4 The Carceral Labor Continuum

BEYOND THE PRISON LABOR/FREE LABOR DIVIDE

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Prison labor is persistently scandalous. Incarcerated workers are at once sharply distinguished from "free labor" by their incarceration and yet intertwined with it through their work. For incarcerated workers to receive the pay, protections, and status accorded to free citizen-workers would violate the political demand of "less eligibility" (Melossi 2003); that principle requires that the state impose on those suffering criminal punishment conditions that visibly and viscerally convey degradation relative to those marked as "law abiding." Yet imposing that degradation also threatens free labor (McLennan 2008). It creates an alternative source of cheap, subordinated labor power, and it contradicts the notion that productive work engenders claims to citizenship.

To contain this scandal, the United States constructed a legal and institutional framework for prison labor that purported to carve "a wide moat between the sphere of the market and that of legal punishment" (McLennan 2008, 5). This framework simultaneously denies that incarcerated workers are workers at all (Zatz 2008) and constrains their use as economic substitutes for free labor (McLennan 2008; Thompson 2011).

This settlement has always been incomplete and potentially unstable. Incarceration without work, or productive work, invites its own less-eligibility challenges to state-supported "idleness" (McLennan 2008; McBride 2007). Penal institutions and private capital alike have financial interests in tapping this captive labor pool. Recent decades have laid the groundwork for a resurgence in prison labor (Thompson 2011; Weiss 2001). Simultaneously, movements against contemporary racialized mass incarceration, including those led by incarcerated people claiming the mantle and tactics of striking workers (Bonsu 2017), have treated prison labor as symptomatic of the "New Jim Crow" (Alexander 2012), a broader betrayal of freedom's promise.

This chapter questions a constant in the preceding sketch: the sharp distinction between prison labor and the free labor market outside. In contrast, I argue for a more capacious conception of "carceral labor" that sweeps in an array of work arrangements directly structured by the state's power to incarcerate. Prison labor—work performed by those currently incarcerated—is carceral labor of a distinct and important kind. Nonetheless, scholars and critics rightly speak of a "carceral state" anchored by penal incarceration but reaching far beyond it (Beckett and Murakawa 2012; Lynch 2012). So, too, should we situate prison labor within a more capacious analysis of how criminal law shapes and compels contemporary work, including ways that are integrated with that abstraction "the labor market," not fundamentally apart from or opposed to it.

The threat of state violence can hover over a worker's head even if the worker is not in state custody, let alone custody as punishment for a crime. For instance, a traffic ticket spawns fines and fees, and the debtor unable to pay gets a choice: go to jail or "work off" the debt doing "community service" (Herrera et al. 2019). Or a "diversion" program allows a defendant to avoid prosecution, conviction, or punishment in exchange for compliant participation in "services" offered as an alternative (McLeod 2012), such as working at a poultry processing plant as a purported method of drug rehabilitation (Harris and Walter 2017). Or a parent who owes child support faces prosecution for quitting a job or remaining jobless (Zatz 2016).

Such phenomena arise at a moment when the carceral state itself is changing. After decades of growth, incarceration rates have leveled off or

even declined. In tandem, however, state capacity has expanded for other forms of surveillance and control through diversion, probation, debt, and other techniques of supervision "in the community" (Phelps 2016; Lynch 2012). Enforcing work often appears as a means to impose accountability without incarceration. This dovetails with labor's centrality to the increasingly prominent "reentry movement" (Petersilia 2003; Travis 2005), which not only focuses on employment for formerly incarcerated or convicted people but also, with that in mind, constructs institutional continuity between inside and out (Taliaferro, Pham, and Cielinski 2016). Meanwhile, employers seek to pay less and control more. They do so at a time when nationalist mobilizations in the United States against both immigration and trade make employers more dependent on existing domestic workforces. All this occurs while organized labor—which drove what sequestration of prison labor did occur (Thompson 2011; McLennan 2008)—is in decline, state strategies of labor discipline are building on their triumph in welfare reform (Mead 2011), and the intertwined racist libels of laziness and criminality are as vital as ever.

Much is at stake in breaching the institutional separation between punishment and the economy. That separation lies at the foundation of "neoliberal penality" (Harcourt 2011), a specific iteration of the laissez-faire notion of a self-regulating economy operating on its inner market logic apart from state action (Polanyi 2001). Although scholars have long conceptualized incarceration as a regulator of total labor supply and as a means to manage or exploit unemployment (Rusche and Kirchheimer 1939; Wacquant 2009; Gilmore 2007; Western and Beckett 1999; cf. Parker in this volume), its capacity for forced labor has been assumed to operate outside the labor market and *inside* the prison (Melossi 2003). Carceral labor *outside* the prison suggests a need to revise accounts of how the criminal legal system operates as a labor market institution (Zatz 2020). Vice versa, it suggests the potential for critical accounts of "free labor" to go beyond attention to how markets are structured by criminal enforcement of property law (Harcourt 2011; Hale 1923)—which underwrite the "economic" pressure to "work or starve"—to more direct criminal regulation of work behavior (cf. Hatton 2018b). Such developments offer potentially powerful weapons for suppressing labor standards and labor

movement. However, by breaching the prison's stark separation between "criminal" and "worker," they also offer a potential material basis for new solidarities between the subjects of criminal law and the subjects of labor markets, now rendered together as subjected to a new, more integrated racialized political economy.

Carceral labor outside the prison may be new, but it is not novel. This chapter first motivates its contemporary account by reprising briefly the "old" Jim Crow era's admixture of criminal law and labor exploitation structured by and in the service of white supremacy. Convict leasing and chain gang systems were integrated with peonage, vagrancy laws, and other criminal legal regulation of work (Du Bois 1935; Hartman 1997; Haley 2016; Lichtenstein 1996; Daniel 1972; Blackmon 2008; Goluboff 2007; Childs 2015). These provide a foil for today's carceral work, even though critical scholarship of contemporary racialized mass incarceration tends to sequester that legacy in today's prisons (Davis 2000; Childs 2015; Alexander 2012). I then sketch the specific legal and institutional basis for the post–New Deal sequestration of carceral work in prisons and the further separation of that prison labor from the conventional labor market. Both are grounded in a hierarchical distinction between the citizen-subjects of "free labor" and the degraded threat of incarcerated people.

This separation, however, has always been incomplete. The reasons arise both from fissures within "free labor" and from the fallacy of treating nonmarket institutions as noneconomic. Conversely, the boundary between incarceration and freedom is itself indistinct. For this reason, parole and work release provide sites to study how carceral work moves beyond incarceration. Turning to criminal legal debt then shows how carceral work can operate without any prior sentence of incarceration. This illustrates how, once viewed through the lens of carceral labor beyond the prison, what is often termed the "new debtors' prison" may be more fully understood as a "new peonage." Both parole and criminal legal debt suggest how keystones of progressive criminal justice reform—"reentry" policy and "alternatives to incarceration"—may accelerate carceral labor beyond the prison. They may do so uncritically just insofar as such efforts are viewed exclusively through the lens of criminal justice policy and not as forms of labor market regulation. By judging working conditions relative to the brutality of incarceration, and by treating work as an unalloyed good independent of

its conditions, the door opens to new forms of labor subordination that reproduce the dilemmas and hierarchies of prison labor on a grander scale.

JIM CROW CARCERAL LABOR INSIDE AND OUTSIDE CUSTODIAL CRIMINAL SENTENCES

The Jim Crow era both stimulates imagination of grim possibility and operates as a touchstone for critical analysis of contemporary configurations of race, labor, and state power. In the period stretching from the abolition of chattel slavery to World War II, the Southern race/labor system was transformed into a regime often referred to as "neoslavery" for African Americans (Du Bois 1935; Hartman 1997; Blackmon 2008; Childs 2015; Haley 2016). Rather than any single practice, there was an interlocking, evolving set of practices that subjected Black workers to violent exploitation benefitting a range of white actors and upholding white supremacy more generally.

The best-known elements of Jim Crow carceral labor were the convict lease and the chain gang, both forms of custodial "hard labor" pursuant to a criminal sentence. As such, they have been incorporated into the history of punishment in the United States generally (McLennan 2008) and analyzed as a prehistory of contemporary mass incarceration specifically (Davis 2000; Childs 2015; Alexander 2012). The early twentieth century saw road work on the chain gang succeed the convict lease throughout much of the South (Lichtenstein 1996; Blackmon 2008). This substituted public for private control (Haley 2016; Childs 2015) but otherwise maintained many essential features: brutal working and living conditions, extreme racial targeting of African Americans, and operation outside any permanent state facility. Both privatized prison labor and public chain gangs functioned in the North and West as well (Lytle Hernández 2017; McLennan 2008), but in qualitatively different ways that mitigated their harshness, productivity, and racialization.

