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Better Than Jail: Social Policy in the Shadow of Racialized Mass Incarceration

Abstract: Racialized mass incarceration enables forms of economic exploitation that evade traditional worker protections despite being integrated into conventional labor markets. Such exploitation is legitimated by normalizing incarceration as the baseline against which these practices are judged. In contrast, conventional social policy imagines an "economy" separate from state violence, opposing "free labor" to "involuntary servitude." The emergent "carceral baseline" recharacterizes labor practices as subjects of criminal justice policy, not economic regulation, especially in "alternatives to incarceration." Examples of this baseline's deployment are drawn from regulation of child support work programs, Thirteenth Amendment challenges to community service "working off" criminal legal debts, minimum wage claims by workers in diversion programs, and legislative proposals to exclude formerly incarcerated workers from labor protections. Implications include the need to integrate insights from theories of nonmarket work and of racial capitalism that challenge the dominance of markets as objects of description and critique in law and political economy analysis.

Keywords: alternatives to incarceration, labor, welfare state, racial capitalism, debt, coercion

I. Introduction

Mississippi's "restitution centers" hold people with unpaid criminal legal debts in a netherworld between debt peonage and prison labor. An impressive piece of investigative journalism (Wolfe and Liu 2020) recently detailed how the predominantly Black workers are confined by the state Department of Corrections (MDOC) and subjected to prison-like conditions. They are held until their daytime work outside the facility for private employers—from McDonald's restaurants to meatpacking plants—generates earnings sufficient to pay off both their underlying debts and the "room and board" charges that accumulate during custody. Crucially, however, Mississippi considers these "residents" *not* to be incarcerated—they are not serving a sentence to prison or jail—and indeed threatens them with imprisonment if they violate the terms of restitution center "residence." Such violations include "refusing to work," "being terminated from employment," and "encouraging others to refuse to work, or participating in a work stoppage" (Mississippi Department of Corrections 2010, 7, 10). Relying on this distinction, MDOC justifies these centers as "provid[ing] an alternative to

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incarceration," an argument echoed by a judge who explained, "Going to the restitution center's better than going to prison, I would think" (Wolfe and Liu 2020).

This article analyzes how racialized mass incarceration enables new forms of economic exploitation that simultaneously operate outside conventional forms of socioeconomic regulation even while being integrated into conventional markets (Zatz 2020). More narrowly, it analyzes how aligned institutional design and policy discourse legitimate such exploitation in a specific way: by normalizing incarceration as the baseline experience against which labor practices are judged. That normalization, of course, operates unevenly. Distributing and enabling this normalization are intersectionally racist and classist accounts of personal responsibility at the juncture of criminalization, labor discipline, and personal finance (Muhammad 2010; Soss, Fording, and Schram 2011; Wherry, Seefeldt, and Alvarez 2019).

This account runs contrary to dominant understandings of social policy that place markets at the center of the economy and civil regulation at its margins, trying to tame market processes. T. H. Marshall's famous mid-twentieth century analysis of "social citizenship" was organized around the claim that "basic equality can be created and preserved [only by] invading the freedom of the competitive market" (Marshall 1950, 9). To achieve social rights, welfare states would both regulate labor markets directly and offer economic provision outside them, with variation in the manner and degree of such "decommodification" (Esping-Andersen 1990).

This framework largely takes for granted the legally constructed system of private property and its distribution principally through markets and intrafamilial transfers. Critics of many stripes, including the Legal Realists and today's Law and Political Economy movement, long have noted this elision of law underlying markets (e.g., Hale 1923; Grewal and Purdy 2015). This system constitutes the common-law "baseline," insulated from constitutional scrutiny, against which subsequent welfare state interventions are judged (Sunstein 1987). That insulation enables analysis of market outcomes legitimated by individual choice and untroubled by legal construction of the choice set. Given the options to work or starve, most choose work, on the market's terms. It's better than hunger.

The criminal legal system or, more generally, the "strong state" (Hall et al. 2013; Simon 2014) operates almost entirely offstage in this account (Wacquant 2009). True, critics of laissez-faire routinely note how criminal law helps establish property rights. This point troubles the contrast between an "unregulated" market and government "intervention," thereby opening the door to directly imagining the economic world a democratic polity ought to create (Polanyi 1944; Harcourt 2011; Kapczynski 2014). Nonetheless, the object of scrutiny remains "the economy" centered on "the market" and the primarily "private" law that constitutes it, largely apart from a separate sphere of criminal law that remains mostly a background condition.

Feminist theory and allied traditions in economic anthropology and sociology provide intellectual resources with which to criticize this understanding of penality as a sphere apart from "the economy" (Zatz 2008; Harcourt 2011). These traditions have identified the ideological and institutional processes by which "the economy" has been limited to marketized processes and separated from social spheres, paradigmatically the family, deemed "noneconomic" precisely by virtue of nonmarket ordering (Folbre 2001; Zelizer 2005). As a result, valuable labor performed outside the market nexus is rendered invisible as "work," which in turn underwrites family caretakers' exclusion from social citizenship claims grounded in work (Roberts 2004; Shklar 1991; Fraser and Gordon 1994). These critical traditions, however, further demonstrate that these boundaries between spheres are themselves constructed and ultimately contingent (Hatton 2015). For instance, even paid caretaking work has

been characterized legally as a component of family life and thereby stripped of welfare state protections nominally attached to paid work. This marginalization of paid domestic work also illuminates the specifically racialized gender structure placing women of color outside, or more precisely, below, the (white) gendered work/family binary (Smith 1999). We can see something similar in the restitution center example and the ones probed below: work at once is integrated into conventional labor markets and yet, by virtue of being marked as a penal practice, is governed by rules otherwise considered antithetical to such markets but appropriate to other domains.

"Racial capitalism" research (Robinson 2000) illuminates this apparent contradiction by demonstrating how racial subordination has been constitutive of capitalist economies and their inequalities. There is more than one mechanism, but most important here is the ongoing centrality, and sophistication, of labor subordination and extraction organized and legitimized through racial violence sanctioned or directly imposed by the state. Far from being vestigial "primitive" or "original" accumulation, racial subordination and extractions have been tightly integrated with labor markets rather than marginal or developmentally prior to them (Robinson 2000; Singh 2017). This point is most intuitive with regard to chattel slavery (Du Bois 1935; Williams 1944; Baptist 2014), but studies of "neoslavery" in the Jim Crow South forcefully extended the analysis forward in time by analyzing the large scale and economic centrality of convict leasing, chain gangs, and debt peonage (Du Bois 1935; Haley 2016; Lichtenstein 1996; Blackmon 2008). Criminal law was central to those institutions, including through the criminalization of labor mobility (Dawson and Francis 2016). Pulling these strands into the present, scholars have explored how the threat of state violence subordinates immigrant labor in both unauthorized and guestworker status (Ontiveros 2010; Kim 2015); how criminal law enables racialized financial extraction through fines, fees, and forfeiture (Murch 2016; Page and Soss 2017; Zhen 2019); and how this reflects a persistent practice of what Cheryl Harris dubs "racial alchemy," by which various forms of debt "obscure[] highly racialized processes and racially differentiated burdens and normalize[] and make[] available for generalized application ever more rapacious and predatory forms of extraction" (forthcoming).

