

To: UCSB Center for Work, Labor, and Democracy Participants

From: Noah Zatz, UCLA School of Law

Date: February 12, 2015

Re: February 20 presentation on “Precarious Work in the Carceral State”

I look forward to meeting you next Friday for a conversation about “Precarious Work in the Carceral State.” I am taking the opportunity to use the forum for a fairly open-ended discussion while I am in the very early stages of conceptualizing and planning a new project. I don’t have a paper draft, or even an outline. Indeed, I doubt that this is one paper, or even one book. Instead, it may be a broad research agenda that calls for constructing multiple collaborations with other scholars, including legal scholars who specialize in some of the sub-fields implicated and where I have less depth, as well as social scientists better positioned to do relevant empirical and theoretical work. This is relatively uncharted territory for me, so I am eager for feedback on how this relates to developments in your fields, which aspects seem most promising, and so forth. I appreciate your bearing with the many rough edges!

This cover note consists of five pages of preliminary thoughts, in which I try to map out the major arguments and themes that I see emerging. The general topic is state coercion of low-wage or unpaid work in today’s racialized carceral state. Appended to this note are three excerpts from representative works that I hope to disagree with or extend. These are about 10 pages of an introductory chapter on deteriorating labor standards, about 8 pages on contemporary mass incarceration as a stage in racial/political economy, and about 5 pages of my own prior work on prison labor and the racialized social meaning of “worker” status. So the whole package is about 30 pages, but only the first five of this note are its core.

Turning to that substance, the very general project is, as articulated in an abstract for a panel I’ve organized at an upcoming labor & employment law conference, this:

Seeing the Invisible Fist: State Power in Precarious Work

Labour law aims to intervene in unequal power relations at work, but where do we locate power? A familiar account of today’s predicament posits that restructured capital and labour markets are rendering work precarious by placing it outside conventional employment relations and thus beyond the grasp of employment-based protections. These deregulated labor markets leave workers at the mercy of powerful employers who are not acknowledged as such. We explore whether this narrative of labour law crisis gives too much credence to a neoliberal fiction of the absent state. The most familiar point is that workers’ bargaining power partly arises from their dependence on labor markets for sustenance as state-enforced property regimes interact with a meager social wage; this is the coercion of “work or starve” made vivid by contemporary workfare regimes. We go further to analyze more direct state compulsion of work in private labor

markets on precarious terms, compulsion grounded in state power over workers' bodies exercised through incarceration, deportation, or child removal. Examples from the United States span immigration enforcement, imprisonment for nonpayment of child-support or criminal justice debts, work as a condition of probation or parole, and antitrust liability for independent contractor organizing. All this suggests how precarity reaches beyond strictly economic insecurity, and how urgent it is for labour law scholarship to question rather than reproduce the bounding of the labour market as a separate economic sphere.

Thus, the general aim is to question the prevailing understanding (at least in law and closely allied arenas) of "precarious work" as a product of *deregulation*. One of appended excerpts is from an introduction to the edited volume *The Gloves-Off Economy* (Bernhardt et al., eds.), which exemplifies the conventional narrative that I want to challenge (and in which my own past work has participated as, among other things, a contributor to that volume).

To counter the deregulatory frame, I will engage the burgeoning literature on the carceral state, which refutes the notion that the neoliberal age is dominated by deregulation. To the contrary, the massive, and massively racialized, expansion of the criminal justice system has gone hand-in-hand with dismantling the protective regulatory and redistributive facets of the modern welfare state. Thus, rather than an absolute withdrawal of the state, we see a *shift* in how power is exercised, and on whose behalf.

In turning to this literature, into which I've only just started to dip, I expect to make two moves that I hope may contribute to it. First, and most distinctively, I want to explore how the carceral state is *productive* of subordinated forms of labor. In contrast, the dominant conceptualization of carcerality's contemporary relationship to the labor market is one of *obstruction*. This is exemplified by the focus in "re-entry" scholarship and advocacy on criminal conviction/incarceration as a "barrier to employment." Similar discourses have emerged around child-support obligations and, more recently, criminal justice debt.

I suspect more of a double movement: the simultaneous *exclusion* from relatively good jobs and *compulsion* toward relatively bad jobs.¹ This dual analysis is inspired in part by more familiar analogues involving immigration regulation and employment. There, it is well understood that marginal immigration statuses simultaneously block access to some set of jobs while entrenching subordination within others, especially where employers are able to leverage the threat of state compulsion through deportation. This exemplifies the second way in which I imagine

¹ For some arguments in this vein, see Jamie Peck & Nik Theodore, *Carceral Chicago: Making the Ex-offender Employability Crisis*, 32 INT'L J. URB. & REG'L RES. 251 (2008); Forrest Stuart, *Race, Space, and the Regulation of Surplus Labor: Policing African-Americans in Los Angeles' Skid Row*, 13 SOULS: A CRITICAL JOURNAL OF BLACK POLITICS, CULTURE, AND SOCIETY 197 (2011); Kristin Bumiller, *Incarceration, Welfare State, and the Labor Market Nexus: The Increasing Significance of Gender in the Prison System*, in WOMEN EXITING PRISON: CRITICAL ESSAYS ON GENDER, POST-RELEASE SUPPORT 13 (Bree Carlton & Marie Segrave eds., 2013).

contributing to the carcerality literature, by adding to the burgeoning interest in the relationship between mass incarceration and mass deportation/detention (and the crime/immigration nexus more generally – see, e.g., Ingrid Eagly, Kelly Lytle Hernandez). Similarly, I hope to draw out connections between the carceral state and the regulation of family through areas such as child-support enforcement and child neglect actions, drawing on work being done by scholars like Melissa Murray and Dorothy Roberts.

To give a better sense of what this might look like, here is another abstract, this one for my individual paper slated for the panel already introduced above:

A New Peonage?: Debt Enforcement as Labor Regulation in the Era of Precarious Work

Are we witnessing the emergence of a new form of debt-mediated coerced labor? Certain state-imposed debts can be enforced by imprisonment for nonpayment. Examples in the United States include child-support obligations and fines or fees originating from criminal justice system involvement. These debts are not owed to an employer, but their enforcement nonetheless may coerce work. The defense against imprisonment is “inability to pay,” but that standard quickly becomes an inquiry into “ability to work.” Individuals who quit or refuse jobs, or limit their search for them, may be deemed voluntarily unemployed, thus voluntarily poor, and face imprisonment for nonpayment. All the familiar problems with policing “involuntary unemployment” in social welfare policy re-emerge, but now with the stakes being subjection to state power over the body rather than withdrawal of state social welfare provision. Child-support enforcement programs targeted at noncustodial parents of children receiving means-tested assistance, programs that have been self-consciously designed as the counterparts to welfare work requirements for custodial parents, illustrate this dynamic and portend its expansion.

These developments appear linked to the rise of precarious work in two ways. First, determinations of “voluntariness” always incorporate moral judgments about the forms of work one is entitled to refuse. In this way, work requirements set minimal labor standards and may establish that unstable, dead-end jobs are nonetheless offers one cannot refuse. Second, the coercion concerns labor market participation itself, not attachment to any one employer. This feature complements degradation of long-term employment relationships and remains facially consistent with the ideological equation of labor freedom with labor mobility. These intersections between labor markets and criminal law, family law, and welfare law make vivid the paradox of forced work in free markets.

