ARTICLES

Contract or Prison

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Critics of the criminal enforcement system have condemned the expansion and privatization of electronic monitoring, criminal diversion, parole, and probation. But the astonishing perversion of contract involved in these new practices has gone unnoticed. Governments are turning to "offender-funded" programs that empower firms to contract with people who are suspected of or have been convicted of crimes—and whose alternative to agreeing to these contracts is prosecution or incarceration. Though incarceration-alternative (IA) contracting is sometimes framed as humane, historical and current context illuminates its coercive nature. IA contracting must be examined under classical contract theory and in light of the history of economic exploitation using criminal enforcement power harnessed to contract, including in the racial peonage system under Jim Crow.

While the norm of expanded choice that justifies enforcement of contracts has prima facie plausibility in this context, IA agreements are not concluded under the conditions assumed in classical contract theory. That is because these contracts are based on coercive background entitlements: rights to sell access to the only escape from punitive government measures. Those coercive entitlements leverage the criminal enforcement system to extract money from defendants and expand the reach of criminal sanctions beyond what the state could achieve without resorting to contract. While regulating IA contracts might in principle restrain their inherent exploitive potential, the minimalistic legal frameworks actually constructed do not do so. This Article documents this systematic underregulation through the first empirical study of legal regimes for IA contracts. It examines forty IA contracting regimes for the presence of features that might mitigate exploitation.

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If contract law is being used coercively against criminal defendants, its limiting principles might provide redress. Applying contract law to allow defendants to rescind or reform these contracts and get their money back once the threat of criminal sanctions has subsided could undermine the economic basis of the practice and lead to broader restructuring of how IAs are financed. To the extent that the theoretical limits of contract are not presently reflected in the common law of contract, regulatory reforms that better regulate seller and government practices might reduce the risk of exploitation.

INTRODUCTION

State and local governments are reviving abolished practices, delegating criminal enforcement powers to private parties, and allowing them to exercise those powers to earn profits by contracting with citizens. Historically similar practices were abolished because experience taught that they were extractive and undermined both public ends and governmental legitimacy. While some of the abolished practices were historically widespread in governmental dealings with citizens, their restoration is concentrated in local governments' dealings with poor and marginalized communities through criminal enforcement. Consider the following examples.

In Pennsylvania, Jennifer Schouse received a letter on the letterhead of the local district attorney. Beneath the heading, "OFFICIAL NOTICE—IMMEDIATE ATTENTION REQUIRED," the letter continued,

> This Office has received a report(s) of criminal activity alleging you have violated Title 18, Section 4105 of the Pennsylvania State Statutes, Issuing a Fraudulent Check. If the check is less than $200, a conviction under this statute, is a Summary Offense and punishable by up to a $300 fine. If the check is more than $200, a conviction under this statute is a MISDEMEANOR and punishable by up to a $5,000 fine and/or two (2) years in jail. . .
>
> However, you may avoid a court appearance by participating in the Luzerne County District Attorney Diversion Program.[1]

In reality, the letter was sent by the corporation National Corrective Group, Inc. (NCG), which operated the "Luzerne County District Attorney Diversion Program" as a for-profit enterprise. The only contact information on the letter was for NCG, and the recipients of letters such as this one who signed up for the diversion program—typically at fees much larger than the amount of the bounced check—were contracting with NCG. Before the corporation sent these letters to people who appeared in a database as having bounced a check, prosecutors did not review the cases to determine whether the intent required for a criminal

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[1] Shouse v. Nat'l Corrective Grp., Inc., 2010 WL 4942222, at *3–4 (M.D. Pa. Nov. 30, 2010); *see also* Lee Romney, *Private Diversion Programs Are Failing Those Who Need Help the Most*, REVEAL (May 31, 2017), https://perma.cc/4VLG-AQMK (discussing the class action against National Corrective Group, Inc., the administrator of this diversion program).

check fraud charge was present.[2] Yet the people who received the letters had no way of ascertaining the validity of the supposed charge against them.

In Georgia, a person who had been arrested and was in jail under threat of being charged for a serious drug offense was told by his lawyer that the district attorney (DA) agreed that he could be released from jail if he posted a bond and contracted directly with a company called ProntoTrak for an ankle monitor.[3] When, months later, the DA determined there was no basis for the threatened charge used to justify the ankle monitor, the defendant had paid thousands of dollars to the ankle monitoring company that he was not entitled to recover.[4]

This Article documents and examines the expanding practice of contracting for incarceration alternatives (IA), illustrated by these two cases. Local governments are increasingly turning to private companies to operate "offender-funded" programs that largely target low-level alleged offenders.[5] The Article focuses on the problems with this regime as a practice of contract. The law of contract is designed to govern obligations undertaken consensually. It is most commonly justified by the norm of expanded choice: the notion that enforcing contracts to exchange entitlements promotes economic welfare or autonomy by generating new options. At first glance, the expanded choice norm seems to justify IA contracts. Defendants offered a contract that allows them to avoid jail time or the risk of prosecution have gained a choice, and a far superior one at that.

But the illusion of expanded choice obscures the background of coercive entitlements on which the choice rests. If the IA is a lawful and legitimate means for the defendant to satisfy the applicable criminal enforcement measure, then the alternative

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[2] Romney, *supra* note 1; *see also* Jessica Silver-Greenberg, *In Prosecutors, Debt Collectors Find a Partner*, N.Y. TIMES (Sept. 15, 2012), https://perma.cc/6P34-ZZH4 (documenting this practice nationwide); Solberg v. Victim Servs., Inc., 415 F. Supp. 3d 935, 945–48 (N.D. Cal. 2019) (discussing a bad-check-diversion company's practice of sending similar letters without individual determinations of probable cause and without informing recipients of their right to such a determination).

[3] Email from Anonymous Attorney to Anonymous Defendant (Oct. 5, 2021) (on file with author); *see also* ProntoTrak, Inc., Financial and Liability Agreement (Oct. 7, 2021) (on file with author).

[4] Email from Anonymous Assistant District Attorney to Anonymous Attorney (Mar. 14, 2022) (on file with author).

[5] *See, e.g.*, Caroline Isaacs, *The Treatment Industrial Complex: How the For-Profit Prison Industry Is Hijacking Sentencing Reform for Corporate Gain*, 8 L.J. FOR SOC. JUST. 1, 15–17 (2017) (reporting that electronic monitoring increased by 68% from 1998 to 2014); Romney, *supra* note 1; *PPS History*, PRO. PROB. SERVS., https://perma.cc/8GH2-QZDV.

accomplishes the government's preventive or punitive goals. Conditioning the availability of the less severe alternative measure on a defendant's entry into a contract with a firm is extractive and facilitates the unjust expansion and misuse of the criminal enforcement power. The practice improperly leverages criminal enforcement discretion to make threats that extract value from those subject to criminal enforcement. Criminal enforcement power is subject to constraints that serve to protect against the abuse of coercive power: it is legitimately used only for specific public ends and is subject to particular procedures and justifications. Harnessing criminal enforcement to contract undermines those constraints, deploying purported consent to relieve governments of their burdens of justification and process, as well as of the costs of criminal enforcement. It also creates institutional incentives that tend to worsen the background conditions against which contract proposals are made, not in service of the legitimate public values at stake but rather to more readily induce ostensible consent.

We can see this more clearly by viewing the rise of IA contracts in the light of two analogs in U.S. history. The first is the system of Black peonage instituted after the abolition of slavery, which combined the form of contract with the structures of the criminal law to reinstitute involuntary servitude. The second historical analog is the regime of public administration for profit, including in criminal enforcement. The momentum that toppled those two regimes gathered as it became undeniable that the ostensibly voluntary bargaining on which they rested was illusory. In reality, the practices were determined to be more like blackmail or forced labor than to comport with the ideal of voluntary choice that justified contract.

This Article contributes to four streams of scholarship: the literature on the changing nature of criminal enforcement, the literature on privatization, the literature critiquing state and local government exploitation of poor and vulnerable communities, and the literature on the contract theory of voluntariness. Criminal law scholars have documented and critiqued the changing nature of state criminal legal systems[6] from being based, however indirectly, on at least the prospect of adjudication of guilt, to

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[6] Many scholars and advocates have replaced the term "criminal justice system" with alternatives, including the one settled on here, that retain the word "system." *See* Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 889, 919–20 (2023). For a historical and theoretical analysis of whether that word should be retained, see Sarah Mayeux, *The Idea of "The Criminal Justice System"*, 45 AM. J. CRIM. L. 55, 58–60 (2018).

systems that operate largely as social surveillance and management of poor and minority communities.[7] This Article uncovers an additional dimension of such criminal enforcement systems. It builds on scholarship exposing the irrelevance of guilt or innocence to large swathes of state and local criminal enforcement, showing another way that criminal enforcement power can be used extractively when untethered from a meaningful obligation to prove guilt.

The restoration of old exploitive practices in the form of IA contracting is a culmination of the enthusiasm for the privatization of government functions that originated on the right, was embraced by the center-left in the 1990s, and has led to widespread privatization of local public services. The rise of privatized government has been widely critiqued, including by those specifically targeting the privatization of criminal enforcement functions like prisons.[8] Few have noticed, however, the particular regime of privatization on which this Article focuses—that of subjecting people to criminal enforcement measures and allowing them to contract out of those measures as part of a state-sanctioned commercial deal.[9] This practice perverts the foundational justification of

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7 *See* Brandon L. Garrett, Sara S. Greene & Marin K. Levy, *Forward: Fees, Fines, Bail, and the Destitution Pipeline*, 69 DUKE L.J. 1463, 1465–68 (2020); Catherine Crump, *Tracking the Trackers: An Examination of Electronic Monitoring of Youth in Practice*, 53 U.C. DAVIS L. REV. 795, 798–99 (2019) (referencing numerous studies of electronic monitoring in the criminal enforcement system); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1077–78 (2015) (exposing the underappreciated harms of decriminalization, including its removal of procedural protections in a system that remains coercive and punitive); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 620–23 (2014) (analyzing the managerial justice model that has replaced the adjudicative model of criminal enforcement, as practiced in New York City). *See generally* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018).

8 *See, e.g.*, Jamiles Lartey, *Think Private Prison Companies Are Going Away Under Biden? They Have Other Plans*, THE MARSHALL PROJECT (Nov. 17, 2020), https://perma.cc/6CNE-DLEL ("[T]he big players in private prisons . . . [have] been steadily diversifying, placing their bets on a future that includes revenue from commercial real estate, electronic monitoring, and halfway houses."). *See generally* CHRIS ALBIN-LACKEY, HUM. RTS. WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY (2014) (describing the private probation and parole industry).

9 One law review article has helpfully argued for the use of consumer protection law in this domain, but it elides the problems with using the form of contract as the legal structure for these relationships. *See* Alex Kornya, Danica Rodarmel, Brian Highsmith, Mel Gonzalez & Ted Mermin, *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L. L. REV. 107, 114–18 (2019). Professor Noah Zatz has exposed and critiqued exploitation through IAs that require people to work for private employers to avoid prison. Noah D. Zatz, *Better than Jail: Social Policy in the Shadow of Racialized Mass Incarceration*, 1 J.L. & POL. ECON. 212, 218 (2021).

contract, turning a legal form legitimated as autonomy- and welfare-enhancing into a tool of oppression and extraction.

This Article also contributes to the literature on state and local government responses to budgetary pressures that focus on generating revenue through nontraditional means, especially through means that exploit those residents least able to escape the governments' reach.[10] It documents the practice of one particular modality of this kind of revenue generation: "offender management" programs that are "offender-funded" via individual defendant contracting.[11] It studies for the first time the legal frameworks employed by ten different states in implementing this regime, analyzing patterns and distinctions across regulatory models. Whereas the scholarship in this area focuses virtually exclusively on public law solutions to local government exploitation, this Article is unique in observing the possibility of private law solutions.

Public law litigation efforts have not significantly changed the practices of IA contracting. The common law of contract holds promise for offering redress to people harmed by IA contracting because the standards for finding a lack of consent are less demanding than those that have to be met to establish constitutional violations. Courts should apply the doctrines that police agreements for defects in consent and substantive unfairness to avoid or reform these contracts, release people from burdensome debts, and allow them to get restitution. By undermining the legal support for these contracts, a common law approach could lead to systemic changes. The Article also proposes legislative and regulatory responses focused on contractual and market regulation.

Part I of the Article describes the practice of IA contracting today, introduces the expanded choice norm that underlies classical contract theory, and explains why IA contracting has prima facie plausibility under this norm.

Part II zooms out from the expanded choice norm to critique IA contracting as incompatible with contract because it rests on coercive background entitlements that facilitate the use of government discretion to extract value from people. Two historical analogs—Black peonage after abolition and government for profit

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[10] *See, e.g.*, Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 40–41 (2023); Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 169–71 (2020); Bernadette Atuahene & Timothy R. Hodge, *Stategraft*, 91 S. CAL. L. REV. 263, 294–96 (2018); Beth Colgan & Jean Galbraith, *The Failed Promise of Installment Fines*, 172 U. PA. L. REV. 989, 991–93 (2024); Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1126–27 (2014).

[11] *Offender Management Programs*, SENTINEL, https://perma.cc/LQA4-SFP8.

in Anglo-American history—shed light on the coerciveness of IA contracting today. This Part also presents the results of the first systematic study of the legal frameworks in ten states for four types of IA contracts: criminal diversion, electronic monitoring, probation and parole, and halfway houses. It concludes that those legal regimes do not adequately restrain the exploitive potential inherent in IA contracting.

Part III considers solutions to the problems of IA contracting. It first draws lessons gleaned from the empirical study of legal frameworks presented in Part II. It argues that, because of the threats that bargaining poses to the values and legitimacy of criminal enforcement, the best response to this practice is a prophylactic one: disallowing it and publicly funding IAs. To the extent that prohibition is politically infeasible, other responses might reduce mistreatment of defendants. Those second-best solutions will vary depending on the IA type, but in general, they involve more market discipline of IA firms, more state discipline, or both. The former solutions sound in requiring effective competition, while the latter sound in tighter regulation. Recognizing that regulatory change might be slow, this Part then appraises possible arguments from the common law of contract to determine their viability for challenging this practice. It finally argues for additional actions that judges in criminal law cases could take to mitigate exploitation in IA contracts.

Part IV responds to objections to the critique of IA contracting. It argues that the ubiquity of plea bargaining, and defenses of that practice, do not compel the acceptance of IA contracting. Without defending plea bargaining, it argues that the commodification that IA contracting introduces into criminal enforcement distinguishes it from plea bargaining and provides reasons for even those who accept plea bargaining to oppose IA contracting. This Part also responds to the objection that eliminating IA contracting will not make defendants better off, offering reasons to expect that it might.

The Article concludes by highlighting the stakes of this practice for the legitimacy of the criminal enforcement system and the state. The legitimacy of criminal enforcement and of government generally is in crisis, particularly with marginalized citizens. A high priority among the many needed criminal enforcement system reforms should be ensuring that the system is, and is seen to be, focused on serving legitimate public goals rather than the end of transferring wealth from the poorest citizens to the state and favored private actors.

I. IA CONTRACTING AND THE EXPANDED CHOICE NORM

This Part describes the practice of IA contracting, introduces the expanded choice norm that is the foundation of classical contract theory, and explains IA contracting's prima facie plausibility under this norm.

A. Bargaining in the Shadow of Prison

IA contracting typically involves threatening or imposing criminal enforcement measures and offering the threatened person the option of contracting for a less severe measure in exchange for money or other things of pecuniary value. Formally, the proposal might be structured in one of two ways: as a command to contract for the IA (as in a sentence upon conviction or plea bargain), backed by the threat of criminal sanctions for violation; or as a more favorable choice in lieu of a default criminal enforcement measure (as in pretrial release subject to electronic monitoring).[12] On one side of the deal is a firm offering to trade IA services in exchange for money together with risk-reduction terms such as liability limitations. On the other side of the transaction is a person facing the risk or certainty of time in jail or prison, or subjection to other criminal enforcement measures. The person might be a suspect or a defendant subject to pretrial detention,[13] a person who has been offered pretrial diversion or a plea bargain, or a person who has already been convicted of a crime and sentenced to serve up to a maximum term of imprisonment. For simplicity, the Article will refer to this person throughout as "the defendant." IA contracting also commonly entails the imposition of criminal penalties on the weaker party for breach of contract. The four services most commonly provided in this fashion are electronic monitoring, criminal diversion, probation and parole supervision, and halfway houses.

Consider several recent examples. Hakeem Meade turned himself in to police in New Orleans after an altercation with a car mechanic in which he and his girlfriend were shot, resulting in

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[12] *See, e.g.*, *Alternatives to Incarceration in a Nutshell*, FAMILIES AGAINST MANDATORY MINIMUMS (July 8, 2011), https://perma.cc/W4NE-QP6L; UNITED NATIONS OFF. ON DRUGS & CRIME, HANDBOOK OF BASIC PRINCIPLES AND PROMISING PRACTICES ON ALTERNATIVES TO IMPRISONMENT 6–7 (2007); U.S. SENT'G COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS 23 (2017).

[13] People might be in this situation before or after the charging decision.

the loss of their unborn twins.[14] During more than a year of pretrial appearances, Meade worked, passed all mandated drug tests, and complied with all the conditions of his release.[15] After Meade was transferred to the court of Judge Paul Bonin, the judge ordered him without explanation to contract with ETOH, an electronic monitoring firm with which the judge had "longstanding personal, financial, professional, and political ties."[16] The judge allegedly ordered defendants to contract for ankle monitoring more often than other New Orleans judges and steered them to ETOH even though there were other approved providers.[17] The judge allegedly acted as a personal collections agency for ETOH, fielding reports on defendants who were behind on payments,[18] keeping people on monitoring, and threatening to jail them for nonpayment.[19]

In Alabama, Catherine Regina Harper was placed on privately operated probation solely because she was unable to immediately pay a traffic fine.[20] The probation firm was granted the entitlement to collect $40 per month from probationers, plus fees for other mandated services such as drug testing, and to supervise their compliance with probation conditions.[21] The company allegedly more than doubled the probation term ordered by the court in most cases, added to the fine, and added conditions unrelated to the underlying offense that allowed the company to increase fees and extend probation for noncompliance.[22] It is alleged that no judge ever reviewed the added terms and that people were threatened with jail for failing to comply.[23]

Tens of thousands of people live in privately operated halfway houses funded partly through rental payments and other fees

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[14] First Amended Class Action Complaint for Declaratory and Injunctive Relief ¶¶ 16–18, Meade v. Bonin, 2020 WL 5311351 (E.D. La. Sept. 4, 2020) (No. 2:20-CV-01455) [hereinafter Meade Class Action Complaint].

[15] *Id.* ¶¶ 19–22, 33, 39.

[16] *Id.* ¶¶ 1, 23, 26–27.

[17] *Id.* ¶¶ 80, 83.

[18] *Id.* ¶¶ 87–88.

[19] Meade Class Action Complaint, *supra* note 14, ¶¶ 84–85.

[20] Complaint (Class Action) ¶¶ 119–20, Harper v. Pro. Prob. Servs., Inc., 2019 WL 3555068 (N.D. Ala. Aug. 5, 2019) (No. 2:17-CV-01791).

[21] *Id.* ¶ 3.

[22] *Id.* ¶¶ 52–61.

[23] *See* Harper v. Pro. Prob. Servs., Inc., 976 F.3d 1236, 1239, 1243 (11th Cir. 2020). The appellate court overturned a motion to dismiss in the probation company's favor, holding that, if plaintiffs' allegations were true, the company violated probationers' due process rights by exercising delegated power to lengthen probation, increase fines, and add probation conditions. *See id.* at 1238.

from their residents.[24] These residences exert extensive control over their residents' daily lives and have wide discretion in applying and enforcing rules.[25] Their residents, in turn, depend on the houses to certify that they deserve to remain out of jail. Government audits have found homes that misused their discretion primarily to advance the owners' financial interest rather than to perform the correction and rehabilitation functions delegated to them, such as by ignoring serious behavioral violations of residents' terms of release but pretextually sanctioning residents who were behind on payments.[26] Investigative reporting has found that government audits are performed infrequently and that officials have regularly failed to remedy deficiencies.[27] Available studies of halfway houses show that a majority of residences are of low quality and have poor outcomes compared with alternatives such as parole.[28]

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[24] *See* Roxanne Daniel & Wendy Sawyer, *What You Should Know About Halfway Houses*, PRISON POL'Y INITIATIVE (Sept. 3, 2020), https://perma.cc/CWG3-UFPG. In 2019, 31,776 people were housed in community correctional facilities operated by private contractors. *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES 7 tbl.1 (2019).

