COMMENT

THE EVER-TURNING WHEEL OF SERVITUDE: COMMUNITY SUPERVISION AND THE NEXT ITERATION OF CARCERAL ECONOMIC EXPLOITATION

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INTRODUCTION

In 2022, more than twice as many Americans were under the control of probation and parole than were serving time behind bars.[1] Those 3,668,000 people[2] were under the direct control of the carceral state[3] and constituted a huge swath of the population as a whole, as one in seventy-one Americans was on probation or parole in 2022.[4] Together, probation and parole make up a system of community supervision which has attracted less scrutiny than its role merits.[5] As a result, the exploitative realities and potentials of probation and parole have not yet been fully considered.

The connection between the criminal legal system and racial oppression in America has been amply and ably traced by a number of scholars. Robust scholarship has traced the development of legal systems enforcing racial caste from slavery and slave patrols, to Jim Crow and vagrancy laws, to the War on Drugs and mass incarceration.[6] An intertwined thread of scholarship explores the economic motivations underlying the development and perpetuation those systems. As attorney and professor Dr. Elizabeth Jones writes, "[t]he criminal justice system, in its initiation on American soil and operating into

1 DANIELLE KAEBLE, BUREAU OF JUST. STAT., NCJ 308575, PROBATION AND PAROLE IN THE UNITED STATES, 2022 1 (2024) (estimating that 3,668,000 adults were under community supervision at the end of 2022); E. ANN CARSON & RICH KLUCKOW, BUREAU OF JUST. STAT., NCJ 307149, PRISONERS IN 2022—STATISTICAL TABLES 1 (2024) (estimating that 1,230,100 people were in state or federal prison at the end of 2022).

2 KAEBLE, *supra* note 1, at 1.

3 MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 1-3 (2015) (coining the term "carceral state" to refer to the range of penal punishment encompassing both incarceration and other forms of state control and supervision).

4 KAEBLE, *supra* note 1, at 4.

5 *See* Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51, 52 (2013) ("As mass incarceration boomed, scholars largely lost interest in probation . . . rarely engaging with it seriously as an important institution."); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 292 (2016) ("The law of probation has not received attention commensurate with its enormous role in the criminal justice system.").

6 *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999).

the present, is predicated on an ideological framework that normalizes the incentivization of exploiting black bodies."[7] The trajectory of racism's economic expression flows from the same starting point—slavery—through specific forms of what I will refer to as "carceral economic exploitation": convict leasing, debt peonage, chain gangs, and modern prison labor.

This body of scholarship posits that systemic racism, in its carceral and corollary economic forms, has adapted to survive attempts at reform. Professor Reva Siegel has called this adaption "preservation-through-transformation,"[8] an idea that Jones summarizes: "as hierarchical status relations are challenged and contested, legal frameworks change to limit the scope of subjugation while simultaneously maintaining the same hierarchical relationship."[9] The continuity of racial oppression has been so thoroughly explored that it has crossed over from scholarship to pop culture. In the Netflix documentary *13th*, for example, Angela Davis observes that "[h]istorically, when one looks at efforts to create reforms, they inevitably lead to more repression."[10] A shared understanding of the durability of racism and exploitation has led both scholars[11] and pundits[12] to warn that as opposition to mass incarceration and prison labor gathers momentum, those systems will be replaced by new iterations of the same discrimination and exploitation within the carceral state.

I argue in this Comment that community supervision, as it exists today, may emerge as one such iteration of state control and economic coercion of Black Americans. Although the architecture for that development is deeply embedded in the existing structure of supervision, it is by no means certain that it will be harnessed in the way I predict. And community supervision is just one avenue for continued racial oppression. The purpose of this Comment is therefore to prompt creative thought about emergent forms of systemic racism and to suggest ways to foreclose its expression within this particular arena. I begin in Part I by summarizing scholarship on the historical trajectory of carceral economic exploitation and on indications that the hegemony of its most recent expression, mass incarceration and prison labor,

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7 Elizabeth Jones, *The Profitability of Racism: Discriminatory Design in the Carceral State*, 57 U. LOUISVILLE L. REV. 61, 61 (2018).

8 Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997) (internal quotation marks omitted).

9 Jones, *supra* note 7, at 76.

10 13TH at 1:19:40-1:19:48 (Netflix 2016).

11 *See* Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 153 (2017) (arguing that private probation will displace private prisons as opposition to mass incarceration leads to decarceration).

12 13TH, *supra* note 10, at 1:22:30-1:22:40 ("We don't know what the next iteration of this will be, but it will be. It will be. And we will have to be vigilant.").

may be diminishing. In Part II, I turn to community supervision as a possible successor or supplement to prison-based economic exploitation, focusing on the employment condition and its coercive applications. Finally, in Part III, I will examine existing probation reform efforts, assess their implications for the issue of coerced labor, and propose additional options for intervention that may decrease the vulnerability of people under community supervision to carceral economic exploitation.

I. DISCRIMINATORY DESIGN: ECONOMIC EXPLOITATION THROUGH THE CARCERAL STATE

Exploring the lineage of the exploitation of Black labor from slavery to mass incarceration, Elizabeth Jones uses the term "discriminatory design" to describe the persistence of coerced work in the carceral state.[13] She writes that the "subjugation of black bodies" undergirds the American economy and constitutes the "ideological foundations of our legal system."[14] Consequently, in her analysis, racism—and race-based economic exploitation—is "part of the original blueprint" of the criminal legal system; through each reform, the system, which was designed to discriminate, produces the same racist results.[15] In sum, discriminatory design

> normalizes racial hierarchies—not as an ideological aberration from business-as-usual, but as an economic imperative that is built in to [sic] the machine. One need not harbor any racial animus to exercise racism in this and so many other contexts; rather, when the default settings have been stipulated, simply doing ones [sic] job—clocking in, punching out, turning the machine on and off—is enough to ensure the consistency of white domination over time.[16]

Using this lens to analyze the evolution of carceral labor spotlights the mechanisms through which the economic exploitation of Black people has been perpetuated since slavery. The fulcrum of its development is the Thirteenth Amendment which, while abolishing slavery and involuntary servitude, carved out an allowance for coerced labor "as a punishment for crime whereof the party shall have been duly convicted."[17]

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13 Jones, *supra* note 7, at 63. Jones borrows the term "discriminatory design" and its accompanying analysis from another scholar, Ruha Benjamin. *See* RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 179 (2019).

14 Jones, *supra* note 7, at 63.

15 *Id.*

16 *Id.* at 68 (quoting Ruha Benjamin, *Catching Our Breath: Critical Race STS and the Carceral Imagination*, 2 ENGAGING SCI., TECH., & SOC'Y 145, 148 (2016)).

17 U.S. CONST. amend. XIII, § 1.

A. *Forced Labor from Slavery to Mass Incarceration*

I rely on extensive scholarship about the development of incarcerated labor in the postbellum period for this summary, which is comparatively cursory. The basic narrative is as follows. Under slavery, the legal system sanctioned the treatment of Black people as chattel. Aside from inflicting brutality and violence that is impossible to capture concisely, slavery functioned to commodify Black people and their labor into something that could be "bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it."[18] After abolition, there was a scramble to create new legal paradigms that would justify a slavery-like economic relationship between newly freed Black people and "prosperous white citizens" whose material interests depended on their labor.[19] Those new dynamics were facilitated by the punishment clause of the Thirteenth Amendment and crystallized as Black Codes, debt peonage, and convict leasing, which collectively trapped free Black Americans in "[s]lavery by [a]nother [n]ame."[20]

Penal labor existed alongside slavery,[21] but it was transformed into an increasingly racialized system after abolition. The Black Codes excluded Black people from social and economic life in many states, where they were barred from owning land, operating businesses, and selling produce, among other things.[22] The Black Codes also included vagrancy laws—misdemeanor codes which criminalized unemployment[23] and, as a result, prevented free Black people from leaving their former masters to seek new jobs.[24] Most of

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18 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

19 Laura I. Appleman, *Bloody Lucre: Carceral Labor and Prison Profit*, 2022 WIS. L. REV. 619, 631.

20 *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (Anchor Books 2009) (2008).