Such accounts challenge narrow identification of "capitalism" with "markets." Yet they risk reproducing the separation between racialized violence and the market, even as both are located within an enlarged "economy." Nancy Fraser, for instance, answers "yes" to the question "Is Capitalism Necessarily Racist?" by analyzing "expropriation" as both intrinsically racialized and essential to capitalism. Yet her analysis sharply distinguishes expropriation from accumulation through "exploitation" of marketized wage labor (Fraser 2019; but cf. Raine 2019).

In contrast, this article explores the racialized interweaving of penal extraction and market exploitation, especially through "carceral work mandates" (Zatz 2020). These mandates echo the "work or starve" choice set with another dilemma: "work or jail." This substitution moves racialized state violence into the center of constituting and regulating labor markets. Not only does the law often demand what might ordinarily be denoted "market" work, as with the restitution centers, but it also portrays work as a price one chooses to pay, preferring it to the alternative. A variety of legal and policy actors specifically invoke the "work or jail" choice to legitimize the forms of work at stake, in particular to justify working conditions that would otherwise violate the conventional labor standards. Practices rejected in a "work or starve" framework can be rehabilitated by "work or jail."

A "better than jail" framework thus threatens to selectively displace conventional means of mobilizing, and protecting, labor, thereby facilitating new forms of racial stratification at once economic in character and obscured as such. Moreover, framed as a choice constructed *within* the sphere of criminal

justice policy, this threat often arrives cloaked in the progressive mantra of "alternatives to incarceration." By normalizing incarceration, today's carceral state enables racialized labor subordination to be presented as liberation, relative to what I term a "carceral baseline."

II. Conventional Social Policy Baselines and the Stipulation of "Free Labor"

Conventional social policy, conceived of as the state taming the market to further equality, typically revolves around two competing baselines, one libertarian and the other social-democratic. These baselines both assume a free labor market insulated from physically violent coercion, as expressed in the US by the Thirteenth Amendment's prohibition on "involuntary servitude."

The libertarian baseline takes existing distributions of property as given and authorizes changes just to the extent that individuals consent, principally through market bargains. Equality inheres in the capacity to hold property and make contracts, what Marshall termed "civil" rights. As nonconsensual transfers, taxes are likened to theft, and regulatory prohibitions on consensual deals stymie both parties' liberty (Nozick 1974). The competing social-democratic baseline rejects the libertarian's procedural emphasis and prioritizes the substance of daily life, access to "social citizenship," its material prerequisites in food, housing, clothing, and even "common enjoyment" (Marshall 1950, 82) and the time necessary for it. This is brutally schematic, but familiar enough to suffice.

Social policy disputes typically revolve around competing invocations of one or another baseline. Consider, for instance, the minimum wage. For the libertarian, first off, it is a solution in search of a problem. If low pay simply reflects whatever the worker can achieve in the market, there is no deviation from baseline. The resulting material conditions and the life it enables, however, may fall below the social-democratic baseline of a minimally adequate and dignified standard of living. That shortfall warrants state remediation. Because the libertarian baseline incorporates no such substantive standard, any resulting economic benefits to workers render them, as the *Wall Street Journal* memorably put it, "lucky duckies" (2002), that is, the beneficiaries of a coercive transfer from employers to workers (Shaviro 1997). Blocking a consensual deal for lower wages offends *the worker's* rights, as in *Lochner* jurisprudence, rather than restraining employer power. That affront may sometimes result in inability to find a job at all; this offends the libertarian baseline by denying the right to choose work from the opportunity set "work or starve." And starvation is fine if the unemployed reject available work at any wage.

The libertarian analysis appalls the social democrat because validating poverty wages as better than nothing reflects the wrong baseline, relative to a system where access to a "social minimum" (Michelman 1973) would be an available choice. The social democrat thus views behavioral conditions on safety-net benefits as an affront that creates second-class citizenship (Kornbluh 2007; Paz-Fuchs 2008). In contrast, the libertarian views these benefits as gratuities. Thus, conditions may be imposed at will, because gifts need not be given at all (Reich 1965).

Almost entirely absent from such familiar debates are questions of criminal law or other forms of state violence. The general removal of criminal regulation from the visible center of economic life is itself a historically specific achievement (Harcourt 2011), and labor historians have traced an arc traveling through a welter of nineteenth-century criminal legal subordination before the final defeat of "belated feudalism" by the New Deal at latest (Tomlins 1993; Orren 1991; Steinfeld 2001). Indeed, removing

interpersonal violence, including state violence, from the marketized economic sphere provides the libertarian baseline's normative foundation. Economic outcomes are ratified precisely by the ostensibly consensual nature of the individual transactions producing them; this enables libertarians to attack the welfare state as thieving and enslaving (Nozick 1974).

Thirteenth Amendment jurisprudence constructs this purported firewall between "free labor" and unfreedom, not only in slavery but "involuntary servitude" generally (VanderVelde 1989). This firewall relies on expelling criminal law from the regulation of work.

In the foundational *Bailey v. Alabama* peonage case, the Supreme Court declared the amendment's purpose "to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." 219 U.S. 219, 241 (1911). This "compulsion of service" "embraces all legislation which seeks to compel the service of labor by making it a crime to refuse or fail to perform," as Alabama's "false pretenses" law did. 219 U.S. at 243-43. Criminal prosecution was functionally equivalent to physical seizure, whether at the hands of the "employing company" or the "constabulary." 219 U.S. at 244. This constitutional line drawn at violence persists today, with involuntary servitude defined legally by whether someone is "forced to work . . . by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." *U.S. v. Kozminski*, 487 U.S. 931 (1988).

Although the peonage cases struck a blow for Black workers, they also cohere with laissez-faire. The violence/contract boundary provides a constitutional floor on labor rights in *Bailey* but a constitutional ceiling in *Lochner* (Huq 2001). In Fraser's terms, the duo prohibits expropriation but protects exploitation. *Bailey* places this boundary at the line between civil liability for breach of contract and criminal liability for failure to work. Beyond the threat of violence, other practical pressures to work become ratified as "freedom," including the mere economic incentives that are markets' lifeblood. In this regard, *Bailey* also rhetorically includes African Americans within a free labor ideal deemed color-blind, as the Court noisily disclaimed the legal relevance of the racial context that everyone knew was fundamental to the case.

The Court elaborated this separation between free labor market and coercive criminal law a few years later in *United States v. Reynolds*, 235 U.S. 133 (1914), a particularly challenging case for the civil/criminal distinction (Childs 2015). In *Bailey*, the criminal legal system formally operated only at the back end of exit from a labor contract, not at its front end, its formation.[1] Instead, entry into the contract was impelled by the grinding poverty and dispossession of a Black farmworker in the Jim Crow South, already indebted and needing an advance on wages at the contract's outset. That cash advance created new debt that was leveraged into potential prosecution for fraud if the worker quit prior to full repayment. *Reynolds*, by contrast, involved debts created through criminal prosecution on the *front end*, before the labor contract formed.