[25] *See* Daniel & Sawyer, *supra* note 24 (describing the far-reaching control halfway houses exercise over their residents and the lack of transparency into how that control is exercised).

[26] *See* Sarah Stillman, *Get Out of Jail, Inc.*, THE NEW YORKER (June 16, 2014), https://perma.cc/27AR-GZMK (quoting a former for-profit halfway house manager describing the facilities' view of residents as "big six-foot pile[s] of money in a bed").

[27] *See, e.g.*, Moe Clark, *Colorado Lawmakers Mandate Audit of Halfway Houses Following ProPublica Investigation*, PROPUBLICA (May 1, 2023), https://perma.cc/DSV4-KC64; *see also Reports*, OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., https://perma.cc/W3LA-3AYV (listing that, since 2013, only ten audits of federal residential reentry centers have been released by the Office of the Inspector General).

[28] *See* EDWARD J. LATESSA, LORI BRUSMAN LOVINS & PAULA SMITH, FOLLOW-UP EVALUATION OF OHIO'S COMMUNITY BASED CORRECTIONAL FACILITY AND HALFWAY HOUSE PROGRAMS—OUTCOME STUDY 11 (2010); Christopher T. Lowenkamp & Edward J. Latessa, *Increasing the Effectiveness of Correctional Programming Through the Risk Principle: Identifying Offenders for Residential Placement*, 4 CRIMINOLOGY & PUB. POL'Y 263, 284 (2005); EDWARD J. LATESSA, CHRISTOPHER T. LOWENKAMP & KRISTIN BECHTEL, COMMUNITY CORRECTIONS CENTERS, PAROLEES, AND RECIDIVISM: AN INVESTIGATION INTO THE CHARACTERISTICS OF EFFECTIVE REENTRY PROGRAMS IN PENNSYLVANIA 195–96 (2009); *see also* Moe Clark, *"Another Place to Warehouse People": The State Where Halfway Houses Are a Revolving Door to Prison*, PROPUBLICA (Sept. 16, 2022) [hereinafter Clark, *Another Place to Warehouse People*], https://perma.cc/E3WN-ZA9A (describing a government audit that found "a clear pattern of inappropriate application of serious sanctions to minor behavioral violations, especially those related to financial matters"); Sam Dolnick, *Pennsylvania Study Finds Halfway Houses Don't Reduce Recidivism*, N.Y. TIMES (Mar. 24, 2013) https://perma.cc/RB5E-CW4A (reporting on a Pennsylvania Corrections Department study that found recidivism rates for halfway house residents were 67%, compared with 60% for straight parolees); Cheryl Lero Jonson & Francis T. Cullen, *Prisoner Reentry Programs*, 44 CRIME & JUST. 517, 540–41 (2015) (reiterating earlier studies and finding that low-risk offenders tend to have

Before this study, no data had been systematically collected on IA contracting. This Article includes the results of a study designed to indicate how many jurisdictions currently practice IA contracting and how they regulate the practice. The detailed results are reported below in Part II.E and in the online Appendix.[29] In brief, of forty regimes studied—comprising of four types of IA contracts in ten states—seventeen were found to practice IA contracting. Other reports indicate that privately operated diversion programs number in the hundreds and are spreading.[30] Tens of thousands of people every year are mandated to live in halfway houses.[31]

Other data give some indication of the number of accused persons who might be subject to IA contracting in the future as governments increase their use of privately administered IAs. As use of private prisons declines, IA services are one of the fastest-growing segments of the private-offender-management market and are being aggressively marketed to governments.[32] Though currently many jurisdictions that work with private companies do so entirely through public procurement contracts rather than

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higher recidivism rates at halfway houses). *But see* Jennifer S. Wong, Jessica Bouchard, Kelsey Gushue & Chelsea Lee, *Halfway Out: An Examination of the Effects of Halfway Houses on Criminal Recidivism*, 63 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 1018, 1029 (2019) (presenting a meta-analysis suggesting halfway houses are an effective correctional strategy but not distinguishing among halfway houses based on privatization or the contractual structure of services provisions).

29 *See* S.R. Blanchard, Appendix to Contract or Prison, https://perma.cc/QZZ4-42Z7.

30 Romney, *supra* note 1; ACLU, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 6–7 (2018).

31 *See* Daniel & Sawyer, *supra* note 24; *About Our Facilities*, FED. BUREAU OF PRISONS, https://perma.cc/Y7UL-TEVQ (identifying that there are nearly ten thousand beds at the federal level alone).

32 *See, e.g.*, Lartey, *supra* note 8. CoreCivic and GEO Groups are two of the largest private criminal corrections companies and have been diversifying into IAs. CoreCivic, Inc., Annual Report (Form 10-K) 14 (Feb. 20, 2024) ("We execute cross-departmental efforts to market CoreCivic Community solutions to government partners seeking residential reentry services . . . ."); *CoreCivic Statement on President Biden's Executive Order Regarding Private Contractors*, CORECIVIC (Jan. 26, 2021), https://perma.cc/9GGF-VVVN:

> While we aren't the driver of mass incarceration, we are working hard to be part of the solution. Our efforts are fully aligned with the administration's goal to prioritize rehabilitation and redemption for individuals in our criminal justice system. . . . In 2014, we made commitments to strengthen reentry programming unprecedented for the public or private sector.

Electronic monitoring, supervision, and reentry services have grown at GEO Group and have received their own categories in GEO's annual investors' reports. These IA services provided 29% of GEO's revenue in 2023, up from 20% of revenue from "community services" in 2013. *Compare* The Geo Group, Inc., Annual Report (Form 10-K) 58 (Feb. 29, 2024), *with* The Geo Group, Inc., Annual Report (Form 10-K) 61 (Mar. 3, 2014).

mandatory contracting by criminal defendants,[33] firms are marketing to governments direct, mandatory contracting by offenders—suspects are silently included—as a solution to tight budgets and expanding caseloads.[34] Roughly 500,000 people in the United States face pending criminal proceedings at any time,[35] and around four million people are under community supervision.[36] The U.S. government and all fifty states use electronic monitoring,[37] contributing to a growing market estimated at $2.01 billion

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[33] Chicago's Cook County, for example, contracts with Track Group, Inc. to procure electronic monitoring devices. Cook Cnty. Gov't & Track Grp., Inc., Professional Services Agreement: Electronic Monitoring Services (Jan. 24, 2019) (government contract) (available at https://perma.cc/3MYD-AWDG). Probationers then contract directly with the Sheriff's Office or Chief Judge to participate in the program. Cook Cnty. Sheriff's Off., Community Corrections—Electronic Monitoring (EM) Program (GPS) Information Sheet (Aug. 2020) (Cook Cnty. Sheriff's Off. form) (available at https://perma.cc/W28D-V9TN). These programs are largely taxpayer funded: the county appropriated $30.7 million for electronic monitoring in 2021 and $35.5 million in 2022. *Exploring the Data on Cook County Pretrial Electronic Monitoring Programs*, THE CIVIC FED'N (June 3, 2022), https://perma.cc/E7NZ-GK2M; 2 TONI PRECKWINKLE, 2022 COOK COUNTY ANNUAL APPROPRIATION BILL, at K-17, O-45 (available at https://perma.cc/6RJX-SJDR); *see also supra* note 28 and accompanying text (describing Ohio's financing model for halfway houses, which does not involve direct contracting between defendants and residences).

[34] *See Offender-Funded Programs*, SENTINEL, https://perma.cc/F8EJ-C6QM ("Reductions to correctional agency budgets threaten the operation of offender supervision and monitoring programs across the nation. . . . [So] Sentinel created the first ever Offender-Funded electronic monitoring program in 1993."); Chris Mai & Maria Katarina E. Rafael, *User Funded? Using Budgets to Examine the Scope and Revenue Impact of Fines and Fees in the Criminal Justice System*, 63 SOCIO. PERSPS. 1002, 1002–03 (2020) (discussing local governments' increasing reliance on "user fees," especially in the wake of the 2008 recession and decreased tax revenues); *Atlanta Sentinel Pullout*, THE MARSHALL PROJECT 121 (Apr. 12, 2017), https://www.themarshallproject.org/documents/3514666-Atlanta-Sentinel-Pullout#document/p121/a343469 (documenting emails sent during the bidding to replace Sentinel Offender Services in the Atlanta courts, including one assuring Atlanta officials that the proposed Judicial Correction Services contract would be fully offender funded and offered at no cost to the city); Kevin Bliss, *Costly Electronic Monitoring Programs Replacing Ineffective Jail Bond Systems*, CRIM. LEGAL NEWS (Dec. 18, 2019), https://perma.cc/Z6FW-JSWR (describing how "[c]ash-strapped counties and municipalities" allow electronic monitoring companies to contract with offenders because the arrangement is a better financial option for the municipalities than incarceration).

[35] *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1346 (2014); U.S. COMM'N ON C.R., THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 22 (2022).

[36] *See* DANIELLE KAEBLE, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2021, at 19 (2023) (finding that 3.88 million adults were under community supervision nationally as of January 1, 2021).

[37] *See* Isaacs, *supra* note 5, at 4–5; STEVEN R. TYLER, SUBRAMANIAM KANDASWAMY, TIMOTHY EVANS & DAVID MAHAFFEY, NAT'L INST. OF JUST., MARKET SURVEY OF LOCATION-BASED OFFENDER TRACKING TECHNOLOGIES, at A-9 to A-10 (2016) (finding that by 2009, all states except Kentucky, Minnesota, and Nevada used electronic monitoring). All three states that didn't use electronic monitoring as of 2009 now do so.

in 2024 and projected to grow to over $3 billion by 2030 according to a market research firm.[38] Policymakers and scholars increasingly view electronic monitoring favorably—with good reason—as a cost-effective and more humane alternative to incarceration.[39] In 2021, about 255,000 people were on ankle monitoring, a fivefold increase since 2005.[40] The First Step Act,[41] enacted in 2018, expands electronic monitoring in service of its laudable goal of easing reentry for people convicted of crimes.[42] Those whose monitoring is structured via contract are paying up to $47 per day.[43] Unlike criminal fines and fees, which are at least formally set through legislation and by reference to democratic determinations of culpability and deterrence, IA contract prices are set by unrelated market considerations through a nondemocratic process.

We are therefore at a historical transition point. More people now have, or will soon have, the opportunity to avoid prosecution or incarceration through technologies and legal reforms.[44] The IA industry is marketing the defendant-contracting model to

Electronic Monitoring and Early Release, LEXINGTON-FAYETTE URB. CNTY. GOV'T, https://perma.cc/7L57-XEH3; *Minnesota Monitoring*, MINN. MONITORING, https://perma.cc/WT4Q-3VRW; *Electronic Monitoring*, STEARNS CNTY. MINN., https://perma.cc/8VNQ-JTY3; *House Arrest*, LAS VEGAS METRO. POLICE DEP'T, https://www.lvmpd.com/about/bureaus/clark-county-detention-center/house-arrest.

38 *Electronic Offender Monitoring Solutions Market Size & Share Analysis—Growth Trends & Forecasts (2025–2030)*, MORDOR INTEL., https://perma.cc/T5PQ-TDQQ; *see also* Isaacs, *supra* note 5, at 15–17.

39 *See, e.g.*, Wiseman, *supra* note 35, at 1398; Malcom M. Feeley, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Justice System—An Account of Convict Transportation and Electronic Monitoring*, 17 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 1, 13 (2016); Jenifer B. McKim, *'Electronic Shackles': Use of GPS Monitors Skyrockets in Massachusetts Justice System*, GBH NEWS (Aug. 10, 2020), https://perma.cc/SJE3-3GLS (quoting a Massachusetts Parole Board official advocating for expanded use of GPS devices as a strategy for reducing incarceration).

40 JESS ZHANG, JACOB KANG-BROWN & ARI KOTLER, VERA INST. OF JUST., PEOPLE ON ELECTRONIC MONITORING 10 (2024).

41 Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

42 *See id.* § 102(b)(1)(B), 132 Stat. at 5210–13.

43 *See* KATE WEISBURD ET AL., GEORGE WASH. UNIV. L. SCH., ELECTRONIC PRISONS: THE OPERATION OF ANKLE MONITORING IN THE CRIMINAL LEGAL SYSTEM 15–17 (2021) (providing daily fee scales nationwide and other charges that electronic monitoring companies collect); *see also* FINES & FEES JUSTICE CTR., ELECTRONIC MONITORING FEES 6 (2022).

44 There is a so-far slow but perceptible shift toward what has been called "criminal law minimalism" that prefers alternatives to incarceration. *See generally* Christopher Slobogin, *The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531 (2024); Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020).

governments across the United States, and more and more governments are adopting it,[45] but it is not inevitable.

B. Plausibility Under the Expanded Choice Norm

An assessment of how IA agreements should be treated under contract law can begin from within the tradition of classical contract theory. Though subject to critiques, classical contract theory—which originated in the thinking of political economists Adam Smith and John Stuart Mill—was elaborated by scholars in the law and economics and liberal traditions over the last half century and comprises the most widely accepted theory of contract law in the United States.[46] The theory is functionalist: it justifies the presumptive enforceability of contracts by reference to the efficiency and autonomy benefits of expanded choice.[47] While theorists diverge on whether expanded choice is good because it increases utility or because it promotes autonomy, they converge on the desirability of expanded choice.[48] For efficiency theorists, the ability to exchange entitlements increases their wealth by allowing people to trade things they value less for things they value more. For autonomy theorists, the ability to exchange entitlements is good because it generates new options for carrying out one's plans.[49] Contract law is justified instrumentally for theorists of both types because it expands the set of possible exchanges by facilitating credible commitments to perform promised actions in the future.[50]

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45 For example, Florida is expanding private probation companies' ability to engage in IA contracting. *See* 2022 Fla. Laws 1676 (codified at FLA. STAT. § 948.01–.15) (removing a statutory prohibition against private companies' supervision of misdemeanor offenders).

46 *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 549–50 (2003); Jack Beatson & Daniel Friedmann, *From 'Classical' to Modern Contract Law*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 3, 7–10 (Jack Beatson & Daniel Friedmann eds., 1997); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 490 (1989); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1293–94 (1979); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 456–57 (1909) (discussing Adam Smith's and John Stuart Mill's defenses of liberty of contract).

47 *See* Alan Schwartz & Daniel Markovits, *Function and Form in Contract Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW THEORY 243, 244–46 (Andrew S. Gold et al. eds., 2020) (discussing functionalist theories based on autonomy and efficiency as both being focused on preference satisfaction).

48 Jody S. Kraus, *Philosophy of Contract Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 688 (Jules Coleman & Scott Shapiro eds., 2004) (discussing disagreements among economic and autonomy theories of contract and the "convergence thesis" that the two theories justify substantially identical legal systems for contract).

49 *See* STEPHEN A. SMITH, CONTRACT THEORY 110–12 (2004).

50 *Id.* at 112.

To assess IA contracts under this paradigm, begin by assuming that an arrest, charge, conviction, and sentence imposed are lawful and motivated by legitimate public purposes.[51] Before the defendant interacts with the firm, the state[52] presents him with a choice: serve the full sentence of incarceration or contract for the alternative.[53] The contract offer seems to increase the defendant's welfare and autonomy. Incarceration is so bad and so inimical to his personal liberty that the option of contracting for an alternative would seem to improve his welfare and autonomy at a wide range of prices.[54] Through the lens of classical contract theory, it is not immediately apparent that there is a problem with this scenario. The expansion across the United States of IA contracting reveals the pervasiveness of this perspective,[55] which follows from the widespread acceptance of plea bargaining and market models of public service provision.[56]

II. THE PROBLEM OF COERCIVE BACKGROUND ENTITLEMENTS

Despite the surface-level acceptability of IA contracting under the expanded choice norm, it is not difficult to detect a problem of fit with the preconditions assumed in classical contract theory. The argument made here is that IA contracting is not justified as a practice of free contract because it rests on coercive

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51 Whether the pretrial context or the plea bargaining context changes the analysis, as well as possible dynamic effects on the legitimacy and lawfulness of the state's arrest, charging, and conviction decisions, can be examined by adapting the base case analysis. Part II.C and Part II.D below address some such potential and observed effects.

52 The "state" is used here to refer to any government entity with authority to present this choice to the defendant.

53 This description captures the variations of a person being offered contract as an alternative to his entire sentence or as a means of early release. This description of the form of the choice also captures scenarios in which a defendant is ordered to contract rather than expressly offered contract in lieu of more severe measures. That is because when a criminal defendant is ordered to contract, the consequence of failing to do so is the application of more severe criminal enforcement measures. *See, e.g.*, Hunter v. Etowah Cnty. Ct. Referral Program, LLC, 309 F. Supp. 3d 1154, 1155–65 (N.D. Ala. 2018) (documenting the use of company and court records to issue arrest warrants for failure to enroll in a private "court referral program").

54 There is no reason to believe that the firm is coerced here, so the analysis focuses on the defendant.

55 *See, e.g.*, James Finn, *Deadly Failures, Vanishing Suspects: Scrutiny of Louisiana's Ankle Monitoring System Grows*, THE ADVOCATE (Feb. 16, 2023), https://perma.cc/23WE-E3UV (reporting state legislators' invocation of free-market arguments in service of nonregulation of IA firms).

56 *See infra* Part IV.A (discussing plea bargaining). For a book on this topic that was hugely influential both in the United States and abroad, and across the political spectrum, see generally DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992) (describing effusively recent experiments in government for profit and advocating its expansion).

entitlements that facilitate the leveraging of criminal enforcement discretion to induce assent.[57]

A. Precursor to Contract: Defining Entitlements

Entitlements define what may be owned and by whom.[58] Background entitlements are not defined by contract; they come from other areas of the law, paradigmatically property law. Contract law and theory take them for granted, even neglect them, except when people try to exchange entitlements that are inalienable or invalid, as in contracts for enslavement.[59] It is not necessary to follow the radical legal realists all the way to the conclusion that all bargains are essentially coercive to recognize, realistically, that there is a category of social relations in which the voluntariness of private bargains is doubtful because of coercion inherent in the background entitlements.[60] Even a defender of law-backed private ordering as avid as economist F.A. Hayek recognized limiting conditions that undermine the presumption of voluntariness in exchange.[61] Wherever the boundary around that category lies, IA contracting falls within it and should be viewed as presumptively invalid, demanding at minimum careful case-by-case judicial scrutiny and robust regulation.

The practice of IA contracting begins with the creation of new entitlements that leverage the criminal law for the purpose of empowering firms, acting as agents of the state, to sell defendants more favorable alternatives to punitive state measures. Governments delegate criminal enforcement powers to IA providers, including those of surveillance; monitoring and adjudication of compliance with enforcement measures; and deprivation of liberty and property. IA providers then propose to exchange the exercise of those delegated powers for money and other consideration from defendants.

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[57] There are many ways to view the problems with this scenario, including through the primary lens of public duty, the purposes of criminal enforcement, and criminal law. The approach presented here seeks to take the vantage point of classical contract theory while paying due attention to the public values at stake.

[58] *See, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 276 (1986).

[59] *See id.* at 293.

[60] *Cf.* Gary Peller, *Classical Theory of Law*, 73 CORNELL L. REV. 300, 306–08 (1988) (arguing that all entitlements are inherently coercive and, therefore, the notion of voluntary bargains is fictitious).

[61] *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 203–04 (Ronald Hamowy ed., Univ. of Chi. Press 2011) (1960) (acknowledging that monopolization of an essential service permits coercion).

