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Debt and Discipline: Neoliberal Political Economy and the Working Classes

Tayyab Mahmud[1]

ABSTRACT

Over the last three decades, neoliberal restructuring of the economy created a symbiosis of debt and discipline. New legal regimes and strategic use of monetary policy displaced Keynesian welfare, facilitated financialization of the economy, broke the power of organized labor, and expanded debt to sustain aggregate demand. Public laws and policies created a field of possibility within which financial markets extended their reach and brought ever–increasing sections of the working classes and the marginalized within the ambit of the credit economy. Reordered public policies and new norms of personal responsibility demarcated the horizon within which the economically vulnerable pursued strategies of economic survival and security. Neoliberalism deployed refashioned concepts of individual responsibility and human capital to facilitate the assemblage of subjects who would engage the financialized economy as risk–taking entrepreneurs. Faced with restructured labor markets, wage pressures, and shrinking welfare, working classes found themselves with little choice but to pay for their basic needs through debt. Engulfment in debt, in turn, induced self–discipline and conformity with the logic of the financialized economy and precarious labor markets. This ensemble sutured debt with discipline.

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1 Professor of Law and Director, Center for Global Justice, Seattle University. Earlier versions of this paper were presented at the Law and Public Affairs (LAPA) Seminar at Princeton University, Law & Society Association's Annual Meeting at San Francisco, ClassCrit VI Workshop at Washington, D.C., LatCrit XVI Conference at San Diego, Chapman University School of Law, DePaul University School of Law, and Hofstra University School of Law. I want to thank Jaswinder Brara, Paula Chakravartty, Angelin Chang, Sumi Cho, Tim Canova, Andrea Freeman, Carmen Gonzalez, Marc–Tizoc González, Gil Gott, Carol Greenhouse, Hamid Khan, Victoria Kill, Martha McCluskey, Charles Pouncy, Steven Ramirez, and Denise Da Silva for their thoughtful comments on earlier drafts. Research librarians at Princeton University and Seattle University School of Law provided invaluable assistance with this project. Any remaining errors are, of course, mine alone.

Get them to invest their savings in their homes and own them. Then they won't leave and they won't strike. It ties them down so they have a stake in our prosperity.
-Charles Harris Whitaker[2]

If history shows anything, it is that there's no better way to justify relations founded on violence, to make such relations seem moral, than by reframing them in the language of debt – above all, because it immediately makes it seem that it's the victim who's doing something wrong.
-David Graeber[3]

He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.
-Michel Foucault[4]

INTRODUCTION

BEFORE there was money, there was debt.[5] Before there was an American republic, there was America's national debt.[6] Over the last three decades, the neoliberal reordering of political economy produced a "debtor nation," a "republic of debtors," and an "American way of debt" resting on a hypertrophied financial system.[7] Pushed beyond the frontiers of sustainability, this "empire of debt" induced a global financial meltdown.[8] The subsequent cost of the public rescue of the financial industry in the

2 CHARLES HARRIS WHITAKER, THE JOKE ABOUT HOUSING 9 (1920) (quoting the "Welfare Director of a large company").

3 DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 5 (2011).

4 MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 202–03 (Alan Sheridan trans., 2d ed. 1995) (1977).

5 For over 5000 years, elaborate credit systems have been used to buy and sell goods—long before the invention of coins or currency. The language of many ancient works of law and religion—words like "guilt," "sin," and "redemption"—often derives from ancient debates about debt, and shaped most basic ideas of right and wrong. GRAEBER, *supra* note 3, at 8.

6 *See* SIMON JOHNSON & JAMES KWAK, WHITE HOUSE BURNING: THE FOUNDING FATHERS, OUR NATIONAL DEBT, AND WHY IT MATTERS TO YOU (2012); ROBERT E. WRIGHT, ONE NATION UNDER DEBT: HAMILTON, JEFFERSON, AND THE HISTORY OF WHAT WE OWE (2008).

7 *See* MENZIE D. CHINN & JEFFRY A. FRIEDEN, LOST DECADES: THE MAKING OF AMERICA'S DEBT CRISIS AND THE LONG RECOVERY (2011); LOUIS HYMAN, BORROW: THE AMERICAN WAY OF DEBT (2012); LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK (2011); ANYA KAMENETZ, GENERATION DEBT: WHY NOW IS A TERRIBLE TIME TO BE YOUNG (2006); BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002); ROBERT D. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT (2000).

8 WILLIAM BONNER & ADDISON WIGGIN, THE NEW EMPIRE OF DEBT: THE RISE AND FALL OF AN EPIC FINANCIAL BUBBLE (2d ed. 2009).

United States alone stands at 7.77 trillion dollars,[9] and the credit worthiness of the United States has been put into question.[10] The meltdown-induced Great Recession sharply increased income and wealth inequality[11] and has hit the working classes and racial minorities particularly hard.[12] The number of those living in poverty in America stands at 46.2 million,[13] and many cannot even afford a burial and are choosing cremation instead.[14] The financial crisis metastasized into pervasive fiscal crises, prompting declarations of "financial martial law" and renewed assaults on the working

9 Gretchen Morgenson, *Secrets of the Bailout, Now Told*, N.Y. TIMES, Dec. 4, 2011, at BU1. Global losses in the financial sector alone exceed USD 3.4 trillion. INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: NAVIGATING THE FINANCIAL CHALLENGES AHEAD 5 (Oct. 2009), *available at* http://www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf. The bill for worldwide public rescue of financial institutions is USD 20 trillion. UNITED NATIONS, WORLD ECONOMIC SITUATION AND PROSPECTS 2010, xii–xiii (2010). The long-term total potential cost of just the U.S. taxpayers' rescue of finance capital is USD23.7 trillion—over 150% of GDP, as estimated by the special inspector general for TARP. SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 174 (2010).

10 *See* BONNER & WIGGIN, *supra* note 8; Binyamin Appelbaum, *Fed Chief Says Politics Hurt Markets and Nation*, N.Y. TIMES, Aug. 27, 2011, at A1; Binyamin Appelbaum & Eric Dash, *S & P Downgrades Debt Rating of U.S. for the First Time*, N.Y. TIMES, Aug. 6, 2011, at A1.

11 *See* CONG. BUDGET OFFICE, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007, at 11–12 (2011), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/10-25-HouseholdIncome.pdf; Timothy Noah, *The United States of Inequality*, SLATE (Sept. 3, 2010, 3:06 PM), http://www.slate.com/articles/news_and_politics/the_great_divergence/features/2010/the_united_states_of_inequality/introducing_the_great_divergence.html.

12 The wealth gap between racial groups has risen to record highs. *See* RAKESH KOCHHAR ET AL., PEW RESEARCH CTR., TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 1 (2011), *available at* http://pewresearch.org/pubs/2069/housing-bubble-subprime-mortgages-hispanics-blacks-household-wealth-disparity. In 2010, about one and a half million people in the U.S. declared bankruptcy and suicide rates are on the rise. Fred Magdoff, *The Jobs Disaster in the United States*, MONTHLY REV., June 2011, at 24, 37 n.1. In August 2011, the unemployment rate was 8.0% for whites, 16.7% for blacks, 11.3% for Hispanics, and 7.1% for Asians. Shaila Dewan, *Zero Job Growth Latest Bleak Sign for U.S. Economy*, N.Y. TIMES, Sept. 3, 2011, at A1. In 2009, 35% of Black households and 31% of Latino households had zero or negative wealth, compared with 15% for whites. Desmond S. King & Rogers M. Smith, *On Race, The Silence Is Bipartisan*, N.Y. TIMES, Sept. 3, 2011, at A21. Worldwide job losses could hit a staggering 50 million by 2009. Nelson D. Schwartz, *Unemployment Surges around the World, Threatening Stability*, N.Y. TIMES, Feb. 15, 2009, at A1. Jobless rates among blacks have consistently been about double those of whites; in October the black unemployment rate was 15.1%, compared with 8% for whites. Timothy Williams, *Public Sector Sheds Jobs; Blacks Are Hit Hardest*, N.Y. TIMES, Nov. 29, 2011, at A16.

13 KRISTIN SEEFELD, ET AL., AT RISK: AMERICA'S POOR DURING AND AFTER THE GREAT RECESSION 5 (2012), *available at* http://www.tavistalks.com/remakingamerica/wp-content/uploads/2011/12/Indiana-University_White-Paper_EMBARGOED-UNTIL-WED__JAN.-11-AT-8AM1.pdf.

14 Cremation is chosen over burial in 41% of American deaths, up from 15% in 1985. For one-third of those who chose cremation in 2010, cost was the primary factor. Kevin Sack, *In Tough Times, a Boom in Cremations as a Way to Save Money*, N.Y. TIMES, Dec. 9, 2011, at A1.

classes.[15] Lower incomes and increased poverty have rendered the 2000s a "lost decade."[16] A sluggish economy with high unemployment is the "new normal,"[17] with prospects of a steep and lasting drop in wages.[18] The search for culprits has turned into a rush to round up the usual suspects.[19] Personal greed, corrupt financiers, imprudent investors, and unworthy homeowners are the favored targets.[20] There is scant recognition that the current financial crisis is a symptom of the structural crisis of capitalism[21] and that we stand at "a transformative moment in global economic history

15 Exemplary is the Michigan legislation, dubbed "financial martial law" by a legislator, which empowers the governor to declare a "financial emergency" in towns or school districts. He could then appoint an emergency financial manager who can fire local elected officials, break contracts, seize and sell assets, eliminate services – and even eliminate whole cities or school districts without any public input. *See* Stephanie Condon, *Michigan Bill Would Impose "Financial Martial Law,"* CBS NEWS (Mar. 11, 2011), http://www.cbsnews.com/8301-503544_162-20042299-503544.html ; Andy Kroll, *Behind Michigan's "Financial Martial Law:" Corporations and Right-Wing Billionaires*, MOTHER JONES (Mar. 23, 2011), http://motherjones.com/politics/2011/03/michigan-snyder-mackinac-center; Chad Selweski, *Michigan Senate Passes Emergency Manager Bills*, DAILY TRIB., http://www.dailytribune.com/article/20110310/NEWS/303109994/michigan-senate-passes-emergency-manager-bills (last updated April 10, 2012, 8:58 PM). A primary objective of declaring financial emergencies is to give emergency managers "the ability to set aside contracts with public workers' unions." Monica Davey, *Detroit's Mayor Says Budget Gap May Require Emergency Manager*, N.Y. TIMES, Nov. 4, 2011, at A15. These measures are helping states and local governments to replace public employees with contract workers "who will do the same job for less." Motoko Rich, *A Hidden Toll as States Shift to Contract Workers*, N.Y. TIMES, Nov. 7, 2011, at A1. Concurrently, assaults on organized labor have picked up pace. *See, e.g.*, Monica Davey, *Indiana Governor Signs a Law Creating a 'Right to Work' State*, N.Y. TIMES, Feb. 2, 2012, at A12.

16 Sabrina Tavernise, *Poverty Rate Soars to Highest Level Since 1993*, N.Y. TIMES, Sept. 14, 2011, at A1.

17 *See* Magdoff, *supra* note 12, at 26, 36; Jason DeParle et al., *Older, Suburban and Struggling: 'Near Poor' Startle the Census*, N.Y. TIMES, Nov. 19, 2011, at A1; Sabrina Tavernise, *Middle-Class Areas Shrink as Income Gap Grows, New Report Finds*, N.Y. TIMES, Nov. 16, 2011, at A16; *see also* David McNally, *Slump, Austerity and Resistance*, 48 SOCIALIST REG. 36, 39 Fig. 1 (2012) (comparing employment recoveries following recessions between 1974 and 2011).

18 Sudeep Reddy, *Downturn's Ugly Trademark: Steep, Lasting Drop in Wages*, WALL ST. J. (Jan. 11, 2011), http://online.wsj.com/article/SB10001424052702304248704575574213897770830.html.

19 Timothy J. Sinclair, *Round Up the Usual Suspects: Blame and the Subprime Crisis*, 15 NEW POL. ECON. 91, 92, 104 (2010).

20 *See, e.g.*, CHARLES H. FERGUSON, PREDATOR NATION: CORPORATE CRIMINALS, POLITICAL CORRUPTION, AND THE HIJACKING OF AMERICA (2012); GRETCHEN MORGENSON & JOSHUA ROSNER, RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITION, GREED, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON (2011); andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, 203–10 (2011), for the tendency to blame racial minorities.

21 "The economic and financial crisis of the late 2000s was not an accident nor the mere result of a banking system that had escaped control. It was a moment of revelation, one that exposed the systemic contradictions with which global capitalism has been struggling for decades." ALEX CALLINICOS, BONFIRE OF ILLUSIONS: THE TWIN CRISES OF THE LIBERAL WORLD 94 (2010).

whose ultimate resolution will likely reshape politics and economics for at least a generation."[22] Pressing systemic and structural questions confront us: Why, when, and how did a debt-driven financialized economy come about? What changes in the labor markets induced the working classes to turn to debt? How were the working and marginalized classes incorporated into the circuits of credit? What was the impact of this incorporation? This article explores these questions by bringing into relief the production of a debt-fueled financialized economy and the laws and public policies that made this possible.

This article argues that neoliberalism, a reorganization of capitalism to secure hegemony of finance capital,[23] is a project of the wealth-owning classes to reverse the setbacks they had suffered during the era of Keynesian welfare. This transformation entailed a rollback of the welfare state, an attack on the power of organized labor, precarization of labor markets,[24] financialization of the economy, and exponential expansion of debt.[25] In this ensemble, debt sustained aggregate demand, fueled liquidity to lubricate financialization, and facilitated assemblage of entrepreneurial subjects responsible for their own economic security. Public welfare was replaced by self-care and working classes were constrained to fund their private welfare through private debt, while calibrating their conduct with the demands of precarious labor markets. Debt, no longer a private choice but a structural imperative, became an instrument of control and discipline. Subprime mortgages that engulfed dispossessed communities are emblematic of the symbiosis of debt and discipline forged by public policies and the market working in concert. This neoliberal concord between debt and discipline underscores that economics is always entwined with politics, with the law as a primary suture between the two.[26]

In order to substantiate these arguments, this article first outlines a conceptual framework suitable to explore the relationship between debt and discipline. It then focuses on the transition from Keynesian to neoliberal response to the chronic demand-deficit problem of capitalism: while Keynesianism prescribed full-employment and raising wages, neoliberalism relies on consumer debt induced by wage-compression and contraction of public welfare. The article then recounts the genesis of

22 CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY 208 (2009).

23 *See* discussion *infra* Part II.

24 *See* discussion *infra* Part III.

25 *See* discussion *infra* Part II, III, IV.

26 *See* DAVID HARVEY, THE NEW IMPERIALISM 137–182 (2003); MICHAEL PERELMAN, THE INVENTION OF CAPITALISM: CLASSICAL POLITICAL ECONOMY AND THE SECRET HISTORY OF PRIMITIVE ACCUMULATION (2000); Jim Glassman, *Primitive Accumulation, Accumulation by Dispossession, Accumulation by 'Extra-Economic' Means*, 30 PROGRESS IN HUM. GEOGRAPHY 608, 613–16 (2006); Michael Perelman, *Primitive Accumulation from Feudalism to Neoliberalism*, CAPITALISM NATURE SOCIALISM, June 2007, at 44.

neoliberalism by focusing on the radical use of monetary policy to trigger the transition from Keynesian welfare to the hegemony of finance, break the power of organized labor, and put downward pressure on wages. It then focuses on the role of law and public policy in forging a link between financialization of the economy and entrapment of the working classes in relationships of debt including subprime mortgages. Next, it brings into relief the increasingly precarious labor markets that add to the pressure on the working classes to turn to debt. Finally, it explores the role of debt in the assemblage of compliant subjects disciplined to conform to the logic of precarious labor markets.

I. THEORETICAL FRAMEWORK

This article combines insights of critical political economy with the conceptual toolkit of Michel Foucault to analyze the connection between debt and discipline. While critical political economy helps uncover macro-level neoliberal economic transformations, Foucault's constructs focus on the attendant micro-level processes of market-mediated subject formation.[27] Of particular utility are Foucault's constructs of governmentality, bio-power, and assemblage of self-caring subjects through "modes of subjectivation . . . in which people are invited or incited to recognize their moral obligations."[28]

Governmentality refers to "techniques and procedures for directing human behavior"[29] and concerns the proper arrangement of the dynamic field of exchange of "individuals, goods, and wealth."[30] The construct trains on the practice of "economic government," where the economy designates "a field of intervention for government."[31] While at a general level it refers to "any manner in which people think about, and put into practice, calculated plans for governing themselves and others," more specifically it refers to the ensemble of technologies of governance that aim at "the care and maximization of the potential of the *population*."[32] Biopower emerges from the shift of focus in modern societies from "an exhaustive and unitary project of police . . . to the economy as a domain of naturalness."[33] Taken together, biopower and governmentality "refer to a manner of exercising power over a population that is directed towards maximizing its potential

27 *See* discussion *infra* Part V.

28 1 MICHEL FOUCAULT, ETHICS: SUBJECTIVITY AND TRUTH 264 (Paul Rabinow ed., Robert Hurley et al. trans., 1998).

29 *Id.* at 81.

30 MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLEGE DE FRANCE, 1977–78 94 (Michel Senellart ed., Graham Burchell trans., 2007).

31 *Id.* at 95.

32 BEN GOLDER & PETER FITZPATRICK, FOUCAULT'S LAW 31 (2009).

33 FOUCAULT, *supra* note 30, at 354.

and optimizing its capacities."[34] This frame where the economy displaces sovereignty as the primary field of governance is particularly useful to examine neoliberal political economy. It posits that *homo economicus* reappears under neoliberalism not only as a "partner of exchange" but as "an entrepreneur, an entrepreneur of himself."[35] Subjected to the incentive structure of the market this entrepreneur is "eminently governable.[36] This article deploys this Foucauldian conceptual toolkit to explore the connection between the aggregate demand problem of capitalism and the disciplinary impact of private debt upon working classes caught between shrinking wages and neoliberal demands of individual responsibility and self-sufficiency.

An obstacle to any fruitful use of Foucault to analyze the debt–discipline combine is his underestimation of the role of law and the state in the exercise of power.[37] Foucault holds that "[d]isciplines will define not a code

34 GOLDER & FITZPATRICK, *supra* note 32, at 32.

35 MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978–1979 226 (Michel Senellart ed., Graham Burchell trans., 2008).

36 *Id.* at 270.

37 For detailed articulation of this argument, see ALAN HUNT & GARY WICKMAN, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE (1994); Alan Hunt, *Foucault's Expulsion of Law: Towards a Retrieval*, 17 LAW & SOC. INQUIRY 1, 1 (1992). For a detailed examination of what they term the "expulsion thesis," see GOLDER & FITZPATRICK, *supra* note 32, at 11–52. Some read Foucault as implying a "radical discontinuity" or "mutual incompatibility" between law and disciplinary power. *See, e.g.*, DUNCAN KENNEDY, SEXY DRESSING ETC. 117–18 (1993); BOAVENTURA DE SAUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 5 (2d ed. 2002). In sum, the critique is that Foucault "led to underestimate at the very least the role of law in the exercise of power within modern societies;... he also underestimates the role of the State itself." NICOS POULANTZAS, STATE, POWER, SOCIALISM 77 (Patrick Camiller trans., 2000).

For productive use of Foucauldian approaches to analyze the economy, see PAT O'MALLEY, RISK, UNCERTAINTY AND GOVERNMENT (2004); MICHAEL POWER, INST. OF CHARTERED ACCOUNTANTS IN ENGLAND & WALES, CTR. FOR BUS. PERFORMANCE, THE AUDIT IMPLOSION: REGULATING RISK FROM THE INSIDE (2000), *available at* http://www.icaew.com/~/media/Files/Technical/Research-and-academics/publications-and-projects/audit-and-assurance-publications/briefing-the-audit-implosion.pdf; PAT O'MALLEY, RISK, UNCERTAINTY AND GOVERNMENT (2004); Richard Ericson, Dean Barry & Aaron Doyle, *The Moral Hazards of Neoliberalism: Lessons from the Private Insurance Industry*, 29 ECON. & SOC. 532 (2000); Peter Miller & Nikolas Rose, *Governing Economic Life*, 19 ECON. & SOC. 1 (1990) . Representative deployments of Foucault in contemporary legal scholarship include Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 771–73 n.34, 45 (1994); Christine Bateup, *Power v the State: Some Cultural Foucauldian Reflections on Administrative Law, Corporatisation and Privatization*, 3 S. CROSS U. L. REV. 85 (1999); Hugh Baxter, *Bringing Foucault into Law and Law Into Foucault*, 48 STAN. L. REV. 449, 449 (1996); Tony Evans, *International Human Rights Law as Power/Knowledge*, 27 HUM. RTS. Q. 1046, 1050–51 (2005); Jonathan Simon, *"In Another Kind of Wood": Michel Foucault and Sociolegal Studies*, 17 LAW & SOC. INQUIRY 49 (1992); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1478–81 (1992).

of law, but a code of normalization."[38] He insists that modern techniques of normalization "develop from and below a system of law, in its margins and maybe even against it."[39] He sees liberal political economics driving "a formidable wedge" between the powers of the state and the sphere of daily human life.[40] Contrary to Foucault's designation of a capitalist economy as a "neutral area," my position is that capitalism is not a de-politicized and de-subjectified market governed solely by "economic laws" but a set of politically contested social relations under the hegemony of capital. Mainstream discourses conflate capitalism and markets and see markets as entities with force and agency of their own.[41] I argue instead that capitalism is a relation of power where the state and the market remain intertwined. Rather than directly determining subjectivities,[42] governmentality forms a "habitat of subjectification" within fields of operation demarcated by law.[43] Foucault comes closer to this position when he acknowledges that operations of power constitute "a triangle: sovereignty, discipline, and governmental management, which has population as its main target."[44] Indeed, he posits that these modalities of power are "deployed coterminously, and in complex contextual amalgams."[45]

In this schema, the state and the law do not evaporate, but are rather "welded to substantive, normalizing, disciplinary and bio-political objectives having to do with the re-shaping of individual and collective conduct in relation to particular substantive conceptions of desirable

38 MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE, 1975-76 38 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003).