The productive outputs of convict leasing and the chain gang were deeply integrated into the Southern economy. Its coal mines, steel mills, and turpentine camps all sold convict-produced goods, and Southern industry (and public finance) relied on convict-produced public infrastructure (Haley 2016; Lichtenstein 1996; Blackmon 2008). Such integration

into product markets became the main target of the prison labor regulation recounted below, but it leaves out another dimension.

Jim Crow carceral labor also was thoroughly integrated into Southern *labor markets*, contrary to any sharp divide between penal custody and free labor, or between emancipation and enslavement (Hartman 1997). The institution of the criminal surety illustrates this continuity. Many sentences to hard labor were not directly imposed but were, instead, the consequence of being unable to pay criminal fines and fees, often for minor crimes (Blackmon 2008; Haley 2016). As an alternative, a local employer acting as a "surety" could pay off the worker's criminal legal debts. In exchange, the worker became bound to the employer in a long-term labor contract to pay off the debt now held in private hands (Blackmon 2008; Daniel 1972; cf. Lytle Hernández 2017). Employer control was backed up by the force of criminal laws that specifically punished failure to perform the surety contract. Thus was created the functional equivalent of the convict lease without any formal criminal sentence (Childs 2015).

The surety system straddled formal punishment on one side and the more general system of debt peonage on the other. Wage advances tied to labor contracts were a routine part of economic life structured to preserve Black agricultural laborers' desperate economic dependence in a state of "indebted servitude" (Hartman 1997). Debts could easily be manufactured (Kelley 1990; Blackmon 2008) based on a white landowner's claims of a broken tool or stolen crop. If denied by the worker, such charges might then be taken up by the local sheriff as accusations of criminal theft. From Reconstruction through World War II, Southern states criminalized workers' failure to complete labor contracts when those contracts were in part a mechanism of debt repayment (Du Bois 1935; Goluboff 2007; Blackmon 2008; Daniel 1972). Private employers thus could trigger public violence—arrest, prosecution, and the threat of the convict lease or chain gang—against workers who sought to leave.

While peonage prevented workers from quitting, other laws criminalized unemployment and labor mobility (Blackmon 2008; Daniel 1972; Goluboff 2007). The most general and notorious was the crime of vagrancy for being out in public "with no visible means of support," again not confined to the South (Stanley 1998; White 2004; Lytle Hernández 2017), but elsewhere seemingly less pervasively utilized to coerce and discipline labor.

These interlocking forms of racialized labor coercion structured by criminal law are well known as descriptions of the period. Nonetheless, they recede—or are sequestered in the prison—when Jim Crow is used as a prism through which to view contemporary life (Dawson and Francis 2016). Perhaps the most common reduction simply writes labor coercion out of civil rights narratives in which racism at work is understood exclusively through the anti-discrimination framework developed through and after *Brown v. Board of Education* (Goluboff 2007; Frymer 2008). Even resolutely structural accounts of racial hierarchy emphasize *exclusion* from good work, leaving Black workers suspended between bad jobs and unemployment. In this vein, Michelle Alexander deploys the "New Jim Crow" to understand how today's carceral state "permanently locks a huge percentage of the African American community out of the mainstream society and economy" (2012, 13). This framework likewise animates reentry scholarship and advocacy focused on criminal records and debt as "barriers to employment" (Bushway, Stoll, and Weiman 2007; Bannon, Nagrecha, and Diller 2010). There is no peonage and forced labor in that story.

This sidelining of subordination *through* labor—not only exclusion from it—can occur even when Jim Crow carceral labor provides the bridge between slavery and contemporary mass incarceration (Davis 2000). Dennis Childs uses physical brutality and confinement to trace an arc from slavery through "convict leasing, peonage, the 'fine/fee system,' and criminal surety" (2015, 8) and into the "coffin-simulating boxcar cells of today's prison-industrial complex (PIC)" (2015, 2). He defends this continuity as consistent with "those entombed within the modern penitentiary . . . not actually producing goods for corporations" because "the mass warehousing of today's PIC" updates the "cargoing of human beings that took place during chattel slavery. . . . The object of commodification in today's neoslavery is therefore not the neoslaves' *labor* but their warehoused *bodies*" (Childs 2015, 190n9). Thus, not only is the contemporary referent incarceration alone rather than a wider racialized labor regime, but even within incarceration, prison labor is sidelined.

Focusing on brutal confinement aligns Childs's account with the influential "warehousing" characterization of the contemporary carceral state (Wacquant 2009; Simon 2007; Lytle Hernández 2017). There, prison labor is understood to have ceased to play any significant role (McLennan

2008; McBride 2007) and to have been replaced by a brutal "idleness" or isolation, epitomized by solitary confinement and the super-max (Simon 2007; Childs 2015). Any integration with the broader political economy operates not through inmates' labor but through the capitalization, construction, and operation of prisons and jails (Gilmore 2007); these complement the integration of policing with gentrification (Stuart 2011), on the one hand, and the carceral state's management of a deteriorating labor market and safety net on the other (Wacquant 2009).

Against the warehousing notion, Heather Ann Thompson describes "a new era of forced labor for America's inmates," one that "eerily echoes the previous exploitative and brutal era of prison labor that flourished in America from 1865 through the New Deal" (2011, 35). Thompson thus highlights carceral labor in the present but confines it to the prison; the resulting historical lineage runs through the convict lease but leaves aside its integration with vagrancy, peonage, and the criminal surety. These are similarly absent from McLennan's incorporation of the Southern convict lease and chain gang into her history of prison labor (2008). In such narratives, carceral work occurs distinctly outside the labor market but then interacts with it when prison labor's output comes into product market competition with market labor's output.

THE LEGAL CONSTRUCTION OF THE PRISON LABOR/FREE LABOR DICHOTOMY

Although the Jim Crow era illustrated the potential economic integration of carceral labor, scholarship has treated carceral labor as largely a relic of the past and at most sequestered within incarceration, walled off from contemporary labor markets. That view mirrors a historically specific sociolegal project of institutionalizing a separation between criminal justice and the economy. This section traces the development of the legal and ideological infrastructure undergirding that apparent separation; subsequent sections turn to the permeability of these boundaries and the contemporary practices that traverse them.

Relative to a baseline like the pre–World War II Jim Crow South, erecting a barrier between spheres of penality and economy requires several

distinct, complementary efforts. With regard to prison labor, this separation operates through two prongs: first, allowing prison labor only insofar as its products are isolated from the "the market" where they could compete with the products of free labor; second, separating the legal status of prison labor from that of free labor so as to make them legally and institutionally incomparable (Hatton 2017). Both prongs, however, take for granted a clear distinction between those in carceral custody and those working in the "free" world; in other words, they take for granted the absence of carceral labor beyond the prison. Indeed, the introduction in the South of state-run chain gangs and penal farms was itself part of constructing this boundary, a shift from the convict-leasing era when criminal defendants were placed in the custody of private firms and no large-scale prison infrastructure existed (Haley 2016; Lichtenstein 1996; McLennan 2008).

The sequestration of carceral labor in the prison thus required not only a transformation in convict labor but also the decline or erasure of carceral labor beyond the prison, in noncustodial contexts. All three components—separating prison labor from product markets, distancing remaining incarcerated workers from rights-bearing free workers, and establishing the free labor market as devoid of carceral influence—work together to affirm and create prison labor's distinction from free labor, a freedom incompatible with carceral labor outside the prison.

The Constitution of Free Labor

Unlike the transformations in prison labor discussed in the next subsection, the mid-twentieth-century decline in peonage, vagrancy, and other structures of carceral labor outside the prison is more assumed than understood. Their suppression, however, is essential to the construction of a market in "free labor" apart from penal coercion. Blackmon treats these practices as having been abruptly abolished when wartime geopolitical considerations prompted the Franklin Delano Roosevelt administration to turn against Southern peonage (2008). That turn spurred newly vigorous enforcement of federal anti-peonage laws (Goluboff 2007). This included securing the Supreme Court's reaffirmation in *Pollock v. Williams* (1944) of its Thirteenth Amendment peonage jurisprudence from the 1910s, which had become a dead letter in the interim (Daniel 1972; Blackmon 2008).

The essence of that peonage jurisprudence was to define labor freedom as the absence of criminal sanction. Thus, the Supreme Court in *Bailey v. Alabama* held "involuntary servitude" to arise under any law that would "compel the service or labor by making it a crime to refuse or fail to perform it" (1911, 243). With this rationale, the Court struck down a "false pretenses" law that had criminalized quitting an employer to whom a worker was indebted for a wage advance. Several years, later, it struck down a functionally similar criminal surety law (*United States v. Reynolds* 1914).

The post–World War II years also saw a rewriting and broadening of the statutory scheme enforcing the Thirteenth Amendment, including the direct criminalization of involuntary servitude without reliance on the element of debt that had been critical to peonage prosecutions.[1] Less clear is how these changes persisted after the wartime effort faded and attention turned to antidiscrimination frameworks (Goluboff 2007). Indeed, at least some traces of peonage continued into the 1960s (Daniel 1972).