Reynolds arose against the backdrop of the brutal Jim Crow practice of convict leasing. In an era without state-run prisons in the South, the state sentenced criminal defendants, almost entirely Black, mostly men but also some women (Haley 2016), to hard labor, then "leased" control over them to private

[1] At one step removed, criminal law channeled Black laborers into such contracts as landowners manufactured debts through accusations of criminal theft during the prior term, and various restrictions on labor mobility limited Black laborers' ability to seek employment elsewhere or to exit the labor market (Kelley 1990; Dawson and Francis 2016; Goluboff 2007).

interests. These private firms often worked these prisoners to death in the coal mines, steel mills, and turpentine farms of the industrializing South. The underlying sentences frequently originated in trivial charges punishable with fines rather than jail and were grounded in racially targeted policing and prosecution. For those who did not pay, the remedy was hard labor in custody to "work off" these fines and the many fees piled upon them. And this system preyed on those who were in no position to pay.

Out of this brutality was born an elegant solution known as the "criminal surety" system, which was attacked in *Reynolds*. A local farmer would pay the fines and fees, satisfying the criminal judgment and thus holding the hard labor sentence at bay. In exchange, the Black defendant would agree to pay back the farmer under an extended labor contract, where monthly deductions from nominal wages went toward repaying the debt. So terrifying was the convict lease that defendants accepted surety contracts several times longer than the hard labor sentence would have been. "[T]he surety system was touted as a 'humane' contractual avenue by which criminally branded black subjects could avoid the brutalities of the chain gang and convict lease camp . . . ." (Childs 2015, 82).

But there was a catch: state law criminalized breach of the surety contract. If the worker quit before having worked off the debt, he would again face the convict lease to punish this new crime. And again, binding himself to a new surety could forestall that fate. *Reynolds* damned this "ever-turning wheel of servitude," 235 U.S. at 146, which, unsurprisingly, produced quite appalling abuses (Childs 2015; Daniel 1972; Blackmon 2008).

Reynolds reasoned that the surety system violated the Thirteenth Amendment just like in *Bailey*: It threatened criminal prosecution for quitting employment prior to having finished working off a debt to the employer. Reaching this conclusion, however, required severing the surety contract from the criminal prosecution that gave rise to it. Otherwise, condemnation of the surety system risked conflation with criticism of the conversion of unpaid criminal debts into "hard labor" sentences; that conversion arguably fell within the Thirteenth Amendment's exception allowing involuntary servitude as punishment for a crime (Childs 2015). *Reynolds* stipulated that "[o]f course, the state may impose fines and penalties which must be worked out for the benefit of the state, and in such manner as the state may legitimately prescribe." 235 U.S. at 149. The Court distinguished the surety structure by insisting that the criminal proceeding terminated at the moment the surety paid off the state. Subsequently, "[t]he surety and convict have made a new contract for service, in regard to the terms of which the state has not been consulted." 235 U.S. at 149. This was a mighty exercise in the formalism of public/private distinctions (Childs 2015), and it illustrates how the spherical independence of the contractualized labor market is constructed through separation from criminal regulation. On the one hand, Thirteenth Amendment jurisprudence expels both private and public violence from the labor market. On the other, through the punishment exception it authorizes involuntary servitude so long as it is institutionally confined to the penal sphere.

In this way, both the libertarian and social democratic baselines assume an allocation of economic entitlements outside of criminal law (even if criminal law then protects those entitlements once allocated). Likewise, when substantively economic arrangements (in the Polanyian sense [Polanyi 1957]) are properly organized within criminal legal institutions, the law treats them as beyond the reach of "economic" regulation directed at constituting markets. That division of labor is established by the Thirteenth Amendment and its penal exception.

The artificiality of this stark divide did not go unnoticed in *Reynolds'* time. The convict lease, though it never faced serious constitutional challenge (cf. Pope 2019), came under sustained political attack. The reasons tracked the contemporaneous assault on privately controlled prison labor: firms gained access to a hyper-exploitable labor force with which they could undercut "free labor" and business competitors who employed it (Lichtenstein 1996; McLennan 2008).

Of greater importance here, and less widely noted, is how the formalistic criminal/civil divide also came under fire from surety employers. They were incredulous that they were being prosecuted for violating federal anti-peonage laws, as had occurred in *Reynolds*. One protested that if this were involuntary servitude, then "I and most all of the farmers in this county must be guilty of peonage" (Daniel 1972, 110). This statement reveals how thoroughly racially coerced labor—organized through the contractual form—underpinned the agricultural economy. Invoking the horrors of the lease, another insisted, in Blackmon's words, that he "acted not as an oppressor but the rescuer of penniless blacks who preferred life on his farm to jail or a forced journey to the coal mines of Birmingham" (2008, 187).

This last objection recalls Saidiya Hartman's analysis of post-Emancipation "indebted servitude," in which a "burden of debt, duty, and gratitude [was] foisted onto the newly emancipated in exchange or repayment for their freedom" (1997, 130). This suture between freedom and debt enabled "slavery [to] provide the pedestal upon which the equality of rights appeared resplendent and veil the relations of domination and exploitation harbored in the language of rights" (1997, 120).

In this fashion, the surety employer's objection likewise previews my main concern. He speaks in the language of worker choice, like invocations of the conventional libertarian baseline. Doing so elides the employer's interest in the subordinating extraction that legally constructed vulnerability enables. Instead, exploitation becomes an opportunity for the worker to advance beyond his default state of abasement, an *opportunity* for which workers should gratefully thank the kindly capitalists. But here, rather than simply avoiding impoverishment and starvation, peonage to the surety appeals at the front end because the work is better than jail.

In addition to enabling the defendant to avoid, through work, the front-end threat of incarceration for nonpayment of the criminal fine, this structure also transforms into liberation even the back-end threat of prosecution for later failing to work off the debt. At the outset, the avoidable (through sustained work) possibility of future incarceration compares favorably with certain and immediate incarceration (at hard labor, no less). Although *Reynolds* rejected the surety system, today courts and other legal actors are reproducing the substance of the sureties' self-defense, as illustrated in the sections below and in the restitution center example with which I began.

Conceptually, the boundary problems raised by *Reynolds* never disappeared. But from the New Deal to the dawn of the twenty-first century, they remained marginal in practice. Although the constitutional declarations of *Bailey* and *Reynolds* were a dead letter for decades (Daniel 1972), they were robustly revived and enforced as the country emerged from World War II and sought to distinguish its free labor markets from authoritarian rivals' reliance on forced labor (Blackmon 2008; Goluboff 2007).

The Supreme Court vigorously reaffirmed *Bailey* and chastised Southern intransigence in its last debt peonage case, *Jackson v. Pollock*, 322 U.S. 4 (1944). It declared the Thirteenth Amendment was designed "not merely to end slavery but to maintain a system of completely free and voluntary labor throughout

the United States." 322 U.S. at 17. For the Court, that freedom consisted of bargaining power in the market, where "in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers;" without that right, "there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." 322 U.S. at 18. This right to choose provided structural protection against the "depression of working conditions and living standards affect[ing] not only the laborer under the system, but every other with whom his labor comes into competition" (18).