21 Appleman, *supra* note 19, at 627; *see also* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 932 (2019) ("By 1835, imprisonment, along with hard labor, was a common punishment for almost all crimes." (citing Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women's Reproductive Rights*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 117, 127-28 (2013)).

22 Goodwin, *supra* note 21, at 935-37 ("Black Codes, which most southern states began enacting as soon as the Union armies withdrew, severely restricted the newly freed Negro workers' employment rights." (internal quotation marks omitted) (footnotes omitted)).

23 Appleman, *supra* note 19, at 631 ("The South passed harsh vagrancy laws that were extremely broad in scope, punishing any Black individual who 'neglect[ed] their calling or employment or misspent what they earn[ed].'").

24 James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1480 (2019) (describing a law directing police "to arrest and take up all idle and vagrant persons running at large without employment" and contemporary commentary that a "regulation like this certainly would make it difficult for freedmen to leave their

those convicted of a crime under the Black Codes and other statutes in this period experienced convict leasing: "Persons guilty of felonies were sent to the state penitentiary, while the county jails housed those convicted of misdemeanors plus costs. From there the prisoners could be leased for 'hard labor' either within the county or elsewhere."[25] In the postbellum period, Black people "rapidly bec[ame] the penitentiary's majority population" and were leased to mines, farms, and railroad construction companies.[26] People who violated the Black Codes also incurred steep fines, leading to state-organized debt peonage.[27] If they were unable to pay, local courts and law enforcement would lease out their labor to private "employers" or send them to work in one of the many forced labor camps established in the South until their debt was paid off.[28] The state could also sell their debt to private owners, for whom they were obligated to work until their debt was paid off (a period of time that was often indefinitely extended through alleged interest).[29] In both permutations of post-abolition forced labor—convict leasing and debt peonage—people "faced brutal beating, whipping, food deprivation, and sadistic torture."[30] Legal and legislative challenges, particularly to debt peonage, accumulated in the early twentieth century.[31] The Supreme Court held that debt peonage was illegal in 1914[32] and states gradually ended convict leasing by statute until Alabama, the final state to do so, abolished the practice in 1927.[33] Vagrancy laws survived until 1972, but they too were eventually ended by the Supreme Court.[34]

The drive to subjugate and profit from Black labor survived under the auspices of mass incarceration. A new class of laws disproportionately criminalizing people of color and the condition of poverty replaced vagrancy laws in the 1970s. Prohibitions on loitering and sleeping in public, for

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former masters for the purpose of seeking employment elsewhere" (internal quotation marks omitted)).

25 Goodwin, *supra* note 21, at 941 (quoting William Warren Rogers & Robert David Ward, *The Convict Lease System in Alabama*, *in* THE ROLE OF CONVICT LABOR IN THE INDUSTRIAL DEVELOPMENT OF BIRMINGHAM 1, 1 (1998) (citation omitted)).

26 *Id.* at 942 (internal quotation marks omitted).

27 *Id.* at 938-39.

28 Appleman, *supra* note 19, at 635.

29 Goodwin, *supra* note 21, at 946-48.

30 Pope, *supra* note 24, at 1507.

31 *See generally* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015) (tracing the history of and legal challenges to debt peonage and illustrating its modern permutations through fines, fees, court costs, and child support prosecutions in the criminal legal system).

32 United States v. Reynolds, 235 U.S. 133, 150 (1914).

33 Pope, *supra* note 24, at 1526.

34 Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972); *see also* Pope, *supra* note 24, at 1528 n.341 (noting that the Thirteenth Amendment was sidelined in vagrancy cases and that the *Papachristou* Court did not mention it).

example, and harsh sentences for drug possession, especially possession of drugs more associated with Black users than with white users, swept Black Americans into the criminal legal system.[35] The surging prison population generated by these enactments was channeled into new forms of convict labor.

Today, prison labor generates more than $2 billion per year in goods and more than $9 billion in services.[36] Prisoners work maintenance jobs within detention facilities, manufacture goods in state-owned prison industries, labor as part of community work crews for public works projects, produce goods for private industries, and do agricultural labor, including on "penal plantations."[37] The average hourly wage of a state prisoner is $0.86 per hour.[38] Prisoners working for the Federal Prison Industries program make between $0.23 and $1.15 per hour.[39] In addition to low or no compensation, inmates have minimal freedom to choose their work and can be assigned more or less work at the whims of corrections staff.[40]

B. *The Bipartisan Critique of Mass Incarceration*

Mass incarceration has come under attack from both the right and the left since the 2010s. On the left, scholarship like *The New Jim Crow*[41] and grassroots movements like Black Lives Matter helped propel the critique of America's disproportionately Black prison population into the mainstream.[42]

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35 Pope, *supra* note 24, at 1529; *see* ALEXANDER, *supra* note 6, at 51-53 (describing the Reagan administration's War on Drugs); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2263 (1998) (describing how law enforcement discretion in issuing civil injunctions promoted similar discrimination as vagrancy laws struck down in the 1960s and 70s).

36 ACLU & UNIV. CHI. L. SCH. GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 6 (2022).

37 *Id.* at 27. The conditions on penal plantations, like Angola prison farm in Louisiana and Parchman prison farm in Mississippi, closely mimicked slave plantations until the 1970s and 1980s. Appleman, *supra* note 19, at 649. In 1974, the Fifth Circuit held that the abuses and corporal punishment at Parchman farm violated the Eighth and Fourteenth Amendments. Gates v. Collier, 501 F.2d 1291, 1299, 1306 (5th Cir. 1974). The same Circuit issued a similar ruling regarding Texas prison plantations in 1980. Ruiz v. Estelle, 503 F. Supp. 1265, 1385 (S.D. Tex. 1980), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *and amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982) (per curiam).

38 ACLU & UNIV. CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 36, at 97.

39 *Id.* at 40.

40 Andrea C. Armstrong, *Beyond the 13th Amendment—Captive Labor*, 82 OHIO ST. L.J. 1039, 1048-49 (2021) (examining Wallace v. Robinson, 940 F.2d 243, 248 (7th Cir. 1991), which held that prisoners have no defensible liberty or property interest in any "particular job placement").

41 ALEXANDER, *supra* note 6.

42 Some on the left tried to point out the massive expansion and inequities of the prison population earlier, but the Clinton administration's "tough on crime" narrative left them "voices in the wilderness," isolated from the mainstream Democratic platform. Takei, *supra* note 11, at 155-56 (internal quotation marks omitted).

