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## Productive Separations: Emergent Governance of Reentry Labor

Shreya Subramani

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# PRODUCTIVE SEPARATIONS: EMERGENT GOVERNANCE OF REENTRY LABOR

*Shreya Subramani\**

## ABSTRACT

*This ethnographic Essay critiques progressive criminal justice reforms as neoliberal technologies that devalue racialized labor within the city of New Orleans, Louisiana. It begins by describing the emergent “reentry space,” a proliferating network of policy and programming emerging to manage and provide services for formerly incarcerated people returning to the city. Reentry is framed as a way to reinvest state and city resources and is also explicitly described as a project toward racial equality through decarceration.*

*The reentry space is an exemplary landscape of what legal and policy scholarship has deemed “New Governance” as it mobilizes private-public partnerships and flexible orientations toward the law to innovate criminal justice governance (Part I). My ethnography of the reentry space demonstrates the problematic deferral of racial justice through the New Governance practices of carceral reform programs. By analyzing the aspirations and practices of an experimental reentry alternative sentencing court and a municipal labor training network for reentrants, it traces how such reform programs depend upon an ideological delineation between the market and carcerality (Part II). It explores the dynamics of labor, value, and debt within Reentry Court practices that ultimately discount and devalue reentrant labor and thus further render reentrants more vulnerable to reincarceration and precarious employment (Part III). It discusses the evaluation of experimental reentry programming, arguing that the definition of*

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*recidivism can also recapitulate the ideological assertion that separates the market and carcerality (Part IV).*

*By mobilizing the analytic of racial capitalism, this Essay argues that racialized inequality is constitutive of economic markets through the capital-carceral circulations of people, labor, and value (Part V). The differential deployment of carceral punishment that disproportionately impacts poor communities of color and the devaluation of racialized labor are coextensive phenomena that emerge as novel configurations within experimental criminal justice reform. Through ethnographic attention, this Essay demonstrates how the productivity of the experimental Reentry Court program to make devalued and discounted racialized labor is obscured by the assertion that the market is outside carcerality, and vice versa (Part VI). This Essay concludes by discussing that while the role of law currently maintains these delineations between carcerality and the market through anchored legal categories, such novel spaces of governance allow for the emergence of the reentrant-worker as a subject who is not fixed, who is simultaneously under carceral management and ostensibly, enfranchised as a worker on the free market.*

*The reentrant-worker is an ambiguous and underdetermined subject of governance who is not legally recognized but who is lawfully intervened upon. While contexts of neoliberal criminal justice reform technology re/produce the conditions of racial capitalism, paying attention to the makings of novel subjectivities, such as the reentrant-worker, potentiates a political terrain that can critique and challenge the frontiers of racialized labor in the “Emerging City.”*

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*“Punishment as labor, labor as punishment, and the curative and coercive forms they entwined were neither limited to an old regime of governance nor invented for new ones: the moral and political economy that weds labor and punishment remains the bedrock of our religious, educational, military, familial, and judicial systems to this day. We would do well to understand how they have formed, how they have changes, and how they continue to work to affect the possibilities and constraints on so many people’s lives.”*

– Ann Laura Stoler, “In Carceral Motion: Disposals of Life and Labour”<sup>1</sup>

### INTRODUCTION

The management of racialized labor through punitive institutions is not a novel technology of urban governance. Today, relations between carcerality and the valuation of labor stem from legacies of plantation economies, chattel slavery, and long histories of racialized dispossession in the American city.<sup>2</sup> However, as many scholars of race and carcerality have demonstrated, these relations have become reconfigured through movements of resistance and subsequent capital crises that have transformed contemporary racial politics in the United States.<sup>3</sup> Such transformations require a conceptualization of racialized labor exploitation that traces the historical genealogies of contemporary carcerality within the afterlives of slavery and empire, while also attending to how racialized labor regimes today are ideologically and materially enacted.<sup>4</sup> It is with this in mind that this ethnographic Essay critiques progressive criminal justice reforms as

1. Ann Laura Stoler, *In Carceral Motion: Disposals of Life and Labour*, in *A GLOBAL HISTORY OF CONVICTS AND PENAL COLONIES* 372 (Clare Anderson ed., 2018).

2. See Nikhil Pal Singh, *On Race, Violence, and ‘So-Called Primitive Accumulation’*, in *FUTURES OF BLACK RADICALISM* 39–58 (Gaye Theresa Johnson & Alex Lubin eds., 2017); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 *PUNISHMENT & SOC’Y* 95, 99 (2001); Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the US*, 13 *NEW LEFT REV.* 41, 41–42 (2002).

3. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 26–27 (2007); NIKHIL PAL SINGH, *RACE AND AMERICA’S LONG WAR* ix–xx (2017); Ruth Wilson Gilmore, *Globalisation and US Prison Growth: From Military Keynesianism to Post-Keynesian Militarism*, 40 *RACE & CLASS* 171, 175–76 (1999); Nikhil Pal Singh, *The Whiteness of Police*, 66 *AM. Q.* 1091, 1092 (2014).

4. Deborah A. Thomas, *Time and the Otherwise: Plantations, Garrisons and Being Human in the Caribbean*, 16 *ANTHRO. THEORY* 177, 179 (2016).

neoliberal technologies that manage and devalue racialized labor within the city. These technologies enact novel modes that, while haunted by the historical repertoires of racial regimes past, chart an emergent frontier of racialized governance.<sup>5</sup>

### I. THE REENTRY SPACE AS NEW GOVERNANCE

My ethnographic research explores prisoner reentry programs in New Orleans, Louisiana — with a primary focus on workforce development for the formerly incarcerated.<sup>6</sup> Louisiana is known as the incarceration capital of the world, and the city of New Orleans is the nationwide leader in urban incarceration.<sup>7</sup> In the state of Louisiana, and the United States more broadly, there has been a growing bipartisan consensus in the last decade that mass incarceration is unjustifiable on both economic and moral grounds.<sup>8</sup>

5. See AVERY F. GORDON, *GHOSTLY MATTERS: HAUNTING AND THE SOCIOLOGICAL IMAGINATION* xv–xvi (2008). See generally SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* (1997); DEBORAH A. THOMAS, *POLITICAL LIFE IN THE WAKE OF THE PLANTATION* (2019). Thomas traces the complex relations of state violence in post-plantation societies through “archives of affect” in which political fields emerge through the “reactivation” of certain affective legacies.

6. This Essay is drawn from ethnographic fieldwork conducted in New Orleans, Louisiana between 2016–2018. My research explores the experiences of formerly incarcerated men and their families, legal professionals, nonprofit operatives, city planners, and municipal bureaucrats as they differentially construct and populate prisoner reentry reform policy and programming. In particular, I focus on workforce development and housing initiatives. I situate these experiences within overlapping historical trajectories, from antebellum plantation economies to post-war racializing processes of urbanization and privatization to the post-Katrina contemporary, where nonprofits and start-up companies have become primary actors in municipal governance. My broader research demonstrates that innovations in progressive urban governance — characterized by a valorization of entrepreneurialism, design-thinking, and data-driven best practices — attempt to ameliorate racial inequality, but ultimately displace and defer racial justice. At the same time, by theorizing the vernacular practices of my interlocutors as moments of Black radical praxis, I show how people challenge the carceral geographies and neoliberal socialites of what I call “reformist New Orleans” to enact a more radical distributive politics.

7. See *State-by-State Data*, SENT’G PROJECT, <https://www.sentencingproject.org/the-facts/> [<https://perma.cc/4F6Q-9HGP>] (last visited Mar. 13, 2020). In 2016, Louisiana had the highest per capita incarceration rate in the United States, with 816 people in prison for every 100,000 residents. *Id.* That was nearly double the national average of 450 per 100,000 residents. See *id.* for more data on the growth of the New Orleans jail population.

8. CALVIN JOHNSON ET AL., *VERA INST. OF JUSTICE NEW ORLEANS, JUSTICE IN KATRINA’S WAKE: CHANGING COURSE ON INCARCERATION IN NEW ORLEANS* 4 (2015); Michael M. O’Hear, *The Second Chance Act and the Future of Reentry Reform*, 20 FED. SENT’G REP. 75, 75 (2007); Jeremy Travis, *Reflections on the Reentry Movement*, 20 FED. SENT’G REP. 84, 84 (2007).

