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## Hypothecation: debt bondage for the neoliberal age

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Wood table,  
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# Hypothecation

*debt bondage for the neoliberal age*

## Micol Seigel

IF I TOLD you this was a ghost story, would you want to read it? If I said it was a serious academic treatment of prisons and profits, aimed to moderate the specter of privatization, would you drop it cold or grip it tighter? What if I have simply written you a letter—a wistful rumination on loss and the perception of loss, on truth and rumor, and the deep truth that resides within rumor?

I mourn the loss of my former student, Trey, the person who led me to this topic and proposed that we explore this particular truth. Trey enrolled in a class I taught at the Putnamville medium-security correctional facility in Greencastle, Indiana, and then became a part of the ongoing discussion group we called a “Think Tank,” which he engaged with his acrid insight. Meanwhile, he argued his own legal appeal *pro se*, and won, and after nine out of a twenty-year bid, moved himself beyond the walls. When Trey got out, we chatted via email and met, once, for lunch at an outdoor café table on an artsy Indy thoroughfare, then strolled the avenue and browsed a bookstore where the middle-aged white ladies behind the counter trembled at his presence.

After some exchange of emails and one or two phone calls, Trey went silent. October of last year, he sent the last text I’ve received from him:

Hello, Micol. I will set up my voicemail later, in the meantime I want to let you know that I am doing okay. That about sums it up at this point (ok). I will try giving u a call later on 2day. Till later, Trey.

Three times, “later” has turned out to mean not yet, though thankfully the Indiana Department of Corrections website still lists Trey as “Discharge.” Still, I fear they have him back in their clutches, as they manage to do with more than a third of those they tauntingly pretend to release.

If I say that I mourn Trey's loss, I don't mean the loss of him to me—as I never had him—but rather the losses *he* suffered during nine years inside, and the losses he continues to suffer, as we know, as he flees the furies at his heels. What he could have done with that time *minus* the cramped constrictions of those years *equals* loss. This is one deep truth of the story of value as Trey calculates.

**Trey discovered a scandalous phenomenon: “When a bond hasn’t been redeemed it is never closed out,” Trey wrote.**

Trey argued his own appeal. He exposed the ineffective assistance of the assigned defense attorney who pled him dry just as the Supreme Court weighed in on the side of due process in plea bargains. Trey had a little good luck in that timing, and lots—stunning quantities—of determination, intelligence, and gumption. Trey taught himself court procedure in the prison's tiny law library, and he won. Here is clearly an intellect of high order.

In the course of his legal research, Trey discovered a scandalous phenomenon, which he told me about, first in person at the prison, and then in a long email that sparked the writing of this paper. Bail bonds, Trey contended, are sold—*after* the person in question goes to prison. “When a bond hasn’t been redeemed it is never closed out,” Trey wrote. Corporations, aided by the courts, “lead an inmate into dishonor or default judgment by putting him/her in prison then they sell the bond (default judgment) to the US District Courts.” State courts sell the bonds to district courts, where contractors buy and then convert them to mortgage-backed securities, said Trey, and send them into motion on the market. “The whole process,” he explained, “is based on hypothecation.”

Whoa. The bail bonds of people who go to prison are not cancelled, as I, and probably you, assumed. Even though the body of the person such a bond was meant to secure *is* secured, and ruinously so, the debt based on his person survives to circulate. The bond enjoys a liquid mobility, while the body—its basis—rails in cages, wilts, and rages. Like so much of neoliberal financial practice, capital travels while laborers face higher walls and closer bars.

Could this possibly *be*? Are the wizards of finance so ingenious as to have devised a way to revive bail bonds cancelled by the people who originally contracted for them? What is this mysterious process of *hypothecation*?

• • •

In the world of financial operation, hypothecation is a well-known principle; it simply means the use of property as security for a loan. The word comes from the Greek, *hypothēke*, “a deposit, pledge, mortgage,” from *hypo* “down” + *tithenai* “to put, place.” It is related to *hypothesis*, still Greek, the “base, basis of an argument, supposition,” literally “a placing under,” from *hypo* “under” + *thesis* “a placing, proposition.” As the dictionary assures, a “term in logic.”