Some politicians and organizers on the left have aimed to reduce the prison population through reforms, such as ending the War on Drugs or eliminating harsh sentencing laws like Three Strikes and mandatory minimum statutes;[43] others seek the complete abolition of prisons.[44] Most frame their advocacy through a racial justice lens: reform or abolition is necessary to end the structural racism that forces Black and Brown people into contact with the criminal legal system.[45] Around the same time, conservative politicians and scholars likewise began criticizing mass incarceration.[46] Conservative initiatives like the "Right on Crime" campaign aimed to decrease the prison population by centering individual liberty, limited government, and "fiscal discipline."[47]

This bipartisan convergence of interests made organizations like Right on Crime and the ACLU into "[u]nlikely [b]edfellows,"[48] but their fellowship produced positive results. Since 2015, a number of sentencing reform measures have been proposed in Congress, including the CORRECTIONS Act and the Sentencing Reform and Corrections Act in 2015.[49] In 2018, one

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43 *Id.* at 157-60. Three Strikes laws impose lengthy and mandatory minimum sentences, often life in prison, on people convicted of three felony offenses. JAMES AUSTIN, JOHN CLARK, PATRICIA HARDYMAN & D. ALAN HENRY, OFF. OF JUST. PROGRAMS, "THREE STRIKES AND YOU'RE OUT": THE IMPLEMENTATION AND IMPACT OF STRIKE LAWS 1 (1999). Mandatory minimums are statutory provisions requiring a specific minimum sentence for certain crimes, "regardless of individual circumstances." ASHELY NELLIS, THE SENT'G PROJECT, HOW MANDATORY MINIMUMS PERPETUATE MASS INCARCERATION AND WHAT TO DO ABOUT IT 1 (2024).

44 *See* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 107 (2003) (offering a pioneering analysis on prison abolition); MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN'T WORK—AND HOW WE CAN DO BETTER 185-98 (2014) (detailing movements advocating for prison abolition).

45 The disproportionate impact of mass incarceration on Black and Brown people is the thesis of Alexander's THE NEW JIM CROW, *supra* note 6.

46 As on the left, there were conservative "voices in the wilderness," primarily libertarians, criticizing mass incarceration much earlier, but that criticism did not gain traction until the past decade and a half. Takei, *supra* note 11, at 161.

47 *Case for Reform*, RIGHT ON CRIME, https://rightoncrime.com/about/case-for-reform [https://perma.cc/XXW8-EAPL] (last visited May 17, 2024); *see also* DAVID DAGAN & STEVEN M. TELES, PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION 159-63 (2016) (describing shifts in modern conservative thought toward supporting mass decarceration).

48 Alice Speri, *Unlikely Bedfellows from Cory Booker to Newt Gingrich Unite in DC to Reform Prisons*, VICE NEWS (Mar. 26, 2015, 5:20 AM), https://www.vice.com/en/article/nem83z/unlikely-bedfellows-from-cory-booker-to-newt-gingrich-unite-in-dc-to-reform-prisons [https://perma.cc/KLQ9-PKWQ]; *see also* Inimai Chettiar & Rebecca McCray, *Sing it, Newt! Gingrich and Allies Promote Criminal Justice Reform*, ACLU NEWS & COMMENT. (Jan. 13, 2011), https://www.aclu.org/news/smart-justice/sing-it-newt-gingrich-and-allies-promote-criminal-justice [https://perma.cc/N7VE-LLQF].

49 The passage of the Sentencing Reform Acted Corrections Act is detailed in Ames Grawert & Tim Lau, *How the FIRST STEP Act Become Law—and What Happens Next*, BRENNAN CENTER FOR JUST. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/EY4Z-RD76].

finally passed: the FIRST STEP Act of 2018, which shortened mandatory minimum sentences for nonviolent drug offenses, gave judges more discretion to deviate below those minimums, and eased the federal "three strikes" rule from life imprisonment to twenty-five years.[50] Bipartisan reforms also passed state legislatures in at least eighteen states between 2010 and 2014.[51] The development of this bipartisan consensus and related reforms correlated with a slow but steady decrease in America's prison population, from 1,575,950 people in 2013 to 1,205,087 in 2021.[52]

These reforms hardly spell the end of mass incarceration. They have been criticized soundly by activists and policymakers for not going far enough.[53] Their limitations are particularly acute when it comes to addressing the disparate impact of overcriminalization and mass incarceration on people of color, which has been sidelined in policymaking processes in order to preserve conservative buy-in to reform efforts.[54] Although the imprisonment rate for Black adults has declined approximately 36% in the past decade, compared to an approximately 23% decline for white adults, the imprisonment rate for Black Americans remains five times the rate of imprisonment for white Americans.[55] And the decline in the incarceration rate has been both slow and halting: in 2022, for the first time in a decade, America's prison population increased (by 2%).[56] The 2022 increase can be attributed in part to the end of

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50 *See id.* (summarizing the content of the Act); Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html [https://perma.cc/7NME-F6KL] (describing passage of the bill).

51 *Justice Reinvestment Initiative State Data Tracker*, URBAN INST., https://apps.urban.org/features/justice-reinvestment [https://perma.cc/YC97-5R7X] (last visited May 17, 2024) (summarizing reform legislation in Arkansas, Delaware, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, and West Virginia and analyzing its impact on prison populations).

52 E. ANN CARSON & RICH KLUCKOW, BUREAU OF JUST. STAT., NCJ 307149, PRISONERS IN 2022—STATISTICAL TABLES 5 (2023).

53 *See* Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV. 161, 162 (2020) ("It would seem that criminal law reform should be racing along at a breakneck pace, given these unusual alliances and the opportunities given the new Biden administration. News flash: it is not, either at the federal or state level."); Alexi Jones, *Reforms Without Results*, PRISON POL'Y INITIATIVE (Apr. 2020), https://www.prisonpolicy.org/reports/violence.html [https://perma.cc/WAR5-SN5E] (criticizing recent reforms for excluding those imprisoned for violent offenses under lengthy sentences).

54 *See, e.g.*, Joseph Margulies, *Shhh! It's Time for Criminal Justice Reform. Keep Race Out of It*, VERDICT (Apr. 6, 2015), https://verdict.justia.com/2015/04/06/shhh-its-time-for-criminal-justice-reform-keep-race-out-of-it [https://perma.cc/L8J4-GWRF] (criticizing the Justice Reinvestment Initiative, which "recommend[s] data-driven reforms that will improve performance and save money without sacrificing public safety," for failing to consider the "implicit (and sometimes explicit) [racial] bias that operates throughout the criminal justice system").

55 CARSON & KLUCKOW, *supra* note 52, at 14.

56 *Id.* at 1.

pandemic-era measures which promoted early releases in some circumstances and artificially accelerated decarceration from 2020 to 2021.[57] Nevertheless, it does not seem as far-fetched as it might have ten years ago to posit that the age of mass incarceration is waning.[58]

C. *Opposition to Prison Labor*

Rising opposition to mass incarceration has been accompanied by opposition to the forced labor that motivates and funds it. Institutions, primarily universities, have agreed to activists' demands that they divest from corporations that profit from prison labor. In 2015, Columbia University became the first college to divest from private prison companies.[59] The University of California (UC) system followed suit, divesting $30 million from private prisons in 2015.[60]

Some corporations have also begun distancing themselves from prison labor and, relatedly, from private prisons. In 2020, Costco announced that it would transition away from the use of prison labor,[61] although its progress towards that goal has been sporadic.[62] The effects of Costco's decision have trickled down its supply chain: Darigold, for example, ended its contract with Montana State Prison in May 2021 to remain in compliance with Costco's policy.[63] In 2015, Whole Foods similarly cut ties with prison labor, in this case

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57 *See* JACOB KANG-BROWN, STEPHEN JONES, JOYCE TAGAL & JESSICA ZHANG, VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN 2022 3 (2023) (explaining that decarceration occurred in 2020 because of "actions undertaken by judges, organizers, and public health officials to reduce the number of people in custody to prevent the circulation of COVID-19 behind bars . . . .").

58 *See generally* COLLEEN P. EREN, REFORM NATION: THE FIRST STEP ACT AND THE MOVEMENT TO END MASS INCARCERATION (2023) (arguing that the successful bipartisan passage of the First Step Act is the beginning of a diminishing trajectory for prison populations); Adam Stevenson, *Slow and Steady May Win This Race: Lasting Criminal Justice Reform in a Time of Broad, but Shallow, Bipartisan Consensus*, 54 NEW ENG. L. REV. 219 (2020) (same).

