibitively high arbitration costs are not a sufficient reason to overrule a class action waiver clause).

104. No. CV-16-03817, 2017 WL 3047034, at \*1 (D. Ariz. Apr. 14, 2017) (granting motion for preliminary approval of class settlement).

105. No. 15-5087, 2016 WL 6276440 (E.D. Pa. Oct. 26, 2016).

106. See Erik Larson, *JPMorgan Pays Inmates for Fees on Get-Out-of-Jail Debit Card*, CHI. TRIB. (Aug. 5, 2016), <https://www.chicagotribune.com/business/ct-jpmorgan-inmate-debit-card->

potentially powerful tool in the fight to curtail the exploitative behavior of release card vendors, the impact of these settlements is limited by the lack of enhanced damages provided by many state consumer protection statutes.<sup>107</sup> While banks are required to return any ill-gotten funds, there is no further monetary punishment and thus little disincentive for further harmful behavior. Though these laws are not always an effective tool for recovering stolen funds and deterring further exploitative behavior, activists continue to develop other pathways to seek restitution for incarcerated individuals through litigation.

### 3. *Brown v. Stored Value Cards and the Future of Litigation Under the EFTA*

Two recent developments have opened up new opportunities for advocates to leverage the EFTA's prepaid card provision<sup>108</sup> to challenge release card vendors' predatory practices.<sup>109</sup> The prepaid card provision prohibits providers of general-use prepaid cards from charging dormancy, inactivity, and service fees unless certain disclosure requirements are met, and the card has remained inactive for a period of twelve months.<sup>110</sup> However, the regulation includes a specific exemption for financial instruments that are "not marketed to the general public."<sup>111</sup> Thus, advocates must resolve two questions to bring claims under the provision: (1) whether release cards fall under the definition of general-use prepaid card; and (2) whether they are marketed to the general public. Though the answer to these questions was unclear in the past, a recent rulemaking by the Consumer Financial Protection Bureau (CFPB), along with the Ninth Circuit's ruling in *Brown v. Stored Value Cards*,<sup>112</sup> have provided would-be claimants with a greater degree of clarity.

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20160805-story.html [https://perma.cc/4PH7-ZSMR]; Derek Gilna, *Settlements in Arizona DOC, BOP Lawsuits over Release Debit Card Fees*, PRISON LEGAL NEWS (Mar. 6, 2018), <https://www.prisonlegalnews.org/news/2018/mar/6/settlements-arizona-doc-bop-lawsuits-over-release-debit-card-fees/> [https://perma.cc/49V9-EA99].

107. See NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: STATE-BY-STATE SUMMARIES OF STATE UDAP STATUTES – APPENDIX B 23 (2009), <https://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf> [https://perma.cc/FX9X-ECYZ]. Only twenty-five states and the District of Columbia provide double or treble damages, though seven other states expressly authorize some form of punitive damages. See generally NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 44 (2018), <https://www.nclc.org/images/pdf/udap/udap-report.pdf> [https://perma.cc/3NNN-VEW7].

108. 15 U.S.C. § 1693i-1.

109. This section builds on the excellent work of the National Consumer Law Center. A more thorough analysis of release card litigation under the EFTA can be found at ARIEL NELSON BRIAN HIGSMITH, ALEX KORNYA & STEPHEN RAHER, NAT'L CONSUMER L. CTR., COMMERCIALIZED (IN)JUSTICE LITIGATION GUIDE: APPLYING CONSUMER LAWS TO COMMERCIAL BAIL, PRISON RETAIL, AND PRIVATE DEBT COLLECTION 48–51 (2020), [https://www.nclc.org/images/pdf/criminal-justice/WP\\_Litigation\\_Guide.pdf](https://www.nclc.org/images/pdf/criminal-justice/WP_Litigation_Guide.pdf) [https://perma.cc/N89V-UAKQ].

110. 15 U.S.C. § 1693i-1(b)(2).

111. *Id.* § 1693i-1(a)(2)(D)(iv).

112. 953 F.3d 567 (9th Cir. 2020).

The CFPB's 2016 amendment to Regulation E, which implements the EFTA, clarified that the type of accounts governed by the statute include "prepaid account[s]," which likely includes prison release cards.<sup>113</sup> The CFPB's commentary even goes so far as to explicitly mention prison release cards as a type of account covered by the updated regulation.<sup>114</sup> This regulatory guidance indicates that the EFTA's prepaid card provision is applicable to prison release cards.

The Ninth Circuit recently answered the question of whether prison release cards fall under the provision's public marketing exception in *Brown*. The case involved a plaintiff, Danica Brown, who was arrested for participating in a public protest and forced to turn over \$30.97 when she was taken into custody.<sup>115</sup> The Multnomah County jail where she was briefly held "contracted with Numi to return released inmates' funds via prepaid debit cards,"<sup>116</sup> and Brown was given such a card when she was released.<sup>117</sup> Numi contended that its release cards were not marketed to the general public because "inmates are not the general public," and they "did not directly market the cards to inmates."<sup>118</sup> But the Ninth Circuit concluded otherwise.<sup>119</sup>

Two key findings in *Brown* help explain the court's conclusion. First, the court observed that because the cards are issued when individuals "are released from jail or prison," they have "rejoin[ed] the general public."<sup>120</sup> Put another way, the question of whether incarcerated individuals are members of the general public is moot because the cards are only ever issued to the *formerly* incarcerated. The court also held that, despite a lack of *direct* marketing targeting formerly incarcerated individuals, the cards were *indirectly* marketed to them through representations made to "municipalities and correctional facilities."<sup>121</sup> Because Numi expected and intended for the county to provide the advertised release cards, and formerly incarcerated individuals had no choice but to accept them, the marketing directed at county officials satisfied the CFPB's articulated standard for indirect marketing.<sup>122</sup> The decision in *Brown*, coupled with the CFPB's clarification of Regulation E, presents a clear path forward for release

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113. 12 C.F.R. § 1005.2(b)(3) (2020). The CFPB's official interpretation further clarifies that the term "prepaid account" includes accounts "loaded with funds when [they are] first provided to the consumer for use." *Id.*

114. See Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 83,934, 83,968 (Nov. 22, 2016) ("The Bureau notes . . . that the final rule's definition is broad enough to . . . include . . . prison release cards that meet the other criteria set forth in the definition.")

115. *Brown*, 953 F.3d at 571–72.

116. *Id.* at 570.

117. *Id.* at 571.

118. *Id.* at 573.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (citing 12 C.F.R. § 1005.20(b)(4) (2019)).

card litigation under the EFTA. Free from the ambiguity surrounding the prepaid card provision, future litigants can ground challenges to release card vendors' abusive practices in a clearer understanding of the EFTA's applicability to debit release cards.

