

RESEARCH BRIEF | MARCH 2016

# Get To Work or Go To Jail: Workplace Rights Under Threat

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## Introduction

Federal, state, and local governments increasingly make, and carry out, a disturbing threat: **get to work or go to jail**. When resisting an employer's terms can lead to imprisonment, employers gain a dangerous advantage. Workers under threat of incarceration for unemployment cannot afford to refuse a job, quit a job, or challenge their employers—and they can even be forced to work for free. This report identifies how the criminal justice system endows employers with this power.

Criminal justice scholars and advocates have identified three phenomena at the intersection between employment and incarceration. These include (1) **barriers** to employment following run-ins with the criminal justice system, (2) **prison labor**, and (3) modern-day **debtors'**

**prisons**, such as those in Ferguson, Missouri,<sup>1</sup> which have gained increasing notoriety in recent years. This report examines a much less understood phenomenon, one we suggest carries drastic consequences for criminal justice reformers and labor advocates alike: what happens when the criminal justice system **compels labor from unincarcerated workers** and locks people into bad jobs?

This threat—*work or jail*—can be invoked in several ways. We focus on three distinct but related sources of legal authority that enable government to make this threat. First, **probation and parole** require participants to seek and maintain employment as part of a set of standard conditions. Probationers and parolees perceived to violate these conditions may be incarcerated instead of remaining free. Second, courts may demand that people work when they are too poor to pay **criminal justice debts** from the fines, fees, and restitution imposed by the criminal justice system. Finally, courts may likewise order parents that are too poor to pay **child support** to find and maintain jobs or face jail as a consequence. Criminal justice debt and child support obligations cannot be erased in bankruptcy, and those who can't pay face incarceration. Debtors can be ordered to find a job, a second or third job, or a even a better-paying job if their present income leaves them unable to pay.

Because little research exists on incarceration for failure to work, this report makes novel use of existing national survey datasets to produce new national estimates. Where possible, we provide estimates specific to California. We find:

### **1. The threat of jail is real.**

On any given day, roughly 9,000 people nationwide are incarcerated for violating a probation or parole requirement to hold a job. In major cities, 5% of all fathers are incarcerated for falling behind on child support.

### **2. These individuals are low-wage workers.**

Of those incarcerated solely for violating probation or parole requirements to pay court-ordered debts, two-thirds reported full-time work, earning on average less than \$1,000 per month. Among fathers incarcerated for failing to pay child support, 95% worked in the previous year and 85% lived in or near poverty.

### **3. Many are forced to work for free.**

In Los Angeles alone, 50,000 - 100,000 people each year must perform unpaid, court-ordered community service often to work off criminal justice debt. State and municipal governments and nonprofits get a stream of free labor from individuals who may have to work for hundreds of hours.

### **4. People of color bear the brunt of these threats.**

Black and Latino people comprise two-thirds of those incarcerated solely for violating probation or parole conditions related to employment or payment of debt. African Americans fathers comprise nearly 80% of those incarcerated by the child support enforcement system and are incarcerated at a rate ten times higher than other fathers.

These findings should cause criminal justice reformers to consider the implications of community service, work programs, and work requirements as alternatives to incarceration. When the alternative to incarceration is mandatory work, the alternative to debtors' prison is debt peonage. So, too, should advocates of workers' rights treat mass incarceration and criminal justice reform as labor issues.

We suggest the threat of incarceration tilts the balance of power even further towards employers and can undermine workers' rights in the following four ways.

#### **1. Depressing labor standards.**

Workers face government pressure to lower their standards and to accept jobs with onerous or dangerous working conditions.

#### **2. Suppressing worker voices.**

Workers who speak up for themselves or organize collectively encounter employers who can retaliate not merely by firing them, but by enlisting law enforcement to send them to jail.

#### **3. Evading legal protections.**

Workers laboring under the threat of incarceration may be stripped of standard employment protections like the minimum wage, workers compensation, and the right to be free from discriminatory

practices—especially in unpaid, court-ordered community service.

#### **4. Undermining or displacing other workers.**

Employers can replace existing workers with workers threatened with incarceration. This forces workers to accede to degraded working conditions or face losing their jobs.

The work-or-jail threat adds the weight of the criminal justice system to employers' power, and turns the lack of good jobs into the basis for further policing, prosecution, and incarceration. Both effects amplify the racial stratification that plagues criminal justice and low-wage work alike.

The directive “get to work or go to jail” has received little attention from the perspective of workers' rights. This report makes the first effort to grasp the scale of this problem and its effect on the workplace. In Section I, we explain the three sources of legal power for the government to threaten “get to work or go to jail.” We provide concrete examples, a rough sense of scale, and evidence of the stratification of this mandate by race and class. In Section II, we focus on how these threats can undermine the rights of all workers, regardless of whether they personally face these threats.

## **I. How the Law Threatens “Get To Work or Go To Jail”**

### **A. Probation and Parole**

Probation and parole are major sources of directives to “get to work or go to jail”. Nearly 5 million Americans and 400,000 Californians are under one of these forms of supervision.<sup>2</sup> Individuals in these programs are not confined to a prison or jail, but must obey a wide array of rules to remain free. If these rules are violated, probation or parole may be revoked and replaced with incarceration. Similar rules also apply in related forms of criminal justice supervision, including “diversion” programs,<sup>3</sup> and all of these forms of supervision are increasingly offered as progressive alternatives to incarceration.

Conditions of criminal justice supervision almost always include

pursuing and maintaining employment,<sup>4</sup> and workers can be imprisoned for refusing certain kinds of work, for quitting,<sup>5</sup> and even for being fired.<sup>6</sup> Conditions also frequently include paying down child support and criminal justice debt, and a failure to do so can be punished as a violation of probation or parole. As we explain below, these duties to pay are also regarded as duties to work.

**Those under criminal justice supervision frequently go to jail or prison for failing to meet conditions related to work and debt.** On any given day in the U.S., about 9,000 people are incarcerated for violating a probation or parole requirement to hold a job, and 32,000 are incarcerated for violating a requirement to pay down a debt.<sup>7</sup> Given California's share of the probation and parole population, several thousand Californians may be incarcerated each year for work-related violations.