59 Wilfred Chan, *Columbia Becomes First U.S. University to Divest from Prisons*, CNN (June 24, 2015, 9:26 AM), https://www.cnn.com/2015/06/23/us/columbia-university-prison-divest/index.html [https://perma.cc/H7KV-Y2UB] (detailing the university's sale of its shares in two private prison companies in response to student activism).

60 Jason Song, *UC System Divests $30 million in Prison Holdings Amid Student Pressure*, L.A. TIMES (Dec. 26, 2015, 12:00 AM), https://www.latimes.com/local/education/la-me-uc-divestment-prisons-20151226-story.html [https://perma.cc/YPS3-YRLS].

61 *See* COSTCO WHOLESALE CORP., STATEMENT ON PRISON LABOR (2020) ("[W]e will begin to transition away from our limited use of legal prison labor.").

62 *See Costco Wholesale Corp*, AFSC INVESTIGATE (Feb. 8, 2024), https://investigate.afsc.org/company/costco-wholesale [https://perma.cc/Q4YL-CQG4] (reporting that Costco "sells eggs produced by Hickman's Family Farms, a private, Arizona-based egg company that has used prison labor for decades" despite the company's explicit prohibition of engaging with suppliers that use prison labor).

63 Seaborn Larson, *Montana State Prison Dairy Loses $1.5M After Darigold Cuts Contract*, INDEP. RECORD (May 20, 2021), https://helenair.com/outdoors/montana-state-prison-dairy-loses-1-5m-

Colorado Correctional Industries, after protests at its Texas stores.[64] A number of banks have also announced that they will no longer issue loans to CoreCivic and GEO Group, thereby divesting from the two largest private prison operators in America.[65]

As with bipartisan opposition to mass incarceration, institutional divestment is not the end of prison labor, which is still used in the supply chain of products from Frosted Flakes to Coca-Cola and supermarkets from Target to Aldi.[66] But it is, perhaps, the beginning of an undoubtedly still distant end: the labor equivalent of "First Step" legislation.

II. AN EMERGING LEVER: COMMUNITY SUPERVISION AND FORCED LABOR

The logic of discriminatory design suggests that the oppressive forces of systemic racism will endure even as the levers exerting those pressures change.[67] The question, then, is if mass incarceration and its corollary, prison labor, continue to diminish, what new iteration of carceral economic exploitation will emerge to fill its role?

Community supervision is a likely answer. Community supervision has two arms: probation and parole. Probation is imposed immediately after conviction, while parole is served after a period of incarceration.[68] Both systems allow defendants to serve all or part of their sentence outside prison

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after-darigold-cuts-contract/article_50489937-e6d7-54b9-89cb-ff2eed97ab51.html [https://perma.cc/GEL3-4BQY].

64 Candice Choi, *Whole Foods to Stop Selling Products Made by Inmates*, AP NEWS (Sept. 30, 2015, 4:07 PM), https://apnews.com/whole-foods-to-stop-selling-products-made-by-inmates-22e5e634807749e2acb767368e27ae47 [https://perma.cc/5Q9P-Q8L7].

65 Medha Chidambaram, Sytonia Reid & Eleanor Greene, *Big Banks Leaving the Private Prison Business*, GREEN AM. https://www.greenamerica.org/unraveling-fashion-industry/big-banks-leaving-private-prison-business [https://perma.cc/FLE3-S53J] (last visited May 17, 2024) (identifying Wells Fargo, Bank of America, SunTrust, J.P. Morgan Chase, and PNC, among others, as banks that announced divestment).

66 Robin McDowell & Margie Mason, *Prisoners in the US Are Part of a Hidden Workforce Linked to Hundreds of Popular Food Brands*, AP NEWS (Jan. 29, 2024, 8:03 AM), https://apnews.com/article/prison-to-plate-inmate-labor-investigation-c6f0eb4747963283316e494eadf08c4e [https://perma.cc/GA5W-K6F2] (noting that "a dizzying array" of goods produced by the labor of Louisiana State Penitentiary prisoners are sold by popular chains including Kroger, Target, Aldi, and Whole Foods).

67 *See* Jones, *supra* note 7, at 63 (citing RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE (2019)) ("Mass criminalization and surveillance are generated through what Princeton scholar Ruha Benjamin refers to as 'discriminatory design,' racist outcomes built into 'the machine' that continue to be systematically replicated overtime because they are part of the original blueprint.").

68 *Community Supervision 101*, AM. PROB. & PAROLE ASS'N, https://www.appa-net.org/eweb/DynamicPage.aspx?webcode=Community-Supervision-101 [https://perma.cc/Q79N-YZS9] (last visited Feb. 1, 2025).

walls but still under state control. Community supervision is therefore often billed as a desirable alternative to incarceration or a tool in the belt of policymakers seeking to reduce prison populations.[69] But over the past three decades, the scope of this system has expanded alongside and eventually eclipsed mass incarceration.[70] In 2022, one in seventy-one adults in the United States was under correctional supervision in the community.[71] That population accounts for 74.9% of the total correctional population.[72] And the same racial disparities that plague prison populations exist in the parole and probation systems. 31% of people on probation and 35% of people on parole are Black,[73] though only 13.7% of the U.S. population is Black.[74]

As this section will explore, the key features of community supervision—limited due process protections and a near-universal requirement that supervisees be employed and pay fines and fees—render it a potential tool of racial subjugation and labor exploitation.

A. *The Landscape of Community Supervision: Conditions, Scrutiny, and Limited Legal Protection*

A person on parole or probation must contend with both persistent scrutiny and a complex list of conditions. Community supervision expands the scope of permissible surveillance by supervising officers and law enforcement by reducing the Fourth Amendment protections available to supervisees:[75] the Supreme Court has held that probation conditions can allow the search of a probationer's home without probable cause[76] and that a probation or police officer need have no more than "reasonable suspicion" to

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69 PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 12 (2009) ("Managing offenders in the community, when done well, produces appreciable costs savings and public safety outcomes.").

70 PEW CHARITABLE TRS., PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 4 (2018) (showing that the number of adults under community supervision has more than tripled in the past 36 years).

71 KAEBLE, *supra* note 1, at 4.

72 This percentage was calculated using statistics in Kaeble, *id.* at 1 (noting that there were 3,668,800 adults under community supervision at the end of 2022) and CARSON & KLUKOW, *supra* note 52, at 1 (citing that 1,230,100 adults were in prison at the end of 2022).

73 KAEBLE, supra note 1, at 7, 8. Note that these numbers exclude unknown and unreported characteristics.

74 *Quick Facts*, U.S. CENSUS BUREAU (2024), https://www.census.gov/quickfacts/fact/table/US/PST045222#PST045222 [https://perma.cc/D8YB-LTEQ].

75 For a critique of the doctrinal justification for Constitutional rights violations in the context of probation and parole, see generally Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305 (2023) and Tonja Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887 (2014).