39 FOUCAULT, *supra* note 30, at 56.

40 MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978-1979 17 (Michel Senellart ed., Graham Burchell trans., 2010).

41 LOWELL BRYAN & DIANA FARRELL, MARKET UNBOUND: UNLEASHING GLOBAL CAPITALISM 21 (1996). Capital and capitalism are often presented as "large, powerful, persistent, active, expansive, progressive, dynamic, transformative; embracing, penetrating, disciplining, colonizing, constraining; systemic, self-reproducing, rational, lawful, self-rectifying; organized and organizing, centered and centering; originating, creative, protean; victorious and ascendant; self-identical, self-expressive, full, definite, real, positive, and capable of conferring identity and meaning." J. K. GIBSON-GRAHAM, THE END OF CAPITALISM (AS WE KNEW IT): A FEMINIST CRITIQUE OF POLITICAL ECONOMY 4 (1996). In the neoliberal era, there is an increasing tendency to treat economic policy as a technical rather than a political matter. *See* DIMITRIS MILONAKIS & BEN FINE, FROM POLITICAL ECONOMY TO ECONOMICS: METHOD, THE SOCIAL AND THE HISTORICAL IN THE EVOLUTION OF ECONOMIC THEORY (2009). Polanyi, in his critique of the "free market," reminded us that "[t]here was nothing natural about laissez-faire; free markets could never have come into being merely by allowing things to take their course. . . . [L]aissez-faire itself was enforced by the state. . . . Laissez-faire was planned; planning was not." KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 145-47 (Beacon 2d ed. 2001).

42 *See infra* Part V.

43 NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 178 (1999).

44 FOUCAULT, *supra* note 30, at 107-08.

45 GEORGE PAVLICH, GOVERNING PARADOXES OF RESTORATIVE JUSTICE 9 (2005).

ends."[46] Public policies promote an incentive structure conducive to "the shaping and reshaping of conduct" by configuring the range of choices within which individuals choose to conduct themselves.[47] Neoliberalism, "a political project that endeavors to create a social reality that it suggests already exists,"[48] aims to produce subjects who, under conditions of apparent autonomy, make choices to perform in ways that are in tune with market imperatives. Neoliberal disciplinary regimes aim to constitute rationally calculating individuals who bear full responsibility for the consequences of their actions; subjects who voluntarily embrace particular choices and behaviors conducive to sustaining the socio–economic order. Promotion of self–disciplined entrepreneurial behavior becomes a primary task of governance. The confluence of debt and discipline demonstrates that neoliberalism has transformed the state rather than diminishing it: "the outcome [is] not implosion but reconstitution."[49] This article argues that in the neoliberal era the hidden hand of the market and the iron fist of the law work in concert to forge governmentalities that suture debt with discipline.

II. From Keynesian Compromise to Neoliberal Counterrevolution

It is often claimed that neoliberalism is "more an ethos or an ethical ideal[] than a set of completed or established institutions."[50] Ostensibly, the central political tenet of neoliberalism is "the negative unity of the disempowerment of government: it disables the state from interfering with the established order of society."[51] I discern, instead, a "programmatic coherence"[52] in the neoliberal socio–economic transition in the U.S. that can be seen, following Karl Polanyi, as historical alternation of stages of de–socialization, re–socialization and a new de–socialization.[53] In these

46 Nicholas Rose & Mariana Valverde, *Governed by Law?*, 7 Soc. & Legal Stud. 541, 543 (1998).

47 Mitchell Dean, Governmentality: Power and Rule in Modern Society 18 (1999).

48 Thomas Lemke, *The Birth of Bio–Politics: Michel Foucault's Lecture at the College de France on Neo–Liberal Governmentality*, 30 Econ. & Soc'y 190, 203 (2001).

49 Jamie Peck & Adam Tickell, *Neoliberalizing Space*, 34 Antipode 380, 388–89 (2002).

50 Mitchell Dean, *Sociology After Society*, *in* Sociology after postmodernism 205, 212 (David Owen ed., 1997). It is claimed that only when "reified," neoliberalism "takes on the denotation of a concrete abstraction, an accomplished object, a totalizing ideological formation; even, in its temporal dimension, an epoch." John Comaroff, *The End of Neoliberalism? What is Left of the Left*, 637 Annals Am. Acad. Pol. & Soc. Sci. 141, 142 (2011).

51 Roberto Mangabeira Unger, Democracy Realized: The Progressive Alternative 58 (1998).

52 Barry Hindess, *A Society Governed by Contract?*, *in* The New Contractualism 14, 22 (Glyn Davis et al. eds., 1997).

53 Polanyi termed systemic changes under capitalism "double movement." First, there is the historical movement of the market, a movement that has no inherent limits and therefore threatens society's very existence. In response, the society defends itself by creating institutions for its protection. Rise of laissez–faire capitalism and the subsequent rise of the

transitions, the state and the law play a formative role. The ideology of the "free" market notwithstanding, "the market has been the outcome of a conscious and often violent intervention on the part of government which imposed the market organization on society for noneconomic ends."[54] In order to appreciate the neoliberal transformation of the economy, it is critical to take account of the preceding Keynesian welfare order.

Born amidst the carnage of the Great Depression, Keynesianism rests on the premise that "[c]apitalism is a flawed system [whose] development[,] [if] not constrained, [] will lead to periodic deep depressions and the perpetuation of poverty."[55] The linchpin of Keynesian economic theory is the underemployment equilibrium thesis and systemic failure of aggregate demand in capitalist economies.[56] Consequently, capitalism can be stuck periodically, even permanently, in a condition of slow growth, high unemployment, and excess capacity.[57] The recognition that "the *normal* state of the monopoly capitalist economy is stagnation"[58] produced

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welfare state follow this model. POLANYI, *supra* note 41, at 136. In this progression, neoliberalism can be seen as ascendency of the market at the expense of the society. In a similar vein, democratic capitalism as a political economy is seen as ruled by two conflicting principles or regimes of resource allocation: "one operating according to marginal productivity, or what is revealed as merit by a 'free play of market forces', and the other based on social need or entitlement, as certified by the collective choices of democratic politics." Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 NEW LEFT REV. 5, 7 (2011). Neoliberalism, in this frame, is ascendancy of the first principle at the expense of the latter.

54 POLANYI, *supra* note 41, at 258.

55 Hyman P. Minsky, *Hyman P. Minsky (1919–1996)*, *in* A BIOGRAPHICAL DICTIONARY OF DISSENTING ECONOMISTS 411, 416 (Philip Arestis & Malcolm Sawyer, eds., 2d ed. 2000).

56 Costas Lapavitsas, *Mainstream Economics in the Neoliberal Era*, *in* NEOLIBERALISM: A CRITICAL READER 32 (Alfredo Saad-Filho & Deborah Johnston eds., 2005). Keynes argued that the traditional "microeconomic" vision, based on the interaction between prices and wages, be replaced by a "macroeconomic" vision based on relations between aggregates, or overall quantities, with influence from economic policy, such as the money supply, national revenue, total consumption, and the volume of savings and investment. In sum,

> Keynes's basic conclusion can . . . be put very directly. Previously it had been held that the economic system, any capitalist system, found its equilibrium at full employment. Left to itself, it was thus that it came to rest. . . . Keynes showed that the modern economy could as well find its equilibrium with continuing, serious underemployment. Its perfectly normal tendency was to what economists have since come to call an underemployment equilibrium.

JOHN KENNETH GALBRAITH, THE AGE OF UNCERTAINTY 216 (1977). For details, see JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY 6 (1936) [hereinafter GENERAL THEORY]. For the influence of Keynes on public policies of the era, for example THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS (Peter A. Hall ed., 1989).

57 For detailed analyses, see, for example ALVIN HARVEY HANSEN, FULL RECOVERY OR STAGNATION? (1938); M. KALECKI, THEORY OF ECONOMIC DYNAMICS: AN ESSAY ON CYCLICAL AND LONG-RUN CHANGES IN CAPITALIST ECONOMY (1954) HYMAN P. MINSKY, JOHN MAYNARD KEYNES (2008).

58 PAUL A. BARAN & PAUL M. SWEEZY, MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER 108 (1966) (emphasis in original).

the so–called Keynesian compromise between capital and labor, which animated national fiscal and counter–cyclical monetary policies calibrated to promote full employment. With this turn the welfare state was born.[59] The chronic aggregate demand problem of capitalism was to be resolved through full employment, increasing wages with increases in productivity, and the resulting enhanced purchasing power of the working classes.[60] The Keynesian compromise produced an activist state as a countervailing power to the market, with the state using regulations and protections to temper the creative destruction of capitalism.[61] Welfare safety nets related to unemployment, nutrition, health, and retirement provided partial but significant reprieve from the ever–expanding commodification of life by capitalism.

Containment of finance capital was a critical component of this compromise. While Keynes's desire for "euthanasia of the rentier, of the functionless investor"[62] and the policy goal to "driv[e] the usurious money lenders out of the temple of international finance"[63] remained elusive, elaborate national and international regulatory regimes that were set in place to make finance capital subservient to production and national priorities.[64]

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59 A good definition of a welfare state is offered by Asa Briggs:

> A welfare state is a state in which organized power is deliberately used (through politics and administration) in an effort to modify the play of market forces in at least three directions – first, by guaranteeing individuals and families a minimum income irrespective of the market value of their work or their property; second by narrowing the extent of insecurity by enabling individuals and families to meet certain "social contingencies" (for example, sickness, old age and unemployment) which lead otherwise to individual and family crises; and third, by ensuring that all citizens without distinction of status or class are offered the best standards available in relation to a certain agreed range of social services.

Asa Briggs, *The Welfare State in Historical Perspective*, *in* THE WELFARE STATE READER 16 (Christopher Pearson & Francis Castle eds., 2d ed. 2006).

60 *See* GRAEBER, *supra* note 3, at 373. The Employment Act of 1946 crystallized the policy of using power of the federal government "to promote maximum employment, production, and purchasing power." PERRY MEHRLING, THE NEW LOMBARD STREET: HOW THE FED BECAME THE DEALER OF LAST RESORT 52–53 (2011).

61 For details, see, e.g., JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 141–57 (1952); POLANYI, *supra* note 41.

62 GENERAL THEORY, *supra* note 56, at 376. Keynes took the position that "comprehensive socialisation [sic] of investment will prove the only means of securing an approximation to full employment." *Id.* at 378.

63 Henry Morgenthau, Sec'y of the Treasury, U.S. Dep't of the Treasury, Closing Address at the Bretton Woods Conference (July 22, 1944), *quoted in* Leo Panitch & Sam Gindin, *Finance and American Empire*, *in* EMPIRE RELOADED 50 (Leo Panitch & Colin Leys eds., 2004) (alteration in original).

64 Architects of the new regulatory regimes were mindful of the inter–war havoc in global finance. BARRY EICHENGREEN, GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM 43–90 (2d ed. 2008); JOHN MAYNARD KEYNES, THE ECONOMIC CONSEQUENCES OF THE PEACE 226 (1920). For details of the post–World War II international financial order, see, for example, HOWARD DAVIES & DAVID GREEN, GLOBAL FINANCIAL REGULATION: THE ESSENTIAL GUIDE (2008); ARMAND VAN DORMAEL, BRETTON WOODS: BIRTH OF A MONETARY SYSTEM

The result of this macroeconomic policy framework was a prolonged era of growth, rising wages, and a linkage between Fordist mass-production and mass-consumption that is often termed "the golden age" of capitalism.[65]

By the early 1970s, the Keynesian welfare system appeared exhausted. The costs of accelerating demands from below for expanded economic and social rights, imperial wars, and an escalating balance of payment deficits created a crisis for wealth-owning classes.[66] Rates of profit were falling, and the share of income of wealth-owning classes shrank.[67] Predictions of "the death of equities"[68] accompanied "the worst bond bear market not just in memory but in history"[69] and the Bank of International Settlements raised alarms of "a genuine dollar crisis."[70] The "golden age" of prosperity turned first into a "limping golden age" then into a "leaden age."[71] Faced with declining rates of profit and shrinking shares of wealth, wealth-owning classes desired a fundamental break with the Keynesian compromise.[72] Breaking the power of the working classes in order to depress wages was an essential step towards this objective. This is when the neoliberal counterrevolution was launched.[73]

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2 (1978); ANTHONY M. ENDRES, GREAT ARCHITECTS OF INTERNATIONAL FINANCE: THE BRETTON WOODS ERA (2005); Jonathan Kirshner, *Keynes, Capital Mobility and the Crisis of Embedded Liberalism*, 6 REV. INT'L POL. ECON. 313 (1999); Tayyab Mahmud, *Is It Greek or Déjà Vu All Over Again?: Neoliberalism and Winners and Losers of International Debt Crises*, 42 LOY. U. CHI. L.J. 629, 654-661 (2011).

65 For a detailed discussion, CHRIS HARMAN, ZOMBIE CAPITALISM: GLOBAL CRISIS AND THE RELEVANCE OF MARX 161-175 (Haymarket Books 2010) (2009).

66 For a detailed analysis, see GÉRARD DUMÉNIL & DOMINIQUE LÉVY, THE CRISIS OF NEOLIBERALISM 7-10 (2011).

67 ROBERT BRENNER, THE BOOM AND THE BUBBLE: THE US IN THE WORLD ECONOMY 19-22 figs.1.1 & 1.2, tbls.1.2 & 1.3 (2002); HARMAN, *supra* note 65, at 196 fig.1; Robert Brenner, *The Long Upturn*, 229 NEW LEFT REV., May/June 1998, at 48; Robert Brenner, *Uneven Development and the Long Downturn: The Advanced Capitalist Economies from Boom to Stagnation, 1950-1988*, NEW LEFT REV., May/June 1998, at 138.

68 *The Death of Equities: How Inflation is Destroying the Stock Market*, BUSINESS WEEK, August 13, 1979, at 54.

69 Bill Gross, CEO of PIMCO, the largest international bond fund, *quoted in* NIALL FERGUSON, THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD 108 (2008).

70 BANK FOR INTERNATIONAL SETTLEMENTS, FORTY-NINTH ANNUAL REPORT 3 (1979) [hereinafter BIS].

71 JOAN ROBINSON, ESSAYS IN THE THEORY OF ECONOMIC GROWTH 52-54 (1962).

72 For details, see GRETA R. KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE (2011); Susanne MacGregor, *The Welfare State and Neoliberalism, in* NEOLIBERALISM: A CRITICAL READER (Alfredo Saad-Filho & Deborah Johnston eds., 2005).

73 See, for example DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 19 (2005) [hereinafter NEOLIBERALISM], for discussions of the genesis and nature of neoliberalism; SAMIR AMIN, THE LIBERAL VIRUS: PERMANENT WAR AND THE AMERICANIZATION OF THE WORLD (James H. Membrez trans., 2004); JAMIE PECK, CONSTRUCTIONS OF NEOLIBERAL REASON 1-8 (2010); MICHAEL PERELMAN, RAILROADING ECONOMICS: THE CREATION OF THE FREE MARKET MYTHOLOGY (2006); RAYMOND PLANT, THE NEO-LIBERAL STATE (2009); David Miller, *How Neoliberalism*

Neoliberalism is a strategy of wealth-owning classes to reverse the setbacks to their wealth and privilege and to expand their reach globally under the hegemony of the United States.[74] Neoliberalism did not displace the state as much as it reformulated it, turning the "nation-state" into a "market-state."[75] Neoliberalism was first road-tested in Chile following Pinochet's *coup d'état*,[76] then in New York City's 1975 "*coup d'état* by financial institutions against the democratically elected government,"[77] and finally in the United Kingdom by the International Monetary Fund to reverse the course of Keynesian fiscal policies.[78] These trial runs established an enduring principle of neoliberalism: "in the event of a conflict between the integrity of financial institutions and bondholders on the one hand and the well-being of the citizens on the other, the former [should be] given preference."[79] Finally, a decisive financial "coup",[80] indeed a "putsch",[81] was launched in 1979 by way of the so-called "Volcker shock," which Paul Volcker, then-Chairman of the Federal Reserve, characterized as a "triumph of central banking."[82] In a radical tightening of monetary policy, interest rates were raised exponentially ostensibly to break the back of inflation, the enemy of finance capital. Note that "monetary policy

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Got to Where It Is: Elite Planning, Corporate Lobbying and the Release of the Free Market, *in* THE RISE AND FALL OF NEOLIBERALISM: THE COLLAPSE OF AN ECONOMIC ORDER? 23 (Kean Birch & Vlad Mykhnenko eds., 2010).

74 This is in tune with Max Weber's observation that "naked class situation" tends to predominate during periods of economic transformation, whereas status-group claims predominate during periods of economic stability. 2 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 938 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. Calif. Press 1978) (1922).

75 Anthony Carty, *Marxism and International Law: Perspectives for the American (Twenty-First) Century?*, *in* INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 170 (Susan Mark ed., 2008). In an evocative portrayal, under neoliberalism government has "*become* business. And nation-states have become holding companies in and for themselves." Comaroff, *supra* note 50, at 145 (emphasis in original).

76 See JUAN GABRIEL VALDÉS, PINOCHET'S ECONOMISTS: THE CHICAGO SCHOOL IN CHILE (1995), for a detailed account.

77 HARVEY, *supra* note 73, at 29. See, for example, WILLIAM K. TABB, THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS (1982), for details of how bankers forced New York to accept "fiscal discipline" as the cost of a bailout by curbing municipal unions, layoffs in public employment, wage freezes, cuts in social provisions, and imposition of user fees; Robert Fitch, *Explaining New York City's Aberrant Economy*, NEW LEFT REV., Sept.–Oct. 1994, at 17.

78 MARK D. HARMON, THE BRITISH LABOUR GOVERNMENT AND THE IMF CRISIS (1997).

79 David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 31 (2007).

80 GÉRARD DUMÉNIL & DOMINIQUE LÉVY, CAPITAL RESURGENT: ROOTS OF NEOLIBERAL REVOLUTION 69, 165 (Derek Jeffers trans., 2004).

81 Streeck, *supra* note 53, at 12.

82 Paul A. Volcker, The Triumph of Central Banking?, Address for the Per Jacobsson Foundation (Sept. 23, 1990), *in* THE 1990 PER JACOBSSON LECTURE, at 3, *available at* http://www.perjacobsson.org/lectures/1990.pdf.

involves trade–offs between inflation and unemployment. Bond–holders worry about inflation; workers, about jobs."[83] High interest rates induced an inflow of capital as U.S. government securities became a secure investment and the dollar became the global currency of choice. Highly liquid U.S. Treasury bills expanded secondary markets in bonds and allowed the U.S. to rely on global savings to run up deficits.[84] Henceforth, bondholders were the disciplinarians of U.S. policy makers.[85] The "'Volcker' shock thus represented a convergence of imperial and domestic responsibilities."[86]

To be able to institute a new global capitalist discipline, the U.S. economic policy–makers had to first, in Volcker's words, "discipline ourselves."[87] The "induced recession"[88] triggered by the Volcker shock was intended to repress wages and emasculate organized labor by raising unemployment to unbearable levels.[89] While the specter of inflation was invoked, what guided the Federal Reserve was "a baseless fear of full employment."[90] The timing of each of the Fed's interest rate hikes substantiates that it "wanted wages to fall, the faster the better. In crude terms, the Fed was

83 JOSEPH E.STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY 142 (2010); *see also* STEPHEN H. AXILROD, INSIDE THE FED: MONETARY POLICY AND ITS MANAGEMENT, MARTIN THROUGH GREENSPAN TO BERNANKE 14 (2011) (explaining that the monetary policy objectives as stated in the Federal Reserve Act require the Federal Reserve to "maintain long run growth of the monetary and credit aggregates . . . so as to promote effectively the goals of maximum employment, stable prices, and moderate long–term interest rates"). For key economic objectives and monetary policy indicators between 1960 and 2010, see *id.* at 209–10 figs.B.1 & B.2.

84 GRAEBER, *supra* note 3, at 364–369. "To the extent that these Treasury IOUs are being built into the world's monetary base they will not have to be repaid, but are to be rolled over indefinitely. This feature is the essence of America's free financial ride, a tax imposed at the entire globe's expense." MICHAEL HUDSON, SUPER IMPERIALISM: THE ECONOMIC STRATEGY OF AMERICAN EMPIRE 12 (2d ed. 2003)

85 Op–Ed., *The Bond Vigilantes*, WALL ST. J., May 28, 2009, at A14.

86 Panitch & Gindin, *supra* note 63, at 65.

87 PAUL A. VOLCKER & TOYOO GYOHTEN, CHANGING FORTUNES: THE WORLD'S MONEY AND THE THREAT TO AMERICAN LEADERSHIP 167 (1992).

88 Panitch & Gindin, *supra* note 63, at 63.

89 *See Monetary Medicine: Fed's 'Cure' Is Likely to Hurt in Short Run, Most Analysts Believe*, WALL ST. J., Oct. 9, 1979, at A1. Alan Greenspan questioned, "Whether, if unemployment begins to climb significantly, monetary authorities will have the fortitude to 'stick to the new policy?" *Id.*

90 James K. Galbraith, Olivier Giovannoni, & Ann J. Russo, *The Fed's Real Reaction Function: Monetary Policy, Inflation, Unemployment, Inequality—and Presidential Politics* 1 (Levy Econ. Inst., Working Paper No. 511, 2007), *available at* http://ideas.repec.org/p/lev/wrkpap/wp_511.html; *see also* Robert J. Barro, *Inflation and Growth*, REV. OF FED. RES. BANK OF ST. LOUIS, May–June 1996, at 153, 159 (arguing that contrary to the anti–inflation posture adopted by the Federal Reserve, moderate inflation—10 to 20%—has low negative effects on growth, and that below 10%, inflation has no effect at all); Michael Sarel, *Nonlinear Effects of Inflation on Economic Growth*, 43 IMF STAFF PAPERS 199 (1996) (explaining that an IMF study found that below 8% inflation has little impact on growth, and may indeed have a positive impact).

determined to break labor."[91] Repeatedly, the Fed raised interest rates just before major union contract re-negotiations, forcing employers to squeeze wages.[92] In order to establish its credibility with finance capital, "the Federal Reserve had to demonstrate its willingness to spill blood, lots of blood, other people's blood."[93] Volcker knew that there would be "blood all over the floor," and "[t]here was blood indeed."[94]

The "shock therapy" of tight monetary policy, a canonical opening salvo of neoliberal structural adjustment,[95] paved the road to jettison welfare safety nets[96] and severed the Keynesian linkage between increasing productivity and increasing worker's wages.[97] Sustained assault on wages and workers ensured that the distribution of gain and pain under neoliberalism would comply with the objectives of the wealth-owning classes. The downward trajectory of the rate of profit was reversed and incomes and wealth of the wealthy increased while those of the rest stagnated and declined.[98]

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91 WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY 429 (1987).