**Data strongly suggest that those incarcerated for violating work-related conditions are unable to find adequate employment.**

For example, about half reported having a job in the month before incarceration, suggesting that they were being pressed to work *more*.<sup>8</sup> Another quarter reported being unemployed while looking for work.<sup>9</sup> Even among those incarcerated *solely* for nonpayment of court-ordered debt, **two-thirds reported full-time work in the month before incarceration**—but mostly with earnings below \$1,000 per month.<sup>10</sup> In other words, these are largely **low-income workers**, and are neither people outside of the labor market nor those who have high incomes and yet refuse to pay.

**Data also suggest stark racial disparities in enforcing these work conditions.** Black and Latino inmates comprise three-fifths of all those incarcerated for probation or parole violations—and a shocking *two-thirds* of those incarcerated solely for violating conditions related to work (employment or payment of debt).<sup>11</sup> African Americans comprise 40% of all those incarcerated as probation/parole violators, yet nearly 70% of those incarcerated solely for failing to be employed. These disparities are consistent with research showing that racial bias is most extreme in circumstances that directly link racial stereotypes to work effort.<sup>12</sup>

In conclusion, parole and probation condition freedom on a set of requirements that almost always include employment and paying criminal justice debt or child support. In practice, when

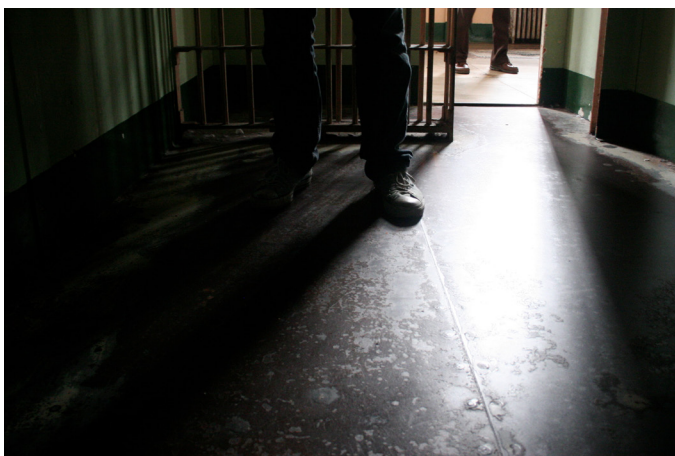
About 9,000 people are incarcerated for violating a probation or parole requirement to hold a job, and 32,000 are incarcerated for violating a requirement to pay down a debt.

the work-or-jail threat is carried out, thousands are incarcerated for insufficient employment. Among them, the vast majority have been working, but these jobs are inadequate to satisfy these requirements. Additionally, a starkly disproportionate number of Black and Latino workers are impacted.

## B. Criminal Justice Debt

Any encounter with the criminal justice system can incur debt that creates a work-or-jail threat, and this can arise entirely outside probation or parole. Cash-strapped states have increasingly turned to “user fees” to fund their criminal justice systems, in addition to fines and restitution imposed by a judge as part of a criminal sentence. States now charge defendants for probation supervision, jail stays, and even the use of a constitutionally-required public defender.<sup>13</sup> In 2014, the California legislature calculated more than \$11 billion in uncollected court-ordered debt.<sup>14</sup> Many low-level infractions, like traffic violations, are punished by high fines, surcharges and “penalty assessments,” which, when paid by defendants, are earmarked for state funds like the Court Construction Fund. California actually imposes *an additional fee* when you cannot pay your existing debt.<sup>15</sup> More than 4 million California driver’s licenses have been suspended because of an inability to pay a traffic fine, limiting the ability to find work to pay those fines.<sup>16</sup> “The result,” one academic report concludes, “is a system effectively designed to turn individuals with criminal convictions into permanent debtors.”<sup>17</sup>

The Constitution forbids incarceration of those who are simply unable to pay, as opposed to those who can pay but willfully refuse. In practice, though, that rule provides little protection. Courts routinely fail to conduct the required assessment of ability to pay. But even resolving that failure may make little difference if courts conclude that “all nonpayment is willful because felons ‘can always go out and get a day job,’” as one corrections officer put it.<sup>18</sup> Because failure to pay these court-ordered debts may be, and often is, punished with incarceration, criminal justice debt provides another tool to threaten the inadequately employed with imprisonment.



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For debtors who cannot afford to pay directly, the court may order them to pay indirectly by providing

free labor through a mandatory “community service” program.<sup>19</sup> Failure to work—for free—can mean going to jail for having failed to “pay.” Thus, in a modern form of debt peonage, these workers’ debts become the basis for forcing them to choose between work or jail, and in exchange for their work, community-service workers receive not a dime in cash but only a reduction in their court-imposed debt. Even debt reduction sometimes is credited at *less than the minimum wage* per hour of work.<sup>20</sup> Those not incarcerated may face the loss of a driver’s license, further undermining their ability to find and keep work.<sup>21</sup>

While very little data is available on court-ordered community service arising from criminal justice debt, we find that at least 50,000, and probably over 100,000, residents of Los Angeles alone perform court-ordered community service each year.<sup>22</sup> Some debtors perform many hundreds of hours of unpaid labor, the equivalent of several months of full-time work. They work at a broad range of state and local government agencies and nonprofits, such as the Los Angeles County Department of Parks, County Probation Department, the California Department of Transportation, churches, social service providers, and others.<sup>23</sup>

In conclusion, any run-in with the criminal justice system, even as minor as a traffic infraction, can result in a cycle of debt and the threat of incarceration. Criminal justice debt is on the rise. In many instances, courts order insolvent debtors to perform free labor in the form of community service. We explore in Section II the effect this threat, and its attendant (un)free labor, has on the workplace.