Such a political shift is evinced by Louisiana's 2017 Justice Reinvestment legislation package, which has implemented an overhaul in criminal justice sentencing and prisoner eligibility for release, as well as invested funds toward the growth of reentry services.<sup>9</sup> Reentry is framed as a way to reinvest state and city resources and is also described as a project toward racial equality through decarceration.<sup>10</sup>

The reentry infrastructure in New Orleans emerged through the efforts of a diverse range of institutional actors, which includes law enforcement and legal agencies, nonprofits, universities, and private industry — all tasked with innovating aspects of criminal justice.<sup>11</sup> A loosely coordinated constellation of experimental programming made up of transitional housing, substance abuse and mental health treatment facilities, and workforce development programs were established to triage the anticipated needs of formerly incarcerated

9. LA. DEP'T OF PUB. SAFETY & CORR., LA. COMM'N ON LAW ENF'T, LOUISIANA'S JUSTICE REINVESTMENT REFORMS FIRST ANNUAL PERFORMANCE REPORT 14–15 (2018), [https://gov.louisiana.gov/assets/docs/JRI/LA\\_JRI\\_Annual\\_Report\\_FINAL.PDF](https://gov.louisiana.gov/assets/docs/JRI/LA_JRI_Annual_Report_FINAL.PDF) [<https://perma.cc/3USB-MY93>]; LA. DEP'T OF PUB. SAFETY & CORR., LOUISIANA'S JUSTICE REINVESTMENT REFORMS PRACTITIONERS' GUIDE 5–6 (2017), [https://www.lasc.org/documents/LA\\_Practitioners\\_Guide\\_Justice\\_Reinvestment\\_Reforms\\_FINAL\\_2017-8-1.pdf](https://www.lasc.org/documents/LA_Practitioners_Guide_Justice_Reinvestment_Reforms_FINAL_2017-8-1.pdf) [<https://perma.cc/G326-D6SM>].

10. PEW CHARITABLE TRS., LOUISIANA'S 2017 CRIMINAL JUSTICE REFORMS: THE MOST INCARCERATED STATE CHANGES COURSE 1 (2018), [https://www.pewtrusts.org/-/media/assets/2018/03/pspp\\_louisianas\\_2017\\_criminal\\_justice\\_reforms.pdf](https://www.pewtrusts.org/-/media/assets/2018/03/pspp_louisianas_2017_criminal_justice_reforms.pdf) [<https://perma.cc/3CFW-XSGM>]. My interlocutors in New Orleans who worked within reentry nonprofits and who supported decarceration legislation often described the potential for reentry to attend to racial inequality because of the disproportionate impact of incarceration on poor communities of color, and mainly Black New Orleanians. Of course, these are voices within a broader terrain of discourse. *See, e.g., id.*; AM. CIVIL LIBERTIES UNION SMART JUSTICE, BLUEPRINT FOR SMART JUSTICE: LOUISIANA 9 (2018), <https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-LA.pdf> [<https://perma.cc/9CLX-VN74>]. In this report, the ACLU specifically discusses targeted criminal justice reform that would attend to racial inequality. Reentry in this reading is not to just prioritize diversion over incarceration or decarceration more broadly, but to emphasize how to enact these reforms toward racial justice missions.

11. *See* NEW ORLEANS REENTRY TASK FORCE, <http://nolareentry.org/> [<https://perma.cc/7HN2-3PWJ>] (last visited Mar. 13, 2020). The Reentry Task Force in New Orleans was established as coalition for reentry services in the city. *See also* WWL Staff & Duke Carter, *Goodwill, Nearly 100 Organizations Start Orleans Re-Entry Task Force*, 4WWL (Mar. 31, 2019), <https://www.wwtv.com/article/news/goodwill-nearly-100-organizations-start-orleans-re-entry-task-force/289-a3aa21cd-d63e-4f71-acd0-938c1031389f> [<https://perma.cc/4QYW-N3GU>]. While the New Orleans Task Force is one institutional iteration of reentry service provisioning, many other organizations and businesses and individuals participated in this growing infrastructure and market.

people coming back to the city.<sup>12</sup> This proliferating network of policy and programming was often referred to by my interlocutors as “the reentry space.”<sup>13</sup>

The reentry space is an exemplary landscape of what legal and policy scholarship has deemed “New Governance,” as it mobilizes private-public partnerships toward progressive reform.<sup>14</sup> Characterized by the valorization of experimentality, “soft law” flexibility, and the collaborative deregulated participation of diverse stakeholders, New Governance has spurred much scholarly and public debate.<sup>15</sup> While many New Governance theorists have considered its positive potentials to engender more equitable policy decisionmaking, others have demonstrated the problematic forms through which it maintains and exacerbates inequality as stakeholder participation is inherently asymmetrical and is “weighted towards protecting certain interests.”<sup>16</sup> New Governance case studies, like Professor Lisa T. Alexander’s critique of the HOPE VI public housing reform process in Chicago, demonstrate that even if marginalized stakeholders are invited to participate in policy problem solving, “rights-based regulation and litigation may need to operate in tandem with new governance processes” because of the long-standing histories of group-differentiated exclusions and social conflict.<sup>17</sup>

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12. *Workgroups*, NEW ORLEANS REENTRY TASK FORCE, <http://nolareentry.org/workgroups/> [<https://perma.cc/YK3D-FKQB>] (last visited Mar. 13, 2020).

13. In my research, I take up the emic landscape of policy and programming of “the reentry space” as both a novel public-private institutional infrastructure and a burgeoning speculative market. *See supra* text accompanying note 12.

14. *See generally* LAW AND NEW GOVERNANCE IN THE EU AND THE US 3 (Gráinne de Búrca & Joanne Scott eds., 2006) (compiling scholarly articles on New Governance in the United States and in the European Union).

15. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 284 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 7 (1997); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611, 1623 (2001).

16. Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 902 (2000).

17. Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago*, 16 GEO. J. ON POVERTY L. & POL’Y 117, 122 (2009). In this case study, Alexander discusses the inadequacy of New Governance practices of collaboration and “soft law” to account for the stark social and racial conflicts that surround the struggle for housing and public space in the city. For other examples of New

The ethics and practices of New Governance stakeholderhood in American criminal justice reform emerge through bipartisan alliances that claim consensus and commitment to decarceration.<sup>18</sup> However, such consensus is questioned as the economic and moral justifications for reform, on the right and the left, are multiple and often are incommensurable projects predicated on very different understandings about the problem of incarceration. As Professor Benjamin Levin writes, underlying disagreements “do not accord neatly with U.S. political parties or conventional packages of views. Instead, they reflect deeper beliefs about the role of the state and the proper function of the criminal system that reject easy political categorization.”<sup>19</sup> Moreover, this myth of consensus obscures the racialized and racializing repercussions of privatizing community corrections programs and experimenting with the lives of the poor communities of color who are disproportionately imprisoned and impacted by the carceral state. There is a recognized resemblance between the “flawed coalitions” of bipartisanship that participated in the expansion of harsh federal sentencing laws that led to the over-imprisonment of Black and Brown communities and those that are emerging around “problem-solving” progressive courts today.<sup>20</sup> In the words of legal scholar Carl Takei, “these left-right reform efforts risk creating a nightmare scenario of mass control, surveillance, and monitoring of Black and Brown communities.”<sup>21</sup> The long histories

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Governance case studies, see Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 195 (2000) (describing non-bureaucratic stakeholder participation in the Habitat Conservation Plan); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 250–51 (2006) (exploring the role of “organizational catalysts” to attend to institutional racial and gender diversity initiatives in higher education); Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 139, 145 (2006) (describing the use of public-private collaborations in the Health Insurance Portability and Accountability Act of 1996 (HIPPA)).

18. See, e.g., CORY BOOKER ET AL., BRENNAN CTR. FOR JUSTICE, ENDING MASS INCARCERATION: IDEAS FROM TODAY’S LEADERS viii (Inmai Chettiar & Priya Raghavan eds., 2019), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_EndingMassIncarceration\\_2.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_EndingMassIncarceration_2.pdf) [<https://perma.cc/AN8R-735N>] (contributors to this report are representative of these bipartisan stakeholders from liberal politicians to conservative republican capitalists).

19. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 266 (2018).