92 *See* Edwin Dickens, *The Federal Reserve's Tight Monetary Policy During the 1973–75 Recession: A Survey of Possible Interpretations*, REV. RADICAL POL. ECON., Sept. 1997, at 79, 87; Edwin Dickens, *The Great Inflation and U.S. Monetary Policy in the Late 1960s: A Political Economy Approach*, 9 SOC. CONCEPT 49 (1995).

93 Michael Mussa, *U.S. Monetary Policy in the 1980s*, *in* AMERICAN ECONOMIC POLICY IN THE 1980s 81, 112 (Martin Feldstein ed., 1994).

94 George Melloan, Op-Ed., *Some Reflections on My 32 Years with Bartley*, WALL ST. J., Dec. 16, 2003.

95 *See* Ben Fine & Dimitris Milonakis, '*Useless But True*': *Economic Crisis and the Peculiarities of Economic Science*, HIST. MATERIALISM, June 1, 2011, at 6 (arguing that neoliberal reordering falls "roughly into two phases – the first as the shock-therapy associated with Reagan and Thatcher, Latin America, and the Soviet bloc, and the second with the social market, Third-Wayism and the post-Washington consensus."). For uses of shocks, both natural and man-made, to promote neoliberal restructuring, see NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 7 (2007).

96 *See* Greg Albo & Bryan Evans, *From Rescue Strategies to Exit Strategies: The Struggle Over Public Sector Austerity*, *in* THE CRISIS THIS TIME 283 (Leo Panitch et al. eds., 2010); Lisa Philipps, *Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization*, LAW & CONTEMP. PROBS., Autumn 2000, at 111.

97 See GRAEBER, *supra* note 3, at 375, for the relationship between productivity and wages between 1947 and 2004.

98 *See* DUMÉNIL & LÉVY, *supra* note 66, at 58–59 fig.4.1 (explaining that the rate of profit, which was 7.8% in 1952–1971, and fell to 6.4% during the 1970s, rose to 8.3% between 1995–2005); *id.* at 46 fig.3.1 (explaining that the share of total income received by the top 1% of the income bracket rose from 9% in 1980 to 23% in 2007); *id.* at 51–52 fig.3.5 (explaining that the share of the top 5% of the total of wages and capital income rose from 15.5% during 1952–1971 to 25.8% during 1990–2009); LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA, 2008/2009 125 tbl.3.1 (2009) (explaining that the median overall compensation, wages plus benefits, rose at a rate of 0.2% during 1983–9, 0.1% per year between 1992–2000, and did not grow at all during 2002–07). For share of total income of the top 1%, 1913 – 2007, see ROBERT B. REICH, AFTERSHOCK: THE NEXT ECONOMY AND AMERICA'S FUTURE 20 fig.1 (2010); Robert B. Reich, *The Limping Middle Class*, N.Y. TIMES, Sept. 4, 2011, at SR6; *see also* DUMÉNIL & LÉVY, *su-*

Concurrently, neoliberalism scored "a critical victory" by "[c]hanging public expectations about citizenship entitlements, the collective provision of social needs, and the efficacy of the welfare state."[99]

Along with the assault on wages and workers through tight monetary policy, the power of organized labor was crushed by direct coercion. This was inaugurated by the smashing of the Air Traffic Controllers' strike in 1981 by President Reagan.[100] Paul Volcker characterized this as "the most important single action of the administration in helping the anti-inflation fight,"[101] and Alan Greenspan designated it "a paradigm shift" and a "political turning point."[102] In its demonstration effect on corporate behavior, this state action "recast the crimes of union busting as acts of patriotism."[103] It triggered "a

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pra note 66, at 49–50 fig.3.3 (explaining that between 1980 and 2009, the share in total income of the bottom 95% wage earners fell from 62.2% to 51.5%); EDWARD N. WOLFF, TOP HEAVY 7 (1996); David McNally, *From Financial Crisis to World-Slump: Accumulation, Financialisation, and the Global Crisis*, HIST. MATERIALISM, June 1, 2009, at 35, 60 (explaining that incomes of the bottom 90% fell by 9%, while incomes for the top 1% increased by 101%, and those of the top 0.1% rose 227%); Sabrina Tavernise, *Poverty Rate Soars to Highest Level Since 1993*, N.Y. TIMES, Sept. 14, 2011, at A1, A21 (stating that in 2010, 15.1% Americans, 46.2 million, were living below the poverty line; the highest level since 1993. The rate for Blacks is 27%, Hispanics 26%, Asians 12.1%, and Whites 9.9%). For a study of global rise of top incomes during the neoliberal era, see Anthony Atkinson, Thomas Piketty & Emmanuel Saez, *Top Incomes in the Long Run of History* 1–68 (Nat'l Bureau of Econ. Research, Working Paper No. 15408, 2009), *available at* http://elsa.berkeley.edu/~saez/atkinson-piketty-saezNBER09topincomes.pdf.

99 Janine Brodie, *Restructuring and the New Citizenship*, *in* RETHINKING RESTRUCTURING: GENDER AND CHANGE IN CANADA 126, 131 (Isabella Bakker ed., 1996). For neoliberal approaches towards constitutionalism, see David Schneiderman, *Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism*, LAW & CONTEMP. PROBS., Autumn 2000, at 83, 85–86. For detailed analyses of the transformations in the welfare systems, see PETRICIA MARCHAK, THE INTEGRATED CIRCUS: THE NEW RIGHT AND THE RESTRUCTURING OF GLOBAL MARKETS 258–59 (1993); BRENDAN MARTIN, IN THE PUBLIC INTEREST? PRIVATIZATION AND PUBLIC SECTOR REFORM (1993); GARY TEEPLE, GLOBALIZATION AND THE DECLINE OF SOCIAL REFORM 41–49 (2000); Macgregor, *supra* note 72, at 142–43; Herman Schwartz, *Round Up the Usual Suspects!: Globalization, Domestic Politics, and Welfare State Change*, *in* THE NEW POLITICS OF THE WELFARE STATE (Paul Pierson ed., 2001). For details of how neoliberalism rose in the midst of a conservative resurgence in U.S. politics aimed against the activist Keynesian welfare state, see Mark A. Smith, *Economic Insecurity, Party Reputations, and the Republican Ascendance*, *in* THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM 135 (Paul Pierson & Theda Skocpol eds., 2007). For an exploration of the relationship between neoliberalism, debt imperialism and evangelical Christianity, see MELINDA COOPER, LIFE AS SURPLUS: BIOTECHNOLOGY AND CAPITALISM IN THE NEOLIBERAL ERA 160–68 (2008).

100 *See* JOSEPH A. MCCARTIN, COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA 24 (2011); Joseph A. McCartin, *The Strike That Busted Unions*, N.Y. TIMES, Aug. 3, 2011, at A25.

101 John B. Taylor, *Changes in American Economic Policy in the 1980s: Watershed or Pendulum Swing?*, 33 J. ECON. LITERATURE 777, 778 (1995) (quoting Paul Volcker).

102 DAVID M. SMICK, THE WORLD IS CURVED: HIDDEN DANGERS TO THE GLOBAL ECONOMY 220–21 (2008) (quoting Alan Greenspan).

103 MARTIN JAY LEVITT WITH TERRY CANROW, CONFESSIONS OF A UNION BUSTER 217 (1993).

capitalist offensive that involved both political mobilization and relentless hostility to unions."[104] Henceforth, investment and relocation decisions were guided by an informal rule that "no plant which is unionized will be expanded onsite."[105] As neoliberal ideology of market fundamentalism took hold, unions weakened.[106] Even labor leaders acknowledged that unions were "sliding towards irrelevance and oblivion,"[107] and were on the road to a complete collapse.[108]

Another prong of the neoliberal attack on wages and workers was to mobilize global labor surpluses through offshoring.[109] As neoliberal globalization, a "disciplinary force over the powers of labor,"[110] unfolded, union power weakened further.[111] Liberalization of international trade and capital movements induced investments to flow to regions where prevailing political and social conditions allowed higher returns on investments.[112]

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104 Dan Clawson & Mary Ann Clawson, *What has Happened to the US Labor Movement? Union Decline and Renewal*, 25 ANN. REV. OF SOC. 95, 100–01 (1999).

105 THOMAS A KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 263 (1986).

106 *See id.*; *see also* William B. Gould IV, Op–Ed., *Crippling the Right to Organize*, N.Y. TIMES, Dec. 17, 2011, at A25 (explaining that the primary federal labor relations oversight body, the National Labor Relations Board, was increasingly rendered dysfunctional after the neoliberal turn)..

107 STEVEN GREENHOUSE, THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER 243 (2008).

108 *See* JACOB S. HACKER & PAUL PIERSON, WINNER–TAKE–ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER–AND TURNED ITS BACK ON THE MIDDLE CLASS 56–57 (2010).

109 David Harvey, *The Enigma of Capital and the Crisis This Time*, *in* BUSINESS AS USUAL: THE ROOTS OF THE GLOBAL FINANCIAL MELTDOWN 89, 98 (Craig Calhoun & Georgi Derluguian eds., 2011).

110 *Id.* at 96.

111 For detailed accounts, see Clawson & Clawson, *supra* note 104, at 101; *see also* ROBERT J. FLANAGAN, GLOBALIZATION AND LABOR CONDITIONS: WORKING CONDITIONS AND WORKER RIGHTS IN A GLOBAL ECONOMY (2006) (explaining how globalization alters labor conditions); ROBERT A. SENSER, JUSTICE AT WORK: GLOBALIZATION AND THE HUMAN RIGHTS OF WORKERS (2009) (concluding that 21st century globalization needs to protect the rights of workers and worker organizations, such as unions); BEVERLY J. SILVER, FORCES OF LABOR: WORKERS' MOVEMENTS AND GLOBALIZATION SINCE 1870 13–25 (2003) (explaining how mobilization of globalization has undermined existing labor unions); Michael Spence, *The Impact of Globalization on Income and Employment: The Downside of Integrating Markets*, 90 FOREIGN AFF., 2011, at 28, 29 (explaining how internationalization negatively affects the job market and labor unions).

112 Flows of corporate profits from the rest of the world generated by U.S. direct foreign investments as a percentage of GDP, rose from 1.4% to 2.0% during the 1990s, and reached 3.8% in 2008. DUMÉNIL & LÉVY, *supra* note 66, at 116. Until 1980, flows of annual direct foreign investment fluctuated around 0.5% of Gross World Product (GWP); by 2007, it accounted for 3.9%. *Id.* at 114–15. By 2007, the outstanding stock of worldwide direct foreign investment reached 29% of GWP and accounted for 25% of global stock market capitalization. *Id.* at 115. A defining feature of neoliberal globalization is dramatic expansion of international trade. Prior to the first oil shock of the early 1970s, foreign trade amounted to about 10% of GWP; by 2008, it accounted for 26.5%. *Id.* at 113–14.

Wage pressure from countries with low labor costs was transmitted to the United States. Fragmentation and global dispersal of labor markets necessitated that workers compete against one another across national boundaries.[113] Labor movements weakened in areas of capital emigration and strengthened in areas of capital in-migration.[114] Capital's unbridled mobility impeded states' ability to manage national economies, and with workers in different parts of the world in direct competition, labor's efforts at international solidarity fragmented.[115] The global labor market erased territorial boundaries for the highly skilled while reinforcing borders for the unskilled.[116] All this combined to add downward wage pressure on vulnerable jobs and, indirectly, throughout the economy.

The combined effect of these developments on organized labor was devastating. Both union membership and union efficacy sank to historic lows.[117] Given the nature and size of union wage premium, wages were

113 KIM MOODY, AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM 112–26 (1988); Clawson & Clawson, *supra* note 104, at 101.

114 There was a sharp drop in labor unrest in core capitalist countries, a slight rise in the semiperiphery, and a sharp rise in the periphery. Beverly J. Silver, *World-Scale Patterns of Labor-Capital Conflict: Labor Unrest, Long Waves, and Cycles of World Hegemony*, 18 FERNAND BRAUDEL CENTER REV. 155, 172–83 (1995).

115 See KIM MOODY, WORKERS IN A LEAN WORLD: UNIONS IN THE INTERNATIONAL ECONOMY 117–40 (1997), for detailed accounts; Frank Borgers, *The Challenges of Economic Globalization for U.S. Labor*, 22 CRITICAL SOC. 67, 78–85 (1996); Terry Boswell & Dimitris Stevis, *Globalization and International Labor Organizing: A World-System Perspective*, 24 WORK OCCUP. 288, 289–92 (1997); Charles Tilly, *Globalization Threatens Labor's Rights*, 47 INT'L. LAB. WORKING-CLASS HIST., Spring 1995, at 1, 16–18.

116 By 2007, 6.5% of U.S. jobs were deemed highly offshorable and another 15.1% offshorable, translating into about 31.6 million jobs. MISHEL ET AL., *supra* note 98, at 194–95 tbl.3.29. Note that occupations vulnerable to offshoring require more education and pay more than other occupations. The offshorable wage premium is 10.8%, and among jobs requiring at least a college degree the offshorable premium is 13.9%. *Id.* The United Nations has observed, "The global labour market is increasingly integrated for the highly skilled – corporate executives, scientists, entertainers, and the many others who form the global professional elite – with high mobility and wages. But the market for unskilled labour is highly restricted by national barriers." UNITED NATIONS DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 1999 3 (1999). Immigration added to the complexity of the labor markets. In the U.S., in 1970, the share of immigrants in the workforce stood at 5.2%, steadily increasing to 15.8% in 2007. MISHEL ET AL., *supra* note 98, at 197, tbl.3.30. The increase in the available labor supply coupled with the fact that 29.1% of immigrants as opposed to 6.1% of native-born workers have less than a high school education, and 11.1% as opposed to 9.1% are with advanced degrees, puts downwards pressure on wages particularly in both unskilled and unskilled sectors. *Id.* at 168, tbl.3.18.

117 In 2010, 11.9% of workers belonged to a union; in 1983 this figure was 20.1%. News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Union Members 2011 (Jan. 27, 2012), *available at* http://www.bls.gov/news.release/pdf/union2.pdf. In the private sector, union membership rate fell from 25% in 1975 to 6.9% in 2010, the lowest level since 1901. *Id. See* STEVEN GREENHOUSE, THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER 243 (2008). While between 1969 and 1979, strikes involved around 950,000 workers every year, the number of strikes dropped to less than half a million workers every year between 1987 and 1996. Clawson & Clawson, *supra* note 104, at 97. The number of work stoppages moved from 3517

directly impacted by the decline of unions.[118] Those in lower-paid jobs and racial minorities were hit particularly hard.[119] Decline in the value of the legally mandated minimum wage added to the burdens of the most vulnerable sections of the working classes.[120] Anemic growth, high systemic unemployment, and a decrease in the rate of investment despite a rise in profits—all enduring features of the neoliberal era—exerted added pressure on the working classes.[121] The Keynesian era linkage of productivity growth with wage growth went by the wayside, resulting in

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in 1950–60, to 2829 in 1960–70, to 2888 in 1970–80, to 831 in 1980–90, to 347 in 1990–2000, to 201 in 2000–10, and to 11 since 2010. News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Work stoppages involving 1,000 or more workers, 1947–2010 tbl.1 (Feb. 8, 2012), *available at* http://www.bls.gov/news.release/wkstp.t01.htm.

118 In 2007, the union wage premium was 14.1%; 17.1% for men, and 10.7% for women. MISHEL ET AL., *supra* note 98, at 201, tbl.3.32. Unionized workers are 28.2% more likely to be covered by employer-provided health insurance, and 24.4% more likely to receive health insurance coverage in their retirement. *Id.* at 202, tbl.3.33. Between 1979 and 2006, the employers' contribution to retirement benefits declined, and workers are less likely to have an employer-sponsored pension in 2006 compared with 1979. *Id.* at 150, tbl.3.13. In 1979, the number of those without any health coverage was 27 million, or about 15% of the nonelderly population; in 2006, the corresponding numbers were over 46 million and almost 18%. Katherine Swartz, *Uninsured in America: New Realities, New Risks*, *in* HEALTH AT RISK: AMERICA'S AILING HEALTH SYSTEM -AND HOW TO HEAL IT 32, 59 (Jacob S. Hacker, ed., 2008). For the relationship between income inequality and the decline of unions, see Zaid Jilani, *How Income Inequality Skyrocketed and the 1 Percent Profited From the Decline of Unions*, THINK PROGRESS (Oct. 21, 2011, 11:30 AM), http://thinkprogress.org/special/2011/10/21/350012/income-inequality-decline-of-unions/.

119 The union wage premium along racial groups is 17.4% for Asians, 18.3% for Blacks, 21.9% for Hispanics, and 12.4% for Whites. MISHEL ET AL., *supra* note 98, at 201, tbl.3.32. The union wage premium is even larger for those with low wages, in lower-paid occupations, and with less education. *Id.* at 207, tbl.3.36.

120 There was a 29.9% decline in minimum wage's value between 1979 and 1989. Even after subsequent legislated raises, in 2009, it was 6.8% less than its peak value in the late 1960s. *Id.* at 208–211, figs.3AA & fig.3AB, tbl.3.38. The ratio of minimum wage to what an average worker earned per hour has also consistently declined since the late 1960s. This ratio was 50% in the late 1960s, 45% in mid-1970s, 40% in early 1990s, and 34% in 2007. *Id.* at 209. Entry-level wages for male high school graduates, adjusted for inflation, have fallen 23% since 1973. Paul Krugman, Op-Ed., *Money and Morals*, N.Y. TIMES, Feb. 10, 2012, at A27.

121 Real GDP grew at an average annual rate of 5.9% in the 1940s, 4.2% in the 1950s and 1960s, 3.4% in the 1970s, 3.2% in the 1980s and 1990s, and 1.9% in the 2000s. Magdoff, *supra* note 12, at 30. During the 1950s and 1960s, for about 40% of the time, the unemployment rate was below 4%; from the 1970s through 2010, unemployment was less than 4% for less than 1% of the time, and higher than 6% over half the time. *Id.* Since the early 1980s, the trend has been a generalized decrease in wages and a decrease of the rate of accumulation despite a rise in profit rates. Christian Marazzi, *The Violence of Financial Capitalism*, *in* CRISIS IN THE GLOBAL ECONOMY: FINANCIAL MARKETS, SOCIAL STRUGGLES, AND NEW POLITICAL SCENARIOS 17 (Andrea Fumagalli & Sandro Mezzadra eds., Jason Francis Mc Gimsey trans., 2010). The stock of fixed capital in the U.S. economy is 32 percent lower than it would have been if investment rates of the pre-1980 era were maintained. DUMÉNIL & LÉVY, *supra* note 66, at 61–63.

further wage-compression and inequality.[122] Workers, in particular married women with children, were constrained to work longer hours.[123] In the end, the average household worked more hours for lesser wages[124] and retiring at age 65 became an increasingly elusive goal.[125]

Structural changes in the organization of capital added to the woes of the working classes. The paradigm of shareholder value maximization became the "zeitgeist" of corporate governance.[126] The emphasis on shareholder

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122 Between 2000 and 2007, while GDP grew 18% and productivity grew 19%, median income of working-age households fell 3.4%, poverty rate increased by 1.1%, and inequality increased by 1.4%. MISHEL ET AL., *supra* note 98, at 19 tbl.1. For a comparison of productivity and hourly compensation growth average and medians for females and males between 1973 and 2007, see *id.* at 161 fig.3O. For hourly wage growth by gender, and race/ethnicity between 1989-2007, see *id.* at 177 tbl.3.22. For inter-gender wage ratio between 1973 and 2007, see *id.* at 178 tbl.2.23. For the relationship between growth of average hourly compensation and productivity, 1947-2008, see REICH, *supra* note 98, at 52 fig.2. For the post-1970s rise of inequality, see KATHERINE S. NEWMAN, FALLING FROM GRACE: DOWNWARD MOBILITY IN THE AGE OF AFFLUENCE (1999).

123 Over this period, the average person earns less per hour worked. BONNER & WIGGIN, *supra* note 8, at 203. Average yearly hours worked for all workers increased from 1703 in 1979 to 1883 in 2006. MISHEL ET AL., *supra* note 98, at 128 tbl.3.2. Average weekly hours spent in the paid labor market for all workers went from 38.7 in 1975 to 39.2 in 2006, annual hours worked for married couples increased by about 25%, and that of middle-income married women doubled. *Id.* at 90 fig.1W. The increase of working hours for married women with children belonging to different income groups increased 31.9 to 60.7% between 1979 and 2000, a change that had a decisive impact on the real income growth of married couples with children among the lower three-fifths of the income groups. *Id.* at 92-93 tbls.1.21 & 1.22. Between 1989 and 2000, annual working hours for the bottom fifth of wage earners increased by 7.3%, while those for the top fifth decreased by 0.5%. *Id.* Americans "work longer hours than the citizens of any other country that has a per capita income of more than $30,000 at market exchange rate in 2007." HA-JOON CHANG, 23 THINGS THEY DON'T TELL YOU ABOUT CAPITALISM 109 (2010); *see also* Thorvaldur Gylfason, *Why Europe Works Less, and Grows Taller*, 50 CHALLENGE 1 (Jan./Feb. 2007).