76 *See* Griffin v. Wisconsin, 483 U.S. 868, 876 (1987) (describing the probation system as having "special needs" that "make the warrant requirement impracticable and justify replacement of the standard of probable cause by 'reasonable grounds'").

search a probationer's home without a warrant.[77] And people under community supervision must abide by a litany of requirements to maintain their status and avoid (re)incarceration. Standard conditions typically require supervisees to avoid new criminal activity, obey all civil and criminal laws, "[a]void injurious or vicious habits," avoid association with people of disreputable character or with criminal records, seek or maintain employment, support their families, check in regularly with their supervising officer, and pay probation fines and fees, to name a few.[78] Additional specialized conditions, such as drug testing or treatment, domestic violence programs, or sex offender programs, are usually imposed based on the nature of the underlying offense.[79]

These "vague and moralistic standards" are typically justified with reference to a bygone era in which probation officers were meant to act as "benevolent supervisor[s]" in a rehabilitative system or on the basis that supervisees agree to probation conditions as a voluntary contract, notwithstanding the coercive effect of incarceration as their only alternative.[80] Regardless of their purported justification, however, the myriad conditions of community supervision, which are hard to understand and hard to follow, "set[] people up to fail."[81] Only 60-69% of people on probation successfully complete it.[82] And Black people often have more conditions than their white counterparts, entrenching the racial disparities in the carceral system by making it more difficult for them to successfully complete probation.[83]

Noncompliance with supervision conditions constitutes a violation, which may cause the revocation of community supervision and reincarceration. Violations may be direct or technical: direct (or new offense) violations involve new criminal activity, whereas technical violations encompass noncompliance with any condition that does not relate to criminal conduct.[84] Failure to report to a supervising officer, a positive drug test, a trip out of the county or state without permission, or a missed fine or fee payment constitute

77 United States v. Knights, 534 U.S. 112, 121 (2001).

78 Doherty, *supra* note 5, at 300-14.

79 *Id.* at 314-16.

80 *Id.* at 296-97, 328-34, 342-44.

81 HUM. RTS. WATCH & ACLU, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES 3 (2020).

82 KAEBLE, *supra* note 1, at 5. This statistic refers to data gathered between 2012 and 2022.

83 Anat Kimchi, *Investigating the Assignment of Probation Conditions: Heterogeneity and the Role of Race and Ethnicity*, 35 J. QUANTITATIVE CRIMINOLOGY 715, 738-39 (2019) (finding that Black probationers were more likely to be required to complete multiple types of treatment, and that young Black probationers were more likely to receive a higher number of restrictive conditions than white probationers).

84 *See* ALEX ROTH, SANDHYA KAJEEPETA & ALEX BOLDIN, VERA INST. OF JUST., THE PERILS OF PROBATION: HOW SUPERVISION CONTRIBUTES TO JAIL POPULATIONS 4 (2021) (defining violations, sanctions, and revocation).

technical violations.[85] In most jurisdictions, probation and parole officers have discretion to determine when to file a revocation petition.[86]

Once the petition is filed, probationers appear before a judge and parolees appear before a parole board to determine whether they will be incarcerated or if new sanctions short of incarceration will be imposed.[87] Revocation is a permissible sanction for both direct and technical violations. In fact, over half of prison admissions for supervision violations in 2021 were for technical, rather than direct, violations.[88] Some states cap incarceration for technical violations at anything from thirty days to the remainder of the underlying sentence, but a plurality (twenty) have no cap on incarceration for technical violations.[89]

People on probation and parole retain minimal due process rights during the revocation process. The Supreme Court has held that revocation hearings are not criminal in nature, so there is no constitutional right to appointed counsel, to cross-examine witnesses, or to a jury determination of guilt.[90] The

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85 *Id.*

86 See Ryan T. Sakoda, *The Architecture of Discretion: Implications of the Structure of Sanctions for Racial Disparities, Severity, and Net Widening*, 117 NW. U. L. REV. 1213, 1220-27 (2023) (describing probation officers' discretion over the imposition of sanctions).

87 *See* HUM. RTS. WATCH & ACLU, *supra* note 81, at 16-17 (explaining the revocations proceedings process).

88 *Supervision Violations and Their Impact on Incarceration*, COUNCIL OF STATE GOV'TS JUST. CTR., https://projects.csgjusticecenter.org/supervision-violations-impact-on-incarceration/key-findings [https://perma.cc/U8AK-K6WG] (last visited May 17, 2024) (tracking prison admissions due to supervision violations nationally and state-by-state).

89 *See Five Evidence-Based Policies Can Improve Community Supervision*, PEW CHARITABLE TRS. (Jan. 27, 2022), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/01/five-evidence-based-policies-can-improve-community-supervision [https://perma.cc/H8MU-JNP3] (tracking the state limits on incarceration for technical violations).

90 *See* Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (extended to probation by Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973) (setting forth the due process rights available in revocation hearings)). The judicial separation of revocation from the criminal process is premised on the idea that defendants have already been convicted and enjoyed a full panoply of due process protections during their criminal prosecution. *See Morrissey*, 408 U.S. at 483 (explaining that parolees have already been found guilty of a crime against the people). Probationers, who are typically convicted of misdemeanor charges, are much more likely to plead guilty, and to plead guilty faster, than people facing felony charges. *See* RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, VERA INST. OF JUST., IN THE SHADOWS: A REVIEW OF RESEARCH ON PLEA BARGAINING 15 (2020) (citing Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 529-57 (2017)). The pressure to plead guilty in the misdemeanor context "can be even more compelling because the punishment in the plea offer, frequently time served or probation, appears minimal, and the prospect of fighting the charge has not only the risk of more substantial punishment, but also tremendous inconvenience . . . ." NAT'L ASS'N OF CRIM. DEF. LAWS., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 32 (2009). The Supreme Court contemplated this tension when it held that counsel must be appointed when the revocation hearing is also a deferred sentencing hearing: "in a case where an accused agreed to plead guilty, although he had a valid defense, because he was

state does not need to prove a violation beyond a reasonable doubt—many jurisdictions use a preponderance of evidence standard—and most rules of evidence are inapplicable.[91] Probationers and parolees have the right to a written notice of the claimed violations and to the disclosure of the government's evidence.[92] They are afforded the right to a hearing in front of a "neutral and detached" body where they can present evidence in their defense and confront government witnesses in some circumstances.[93] After the hearing, they have the right to a written statement of the reasons for revocation.[94] Revocation decisions are reviewed for abuse of discretion at the appellate level.[95]

The relationship between community supervision and mass incarceration is disputed. Probation is meant to allow defendants to avoid incarceration entirely, and parole is an early release mechanism that should lead to decarceration. Probation, however, has a well-documented "net-widening" effect, sweeping people with low-level cases, which would otherwise have been withdrawn or dispensed with via fines and community service, into long-term contact with the criminal legal system, after which the risk of revocation makes them more likely to end up behind bars.[96] Thus, "expanding probation rates leads to slightly greater incarceration rates."[97] In 2021, 44% of new prison admissions were due to supervision violations.[98]

People of color confront disproportionate sanctions (and disproportionate incarceration) through community supervision, mirroring their experiences with the criminal legal system as a whole. Black people have their probation revoked at significantly higher rates than white probationers: one study showed rates ranging from 55–100% higher across four jurisdictions.[99] The

offered probation, absence of counsel at the imposition of the deferred sentence might well result in loss of the right to appeal." Mempa v. Rhay, 389 U.S. 128, 136 (1967).

91 *See* Doherty, *supra* note 5, at 323 (listing states that use a preponderance of evidence standard).

92 *Morrissey*, 408 U.S. at 471; *Gagnon*, 411 U.S. at 778.

93 *Morrissey*, 408 U.S. at 489 (internal quotation marks omitted).

94 *Id.*

95 *See e.g.*, Burns v. United States, 287 U.S. 216, 224 (1932).

96 *See* Phelps, *supra* note 5, at 57 (introducing the concept of "net-widening").

97 *Id.* at 53 (noting state-level variation).

98 COUNCIL OF STATE GOV'TS JUST. CTR., *supra* note 88. *See generally* ROTH ET AL., *supra* note 84 (discussing how probation contributes to mass incarceration).