Litigation is rightfully viewed as a useful tool in recouping funds that have been stolen from formerly incarcerated individuals via exploitative release cards, but the recovery it provides is reactionary and jurisdictionally limited. Lawsuits brought by the plaintiffs' bar require a violation to take place before a response can begin the tedious process of navigating the legal system. Recovery, if it is ever obtained, can arrive too late to make a meaningful difference in the lives of those who have had their reentry funds stolen from them. Past victories are also limited by the multitude of jurisdictions within the U.S. legal system. Absent a favorable decision from the Supreme Court, the issue would need to be relitigated successfully in multiple circuits before a durable precedent would form. Such a result could take years to achieve, and during that time release cards will continue to extract money from formerly incarcerated individuals attempting to rejoin their communities. Given these limitations, other reform efforts have sought to address the problem closer to the source.

*B. Prison Telecommunications: A Blueprint for Regulating Prison Finance?*

Though not identical, the inmate communications services ("ICS") industry and the prison finance industry occupy similarly structured spaces within the larger prison industrial complex. Both are dominated by a handful of consolidated private firms,<sup>123</sup> and both rely on a business model that coerces prison operators into providing the firms with exclusive access to their incarcerated market in exchange for lucrative kickbacks.<sup>124</sup> Both industries have also played host to systematic financial abuse.<sup>125</sup> While money transfer fees and release cards have served as the primary vehicles for the prison finance industry, the ICS industry is built on drastically inflated communications costs. Telecom

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123. Global Tel\*Link and Securus control a collective 70% of the ICS industry. See Zachary Fuchs, *Behind Bars: The Urgency and Simplicity of Prison Phone Reform*, 14 HARV. L. & POL'Y REV. 205, 209 (2019). As recently as 2015, JPMorgan Chase had exclusive control of the financial industry in federal prisons, while state and local prisons and jails contract with several companies, the largest being JPay, Inc. (now owned by Securus). See Diallo, *supra* note 80.

124. ICS industry contracts "almost always involve kickbacks." Fuchs, *supra* note 123, at 210. In the prison finance industry, "both Keefe Group and JPay agree to provide contracting facilities with a 'commission' (kickback) for each deposit received into a trust account." Raheer Letter, *supra* note 83, at 11. Release cards also carry a financial incentive for prison operators because they allow operators to off-load a tedious and expensive task. See *Brown*, 953 F.3d at 569 ("[The process of providing formerly incarcerated people with cash or check] was considered by Multnomah County to be expensive and time consuming: Multnomah County estimates that it spent about \$275,000 in labor costs annually and two to three staff hours per day handling inmates' cash.").

125. See generally Fuchs, *supra* note 123, at 208–13 (detailing the history and negative effects of the ICS industry).

providers have charged rates as high as \$1 per minute to contact friends and family on the outside, sums that place even more fiscal pressure on incarcerated individuals and their already strained budgets.<sup>126</sup>

Regulatory authorities have shown a willingness in recent years to curtail the excesses of the ICS industry. Recent action taken by the FCC has capped many of the fees associated with prison telecommunications,<sup>127</sup> and many state prisons have lowered rates for both in-state and out-of-state calls as a result.<sup>128</sup> While the FCC eventually caved to public pressure and acted to partially curtail some of the abuses of the ICS industry, similar calls for regulation of the prison financial system have been less successful. Advocates have long called for increased choice of medium for formerly incarcerated individuals' release money disbursement,<sup>129</sup> but thus far those calls have failed to spark comprehensive action from the CFPB.<sup>130</sup>

One possible explanation for why the CFPB hasn't been able to fully curtail the usage of debit release cards is that they simply lack the authority to impose such a sweeping change. The EFTA has been the primary focus of advocates,<sup>131</sup> but the reality is that it's not a perfect fit for regulatory action directed at expanding formerly incarcerated individuals' choice of medium when receiving their release money.<sup>132</sup> The EFTA focuses on strengthening disclosure requirements in the hopes that informed consumers will make decisions that are in their own financial self-interest. In situations where such choice is impossible, it is unclear if the law could be interpreted to provide the protection sought by reform advocates.

The regulatory approach, though it is useful in certain respects, is ill-equipped to produce durable results within the decentralized carceral framework

126. See Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL'Y INITIATIVE (Feb. 2019), [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice.html](https://www.prisonpolicy.org/phones/state_of_phone_justice.html) [<https://perma.cc/HF9A-U5ZP>].

127. See Press Release, Fed. Comm'n Comm'n, FCC Takes Next Big Steps in Inmate Calling Rates (Oct. 22, 2015), <https://www.fcc.gov/document/fcc-takes-next-big-steps-reducing-inmate-calling-rates> [<https://perma.cc/E5ED-4KMX>]; Peter Wagner, *FCC Commissioners Reveal Details of their Proposal to Protect All Families of Incarcerated People*, PRISON POL'Y INITIATIVE (Oct. 1, 2015), <https://www.prisonpolicy.org/blog/2015/10/01/clyburn-proposal/> [<https://perma.cc/E5RZ-TXA6>].

128. See Wagner, *supra* note 127; Wagner & Jones, *supra* note 126.

129. See Rahe Letter, *supra* note 83, at 6–7.

130. See Aleks Kajstura, *A Partial Victory: Release Cards Included in CFPB's New Regulations*, PRISON POL'Y INITIATIVE (Oct. 5, 2016), <https://www.prisonpolicy.org/blog/2016/10/05/cfpb/> [<https://perma.cc/W4A2-Z4KF>] (“Prison Policy Initiative had argued that correctional facilities should be prohibited from requiring that people receive their money on prepaid cards. The CFPB [*sic*] declined to impose such a prohibition at this time.”).

131. See Rahe Letter, *supra* note 83, at 7–8.

132. See RAHER, *supra* note 67, at 63 (“[T]he law is largely concerned with preventing unauthorized transactions, which does not appear to be a widespread problem in prison retailing. Rather, the primary problem is exorbitant fees, but EFTA contains little direct regulation of fees, instead favoring disclosure of costs under the premise that consumers will make informed choices. In the context of correctional banking, the EFTA’s emphasis on disclosure is an ill fit, since consumers have no meaningful choice in financial companies.” (internal citations omitted)).

of the United States. Even if a regulatory body can be persuaded to act, which can take several years and face varying challenges depending on the political climate *du jour*, that action is often limited by the restricted tools that each agency has to effect change. As such, a commitment to working within the existing system to ameliorate the harm caused by the prison industrial complex will likely end in disappointment.

### C. Pathways to Consumer Banking for Incarcerated Individuals

In addition to harming incarcerated individuals through exploitative fees and financial instruments, the existing prison financial system also denies them any opportunity to engage with the financial institutions and tools that they will rely on when they are free. Formerly incarcerated individuals already face myriad financial barriers upon reentry, some of which can potentially be removed by increased access to financial services. As such, reformists have worked to increase the ties between incarcerated and formerly incarcerated individuals and traditional financial institutions.

