Title
The Carceral State at Work: Exclusion, Coercion, and Subordination, in Criminality at Work

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The Carceral State at Work

Exclusion, Coercion, and Subordinated Inclusion

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A. Introduction

Work has two faces. It is a boon, even a necessity, providing access to the stuff of life: bread, dignity, purpose, belonging. It is a burden, even a curse: exploiting, humiliating, disrupting, subordinating. In part this reflects the duality of exchange, in which employers and workers both give and receive. But it also reflects a tendency to mystify 'work' in the abstract without due regard to the varied particular ways that work may be institutionalized.

Through this duality's lens, this chapter explores how the United States' current, sprawling 'carceral state'[1] is shaping the conditions and meanings of work—how it is operating as a heterodox form of labour law. When addressing such interactions between work and racialized mass incarceration, most contemporary scholarship, advocacy, and policy treat work as uplifting and then tell a story of harmful *exclusion*. The carceral state blocks access to work, especially when a criminal record is disqualifying from employment. It also manages and legitimizes economic displacement by criminalizing poverty.

The debilitating side of work has, until recently, largely been confined to the exceptional space of prison labour. But an emerging line of scholarship has begun examining the criminal legal system's coercion and exploitation of labour *outside* the prison, an ongoing 'repressive' or 'disciplinary' aspect of labour regulation that has survived its supposed demise with the decline of master–servant law.[2] Here, the focus turns to work performed under threat of *future* incarceration.

If one considers 'work' in the abstract, then these two modes appear contradictory: the carceral state simultaneously excludes people from and coerces them into work.[3] Such cross-cutting pressures would tend to offset in aggregate and, for individuals subject to both, put them in a 'double bind'.[4] But a different picture emerges from highlighting the *types of work* to which these forces apply.

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[1] Katherine Beckett and Naomi Murakawa, 'Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment' (2012) 16 Theoretical Criminology 221; Kelly Lytle Hernández and others, 'Introduction: Constructing the Carceral State' (2015) 102 Journal of American History 18

[2] cf Ana Aliverti; Alan Bogg, Keith Ewing, and Andrew Moretta,; Eric Tucker and Judy Fudge, this volume.

[3] Although coercive in opposing directions, exclusion and coercion together can be contrasted with the more familiar protective aspects of contemporary labour law: Eric Tucker and Judy Fudge, this volume.

[4] Dallas Augustine, 'Working Around the Law: Navigating Legal Barriers to Good Work During Reentry' (2019) 44 Law & Social Inquiry 726.

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Put schematically, exclusion from 'good' jobs complements rather than contradicts coercion into 'bad' jobs. The combined result is neither simple exclusion nor the equally facile 'inclusion' touted by active labour market policies.[5] What emerges is a form of *subordinated inclusion* or, as the sociologists might put it, stratification.[6] At the extreme, this manifests in distinct tiers of substandard work reserved for people subjected to criminal legal control and authorized by that subjection.

B. Subordinated Inclusion: Frameworks and Foils

This section analyses how subordinated inclusion of labour can arise at the intersection of systematic exclusion and state coercion. The thriving yet marginalized tier of unauthorized immigrant labour provides the most familiar contemporary example. Such work is precarious in terms of labour standards and job security but also in physical security from the state violence of detention and deportation. Exclusion and coercion map onto the typology of 'opportunity hoarding' and 'exploitation', the two simple, complementary mechanisms with which sociologist Douglass Massey has analysed social stratification in the United States.[7]

Opportunity hoarding is essentially exclusion phrased positively: excluding one group from a resource provides others with unfettered access. When the carceral state 'marks'[8] people as unfit for certain jobs, it reserves those jobs for others deemed deserving on account of their ascribed law-abidingness. This tracks familiar forms of employment discrimination, where some jobs are reserved for white people and thus denied to Black people. Accordingly, the US carceral state has been described as a 'New Jim Crow'.[9] Criminal legal contact operates as a fundamental form of social categorization *and* one so thoroughly structured by racial inequality that it re-establishes Black subordination notwithstanding nominal commitments to colour-blind social policy.

Exploitation complements opportunity hoarding. It extracts resources from a subordinated group and allocates them to a superordinate one. With regard to already extant resources, description as hoarding versus exploitation can turn on a baseline question. A resource initially allocated to A (or unallocated) is hoarded by A if B is blocked from acquiring it. If a resource is initially allocated to B and then appropriated by A, that dispossession can be characterized as exploitation. But the terminology of exploitation, versus the perhaps more general concept of expropriation, is peculiarly appropriate to the *production* of resources through labour and their subsequent appropriation or hoarding.[10]

Labour exploitation in the first instance denotes a relationship between worker and employer; in contrast, hoarding jobs through discrimination identifies a relationship among workers. That distinction may fade with further scrutiny. Employers may share some fruits

[5] Joel F Handler, *Social Citizenship and Workfare in the United States and Western Europe: The Paradox of Inclusion* (CUP 2004).

[6] Douglas S Massey, *Categorically Unequal: The American Stratification System* (Russell Sage Foundation 2007).

[7] ibid.

[8] Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (University of Chicago Press 2008).

[9] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2012).

[10] Massey defines exploitation this way: Massey (n 6) 6. On the overemphasis of labour exploitation relative to land dispossession, see Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press 2015).

of exploitation with other workers in higher status jobs[11]—hoarded by the dominant group. More generally, one group's exploitation in 'bad' jobs may confer status on another working in 'good' jobs. These are roughly what WEB Du Bois called the psychological and material 'wages of whiteness'.[12]

How does exploitation arise? Massey curiously focuses on discrimination and treats as exploitation the concentration of subordinated groups in bad jobs; this neglects the hoarding of better jobs. Overcoming hoarding would require breaching the barriers of exclusion, but what about exploitation? Why don't workers just quit? The traditional answer is that property relations under capitalism render their choice as 'work or starve'. Elaborations account for resource distribution within families[13] and through 'decommodified'[14] welfare state support. The general point, however, retains its force. Here, state power operates at one step removed from personal work relations, through its enforcement of property law.[15]

The contrast between economic pressure and more direct physical coercion provides the normative and legal foundation for the 'free labour' structure of modern labour markets. In the United States, this distinction is constitutionalized through the Thirteenth Amendment's ban on slavery and involuntary servitude.[16] To constitute prohibited involuntary servitude, a work situation must involve 'physical or legal coercion'.[17] 'Legal coercion' here means the state's exercise of physical power over the body, paradigmatically by arrest and detention; it does not extend to civil money judgments.[18] Thus, the threat of physical violence, whether public or private, constitutes legally cognizable coercion. In this vein, the Supreme Court's foundational involuntary servitude opinion striking down debt peonage equated a situation in which 'the employing company … seize[d] the debtor and h[e]ld him to the service' with one in which 'the constabulary … prevent[ed] the servant from escaping, and … force[d] him to work out his debt'.[19] The latter was further equated to criminal punishment for failure to work. This same jurisprudence, however, legitimates as *voluntary* decisions to work under economic pressure alone.[20]

Thus, where hoarding requires locking some group out, labour exploitation requires locking that group in. The complement to exclusion is *inclusion*, but not of a warm and fuzzy kind. Where exclusion harms by cutting off social and economic relations, inclusion harms through incorporation into social relations on subordinate terms.[21] These terms are

[11] Cedric J Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Zed Press 2000); Adelle Blackett, 'Emancipation in the Idea of Labour Law' in Brian Langille and Guy Davidov (eds), *The Idea of Labour Law* (OUP 2011).