99 *See* JESSE JANNETTA, JUSTIN BREAUX, HELEN HO & JEREMY PORTER, URBAN INST., EXAMINING RACIAL AND ETHNIC DISPARITIES IN PROBATION REVOCATION 4 (2014) (examining revocation rates by race in New York City, NY, Multnomah County, OR, Dallas County, TX, and Iowa's Sixth Judicial District); *see also* Kevin F. Steinmetz & Howard Henderson, *Inequality on Probation: An Examination of Differential Probation Outcomes*, 14 J. ETHNICITY CRIM. JUST. 1, 8 (2016) (finding that race was a statistically significant predictor of revocation).

statistics are similar for parole.[100] And although racial statistics on technical violations specifically are not as readily available at a national level, local studies suggest a similar pattern of disproportionality.[101] In New York, for example, Black people are incarcerated for technical violations at five times the rate of white probationers.[102]

B. *The Employment Condition*

Most state and county standard probation conditions require that probationers and parolees secure or seek employment. The employment condition is just one of the many community supervision requirements discussed above, most of which have received little scrutiny from scholars.[103] But it merits specific attention because it creates the conditions for a new iteration of the carceral economic exploitation explored in Part II.

In her survey of probation requirements, Professor Fiona Doherty lays out a taxonomy of three types of employment conditions. Some jurisdictions require that probationers "try[] their hardest" to find work, vesting power in their probation officer to determine whether they are trying hard enough.[104] In Allegheny, Delaware, Montgomery, and Philadelphia Counties in Pennsylvania, for example, probationers must "[m]ake every effort to obtain and maintain employment."[105] Other jurisdictions give probation officers the authority to *decide* whether probationers must work or attend school or job

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100 *See* Sara Steen, Tara Opsal, Peter Lovegrove & Shelby McKinzey, *Putting Parolees Back in Prison: Discretion and the Parole Revocation Process*, 38 CRIM. JUST. REV. 70, 82 (2013) (providing data about parole revocation by race).

101 *See* JOE RUSSO, SAMUEL PETERSON, MICHAEL J.D. VERMEER, DULANI WOODS & BRIAN A. JACKSON, RAND CORP., REDUCING RACIAL AND ETHNIC DISPARITIES IN TECHNICAL VIOLATIONS OF PROBATION OR PAROLE SUPERVISION 5 (2023) ("Research is scarce on disparities in the handling of cases in which technical violations are the sole type of violation . . . .").

102 KENDRA BRADNER, VINCENT SCHIRALDI, NATASHA MEJIA & EVANGELINE LOPOO, COLUM. U. JUST. LAB, MORE WORK TO DO: ANALYSIS OF *PROBATION AND PAROLE IN THE UNITED STATES*, *2017-2018* 12 (2020); *see also* U. WYO. CRIM. JUST. & SOCIO. DEP'T & DENV. ADULT PROB. DEP'T, REDUCING REVOCATION CHALLENGE: FINAL REPORT 7 (2021) (finding that 34.4% of Black probationers in Denver County, CO had their probation revoked for technical violations, compared to 29.4% of white probationers and 26% of Hispanic probationers).

103 *See* Doherty, *supra* note 5, at 294 ("Courts, legislators, and scholars have devoted almost no attention to analyzing (or even acknowledging) the conditions of probation that are routinely imposed on probationers in state after state, year after year.").

104 *Id.* at 310.

105 *Id.* at 302, 312 (citing ADULT PROB. DEP'T, 5TH JUD. DIST., ALLEGHENY CNTY., PA., GENERAL RULES AND CONDITIONS OF PROBATION, PAROLE AND INTERMEDIATE PUNISHMENT (n.d.); ADULT PROB. & PAROLE DEP'T, MONTGOMERY CNTY., PA., RULES AND CONDITIONS GOVERNING PROBATION/PAROLE AND INTERMEDIATE PUNISHMENT (n.d.); ADULT PROB. & PAROLE DEP'T, 1ST JUD. DIST., PHILA. CNTY., PA., RULES OF PROBATION AND PAROLE (n.d.)).

training (and in some cases to decide when they can accept, leave, or change employment[106]). In Florida, probationers must "[w]ork diligently at a lawful occupation as directed by [their parole officer]."[107] And a third set of jurisdictions requires employment "apparently without limitation or exception."[108] In Harris and Tarrant Counties in Texas, probationers must "[w]ork faithfully at suitable employment;"[109] in Allen County, Indiana, probationers are instructed to "be employed full-time."[110]

People on probation who fail to secure employment can therefore face a technical violation of their conditions and consequent revocation. More specifically, they face the threat of reincarceration for reasons as varied as declining to take a job outside their trade, holding out for a better paying position, or leaving a job due to interpersonal conflict, unsafe working conditions, or to pursue another opportunity.[111]

Risk of revocation is heightened by the fees, fines, and restitution costs levied against people on community supervision. Probation fees range from $10 to $208 per month in the thirty-eight states that impose a monthly supervision fee, while parole fees span the same range in the thirty-three states that charge a monthly fee.[112] Additional fees are added in many states for probation programming, like electronic monitoring and alcohol and drug testing and treatment.[113]

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106 *Id.* at 310 ("In Idaho, for example, a probationer 'shall not accept, cause to be terminated from, or change employment without first obtaining written permission from his/her supervising officer.'").

107 *Id.* at 310, 312 (citing FLA. R. CRIM. P. 3.986(e)(3)(8)).

108 *Id.* at 311.

109 *Id.* at 311, 312 (internal quotation marks omitted) (citing HARRIS CNTY., TEX., CONDITIONS OF COMMUNITY SUPERVISION (n.d.); TARRANT CNTY., TEX., CONDITIONS OF COMMUNITY SUPERVISION (n.d.)).

110 *Id.* at 296, 312 (citing ADULT PROB. DEP'T, ALLEN CNTY., IND., ORDER OF PROBATION (n.d.)).

111 *See, e.g.*, United States v. Cofield, 233 F.3d 405, 408 (6th Cir. 2000) (upholding revocation for violations including "failing to maintain gainful employment"); United States v. White, No. 02-CR-47-BBC-02, 2008 WL 4449980, at *1 (W.D. Wis. Apr. 22, 2008) (upholding defendant's revocation for failing to follow probation officer's directions to find a job and support his dependents); United States v. Johnson, No. 02-20390-CR, 2008 WL 2704454, at *1 (S.D. Fla. July 7, 2008) (upholding revocation for "failing to maintain full-time legitimate employment" and failing to pay court-ordered child support); Ramirez v. State, No. 08-09-00245-CR, 2011 WL 241954, at *1 (Tex. Ct. App. Jan. 26, 2011) (upholding revocation based on defendant "failing to maintain suitable employment"); Reese v. State, No. 01-11-00360-CR, 2013 WL 174562, at *1 (Tex. Ct. App. Jan. 17, 2013) (upholding revocation for failing to comply with the probation department's policy that probationers must apply to four jobs each weekday and faulting probationer specifically for applying "only to jobs related to his trade").

112 *See* FINES & FEES JUST. CTR., 50 STATE SURVEY: PROBATION & PAROLE FEES 5, 8 (2022) (detailing probation fees in various states).

113 *Id.* at 6, 9.