This last point echoed the contemporaneous campaigns against incarcerated labor, including convict leasing, for private interests (McLennan 2008). Alongside the constitutional attack on Southern debt peonage, the Northern labor movement prevailed upon states and eventually Congress to establish legislatively a buffer zone between free labor and prison labor. New laws barred prisoner-produced goods from interstate commerce, and others excluded incarcerated workers from publicly funded projects (such as road-building) to avoid undercutting private contractors who utilized wage labor. The latter helped suppress the chain gang, the convict lease's successor (Thompson 2011; Zatz forthcoming). Like the Thirteenth Amendment with its penal exception, this regime did not so much eliminate prison labor (which lived on in the "state use" form) as structure and interpret it as banished to the penal sphere where its economic character would be denied (McLennan 2008). In this fashion, modern case law excludes incarcerated workers from statutory employment protections on the ground that they inhabit the "separate world of the prison," where "[p]risoners are essentially taken out of the national economy" (*Vanskike v. Peters*, 974 F.2d 806, 812 (7th Cir. 1992); see also Zatz 2008).

III. The Conventional Baselines in the Era of Neoliberal Mass Incarceration

With its separation between a labor market organized through civil contract and the noneconomic domain of criminal law, the New Deal settlement set the terms of social policy analysis up to the present. Recently, robust public and scholarly debate has decried labor market transformations, organized labor's decline, overt retrenchment of employment rights, a crisis in their underenforcement, and the resulting ascent of increasingly "precarious" work (Bernhardt et al. 2008; Kalleberg 2011; Standing 2016). These transformations, however, largely have been understood as a shift toward the libertarian baseline, the welfare state receding from its regulatory and safety net intercessions, leaving private market power to run wild. This likewise characterizes the prolific critical literature on "neoliberalism," understood fundamentally as marketization (Wacquant 2009; Grewal and Purdy 2015).

The centrality of the market, and the driving force of economic need, persists even in neo-Realist accounts of neoliberalism supplied by the emerging Law and Political Economy movement. These highlight the legal construction or "roll-out" of markets, and market subjectivity, through state power, not only welfare state "rollback" (Grewal and Purdy 2015). Joe Soss, Richard Fording, and Sanford Schram, for instance, magnificently interpret 1990s welfare reform as a "neoliberal paternalism," in which welfare sanctioning to enforce work requirements constructs neoliberal labor discipline (2011). The way they characterize sanctioning as "punitive" illustrates the conventional war of baselines. "Punishment" here is withdrawal of economic resources, quintessentially cash welfare, not criminal prosecution. The "punitive" characterization arises from derogation of an implicit social-democratic baseline, in which only wrongdoing could strip someone of their ordinary entitlement to "social rights" of livelihood and "civil rights" of personal liberty.

The economy/penality divide remains discursively robust notwithstanding transformations in the criminal legal system concurrent with those in the labor market since the early 1970s. The explosion in incarceration rates, targeted at African Americans, especially but not exclusively in lower-income communities (Forman 2011), has been dubbed "The New Jim Crow" (Alexander 2012). Analysis of today's racialized mass incarceration, however, largely has *not* recalled the penality-economy integration that characterized the old Jim Crow (Dawson and Francis 2016; Zatz 2020). To the contrary, accounts of new Jim Crow economic exploitation generally focus on profiteering off racialized "surplus populations" excluded from labor markets (Gilmore 2007). Banished from market production, communities of color instead become raw material for others' economic gain through a Prison Industrial Complex of prison construction, prison employment, and (among other things) exorbitant charges for phone calls with incarcerated loved ones. Leading critics often emphasize the relative *absence* of prison labor as a driving political economic force today (Gilmore 2007; Childs 2015; Wacquant 2009).[2] Instead, the newly sprawling carceral state shores up neoliberal labor markets by "warehousing" those rendered productively superfluous, containing the threat of disorder with the brutality of "prisonfare" rather than grudging support via welfare. The carceral and neoliberal states thus operate in complementary fashion, the former entrenching the latter's hegemony by cutting off access to livelihood outside the market nexus (Harcourt 2011), including by criminalizing welfare receipt (Gustafson 2011) and homelessness (Stuart 2011). Thus, in classic Realist fashion, a growing carceral state channels economic claims into the labor market, ensuring that starvation (or exposure) is indeed the alternative to work.

Finally, this thematic of exclusion also characterizes analysis of how the carceral state generates "barriers to employment." Denial of employment based on past incarceration or conviction is how the New Jim Crow "permanently locks a huge percentage of the African American community out of the mainstream society and economy" (Alexander 2012, 13; Pager 2008; Stoll and Bushway 2008). Related forms of economic exclusion include diminished access to housing, including publicly subsidized housing, which in turn exemplifies expulsion from the already limited regime of public benefits (Mukamal and Samuels 2003). The resulting vicious cycle of economic exclusion and criminalization, especially hyper-policing of young people of color, gives rise to the compelling narrative of racialized "surplus populations" discarded from the labor market and consigned to the penal sphere from the outset. Although the criminal legal system affects who has access to the market economy, these continue to be conceptualized as mutually exclusive spheres.

IV. Forced Labor as an Alternative to Incarceration

We may now, gingerly, be entering a new phase of decarceration. Mass incarceration faces pressures ranging from fundamental opposition to human caging as a governance technique to technocratic doubts that its direct and indirect financial costs are worth it. As scholars have noted from diverse perspectives, exactly *how* decarceration proceeds, even assuming it does, is profoundly important (Byrd

[2] Michael Dawson and Megan Ming Francis' account of contemporary racial neoliberalism highlights continuities in criminalization and indebtedness, highlighting convict leasing and debt peonage under the old Jim Crow, but they likewise see the disappearance of Black labor as a distinctive shift. "[D]ebt during the previous era was tied to blacks' roles as producers in the economy. . . In this [today's] era, the debt is primarily tied to blacks' roles as consumers" (Dawson and Francis 2016, 41). This displacement of predatory labor extraction by predatory financialization is common to many accounts of neoliberalism (Page and Soss 2017).

2016; McLeod 2012). The process presents substantial risks not only of attenuated scale but also of "preservation through transformation" (Siegel 1997).

In this tenuous decarceral moment, "carceral work mandates" take on special significance. These governmental demands to "get to work or go to jail" (Zatz 2020) harken back to the criminally enforced, racially targeted labor discipline of Jim Crow, largely forgotten or asserted to have disappeared. In many cases, policymakers have implemented carceral work mandates specifically to provide an "alternative to incarceration." As in *Reynolds*, they trade the certainty of immediate incarceration for its deferred risk, mediated in the meantime by performing labor discipline, with the attendant potential for exploitative and subordinating working conditions (Zatz 2020). Thus, carceral work mandates may well expand as part of decarceration. In addition to offering an alternative sanction in cases that today would otherwise lead to incarceration, they also risk "net widening" as decreasing harshness facilitates wider criminalization (Austin and Krisberg 1982; Natapoff 2015).