Vagrancy law and its kin suffered no similar frontal assault on free labor grounds. Instead, by the time vagrancy fell into constitutional disgrace during the 1960s, its association with labor discipline already had faded (Goluboff 2016). In 1967, New York's highest court sidestepped the Thirteenth Amendment issue because "vagrancy laws have been abandoned by our governmental authorities as a means of 'persuading' unemployed poor persons to seek work" (*Fenster v. Leary* 1967, 429–30). Such "persuasion" would be incongruous "in this era of widespread efforts to motivate and educate the poor toward economic betterment of themselves, of the 'War on Poverty' and all its varied programs" (429).[2]

By the time the US Supreme Court struck down vagrancy laws in 1971, the Thirteenth Amendment was not even mentioned (*Papachristou v. City of Jacksonville* 1971). The criminalization of unemployment had dissolved into a question of cultural nonconformity: "If some carefree type of fellow is satisfied to work just so much, and no more, as will pay for one square meal, some wine, and a flophouse daily, but a court thinks this kind of living subhuman, the fellow can be forced to raise his sights or go to jail as a vagrant" (1971, 170). None of the 1,624 subsequent cases citing *Papachristou* discuss vagrancy's history as labor regulation or its connection to neoslavery.[3]

It appears, then, that the postwar era saw a marked retreat in the actual practice of carceral labor outside the prison and a legal infrastructure at least partially suited to compel that retreat. Yet rather than being the object of iconic struggles, peonage, vagrancy, and the like also faded from legal anti-canon of Jim Crow practices to be avoided and distinguished.

Isolating the Products of Prison Labor from "the Economy"

In the pre-WWII era, the market integration of production by incarcerated people posed practical problems for "free labor": the constant wage and strike discipline from the threat of substituting carceral labor (Blackmon 2008; Thompson 2011; Lichtenstein 1996). A series of midcentury federal laws attempted to insulate "free labor" (racialized white [Roediger 1999])—and the firms employing it—from such competition with enterprises that could draw on a captive labor force (Thompson 2011). These developments nationalized a legislative strategy that organized labor had deployed with increasing success at the state level since the late nineteenth century (McLennan 2008).

The first federal volley came in 1929 when Congress passed the Hawes-Cooper Act, which explicitly authorized states to apply their own regulations restricting sales of goods produced by prisoners in other states. Hawes-Cooper thereby removed the otherwise serious threat that such state restrictions would be struck down for improperly intruding on Congress's jurisdiction over interstate commerce (McLennan 2008). In *Whitfield v. Ohio* (1936), Ohio convicted a man for selling shirts manufactured in an Alabama prison in violation of Ohio's 1912 law against selling prisoner-made goods "on the open market in this state" (434). The Supreme Court upheld the conviction and Hawes-Cooper's legitimation of it. The Court explained the underlying policy that "free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison" (439).

Congress then repeatedly built on Hawes-Cooper's foundation. The Ashurst-Sumners Act of 1935 directly criminalized under federal law the interstate transportation of inmate-produced goods for sale or use in violation of the receiving state's law. *Kentucky Whip & Collar Co. v. Illinois*

Central Railroad Co. (1937) upheld application of the statute to a railroad, with the Court reciting *Whitfield*'s "free labor" rationale. Next, the Sumners-Amherst Act of 1940 made it a federal crime to conduct interstate commerce in prisoner-produced goods, regardless of state policy. The basic terms and structure of Sumners-Amherst were preserved during a reorganization of federal criminal statutes in 1948.[4] They persist to the present day (18 U.S.C. § 1761–62), with some important modifications discussed below.[5]

These state and federal laws made no attempt to outlaw prison labor altogether. Rather, their prohibitions on market access were coupled with the affirmative construction of a system of "state use" (McLennan 2008) under which government entities could freely purchase and use goods manufactured by incarcerated people. Sumners-Amherst, for instance, has always exempted "commodities manufactured in Federal or District of Columbia penal and correctional institutions for use by the Federal Government," as well as "commodities manufactured in any State penal or correctional institution for use by any other State, or States, or political subdivisions thereof."

State-use regimes preserve prison labor while attempting to separate it from the market. That effort inevitably stumbles over governments' role as economic actors that hire labor and purchase goods and services. This point plagued the chain gang, a "state use" innovation. Although public roads are not sold, they still can be built with private contractors employing "free labor" (Lytle Hernández 2014; Lichtenstein 1996), and so those interests unsurprisingly preferred to suppress the chain gang in favor of the penitentiary.

Congress eventually federalized protections against chain gang displacement of private contractors and their (white) "free labor" workforce. This time it used the leverage of federal spending and, in 1932, barred the use of convict labor on any federally funded state road project (Myers and Massey 1991).[6] The sponsor, New York representative Fiorello LaGuardia, argued in terms familiar from *Whitfield* and *Kentucky Whip and Collar*: "Every convict working in this way takes a place of a free laborer or an unemployed man who obeys the law and wants to live and support a family honestly. Every convict used displaces an unemployed worker."[7] LaGuardia's restriction was renewed annually and eventually codified.[8] It remains in place today (23 U.S.C. § 114(b)). These road-building restrictions extended

an older patchwork of prohibitions on federal agencies' and contractors' use of state prisoners (McLennan 2008).[9] The Walsh-Healey Act of 1936 more generally prohibited use of prison labor to fulfill federal contracts for goods.

Isolating Incarcerated Workers from "Free Labor"

These efforts to protect "free labor" in the "free market" have been complemented by the legal degradation of incarcerated workers. As I have shown elsewhere (Zatz 2008), courts largely have rejected incarcerated workers' claims to basic statutory employment rights. They do so on the theory that those rights were meant to constrain only the contractual relationships of the free labor market. They do not apply to work organized through the distinct penal logics of the "separate world of the prison," where "[p]risoners are essentially taken out of the national economy" (*Vanskike v. Peters* 1992, 810).

The prison labor cases often cite Sumners-Amherst and related laws to demonstrate both that this separation exists and that it protects "free world" workers from being undercut by unprotected incarcerated workers (*Hale v. Arizona* 1993). Thus, the working conditions of incarcerated workers already are severed from those of "free labor," rendering superfluous the "fair competition" rationale for employment protections (Harris 2000). Even when Sumners-Amherst and its ilk do not apply, however, courts nonetheless insist upon—and construct—prison labor's separation from market work by denying employment rights on the "separate world" rationale. For instance, incarcerated workers performing data entry and telemarketing for private corporations have lost claims on this basis, notwithstanding that these services fall outside Sumners-Amherst's rule for goods (*McMaster v. Minnesota* 1994; *George v. SC Data Center, Inc.* 1995).

THE INCOMPLETENESS AND EROSION OF PRISON LABOR'S ISOLATION

Notwithstanding these efforts at separation, the boundaries between the criminal legal system and the labor market were always porous and have

become more so. This section focuses on how even conventional prison labor is not truly sequestered.

First, the structures described above do not even purport to hermetically seal off prison labor from all conventional market activity. Sumners-Amherst from the beginning and through today applies only to manufactured goods, explicitly exempting agricultural products. Similarly, services lie beyond the statute's reach (Office of Justice Programs 1999, 17,009), escaping even textual mention. Likewise, the Service Contract Act of 1965 (41 U.S.C. § 6703), which governs federal services contracts, contains no convict labor provisions and never has, in direct contrast to Walsh-Healey's provisions governing purchases of goods; the two procurement statutes contain analogous labor protections in other respects. This emphasis on the manufacturing sector mirrors the pattern of New Deal employment laws that focused on protecting workers in sectors dominated by and associated with white men (Palmer 1995; Mettler 1998). Thus, the prison/market dichotomy appears to be substantially bolstered by the specific race/gender configuration of "free labor" and the labor movement campaigns to protect it.

Second, as noted earlier, even where a state-use regime is enforced, it cannot fully isolate prison labor from "the economy" because the state itself engages massively in economic activity. Even the most extreme version of state use—"prison housework" (Zatz 2008) like cleaning, cooking, and laundry used directly in prison operations without sale or benefit to another government agency—interacts with "outside" labor markets. That is because "there is presumably someone in the outside world who could be hired to do the job" instead (*Vanskike v. Peters* 1992, 811). This is how prison officials are able to tout prison labor as saving taxpayers money, as with California's claim that its incarcerated firefighters annually save the state about $100 million that would otherwise be spent to hire civilian firefighters (Helmick 2017). Private prisons also blur the line between prison labor and the "private" market because even prison housework contributes to private profit (Thompson 2011; Stevens in this volume). Nonetheless, courts confronting such cases remain committed ideologically to the separate, unprotected status of incarcerated workers (*Vanskike v. Peters* 1992; *Bennett v. Frank* 2005).

The general boundary problem can be seen in efforts to define the scope of prohibitions on convict labor in federally funded road projects.