The Supreme Court held in *Bearden v. Georgia* that due process and equal protection prohibit the revocation of probation solely for failure to pay fines and restitution.[114] Mr. Bearden was laid off from his job which made him unable to keep up with the costs of his supervision.[115] In revoking his probation status, the sentencing court made no finding as to whether or not he had been diligently looking for work.[116] The Court concluded that the validity of revocation hinged on the question of whether he "willfully refused to pay the fine."[117] If Mr. Bearden was unable to find work, then he was unable to pay through no fault of his own and revocation would be contrary to "the fundamental fairness required by the Fourteenth Amendment."[118] The Court specified, however, that

> a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense.[119]

Failure to make restitution payments and failure to maintain employment often appear in tandem before sentencing courts at revocation hearings. In many jurisdictions, the combination is sufficient to justify revocation. In *State v. Archuleta*, for example, the Utah Court of Appeals relied on *Bearden* to uphold revocation for failure to pay fines, failure to pay child support, and failure to maintain employment.[120] Because Mr. Archuleta had quit his job, rather than getting fired as Mr. Bearden had, his failure to pay fines and child support was deemed willful.[121] When he quit, the court in *Archuleta* elaborated, he "knew that . . . he ran the risk of having his probation revoked."[122]

Even so, probation officers and judges do not necessarily move to revoke probation for these kinds of technical violations consistently or even often. It is hard to know how common revocation for employment violations is beyond anecdotal examples, although threats of revocation appear to be fairly common. In the only available empirical study on the experiences of people on parole with the employment condition, 9% of survey respondents had

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114 Bearden v. Georgia, 461 U.S. 660, 668-69 (1983).
115 *Id.* at 673.
116 *Id.*
117 *Id.* at 668.
118 *Id.* at 673.
119 *Id.* at 668.
120 State v. Archuleta, 812 P.2d 80, 85 (Utah Ct. App. 1991).
121 *Id.*
122 *Id.*

received a violation related to employment and almost 8% had been reincarcerated for an employment-related violation.[123] In the same empirical study, 20% of survey respondents reported that their parole officer had threatened them with a violation related to employment, indicating that the threat of incarceration is more widespread.[124] The central concern sparked by the employment condition is how the threat of incarceration leaves probationers vulnerable to labor exploitation, replicating the dynamics of coerced labor present in other arenas of the carceral state.

C. *Incentives for Exploitation*

Employment conditions create an opportunity for community supervision systems to coerce people on probation and parole to work. The existence of that opportunity does not necessarily mean that community supervision will become a mechanism for coerced labor in practice. The specific dynamics of parole and probation, however, correspond to recent shifts in the political economy. The convergence of opposition to prison, widespread multi-industrial labor shortages, and increases in labor organizing create strong incentives for private companies to exploit the labor of people on probation or parole—and for the legal system to allow that exploitation.[125]

1. The Labor Shortage and the Probation Supply Gauge

Prisons have historically functioned to "warehouse surplus labor" through a daisy chain of unemployment, poverty, and criminalization.[126] But in recent years, and especially since the COVID-19 pandemic, America no longer has surplus labor. Instead, the country faces an acute labor deficit.[127] In-person, low-wage jobs have the most difficulty retaining workers, even prior to the

123 Dallas Augustine, *Coerced Work During Parole: Prevalence, Mechanisms, and Characteristics*, 61 CRIMINOLOGY 546, 566-70 (2023) (surveying the experiences of people on parole in Los Angeles County, California).

124 *Id.* at 561-62.

125 Collusion between states, courts, and industry has facilitated every previous phase of carceral economic exploitation. Under the convict leasing system, for example, "[s]tates adopted expansion measures to increase both the supply of convicts and the leasing of them." Goodwin, *supra* note 21, at 944-45.

126 Jones, *supra* note 7, at 78; *see also* David Theo Goldberg, *Surplus Value: The Political Economy of Prisons and Policing*, in STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISONS 205, 219 (Joy James ed., 2000).

127 Stephanie Ferguson Melhorn, *Understanding America's Labor Shortage*, U.S. CHAMBER OF COM. (Dec. 13, 2024), https://www.uschamber.com/workforce/understanding-americas-labor-shortage [https://perma.cc/25VL-5PPD] (reviewing how and why the United States has entered a worker shortage).

pandemic.[128] In the manufacturing industry, 622,000 job openings had yet to be filled as of January 2024.[129] Similar labor gaps have opened in agriculture.[130] The economic role of prisoners has adjusted to compensate: convict leasing programs have expanded and prison labor is now used to fill low-wage agriculture jobs, often at even lower wages.[131] In Idaho, Washington, and Arizona, for example, convict labor is used to harvest potatoes, apples, and onions.[132] However, as explored in Section II.C., using incarcerated workers as a stopgap is growing less desirable due to rising opposition to prison labor.

If the economic benefit of prison labor continues to shrink, community supervision and its ubiquitous employment condition present an alternative gauge through which to control the supply and demand of labor on the market.[133] Case law illustrates the mechanism through which revocation already forces people on probation and parole to fill labor gaps in their communities. In *State v. Archuleta*, discussed above, the trial court's finding that "there were jobs available during this period in Salt Lake City" weighed

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128 *See* Stephanie Ferguson Melhorn & Makinizi Hoover, *Understanding America's Labor Shortage: The Most Impacted Industries*, U.S. CHAMBER OF COM. (Dec. 13, 2024), https://www.uschamber.com/workforce/understanding-americas-labor-shortage-the-most-impacted-industries#:~:text=Food%20service%20and%20hospitality%20businesses,even%20prior%20to%20the%20pandemic [https://perma.cc/B4QZ-QHYY] (reviewing the specific industries that have been most impacted by the American labor shortage).

129 *Id.*; *see also* Adam Grundy, *Diversity, Equity, and Inclusion Key to Filling High-Skilled Manufacturing Jobs*, U.S. CENSUS BUREAU (Sept. 29, 2023), https://www.census.gov/library/stories/2023/09/manufacturing-faces-labor-shortage.html [https://perma.cc/43LE-5G3X] (noting that the labor shortage has had a particularly notable impact in the manufacturing industry).

130 *See* Hal Bernton, *Worried Washington Growers: 'Mob Mentality' Around Immigration Threatens State's AG Industry*, SEATTLE TIMES (Mar. 17, 2017, 6:00 AM), https://www.seattletimes.com/seattle-news/northwest/washington-farmers-tell-trump-we-need-more-foreign-workers [https://perma.cc/WCT2-MJ5L] (highlighting the impact of labor gaps in the agriculture industry in Washington State). *See generally* J. Edward Taylor, Diane Charlton & Antonio Yúnez-Naude, *The End of Farm Labor Abundance*, 34 APPLIED ECON. PERSPS. & POL'Y 587 (2012) (reviewing how the agriculture industry is suffering from labor shortages due to changes in immigration policies).

131 *See* Audrey M. Baumgartner, *Covering the Gap: Convict Leasing in Agriculture*, 26 DRAKE J. AGRIC. L. 395, 400, 408 (2021) (reviewing prison labor compensation trends).

132 Stian Rice, *Convicts Are Returning to Farming—Anti-Immigrant Policies Are the Reason*, THE CONVERSATION (June 7, 2019, 7:27 AM), https://theconversation.com/convicts-are-returning-to-farming-anti-immigrant-policies-are-the-reason-117152 [https://perma.cc/WX8D-D62A]; André Souza, *Prison Potatoes: Idaho's Famous Food*, BOISE HIGHLIGHTS (Jan. 22, 2020), https://boisehighlights.com/2135/front-page-stories/prison-potatoes-idahos-famous-food [https://perma.cc/D4EH-CA2T].