To say that the IA is a lawful and acceptable means for the defendant to satisfy the applicable criminal enforcement measure is to say that the alternative accomplishes the government's criminal enforcement goal. That is, the applicable measure takes the form of either incarceration or the IA. As noted above, most IAs are less costly to the state per defendant than incarceration.[62] Choosing enforcement measures that serve the state's criminal enforcement goals at the lowest cost will tend away from incarceration and toward privatized alternatives. Granting that the state and not the defendant has the authority to choose discretionarily between the alternatives, what is the logic behind making the availability of an alternative that is both preferable to the defendant and acceptable and less costly to the state conditional on the defendant's entry into a commercial contract? Governments regularly purchase privatized services through public procurement, and they could do so in this context if the goal is to reduce costs and improve service quality. A further step is involved in allocating entitlements to require defendants to contract for access to a less severe and less expensive alternative.[63]

B. Coercion and Voluntary Consent

As discussed above, classical theory justifies the enforcement of contracts instrumentally as a means of increasing material welfare and autonomy. Voluntary consent is a precondition to contract under classical theory because exchange can only be presumed to promote welfare or autonomy if it is uncoerced.[64] But not every constraint on choice amounts to coercion; all choices are constrained to an extent. Contract theory grapples with the conditions under which constraints become so severe that they render an exchange involuntary and thus not a subject of contract

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[62] Some alternatives, such as addiction and other mental health treatment, might be more costly, at least in the short run.

[63] While this practice is susceptible to several critiques, this Article focuses on a critique from contract theory and law. There are humane and other policy reasons for the state to fund mental health services for defendants, even if doing so costs more than incarceration alone. Making the availability of IAs dependent on ability to pay exacerbates inequality among defendants. But focusing on classical contract law and theory reveals other fundamental problems with the practice that should be intelligible even to those disinclined to be moved by other concerns.

[64] *See* Peller, *supra* note 60, at 303; Schwartz & Markovits, *supra* note 47, at 245; MILTON FRIEDMAN, CAPITALISM AND FREEDOM 13 (40th anniversary ed., 2002) ("The possibility of co-ordination through voluntary co-operation rests on the elementary—yet frequently denied—proposition that both parties to an economic transaction benefit from it, provided the transaction is bi-laterally voluntary and informed." (emphasis omitted)); Pound, *supra* note 46, at 454 (discussing Smith's and Mill's defenses of liberty of contract).

enforcement. Uncoerced agreements are often distinguished from coerced agreements by differentiating offers from threats, where an offer expands the offeree's options but a threat takes away an option.[65] The task then is to determine the relevant baseline for assessing whether an option has been added or subtracted. A phenomenological baseline is what the threatened person reasonably expected before the proposal (threat or offer) was made. A moral baseline is set by reference to what the threatened person is morally entitled to. Economic welfare approaches seek to draw the line between coerced and uncoerced trades by reference to long-run or dynamic effects, with a view to disincentivizing investment in activity that has no social value—such as acquiring the power to force pure transfers and to protect oneself from them—and incentivizing behavior that generates new options.[66] The efficiency theorist committed to the paradigm of deference to individual choice as the best indicator of welfare would direct courts to assess whether the exchange, assessed ex ante, was expected to make the parties better off than they would have been had they not encountered one another.[67] This test implies that deals are not coerced unless one contracting party caused—either directly or indirectly—the risk facing the other party. If one party did not cause the other party's need, then the latter's encounter with the former and proposal of an alternative would seem to add an option to the other party's choice set relative to the phenomenological baseline.

The difficulty in teasing out the differences between threats and offers has given rise to a set of hypotheticals used to elicit and elaborate intuitions about the question. Comparing those hypotheticals to IA contracting illuminates what makes IA contracting tricky to assess. One set of hypotheticals focuses on an unambiguously wrongful threat that does not create value but forces a transfer of wealth, such as a gunman proposing, "Your money or your life."[68] This hypothetical is meant to capture situations in which one party creates a risk of taking away an indisputably valid entitlement from the threatened person unless the latter consents to the threatener's demands. Theorists of all stripes

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65 *See* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 80–84 (1993) (synthesizing the key theories of philosophers Robert Nozick, Joel Feinberg, and Alan Wertheimer, and jurist Charles Fried).

66 *See id.* at 83–84 (discussing Professor Anthony Kronman's analytically similar modified-Paretian principle, which would hold an instance of advantage taking to be voluntary and therefore enforceable if permitting it would, in general, tend to benefit the group to which the person taken advantage of belongs).

67 *Id.* at 84.

68 *Id.* (synthesizing this hypothetical from Nozick and others).

agree that doing so amounts to coercion that negates consent. This judgment is reflected in the clear rule that threats to commit a crime or a tort, or to wrongfully cause and then take advantage of a dire economic situation, render a contract induced thereby unenforceable because of duress.[69]

A second set of hypotheticals focuses on a situation in which a party facing a grave risk concludes a bargain with a rescuer who did not create the risk. An example is the captain of a ship in urgent need of rescue being offered rescue at an exorbitant price.[70] Autonomy and efficiency theorists, and various theorists within each group, diverge on whether this bargain should be enforced. Some autonomy theorists conclude that the ship captain has a moral entitlement to rescue at a reasonable price, so a proposal to rescue only at an exorbitant price is a threat. Other autonomy theorists, such as Robert Nozick, have argued that this bargain is not coerced because the rescuer offers a better option than the phenomenological baseline—thus, an offer rather than a threat.[71] Some efficiency theorists would similarly reason that the ship captain's payment shows his revealed preference that he values rescue more than its price. Other efficiency theorists zoom out from the particular transaction to ask whether enforcing the deal incentivizes optimal or excessive investment in rescue and prevention as compared to a regime of quantum meruit; their conclusions diverge.[72] Notably, this latter efficiency analysis does not rest on whether consent was given voluntarily—thus justifying a presumption of its social utility—but on whether the same beneficial outcome could be achieved at a lower social cost by instituting a different legal rule. That is not the kind of analysis that courts normally explicitly engage in when asked to enforce bargains, and it is in tension with the expanded choice norm.

The common law addresses this category of cases in which the offeror/threatener did not cause the other party's necessity through the doctrines of quantum meruit, unconscionability, and public policy. It is difficult to discern a general and determinate principle for distinguishing cases. Real-life cases involving

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69 *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. L. INST. 1981).

70 TREBILCOCK, *supra* note 65, at 85; *cf.* Post v. Jones (The Richmond), 60 U.S. (19 How.) 150, 159–62 (1856) (holding that a salvage bargain concluded under dire necessity is not enforceable as made by the parties but is subject to reform for reasonableness of terms).

71 *See* Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD 440, 447 (Sidney Morgenbesser et al. eds., 1969).

72 TREBILCOCK, *supra* note 65, at 86; William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 100–05 (1978).

bargains for rescue at sea concluded under peril are not governed by the rule of freedom of contract but subject to judicial reform.[73] Unconscionability and public policy are discussed in Part III.B.

The brightest line in the theories and in the doctrine is drawn by reference to whether one contracting party caused the risk faced by the other party. Where it did so wrongfully—on which more below—that is the nucleus of duress. Duress also extends to situations in which a counterparty was not the threatener but had a beneficial relationship with the threatener or should have known about the threat.[74] This focus on the causation of the risk by the offeror or a person plausibly colluding with the offeror reflects the law's concern with distinguishing threats that reduce choices from offers that augment choices. The core cases of wrongfulness are threats to commit crimes or torts, reflecting deference to baseline expectations encoded in other legal domains, which does not foreclose the possibility that those baselines are set by principles of dynamic efficiency or autonomy.[75]

C. Creating Coercive Entitlements

As IAs emerge as viable and less costly means of carrying out many aspects of the criminal enforcement function, states are creating new entitlements that interpose a contract proposal between the defendant and access to a lawful, less severe, and less costly means of complying with a criminal enforcement measure. Governments could reduce their criminal enforcement expenses by moving from incarceration to privatized alternatives paid for by public funds. But IA companies pitch their services to governments as self-funding.[76] Governments give the firms entitlements

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[73] *See* The Blackwall, 77 U.S. (10 Wall.) 1, 13–14 (1869) (setting out a six-factor test for determining remuneration for rescue of an imperiled vessel); *Jones*, 60 U.S. (19 How.) at 160.

[74] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (requiring ignorance of the threat to prevent duress defense). Some jurisdictions require more: a beneficial relationship between the threatener and the unthreatened contractual party benefiting. *Duress*, BLOOMBERG L., https://www.bloomberglaw.com/external/document/XF9CCU78000000/litigation-overview-duress.

[75] This feature of the doctrine leads some theorists to conclude that duress is not properly a part of contract law—because it is not related to consent—but is instead grounded externally to contract law in a principle that courts will not give support to wrongful behavior. *See* SMITH, *supra* note 49, at 316–20. Some economic theorists argue that the structure of legal wrongs and remedies reflects a design of systemic efficiency. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 98–99 (1972).

[76] *See, e.g.*, *Offender-Funded Programs*, *supra* note 34:

> Reductions to correctional agency budgets threaten the operation of offender supervision and monitoring programs across the nation. . . . Managing ever-growing offender populations with ever-shrinking fiscal resources is forcing

to sell IAs in order to reduce their operating costs or to raise revenue through fees.[77] The rise of IA contracting is one mode of the turn to local government minimization described by Professor Michelle Wilde Anderson. As she explained, wealthier jurisdictions adopting minimization do so to compete for residents by minimizing taxes and providing only public services that cater to the affluent.[78] Economically distressed jurisdictions adopt minimization to adapt to shrinking budgets and growing demand for services as poverty rises.[79] Creating entitlements to sell IA services is an example of local government asset monetization, a technique that local governments use to forestall or respond to financial distress instead of, or in addition to, cutting services.[80] Governments are monetizing the population of suspected and convicted persons, who are willing to pay to avoid criminal enforcement measures. In creating entitlements that empower IA firms to contract with these people, governments leverage the threat of criminal penalties to shift costs of criminal enforcement and other government functions onto defendants.[81]

> correctional agencies to re-examine the current direct-billing model that holds them singularly accountable for the costs of offender supervision . . . . Realizing that this situation was untenable, Sentinel created the first ever Offender-Funded electronic monitoring program in 1993.
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> This revolutionary offender-funded model removes all of the agency's financial responsibilities for their offender monitoring programs.

See also DMS Has Joined with Law Enforcement to Reduce Overcrowding and Provide Reliable Monitoring, DIVERSIFIED MONITORING SYS., https://perma.cc/7WUJ-VT2U:

> DMS can provide offender-funded monitoring meaning the defendant is required to pay the cost of their alcohol, GPS, or home confinement monitoring. Offenders monitored with SCRAM devices are kept out of jail as long as they remain compliant. This provides a significant saving to both the taxpayers and law enforcement agencies.

77 *See* ALBIN-LACKEY, *supra* note 8, at 13–14 (discussing the experience of local governments of finding that their efforts to raise revenue through criminal fines and fees cost more than the amount generated and their turn to private companies to take over the role and collect fees directly from citizens).

78 *See* Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1126 (2014); *see also* GARY J. MILLER, CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION 85–86 (1981).

79 *See* Anderson, *supra* note 78, at 1126–28, 1141–42, 1144.

80 *See id.* at 1160, 1167.

81 Governments use funds raised by IA contracting variously. While most state laws require fees collected from defendants by government agencies to be used for supervision, in three states revenue goes to the state general fund, and there are reports of state legislatures pressuring courts to produce revenue through fees. FINES & FEES JUST. CTR., *supra* note 43, at 9; Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES (July 2, 2012), https://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html. Revenue has been used to fund

Entitlements grounded in criminal law are a poor fit in the domain of contract. Whereas the criminal law is "a system of compulsion[,] . . . a collection of threats of injury to life, liberty, and property,"[82] contract enforcement is justified on the basis that there are moral reasons for the state to enforce promises made voluntarily.[83] The difficulty with assessing IA contracting from within the threat/offer paradigm is that the position of the state–IA contractor is apparently different from both that of the villainous gunman and that of the innocent rescuer in the core hypotheticals distinguishing threats from offers. Does the state, in cooperation with its agent the IA provider, create or merely exploit the defendant's vulnerability in the relevant sense? If the state–IA contractor is only exploiting and not creating the situation, is doing so wrongful in a sense that undermines the justification of the resulting contracts? If the state–IA contractor creates the situation, does the existence of coercion depend on whether the state is culpable like the gunman?

Begin with whether the state–IA contractor creates or only exploits the defendant's situation. If the defendant's subjection to the criminal enforcement measure flows from causes exogenous to the proposed bargain—such as suspicion or conviction of a crime—then the coercion does not seem to have been applied for the purpose of inducing consent to the contract. That would seem to make the situation one of necessity and the proposal of an IA contract an offer, not a threat. Once the exogenous cause puts the defendant in a state of necessity by subjecting him to loss of liberty or risk thereof, the state–IA contractor offers access to a less severe measure via contract.

But the state's willingness to offer via contract the measure that is less severe and less costly to administer undermines the

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retirements, training, labs, and computers. Bronner, *supra*. Some state laws expressly give local governments discretion in how to use fees they earn through deals with private IA firms. FINES & FEES JUST. CTR., *supra* note 43, at 9. Other states have statutory restrictions on the use of funds that governments collect from criminal defendants and those convicted of crimes but no legislation specifically governing the use of fees that governments earn through deals with IA firms. *Id.* In those states, deals that grant firms entitlements to sell IAs to defendants or offenders and to share revenue with governments can be used to circumvent statutory limits on criminal fines and fees. *Id.* Even when firms do not share revenue with governments, they remove enforcement expenses from state or local government budgets and place them directly on defendants.

82 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 107 (Cambridge Univ. Press 2014) (1883).

83 *See, e.g.*, Peller, *supra* note 60, at 300–02 (describing the rules of tort, contract, and property as conceived of as providing a "neutral, objective framework within which individuals could pursue their own, self-defined ends free from social coercion").

conceit that the defendant's state of necessity flows from an exogenous cause—punitive or preventive measures occasioned by criminal suspicion or conviction—without reference to the contract offer. It reveals that the threatened measure presented as the more severe alternative to contracting is one among a set of measures the state could have applied. It could have instead applied the milder measure now offered contractually. It is therefore untenable to cast the baseline measure as an exogenous circumstance against which the state–IA contractor has independently made an offer, as in the case of the innocent rescuer. Rather, the state has created a regime that takes a group of people subject to its coercion and has used its discretion to structure the coercion in a manner that will tend to induce assent. The state–IA contractor has caused the risk facing the defendant; it is not the innocent rescuer. That does not necessarily imply that it is the villainous gunman, but it does necessarily imply that it is applying coercion for the purpose of inducing assent.

One difficulty in applying the threat/offer paradigm lies in determining the appropriate baseline. As discussed, phenomenological baselines refer to people's reasonable expectations. Given the uncertainties inherent in facing the criminal enforcement system and the discretion enjoyed by the public officials involved, it is likely that many defendants do not have granular expectations about what might actually happen to them. But they have reasonable expectations about the considerations and procedures that will *determine* what will happen to them. Criminal defendants reasonably expect that the measures imposed upon them will be determined through lawful procedures and justified by reference to the legitimate public ends for which criminal enforcement power may be used. As explained above, when a state proposes a contract for a less severe criminal enforcement measure, it reveals that the less severe measure satisfies the state's preventive or punitive criminal enforcement interests. Therefore, the state's offer of the less severe measure, via consumer contract, constructs the specific content of the defendant's reasonable expectation of treatment. Defendants who receive such proposals reasonably expect to access the less severe measure without having to exchange consideration for it. Therefore, proposing to subject them to the more severe measure unless they contract and pay is a threat that removes a reasonably expected choice rather than an offer that adds a choice.

It might be argued that even if the proposal is a threat, the threat or application of a lawful criminal enforcement measure is

not wrongful and therefore does not undermine the validity of a contract induced thereby. However, it can be true that a criminal enforcement measure is lawful and also that it is being used wrongfully. An analogy to blackmail is apposite. The law of blackmail criminalizes threatening to perform an act that would not itself be criminal.[84] The theories of blackmail that most closely align with empirically demonstrated moral intuitions locate its wrongfulness in the threatener's motivations.[85] Even if the threatened act is not wrongful in itself, threatening it becomes wrongful if done to induce payment.

A similar principle has been articulated in contract.[86] An insight that appears repeatedly in the case law on threats of criminal prosecution and duress is that mechanisms, the purpose of which is to vindicate the public interest in criminal enforcement, are misused when employed to induce assent to contract. While that principle emerged in a different social context, it is broad enough to apply to this one. The context in historical cases was most often that of a person threatening or causing criminal prosecution or imprisonment and using that threat or use of force to induce the other party to agree to civilly settle the matter that was also subject to criminal sanctions under the law. Historically, those contract cases typically involved threats by private parties.[87]

However, the history of abolished practices analogous to IA contracting illuminates the same principle underlying the use of criminal enforcement power by public officials and their agents or beneficiaries. Courts and legislatures historically recognized the illegitimately coercive nature of practices analogous to IA contracting that empowered private parties to profit from the exercise of coercive public authority. They applied the common law, and eventually legislated, to decline to enforce bargains or to hold them extortionate or oppressive.

Before turning to a discussion of those historical practices and their abolition, the next Section discusses the risk of moral

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84 *See* Paul H. Robinson, Michael T. Cahill & Daniel M. Bartels, *Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory*, 89 TEX. L. REV. 291, 293 (2010).

85 *See id.* at 296–98, 339–40 (discussing Professor Mitchell Berman's and Professor Leo Katz's theories of blackmail and showing the results of an empirical study of moral intuitions demonstrating that those theories most align with lay intuitions).

86 *See* Silsbee v. Webber, 50 N.E. 555, 556 (Mass. 1898) (invalidating a contract induced by a threat to tell the counterparty's spouse about their son's theft, reasoning "it does not follow that, because you cannot be made to answer for the act, you may use the threat").

87 *See supra* notes 70, 86, and accompanying text.

hazard inherent in the creation of coercive entitlements. The discussion of historical analogs that follows in Section E illuminates both the coercive nature of the entitlements created to enable IA contracting and the risk of moral hazard that history shows attends extractive entitlements of this type.

D. Adding Moral Hazard: Net Widening and Shirking

The public is indifferent to the treatment of people involved in the criminal enforcement system relative to other voter concerns, such as the level of taxation and the provision of public services that voters experience as tangibly welfare improving.[88] That indifference weakens democratic processes as means of disciplining officials in criminal enforcement systems for the treatment of people suspected or convicted of crimes. Government officials and their private delegates have substantial slack that enables them to apply low effort in operating or supervising IAs and to engage in net widening, applying criminal enforcement power to bring in revenue for the state or firms exercising delegated power. Government actors have already been documented shirking their duties to oversee IA firms.[89] At least as pernicious is the opportunity for corruption or influence by IA firms on elected judges, sheriffs, prosecutors, or other local government officials in a position to coerce people into contracting with these firms, leading to net widening.[90]

Net widening is the expansion of the use of IAs beyond legitimate criminal enforcement purposes. Because it lowers the cost to the government of IAs and even allows those activities to become revenue generators, IA contracting creates incentives for net widening.[91] There is evidence of increased use of electronic

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88 Melissa de Vel-Palumbo & Colleen M. Berryessa, *When Bad Things Happen to Rotten People: Indifference to Incidental Harms in the Criminal Justice System*, 29 PSYCH., CRIME & L. 795, 795 (2022).

89 *See* Bruce Bender & John R. Lott, Jr., *Legislator Voting and Shirking: A Critical Review of the Literature*, 87 PUB. CHOICE 67, 73–79 (1996).

90 *See, e.g.*, Meade v. Bonin, 2021 WL 4133506, at *1 (E.D. La. Sept. 10, 2021), *appeal dismissed in part*, 2022 WL 5287800 (5th Cir. Feb. 15, 2022) (alleging improper use of judicial influence to direct defendants to certain IA servicers).