An early regulation barred not only convict labor directly on the road site but also installation of prison-made goods such as drain tiles, signage, and waterworks. This regulation was eventually struck down as beyond the statutory prohibition on using convict labor "in construction."[10] Congress then reinstated the prohibition by clarifying that it covered "materials produced by convict labor."[11] Several cycles of repeal, reinstatement, and modification have ensued.[12] Nothing, however, would seem to prevent using prison labor to produce the uniforms worn by "free labor" road crews, and so on.

The separation between prison labor and the market appears better understood as an ideological assertion than a descriptive reality. It provides through distinction an occasion for chest-thumping about how in the ordinary case "labor is exchanged for wages in a free market" (*Hale v. Arizona* 1993, 1394). Meanwhile, large swaths of the conventional labor market are not, in fact, shielded from competition with enterprises reliant on incarcerated workers. By virtue of the prison labor employment doctrine, such enterprises may utilize inmate labor without restraint by employment law.

Third, even these partial barriers have begun to recede since the 1970s (Thompson 2011). Most prominently, Sumners-Amherst was amended in 1979 to create the Prison Industry Enhancement (PIE) program.[13] This amendment authorized pilot programs to employ incarcerated workers in production for sale to, or managed by, for-profit, private sector firms. An additional amendment in 1996 broadened the "state use" exception to include sales to nongovernmental, not-for-profit organizations.[14] Meanwhile, in the states, prominent efforts have been underway to expand prison labor programs (Travis 2005) in tandem with the expanding prison population, worsening prison conditions, and retrenchment in education and supportive services.

Thus, the idea that productive labor has been banished from contemporary US prisons is overstated, as is the corollary that today's prisoners are left either "idle" or engaged in purely punitive make-work (McBride 2007). One Louisiana sheriff recently made news by complaining about new laws that would reduce his jail's population of state prisoners, objecting that this would include "some good ones that we use every day to wash cars, to change oil in our cars, to cook in the kitchens, to do all that where

we save money" (Miller 2017). California has made similar, if less vivid, arguments about the tension between decarceration and its reliance on incarcerated labor to fight wildfires.

The overall scale of contemporary prison labor is more difficult to assess. Looking solely at the number of workers employed in "prison industries" engaged in sales to outside entities, the percentages appear quite modest compared to the pre-WWII heydays of convict leasing and the Northern contract system (McLennan 2008). One recent analysis of the federal Survey of Inmates in State and Federal Correctional Facilities found that, in the early 2000s, only about 3 percent of inmates worked in prison industries (Crittenden, Koons-Witt, and Kaminski 2016). Another source puts the combined percentage in prison industries and farms at 11 percent (Camp 2003). But by casting a wider net including work on institutional maintenance, public facilities, and agricultural production, the same study puts prison labor participation at about 50 percent (Camp 2003; cf. Stephan 2008). That is only modestly smaller than what Gresham Sykes found in his classic study of a New Jersey prison in the 1950s (1971), where about half worked in some kind of direct state-use activity and more worked in institutional upkeep. Although these figures do not capture the intensity or hours of work, they suggest that the contrast between the post-WWII and earlier periods is less stark than often asserted.

Beyond the character and scale of prison labor itself, the robustness of its separation from market labor also turns on a more neglected question: the absence of any carceral character from the market labor conventionally deemed "free." The next section returns to labor under the demands and supervision of the criminal legal system *among those not currently incarcerated*.

PAROLE, WORK RELEASE, AND THE BOUNDARIES OF INCARCERATION

The previous section provided a glimpse of the ongoing sociolegal negotiation of the spherical boundaries that structure "neoliberal penality" (Harcourt 2011), particularly the designation of when convict labor production crosses into "the market" and triggers a crackdown. That such

production *originates outside the economy* in the penal sphere is never in question, reflecting the notion that the exercise of state power is fundamentally noneconomic. This section turns to the converse problem. Here, the firms doing the buying and selling are anchored in "the market" and thus their activities are deemed forthrightly economic from the outset. In this context, policing violations of the economy/penality distinction proceeds against the backdrop notion that market ordering operates autonomously from state power, and so it becomes problematic for workers in "the economy" to be under penal control. Roughly speaking, the previous section concerns keeping prison production in the prison, outside the economy, while this section concerns grounding market production in labor markets, away from the prison and its workforce. Again, however, the boundary is troubled, here because criminal legal supervision itself is more varied than an all-or-nothing contrast between incarceration and freedom.

Work on Parole

Employment while on parole provides a simple example of carceral work both beyond the prison and yet firmly located within the labor market. Similar points apply to probation and supervised release. Together, these forms of criminal legal supervision pursuant to a criminal sentence, but outside incarceration, currently affect nearly five million people beyond the over two million incarcerated at any one time (Kaeble and Glaze 2016).

For the purpose of doctrines related to prison labor, parolees generally are treated as members of "free labor." Since Hawes-Cooper in 1929, almost all the previously cited federal prohibitions on integrating convict labor into "the market" include an explicit exception for people currently serving a criminal sentence while on probation or parole. So, too, did the state laws like the Ohio prohibition at issue in *Whitfield*, laws that preceded and prompted their federal counterparts. Indeed, such exceptions were essential to the structure of parole, which initially was limited to prisoners who had a specific outside job offer that parole would allow them to accept (Simon 1993). Without this parole exception, however, extending such job offers typically would have been a federal crime once Sumners-Amherst criminalized commerce in goods produced with convict labor.

In some cases, the parole exception amplified the previously noted exclusion of inmate-provided services from prohibitions centered in manufacturing and construction. Thus, Sarah Haley describes how Georgia's creation of parole alongside its elimination of the convict lease led to the parole of incarcerated Black women into domestic service in the homes of white families (2016). Unlike the contemporaneous expansion of the chain gang, this practice would lie beyond the reach of the subsequent federal restrictions on convict labor; it presented only continuity with Black women's domestic work from slavery onward and not in competition with sectors claimed by white men for free labor.

More generally, though, the parole exception challenges the divide between criminal regulation and market freedom. The exception's textual structure shows the practical difficulty. Sumners-Amherst, for instance, applies to work performed by "convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation" (18 U.S.C. § 1761(a)). These forms of criminal legal supervision are aspects of a criminal sentence, and so they operate by virtue of someone's status as a "convict." Strikingly, the Thirteenth Amendment's textual exception applies to "punishment for crime whereof the party shall have been duly convicted," and so there is a plausible textual argument that these forms of supervised release fall within the penal exception alongside actual incarceration (but cf. Pope 2020). Sumners-Amherst and other prison labor sequestration statutes, however, take the contrary approach. They incorporate people under noncustodial supervision into the body of "free labor"—at least for the limited purpose of allowing employers to use that labor without penalty or restriction.

For the workers under noncustodial supervision, however, that freedom looks rather different. Work requirements are ubiquitous conditions of parole, probation, and supervised release, following only general injunctions to "obey all laws" and procedural requirements to maintain contact with supervising officers (Petersilia 2003; Doherty 2015; Travis and Stacey 2010). This means that, in principle, parolees can be incarcerated for failing to find a job, for quitting or refusing a job, or for working at a job that fails to maximize earnings (Zatz 2020). Deciding whether someone is responsible for these outcomes immediately opens the door to a vast set of personal and political judgments about the causes of unemployment and

the suitability of jobs (Gurusami 2017). Such judgments are most familiar in the administration of work requirements in social welfare programs (Williams 1999) and are profoundly shaped by race, gender, immigration status, and a host of other differentiating considerations (Soss, Fording, and Schram 2011; Roberts 1996; Waldinger and Lichter 2003).

We know strikingly little about how these work requirements operate in practice. In his classic book twenty-five years ago, Jonathan Simon argued that employment's historical centrality to parole had withered over the twentieth century, to the point that not only was a job offer no longer necessary for initial release but also that post-release work requirements went unenforced (Simon 1993, 164–65). More recent treatments largely ignore work requirements (Petersilia 2003; Travis 2005), though there is some evidence that their prevalence has rebounded and apply almost universally, at least on paper (Travis and Stacey 2010).

The limited available evidence suggests that work requirements are hardly a dead letter. As of the early 2000s, at any one time about nine thousand people nationally were held in prisons or jails on the basis of parole or probation revocations for failure to comply with work requirements (Zatz et al. 2016); those findings are consistent with earlier data showing that about 1 percent of parole revocations nationally are based on nonwork (Petersilia 2003, 151). Those figures enlarge substantially, but still within the same order of magnitude, after incorporating revocations for failure to pay fines, fees, and child support; these are tightly intertwined with work requirements as discussed further below. A recent Kentucky case, for instance, upheld a parole revocation based technically in nonpayment of child support but substantively in the defendant's responsibility for having gotten fired from his job (*Batton v. Com. ex rel. Noble* 2012). Moreover, work requirements can operate indirectly, where suitable employment is deemed evidence of rehabilitation or its potential, and such judgments then shape whether some other violation becomes the basis for revocation (Gurusami 2017; Simon 1993, 221).