[12] *Black Reconstruction in America (The Oxford WEB Du Bois): An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880* (OUP 1935).

[13] Nancy Folbre, 'Exploitation Comes Home: A Critique of the Marxian Theory of Family Labour' (1982) 6 Cambridge Journal of Economics 317.

[14] Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990).

[15] Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 Political Science Quarterly 470.

[16] cf Forced Labour Convention (International Labour Organization No 29) (adopted 28 June 1930, entered into force 1 May 1932); Abolition of Forced Labour Convention (International Labour Organization No 105) (adopted 25 June 1957, entered into force 17 January 1959).

[17] *United States v Kozminski* (1987) 487 US 931.

[18] *Bailey v Alabama* (1911) 219 US 219.

[19] ibid 244.

[20] Aziz Z Huq, 'Peonage and Contractual Liberty' (2001) 101 Columbia Law Review 351.

[21] Devon Carbado and others, 'After Inclusion' (2008) 4 Annual Review of Law & Social Science 83.

enforced by cutting off avenues of escape; hence the centrality of quitting or striking to labour law generally and to involuntary servitude jurisprudence specifically.[22]

In liberal labour markets, exclusion and inclusion complement one another when opportunity hoarding cuts off upward movement while the work-or-starve imperative cuts off labour market exit. Together, these accomplish what the occupational segregation literature calls the 'crowding' of subordinated workers into lower rungs of the labour market.[23] Because, for Massey, the economic coercion of labour is not group-specific, it fades into the background. The spotlight is left to group-specific aspects of discrimination, even though its translation into exploitation relies upon that background condition.

The coercive side of this complementarity comes into view when it goes beyond work-or-starve. Unauthorized immigrant workers provide the most salient contemporary example of how hoarding and exploitation may work in concert. In the pre-1986 US, such workers were paid no less than otherwise similar (in terms of education, experience, etc) but legally authorized workers. In 1986, however, a major shift in law and practice prohibited employers from hiring unauthorized immigrants, intensified deportations over time, and, crucially, established employers as intermediaries charged with screening and identifying unauthorized workers.[24]

Intensified workplace enforcement has not principally reduced unauthorized employment, as one would expect from formal exclusion alone. Instead, intensified exploitation arose as workers were cut off from better jobs in the formal economy and crowded into more informal ones. They also became dependent on their employers not only for wages but for shelter from immigration authorities. If workers made demands, organized, or quit, employers could pick up the phone and have them detained and deported—above and beyond cutting off wage income.[25]

The resulting workplace vulnerability has been widely documented, including significant wage penalties for undocumented status.[26] Rather than being excluded from the labour market, unauthorized immigrant workers have been incorporated into its lowest echelons. Moreover, this incorporation often operates below the legal floor of labour rights because challenging violations is difficult and because authorities may view them as undeserving of labour law's protections.[27]

The result, in other words, has been *subordinated inclusion* of unauthorized immigrant workers, notwithstanding formal exclusion. The remainder of this chapter argues that something similar may be developing with regard to workers marked for both exclusion and coercion by the criminal legal system.

[22] James Gray Pope, 'Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"' (2010) 119 Yale Law Journal 1474.

[23] Paula England, *Comparable Worth: Theories and Evidence* (Aldine de Gruyter 1992).

[24] Massey (n 6); Stephen Lee, 'Private Immigration Screening in the Workplace' (2009) 61 Stanford Law Review 1103.

[25] Lee (n 24).

[26] Massey (n 6).

[27] cf Aliverti, this volume.

C. The Carceral State and Labour Market Exclusion

Since the late 1990s, considerable attention has focused on the US criminal legal system's operation as a labour market institution.[28] Driving that interest has been the exploding scale and dramatic racial skew of incarceration. The US incarceration rate quintupled in the last quarter of the twentieth century, reaching levels five times larger than even Western Europe's most avid incarcerator, the United Kingdom.[29] This amplified longstanding inequalities in the distribution of criminal justice contact, with African Americans generally facing incarceration rates eight times larger than whites, alongside similarly dramatic within-race disparities by educational attainment. In absolute terms, by the early 2000s over 2 million Americans were in state custody at any one time, including one-third of Black male high school dropouts age twenty to forty; one-quarter of all Black men would go to prison (excluding shorter jail stays) by their early thirties.

This criminal legal system's labour market function has been understood primarily as exclusion. The most prominent, and most legally oriented, connection to exclusion runs through the denial of employment based on a criminal record, especially prior conviction. This concern exemplifies two broader trends: rising attention to questions of 'reentry' and of 'collateral consequences'.[30] Reentry focuses on integration into a wide range of social institutions—including employment, families, political participation, and so on—in the aftermath of criminal legal contact, but especially after incarceration.[31] Collateral consequences typically are defined more narrowly as the consequences of criminal legal contact that arise through civil or administrative law formally separate from the criminal proceedings.[32] Examples include restrictions on voting, driver's licences, receiving social assistance, and, again, employment.

Employers' aversion to hiring people with criminal records has been widely documented. Experimental audit studies using paired 'testers' have found dramatic reductions—in the vicinity of 50 per cent—in how often job applications receive follow-up actions like an interview when a prior conviction is disclosed; these vary substantially by race, with larger percentage reductions for Black applicants compounding their lower baseline follow-up rates without a record.[33] Direct employer surveys also find that most employers inquire about criminal records when hiring for entry-level positions and are averse to hiring people with records.[34]

Reducing such exclusion has been the goal of the 'Ban the Box' or 'Fair Chance Hiring' movement. This effort has successfully advocated for a spate of state and local laws limiting

[28] Bruce Western and Katherine Beckett, 'How Unregulated is the US Labor Market? The Penal System as a Labor Market Institution' (1999) 104 American Journal of Sociology 1030.

[29] Bruce Western, *Punishment and Inequality in America* (Russell Sage Foundation 2006).

[30] Michael Pinard, 'An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals' (2006) 86 Boston University Law Review 623.

[31] Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* (Urban Institute Press 2005); Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (OUP 2003).

[32] Alec C Ewald, 'Collateral Consequences in the American States' (2012) 93 Social Science Quarterly 211.

[33] Pager, *Marked* (n 8); Devah Pager and others, 'Discrimination in a Low-Wage Labor Market: A Field Experiment' (2009) 74 American Sociological Review 777.