#### 1. The Challenges of Being Unbanked

When Martize Tolbert was released from prison in 2013, he faced a seemingly insurmountable debt from his contact with the criminal legal system, and his financial challenges were compounded by the fact that he also faced numerous barriers to opening a bank account.<sup>133</sup> Without access to a permanent address or government-issued identification, many people like Martize lack the necessary tools to begin the process of opening an account.<sup>134</sup> Those that make it past the first step are often penalized and discriminated against if they have a checkered financial history, which is common among formerly incarcerated individuals.<sup>135</sup>

Living without a bank account can lead to cascading financial crises. Unbanked individuals are a frequent target of the predatory payday loan industry,<sup>136</sup> and between twenty and forty percent of unbanked individuals living in large urban areas rely on commercial check cashing services that charge exorbitant fees for basic financial services.<sup>137</sup> Many unbanked individuals also rely on prepaid debit cards to conduct everyday transactions.<sup>138</sup> Though prepaid

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133. See David Benoit, *Ex-Inmates Struggle in a Banking System Not Made for Them*, WALL ST. J. (Oct. 31, 2020), <https://www.wsj.com/articles/ex-inmates-struggle-in-a-banking-system-not-made-for-them-11604149200> [<https://perma.cc/P5S2-NL9A>].

134. *Id.*

135. *See id.*

136. See Marc D. Glidden & Timothy C. Brown, *Separated by Bars or Dollar Signs? A Comparative Examination of the Financial Literacy of Those Incarcerated and the General Population*, 42 AM. J. CRIM. JUST. 533, 536–37 (2017).

137. *See id.* at 537.

138. See JEAN ANN FOX & PATRICK WOODALL, CONSUMER FED’N OF AM., CASHED OUT: CONSUMERS PAY STEEP PREMIUM TO “BANK” AT CHECK CASHING OUTLETS 9–10 (2006),

cards obtained at check cashing outlets often have fewer fees than the release cards foisted upon formerly incarcerated individuals, the average card still costs \$10.86.<sup>139</sup> Reliance on off-the-grid financial instruments also prevents unbanked individuals from building and accessing credit, which can jeopardize future financial prospects.<sup>140</sup> For Martize, lingering court debt and a lack of access to financial services left him unable to obtain a driver's license.<sup>141</sup> When he was pulled over while driving to work, he faced greater fines that put him further in debt.<sup>142</sup>

## 2. Bank Accounts and Recidivism Rates

Given the potential role that banking access can play in assisting formerly incarcerated individuals with reintegration, reformists have suggested that strengthening the relationship between incarcerated individuals and external financial institutions can reduce recidivism rates. Examples from the United Kingdom and United States suggest a correlation between banking access and successful reintegration, but the proposed pathways are also contingent on the willingness of traditional banks—which often lack interest in a formerly incarcerated individual's successful reentry—to embrace the proposed reform.

The United Kingdom was one of the first countries to experiment with building a pathway for currently and formerly incarcerated individuals to open bank accounts. Several large banks, including Halifax and Barclays, piloted programs that allowed formerly incarcerated individuals to gain access to financial services in the mid-late 2000s.<sup>143</sup> A survey of participants in one such program found that only thirty-nine percent reoffended, notably lower than the national average of sixty percent.<sup>144</sup> Research from the United States, though not directly comparable, suggests a similar relationship between banking access and recidivism. A recent survey of formerly incarcerated residents of Pennsylvania found that seventy-three percent of “successful reentrants” had an account with a credit union or a bank.<sup>145</sup> Conversely, that same survey found that “[o]f

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[https://consumerfed.org/pdfs/CFA\\_2006\\_Check\\_Cashing\\_Study111506.pdf](https://consumerfed.org/pdfs/CFA_2006_Check_Cashing_Study111506.pdf) [<https://perma.cc/3FZ9-46GK>].

139. *Id.* at 10.

140. See Tony Armstrong, *The Cost of Being Unbanked: Hundreds of Dollars a Year, Always One Step Behind*, NERDWALLET, <https://www.nerdwallet.com/blog/banking/unbanked-consumer-study/> [<https://perma.cc/28RA-XJ6V>].

141. See Benoit, *supra* note 133.

142. *See id.*

143. See *Bank Accounts and Insurance: Access in Prison and Beyond*, PRISON REFORM TRUST (Nov. 20, 2012), <http://www.prisonreformtrust.org.uk/PressPolicy/Parliament/AllPartyParliamentaryPenalAffairsGroup/BankaccountsinsuranceNovember2012> [<https://perma.cc/B98X-272R>].

144. Colin Shek, *Barclays Launches Prisoner Bank Accounts Scheme*, GUARDIAN (Sept. 28, 2010), <https://www.theguardian.com/money/2010/sep/28/barclays-prisoner-bank-accounts> [<https://perma.cc/Q8UZ-CKS7>].

145. JOHN E. WETZEL & ROBIN L. WIESSMANN, FINANCES AFTER PRISON, A COLLABORATIVE APPROACH (2018),

unsuccessful reentrants (those recidivating before three years) only thirty-nine percent had accounts.”<sup>146</sup> These results suggest a correlation, but still leave many questions unanswered.

Efforts to build pathways between prisons and banks require that the destination banks demonstrate a willingness to accept a demographic group frequently viewed as high-risk into their customer base. This is by no means assured. In fact, Prisoner Assistant, a private service that offered to open and maintain bank accounts on behalf of incarcerated individuals, was forced to shut down when Wells Fargo suddenly closed their clients’ accounts without explanation.<sup>147</sup> While this incident is not necessarily indicative of the industry’s attitude as a whole, it creates doubt about whether traditional banks are best positioned to assist formerly incarcerated individuals as they seek to reintegrate.

Traditional banks have little, if any, incentive to act in the best interest of low-income individuals. Indeed, the banking industry has adapted itself to primarily address the needs of wealthy individuals and corporate interests.<sup>148</sup> Banks’ overhead costs are the same regardless of the size of a loan, but “the larger loan yields a much higher profit.”<sup>149</sup> Faced with this reality, it is unsurprising that formerly incarcerated individuals—an overwhelmingly low-income demographic group—are not well-served by the financial services sector.

Further, two of the largest banks in the United States, JPMorgan Chase and Bank of America, issued exploitative debit release cards to individuals formerly incarcerated in federal prison. Banks have no imperative to act in the interest of the general public, much less incarcerated and formerly incarcerated individuals, and efforts to build banking relationships between the two groups should be approached with some degree of skepticism. And even if this reform approach is widely pursued, advocates should be vigilant about further exploitative behavior.

### III.

#### ABOLISHING THE PRISON FINANCIAL SYSTEM

Thus far, this Note has largely contextualized the existing practices that have come to define the prison financial system and explored contemporary efforts to rein in the abuses of the system, as well as the challenges those efforts face. The remaining section will take on a new project: exploring the advantages of addressing the prison financial system through the lens of abolition and

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<https://www.dobs.pa.gov/Documents/Publications/Reports/Financial%20Capability%20for%20Reentry.pdf> [<https://perma.cc/9ZSB-AYZS>].