Indeed, hypothecation, the use of property as security for a loan, is the basis for a bail bond, as it is for any loan secured by property, which is to say, any loan these days. Gone is the day when the “surety,” a person, the guarantor for an accused man, promised to put himself in the “principal’s” place, to be punished should the fearful soul abscond. Nor do banks these days tend to lend money on the strength of a borrower’s word. Honor is cheap, in the world aflame with finance-insurance-real estate.

In Trey’s version, hypothecation is the basis of an argument indeed. A stunning proposition. A term illogic. Frankly, it sounds loony. This was the opinion of a pair of law professors with whom I consulted. “We both think the writer is crazy,” wrote my esteemed colleague, a lefty lawyer of impeccable convictions.

While there are individual sentences which seem lucid, the article makes no sense. He seems to have taken a string of ideas which are unrelated and tried to connect them . . . and the info about bail bonds makes no sense at all. Once someone is convicted or acquitted, the bond is satisfied . . . [T]here is nothing to sell. The writer doesn’t seem to be a fringe-on-the-flag type . . . but this writing doesn’t seem to be grounded in reality.

This, Trey well understood. “Seems like some type of conspiracy theory,” he warned, “but you can see it for yourself if you get on a search engine and type *US Courts*. It may take some time so plan accordingly. After you get to *US Courts* and you find *Circuits 1–11*, click on *Circuit 7*,” and on he guided me, through the dot-gov maze to a series of forms for payment bonds and bid bonds for penal sums. There it is, the court’s financial involvement, Trey marveled: “this is all spelled out, they are not trying to hide it!”

And yet, what is offered there for all to see is not exactly evidence that courts sell prisoners’ bonds by treating a guilty plea as a default

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judgment. Guilty verdicts, even pled, are not the same thing as default judgments, which are civil judgments, and in most cases reflect a no-show by the defendant. Default judgments don't seem to be financial products either. And state courts do not seem to sell criminal judgments to district courts, later to be converted, via several more rounds of exchange, to mortgage-backed securities. The forms Trey uncovered are for escrow, or the standard insurance and reinsurance processes of the construction business, or any of the myriad of other cases in which funds are disputed or promised. The names of these industry standards—"bid bonds," "penal sums," etc.—are false cognates, not the "bid" of a prison sentence, not the "penal" of the penal system. *Bonds* and *security/ies* are concepts that underpin both globalized high finance and the dungeoned mire of hyperincarceration, pointing to terrifying shared shadow territories just beneath the skin of both beasts. But this is truth beyond any literal meaning. The deep truth of rumor.

• • •

"Seems like some type of conspiracy theory," Trey warned. Alas, some of the contentions in Trey's email are precisely "some type of conspiracy

theory”; I can tell you *what* type. Searching for the kernels of his truth, I hit upon a source of Trey’s notions. The default judgment concept, the chain of forms, and other fragments of Trey’s treatise were not original, but the postulates of an internet finance-law guru-kook named Gene Keating, a potbellied, balding white guy in a dingy t-shirt who can be seen expounding upon commerce and CUSIP in a series of lectures scattered across YouTube, the surface of the visible web, and New Age blogs offering grid-eva-sion tactical advice. If you liked, you, too, could easily read and hear this Beautiful Mind performing his track-switch hype, browbeating audiences of mildly-interested retirees who have each paid twenty-five dollars for the privilege. Large chunks of Trey’s email to me are wholesale cut-and-pasted pieces of Keating’s quintessential fringe-on-the-flag ravings regarding mercantile law, commercial paper, and the evidence hidden in plain sight.

**Bail bonds generate profit at great cost to the prisoner. Bail is stupidly extortionate.**

And yet, Trey is still the brilliant lawyer who beat the odds and argued his case to fruition. And Trey’s argument is still true, in a range of ways.

Trey is right about courts profiting from the people they run through their mills. Court fees, applied to things that used to come out of the general coffer, have both proliferated and risen in the past twenty years, with another sharp uptick after the financial crisis of 2008. Filing fees, copy fees, videoconference fees, fees for returned checks, arrest processing fees, fees for management of registry funds. Fees for probation, house arrest, drug court, piss tests. Even where politicians are pushing moratoria on government fee increases, it is only for civil fees—no pol dares to suggest lowering fees on the criminal side. So the hyperpoliced, disproportionately black and brown—already the most financially vulnerable among us—are brutally, regressively taxed.