[34] Harry J Holzer and others, 'Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers' (2006) 49 The Journal of Law and Economics 451; Mike Vuolo and others, 'Criminal Record Questions in the Era of "Ban the Box"' (2017) 16 Criminology & Public Policy 139.

employer use of criminal record information.[35] Similar efforts have increased scrutiny of criminal record screening under general purpose laws barring indirect race discrimination in employment.[36]

Employers often report that they check criminal records out of legal obligation.[37] In many occupations, including low-wage human services jobs in health care or child care, state or federal laws directly bar employment of people with records; they also do so indirectly via occupational licensure requirements that authorize or require exclusion based on criminal records.[38] These restrictions have been targeted for reform both legislatively and via constitutional litigation challenges.[39]

Criminal legal contact also can disrupt and degrade employment opportunities indirectly, without reference to a record. Arrest may lead to job loss by virtue of missing work. Extended incarceration may impede post-release employment through 'transformative effects' like degrading skills and work habits, blocking opportunities to gain work experience, and severing social networks that facilitate employment and advancement.[40]

In combination, these mechanisms are widely thought to drive high levels of unemployment and underemployment among previously convicted people.[41] Given the massively disproportionate concentration of criminal legal contact among young, less educated, men of colour, especially African Americans, these effects have been identified as a major contributor to declining employment fortunes among this group as a whole.[42] These effects compound more familiar forms of racial discrimination and disadvantage.[43] Absent criminal record checks, employers stereotypically attribute criminality to African American applicants, exacerbating widespread race discrimination.[44] Michelle Alexander dubbed 'The New Jim Crow' the resulting system of pervasive racial stratification structured by racialized mass incarceration.[45]

In keeping with the above, the New Jim Crow consistently is conceptualized in terms of *exclusion*. Alexander's overarching thesis is that the New Jim Crow 'permanently locks a huge percentage of the African American community out of the mainstream society and

[35] Beth Avery and Phil Hernandez, 'Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies' (National Employment Law Project 20 April 2018) <http://stage.nelp.org/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> accessed 7 August 2019.

[36] Andrew Elmore, 'Civil Disabilities in an Era of Diminishing Privacy: A Disability Approach for the Use of Criminal Records in Hiring' (2015) 64 DePaul Law Review 991; Kimani Paul-Emile, 'Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age' (2014) 100 Virginia Law Review 893.

[37] Harry J Holzer and others, 'The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles' in Shawn D Bushway and others (eds), *Barriers to Reentry? The Labor Market for Released Prisoners in Post-Industrial America* (Russell Sage Foundation 2007).

[38] Michelle Natividad Rodriguez and Beth Avery, 'Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records' (National Employment Law Project 26 April 2016) <https://s27147.pcdn.co/wp-content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf> accessed 7 August 2019.

[39] *Peake v Commonwealth* (2015) 132 A3d 506 (Pennsylvania Commonwealth Court).

[40] Pager, *Marked* (n 8).

[41] Naomi F Sugie, 'Work as Foraging: A Smartphone Study of Job Search and Employment after Prison' (2018) 123 American Journal of Sociology 1453.

[42] Harry J Holzer and others, 'Declining Employment Among Young Black Less-Educated Men: The Role of Incarceration and Child Support' (2005) 24 Journal of Policy Analysis and Management 329.

[43] Pager, *Marked* (n 8).

[44] Holzer and others, 'Perceived Criminality' (n 34); Amanda Agan and Sonja Starr, 'Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment' (2018) 133 Quarterly Journal of Economics 191.

[45] Alexander (n 9).

economy'.[46] More generally, scholars and advocates routinely characterize the carceral state as erecting 'barriers to employment',[47] a concept that operates both as a subset of the broader category of 'barriers to reentry'[48] and as a specific example of the 'barriers' that explain un(der)employment generally among marginalized populations.[49]

Exclusion also characterizes another, less legally oriented, line of analysis. Not only does prior criminal legal contact lead to labour market exclusion, but prior exclusion leads to criminal legal system involvement. Criminologists and social theorists characterize the latter phenomenon in terms of 'warehousing'[50] of 'surplus populations'.[51] This functions to maintain social order amidst the economic dislocations and inequalities of neoliberalism. The old functions of the now-shrivelled welfare state are reallocated, in brutalized form, to a new regime of 'prisonfare',[52] masking mass unemployment, especially among younger Black men, by imprisoning the otherwise unemployed.[53]

Warehousing accounts generally treat labour market conditions as analytically prior to the carceral response.[54] In Wacquant's case, this marks an explicit contrast with prior regimes:

> What makes the racial intercession of the carceral system different today is that, unlike slavery, Jim Crow, and the ghetto of the mid-century, *it does not carry out a positive economic mission of recruitment and disciplining of an active workforce*. The prison serves mainly to warehouse the precarious and deproletarianized fractions of the black working class …[55]

In his account of a rising 'waste management model' of criminal law, Jonathan Simon placed its structural roots in a 'culture for which work remains the overriding source of personal worth', where 'the fate of a class excluded from the labour market is to be treated as a kind of a toxic waste'.[56]

Thus, either way, exclusion is the paradigmatic labour market status of those subjected to criminal legal supervision, whether as cause, effect, or a mutually reinforcing cycle.

[46] ibid 13.

[47] Devah Pager and others, 'Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records' (2009) 623 The ANNALS of the American Academy of Political and Social Science 195.

[48] Bushway and others (eds), *Barriers to Reentry?* (n 37).

[49] Sandra K Danziger and Kristin S Seefeldt, 'Barriers to Employment and the "Hard to Serve": Implications for Services, Sanctions, and Time Limits' (2003) 2 Social Policy and Society 151.

[50] Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (OUP 2007).

[51] Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (University of California Press 2007) 72.

[52] Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009).

[53] Western and Beckett, 'How Unregulated is the US Labor Market?' (n 28).

[54] cf Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (Transaction Publishers 1939).

[55] Wacquant, *Punishing the Poor* (n 52) 208.

[56] Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890–1990* (University of Chicago Press 1993) 259.

D. Intermediate Steps: Prison Labour, Channelling, and Wage Penalties

Notwithstanding this emphasis on labour market exclusion—an opportunity-hoarding lens—several minor strands of analysis link the carceral state to labour subordination *in work*, often tentatively or indirectly. Such links arise through consideration of prison labour, channelling towards lower status jobs, and wage effects of criminal record aversion.

Prison labour provides the most obvious counterpoint to labour market exclusion. One line of criticism of the 'prison industrial complex' is that mass incarceration provides a supply of highly exploitable labour, especially to private firms.[57]

Consideration of prison labour, however, does not generally alter the labour market exclusion story discussed above. The primary reason is that prison labour generally is understood as separate from, though perhaps complementary to, 'the labour market'. Earl Smith and Angela Hattery, for instance, theorize incarceration as simultaneously 'removing unwanted competition from the labor market',[58] *and* then accomplishing 'the transformation of that labor so that it can be extracted' through prison labour.[59] Thus, while prison labour, especially for private firms, may operate as a spectacular example of exploitation, it will not alter accounts of labour market exclusion unless accompanied by a fundamental reconceptualization of 'the labour market' to *include* prison labour rather than operate in opposition to it.[60]

Furthermore, even after the prison boom, prison labour remains relatively economically insignificant. A number of scholars have argued that prison labour, especially its privatized versions, receives attention disproportionate to its scale.[61] This complements the prevailing notion that contemporary prison labour has shrivelled relative to its outsized historical role in incarceration,[62] though this point has been contested.[63]

Within the labour market—or at least outside the prison—some attention has been given to how exclusion leads not simply to unemployment but to *channelling down*. If exclusion operates more intensively with regard to better jobs, then the predictable effect will be to push those workers into worse jobs—and not necessarily out of the labour market.[64] One audit study yielded accompanying qualitative data suggesting that Black and Latino applicants were more likely to be channelled, within the audited employer's workforce, towards lower-status positions involving less customer contact and more manual labour.[65] Vice

[57] Earl Smith and Angela Hattery, 'Incarceration: A Tool for Racial Segregation and Labor Exploitation' (2008) 15 Race, Gender & Class 79; Angela Y Davis, 'From the Convict Lease System to the Super-Max Prison' in Joy James (ed), *States of Confinement: Policing, Detention, and Prisons* (St Martin's Press 2000); Loïc Wacquant, 'Prisoner Reentry as Myth and Ceremony' (2010) 34 Dialectical Anthropology 605.