To be more concrete, in the five-county Los Angeles region, over 200,000 adults are on probation, parole, or supervised release, where seeking and maintaining employment is a ubiquitous condition. Inadequate search or unjustified refusals to take or keep jobs can trigger revocation of community supervision and remand to prison. The region also witnesses about

500,000 current child-support orders, publicly-imposed debts that create work obligations. In *Moss v. Superior Court*, California's Supreme Court upheld incarceration for violating a Riverside County child-support order absent proof of "inability to obtain remunerative employment in order to pay"; obligors must "seek and accept employment."² This concept is institutionalized in the "seek work order," issued to those deemed voluntarily unemployed and back by civil contempt or criminal charges for noncompliance. Collaborations among Los Angeles' Child Support Services Department, WorkSource Centers, and Superior Court mandate employment services under threat of jail and use them to test claims that jobs are unavailable. The constant question is whether work cannot be found or instead individuals avoid work and are too choosy among jobs. In *Moss*, the trial judge had concluded that the obligor "could get a job flipping hamburgers [but] chose[] not to."³ The California Supreme Court rejected the contention that the obligation to flip burgers or go to jail constitutes involuntary servitude in violation of the Thirteenth Amendment because such an order "does not bind the parent to any particular employer or form of employment or otherwise affect the freedom of the parent."

Welfare-to-work programs provide the model here. Indeed, Lawrence Mead, a crucial academic architect of welfare work regimes, is advocating massive extension of "paternalist" welfare work programs to child-support and criminal justice community supervision systems.⁴ Nonpayment of restitution, fines, and fees stemming from criminal justice system involvement also can trigger incarceration. A leading "progressive" reform proposal is to allow debtors to "pay off" their obligations through unpaid community service assignments as an alternative to incarceration and in the absence of jobs.⁵ This echoes the rationale for "workfare" or "work experience" programs during welfare reform and raises similar concerns about working conditions, displacement, and suppression of labor standards.

To provide some broader context on this *obstruction vs. production* theme, I have appended an excerpt from Loic Wacquant's influential essay on "From Slavery to Mass Incarceration." As Wacquant exemplifies, the main exception to the labor "obstruction" theme in carceral studies seems to concern inmate labor. In essence, I doubt that coerced labor in the carceral state is confined temporally, spatially, or institutionally to periods of actual imprisonment.

The prison labor connection also introduces another theme. This one concerns a longstanding interest of mine, which is the ideological nature of separation between "economic" and "noneconomic" spheres delineated by "market" vs. "nonmarket" social relations. A significant feature of the forms of labor coercion in question is that they treat work, and the state's coercion of it, as an appendage to some "noneconomic" sphere: criminal justice, child welfare, immigration, etc. *Moss*, for instance, treated forced labor in service of child-support payments as

² 950 P.2d 59 (1998).

³ *Id.* at n. 16.

⁴ LAWRENCE M. MEAD, EXPANDING WORK PROGRAMS FOR POOR MEN (2011).

⁵ Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010).

enforcement of a “civic duty” analogous to jury or military service, and grounded in fundamental principles of family obligation.

This angle of approach diverges sharply from traditional labor & employment law, which takes the employer-employee relationship as the central object of analysis. Here, the employer disappears from view and the central figure is the worker, except the worker is not figured primarily *as a worker*, but instead as a denizen of one of these other spheres. This positioning as an ex-offender, an immigrant, a noncustodial father, a debtor, etc. is itself highly racialized, both because (simplifying, obviously) these “noneconomic” spheres are racialized nonwhite *and* because market work is racialized white. I tentatively explored this theme in my prior work on prison labor, and so I attach an excerpt from that as the last appendix to this cover note. In addition, this focus on the individual worker and the extent to which he is committed to fulfilling his “noneconomic” obligations, is directly continuous with the race/gendered politics of “personal responsibility” associated with welfare reform and its work requirements.

The welfare connection points to a final connective theme, one that returns to broad questions of the relationship between the carceral state and the more familiar faces of neoliberalism. Various forms of window dressing notwithstanding, welfare work requirements function largely to reduce financial claims on the state through some combination of lowered living standards for low-income families and increased work effort. Such cost-shifting runs throughout my subject matter. Child-support enforcement similarly, and quite explicitly, is designed to shift costs from public assistance to private support from noncustodial parents. Prison labor reduces the public costs of mass incarceration by substituting low-cost inmate labor for publicly contracted work. Similarly, the explosion in criminal justice fines and fees serves to shift financing from the public to those subjected to incarceration and criminal justice supervision; ultimately, for that cost shift to succeed, it requires both an increase in work and the transfer of its fruits from workers to the carceral state. In these ways, the more familiar faces of neoliberalism – low taxes, low transfers, and minimal regulation of capital – are deeply symbiotic with the labor politics of the carceral state, which themselves are thoroughly shaped and enabled by its racially stratified character.

The Gloves-Off Economy: Problems and Possibilities at the Bottom of America's Labor Market (edited by Annette Bernhardt, Heather Boushey, Laura Dresser, and Chris Tilly, Cornell University Press, 2008)

CHAPTER 1

An Introduction to the “Gloves-off” Economy

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At 6:00 a.m. in New York City, a domestic worker wakes up her employer's children and starts to cook breakfast for them, in a work week in which she will earn a flat \$400 for as many hours as her employer needs. In Chicago, men are picked up at a homeless shelter at 8:00 a.m. and bussed by a temp agency to a wholesale distribution center to spend the next 10 hours packing toys into boxes, for the minimum wage without overtime. In Atlanta, workers at a poultry processing plant break for lunch, hands raw from handling chemicals without protective gear. At 3:00 p.m. in Dallas, a new shift of nursing home workers start their day, severely understaffed and underpaid. During the evening rush hour in Minneapolis, gas station workers fill up tanks, working only for tips. In New Orleans, a dishwasher stays late into the night finishing the evening's cleaning, off the clock and unpaid. And at midnight, a janitor in Los Angeles begins buffing the floor of a major retailer, working for a contract cleaning company that pays \$8 an hour with no benefits.

These workers—and millions more—share more than the fact that they are paid low wages. The central thesis of this volume is that they are part of the “gloves-off” economy, in which some employers are increasingly breaking, bending, or evading long-established laws and standards

designed to protect workers. Such practices are sending fault lines into every corner of the low-wage labor market, stunting wages and working conditions for an expanding set of jobs. In the process, employers who play by the rules are under growing pressure to follow suit, intensifying the search for low-cost business strategies across a wide range of industries and eventually ratcheting up into higher wage parts of the labor market.

When we talk about the "gloves-off economy," we are identifying *a set of employer strategies and practices that either evade or outright violate the core laws and standards that govern job quality in the U.S.* While such strategies have long been present in certain sectors, such as sweatshops and marginal small businesses, we argue that they are spreading. This trend, driven by competitive pressures, has been shaped by an environment where other major economic actors—government, unions, and civil society—have either promoted deregulation or have been unable to contain gloves-off business strategies. The result, at the start of the 21st century, is the reality that a major segment of the U.S. labor market increasingly diverges from the legal and normative bounds put into place decades ago.

The workplace laws in question are a familiar list of regulations at the federal, state, and local level. They include laws that regulate wages and hours worked, setting minimum standards for the wage floor, for overtime pay, and, in some states, for rest and meal breaks. They also comprise laws governing health and safety conditions in the workplace, setting detailed requirements for particular industries and occupations. Others on the list include antidiscrimination laws, right-to-organize laws, and laws mandating employers' contribution to social welfare benefits such as Social Security, unemployment insurance, and workers compensation.