Trey is right, again, that bail bonds generate profit at great cost to the prisoner. Bail is stupidly extortionate. It costs someone ten percent of the bond the court sets. More, if a bail bondsman is needed (for phone calls and copies and other incidental costs). Still more, if a credit card is used (another nine percent in Cook County, Chicago’s seat). This is a cruel taunt, whether the person ultimately pays for the privilege of going to prison, or for the joy of a drawn-out process of exoneration. (I came across a wonderful suggestion in researching the evil that is bail: in the case of a person found innocent, charge the ten percent of the bail security to the arresting officer’s police department. Wouldn’t *that* immediately alter the racist police performance of power!)

Many courts now accept bail funds directly, rather than work with bail bonding companies. This change, made possible by bail reform in

the 1960s, reflects a desire to limit the predations of bonding companies. But it is also undeniably profitable. Courts do well by doing good, pocketing the commission and collecting the full amount in cases of absconding or default. Cook County earns six to seven million dollars a year from the ten percent bail bond fee. In New Orleans, bail bond

**The principle that dominates pretrial release is not appearance at trial, but “danger protection,” keeping the public safe from the accused, whose innocence is functionally no longer presumed.**

revenues are split between the District Attorney’s office and the court—the bodies that decide on charges and subsequent bond amounts.

The history of bail reform in the United States since the mid-century echoes that of prison reform more broadly. Progressive and even genuinely radical measures proposed and begun in the 1960s were strangled by counteractive retrenchment in the 1970s, then cemented in the 1980s as the crack epidemic inflamed prison growth trends. The famous Manhattan Bail Project of the Vera Institute, launched in 1961, proposed and tested measures designed neither to punish nor to fund the system, but to ensure a person’s appearance at trial. Vera promoted the practice of releasing defendants on their own recognizance (“OR”), which had a fail rate of under seven-tenths of one percent. Today, the principle that dominates pretrial release is not appearance at trial, but “danger protection,” keeping the public safe from the accused, whose innocence is functionally no longer presumed. Given the importance of pretrial release to trial outcomes, Trey is right to suspect that the bail system does not work in his favor.

Lots of people understand that prisons create value at predatory expense to the people they cage. Yet when we think about profiting from prison, we often assume it has to do with either prison labor or private prisons. In truth, private prisons remain but a fraction of the whole (eight percent of the total number of prisons in the United States, at the Justice Policy Institute’s last count). Likewise, profit from prison labor is grossly overwhelmed by the value produced in every shady corner of what some like to call the prison-industrial complex—a term that, for all its errors of totalizing generalization, names a rock-bottom truth about the inextricable business-government matrix that profits from this heritage of African chattel slavery. As Ian Baucom so compellingly observes in his *Specters of the Atlantic*, the theory of value that made slavery possible rested on a logic opposite to that of commodity capital—not the labor, but the credit; not the object produced, but the deferred justification of that production. Imaginary values. Truths unmoored from any bedrock, nonetheless true. Nonetheless of value.





The wide world of prison profiteering is both more mundane and more colossal than our fears of privatization admit. It encompasses the contracts with construction firms, food service contractors, laundry services, private telephone companies, transport services, medical personnel; the profits of hotels and other service sector businesses in prison towns; the political gains from prison guard unions, a dynamite lobby, or voting blocs of constituents for tough-on-crime-talking legislators; the boon to rural counties whose census count includes prisoners, who reap zero benefit from the resource allocation based on their bodies; the massive world of technology development focused on instruments of punishment, from tasers to restraining chairs to ankle bracelet GPS tracking devices; and the vast network of services, both public and private, that are animated by the engorged criminal justice system, including lawyers, the minor armies of law-office employees, court personnel, probation officers, drug court administrators, addiction treatment program staff, social workers, child protective workers,

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Wood table, metal umbrella frame, assorted banknotes, clothespins, cotton stocks. ©2014 Meshac Gaba. Courtesy of the artist and Tanya Bonakdar Gallery, New York.

schoolyard cops, juvenile facility personnel, professors of criminal justice, instructors in training programs for all the occupations listed here, therapists, behavior management counselors, non-profit defense and mitigation agents, sheriffs, jailors, prison guards, private security officers, prison architects, bail bondsmen, and, of course, police, police, and ever more police.