### C. Child Support Enforcement

As when one owes criminal justice debt, owing child support can trigger a pay-or-jail threat that becomes a work-or-jail threat. Child support orders tell a parent who does not have custody of a child to financially assist the custodial parent in supporting the child. When the custodial parent and child are poor enough to receive public assistance, child support is not paid directly to them; instead, the government typically seizes all or most of the payments to reimburse itself for the family’s benefits.<sup>24</sup> This gives the government a financial interest in extracting payments, just as it does with criminal justice debt. California alone has well over a million non-custodial parents in its system,<sup>25</sup> and nearly one-quarter of its cases are in Los Angeles County.<sup>26</sup>

At least 50,000, and probably over 100,000, residents of Los Angeles alone perform court-ordered community service each year. Some debtors perform many hundreds of hours of unpaid labor, the equivalent of several months of full-time work.

Contrary to the stereotype of the “deadbeat,” these parents are just “deadbroke”... over 80% of those in arrears had annual incomes below \$20,000, and over 60% had annual incomes below \$10,000.

As with criminal justice debt, nonpayment of child support obligations can lead to incarceration, either by holding the debtor in contempt of court or through direct criminal prosecution. This is a serious risk because many noncustodial parents face child support debts that far outstrip their ability to pay.<sup>27</sup> **Contrary to the stereotype of the “deadbeat,” these parents are just “deadbroke.”**<sup>28</sup> One study of California child support arrears found that over 80% of those in arrears had annual incomes below \$20,000, and over 60% had annual incomes below \$10,000.<sup>29</sup> Low-income obligors fall further and further behind because child support orders are set unrealistically high, often demanding payments over 50% of incomes that were already below the poverty line.<sup>30</sup> And as with criminal justice debt, no bankruptcy relief is available.

Pay-or-jail leads to work-or-jail because the law treats child support obligations as a duty to earn enough to pay. The California Supreme Court has concluded that child support debtors must “seek and accept available employment” or face jail time.<sup>31</sup> In that 1998 decision, the trial judge jailed a father purely because he was unemployed. There was no specific job that he had quit or turned down, but the court decided that he “could get a job flipping hamburgers at McDonald’s [but] chose [] not to.”<sup>32</sup>

**Among parents who face any child support enforcement action, one in four is incarcerated.**<sup>33</sup> Even more strikingly, within the much broader population of all fathers in U.S. cities, we estimate that **at least 5% face incarceration for child support at some point, including a remarkable 15% of all African American fathers.**<sup>34</sup> If California follows the national pattern, a back-of-the-envelope estimate predicts that upwards of 100,000 Californians may face child support incarceration at some point.<sup>35</sup>

Figures 1 and 2 illustrate that fathers incarcerated for child support are disproportionately Black and poor. Figure 1, “Race and Child Support Enforcement,” shows that while **African American fathers** are 41% of all non-custodial fathers, they **comprise 78% of all fathers incarcerated as child support enforcement.** Similarly, Figure 2, “Poverty and Child Support Enforcement,” shows that **impoverished** non-custodial fathers comprise 29% of all non-custodial fathers, but a stunning **85% of those incarcerated for failure to pay child support.**



Figure 1: Race and Child Support Enforcement

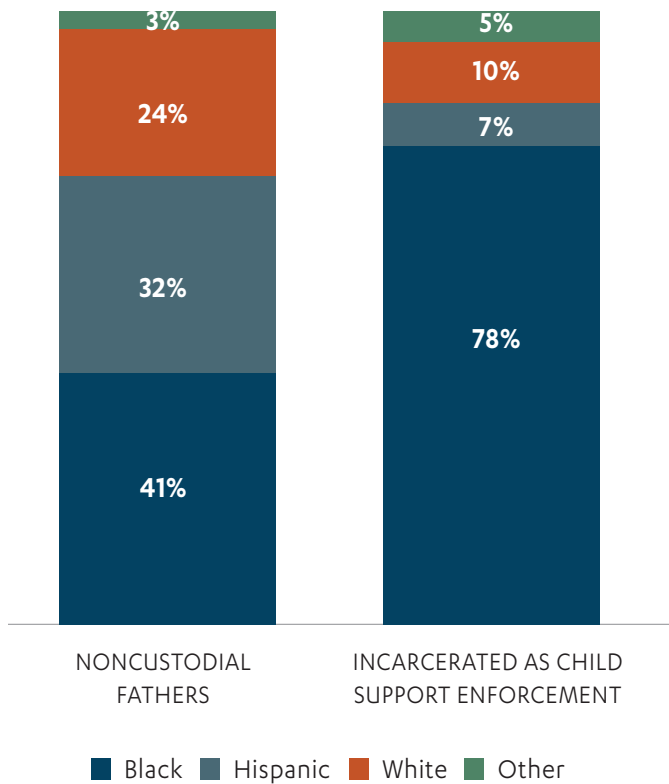
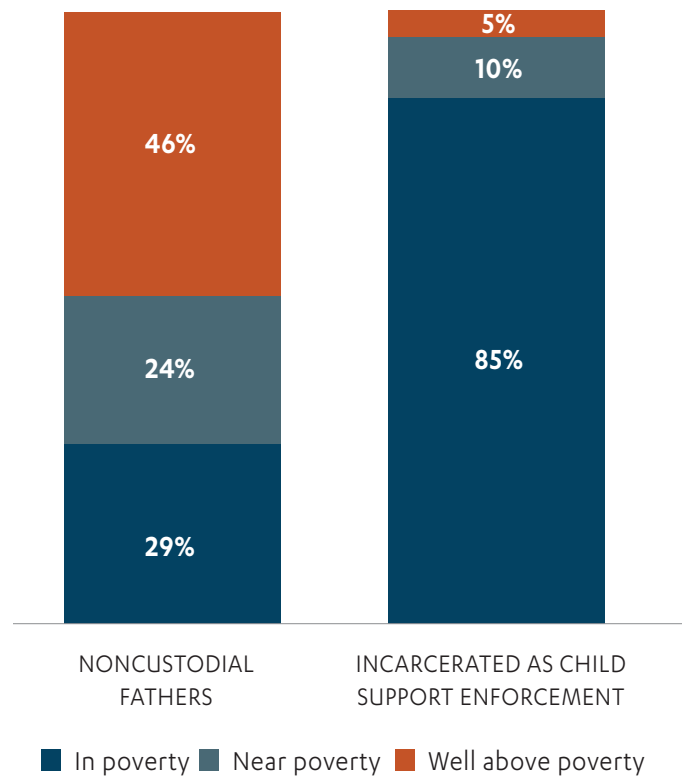