By contrast, the standards we have in mind are set not by laws, but rather by norms that have enough weight (and organizing force behind them) to shape employers' decisions about wages and working conditions. At least until the past few decades, such normative standards typically included predictability of schedules, vacation and/or sick leave, annual raises, full-time hours, and, in some industries, living wages and employer-provided health insurance and pensions. Though it may seem utopian to focus on standards at a time when even legally guaranteed rights are frequently abrogated, we argue that both laws and standards are being eroded for similar reasons as employers seek to reduce labor costs. Further, we argue that the existence of strategies to subvert or ignore laws by some employers pulls down labor norms farther up in the labor market.

Perhaps the concepts that correspond most closely to our gloves-off metaphor are *informal employment* and *unregulated work or employment*. The International Labour Organization (2002) defined informal employment as employment without secure contracts or Social Security coverage, whether in the formal or informal sector. Our gaze is similarly motivated, but both narrower (excluding true self-employment) and broader (including jobs that breach standards other than the contract and Social Security). The term “unregulated work” (or employment) is often used interchangeably with the informal sector, but in recent years researchers, particularly in Europe, have increasingly used it in a way that has much in common with gloves-off employer strategies (Bernhardt, McGrath, and DeFilippis 2007; Dicken and Hall 2003; Esping-Andersen 1999; UN-HABITAT 2004; Williams and Thomas 1996). William Robinson (2003:260) offers a helpful distinction: “Casualization generally refers to the new unregulated work that labor performs for capital under ‘flexible’ conditions. Informalization refers to the transfer of much economic activity from the formal to the informal economy.”

In any case, our chief goal here is not to find the right name for employer evasion and violation of laws and standards, but to explain it. Extending a taxonomy proposed by Avirgan, Bivens, and Gammage (2005), there are four major explanations for the existence and/or growth of unregulated work:

- *Dualist*: Unregulated work is a lingering vestige of precapitalist production.
- *Survivalist*: Unregulated work, including self-employment, is the consequence of family survival strategies in the face of inadequate employment growth.
- *Legalist*: Unregulated work is a response to excessive regulation of businesses and employment (a view advanced forcefully by De Soto 1989).
- *Structuralist*: Unregulated work is generated by capitalist strategies to keep labor costs low.

TABLE 1
Examples of Employer Strategies in the "Gloves-off Economy"

	Evasion strategies	Violation strategies
Employment and labor laws	<p>Strategies to evade core workplace laws by creating legal distance between employer and employee, such as these:</p> <ul style="list-style-type: none"> • Subcontracting on-site and off-site work to outside companies where lower wages are generated via the subcontractor's evasion of labor law • Misclassification of workers as independent contractors • Using temporary, leased, and contract workers to distance and confuse the employment relationship and reduce legal obligations 	<p>Outright violation of laws governing the employment relationship, such as these:</p> <ul style="list-style-type: none"> • Direct violation of core laws: FLSA, OSHA, FMLA, ERISA, Title VII, NLRA, prevailing wage, living wage, etc. • Payment (whole or part) in cash and "off the books" • Failure to contribute to workers' compensation, disability insurance, unemployment insurance, Social Security, etc. • Forced labor and trafficking
	Erosion strategies	Abandonment strategies
Normative workplace standards	<p>Strategies that erode normative standards, such as these:</p> <ul style="list-style-type: none"> • Increases in employee contributions to health insurance and shifts to defined-contribution pensions • Manipulating work hours so that employees do not qualify for benefits • Shift to piece-rate, commission, or project-based pay as a means of lowering wages • Reducing sick days by shifting to package of leave days and/or requiring medical documentation for sick days • Subcontracting and temping out to gain wage and numerical flexibility • Legal union avoidance tactics, such as double-breasting 	<p>Outright abandonment of normative standards, such as these:</p> <ul style="list-style-type: none"> • Wage freezes or outright wage cuts • Failure to provide health insurance and pensions or elimination of programs • Conversion of full-time jobs to part-time • Instituting two-tiered pay systems • Dismantling internal labor markets

Probably the most important evasion strategy is to subcontract certain jobs or functions to outside companies. The workers performing those jobs may still be located on-site (as with subcontracted janitorial workers) or be moved off-site (as with industrial laundry workers cleaning linens for hotels and hospitals). Of course, greater use of subcontracting in and of itself does not necessarily imply an attempt to evade workplace laws—but it certainly can facilitate such evasion. As shown in Table 1, subcontracting can help employers evade responsibility for compliance with employment and labor laws, creating greater legal distance in cases where, for example, a fly-by-night cleaning subcontractor pays less than the minimum wage.

Similarly, for some employers the motivation for using temp, leased, or contract workers is to lessen legal liability for working conditions and social welfare contributions. The deliberate misclassification of employees as independent contractors is perhaps the most extreme version of this strategy, since independent contractors are not covered by most employment and labor laws (Ruckelshaus and Goldstein 2002).

In this row of Table 1 (as in the next), the distinction between violation and evasion strategies is not always clear. For example, an employer may subcontract with the explicit recognition that the contractor will do the dirty work of violating the law by underpaying or failing to make employer unemployment insurance contributions. Still, the distinction between violations and evasions is an important one, not just descriptively but also legally and, by extension, in terms of options for public policy responses.

How the Gloves Went On and Came Off Again: The Rise and Fall of the Regulation of Work

The gloves-off economy did not appear out of nowhere. Employers' decisions about how to organize work and production are shaped by competitive forces and institutional constraints, each of which they also influence. Indeed, we see the trajectory toward labor cost reduction progressing along four axes: business has become less inclined toward self-regulation, government regulation of business has increasingly gone

unenforced, the decline in unions has limited civil society regulation of business, and government has reduced the social safety net and adopted policies that expand the group of vulnerable workers.

*The Gloves Go On: Rising Regulation of Work
in the United States, 1890–1975*

The first to regulate employment in the United States were businesses themselves. In the late 19th and early 20th centuries, the vertical integration documented by Alfred Chandler (1977, 1990), as well as horizontal integration—for example, at U.S. Steel and General Motors—came to fruition. This had a number of consequences. Oligopoly power shifted competition away from price competition and allowed large corporations to pass on added costs including labor costs (Freeman and Medoff 1984). Companies enjoyed sheltered capital markets, since the major source of finance was retained earnings, and managerial capitalism flourished. To increase control over production processes, businesses standardized their hiring and supervision, rather than leaving them to the whims of individual managers (Jacoby 1985; Roy 1997; Zunz 1990).

The combination of large companies, the importance of firm-specific knowledge, and personnel management oriented toward adding value rather than cutting costs led to widespread development of internal labor markets featuring long-term employment, upward mobility, and company-run training. Of course, labor unrest and union pressure also played a strong role (Gordon, Edwards, and Reich 1982; Jacoby 1997).

At the same time, government regulation of employment began to develop alongside business self-regulation, spurred to action by the muckraking journalists and crusading advocates of the Progressive Era. States led in the innovation, instituting “Workman’s Compensation” programs, regulating child labor, and passing safety and women’s minimum wage legislation.

In the crucible of the Great Depression, the federal government finally stepped forward in concerted fashion to establish a system of employer regulation via the New Deal legislation of the 1930s. The cornerstone of this system was the 1938 Fair Labor Standards Act (FLSA), which set the floor for wages and overtime. Initially, the FLSA excluded some groups of workers, but it was expanded from the 1940s through the 1980s to include most workers except for employees of state and local government, small-farm workers, and some domestic and home care workers (Department of Labor 2007). The 1935 National Labor Relations Act (NLRA) provided private-sector workers with the right to organize around working conditions, to bargain collectively, and to strike.