146. *Id.*

147. See Joe Palazzolo, *Wells Fargo Cuts Ties with Prisoner Banking Service*, WALL ST. J. (Dec. 1, 2014), <https://www.wsj.com/articles/BL-LB-49949> [<https://perma.cc/6JPV-HKMC>].

148. See MEHRSA BARADARAN, *HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY* 64 (2015).

149. *Id.* at 140 (“Several barriers keep mainstream banks from serving the poor—the most important is simple math. Banks can make much higher profits elsewhere. The poor may need banks, but banks most definitely do not need the poor.”).

articulating a non-reformist alternative that replaces the prison financial system with a community-centered solution.

### A. *The Limitations of Reform*

There is a critical distinction to be drawn between reforms that leave the overall architecture of the prison system largely intact—including the efforts examined within this Note—and those that seek to build towards the abolition of the system entirely.<sup>150</sup> The difference between these two camps is drawn along both ideological and methodological lines. While it is readily apparent at times how the two schools of thought differ, it is decidedly less clear at others.

The abolitionist group Critical Resistance characterizes the difference between reform and abolition as one of vision, explaining that “[t]he abolitionist keeps a constant eye on an alternative vision of the world in which the [prison industrial complex] no longer exists, while the reformist envisions changes that stop short of this.”<sup>151</sup> While abolitionists view their work as “both a deconstructive and imaginative project,”<sup>152</sup> reformists instead “advance critiques . . . that do not question underlying premises or advance alternative futures.”<sup>153</sup> But this disconnect exists in spite of the fact that both ideological groups are often drawn to support similar policies.<sup>154</sup> As Professor Amna Akbar explains, “whether something is non-reformist or reformist is about more than the nature of the demand and its particulars: it is also a question of how the campaign is waged.”<sup>155</sup> This section will explore how the limitations of reformist politics, including both the range of solutions that they consider viable and the durability of the solutions they champion, explain why some of the campaigns pursued by each group can overlap even while their overarching perspectives differ radically.<sup>156</sup>

#### 1. *The Reformist View Is Narrow*

One of the critical limitations of the reformist view is that it often dismisses demands that challenge the institutional legitimacy of the prison system. The reformist view sees incarceration as a regrettable but necessary part of our society.<sup>157</sup> While it is acceptable to view carceral overabundance as a problem

150. See, e.g., Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/6327-BY35>].

151. CRITICAL RESISTANCE, ABOLITIONIST STEPS 1 (2012), <http://criticalresistance.org/wp-content/uploads/2012/06/Ab-Toolkit-Part-6.pdf> [<https://perma.cc/89EF-DNS4>].

152. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 461 (2018).

153. Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 103 (2020) [hereinafter Akbar, *Demands*].

154. See CRITICAL RESISTANCE, *supra* note 151, at 1.

155. Akbar, *Demands*, *supra* note 153, at 102.

156. See *id.*

157. See, e.g., Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1584–85 (2019).

in dire need of reform, the idea that incarceration could be abolished entirely fails to gain any meaningful traction. Conversely, abolitionists take as their starting point the idea that incarceration itself is a symptom of much larger social, economic, and political problems. Rather than helping solve those problems, incarceration only perpetuates them. The reformist focuses on correcting the course of a misguided prison system, while the abolitionist travels towards an entirely different destination.

The commitment of the reformist view to repairing the perceived flaws of the prison system has real consequences. As a result of placing reform efforts at the center of the conversation, the debates “which should be the focal point of our conversations on the prison crisis” are pushed to the margins.<sup>158</sup> Nowhere is this more acutely evident than in the divergent reactions to the ongoing police brutality against Black people—crisis that has provoked calls for dismantling from abolitionists and similar resistance from reformists. As Professor Akbar explains:

[T]he prevailing frame for thinking about solutions remains focused on reforming the police. Police are taken as a necessary social good: they ensure our safety, maintain law and order, protect us from violence and anarchy, and prevent and punish crime in socially valuable ways. Scholars locate the problem with police violence as a problem for regulation. . . . But there is no way to redress police violence without acknowledging the centrality of violence to their function or the scale, history, and power of the institution.<sup>159</sup>

The parallels between incarceration and policing as tools of Black subjugation render the latter an insightful tool in evaluating the limitations of the reformist approach on both fronts. Just as the modern prison system exists in the shadow of the Black Codes and convict leasing, the modern police force traces its roots to slave patrols and the Ku Klux Klan.<sup>160</sup> These early institutions existed largely to “monitor, control, suppress, and kill Black and Indigenous people,”<sup>161</sup> and their current incarnations continue this shameful legacy. While the murder of George Floyd and the protests that followed marked a turning point in the dialogue surrounding police abolition,<sup>162</sup> few substantive changes were actually made to major metropolitan police budgets in the succeeding months.<sup>163</sup>

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158. DAVIS, *supra* note 16, at 20.

159. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1802 (2020) [hereinafter Akbar, *An Abolitionist Horizon*].

160. *See id.* at 1817–18.

161. *Id.* at 1818.

162. *See id.* at 1783 (explaining how the protests following the murder of George Floyd “catapulted prison and police abolition into the mainstream. . .”).

163. Though New York City cut \$1 billion from their police budget, critics maintain that many of the changes were illusory. *See, e.g.*, Dana Rubinstein & Jeffery C. Mays, *Nearly \$1 Billion Is Shifted From Police in Budget That Pleases No One*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/06/30/nyregion/nypd-budget.html> [https://perma.cc/B26W-E4QP]. For example, the proposed budget relocated \$400 million spent policing schools from the Police

Within the reformist framework, efforts to defund, dismantle, and delegitimize police forces are met with reactions that range from cautious skepticism<sup>164</sup> to outright hostility.<sup>165</sup> The rejection of views that are “incompatible with the preservation of the system”<sup>166</sup> silences important discussions about the role police should play in society. Similarly, reformists’ decision to devote their energy to improving the existing prison system strengthens the “stultifying idea that nothing lies beyond the prison.”<sup>167</sup> By limiting themselves to reforms that fail to challenge the racist and violent systems that they claim to oppose, reformists’ efforts instead further legitimize and strengthen these systems.<sup>168</sup>

## 2. Reformist Solutions Are Fragile

Reformists’ willingness to preserve the underlying structure of the prison system also undermines many of the changes they have successfully pushed. Consider the recent FCC actions to curb financial exploitation in prison telecommunications, introduced earlier as an example of regulatory “success.” While the FCC’s reforms—including capping the cost of out-of-state phone calls and eliminating some abusive fees—undeniably reduced the harm inflicted upon incarcerated individuals, advocates acknowledge that their progress has largely been limited to state-run prisons.<sup>169</sup> In county- and city-run prisons and jails, which are home to approximately 630,000 incarcerated individuals, phone calls can still cost up to \$1 per minute.<sup>170</sup> Further, many of the hidden fees displaced by the FCC’s regulatory action found new homes elsewhere in the chain of transactions required to communicate with incarcerated individuals.<sup>171</sup> Companies such as Western Union and MoneyGram now charge as much as double their usual fee for payments made to prison telecommunications

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Department to the Department of Education, despite the fact that “[t]he Department of Education already funds the school safety program, sending some \$300 million a year to the Police Department.” *Id.* Other cities, such as Washington D.C., have *increased* their police budgets. See James Doubek, *D.C. Mayor Muriel Bowser: ‘Not at All’ Reconsidering Police Funding*, NPR (June 10, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/10/873371574/d-c-mayor-muriel-bowser-not-at-all-reconsidering-police-funding> [<https://perma.cc/T9DU-8ZYP>].