Even if work requirements are an infrequent basis for (re)incarceration, the credible threat of incarceration may still shape labor market participation among those *complying* with the mandate, or attempting to (Augustine 2019; Purser in this volume). Susila Gurusami's recent ethnographic study of Black women under probation or parole supervision in

Los Angeles found that their employment status was a mainstay of interactions with parole and probation officers (2017). Agents pressured them to work longer, more regular hours; avoid informal work; and prioritize immediate service sector work over efforts to improve skills or health that might sustain longer-term economic security. A recent investigative report detailed how an Oklahoma court-ordered residential drug treatment program was structured around mandatory work assignments at a poultry processing plant (Harris and Walter 2017); although the report profiles one worker who was incarcerated after becoming unable to work due to on-the-job injury, hundreds more abided brutal conditions and no pay.

Pressure from criminal justice actors also can become a resource for employers (Simon 1993). A brochure advertising a New Orleans reentry employment program touts the benefits of hiring through the program: "Oversight: Probation Officers and Case Managers are your HR Department" and "Motivation: Gainful employment is their ticket to Freedom and a changed life."[15] As a judge in a Syracuse, New York, drug court explained to a defendant, "When [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" (Nolan 2002, 32). Gretchen Purser's contribution to this volume explores in depth how the threat of a parole violation for job loss creates a situation in which "you put up with anything" from the employer.

There are some indications that such pressures affect aggregate labor market outcomes. One prominent study of post-incarceration employment found an *increase* in employment during the immediate post-release period relative to the pre-incarceration baseline (Pettit and Lyons 2007); this runs contrary to the notion that recent criminal legal involvement functions primarily as a "barrier to employment," though in this case there also were subsequent reductions in employment. The authors speculate that the initial increase could be attributed to employment services provided through parole, but they fail to consider that it might instead reflect the pressures of work enforcement, recently termed "parolefare" in another study finding similar post-release employment increases (Seim and Harding 2020). The latter would be consistent with evidence that parole often offers more "hassle" than "help" (Gurusami 2017), to use the distinction from the welfare work requirements literature (Mead 2007). It also coheres with evidence from the same study that parolee wages fell even

as employment grew (Pettit and Lyons 2007), consistent with evidence that mandatory work programs in the related child-support enforcement and welfare contexts lower rather than raise wage rates (Schroeder and Doughty 2009; Cancian et al. 2002; Zatz and Stoll 2020); such findings suggest that the programs raise employment by pushing people into worse jobs, not by opening doors to better ones.

Work Release and the Incarceration-Parole Continuum

The previous section showed how parole troubles the notion of a sharp boundary between carceral labor in the prison and free labor in the market. Parolee labor operates in the shadow of carceral threat even while workers and their employers stand outside the legal regimes that restrict commerce in prisoner-produced goods and that strip inmates of the protections of standard labor and employment law. This section further shows how the boundary between prison labor and parolee labor is itself far from clear. In other words, prison labor and parolee labor are legally very different, yet not always easy to tell apart.

In principle, quite a lot is at stake in distinguishing work performed by "convicts or prisoners" generally from that performed by "convicts or prisoners on parole, supervised release, or probation" (18 U.S.C. § 1761(a)). Employers selling goods produced by the former commit a federal crime; those selling goods produced by the latter do not. Despite this, I have not been able to locate any litigation about where to draw this line.

The only known dispute was an administrative one concerning the closely related prohibition of convict labor on federally funded roads projects, again with an exception for "convicts who are on parole, supervised release, or probation" (23 U.S.C. § 114(b)(1)). In 1996, South Dakota sought to use incarcerated workers for a variety of "transportation enhancement projects," including landscaping, as part of a "Community Service Program for Minimum Risk and Low/Medium Risk Inmates" (Federal Highway Administration 1996). The work would be done through a community partner and was characterized as a form of "work release." South Dakota sought to include this program under the statutorily exempted term "supervised release," thereby rendering it permissible to utilize this labor source on a federally funded highway project.

The Federal Highway Administration rejected the state's request. It reasoned that the 1984 addition of "supervised release" to the long-standing parole/probation exception was not meant to be a substantive expansion; instead, it simply accounted terminologically for the federal government's adoption of "supervised release" as the name for post-release supervision of federal prisoners. The agency limited the exemption to "supervision after imprisonment," as opposed to "convicts on inmate status." Therefore, the South Dakota work release program fell outside the exception and was therefore prohibited. The US Department of Labor has provided the same interpretation of analogous language in Sumners-Amherst (Office of Justice Programs 1999, 17,008).

What if these South Dakota workers had challenged their working conditions? Where, in other words, does the boundary lie between the legal regime stripping incarcerated workers of employment rights and the one governing "free labor"? It is hard to say.

On the one hand, and unlike Sumners-Amherst, the prison labor employment cases generally *do* treat work release differently than other forms of work by currently incarcerated workers. Unlike other forms of prison labor, worker protections do apply to "work release" programs that operate outside the prison and involve employment by a separate entity that is not catering to the prison's institutional needs. Several cases have allowed workers' claims to proceed under those circumstances (*Watson v. Graves* 1990; *Barnett v. Young Men's Christian Ass'n* 1999; *Walker v. City of Elba* 1994).[16] Courts rejecting inmate claims typically distinguish them from the work release cases because in the latter, "those prisoners weren't working as prison labor, but as free laborers in transition to their expected discharge from the prison" (*Bennett v. Frank*, 2005, 410).

On the other hand, work release easily could be characterized as *not* involving a "free labor" arrangement but instead as possessing those features that courts have found indicative of non-employee status for incarcerated workers. Work release programs often involve some mandatory aspects, including sanctions for refusing to participate at the outset (Drake 2007, 5) and returns to prison from community-based (but still custodial) facilities for failure to maintain employment (Jung 2014; Turner and Petersilia 1996). In some prison labor cases, mandatory work participation has been deemed sufficient to take workers

outside the protected realm of "free labor" even when, as is typical of work release, they could choose particular jobs or work assignments (*Burleson v. State of California* 1996); indeed, that analysis would seem to reach parolees, too.

Furthermore, the rationale for work release programs (and, again, parole work requirements) is replete with the language and practice of rehabilitation. This includes integration with services such as drug treatment (Martin et al. 1999; Jung 2014). Courts often have held that prison-structured work was not employment because "the purpose of the program is to prepare inmates upon release from prison to function as responsible, self-sufficient members of society" (*Reimonenq v. Foti* 1996); that is also precisely the stated purpose of most work release programs.

During a prior wave of interest in work release in the early 1970s, program design established a sharp distinction between prison labor, on the one hand, and affirmative connection to the labor market, on the other. Maintenance of labor standards on a par with nonincarcerated workers was widely cited as a core feature of program design (Waldo, Chiricos, and Dobrin 1973; Jeffery and Woolpert 1975). President Nixon updated President Theodore Roosevelt's original executive order barring use of prison labor in federal contracts to include an exception for work release ("work at paid employment in the community") so long as that work did not displace other employees or undercut local labor standards.[17] These concerns have since receded. None of the prominent discussions of work release of the past two decades even mention this design consideration.

Just as the boundary between prison labor and work release is porous, so, too, is that between work release and parole. Work release has been described as a "mid-point between incarceration and probation" (Jeffery and Woolpert 1975) and as "analogous to parole" (Austin and Krisberg 1982). Studies of work release outcomes vary as to whether they use incarcerated people or parolees as the relevant comparison set (Duwe 2015; Turner and Petersilia 1996). This ambiguity, or continuity, is only heightened by considering work release alongside day reporting centers, electronic monitoring, and home confinement (Jung 2014; Petersilia 1997), as well as residential reentry centers, including "halfway back" houses for people with parole violations (Routh and Hamilton 2015), and so-called "restitution centers" (Wolfe and Liu 2020).

A recent case in Los Angeles illustrates this ambiguity. Under California law, the local sheriff is authorized to substitute "work release" for someone sentenced to incarceration in county jail (Cal. Penal Code § 4024.2). Functionally, the resulting arrangement is quite like court-ordered community service for someone on probation or parole; the worker is free to go home at night after completing the day's work rather than returning to a custodial facility. However, the arrangement proceeds under the sheriff's authority over defendants sentenced to jail time, not under a court's authority to substitute probation for incarceration. Nor is it subject to the supervisory arrangements of the Corrections or Probation Departments that manage parole or probation. Nonetheless, a California court recently ruled that, for the purposes at issue, a defendant's noncompliance with his work assignment had to be treated like a probation violation (In re *Barber* 2017). Even more strikingly, a New Jersey Supreme Court decision from the late 1960s characterized an inmate's assignment to perform prison labor in order to "work off" a fine as a form of "cell parole" functionally equivalent to paying off the fine with wages earned on "street parole" (*State v. Lavelle* 1969).