124 Between 1999 and 2009, median household income fell 7%. For those in the bottom 10% of the income spectrum, the fall was 12%. Sabrina Tavernise, *Poverty Rate Soars to Highest Level Since 1993*, N.Y. TIMES, Sept. 14, 2011, at A1, A21. Between 1979 and 2007, the share of after-tax income of the top 1% of the population climbed from 8 to 17%, while that of the middle three-fifth of the population declined by 2 to 3%. Robert Pear, *It's Official: The Rich Get Richer*, N.Y. TIMES, Oct. 26, 2011, at A20. The share of total income of the top 1%t rose from 8% in 1979 to 24% in 2007, a level last seen in 1928. Sam Roberts, *As the Data Show, There's a Reason the Protesters Chose New York*, N.Y. TIMES, Oct. 26, 2011, at A23.

125 In March 2012, 18% of Americans 65 and older are in the labor force, up from 13% a decade ago. Steven Greenhouse, *After the Storm: Rescuing the Little Nest Egg That Couldn't*, N.Y. TIMES, Mar. 8, 2012, at F1. The proportion of Americans over 65 in the labor force increased from 10.8% in 1985 to 12.1% in 1995 to 15.1% in 2005 to 17.4% in 2010. Another 450,000 Americans 65 and older are unemployed and looking for work. Edward P. Glaeser, *Goodbye, Golden Years*, N.Y. TIMES, Nov. 20, 2011, at SR1.

126 CHANG, *supra* note 123, at 17. For detailed analyses, see MICHEL AGLIETTA & ANTOINE REBÉRIOUX, CORPORATE GOVERNANCE ADRIFT: A CRITIQUE OF SHAREHOLDER VALUE (2005); COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM 103-109 (2011); Paddy Ireland, *Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism?*, 23

value necessitated squeezing out other stakeholders; job cuts, lower wages, and fewer benefits were a natural corollary.[127] Besides reducing the wage bill, capital expenditures were reduced by cutting back investment.[128] Capital accumulation was sacrificed in favor of income distribution benefitting the upper classes.[129] As dividends and stock buybacks increased, reinvestment decreased, with a negative impact on productive capacity and employment.[130] Furthermore, increased debt levels of corporations unavoidably tended to "discipline the employment relationship" as firms with higher debt reduced their employment more often, used more part time and seasonal employees, paid lower wages, and funded pension plans less generously.[131]

J.L. & SOC'Y 287 (1996); William Lazonick & Mary O'Sullivan, *Maximizing Shareholder Value: A New Ideology for Corporate Governance*, 29 ECON. & SOC'Y 13 (2000). Jack Welch, credited with coining the phrase "shareholder value," now calls it the "dumbest idea in the world." CHANG, *supra* note 123, at 17, 22.

127 Floyd Norris, *For Business, Golden Days; For Workers, The Dross*, N.Y. TIMES, Nov. 26, 2011, at B3.

128 CHANG, *supra* note 123, at 19.

129 For comparison of profits and net investment as a percentage of GDP between 1960 and 2005, *see* JOHN BELLAMY FOSTER & FRED MAGDOFF, THE GREAT FINANCIAL CRISIS: CAUSES AND CONSEQUENCES 133, chart 6.5 (2009). The share of after-tax profits paid out as dividends rose from 51% in the 1960s and 1970s, to 74% in the 1980s and 1990s, and peaked above 100% after 2000. DUMÉNIL & LÉVY, *supra* note 66, at 62 fig.4.3, 355 n.8. Note that the richest 1% in the United States holds USD 1.9 trillion in stock, about equal to that of the other 99%. Edward N. Wolff, *Changes in Household Wealth in the 1980s and 1990s in the U.S.* 31, tbl.3 (Levy Econ. Inst. of Bard Coll., Working Paper No. 407, May 2004), *available at* http://www.levyinstitute.org/pubs/wp407.pdf. Share buy-backs that were less than 5% of U.S. corporate profits until the early 1980s, reached 90% in 2007 and 280% in 2008. CHANG, *supra* note 123, at 19–20; Lazonick & O'Sullivan, *supra* note 126, at 24; William Lazonick, *The Buyback Boondoggle*, BUS. WK., Aug. 24, 2009, at 96.

130 For comparison of profits and net investment as a percentage of GDP between 1960 and 2005, see FOSTER & MAGDOFF, *supra* note 129, at 133, chart 6.5. Investment as a share of U.S. national output declined from 20.5% in the 1980s to 18.7% during 1990–2009. CHANG, *supra* note 123, at 19. For five-year moving average of net-private non-residential fixed investments as a percentage of GDP between 1960 and 2005, see FOSTER & MAGDOFF, *supra* note 129, at 103, chart 5.2. For percent utilization of industrial capacity between 1965 and 2005, see *id.* at 132, chart 6.4. It was noted that "the withering away of net investment spells approaching termination of the historical and deeply rooted raison d'etre of the non-financial firm: accumulation of capital." HAROLD G. VATTER & JOHN F. WALKER, THE INEVITABILITY OF GOVERNMENT GROWTH 7 (1990).

131 Gordon Hanka, *Debt and the Terms of Employment*, 48 J. OF FIN. ECON. 245, 245 (1998). For companies shortchanging employees with regards to pension plans, see ELLEN E. SCHULTZ, RETIREMENT HEIST: HOW COMPANIES PLUNDER AND PROFIT FROM THE NEST EGGS OF AMERICAN WORKERS 9–28 (2011). For increased influence of credit-rating agencies over corporations, see TIMOTHY J. SINCLAIR, THE NEW MASTERS OF CAPITAL: AMERICAN BOND RATING AGENCIES AND THE POLITICS OF CREDITWORTHINESS (2005). The increased delegation of disciplining to non-majoritarian institution like rating agencies formed part of a shift towards "privatization of public policy." For details, see David Cohen & Wyn Grant, *Managing Business and Government Relations*, *in* BUSINESS AND GOVERNMENT: METHODS AND PRACTICE 13, 14 (David Cohen &

Financialization, another defining feature of the neoliberal era, engendered "a *prolonged* split between the divergent real and financial economies."[132] Whereas up until the 1970s "the old structure of the economy[] consist[ed] of a production system served by modest financial adjuncts," with the neoliberal turn this gave way to "a new structure in which a greatly expanded financial sector had achieved a high degree of independence and sat on top of the underlying production system."[133] Far beyond its classic role of credit provision, finance was now positioned "directly at the heart of the accumulation process, essentially introducing a new sector that straddled credit and production."[134] The result was "exhaustion of the progressive force of capital" and reinforcement of its "increasingly parasitical character."[135] The pursuit of neoliberal class objectives resulted in a "divorce" between the upper classes and the United States domestic economy.[136]

In sum, the radical use of monetary policy to attack wages and smash the power of organized labor inaugurated the neoliberal era. This was complemented by coercion of unions, globalization, focus on shareholder value, and a divorce between finance and the productive economy. These systemic changes decisively transformed the grounds of aggregate demand from full employment to consumer debt. Two mechanisms combined to create the requisite domestic demand: (1) increased consumption by wealth owning classes whose incomes now saw a steady rise, and (2) increased indebtedness of the working classes.[137] Financialization of the economy, facilitated by public laws and policies, operationalized this historic shift.

III. FINANCIALIZATION, REVERSE RED-LINING, AND PRIVATE DEFICIT SPENDING

Wyn Grant eds., 2006); Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 W. EUR. POL., Jan. 2002, at 1.

132 KEVIN PHILLIPS, ARROGANT CAPITAL: WASHINGTON, WALL STREET, AND THE FRUSTRATION OF AMERICAN POLITICS 82 (1994) (emphasis in original). The divergence between profits and accumulation is a primary indication of financialization. *See* Marazzi, *supra* note 121, at 28.

133 Paul M. Sweezy, *Economic Reminiscences*, 47 MONTHLY REV. 8, 9 (May 1995).

134 Panitch & Gindin, *supra* note 63, at 68.

135 Carlo Vercellone, *The Crisis of the Law of Value and the Becoming-Rent of Profit*, *in* CRISIS IN THE GLOBAL ECONOMY: FINANCIAL MARKETS, SOCIAL STRUGGLES, AND NEW POLITICAL SCENARIOS 86, 90 (Andrea Fumagalli & Sandro Mezzadra eds., Jason Francis Mc Gimsey trans., 2010). The progressive force of capital refers to its active role in the organization of labor and development of productive forces as a means of struggle against scarcity and enabling the passage from necessity to liberty. *Id.* at 92. Parasitical character comes forth in intensification of accumulation by dispossession and increased appropriations of the commons. *Id.* at 94–95.

136 DUMÉNIL & LÉVY, *supra* note 66, at 27.

137 *Id.* at 37–38. Critical political economists recognized "the increase in the reliance on debt by U.S. households as a means of maintaining their living standard as their wages started to stagnate or fall." Robert Pollin, *The Man Who Explained the Empire: Remembering Harry Magdoff*, COUNTERPUNCH, Jan. 6, 2006, http://www.counterpunch.org/pollin01062006.html.

Financialization refers to a marked increase in the volume, velocity, complexity and connectedness of financial flows and an increasing shift of finance capital from production and trade toward speculation and intermediation.[138] In the U.S., financialization entailed both the exponential expansion of financial institutions and instruments to accommodate corresponding masses of assets and debt and the hegemony of the corporate managerial criteria of the primacy of value for the shareholders.[139] These developments furnished the prerequisites for the dramatic growth of household debt and the connection between debt and discipline. Public law and state policy played a foundational role in this transformation.[140]

Neoliberalism's turn to financialization as a systemic response to the crisis of profitability is in tune with historical cycles of capitalism.[141] However, in a departure from historical precedence, financialization of the U.S. economy served added objectives through innovative means. It increased both the reach and the depth of the credit economy whereby debt became the primary catalyst for aggregate demand. Securitization of debt was a considered public policy aimed to help boost demand and liquidity for financial markets. As early as the 1980s, Alan Greenspan, the

138 Beverly J. Silver & Giovanni Arrighi, *The End of the Long Twentieth Century*, *in* BUSINESS AS USUAL: THE ROOTS OF THE GLOBAL FINANCIAL MELTDOWN 53, 66 (Craig Calhoun & Georgi Derluguian eds. 2011); Immanuel Wallerstein, *Dynamics of (Unresolved) Global Crisis*, *in* BUSINESS AS USUAL, 69, 78 (Craig Calhoun & Georgi Derluguian eds. 2011). Financialization also entails a "set of transformations through which *relations between capitals and between capital and wage–labour have been increasingly financialised* – that is, increasingly embedded in interest–paying financial transactions." McNally, *supra* note 98, at 56.

139 R. HILFERDING, FINANCE CAPITAL: A STUDY OF THE LATEST PHASE OF CAPITALIST DEVELOPMENT (London: Routledge and Kegan Paul 1981) (1910), *quoted in* DUMÉNIL & LÉVY, *supra* note 66, at 35; *see* Craig Calhoun & Georgi Derluguian, *Introduction* to BUSINESS AS USUAL, *supra* note 109, at 47. See KRIPPNER, *supra* note 72, for a detailed study of the political context of the turn to financialization.

140 The state is "necessarily present in the financial markets." MASSIMO AMATO & LUCA FANTACCI, THE END OF FINANCE 46 (English ed. 2012). There are two essentially public functions without which financial markets cannot function: setting up a legal framework within which contracts are performed and to define what will serve as a unit of account and as an instrument of payment. Furthermore, the state is the lender of last resort for financial institutions. *Id.*

141 The pattern of capital shifting into finance and away from trade and production unfolded in Genoa in the early seventeenth century, the Dutch Republic in the late eighteenth century, and in Britain in the early twentieth century. Silver & Arrighi, *supra* note 138, at 55. For a detailed explanation of this phenomenon, see GIOVANNI ARRIGHI, ADAM SMITH IN BEIJING: LINEAGES OF THE TWENTY–FIRST CENTURY 85–86 (2007). Perceptive economists argued as early as the mid–1970s that "the over extension of debt and the overreach of the banks was exactly what was needed to protect the capitalist system and its profits; to overcome, at least temporarily, its contradictions." HARRY MAGDOFF & PAUL M. SWEEZY, THE END OF PROSPERITY: THE AMERICAN ECONOMY IN THE 1970S 35 (1977); *see also* HARRY MAGDOFF & PAUL M. SWEEZY, STAGNATION AND THE FINANCIAL EXPLOSION 149 (1987); Harry Magdoff & Paul M. Sweezy, *Production and Finance*, 35 MONTHLY REV. 11 (May 1983).

"maestro" of neoliberal financialization,[142] articulated a primary objective of American foreign economic policy: "diversifying international securities portfolios . . . disproportionately in dollars."[143] Securitizing debt and channeling it into global financial markets enabled syphoning of global savings to sustain fiscal and trade deficits of the U.S.

The interconnected shift towards financialization and globalization linked the dramatic growth of household debt with access to global liquidity.[144] It facilitated Americanization of global finance, helped to entrench the imperial role of the U.S. into global finance, and made it possible for global savings to flow to the U.S. at an unprecedented scale.[145] The global capital flows now resembled a game of marbles in which, after each round, "the winners return their marbles to the losers."[146] These capital flows secured by a deficit-ridden military power functioned as "*an imperial tithe*,"[147] and enabled the U.S. to become "the superpower

142 *See* BOB WOODWARD, MAESTRO: GREENSPAN'S FED AND THE AMERICAN BOOM (2001).

143 LEONARD SEABROOKE, US POWER IN INTERNATIONAL FINANCE: THE VICTORY OF DIVIDENDS 150 (2001) (alteration in original).

144 DUMÉNIL & LÉVY, *supra* note 66, at 24. This interconnection is evidenced by exponential rise is the amount of foreign assets held by banks around the world. These assets amounted to 9% of GWP at the end of 1977 and rose to 59% in 2008. *Id.* at 118. Another evidence of this interconnection is the nearly five-fold rise in the daily global turnover of foreign exchange markets for USD 590 billion in 1989 to USD 3.210 billion in 2007. *Id.* at 124 tbl.8.3. For the whole U.S. economy, profits from investments abroad represented about 6% of total business profits in the 1960s, 11% in the 1970s, 15 to 16% in the 1980s and 1990s, and averaged 18% for the five year period 2000–04. FOSTER & MAGDOFF, *supra* note 129, at 41.

145 MARTIN WOLF, FIXING GLOBAL FINANCE 78 fig.4.14 (2008). For the current account balance between the industrialized North and the rest of the world, see Silver & Arrighi, *supra* note 138, at 64 fig.1.2.

146 RICHARD DUNCAN, THE DOLLAR CRISIS: CAUSES, CONSEQUENCES, CURES 43 (2003) (quoting French economist Jacques Rueff).

147 Panitch & Gindin, *Finance and American Empire*, *supra* note 63, at 69 (emphasis added). In the 1990s, the Clinton administration put direct pressure on governments around the world to open their markets for goods, capital and services, and instructed the IMF to pursue this strategy in the strictest possible terms. Nicholas Kristoff & David E. Sanger, *How US Wooed Asia to let Cash Flow in*, N. Y. TIMES, Feb. 16, 1999, at A1. The United States removed its capital controls in 1974, the United Kingdom in 1979, Australia and New Zealand in 1984–85, and Japan during the 1980s. ERIC HELLEINER, STATES AND THE REEMERGENCE OF INTERNATIONAL FINANCE: FROM BRETTON WOODS TO THE 1990s 8–9 (1994). In 1992, the Maastricht Treaty established free mobility of capital within the European Union with the rest of the world. Under Article 73c of the treaty, unanimity is required to restrict mobility towards countries outside the Union. DUMÉNIL & LÉVY, *supra* note 66, at 132, 359 n.2. Seeking "global cooperation," Ben Bernanke sought Japan's help to hold down U.S. interest rates. BONNER AND WIGGIN, *supra* note 8, at 224. In response, Japanese monetary authorities in 2003–04, injected 35 trillion yen to support the dollar that kept the U.S. long bond yields down to historical low levels. "By creating and lending the equivalent of $320 billion to the United States, the bank of Japan and the Japanese Ministry of Finance contracted a private sector run on the dollar and, at the same time, financed the U.S. tax cuts that reflated the global economy . . . ." Richard Duncan, *How Japan Financed Global Reflation*, FIN. ASIA, Feb. 2005, at 35. For details, see RICHARD DUNCAN,

of borrowing,"[148] making the current account a "meaningless concept" for U.S. policy makers.[149] The escalating U.S. current account deficit and debt–driven consumer spending allowed the U.S. economy to function as "the 'Keynesian engine' of the global economy."[150] Financialization, then, is a kind of "paradoxical financial Keynesianism" whereby demand was stimulated by asset–bubbles, and these bubbles together with the reserve currency status of the USD made the U.S. "catalyst of world effective demand."[151]

Again, the financialized economy turned debt, rather than full employment, into the propellant of aggregate demand. Here was "privatized Keynesianism" in action; instead of governments taking on debt to stimulate the economy, individuals and families, including the poor, did so.[152] Stagnating and declining wages triggered a marked decline in savings.[153] However, even in the face of stagnating wages and declining savings, the boom of consumption during the neoliberal era was "without precedent,"[154] making the U.S. consumer "by far the most important consumer in the world."[155] As shrinking wages were insufficient to generate

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THE DOLLAR CRISIS: CAUSES, CONSEQUENCES, CURES 135–37 (2003) (discussing the history of Japan's monetary policy).

148 WOLF, *supra* note 145, at 4.

149 *The O'Neill Doctrine*, ECONOMIST, Apr. 27, 2002, at 12 (quoting Treasury Secretary Paul O'Neill). This refers to the unique exemption the U.S. enjoys on account of its global hegemony from the general requirement for states to balance their external trade and current accounts. DUMÉNIL AND LÉVY, *supra* note 66, at 24. Outstanding U.S. Treasury securities held by the rest of the world increased from 17% of the total GDP in 1980 to 51% in 2008. U.S. corporate bonds outstanding held by the rest of the world increased from 4% in 1980 to 29% in 2008. *Id.* at 116 fig.8.4; *see also* GODFREY HODGSON, MORE EQUAL THAN OTHERS: AMERICA FROM NIXON TO THE NEW CENTURY (2004) (discussing the economic history of the United States from the era of President Nixon until 2003).

150 McNally, *supra* note 98, at 63.

151 Riccardo Belloriore & Joseph Halevi, *A Minsky Moment?: The Subprime Crisis and "New" Capitalism*, *in* CREDIT, MONEY AND MACROECONOMIC POLICY: A POST–KEYNESIAN APPROACH 29 (Claude Gnos & Louis–Philippe Rochon eds., 2011).

152 CROUCH, *supra* note 126, at 114 (2011); Colin Crouch, *Privatised Keynesianism: An Unacknowledged Policy Regime*, 11 BRIT. J. OF POL. AND INT'L REL. 382, 390–91 (2009); Colin Crouch, *What Will Follow the Demise of Privatized Keynesianism?*, 79 POL. Q. 476 (2008).

153 While between 1965 and 1980 savings amounted to 9.3% of disposable income, by 2005, savings declined to 1.2% (–3.7% if residential investment is treated as consumption). DUMÉNIL & LÉVY, *supra* note 66, at 147 fig.10.3.

154 *Id.* at 146. Consumption in the period 1952–1980, as a percentage of GDP remained about constant at around 62%, then rose steadily to a plateau of about 70% since 2001. *Id.* at 147 fig.10.3.

155 Stephen Roach, *US Not Certain of Avoiding Japan–Style 'Lost Decade*,' FIN. TIMES, Jan. 14, 2009, http://www.ft.com/intl/cms/s/0/b2e558f4–e1db–11dd–afa0–0000779fd2ac.html#axzz25HbYJL90. Consumption, which in the period from 1952–1980, as a percentage of GDP, was around 62%, rose steadily to a plateau of about 70%. DUMÉNIL & LÉVY, *supra* note 66, at 147 fig.10.3. For the impact of consumer rights movements on the transformation of retail-

effective demand, consumers turned to debt by partaking of "overextended credit."[156] This turn to debt-driven consumption was facilitated by public policy and the market acting in concert, a combination appropriately characterized the "state-finance nexus."[157] The intellectual justification for new regulatory regimes was furnished by the overarching neoliberal ideology augmented by the "efficient market hypothesis" that saw all markets as efficient and self-adjusting entities which, left to their own, would produce efficiency, innovation, supply and demand equilibrium, and stability.[158] Mythologies of neoliberal deregulation notwithstanding,

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ers' credit policies, see LIZABETH COHEN, A CONSUMERS' REPUBLIC 381-85 (2003).

156 Caglar Keyder, *Crisis, Underconsumption, and Social Policy*, *in* BUSINESS AS USUAL, *supra* note 109, at 159, 165. Outstanding consumer debt as a percentage of disposable income grew from 62% in 1975 to 127.2% in 2005. FOSTER & MAGDOFF, *supra* note 129, at 29 tbl.1.1. Gross debt of households rose from 50% of GDP in 1980 to 98% of GDP in 2007. *Id.* at 150 fig.10.6. Between 1980 and 2008, the size of debt of all U.S. sectors as a percentage of GDP rose from 155% to 353% by 2008. DUMÉNIL & LÉVY, *supra* note 66, at 104 tbl.7.2. The flow of interest paid by households that was 4.4% of GDP in 1979, rose to in 5.7% in 2007. *Id.* at 65-66. The size of debt of all U.S. sectors as percentage of GDP was 126% in 1952, 155% in 1980 and rose dramatically to 353% by 2008. *Id.* at 104. From 1996 to 2000, all debt increased by an average of USD 1.6 trillion per year, with household debt alone averaging over USD 400 billion per year, at a time when the GDP grew at an average rate of about USD 500 billion per year. Magdoff, *supra* note 12, at 30-31. From 2001 through 2007, all debt increased by USD 3 trillion per year, with household debt increasing by USD 900 billion per year, while the GDP increased by less than USD 600 billion per year. *Id.* at 31. At the end of 2008, 70% of U.S. families held credit cards, with the total credit card debt reaching USD 972.73 trillion. *Credit card statistics, industry facts, and debt statistics*, CREDIT CARDS, http://www.creditcards.com/credit-card-news/credit-card-industry-facts-personal-debt-statistics-1276.php (last visited August 25, 2012). In 2007, interest paid by household and governments amounted to a total of 8.1% of GDP; this is larger than the profits of nonfinancial enterprises that were 7.6% of GDP for that year. DUMÉNIL & LÉVY, *supra* note 66, at 65-66. Instructive literature on consumer credit in the U.S. includes, DAVID EVANS & RICHARD SCHMALENSEE, PLAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING (1999) (discussing the role of technology in the evolution of credit card use); LLOYD KLEIN, IT'S IN THE CARDS: CONSUMER CREDIT AND THE AMERICAN EXPERIENCE (1999); JOSEPH NOCERA, A PIECE OF THE ACTION: HOW THE MIDDLE CLASS JOINED THE MONEY CLASS (1994); JULIET SCHOR, THE OVERSPENT AMERICAN 19-20 (1998) (discussing credit card debt as it relates to the intensification of competitive consumption); BRETT WILLIAMS, DEBT FOR SALE (2004). For the variety of lending and repayment practices of consumer credit, see ROSE-MARIA GELPI, THE HISTORY OF CONSUMER CREDIT: DOCTRINES AND PRACTICES (2000).