[58] Smith and Hattery (n 57) 87.

[59] ibid 90.

[60] Noah D Zatz, 'Prison Labor and the Paradox of Paid Nonmarket Work' in Nina Bandelj (ed), *Economic Sociology of Work* (Research in the Sociology of Work 19, Emerald Press 2009); Erin Hatton, '"Either You Do It or You're Going to the Box": Coerced Labor in Contemporary America' [2018] Critical Sociology <https://doi.org/10.1177/0896920518763929> accessed 7 August 2019.

[61] Wacquant, 'Prisoner Reentry' (n 57); Ruth Wilson Gilmore, 'The Worrying State of the Anti-Prison Movement' *Social Justice Blog* (23 February 2015) <www.socialjusticejournal.org/the-worrying-state-of-the-anti-prison-movement/> accessed 7 August 2019.

[62] Simon, *Governing Through Crime* (n 50); Keally D McBride, *Punishment and Political Order* (University of Michigan Press 2007).

[63] Heather Ann Thompson, 'Rethinking Working-Class Struggle through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards' (2011) 8 Labor: Studies in Working Class History of the Americas 15.

[64] Western, *Punishment* (n 29).

[65] Pager and others, 'Discrimination' (n 33).

versa, the criminalization of income-earning strategies in illegal or informal sectors, which might otherwise provide alternatives to conventional employment, may push people into the low end of conventional employment.[66]

In this vein, research on criminal records exclusions has been criticized for focusing on jobs—-even entry-level jobs in restaurants, retail, and the like—that operate above the level at which formerly incarcerated people often work.[67] Of course, this begs the question whether presence in those jobs reflects exclusion from others. Scholars have, however, identified a considerable presence of formerly incarcerated people in the most unstable, difficult, low-paying occupations such as day labour and warehousing, often alongside unauthorized immigrant workers.[68]

Consistent with a channelling analysis is the modest body of scholarship on the wage effects of prior incarceration. This research finds significant reductions in hourly wages.[69] Western finds evidence of concentration in 'secondary' forms of employment characterized by shorter job tenure and slow wage growth.[70]

Negative wage effects typically are understood as an extension of the mechanisms of exclusion.[71] Criminal legal system involvement either stigmatizes workers or degrades their productivity, resulting in employer aversion and discrimination. One important study, however, produced results that sit uneasily with this analysis. Becky Pettit and Christopher Lyons found that, in the immediate post-release period, recently incarcerated people actually experienced *higher* employment rates than they did pre-incarceration.[72] Their *wages*, however, were lower.[73]

Pettit and Lyons attribute this post-release employment increase to the beneficial influence of services offered via parole. Yet that explanation seems inconsistent with the wage losses: if parole made it easier to find jobs or made people more attractive workers, that ought to have meant access to *better*, higher-paying jobs, if not merely quicker employment at similar jobs. Vice versa, if wage decreases were an extension of exclusion, then one would expect an accompanying reduction in employment.

An alternative explanation is that workers were more desperate for work post-release, leading them to accept jobs they previously would have refused: that would yield the observed pattern of higher employment at lower wages. Some evidence consistent with that hypothesis comes from Sugie's recent finding that, among those just released from prison, higher rates of work are associated with those 'more willing to take on poorer quality

[66] Simon, *Governing Through Crime* (n 50).

[67] Bruce Western, 'Criminal Background Checks and Employment Among Workers with Criminal Records' (2008) 7 Criminology & Public Policy 413.

[68] Jamie Peck and Nik Theodore, 'Carceral Chicago: Making the Ex-Offender Employability Crisis' (2008) 32 International Journal of Urban and Regional Research 251; Kristin Bumiller, 'Bad Jobs and Good Workers: The Hiring of Ex-Prisoners in a Segmented Economy' (2015) 19 Theoretical Criminology 336; Sugie (n 41).

[69] Western, *Punishment* (n 29); Becky Pettit and Christopher Lyons, 'Status and the Stigma of Incarceration: The Labor Market Effects of Incarceration by Race, Class, and Criminal Involvement' in Bushway and others (eds), *Barriers to Reentry?* (n 37).

[70] Western, *Punishment* (n 29).

[71] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (The National Academies Press 2014).

[72] Pettit and Lyons (n 69).

[73] Sabol found a similar, temporary post-release increase in employment but did not analyse wages. William Sabol, 'Local Labor-Market Conditions and Post-Prison Employment Experiences of Offenders Released from Ohio State Prisons' in Bushway and others (eds), *Barriers to Reentry?* (n 37).

work'.[74] One mechanism that could drive such a phenomenon post-incarceration would be intensified coercion into work, to which the next section turns.

E. The Carceral State and Labour Coercion *Outside* of Prison

Scholarship on the criminal legal system as a labour market institution largely overlooks practices that amount to *coercion into* work. These 'carceral work mandates'[75] threaten criminal penalties—quintessentially incarceration—for *un*employment or *under*employment. Rather than erecting barriers to entry *into* work (thereby excluding), such practices erect barriers to labour market *exit*, thereby coercing inclusion. These pressures against exit and into work supplement those otherwise produced by economic need for income.

Carceral work mandates arise primarily in two ways. One route is via conditions of criminal legal supervision typically conceptualized as 'alternatives to incarceration'. These include the work requirements that pervade both probation and parole,[76] as well as 'diversion' programmes.[77] The other method builds upon debt obligations for which non-payment is punishable by incarceration—primarily child support and criminal fines and fees. These duties to pay are transformed into duties to earn enough to pay.[78] This transfers the logic of welfare work requirements from the conditions of access to state economic support to the conditions of freedom from state violence.

Consider the work requirements characteristic of 'community supervision'—non-custodial criminal legal supervision while someone is living 'free' 'in the community'. Work requirements are ubiquitous conditions of parole, probation, and supervised release.[79] This means that, in principle, supervisees can be incarcerated—technically under the original sentence for the underlying offence of conviction—for failing to find a job, for quitting or refusing a job, or for working at a job that fails to maximize earnings.[80]

The limited available evidence suggests that these work requirements are hardly a dead letter.[81] As of the early 2000s, at any one time about 9,000 people were held in US prisons or jails on parole or probation revocations for failure to comply with work requirements,[82] consistent with data from the 1990s.[83] Those figures grow substantially after incorporating

[74] Sugie (n 41) 1478.

[75] Noah D Zatz, 'Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work' (forthcoming 2020) 45 Law & Social Inquiry, available online at <http://dx.doi.org/10.1017/lsi.2019.56>.

[76] Fiona Doherty, 'Obey All Laws and Be Good: Probation and the Meaning of Recidivism' (2015) 104 Georgetown Law Journal 291; Susila Gurusami, 'Working for Redemption: Formerly Incarcerated Black Women and Punishment in the Labor Market' (2017) 31 Gender & Society 433; Augustine (n 4).

[77] Forrest Stuart, 'Race, Space, and the Regulation of Surplus Labor: Policing African Americans in Los Angeles's Skid Row' (2011) 13 Souls: A Critical Journal of Black Politics, Culture, and Society 197.

[78] Noah D Zatz, 'A New Peonage? Pay, Work, or Go To Jail in Contemporary Child Support Enforcement and Beyond' (2016) 39 Seattle Law Review 927.