91 A similar dynamic led to increased criminalization and imprisonment under the system of convict leasing. *See* Ion Meyn, Essay, *White-on-Black Crime: Revisiting the Convict Leasing Narrative*, 2024 WIS. L. REV. 533, 536, 540 (citing DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, at 64–70, 79 (2008)):

> Proceeds of these lease agreements funded the livelihoods of White judges, deputies, witnesses, and court staff, as well as the legal system's physical infrastructure. A financial market formed around the system, in which

monitoring over time, as well as its possibly unwarranted use,[92] though it is not clear whether this increased use amounts to net widening in the sense used here. For instance, in recent years, evidence has suggested that pretrial electronic monitoring is used in addition to bail when previously bail alone would have been required for release.[93] Without a criterion by which to determine the appropriate level of use of monitoring, it is not possible to say with certainty whether this increase in electronic monitoring amounts to unjustified net widening. However, expert observers have expressed concern that net widening is occurring in electronic monitoring.[94]

The 2015 Department of Justice report on the Ferguson, Missouri, police department's deployment of law enforcement power to raise revenue from poor, and especially Black, citizens should inspire special attention to the risk of revenue-generating net widening through arrests and citations.[95] This practice—in various guises—appears to be not uncommon.[96] A person arrested on suspicion of a crime and required to enter into an IA contract as a condition of pretrial release might pay thousands of dollars

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> lenders paid a percentage of the lease's value to state actors, assuming the risk of not receiving full payment at the end of the lease term.
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> . . .
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> Statistics . . . support the contention that a significant number of Black men were sent to forced labor as a result of a White-perpetrated criminal conspiracy. For example, in the year that Shelby County, Alabama, entered into an agreement to furnish convict labor to surrounding mines, the county's "crime rate" spiked 1,100 percent in just one year. Before this arrangement, the county averaged twenty convictions each year . . . . After [the] agreement . . . , the county register indicates at least twenty convictions each month.

92 Catherine Crump, *Tracking the Trackers: An Examination of Electronic Monitoring of Youth in Practice*, 53 U.C. DAVIS L. REV. 795, 802–06 (2019); *Examining Electronic Monitoring Technologies*, PEW CHARITABLE TRS. (Nov. 19, 2015), https://perma.cc/NN98-K9ZC (reporting on a study of probation and parole officers finding that many people who judges placed on electronic monitoring did not warrant monitoring to protect public safety or reduce flight risk).

93 *See, e.g.*, Crump, *supra* note 92, at 805–07 (reporting evidence of net widening in juvenile criminal enforcement based on trends in the number of juveniles enrolled in monitoring relative to those incarcerated and interviews with defense attorneys); SCOTTISH GOV'T, ELECTRONIC MONITORING: USES, CHALLENGES AND SUCCESSES 45 (2019) (citing data from the United States and other countries indicating net widening).

94 *See* Crump, *supra* note 92, at 805–06.

95 *See Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri*, U.S. DEP'T OF JUST. (Mar. 4, 2015), https://perma.cc/U3UB-UGXB.

96 *See* Natapoff, *supra* note 7, at 1059, 1077–78, 1098–99; ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS 9–10, 25–28, 50, 55 (2010) [hereinafter ACLU, IN FOR A PENNY] (citing investigations finding a troubling reliance on aggressive collection of fees and fines from people accused or convicted of crimes to fund the operation of courts and other local government entities).

that he cannot recover, even if he is never even charged with a crime. Or he might be coerced into an expensive diversion program regardless of guilt or innocence because the cost, including risk, of prosecution is too great.

The primary harm of IA contracting without net widening is the unjust imposition of costs onto defendants through the misuse of criminal enforcement discretion to induce payment. Systemically, IA contracting facilitates the expansion of criminal enforcement by reducing the state's cost of process and punishment. But net widening further expands the reach of punishment, causing more people to be unjustly subjected to coercive measures.[97] When net widening through arrests and citations occurs, the threat of prosecution or incarceration is made for the purpose of inducing the consent to contract, rather than for the separate purpose of serving the legitimate goals of the criminal enforcement system. Within the context of the threat, the accused person makes a Pareto-improving move by contracting for the incarceration alternative. However, if not for the possibility of IA contracting, the wrongful threat of incarceration would not have occurred. This scenario is easily one of duress under even the narrowest conception, which requires a threat such as "your money or your life" that removes a choice that was previously available.[98] It will be very difficult, and often impossible, to prove in court that net widening has occurred. The risk of shirking and net widening attendant to using the criminal enforcement power to generate revenue, and the difficulty of detecting such use, are reasons to cleanly sever revenue generation from criminal enforcement.

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[97] Electronic monitoring and other conditions of release can place additional hurdles in the already-difficult path of people struggling to lead or reconstruct their lives. An ankle monitor is a scarlet letter that besmirches reputations and can cost people jobs. Melanie Lefkowitz, *Ankle Monitors Could Stigmatize Wearers, Research Says*, CORNELL CHRON. (June 17, 2020), https://perma.cc/774S-ADZS; Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants into Debt*, PROPUBLICA (July 3, 2019), https://perma.cc/CBM2-XE53; Laura Kilgour, *The Ethics of Aesthetics: Stigma, Information, and the Politics of Electronic Ankle Monitor Design*, 36 INFO. SOC'Y 131, 137–39 (2020). Movement and check-in requirements are sometimes excessively restrictive and make it difficult or impossible for accused persons to commit to or fulfill work, study, or other family or community obligations that would help them to improve their lives. Getting movement restrictions changed or lifted to accommodate constructive activities is sometimes burdensome to impossible. *See* Ayomikun Idowu, Allison Frankel & Yazmine Nichols, *Three People Share How Ankle Monitoring Devices Fail, Harm, and Stigmatize*, ACLU (Sept. 29, 2022), https://perma.cc/R976-7PWS; Riley Vetterkind, *Bad Cell Signal? If You Wear a GPS Ankle Bracelet, It Can Send You Back to Jail*, THE CRIME REP. (Mar. 9, 2018), https://perma.cc/B9DM-Z55L.

[98] *See generally* Nozick, *supra* note 71.

In addition, while governments can, and do, operate their criminal enforcement systems extractively and abusively in a variety of ways, including ways that do not involve private firms or contracts, the creation of extractive entitlements to sell IA services introduces additional opportunities for governments, and their delegates, to shirk in legal and other public duties. Permitting private firms to sell IAs to defendants increases the extractive potential of criminal enforcement by harnessing the commercial incentives and operational know-how of firms to the coercive power of governments—all while circumventing legal protections designed to prevent unjust fines and fees and criminalization of their nonpayment. Several features of the practice can operate together to shield governments and firms from legal responsibility for rights violations.

First, governments can comply with the letter of laws protecting people suspected or convicted of crimes from financial exploitation while extracting money from them to fund government activities in what functions equivalently to an egregiously regressive tax. For example, state laws prohibit the collection of fees from suspects to cover the costs of their pretrial detention—so-called pay-to-stay jail policies.[99] They also restrict the imposition of fines or fees absent or before conviction.[100] Yet, without violating the letter of such laws, governments can impose pretrial detention on suspects and then give them the choice to contract for an ankle monitor to be released from jail, thereby allocating the costs of pretrial preventive measures to the defendant.[101]

Second, IA contracting allows governments to delegate responsibility without monitoring performance. Local governments and the firms they do business with are, systematically, minimally regulated. Contracts with IA providers sometimes call for the company to conduct the constitutionally required indigence determination with little oversight, and there are reports of

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99 *See* ACLU, IN FOR A PENNY, *supra* note 96, at 29, 43, 55.

100 *See, e.g.*, State v. Karst, 553 P.3d 938, 947 (Idaho 2024) (holding that the defendant was entitled to reimbursement of criminal fines she paid before her conviction was invalidated); OHIO REV. CODE ANN. § 341.19(A) (West 2024) ("[T]he board of county commissioners may require a person who was convicted of an offense and who is confined in the county jail to reimburse the county for its expenses incurred by reason of the person's confinement."); Berry v. Lucas Cnty. Bd. of Comm'rs, 2010 WL 480981, at *1 (N.D. Ohio Feb. 4, 2010) (stating that a prior consent decree addressing pay-to-stay programs "prohibited the defendants from 'charging or collecting . . . any costs of confinement . . . from inmates who are or have been incarcerated in the county jails . . . unless that inmate has been incarcerated pursuant to a journal entry of conviction'").

101 *See, e.g.*, *supra* note 78.

companies failing to do so.[102] Companies are often required to provide their service free of charge to indigent defendants, incentivizing them to minimize the number of people they determine to be indigent. Similarly, firms are given the power to ask courts to revoke a probationer's probation for alleged violations, and judges have admitted to rubber-stamping these warrants.[103] Where public oversight mechanisms have been instituted, they have, in observed cases, done little to correct the defects and harmful consequences of IA contracting. Audits, for example, have been infrequent and perfunctory, and states have allowed firms to designate key details of their operations as trade secrets and thereby shield them from oversight.[104]

Third, IA contracting conceals information from the public and from defendants. Because governments place IA firms as the primary—and sometimes the only—official communicator with defendants, the firms control the information available to suspects and defendants about their rights, obligations, and the legal consequences of nonpayment or nonperformance.[105] Courts have long recognized the risk of moral hazard that arises from the information asymmetry inherent in delegations of official power together with entitlements to demand payment for exercising those

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[102] People who have been subject to IA contracts and have been jailed for inability to pay have reported that, at the time they were jailed, no formal indigency determination was made, even though they informed their counterparty that they were unable to pay. *See, e.g.*, Carter v. City of Montgomery, 473 F. Supp. 3d 1273, 1298–99 (M.D. Ala. 2020) (finding that "the Municipal Court incarcerated offenders without assessing their ability to pay on 'many occasions'" (quoting *In re* Hayes, 2016 WL 7743819, at *5 (Ala. Ct. of the Judiciary Jan. 5, 2017))); Chapman v. City of Clanton, 2017 WL 1508182, at *2 (M.D. Ala. Apr. 25, 2017) (recounting the allegations that neither the court nor the probation company was making indigency determinations before converting fines to jail time); Kimberly King, *News 13 Investigates: Questions Raised About For-Profit Company Running Indigent Fund*, ABC 13 NEWS (Oct. 11, 2016), https://perma.cc/3FCM-CHJA (reporting on an indigent fund run by a private diversion company); HUM. RTS. WATCH, "SET UP TO FAIL": THE IMPACT OF OFFENDER-FUNDED PRIVATE PROBATION ON THE POOR 108 (2018) (showing an example Fee Waiver Form allowing a probation company to "most likely deny" probationers' requests to reduce fees before any court involvement); *see also* Ingham Cnty. Bd. of Comm'rs, Resolution No. 19-393, at 2 (Sept. 24, 2019) (available at https://resolutions.ingham.org/?search=&years%5B0%5D=2019&page=6) (requiring a county's electronic monitoring contractor to "make determinations of eligibility for County Indigent Funding eligibility").

[103] *Carter*, 473 F. Supp. 3d at 1288–89; ALBIN-LACKEY, *supra* note 8, at 59.

[104] ALBIN-LACKEY, *supra* note 8, at 4; *see also* Christina Fialho & Grisel Ruiz, *Costly, Inefficient, and Unaccountable: The Case for Outlawing Private Prisons*, FORBES (Sept. 19, 2016), https://perma.cc/9HTK-W8TE; Chung Kao, *Transparency Lacking in Private Prisons*, SAN QUENTIN NEWS (Oct. 29, 2014), https://perma.cc/M5PP-U3HX.

[105] *See* Harper v. Pro. Prob. Servs., Inc., 976 F.3d 1236, 1238–40 (11th Cir. 2020).

powers.[106] IA firms are known to have abused or misused their informational advantage to tell people they can be jailed for nonpayment even absent a legal basis for doing so.[107] They have the capacity to use their unsupervised delegated power to unlawfully jail or threaten to jail people and then approach them or their family members for payment or renegotiation on terms more favorable to the provider in exchange for forbearance or release.[108] Public oversight is reduced by contracting out the detailed structuring and implementation of supervision, and at the same time, firms can force people to agree to release them from liability for injuries, mistakes, and abuses.[109]

Eliminating IA contracting will not eliminate all exploitation and abuse in criminal enforcement. The proposals made here are but one part of extensive reforms needed throughout U.S. criminal enforcement systems. However, experience and reason show that introducing bargaining against the background of criminal enforcement creates incentives to expand the reach of criminal enforcement and to make the baseline level of treatment in the criminal enforcement system harsher to induce agreement to a less severe alternative. One such example is the history of plea bargaining. As Professor John Langbein and others have shown,

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[106] *See* Puget Sound Alumni of Kappa Sigma v. City of Seattle, 422 P.2d 799, 803 (Wash. 1967):

> [T]he officer and the public who have business to transact with him do not stand on an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand for his services; but with them it is different. They have neither the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not, and as a general rule, relying on his honesty and integrity, they acquiesce in his demands.

See also Am. S.S. v. Young, 89 Pa. 186, 191 (1879), *aff'd*, 105 U.S. 41 (1881) ("[A] public officer who, *virtute officii*, demands and takes as fees for his services, what is not authorized or more than is allowed by law, should be compelled to make restitution.").

[107] ALBIN-LACKEY, *supra* note 8, at 59; *see also* Sarah Shannon, *Probation and Monetary Sanctions in Georgia: Evidence from a Multi-Method Study*, 54 GA. L. REV. 1213, 1226 (2020); McGee v. Sentinel Offender Servs., LLC, 719 F.3d 1236, 1238–39, 1243 (11th Cir. 2013) (discussing a private probation company that continued to send letters demanding payment and threatening arrest after the offender had been granted habeas corpus and released from jail).

[108] *See Carter*, 473 F. Supp. 3d at 1298–99. For other instances of heavy-handed collections practices, see, for example, Stillman, *supra* note 26 (describing a firm calling to pressure probationer's family). For firms' alleged abuse of power to amend probation terms, see, for example, *Harper*, 976 F.3d at 1239 (describing a firm allegedly abusing its delegated judicial power to increase already-convicted probationers' terms, fines, and conditions in violation of due process).

[109] *See* Romney, *supra* note 1 (quoting a DA who approved a private diversion program and touted its secrecy as a desirable feature by noting that it was not "subject to the sunshine laws").

the introduction of plea bargaining led to sentencing reforms that empowered prosecutors to threaten dramatically harsher sentences than were previously available in order to induce people to give up their procedural rights in exchange for leniency.[110] Another example comes from the criminal enforcement system reforms that Southern states crafted after the abolition of slavery to coerce freedmen into labor contracts. Part IV.A discusses the former, and the next Section discusses the latter.

E. Historical Analogs

Two historical analogs to the practice of IA contracting contextualize it, illustrating how combining contract with delegated coercive governing power facilitates the extraction of value from citizens.

1. Racial peonage.

The first historical analog is Black peonage in the postslavery South. Under this regime, the legal and social system was reformed to approximate the legal control exerted over Black persons under slavery by using the criminal law to coerce freedmen into ostensible contracts. A key component of the peonage regime was the system of laws enacted to facilitate suretyship for criminal fines and fees. This building block of the peonage regime is analogous to IA contracting today. Once convicted of one of the myriad new crimes crafted to constitute the peonage regime, Black persons were forced to sign long-term contracts to labor for private employers to pay off their fines.[111] A common practice was for employers to wait in the courthouse for a person to be sentenced to a fine and then approach the bench to argue over whom he would commit to working for, sometimes for years, in exchange for the employer serving as surety for the criminal fine to permit the condemned man to avoid the chain gang.[112] Breach of such a

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110 *See infra* notes 280–86 and accompanying text.

111 DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY 5–7 (1978).

112 *See* United States v. Reynolds, 235 U.S. 133, 138–39 (1914); NOVAK, *supra* note 111, at 5–8, 30–31; DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, at 7–8 (2008):

> By 1900, the South's judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans to comply with the . . . labor demands of whites. . . . Sentences were handed down by . . . men in the employ of the white business owners who relied on the forced labor produced by the judgments. Dockets and trial records were inconsistently maintained. Attorneys were rarely involved on the side of blacks.

surety contract was criminalized, allowing the condemned man who failed to perform the service to be rearrested, resentenced, and forced into peonage again.[113] A number of felonies were reclassified as misdemeanors to allow their punishment to be converted from incarceration to a fine, a legal reform that made more Black persons available to work off fines under debt bondage agreements.[114] Under this system, the criminal enforcement system was used to benefit favored employers and to generate public revenue. In time, the Supreme Court outlawed the particular regime of forced contracting instituted under racial peonage. In holding that debt bondage is an unconstitutional form of involuntary servitude in *United States v. Reynolds*[115] and *Bailey v. Alabama*,[116] the Court distinguished prohibited debt peonage from a lawful voluntary contract to perform services to satisfy a debt. It distinguished the two in part based on the availability of criminal sanctions for breach.[117]

What has recently emerged in some states looks eerily like this old system that is known to have been designed to use the criminal law to coerce people into contract for the benefit of state and local governments and favored private parties. Mandatory contracting for IAs can similarly drape coercive practices, which lack contract's underpinning of voluntary consent, in the cloak of contract. The legal regimes facilitating IA contracting today have reintroduced some of the features of peonage that were instituted to lock Black people into service contracts and to increase the power of their employers. Breach was criminalized, and various laws prevented Black people from accessing the benefits of

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> Revenues from the neo-slavery poured the equivalent of tens of millions of dollars into the treasuries of Alabama, Mississippi, Louisiana, Georgia, Florida, Texas, North Carolina, and South Carolina—where more than 75 percent of the black population in the United States then lived.

[113] *See Reynolds*, 235 U.S. at 147.

[114] NOVAK, *supra* note 111, at 6–7. Later, as convict-labor leasing developed and became profitable for governments, the system was converted from one of forced contracting by defendants to forced labor under contracts between governments and private firms. Various misdemeanors were reclassified as felonies carrying long prison terms to allow for the hiring out of groups of prisoners under long-term contracts. Prison populations soon tripled or quadrupled, with the increase consisting nearly entirely of Black persons. *Id.* at 31–34. In addition to widening the net of criminal enforcement to encompass conduct that previously was not criminalized, the peonage regime relied on widespread false accusations and wrongful convictions of innocent people. *See* Meyn, *supra* note 91, at 539–43.

[115] 235 U.S. 133 (1914).

[116] 219 U.S. 219 (1911).

[117] *Reynolds*, 235 U.S. at 144–46.

market competition for their labor.[118] The criminalization of breach of contract has been reintroduced in that people can be incarcerated or face other criminal penalties for nonpayment. In some jurisdictions, the law explicitly provides for incarceration for nonpayment.[119] In others, criminalization of breach is functional rather than formal, as firms use their unsupervised delegated criminal enforcement power to inflict criminal penalties on their counterparties for breach. Also as under peonage, IA contracting is typically structured in a way that denies the defendant access to market competition.[120] So, as with peonage, the legal structure locks people into a contract with one party and criminalizes the breach of that contract by the disempowered party.

Rather than forcing defendants to labor for private parties, governments today can force them to purchase their freedom from private parties. Breach of contract is again being criminalized.[121] There are chilling similarities between the construction of the peonage regime and the changes that have been made to the criminal law in tandem with the rise of IA contracting. The proliferation of newly defined low-level crimes mirrors the overcriminalization designed to facilitate forced contracting during Jim Crow.[122] To a significant extent, the enforcement systems for handling misdemeanors and felonies have replaced the reasonable possibility of adjudication of guilt with either a managerial model or a system that presents defendants with prohibitively

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[118] Two legal rules blocked the worker from exiting a contractual relationship. First, the criminalization of "enticement," or hiring an employed freedman, foreclosed the option of leaving one employer for another. NOVAK, *supra* note 111, at 6–7. Second, the definition of vagrancy was expanded to facilitate the threat of criminal sanction as a proximate consequence of withdrawing from the labor force and relying on subsistence farming or barter. *See id.* at 3–7. The criminalization of breach of contract, previously unknown in U.S. law, was enacted in several ways, sometimes expressly by statute and sometimes by expanding the definition of criminal vagrancy to include "idleness" and "neglect [of] their work." *Id.* at 1–5; BLACKMON, *supra* note 112, at 6–7; *see also Reynolds*, 235 U.S. at 141–43; *Bailey*, 219 U.S. at 227; Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The "Peonage Cases"*, 82 COLUM. L. REV. 646, 647 (1982) (explaining that the laws at issue in the peonage cases before the Supreme Court were not expressly racialized). *But see* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 400–02 (1989) (emphasizing the limited effectiveness of these efforts at securing the quantity of labor demanded and reporting that Southern employers did at some times and in some places compete for Black labor).

[119] *E.g.*, GA. CODE ANN. § 42-8-102(e)(2) (West 2024).

[120] *See infra* notes 216–17 and accompanying text.

[121] *See, e.g.*, GA. CODE ANN. § 17-6-1.1(h)(2) (mandating "immediate" imprisonment for nonpayment of electronic monitoring fees); *see also supra* note 118; *infra* note 165 and accompanying text (describing the de facto regime of incarceration for nonpayment).