Later, Title VII of the 1964 Civil Rights Act prohibited discrimination by covered employers (with a small number of exclusions, such as the federal government itself) on the basis of race, color, religion, sex, or national origin. Legislative and judicial extensions of the act banned sexual harassment and discrimination on the basis of pregnancy, age, or disability. Finally, the regulation of health and safety on the job was established by the 1970 Occupational Safety and Health Act, which is enforced by OSHA.

In step with heightened government regulation of the terms and conditions of employment, civil society expanded its regulatory role as well. Labor unions took the lead. Though unions in the United States date back to the 18th century, the critical turning point for the country's labor movement came with the organizing drives of the Congress of Industrial Organizations (CIO)—and of the American Federation of Labor (AFL) from which it had emerged—in the 1930s and 1940s. In 1935, when the NLRA was passed, the AFL (prior to the CIO's departure) claimed 2.5 million members. By 1945, the AFL and CIO combined claimed 14.8 million workers, over one-third of the nonagricultural workforce (New York Public Library 1997).

A less widely recognized element of civil society regulation of the workplace was launched in 1974 with the federal government's creation of the Legal Services Corporation (LSC). LSC disburses federal funds to independent local groups of public interest attorneys, with a mission to "promote equal access to justice and to provide high-quality civil legal assistance to low-income Americans" (Legal Services Corporation 2008a). While local legal services agencies address a wide range of issues, their portfolio typically includes labor, both through individual lawsuits and through litigation directed more broadly at the implementation of "the unemployment system, wage and hour laws, low wage worker protections, and training for disadvantaged families" (Greater Boston Legal Services 2008).

In addition to direct regulation of employment, government took on a stronger role in regulating labor supply from the 1930s forward. From the 1930s to the 1970s, regulating labor supply chiefly meant limiting the extent to which economically vulnerable workers were forced into taking any job, regardless of the pay, working conditions, or their family's needs. The 1935 Social Security Act was the key law in this regard, creating income streams for several distinct groups—widows and single mothers, the elderly, the disabled, and those unemployed through no fault of their own—to protect them from destitution when they could not work. The net effect of the act was to provide income to vulnerable groups in the workforce, making them less desperate for work.

Immigration policy can also directly expand or contract the number of vulnerable workers in an economy. For example, during a critical two decades, 1942 to 1964, the U.S. Bracero Program managed a large flow of legal, regulated immigrants from Mexico. The program, aimed at limiting illegal immigration and meeting the labor needs of agribusiness (which faced labor shortages during World War II), offered 4.5 million work contracts to Mexicans over its lifetime, about 200,000 per year. *Braceros* had far from full rights as workers: They were temporary and tied to an individual employer, and they often suffered abuse at the hands of farm owners and the U.S. and Mexican governments. Still, the program offered an attractive alternative to illegal immigration, which would have left immigrants even more vulnerable (Gammage, this volume).

Thus, regulation of the U.S. workplace followed an upward arc for the first 75 years of the 20th century. Businesses built rules and bureaucracies that reshaped jobs, and an important subset of companies achieved market dominance and shared some of the resulting "rents" with their workforce. Government took an increasingly active role in mandating and enforcing employment rights and standards; civil society, especially in the form of unions, did the same. Government policies also provided supports and opportunities that moderated the whip of desperation for particular groups of potential workers. American workplaces in the early 1970s were no workers' paradise, but many workers were sheltered by a set of norms and regulations that, from today's vantage point, look quite impressive.

*The Gloves Come Off: Declining Regulation of Work
in the United States, 1975–Present*

Then it all began to unravel. A historical map of the deregulation of work in the United States—and recent attempts at re-regulation—can also serve as a map of the major themes of this volume.

How Employers Take the Gloves Off

Starting in the mid-1970s, business self-organization moved in new directions. Whereas vertical integration characterized most of the 20th century, disintegration has been a business watchword since the 1980s. Corporations are increasingly subcontracting and outsourcing work, creating extended supply chains (Gereffi 2003; Harrison 1994; Moss, Salzman, and Tilly 2000). The public sector as well has turned to subcontracting, in the privatization trend that has swept governments from federal to local in recent decades (Sclar and Leone 2000). Globalization and rapid technological change have rendered market dominance more transitory. Capital has become more mobile, undermining job stability

(Bluestone and Harrison 1982; Silver 2003). Businesses draw increasingly on nonstandard forms of work, often mediated by a third party: even the largest corporations have distanced themselves from lifetime employment (Baumol, Blinder, and Wolff 2003). As AT&T geared up to lay off an estimated 40,000 workers in early 1996, vice president for human resources James Meadows told *The New York Times*, "People need to look at themselves as self-employed, as vendors who come to this company to sell their skills." Instead of "jobs," people increasingly have "projects" or "fields of work," he remarked, leading to a society that is increasingly "jobless but not workless" (Andrews 1996:D10).

The chapters in the next section of this volume, *How Employers Take the Gloves Off*, highlight key aspects of these shifts in employer behavior. Noah Zatz sets the scene by reviewing the core employment and labor laws protecting workers on the job, then teases out the myriad ways that some employers dodge or violate them. Ruth Milkman, followed by Nik Theodore, Edwin Meléndez, Abel Valenzuela Jr., and Ana Luz Gonzalez, offers related discussion of the role that new forms of business organization play in the degradation of work. Exploring construction, building services, and trucking in southern California, Milkman documents the emergence of business strategies like subcontracting, double-breasting, and converting truckers from employees to "owner-operators" and the direct negative impact these practices have on job quality in these sectors. Theodore and co-authors focus on the growing phenomenon of day labor, especially in construction, and provide evidence from a survey of day laborers in the Washington, DC, area that this work is primed for and riddled with abuse of basic labor standards. Laura Dresser reminds us that caring and cleaning work in the home includes both old and new elements: child care and cleaning work as old as human society as well as the recent explosion in home health care stemming from changes in the family and in the health care industry. An analysis spanning these different occupations, Dresser argues, highlights a shared and structural vulnerability to abuses of labor rights and standards.

At the same time that businesses have restructured over the past three decades, government regulation of employers has declined. The laws and agencies established in the middle of the 20th century to regulate business still exist, and there are more workplace regulations, but there have not been commensurate increases in the government's capacity to investigate and ensure compliance with these laws. According to David Weil (this volume), between 1940 and 1994, the number of workplace regulations administered by the Department of Labor grew from 18 to 189; currently there are nearly 200 statutes to oversee. But as we noted above, federal resources for enforcement have been scaled back

considerably. Thus, although regulation may be increasing on paper, in practice there is strong evidence that some of our most basic workplace laws are not being enforced. Noah Zatz, in his chapter in this volume, drives the point home by distinguishing between the reach (coverage) and grasp (enforcement effectiveness) of government workplace regulation.

Moreover, the standards set by some of those laws are weaker today than they were several decades ago. The core standards of the FLSA have become weaker as the wage floor provided by the minimum wage has fallen (though recent legislation at the state and federal level has boosted it somewhat), and federal regulatory changes recently reduced the reach of the overtime pay provisions by exempting more workers. In 2003, analysts estimated that this redefinition would remove an added eight million workers (about 6% of the total employed workforce) from eligibility for overtime pay (Eisenbrey and Bernstein 2003).