Plus, under finance capitalism, the pinstripe hustles of molten capital. For Trey is also right about the collaboration between the federal government and the states to profit from court proceedings. In a 1980s court-finance innovation, a Texas District Court administrator developed a system to allow court clerks to deposit fees in a centralized federal Treasury account, rather than placing funds in individual, private bank accounts. This Court Registry Investment System, CRIS, now thriving and amply-subscribed, is a tidy way for courts to insulate themselves (and the parties to the trial) from bank failure and prop up the federal government in the process, for the funds are invested in Treasury bonds. Interest-bearing, of course.

This is slightly mind-boggling, when you consider that an agent of the federal government (a court) is buying federal government bonds. It isn't just putting money in a federal account: buying T-bonds is buying federal debt. The government is financing itself by loaning itself prisoners' money.

If that weren't close enough to hypothecation to prove Trey right in spirit and letter, consider another iteration, a seriously unsavory high-finance shell game called *re-hypothecation*. Re-hypothecation is the use of client collateral to back a broker's trades or borrowing. So a bank or broker takes clients' collateral—property pledged in case the borrower defaults in paying back a loan—and uses that pledged property to back entirely separate deals, in which the original borrower is not involved. To concretize, say I take out a loan at my local (not!) bank, using my house as collateral. I make my payments regularly, and thus might be forgiven for thinking my humble abode is not in jeopardy. But the bank turns around and says, *Hey, Bank #2, lend us some money. We have this really nice house in Bloomington, Indiana that we don't exactly own, but . . . close enough.* I have no idea this is going on until one of these banks somewhere along the food chain fails, and creditors come looking for the solvent object underlying the sequence of loans.

Yes, that ought to be illegal. But it's not. There are regulations in the U.S. now, limits to how much a broker can re-hypothecate: 140% of the original liability. So, in our theoretical case involving my house, that's 140% of what I borrowed, according to the International Capital Market Association. It's better than the 400% that was the market's burden leading up to 2008, but somehow, it still doesn't make me feel secure.



And well it shouldn't. Re-hypothecation was at the heart of some of the largest bank failures of 2008. By 2007, writes Christopher Elias, a Thomson Reuters business law correspondent,

re-hypothecation had grown so large that it accounted for half of the activity of the shadow banking system. Prior to Lehman Brothers collapse, the International Monetary Fund (IMF) calculated that U.S. banks were receiving \$4 trillion worth of funding by re-hypothecation, much of which was sourced from the UK. With assets being re-hypothecated many times over (known as “churn”), the original collateral being used may have been as little as \$1 trillion—a quarter of the financial footprint created through re-hypothecation.

Re-hypothecation caused the failure of MF Global, the major financial derivatives broker whose spectacular collapse had “wide ranging consequences for the American economy,” including—according to a 2011 Commodity Customer Coalition White Paper by John Roe and James Koutoulas—a “significant impact on the day-to-day operations of

**Exchange Market.**

Installation view, Tanya Bonakdar Gallery, New York, April 26–June 7, 2014. ©2014 Meshac Gaba. Courtesy of the artist and Tanya Bonakdar Gallery, New York.

farmers, mining operators, ranchers, and other commodity consumers and producers, as well as the portfolios of pension funds and retirees alike.”

Re-hypothecation shares much with the selling of prisoners’ bonds, post-conviction. It’s just as confusing and at least as shady. It relies on assets a broker does not own and should not be able to claim. It creates wealth by subjecting investors, without their consent, to unpredictable liability. Interestingly, prior to 2008, much of the re-hypothecated funds involved the sovereign debt of Spain, Italy, Greece, Ireland, and Portugal, nations that could scarce afford to satisfy any angry creditors who might come calling. Like hypothecation—and like CRIS, since buying T-Bonds is buying U.S. sovereign debt—re-hypothecation mixes public and private debt in ways that reveal the porousness of the state-idea. Against the great discursive labors expended to demonstrate the autonomy of state and market, these practices reveal their constant overlaps and spillovers. Ultimately, they reinforce the suggestions of political theorists, such as Timothy Mitchell or Philip Abrams, regarding the non-autonomy of the very concept of the state.