20. David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1504–05 (2014).

21. Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 128 (2017).



of the surveillance and criminalization of Blackness are thus reconfigured and recast in novel modalities through a seemingly progressive agenda towards racial justice.<sup>22</sup> The liberal initiatives in the United States attendant to racial inequity can set the grounds to expand the reach of the racialized carceral state.<sup>23</sup>

My ethnography of the reentry space demonstrates the problematic deferral of racial justice through carceral reform programs. I consider the reentry space as charting a *space of exception*.<sup>24</sup> By this, I mean the innovative flexibility of experimental criminal justice enacts violations of laws and norms to attend to the “crisis” of reentry and, by extension, mass incarceration. This Essay interrogates the novel configurations of carceral governance as an emergent frontier of neoliberal racial capitalism. In using the term carceral governance, I am including punitive state institutions (for example, prisons, criminal courts, and police) and the geographies of confinement and control they enact. But this concept also encompasses experimental spaces of “innovation” managed in part by private companies, nonprofits, and startup organizations that rely upon the circulations of people, capital, and labor through those geographies to produce capital value.<sup>25</sup>

Racial capitalism, a concept originally developed through the work of Cedric Robinson, serves as a guiding analytic to engage some of the contradictions of this emergent reentry space.<sup>26</sup> Racial capitalism argues that racial differentiation is intrinsic to modern capitalism and combats theorizations that figure racial differentiation as incidental to capital accumulation and valuation.<sup>27</sup> That is to say, capitalism is a

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22. See, e.g., SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* (2015); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 88–145 (2019).

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

24. Here, I am evoking Giorgio Agamben’s theorization of the state of exception through which juridical order is suspended in the case of a crisis threatening the state. See GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005). The concept of exception as intrinsic to law is also developed by the work of Carl Schmitt and Walter Benjamin in the early twentieth century. Walter Benjamin, *Critique of Violence*, in WALTER BENJAMIN: *SELECTED WRITINGS VOLUME ONE 1913–1926* (Marcus Bullock & Michael W. Jennings eds., 2004); CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., 2005).

25. See Ruha Benjamin, *Catching Our Breath: Critical Race STS and the Carceral Imagination*, 2 *ENGAGING SCI., TECH., & SOC.* 145, 150–51 (2016).

26. CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 2–3 (2000).

27. *Id.*

racial system.<sup>28</sup> In the context of the reentry space, this capacious analytic recognizes the genealogic relation to the deep and durable racial histories of Black dispossession by white accumulation in the United States, while also attending to the productive and ever-evolving relations that make capital value through racialization today. Drawing from scholars such as Ruth Wilson Gilmore, Alexander Weheliye, and Nikhil Pal Singh, I take racialization to be the group-differentiated devaluation of human life.<sup>29</sup> Such a definition can critique emergent forms of racial governance that do not necessarily articulate as repetitions or reproductions of racism along color lines. This analytic tradition privileges the study of relational social formations, and I join social theorist Jodi Melamed who argues that a way to “strengthen racial capitalism as an activist hermeneutic is to use it to name and analyze the production of social separateness — the disjoining or deactivating of relations between human beings . . . — needed for capitalist expropriation to work.”<sup>30</sup>

This Essay demonstrates how the reentry space reproduces the ideological delineation between the market and carcerality. Through

28. See *Prisons and Class Warfare: Interview with Ruth Wilson Gilmore*, HIST. MATERIALISM BLOG (Aug. 2, 2018), <http://www.historicalmaterialism.org/index.php/interviews/prisons-and-class-warfare> [https://perma.cc/E3DM-6TLT]. This interview discusses the capital surplus crises through which the California Prison System expanded. *Id.* Gilmore mobilizes a reading of racial capitalism to discuss how inequality is inherent to capitalist crisis and transformation. *Id.*

29. In my research, I use the concept of racialization to understand how criminal justice reform practices do not just partake in governing the racial order but make race through novel reconfigurations and technologies. These scholars all attend to the *making* of race through racializing assemblages that differentially value or vulnerabilize human life. They discuss the heterogeneity through which race and racism are enacted. See, e.g., GILMORE, *supra* note 3, at 28; SINGH, *supra* note 3, at xv–xvi; ALEXANDER G. WEHELIYE, *HABEAS VISCUS: RACIALIZING ASSEMBLAGES, BIOPOLITICS, AND BLACK FEMINIST THEORIES OF THE HUMAN* 3–4 (2014). Weheliye construes

race, racialization, and racial identities as ongoing sets of political relations that require, through constant perpetuation via institutions, discourses, practices, desires, infrastructures, languages, technologies, sciences, economies, dreams, and cultural artifacts, the barring of nonwhite subjects from the category of the human as it is preformed in the modern west . . . . If racialization is understood not as a biological or cultural descriptor but as a conglomerate of sociopolitical relations that discipline humanity into full humans, not-quite-humans, and nonhumans, then blackness designates a changing system of unequal power structures that apportion and delimit which humans can lay claim to full human status and which humans cannot.

*Id.* at 3.

30. Jodi Melamed, *Racial Capitalism*, CRITICAL ETHNIC STUDS., Spring 2015, at 76, 78.

a case study of an experimental Reentry Court in New Orleans, this Essay traces how labor markets and carceral circulations are mutually constituted. Deploying a racial capitalist reading of this reentry program, I argue that the ideological disconnection between the market and carcerality asserted by this judicial milieu obscures how racialization produced through carcerality is intrinsic to the making of capital value and accumulation.

## II. REENTRY COURT: AN ETHNOGRAPHIC TOUR OF MARKET-CARCERAL BOUNDARY MAKING

From 2016–2018, I chronicled a unique and locally celebrated collaboration between the Louisiana State Penitentiary (also known as “Angola Prison”) and an experimental workforce development court in New Orleans.<sup>31</sup> Recognizing that unemployment and poverty contribute to rates of incarceration and that formerly incarcerated individuals face discrimination by employers after they serve time, this alternative-sentencing court aims to reduce recidivism by ensuring employment after prison. The New Orleans Reentry Court sentences individuals to a specialized vocational training campus at Angola, where they are trained and certified as skilled laborers.<sup>32</sup> Upon release, the court provides an avenue to be hired by a local employer. This court presided over by Judge V started as a pilot in

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31. It should be noted that this Reentry Court is primarily for men. There was an intended expansion of this program to a women’s penitentiary, Louisiana Correctional Institute for Women, but there was damaging flooding of this facility which lead to the displacement of inmates. See Grace Toothey, *Temporary Has Become Permanent’ for Displaced Inmates of Flooded Louisiana Women’s Prison*, *ADVOCATE* (Apr. 20, 2019), [https://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_0fcebfb8-5d6b-11e9-bac5-f7b4ee1d77f0.html](https://www.theadvocate.com/baton_rouge/news/crime_police/article_0fcebfb8-5d6b-11e9-bac5-f7b4ee1d77f0.html) [<https://perma.cc/83KV-H2JD>]. The reentry infrastructure for women in New Orleans, in Louisiana, and in the country is not at all as robust as the programming available for incarcerated men.

32. The Louisiana State Penitentiary is one example that not only draws out these analogous functions between the institution of chattel slavery and the penitentiary, but also shows the direct historical and material linkages between plantation economies and prison labor. See *generally* MARK T. CARLETON, *POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM* (1971). Built directly upon the land of a plantation, the prison is referred to by the same name as the plantation, “Angola.” The Angola Plantation was named after the African country from which most Louisiana’s slaves came. It functioned as a privately-owned prison in the 1880’s by housing inmates in the former slave’s quarters and forcing them to work at hard labor on the plantation. The State of Louisiana took control over the prison in 1901 and continued to work prisoners in the fields — a practice that has given Angola the nickname of “the Farm” today. Angola Prison also partook in the practice of convict leasing; the state would lease out its prisoners to work the surrounding plantations that could no longer use slave labor.

2010, and was one of the first reentry programs of its kind in the country.<sup>33</sup> It has now been established in 13 parishes in the state of Louisiana and is run differently in each parish as it relies on the regulatory digression of the presiding judge. According to a 2016 published flyer, “[n]ot only has the program already shown a significant decrease in the recidivism rates for participants, but it also has a great potential to *cut costs* within the criminal justice system.”<sup>34</sup> This court program is exemplary of New Governance practices of private-public collaboration and the flexible deployment of *soft law*. I like to think of the New Governance space of Reentry Court through a metaphor one of the administrators used to describe it: “Building the plane as you fly it!”<sup>35</sup>

In this experimental court program, recommended offenders who plead guilty to nonviolent charges with sentences under ten years are eligible to be trained at the reentry campus.<sup>36</sup> Many who ultimately participated in the program were recommended to Reentry Court over risking a trial or facing what were oftentimes shorter sentences or community supervision on probation. That is to say, some people have accepted and served a prison sentence or extended a prison sentence in order to participate in the reentry program. As Judge V would often describe in court, “You can either just do your time, or you can invest in yourself by joining Reentry Court.”