The following sketches show a variety of policy actors deploying a "better than jail" framework to justify, and in some cases to create, carceral work mandates. Each example involves the depression of labor standards in the mandated work, including through removal from labor protections, the traditional terrain of social policy concerned with constraining inequality in labor markets. Although certainly not comprehensive, the cases show several different types of policy actor—judges, administrators, academics, and advocates—invoking "better than jail" reasoning, and doing so across several types of disputed carceral work mandates. This suggests a relatively robust rather than idiosyncratic discourse, one intertwined with the development and defense of specific institutional practices.[3]

A. Child Support and Mandatory Employment in Federal Work Mandate Policy

The US welfare state seeks to "privatize dependency" (Fineman 1995) within families by coupling primary caretakers to breadwinners' earnings, through marriage or child support. This feature of welfare retrenchment ties intensified child support enforcement to the more familiar emphasis on employment by custodial parents (Brito 2012; Smith 2007). Enforcement has targeted low-income Black men, whose labor market disadvantage makes them a plurality of low-income obligors in arrears (Sorensen and Zibman 2001); state enforcement often prioritizes these arrears because collections offset government expenditures on public assistance. Through a variety of legal forms, enforcement against low-income obligors relies heavily on incarceration for nonpayment, even though payment obligations often outstrip realistic earnings potential or other sources of funds (Brito 2012; cf. Harris 2016).

As part of the broader pushback against "modern debtors' prisons," incarceration sanctions for child support nonpayment face increasing criticism (Brito 2012). One prominent proposed solution strengthens work requirements targeted at low-income obligors in arrears. These work mandates flow from the legal theory that the duty to pay includes a duty to earn enough to be able to pay (Zatz 2016).

[3] The study of judicial rhetoric alone comes with well-known limitations (Suchman and Edelman 1996). Nonetheless, a robust tradition treats it as one place to study the "the constitutive legal environment [that] provides cognitive possibilities and values that influence the structure, form, and strategies of organizations" (Edelman and Stryker 2005, 540) as part of law's broader tendency to "legitimate and reify the status and power hierarchies that are played out in economic life" (544). Those processes include the very designation of practices as "economic" in nature and the attendant implication for regulatory approaches (Zatz 2008).

In addition to potentially increasing support payments (Sorensen 2010), some work mandate proponents also tout them in broader terms. Most notably, Lawrence Mead, previously a leading conservative advocate of welfare work requirements, places child support work mandates among several means of reversing a broad "breakdown in work discipline" (Mead 2011, 16). For Mead, this breakdown explains low wages and unemployment because "[l]ow-income men, particularly blacks, have become less reliable employees" (16).

Without sharing Mead's broader project, proponents of child support work mandates also cast them as a progressive policy option because they are better than jail (Sorensen 2010). In this vein, the Obama Administration's Office of Child Support Enforcement undertook several initiatives to reduce child support incarceration, one of which was expanding work programs (Turetsky 2012). Some programs attempt to expand labor market opportunities by providing voluntary access to valuable training and other forms of support, but others are mandatory. In the latter type, sanctions, including incarceration, are imposed for nonparticipation or for noncompliance with program rules, including failure to accept jobs deemed appropriate by the program.

In a memorandum to state child support programs entitled "Alternatives to Incarceration," the administration highlighted these "jobs not jail" programs. It specifically endorsed work mandates under threat of incarceration as "a better alternative to ordering jail time" (Turetsky 2012). It touted one Texas program found to have increased employment and support payments. Omitted from the memorandum, however, was the same evaluation's findings that the program also reduced earnings, apparently by pressing participants into lower-wage jobs (Schroeder and Doughty 2009). That conclusion coheres with research on employment by parolees subject to work requirements (Pettit and Lyons 2007) and a recent study of incarceration in child support enforcement generally (Zatz and Stoll 2020); both found downward pressure on wage rates.

Subsequently, the Administration issued proposed regulations that, again, turned to mandatory employment programs as one way to reduce incarceration sanctions, though not the only one (Office of Child Support Enforcement 2014). The proposal highlighted the impermissibility of incarcerating for nonpayment someone who lacked the present ability to pay; this principle drew from constitutional jurisprudence originating in the context of parole violations, *Bearden v. Georgia*, 461 U.S. 660 (1983), and later extended to civil contempt incarceration in child support enforcement. *Turner v. Rogers*, 564 U.S. 431 (2011). The regulatory rationale specifically contrasted inappropriate incarceration for nonpayment with acceptable incarceration for nonwork, or nonparticipation in work programs. The latter was unobjectionable because it preserved choice: "the obligor has the present ability to do what is ordered of him or her" (Office of Child Support Enforcement 2014, 68557). Furthermore, the proposal rejected "services to promote access to better jobs and careers" in favor of pure work discipline, pressuring obligors to accept and maintain whatever jobs might already be available to them (ibid., 68558).[4]

[4] The final regulations dropped the proposed funding stream for work programs, citing unspecified congressional opposition (Office of Child Support Enforcement 2016), perhaps related to Republican criticism that the regulations were insufficiently tough on obligors in arrears (U.S. Senate Committee on Finance 2015).

B. Working Off Fines and Fees in Thirteenth Amendment Litigation

Modern requirements to "work off" criminal legal debt face ongoing vulnerability to Thirteenth Amendment involuntary servitude challenges in the *Reynolds* lineage. Litigation against criminal legal debt, however, has focused primarily on incarceration, not labor, and have centered concepts of inability to pay under Fourteenth Amendment due process and equal protection principles, as well as the Eighth Amendment's Excessive Fines Clause (Colgan 2014; Colgan 2018; Zhen 2019). Surprisingly, the penal exception has not been the main constraint on Thirteenth Amendment challenges. Instead, the criminal context of these fines and fees cases becomes salient in another way: by facilitating application of a "better than jail" framework where work mandates are formalized as probation conditions.

In 1968, the Virginia Supreme Court granted a habeas petition seeking "release from a State farm where [defendant] is confined for failure to pay the costs of criminal prosecutions." *Wright v. Matthews*, 163 S.E.2d 158 (Va. 1968). For each day Wright worked, he was credited $.75 toward his $1,000 in costs. The court briskly found Thirteenth Amendment liability in three sentences: (1) this was involuntary servitude, (2) costs "are not part of his punishment for the crime" under state law, (3) therefore, the penal exception did not insulate the practice from constitutional condemnation. 163 S.Ed.2d at 160.

A three-judge federal district court quickly extended this reasoning in *Anderson v. Ellington*, where the defendant was incarcerated in a Tennessee "County Workhouse," "working off the costs assessed against him at the rate of $5 per day." 300 F. Supp. 789, 790 n.1 (D. Tenn. 1969). Again, the court held that the fees were nonpunitive for Thirteenth Amendment purposes and that the involuntary servitude was obvious; therefore, it concluded that the penal exception provided no protection and cited *Bailey v. Alabama* to enjoin the scheme. 300 F. Supp. at 793.

Wright and *Anderson* offered no analysis of the underlying work arrangements or their relationship to broader Thirteenth Amendment concerns. Indeed, when these opinions summarized their holdings, labor disappeared, eclipsed by incarceration for debt. In this respect, Thirteenth Amendment cases echoed a contemporaneous wave of Fourteenth Amendment litigation that directly challenged incarceration for nonpayment of criminal legal debt, eventually leading to the landmark 1983 *Bearden* decision.

These Fourteenth Amendment claims sounded in both due process and equal protection. The former questioned punishment for conduct over which one has no control (if there was no ability to pay); the latter compared the harsh treatment (incarceration) of the poor with the lenient treatment (an often easy payment) of those with means, a difference driven by economic status, not culpability. The underlying facts often involved incarceration specifically to "work off" debts in jail work programs, but this labor aspect played no role in constitutional analyses focused exclusively on subjection to incarceration for nonpayment. *State v. Lavelle*, 255 A.2d 223 (N.J. 1969); *Williams v. Illinois*, 399 U.S. 235 (1970).