FROM THE NEW DEBTORS PRISONS TO THE NEW DEBT PEONAGE

All the labor associated with prison, work release, parole, and probation arises through a criminal sentence and bridges the supposed divide between punishment and economy. But this intermingling goes further still, because carceral labor also can arise without any extant criminal sentence to incarceration, even one held in abeyance, as with parole or probation. For instance, courts increasingly charge criminal defendants both with fines and with some of the costs of their own prosecution and punishment (Harris 2016). The resulting demands for work are not incidents of a carceral sentence (as with prison labor) or its suspension (as with parole or probation); rather, they are an extension of demands for payment, and incarceration enters as a potential future sanction for nonpayment. The forthrightly economic nature of fines and fees thus offers fertile ground for examining how the criminal justice/economy boundary is breached.

As was the case for criminal surety schemes under Jim Crow and other historical examples where criminal legal debt was converted into forced labor (Lytle Hernández 2017), contemporary fines and fees often originate with minor offenses, such as petty misdemeanors or even speeding tickets (Bingham et al. 2016; Natapoff 2015). Defendants who do not pay become subject to incarceration via either contempt of court or additional criminal charges like "failure to pay." Current constitutional doctrine allows such incarceration only for a *willful* failure to pay (Colgan 2014)—not the bare fact of nonpayment—but in practice courts often fail to make any meaningful, or even nominal, inquiry into ability to pay (Colgan 2017).

Such incarceration has been widely condemned as the "criminalization of poverty" and reintroduction of "debtors prisons" (American Civil Liberties Union 2010). In conjunction with the thoroughly racialized character of the policing, prosecution, and judicial practices at issue, the overall phenomenon exemplifies the confluence of racialized state violence and racialized economic exploitation (Murch 2016) characteristic of racial capitalism (Robinson 2000; Dawson 2016).

This system's labor dimensions, however, have received little attention. Instead of seeing a three-way bind among payment, work, and incarceration (Zatz 2016; Herrera et al. 2019), analysis focuses on the payment/incarceration dyad alone. Even a prominent law review article analyzing the phenomenon as "The New Peonage" divorces that characterization from forced labor (Birckhead 2015). Instead, labor enters the picture, if at all, either through prison labor imposed during incarceration for debt (Southern Poverty Law Center 2017) or as something that lies on the other side of the "barriers to employment" erected by criminal legal debt.

In fact, labor is central to the system of fines and fees. Indeed, this is likely to become more explicit and extensive as critical scholarship and advocacy make "ability to pay" a central concept (Colgan 2017). Scrutinizing ability to pay leads to scrutinizing employment because future wages provide a potential source of funds for those who cannot currently pay. Scrutinizing ability to pay thus can quickly convert into scrutinizing ability to work and the voluntariness versus involuntariness of unemployment (Zatz 2020), just as it does in means-tested welfare programs that assess the ability to pay for household needs (Zatz 2012).

This conversion of demands of "pay or jail" into "work or jail" has already been thoroughly formalized and institutionalized in the closely related domain of child support enforcement (Zatz 2016). For criminal legal debt, analogous dynamics already operate informally as prosecutors and judges make judgments about ability to pay (Harris 2016). In the child-support context a judge may assume that almost anyone can get a job "flipping hamburgers"—and therefore deem unemployment voluntary, and therefore nonpayment willful (*Moss v. Superior Court* 1998). Similarly, Harris found that some judges considering sanctions for criminal legal debt nonpayment "would explicitly assess whether defendants were trying hard enough to secure employment" (2016, 138).

The direct evaluation of responsibility for unemployment—in the context of assessing ability to pay—can easily become institutionalized in an apparatus of monitored job search, job readiness, and related work programs. The duty to work (in order to pay) becomes operationalized as a duty to participate in such programs, or face incarceration. New Jersey's pilot program in this vein was named MUSTER, for Must Earn Restitution (Weisburd, Einat, and Kowalski 2008). Although such programs often are cast as supportive services designed to help workers find employment, in practice they may operate primarily to "hassle" workers into accepting marginal employment that they already could get but elect to avoid. Work programs can achieve this both by confronting people with opportunities for such work and by degrading the value of time spent not working. Thus, we see the Obama administration's child-support work strategy explicitly embracing the "work first" strategy of "rapid labor force attachment" over "services to promote access to better jobs and careers" (Office of Child Support Enforcement 2014, 68558). Although the latter might be appropriate in "other contexts," not so for "unemployed noncustodial parents with child support responsibilities." In the criminal legal debt context, too, it seems likely that the moral weight of indebtedness and conviction, as well as the state's financial incentives for collection, could create a powerful push toward "any job is better than no job."

Criminal legal debt enforcement already has drawn one arrow from the established quiver of welfare work programs. Most jurisdictions make some provision for substituting "community service" work for criminal legal debt payments, especially where defendants lack funds to pay (Harris 2016).

As with "workfare" assignments, such programs generally involve unpaid work for a nonprofit or governmental agency and can be understood as efforts toward several distinct goals (Turner and Main 2001): improving employability (hence the moniker "work experience programs" common in the welfare context), hassling people into taking paying jobs instead, or enabling in-kind payment through valuable labor in lieu of cash.

Little is known about the scope and operation of court-ordered community service. In Los Angeles County, for instance, courts assigned roughly one hundred thousand people to community service in a one-year period in 2013–14 (Herrera et al. 2019). Detailed records on the nearly five thousand people assigned to community service through one neighborhood nonprofit intermediary show a typical assignment of about one hundred hours of work. Based on the work actually completed, and extrapolating to the county level, this would amount to about eight million hours of work annually, or about five thousand full-time, full-year jobs. To be sure, this does not represent a large proportion of the entire low-wage labor market in Los Angeles. However, this form of carceral labor in this one county roughly equals the approximately five thousand incarcerated people working for private companies in the entire national PIE program (Prison Industry Enhancement Certification Program 2020). Moreover, it easily exceeds in full-time, full-year equivalents the number of California inmates statewide who work to fight the state's wildfires, a practice that receives substantial journalistic attention each fire season (Fang 2017).

CARCERAL LABOR AS PROGRESSIVE REFORM

Court-ordered community service programs generally involve forced labor for no pay. This might seem an inauspicious formula for policies designed to counteract the carceral state's toll on racial and economic equality. And yet, such programs are widely touted as progressive solutions to debtors prisons, an "alternative to incarceration" (Bannon, Nagrecha, and Diller 2010; American Civil Liberties Union 2010). Until recently, critical treatments have focused narrowly on how community service can disrupt paid employment or fail to provide a meaningful alternative because of difficulties complying with its requirements (Birckhead 2015; Harris 2016;

but cf. Herrera et al. 2019). Similarly, carceral labor outside the prison is often touted as part of a progressive reentry strategy that can overcome otherwise formidable barriers to employment.

These reformist embraces of carceral labor outside the prison have not seriously considered how critiques of prison labor might apply. Here, too, the state uses its power to incarcerate to deliver up a pool of vulnerable unpaid or low-paid labor, consisting disproportionately of low-income people of color, to cash-strapped government agencies, contractors, or the "private" sector. Instead of triggering such criticisms, these reform programs repeat the dynamics of welfare reform in which "work" becomes an intrinsic good. This role for work operates independently of the *kind of work* at issue and ignores how such programs can degrade the quality of work available both to participants *and* to other workers (Zatz 2020).

Carceral Work as an Alternative to Incarceration

Community service programs carve out a degraded labor market tier operating below conventional labor standards. In Los Angeles, court-ordered community service workers must sign forms declaring themselves to be "volunteers," not employees, and thus to fall outside the protections of workers' compensation, not to mention the minimum wage and rights to organize (Herrera et al. 2019). This reprises conflicts over the employee status—and associated protections—of participants in the unpaid "work experience" programs many jurisdictions introduced as a means to comply with welfare work requirements (Diller 1998; Goldberg 2007; Zatz 2008; Hatton 2018a).

A federal court in New York recently held similar community service assignments to fall outside the employment relationships covered by the federal minimum wage (*Doyle v. City of New York* 2015). The work in question was a condition of a City diversion program. The judge reasoned that community service was noneconomic in nature because the defendants were not motivated by "monetary compensation." Instead, they sought the opportunity to "resolve cases involving minor offenses in a way that provides more substantial consequences than outright dismissal of the charges but allows defendants to avoid the risks and anxieties associated with further prosecution and the 'criminal stigma' that attaches

to convictions" (487). The court thus placed the work at issue within a domain of criminal justice policy thought to operate apart from "the labor market," precisely the reasoning animating the caselaw excluding prison labor from employment protections (Zatz 2008); indeed, *Doyle* relied explicitly upon that caselaw.