Figure 2: Poverty and Child Support Enforcement



Note: In/near/well above = below 100%/100-200%/above 200% of federal poverty line

Like those incarcerated for failure to comply with work and debt-related probation and parole requirements, **these individuals are workers. The overwhelming majority, 95%, reported employment in the prior year.**<sup>36</sup> Inadequate employment—with wages too low and/or hours too few—appear to prevent these fathers from being able to consistently pay. In other words, they are “deadbroke,” not “deadbeat.” These parents are most vulnerable to incarceration because most other enforcement tools—like garnishing wages or intercepting tax returns—only work against those who have money but refuse to turn it over.

As with work and debt-related conditions of probation and parole, little research has thus far explored the extent of incarceration for nonpayment of child support.<sup>37</sup> We have made novel use of an existing survey dataset to produce these new national estimates. Our findings indicate the threat of incarceration is not only real, but disproportionately impacts fathers of color.

## II. Dangers to Workers' Rights

Clearly, even a very bad job is better than prison. The work-or-jail threat makes bad or exploitative work more appealing by that comparison. Furthermore, that threat likely makes bad jobs worse by amplifying the vulnerability of workers, empowering their employers, placing a legal seal of approval on exploitative practices, and profoundly complicating worker solidarity. This section elaborates on some of the specific mechanisms by which this can happen, often by analogy to similar dynamics involving immigrant workers, welfare-to-work programs, and prison labor.

**A. Depressing labor standards.** Workers face government pressure to lower their standards and to accept jobs with onerous or dangerous working conditions.

In theory, someone ordered to pay cannot be incarcerated if he simply has no money, and someone ordered to work cannot be incarcerated if he simply cannot find a job. However, someone *can* be incarcerated if the court decides that he is not trying hard enough to find or keep a job, or is not working *hard enough* on the job. For instance, courts have punished workers for failing to change occupations,<sup>38</sup> quit college,<sup>39</sup> accept a 60-hour workweek,<sup>40</sup> or relocate across state lines,<sup>41</sup> treating each of these examples as workers “choosing” not to earn enough income to pay child support.

This particular pressure to find employment can quickly and dramatically depress workplace standards and can cause workers to enter, or remain in, jobs with onerous or dangerous working conditions. Consider, for instance, someone who can find only jobs that pay *illegally low wages*. This reality is all-too-frequent in Los Angeles, where nearly one in three low-wage workers makes less than minimum wage.<sup>42</sup> If a worker rejects a job that violates her basic rights, is she “voluntarily” or “involuntarily” unemployed? In the unemployment insurance system, workers have the right to refuse to undercut prevailing wages, replace strikers, or work for unlicensed employers.<sup>43</sup> This protection lets workers remain eligible for benefits because they are considered “involuntarily unemployed.” In the work-or-jail context, where the stakes are losing physical freedom rather than losing income, similar protections are not in place. The question, then, is **what degraded labor standards can workers be required to accept, and can the government prioritize payment of debt over workplace rights?**

Courts have punished workers for failing to change occupations, quit college, accept a 60-hour workweek, or relocate across state lines, treating each of these examples as workers “choosing” not to earn enough income to pay child support.

Further, the power of probation and parole, child support enforcement, and criminal justice debt collection is often used to order un(der) employed individuals to attend and participate in closely-monitored employment services. In principle, such programs can expand workers' job opportunities by providing training, helping overcome barriers to employment, and offering other work supports.<sup>44</sup> The federal child support enforcement agency touts such programs as "increasing the ability of unemployed noncustodial parents to get and keep a job" and thereby offering productive alternatives to punitive enforcement techniques.<sup>45</sup> The same federal guidance, however, specifically endorses the appropriateness of incarceration for nonparticipation, in contrast to incarceration for mere nonpayment.<sup>46</sup>

There is strong reason to suspect that these "services" often function primarily to lower expectations and channel workers into bad jobs.<sup>47</sup> That concern is amplified when an employment program cannot attract workers' *voluntary* participation with the prospect of helping them find better jobs, but instead relies on threatening them with incarceration for nonparticipation. For instance, pending federal child support regulations advocate a "work first" approach that resembles the harshest kind of welfare-to-work program. They specifically reject "services to promote access to better jobs and careers" and instead endorse "rapid labor force attachment,"<sup>48</sup> affirming programs that primarily intensify monitoring to push un(der)employed participants to search harder and less selectively and to accept any job on any terms. Unsurprisingly, one Texas program run on this model simultaneously increased the *number* of people working but decreased the *earnings* of those who worked.<sup>49</sup> This monitored "work first" tack builds on longstanding techniques like California's practice of issuing "seek work orders," which require unemployed child support obligors to submit lists of at least five job applications every two weeks or face contempt proceedings that can lead to incarceration.<sup>50</sup>

Reliance on these structured employment programs is growing, with support across the political spectrum. The Obama administration's Office of Child Support Enforcement has been promoting child support work programs in 30 states, 15 of which had programs with over 400 participants, including several



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in California.<sup>51</sup> Similar programs, with similar consequences for nonparticipation,<sup>52</sup> may be imposed as a condition of probation or parole, and some have advocated a massive expansion in this direction.<sup>53</sup> Growth in this direction in the criminal justice debt context would also be unsurprising,<sup>54</sup> given the history of characterizing unpaid community service as a form of “work experience” in the context of “work first” welfare reform.<sup>55</sup>

**B. Suppressing Worker Voice.** Workers who speak up for themselves or organize collectively face employers who can retaliate not merely by firing them but by enlisting law enforcement to send workers to jail.