On the reentry campus at Angola, participants are meant to choose two vocational tracks, which include fields like electrical, plumbing, HVAC maintenance, automotive repair, and landscaping. However, this choice is contested among many participants who say that there

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33. For the sake of anonymity, I have changed names and identifying details about the interlocutors I mention in this Essay. All information about the Reentry Court will be discussed as firsthand knowledge gained through my ethnographic research. My methods of participant observation included my attendance at court proceedings and semi-structured interviews with the Judge, administrators, and organizational partners of the court as well as reentrant participants and their social network. Statistical information about this experimental program are limited as they are not published. However, part of this research is to explore the making of reform “efficacy data” as a critical ethnographic object of study.

34. LOUISIANA REENTRY COURT PROGRAM (2016) (on file with author). This flyer depicts the cost effectiveness of Reentry Court probation, comparing \$934 per year per person in relation to \$19,458 a year per prisoner incarcerated.

35. This was said often by an interlocutor that I will call Sherry, who works as a workforce development consultant for the Reentry Court.

36. Public defenders usually ask the judge when they believe a client is eligible for Reentry Court matriculation. Men are sentenced to the reentry campus at the Louisiana State Penitentiary only if they are charged with nonviolent or nonsexual offenses. Sentences are a minimum of two years for GED completion and vocational training.

are set numbers for each track and that discrimination against or preferential treatment of certain inmates by mentors and correctional officers often impact their options. Men serving life sentences mentor and train participants in the vocational trades and tutor them to complete their GED.<sup>37</sup>

Upon release, participants are subject to supervision by New Orleans Probation and Parole Office and are assigned a Reentry Court case manager. They are also required to make monthly court appearances and attend weekly mentorship meetings run by court affiliated nonprofits. The case management team sets personal benchmarks each month for each participant. Reentry Court is not included on the regular criminal court docket. Instead, the judge takes off her robe and sits alongside the panel of officers and case managers at a long wooden table. Members of the public sitting in the gallery are asked to introduce themselves and identify their interest in reentry. Reentrants are called up to sit at the table and discuss their monthly progress with the team in front of the other participants and the court attendees.

During my fieldwork, Reentry Court was affiliated with a fledgling initiative started by the Obama-appointed U.S. Attorney's office that offered tax abatements to employers who agreed to hire two formerly incarcerated men from the court for a two-year trial period. To recruit potential employers from New Orleans, a representative from the U.S. Attorney's office, Elizabeth, and the presiding judge of Reentry Court would organize tours of the reentry vocational training campus located at Angola Prison.

Elizabeth would give an introduction on the two-hour bus ride to the employers, outlining the benefits of participating in the program for their businesses. She would read out statistics about recidivism and employment, stating that formerly incarcerated individuals are unemployed at a rate of over 27% in the United States and that, in Louisiana, about 43% of those released from prison will recidivate within five years — partially attributing recidivism to unemployment.<sup>38</sup> She then would conclude by saying, “[t]he campus

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37. From my interviews with Reentry Court staff, I came to know that there were approximately 75 mentors serving life sentences training reentrants and about 130 reentrants participating in the program from 13 parishes across the state as of 2016. Approximately 30 reentrant participants (with new participants and graduating participants staggering during my two years of fieldwork) were from Orleans Parish. The majority of these participants attended Judge V's section of the court program. My ethnographic work is primarily in this court.

38. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE

is very impressive. It is amazing how prisoners serving life sentences have really taken on managerial roles.”

I was struck by the range of employers who expressed interest in the program, from small family-owned businesses to city agencies to massive-scale corporate entities. For example, Miss Thelma, who, at 70, ran a few popular diners in New Orleans and wanted “to give these men an opportunity that she hopes her grandson will have when he gets out.” There was also Tim, from the New Orleans Sewage and Water Board, who was interested in hiring laborers to work on the proposed retrofitting of the city’s water infrastructure. Then there was Steve from Global Workmen, a contracting company that staffs commercial construction projects. According to their corporate mission statement, Global Workmen provided temporary laborers to development companies and promised to limit benefits expenditures, minimize unemployment costs, and reduce workers’ compensation exposure for those companies.<sup>39</sup>

Once we reached the prison reentry campus, Elizabeth took us through each vocational training area. During the tour, the “lifers” — prisoners serving life sentences who are the mentors and instructors of the reentry trainees — described their pedagogy to the employers. “We seek to teach both the vocational skills but also the soft skills you need to keep a job,” said one mentor. We first traveled through a huge garage for auto mechanic certification, where cars come directly from General Motors to be worked on, on to the greenhouse used for the horticultural and landscaping certification, to the workshop for the welding and electrical certification, and finally arrived at the large HVAC shop filled with refrigerators and ventilation shafts. Here, the employers and all the reentry trainees sat down for a concluding group discussion.

Judge V thanked all the employers for taking the trip to meet their potential employees. She retold the origins of the program. The idea for it emerged from her yearning to help those with life sentences do something meaningful and productive with their time in prison. “And now, they help to create the next workforce through this program,”

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(July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [https://perma.cc/JJD8-BTX3].

39. While I have changed the name and details of the actors and organizations in my ethnographic writing, I draw on similar kinds of actors to convey my analytic points. Please see an existing company that resembles that of the one I describe above. TRADESMAN INT’L, <https://www.tradesmeninternational.com/staffing/reserve/#cform> [https://perma.cc/2NR4-LAXY] (last visited Mar. 13, 2020).

she declared. Judge V asked who would be released within the year, and about 20 men stood up. Pointing to the side of the room where the tour group was seated, Judge V said, “Talk to these folks here today. They could be your bosses when you get out. They could give you a shot.” After a few reentrants gave testimonials about what they had learned on campus, one prisoner chimed in, “I wanted to be in welding, if anything, but they wouldn’t let me. I don’t find HVAC interesting.” This comment upset Judge V:

These men take the time to provide training for you all. I was a lawyer and now am a judge. When I was getting my training, I had a job and other responsibilities. What I wouldn’t have given for the kind of time you all have while you are here. Time to think, time to learn, time to work, and become really good at something. What is it that you want?

The reentry trainee responded, “I want to be an entrepreneur and own my own business after I get out.” To this, Judge V responds, “Can I ask you a question? How do you get to the door?” The reentry trainee looked at her, confused.

“Did you walk to the door? Or do you float to the door? Because let me tell you, you sound like you think you can float to the door, but you have to crawl before you walk, you have to walk before you can run.” She continued, “You can’t skip steps, and especially being in this program, you have to take the jobs available to you.”

On the bus ride back to New Orleans, our reentry tour guide, Elizabeth and I struck up a conversation about a Reentry Court participant, Carter, who had been recently fired from one of the program’s employers. She described to me that the employment initiative “serves to remove the stigma of employing a formerly incarcerated person.” However, in her eyes, Carter’s termination “resulted from a natural up and down of the market” and “not because he was formerly incarcerated.” Then she added, “[w]e can only try to account for one of those issues.”

This delineation made by Elizabeth gave me pause. In this framing, the free labor market began where carcerality ended. The carceral experience was figured as outside of the market. However, not 20 minutes ago, we had both been in the midst of labor recruitment happening within the prison. We were watching men work on cars for General Motors dealerships. We were watching them network with potential employers by demonstrating both their vocational and soft skills. Nothing I saw during this visit seemed divorced from market forces. In the case of Carter’s termination, how could she tell the difference between discrimination on the grounds of being formerly incarcerated and the discrimination of the market?