In response to this Fourteenth Amendment litigation, however, during the 1970s many jurisdictions began restructuring their efforts to make poor defendants work off criminal legal debts (Herrera et al. 2019). Rather than making work an incident of incarceration, they applied work mandates *outside* of

jail but under threat of incarceration for noncompliance. Defendants who previously might have been incarcerated for nonpayment were instead ordered to perform "community service."

A 1981 New Hampshire Supreme Court opinion illustrates the significance of this shift. *Opinion of the Justices* considered a statute requiring a defendant, outside of state custody, to "work off" the costs of appointed counsel at the rate of $25 per day through "uncompensated work for any town, county or agency of the state." 431 A.2d 144, 149 (N.H. 1981). This requirement applied to those "financially unable to repay" but "physically able to work." Failure to comply was sanctionable with incarceration. The court struck down the scheme under the Thirteenth Amendment, again finding involuntary servitude obvious and the penal exception inapplicable because the costs of counsel were not punitive.

The court found involuntariness because work was imposed on those unable to pay. If there had been a meaningful option to pay rather than work, then anyone working rather than paying would have been deemed to be doing so voluntarily in the constitutional sense. "Involuntary servitude" occurred because the only choices available were work or jail. Although inability to *pay* was thus essential to the Thirteenth Amendment infirmity, the claim did *not* likewise depend on inability to *work*. To the contrary, the statute applied only to defendants deemed able to work. This proviso would have defeated a Fourteenth Amendment challenge, for the same reasons cited by the child support regulations discussed above: the Due Process Clause's fundamental fairness considerations apply when compliance is impossible, such as when the defendant cannot pay; they do not protect someone who "willfully" chooses noncompliance over another option, such as refusing to perform community service in lieu of payment when that work is perfectly feasible. In contrast, the Thirteenth Amendment attaches to the coercion of work, not the inability to comply (Zatz 2016). It establishes a constitutional privilege to refuse work, and so the New Hampshire scheme was struck down under the Thirteenth Amendment where it would have been sustained under the Fourteenth.

Opinion of the Justices has had surprisingly limited effect, though some courts have followed it and none have rejected it.[5] It has not deterred the fairly widespread—and oft-touted—practice of offering community service as an alternative to incarceration for nonpayment of criminal legal debt (Harris 2016; Herrera et al. 2019). Another strand of the opinion explains why, for reasons that sound in "better than jail."

Despite striking down the statute at issue, the New Hampshire Supreme Court mapped out how the legislature could restructure its mandatory work rule to pass constitutional muster. Rather than directly mandating community service, the legislature could, instead, "require a physically fit indigent defendant who is financially unable to reimburse the government creditor for the expense of counsel to satisfy his debt by performing uncompensated work for the government *as a condition of probation*." 431 A.2d at 152 (emphasis added). This seemingly formalistic distinction mattered because "[a] person convicted of a crime is not constitutionally entitled to probation" when the statute authorizes a jail sentence. Accordingly, the court reasoned there would be no coercion because the defendant has a nonwork alternative—serving an unsuspended term of incarceration—that they have no constitutional right to avoid, just like if they could choose to pay instead of working. Their criminal conviction—not itself premised on nonwork—already exposes them to that carceral outcome.

[5] See State ex rel. Carriger v. City of Galion, 560 N.E.2d 194 (Ohio 1990); State v. Auxter, 2017-Ohio-1311, ¶ 24, 2017 WL 1316971 (unpublished); Community Service of Work Projects in Lieu of Payment of Court Costs, Tenn. Op. Att'y Gen. No. 99-233 (Dec. 15, 1999).

The magic of this reasoning relies on transforming incarceration from a back-end to a front-end legal imposition. Technically, incarceration is no longer a sanction for violating an order to work. Instead, incarceration is the sentence imposed at the outset upon conviction of the underlying offense. But, lucky defendants, they get the opportunity to *choose* to instead perform uncompensated labor on probation. Making that choice affirms that this labor is better than jail, so what basis have they to complain? Having been *chosen*, the labor is constitutionally sanctified as *voluntary*. This is the *Lochnerian* logic of laissez-faire, now applied to a preference for work over jail rather than work over hunger.

Opinion of the Justices illustrates what we may term a "carceral baseline." The work falls below the libertarian baseline: It is coerced and uncompensated, providing no relief from starvation. What it offers instead is relief from incarceration. That relief justifies the practice, ratified by the opportunity to choose. The carceral referent is established by embedding the practice within the ongoing criminal jurisdiction of the sentencing court. In *Reynolds*, recall, the criminal case had formally terminated, thereby placing the subsequent work in the presumptively free world of market labor. In what *Opinion of the Justices* proposed, the work instead is structured to achieve precisely the opposite. This same incorporation of work mandates into probation conditions animates the Mississippi restitution center example with which I began, as well as the widespread imposition of community service mandates in Los Angeles (Herrera et al. 2019).

The carceral baseline operates widely in non-constitutional contexts, too. When imposing community service is designed to address an inability to pay without incarcerating the debtor, another alternative would simply be to write down the debt. Indeed, in Los Angeles, public defenders prioritized waiver of fines and fees over access to alternative sentences like community service (Herrera et al. 2019). Nonetheless, unorganized individual community service workers did not consider this possibility. Accordingly, they judged their work assignments within a binary frame of work or jail, and given that choice set, they indeed typically were grateful to avoid incarceration (Sonsteng-Person et al. 2021).

Reducing monetary sanctions, not converting them into forced labor, is indeed one proposed policy response to the new debtors' prisons. But some resist this approach on the ground that the availability of monetary sanctions holds incarceration at bay on the front end. One scholar argues, "the abolition of fines . . . would make a line of flight away from high rates of incarceration even more difficult. Fines as a stand-alone punishment offer exactly such a promise of reduced imprisonment" (O'Malley 2011). Here we glimpse how the "better than jail" rationale need not be limited to labor standards but can be extended to other forms of economic distribution (Cooper 2018).

C. Probation and Community Service Sentencing in Minimum Wage Litigation

This section revisits court-ordered community service, but here as an integral part of a sentence, not a substitute for paying fines and fees with cash. Here, too, community service orders are construed as an "alternative to incarceration" (Austin and Krisberg 1982). In this context, the work/jail tradeoff arises at the front end, when a jail sentence might otherwise be imposed at the outset, not at the back end when work or jail are alternative responses to nonpayment of monetary sanctions. Such community service sentences may either be structured as probation conditions against the backdrop of a suspended carceral sentence, or they may entirely substitute for a jail term (Herrera et al. 2019).

A variant on the latter form of community service recently drew a legal challenge to its failure to pay participants for their work. In New York City, community service is a very common condition of an

Adjournment in Contemplation of Dismissal (ACD). An ACD disposition operates as a kind of diversion, where compliance with ACD conditions results in dismissal of the underlying prosecution for most purposes, not as completion of a sentence. Failure to comply, however, leads to renewed and intensified prosecution, including exposure to jail (Kohler-Hausmann 2018).