[Judge to the employer:] Okay, I’ll make a deal with you, you take him back and I’ll add another weapon to your arsenal. If he doesn’t come to work when he is supposed to, doesn’t come to work on time . . . I’ll put him in jail, on your say so.

[Judge to the defendant:] Your employer is now on the team of people who are reporting to me. When he calls up and tells me that you are late, or that you’re not there, I’m going to send the cops out to arrest you.<sup>56</sup>

This exchange from a court supervision program illustrates how a work-or-jail threat issued to a worker can empower employers. Any system of work requirements invites an accompanying system of surveillance. For unemployed workers, mandatory participation in structured job search or work programs includes monitoring for compliance with those programs. For employed workers, however, **the criminal justice system is likely to rely on employers, deferring to their judgments about appropriate work commitment and discipline, essentially deputizing them as probation officers.** In every instance of workplace friction or conflict, then, the balance of power is fundamentally tilted toward employers.

Employers have tremendous incentives to misuse this power to their advantage. The recent history of employer-based immigration enforcement communicates this fact vividly.<sup>57</sup> There, the government empowers employers by relying on them to screen for work authorization status through the I-9 process. Employers can do this

In every instance of workplace friction or conflict, then, the balance of power is fundamentally tilted toward employers.

selectively and wield the threat to trigger immigration enforcement in a dispute.<sup>58</sup> This dynamic likewise occurs in guestworker programs where workers face deportation if they lose their job. In both cases, the employer's power to fire is multiplied by the government's power to detain and deport. Scholars and immigrant worker advocates have documented at length how employers use this power to disrupt organizing, degrade working conditions, and depress wages.<sup>59</sup>

In the example above, imagine that the employer wants to get rid of the worker for protesting working conditions or organizing to improve them. The employer needs only to tell the judge that the worker was late, even if it's false or merely a pretext for retaliation. In theory, the worker might protest his innocence or identify the employer's manipulation, but can the worker be confident that truth will win out? After all, the judge has already promised to rely on the employer's narrative. For workers who already have been marked as untrustworthy by the criminal justice system and who can face racist stereotypes about work discipline, there is every reason to expect that authorities will give employers the benefit of the doubt and assume that workers are in the wrong.

**C. Evading Legal Protections.** Workers laboring under the threat of incarceration may be stripped of standard employment protections like the minimum wage, workers compensation, and the right to be free from discriminatory practices—especially in unpaid, court-ordered community service.

At a minimum, labor and employment laws theoretically protect workers from being forced to accept jobs that the law independently deems illegal, and to sanction employers who use their power to accomplish independently illegal purposes. Yet these protections are routinely circumvented. Consider the participation agreement that must be signed by some court-ordered community service workers in LA:

I understand that I am not an employee of the [agency] for which I will be performing unpaid community service. I further understand and agree that if I suffer any injury or illness arising out of, and/or in the course of, performing the community service, ***I will not be entitled to recover any workers' compensation benefits.***<sup>60</sup>

Not only are these workers forced to work or go to jail, they are not classified as employees and are compelled to work for free. Ordinarily, this would be a flagrant violation of minimum wage laws, but they are sidestepped by this arrangement's claim that these workers have no legal rights as *workers*. This tactic also thwarts protections against workplace discrimination, retaliation for worker organizing, and workplace injury.

Reasonably, volunteers who donate their services generally are not protected by labor laws, but workers forced to do similar work or go to jail are very differently situated. Indeed, it is misleading to characterize the work as unpaid when it is done in exchange for cancelling a debt. Rather, it more closely resembles wage garnishment at the unconscionable rate of 100%.<sup>61</sup> Courts have used similarly flexible definitions of compensation to find an employment relationship, and therefore employment protections, where nominally unpaid workfare workers received the financial benefit of continued public assistance in exchange for their work.<sup>62</sup>

Stripping workers of rights by declaring them not to be "employees" is a familiar pattern,<sup>63</sup> one that has met with mixed success legally. Unpaid "community service" or "work experience" programs run by welfare-to-work agencies have long taken such a position but have been rebuffed in court.<sup>64</sup> In contrast, courts almost uniformly exempt prison labor programs from employment protections, even when that work is explicitly paid an hourly wage.<sup>65</sup> The issue has received negligible attention in the context of court-ordered community service, but one federal judge recently found a program in New York to be exempt from employment law.<sup>66</sup>

Consider another example. In the United States, the most basic worker's right is the right to quit, a right enshrined in the Constitution by the Thirteenth Amendment's prohibition of involuntary servitude. Over the years, however, courts have invented exceptions for work ranging from military service to sailing a private commercial vessel.<sup>67</sup> One federal appeals court has likewise exempted forced labor in the context of the child support system, reasoning that it fulfills a duty "of vital importance to the community," not least because it helps the government avoid providing public assistance to low-income children.<sup>68</sup> It is easy to imagine how this precedent might be extended to more conventional labor and employment law claims and to other contexts, especially those more directly linked to the criminal justice system.

**D. Disciplining or Displacing Other Workers.** Employers can replace existing workers with workers threatened with incarceration. This forces workers to accede to degraded working conditions or face losing their jobs.

Allowing employers to degrade the working conditions of some workers inherently threatens all workers. The analogy to immigrant workers is again instructive: the power of employers to leverage workers' unauthorized immigration status often translates into lower wages, slack safety standards, and stifled organizing for all workers.<sup>69</sup> Employers can threaten to replace existing workers with more vulnerable ones, unsettling solidarity and organizing in mixed-status workplaces.

This threat of replacement is especially pronounced in court-ordered community service, where employers have access to a captive workforce that is excluded from employment protections. Clearly, making one person work for free means that an employer need not hire someone else to perform that labor. Unpaid welfare-to-work programs similarly created a substitute workforce that state and local governments used to slash unionized public sector jobs.<sup>70</sup> The growing presence of a sprawling, uncompensated “community service” labor force allows employers, typically nonprofits or state and local governments, to either eliminate paid workers or avoid hiring them in the first place. It also provides leverage with which to push unions into concessions. And when one employer has access to free or cheap labor, it puts downward pressure on its competitors' workers, a longstanding concern in prison labor programs.<sup>71</sup>

Welfare-to-work programs attempt to address these problems with rules against using unpaid labor to displace regular employees or perform unionized work.<sup>72</sup> Likewise, guestworkers are permitted only in the context of labor shortages and are required to receive the prevailing wage, and strict restrictions apply to using prison labor to underbid firms with conventional workforces.<sup>73</sup> No such protections exist for workers potentially replaced or undermined by court-ordered community service or by other forms of work compelled by the threats of incarceration discussed in this report.