164. See Nolan D. McCaskill, *‘Defund the Police’ Faces Skepticism – Even in Deeply Liberal Cities*, POLITICO (June 19, 2020), <https://www.politico.com/news/2020/06/19/defund-the-police-movement-faces-skepticism-328084> [<https://perma.cc/SGW3-JA6M>].

165. See Robert Verbruggen, *Cities Need Better Policing – Not Depolicing and Riots*, NAT’L REV. (June 5, 2020), <https://www.nationalreview.com/2020/06/cities-need-better-policing-not-depolicing-and-riots/> [<https://perma.cc/CJG7-4YYB>].

166. Akbar, *Demands*, *supra* note 153, at 103.

167. DAVIS, *supra* note 16, at 20.

168. See Akbar, *An Abolitionist Horizon*, *supra* note 159, at 1814 (“[T]he conventional reform agenda . . . invites investments in police and, therefore, builds the power and legitimacy of police, including their discretion for violence.”).

169. See Wagner & Jones, *supra* note 126.

170. *Id.*

171. See *id.*

providers such as Securus.<sup>172</sup> A portion of these excessive fees are then kicked back to the telecommunications provider through payment channels that are beyond the regulatory authority of the FCC.<sup>173</sup> This illustrates the pitfalls inherent in attempting to solve systemic problems with isolated reforms, and those hoping for similar action by the CFPB to rein in the prison financial system would do well to temper their expectations.

### B. *The Alternative: Non-Reformist Reform*

Non-reformist reforms reject the idea that the prison system can be fixed, and instead aim to “reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”<sup>174</sup> Despite the widespread preference within abolitionist circles for non-reformist reforms, the demarcation between reformist and non-reformist demands is not clearly drawn. This section clarifies the distinction between the two and explores some of the guiding principles of non-reformist reforms.

#### 1. *Defining Ideological Differences in Framing and Motivation*

The distinction between reformist and non-reformist organizing is difficult to discern when each ideological group is reduced to the demands that it makes of the carceral state. Differences become clearer when the motivations behind and framing of those demands are drawn into focus. Consider the ongoing litigation in *Brown v. Stored Value Cards*. In the most recent decision, the court commented that the private prison financier should not “be able *without restriction* to provide cards to released inmates who have not asked for them and who are likely to end up with less money than was taken from them.”<sup>175</sup> Two things are implicit in the court’s statement: first, that the state has a fundamental right to control the financial identity of an incarcerated individual; and second, that private companies with a history of predatory practices should still be allowed to manage an incarcerated individual’s finances—but should simply be restricted in how they do so. While many reform advocates considered this decision to be a clear victory,<sup>176</sup> the abolitionist perspective calls for a more cautious endorsement. Though the decision is a step towards reducing the harm caused by release cards, it simultaneously reaffirms the state’s authority to strip incarcerated individuals of their financial autonomy.

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172. *See id.* Both Western Union and MoneyGram charge a standard price of \$6.00 for transfers to most companies, but that rate goes up to almost \$12.00 for payments made to Securus. *Id.*

173. *See id.*

174. Berger et al., *supra* note 150.

175. *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 576 (9th Cir. 2020) (emphasis added).

176. *See, e.g.*, Press Release, Hum. Rts. Def. Ctr., Ninth Circuit Court of Appeals Agrees That Debit Card Companies Cannot Financially Exploit Prisoners Without Restriction (Mar. 17, 2020), [https://www.prisonlegalnews.org/media/pdfs/HRDC\\_press\\_release\\_re\\_Ninth\\_Circuit\\_debit\\_cards.pdf](https://www.prisonlegalnews.org/media/pdfs/HRDC_press_release_re_Ninth_Circuit_debit_cards.pdf) [<https://perma.cc/7VE3-A5H5>].

Herein lies a key difference between reform and abolition. While a reformist might be content with a procedural success that brings them one step closer to their material goal, an abolitionist grounds their objection to the abusive practice in a rejection of the underlying structure that aids and abets symbiosis between private industry and the carceral state. As Professor Akbar explains, alignment with either the abolitionist or reformist approach “reflect[s] ideological commitments, critiques of or acquiescence to underlying systems, aspirations for the future, and theories of change.”<sup>177</sup> Reformist demands are content with leaving the underlying structure of the prison industrial complex uninterrogated. Though the concrete actions pursued by abolitionists may work in the short term towards the same material end, they are motivated by the long-term goal of bringing an end to the carceral state as a whole. From the abolitionist perspective, a victory that legitimates the power of the carceral state or private industry—even while acknowledging certain contexts in which it is unacceptable—is no victory at all.

## 2. *Abolitionist Politics Demand Concrete Alternatives*

One of the defining ideological repercussions of prison abolitionists’ refusal to accept the legitimacy of the carceral state is the need to articulate a system that can replace it. This project has long been at the core of abolitionist thought. W.E.B. Du Bois argued that one of the great failures of the abolition of chattel slavery in the wake of the Civil War was the dearth of institutional power set forth with the express goal of “the uplift[ing] of slaves and their eventual incorporation into the body civil, politic, and social, of the United States.”<sup>178</sup> For this reason, Du Bois contended that abolition was accomplished only in the negative sense, while the positive project was left unfinished.<sup>179</sup>

Professor Angela Davis places Du Bois’s call for positive institutional development within the context of prison abolition, explaining that “[prison abolitionists] would propose the creation of an array of social institutions that would begin to solve the social problems that set people on the track to prison, thereby helping to render the prison obsolete.”<sup>180</sup> But this call to action also leaves two important questions unanswered: what should these new institutions look like and how should they work to advance the cause of abolition? Though there is no single answer to these questions, modern abolitionist scholarship has come to embrace broad positional requirements for proposed alternative institutions.

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177. Akbar, *Demands*, *supra* note 153, at 104.

178. W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 189 (Transaction Publishers 2014).

179. See ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 95 (2005).

180. *Id.* at 96.