A few years ago, an Obama appointee sitting in the federal district court for Manhattan decided the only known minimum wage claim brought by people performing court-ordered community service. *Doyle v. City of New York*, 91 F. Supp. 3d 480 (S.D.N.Y. 2015). The workers claimed statutory rights as employees under the Fair Labor Standards Act. The court rejected their claims on the ground that no employment relationship existed. Its reasoning recalls aspects of the prison labor statutory cases, on which it explicitly draws, as well as Thirteenth Amendment child support cases that construe coercion as permissible because the work vindicates family obligations (Zatz 2016). The court deemed community service pursuant to an ACD condition to be noneconomic in nature. Rather than being motivated by "monetary compensation" as employment is, this labor offered an opportunity to "avoid the risks and anxieties associated with further prosecution and the 'criminal stigma' that attaches to convictions." 91 F. Supp. 3d at 487. In other words, it was better than jail.

Moreover, in an echo of the New Hampshire court's reasoning about probation, the court saw this as a good deal for the defendants, who did not deserve anything better than jail. Accordingly, it would be perverse for federal employment law to muck up that opportunity. Like the defense of monetary sanctions noted above, the court worried that imposing minimum wage coverage would "threaten to undermine the efficacy of programs [like this], as judges and prosecutors might be less inclined to agree to [diversion] if doing so would require City agencies to pay for labor that they might not otherwise have even wanted." 91 F. Supp. 3d at 488. In other words, the City was doing defendants a favor by letting them choose to work for free to avoid jail.

Notably, *Doyle*'s better-than-jail analysis operates within a "regime of accountability" (Joseph 2014) where the work's noneconomic character arises from its function as currency within the penal sphere. Exchanging work for personal liberty not only establishes the critical *lack* of "monetary compensation," but, in the passage above, the court speculates, without any apparent basis, that the labor was economically worthless to the city (but cf. Krinsky and Simonet 2017). In other words, the material and penal economies are incommensurable systems. Yet the court quickly undermines this separation by quoting the ACD provision's legislative history that identified its function as enabling defendants to "pay for their offense through community service." 91 F. Supp. 3d at 487. This invocation of the proverbial "debt to society" incorporates commensuration with money, as the same passage notes that community service has special relevance to "[d]efendants who do not have money to make restitution."

This instability of the penality/economy distinction, marked by the ambiguities of using money (or labor) to pay a "debt to society," had previously come to the fore in a California case considering the employment status of court-ordered community service. *Arriaga v. County of Alameda*, however, arose in a workers' compensation case where employee status would defeat the worker's effort to sue over workplace injuries. 892 P.2d 150 (Cal. 1995). A prior lower court decision had denied employment status because the worker-defendant's "debt to society" could be "paid" in several ways: incarceration, a monetary fine, or community service. 892 P.2d at 155. This equivalence across forms of punishment, as *Doyle* also later reasoned, precluded treating the labor as having been for the "consideration" associated with economic exchange in contract. 892 P.2d at 155. In *Arriaga*, however, the California Supreme Court eventually reached the opposite conclusion. It focused on labor's equivalence not with

incarceration but instead with the money otherwise required to pay off the fine being "worked off" through community service. Because "in exchange for her work, Arriaga received credit against the court-imposed fine," there *was* the economic "remuneration" characteristic of employment. 892 P.2d at 156.

The "better than jail" framework does not, however, strictly require denying the economic significance of the work at issue. A logic similar to *Doyle* animates another recent decision from liberal New York, one involving participation in a residential drug rehab program as a court-imposed condition of diversion. *Vaughn v. Phoenix House Found., Inc.*, No. 14-CV-3918 (RA), 2019 WL 568012 (S.D.N.Y. Feb. 12, 2019*), aff'd*, 957 F.3d 141 (2d Cir. 2020). The program consisted almost exclusively of full-time uncompensated work—processing garbage, relaying messages, packing deliveries—that sustained the center's internal operations. Again, the court rejected a FLSA minimum wage claim on the ground that no employment relationship existed. This time, the district court acknowledged that the nonprofit benefitted by not needing to hire paid staff to do the same work. Nonetheless, it deemed the worker to be the "primary beneficiary" of the relationship, and therefore not an employee.[6] "[M]ost importantly," the worker was "given the opportunity to avoid facing his criminal charges and to stay out of prison." 2019 WL 568012, at *8. Another lucky ducky.

D. Beyond Formal Work Mandates: Reentry Employment and Labor Standards Exceptions

The examples above involve legally institutionalized tradeoffs between work and incarceration. Otherwise troubling features of the work side of the dilemma are justified rhetorically as still better than the jail alternative. Even without formal institutionalization, however, there may be similar functional tradeoffs, real or imagined, that are embedded in public policy, in part of the grounds of a "better than jail" analysis. A long and varied scholarly tradition sees the labor market and the criminal legal system as complementary in practice, from the "warehousing" literature discussed above (cf. Simon 1993; Rusche and Kirchheimer 1939) to William Julius Wilson's analysis of urban crime as resulting from employment's decline as a structuring institution (1996). This tradition often treats labor market conditions as prior to, though influential on, criminal justice practices; the perspective developed here implies a more dynamic relationship. Enabling people to avoid criminal legal entanglements can itself become a rationale for restructuring the work they do.

This rationale pervades analysis of "reentry" after incarceration and overcoming the "barriers to employment" facing people with criminal records. A central idea is that employment can prevent future criminal legal involvement (Lageson and Uggen 2013). Consequently, the argument goes, reentry employment efforts operate as anti-recidivism policy and should be supported and designed as such (Duran et al. 2013). Here, nonwork leads to jail not via violation of a formal mandate—though that may occur under certain conditions of supervision (Doherty 2015; Gurusami 2017; Augustine 2019)—but through indirect processes mediated by income, social integration, and so on (Lageson and Uggen 2013).

[6] On appeal, the Second Circuit adopted the district court's reasoning. 957 F.3d 141, 146. Two federal district courts recently reached a contrary conclusion in similar cases. In these, however, the plaintiffs had been "farmed out" to work without pay at for-profit firms that, in turn, paid the rehab facility (thereby funding its operation) for access to its supply of coerced labor. *Fochtman v. DARP, Inc.*, No. 5:18-cv-5047, 2019 WL 4740510 (W.D. Ark. Sept. 7, 2019); *Copeland v. C.A.A.I.R., Inc.*, No. 17-CV-564-TCK-JFJ, 2019 WL 4307125 (N.D. Okla., Sept. 11, 2019) **(**cf. Harris and Walter 2017).

In the reentry context, the carceral baseline arises from the social meaning given to high rates of renewed criminal legal contact among formerly incarcerated people: two-thirds of those released from state prisons are rearrested within three years, four-fifths within six years (Alper and Durose 2018). Informed by racialized attributions of both criminality and labor indiscipline, the subjects of reentry thus often are imagined as presumptive once and future prisoners who nonetheless might be reformed through work. Similar dynamics may apply to those without a record but nonetheless deemed "at-risk," another heavily racialized population targeted for employment interventions on crime prevention grounds (Heller 2014).