Part of the deregulation occurred simply by choosing agency directors skeptical of—or even hostile to—the regulation of business. For example, beginning with President Reagan in 1981, Republican presidents making appointments to the National Labor Relations Board began to choose board members opposed to unions, creating an ever-less-favorable terrain for union representation (Miller 2006, Moberg 1998). In some cases, businesses themselves are playing an important role in driving down government-mandated labor standards. For example, it was the restaurant and retail industries, which employ the bulk of low-wage workers, that led the drive to reduce the real value of the minimum wage (Tilly 2005).

Alongside the weakening of governmental institutions regulating employers, civil society's grip has also loosened as unions have lost much of their historic strength. Declining union membership has been driven by a number of factors, but concerted (often illegal) anti-union activity has clearly played a role. For example, Bronfenbrenner (2000) has documented that employers threaten to close all or part of their business in more than half of all union organizing campaigns and that unions win only 38% of representation elections when such threats are made, compared to 51% in the absence of shutdown threats.⁵ Research on deunionization in the construction, trucking, and garment industries shows that gloves-off workplace practices increase as a result (Belzer 1994; Milkman 2007; Milkman this volume, Theodore this volume). Finally, about one third of non-union workers in the U.S. would prefer union representation (Freeman and Rogers 1999), another indicator that the decline in private-sector union membership has had more to do with employer strategies than with the preferences of American workers.

With unions on the defensive and reduced to a small corner of the private sector, employers have had a relatively free hand to contain and even reduce wages and benefits in non-union settings. As a result, the gap between union and non-union compensation yawns wide. Full-time workers who are union members earn 30% more per week than their non-union counterparts (Bureau of Labor Statistics 2007). Seventy percent of union workers have defined-benefit pension plans; only 15% of non-union workers do (Labor Research Association 2006). Union members are also 25% more likely to have employer-provided benefits, like health insurance or a retirement plan (Schmitt et al. 2007).

Less momentous than union atrophy, but perhaps more insidious, is the trimming of funds for the Legal Services Corporation. In 2007 dollars, nationwide federal funding for LSC stood at \$757 million in 1980, but following deep cuts in 1981 and 1995 had fallen to \$332 million in 2007, with the number of clients served dropping from 1.6 million to 1 million (Hoffman 1996; Iowa Legal Aid 2008; Legal Services Corporation 2007; Legal Services Corporation 2008b). Federal legislation also barred use of LSC funds for class-action lawsuits (Hoffman 1996) and limited immigrant representation to permanent residents and a few other selected categories (such as refugees and asylum seekers). These cuts have muted important voices advocating for low-wage workers' rights.

Workers at Risk

Whether intentionally or not, federal and state policy makers have in recent years exacerbated the trend toward deregulation by adopting policies that leave growing numbers of workers increasingly vulnerable to gloves-off practices. This has occurred along multiple dimensions: immigration policy, safety net and welfare policy, and policies affecting ex-offenders. The three chapters making up our section on "Workers at Risk" tell these stories in more detail.

Also expanding the stock of vulnerable workers has been the dramatic climb in incarceration rates, which has led to a mushrooming ex-offender population that faces significant formal and informal bars to employment. Over two million persons, disproportionately black and Latino, are currently behind bars, a 500% increase over the last 30 years (The Sentencing Project 2008). The United States has the highest incarceration rate of any nation in the Organisation for Economic Co-operation and Development, much of which stems from the high rates of incarceration for drug offenses.⁷ Of the state prison population, African American and Hispanic prisoners are more likely than whites to have been sentenced for drug offenses: 15% of whites, 25% of African Americans, and

27% of Hispanics. According to Maurice Emsellem and Debbie A. Mukamal (chapter 8), many of those now being released from prison were convicted on drug offenses (37%), and nearly two thirds overall served time for nonviolent offenses (Glaze and Bonczar 2007). As they are released from prison, ex-offenders face significant challenges integrating into stable employment, especially since many more sectors of the labor market are using background checks and limiting employment for felons, pushing yet another population to the margins of the world of work.

Since most forms of evasion and violation of workplace standards are not measurable in standard data sets, we cannot definitively say which workers are touched by such practices. Here we have focused on three groups of workers whose power in the workplace has been significantly shaped—and more often than not reduced—by public policy, resulting in greater vulnerability to substandard working conditions. But it is not an exhaustive list, and clearly there are many more groups of workers trapped in the gloves-off economy, whether because of their skill level, lack of work experience, skin color, gender, or other reasons. From the standpoint of this volume, however, the key lesson is that the workers most often impacted by “gloves-off” workplace practices are those that, for varying reasons, have little or no recourse to either challenge an employer’s behavior or to seek employment elsewhere.

LOÏC WACQUANT

FROM SLAVERY TO MASS INCARCERATION

Rethinking the 'race question' in the US

NOT ONE BUT SEVERAL 'peculiar institutions' have successively operated to define, confine, and control African-Americans in the history of the United States. The first is *chattel slavery* as the pivot of the plantation economy and inceptive matrix of racial division from the colonial era to the Civil War. The second is the *Jim Crow system* of legally enforced discrimination and segregation from cradle to grave that anchored the predominantly agrarian society of the South from the close of Reconstruction to the Civil Rights revolution which toppled it a full century after abolition. America's third special device for containing the descendants of slaves in the Northern industrial metropolis is the *ghetto*, corresponding to the conjoint urbanization and proletarianization of African-Americans from the Great Migration of 1914–30 to the 1960s, when it was rendered partially obsolete by the concurrent transformation of economy and state and by the mounting protest of blacks against continued caste exclusion, climaxing with the explosive urban riots chronicled in the Kerner Commission Report.¹

The fourth, I contend here, is the novel institutional complex formed by the *remnants of the dark ghetto and the carceral apparatus* with which it has become joined by a linked relationship of structural symbiosis and functional surrogacy. This suggests that slavery and mass imprisonment are genealogically linked and that one cannot understand the latter—its

timing, composition, and smooth onset as well as the quiet ignorance or acceptance of its deleterious effects on those it affects—without returning to the former as historic starting point and functional analogue.

Viewed against the backdrop of the full historical trajectory of racial domination in the United States (summed up in Table 1), the glaring and growing ‘disproportionality’ in incarceration that has afflicted African-Americans over the past three decades can be understood as the result of the ‘extra-penological’ functions that the prison system has come to shoulder in the wake of the crisis of the ghetto and of the continuing stigma that afflicts the descendants of slaves by virtue of their membership in a group constitutively deprived of ethnic honour (Max Weber’s *Massehre*).

TABLE 1 *The four ‘peculiar institutions’ and their basis*

Institution	Form of labour	Core of economy	Dominant social type
Slavery (1619–1865)	unfree fixed labour	Plantation	slave
Jim Crow (South, 1865–1965)	free fixed labour	Agrarian and extractive	sharecropper
Ghetto (North, 1915–68)	free mobile labour	Segmented industrial manufacturing	menial worker
Hyperghetto & Prison (1968–)	fixed surplus labour	Polarized postindustrial services	welfare recipient & criminal

¹ See, respectively: Kenneth Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South*, New York [1956] 1989; Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America*, Cambridge, MA 1998; C. Vann Woodward, *The Strange Career of Jim Crow*, Oxford [1957] 1989; Leon Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow*, New York 1998; Allan Spear, *Black Chicago: The Making of a Negro Ghetto, 1890–1920*, Chicago 1968; Kerner Commission, *1968 Report of the National Advisory Commission on Civil Disorders*, New York [1968] 1988.