157 Harvey, *supra* note 109, at 92.

158 JOHN CASSIDY, HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES 97-107 (2009); JUSTIN FOX, THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET (2009); JOHNSON & KWAK, *supra* note 9, at 68-69; Timothy A. Canova, *The Failing Bubble Economy: American Exceptionalism and The Crisis in Legitimacy*, 102 AM. SOC'Y INT. L. PROC. 237, 238 (2008); Robert Wade, *The First-World Debt Crisis of 2007-2010 in Global Perspective*, 51 CHALLENGE 25, 34 (July/Aug. 2008). The efficient market hypothesis views all human behavior as being uniformly dictated by an impulse to maximize gains and all facets of life operating in a competitive market of some sort. *See* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 5-6 (1976). For an insightful analysis of the efficient market hypothesis, and the underlying neo-classical economic theory, see ROBERT SKIDELSKY, KEYNES: THE RETURN OF THE MASTER 29-51 (2009). One scholar notes that "an ideological

elaborate new regulations were fashioned to pave the way for the ascendency of finance capital. After over three decades of the neoliberal era's ostensible deregulation, the financial sector remains "among the most heavily regulated sectors of the American economy."[159] During the heyday of neoliberal "deregulation," the U.S. had a regulatory regime with over 100 authorities overseeing different segments of the financial market.[160]

Critical legislations that enabled neoliberal financialization included: the Depository Institutions Deregulation and Monetary Control Act of 1980,[161] which eliminated interest rate caps; the addition of the 401(k) provision

backlash against state economic interventionism" played a key part in this reordering of the markets. Philip G. Cerny, *The Deregulation and Re-Regulation of Financial Markets in a More Open World*, *in* FINANCE AND WORLD POLITICS 51, 51–53 (Philip G. Cerny ed., 1993). Another notes the critical role of "widely shared ideological commitments" and "mindsets." David M. Andrews, *Capital Mobility and State Autonomy: Towards a Structural Theory of International Monetary Relations*, 38 INT. STUD. Q. 193, 200–201 (1994). For critical evaluations, see DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); Alexander Rosenberg, *Can Economic Theory Explain Everything?*, 9 PHIL. OF THE SOC. SCI. 509 (1979). The foundational flaw of neoclassical economic theory is that that, "leaving history and its uncertain movement out of the analysis imparts false sense of determinacy and predictability to the economic process." Wallace C. Peterson, *Institutionalism, Keynes and the Real World*, 11 J. ECON. ISSUES, June 1977, at 213–14. In light of the 2007–2009 financial meltdown, it has been suggested that "September 15, 2008, the date that Lehman Brothers collapsed, may be to market fundamentalism . . . what the fall of the Berlin wall was to communism." STIGLITZ, *supra* note 83, at 219. Even a storied herald of capitalism and globalization has now questioned the monetarist, efficient-market, and rational-expectations thesis of neoliberalism. *The Otherworldly Philosophers*, ECONOMIST, July 15, 2009, at 65–67.

159 FREDERIC S. MISHKIN, THE ECONOMICS OF MONEY, BANKING AND FINANCIAL MARKETS 46 (9th ed. 2009). For perceptive analyses of the re-regulation of the finance industry, see Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. POL'Y REV. 369, 388–96 (2009) (analyzing the most important institutional and regulatory factors that have contributed to the ongoing financial market failure and offering a framework for designing a new approach to financial regulation that would meet the demands of the present); Timothy A. Canova, *The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership*, 60 BROOK. L. REV. 1295 (1995); Joseph Karl Grant, *What the Financial Services Industry Puts Together Let No Person Put Asunder: How the Gramm–Leach–Bliley Act Contributed to the 2008–2009 American Capital Markets Crisis*, 73 ALB. L. REV. 371, 410–20 (2010) (analyzing the current financial crisis and stating proposals for future preventative regulations); Kristin N. Johnson, *Things Fall Apart: Regulating the Credit Default Swap Commons*, 82 U. COLO. L. REV. 167 (2011) (analyzing credit default swap markets by comparing them to traditional commons); Cathy Lesser Mansfield, *The Road to Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473, 561–75 (2000) (discussing the deregulation and its effect on the subprime mortgage equity lending industry).

160 Joanna Chung, *Multi-Layered Patchwork Will Be Tough to Unpick*, FIN. TIMES, Apr. 24, 2008, at 13 (quoted in Robert Wade, *The First-World Debt Crisis of 2007—2010 in Global Perspective*, 51 CHALLENGE 23, 34, n.7 (July/Aug. 2008)).

161 Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96–221, 94 Stat. 132 (codified as amended in scattered sections of 12 U.S.C.).

to the tax code in 1980,[162] which channeled savings into private pension plans; the Garn–St. Germain Depository Institutions Act of 1982, which allowed Savings and Loan Associations to engage in commercial lending and corporate bonds;[163] the Secondary Mortgage Market Enhancement Act of 1984, which permitted investment banks to buy, pool, and resell mortgages; [164] the Tax Reform Act of 1986, which created the Real Estate Mortgage Investment Conduit, making mortgage-backed securities more attractive;[165] the Financial Institutions Reform, Recovery, and Enhancement Act of 1989, which rearranged the government-sponsored mortgage-facilitating entities;[166] the Interstate Banking and Branching Act of 1994, which allowed banks to operate across state lines;[167] the Private Securities Litigation Reform Act of 1995, which made it difficult for securities fraud plaintiffs to plead fraud;[168] the Community Reinvestment Act of 1977, which directed financial institutions to expand their market base;[169] the Gramm–Leach Billey Act of 1999 that permitted comingling of commercial and investment banking;[170] the Commodities Futures Modernization Act of 2000, which left derivatives out of regulatory oversight; [171] and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which made it more difficult for consumers to seek bankruptcy

162 An Act to amend the Internal Revenue Code of 1954 to reduce income taxes, and for other purposes, Pub. L. No. 95–600, 92 Stat. 2763 (1978) (codified as amended at I.R.C. § 401(k) (2006)) (going into effect Jan. 1, 1980). For details, see ROGER LOWENSTEIN, ORIGINS OF THE CRASH: THE GREAT BUBBLE AND ITS UNDOING 24–25 (2004).

163 Garn–St. Germain Depository Institutions Act of 1982, Pub. L. No. 97–320, 96 Stat. 1469 (codified as amended in scattered sections of 12 U.S.C).

164 Secondary Mortgage Market Enhancement Act of 1984, Pub. L. No. 98–440, 98 Stat. 1689 (codified as amended in scattered sections of 15 U.S.C.).

165 Tax Reform Act of 1986, Pub. L. No. 99–514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.). By phasing out the interest deduction on all forms of consumer borrowing except for mortgages, this legislation also inaugurated the era of securitization of consumer credit. LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 252–54 (2011).

166 Financial Institutions Reform, Recovery, and Enhancement Act of 1989, Pub. L. No. 101–73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.).

167 Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103–328; 108 Stat. 2338 (codified as amended in scattered sections of 12 U.S.C).

168 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (codifies as amended in scattered sections of 15 U.S.C.).

169 Community Re-Investment Act, Pub. L. No. 95–128, 91 Stat. 1147 (1977) (codified as amended at 12 U.S.C. § 2901 (2006) and implemented by12 C.F.R. pts. 25, 228, 345, 563e). While this legislation is often cited by free–market enthusiasts as the primary cause of the mortgage meltdown, default rates on CRA lending are comparable to other areas of lending. *See* STIGLITZ, *supra* note 83, at 10.

170 Gramm–Leach–Bliley Act, Pub. L. No. 106–102, 113 Stat. 1338 (1999) (codified as amended at 15 U.S.C. §§ 6801–6809 (2006)).

171 Commodities Futures Modernization Act of 2000, Pub. L. No. 106–554, 114 Stat. 2763.

protection.[172] The courts and regulatory agencies played a supportive role in the interpretation and enforcement of these provisions.[173] This new legal terrain was indispensable for the financialization of the U.S. economy and consolidation of debt as a primary source of aggregate demand.

Law and public policy also played a critical role in enhancing liquidity, the lifeblood of finacialization.[174] This blood was first drawn from workers' savings and expanded debt–creation through extraordinarily loose monetary policy. The 401(k) provision of the tax code inaugurated siphoning of workers' savings through privatization of pension funds. Tapping this colossal reservoir of liquidity served three related functions: it fed the ever growing indebtedness of firms and households, gave workers a stake in the health of the financial markets, and augmented the ideological ensemble of ownership society, workers–as–shareholders, and "shareholder nation."[175] The other crucial step in liquidity generation was expansion and securitization of debt. In this context, "the purpose of making loans, mortgages and offering credit cards [was], increasingly, the generation of tradable financial assets based on the cycle of monthly repayments."[176] Neoliberalism, which was inaugurated by a radically tight

172 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.) *see also* Robert H. Scott III, *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: How the Credit Card Industry's Perseverance Paid Off*, 41 J. ECON. ISSUES, Dec. 2007, at 943, 943.

173 In 1986, the courts upheld the Federal Reserve's ruling that commercial banks' placing commercial paper issued by corporations with investors did not violate Glass–Steagall. Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys., 807 F.2d 1052, 1062–63 (D.C. Cir. 1986). A November 2001 rule jointly adopted by the Office of Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Federal Reserve tied bank capital requirement in securitization to the ability of banks get rating agencies to approve the investment; the rule was published in the Federal Register, November 29, 2001. JOHNSON & KWAK, *supra* note 9, at 138–39. On April 28, 2004, SEC agreed to allow large investment banks use their own "risk management practices for regulatory purposes." Alternative Net Capital Requirements for Broker–Dealers That Are Part of Consolidated Supervised Entities, Exchange Act Release No. 34–49830, 82 SEC Docket 3515 (June 8, 2004); *see also* JOHNSON & KWAK, *supra* note 9, at 140; Stephen Labaton, *Agency's '04 Rule Let Banks Pile Up New Debt, and Risk*, N.Y. TIMES, Oct. 3, 2008, at A1. This decision facilitated investment banks to increase their leverage up to 40 to 1. STIGLITZ, *supra* note 83, at 163.

174 Indeed, the combination of subprime mortgages and securitization rested "programmatically on the assumption that the important thing about debt is not its 'payability' but its 'liquidity.'" AMATO & FANTACCI, *supra* note 140, at 63.

175 BONNER & WIGGIN, *supra* note 8, at 203; *see* PETER F. DRUCKER, THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA (1976); Marleen O'Connor, *Labor's Role in the Shareholder Revolution*, *in* WORKING CAPITAL: THE POWER OF LABOR'S PENSIONS 67 (Archon Fung et al. eds., 2001). The proportion of pension funds channeled into stocks grew from 35.1% (USD 871 billion) in 1980 to 49.5% (USD 8.6 trillion) in 2008. Susanne Soederberg, *Cannibalistic Capitalism: The Paradoxes of Neoliberal Pension Securitization*, *in* SOCIALIST REGISTER 2011: THE CRISIS THIS TIME 229 tbl.1 (Leo Panitch et al. eds., 2010).

176 Andrew Leyshon & Nigel Thrift, *The Capitalization of Almost Everything: The Future of Finance and Capitalism*, 24 THEORY, CULTURE & SOC'Y, Dec. 2007, at 97, 106 (2007).

monetary policy, now turned to a radically loose monetary policy to fuel liquidity by keeping interest rates at historical lows.[177] Financial markets relied on the Fed to keep the system awash with liquidity to sustain the wealth–effect produced by credit–driven financialization. Particularly in response to the dot–com crash of the early 2000s, the Fed lowered interest rates and kept them low, incessantly creating liquidity and a credit–fueled boom.[178] This propelled "'artificial liquidity,'" "'liquidity black holes,'" and "Ponzi finance," the ubiquitous characterizations of the financial boom that rested substantially on derivatives based on bundled and securitized debt, particularly mortgages.[179] An accompanying recalibration of securities laws facilitated the change from lend–and–hold to lend–and–distribute banking and triggered "in–house debt collection" to increasingly give way to a "debt sale market in personal finance."[180] The exponential rise in subprime mortgages was made possible by these general policies that "stoked mortgage bonfire."[181] The subprime sector of the mortgage finance

177 Before the neoliberal era, the ability of credit originators to grant new loans was highly dependent on the support of public agency securitization and the levels of Federal Fund rate. With neoliberalism, private–label securitization allowed credit originators to refinance their activity as much as needed. Lenders became less vulnerable to shortage of liquidity induced by tighter monetary policy, and securities pooled in vehicles were sold at long–term rates in the rest of the world independent of Federal Reserve policies. DUMÉNIL & LÉVY, *supra* note 66, at 199–200. One effect of financial globalization was the convergence of long–term interest rates around the world, depriving the ability of national monetary authorities to adjust rates for domestic purposes. *Id.*, at 137. For convergence of rates worldwide, see *id.*, at 138 fig.9.1. After the 2001 recession, long–term interest rates stopped responding to increases in Federal Fund rates. For the relationship between the Federal Funds rate and long–term rates between 1980 and 2009, see *id.*, at 198 fig.14.1. Alan Greenspan reported to Congress that "[t]he drop in long–term rates is especially surprising given the increase in the federal funds rate over the same period. Such a pattern is clearly without precedent in our experience." ALAN GREENSPAN, FEDERAL RESERVE BOARD'S SEMIANNUAL MONETARY POLICY REPORT TO THE CONGRESS (July 20, 2005), http://www.federalreserve.gov/boarddocs/hh/2005/july/testimony.htm.

178 The Fed overnight rate was lowered from 6% to 1% on January 3, 2001, and did not rise until June 30, 2004. PADMA DESAI, FROM FINANCIAL CRISIS TO GLOBAL RECOVERY 2 (2011). After correcting for inflation, negative rates prevailed during almost three years. DUMÉNIL & LÉVY, *supra* note 66, at 197–98; Greg Ip, *Did Greenspan Add to Subprime Woes?*, WALL ST. J., June 9, 2007, at B1. Housing demand and prices soured, and "[t]he supply of asset–backed securities doubled between 2003 and 2004, and doubled again between 2004 and 2005." Wade, *supra* note 158, at 35.

179 Anastasia Nesvetailova & Ronen Palan, *A Very North Atlantic Credit Crunch: Geopolitical Implications of the Global Liquidity Crisis*, 62 J. OF INT'L AFFAIRS, Fall/Winter 2008, at 165, 168.

180 DAWN BURTON, CREDIT AND CONSUMER SOCIETY 123 (2008).

181 Jo Becker et al., *White House Philosophy Stoked Mortgage Bonfire*, N.Y. TIMES, Dec. 21, 2008, at A1, *available at* http://www.nytimes.com/2008/12/21/business/21admin.html. Subprime lending also presupposed the elaborate and varied legal regimes of foreclosure. *See* Kelly D. Edmiston & Roger Zalneraitis, *Rising Foreclosures in the United States: A Perfect Storm*, 92 ECON. REV. 115, 120–21 (Federal Reserve Bank of Kansas City (2007)).

industry grew at an annual rate of 25 percent between 1994 and 2003, and was "the key to extending the asset-based welfare vision."[182]

Far from being a "'democratization of finance,'"[183] subprime mortgages testify to the enduring grammar of modern power's engagement with alterity as one of engulfment/subordination and not of exclusion.[184] The subprime-lending boom was "'reverse redlining'"[185]—marginalized groups traditionally denied credit became targeted with high-risk credit.[186] It demonstrated that, to grow and increase profits without engaging the sphere of production, finance needed to spread its reach beyond the middle class to the poor.[187] Home ownership had long been advocated as an effective tool of social control, indeed, a "'prophylactic against mob mind.'"[188] The liberalized financial markets were well-positioned to deploy this tool on an ever-widening scale. With the neoliberal turn, equity markets propelled by inflow of funds from newly created private pension schemes began to rise and "[b]ig companies . . . increasingly relied on equity markets for finance . . . ."[189] In response, banks pushed lending into more marginal markets, developed new financial instruments, and invented new ways

182 Paul Langley, *Debt, Discipline, and Government: Foreclosure and Forbearance in the Subprime Mortgage Market*, 41 ENV'T AND PLAN. A 1404, 1410 (2009). *See also* RICHARD RONALD, THE IDEOLOGY OF HOME OWNERSHIP: HOMEOWNER SOCIETIES AND THE ROLE OF HOUSING (2008); Susan J Smith, *Owner-Occupation:At Home with a Hybrid of Money and Materials*, 40 ENV'T AND PLAN. A 520 (2008).

183 PETER GOSSELIN, HIGH WIRE: THE PRECARIOUS FINANCIAL LIVES OF AMERICAN FAMILIES 183 (2008) (quoting finance expert Gregory Elliehausen).

184 For an insightful refutation of the exclusion thesis in the context of race relations, see DENISE FERREIRA DA SILVA, TOWARDS A GLOBAL IDEA OF RACE (2007).

185 Fiona Allon, *Speculating on Everyday Life: The Cultural Economy of the Quotidian*, 34 J. OF COMM. INQ. 366, 368 (2010).

186 Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165, 176–79 (2010). For racial wealth inequality partly resulting from lack of access to credit, see MELVIN OLIVER, BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 136–41 (1995). For a comparison of assets and debt use between black and white households, see HYMAN, *supra* note 165, at 139–40, Figs.5.2 & 5.3. Racial minorities traditionally paid higher interest rates on mortgage loans. *Id.*, at 143–44, Figs.5.4 & 5.5. Indeed, "FHA policies led to a systematic disinvestment in black-owned housing." *Id.* at 341, n.1. For a detailed exposition of the impact of public policies on minority housing, see THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 7 (1996). For how class impacted credit availability, see *Consumer Credit and the Poor Before the Subcomm. on Financial Institutions of the Committee on Banking and Currency*, 90th Cong. 3–5 (1968) (statement of Paul Rand Dixon, Chairman, Federal Trade Commission).

187 Andrea Fumagalli, *The Global Economic Crisis and Socioeconomic Governance*, *in* CRISIS IN THE GLOBAL ECONOMY: FINANCIAL MARKETS, SOCIAL STRUGGLES, AND NEW POLITICAL SCENARIOS 64 (Andrea Fumagilli & Sandro Mezzadra eds., 2010).

188 BARBARA EHRENREICH & DEIRDRE ENGLISH, FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN 133–34 (1978) (quoting Sociologist Ross).

189 Wade, *supra* note 158, at 30 (2008).

to make mortgage loans to lower-income workers whom lenders had previously avoided.[190] Alan Greenspan expressly acknowledged this move: "innovation and deregulation have vastly expanded credit availability to virtually all income classes."[191] Ferreting out economically marginal groups for mortgage and consumer credit expanded the scope of the financial market. "Bottom-feeding" on the "unbanked" and "uncarded ethnics" became a lucrative growth field.[192] In this process "[e]conomically marginal people constituted, in effect, *a 'developing country' within the United States*."[193] African Americans, who historically had limited access to credit markets on account of racial prejudice and discrimination, now became "the most profitable group to lend to."[194] Gender also intersected with race and class in this schema. As women constituted an ever-increasing proportion of recipients of subprime loans, "single, female, with two children, in her first home" became the profile of a typical subprime borrower seeking foreclosure counseling.[195]

For the borrowers, the subprime mortgages boom was "asset-based welfare";[196] a "welfare trade-off" emerged between housing as a social right secured by public resources and homeownership as a mode to accumulate and store wealth.[197] Neoliberal contraction of the redistributive

190 For details, see EDWARD M. GRAMLICH, SUBPRIME MORTGAGES: AMERICA'S LATEST BOOM AND BUST 6 (2007); ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT 23-24 (2008).

191 Alan Greenspan, Chairman, Fed. Reserve Bd., Remarks at the Federal Reserve System's Fourth Annual Community Affairs Research Conference (Apr. 8, 2005) (transcript available at http://www.federalreserve.gov/BoardDocs/speeches/2005/20050408/default.htm).

192 HYMAN, *supra* note 7, at 270 (quoting Kevin Higgins, *Bottom Feeding, in* CREDIT CARD MANAGEMENT 62 (1994)).

193 Wade, *supra* note 158, at 31 (emphasis added).

194 HYMAN, *supra* note 7, at 243. This was because due to lesser wealth and income, African American borrowers were three times as likely to revolve their debts. *Id.* At the height of subprime lending boom in 2006, nearly 55 percent of loans to African Americans were subprime, despite the fact that many of those borrowers qualified for prime loans. Editorial, *Mortgages and Minorities*, N.Y. TIMES, Dec. 9, 2008, at A34. For a comprehensive history of political economy of racism in the U.S., see DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA (10th Anniversary ed., 2010); MELVIN LEIMAN, THE POLITICAL ECONOMY OF RACISM (1993).

195 *See* Allen J. Fishbein & Patrick Woodall, *Women Are Prime Targets for Subprime Lending: Women Are Disproportionately Represented in High-Cost Mortgage Market*, CONSUMER FED'N OF AM. (Dec. 2006), http://www.consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf. For historical gender discrimination in availability of credit, see HYMAN, *supra* note 7, at 191-206.