My question in some sense sounds naïve because this assumption — that there is a bounded free market made of competing economic actors on the one hand, and a bounded space of incarceration that is primarily one of confinement and exclusion from the market — was not unique to Elizabeth. Upon reflection, both of the reentry program representatives characterized the experience of incarceration as firmly outside economic markets. Judge V’s comments cast incarceration as an undisturbed time to invest in the *self*, suggesting that serving a prison sentence (aka “doing time”) is a suspension from other forms of temporal organization, like the responsibility of a *real* job outside of prison. The judge’s metaphor stresses a normative assumption that there are specific developmental stages to move from vocational laborer to managerial role to entrepreneur/innovator. The vocational training on the prison campus is framed as the educational starting point of self-investment. It is figured as the unpaid labor required before one can move to forms of wage labor and then perhaps, eventually capital ownership. She alludes to incarceration as being outside of development, such that personal, professional, and financial growth can only manifest once you leave prison through a predetermined telos of labor; you do not “float to the door,” you “crawl” and “walk” first. It is discussed as though it is common sense.

Of course, this teleological assumption of progress is troubled when considering the contemporary values of city labor markets today in relation to vocational labor. Reentry workforce development limits the potential labor markets reentrants may enter by providing vocational training that is designed to subtend industries within the real estate, tech, and idea economy. They train within industries that do not demonstrate growth potential, given the patterns of contemporary urban capital investment. Thus, reentrants often enter precarious markets of temporary, unskilled jobs instead of contractually sustainable and salaried jobs. This is juxtaposed with the valorization of flexibility and mobility within the emergent “innovation economy,” comprised of elite transplants to the city who participate in urban governance through social entrepreneurship and startup companies. These individuals are not necessarily held to the developmental stages of labor, but rather their symbolic capital and financial resources render them as already leading the next frontier of capital investment in the American economy.<sup>40</sup>

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40. The 2016 Democratic Party Platform illustrates this distinction as coded by liberal social policy. DEMOCRATIC PLATFORM COMM., 2016 DEMOCRATIC PARTY



I want to note that these examples are not intended to merely depict Judge V or Elizabeth as condescending or dismissive of the carceral experience. Rather, I believe their ideological separation of carcerality and the market echo the logics that structure criminal justice reform more broadly.<sup>41</sup> It even resonates with sociological scholarship about neoliberalism that places carceral punishment at the margins of the market. As Professor Bernard Harcourt argues, neoliberal penalty is “a form of rationality in which the penal sphere is pushed outside political economy and serves the function of a boundary: the penal sanction is marked off from the dominant logic of classical economics as the only space where order is legitimately enforced by the state.”<sup>42</sup> Sociological scholar Loïc Wacquant’s theorization of the “penal state” similarly reduces the administrative power of the state to the criminalization and punitive sanction of those excluded from market participation.<sup>43</sup> I therefore ask: What does this ideological boundary between carcerality and the market reveal, and what does it obscure?

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PLATFORM 8 (2016), [https://democrats.org/wp-content/uploads/2018/10/2016\\_DNC\\_Platform.pdf](https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf) [<https://perma.cc/596E-MYFL>]. In this proposal, the new frontiers of the U.S. labor market are characterized by “innovation economies” including the tech start-up sector which depend upon “the next generation of scientists, engineers, and entrepreneurs, especially women and people of color, to make sure America continues to out-compete and out-innovate the rest of the world with our bold innovation agenda.” *Id.* At the same time, this platform outlines the road to racial justice in the workforce as dependent upon vocational and technical skills training — the jobs that subtend such innovation at best or are entirely excluded from it.

41. See, e.g., Adrienne Jeffries, *Why We Exclude Prisoners from the Unemployment Rate*, OUTLINE (Jan. 27, 2017), <https://theoutline.com/post/955/why-we-exclude-prisoners-from-the-unemployment-rate?zd=1&zi=ooktdxqf> [<https://perma.cc/A5JK-CRVH>]. Prisoners are excluded from the unemployment rate as they are not fundamentally considered actors within the free labor market. Such practices inform criminal justice reform as the overarching logic is that of prisoners being excised from the market through incarceration. From my interviews with liberals and conservatives who supported the Louisiana Justice Reinvestment legislation, they all framed reentry as a way for formerly incarcerated people to rejoin the workforce. The market was outside of the prison and vice versa.

42. Bernard E. Harcourt, *Neoliberal Penalty: A Brief Genealogy*, 14 THEORETICAL CRIMINOLOGY 74, 77 (2010).

43. LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 58–61 (2009).

### III. DISCOUNT THROUGH MANAGEMENT, DEVALUE THROUGH DEBT

The goal of the court program was to “encourage employers to invest in reentry.”<sup>44</sup> To do so often meant reframing social justice rationales as business incentives. The court program concedes that businesses will be taking on a risk by hiring a formerly incarcerated person and, therefore, offers financial incentives. As mentioned, employers are promised tax abatements for hiring reentrants for a flexible trial period. The tentative terms of reentrant employment, as well as the tacit agreement to assume certain operational costs and oversight, situate the experimental court and the Department of Probation and Parole in supervisory roles within labor markets. While this program in New Orleans has never described itself in this way, one rather crass pamphlet produced by a neighboring parish’s Business Alliance advertised employer investment in reentry as both cost-effective and easy to manage because “Probation and Parole serve as your Human Resources Department.”<sup>45</sup> It is important to note also that employers do not have any contractual obligation to the reentrant employee or the court.

Visitors to Reentry Court were encouraged to participate in the dialogue as the judge would often solicit the opinions or the opportunities the court attendees could offer the reentrants. Potential employers were always welcome to attend the Reentry Court proceedings every month and announce the job openings that they were hoping to fill. Like when an owner of a bricklaying business addressed the Judge and the court: “I wanted to come here and tell you, Judge, what a great worker Darrell is. Even if he’s been in trouble in the past, he is there every day on time for the job. I’d like to hire four more, just like him.” Here we see perhaps one of the more explicit (and somewhat audacious) examples of how the court as coextensive with the labor marketplace and the punitive apparatus works to render reentrant labor as redundant and thus, reentrant employees as potentially expendable. The court also invites many nonprofits and social service providers in addition to employers to its proceedings. These organizations treat court like a marketplace, too, as they seek to offer a diverse array of services to the reentrant participants and often do as a result of the judge’s ruling. Ultimately,

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44. Interlocutor quote from the person I call Elizabeth. Such statements tacitly demonstrate how incentivizing private actors is crucial to the success of the court.

45. JEFFERSON PARISH BUSINESS ALLIANCE REENTRY PAMPHLET (2017) (on file with author).

the judge still holds punitive power and could send reentrants to jail for violating the terms of their release, which in this case includes losing a court-brokered job or refusing court-mandated programming.

The structures of debt that criminal justice institutions depend upon add another dimension to the ideological delineation between free market and carceral confinement. Formerly incarcerated people often face insurmountable financial debt after release from prison, and participants in the Reentry Court are no exception.<sup>46</sup> Court and Probation and Parole fines and fees continue to accrue as they participate in the reentry program back in the city. Judge V offers opportunities to reduce court fees if reentrants participate in volunteer projects — sometimes offering \$10 per hour of volunteer work, other times \$5 or \$12. She changes her mind constantly and somewhat arbitrarily. Once, she even offered \$100 per hour, but quickly realized that this would bankrupt the court and subsequently rescinded. Judge V would announce volunteer opportunities that were usually some form of manual labor or construction. “Now, you can’t just expect everyone to pity you and offer their help. If you are the ones who need help, you have to learn to pay it forward,” Judge V said one day before signing reentrants up to help paint a fence for a local nonprofit.

The moral framing of volunteerism espoused by the court links the virtue of altruism to autonomy, and counterintuitively, to self-interest. The conditions of debt and supervision under which reentrants are beholden to the court contradict the very potential of autonomous volunteerism. Their volunteerism is contoured through their indebtedness to the court and the value of their labor is determined by the Judge. The Judge would sometimes be challenged about the rates of court fee deductions by Laurel, a public defender and reentry nonprofit director who works with the court. Laurel would argue that \$10 an hour would never be fair market rate to get a crew to do the same work, to which the Judge would sternly reply, “These are volunteer projects for reentry. It shouldn’t even require monetary incentive.” While Laurel argues that reentrant labor deserves a fair

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46. See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 24 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINANCIAL.pdf> [<https://perma.cc/4HKP-LPN7>]; Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1781 (2010). See generally KARIN D. MARTIN ET AL., HARV. UNIV. KENNEDY SCH., SHACKLED TO DEBT: CRIMINAL JUSTICE FINANCIAL OBLIGATIONS AND THE BARRIERS TO RE-ENTRY THEY CREATE (2017), <https://www.ncjrs.gov/pdffiles1/nij/249976.pdf> [<https://perma.cc/3SYX-T5DQ>].

market wage, Judge V makes clear that volunteerism is not wage labor, but rather, it is a mandate of the court.