With the earlier examples in hand, we can now imagine how such a carceral baseline might enable a "better than jail" framework to justify reentry work programs that might otherwise violate conventional labor standards. One place to look for this phenomenon is in targeted carve-outs from otherwise generally applicable labor protections: There is a long history of these selective, often racialized and gendered, exclusions that reflect stratified citizenship (Mettler 1998), such as with agricultural and domestic workers (Palmer 1995; Boris and Nadasen 2008).

One common justification for carve-outs is that, by lowering hiring costs, they encourage employment of those whom employers otherwise avoid. This rationale sometimes is put forward entirely within conventional social policy disputes, often as a particular application of the libertarian baseline, wherein "any job is better than no job." That argument may have special force for those with systematic difficulty in the labor market, and it has long been deployed to justify carve-outs from the minimum wage for young workers, 29 U.S.C. § 206(g), and workers with disabilities, 29 U.S.C. § 214(c). These face intense criticism for discriminatory exclusion from access to the social-democratic baseline (Bagenstos 2012). For present purposes, the interesting question is whether such carve-outs also are put forward as ways to avoid jail, not only to avoid destitution.

A recent episode fitting this pattern was Los Angeles' contentious decision to create a carve-out from its pathbreaking $15 per hour local minimum wage. The provision excludes workers during their first eighteen months in what is deemed a "transitional job" "for the hardest to employ in the City." Chapter XVIII Municipal Code Art.7, § 187.02(F) (2016). The exemption's primary advocate was the well-known and respected reentry service provider Homeboy Industries, which operates social enterprises staffed by formerly gang-involved or previously incarcerated people (Reyes 2015a; Reyes 2015b). Much of the debate revolved around the conventional contest between an "on ramp" sub-minimum wage that gave otherwise excluded workers access to jobs, and eventually upward mobility, versus dignifying all workers with a decent wage.

A significant strand of testimony before the LA City Council, however, mobilized the idea of "second chances." These arguments framed transitional employment primarily as enabling workers to avoid returning to prison, or worse. For instance, Alex Lopez, a high-ranking staff member at the employment program LA Conservation Corps, and a former Corps participant decades earlier, testified that "if this opportunity was not given to me I wouldn't be standing here today. I'd be in prison, or six feet under."[7] Chris Vijoco from Homeboy Industries likewise testified, "If it [the minimum wage] affects us and I lose my job, you know, I hate to say it but I, I'm not gonna sugarcoat it—it can be devastating for somebody like me. And I don't want to go resort back to crimes, I don't

[7] Los Angeles City Economic Development Committee Meeting on Ordinance 184320 (May 29, 2015) (statement of Alex Lopez, LA Conservation Corps, at timestamp: 40:00 – 41:10), https://lacity.granicus.com/MediaPlayer.php?view_id=46&clip_id=14748.

wanna go back to prison, and I don't wanna be out there hurting people like I used to. So please exempt us."[8]

The Los Angeles exemption provides the best documented example, but it is not alone. Chicago's minimum wage for several years had a similar transitional jobs exemption, now repealed (Elejalde-Ruiz 2019), and Arkansas recently considered an exemption. S. 115, 92nd General Assembly (Arkansas 2019). Law professor Samuel Estreicher also has proposed "safe harbors" from employment discrimination liability when hiring (and then terminating) workers with criminal records, alongside other chronically underemployed groups (Estreicher 2017). Using incarceration as a baseline also generalizes from Erin Hatton's observation that the degraded nature of prison labor specifically operates to legitimize the bottom end of the "free" labor market for those transitioning from the former to the latter (forthcoming).

V. Conclusion

Today's system of racialized mass incarceration is disrupting the conventional contest between libertarian and social-democratic baselines. It is creating a social and legal reality in which, for large swaths of the population, especially working-class people of color, the baseline expectation is incarceration and debt. Against that baseline, even getting up to the libertarian baseline—penniless, unemployed, but free of state custody—can seem like an achievement, even a gift. This enables new forms of exploitation, not only to receive insulation from legal challenges and policy critique on conventional grounds, but also to be cast as liberatory.

Here, mass incarceration reshapes work's meaning in a more far-reaching way than prison labor. Incarceration provides the referent even for people *not* in state custody. This state of *non*-incarceration nonetheless supplies the legal meaning of their condition, crowding out analyses grounded in work, production, and economic exchange. The purchase of this carceral baseline draws together the thoroughly racialized targeting of the criminal legal system, racial stratification within labor markets, longstanding practices by which "[i]ndebtedness [has been] cast as a characteristic of blackness" (Harris forthcoming), and racial tropes of the incorrigibly criminal Black man lacking in labor discipline.

Putting the point in terms of competing baselines may have two complementary virtues. First, for those focused on the depredations of the New Jim Crow, it offers a way to name and resist the lowered expectations produced by the system being challenged. In this way, articulating and advancing ambitious economic projects can be understood as part and parcel of resisting the carceral state, all the more so insofar as criminalization is itself facilitated by economic marginalization. From this perspective, even seemingly radical calls to abolish criminal legal debt may seem less impressive. Reconstructing economic life to provide the ability to pay, and thrive, might ultimately go further than simply avoiding monetary sanctions for those unable to pay. In other words, the libertarian baseline—lacking criminal debt, but also still lacking livelihood—need not set the horizon of possibility.

Second, those focused on building a political economy far above the libertarian baseline must seek common cause with those contesting the carceral state. The threat of precarious work does not come exclusively from marketization swamping a shrinking welfare state. It comes as well from a

[8] Los Angeles City Council Meeting on Ordinance 184320 (May 19, 2015) (statement of Chris Vijoco, Homeboy Industries, at timestamp: 1:44:09 – 1:45:18), https://lacity.granicus.com/MediaPlayer.php?view_id=129&clip_id=14672.

metastasizing carceral state, one that simultaneously speaks the language of public violence and sings in the liberal key of choice, the freedom to choose something better than jail.

This, finally, invites an account of Law and Political Economy that engages but does not fetishize markets and "economic" coercion (Hatton 2018b), even as the enemy; that stance flows from the imperative to analyze the political economy as racially constituted. This implication, however, goes beyond a mere complementarity between colorblind marketization and racialized expropriation. Nikhil Pal Singh has suggested that, rather than grounding an understanding of capitalism exclusively in market labor, we might analyze it as requiring "the ongoing differentiation of free labor and slavery, waged labor and unpaid labor," a differentiation understood as an ideological achievement, not an objective description, and thus an object of criticism (2017, 51).

Such a critical endeavor is necessary to understand the "better than jail" phenomena charted here. Labor under carceral threat is taken outside "the market" by placing it in relation to incarceration, yet that relation is one of distinction. Individuals' widespread practice of "rational calculation" often is posited as the basis for generating order within markets, and its absence a threat to be met with force in the penal sphere (Harcourt 2011, 148); that distinction itself is freighted with raced and gendered understandings of who possesses and exercises market rationality. Here, however, legitimation operates in part through the act of "choosing" subordinated work over incarceration, rendering this a fair trade in payment of a "debt to society." Vice versa, the threat of racialized state violence, not only the prospect of financial security, impels entry into the low-wage labor market; this opens up space for conceptualizing work as its own structure of punishment and supervision (Hatton 2018a; Zatz 2020). This discussion may pose more puzzles than it solves, but it suggests how breaching the boundaries between penality and economy can chart a path toward a more integrated, nonreductionist account of racial capitalism.

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