Not crime, but the need to shore up an eroding caste cleavage, along with buttressing the emergent regime of desocialized wage labour to which most blacks are fated by virtue of their lack of marketable cultural capital, and which the most deprived among them resist by escaping into the illegal street economy, is the main impetus behind the stupendous expansion of America's penal state in the post-Keynesian age and its de facto policy of 'carceral affirmative action' towards African-Americans.²

Labour extraction and caste division

America's first three 'peculiar institutions', slavery, Jim Crow, and the ghetto, have this in common: they were all instruments for the conjoint *extraction of labour* and *social ostracization* of an outcast group deemed unassimilable by virtue of the indelible threefold stigma it carries. African-Americans arrived under bondage in the land of freedom. They were accordingly deprived of the right to vote in the self-appointed cradle of democracy (until 1965 for residents of the Southern states). And, for lack of a recognizable national affiliation, they were shorn of ethnic honour, which implies that, rather than simply standing at the bottom of the rank ordering of group prestige in American society, they were barred from it *ab initio*.³

* * *

² See my 'Crime et châtement en Amérique de Nixon à Clinton', *Archives de politique criminelle*, vol. 20, pp. 123–38; and *Les Prisons de la misère*, Paris 1999, pp. 71–94 (English trans. *Prisons of Poverty*, Minneapolis 2002).

³ 'Among the groups commonly considered unassimilable, the Negro people is by far the largest. The Negroes do not, like the Japanese and the Chinese, have a politically organized nation and an accepted culture of their own outside of America to fall back upon. Unlike the Oriental, there attaches to the Negro an historical memory of slavery and inferiority. It is more difficult for them to answer prejudice with prejudice and, as the Orientals may do, to consider themselves and their history superior to the white Americans and their recent cultural achievements. The Negroes do not have these fortifications of self-respect. They are more helplessly *imprisoned* as a subordinate caste, a caste of people deemed to be lacking a cultural past and assumed to be incapable of a cultural future.' Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, New York [1944] 1962, p. 54; emphasis added.

3. *Ghetto (North, 1915–68)*. The sheer brutality of caste oppression in the South, the decline of cotton agriculture due to floods and the boll weevil, and the pressing shortage of labour in Northern factories caused by the outbreak of World War 1 created the impetus for African-Americans to emigrate en masse to the booming industrial centers of the Midwest and Northeast (over 1.5 million left in 1910–30, followed by another 3 million in 1940–60). But as migrants from Mississippi to the Carolinas flocked to the Northern metropolis, what they discovered there was not the ‘promised land’ of equality and full citizenship but another system of racial enclosure, the ghetto, which, though it was less rigid and fearsome than the one they had fled, was no less encompassing and constricting. To be sure, greater freedom to come and go in public places and to consume in regular commercial establishments, the disappearance of the humiliating signs pointing to ‘Coloured’ here and ‘White’ there, renewed access to the ballot box and protection from the courts, the possibility of limited economic advancement, release from personal subservience and from the dread of omnipresent white violence, all made life in the urban North incomparably preferable to continued peonage in the rural South: it was ‘better to be a lamppost in Chicago than President of Dixie,’ as migrants famously put it to Richard Wright. But restrictive covenants forced African-Americans to congregate in a ‘Black Belt’ which quickly became overcrowded, underserved and blighted by crime, disease, and dilapidation, while the ‘job ceiling’ restricted them to the most hazardous, menial, and underpaid occupations in both industry and personal

⁹ The Mississippi legislature went so far as to outlaw the advocacy of social equality between blacks and whites. A law of 1920 subjected to a fine of 500 dollars and 6 months’ jail anyone ‘found guilty of printing, publishing or circulating arguments in favour of social equality or intermarriage’: McMillen, *Dark Journey*, pp. 8–9.

services. As for 'social equality', understood as the possibility of 'becoming members of white cliques, churches and voluntary associations, or marrying into their families', it was firmly and definitively denied.¹⁰

Blacks had entered the Fordist industrial economy, to which they contributed a vital source of abundant and cheap labour willing to ride along its cycles of boom and bust. Yet they remained locked in a precarious position of structural economic marginality and consigned to a secluded and dependent microcosm, complete with its own internal division of labour, social stratification, and agencies of collective voice and symbolic representation: a 'city within the city' moored in a complexus of black churches and press, businesses and professional practices, fraternal lodges and communal associations that provided both a 'milieu for Negro Americans in which they [could] imbue their lives with meaning' and a bulwark 'to "protect" white America from "social contact" with Negroes'.¹¹ Continued caste hostility from without and renewed ethnic affinity from within converged to create the ghetto as the third vehicle to extract black labour while keeping black bodies at a safe distance, to the material and symbolic benefit of white society.

The era of the ghetto as paramount mechanism of ethnoracial domination had opened with the urban riots of 1917–19 (in East St. Louis, Chicago, Longview, Houston, etc.). It closed with a wave of clashes, looting and burning that rocked hundreds of American cities from coast to coast, from the Watts uprising of 1965 to the riots of rage and grief triggered by the assassination of Martin Luther King in the summer of 1968. Indeed, by the end of the sixties, the ghetto was well on its way to becoming functionally obsolete or, to be more precise, increasingly *unsuited* to accomplishing the twofold task historically entrusted to America's 'peculiar institutions.' On the side of *labour extraction*, the shift from an urban industrial economy to a suburban service economy and the accompanying dualization of the occupational structure, along with the upsurge of working-class immigration from Mexico, the Caribbean and Asia, meant that large segments of the workforce contained in the 'Black Belts' of the

¹⁰ St. Clair Drake and Horace Cayton, *Black Metropolis: A Study of Negro Life in a Northern City*, New York [1945] 1962, vol. 1, pp. 112–28.

¹¹ *Black Metropolis*, vol. 2, p. xiv.

Northern metropolis were simply no longer needed. On the side of *ethnoracial closure*, the decades-long mobilization of African-Americans against caste rule finally succeeded, in the propitious political conjuncture of crisis stemming from the Vietnam war and assorted social unrest, in forcing the federal state to dismantle the legal machinery of caste exclusion. Having secured voting and civil rights, blacks were at long last full citizens who would no longer brook being shunted off into the separate and inferior world of the ghetto.¹²

But while whites begrudgingly accepted 'integration' in principle, in practice they strove to maintain an unbridgeable social and symbolic gulf with their compatriots of African descent. They abandoned public schools, shunned public space, and fled to the suburbs in their millions to avoid mixing and ward off the spectre of 'social equality' in the city. They then turned against the welfare state and those social programmes upon which the collective advancement of blacks was most dependent. A *contrario*, they extended enthusiastic support for the 'law-and-order' policies that vowed to firmly repress urban disorders connately perceived as racial threats.¹³ Such policies pointed to yet another special institution capable of confining and controlling if not the entire African-American community, at least its most disruptive, disreputable and dangerous members: the prison.

* * *

¹² This was the meaning of Martin Luther King's Freedom Campaign in the summer of 1966 in Chicago: it sought to apply to the ghetto the techniques of collective mobilization and civil disobedience successfully used in the attack on Jim Crow in the South, to reveal and protest against the life to which blacks were condemned in the Northern metropolis. The campaign to make Chicago an open city was swiftly crushed by formidable repression, spearheaded by 4,000 National Guards. Stephen Oakes, *Let the Trumpet Sound: A Life of Martin Luther King*, New York 1982.

¹³ Thomas Byrne Edsall and Mary Edsall, *Chain Reaction: The Impact of Race, Rights and Taxes on American Politics*, New York 1991; Jill Quadagno, *The Colour of Welfare: How Racism Undermined the War on Poverty*, Oxford 1994; Katherine Beckett and Theodore Sasson, *The Politics of Injustice*, Thousand Oaks 2000, pp. 49-74.