Volunteerism serves as a moral justification for the continued devaluation of reentrant labor vis-à-vis the court. This casts such labor as outside of the market while maintaining the conditions of carceral indebtedness as this kind of devalued labor also prevents reentrants from accumulating financial wealth. This example illustrates what legal scholar, Tayyab Mahmud, calls the suturing of debt and discipline in the neoliberal era, a joint venture of the market and the law.<sup>47</sup> “For the working classes, the expanded deployment of the penal arm of the state increases the cost of not participating in the increasingly precarious labor markets.”<sup>48</sup> The ideological boundary between the market and carcerality obscures how relations of labor and capital are fundamentally contoured by coercive, punitive regimes.

Labor is discounted through the functioning of the court as a state-subsidized marketplace as well as a coercive, punitive institution. Labor is devalued through structures of indebtedness — financial indebtedness to the court and moral indebtedness to society — that justify scarce remuneration for the reentrant labor volunteered by the court. Understanding this devaluation of labor as a form of group-differentiated devaluation of human life, or at least a devaluation of an aspect of moral and economic life, we see how the practices of the reformist court is a racializing technology. The making of a reentrant labor force is the making of a novel racialized labor market.

#### IV. EVALUATING REFORM: THE EPISTEMOLOGICAL SUPPORT OF THE BOUNDARY

Innovations in criminal justice make new objects for knowledge production. Part V turns to the epistemic boundary work that subtends the ideological separation between the market and carcerality. While New Governance spaces like Reentry Court may require alternative orientations toward determining its efficacy, the primary category of judging reentry program success is recidivism.<sup>49</sup>

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47. Tayyab Mahmud, *Debt and Discipline: Neoliberal Political Economy and the Working Classes*, 101 KY. L.J. 1, 42–43 (2013) (“Throughout history, debt both lubricated circuits of value extraction and acted as a disciplinary device.”); see also DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* (2011).

48. Mahmud, *supra* note 47, at 52.

49. The recidivism rate in Louisiana as of 2015 was 43%. The rate of Orleans Parish was estimated between 43% and 49%. *Reentry Initiatives & Transitional Work Programs*, LA DEP’T PUB. SAFETY & CORRECTIONS,

Essentially, the success of reentry programs is judged by the question: Once people are released from prison, does this program keep people out of prison? The private and public grants that funded some of the operations of the court, like the salaries of the case managers, for example, required efficacy reports that demonstrated that the court was indeed reducing recidivism.<sup>50</sup>

In order to collect such data, an esteemed sociologist in New Orleans, Dr. M, was brought in by Judge V and Elizabeth to develop an efficacy assessment of Reentry Court. His findings would be shared internally with the court administrators to tweak practices and procedures and also were intended to produce data that would be submitted to the granting institutions that invest in the court. This data would also serve as part of the court program's public relations strategy.

Dr. M and I developed a rapport as we were usually the only two social scientists sitting in court. While I was doing qualitative and independent ethnographic work, he was juggling his own qualitative notes while simultaneously developing a quantitative methodology for assessing the court's success. When discussing his methods and findings with me, expressed jocular envy that my ethnographic practice that allowed me to write down "the dramas of the court" and have "more free-flowing conversations" with court participants and staff.<sup>51</sup> After telling me that he was asked by the Judge to assess recidivism rates, he said, "You're lucky that you are documenting life experiences. 1s and 0s conveying recidivism or not recidivism is a ridiculous way to approach this court," referring to the statistical binaries that he used to keep track of reentry participants. He continued, sounding frustrated:

Every single participant has a unique and extenuating case that cannot be used to model recidivism rates. To help to see a pattern, I chose to technically factor any return to a cell — whether to jail or to prison — as recidivism. If the goal of the program is to provide workforce participation, then any carceral disruption where they are taken out of the workforce for whatever period of time should count as recidivism. Don't you agree?

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<https://doc.la.gov/reentry-overview> [<https://perma.cc/2WCC-TAHM>] (last visited Mar. 13, 2020).

50. See generally PEW CHARITABLE TRS., *supra* note 10. This report of the state Justice Reinvestment Package discusses how 70% of money saved through decarceration will be invested into grants for programs dedicated to recidivism prevention. *Id.* at 18.

51. These quotes signal Dr. M's characterizations of the court and of my ethnographic practice.

Definitions of recidivism vary a great deal within studies of criminal justice, which makes agreeing or disagreeing with Dr. M more complicated.<sup>52</sup> The absence of a uniform definition of recidivism has long led studies of crime and punishment toward very diverse conclusions.<sup>53</sup> According to the National Institute of Justice, “recidivism is measured by criminal acts that resulted in rearrest, reconviction or return to prison with or without a new sentence during a three-year period following the prisoner’s release.”<sup>54</sup> I have read studies that do not consider a return to incarceration within set time frames, and others that still do not adequately differentiate criminal charges from probation or parole violations.<sup>55</sup> As argued by Professor Robert Weisberg, the definition of recidivism remains “contingent on empirical uncertainty.”<sup>56</sup>

It is, therefore, interesting in this context to see Dr. M struggle to develop a take on an operational definition of recidivism that relies on the concept of workforce disruption. He alludes to the ambivalence of the court’s mission to ensure employment for reentrants after incarceration. He sees participants frequently serving

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52. Nathan G. Mandel et al., *Recidivism Studied and Defined*, 56 J. CRIM. L. CRIMINOLOGY & POL. SCI. 59, 59 (1965) (making a case for the development of a uniform definition of recidivism and finding that “[t]he reporting of these rates has heretofore lacked uniformity because of the absence of consensus in defining recidivism.”). See generally Harry Willbach, *What Constitutes Recidivism*, 33 J. CRIM. L. & CRIMINOLOGY 32 (1942) (arguing for a uniform definition of recidivism that would be based on prior conviction of individuals). “Recidivism has a variety of meanings which are frequently used interchangeably with the result that statements or conclusions must be carefully explained and qualified. Because of this, the findings become vitiated and tend to create a morass which lacks clarity and hinders progress.” *Id.* at 32. Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785, 785 (2014) (reviewing “how variable and contingent the formal definitions of measures of recidivism, and . . . address[es] the need for sensibly self-critical stipulations of the meaning of the term in order to make the most of any pragmatic use of the term feasible”). Weisberg is probably the most nuanced and reflexive take of these articles and does not argue for a particular kind of uniformity but problematizes the various conditions different notions of recidivism produce in the context of criminal justice reform.

53. Michael Ostermann et al., *How Different Operationalizations of Recidivism Impact Conclusions of Effectiveness of Parole Supervision*, 52 J. RES. CRIME & DELINQ. 771, 772–73 (2015).

54. *Recidivism*, NAT’L INST. JUST., <https://nij.ojp.gov/topics/corrections/recidivism> [<https://perma.cc/B6RS-AEL6>] (last visited Mar. 13, 2020).

55. See e.g., RYKEN GRATTET ET AL., U.S. DEP’T OF JUSTICE, PAROLE VIOLATIONS AND REVOCATIONS IN CALIFORNIA 5 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/224521.pdf> [<https://perma.cc/Q88Y-SL5T>] (failing to consider the period of time since grant of parole as a potentially relevant factor in evaluating recidivism rates).

56. Weisberg, *supra* note 52, at 787.

short jail sentences as punitive sanctions for probation violations but also as reprimands for losing court-brokered jobs. Dr. M's analysis thus would seemingly conclude a failure of the court to reduce recidivism through the reentrant employment managed by the court.

Dr. M's framing of recidivism as disruption ultimately reproduces the boundary between the market and carcerality. In this case, the definition of recidivism considers being behind bars a rupture from participating in the free market. Such an assertion begs the question: Is there ever really a point where these men will solely be in the realm of the free market if the condition on them being part of the market is their carceral management? Defining recidivism as the oscillation between the confinement of carcerality and the freedom of market participation obscures the productivity of carceral circulations to differentially devalue labor. A definition of recidivism that relies on the binaries between free and confined, market and carceral, mystifies the productivity of the Reentry Court as coextensive with the city's labor market.