So, regardless of whether courts cancel or sell prisoners’ bonds, hypothecation names terrible truths. Truth lies, after all, in the deep waters of rumor and conspiracy theory, which distill into narrative the feeling—the structure of feeling, Raymond Williams would say—the structure of feeling fucked that we, the ninety-nine percent, know so well, whether (to adapt the infamous Rumsfeldism) we know knowingly or unknowingly know. As Slavoj Žižek commented in 2004 in *In These Times* about then-Secretary of Defense Donald Rumsfeld’s hypothesication [*sic*], “the main dangers lie in the ‘unknown knowns’—the disavowed beliefs, suppositions and obscene practices we pretend not to know about, even though they form the background of our public values.” Žižek was talking about Iraq, but disavowal of obscenity functions equally powerfully to subvert prison policy and policing practice. In the face of this elite disavowal, of Rumsfeld and Wall Street’s unknown knowns, what more appropriate response than the known unknowns of rumor, polysyllabic hype, and conspiracy theory? As the body of academic work on rumor and urban legend explores, such tales are narrative versions of the lived experience of their crafters. Their form reveals the very texture of such lives. Conspiracy theories are ur-expressions of feelings of powerlessness, widely justified in our world—all the more deeply so for those most targeted by hyperincarceration: the dark-skinned youths in ever more shades of brown, the immigrants, the radicals—in sum, the black. If powerlessness is the dominant structure of feeling for a marginalized majority today, then conspiracy theory is no more than common sense, in the Gramscian understanding of common sense as the distilled philosophy of the masses.

Hypothecation offers an occasion for a meditation on value, on value as metaphor, on metaphors of value. It leads us to meditate on trust, and rumor, on the status of a given knowledge as trustworthy and the status of rumor as knowledge. Rumor, from the Latin *rumorem*, meaning “noise, clamor, common talk.” Rumor points to the formal separation of “expert” from “common” knowledge that discredits the truths understood at the bottom. *Discredits*: one encounters, again and again, the financial metaphors that structure our notions of value. Metaphor has become truth, and truth, metaphor. So now, if everything is reducible to exchange value—that is, to a symbol of something else, and never the thing itself—then what are we left to have and to hold, at the end of the day?

“All that is solid melts into air,” Marx both worried and hoped. He was talking about the tendency of capital to resolve all bodies that matter, to dissolve them into the ultimate metaphor—money—leaving people to see, perchance to wake. “All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses his real conditions of life, and his relations with his kind.” In other words, “Bourgeoisie, watch out!”

Hypothecation, as Trey posits, creates a golem, a zombie—an object that ought to be laid to rest but continues to skulk-creep and scavenge.

This, too, is a vision Trey shares with Marx, himself no stranger to the undead. Capital, Marx pointed out, is basically “dead labour, that, vampire-like, only lives by sucking living labour, and lives the more, the more labour it sucks.” What more sated vampire could we find than the one who had gorged on the all-consuming labor of *being* imprisoned, of spending—*spending*—every hour devoted to the task of enduring.

**Truth lies, after all, in the deep waters of rumor and conspiracy theory.**

Marx also understood haunting, as in the séance he hoped to mediate with a certain specter stalking Europe, reprised in Derrida’s hope that, with the fall of the Berlin Wall, our world could be genuinely haunted by Marx. These specters of the Atlantic bequeath a “hauntological consciousness” (Baucom, again, and a bow to Avery Gordon and Toni Morrison), forcing our pens to produce ghost stories even when we’re writing oh-so-serious nonfiction. These specters allow us to wonder, *who is the most petrifying monster?* What, really, need we fear? Not the wronged African, that most psychically taxing of our social dead, transmuted into thug-villain in a classic Freudian case of guilt redirected into righteous outrage. Far more troubling are the wardens of our perfectly modern dungeons that devour people we love, extruding reinforced racial boundaries, hard-carved lines circumscribing these who may live and those who must die. 🌐