Despite this effort to separate carceral work from the labor market, the court also drew upon the interconversion among payment, wages, and work. It explained that the program allows defendants to "pay for their offense through community service" when they "do not have money to make restitution" (487). Nothing could better illustrate the conceptual hopelessness of the penality/economy distinction. Moreover, this passage suggests the way that, as in the Obama administration's analysis of child-support work programs, the stigmatized position of the worker—someone whose transgression created a state of moral indebtedness (Joseph 2014)—functions to validate a labor arrangement that would otherwise be illegal (Hatton 2015): a worker with a conventional financial debt would not be permitted, let alone required, to pay off that debt through subminimum wage work.

Doyle also illustrates how carceral labor sweeps even further than formal punishments, stretching not only from prison to parole to fines, but also into the burgeoning world of "diversion." Here, the "alternative to incarceration" operates as a substitute for conviction itself, not only (as in the fines/fees example) as a substitute for a post-conviction carceral sentence (Lynch 2012; McLeod 2012). Mandatory work is a pervasive feature of such programs. For instance, San Francisco's widely touted "Back on Track" (Rivers and Anderson 2009), implemented by then city attorney and now US vice president Kamala Harris, featured both general work requirements and mandatory assignments to work for Goodwill Industries. Other programs are similar (McClanahan et al. 2013), as are some influential approaches to diminishing money bail and substituting supervision (Steinberg and Feige 2015). In conjunction with the intensive, if selective, use of "order maintenance policing," the result can approximate the old regime of vagrancy laws. Forrest Stuart suggests as much in his account of Skid Row policing and its funneling of residents into low-end labor through diversion (2011).

Key features of "community service"—mandates to work at specific assignments, not just to "get a job" generally, and creation of a segregated

category of carceral labor operating outside conventional labor protections—also can be integrated into the operations of conventional for-profit employers. A shocking series of recent exposés by journalists Amy Julia Harris and Shoshana Walter began by documenting how what was nominally a drug rehabilitation program was in practice a forced labor camp (2017), an extreme variant of the "therapeutic community" model analyzed in depth by Caroline Parker's chapter in this volume. The workers were ordered into the program by the Oklahoma criminal legal system—either as a condition of probation or as a pre-sentence "drug court" diversion program—and forced to work full-time without pay in poultry processing plants or face imprisonment. The workers' role in the program was deemed to be that of "clients," not employees.

Carceral Work as a Reentry Employment Strategy

Reentry employment "services" also have the potential for integrating carceral work mandates in ways that incorporate features associated with prison labor into programs framed as overcoming "barriers to employment." Within reentry policy, parole and probation have been identified as potential institutional frameworks for offering services (Rhine, Petersilia, and Reitz 2017; Travis and Stacey 2010), but necessarily accompanied by supervision and the potential for coercion.

"Work" is generally treated as a core reentry objective, both because of its obvious connection to economic support through wage income but also as a form of community integration and discipline essential to law-abidingness, self-respect, and flourishing across multiple domains of life (Travis 2005; Uggen 2000). In this regard it recalls the multifaceted and often mystical paeans to work that were characteristic of welfare reform (Bumiller 2013; Gurusami 2017; Zatz 2006) and easily disconnected from questions about the *quality* of work.

Instructive here are Lawrence Mead's writings calling for a "mandatory work policy for men" (2007; 2011). Mead was a leading conservative academic voice for welfare work requirements, and he draws a straight line from its rationales and institutions to those of criminal legal work programs, with child support enforcement regimes providing the bridge in between. According to Mead's "cultural approach," the problem of un(der)

employment, including or perhaps especially for formerly incarcerated or convicted people, is that these "dysfunctional" (2011, 14) "nonworking men fail to take advantage even of the jobs they can get," reflecting "a breakdown in work discipline," particularly among Black men (2011, 16). Gurusami identifies similar attitudes, and even more direct connection to the Black women targeted by welfare reform, in her research on Black women under supervision (2017).

In the early 1990s, Mead wrote an entire book attacking the idea that welfare-to-work policies should focus on overcoming "barriers to employment"—in that context, childcare, race discrimination, disability, and lower educational attainment (1992). The recurring form of argument is that while barriers may block access to *some* jobs, there is always some other *worse* job that remains available, and that other people with similar barriers are able and willing to take. The failure or unwillingness to take those worse jobs demonstrates personal incompetence or malingering. The "distinctive purpose of workfare has never been to raise earnings for clients, although this is desirable, but rather to cause more adult recipients to work or prepare for work as an end in itself" (Mead 1992, 167). Once work—divorced from job quality—becomes an end in itself, then working for pennies per hour under brutal conditions can seem a policy success.

An analysis tracing unemployment to poor work discipline or weak "soft skills" invites a policy response grounded in coercion and focused on process characteristics of work—obedience, timeliness, unassertiveness—disconnected from the rewards and protections of conventional employment. According to Mead, "If poverty means disorder, the chief solution to it is to restore order. Government must provide some of the pressure to work that today's poor have not internalized" (2011, 22).

Similar ideas are reflected across the political spectrum regarding reentry, as they were with welfare reform (Zatz 2006). Bruce Western, for instance, traces the employment struggles of recently incarcerated people to a lack of "the rudimentary life skills of reliability, motivation, and sociability with supervisors and coworkers," but he holds out hope that "the habits of everyday work and the noncognitive skills on which they are based can be developed in adulthood by the daily rehearsal of the routines of working life" (2008). Accordingly, Western proposes a massive, mandatory work program backed by threats of incarceration for noncompliance.

The existing, smaller-scale jobs programs developed by the Center for Employment Opportunities, and on which Western bases his proposal, already work closely with parole, in some cases as a mandatory placement (Broadus et al. 2016). This reliance on coercive criminal legal supervision, and its characterization as an antidote for the personal failings of formerly incarcerated people, reproduces a broader pattern in which reentry policy brackets off critical engagement with the policing and penal practices that produce the problems reentry attempts to solve (López 2014).

To be sure, Western's specific version of "community service employment" anticipates payment at the minimum wage and integration with supportive housing. Nonetheless, it is easy to see how his rehabilitative rationale could be deployed in favor of "community service" or "work experience" programs like those developed to enforce welfare work requirements and criminal legal debt obligations, programs designed to operate outside employment laws. In the reentry context, this could be facilitated by the prospect of linking up with the well-established punitive/rehabilitative analysis of prison labor discussed above and also deployed in the Oklahoma poultry-processing scheme.[18]

The critical juncture is when, persuaded that formerly incarcerated people often may not be able to find jobs that meet conventional labor standards, policy makers decide to make substandard work the solution. An explicit example of this arose recently in progressive Los Angeles as part of the nationwide Fight for $15 movement. The new City ordinance raising the minimum wage also contained a carve-out for transitional employment programs aimed at formerly incarcerated people, allowing them to pay substantially sub-minimum wages.[19] That exception was vigorously promoted by the prominent Homeboy Industries reentry employment program. The rationale, of course, was that any job is better than no job (Reyes 2015), and better than jail.

CONCLUSION

Highlighting carceral labor beyond the prison can enrich analysis of prison labor, market labor, and the broader racialized political economy of today's interconnected carceral/welfare state (Hatton 2018a). It

confounds the divide between carceral and market labor and, in doing so, identifies mechanisms of downward pressure on labor standards that at once originate in the carceral state yet cannot readily be managed by the classic strategy of sequestration.

A long scholarly tradition dating back to Rusche & Kirchheimer (1939) has recognized the potential for carceral labor to be used to discipline free labor. Within this framework, the carceral state acts on labor markets at most indirectly, by creating alternate systems of production and by influencing the size of the market labor force through incarceration rates (Melossi 2003). Historically, the dominant political response from organized labor has been to insulate the market from prisoner-produced goods. This strategy relies upon the sharp differentiation and separation between incarcerated people and free workers. Indeed, it relies upon casting incarcerated people as dangerous and undeserving, a practice that "served to build and buttress the moral (and eventually, legal) wall that, down through the twentieth century, and for many years after the death of hard labor penology, separated the unfree convict from the free citizen" (McLennan 2008, 470).

Carceral labor beyond the prison—and integrated into conventional labor markets—challenges the separation that is essential to protecting "free" labor by suppressing carceral labor. Moreover, if free labor cannot readily be distinguished from carceral labor beyond the prison, the door opens to a chain of linkages crossing back into incarceration itself. This may occur via the continuities of parole, work release, and prison; the integration of pre- and post-release reentry strategies; or the linkage between "alternatives to incarceration" and incarceration itself.

In this fashion, we might glimpse the potential for new politics of solidarity amid the grim new technologies of labor control and extraction. Historically, there have been fleeting efforts to respond to the threat from prison labor by linking working conditions and labor rights inside and outside prison walls. In the 1910s, the American Federation of Labor explored a partnership with New York's Sing Sing prison that would have extended union membership to incarcerated workers (McLennan 2008). Recent prison strikes have been organized cooperatively through incarceration-focused organizations like the Free Alabama Movement and the contemporary incarnation of the Industrial Workers of the World (Bonsu 2017). Compared to conventional prison labor, carceral labor beyond the prison

features a much larger potential scale, greater integration into "free" workplaces, and reduced applicability of "less eligibility" concepts; these workers either have not been convicted at all or are designated as reentering. These factors may make robust forms of solidarity more viable than has proven the case for prison labor, and also more necessary. The obvious analogy here is to the US labor movement's pivot—halting and contested though it has been—from a sustained effort at excluding immigrant workers from labor market competition toward incorporating them into labor standards and labor organizations (Gordon 2006).