196 Allon, *supra* note 185, at 377.

197 Leonard Seabrooke, *What Do I Get? The Everyday Politics of Expectations and the Subprime Crisis*, 15 NEW POL. ECON. 51, 56 (2010). For the need of lower-income groups to use credit for subsistence needs, see JANIS BOWDLER, NAT'L COUNCIL OF LA RAZA, SURVIVAL SPENDING: THE ROLE OF CREDIT CARDS IN HISPANIC HOUSEHOLDS (2010); Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 RUTGERS L.J. 59 (2007); Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*,

function of the welfare state was complemented by "privatization of deficit spending"[198]—creation of aggregate demand through private debt. Demand for credit and complex financial products did not naturally flow from their supply; it had "to be created, and liquidity relied critically on demand being whipped up."[199] Financial markets cultivated expectations of infinite increases in asset prices and the resulting wealth–effect—an inflationary increase without which it would be impossible to co–opt the have–nots.

Legal regimes played a pivotal role in the expansion and securitization of sub–prime loans and in their channeling into global financial markets.[200] It was "the securitization rules themselves made all this possible, and indeed desirable."[201] State intervention in the home mortgage business had started with the creation of the Home Owner's Loan Corporation in response to the collapse of the property market and the real estate bond market following the Great Depression.[202] New Deal legislation designed to support the housing market created FHA to provide lenders with protection against losses and established Fannie May to buy mortgage loans of banks, thus providing them liquidity to expand mortgage lending.[203] For over four decades, such public backing facilitated expansion of home–ownership by high–wage

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40 LOY. U. CHI. L.J. 557 (2009); Christian E. Weller, *Need or Want: What Explains the Run–up in Consumer Debt?*, 41 J. ECON. ISSUES, June 2007, at 583.

198 Christian Marazzi, *supra* note 121, at 31.

199 Nesvetailova & Palan, *supra* note 179, at 166. As Stiglitz reports: "The economy grew, but mainly because American families were persuaded to take on more debt, refinancing their mortgages and spending some of the proceeds. And, as long as housing prices rose as a result of lower interest rates, Americans could ignore their growing indebtedness." Joseph Stiglitz, *America's Day of Reckoning*, PROJECT SYNDICATE (Aug. 6, 2007), http://www.project–syndicate.org/commentary/stiglitz90/English.

200 A comprehensive study of concludes:

> The government made the resale of debt possible, not just through the enforcement of contracts, but in many instances by actually creating the basic institutions for buying and selling loans – making markets – like the government–made quasi–corporation Fannie Mae. . . . [I]t was not by the invisible hands of the market but by the visible minds of policymakers that new financial instruments and institutions were invented.

HYMAN, *supra* note 7, at 2–3.

201 AMATO & FANTACCI, *supra* note 140, at 73.

202 For details, see HYMAN, *supra* note 7, at 49–50; Kenneth A. Snowden, *Mortgage Securitization in the United States: Twentieth Century Developments in Historical Perspective*, *in* ANGLO–AMERICAN FINANCIAL SYSTEMS: INSTITUTIONS AND MARKETS IN THE TWENTIETH CENTURY 276–88 (Michael D. Bordo and Richard Sylla eds., 1995); Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2194–99 (2007).

203 DUMÉNIL & LÉVY, *supra* note 66, at 185–87. In 1934 the National Housing Act created the Federal Housing Administration, and in 1938 the Federal National Mortgage Association (Fannie Mae) was set up. For details, see LEONARD SEABROOKE, THE SOCIAL SOURCES OF FINANCIAL POWER: DOMESTIC LEGITIMACY AND INTERNATIONAL FINANCIAL ORDERS 125 (2006). Fannie Mae bought and sold mortgages, thus creating a secondary market for mortgages that linked lender, insurers and investors. HYMAN, *supra* note 7, at 53–70.

earners—the so-called "middle class." As wages started to stagnate in the 1970s and the existing mortgage market was saturated, public policy promoted a broadening of this market by inducing the financial sector to reach new borrowers and develop new financial instruments.[204] Often discourses of civil rights and equal access and opportunity were deployed to effectuate the changes. Salutary as the stated objectives were, bringing the marginalized into circuits of credit at a time when financialization and debt-driven demand generation was taking root, the consequences for the purported beneficiaries were disastrous. Ginnie Mae, created to cater particularly to low-income and minority borrowers, invented mortgage-backed securities.[205] Freddie Mac was created with the specific purpose of securitizing mortgage loans and selling those in secondary markets.[206] The first-ever mortgage-based security sale by Ginnie Mae in 1970 was hailed by the Secretary of Housing and Urban Development as "a revolutionary step."[207] Subsequent legislations explicitly forbade redlining practices and required Fannie Mae and Freddie Mac to concentrate more on the lower income and minority groups.[208] Soon, next to the Treasury Department, Freddie Mac was the largest debt-issuing institution in U.S. capital markets.[209] Wall Street became "addicted to mortgage-backed

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204 The Housing Act of 1968 also authorized the Treasury Department to act as a buyer of last resort of mortgage-backed securities. HYMAN, *supra* note 7, at 232. For affordable housing goals of government-sponsored entities, and the growth of the mortgage market, securitization and share of the market, see VIRAL V. ACHARYA ET AL., GUARANTEED TO FAIL: FANNIE MAE, FREDDIE MAC AND THE DEBACLE OF MORTGAGE FINANCE 34 fig.2.1, 42 fig.3.1 (2011); Lewis S. Ranieri, *The Origins of Securitization, Sources of Its Growth, and Its Future Potential*, *in* A PRIMER OF SECURITIZATION 31 (Leon T. Kendall & Michael J. Fishman eds., 1996); Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369 (1991).

205 JOHNSON & KWAK, 13 BANKERS, *supra* note 7, at 123. Under the Civil Rights Act of 1968 (Title VIII), the Fair Housing Act that created Ginnie Mae to cater particularly to low-income and minority borrowers, also created mortgage-back securities paving the way for resale of debt as a financial investment. HYMAN, *supra* note 7, at 221, 225–30.

206 Seabrooke, *supra* note 203, at 125–30. The Emergency Home Finance Act of 1970 created Freddie Mac, and permitted Fannie Mae and Freddie Mac to expand secondary markets in home mortgages by buying and pooling mortgages and selling those as mortgage-backed securities in the open market. *Id.*; HYMAN, *supra* note 7, at 231. The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 required Fannie Mae and Freddie Mac to concentrate more on the lower income and minority groups, and to improve systemic credit assessments. GUY STUART, DISCRIMINATING RISK: THE U.S. MORTGAGE LENDING INDUSTRY IN THE TWENTIETH CENTURY 192 (2003).

207 Louis Hyman, Op-Ed., *The House That George Romney Built*, N.Y. TIMES, Feb. 1, 2012, at A27 (quoting George C. Romney).

208 The Community Reinvestment Act of 1977 explicitly forbade redlining practices. STUART, *supra* note 206, at 110. For a detailed exposition of the role of Fannie Mae and Freddie Mac in the mortgage finance crisis, see ACHARYA ET AL., *supra* note 204, at 31–79.

209 HYMAN, *supra* note 7, at 232. For details, see Christopher L. Peterson, *Fannie Mae, Freddie Mac, and the Home Mortgage Foreclosure Crisis*, 10 LOY. J. PUB. INT. L. 149 (2009).

securities" and the demand for subprime loans by banks and investors outstripped their supply.[210] By modifying Keynesian–era legal regimes and fashioning new ones, neoliberal policies had ignited the subprime mortgage frenzy.[211] With foreigners holding one–third of the debt of the two agencies, compared with 13 percent of the U.S. mortgage–backed securities market in general, Freddie Mac and Fannie Mae, together "the single largest player in the game,"[212] served as the key link between global finance and the U.S. mortgage market.[213] Hailed at the time as instruments of progressive expansion of home–ownership, the expanded borrower–base and mortgage–backed securitization had three inter–linked effects: ever–larger sections of the working classes were brought within the fold of housing debt, the secondary markets for these securities helped syphon global savings to the U.S., and the size and profits of finance exploded.[214]

The entrapment of the working classes and the marginalized into circuits of credit, then, resulted from the financial sector's search for depth and liquidity as debt became the primary instrument to sustain aggregate demand. Redesigned legal regimes and public agencies were critical to this transformation.

IV. The New Economy and Precarious Labor Markets

The turn to debt by the working classes was also propelled by the rise of precarious labor markets.[215] Besides the demise of unions and

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210 Johnson & Kwak, 13 Bankers, *supra* note 9, at 124–25. For the share of the mortgage market backed by public entities, see Acharya et al., *supra* note 204, at 21 fig.1.1 (2011). In 1994, 32% of subprime loans were securitized for a value of USD 11 billion; in 2003, the figures rose to 61% and USD 203 billion. Dawn Burton, *supra* note 180, at 81 tbl.4.4 (2008).

211 By the end of the1990s, the value of outstanding mortgage–backed securities was USD 1 trillion, with the share of Fannie Mae and Freddie Mac at 90%. Seabrooke, *supra* note 203, at 126–27. By 2008, this had grown to USD 5.3 trillion. By 2003, the total liabilities, both standard securities and mortgage–backed securities of these institutions reached 53% of GDP. This amount compares to 136% of all assets of banks and insurance, or, equivalently, 132% for all financial assets of mutual and pension funds. Duménil & Lévy, *supra* note 66, at 185–87. Between 2001 and 2006, while conforming mortgages declined from USD 1280 billion to USD 990 billion, subprime rose from USD 120 billion to USD 600 billion, and nonprime climbed from 14% of the market to 48% of the market. Acharya et al., *supra* note 204, at 46 tbl.3.1. For the increasingly risky lending activity by government–sponsored entities between 2003 and 2007, see *id.* at 59 tbl.3.4. Use of Credit Default Swaps (CDS) as an insurance hedge against the expanding securitized investment instruments induced riskier speculation. *See* Michael Lewis, The Big Short: Inside the Doomsday Machine 104–08, 201–12 (2010).

212 Daniel Chirot, *A Turning Point or Business as Usual?*, *in* Business As Usual, *supra* note 109, at 121.

213 Richard Roll, *Benefits to Homeowners from Mortgage Portfolios Retained by Fannie Mae and Freddie Mac*, 23 J. of Fin. Services Res. 29, 36 (2003).

214 Between 1982 and 2007, profits of financial corporations as a percentage of total corporate profits rose from 5% to 41%. Wade, *supra* note 158, at 33.

215 For precarization of labor, see Gerald Rauning, A Thousand Machines: A Concise

compression of wages, compelling corollary changes in the employment landscape have included the reduction of socially necessary labor, the rise of flexible contingent labor, and the growth of ever-vaster pools of free labor. In a new "age of the superfluous worker,"[216] a growing segment of the working class forms part of the "precariat,"[217] signified by jobs that are temporary, low-wage, and without benefits or protections. The contingent workforce includes independent contractors, contracted workers, leased employees, part-time employees, and temporary employees.[218] Estimates of the numbers of contingent workers range between twenty to thirty percent of the work force.[219] This "crisis of work"[220] and "contingency explosion"[221] issued from firms' drive to maximize labor market flexibility, changes in information technologies, the rise in forms of work that avoid employee status and its accompanying legal structures, and firms' desire to avoid unions.[222] Fordist era forms of work, based on full-time employment,

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PHILOSOPHY OF THE MACHINE AS SOCIAL MOVEMENT 75–90 (Aileeen Derieg trans., 2010); Brett Neilson & Ned Rossiter, *From Precarity to Precariousness and Back Again: Labour, Life and Unstable Networks*, 5 FIBRECULTURE J. (2005), http://journal.fibreculture.org/issue5/neilson_rossiter.html; Vassilis Tsianos & Dimitris Papadopoulos, *Precarity: A Savage Journey into the Heart of Embodied Capitalism*, 10 EUROPEAN INSTITUTE FOR PROGRESSIVE CULTURAL POLICIES (2006), http://eipcp.net/transversal/1106/tsianospapadopoulos/en.

216 Herbert J. Gans, Op-Ed., *The Age of the Superfluous Worker*, N.Y. TIMES, Nov. 25, 2011, at A35; *see also* Dave Jamieson, *The New Blue Collar: Temporary Work, Lasting Poverty And The American Warehouse*, HUFFINGTON POST (Dec. 20, 2011, 8:19 AM), http://www.huffingtonpost.com/2011/12/20/new-blue-collar-temp-warehouses_n_1158490.html.

217 THE CRISIS AND THE LEFT ix (Leo Panitch, Greg Albo & Vivek Chibber eds., 2011).

218 For studies of the rise of temporary work in the U.S., see CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION (Kathleen Barker and Kathleen Christensen eds., 1998); ERIN HATTON, THE TEMP ECONOMY: FROM KELLY GIRLS TO PERMATEMPS IN POSTWAR AMERICA (2011); ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY (2011); LEAH F. VOSKO, TEMPORARY WORK: THE GENDERED RISE OF A PRECARIOUS EMPLOYMENT RELATIONSHIP (2000).

219 RICHARD S. BELOUS, THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE 15 (1989); STANLEY NOLLEN & HELEN AXEL, MANAGING CONTINGENT WORKERS: HOW TO REAP THE BENEFITS AND REDUCE THE RISKS 9–10 (1996).

220 *See* Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 524–26 (1997). *See also* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEW DATA ON CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS (Aug. 1995); JEREMY RIFKIN, THE END OF WORK: THE DECLINE OF THE GLOBAL LABOR FORCE AND THE DAWN OF THE POST-MARKET ERA 3–6 (1995); William Bridges, *The End of Jobs*, FORTUNE, Sept. 19, 1994, at 62; Janice Castro, *Disposable Workers*, TIME, Mar. 29, 1993, at 43; Lance Morrow, *The Temping of America*, TIME, Mar. 29, 1993, at 40.

221 Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 368 (2002).

222 "The increase in 'contingent work' is largely the result of the way in which employers offer jobs to increase flexibility with uncertain product demand and to reduce labor costs by retaining a smaller core of year round full-time workers . . . ." U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 22 (1994);s*See generally* BELOUS, *supra* note 219 (analyzing the growth of

clear–cut occupational assignments, and a career pattern over the life cycle eroded. Racial discrimination and the widespread availability of flexible peripheral labor markets combined to increase social inequality and marginalization.[223] The rise of contingent work also directly contributed to the decline of unions and wages.[224] As a result, an increasing portion of the workforce received less wages and benefits.

Revolutionary changes in information and communication technologies combined with changes in the organization of production increasingly changed the very nature of work and attendant social rights.[225] Reduction of labor costs in both private and public sectors was achieved through lean production and outsourcing. While just–in–time production organized labor in the most flexible way possible to avoid accumulation of inventory, outsourcing helped avoid social costs of labor.[226] With the demise of Fordist

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the contingent economy and the forces that have driven its development); Richard S. Belous, *The Rise of the Contingent Workforce: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863 (1995) (analyzing key questions raised by the growth of the contingent work force in the economic and political climate). *See also* Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 571 (1996) ("One of the primary motivations for employers to move to contingent work arrangements is to avoid employment regulations."). The judiciary has treated contingent workers as having weaker entitlements to protections under unjust dismissal laws. Mark Berger, *Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee*, 16 YALE L. & POL'Y REV. 1, 7–8 (1997).

223 For a detailed study, see MARTIN CARNOY, FADED DREAMS: THE POLITICS AND ECONOMICS OF RACE IN AMERICA (1994).

224 Many contingent workers are technically not employees of any entity and therefore not covered by NLRA. Others, though legally classified as employees, are often excluded from bargaining units on account of insufficient community of interest with permanent employees. Leased employees cannot be included in bargaining units of user firm's employees without consent of both joint employers. *See* Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 505 (1997); Katherine M. Forster, Note, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541, 558 (2001); Bita Rahebi, Comment, *Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105, 1106 (2000). Part–time employees earned 58 percent of the hourly wage of median full–time employees in 1989, and the average hourly wage for temporary employees in 1994 was 35 percent lower than it was for full–time employees. Middleton, *supra* note 222, at 565; Karst, *supra* note 220, at 525 n.11. Only 22 percent of part–time workers received health care benefits through their employers in 1988 as compared to 78 percent of full–time employees. Middleton, *supra*. For the link between contingent employment and growing income inequality, see BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U–TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA 74–75 (1988).

225 For detailed expositions of this transformation, see URSULA HUWS, THE MAKING OF A CYBERTARIAT: VIRTUAL WORK IN A REAL WORLD (2003); ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST–CENTURY CAPITALISM (1992); WORKING UNDER DIFFERENT RULES (Richard B. Freeman ed., 1994).

226 For details, see CHRISTIAN MARAZZI, CAPITAL AND AFFECTS: THE POLITICS OF THE LANGUAGE ECONOMY 19–35 (Giuseppina Mecchia trans., Semiotext(e) 2011).

and Taylorist production systems,[227] direct command and control over the production process was increasingly substituted with marketplace command. Taylorist modes of direct allocation of tasks were increasingly replaced by indirect mechanisms based on imperatives to deliver and unavoidable pressures of precarization of the wage relation.[228] The labor force had to adapt to the increasingly volatile process of value creation; indeed, the pressure was to constantly "reinvent oneself."[229] The just-in-time inventory management and optimal scheduling led to just-in-time labor.[230] The working classes faced new market imperatives to be adaptable and "multivalent."[231] Flexible production produced flexible individuals who changed jobs frequently and whose social relations were increasingly transitory.[232] As a result, a growing number of workers lived "neither inside nor outside the world of work, but along its margins. . . . [inhabiting] a new netherworld, the vocational purgatory of the 'unjob.'"[233]

In a financialized economy, "profit, like rent, increasingly depend on mechanisms of value expropriation that proceed from a position of exteriority in respect of the organization of production."[234] The new speculative profit-making rested on the value-making capabilities of "common work."[235] Labor practices made possible by new information

227 Fordism refers to the system of industrial mass production symbolized by the assembly line of auto production introduced by Henry Ford. Under Fordism, industrial workers are paid relatively high wages to generate demand for products of industrial mass production. For details, see ANTONIO GRAMSCI, *Americanism and Fordism*, *in* SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds., trans., 1971). Named after industrial engineer Frederick Taylor, Taylorism is an industrial efficiency methodology that breaks down each task to small and simple segments that can be easily taught and replicated. Taylorism introduced time and motion study to promote optimum job performance, cost accounting, and tool and work-station design. For details, see ROBERT KANIGEL, THE ONE BEST WAY: FREDERICK WINSLOW TAYLOR AND THE ENIGMA OF EFFICIENCY (1997).

228 The wage form itself has changed with fixed salary increasingly replaced by adjustable performance-based remuneration. MARAZZI, *supra* note 226, at 47-48. This facilitates a servile labor force constrained to demonstrate devotion and obedience, under the penalty of losing work. *Id.* at 44-47.

229 Giuseppina Mecchia, *Introduction* to MARAZZI, *supra* note 226, at 10.

230 MARAZZI, *supra* note 226, at 17-25.

231 MARAZZI, *supra* note 226, at 23.

232 RICHARD SENNETT, THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM 46-63 (1998).

233 GOSSELIN, *supra* note 183, at 142.

234 Vercellone, *supra* note 135, at 91.

235 MICHAEL HARDT & ANTONIO NEGRI, COMMONWEALTH 155 (Paperback ed., Harvard University Press 2011) (2009). This phenomenon is yet another appropriation of the commons for private gain, an enduring feature of capitalism. For example, the widespread knowledge base of the working classes tapped into by cognitive capitalism in conditions of precarization of work, is the fruit of socialized education supplied by the welfare state.

> [T]he truly driving sectors of an economy founded on knowledge are not found in the private R&D laboratories. Such a driving role is instead played by the collec-

technologies expanded the scope of immaterial labor, helping to blur the line between work and non–work. As a result, increasingly processes of production of value traditionally confined to the place of work spread "throughout the whole society."[236] Here we see deployment of bio–labor: "life put to work, outside the times officially certified by private law."[237] The new order becomes one of externalization of the production process, of "crowdsourcing"[238] and "unpaid labor"[239] of the crowd. The consumer–as–producer phenomenon is part of this complex. Bagging one's own groceries and self–service at IKEA are emblematic examples of externalizing fixed and variable costs. Similarly, open–source information systems shift costs of labor to consumers through mechanisms like externalization of program evaluation, beta–testing, user technical assistance, and open–source program development.[240]

The information/communication revolution resulted in the centrality of cognitive/non–material labor, the loss of the strategic importance of fixed capital, and the transfer of a series of productive–instrumental functions to the living body of labor–power. This rapidly unfolding phenomenon

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> tive *man for man productions*, traditionally assured by the common institutions of the welfare state according to a non–commercial logic. This element explains the extraordinary pressure exercised by capital to privatize collective welfare services, and this is both for its strategic role in the growth of the social demand and in biopolitical and bioeconomic control of the population.

Vercellone, *supra* note 135, at 111.

236 For a detailed analysis, see Marazzi, *supra* note 121, at 37–42.

237 Fumagalli, *supra* note 187, at 81–82.

238 JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS (2008).

"These crowdsourcing technologies represent the new organic composition of capital, i.e., the relation between constant capital diffused in society and variable capital that is de-localized, de–spatialized and dispersed in the sphere of reproduction, consumption, forms of life, and individual and collective imaginaries." Marazzi, *supra* note 121, at 41.