Traditional abolitionist scholarship maintained that alternative institutions must be both competitive with and contradictory to the existing systems they seek to replace.<sup>181</sup> Norwegian sociologist and abolitionist pioneer Thomas Mathiesen explained that contradiction was a necessary feature of any true alternative to the existing prison system because it protected that alternative from being subsumed by existing reform efforts. Correspondingly, competition was necessary because confronting a “satisfied system-member” with a competing alternative was the best way to expose the insufficiency of their satisfaction, thereby motivating a change in attitude.<sup>182</sup> While Mathiesen’s view continues to influence abolitionist scholarship, more recent work has sought to articulate clearer guiding principles for the positive project of prison abolition.<sup>183</sup>

One of the emerging principles in contemporary abolitionist scholarship is the importance of power shifting as a central focus within proposed non-reformist reforms. Power shifting seeks to place control over harm-producing institutions, such as the police or the prison system, within the low-income, Black, Latinx, and Indigenous communities that are most directly affected by those institutions.<sup>184</sup> Professor Jocelyn Simonson explained power shifting as not simply questioning “whether voices are heard,” but whether historically marginalized communities are given “direct political power: the ability . . . to influence policy outcomes . . . and control the distribution of state resources.”<sup>185</sup> This focus is rooted in a fundamental recognition that historically marginalized communities possess an experiential understanding of the carceral state that is critical to imagining and working towards a post-prison society.<sup>186</sup> Further, the focus on power shifting sends an important message that the composition of the movement—its decision makers, thought leaders, and community groups—is more important than any single material goal.<sup>187</sup>

Perhaps unsurprisingly, the focus on where and how power is located within the abolitionist movement has led many contemporary scholars and activists to champion community-centered alternatives to the police or the prison system. These alternative systems take many forms. For example, Critical Resistance’s Oakland Power Projects have developed “Know Your Options” workshops designed to educate historically marginalized communities on alternatives to police intervention in health crises.<sup>188</sup> Elsewhere, organizations

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181. See THOMAS MATHIESEN, *THE POLITICS OF ABOLITION REVISITED* 47–48 (2015).

182. *Id.* at 48.

183. See Akbar, *Demands*, *supra* note 153, at 100–02 (observing that “[o]rganizers are increasingly invoking non-reformist reforms” and “focus[ing] on the ideological scaffolding of carceral control”).

184. See, e.g., *id.* at 94.

185. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 *YALE L.J.* 778, 803–04 (2021).

186. *Id.* at 805–06, 812.

187. *Id.* at 812.

188. See *Oakland Power Projects*, *Power Project #1: Healthcare*, OAKLAND POWER PROJECTS, <https://oaklandpowerprojects.org/healthcare> [https://perma.cc/3R6Z-D7TC].

such as “Sistas Liberated Ground,” a collective of women of color based out of Brooklyn, have worked to “empower[] vulnerable individuals to keep themselves safe” by holding members of the community accountable for domestic violence.<sup>189</sup> Alternatives to the existing systems of policing and incarceration also exist in various stages of development. The two examples mentioned already prove themselves to be viable alternatives, but other ideas—such as proposed frameworks for the complete community control of police forces<sup>190</sup>—exist at a largely theoretical level. The abolitionist movement seeks to nurture new and bold ideas from inception to action, while also recognizing that practices of abolition are readily available already.<sup>191</sup> This work is far from complete, but recognition of and respect for the role that abolition can play in the dismantling of the prison industrial complex continues to grow.

### C. *Community Development Financial Institutions: An Alternative to the Prison Financial System*

The work of articulating alternatives to the prison system is being done on a number of different fronts,<sup>192</sup> and this section will open yet another by articulating a concrete alternative to the prison financial system. The proposed alternative is to liberate the fiduciary responsibility currently claimed by the prison system and relocate it within Community Development Financial Institutions (“CDFIs”).

#### 1. *ShoreBank: Blueprint for the Modern CDFI*

CDFIs are financial institutions that operate with the express goal of serving communities that historically lacked access to banking and credit.<sup>193</sup> Unlike traditional banks, CDFIs prioritize the economic wellbeing of their communities over their own bottom line. Given their commitment to uplifting many of the same communities that are most acutely harmed by the prison

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189. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1217 (2015).

190. See Olúfẹ̀mi O. Táíwò, *Power over the Police*, DISSENT (June 12, 2020), [https://www.dissentmagazine.org/online\\_articles/power-over-the-police](https://www.dissentmagazine.org/online_articles/power-over-the-police) [<https://perma.cc/4D9C-5KJD>].

191. See Akbar, *An Abolitionist Horizon*, *supra* note 159, at 1834.

192. For efforts to articulate an alternative to the police, see ANDREA J. RITCHIE, MARIAME KABA & WOODS ERVIN, *INTERRUPTING CRIMINALIZATION, #DEFUNDPOLICE TOOLKIT: CONCRETE STEPS TOWARD DIVESTMENT FROM POLICING & INVESTMENT IN COMMUNITY SAFETY* (2020), <https://www.interruptingcriminalization.com/s/Defund-Toolkit.pdf> [<https://perma.cc/L2ZV-7TGW>], as just one example of abolitionists at work.

193. See *What Is a CDFI?*, OPPORTUNITY FIN. NETWORK (Feb. 2, 2021), <https://ofn.org/what-cdfi> [<https://perma.cc/L9UT-3589>]. CDFIs take a number of different forms, including Community Development Banks, which operate as for-profit businesses but are directed in part by members of the community, as well as Community Development Credit Unions, which are nonprofit financial cooperatives owned by their members. *Id.*

industrial complex, CDFIs are a natural destination for an incarcerated individual's finances both during and after their time in prison.

The modern CDFI traces its roots to ShoreBank, an experiment in providing banking services to poor communities that, at one point in time, had invested \$4.1 billion in inner-city Chicago and financed more than 59,000 units of affordable housing.<sup>194</sup> Founded by community activists in 1973, ShoreBank was a response to the redlining that defined the preceding decades' lending practices and resulted in an extreme racial wealth gap.<sup>195</sup> Its then-radical mission was not merely to provide low-income communities and communities of color with bank accounts, but to invest in minority-owned businesses and fund non-profit organizations that shared the goal of revitalizing communities that were cast aside by the traditional financial system.<sup>196</sup>

ShoreBank was a remarkable success, but its rapid expansion elevated it as both a model for success<sup>197</sup> and a lightning rod for criticism.<sup>198</sup> ShoreBank's decision to target its services to impoverished communities also left it vulnerable to fluctuations in the market, and it ultimately shut down in the wake of the 2008 financial crisis.<sup>199</sup> Despite its eventual demise, ShoreBank spurred the establishment of over a hundred institutions built in its image and in pursuit of the same transformative goal.<sup>200</sup> Today, CDFIs include not just banks, but also credit unions, loan funds, and even venture capital funds, all of whom are committed to operating for the benefit of—and often are directly managed by—historically marginalized communities.<sup>201</sup>

## 2. CDFIs in Action: The Two-Account System

Relocating incarcerated individuals' financial power within CDFIs would simultaneously strengthen a financial network dedicated to providing economic support to traditionally underserved communities and builds relationships between incarcerated individuals and the financial system. This allows formerly incarcerated individuals to reap many of the same benefits that reformists fight

194. James E. Post & Fiona S. Wilson, *Too Good to Fail*, STAN. SOC. INNOVATION REV., Fall 2011, at 66, 66.

195. See BARADARAN, *supra* note 148, at 162–63.

196. See Post & Wilson, *supra* note 194, at 66–68.

197. Then-President Bill Clinton referred to ShoreBank as “the most important bank in America” during his 1992 campaign. RICHARD DOUTHWAITE, SHORT CIRCUIT: STRENGTHENING LOCAL ECONOMIC FOR SECURITY IN AN UNSTABLE WORLD 144, 153 (1996).