[122] *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 817–18 (2015).

high process costs and risks of extreme punishment if they contest charges.[123] Under the present system, then, the guilt or innocence of people offered IA contracts is often irrelevant, as it was then.

2. Government for profit in Anglo-American history.

A second historical analog to IA contracting is the regime of government for profit that was introduced to the American colonies from England and continued through the nineteenth century. As Professor Nicholas Parrillo's historical research has shown, officials were granted authority to bargain with citizens for the provision of public services.[124] The panoply of public services provided in this manner included the clearing of goods through customs, the processing of applications for land grants and occupational licenses, arrests, and prosecution.[125] Public offices were largely independent of legislatures; officials were "free-standing vendors" governed primarily by the common law.[126] Defenses of this practice sounded in the virtues of markets: it was said to bring subjects or citizens "into a mutual relation" with officials, "thus promoting 'habits of pecuniary obligation or exchange of private interest.'"[127]

The practice was gradually regulated by common law judges and legislatures before finally being abolished in the United States

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[123] *See* Kohler-Haussmann, *supra* note 7, at 620–23 (analyzing the managerial justice model that has replaced the adjudicative model of criminal enforcement, as practiced in New York City). Similarly, plea bargaining reduces the relevance of adjudication of guilt or innocence even for felonies. *See* Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 172 (2012) [hereinafter Bibas, *Incompetent Plea Bargaining*] (citing WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 227–28 (2011)); Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALBANY L. REV. 919, 921–22, 937–38 (2016) (discussing the incentives for innocent defendants to plead guilty, and arguing that they are higher in misdemeanor cases because the process of going to trial is costlier than the expected punishment); Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 348–62 (2012) (summarizing the literature arguing that plea bargaining makes innocence irrelevant at best, and offering empirical evidence contesting that view); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2494–95 (2004) (arguing that information asymmetries might lead to innocent people pleading guilty).

[124] *See* NICHOLAS PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 51–58 (2013).

[125] *See id.* at 59–60.

[126] *See id.* at 65.

[127] *Id.* at 76 (quotation marks omitted) (quoting 3 JOHN LANE, THE REPORTS OF THE COMMISSIONERS APPOINTED TO EXAMINE, TAKE, AND STATE THE PUBLIC ACCOUNTS OF THE KINGDOM 187 (London 1787)).

by all states and the federal government.[128] Its reform and abolition were prompted by a growing recognition that officials often were not in fact engaging with subjects or citizens in "mutually beneficial accommodations" that improved public service provision. Instead, they were exploiting their exclusive power over public action to extract money from the population.[129] The risk of extraction was seen as being especially high with local officials, whose duties were the most systematically underregulated by state law.[130] Lawmakers came to believe that allowing officials to collect payments from citizens for performing public functions undermined state legitimacy and voluntary cooperation with the law.[131]

In early English law, even before substantial legal reform of this practice began, payments extracted through overt coercion or deception amounted to criminal extortion or a related offense at common law.[132] For example, a farmer exercising the quasi-public function of running a town market was prosecuted for extortion for taking money in exchange for allocating stalls.[133] The opinion reasoned that if he had monopolized access to the market, rather than allowing sellers to set up their own sales areas, the demand for payment would be extortion.[134] The law therefore protected people from demands for payment from people who, by holding official authority, exclusively controlled access to something needful.

In the period of English history that prompted reforms, cases of official extortion frequently involved law enforcement officers, including one who imprisoned an entire village until they paid for their release.[135] A recurring pattern was for sheriffs to arrest or accuse a person falsely and require payment for their release.[136]

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128 *See id.* at 80–81. There was a resurgence in this form of government in the 1980 and 1990s, which led to the current regime of IA contracting. *See generally* OSBORNE & GAEBLER, *supra* note 56.

129 PARRILLO, *supra* note 124, at 81, 94. In addition, the demanded payments were seen as unrepresentative taxes charged without legislative action and as undermining public service provided as a matter of right and virtuously. *See id.* at 81.

130 *See id.* at 107.

131 *See id.* at 359.

132 *Id.* at 52. Related crimes arising out of payment demands by public officials that parallel practices allegedly engaged in by IA firms are "criminal exaction," or demanding payment not authorized by the law. *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 864–65 (1988). The crime of oppression overlapped with extortion; it required that the official make a threat to induce payment. *Id.* at 884.

133 Rex v. Burdett (1696) 91 Eng. Rep. 996, 996; 1 Ld. Raym. 148, 148; *see also* Lindgren, *supra* note 132, at 877 (explaining that the farmer was exercising a quasi-public function in running the market).

134 *Rex*, 91 Eng. Rep. at 996; 1 Ld. Raym. at 149.

135 These cases are discussed and cited in Lindgren, *supra* note 132, at 839–43.

136 *Id.* at 842–43.

The problem of officials using law enforcement power extractively was sufficiently pervasive that, in a royal proclamation issued in the thirteenth century, the Crown promised to "pay our bailiffs from our own resources, so that they will not have occasion to take anything from other people," and required sheriffs to swear to "take nothing from anyone either himself or by another, or by any manner of art or device by occasion of his bailiwick."[137]

Widespread backlash against the "parallel" evils of state-granted monopolies and official extortion prompted substantial legislative reforms in the seventeenth century.[138] Legislative reform in England, and later in the American colonies, focused on specifying the services for which payment could be demanded and the amount of lawful fees.[139] The definition of extortion was expanded to include demanding fees not authorized by statute, and sheriffs were statutorily prohibited from taking payments.[140] This series of reforms recognized the power of those holding a monopoly on the provision of an official service, or on the use of force, to extract value from people who needed the service or were subject to the force; reforms sought to limit such extraction by establishing boundaries around officials' ability to demand payment.[141]

This regime was imported into the American colonies: officials were permitted to demand fees from subjects as authorized and regulated by statute.[142] Legislatures faced the difficulty of setting fees, especially for services that varied significantly from instance to instance, and of appropriately revising them over time to avoid obsolescence.[143] Under partial fee regulation, officers could collect more fees than expressly authorized by categorizing their services as involving tasks not included in the fee schedule.[144] While sometimes this flexibility enabled bargaining that might have made certain individual subjects better off, officers often miscategorized the services they provided to collect higher fees.[145]

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[137] *Id.* at 838 & n.106 (quotation marks omitted) (first quoting H. CAM, THE HUNDRED AND THE HUNDRED ROLLS 150 (1930); and then quoting 3 ENGLISH HISTORICAL DOCUMENTS 369 (David C. Douglas & Harry Rothwell eds., 1975)).

[138] PARRILLO, *supra* note 124, at 81.

[139] *Id.* at 58, 66. Fees were set either quantitatively or by reference to an objective standard such as long usage and custom or quantum meruit.

[140] *See* Lindgren, *supra* note 132, at 845, 868 (describing the prohibition on sheriffs taking payment as a codification and rearticulation of the common law).

[141] PARRILLO, *supra* note 124, at 88.

[142] *Id.* at 58–65.

[143] *Id.* at 66, 72.

[144] *Id.* at 70–72.

[145] *Id.* at 71.

Attempts to regulate official bargaining failed, so eventually it was abolished. By the close of the nineteenth century, nonstatutory fees had been abolished throughout the United States, at the federal and state levels, by common law courts and state legislatures.[146] All of the dominant political parties supported this abolition, invoking the monopoly power of public officials and the consequent risk of oppression.[147] Courts began to deny claims by officers for implied promises to pay for services not enumerated and regulated by statute.[148] Monopoly power was abolished where it could be and regulated elsewhere. Officials could now collect fees only by legislative authorization.[149] But these reform efforts failed because the collection of fees by officials was too costly to monitor and those in positions to monitor fee collection lacked the will to do so. Judges declined to actively monitor the fees officials demanded, and there were barriers to citizen lawsuits.[150] Fee-earning officials played a "darkly comic game of cat and mouse" with legislators, interpreting statutes so as to multiply the enumerated services they claimed to provide and thereby demanding multiplying fees.[151] As reformers came to realize that effective regulation was impossible, "salarization" was adopted across the United States.[152]

Documented abuses in IA contracting, unsurprisingly, echo those that occurred in the earlier period of for-profit government. As mentioned, halfway houses have wrongfully used their punitive power over defendants for financial ends, and probation companies have wrongfully extended people's sentences and imposed additional conditions to collect more fees.[153] Advocates who have in recent years drawn attention to and critiqued the privatization of criminal enforcement functions tend to focus on improved public oversight to ameliorate the harms caused by privatization.[154] Improving governance is a worthy goal. However, as with the historical analog of government for profit, the practice and trajectory of IA contracting do not inspire confidence that government actors in criminal enforcement systems will implement public oversight in a manner that will curb abuses. The

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146 PARRILLO, *supra* note 124, at 91, 94.
147 *Id.* at 94.
148 *Id.* at 94–100, 105–07.
149 *Id.* at 93–100.
150 *Id.* at 119.
151 PARRILLO, *supra* note 124, at 119–20.
152 *Id.* at 119–21.
153 *See supra* notes 26, 108, and accompanying text.
154 *See, e.g.*, ALBIN-LACKEY, *supra* note 8, at 7.

next Section discusses the inadequacy of current statutory and regulatory frameworks for IA contracting.

F. Underregulation in Existing Regimes

This Section summarizes the results of an analysis of the legal frameworks in ten states for four different types of IA contracting: criminal diversion, electronic monitoring, probation, and halfway houses. The detailed information collected is presented in Tables 1 through 4 in the Appendix.[155] The ten states studied—California, Connecticut, Georgia, Louisiana, Massachusetts, New York, Ohio, Texas, Utah, and Vermont—were chosen for two reasons. First, in preliminary research, each state was observed to practice defendant IA contracting in at least one of the four types of IA services, and it appeared that there would be enough information available to sufficiently describe the state's practices. Second, the set of states was chosen to include diversity in geography and dominant political ideology. Of the forty regimes included in the study, seventeen currently practice direct defendant contracting. Those seventeen regimes were examined for institutional design features that might plausibly constrain exploitation by holders of delegated criminal enforcement power to bargain with people accused or convicted of crimes. Searches were performed for all published state legislation, regulations, and case law addressing IA contracting. Also studied were the websites of departments of corrections and IA companies, as well as news reports about the practice in the jurisdictions.

Halfway houses were most commonly structured through direct defendant contracting: seven of the ten states use this model.[156] The next most common was electronic monitoring (five states), followed by probation (three) and criminal diversion (two).[157] After describing the legal authorization and oversight procedures for these contracts, this Section describes particular regulatory features: regulation of prices and other contract terms, the permitted consequences of a defendant's nonpayment, defendant grievance procedures, and regulation of competition. In broad overview, the analysis found some legislation that expressly constrains companies' practices or authorizes a regulator to oversee them. Occasionally, legislation regulates some aspects of the

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155 *See* Appendix, *supra* note 29.

156 *See id.* tbl.2.

157 *See id.* tbls.1, 3–4.

terms of mandatory IA contracts.[158] More often, states authorize IA contracts through minimalistic statutes or regulations, leaving county- or city-level officials to decide on operational details through their procurement contracts with the private actor.[159] In some cases, legislation is silent regarding IA contracting, which might imply that such contracting is not authorized, except that local governments in some of those states practice it.[160] Defendants are often subject to incarceration for nonpayment, either as a formal legal matter or de facto.[161] Grievance mechanisms exist for some forms of IA contracting in some jurisdictions, but there are reasons to doubt their effectiveness at protecting defendants.[162] Defendants typically do not contract for IAs in even imperfectly competitive markets, and formal procompetitive requirements are rare.[163]

1. Authorization and oversight.

Jurisdictions practicing IA contracting usually do so under express or strongly implied statutory authorization. Legislation often authorizes state criminal enforcement agencies, county-level boards, sheriffs, or probation departments to contract with or authorize private providers, and authorizes courts or other authorities to order defendants to use and to pay for the IA service. In some cases, defendant contracting operates under implicit legal permission or legislative silence.[164] In those regimes, defendant contracting is left to the discretion of local governments. In other cases, legislation stops at the grant of authorization, leaving further details to the discretion of local officials. Some states have adopted more detailed legislative frameworks in response to public backlash against contracting practices.[165] In some

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158 *See id.* tbls.1–4.

159 *See id.*

160 *See* Appendix, *supra* note 29.

161 *See id.*

162 *See id.*

163 *See id.*

164 There is no Texas statute explicitly authorizing defendant-contracted probation, but there is evidence of the practice. *See id.* tbl.3. Until very recently, Louisiana statutes did not address electronic monitoring contracting, even though companies in the state were operating through defendant contracting. *See* Appendix, *supra* note 29, tbl.1.

165 For example, in the wake of a *New York Times* report detailing abuses of diversion programs, Georgia's legislature capped fees. *See* GA. CODE ANN. § 15-18-80(f); Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), https://perma.cc/VGE4-5R3B. Similarly, Utah's private probation statutes were recently overhauled in response to public outcry over probation companies' practices. *See* 2023 Utah Laws 2242 (codified at scattered sections of UTAH CODE ANN.) (adding prohibitions

jurisdictions, statutory frameworks are ambiguous enough to possibly permit direct defendant contracting, but there is no indication that it is practiced.[166]

IA companies differ in the services they perform, and some interact with defendants at different points in the criminal enforcement system. Accordingly, the legal frameworks governing them vary by IA type. Electronic monitoring and criminal diversion services share similar legal structures across several states. Corrections agencies, local law enforcement officers (sheriffs or DAs), local courts, or county governments are authorized to enter into framework agreements with private entities.[167] Sometimes those agreements must be approved by a county board.[168] In other regimes, sheriffs have sole authority to approve providers.[169] In other states, a court may order electronic monitoring as a condition of probation or pretrial release and may require defendants to contract with companies that have no formal ties to the court or another governmental entity.[170] There is little statutory regulation or state-level oversight of such companies.[171]

Halfway houses that offer services to defendants on probation or parole have varying relationships with sentencing bodies: some jurisdictions merely require residence in any halfway house as a condition of probation or parole, leaving defendants to enter the market without any formal constraints on their potential counterparties. Other jurisdictions contract with several private houses under common terms and then direct defendants to particular residences with which they must contract.[172] More strictly managed work facilities for early releasees tend to operate through direct contracts with state corrections departments and offer defendants less choice.[173] Halfway house facilities of all types are subject to statewide licensing and auditing requirements,

against conflicts of interest in services provided by these companies); 2022 Utah Laws 719 (codified at scattered sections of UTAH CODE ANN.) (adding prohibitions against judges directing probationers to contract with any specific company). For a news report describing the conditions prompting this legislation, see Jillian Smukler, *Set Up to Fail: Impact of Private Probation on the Poor*, ABC4.COM (Nov. 7, 2021), https://perma.cc/3GT8-DWTN.

166 *See* Appendix, *supra* note 29, text accompanying tbl.1.

167 *See id.* tbls.1, 4.

168 *See id.* tbls.1, 3 (California and Ohio).

169 *See id.* tbl.1 (Georgia).

170 *See id.* (Louisiana and Ohio).

171 For examples of these programs that have not been regulated beyond the statutes authorizing government parties to enter into contracts with them, see Appendix, *supra* note 29, tbls.1, 4.

172 *See id.* tbl.2.

173 *See id.*

typically overseen by corrections, probation, or parole departments. Investigations have found that, in practice, such oversight mechanisms are sometimes operated laxly.[174] Those investigations reveal that laws that ostensibly regulate IA providers do not necessarily do so in practice, a finding that echoes the regulation of officials under the historical regime of government for profit.[175]

Defendant contracting for private probation is structured similarly across states. Probation companies enter into framework contracts with county governments, with the county court's approval.[176] Some state legislation grants oversight authority to a state executive-branch board or licensing body with the power to act on reports of bad behavior by providers.[177] Grievance procedures are discussed in greater detail below in Part II.E.4.

2. Regulation of prices and contract terms.

Statutes and regulations that address contracting practices and contract terms, including prices, between defendants and IA companies are sparse across the states studied.[178] Where legislation addresses the specifics of IA providers' practices at all, it is usually directed at ensuring the state's criminal enforcement goals are met.[179]

A few mechanisms were found that might, in principle, operate to protect defendants. The most common of these are statutes that provide for maximum permissible monthly fees that companies may charge defendants or that require that fees be "reasonable."[180] Statutory fee limits (including maximums and reasonableness requirements) were found in eight of the seventeen regimes.[181] However, the effectiveness of such laws depends on the body empowered to supervise reasonability. That power might be granted exclusively to local sheriffs (as in one of the regimes in the study), given to a body with little will to enforce the limit, or left unclear (as in two regimes in the study).[182] One regime requires an ex ante indigency or financial hardship determination and provides for state funding where defendants are deemed unable to pay, while nine require this determination without

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174 *See supra* notes 25, 27.
175 *See supra* notes 124–52 and accompanying text.
176 *See* Appendix, *supra* note 29, tbl.3.
177 *See id.*
178 *See id.* tbls.1–4.
179 *See id.*
180 *See id.* tbls.1, 3.
181 *See* Appendix, *supra* note 29.
182 *See id.* tbl.1.

clarifying a funding source. Statutes that require judges to specify particular terms, fees, or the duration of the IA arrangement—rather than leaving these terms to be set by the IA provider—might improve judicial supervision of the relationship between the firm and the defendant.[183] However, these were found in only one of the regimes studied. Some states regulate halfway houses through state-level master agreements that prescribe particular terms in defendant contracts. However, rather than aiming to protect defendants from exploitation, these prescribed terms tend to specify restrictions that must be placed on defendants in the facility.[184] Legal frameworks for halfway houses rarely attempt to protect defendants through direct regulation of companies' contract procedures or substance, with the exception of some regulation setting maximum fees.[185] A rare exception is Utah's recently passed legislation requiring specific notice and informed consent terms for private probation providers' contracts with defendants.[186]

3. Consequences of nonpayment.

A pressing question for impoverished defendants is the consequence of their inability to pay under the IA contract. In a trio of decisions—*Williams v. Illinois*,[187] *Tate v. Short*,[188] and *Bearden v. Georgia*[189]—the Supreme Court ruled that it is unconstitutional to incarcerate people solely because of their inability to pay court-ordered fines and fees.[190] In the last of the three cases, *Bearden*, the Supreme Court held that a sentencing court asked to determine whether a person should be incarcerated for nonpayment of probation fines and fees must determine whether the person was able to pay. If the nonpayment was not willful, the court must consider whether alternatives to incarceration, like community service, would satisfy the state's interests.[191] The Supreme Court instructed lower courts to ask whether the

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183 *See id.* tbl.1; *cf. Harper*, 976 F.3d at 1243 (alleging that a private probation company used its discretion to act independently of the court to increase fines and lengths of sentences); Ray v. Jud. Corr. Servs., Inc., 270 F. Supp. 3d 1262, 1272 (N.D. Ala. 2017) (same).

184 *See* Appendix, *supra* note 29, tbl.2.

185 *See supra* note 181 and accompanying text.

186 *See* Appendix, *supra* note 29, tbl.3.

187 399 U.S. 235 (1970).

188 401 U.S. 395 (1971).

189 461 U.S. 660 (1983).

190 *See* Colgan & Galbraith, *supra* note 10, at 994.

191 *Bearden*, 461 U.S. at 668–69.

defendant has made "sufficient bona fide efforts legally to acquire the resources to . . . pay."[192]

The *Bearden* framework has been criticized as failing to protect indigent people from being jailed for nonpayment because it leaves judges with too much discretion in assessing indigency.[193] But however limited this constitutional protection might be in practice, governments can use IA contracting to circumvent it entirely. When payments that defendants owe to IA companies are contractual, they can be characterized as being outside the protection afforded by *Williams*, *Tate*, and *Bearden*, which explicitly extends only to court-ordered fines and fees.[194] IA contracting thus allows for formal recharacterization of payments that defendants make to access alternatives to jail. For example, instead of being ordered to wear an ankle monitor as a condition of release and to pay an associated statutory fee, a defendant can be committed to jail and presented with the option of privately contracting for an ankle monitor to secure his release. The defendant who then fails to pay the ankle monitoring provider is subject to reincarceration but has not failed to pay a court-ordered fee and therefore is not clearly constitutionally protected under current law.