Now, the carceral system had already functioned as an *ancillary* institution for caste preservation and labour control in America during one previous transition between regimes of racial domination, that between slavery and Jim Crow in the South. On the morrow of Emancipation, Southern prisons turned black overnight as ‘thousands of ex-slaves were being arrested, tried, and convicted for acts that in the past had been dealt with by the master alone’ and for refusing to behave as menials and follow the demeaning rules of racial etiquette. Soon thereafter, the former confederate states introduced ‘convict leasing’ as a response to the moral panic of ‘Negro crime’ that presented the double advantage of generating prodigious funds for the state coffers and furnishing abundant bound labour to till the fields, build the levees, lay down the railroads, clean the swamps, and dig the mines of the region under murderous conditions.²³ Indeed, penal labour, in the form of the convict-lease and its heir, the chain gang, played a major role in the economic advancement of the New South during the Progressive era, as it ‘reconciled modernization with the continuation of racial domination’.²⁴

What makes the racial intercession of the carceral system different today is that, unlike slavery, Jim Crow and the ghetto of mid-century, it does not carry out a positive economic mission of recruitment and disciplining of the workforce: it serves only to warehouse the precarious and deproletarianized fractions of the black working class, be it that they cannot find employment owing to a combination of skills deficit,

²² A fuller discussion of this ‘deadly symbiosis’ between ghetto and prison in the post-Civil Rights era is provided in my ‘Deadly Symbiosis’, *Punishment and Society*, vol. 3, no. 1, pp. 95–134.

²³ This is not a figure of speech: the annual mortality rate for convicts reached 16 per cent in Mississippi in the 1880s, where ‘not a single leased convict ever lived long enough to serve a sentence of ten years or more’. Hundreds of black children, many as young as six years old, were leased by the state for the benefit of planters, businessmen and financiers, to toil in conditions that even some patrician Southerners found shameful and ‘a stain upon our manhood’. See David Oshinsky, *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*, New York 1996, p. 45.

²⁴ Alex Lichtenstein, *Twice the Work of Free Labour: The Political Economy of Convict Labour in the New South*, London and New York 1999, p. 195.

employer discrimination and competition from immigrants, or that they refuse to submit to the indignity of substandard work in the peripheral sectors of the service economy—what ghetto residents commonly label ‘slave jobs.’ But there is presently mounting financial and ideological pressure, as well as renewed political interest, to relax restrictions on penal labour so as to (re)introduce mass unskilled work in private enterprises inside American prisons: putting most inmates to work would help lower the country’s ‘carceral bill’ as well as effectively extend to the inmate poor the workfare requirements now imposed upon the free poor as a requirement of citizenship.²⁵ The next decade will tell whether the prison remains an appendage to the dark ghetto or supersedes it to go it alone and become America’s fourth ‘peculiar institution.’

²⁵ See my *Les Prisons de la misère*, Paris 1999, pp. 71–94. Expert testimony presented to the House Committees on the Judiciary and Crime during discussion of the Prison Industries Reform Act of 1998 explicitly linked welfare reform to the need to expand private prison labour.

Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships

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VANDERBILT LAW REVIEW

[Vol. 61:3:857

a. Free Labor, Independence, and Competence

One way that courts position inmate workers outside employment is to characterize employees as “free labor.”³²⁵ In the United States, free labor and related concepts historically have formed an important framework that links political standing, economic participation, and social status.³²⁶ Participation in wage labor organized through contract has been one defining feature of free labor,³²⁷ but free labor also has been constituted through opposition to and distinction from subordinated categories of slaves, paupers, and housewives.³²⁸ These relational contrasts have been articulated through ideas of the working person’s economic independence *from* employers and the state, in combination with a family’s economic dependence *on* the worker.³²⁹ This independence, in turn, is grounded in particular personal competences, including rationality, discipline, intelligence, and strength. Ascribed race and gender differences help mediate the distinction between the competent, independent citizens

325. *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005); *Villarreal v. Woodham*, 113 F.3d 202, 206 (11th Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993) (en banc); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993).

326. See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN* (1970); EVELYN NAKANO GLENN, *UNEQUAL FREEDOM* (1998); STANLEY, *supra* note 3.

327. STANLEY, *supra* note 3, at 61.

328. *Id.* at 60-61; Goldberg, *supra* note 308, at 338; Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1669 (2001); VanderVelde, *supra* note 112, at 438.

329. STANLEY, *supra* note 3, at 138-64; Nancy Fraser & Linda Gordon, *A Genealogy of “Dependency”: Tracing a Keyword of the U.S. Welfare State*, in FRASER, *supra* note 3, at 121, 142-44; see also BOYDSTON, *supra* note 3, at 44 (describing similar pattern in early nineteenth century civic republicanism); ELI ZARETSKY, *CAPITALISM, THE FAMILY, AND PERSONAL LIFE* (1976).

of free labor and incompetent, dependent others.³³⁰ This history continues to resonate widely today.³³¹

Beyond simply using the phrase, courts tie employee status to many of these familiar features of free labor that situate wage contracts as just one aspect of a more fully elaborated social position and way of life. Portraying inmates as dependent, courts emphasize prisoners' reliance on the state for the provision of food, housing, and other basic needs:³³² "So long as the [prison] provides for these needs," inmate workers do not fall within the employee class protected by the statute.³³³ Somewhat less frequently, courts also suggest that, were they not imprisoned, inmates would not be able to hold down jobs on

330. BOYDSTON, *supra* note 3, at xviii; GLENN, *supra* note 326; JONES, *supra* note 230; LICHTENSTEIN, *supra* note 36, at 180-84; CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); Ann Shola Orloff & Renee A. Monson, *Citizens, Workers, or Fathers? Men in the History of US Social Policy*, in *MAKING MEN INTO FATHERS: MEN, MASCULINITIES, AND THE SOCIAL POLITICS OF FATHERHOOD* 61 (Barbara Hobson ed., 2002); Schultz, *supra* note 3; Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981). I am here specifically referring to competency for *market* work. On the complementary role played by gendered ascriptions of competence at familial roles like caregiving, see SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 99-107 (1996); Williams, *From Difference to Dominance*, *supra* note 3, at 1448-52.

331. See, e.g., MICHÈLE LAMONT, *THE DIGNITY OF WORKING MEN* 24, 57, 61, 132 (2000) (exploring how white men link race, work discipline, unemployment, and public benefits receipt); Fraser & Gordon, *supra* note 329 (tracing the evolution of "dependency" discourse to the present); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996).

332. See *Villarreal v. Woodham*, 113 F.3d 202, 206 (11th Cir. 1997); *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1124 (11th Cir. 1997); *Danneskjold v. Hausrath*, 82 F.3d 37, 42 (2d Cir. 1996); *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994); *Hale v. Arizona*, 993 F.2d 1387, 1396 (9th Cir. 1993); *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992); *Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1325 (9th Cir. 1991). In doing so, courts systematically ignore the question of how inmates use their earnings from prison labor, whether as remittances to family, for purchase in prison of consumer products or services beyond basic prison provisions, or savings that are used after release. See DONALD BRAMAN, *DOING TIME ON THE OUTSIDE* 140-42 (2004); Michael G. Santos, *Commissaries*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 100 (Marilyn D. McShane & Frank P. Williams eds., 1996); David B. Kalinich, *Contraband*, in *ENCYCLOPEDIA OF AMERICAN PRISONS*, *supra*, at 111.