The growing presence of a sprawling, uncompensated “community service” labor force allows employers, typically nonprofits or state and local governments, to either eliminate paid workers or avoid hiring them in the first place.

## Conclusion: Directions for Future Research

In this report, we have presented three mechanisms by which the government compels people to work by threatening them with jail. Those mechanisms include probation and parole requirements, criminal justice debt, and child support. We find that the threat of jail is real, these individuals are workers, and people of color and poor people are dramatically disproportionately impacted.

This report is meant to raise a series of novel, urgent questions that future research must address. As criminal justice reformers seek alternatives to incarceration, it is essential to scrutinize those alternatives for new risks of exploitation or abuse. Those risks are high when the alternative to incarceration is mandatory work, especially in a low-wage labor market already plagued by unemployment, wage theft, job insecurity, and racial discrimination.

Similarly, advocates of workers' rights should take interest in mass incarceration and the threat of imprisonment. We identify four possible effects on the workplace: (1) depressing labor standards, (2) suppressing workers' voices, (3) evading legal protections, and (4) disciplining or displacing other workers. Available data, though limited, and analogous phenomena involving immigrant labor, prison labor, and welfare-to-work programs, suggest cause for serious concern.

Future empirical research should explore whether and to what degree these four effects occur. Legal and policy research should begin to consider what reforms might blunt any such effects.

Many of this report's topics may involve unintended consequences of well-meaning efforts to reduce child poverty, roll back mass incarceration, and overcome the severe barriers to employment for formerly incarcerated or convicted people. But when forced labor has come to seem like an appealing solution, something has gone dramatically awry. We might instead try to imagine a different world that could make freedom, solidarity, and prosperity available to all.



# Acknowledgements

This report was supported in part by generous funding from the UCLA Institute for Research on Labor and Employment and from the John Randolph Haynes and Dora Haynes Foundation.

This report benefited from generous feedback and contributions from the following: Alliance of Californians for Community Empowerment (ACCE), American Civil Liberties Union (ACLU) of Southern California, All of Us or None, LA Black Worker Center (BWC), CLEAN Carwash Campaign, Fight for 15, Koreatown Immigrant Workers Association (KIWA), Mental Health Advocacy Service, Restaurant Opportunity Center-LA (ROC-LA), SEIU-United Services Workers West (USWW), Warehouse Workers United (WWU), and others.

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## Notes

<sup>1</sup> Apuzzo, Matt, Eligon, John. March 4, 2015. "Ferguson Police Tainted by Bias, Justice Dept. Says." *The New York Times*. [http://www.nytimes.com/2015/03/05/us/us-calls-on-ferguson-to-overhaul-criminal-justice-system.html?\\_r=0](http://www.nytimes.com/2015/03/05/us/us-calls-on-ferguson-to-overhaul-criminal-justice-system.html?_r=0); Rosenberg, Tina. March 27, 2015. "Out of Debtors' Prison, With Law as the Key." *The New York Times*. <http://opinionator.blogs.nytimes.com/2015/03/27/shutting-modern-debtors-prisons/>

<sup>2</sup> Herbherman, Erinn J. & Bonczar, Thomas P. 2015. "Probation and Parole in the United States, 2013." *Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics*.

<sup>3</sup> Examples of local programs include San Francisco's "Back on Track" or Los Angeles' "Back on Track LA" diversion programs. See Rivers, Jacquelyn L. & Anderson, Lenore. September 2009. "Back on Track: A Problem-Solving Re-Entry Court, BJA Fact Sheet," *Bureau of Justice Affairs Press Release*. <https://www.bja.gov/Publications/BackonTrackFS.pdf>. March 11, 2015. "Attorney General Kamala D. Harris, LA County Officials Launch Los Angeles Recidivism Reduction Initiative," *State Department of Justice Office of the Attorney General Press Release*. <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-la-county-officials-launch-los-angeles>. Federal examples include the Conviction Alternatives Program in the Northern Federal District, <http://www.cand.uscourts.gov/>

CAP, and Conviction and Sentence Alternatives in the Central District, <https://www.cacd.uscourts.gov/judges-requirements/court-programs/casa>.

<sup>4</sup> Doherty, Fiona. Forthcoming 2016. "Obey All Laws and Be Good: Probation and the Meaning of Recidivism," *Georgetown Law Journal*, 104 (2), p. 291.

<sup>5</sup> *United States v. Woodson*, 463 F. App'x 266 (5th Cir. 2012), cert. denied, 133 S. Ct. 43 (U.S. Jun. 25, 2012).

<sup>6</sup> *Batton v. Com. ex rel. Noble*, 369 S.W.3d 722 (Ky. Ct. App. 2012).

<sup>7</sup> Authors' calculations from the 2002 Survey of Inmates in Local Jails and the 2004 Survey of Inmates in State and Federal Correctional Facilities.

<sup>8</sup> Authors' calculations from the 2002 Survey of Inmates in Local Jails and the 2004 Survey of Inmates in State and Federal Correctional Facilities.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Soss, Joe, et al. 2011. *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race*. University of Chicago Press.

<sup>13</sup> Bannon, Alicia, et al. 2010. "Criminal Justice Debt: A Barrier to Reentry." *Brennan Center for Justice at New York University School of Law*. p. 4. <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; Colgan, Beth A. 2014. "Paying for Gideon." *Iowa Law Review*, 99, p. 1929, 2014.

<sup>14</sup> Taylor, Mac. 2016. "Improving California's Criminal Fine and Fee System." *Legislative Analyst's Office*, p. 8. <http://lao.ca.gov/reports/2016/3322/criminal-fine-and-fee-system-010516.pdf>.