[79] Petersilia (n 31); Doherty (n 76); Lawrence F Travis and James Stacey, 'A Half Century of Parole Rules: Conditions of Parole in the United States, 2008' (2010) 38 Journal of Criminal Justice 604.

[80] Noah D Zatz and others, 'Get To Work or Go To Jail: Workplace Rights Under Threat' (UCLA Institute for Research on Labor and Employment: A New Way of Life Reentry Project, UCLA Labor Center March 2016) <https://irle.ucla.edu/wp-content/uploads/2016/03/Get-To-Work-or-Go-To-Jail-Workplace-Rights-Under-Threat.pdf> accessed 7 August 2019.

[81] But cf Simon, *Poor Discipline* (n 56).

[82] Zatz and others, 'Get To Work or Go To Jail' (n 80).

[83] Petersilia (n 31) 151.

revocations for failure to pay fines, fees, and child support, which are tightly intertwined with work requirements.

The credible threat of incarceration for non-work may shape the work behaviour and conditions of those *complying* with the mandate, or attempting to.[84] One study found that employment was a mainstay of Black women's interactions with Los Angeles parole and probation officers. Supervised individuals were pressured to work longer, more regular hours, avoid informal work, and prioritize immediate employment work over improving skills or health that might enable longer-term economic security.[85] Another recent study in neighbouring Orange County likewise found that supervisory work requirements added to economic pressures and pushed workers towards formal employment that facilitated documentation of work.[86] Investigative journalists also recently examined an Oklahoma court-ordered residential drug treatment programme structured around mandatory, unpaid work assignments at a commercial poultry processing plant.[87] That report profiles one worker who was incarcerated after becoming unable to work due to on-the-job injury while hundreds more abided brutal conditions and no pay.

Pressure from state authorities to 'get to work or go to jail'[88] obviously could, at the margin, push workers into 'bad jobs' that they otherwise might avoid. Indeed, Augustine specifically found that settling for marginal forms of work, including with temporary staffing agencies, was among the strategies supervisees used to manage the financial and legal pressures to work.[89]

This direct pressure from the state also provides a disciplinary tool to employers. When employers are empowered to assess workers' compliance with work requirements or can report non-compliance to supervisory authorities, they gain the ability to inflict non-economic losses of liberty in addition to the economic harms from lost wages. This directly parallels the leverage, discussed above, that employers gain from being able to trigger immigration enforcement. Here, moreover, employers do not even run the risk of being implicated in any impropriety because typically there is no formal bar on employing workers under supervision, unlike unauthorized workers. The point was made brutally clear when a judge in a Syracuse, New York drug court explained to a defendant, '[w]hen [your employer] calls up and tells me that you are late, or that you're not there, I'm going to send the cops out to arrest you.'[90]

There are some indications that such pressures can affect aggregate labour market outcomes. As noted above, the Pettit and Lyons study found that parolees exhibited increased employment but decreased wages.[91] That is consistent with what economic theory would predict when the alternative to employment—loss of not only pay but personal liberty—deteriorates.[92] This coheres with evidence that carceral work mandates in a Texas

[84] Hatton (n 60).
[85] Gurusami (n 76).
[86] Augustine (n 4)
[87] Amy Julia Harris and Shoshana Walter, 'All Work. No Pay: They Thought They Were Going to Rehab. They Ended up in Chicken Plants' *Reveal* (4 October 2017) <www.revealnews.org/article/they-thought-they-were-going-to-rehab-they-ended-up-in-chicken-plants/> accessed 26 October 2017.
[88] Zatz and others, 'Get To Work or Go To Jail' (n 80).
[89] Augustine (n 4).
[90] James L Nolan, 'Therapeutic Adjudication' (2002) 39 Society 29, 32.
[91] Pettit and Lyons (n 69).
[92] Sabol notes in passing that supervision could increase employment either by offering beneficial services or by increasing motivation, without explaining why the latter might be: Sabol (n 73). A National Research Council report suggests that reported post-incarceration employment increases may be artifacts of shifts from informal

child-support enforcement programme increased employment but lowered average earnings, which the authors suggest reflects job gains concentrated in lower-wage positions.[93] Such results imply that the programme, which required participation in job search and job readiness services, raised employment by pushing people into worse jobs, not by opening doors to better ones. That coheres with evidence that parole often offers more 'hassle' than 'help',[94] to use the distinction originating in the welfare work requirements literature and transferred to child support and reentry employment programmes.[95] Another study focused on payment of criminal fines, fees, and restitution likewise found that work programmes mandated under threat of incarceration increased payments (employment effects were not directly measured), but that the incarceration threat, not any employability benefits from the programming, drove all the increase.[96]

This lean towards hassle over help—lowered expectations over expanded opportunities—was explicitly embraced by the Obama Administration's efforts to expand employment by non-custodial parents in order to increase child support payments. Child-support non-payment is overwhelmingly concentrated in non-custodial parents with very low income and limited earnings capacity.[97] US constitutional law allows incarceration only for 'willful' non-payment, not when non-payment results from 'inability to pay', but this principle has been widely violated.[98] To reduce excessive incarceration for non-payment, the Obama Administration embraced mandatory work programmes, like the Texas one noted above, as an 'alternative to incarceration'. In contrast to non-payment alone, it reasoned that non-compliance with mandatory work programmes provides an appropriate basis for incarceration because 'the obligor has the present ability to do what is ordered of him or her'.[99]

Such structured work programmes build on the legal principle, previously established through case law and statute, that the obligation to pay child support—enforceable ultimately through incarceration as a civil contempt sanction or criminal sentence—entails an obligation to obtain the means to pay. Thus, the California Supreme Court's *Moss* decision upheld incarceration of a non-paying, penniless child support obligor who 'fails or refuses to seek and accept available employment for which the parent is suited by virtue of education, experience, and physical ability'.[100]

Although this duty to work typically is stated in the abstract, in practice it entails an obligation to work *in particular types of jobs*. For instance, the 'willful noncompliance' label

to formal employment, where study data capture only the latter and supervision privileges the latter: National Research Council, *The Growth of Incarceration in the United States* (n 71). Informal-formal transitions could also explain wage decreases if they sacrifice a wage premium for informality. I am grateful to Naomi Sugie for raising this point.

[93] Daniel Schroeder and Nicholas Doughty, 'Texas Non-Custodial Parent Choices: Program Impact Analysis' (Ray Marshall Centre, Johnson School of Public Affairs, University of Texas August 2009) <https://raymarshallcenter.org/files/2005/07/NCP_Choices_Final_Sep_03_2009.pdf> accessed 7 August 2019.

[94] Gurusami (n 76).

[95] Lawrence M Mead, 'Toward a Mandatory Work Policy for Men' (2007) 17 The Future of Children 43.

[96] David Weisburd and others, 'The Miracle of the Cells: An Experimental Study of Interventions to Increase Payment of Court-ordered Financial Obligations' (2008) 7 Criminology & Public Policy 9.

[97] Elaine Sorensen and others, *Assessing Child Support Arrears in Nine Large States and the Nation: The Urban Institute Report to U.S. Department of Health and Human Services* (Urban Institute 2007) <http://opnff.net/Files/Admin/Assessing%20Child%20Support%20Arrears.pdf> accessed 7 August 2019.