Notably, opinions supportive of inmate employment claims do not challenge this portrayal of inmates as radically unlike "free labor." Instead, they accept the dichotomy but argue that protecting inmate working conditions is necessary to protect free labor. See *Hale*, 993 F.3d at 1403; *Watson v. Graves*, 909 F.2d 1549, 1555 (5th Cir. 1990); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13 (2d Cir. 1984).

333. *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993). *But see Carter*, 735 F.2d at 12-13 (rejecting this argument). This argument draws on one of the FLSA's statutory purposes: to provide a "decent standard of living for all workers." *Gambetta*, 112 F.3d at 1124; accord *Harker*, 990 F.2d at 133.

their own due to their lack of skills or self-discipline.³³⁴ The ubiquitous invocation of prison labor's rehabilitative function suggests something similar.

By highlighting economic dependence on the prison, courts place inmates in opposition to the "free citizens in the labor market" who are self-reliant, independent, and competent wageworkers.³³⁵ Instead, judicial images of inmate workers evoke both the figure of the welfare dependent—defined as reliant on state support by virtue of inability or unwillingness to participate in market labor³³⁶—and also that of the slave or servant who, while economically productive, is incorporated into the master's household, rather than using his wages to act as an independent consumer in his own home.³³⁷

The wage earner's independence from state and employer is closely related to family members' dependence on this breadwinner.³³⁸ Drawing on a framework of radical separation between the prison and the rest of society, courts place inmate workers outside this masculinized provider role by characterizing them as lone individuals and ignoring their ongoing ties, and financial obligations, to family members outside the prison.³³⁹ Thus, the prison's provision of food, shelter, and medical care to the prisoner is taken as meeting inmates'

334. See *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) (asserting that prison labor "equip[s] [inmates] with skills and habits that will make them less likely to return to crime outside"); *Danneskjold*, 82 F.3d at 43 (asserting that prison labor "trains prisoners in the discipline and skills of work"); *Hale*, 993 F.2d at 1398 (explaining that the work inmates do provides valuable skills and job training). In fact, most inmates were employed full-time prior to their arrest. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, NCJ 195670, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, EDUCATION AND CORRECTIONAL POPULATIONS 10 tbl.14 (Jan. 2003, rev. Apr. 15, 2003), available at <http://www.ojp.gov/bjs/pub/pdf/ecp.pdf>. That said, relative to the remainder of the population, inmates in aggregate have lower levels of educational attainment, *id.* at 2 tbl.1, and, were they not incarcerated, would be substantially more likely to be unemployed, Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030 (1999).

335. *McGinnis v. Stevens*, 543 P.2d 1221, 1239 (Ala. 1975). Ironically, when evaluating employment's control dimensions, workers' dependence on and subordination to their employers is taken to be the very essence of the employment relationship. See *supra* Part I.B.

336. STANLEY, *supra* note 3, at 98-137; Fraser & Gordon, *supra* note 329, at 121; Goldberg, *supra* note 308, at 338.

337. STANLEY, *supra* note 3, at 18, 166; VanderVelde, *supra* note 112, at 439, 459.

338. KESSLER-HARRIS, *supra* note 230, at 36-37; STANLEY, *supra* note 3, at 138-64; Williams, *From Difference to Dominance*, *supra* note 3, at 1445. Enabling (at least some) wage workers to fulfill this role often has been one explicit purpose of labor and employment regulation. EILEEN BORIS, HOME TO WORK 31, 201, 216, 314 (1994); KESSLER-HARRIS, *supra* note 230, at 68-72; WITT, *supra* note 112, at 35, 127-33. Characterizing non-wage earners as dependent erases their unpaid contributions both to other household members' earnings capacity and to household life more generally. See discussion *supra* Part III.B.1.

339. See generally BRAMAN, *supra* note 332; RE-ENTRY POL'Y COUNCIL, *supra* note 284, at pt. II.B, ch. 13.

basic needs, without considering how family members may have lost access to the inmate's wages.³⁴⁰

Both free labor and contemporary incarceration are intensely racialized terrain, and this racial dimension seemingly bolsters the accounts of prison labor described above.³⁴¹ Characterizing inmates as in need of rehabilitation into disciplined workers evokes longstanding racist discourses—from Reconstruction to contemporary welfare reform—that attribute laziness, unreliability, and incompetence to people of color, especially African American men. In turn, these have been used to justify labor coercion toward those deemed unsuited to the institutions of free labor and to explain away labor market disadvantage.³⁴² Additionally, African American workers have been assumed to possess, or be entitled to, lower material needs than whites.³⁴³ In part, this assumption reflects the racialization of the male breadwinner ideal. Insofar as African American women, unlike their white counterparts, long have been expected to work in the labor market,³⁴⁴ African American men were not always included in policies designed to allow white men to maintain households with nonmarket-working wives.³⁴⁵ And to this day, portrayals of African American men as disconnected from the labor market are closely linked to portrayals of disconnection from family responsibilities.³⁴⁶

340. *Hale v. Arizona*, 993 F.2d 1387, 1396 (9th Cir. 1993) (en banc); *Harker v. State Use Indus.*, 990 F.2d 131, 132 (4th Cir. 1993). Thus, courts dismiss as inapposite the FLSA's goal of guaranteeing a basic standard of living.

341. See Wacquant, *supra* note 324, at 52-53 (arguing for the existence of racialized "carceral continuum" between the prison and jobless urban neighborhoods that places African-Americans in opposition to "working families").

342. See LAMONT, *supra* note 331, at 24, 57, 61, 132; LICHTENSTEIN, *supra* note 36, at 180-84; WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* 113, 118 (1996); Fraser & Gordon, *supra* note 329.

343. GLENN, *supra* note 326, at 82, 154; LINDA GORDON, *PITIED BUT NOT ENTITLED* 47-48 (1994); cf. KESSLER-HARRIS, *supra* note 230, at 15 (discussing linkages among gender, perceived need, and wages).

344. See GORDON, *supra* note 343, at 275-76; SUZANNE METTLER, *DIVIDING CITIZENS* 172 (1998); STANLEY, *supra* note 3, at 148, 188; Roberts, *supra* note 3, at 875 ("The conception of motherhood confined to the home and opposed to wage labor never applied to Black women.").

345. See METTLER, *supra* note 344, at 186; William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1831-38 (2001); see also GLENN, *supra* note 329, at 82.

346. See, e.g., WILSON, *supra* note 342, at 91-92, 104-07; Ronald B. Mincy, Charles E. Lewis, Jr. & Wen-Jui Han, *Left Behind: Less-Educated Young Black Men in the Economic Boom of the 1990s*, in *BLACK MALES LEFT BEHIND* 1, 1 (Ronald B. Mincy ed., 2006); Ron Haskins, *Poor Fathers and Public Policy: What Is To Be Done?*, in *BLACK MALES LEFT BEHIND*, *supra*, 249; cf. Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW* 195, 210-11 (Daivd Kairys ed., 2d ed. 1990) (criticizing this tendency for pathologizing African American single motherhood).

Put simply, courts imply that, absent imprisonment, inmate workers would be single, unemployed, and adrift. Their distinction from free labor, in other words, inheres not just in the present organization of their work but also in their persons more deeply. In an analysis that equates employees with free labor, the market becomes an arena inhabited by specific sorts of people leading specific sorts of lives. Insofar as courts imagine prisoners to be quite different, it buttresses the conclusion that their work is not market work.