#### V. RETHINKING RELATIONS: RACIAL CAPITALISM'S PRODUCTIVITY AT THE BOUNDARY

In this Essay, I trace the delineations that are assumed self-evident within the reentry space: (1) carceral spaces of confinement are distinguished from the "free" spaces of capital flow; (2) criminal justice institutions govern those who are excluded from the market; (3) there are free contracts on the one hand, and work resulting from punitive coercion on the other. However, as my empirical examples demonstrate, in practice, these distinctions break down. As they do, it is revealed that the racializing processes of the criminal justice system are a technology constitutive of labor markets.

The court controls the skills training on the prison campus; it determines the value of the skills that are discounted through tax abatements and subsidized operational costs, and it also determines the wage of labor that is devalued through structures of carceral debt. Moreover, as the effects of incarceration and the work of Reentry Court overwhelmingly target Black men in Louisiana, we have the re/production<sup>57</sup> of discounted and devalued Black labor, which

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57. I use the term "re/production" to signal capitalist reinvention and innovation that produce novel social assemblages alongside the historical repertoires of white supremacy and the heteronormative patriarchy that reproduce social orders through racial and gendered differentiations. Such a term draws from Black radical and feminist critiques of Marxism that argue that reproductions, reconfigurations and transformations in social orders merit analytic attention when studying capitalist

renders market discrimination and the differential deployment of carceral punishment as mutually constituted racializing forces entrenched in the histories of antiblackness and Black dispossession in the United States.<sup>58</sup>

The critical scholarship on unpaid prison labor, including the histories of chain gangs and prison farms during and after the abolition of chattel slavery, for example, clearly identifies the inadequacy of figuring labor markets as distinct from carcerality.<sup>59</sup> The privatization of prisons, an issue that has gained much attention by progressive reformers, is also a salient example of a phenomenon that troubles the boundary between market and carcerality.<sup>60</sup> These are important contexts through which the borderlands and contact zones of the market and carcerality are made obvious. However, the analysis of these contexts can frame carcerality as something exploited by capitalism. In other words, the private market takes advantage of public prison labor, or the private market profits by taking on the role of the state to lock people up.<sup>61</sup> It treats the

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production. See ROBINSON, *supra* note 26 (tracing the development of the concept of racial capitalism that demonstrates how racial differentiation is intrinsic to capitalist development); Nancy Fraser, *Contradictions of Capital and Care*, NEW LEFT REV., July–Aug 2016, at 100, 103 (arguing that capitalism simultaneously relies upon and destabilizes social reproduction). See also *supra* note 29 for my discussion of the term racialization that is linked to this concept of re/production.

58. See, e.g., RACE AND LABOR MATTERS IN THE NEW U.S. ECONOMY (Manning Marable et al. eds., 2006); Augustus C. Wood III, *The Crisis of the Black Worker, the U.S. Labor Movement, and Democracy for All*, 44 LAB. STUD. J. 396, 399 (2019).

59. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* (1996).

60. See *Private Prisons in the United States*, SENT'G PROJECT (Oct. 24, 2019), <https://www.sentencingproject.org/publications/private-prisons-united-states/> [<https://perma.cc/W2NE-ERZJ>] (depicting the rise of private prison contracts in the United States).

61. See GILMORE, *supra* note 3, at 20–22 for discussions of why “racial cleansing” and “new slavery” as well as the privatization of prison arguments are not adequate to fully understanding the transformations of contemporary carcerality. See also Ruth Wilson Gilmore, *The Worrying State of the Anti-Prison Movement*, SOC. JUST. J. CRIME, CONFLICT & WORLD ORDER (Feb. 23, 2015), <http://www.socialjusticejournal.org/the-worrying-state-of-the-anti-prison-movement/> [<https://perma.cc/8UT8-J3JR>]. Gilmore outlines the attention “new realists” within criminal justice reform pay to private prisons minimizes, “the fact that 92 percent of the vast money-sloshing public system is central to how capitalism’s racial inequality works.” *Id.* This also speaks to my critique that the relations of private-public collaborations under New Governance obscure the forms of public subsidies and the powers of the Department of Corrections that fundamentally are required for reentrant labor to be devalued and discounted.



racialized inequalities of differentially devalued labor and life made through carcerality as prior to market investment. Such a framing recapitulates the premise that carceral spaces are potential frontiers for market exploitation and thus misrecognizes the mutually constitutive relations of the market and carcerality and does not give a more relationally expansive notion of how the prison industrial complex transforms.<sup>62</sup>

I, therefore, argue that these phenomena are not simply market exploits but are instead part of what anthropologist Hannah Appel refers to as “the licit life of capitalism,” through which economic markets are constituted through racial differentiation.<sup>63</sup> Racialized inequality is not incidental to the market and thus merely an advantage for capitalism’s appetites. Racialized inequality constitutes economic markets through the capital-carceral circulations of people, labor, and value. Geographer Ruth Wilson Gilmore’s work on the California prison system, for example, compellingly demonstrates this point through her concept of “the prison fix,” arguing that the growth of the racialized carceral system emerged to resolve capital surplus crises.<sup>64</sup> Gilmore, alongside activist scholars like Angela Y. Davis points to how reform as a response to capital crises tends to “strengthen institutions, especially those geared to social control.”<sup>65</sup> Grounded attention to the political economies of criminal justice reform thereby offers a lens to revisit how racialized labor has historically been devalued and managed through historically transformed technologies of carceral power. Moreover, as we consider the governance of reformist decarceration projects, like reentry programming, I argue that we must mobilize analytics that recognize the relational spaces emergent between the ideological separations asserted between markets and carcerality, between private and public, and between social reform and social control. Only then can we adequately critique how the technologies of neoliberal racial capitalism forge the frontiers of carceral expansion. That is to say, the very ambiguous spaces made through such practices of New Governance within criminal justice today are productive racializing technologies.

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62. For discussions of the prison industrial complex as a relational and historically contingent capitalist phenomenon, see generally ANGELA DAVIS, *ARE PRISONS OBSOLETE?* (2003); Gilmore, *supra* note 3.

63. See generally HANNAH APPEL, *THE LICIT LIFE OF CAPITALISM: U.S. OIL IN EQUATORIAL GUINEA* (2019).

64. Gilmore, *supra* note 3, at 182–83.

65. *Id.* at 183.

## VI. THE SEARCH FOR THE LEGAL SUBJECT AND THE MAKING OF THE UNFINISHED REENRANT-WORKER

The final institutional reinforcement of the distinctions between the market and carcerality is left to the technical terms of the law. Take the practices of prison labor in the United States. Justified by the Thirteenth Amendment of the U.S. Constitution, forced labor as criminal punishment was the legal exemption to the banning of involuntary servitude and slavery.<sup>66</sup> While often the earliest manifestations of such practices took the form of chain gangs post-emancipation, New Orleans has a fascinating history of a carceral “private-public partnership” as it was emerging as an American city during the Age of Revolutions (1791 and 1825).<sup>67</sup> During this time, slave owners essentially rented out their slaves to the city prison so that they could build the city’s infrastructure and public works.<sup>68</sup> Early criminal justice “innovations” like this practice demonstrate the entrenched histories through which carceral labor, the racial order, and even the emergent city were and continue to be relationally made.

Such repertoires of racializing labor regimes haunt contemporary prison labor, which has primarily taken the form of menial, unskilled work for the garment or manufacturing industries.<sup>69</sup> However, there is reformist faith in small-scale programs that do offer more substantial vocational training and perhaps nationally recognized skills certifications, especially since these programs seem to demonstrate a reduction in recidivism.<sup>70</sup> But while the justification for these programs focus on training, they do not measure success by the socioeconomic stability achieved by the people moving through them, as legal practitioner and journalist Emily Galvin writes, “[w]e know these programs make people less likely to reoffend by

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66. U.S. CONST. amend. XIII, § 1.

67. RASHAUNA JOHNSON, *SLAVERY’S METROPOLIS: UNFREE LABOR IN NEW ORLEANS DURING THE AGE OF REVOLUTIONS* 144–46 (2016). For scholarship on prison chain gangs in the American South, see LICHTENSTEIN, *supra* note 59, at 165–67.

68. See JOHNSON, *supra* note 67, at 144–46.

69. See *The Incarcerated Workforce: Prison Labour Is a Billion-Dollar Industry, With Uncertain Returns for Inmates*, *ECONOMIST* (Mar. 18, 2017), <https://www.economist.com/united-states/2017/03/16/prison-labour-is-a-billion-dollar-industry-with-uncertain-returns-for-inmates> [<https://perma.cc/89RC-NBWC>].