239 Marazzi, *supra* note 121, at 38–39.

240 For detailed analyses, see YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); 1 MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE (2d ed. 2010); John Banks & Sal Humphreys, *The Labour of User Co–Creators: Emergent Social Network Markets?*, 14 CONVERGENCE: THE INT'L J. OF RES. INTO NEW MEDIA TECH. 401 (2008). The key phrases of the post–crass New Economy were "social web" or "web 2.0." These models were based on their ability to attract masses of users who create a world of social relations on the bases of cost–free web platforms, to harness user browsing, and applications that allow extraction of value from common actions like linking a site, flagging a blog post, modifying software, etc. Web 2.0 proved a winning model for investors since it harnesses, incorporates and valorizes users' social and technological labor, through marginalization of waged labor and the valorization of free user labor: unpaid and undirected labor, which is nonetheless controlled by its insertion into a value appropriation circuit. For detailed analyses, see ALEXANDER R. GALLOWAY, PROTOCOL: HOW CONTROL EXISTS AFTER DECENTRALIZATION (2004); TIZIANA TERRANOVA, NETWORK CULTURE: POLITICS FOR THE INFORMATION AGE (2004).

is evocatively labeled "cognitive capitalism"[241] Knowledge-based innovation and value-production by highly skilled precarious labor are distinct features of cognitive capitalism. Armed with new technologies, immaterial organizational systems "pursu[ed] workers in every moment of their lives ... [and] the work day, the time of living labor, is extended and intensified."[242] Modalities of value production moved "from factory to the *social* factory."[243] The information revolution procreated a new labor culture that had absorbed the need for liberty and informality born of the preceding cycle of social struggles, imported the dissolution of the borders between work-time and life-time from academic labor, and possessed the ideology of entrepreneurship.[244] It produced a new economic model capable of generating value by mass use of the internet.[245] In this realm, ubiquitous activities such as using a search engine, visiting a website, even carrying a cell phone that transmits the carrier's location, generate opportunities for enterprises to harvest value without costs.[246]

"Skill-biased technological change" is a dominant explanation for inequality trends in the United States, with the computer/internet revolution and the failure of education to keep pace with the growing skill demands of the knowledge economy cited as the main reasons.[247] Analysts discerned a "new digital divide" that runs along class and racial

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241 For an articulation of the hypothesis of cognitive capitalism, see YANN MOULIER BOUTANG, COGNITIVE CAPITALISM (English ed., Ed Emery trans., Polity Press 2011) (2008); Bernard Paulré, *Cognitive Capitalism and the Financialization of Economic Systems*, *in* CRISIS IN THE GLOBAL ECONOMY: FINANCIAL MARKETS, SOCIAL STRUGGLES, AND NEW POLITICAL SCENARIOS 171 (Andrea Fumagalli & Sandro Mezzadra eds., 2010); Carlo Vercellone, *From Formal Subsumption to General Intellect: Elements for a Marxist Reading of the Thesis of Cognitive Capitalism*, 15 HIST. MATERIALISM 13 (2007).

242 Marazzi, *supra* note 121, at 41.

243 Federico Chicchi, *On the Threshold of Capital, At the Thresholds of the Common: Sidenotes on the Ambivalences of Biopolitical Capitalism*, *in* CRISIS IN THE GLOBAL ECONOMY: FINANCIAL MARKETS, SOCIAL STRUGGLES, AND NEW POLITICAL SCENARIOS 139, 144 (Andrea Fumagalli & Sandro Mezzadra eds., 2010).

244 For a detailed analysis, see ANDREW ROSS, NO-COLLAR: THE HUMANE WORKPLACE AND ITS HIDDEN COSTS (2003).

245 Tim O'Reilly, *What is Web 2.0*, O'REILLY (Sept. 30, 2005), http://oreilly.com/web2/archive/what-is-web-20.html.

246 This phenomenon is captured well by the following: "You may not know it, but if you carry a smartphone in your pocket, you are probably doing unpaid work for Apple or Google—and helping them eventually aim more advertising directly at you." Miguel Helft, *Phone Data Used to Fill Digital Map*, N.Y. TIMES, Apr. 26, 2011, at B1; *see also* Stephen Baker, *The Next: Companies May Soon Know Where Customers are Likely to be Every Minute of the Day*, BUS. WK., Mar. 9, 2009, at 42, 44-45.

247 *See, e.g.*, David H. Autor et al., *The Polarization of the U.S. Labor Market*, 96 AM. ECON. REV. PAPERS AND PROCEEDINGS, May 2006, 189, 191-92; David H. Autor et al., *The Skill Content of Recent Technological Change: An Empirical Exploration*, 118 Q.J. ECON., Nov. 2003, at 1279, 1280; David H. Autor et al., *Trends in U.S. Wage Inequality: Re-Assessing the Revisionists* (Nat'l Bureau of Econ. Research, Working Paper No. 11627, 2005).

divides[248] and is marked by deep socio–economic distinctions between "the networkers ... the networked ... the switched–off" and between "the deciders ... the participants ... the executants."[249] In this context, higher education and incessant skills–development play an increasingly critical role in establishing an individual's ranking in the hierarchy of employability.[250] At the same time, public education faced disinvestment, and the cost of education spiraled.[251] As a result, reliance on debt for education and retraining soared. Surging above one trillion dollars, student–loans now exceed credit–card and auto–loan debt.[252]

In the context of a financialized economy, with precarization of labor, demands for enhanced skills, and contraction of public support for education and re–training, increasing reliance on debt to re–train, indeed to live, becomes the only available option for the working classes.

V. Discipline of Debt

Throughout history, debt both lubricated circuits of value extraction and acted as a disciplinary device. From Athenian debt–bondage to contemporary labor trafficking, debt–peonage has been part of labor management regimes across a variety of modes of production. The historical role of debt in moral discipline is evidenced by the fact that in all Indo–European languages, words for debt are synonymous with those for sin or guilt.[253] Debt has also played a foundational role in modern imperial

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248 Susan P. Crawford, *The New Digital Divide*, N.Y. Times, Dec. 4, 2011, at SR1.

249 Castells, supra note 240, at 260.

250 For a detailed analysis of the nexus between education and economic growth, see Alison Wolf, Does Education Matter?: Myths About Education and Economic Growth (2002).

251 The average tuition at a four–year non–profit college in 2009–10 was $21,324, while at public colleges it was $10,747. Tamar Lewin, *What's the Most Expensive College? The Least? Education Dept. Puts It All Online*, N.Y. Times, June 30, 2011, at A8. Between 1999 to 2009, tuition at public two–year colleges increased 71%, while the median family income, adjusted for inflation, declined 4.9%. *Id.* Between 1989 and 2009, law school tuition shot up 317%. David Segal, *Law School Economics: Ka–Ching!*, N.Y. Times, July 17, 2011, at B1. For the political economy of education under neoliberalism, see John Bellamy Foster, *Education and the Structural Crisis of Capital: The U.S. Case*, 63 Monthly Rev., 2011, at 6, 7–10, 14, 30. These developments have helped trigger student protests. *See* Springtime: The New Student Rebellions 1–2 (Clare Solomon & Tania Palmieri eds., 2011).

252 Josh Mitchell & Maya Jackson–Randall, *Student–Loan Debt Tops $1 Trillion*, Wall St. J., March 22, 2012, at A5; Tom Raum, *Student Loan Debt Threatening Economic Recovery*, Huffington Post (Apr., 3, 2012), http://www.huffingtonpost.com/2012/04/03/student–loan–debt–recovery_n_1399136.html. Loans accounted for one–third of the 130 billion paid for undergraduate education in 2006, and student loans from private bank loans to students jumped from almost nothing in the mid–1990s to 17 billion USD. Peter Gosselin, High Wire: The Precarious Financial Lives of American Families 225 (2008).

253 Geoffrey Ingham, The Nature of Money 90 (2004).

domination. During the colonial era, colonial powers often intervened militarily to enforce debt contracts.[254] After decolonization, conditions accompanying international credits were deployed to control public policies of post-colonial formations.[255] The recurrent international debt crises of the last three decades were used to enforce neoliberal restructuring of economies of debtor states.[256] Debt levels of corporations unavoidably tend to discipline the employment relationship as firms with higher debt reduce their payroll, use more part time employees, pay lower wages, and have anemic pension plans.[257] The disciplinary impact of debt in all these instances issued from direct coercion and/or express provisions of debt contracts. What is distinctive about the neoliberal era is the self-discipline of debtors procreated by governmentalities that are unencumbered by direct coercion or express undertakings.

In the perennial search for effective modes to contain and control the dispossessed, debt surfaced on the agenda of American ruling classes at least as early as the early 1900s. In particular, home mortgage was advocated as an effective tool of social control, indeed, a "prophylactic against mob mind."[258] As organized labor took roots, captains of industry recommended that workers should be induced to "invest their savings in their homes and own them. Then they won't leave and they won't strike. It ties them down so they have a stake in *our* prosperity."[259] While a beginning was made along this agenda during the Keynesian era, neoliberal financialization dramatically expanded the scope and reach of credit in general and mortgage-driven home-ownership in particular. Neoliberalism opened up new frontiers for the disciplinary operations of debt: self-discipline by indebted masses engulfed by the financialized economy and refashioned governmentalities.

Neoliberal economic policies and an attending discourse of personal responsibility furnished the grounds for the symbiosis of debt and discipline. Neoliberal rationality aims at congruence between a responsible and moral individual and an economic-rational actor: a prudent subject whose moral quality rests on rational assessment of economic costs and benefits of their actions. The prescription of subjectivity to obtain interiorization of the market's goal in the context of precarization of labor is accomplished

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254 NIALL FERGUSON, THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD 98–100 (2009).

255 For details, see CHERYL PAYER, DEBT TRAP: THE IMF AND THE THIRD WORLD, ix–xiii (1974).

256 For details, see Tayyab Mahmud, *Is it Greek or Déjà Vu All Over Again: Neoliberalism and Winners and Losers of International Debt Crises*, 42 LOY. U. CHI. L.J. 629, 661–68 (2011).

257 Gordon Hanka, *Debt and the Terms of Employment*, 48 J. FIN. ECON. 245, 247–49 (1998).

258 EDWARD ALSWORTH ROSS, SOCIAL PSYCHOLOGY 89 (1908).

259 CHARLES HARRIS WHITAKER, THE JOKE ABOUT HOUSING 9 (1920) (emphasis added) (quoting a business manager).

through generalization of debt. The result is an assemblage that "accepts" itself as a *homo economicus*,[260] "a dependent subjectivity, a subjectivity conforming to capital, and in which the rationality of *homo economicus*, of *human capital*, replaces the idea of social rights and common goods."[261] This ensures self–discipline whereby time and life both within and outside the bounds of any specific site of production remain subjected to value production.

Neoliberalism fashioned "workfare regimes" intended to "throw a long shadow, shaping the norms, values, and behavior of the wider population, and *maintaining a form of order*."[262] Evocatively styled, the *Personal Responsibility and Work Opportunity Act* of 1996, ended "welfare as we know it"[263] and instituted "workfare": forced deskilled wage labor as the sole means of support on the pretext of setting the indigent on the road to "independence."[264] Similarly, the *Quality Housing and Work Responsibility Act* of 1998 radically reduced public housing and turned the indigent towards private rental markets.[265] Workfare underscored the imperative of wage labor by issuing "a warning to all Americans who are working more and earning less, if they are working at all. There is a fate worse, and a status lower, than hard and unrewarding work."[266] The new behavior–related rules of workfare aim "to build habits of responsible behavior."[267] "Stripped

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260 FOUCAULT, THE BIRTH OF BIOPOLITICS, *supra* note 39 at 269.

261 Vercellone, *supra* note 235, at 107.

262 JAMIE PECK, WORKFARE STATES 23 (2001). For a detailed study of neoliberal strategies and policies directed at the poor in which race played a critical role, see JOE ROSS ET AL., DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE (2011); Frances Fox Pivin, *The New American Poor Law*, in THE CRISIS AND THE LEFT, *supra* note 217, at 108.

263 R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 1 (2000).

264 *See* Sharon Dietrich et al., *Work Reform: The Other Side of Welfare Reform*, 9 STAN. L. & POL'Y. REV. 57 (1998). Women were disproportionately impacted by the changes in the welfare systems. For details, see SHARON HAYS, FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM 7–8 (2004).

265 Other legislations that invoked "responsibility" include Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104–208, 110 Stat. 3009–546 (1996) and Student Aid and Fiscal Responsibility Act of 2009, H. R. 3221, 111th Cong. (2009).

266 FRANCES FOX PIVEN AND RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 396 (1993).

267 Douglas J. Besharov & Karen N. Gardiner, *Paternalism and Welfare Reform*, 122 PUB. INTEREST, Winter 1996, at 70, 84 (1996). Conservative scholars continue to cite morals rather than the economy as the cause of socio–economic decline and rising inequality. *See, e.g.*, CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA 1960–2010 (2012). Conversely, perceptive scholars had noted a generation ago that social disruptions among the urban poor, was due to drastic shrinkage of blue–collar jobs in urban areas. *See, e.g.*, WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE NEW WORLD OF THE URBAN POOR (1996).

down to its labor–regulatory essence," workfare seeks "to make 'docile bodies' for the new economy: flexible, self–reliant, and self–disciplining."[268]

Under neoliberalism, responsibilization emerged as the dominant register of subject–formation. Responsibilization turns on the ubiquitous neoliberal construct of "human capital."[269] Through the lens of human capital, wage is not the selling of labor power but an income from a special type of capital. This capital is integral to the person who possesses it and consists of both physical predispositions and the skills acquired as a result of "investments" in education, training, and physical capacity.[270] This focus on predispositions and acquired capacities raises troubling questions of race, genetics, family, and class.[271] In the "human capital" discourse, a human being is deemed a "machine–stream ensemble," a "capital–ability," indeed "a machine that produces." [272] This actively responsible agent is a subject of the market and is obliged to enhance her quality of life through her own decisions. In this schema, everyone is an expert on herself, responsible for managing her own human capital to maximal effect. A politics of the self emerges wherein we are all induced to "work on ourselves" outside the purview of the social.[273] This biopolitical governmentality produces a subject to represent herself as enough for herself, complete and self–

268 PECK, WORKFARE STATES, *supra* note 262, at 6.

269 The canonical texts of the human capital paradigm are GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION (2d ed. 1975); GARY BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 169–250 (1976); ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN, AND HUMAN CAPITAL (Theodore W. Schultz, ed., 1974); Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9 (1962); John G. Haaga, *The Biology of Behavior and the Study of Human Fertility: A Review Essay*, 29 POPULATION AND DEV. REV. 505 (2003); Arleen Leibowitz, *Home Investments in Children* 82 J. POL. ECON. 111 (1974); Theodore W. Schultz, *Capital Formation by Education*, 68 J. POL. ECON. 571 (1960); Theodore W. Schultz, *Investment in Human Capital*, 51 AM. ECON. REV. 1 (1961). During the neoliberal era, the bible of the human capital theme was a book sponsored by the consulting firm Arthur Anderson. BRIAN FRIEDMAN ET AL., DELIVERING ON THE PROMISE: HOW TO ATTRACT, MANAGE, AND RETAIN HUMAN CAPITAL (1998).

270 For a detailed exposition of the argument that central to contemporary strategies for governing is to produce subjects that are required to conduct themselves responsibly and to be free at maximize one's life as a kind of enterprise, see NIKOLAS ROSE, GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF (1989). This broad strategy is tied to neoliberalism, which

> [c]reated another rationality for government in the name of freedom, and invented or utilized a range of techniques that would enable the state to divest itself of many of its obligations, devolving those to quasi–autonomous entities that would be governed at a distance by means of budgets, audits, standards, benchmarks, and other technologies that were both autonomizing and responsibilizing.

Nikolas Rose et al., *Governmentality*, 2 ANN. REV. L. SOC. SCI. 83, 91 (2006).

271 FOUCAULT, THE BIRTH OF BIOPOLITICS, *supra* note 39, at 227–30.

272 *Id.* at 224–25.

273 *See* Mitchell Dean, *Governing the Unemployed Self in an Active Society*, 24 ECON. & SOC'Y 559 (1995).

sufficient: a "narcissistic separation of *living labor* from the public sphere . . . [where] labor *becomes individual business* and/or *human capital*."[274]

As welfare safety nets are removed, workers are induced to think of themselves as free-standing businesses that shield themselves, much as corporations do, by measuring and apportioning risks and by diversifying operations and investments.[275] Indeed, cheerleaders of neoliberal globalization are rather explicit: "We're all entrepreneurs now, or should be."[276] Risk, which was deemed harmful and needed careful calculation and management by actuarial experts,[277] is now represented as an opportunity to be negotiated, cultivated, and exploited by the entrepreneurial financial subject.[278] Ideologues of neoliberalism warn against "diffusing, equalizing, concealing, shuffling, smoothing, evading, relegating, and collectivizing the real risks" and argue "with more of the risks borne by the individual citizens . . . the overall system may be more stable."[279] This assemblage of the risk-taking entrepreneur is facilitated by attendant discourses of rational economic actors, efficient and self-correcting markets, and the ostensibly tamed business cycle.[280] This calls forth a particular subjectivity by demanding that individuals increasingly act as entrepreneurial investor subjects as part of a wider individualization of risk.[281] In this schema, "a personal loan was taking responsibility for life's uncertainties."[282]

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274 Chicchi, *supra* note 243, at 149 (parentheses omitted).

275 For a detailed analysis, see Colin Gordon, *The Soul of the Citizen: Max Weber and Michel Foucault on Rationality and Government*, *in* MAX WEBER, RATIONALITY AND MODERNITY 293 (Scott Lash & Sam Whimster eds., 1987).

276 Thomas L. Friedman, Op-Ed., *The Start-Up Of You*, N.Y. TIMES, July 13, 2011, at A27. Friedman added:

> The old paradigm of climb up a stable career ladder is dead and gone. . . . No career is a sure thing anymore. The uncertain, rapidly changing conditions in which entrepreneurs start companies is what it's now like for all of us fashioning a career. Therefore you should approach career strategy the same way an entrepreneur approaches starting a business.

Id. (internal quotation marks omitted) (quoting Reid Garrett Hoffman, founder of LinkedIn).

277 Liz McFall, *The Disinterested Self: The Idealized Subject of Life Assurance*, 21 CULTURAL STUD. 591, 602–05 (2007); Thomas Wainwright, *Elite Knowledges: Framing Risk and the Geographies of Credit*, 43 ENV'T & PLAN. A 650, 653–61 (2011).

278 Shaun French & James Kneale, *Excessive Financialisation: Insuring Lifestyles, Enlivening Subjects, and Everyday Spaces of Biosocial Excess*, 27 ENV'T & PLAN. D: SOC. & SPACE 1030, 1031, 1037–45 (2009).

279 GEORGE GILDER, WEALTH AND POVERTY 110 (ICS Press 1993) (1981).

280 For the relationship between the efficient market hypothesis and the financial crisis, see GEORGE COOPER, THE ORIGIN OF FINANCIAL CRISES: CENTRAL BANKS, CREDIT BUBBLES AND THE EFFICIENT MARKET FALLACY 25–37 (2008).

281 Paul Langley, *The Making of Investor Subjects in Anglo-American Pensions*, 24 ENV'T & PLAN. D: SOC. & SPACE 919, 923–26 (2006).

282 HYMAN, *supra* note 165, at 75.

With the neoliberal call for individuals to secure their freedom, autonomy and security through financial markets and not the state, practices of investment, calculation and speculation became signs of initiative, self-management, and enterprise. Neoliberal economic theory rests on the notion of the "'rational individual,' a fantastic creature that aims exclusively at private gain, has no altruism and strictly calculates the necessary means to achieve desired ends."[283] Eliding the fact that much of human behavior is irrational,[284] neoliberalism expects individuals to rationally evaluate risk. Indeed, in the neoliberal ensemble, "risk itself is being more positively evaluated,"[285] with the result that "investment appears as the most rational form of saving."[286] In the assemblage of investor/entrepreneur subjectivity, "[w]ithout significant capital, people are being asked to think like capitalists."[287] The consolidation of finance as a way of life introduces "a new set of signals . . . as to how life is to be lived and what it is for."[288] Everyday life is increasingly framed as a space of investment, and the individual is positioned as an investor in a life project to continuously pursue opportunities and negotiate risks in the expectation of rewards. One is engulfed by information about finance in the news media, particularly the ubiquitous stock market ticker-tape on television, that "breathe[s] life into finance, turning it into a living organism."[289] Tying everyday practices to global financial networks—retirement plans, pensions, purchase of goods on credit, repayment of credit bills, credit cards, student loans, and mortgages—induces the self-fashioning of financial subject

283 Costas Lapavitsas, *Mainstream Economics in the Neoliberal Era*, *in* NEOLIBERALISM: A CRITICAL READER 30, 35 (Alfredo Saad-Filho & Deborah Johnston eds., 2005).

284 For studies on irrationality of human behavior, see GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM (2009) (arguing that "animal spirits"-like confidence and fear, corruption and fairness - influence human decisions and drive worldwide financial events); DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE (1996) (arguing that rational choice theory has not offered empirically useful results and demonstrating its inconsistencies in the context of voter turnout and social dilemmas); ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 132 (1st ed. 1977) (arguing that "capitalism was supposed to accomplish exactly what was soon to be denounced as its worst feature"); PETER A. UBEL, FREE MARKET MADNESS: WHY HUMAN NATURE IS AT ODDS WITH ECONOMICS-AND WHY IT MATTERS (2009) (arguing that irrational human behavior undermines the premise of free-choice economics, particularly in the context of decisions involving health and well-being).

285 PAT O'MALLEY, RISK, UNCERTAINTY AND GOVERNMENT 131 (2004).

286 PAUL LANGLEY, THE EVERYDAY LIFE OF GLOBAL FINANCE: SAVING AND BORROWING IN ANGLO-AMERICA 47 (2008).

287 RANDY MARTIN, FINANCIALIZATION OF DAILY LIFE 12 (2002).

288 *Id.* at 17; *see also* Nicholas J. Kiersey, *Everyday Neoliberalism and the Subjectivity of Crisis: Post-Political Control in an Era of Financial Turmoil*, J. OF CRITICAL GLOBALISATION STUD., 2011, at 23, 36-38.

289 Gordon L. Clark et al., *Performing Finance: The Industry, the Media and Its Image*, 11 REV. OF INT'L POL. ECON. 289, 298 (2004).

positions and identities. In this context, finance becomes "a way of working money over, and ultimately, a way of working over oneself."[290] Finance, then, by constituting a primary frame of interpellation of subjectivity, became a primary "technology of the self,"[291] and financialization becomes "a practice of social control. . . . compatible with democratic societies where order is based on the formalized participation of great masses."[292] The "command devices" of this practice exist in "the hybrid zone where the political economy meets social psychology."[293] In the wake of the displacement of the welfare state by neoliberal reordering of the economy, personal well-being and financial security becomes increasingly bound up with the fortunes of the international financial markets through pensions, mortgages, and stocks.[294] The result is inescapability of finance as everyday life becomes increasingly financialized.[295] It leads individuals to believe that their well-being depends more on financial markets than on demands for higher wages and claims on public resources. In this context, to be a leveraged mortgage debtor is to be a responsible and self-disciplined entrepreneur.