[98] Tamar R Birckhead, 'The New Peonage' (2015) 72 Washington and Lee Law Review 1595.

[99] 79 Fed Reg 68548, 68557 (17 Nov 2014).

[100] *Moss v Superior Court* (1998) 950 P2d 59, 76 (Cal).

would not be applied to refusing—even through a deliberate choice—a job that paid a penny and imposed a lashing daily. The challenge, in other words, is the longstanding welfare state task of distinguishing between voluntary and involuntary unemployment.[101] In such contexts, 'voluntariness' encodes substantive judgements about acceptable and unacceptable job quality under particular personal circumstance.[102] Indeed, the *Moss* Court's formulation above—applying a work obligation qualified by job suitability—echoes standard formulations in US unemployment insurance law.

The question, then, is towards *what kinds of jobs* are work programme participants directed, on pain of being judged non-compliant and thus subjected to incarceration? The federal regulations referenced above answer that question via the distinction between 'labour force attachment' and 'human capital enhancement' strategies that structured US policy debates over welfare work requirements. They endorse the former, specifically rejecting 'services to promote access to better jobs and careers'.[103] In other words, the goal is to 'persuade'—through threat of incarceration—people to take the jobs they already could get but might otherwise avoid.

F. From Double Binds to Subordinated Inclusion

How, then, can we generate an integrated analysis of the US criminal legal system's exclusion *from* work and coercion *into* work? Stated this abstractly, these appear to be *contradictory* phenomena. Of course, contradictions are possible in complex systems. But attending in finer-grained fashion to the *types* of work at issue shows how exclusion and coercion can operate in complementary rather than contradictory ways. This section illustrates that general possibility by highlighting a specific form of labour into which carceral work mandates may push people: court-ordered 'community service'. Such work operates outside, and below, the legal labour standards applicable to the conventional market employment from which people with criminal records often are excluded. It thus also provides an illustration of how 'the criminal law is instrumental in determining the boundaries of … which relations count as work relations, for the purposes of worker protection'.[104]

Were the criminal legal system issuing two contradictory edicts, it would impose a double bind on individuals subject to both: accepting exclusion would mean defying compulsion, and vice versa. This apparent contradiction provides the framework for Dallas Augustine's pathbreaking study of formerly incarcerated job seekers who reported how both exclusion and compulsion shaped their efforts to find and keep employment.[105] Augustine explores how these cross-cutting constraints produce a legal consciousness among respondents that she dubs 'working around the law', in which strategies that are 'extra-legal' with regard to one constraint are nonetheless understood as good faith efforts to satisfy another constraint. Her two cleanest examples involve violating the exclusionary constraint by

[101] Joel F Handler and Yeheskel Hasenfeld, *The Moral Construction of Poverty: Welfare Reform in America* (Sage 1991).

[102] Lucy A Williams, 'Unemployment Insurance and Low Wage Work' in Joel F Handler and Lucie White (eds), *Hard Labor: Women and Work in the Post-Welfare Era* (ME Sharpe 1999); Noah D Zatz, 'What Welfare Requires from Work' (2006) 54 UCLA Law Review 373.

[103] 79 Fed Reg 68548, 68558 (17 Nov 2014).

[104] Alan Bogg and Mark Freedland, Introduction, this volume.

[105] Augustine (n 4).

concealing a criminal record from employers, either at hire or during employment. A third involves turning to illicit work; this seems unlikely to satisfy formal work mandates, though it might allow satisfaction of the financial obligations that Augustine groups together with work mandates.

Of most interest here, however, is Augustine's observation of a fourth strategy: accepting 'bad' jobs characterized by particularly low wages and short job tenure, often involving off-the-books work or mediation by a temp agency. Notably, this strategy appears not to involve violating any legal constraint. The work seemingly satisfies work mandates, and, crucially, these are positions to which the exclusionary constraint does not apply. Indeed, Augustine notes the importance, and difficulty, of finding temp agencies that do not screen for criminal records. The absence of such exclusion helps explain why workers gravitated to these jobs, as opposed to prior (and typically better) lines of work to which they could not return.

From a more structural perspective focused on how criminal legal and labour market institutions interact, this last scenario is the most significant because it identifies how there *is* a way out of the double bind. That way out consists of working jobs that are *not* subject to exclusions based on criminal records but that *do* satisfy carceral work mandates. Insofar as these jobs are inferior to those to which access has been blocked, exclusion alone pushes workers *either* into these inferior work situations *or* out of work altogether; carceral work mandates then intervene to cut off the exit option.[106] The structural possibility, of which Augustine's findings are strongly suggestive, is that exclusion (from some jobs) and coercion (into others) could operate in complementary, not contradictory, fashion to keep people at work in worse jobs: subordinated inclusion.

Analysing this possibility more fully requires a finer-grained understanding of both prongs of the putative double bind. First, what is the nature and scale of work where a criminal record is *not* a barrier, or might even be an affirmative credential insofar as it signals reduced bargaining power and legal vulnerability?[107] Second, to what extent does such work satisfy carceral work mandates? The latter question is actually two-fold. Not only must the work *satisfy* the mandates (as illicit work is unlikely to do), but the mandates must count *rejection* of that work as a violation that triggers sanction.

This last point is where the distinction between voluntary and involuntary unemployment becomes crucial. Imagine someone for whom the only possible employment (being excluded from the rest) is a job that requires working seventy hours at the minimum wage without overtime. Accepting this job would satisfy the mandate, but what if she rejects it? Would that refusal render the worker 'voluntarily' unemployed in violation of a work mandate? Or is she 'involuntarily' unemployed because no acceptable work is available and she is at liberty to reject what is on offer? If the latter, the exclusion/coercion combination does not push her into this job.

One might expect even carceral work mandates not to require employment under conditions that violate a worker's labour rights. That certainly is the case with work requirements attached to social welfare programmes, where even rules that nominally require workers to accept 'any job' generally exclude those with illegal conditions.[108] But that constraint, even

[106] Of course, this is only relative to the financial pressures that already weigh against exit.

[107] On employer preferences for more exploitable immigrant workers, see Rachel Bloomekatz, 'Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace' (2007) 54 UCLA Law Review 1963.

[108] Zatz, 'What Welfare Requires from Work' (n 101).

were it enforceable, still leaves ample room for downward pressure into jobs that remain above the legal floor. Not only may workers be pushed into less advantageous, but still legal, occupations, but within a single job type there is room for downward wage pressures towards the legal minimums; that dynamic is what 'prevailing wage' standards are designed to prevent in work-based benefit programmes. Similarly, various working conditions, though legal, may be considered harsh enough to legitimize their rejection. Often these involve geography and working time, such as long commutes, rotating shifts, relocation, and mandatory overtime. For instance, welfare work requirements, harsh as they are, nonetheless generally permit individuals to refuse to work more than forty hours per week,[109] even though such hours are legal.