Indeed, while some jurisdictions' statutory frameworks for IA contracts (one, among the regimes studied) are careful to specify that failure to pay does not, by itself, justify incarceration, most do not explicitly say so. To the contrary, some state laws (four of those studied) even provide explicitly that nonpayment of electronic monitoring fees to providers may result in reincarceration (for defendants on early release) or first-time incarceration (for defendants on pretrial monitoring).[195] Some courts apply *Bearden*'s principles more broadly to prohibit these and similar practices.[196] But where statutory and other legal rules are silent as to the result of nonpayment, a defendant's failure to pay a

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[192] *Id.* at 672. Many states have passed legislation directing courts to comply with *Bearden*. *See, e.g.*, GA. CODE ANN. § 42-8-102(f)(4)(A).

[193] *See* Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), https://perma.cc/SP3E-R85S (discussing defendants being deemed able to pay based on their clothes, tattoos, or cigarette addictions).

[194] *Cf.* United States v. Johnson, 767 F. Supp. 243, 248 (N.D. Ala. 1991) (holding that *Bearden* does not govern obligations imposed under a plea bargain because the defendant agreed to them).

[195] *See* Appendix, *supra* note 29, tbl.1.

[196] *See* Dear Colleague Letter from Kristen Clarke, Assistant Att'y Gen., C.R. Div., Amy L. Solomon, Principal Deputy Assistant Att'y Gen., Off. of Just. Programs, and Rachel Rossi, Dir., Off. for Access to Just. (Apr. 20, 2023) (available at https://perma.cc/5925-EPYK).

halfway house,[197] probation company,[198] or electronic monitoring company[199] constitutes breach of contract that often permits the provider to cease providing IA services and report the defendant to be in violation of their terms of release, justifying incarceration or other punitive measures.

This snapshot of the law on the books regarding nonpayment must be contextualized with evidence of the law in practice. In practice, the delegated criminal enforcement power that IA firms hold over their counterparties, with limited observability and verifiability, gives the firms power to use the threat and imposition of criminal sanctions to induce performance or renegotiation. Firms certify to the state whether a person has complied with conditions of release and therefore have power to return people to jail or prison.[200] Investigations have documented the wrongful use of this power, including unlawful threats to return and unlawfully returning people to jail or prison for nonpayment.[201] Additionally, firms sometimes use their unsupervised power to unlawfully extend their control over defendants. For example, journalists have reported that electronic monitoring firms have unlawfully refused to remove their equipment from defendants' bodies, even after defendants have served their sentences or been released from pretrial monitoring by the state, because defendants have not paid in full.[202]

Another key to understanding the pressures of IA contracting on impoverished people is the phenomenon of incarceration for proxies to nonpayment.[203] Defendants unable to fulfill their financial obligations will sometimes consequently violate some other requirement of release. They might miss a meeting with a probation officer, be unable to find regular transportation to work, or not complete drug or background checks due to the additional costs. They might be denied IA services, such as drug testing, that

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197 *See* Appendix, *supra* note 29, tbl.2.

198 *See* Shannon, *supra* note 107, at 1226; HUM. RTS. WATCH, *supra* note 102, at 1 ("On one visit when she did not have the money to make a payment, her probation officer told her that she would 'violate' her [probation] and that she would go to jail, which is what happened."); *Ray*, 270 F. Supp. 3d at 1271 ("JCS's employees allegedly threatened to revoke an individual's probation, increase the fines and costs owed by a probationer, or increase the jail time a probationer faced if he or she was not able to pay JCS.").

199 *See* Appendix, *supra* note 29, tbl.1.

200 *See* State v. Mays, 2007 WL 2703113, at *6 (Minn. Ct. App. Sept. 18, 2007).

201 *See* Hanton v. Massarri, 2005 WL 3112807, at *1–2 (Conn. Super. Ct. Nov. 2, 2005); Clark, *Another Place to Warehouse People*, *supra* note 28; ALBIN-LACKEY, *supra* note 8, at 26; Shannon, *supra* note 107, at 1226–31.

202 *See* Kofman, *supra* note 97.

203 HUM. RTS. WATCH, *supra* note 102, at 60–64.

are required to meet the conditions of their release.[204] Defendants who violate these terms can be incarcerated without implicating equal protection or due process concerns, since they commit technical violations nominally unrelated to their financial ability. In reality, however, these defendants' inability to pay for IA services causes them to be jailed.

4. Grievance procedures.

One possible means of preventing or providing redress for abuse by IA providers is an effective grievance reporting system. Defendants who are able to report abusive and illegal behavior, especially confidentially, to an overseeing agency or local government body might be more empowered during performance of the contract. Unfortunately, it is uncommon for states to implement specific grievance procedures for defendants contracting with IA companies. Only one of five direct-contracting electronic monitoring regimes studied had any formal grievance reporting system, while all halfway house regimes had reporting systems.[205] Probation and diversion regimes ranged from having no grievance reporting mechanism, to having one that appeared hard to discover and use, to having apparently accessible mechanisms.[206]

Broadly, there are four ways defendants might be able to report abuses by IA companies: via state-level consumer agencies;[207] state-level oversight specific to the service, such as to private probation oversight boards or corrections departments grievance channels;[208] county-level reporting, such as to the court, DA, or general county-level oversight personnel;[209] or through local, program-specific reporting, often to the company.[210] It is difficult to ascertain the details of some grievance procedures, and observed grievance reporting methods raise concerns. Setting up grievance mechanisms that are confusing to use, requiring

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[204] *See, e.g.*, McNeil v. Cmty. Prob. Servs., LLC, 2021 WL 366776, at *28–29 (M.D. Tenn. Feb. 3, 2021) (citing plaintiffs' allegation that they are required to submit to and pay for drug tests and other mandatory services, subject to arrest if they do not); Briggs v. Montgomery, 2019 WL 2515950, at *2, *6–7 (D. Ariz. June 18, 2019) (citing a probation contract providing that participants may be terminated from the diversion program and referred for prosecution for failure to pay program fees or take required drug tests, which participants were denied if they could not pay).

[205] *See* Appendix, *supra* note 29, tbls.1–2.

[206] *See id.* tbls.3–4.

[207] *See id.* tbls.1, 3.

[208] *See id.* tbls.2–3.

[209] County-level reporting appears to be the presumptive channel for defendants in systems without other formal or explicit grievance procedures. *See id.* tbls.1–4.

[210] *See* Appendix, *supra* note 29.

defendants to attempt informal resolution before formally complaining, failing to offer a confidential means of complaining, or not providing adequate appeals limits the effectiveness and credibility of grievance procedures.[211] In particular, anonymity is rarely expressly protected, subjecting defendants to actual or feared retaliation that might chill their willingness to report grievances.[212]

5. Competition.

When contracting with IA companies, defendants frequently have no or little choice between providers. While the degree of competition varies across the states and types of IA services studied, most legal frameworks prevent or limit defendant choice among providers. No legal frameworks within these ten states, as far as observed, went so far as to require competition in IA markets.[213]

Choice is most limited in regimes that require the IA company to contract with the county in order to provide services within the jurisdiction, as observed in seven of the regimes studied.[214] A jurisdiction will commonly contract with only one service provider and direct defendants to contract with that provider. In contrast, where service providers must contract or be licensed on a statewide level, sometimes subject to further approval by local jurisdictions, there may be more market competition. These statewide structures were observed in twelve regimes.[215]

Even in such regimes, competition is limited by barriers to entry such as monopolization of a geographic area to which a defendant is constrained. Additionally, while licensing might in principle be used to improve quality, it is well documented that state licensing regimes are sometimes so cornered by the regulated industry that they are instead used primarily to restrict competition and raise prices.[216] Recognizing this reality, the Supreme Court has opened the door to federal antitrust action against state licensing bodies.[217] A third type of regime, found in

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211 *See id.* tbl.2.

212 *See id.* tbls.1–4.

213 *See id.*

214 *See id.*

215 *See* Appendix, *supra* note 29.

216 *See* Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CALIF. L. REV. 1567, 1589 (2017); Aaron S. Edlin & Rebecca Haw Allensworth, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1113 (2014).

217 Edlin & Allensworth, *supra* note 216, at 1099–1100.

one instance, does not have a state-control mechanism but only requires registration.[218] A fourth, rare feature is one that, if not explicitly requiring competition, attempts to undermine local patronage by prohibiting courts from referring defendants to a specific company if more than one provider offers services in the jurisdiction.[219] Such features are present in three of the studied regimes, though in one of those, DAs have been observed in practice to direct defendants to a particular company.[220] How common steering is despite formal prohibitions of it is unknown.

III. SOLUTIONS

Because of the invalidity of IA contracting under contract theory and the risk of moral hazard inherent in the practice, the best solution is to replace it with IAs that are operated by governments or privatized but fully publicly funded. That option is discussed in detail in Part III.B. Efforts to challenge IA contracting to date have focused on public law litigation. Several recent and pending cases before federal courts suggest that civil rights lawsuits might offer some redress for unjust IA contracts. Several of these cases have proceeded past summary judgment or dismissal and then settled before trial.[221] This Part considers other possible solutions from private law, including through the common law of contract, market regulation by executive agencies, and ex ante judicial oversight of IA contracting.

A. Regulatory Reforms

The study of existing legal regimes detailed in Part II suggests a number of possible regulatory reforms. Given the potential for abuse and moral hazard, and the political and other institutional barriers to effectively regulating this practice, prohibiting these contracts ex ante might be the first-best response. Some states disallow defendant contracting for some IAs,

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218 *See* Appendix, *supra* note 29, tbl.1.

219 *See id.* tbl.3.

220 *See* Email from Anonymous Attorney to Anonymous Defendant, *supra* note 3; ProntoTrak, *supra* note 3.

221 *See, e.g.*, Rodriguez v. Providence Cmty. Corrs., Inc., 191 F. Supp. 3d 758, 773–76 (M.D. Tenn. 2016) (permitting equal protection and due process claims against a private probation company and county to proceed past dismissal); *Rodriguez v. Providence Community Corrections*, FINES & FEES JUST. CTR., https://perma.cc/NP3X-XM38 (providing details of the settlement agreement reached in *Rodriguez*); Bell v. Providence Cmty. Corrs., Inc., 2011 WL 2218600, at *2–4 (M.D. Tenn. June 7, 2011) (permitting the plaintiff's claim under 42 U.S.C. § 1983 to proceed past dismissal); ALBIN-LACKEY, *supra* note 8, at 49 n.126 (noting the settlement in *Bell*).

for example, by prohibiting private entities from collecting fees directly from accused persons.

Measures to increase the transparency of these contracting practices might reduce abuses. Professors Omri Ben-Shahar and Carl E. Schneider have ably demonstrated the limits of mandated disclosures in contract.[222] There are even greater barriers to the effectiveness of mandatory disclosures when the outside option of the disclosure's recipient is jail or prosecution. However, requiring disclosure of the relevant background facts of these agreements might bring the agreements to the attention of judges, the criminal defense bar, public interest advocates, voters, and others who can deploy legal or reputational remedies to contest them. The prospect of such transparency might induce favorable changes to how programs are structured or operated.

Public records laws should be amended to cover programs and contracts administered through mandatory IA contracting, subject to appropriate redaction to protect defendants' privacy.[223] IA contracts could be required to conspicuously notify putative defendants of all applicable fees. When a program is administered by a government entity other than the court with jurisdiction over the criminal matter, it should be mandatory to disclose to the court the fees to be charged to the defendant.

In addition to disclosures designed to activate remedies against abuses in these practices, legislatures and regulators with authority over IA contracting should adopt mandatory disclosures and terms for IA contracts designed to inform the weaker parties of their contractual legal rights. To mitigate information asymmetries, firms should also have to conspicuously disclose to the defendant that the relationship is a contractual one and that it entitles the defendant to performance of the obligations undertaken by the IA provider. Disclosures should include a plain-language statement of the firm's contractual duties, applicable state or federal consumer protections, and the legal and regulatory recourse for provider breaches and violations. At a minimum, regulation should restrict contractual limitations of liability for tortious conduct. Confidential arbitration agreements should be prohibited due to the importance of public visibility and

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[222] *See* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 42–54 (2014).

[223] *See infra* note 301 and accompanying text (discussing an empirical study finding that data on electronic monitoring of criminal defendants was unavailable in states that employed private contractors because the contractors were exempt from public record laws).

oversight.[224] Collecting any data other than that required by the state for legitimate monitoring purposes should be prohibited, as should the use of microphones to surveil or record. Selling defendant data should be prohibited, as should the use of such data for any purpose other than the legitimate requirements of the state related to monitoring.[225]

Meaningful competition among providers of IA services might improve the terms offered to defendants and their treatment by IA firms. Antitrust law is designed to reduce exploitation and coercion that can result from concentration of ownership or control, and it is especially important when the consumer's outside options to obtaining the relevant product are dire.[226] Laws that require local governments to give defendants meaningful choice between providers of a given IA service might curtail exploitation. Companies competing for defendants' business might be incentivized to lower prices, impose less onerous conditions, and treat their counterparties more respectfully. Relatedly, if meaningful competition existed, it is conceivable that an information-intermediary market that would contribute to disciplining IA providers might develop.[227] To facilitate such an information market, firms should be prohibited from imposing contractual terms that prevent counterparties from disclosing information about their experience to third parties.

Utah has taken a small step toward limiting the potential for local patronage by prohibiting local governments from referring defendants to a particular electronic monitoring firm.[228] Another possible reform is for state laws to require local officials to permit all state-approved providers to offer services in their jurisdictions.[229] Where that approach is infeasible, local governments could at least be required to approve a set minimum number of

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224 While under the Federal Arbitration Act, 9 U.S.C. §§ 1–16, states and courts are unlikely to be able to regulate arbitration clauses specifically, to the extent that it is within congressional authority, Congress should carve out defendant-contracted IA services from the scope of arbitrable disputes. *See supra* note 109 and accompanying text.

225 Legislators should follow the lead of Germany in requiring that records be destroyed after a specified time. *See* Frieder Dünkel, Christoph Thiele & Judith Treig, "*You'll Never Stand-Alone": Electronic Monitoring in Germany*, 9 EUR. J. PROB. 28, 39 (2017).

226 Efficiency and autonomy theorists often converge on antitrust law as a preferable solution over contract law to problems of structural market power. *See* TREBILCOCK, *supra* note 65, at 95–96; *cf.* HAYEK, *supra* note 61, at 204 (acknowledging that monopolization of an essential service permits coercion).

227 G.B. RICHARDSON, INFORMATION AND INVESTMENT: A STUDY IN THE WORKING OF THE COMPETITIVE ECONOMY 123–24 (2d ed. 1997).

228 *See supra* note 186 and accompanying text.

229 *Cf. supra* note 215 and accompanying text (describing jurisdictions employing this or similar models).

providers from which defendants may choose. However, whether doing so would create enough competition to significantly improve defendants' choices is unclear. First, illegal coordination is more likely in concentrated markets. Second, the gatekeeping position of local governments implies that each firm might have close ties with local government officials. This structure might lower the cost of interfirm coordination on prices and terms. For that reason, state and federal antitrust enforcement authorities should devote attention to the IA industry, particularly in markets where there are few providers. That scrutiny should extend to state-level licensing regimes for IA providers. Professor Rebecca Haw Allensworth has shown how state licensing regimes are sometimes so cornered by the regulated industry that they are used primarily to restrict competition and raise prices rather than to regulate quality.[230] In response to that reality, the Supreme Court has opened the door to federal antitrust action against state licensing bodies.[231] However, there are practical constraints on introducing competition in at least some kinds of IA contracting, since the public function of maintaining public safety and the associated bureaucratic structures might necessitate limiting the number of providers of IA services.

While more mandatory contract terms and competition would be an improvement over the present lightly regulated contract regime, an even better alternative is to replace direct defendant contracting with government-funded alternatives. At minimum, legislation should require government authorities using private IA contracting to institute an effective ability-to-pay scheme and a public payment option for defendants who cannot pay for these services, either at the time of release or later. Every judge involved in requiring a person to contract with a private party should be required to conduct an indigency determination.

How to make courts do this in practice is unclear. The law in some states already requires indigency determinations for payment of criminal enforcement fines and fees, yet in practice these obligations are routinely ignored.[232] As discussed above, incarcerating a person for inability to pay violates the Equal Protection Clause of the Fourteenth Amendment.[233] Additionally, some state constitutions and statutes require courts to determine ability to

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230 *See* Allensworth, *supra* note 216, at 1572–79.

231 *Id.* at 1569.

232 *See* ACLU, IN FOR A PENNY, *supra* note 96, at 43.

233 *See supra* notes 187–92 and accompanying text.

pay before jailing someone for nonpayment of a fine.[234] Many states ban debtors' prisons, prohibit the state from charging fees before sentencing, and provide for waiver of fees for indigent defendants.[235] But when fines are owed to courts, local governments, or IA firms, defendants often are simply not informed that they are entitled to indigency determinations.[236] And the laws of some of those same states permit that defendants be mandated to contract and pay for electronic monitoring before sentencing as a condition of release from jail and prescribe immediate incarceration nonpayment of electronic monitoring fees.[237] Defendants who have been assigned public defenders—a clear manifestation of their indigence—can be assessed fines anyway.[238] In misdemeanor cases that fall below the constitutional entitlement to counsel, defendants receive no legal advice and are therefore often unaware that they are entitled to an indigence determination.[239]

This state of affairs is reminiscent of the period of attempted regulation of fee-for-service provision of public services in Parrillo's study, discussed above.[240] Courts and other public entities with authority to supervise the practice were unable or unwilling to do so effectively. The elimination of these markets was eventually widely agreed upon as the solution to these problems. That precedent recommends a similar approach here.

B. Appraising Common Law Solutions

This Section considers the common law of contract as a means of redress for people harmed by IA agreements under the existing underregulated regime. Litigators can bring contract law claims together with public law claims. An advantage of using the common law of contract is that the standards for providing relief—and perhaps also the political stakes as perceived by judges—will be lower than the standards and political stakes for establishing government liability for a constitutional violation.

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234 *See* ACLU, IN FOR A PENNY, *supra* note 96, at 17.

235 *See id.* at 17, 23, 53.

236 *See, e.g.*, *id.* at 17.

237 *E.g.*, GA. CODE ANN. § 17-6-1.1(h)(2) ("Failure to make timely payments shall constitute a violation of the terms of the electronic pretrial release and monitoring program and shall result in the defendant's immediate return to custody.").

238 *See id.* § 17.6-1.1(h)(3).

239 *See id.*; Natapoff, *supra* note 7, at 1059.

240 *See supra* notes 141–52 and accompanying text (describing attempts to regulate the market-based fee-for-public-service model by limiting fees that officials could charge and the failure of this reform effort, which was caused in part by the unwillingness or inability of courts to supervise the practice).

Rather than having to meet the high bars for establishing liability for violations of constitutional rights, a defendant could succeed by meeting the lower bar of establishing that the circumstances created a situation that vitiated her apparent consent under the law of contract.[241]

While, as discussed above, providers of IAs rely more heavily on criminal law and effective control over defendants than on contract law to enforce terms,[242] there are opportunities for defendants to deploy contract law arguments to be released from oppressive terms. Even after being harassed, battered, or jailed for nonpayment, defendants sometimes carry crushing debt owed to IA firms.[243] If IA agreements can be avoided or reformed, then defendants can be released from such debt, avoid exculpatory clauses, and proceed with tort claims. Additionally, undermining the enforceability of these contracts might lead to broader restructuring of the financing of IAs.[244]

1. No consideration.

The argument might be made that agreements between defendants and IA firms are not contractual because the firm has made no express or implied promises to the defendant but is merely exercising delegated governmental powers subject only to performance obligations and regulatory scrutiny by the government.[245] Contract enforces only promises made as part of a

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[241] *See* Silsbee v. Webber, 50 N.E. 555, 556 (Mass. 1898).

[242] *See supra* notes 200–04 and accompanying text.

[243] ALBIN-LACKEY, *supra* note 8, at 14; ACLU, IN FOR A PENNY, *supra* note 96, at 68.