Such a turn toward solidarity across different criminal legal system statuses—incarcerated, supervised, threatened, unthreatened—surely faces steep challenges, as has solidarity across immigration status. In both cases, racial cleavages are of paramount importance and particularly amenable to fusion with deserving/undeserving distinctions grounded in stigmas of illegality or criminality. The alternative path following such cleavages would involve construction of a new sequestration strategy, one that tracks and fortifies a boundary between "free labor" and carcerally supervised labor outside prison walls.

Such a new sequestration strategy would likely follow the pattern familiar not only from prison labor but from immigrant labor and welfare work programs, too. First, there would be separation through degradation: creating substandard forms of work institutionally demarcated as different from the conventional labor market and therefore stripped of protections. Such exclusion would be justified both as serving nominally noneconomic goals (rehabilitation, etc.) and as affirming participants' degraded status that deprives them of recognition as workers. Herein lies the reassertion of less eligibility. Second, there would be separation through noncompetition: concentration of carceral labor in forms of production either imagined to lie outside "the economy" (like the governmental and nonprofit sectors) or where the substitution at issue affects only other degraded or relatively powerless workers (e.g., substituting carceral labor for unauthorized immigrant labor). Unsurprisingly, we see the stirrings of such phenomena in carceral labor denoted as not employment but rather "community service" or "rehabilitation," as well as in labor standards exceptions like Los Angeles' subminimum reentry wage.

This potential—for the application of carceral power to create new forms of work that lie below the nominal "floor" of labor standards—has broader theoretical implications as well. First, it suggests a weakness in theories that relate carceral institutions to labor market dynamics but that treat labor market conditions as analytically prior to their carceral implications. For instance, as is true for many "warehousing" accounts of the contemporary US carceral state, Simon dismisses the relevance of parole work requirements where parolees face obdurate unemployment and labor market exclusion (1993). But such unemployment is itself contingent on the existence of binding labor market floors. People who (for example) cannot get a job at a minimum wage of $10 end up unemployed, even if an employer would hire them for $5 an hour. The unemployment outcome is a function both of limits on employers' ability to violate the minimum wage and of would-be workers having better things to do with their time. Degraded forms of carceral labor affect both of those constraints: potentially allowing employers to pay $5 rather than $10 an hour (by creating minimum wage exemptions) *and* pressuring workers to accept $5 (by making incarceration the alternative to work). Similarly, Rusche and Kirchheimer dismissed the viability of ordering criminal defendants to work off debt rather than incarcerating them because they assumed that "the administration would be obliged to procure a wage which would be sufficient to maintain him and his family and still permit the payment of the fine" (1939, 176); various forms of unpaid or unprotected community service upend this assumption. In these ways, the carceral state acts upon the range of labor market conditions and outcomes that themselves structure carceral institutions.

This point—that carceral labor beyond the prison helps constitute rather than merely respond to labor market conditions generally—also challenges influential frameworks for analyzing labor markets. Writing about the eighteenth and nineteenth centuries, Christopher Tomlins rejected the notion of a transition from legal compulsion to "free labor" "disciplined by the constraints of need" and grounded in "economic inequalities," where "[f]actory discipline was modern discipline—the discipline of the clock, not the dock" (1995, 59). Instead, Tomlins highlighted master-servant relationships grounded in the household and

underwriting ongoing criminalization of labor indiscipline among the emergent category of employees. I suggest something analogous today, but grounded in contemporary institutions of mass incarceration, albeit linked to Tomlins's household account via the strand of child support enforcement.

When labor markets are denaturalized and analyzed as legally constituted institutions, that legal constitution generally is understood to operate through the law of economic allocation; this includes the building blocks of property and contract as then modified to greater or lesser extents by the welfare state techniques of tax-and-transfer redistribution or labor regulation. Criminal law plays no role, except in upholding property rights through criminalization of theft and trespass. In contrast, this chapter suggests how criminal punishment and prohibition alike operate within labor markets. They directly regulate work behavior but also go deeper. They contribute to work's legal constitution *as labor market participation* or, instead, as an extension of nominally "noneconomic" practices of punishment, rehabilitation, and so on. I previously analyzed this role with respect to carceral labor *inside* the prison (Zatz 2008), and here it extends beyond the prison.

At stake in carceral labor beyond the prison, then, is not only the *relationship* between criminal justice and the labor market but their constitution as distinct fields. That distinction, in turn, is fundamental to the articulation of law-abidingness to productive work. That linkage operates in racialized opposition to criminality and idleness and thereby provides an enduring cornerstone for racial capitalism.

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NOTES

1. 18 U.S.C. § 1584, originating in P.L. 80-772, 80 Cong. Ch. 645, 62 Stat. 683, 733 (June 25, 1948).

2. That explanation elides the stratified structure of the post–New Deal welfare state (Mettler 1998), which could have left room for continued carceral coercion of workers of color, as did welfare work regimes themselves (Roberts 1996). That welfare state also excluded newly institutionalized migrant guestworker programs, which allowed employers to leverage threats of racialized state violence in the form of deportation rather than criminal punishment (Glenn 2002).

3. Based on a Westlaw search last updated January 31, 2020.

4. P.L. 80-772, 80 Cong. Ch. 645, June 25, 1948, 62 Stat. 683, 785–86.

5. Although Sumners-Amherst introduced the provisions that survive today, the current statute often is referred to as Ashurst-Sumners (Office of Justice Programs 1999; *Hale v. Arizona* 1993; Thompson 2011), notwithstanding that the 1935 provisions largely were superseded by Sumners-Amherst. I use the latter to refer to today's statute.

6. 72 Cong. Ch. 443, July 7, 1932, 47 Stat. 609, 643.

7. 75 Cong. Rec. 2696, 2743, Jan. 26, 1932.

8. P.L. 85-767, Aug. 27, 1958; 72 Stat. 885, 896; Comptroller letter B-145000, Oct. 2, 1961, 41 Comp. Gen. 213.

9. See, e.g., 49 Cong. Ch. 213, Feb. 23, 1887, 24 Stat. 411, now codified at 18 U.S.C. § 436) (federal contracts); Pub. L 58-191, Ch. 1759 (1904), 33 Stat. 435; now codified at 39 U.S.C. § 2201 as modernized by Pub. L. 86-682 (1960) (U.S. post office); Executive Order 325A, May 18, 1905; Exec. Order No. 2960 (Sept. 14, 1918), reprinted in Nat'l Comm. on Prisons & Prison Labor, Prison Leaflets No. 44, The Use of Prison Labor on U.S. Government Work, at 9 (1918); 32 Comp. Gen. 32, 33 (July 21, 1952).

10. Comptroller letter B-145000, October 2, 1961, 41 Comp. Gen. 213.

11. Pub. L. 97–424, § 148, January 6, 1983, 96 Stat 2097.

12. 58 Fed. Reg. 38,973, 38,974, July 21, 1993; US Federal Highway Administration, Memorandum Re: Procurement of Signing Materials, May 8, 1985, https://www.fhwa.dot.gov/pgc/results.cfm?id=2802.

13. Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 827(a), 93 Stat. 1215 (1979) (codified at 18 U.S.C. § 1761(c)).

14. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 101(b) (tit. I, § 136), 110 Stat. 1321 (1996) (codified at 18 U.S.C. § 1761(b)).

15. New Orleans Education League of the Construction industry, *Staffing Solutions for the Residential Construction Industry* (n.d.)

16. In each case, the work at issue probably would *not* have run afoul of Sumners-Amherst either, but not due to the parole exception. Instead, the work in question was performed for an exempted governmental or nonprofit entity or involved only exempted intrastate economic activity.

17. 39 FR 779, Exec. Order No. 11755, 1973 WL 173193 (Pres.).

18. A federal district court recently rejected such arguments, however (Fochtman v. DARP, Inc., No. 5:18-cv-5047, 2019 WL 4740510 (W.D. Ark. Sept. 7, 2019).

19. Los Angeles, Cal., Ordinance 184320 (June 1, 2016), *codified as* Los Angeles Minimum Wage Ordinance, Ch. XVIII Mun. Code art.7 (2016).

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Fenster v. Leary, 229 N.E.2d 426 (N.Y. 1967)
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Hawes-Cooper Act of 1929, Jan. 19, 1929, ch. 79, 45 Stat. 1084
Sumners-Amherst Act of 1940, Oct. 14, 1940, ch. 872, 54 Stat. 1134, now codified at 18 U.S.C. § 1761–62
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