70. See Shawn Bushway, *Reentry and Prison Work Programs 5–7* (May 19, 2003) (unpublished discussion paper) (on file with The Urban Institute), <https://www.urban.org/sites/default/files/publication/59406/410853-Reentry-and-Prison-Work-Programs.PDF> [<https://perma.cc/278G-DGDZ>].

providing job skills, education, engagement, and staving off hopelessness — but what about that problem of poverty?”<sup>71</sup> In arguing that prisoner accumulation of earnings should be in the interest of public safety, Galvin writes, “[a]llowing companies to exploit hard labor rather than incentivizing them to provide meaningful employment is not just morally wrong, it is a dereliction of our duty to public safety and rehabilitation.”<sup>72</sup> However, in framing this appeal, Galvin is essentially assuming that there is a clear delineation between the interests and incentives of private companies and the interests and incentives of public safety.

Legal scholars who problematize the market-carcerality separation critique the limitations of the law to recognize prisoner-workers as legal subjects. The U.S. Courts of Appeals’ consistent characterization of the prison’s relationship to the prisoner as non-economic and primarily punitive has repeatedly foreclosed the potential for employment law to be mobilized in cases arguing the exploitation of incarcerated labor.<sup>73</sup> As an attorney with the National Labor Relations Board, Katherine E. Leung argues that the exclusions of prisoner-workers from the Fair Labor and Standards Act to receive minimum wage<sup>74</sup> and the National Labor Relations Act to possess the rights to collectively organize as workers<sup>75</sup> should itself be a violation of Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination based on race, color, religion, sex, and national origin.<sup>76</sup> Leung writes, “The use of prison labor functionally creates a second-class labor market, largely made up of people of color, which exists outside of Title VII’s protection against disparate impact discrimination in the workplace.”<sup>77</sup> By discussing prison labor in these terms, Leung calls for a reconceptualization of the labor-market as a totality that includes the prisoner-workers as a

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71. Emily Galvin, *Let Them Work: Prisoners Need Jobs While Still in Prison to Break America’s Epidemic of Recidivism*, SLATE (Apr. 21, 2016), <https://slate.com/news-and-politics/2016/04/a-great-way-to-end-recidivism-give-prisoners-jobs.html> [<https://perma.cc/5D7J-JZPE>].

72. *Id.*

73. *Compare* *Watson v. Graves*, 909 F.2d 1549, 1556 (5th Cir. 1990) (holding that inmates working as contractors for a private firm under a work-release program are covered by the FLSA), *with* *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) (holding that inmates working directly for a prison are not “employees” under the FLSA) *and* *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) (same).

74. Fair Labor Standards Act, 29 U.S.C. §§ 203, 206 (2016).

75. National Labor Relations Act of 1935, 29 U.S.C. §§ 152, 157 (2016).

76. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

77. Katherine E. Leung, *Prison Labor as a Lawful Form of Race Discrimination*, 53 HARV. C.R.-C.L. L. REV. 681, 685 (2018).

racially segregated labor pool of poor and predominantly Black and Brown people.

Leung's arguments critique how the prison is characterized by law as outside of the market and, therefore, how the aspirational legal subject of racialized prisoner-worker is unrecognizable under current legal regimes. Leung writes that legal precedent has drawn a "clear bright-line to define the actors as either jailer or employer," claiming that the one-dimensionality of legal abstractions conveniently characterize who is "deserving or undeserving of a statute's protection" without reflecting upon a human being's experience and social relationships.<sup>78</sup> Further, in following the prisoner-worker as an important relation foreclosed by the law, legal scholar Noah Zatz asserts that the law itself is not external to the economy but rather "helps produce employment and the labor market as social fields separate from other types of relationships."<sup>79</sup>

However, the case study of the New Orleans Reentry Court blurs the lines between punitive and labor categorization of legal subjects because it is an experimental, *soft law* innovation. Reentry Court opens a space of legal and social ambivalence between the market and carcerality even as it ideologically adheres to their productive separation. This space realizes the contested and ever-shifting subjectivity of the *racialized reentrant-worker* without a clear legal delineation between jailer and employer, without a clear legal delineation between prisoner and worker, punishment, and labor. The experimental and flexible practices of the court render reentrant-employee relations with employers and the court neither solely economic, nor punitive. The productivity of these mutually constitutive relations makes value under neoliberal racial capitalism by producing ambiguous, fungible, and underdetermined subject positions like the racialized reentrant-worker. Reentry Court is not a governance purgatory toggling between its carceral and market identity, but a productive site of capital value creation because of its strategic ambiguity.

So, what then are we supposed to make of the *racialized reentrant-employee* as a subject made through technologies of ambiguity? The court manages the employment of reentrants and the value of their labor on the market while also holding the ability to enact punitive

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78. *Id.* at 696.

79. Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 866 (2008).

sanctions should reentrants not accept or comply with the terms of such employment. The city employers are not legally accountable to reentrant employees through a contract, thus producing a tentative relation that depends upon the court's subsidies and coercive power. While the private employer is not lawfully accountable for the treatment of the reentrant employee, the reentrant-employee can be legally intervened upon by the court. Yet, as the original provocation of this critique articulated, the court cannot account for the "natural" flows of the market because it insists on being external to and, therefore, not responsible for such market phenomena. The New Governance practices of such reform programs work to further obscure this process through its experimental and flexible nature, which continues to render reentrant-employee relations with employers and the court neither solely economic nor punitive. Carceral circulations constitute labor markets and this relation re/produces and governs racial regimes through the differential devaluation of human life, and the devaluation of peoples' labor under racial capitalism.

#### CONCLUSION: EMERGENT POLITICAL POTENTIALS

The New Governance practices of carceral reform programs, like Reentry Court, emerge as an underdetermined "nonspace" of legal and economic subjectivity. In this case, the soft law enacted through the practices and epistemologies of the Reentry Court produces and governs racial regimes through the differential devaluation of human life, through the devaluation of peoples' labor, demonstrating the constitutive relation between carceral circulations and labor markets. Reentry Court thus re/produces the conditions of neoliberal racial capitalism through its productive separation of the market and carcerality. Yet, paying attention to the makings of novel and undetermined subjectivities, such as the reentrant-worker, does offer critical anticipation that could challenge the frontiers of racialized labor.

To reveal what liberal reform produces by adhering to these ideological separations is to reveal the inadequacy of such reform to attend to racial justice in the United States. What would it mean for the law and for society to rethink this boundary-making between carcerality and the market? Perhaps the spatial metaphor of borders could be helpful. Gilmore writes,

Even while borders highlight the distinction between places, they also connect places into relationships with each other and with noncontiguous places. So too with prisons: the government-

organized-and-funded dispersal of marginalized people from urban to rural locations suggests both that problems stretch across space in a connected way and that arenas for activism are less segregated than they seem.<sup>80</sup>

In this case, Gilmore is critiquing the commonsense notion that prison sits “at the margins of social spaces, economic regions, political territories, and fights for rights.”<sup>81</sup> As I pursue my work on the transformations of carceral technologies, I read this analogy as a call to continue to interrogate borders: Why are certain borders common sense? What makes a border productive, and what are the technologies of power that render it valuable? If instead of reinforcing borders, we elucidate their productive relations, then what sorts of political critiques and potentials would that engender? A move toward racial justice would require a vast shift in the kinds of social worlds and relationships we recognize in our everyday interactions and in our scholarly analysis of emergent innovations. It would require an intention toward social solidarities that challenge the productive separations made common sense under racial capitalism.<sup>82</sup>

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80. GILMORE, *supra* note 3, at 11.

81. *Id.*

82. This shift in language from boundary to border is intentional. As efforts to decarcerate Louisiana are being implemented under criminal justice reform, prison facilities are being redeployed to detain asylum seekers. My critique of the ideological border between the spaces of the free market and the spaces of carceral confinement is also a call to recognize how the U.S. national borders are related sites of racialized labor devaluation and violent displacement. Immigration detention is part of a continuous frontier of carceral reconfiguration and expansion — a relation that is obscured by the productive separations of racial capitalism that render the reformist project of decarceration as distinct from the movements of migrant labor and the militarization of borders.