[244] An argument in the law and economics literature on second-order effects is that when a subset of contracts is susceptible to nonenforcement, such as through the unconscionability doctrine, sellers will price the risk of nonenforcement into their products. *See* ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 60 (5th ed. 2017). That might be a further argument for disallowing IA contracting wholesale rather than intervening on a case-by-case basis. However, the arguments made in this Section generally address such fundamental features of the practice that, if courts accept them, they would tend to undermine IA contracting wholesale. Second-order price increases might result if courts refuse enforcement only on any of the more limited grounds discussed below that depend on facts present in only a small fraction of cases.

[245] At least three judicial opinions have ruled against plaintiffs who were parties to mandatory IA agreements and sued their IA providers, reasoning that there was no contract to support the plaintiff's legal claims. Two of the cases involve suits against halfway houses, both of which contain flawed reasoning; still, they present an intriguing argument, the implications of which are worth considering. *See* Hunt v. Airline House, Inc., 2017 WL 3927231, at *2 (Tex. App. Sept. 7, 2017); Jackson v. Biedenharn, 429 Fed. App'x 369, 371 (5th Cir. 2011). In the third case, claims against a private probation provider based on the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, and the Tennessee Consumer Protection Act, TENN. CODE ANN. § 47-18-125 (2024), were denied on a similar basis, *see Bell*, 2011 WL 2218600, at *4–6.

bargained-for exchange. If defendants do not have contracts with IA firms, it raises the question of whether any promises defendants make under these agreements are legally enforceable. If not, defendants may avoid terms such as exculpatory clauses and payment obligations. For instance, one court found that a contract existed for electronic monitoring but dismissed the criminal defendant's case against the firm partly on the basis that she had agreed to certain consequences of not performing conditions in the agreement.[246] Similarly, at least one suit alleging injury against an ankle monitoring device company recently settled.[247] Exculpatory clauses in IA agreements that might hinder such suits may be avoided if there is no bargained-for exchange.[248]

If IA agreements are not contractual, firms must fall back on equitable doctrines such as promissory estoppel and quantum meruit to enforce terms to which defendants have ostensibly agreed. Courts therefore have broad discretion over whether to enforce those terms. Concluding that an apparent agreement is not a contract because it lacks mutuality shifts the burden to the service provider to show that any promises by criminal defendants should be enforced, or claims to compensation upheld on non-contract grounds, rather than placing the burden on the defendant to establish an affirmative defense to contract. This would allow criminal defendants to obtain relief by meeting the lower bar of showing that justice does not require enforcement under promissory estoppel, rather than having to satisfy the demanding doctrines governing affirmative defenses to contract—such as duress and unconscionability.[249] Judges might be more willing to rule in favor of criminal defendants on the basis that the agreements lack mutuality than they would be to apply the doctrines discussed next—duress and unconscionability—because a finding of no consideration does not require judges to wade into assessing the legitimacy of the actions of other branches of government in creating and supervising the operation of these entitlements. A finding of no consideration is a more formal, technical basis for

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[246] *See* Ogle v. Greco, 2015 WL 7454030, at *7 (Ohio Ct. App. Nov. 16, 2015) (affirming the dismissal of a breach of contract action).

[247] *See* Valenta v. BI Inc., 2021 WL 7185785 at *2 (W.D. Pa. Oct. 8, 2021) (setting out the allegations in the complaint that plaintiff was burned by a defective ankle monitor); Valenta v. BI Inc., 2022 WL 580930, at *1 (W.D. Pa. Feb. 25, 2022) (denying the ankle monitoring firm's motion to dismiss); Order for Administrative Closing, Valenta v. BI Inc., No. 2:20-CV-00912 (W.D. Pa. Aug. 23, 2022).

[248] ProntoTrak, *supra* note 3.

[249] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90.

declining to enforce an IA agreement than a finding of duress, unconscionability, or public policy.

2. Duress.

The doctrine of duress allows a party to defend against enforcement of a contract by showing that her consent was induced by improper coercion.[250] The duress defense instantiates in contract law the principle of voluntariness discussed in Part II. There are two potential hurdles in a duress defense to the enforcement of an IA agreement. The first is the argument that the detention, prosecution, incarceration, or threat thereof is not improper. The second is that the party exerting the force or making the threat is not identical to the counterparty to the agreement.

Beginning with the situations that present easy cases, certain frequently obtaining circumstances in IA contracts should make it uncontroversial that neither of these two hurdles poses a barrier to a duress defense. The first such situation is when the private company itself issues the threat of prosecution, detention, or incarceration while posing as the government or acting as an agent of the government, under circumstances in which the threatened person is unable to assess reasonably the lawfulness of the threatened action or the likelihood that the threat will be carried out.

An example is the letter quoted in the Introduction from NCG. The letter was printed on the prosecutor's letterhead but sent by the company, and it directed the recipient to contact NCG to enroll in its diversion program to avoid prosecution.[251] NCG sent this letter without any investigation having been made to determine whether the intent necessary for criminal prosecution was present.[252] This practice of effectively criminalizing breach of a promise without inquiring into intent to defraud is redolent of the practice in the eighteenth- and early-nineteenth-century South of criminalizing, as a kind of promissory fraud, breach of a promise of service made in consideration of money or other value received in advance. The Supreme Court held that earlier practice to constitute compelled contract performance in violation of the Thirteenth Amendment and the antipeonage acts.[253] While the

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[250] *See, e.g.*, *id.* § 175.

[251] *See supra* note 1 and accompanying text.

[252] *See supra* note 1 and accompanying text.

[253] *See Bailey*, 219 U.S. at 219–21, 238. The statute at issue had initially required proof of intent to defraud, but the Alabama Supreme Court had held that meeting that element required evidence from which the inference of intent to defraud could be drawn,

constitutional protection established in those cases was concerned with forced labor and is unlikely to extend to promises to pay, the recognition of coercion in that practice extends to IA contracting.

Likewise, in other cases—particularly those involving misdemeanors in which defendants are not entitled to counsel—suspects or defendants are informed that they face an actual or potential charge and are referred to a private firm to contract out of prosecution or pretrial detention. These suspects or defendants have insufficient means of reasonably assessing the merits or likelihood of success of the proposed charge, and they face significant barriers to contesting it. A related practice is IA providers unlawfully threatening their existing customers with incarceration to induce payment or renegotiation.[254] Agreements entered into under pretexts such as these should be voidable for duress and entitle defendants to be released from debts and receive restitution of amounts paid.[255]

When incarceration, prosecution, or threats thereof have been applied in a manner less glaringly improper, duress will be less easily established under current legal practice. However, courts should recover the historical doctrines policing deals coerced by holders of official power—as found in the decisions that led to the elimination of the government-for-profit system discussed above[256]—to rescind IA agreements more broadly than in the easy cases just discussed. In doing so, they would better align the practice of contract law with its consensus justification. Jurisdictions are split on whether a legally founded threat to detain, prosecute, or incarcerate is improper. There are two views on whether a threat to arrest and jail or criminally prosecute must be unfounded to ground a duress claim. One view is that if there is a basis for the threat to prosecute or imprison (or actual prosecution or imprisonment), the force or threat cannot support a duress defense to contract formation.[257] The historically more

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not mere conjecture. In response, the Alabama legislature amended the statute to make the refusal to perform the service prima facie evidence of intent to defraud, which the U.S. Supreme Court held unconstitutional. *Id.* at 219–20.

[254] *See supra* notes 105–08 and accompanying text.

[255] Misrepresentation is also a colorable claim when the firm, posing as a law enforcement entity, represents that law enforcement believes that the person has committed a crime. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164.

[256] *See supra* notes 132–37 and accompanying text.

[257] *See, e.g.*, Harrison Twp. v. Addison, 96 N.E. 146, 149 (Ind. 1911):

> It may be conceded that the contention of counsel for appellee that to free a transaction from the charge of duress of imprisonment there must be lawful authority for the arrest, a just cause, and a proper purpose is the law in this state and applicable to this case . . . . When a party seeks to avoid a contract

common view is that even a well-founded threat to criminally prosecute or imprison supports a duress defense.[258] Courts have overturned agreements to settle disputes regarding civil matters when one party threatened to initiate criminal proceedings to induce the other party to agree to the settlement agreement, even where the threatened prosecution was well-founded and based on the conduct that gave rise to the settled dispute.[259] There is also precedent for refusal to enforce unfair agreements or excessive payments made while under threat by a public official or private party exercising delegated public power.[260]

It will be easiest to find an improper threat when there is no express statutory authority for the kind of IA contract at issue and the government steered the defendant to a particular IA firm. Even if statutory authority is present, courts could still find duress when legal protections for criminal defendants were circumvented, because government entities cannot delegate

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> because of duress by imprisonment, it is not enough to simply show that he was imprisoned. He must . . . show that the imprisonment was unlawful.

See generally Conant v. Kent, 130 Mass. 178 (1881); Meachem v. Town of Newport, 39 A. 631 (Vt. 1897); Pflaum v. McClintock, 18 A. 734 (Pa. 1889); Spaulding v. Crawford, 27 Tex. 155 (1863); Diller v. Johnson, 37 Tex. 47 (1872); Landa v. Obert, 45 Tex. 539 (1876); Bodine v. Morgan, 37 N.J. Eq. 426 (Ch. 1883); Comstock v. Tupper, 50 Vt. 596 (1878); Feller v. Green, 26 Mich. 70 (1872); Clark v. Turnbull, 47 N.J.L. 265 (Super. Ct. 1885); Mascolo v. Montesanto, 23 A. 714 (Conn. 1891).

[258] *See* RESTATEMENT (SECOND) OF CONTRACTS § 176; Weinberg v. Baharav, 553 S.W.3d 131, 135 (Tex. App. 2018) ("Indeed, the majority position in Texas, as well as other states, appears to be that the threat of criminal prosecution to pressure someone to execute a contract is itself a wrongful use of the criminal justice process that may constitute duress sufficient to void the resulting agreement."); *see also, e.g.*, Pierce v. Estate of Haverlah, 428 S.W.2d 422, 425 (Tex. Civ. App. 1968) ("[T]he threatened prosecution need not be for a crime or offense of which the party threatened is not guilty, but [ ] duress may arise from threats of prosecution for an offense of which the party threatened is actually guilty."). This view is not new. *See, e.g.*, Williamson-Halsell, Frazier Co. v. Ackerman, 94 P. 807, 809 (Kan. 1908) (holding, in regard to a threat to arrest and jail wielded against a debtor to induce execution of a promissory note, that "threats of unlawful imprisonment were not necessary to constitute duress . . . if there was a liability for arrest and imprisonment, and such liability was used to overcome the will and compel the making of a contract, which would otherwise not have been made, it would amount to duress"); Gray v. Freeman, 84 S.W. 1105, 1106–08 (Tex. Civ. App. 1905) ("[T]he guilt or innocence of the wronged party, or the lawfulness or unlawfulness of the threats, are immaterial.").

[259] *See, e.g.*, *Weinberg*, 553 S.W.3d at 135; Shasta Water Co. v. Croke, 276 P.2d 88, 91 (Cal. 1954).

[260] *See, e.g.*, Robertson v. Frank Bros. Co., 132 U.S. 17, 24 (1889) (permitting an importer to recover excessive duties paid to a customs official under threat of onerous penalty); Smith v. Hudson Cnty. Reg., 988 A.2d 114, 119, 122–23 (N.J. Super. Ct. App. Div. 2010) (permitting recovery of excessive payments demanded for copies of public documents), *superseded by statute*, Act of Sept. 10, 2010, § 5, 2010 N.J. Laws 1013, 1017–21, *as recognized by* Kennedy v. Montclair Ctr. Corp. Bus. Improvement Dist., 2017 WL 5664389, at *5 (N.J. Super. Ct. App. Div. Nov. 27, 2017).

governmental power to private parties to do what they may not themselves do. An example would be requiring pretrial detainees to contract for electronic monitoring when the law prohibits charging fees before conviction. Courts could also consider the adequacy of government oversight of the IA provider.

The second matter is the question of the identity between the maker of the threat and the contractual counterparty. In jurisdictions that follow the majority approach presented in the Second Restatement of Contracts, the nonidentity between the maker of the threat and the party to the contract is not a barrier to successfully asserting a duress defense. According to the Restatement, a person in this situation may challenge a contract unless the other party did not know of the duress and materially relied on the transaction.[261] That knowledge element is lacking—in other words, the lack of knowledge fails to obtain—in the case of IA contracts. Other jurisdictions follow a more demanding approach, requiring a beneficial or similar relationship between the issuer of the threat and the contracting party. This requirement will also be satisfied when IA providers hold and profit from delegated government powers under a contractual relationship with the law enforcement entity applying the coercive measures that induce the defendant's agreement.

3. Unconscionability.

If the elements of duress cannot be established in a given case, unconscionability—which polices defective exchanges that fall near, but outside, the doctrinal bounds of duress, fraud, and party incapacity—might be.[262] As defined in the germinal case, unconscionability reduces to the "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[263] Unconscionability regulates the quality of the bargain,[264] and avoiding or reforming a contract for unconscionability requires establishing that the bargain is both procedurally and substantively deficient. The

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[261] RESTATEMENT (SECOND) OF CONTRACTS § 176.

[262] *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 302 (1975).

[263] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981).

[264] *See* Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 785 (1982).

substantive element focuses on the fairness of the terms of the bargain. The procedural element inquires into whether the process by which the agreement was concluded undermines the presumption of voluntary and informed choice.

Procedural unconscionability is found when drastically unequal bargaining power or a lack of market competition undermines the presumption that a party had the opportunity to exercise sufficiently informed and voluntary choice in making the exchange.[265] Both of those possible bases for procedural unconscionability—power imbalance and monopoly—are present in many, if not most, IA contracts. Other contracts between holders of criminal enforcement power (or similarly coercive governmental power) and people subject to that power have recently been found unconscionable.[266] Typically, disparate bargaining power, as in run-of-the-mill consumer contracts, is not sufficient. What is required is a severe differential that allows the more powerful party to effectively force the other party to take or leave dictated terms. While there is a dearth of empirical information about IA contracts, the available information suggests that they tend to be offered to defendants as adhesive, standard form contracts.[267] It is hard to conjure up many real-world bargaining power imbalances more drastic than that between a person offered a contract as the only alternative to incarceration or prosecution and the government-backed private offeror of that contract. That is especially so when defendants have no choice among providers of IAs but are directed to contract with a particular firm, as is often the case. Defendants sometimes may choose between a few firms. In the case of halfway houses, there are typically more approved providers from which a defendant can choose in principle than is

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[265] *See* State v. Baldon, 829 N.W.2d 785, 801 (Iowa 2013) (quoting *In re* Marriage of Shanks, 758 N.W.2d 506, 515 (Iowa 2008)):

> [G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

[266] *See* Menocal v. GEO Grp., Inc., 635 F. Supp. 3d 1151, 1197–98 (D. Colo. 2022) (holding unconscionable labor contracts between private immigration detention centers and detainees), *aff'd*, 2024 WL 4544184 (10th Cir. 2024), *petition for cert. filed*, No. 24-758 (U.S. Jan. 13, 2025); *Baldon*, 829 N.W.2d at 803 (applying unconscionability principles to void a parole agreement that waived the defendant's Fourth Amendment rights). *But see Baldon*, 829 N.W.2d at 846 (Mansfield, J., dissenting) ("[I]f we consider my colleagues' reasoning, [unconscionability analyses] would seem to invalidate as involuntary many plea bargains.").

[267] *See, e.g.*, *Baldon*, 829 N.W.2d at 801–02.

typical in private probation contracting. However, even then, in practice the defendant's choices are often severely limited by the availability of beds.

A criminal defendant can show that the substantive element of unconscionability is satisfied by showing that the exchange is egregiously one-sided, creates severe economic hardship, or represents "too harsh a bargain."[268] Since most defendants are poor,[269] prices are often a significant proportion of the cost of a subsistence-level standard of living, and since IA fees are ordinarily not determined in a competitive market, there will often be a compelling case for severing or reforming payment terms.[270] Additionally, terms authorizing a firm to leave equipment attached to a defendant's body after a completed sentence solely for nonpayment drives "too hard a bargain" and shocks the conscience on the face of it, when it is considered—as is necessary when assessing unconscionability—that this demand is made as part of an adhesive contract offered on pain of incarceration.[271] Moreover, the terms of these agreements are often one-sided in their grant to the firm of extensive control over the defendant, including through the ability to bring criminal sanctions to bear for nonperformance. The magnitude of that control is particularly stark when compared to the severe curtailment of the defendant's recourse for nonperformance by the firm by virtue of her dependence on the firm for certification to the state that she deserves to remain out of jail. This one-sidedness might offer a basis for relieving a defendant of a duty to pay fees assessed by a halfway house for alleged behavioral violations.

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[268] *See* Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1070 (1977).

[269] *See* Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1857 (2020) (noting that "prisoners had a median annual income of under $19,185 prior to their incarceration," and their families "are disproportionally likely to be poor" (quotation marks omitted) (quoting Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://perma.cc/XW4V-T9G6)).

[270] For example, electronic monitoring supervision fees average nearly $300 per month, *see* WEISBURD ET AL., *supra* note 43, at 16, and diversion programs can cost much more, which could support an unconscionability argument. *Cf.* Maxwell v. Fairbanks Cap. Corp. (*In re* Maxwell), 281 B.R. 101, 129–30 (Bankr. D. Mass. 2002) (holding a loan agreement substantively unconscionable because of the high debt-to-income ratio); Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 63 (Ariz. 1995) (Martone, J., concurring in the judgment) (reasoning that an agreement should have been held unconscionable as a matter of law on the basis that the firm "took advantage of a limited person living on the margin of existence," "subject[ed] a marginal person to the risk of loss of her home," and sought to "extract $17,000 from a hotel maid who earned $400 per month" (quotation marks omitted) (quoting *Maxwell*, 907 P.2d at 53–54)).

[271] *See e.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80, 84 (3d Cir. 1948).

4. Public policy.

Besides duress and unconscionability, courts will sometimes be able to apply the public policy defense to enforcement to void IA contracts or reform their oppressive terms.

Contracts used in a way that circumvents legal protections for defendants—such as laws prohibiting excessive criminal fines and fees, barring preconviction fees, requiring indigency determinations, or banning imprisonment for inability to pay fines and fees[272]—should be reformed as against public policy to release defendants from IA debt and prevent them from being jailed because of such debt. The cases in which it might be easiest to reform these contracts on public policy grounds are those in which there is no express statutory authority for the kind of IA contract at issue. If statutory authority is present, courts should still void contracts that circumvent constitutional and other legal protections for defendants, because government entities cannot delegate governmental power to private parties to do what they may not themselves do. Because inadequate government supervision results in abusive private exercise of delegated government power,[273] courts should also assess the adequacy of oversight rather than concluding that the presence of statutory authority or a government contracting relationship ipso facto validates the terms of a contract.

In addition, there is a strong doctrinal basis in some jurisdictions for courts to sever oppressive terms in contracts that affect the public interest, are concluded in monopolistic or oligopolistic markets, and give one party significant control over the person or property of the other.[274] Exculpatory clauses in such contracts have been voided, for instance.[275] It is hard to imagine a contract that fits more cleanly with this doctrine than IA contracts. Given the coercive nature of these contracts, liability limitations could be severed, as could oppressive prices and terms permitting firms

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[272] *See supra* Part III.B.

[273] *See, e.g.*, Romney, *supra* note 1; ALBIN-LACKEY, *supra* note 8, at 55–67; Tierney Sneed, *Private Misdemeanor Probation Industry Faces New Scrutiny*, U.S. NEWS (Feb. 6, 2015), https://perma.cc/9TPH-RSQE; Laura I. Appleman, *The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt*, 55 HARV. C.R.-C.L. L. REV. 1, 5 (2020).

[274] *See, e.g.*, Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 447 (Cal. 1963) (invalidating as against public policy a contract requiring, as a condition for admission to a hospital, the release from liability for future negligence).