<sup>15</sup> *Ibid.* See also, e.g., Cal. Penal Code § 1214.1 (imposing a \$300 penalty for failing to pay a fine).

<sup>16</sup> "Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California." April 8, 2015. *Justice Not Jails*. <http://justicenotjails.org/traffic-courts-drive-inequality/>.

<sup>17</sup> Bannon, supra note 13.

<sup>18</sup> Harris, Alexes, et al. 2010. "Drawing Blood from Stones: Legal

Debt and Social Inequality in the Contemporary United States.” *American Journal of Sociology*, 115 (6), pp. 1753-1799, 1788 n. 28.

<sup>19</sup> Cal. Penal Code § 1205.3.

<sup>20</sup> Interview with Theresa Zhen, Skadden Fellow at A New Way of Life Reentry Project, February 2, 2016 (detailing her experiences representing clients in Los Angeles County).

<sup>21</sup> “Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California.” 2015. *Justice Not Jails*. <http://justicenotjails.org/traffic-courts-drive-inequality/>

<sup>22</sup> LA Superior Court records indicate that from July 2013 through June 2014, approximately 50,000 individuals performed court-ordered community service through six intermediary referral agencies (Alternative Sentencing Program, the El Monte Police Department, Volunteer Center South Bay, Special Services for Groups, and Inland Valley Resource Center). This figure, however, excludes most of the referral agencies serving the LA Superior Court, including the largest, Volunteer Center of Los Angeles, and so the true figure is likely at least twice as large.

<sup>23</sup> These and many more are included in lists of placement sites identified by the six referral agencies referenced above.

<sup>24</sup> Hatcher, Daniel L. 2007. “Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State.” *Wake Forest Law Review*, 42 (4), pp. 1029-1086.

<sup>25</sup> “FY 2012 Annual Report to Congress, State Performance Alabama to Georgia.” March 11, 2015. *Office of Child Support Enforcement, Office of the Administration for Children & Families*, p. 27. <http://www.acf.hhs.gov/programs/css/resource/fy2012-annual-report-to-congress>

<sup>26</sup> “Preliminary Performance Data Federal Fiscal Year 2015.” November 2015. *California Department of Child Support Services*, Tbl. 1.2. <http://www.childsup.ca.gov/portals/0/resources/docs/reports/2015/ff2015preliminaryperformancedata.pdf>

<sup>27</sup> Brito, Tonya. 2012. “Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Fathers and Their Families.” *Journal of Gender, Race & Justice*, 15 (3), pp. 617-673.

<sup>28</sup> Maldonado, Solangel. 2005. “Deadbeat or Deadbroke: Redefining

Child Support for Poor Fathers.” *UC Davis Law Review*, 39 (991).

<sup>29</sup> Sorensen, Elaine, et al. 2009. “Examining Child Support Arrears In California: The Collectibility Study.” *Urban Institute*.[http://www.urban.org/research/publication/examining-child-support-arrears-california-collectibility-study/view/full\\_report](http://www.urban.org/research/publication/examining-child-support-arrears-california-collectibility-study/view/full_report)

<sup>30</sup> *Ibid.* at 9.

<sup>31</sup> Moss v. Superior Court, 950 P.2d 59, 76 (Cal. 1998).

<sup>32</sup> *Ibid.* at 63.

<sup>33</sup> Authors’ analysis of data from the “Fragile Families and Child Wellbeing Study” (FFCWS), which follows the parents of a representative samples of children born in 20 U.S. cities in 1998-2000 and weighted to be nationally representative of families with biological children in cities with populations over 200,000. Brooks-Gunn, Jeanne et al. 2010. “Fragile Families and Child Wellbeing Study, ICPSR31622-v1.” *Inter-university Consortium for Political and Social Research*. <http://doi.org/10.3886/ICPSR31622.v1>. This result draws on responses by both fathers and mothers to questions about child support and its enforcement, as well as to questions about the charges that were the basis for any criminal conviction or incarceration.

<sup>34</sup> *Ibid.* This figure is based on FFCWS reports collected over the first nine years of the focal child’s life. Accordingly, it does not capture paternal incarceration when the child was older, and it probably underrepresents incarceration based on child support owed for any children other than the focal child with a different mother. For these and other methodological reasons, this estimate is unavoidably imprecise but nonetheless provides a reasonable estimate of the scale of incarceration for child support nonpayment.

<sup>35</sup> *Ibid.* Based on national results for fathers of children born in cities of over 200,000 residents. 7% of noncustodial fathers were incarcerated within 9 years after the child’s birth. Applied to California’s base of 1.1 million noncustodial parents, and with allowance for the potential undercounts noted above.

<sup>36</sup> *Ibid.*

<sup>37</sup> Brito *supra* note 27.

<sup>38</sup> United States v. Fuller, 751 F.3d 1150 (10th Cir. 2014).

<sup>39</sup> Child Support Enforcement Agency v. Doe, 109 Haw. 240 (Haw. 2005).

<sup>40</sup> McDaniel v. McDaniel, 878 So. 2d 686 (La. Ct. App. 2004).

<sup>41</sup> Ibid.

<sup>42</sup> Milkman, Ruth, et al. 2010. "Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers." *UCLA Institute for Research on Labor and Employment*. <http://www.irlle.edu/publications/documents/LAwagetheft-Milkman-Narro-110.pdf>.

<sup>43</sup> Cal. Unemp. Ins. Code §§ 1258.5, 1259.

<sup>44</sup> Mincy, Ronald B., et al. 2011. "Income Support Policies for Low-Income Men and Noncustodial Fathers: Tax and Transfer Programs." *The Annals of the American Academy of Political and Social Science*, 635 (1), pp. 240-261.

<sup>45</sup> Office of Child Support Enforcement. November 17, 2014. "Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs." *79 Fed. Reg.* pp. 68548, 68558.

<sup>46</sup> Ibid.