198. See, e.g., Post & Wilson, *supra* note 194, at 70–71.

199. See Nick Carey, *Regulators Close ShoreBank in Chicago*, REUTERS (Aug. 20, 2010), <https://www.reuters.com/article/us-shorebank-failure/regulators-close-shorebank-in-chicago-idUSTRE67J5AE20100821> [<https://perma.cc/7FTR-39S9>].

200. See generally NAT'L CMTY. INV. FUND, CDFI BANKING INDUSTRY PEER GROUP REPORT: FIRST QUARTER 2020 6–9 (2020), [http://ncif.org/sites/default/files/documents/CDFI\\_Banking\\_Industry\\_Peer\\_Group\\_Report-Q1\\_2020.pdf](http://ncif.org/sites/default/files/documents/CDFI_Banking_Industry_Peer_Group_Report-Q1_2020.pdf) [<https://perma.cc/2EN3-XXMH>].

201. See *What Is a CDFI?*, *supra* note 193.

for while also shifting power away from the carceral state. An alternative financial system has the potential not just to act as a conduit for incarcerated individuals to build relationships with financial institutions in the formal economy, but also to serve as a pedagogical tool that allows incarcerated individuals to build their financial literacy and establish a fiscal safety net that can facilitate successful reentry.

Within the proposed alternative system, each incarcerated individual would be empowered to maintain access to or be provided with a checking account at a bank or credit union dedicated to community investment. While an individual is incarcerated, this account would serve as a collection point for funds sent to them from their family and friends, and prison operators would be required to provide the necessary infrastructure to allow incarcerated individuals to access and manage their money while they are in prison. Incarcerated individuals would, in turn, be able to use the account to pay for any items that they needed within a prison facility. This system has two immediate benefits: it eliminates much of the harm caused by the current prison financial system, and it provides formerly incarcerated individuals with the benefit of increased access to the formal economy upon their release.

Under the alternative system, prison profiteers would no longer have control over the critical financial conduits that currently allow them to take advantage of incarcerated individuals and their communities. Transfers to an incarcerated person's bank account would be no different than an ACH transfer between any two bank accounts, thus obviating the need for excessive transfer fees. Further, prison operators would play no role in returning formerly incarcerated individuals' money at the point of their release because it would never have been taken from them in the first place. As such, there would be no opportunity to further extract wealth from formerly incarcerated individuals through debit release cards.

These benefits are also a demonstration of the durability that comes with the reclamation of power from the private sector. Prison telecommunications providers were able to evade regulatory action by the FCC because they still controlled the basic system of communication that every incarcerated individual was forced to use. The proposed reform does not allow for that possibility. By reclaiming and relocating incarcerated individuals' financial power, private interests have no opportunity to find loopholes or develop alternate profit streams.

The alternative system also ensures that every incarcerated person begins the reentry process with a bank account. As many reformists have correctly argued, this financial tool can have a positive effect on a formerly incarcerated individual's reintegration back into their community.<sup>202</sup> Yet the proposed alternative takes this idea a step further. Current reform efforts have sought to

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202. *See supra* Part II.C.2.

build connections between incarcerated individuals and traditional banks, many of whom have been active participants in the exploitative prison financial system. Connecting incarcerated and formerly incarcerated individuals with CDFIs ensures that their interests are considered and the fiscal health of their communities is prioritized.

The second account provided to incarcerated individuals under the alternative system is a savings account, which would be funded by a percentage of the wages earned during an incarcerated individual's time in prison. Though some jurisdictions, such as Washington<sup>203</sup> and Kansas,<sup>204</sup> already provide (and often mandate) that incarcerated individuals maintain a savings account, the accounts proposed here differ in two key ways.

First, the accounts proposed under the alternative system would contain additional protections not found within the existing prison financial system. Specifically, money deposited in a savings account would be safeguarded from garnishment to pay external debts (including court fines). This provides formerly incarcerated individuals with at least some<sup>205</sup> financial safety net that they can use to cover the necessary costs of reintegration even if they leave prison in debt, as is often the case with formerly incarcerated individuals from low-income communities.

Second, the percentage of an incarcerated individual's wages that are directed to the savings account would not be predefined, as is currently the case in jurisdictions mandating that incarcerated individuals maintain a savings account. Under the proposed alternative system, incarcerated individuals are free to place as much or as little of their wages in the account as they choose. This allows incarcerated individuals to retain their financial autonomy and make decisions that are in their own financial interest while they are incarcerated. This added flexibility allows the system to better respond to the individual needs of different incarcerated individuals, and it has the added benefit of helping them develop financial skills that will assist them in the reintegration process.

The savings and checking accounts work in concert with each other to provide incarcerated individuals with an opportunity to develop economic autonomy. Under the current prison financial system, financial self-determination is necessarily compromised when an individual is incarcerated, and the closed economies of prison bear little similarity to the actual economy

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203. See ST. WASH. DEPT. CORR., TRUST ACCOUNTS FOR INCARCERATED INDIVIDUALS (2020), <https://www.doc.wa.gov/information/policies/files/200000.pdf> [https://perma.cc/PF44-T5UD].

204. See KAN. DEPT. CORR., FISCAL: INMATE TRUST FUND (2015), <https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-4/04-103d/view> [https://perma.cc/K9J2-S4EK].

205. I recognize that the wages earned by incarcerated individuals are unfair and exploitative—averaging only \$.86 per hour if they are provided at all. Sawyer, *supra* note 70. This proposal is not meant to suggest that this practice is acceptable or that the wages accumulated in a proposed savings account will meaningfully affect a formerly incarcerated individual's reintegration, it merely sets forth a framework that allows for such a benefit when exploitative prison labor practices are abolished as well.

that formerly incarcerated individuals will interact with after their release. In contrast, the alternative system allows prison facilities to serve as fora for incarcerated individuals to learn critical financial skills. By allowing incarcerated individuals to engage with and balance both a checking and a savings account, the system promotes the development of choice-making capacity, which can serve as a prerequisite for financial decision-making.<sup>206</sup> This alternative, though far from comprehensive, shifts power back to the communities that are disproportionately incarcerated, and it represents an important potential step towards prison abolition.