[275] *Id.* at 442.

to refuse to remove a device after the punishment term has ended just because of nonpayment.[276]

C. Other Judicial Responses

In addition to appropriately applying the common law doctrines available to void or reform IA contracts, judges should also do more as supervisors of release conditions and agreements to avoid prosecution or incarceration. In cases of release from pretrial detention, judges must approve the terms of release submitted by the prosecutor. Terms of release often reference the requirements of electronic monitoring and participation in diversion programs. To the extent that these details are not subject to judicial approval, they should be. The contracts that defendants are required to agree to with private companies should be required to be appended to the motion to the court seeking approval for release. Judges should scrutinize these agreements for oppressive and privacy-invasive terms. It should be mandatory to inform judges of prosecutorial incentives to overuse private IAs, including participation in "offender-funded" programs and profit sharing with prosecutors' offices. Judges should scrutinize conditions imposed on release to ensure that they comply with presumptions that putative defendants be released on their own recognizance, with standards for imposing conditions—such as that they be reasonably related to mitigating flight or public safety risks—and with laws controlling the costs of conditions on putative defendants. Judges should also conduct an ability-to-pay inquiry before approving offender-funded conditions. Of course, the effectiveness of these proposals is limited by the scrupulousness of judges. The effectiveness of solutions that seek to improve judicial oversight in the criminal process might be increased by mandating that IA contracts submitted as part of court filings be made public records published online. Advocacy organizations can then compile and publicize comparative reports on judges' treatment of defendants vis-à-vis IA contracts.

IV. OBJECTIONS AND RESPONSES

This Part addresses two objections to critiquing the practice of IA contracting: that the widely accepted fact of plea bargaining entails the acceptability of IA contracting and that eliminating IA contracting will make defendants worse off.

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[276] Firms are currently engaging in this practice. *See* Kofman, *supra* note 97.

A. If Plea Bargaining, Why Not This?

More than 95% of criminal convictions in the United States are obtained through plea bargaining.[277] Many legal scholars have criticized plea bargaining,[278] but it is an established and generally accepted social practice that shows no signs of abating. Several leading scholars have applied contract theory to the practice, some to criticize and others to defend it.[279] A number of scholars have persuasively shown how plea bargaining uses coercive criminal enforcement power to induce defendants to give up their legal rights in order to make administering the criminal law less expensive and more convenient for public officials.[280] Professor John Langbein compared plea bargaining to torture in that the criminal law has been reformed to facilitate the practice by empowering prosecutors to impose, and credibly threaten to impose, drastically harsher sentences than would otherwise be available in order to induce defendants to accept plea bargains and thereby spare prosecutors the effort of proving guilt at trial.[281] That powerful critique of plea bargaining extends seamlessly to IA contracting. But the reverse is not true: accepting defenses of plea bargaining does not compel the acceptance of IA contracting. IA contracting differs importantly from plea bargaining in that it commodifies the criminal enforcement power and

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[277] Bibas, *Incompetent Plea Bargaining*, *supra* note 123, at 150.

[278] *See, e.g.*, CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 16 (2021); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 698 (1981) [hereinafter Alschuler, *Plea Bargaining Debate*] (arguing that contract theory supports prohibiting plea bargaining); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1195–96 (1975); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part 1*, 76 COLUM. L. REV. 1059, 1127–28 (1976); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 56 (1988) [hereinafter Schulhofer, *Criminal Justice Discretion*] (arguing that contract theory supports prohibiting plea bargaining); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 752–53 (1980); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1038–39 (1984) [hereinafter Schulhofer, *Plea Bargaining*].

[279] *Compare, e.g.*, Robert E. Scott & William J. Stuntz, *Plea-Bargaining as a Social Contract*, 101 YALE L.J. 1909, 1911–13 (1992) (defending plea bargaining using contract theory), *and* Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308–09 (1983) (defending plea bargaining using economic theory), *with* Alschuler, *Plea Bargaining Debate*, *supra* note 278, at 698 (arguing that contract theory supports prohibiting plea bargaining), *and* Schulhofer, *Criminal Justice Discretion*, *supra* note 278, at 56 (same).

[280] *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978).

[281] *See* Langbein, *supra* note 280, at 8.

introduces risks of venal moral hazard not present in plea bargaining without IA contracting.

Both plea bargaining and IA contracting apply the coercive power of criminal enforcement to induce defendants to agree to give up entitlements.[282] In plea bargaining, the powers granted to prosecutors to enable them to apply the requisite pressure, and the entitlements whose trading they facilitate, are internal to criminal procedure.[283] Prosecutors are granted wide discretion in charging and sentencing decisions that permit them to leverage large sentencing differentials to pressure defendants to plead guilty rather than proceed to trial.[284] As conceptualized by two scholars who defend plea bargaining under the expanded choice norm, defendants exchange their entitlement to force prosecutors to prove their cases at trial for prosecutors' entitlement to seek the maximum punishment.[285] Defenses of plea bargaining mostly reduce to two arguments, neither of which extends to IA contracting.

Plea bargaining is commonly defended as being inevitable because it is impossible to adjudicate the number of cases that the criminal legal system must process.[286] Plea bargaining is tolerated as a "necessary evil," as Justice Antonin Scalia put it, despite the "grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense" because "many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed upon it, and our system of criminal justice would

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[282] *See id.*; Scott & Stuntz, *supra* note 279, at 1912.

[283] This was historically true. However, plea bargaining is more often being used to induce people to relinquish their rights to pursue civil suits against governments for torts. This practice has the same structure and is subject to the same critiques as the kinds of IA contracting that are the focus of this Article. *See* Town of Newton v. Rumery, 480 U.S. 386, 394 (1987) (sanctioning an agreement to dismiss charges if the defendant waived civil claims arising from government conduct during arrest or prosecution); Bordenkircher v. Hayes, 434 U.S. 357, 361–65 (1978). I thank Professor Christopher Slobogin for calling these cases to my attention.

[284] *See* Langbein, *supra* note 280, at 10–13; Missouri v. Frye, 566 U.S. 134, 144 (2012) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes." (alteration in original) (quotation marks omitted) (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006))). *See generally* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37.

[285] *See* Scott & Stuntz, *supra* note 279, at 1914.

[286] *See, e.g.*, Santobello v. New York, 404 U.S. 257, 260 (1971); Schulhofer, *Plea Bargaining*, *supra* note 278, at 1038–40; Langbein, *supra* note 280, at 21.

grind to a halt."[287] Upholding the lawfulness of plea bargaining as an evil that has become necessary for the criminal enforcement system to function does not require courts to permit the further step of commodifying the system by facilitating IA contracting. The very notion of tolerating a necessary evil implies a strong presumption against the expansion of that toleration. Extending the toleration of plea bargaining to IA contracting requires further justification of two additional practices: (1) the creation of entitlements to sell access to more lenient criminal enforcement measures and (2) the use of the criminal enforcement power to raise money from defendants to fund government functions.[288] The law protects in various ways against such use of the criminal enforcement power, and the underlying rationales for those protections extend to IA contracting.[289] In addition to the injustice inherent in using the criminal enforcement power extractively, doing so creates opportunities for venal moral hazard and perceptions thereof that simply are not presented in plea bargaining absent IA contracting.

The second regular feature of defenses of plea bargaining is the suggestion that it improves the situation facing defendants as compared to the alternative of withdrawing the entitlement to plead guilty.[290] That argument is often supported, more or less subtly, by the assertion that nearly all defendants are guilty anyway.[291] Set aside for now the circularity of justifying the removal of procedural protections by assuming that most defendants are guilty—why stop at plea bargaining? Set aside also the difficulty of sustaining the presumption of guilt as more and more people

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[287] Lafler v. Cooper, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting); *accord* Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WILLIAM & MARY L. REV. 1505, 1507 (2016) (recognizing that plea bargaining might be necessary but showing that it is "incompatible with the most commonly-accepted premises of American criminal justice"—retributivism and adversarialism—and yet might be justified if it is reformed to align with a different set of premises: crime prevention and inquisitorialism); Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process:* Missouri v. Frye *&* Lafler v. Cooper, 46 LOYOLA L.A. L. REV. 457, 460 (2013) ("[Plea bargaining] is a system that is tolerated because, without it, our criminal justice system would be so overwhelmed that it would collapse.").

[288] *See supra* Part III.

[289] *See supra* Part III.B.

[290] *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119–20 (2008); Scott & Stuntz, *supra* note 279, at 1918.

[291] *See, e.g.*, Scott & Stuntz, *supra* note 279, at 1935 n.99 (defending plea bargaining using contract theory and noting the conclusion of a qualitative empirical study that most defense lawyers come to learn that most of their clients are guilty); Schulhofer, *Plea Bargaining*, *supra* note 278, at 1043–44 (citing scholars arguing that most defendants are guilty).

convicted through guilty pleas are exonerated.[292] The arguments presented here against IA contracting do not depend on defendants' guilt or innocence and do not entail withdrawing the entitlement to plead guilty. Whatever support there might be for the empirical claim that plea bargaining makes defendants better off, there is little reason to believe that the regime of IA contracting makes defendants better off overall. Moreover, as explained in the next Section, IAs are typically cheaper than incarceration, so if IA contracting were not permitted, governments would still have incentives to prefer alternatives to jail or prison.[293]

B. Better Alternatives?

When the alternative is requiring the accused person to go to jail, and when people are observed to choose IA contracting over jail, in what sense can it be said that people are harmed by IA contracting? Restricting the contracting opportunities available to a person who is already in a disadvantageous position will sometimes make that person even worse off.[294] Undoubtedly, IAs benefit defendants as well as governments.[295] The question then is how they should be structured and financed. Instead of commodifying IAs, governments can operate IA programs in-house or

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[292] *See Home*, THE NAT'L REGISTRY OF EXONERATIONS, https://perma.cc/72VZ-V2VV; Ryan Gabrielson & Topher Sanders, *How a $2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES (July 7, 2016), https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html (discussing the hundreds of people in one Texas district who pleaded guilty to drug possession after police either misread or misrepresented field drug tests, later determined to have actually indicated that no drugs were detected, and reporting that nearly 60% of those arrested based on false or erroneous readings of field tests were Black).

[293] *See infra* notes 302, 303, and accompanying text.

[294] *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1910–11 (1987).

[295] Humanitarian arguments have been made for electronically monitored release, diversion from prosecution, and community corrections. Wiseman, *supra* note 35, at 1351–53; Kofman, *supra* note 97; Mirko Bagaric, Dan Hunter & Gabrielle Wolfe, *Technological Incarceration and the End of the Prison Crisis*, 108 CRIM. L. & CRIMINOLOGY 73, 75–80 (2018); Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123, 127–31 (2017). Bail reform proposals and statutes typically include expanded electronic monitoring. *See, e.g.*, John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis*, 88 U. CHI. L. REV. 1285, 1355 (2021). IAs might improve prison conditions by reducing overcrowding. *See Examining Electronic Monitoring Technologies*, *supra* note 92; Kofman, *supra* note 97. Electronic monitoring and diversion programs help some offenders by providing guardrails of accountability that can help them to develop constructive habits. *See* Malcom M. Feely, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Enforcement System—An Account of Convict Transportation and Electronic Monitoring*, 17 CRIM. JUST., L. & SOC'Y (2016) ("One innovative way to combat chronic truancy is to attach electronic tethers to problem students.").

privatize them through public procurement and public funding.[296] Admittedly, doing so does not eliminate the possibility of using the criminal enforcement power extractively, as recent experience in Ferguson, Missouri, and elsewhere demonstrates.[297] Even so, there are good reasons to focus on opposing IA contracting. Governments use IA contracting to extract value from defendants more effectively and surreptitiously. Some governments that have ventured into using the criminal enforcement system extractively have found that operating such a system in-house costs more than it yielded in revenue.[298] The value proposition that IA firms explicitly offer to local governments is the application of their commercial incentives and know-how to generate revenue using criminal enforcement power.[299] Therefore, removing this

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[296] *See generally* Farhang Heydari, *The Private Role in Public Safety*, 90 GEORGE WASH. L. REV. 696, 703–08 (2022) (explaining the varied forms that private participation in the criminal enforcement system takes and showing that the effects of private involvement depend on its institutional structure); Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO STATE L.J. 983, 986–88 (2011) (proposing combining choice and competition with public funding of prisons by giving prisoners vouchers).

[297] A government that wishes to transfer wealth upward might do so by imposing criminal fees and fines and transferring the money through public procurement contracting or in other ways. There is substantial evidence of local governments using their criminal enforcement apparatuses in just this way, even without outsourcing the task to private firms. The most famous recent exposure of such behavior is the Justice Department's report on Ferguson, Missouri, following the killing of Michael Brown. *See Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri*, *supra* note 95. This practice, taking various forms, appears to be commonplace. *See* Natapoff, *supra* note 7, at 1059, 1077–78, 1098; ACLU, IN FOR A PENNY, *supra* note 96, at 9–10, 25–28, 50, 55 (citing government investigations finding troubling reliance on aggressive collection of fees and fines from people accused or convicted of crimes to fund the operation of courts and other local government entities).

[298] *See* ALBIN-LACKEY, *supra* note 8, at 13–14 (discussing local governments' experience finding that their efforts to raise revenue through criminal fines and fees cost more than the amount generated, and their turning toward private companies promising to take over the role and collect fees directly from citizens); Donna Rogers, *Private Versus Public Probation Services*, CORRS. F., May/June 2018, at 42, 42–43 ("Private probation companies shift the cost of supervision from the state to the system's 'users,' meaning the cost of probation is 'free' to the courts, an attractive option in the era of shrinking budgets and rising costs."); Beth M. Huebner & Sharon K.S. Shannon, *Private Probation Costs, Compliance, and the Proportionality of Punishment: Evidence from Georgia and Missouri*, RSF: RUSSELL SAGE FOUND. J. SOC. SCIS., Jan. 2022, at 179, 180 (finding that extractive state probation systems are usually tax-funded, but private probation companies promise services free of charge to the jurisdiction); *see also, e.g.*, Rob Masson, *Dozens of Defendants Ordered to Remove Ankle Monitors, as Sheriff Withdraws from Program*, FOX 8 (Jan. 13, 2016), https://perma.cc/BXX9-C9VF (reporting that a local sheriff's office shut down its electronic monitoring program due to costs and that private firms were willing to bid for the contract).

[299] *Offender-Funded Programs*, *supra* note 76 (pitching offender-funded programs to governments); *DMS Has Joined with Law Enforcement to Reduce Overcrowding and Provide Reliable Monitoring*, *supra* note 76 (pitching offender-funded programs to governments).

technology from governments' grasp reduces their capacity to exploit the criminal enforcement power. In addition, programs administered via IA contracting are less transparent and less regulated than government-administered programs.[300] IA contracting allows private companies and governments to circumvent laws, regulations, and scrutiny designed to protect people in the criminal enforcement system. It allows firms to impose onerous and one-sided terms on people through contracting that governments might not be able to impose directly through legislation and regulations. Public records laws do not apply to the companies, making it difficult for researchers, advocates, and the rest of the public to learn how they operate.[301] The heightened extractive power that results from harnessing private contracting to criminal enforcement is not incidental to this practice; it is precisely the arbitrage opportunity that generated and sustains it.

An analysis of what arrangements governments would adopt if precluded from engaging in IA contracting is inevitably speculative. However, there are reasons to expect a less extractive alternative to emerge. The reported experience of some jurisdictions indicates the difficulty of profitably operating an extractive criminal enforcement apparatus in-house.[302] Many, perhaps most, IAs—such as probation, electronic monitoring, parole, and halfway houses—are less costly per person to administer than incarceration.[303] When cost-reducing or revenue-seeking governments are precluded legally or practically (because of operational constraints) from forcing defendants to bear the costs of enforcement, they will often have incentives to resort to publicly funded IAs or to deprioritize the enforcement of misdemeanors that gives rise to a large proportion of IA contracting. Precisely how decisionmaking will proceed depends on the structure of corrections financing within a state, including factors such as the proportion of funding for jails and prisons as compared to IAs that comes from state versus county budgets.[304] It also depends on the power

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300 *See supra* Part III.C.

301 WEISBURD ET AL., *supra* note 43, at 22 ("These arrangements cut out government agencies and make it almost impossible to determine the precise ways in which monitoring operates. Likewise, because private companies are not governed by public record laws, it is virtually impossible to determine how these companies function.").

302 *See* ALBIN-LACKEY, *supra* note 8, at 13–14.

303 *See, e.g.*, *Supervision Costs Significantly Less than Incarceration in Federal System*, U.S. CTS. (July 18, 2013), https://perma.cc/QN4H-LZE7.

304 For this insight, I am grateful to Frank J. Sullivan, Jr., a former Justice of the Indiana Supreme Court and one of the state's former State Budget Directors.

of interest groups such as prison officers.[305] A detailed analysis of the political economy of state and local criminal enforcement funding is beyond the scope of this Article. It suffices to say that there are compelling reasons to believe that better alternatives to mandated defendant contracting for IAs are feasible.

CONCLUSION

Mandatory IA contracting rests on unexamined presumptions about the proper scope of contract. These presumptions are evident in the fact that for all the criticism of private provision of IAs, it has gone unnoticed that what is occurring is forced contracting. State legislators and lobbyists have successfully resisted regulation of IA firms by invoking free-market ideology.[306] The private provision of public services has become so entrenched that it has been forgotten that there are preconditions to the ability of contract to provide the benefits that justify it.[307]

Whether the practice does in fact lead to the widespread moral hazard to which it is structurally susceptible, it inevitably earns the suspicion of misusing the criminal enforcement power for profit. Requiring people to contract on pain of incarceration or prosecution is likely to increase distrust in the criminal law system, and the law and government more broadly, especially among the minority and poor communities that have the most encounters with the criminal enforcement system. This is an old problem. The histories of peonage and government for profit demonstrate that introducing contract into relations of state coercion can cause changes in law, policy, and official behavior that facilitate extraction through threats and undermine the public

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[305] *Cf.* Kaufman, *supra* note 269, at 1854 n.231, 1861 (suggesting that corrections officers unions might resist the practice of transferring prisoners to other states and other practices that reduce the demand for officers' work).

[306] *See* James Finn, *Deadly Failures, Vanishing Suspects: Scrutiny of Ankle Monitoring System Grows*, THE ADVOCATE (Feb. 15, 2023), https://perma.cc/8WKN-RQEB.

[307] *See, e.g.*, Avinash Dixit, *Incentives and Organizations in the Public Sector: An Interpretative Review*, 37 J. HUM. RES. 696, 697 (2002) (noting the special features of public sector entities—including "multiplicity of . . . tasks" and "stakeholders . . . [with] often-conflicting interests"—that make the application of incentive theory to the public sector complex); Oliver Hart, Andrei Shleifer & Robert W. Vishny, *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1139–41 (1997) (arguing that a private prison provider has incentive to overinvest in reducing costs because it ignores the effect on noncontractible quality). *See generally* Andrei Shleifer, *State Versus Private Ownership*, 12 J. ECON. PERSPS. 133 (1998) (laying out the debates regarding market versus state provision of goods and the state's make-or-buy decisions).

values at stake. Additionally, people recognize this and lose trust in government.

Distrust of police, the criminal enforcement system, and governmental institutions generally by Black Americans has been thoroughly empirically documented for over a century.[308] Sociologist W.E.B. Du Bois's germinal study of this distrust in the early twentieth century concluded that the divergent perceptions of legitimacy of the criminal enforcement system in Georgia among white and Black citizens was caused partly by the system of convict leasing, which made "the state traffic in crime for the sake of revenue instead of seeking to reform criminals for the sake of moral regeneration."[309] Du Bois argued that this earned distrust contributed to criminal behavior, a causal claim supported by the large body of research now existing on why people obey the law.[310] Professor Monica C. Bell has elaborated the even broader consequences of earned distrust, which she theorized as legal and social estrangement.[311]

Mandating contract with the force of criminal penalties undermines the legitimacy of both contract and the criminal enforcement system. After 120 years, Du Bois's appeal for "the abolition of state traffic in crime for public revenue and private gain" still resonates.[312] Earned distrust in the criminal enforcement system remains high and, indeed, has increased in recent decades, particularly among Black, other minority community, and poor Americans.[313] The rise of the new "offender-funded offender management" exacerbates this merited suspicion and the illegitimacy and estrangement that it engenders.[314]

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[308] *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067–70 (2017).

[309] W.E.B. DU BOIS, SOME NOTES ON NEGRO CRIME, PARTICULARLY IN GEORGIA 65 (1904).

[310] *Id.*; *see* Bell, *supra* note 308, at 2067–87.

[311] Bell, *supra* note 308, at 2067–87.

[312] DU BOIS, *supra* note 309, at 66.

[313] Bell, *supra* note 308, at 2109; Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO STATE J. CRIM. L. 231, 238–39 (2008).

[314] Bell, *supra* note 308, at 2109.