The Keynesian productivity–wage and production–mass consumption connections are substituted with a debt–consumption connection driven by the so-called wealth-effect, an evocative instrument of this mode of control and discipline. The wealth-effect is tied to the emergence of "an asset economy," which, in turn, results in a "'patrimonialization' of behaviors."[296] The wealth-effect, "a sort of illusory social insurance for the crumbling of Fordist social security"[297] induced by increases in asset value, particular stocks, and housing, "affects consumption behaviors more than the expected wealth due to an increase in wages."[298] Indeed, debtors often harvested the wealth-effect, further fueling aggregate demand: cash-out volumes for all prime conventional loans amounted to $26 billion in 2000

290 MARTIN, *supra* note 287, at 17; *see also* ALYSSA KATZ, OUR LOT: HOW REAL ESTATE CAME TO OWN US 38 (2009).

291 Michel Foucault, *Technologies of the Self*, *in* TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT 16, 17 (Luther H. Martin et al. eds., 1988).

292 Stefano Lucarelli, *Financialization as Biopower*, *in* CRISIS IN THE GLOBAL ECONOMY: FINANCIAL MARKETS, SOCIAL STRUGGLES, AND NEW POLITICAL SCENARIOS 119, 120 (Andrea Fumagalli & Sandro Mezzadra eds., 2010).

293 *Id.* at 119–20.

294 For detailed expositions, see MARTIN, *supra* note 287, at 17; Shaun French & Andrew Leyshon, *The New, New Financial System? Towards a Conceptualization of Financial Reintermediation*, 11 REV. OF INT'L POL. ECON. 263, 280–84 (2004).

295 *See* ROB AITKEN, PERFORMING CAPITAL: TOWARD A CULTURAL ECONOMY OF POPULAR AND GLOBAL FINANCE 113–39 (2007).

296 Paulré, *supra* note 241, at 193.

297 Chicchi, *supra* note 243, at 147.

298 Lucarelli, *supra* note 292, at 125.

and reached $318 billion in 2006.[299] In effect, the working classes "used asset-growth to substitute for wage-growth."[300]

In this context, for the risk-taking entrepreneurial subject, borrowing and living with debt appear both essential and rational. Living with debt, however, is living in a "credit panopticon,"[301] with disciplining effects both at the inception of debt and through its career. The disciplinary controls of standardization and synchronization exercised through the "credit panopticon" displace trust as a grounds for lending. Critical to note here is that credit scoring did not aim at exclusion of deviants but provided the grounds for inclusion and differentiation in mortgage lending, a development critical for reverse redlining. Credit scoring knowledge produced debtors sorted, targeted and governed through the prism of risk-based pricing.[302] It also produced new forms of responsible and entrepreneurial self-discipline and mortgagors as leveraged investor subjects. In this context, charging higher interest rates to racial minorities became seemingly rational and above political questioning.[303] Finally, the subprime mortgage market partook of the benefits of the neoliberal phenomenon of responsibilization of entrepreneurial self, whereby individuals were induced to provide for

299 DUMÉNIL & LÉVY, *supra* note 66, at 151 (citing FREDDIE MAC, CASH-OUT REFINANCE REPORT (2008)). While predatory lending has received scholarly attention, perceptive scholars have identified "predatory borrowing," where speculative borrowers took advantage of easy credit and a rising property market. *See* cummings, *supra* note 20, at 181–83.

300 HYMAN, *supra* note 165, at 4.

301 DAWN BURTON, CREDIT AND CONSUMER SOCIETY 53 (2008). A panopticon is a type of institutional building designed by philosopher Jeremy Bentham in the late eighteenth century that allows a watchman to observe all inmates of the institution without the inmates being able to tell whether or not they are being watched. Bentham's idea of a panopticon was very influential in the designs of modern prisons. For details, see JEREMY BENTHAM, *Panopticon Letters*, *in* THE PANOPTICON WRITINGS 29 (Miran Božovi[illegible] ed., 1995); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 195–228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

302 For details, see Herbert Kalthoff, *Practices of Calculation: Economic Representations and Risk Management*, THEORY, CULTURE & SOC'Y, Apr. 2005, at 69, 70; Paul Langley, *Consumer Credit, Self-Discipline, and Risk Management*, in MANAGING FINANCIAL RISKS: FROM GLOBAL TO LOCAL 280 (Gordon L. Clark et al. eds., 2009); Andrew Leyshon & Nigel Thrift, *Lists Come Alive: Electronic Systems of Knowledge and the Rise of Credit-Scoring in Retail Banking*, 28 ECON. & SOC'Y 434, 443–450 (1999); Donncha Marron, *'Lending by Numbers': Credit Scoring and the Constitution of Risk Within American Consumer Credit*, 36 ECON. & SOC'Y 103 (2007); Wainwright, *supra* note 277, at 650.

303 For detailed analyses, see STEPHEN ROSS & JOHN YINGER, THE COLOR OF CREDIT: MORTGAGE DISCRIMINATION, RESEARCH METHODOLOGY, AND FAIR-LENDING ENFORCEMENT 223–227 (2002); Elvin K. Wyly et al., *American Home: Predatory Mortgage Capital and Neighbourhood Spaces of Race and Class Exploitation in the United States*, 88 GEOGRAFISKA ANNALER 105, 107 (2006); Elvin K. Wyly et al., *Race, Gender, and Statistical Representation: Predatory Mortgage Lending and the US Community Reinvestment Movement*, 39 ENV'T & PLAN. A 2139, 2140 (2007).

their own freedom and security through opportunities offered by the market.[304]

The marketing of credit is built around the time-and-space-specific constructs of the "normal" consumer held within financial institutions.[305] These normative expectations inform profiles of consumers including embedded understandings of normalcy and deviance.[306] Therefore, in order to qualify for debt, a borrower has to demonstrate subscription to such standards of normalcy. Internalizing such constructions of normalcy, debtors who use credit disproportionately "feel affluent" and think of themselves as "ordinary."[307] Once indebted, debtors become subjected to normalization by debt and are less likely to claim nonconformist views or indulge in nonconformist conduct.[308] It was noted as early as the 1920s that debt-encumbered homeowners are less likely to go on strike.[309] Later, during the neoliberal era, Greenspan echoed that the more debts workers have, the less free they are to strike.[310] Conformity with rules of the new financial and labor markets renders the debtor a responsible subject called forth by neoliberalism.[311] Thus disciplined, the atomized and self-sufficient

304 *See* Paul Langley, *Sub-Prime Mortgage Lending: A Cultural Economy*, 37 ECON. & SOC'Y 469, 486 (2008).

305 Traditionally, class, race and gender underscore construction of credit worthiness, as credit standards are "geared towards affluent, white men." LOUIS HYMAN, *supra* note 165, at 173. For details of how credit rating systems have historically marginalized the poor, women and racial minorities, see *id.* at 173–219.

306 *See* BURTON, *supra* note 180, at 53; *see also* David Knights et al., *The Consumer Rules?: An Examination of the Rhetoric and "Reality" of Marketing in Financial Services*, 28 EUR. J. OF MARKETING 42 (1994); Leyshon & Thrift, *supra* note 302, at 455–61 (1999).

307 HYMAN, *supra* note 165, at 155–56.

308 Stephen E.G. Lea et al., *The Economic Psychology of Consumer Debt*, 14 J. OF ECON. PSYCHOL. 85, 85 (1993).

309 ROSS, *supra* note 188, at 89; *see also* David Harvey, *The Urban Roots of Financial Crises: Reclaiming the City for Anti-Capitalist Struggle*, *in* THE CRISIS AND THE LEFT, *supra* note 217, at 15.

310 AMATO & FANTACCI, *supra* note 140, at 227.

311 Parents and teachers are encouraged to inculcate even in children "the problems that can result from a poor credit rating." HOUSEHOLD FIN. CORP., MONEY MANAGEMENT: CHILDREN'S SPENDING 28 (1968). Empirical studies find that serious debtors are less likely to claim nonconformist views. Lea et al., *supra* note 308, at 85. Household heads who have outstanding credit, and who have higher amounts of such debt, are significantly less likely to report complete psychological wellbeing. The average increase in the psychological distress is greater when outstanding credit is measured at the individual, as opposed to household, level. Sarah Brown et al., *Debt and Distress: Evaluating the Psychological Cost of Credit*, 26 J. OF ECON. PSYCHOL. 642, 645 (2005). Rising tuition has led to increased student indebtedness and a decline in student satisfaction with the education they receive. Hilary Metcalf, *Paying for University: The Impact of Increasing Costs on Student Employment, Debt and Satisfaction*, 191 NAT'L INST. ECON. REV. 106 (2005). Those from lower income groups are more debt averse than those from other social classes, and are far more likely to be deterred from going to university because of their fear of debt. Claire Callender & Jonathan Jackson, *Does the Fear of Debt Deter Students from Higher Education?*, 34 J. OF SOC. POL'Y 509, 520 (2005). Debt affects students' academic decisions during college, and causes graduates to choose substantially higher-salary jobs and

subject of the market becomes incompatible with projects of solidarity, collective rights, and anti-subordination.[312]

VI. JUST IN CASE: HYPER-EXTENDED PENAL APPARATUS

To be on the safe side, the neoliberal order did not leave the project of disciplining the working classes entirely to debt. It complemented the "invisible hand" of the precarious labor market and burdens of debt with the "iron fist" of the penal state.[313] Indeed, mass incarceration and a "plague of prisons" have become a defining feature of the neoliberal age.[314]

Betraying "an eerie similarity" between criminal justice and welfare reform,[315] the neoliberal era is marked by a "culture of control,"[316]

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reduces the probability that students choose low-paid "public interest" jobs. Jesse Rothstein & Cecilia Elena Rouse, *Constrained After College: Student Loans and Early-Career Occupational Choices*, 95 J. OF PUB. ECON. 149, 150 (2011). Financial issues constrain lower income group students' choice of university far more than those from other social classes. Claire Callender & Jonathan Jackson, *Does the Fear of Debt Constrain Choice of University and Subject of Study?*, 33 STUD. IN HIGHER EDUC. 405, 409 (2008). Housing payment problems have independent psychological costs over and above those associated with general financial hardship, and the magnitude of the effect is similar to that shown for marital breakdown and job loss. Mark P. Taylor et al., *The Psychological Costs of Unsustainable Housing Commitments*, 37 PSYCHOL. MED. 1027, 1034 (2007). Note that the connection between debt-driven home-ownership and self-discipline had been argued at least since the early twentieth century. For example, a leading campaigner against liberalization of divorce laws argued that "[t]he industrial world should see that its fundamental needs of industry, efficiency, fidelity to tasks, and loyalty to all demands of the situation require qualifications of mind and character that depend very largely on the home behind the workman . . . ." 3 ARTHUR W. CALHOUN, A SOCIAL HISTORY OF THE AMERICAN FAMILY FROM COLONIAL TIMES TO THE PRESENT 197-98 (1919) (quoting Rev. Samuel Dike).

312 The overarching political impact has been captured well by the following:

> The bases of prosperity shifted from the social democratic formula of working classes supported by government intervention to the neoliberal conservative one of banks, stock exchanges and financial markets. Ordinary people played their part, not as workers seeking to improve their situation through trade unions, legislation protecting employment rights and publically funded social insurance schemes, but as debt-holders, participants in credit markets. The fundamental political shift was more profound than anything that could be produced by alternations between nominally social democratic and neoliberal conservative parties in government as the result of elections. In has imparted a fundamental rightward shift to the whole political spectrum, as the collective and individual interests of everyone are tied to the financial markets, which in their own operations act highly unequally, producing extreme concentrations of wealth.

COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM 116 (2011).

313 Pierre Bourdieu makes a parallel analogy by way of "the left hand" of the state, which protects and expands life chances through Keynesian welfare, and is supplanted by the "right hand," that of coercion. PIERRE BOURDIEU, ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET 1-10 (1998).

314 ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA 38 (2011).

315 JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 137 (1995).

316 *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 196-198 (2001).

"penalisation of poverty,"[317] and an "enlargement and exaltation of the penal sector" of the state.[318] A renewed deployment of the penal apparatus "increase[es] the cost of strategies of exit into the informal economy of the street" and "neutralizes and warehouses" its most disruptive factions or those "rendered wholly superfluous" by the new economy.[319] While between 1950 and 1970 the imprisonment rate declined, it saw an exponential boom after 1975.[320] Between 1975 and 2000, the total incarcerated population increased by 500 percent.[321] In the United States today, over seven million adults are subjected to the correctional system, including 2,266,800 incarcerated and 4,887,900 under criminal justice supervision outside prisons.[322] Racial minorities and the economically marginalized constitute disproportionate parts of this population.[323] Since 1975, "corrections" posted the fastest expansion in public expenditures and has become the third largest employer in the U.S.[324] As public housing has been dismantled in large part as part of welfare reform, prisons have *"effectively [become] the country's main public housing program."*[325] In tune with the neoliberal agenda of turning the state into a market–state, the penal system has been increasingly privatized. For–profit private prisons,

317 Loïc Wacquant, *The Penalisation of Poverty and the Rise of Neo–Liberalism*, 9 EUR. J. OF CRIM. POL'Y & RES. 401, 401 (2001).

318 LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 305 (English Language ed., Duke Univ. Press 2009) (2004). It has been noted that "the poverty of the social state against the backdrop of deregulation elicits and necessitates the grandeur of the penal state." Loïc Wacquant, *Ordering Insecurity: Social Polarization and the Punitive Upsurge*, 11 RADICAL PHIL. REV. 1, 19 (2008).

319 *Id.* at 8. For the political and economic history that frames the enhanced incarceration, see AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION (Mary Louise Frampton et al. eds., 2008); GLENN C. LOURY ET AL., RACE, INCARCERATION, AND AMERICAN VALUES 1–37 (2008); MARC MAUER, RACE TO INCARCERATE (1999); CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS (1999).

320 WACQUANT, PUNISHING THE POOR, *supra* note 318, at 117 fig.1.

321 *Id.* at 115 tbl.6. By 2001, 1,319,000 adults were incarcerated and 1,334,000 were under criminal justice supervision outside prisons. THOMAS P. BONCZAR, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001 1, 1–2 (2003), *available at* http://permanent.access.gpo.gov/lps62432/piuspo1.pdf.

322 LAUREN E. GLAZE, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, at 3 tbl.1, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf.

323 *Id.* at 8, app. tbl.3. For detailed analyses of intersections of race and incarceration, see MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); LOÏC WACQUANT, DEADLY SYMBIOSIS: RACE AND THE RISE OF THE PENAL STATE (2009); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004).

324 WACQUANT, PUNISHING THE POOR, *supra* note 318, at 153.

325 *Id.* at 160. For the inverse relationship between expenditures on public housing and corrections, see *id.* at 160 fig.4.

reinstituted in 1983 after having been outlawed in 1925, saw an exponential growth, yielding handsome profits for the burgeoning industry.[326] In line with replacing taxes with user-fees, federal and state governments increasingly adopted "carceral taxation" to have inmates pay for the cost of their own incarceration.[327] Coercive discipline, of course, begins in the streets. The "militarization" of the American police that started with the "war on drugs" and accelerated with the "war on terror" was on display as the Occupy Movement erupted in late 2011.[328]

For the working classes, the expanded deployment of the penal arm of the state increases the cost of not participating in the increasingly precarious labor markets. The prospect of falling off the treadmill of the financialized debt-driven becomes more frightening than ever. This further substantiates the position that law and the state remain critical enablers of subject-forming governmentalities.

CONCLUSION

This article has combined insights of critical political economy with Michel Foucault's constructs of governmentality, bio-power, and assemblage of self-caring subjects to explore the symbiosis of debt and discipline in the neoliberal era. Laws and public policy were indispensable for choreographing the displacement of Keynesian welfare by the hegemony of finance capital, the hallmark of neoliberalism. Strategic use of monetary policy and radical rearrangement of legal regimes facilitated financialization of the economy, broke the power of organized labor, and expanded debt to sustain aggregate demand. Financial markets extended their reach and expanded liquidity by bringing ever-increasing sections of the working classes within the ambit of the credit economy. Faced with shrinking welfare, wage pressures, and precarious labor markets, working classes had little choice but to fund their basic needs through debt. The subprime mortgage boom testifies to this structural transformation. Neoliberal rationalities procreated constructs of individual responsibility and human capital that facilitated assemblage of subjects who were coaxed to engage the financialized economy as risk-taking entrepreneurs. Engulfment in relationships of debt induced self-discipline and conformity with the logic of the financialized economy and precarious labor markets. Neoliberal

326 For growth of private imprisonment, see *id.* at 170 fig.5; *see also* Alexis M. Durham III, *Origins and Interest in the Privatization of Punishment: The Nineteenth and Twentieth Century American Experience*, 27 CRIMINOLOGY 107 (1989); Charles H. Logan & Sharla P. Rausch, *Punish and Profit: The Emergence of Private Enterprise Prisons*, 2 JUST. Q. 303 (1985).

327 WACQUANT, PUNISHING THE POOR, *supra* note 318, at 172; *see also* Erica Goode, *Inmate Visits Now Carry Added Cost in Arizona*, N.Y. TIMES, Sept. 5, 2011, at A10; Jennifer Medina, *In California, a Plan to Charge Inmates for Their Stay*, N.Y. TIMES, Dec. 12, 2011, at A15.

328 Al Baker, *When the Police Go Military*, N.Y. TIMES, Dec. 4, 2011, at SR6.

financialization of the economy, thus, has transformed capitalism and recruited within its modes of governance the transformation of subjectivity. Neoliberalism emerges as a regime of immanent social control through the market. Public policies drew the frame for conventions and norms of social practice and shaped the horizon within which individuals pursued strategies of economic survival and security. State power created a field of possibility within which market governmentality instilled in the subject an understanding of herself as capital. To live and survive in the debt-fueled financialized economy, this understanding had to be reproduced in practices of daily life. This ensemble sutured debt with discipline.

For three decades, neoliberal financialization combined with globalization contained the crisis of profitability and produced debt-encumbered self-disciplined working classes. In the process, however, it sowed the seeds of a larger crisis. Syphoning of savings from the periphery to sustain demand in the core and securitization of subprime mortgages to generate liquidity had its limits. Pushed beyond the frontiers of sustainability, this empire of debt collapsed. Securitization of debt, designed to spread risk, now spread contagion. The result was the 2008 global financial meltdown and the resulting Great Recession. This trajectory underscores the history of capitalism; it never solves its foundational contradictions and tendencies to crisis, it only transforms them.

The magnitude of the ongoing crisis created by neoliberal financialization is alarming. The global losses of the financial sector exceed 3.4 trillion dollars,[329] and the bill for public rescue of financial institution exceeds 20 trillion dollars.[330] Worldwide, over 50 million jobs were lost,[331] 200 million working people slipped below the poverty line, and high unemployment has become the "new normal."[332] Value of derivatives at 596 trillion dollars dwarfs the entire world output of 48.6 trillion dollars.[333] By 2014, government debt of G20 countries is projected to be 120 percent of GDP.[334] The credit worthiness of the U.S. stands questioned and the

329 INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: NAVIGATING THE FINANCIAL CHALLENGES AHEAD 5 (2009), *available* at http://www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf.

330 UNITED NATIONS, WORLD ECONOMIC SITUATION AND PROSPECTS 2010, xii–xiii (2010), *available at* http://www.un.org/en/development/desa/policy/wesp/wesp_archive/2010wesp.pdf.

331 Nelson D. Schwartz, *Unemployment Surges Around the World, Threatening Stability*, N.Y. TIMES, February 15, 2009, at A1.

332 Jomo Kwame Sundaram & Felice Noelle Rodriguez, *Structural Causes and Consequences of the 2008–2009 Financial Crisis*, in AFTERMATH: A NEW GLOBAL ECONOMIC ORDER? 97, 109–110 (Craig Calhoun and Georgi Derluguian eds., 2011) (reporting ILO estimates).

333 FERGUSON, *supra* note 6, at 5, 229.

334 Manuel Castells, *The Crisis of Global Capitalism: Towards a New Economic Culture?*, *in* BUSINESS AS USUAL: THE ROOTS OF THE GLOBAL FINANCIAL MELTDOWN 185, 199 (Craig Calhoun & Georgi Derluguian eds., (2011).

status of the dollar as the dominant global currency is in jeopardy. The policy responses to the crisis thus far are consistent with the track record of the last three decades: using crises to reinforce the priority of financial institutions and bondholders over the well-being of working classes.[335] The myriad policy responses have stubbornly refused to ease the debt burdens of consumers and sovereigns, lest the disciplinary role of debt falter. There have been five typical policy responses to the crisis thus far: (1) massive injections of liquidity into the financial system and bailouts of major financial institutions; (2) imposition of fiscal discipline through austerity measures, turning governments into collection agencies for the bond markets; (3) accelerated hollowing out of welfare systems and further pressure on wages; (4) activation of racist xenophobia to recalibrate the boundaries of legitimate membership in society; and (5) acceleration of militarization and use of direct violence both locally and globally.

The crisis and the policy responses have triggered resistance from below. From the Arab Spring to Greek general strikes and from the Occupy Wall Street Movement in the U.S. to mass demonstrations in London, new spaces and modes of resistance are being forged. However, finding a way to respond to the disciplinary function of debt is yet to achieve priority on the agendas of these movements. It is imperative that theory and praxis aimed at emancipatory transformation and global justice take account of the nature and magnitude of the contemporary crisis and the implications of policy responses on the offer. In particular, we must focus on how to deal with the new and refurbished disciplinary regimes that are reinforcing the discipline of debt through national policies to transfer all costs of the crisis to the working classes and the marginalized. Popular democratization of finance through management of finance as a public utility must be high on the agenda of popular movements. An urgent challenge is to explore agendas, coalitions, and organizational forms of resistive social movements suitable to pursue popular democratization of finance. Also needed are designs of political and economic governance conducive to organizing banking and finance as public utilities. The current crisis has opened up the possibility of alternative social orders and modes of life. What shape the future will take depends in no small measure on how contending social forces will confront the perennial question of finance and the relationship between debt and discipline.

335 For details, see PAUL KRUGMAN, END THIS DEPRESSION NOW! (2012).