### 3. *Advancing the Project of Prison Abolition*

CDFIs represent the ideal place for incarcerated individuals' finances because of their institutional commitment to investing in and responding to the needs of communities that have historically been denied access to formal financial services. Those communities are disproportionately represented within prisons and jails.<sup>207</sup> Ensuring that the interests of incarcerated individuals are represented by the financial institutions that serve them can play a critical role in shaping their reintegration into their community—as well as the fabric of the community itself.

Today, CDFIs are responsible for over \$11 billion in lending to first time homeowners, community facilities, and Black-, Latinx-, and Indigenous-owned businesses.<sup>208</sup> Organizations like access+capital, located in Fresno, California, provided \$6.7 million to small businesses in 2019 alone, and 55% of that money went to businesses owned by Black, Latinx, and/or Indigenous individuals.<sup>209</sup> Other CDFIs, such as the Northwest Native Development Fund in Coulee Dam, Washington, or the Citizen Potawatomi Community Development Corporation in Shawnee, Oklahoma, operate with the express goal of providing financial services and education to Indigenous communities.<sup>210</sup> Collectively, these two organizations have provided loans totaling more than \$85 million.<sup>211</sup> The diversity of the communities served by CDFIs, as well as the diverse financial tools that they are able to offer, provide historically marginalized individuals with critical tools to build safer and more prosperous spaces for themselves and their loved ones.

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206. See Charlotta Bay, *Framing Financial Responsibility: An Analysis of the Limitations of Accounting*, 22 CRITICAL PERSPS. ON ACCT. 593 (2011).

207. See *supra* Part I.A.

208. CDFI COALITION, COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS: COMMUNITY-BASED, MISSION-DRIVEN 6 (2019), <https://cdfi.org/wp-content/uploads/2019/03/2019-CDFI-Report-Complete-FINAL-1.pdf> [<https://perma.cc/BA66-4VLG>].

209. *2019 Annual Report*, ACCESS PLUS CAPITAL (June 2, 2020), <https://www.accesspluscapital.com/2019-annual-report/> [<https://perma.cc/L8X2-FJGQ>].

210. See *About*, CITIZEN POTAWATOMI CMTY. DEV. CORP. (Aug. 16, 2021), <https://cpcdc.org/about/> [<https://perma.cc/C637-D3DM>]; *Mission Statement*, NW. NATIVE DEV. FUND, <https://thenndf.org/about/> [<https://perma.cc/97CG-VYVJ>].

211. CDFI COALITION, *supra* note 208, at 22, 59.

Locating incarcerated individuals' finances within CDFIs also works towards the project of prison abolition by redirecting financial power into spaces that are defined and managed by and for the communities that they serve. While some CDFIs, such as community development credit unions, are directly owned and managed by the communities they serve, even community development banks and venture capital funds—organizations that are often for-profit—include community representation in their management.<sup>212</sup> For example, Optus Bank, a for-profit CDFI in Columbia, South Carolina, is the only Black-owned bank in the state,<sup>213</sup> and in 2018 it provided 144 loans to individuals with below-average credit.<sup>214</sup> By shifting financial power away from prison operators and towards community-driven organizations, the individuals who have most directly experienced the harm of the prison financial system will be empowered to direct the policies and strategies that push the alternative system forward. Despite the promise that CDFIs have shown, embracing them as a widespread alternative to privatized prison finance is not without challenges.

#### 4. *The Question of Feasibility*

The most obvious challenge in relocating incarcerated individuals' finances to CDFIs is one of feasibility. There are numerous practical barriers standing in the way of entrusting millions of incarcerated individuals' finances to a relatively small sector of the financial services industry. First, the current network of CDFIs, as vibrant as it may be, is neither geographically nor logistically capable of providing financial services to the vast population the United States currently incarcerates. Second, there are powerful institutional forces, ranging from private prison financial service providers to prison operators whose budgets are reliant on kickbacks, invested in maintaining the status quo. They will doubtlessly use whatever political will they have to sabotage or circumvent any attempt to reduce their power. Third, there may be public resistance to developing the necessary infrastructure to support the relocation of prison finances, as well as apprehension as to their proposed new destination. These criticisms are a natural response to any radical idea that challenges the fundamental framework of the criminal legal system. But they also reflect an unnecessarily pessimistic view of our capacity for far-reaching change.

The fact that abolitionist demands push the boundaries of public thought is neither accident nor oversight. Instead, it reflects a conscious choice to “reignite people’s imaginations”<sup>215</sup> by envisioning alternatives to systems that heretofore have existed only in the shadow of racism and state-sanctioned violence.

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212. See *What Is a CDFI?*, *supra* note 193.

213. See *U.S. Map of Black Banks & Credit Unions*, BLACKOUT COALITION (Aug. 22, 2021), <https://blackoutcoalition.org/black-u-s-banks/> [https://perma.cc/8Z2A-G62P].

214. CDFI COALITION, *supra* note 208, at 63.

215. Dean Spade, *Solidarity Not Charity: Mutual Aid for Mobilization and Survival*, 38 SOC. TEXT 131, 134 (2020).

Arguments rooted in feasibility and public resistance were mobilized against the movement to abolish chattel slavery in the 19th century, the movement for women's suffrage in the 1910s, and the Civil Rights movement in the 1950s and 1960s.<sup>216</sup> That these monumental projects were ultimately realized is proof enough that massive political and social change is within our reach. Though it may be difficult to imagine a world in which corrupt and abusive prison financial practices are abolished as well, it is certainly within our capacity to make it so.

No single piece of scholarship can offer an immediately complete prescriptive answer to the immense problems plaguing the criminal legal system. The needs of individual communities are as varied as the people who comprise them, and abolitionist alternatives can and should remain adaptable. Rather than attempting to prescribe a one-size-fits-all solution, abolitionist scholarship provides a "hopeful horizon" towards which we can aspire.<sup>217</sup> As Professor Davis explains, "The most difficult and urgent challenge [for abolitionists] today is that of creatively exploring new terrains of justice, where the prison no longer serves as our major anchor."<sup>218</sup> Exploring that terrain necessarily requires bold ideas, and dismissing them for their perceived lack of feasibility serves only to limit our conception of what a post-carceral future can look like.

#### CONCLUSION

The predatory practices that define the modern prison financial system have rightfully provoked outrage, but there remains a deep divide between reformists and abolitionists as to how the system should be challenged. Efforts to reform the prison financial system through litigation and regulation, though they often do improve the lives of incarcerated individuals and their communities in the short term, also strengthen and legitimize a system that is inextricably connected to the institutionalized racism that has shaped the United States for centuries—from chattel slavery to the Black Codes to the War on Drugs. Overcoming the institutional power of the prison industrial complex requires us to imagine what our society can look like when such institutions are abolished. Scholars, activists, and ordinary people everywhere continue to construct the systems that will one day replace prisons and jails. By articulating concrete alternatives to the prison industrial complex, abolitionists work to chart a pathway towards a safer and more just future.

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216. See Berger et al., *supra* note 150.

217. Akbar, *An Abolitionist Horizon*, *supra* note 159, at 1825.

218. DAVIS, *supra* note 16, at 21.