The potential for downward pressure on labour standards, yet within legal limits, is illustrated by carceral work mandates in child support enforcement. Although those subject to these mandates do not necessarily have a criminal record, often they do.[110] Judges appear to treat the obligation to pay support as skewing the voluntary/involuntary boundary towards requiring quite onerous working conditions. Lynne Haney's recent study reports one trial judge admonishing an obligor by saying, 'I just had a father here who's working four jobs and mows lawns on the weekends … [d]on't tell me you can't do it.'[111] The Michigan Supreme Court has opined that

> [T]o avoid conviction for felony nonsupport, parents should be required to have done everything possible to provide for their child and to have arranged their finances in a way that prioritized their parental responsibility.[112]

Though the court still limits the 'everything possible' concept to 'reasonably possible, lawful avenues of obtaining the revenue'.[113] Coupled with a widespread assumption that minimally acceptable employment is readily available—the trial judge in *Moss* specifically suggested a job 'flipping hamburgers at MacDonald's [sic]'[114]—this yields a presumption that unemployment is voluntary, even without specific evidence of inadequate search or inappropriate refusal. Similar dynamics are evident in the limited available research on enforcement of criminal legal fines and fees.[115]

The fines and fees context, moreover, points to how even legal floors beneath working conditions may not constrain the scope of carceral work mandates. To the contrary, when the imperative to find work collides with the unavailability of work above the legal floor, pressure builds to release the policy double bind by lowering the floor—and to treat that as a boon to those with renewed 'opportunities' to work without exclusion. With labour standards relaxed, workers subjected to carceral work mandates may be pushed into work that would be illegally substandard *for other workers*. By expanding, through degradation, the

[109] ibid.

[110] Lynne Haney, 'Incarcerated Fatherhood: The Entanglements of Child Support Debt and Mass Imprisonment' (2018) 124 American Journal of Sociology 1.

[111] ibid 35.

[112] *People v Likine* (2012) 823 NW2d 50, 55 (Mich).

[113] ibid at 70.

[114] (n 99) 63.

[115] Alexes Harris and others, 'Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States' (2010) 115 American Journal of Sociology 1753; Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (Russell Sage Foundation 2016).

scope of work into which workers may be pushed, the double bind may be transformed into a double standard.

This dynamic operates most clearly in the widespread regime of court-ordered 'community service' intertwined with the imposition and collection of criminal legal fines and fees. Recent years have seen rising attention to, and legal attack on, what have been dubbed 'modern debtors prisons'.[116] These arise where defendants, typically low-income people of colour, face criminal fines and large multipliers of court fees, often for low-level misdemeanours or violations such as traffic tickets. Unable to pay, they face incarceration.

Most jurisdictions allow some form of 'community service' to be performed in lieu of paying certain criminal fines and fees, or at least in lieu of being incarcerated for non-payment.[117] Indeed, greater allowance and utilization of such community service is among commonly proposed solutions to incarceration for debt.[118]

Apart from any in-kind debt relief, community service programmes generally are entirely unpaid. Consistent with their 'community service' moniker, this unpaid character is part and parcel of a more general characterization as a form of 'volunteering'—despite the threat of incarceration that hovers over non-participation. As 'volunteers', the workers are deemed to work outside the employment relationship to which labour protections attach.[119] Defendants assigned to community service in Los Angeles, for instance, are required to sign agreements to this effect.[120] Similarly, participants in the Oklahoma drug court poultry processing scheme are deemed to be 'clients', not employees.[121]

In the poultry processing case, coercion into subordinated work operates directly—participants do not have even the nominal choice to take some other job. But where community service operates in lieu of paying criminal fines and fees, defendants generally retain the option of paying off the debt directly. Defendants generally would be better off taking even a lousy paying job and using the wages to pay down their criminal legal debt. But many do not do so, presumably because they cannot obtain such employment.

With regard to conventional employment, such workers are subjected to a genuine double bind—unable to find employment on the one hand, obligated to do so under carceral threat on the other. But that bind is incomplete precisely because 'community service' is made available to them, and the mandate obliges them to accept it. Work outside the employment relationship—and below the floor of labour standards—provides the solution.

This mirrors a familiar pattern from welfare work requirements where, for instance, the main US work-based 'welfare reform' statute allowed states to mandate participation in unpaid 'work experience' (often known as 'workfare') programmes 'if sufficient private sector employment is not available'.[122] Indeed, Simon drew on that example to propose that '[g]iven the grim prospects that released prisoners have of obtaining paid employment, we must also consider the potential of community service labor' to provide a pervasive

[116] Beth A Colgan, 'The Excessive Fines Clause: Challenging the Modern Debtors' Prison' (2018) 65 UCLA L Rev 2.

[117] Harris and others, 'Drawing Blood from Stones' (n 115).

[118] Alicia Bannon and others, 'Criminal Justice Debt: A Barrier to Reentry' (2010)https://www.brennancenter.org/our-work/research-reports/criminal-justice-debt-barrier-reentry>

[119] Sabine Tsuruda, 'Volunteer Work, Inclusivity, and Social Equality' in Hugh Collins and others (eds), *The Philosophical Foundations of Labour Law* (OUP 2018).

[120] Zatz and others, 'Get To Work or Go To Jail' (n 80).

[121] Harris and Walter, 'All Work. No Pay' (n 87).

[122] 42 USC 607(d)(4).

component of parole that could deliver the integrative benefits of employment.[123] Yet, as Sugie notes with regard to the highly precarious nature of the work actually performed by people recently released from prison, degraded forms of work may fail to deliver the socially integrative functions typically attributed to post-release employment and, instead, could even be criminogenic.[124]

Of course, the inability to find regular employment may be a function of many things, not only a criminal record. But the availability of community service or similar work programmes creates the structural possibility that even *complete exclusion* from the conventional labour market need not lead to non-work. Instead, it can operate in conjunction with work mandates to funnel workers into a secondary institution for structuring work, one that operates outside the prison but bears many of prison labour's legal characteristics as unprotected non-employment.

Although the 'community service' moniker may suggest limitations to non-profit or governmental organizations and to the production of public goods outside ordinary product markets, that need not be the case. My ongoing research in Los Angeles, for instance, finds substantial court-ordered community service placements in Goodwill Industries, which is organized as a not-for-profit but sells a range of household goods in the low-price retail market; there also are many for-profit entities that operate in sectors associated with non-profits, such as cemeteries. The potential for work pursuant to carceral mandates to be incorporated into conventional profit-making enterprises, and yet sharply differentiated from conventional employment, is also illustrated by the poultry-processing scheme referenced above,[125] by the modest but growing amount of contemporary prison in outside private firms,[126] and by its much larger historical footprint in US prisons.[127]

Intermediate possibilities also exist where work is institutionalized in forms below the ordinary legal floor for employment but without the full exemption from labour rights associated with community service. For instance, Los Angeles recently passed an ordinance raising the minimum wage to $15 an hour, part of the national Fight for $15 movement. That ordinance, however, contained a carve-out for transitional employment programmes aimed at formerly incarcerated people; such employers are allowed to pay sub-minimum wages.[128] The rationale, of course, was that any job is better than no job. In broadly similar spirit, Samuel Estreicher recently proposed reducing employment law protections for people with criminal convictions in order to incentivize employers to hire them.[129] In both cases, the 'any job is better than no job' notion is married to the promise that the substandard work is confined to a transitional period that enables the worker to then move on to standard employment with some other employer. But the structure of these schemes allows *the employer* to rely on permanently substandard positions through which successive temporary workers

[123] Simon, *Poor Discipline* (n 56) 263.

[124] Sugie (n 41). For a similar criticism of welfare work requirements, see Zatz, 'What Welfare Requires from Work' (n 101).

[125] Harris and Walter, 'All Work. No Pay' (n 87).

[126] Thompson (n 63).