<sup>47</sup> Lafer, Gordon. 2002. "What is 'Skill?': Training for Discipline in the Low-Wage Labour Market", in *The Skills that Matter*. (Chris Warhurst, et al., eds. 2004); Cancian, Maria, et al. 2002. "Before and After TANF: The Economic Well Being of Women Leaving Welfare." *Social Service Review*, 76 (4), 603-641.

<sup>48</sup> Office of Child Support Enforcement supra note 45.

<sup>49</sup> Schroeder, Daniel & Doughty, Nicholas. 2009. "Texas Non-Custodial Parent Choices: Program Impact Analysis." *Ray Marshall Center for the Study of Human Resources, LBJ School of Public Affairs, The University of Texas at Austin*, p. 59.

<sup>50</sup> Cal. Fam. Code § 4505.

<sup>51</sup> Office of Child Support Enforcement. 2014. "Work-Oriented Programs with Active Child Support Agency Involvement that Serve Noncustodial Parents." [https://www.acf.hhs.gov/sites/default/files/programs/css/work\\_oriented\\_programs\\_for\\_non\\_custodial\\_parents\\_2014.pdf](https://www.acf.hhs.gov/sites/default/files/programs/css/work_oriented_programs_for_non_custodial_parents_2014.pdf). See also Office of Child Support Enforcement. 2012. "Alternatives to Incarceration." <http://www.acf.hhs.gov/programs/css/resource/alternatives-to-incarceration>.

<sup>52</sup> United States v. Holmes, 489 F. App'x 977 (8th Cir. 2012).

<sup>53</sup> Mead, Lawrence M. 2011. "Expanding Work Programs for Poor Men." *American Enterprise Institute*. <https://www.aei.org/>

[publication/expanding-work-programs-for-poor-men/](#)

<sup>54</sup> Weisburd, David, et al. 2008. "The Miracle of the Cells: An Experimental Study of Interventions to Increase Payment of Court-Ordered Financial Obligations." *Criminology & Public Policy*, 7 (1), pp. 9-16. <https://goo.gl/1pAehT>

<sup>55</sup> Turner, Jason A. & Main, Thomas. "Work Experience Under Welfare Reform" in *The New World of Welfare* (p. 291) (Blank and Haskins, eds. 2001).

<sup>56</sup> McLeod, Allegra M. 2012. "Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law," *Georgetown Law Journal* 100, pp. 1587, 1594. <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2285&context=facpub>

<sup>57</sup> Lee, Stephen. 2011. "Monitoring Immigration Enforcement." *Arizona Law Review*, 53, 1089-1136.

<sup>58</sup> Smith, Rebecca, et al. 2009. "Iced Out: How Immigration Reform Interferes with Workers' Rights." *National Employment Law Project, AFL-CIO, and American Rights at Work Education Fund*. [http://www.nelp.org/content/uploads/2015/03/ICED\\_OUT.pdf](http://www.nelp.org/content/uploads/2015/03/ICED_OUT.pdf)

<sup>59</sup> Baur, Mary, Stewart, Meredith. 2013. "Close to Slavery: Guestworker Programs in the United States." *Southern Poverty Law Center*. <https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states#deportation-card>

<sup>60</sup> Court Referred Volunteer Center. Revised March 1, 2015. "Community Service Intake & Agreement Form." *Assistance League Los Angeles*.

<sup>61</sup> "Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title 3 (CCPA)." Revised July 2009. *U.S. Department of Labor, Wage and Hour Division*. <https://www.dol.gov/whd/regs/compliance/whdfs30.pdf>

<sup>62</sup> United States v. City of New York, 359 F.3d 83 (2d Cir. 2003).

<sup>63</sup> Zatz, Noah D. "Working Beyond the Reach or Grasp of Employment Law" in *The Gloves-Off Economy: Problems and Possibilities at the Bottom of America's Labor Market* (Bernhardt, Annette et al., eds. 2008). *Labor and Employment Relations Association*.

<sup>64</sup> E.g., United States v. City of New York, 359 F.3d 83 (2d Cir. 2003).

<sup>65</sup> Zatz, Noah D. 2008. "Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships." *Vanderbilt Law Review*, 61, pp. 857-958.

<sup>66</sup> Doyle v. City of New York, 91 F.Supp.3d 480 (S.D.N.Y. 2015).

<sup>67</sup> Robertson v. Baldwin, 165 U.S. 275 (1897); Butler v. Perry, 240 U.S. 328 (1916); Arver v. United States, 245 U.S. 366 (1918).

<sup>68</sup> United States v. Ballek, 170 F.3d 871 (9th Cir. 1998). Moss v. Superior Court, 950 P.2d 59 (Cal. 1998). See generally Zatz, Noah D. Forthcoming 2016. "A New Peonage?: Pay, Work, or Go To Jail in Contemporary Child Support Enforcement and Beyond," *Seattle Law Review*, 39.

<sup>69</sup> Motomura, Hiroshi. 2014. *Immigration Outside the Law*. Oxford University Press.

<sup>70</sup> 'Greenhouse, Steven. April 13, 1998. "Many Participants in Workfare Take the Place of City Workers." *New York Times*. <http://www.nytimes.com/1998/04/13/nyregion/many-participants-in-workfare-take-the-place-of-city-workers.html?pagewanted=all>. See also, Seitz-Wald, Alex. 2011. "Union Workers Replaced With Prison Labor Under Scott Walker's Collective Bargaining Law." *Think Progress*. <http://thinkprogress.org/politics/2011/07/06/261319/scott-walker-prison-labor/>

<sup>71</sup> Schwartzapfel, Beth. 2012. "Modern-Day Slavery in America's Prison Workforce." *American Prospect*. <http://prospect.org/article/great-american-chain-gang>: Wood, Graeme. 2015. "From Our Prison to Your Dinner Table." *Pacific Standard*. <http://www.psmag.com/business-economics/from-our-prison-to-your-dinner-table>

<sup>72</sup> E.g., Cal. Welf. & Inst. Code § 11324.6(g); 42 U.S.C. § 607(f).

<sup>73</sup> 18 U.S.C. § 1761(c)(2).