[127] Rebecca M McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941* (CUP 2008).

[128] Los Angeles, Cal, Ordinance 184320 (1 June 2016), *codified as* Los Angeles Minimum Wage Ordinance, Ch XVIII Municipal Code, art 7 (2016).

[129] Samuel Estreicher, 'Achieving Antidiscrimination Objectives Through "Safe Harbor" Rules for Cases of Chronic Hiring Aversion' (2017) 2 Journal of Law & Public Affairs 1.

'churn'.[130] There is little evidence that such workers receive labour market benefits that extend beyond the subsidized period.[131]

All these examples highlight how problems of non-work are perennially vulnerable to being 'solved' with degraded work. Superficially, such solutions appear as efforts to overcome labour market exclusion. Implicitly, they draw their appeal from the idea of creating access *to the goods from which workers are being excluded*. But vindicating that principle requires access to jobs *comparable to those from which workers are excluded*. Instead, in a sleight of hand, the remedial imperative often gets stripped of any job quality benchmark; instead, it gets transformed into a generic imperative to work, under any conditions. That is how a double bind gets transformed into a downward ratchet. That ratchet is difficult to reverse because the availability of labour at substandard conditions undermines incentives to hire it at better ones.

Worse yet, pointing to the availability of such work—and the occasional reluctance of the excluded to accept it—can turn the tables and recast the outcome of structural exclusion (from better jobs) as the consequence of insufficient eagerness to work (in worse ones). This last risk is particularly acute when the workers in question are often doubly marked by racial stereotypes of laziness or unreliability and by institutions—through criminal conviction or child support arrears—that directly attribute irresponsibility.

G. Conclusion

To summarize, the US criminal legal system structures work in two distinct and seemingly contradictory ways. On the one hand, it excludes people *from* work. On the other, it coerces people *into* work. These phenomena do not simply operate at loggerheads. Instead, by incorporating attention to the *quality* of work in question, we can see how these seemingly opposing forces may act in complementary fashion. They may hoard better jobs for those not marked by the criminal legal system as undeserving while also driving people so marked into exploitation in worse jobs, indeed by creating new substandard tiers of work. These substandard tiers may be reserved specifically for people facing these carceral work mandates and may be touted as accommodations allowing them to achieve the holy grail of work, in any form.

Whether or not such grim possibilities come about, however, is a function of how binding these cross-cutting imperatives are in practice, in addition to how widely they are applied. This is, in significant part, a question of legal design.

With regard to the exclusionary dimension, active efforts are underway to expand access to better jobs for those marked by criminal legal system contact. Most prominent are attempts to reduce both employer hiring restrictions and legal prohibitions on employment; other efforts include hiring incentives for employers, skill-building for people with records,

[130] Sarah Hamersma and Carolyn Heinrich, 'Temporary Help Service Firms' Use of Employer Tax Credits: Implications for Disadvantaged Workers' Labor Market Outcomes' (2008) 74 Southern Economic Journal 1123.

[131] ibid; Shawn D Bushway and Robert Apel, 'A Signaling Perspective on Employment-Based Reentry Programming: Training Completion as a Desistance Signal' (2012) 11 Criminology & Public Policy 21.

and publicly supported credentialing techniques that identify those for whom a record is an especially weak signal of future risk.[132]

A complementary set of reforms could loosen the downward pressure from carceral work mandates. They are complementary in part because, even in the absence of exclusions based on criminal records, people with records independently face grim labour market prospects,[133] as do others who typically face carceral work mandates.

Short of simply eliminating the mandates, such reforms could operate in two different ways. One would expand the range of activities *permitted* to satisfy the mandate. This is the question so prominent in welfare work requirement debates over the appropriateness of education, training, rehabilitation, caregiving, and other forms of useful activity apart from employment.[134] In the criminal legal debt context, some current reform bills would allow education to satisfy community service mandates in lieu of payment.[135] In essence, such reforms create a range of permissible *destinations* for those exiting the labour market, thereby expanding opportunities to exit.

Another path focuses on which forms of work may legitimately be *rejected* without state-imposed consequence. This includes the standard parameters of work requirements in the social assistance and social insurance context, such as limitations on maximum hours, commuting time, or work below prevailing wages, and these can readily include compliance with ongoing standards within the work relationship, such as protections against harassment or retaliation on various protected grounds, from race to union activity. In essence, such reforms expand the range of jobs *from which* exit is permissible.

Both approaches mitigate the downward pressure from work mandates by enhancing exit rights, consistent with the fundamental role in constitutional and human rights law of prohibitions on forced labour[136] and with the renewed emphasis on labour exit rights in neo-republican theory.[137] The two techniques can be tied together when access to alternative activities is predicated on the unavailability of acceptable employment or, vice versa, permissible exit from substandard work is not unqualified but rather conditional on exit into a limited range of alternatives.

The two approaches can be integrated with active labour market policies to essentially create an alternative to the conventional labour market where that alternative consists of a minimally acceptable work opportunity. By raising labour standards towards those applicable to regular employment, this is functionally equivalent to converting community service into publicly created paying jobs of last resort, again as seen in the welfare-to-work context.[138] In this configuration, the cross-cutting pressures of exclusion and mandates

[132] Jennifer L Doleac, 'Increasing Employment for Individuals with Criminal Records' (Policy Memo 2016–2, The Hamilton Project October 2016) <www.hamiltonproject.org/assets/files/increasing_employment_individuals_criminal_records.PDF> accessed 7 August 2019.

[133] National Research Council, *The Growth of Incarceration in the United States* (n 71).

[134] Iris Marion Young, 'Autonomy, Welfare Reform, and the Meaningful Work' in Eva Feder Kittay and Ellen K Feder (eds), *The Subject of Care: Feminist Perspectives on Dependency* (Rowman & Littlefield 2003); Noah D Zatz, 'Welfare to What?' (2006) 57 Hastings Law Journal 1131.

[135] 'SB 1233 (McGuide): The Community Service Opportunities Act' (The Women's Foundation of California) <womensfoundca.org/sb-1233-fact-sheet/> accessed 17 December 2018.

[136] Pope (n 22); Zatz, 'A New Peonage?' (n 78).

[137] Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Collins and others, *Philosophical Foundations of Employment Law* (n 119).

[138] David T Ellwood and Elisabeth D Welty, 'Public Service Employment and Mandatory Work: A Policy Whose Time Has Come and Gone and Come Again?' in Rebecca M Blank and David E Card (eds), *Finding Jobs: Work and Welfare Reform* (Russell Sage Foundation 2000).

would still push people into work, but that work would sit at, not below, the bottom of the general labour market.

As this last possibility illustrates, focusing on job quality rather than the basic fact of coercion leaves some difficult questions for labour lawyers. The most fundamental one concerns the relative importance of formal, direct regulation of work relationships versus workers' underlying bargaining power founded in the availability of exit. Simply put, the offence of forced labour may persist even when workers are coerced only into 'good jobs'. When a worker still risks incarceration if the state deems him at fault for refusing, losing, or quitting the job, he will experience workplace dynamics that are different—and worse—than for a co-worker in the 'same' job but without personal liberty at stake.[139] Were this to be the biggest threat posed by carceral work mandates, however, it would be progress indeed.

[139] Linda Bosniak makes the analogous point that immigrant vulnerability to deportation necessarily defeats efforts to achieve equality with citizens via parity in employment rights. Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2006).