133 Criminal law as a mechanism to control labor supply in this context echoes its use in the nineteenth century, when "arrest rates [under vagrancy laws] responded more to fluctuations in the demand for labor than in the crime rate." Pope, *supra* note 24, at 1514.

in favor of revocation.[134] The court considered Mr. Archuleta obligated to accept one of those jobs to avoid incarceration regardless of their nature, pay, or conditions.[135] The lack of due process governing revocations creates fluidity between community supervision and incarceration, which makes the metaphorical tap of labor supply easy to turn on and off. As demand for workers rises and falls in a community, supervision can become more or less restrictive: during shortages, supervising officers may use their discretion to overlook technical violations that could justify revocation, but crack down on violations when jobs are filled. In doing so, they restore prisons to their traditional role as surplus labor warehouses.

2. Undermining Freedom of Contract and Collective Bargaining

Being forced to work under the threat of incarceration prevents those under community supervision from holding out for good jobs, advocating for better wages, or refusing to work under exploitative conditions. Skilled laborers risk being penalized if they seek employment within their trade, which happened to James Earl Reese, who was on probation in Texas from 2010–2011.[136] His probation was revoked for "failure to obtain suitable employment" and for two related violations (as explored in Section II.B): failure to "pay the required fees" and failure to "purchase [an] in-home alcohol monitoring device."[137] Mr. Reese "limited his search to jobs he preferred, where he could use his skills as a pipe-fitter."[138] The Harris County district court that revoked Mr. Harris' probation—like courts enforcing the vagrancy prosecutions that fueled convict leasing—"criminaliz[ed] the search for better employment."[139]

There is a clear parallel between the exploitation of Black labor facilitated by nineteenth-century vagrancy laws and convict leasing and twenty-first century exploitation by community supervision: in both systems, the threat of incarceration hinders freedom of contract. Because vagrancy laws criminalized unemployment, Black workers in the South were restricted from leaving a job—to seek better wages or less exploitative conditions—by the threat of incarceration.[140] The employment condition of community supervision forces probationers and parolees on the job hunt today to adopt

134 812 P.2d 80, 85 (Utah Ct. App. 1991).

135 *Id.*

136 *See* Reese v. State, No. 01–11–00360–CR, 2013 WL 174562, at *1-2 (Tex. Crim. App. Jan. 17, 2013).

137 *Id.* at *1.

138 *Id.* at *3.

139 Pope, *supra* note 24, at 1480.

140 *Id.* ("Laborers would accept the masters' offer of sub-living wages rather than submit to outright servitude.").

the same logic when balancing unfavorable employment conditions against the threat of incarceration.[141] How can a worker demand a livable wage, or a wage commensurate with their experience, when the alternative to accepting the first offer on the table is incarceration? In one survey of parolees in Los Angeles, almost 15% of those surveyed reported that an employer had threatened to speak to their parole agent about them.[142] As a result, according to qualitative interviews, some tolerated subminimum wages.[143]

Taking that logic a step further, how can a probationer or parolee participate in collective bargaining or labor organizing when the risk of retaliation (illegal[144] but nonetheless common[145]) is not just a lost job, but also jail time? The tension between supervisees' fragile freedom and a rising labor movement[146] may incentivize employers to hire people on community supervision as a means of undermining organizing efforts, much like private industry in the 1860s frequently used cheap convict labor to depress wages when the "broad hegemony of market values flowered."[147] Testifying before the Alabama General Assembly, one coal baron reported "that 'convict labor competing with free labor is advantageous to the mine owner' because '[i]f all were free miners they could combine and strike and thereby put up the price of coal, but where convict labor exists the mine owner can sell coal

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141 *Id.*

142 Augustine, supra note 123, at 563.

143 *Id.*

144 *See* National Labor Relations Act, 29 U.S.C. § 158 (outlawing retaliation against employees for organizing).

145 *See, e.g.*, Noam Scheiber, *Companies Are Taking a Harder Line on Union Organizers, Workers Say*, N.Y. TIMES (May 24, 2023), https://www.nytimes.com/2023/05/22/business/economy/unions-starbucks-apple-rei-trader-joes.html [https://perma.cc/CM7B-3U95] (highlighting how companies like Starbucks, Apple, REI and Trader Joes have cracked down on employee efforts to organize); Abigail Weinberg, *Starbucks Closed a Store "In Large Part to Discourage Unionization," Rules Judge*, MOTHER JONES (July 7, 2023), https://www.motherjones.com/politics/2023/07/starbucks-retaliation-union-schultz-ithica-new-york [https://perma.cc/M8PE-BB4S] (detailing a recent store closure by a Starbucks in New York and the company's anti-organizing intentions); Ivana Saric, *Tesla Workers Allege Company Fired Dozens in Retaliation for Union Campaign*, AXIOS (Feb. 16, 2023), https://www.axios.com/2023/02/16/tesla-union-buffalo-new-york-nlrb-complaint [https://perma.cc/R5JF-496H] (reviewing a complaint lodged by Tesla employees accusing the company of retaliation against employees who campaigned for unionization); Beverly Banks, *Apple Illegally Retaliated Against Union Backer, CWA Says*, LAW360 (May 8, 2024, 8:00 PM), https://www.law360.com/employment-authority/articles/1834966/apple-illegally-retaliated-against-union-backer-cwa-says [https://perma.cc/KW5R-EPUE] (discussing a retaliation effort by Apple against an employee who supported unionization).

146 Sampada Kapoor, *The U.S. Labor Union Spike*, A.B.A. (July 21, 2022), https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-august/the-u-s-labor-union-spike [https://perma.cc/HT4K-R8X6] (tracking "growing economic power and recent social support" for unions).

147 *See* Appleman, *supra* note 19, at 652 (internal quotation marks omitted) (footnote omitted) (noting that unions later gained sufficient strength, in the 1870-90s, to force a shift to a state-use system of prison labor that barred convict-produced goods from the open market).

cheaper.'"[148] The same logic applies to the relationship between organized labor and coerced labor through community supervision today, and the same predatory behavior has begun to emerge. A survey of people on parole in California found that almost 15% of those surveyed had an employer threaten to speak to their parole officer about them; in qualitative interviews, survey participants described employers refusing to fully compensate them and being pressured to work in environments that they felt were dangerous.[149]

Thus, the employment condition of community supervision provides an avenue of expression for the same *profit motive* that once undergirded convict leasing and now drives prison labor. The brutal conditions of convict leasing, which inflicted beating, whipping, starvation, and even torture on people who had been convicted of a crime, bear little similarity to merely being required to work a minimum wage job. And prison labor as it currently exists typically pays inmates below minimum wage and exempts them from the protection offered by the Fair Labor Standards Act and the Occupational Safety Health Administration;[150] that too represents more harm than the coercion and exploitation that probationers and parolees may (and likely already do) face in the labor market. But by conditioning freedom on work, the employment condition funnels people into undesirable jobs and inhibits their ability to advance either individually or as part of a broader labor movement.[151]

3. Private Probation

Private probation heightens the risk of exploitation through the employment condition in the same way that private prisons heighten the risk of exploitation through inmate labor: separation from state control decreases

148 Pope, *supra* note 24, at 1515 (quoting ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 3, 96 (1996)). Pope's article provides many examples of convict leasing being used to suppress labor organizing; for more, see Pope, *supra* note 24, at 1515 n.263. In some cases, labor organizers responded by trying to dismantle the system of convict leasing: striking miners in Coal Creek, Tennessee, for example, forcibly freed hundreds of people imprisoned by the convict leasing system. *See generally* Pete Daniel, *The Tennessee Convict War*, 34 TENN. HISTOR. Q. 273 (1975); KARIN A. SHAPIRO, A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COALFIELDS, 1871-1896 (1998).

149 Augustine, *supra* note 123, at 563-64.

150 Appleman, *supra* note 19, at 673-75.

151 For additional discussion of the relationship between the carceral state and dangers to workers' rights, see generally NOAH ZATZ, TIA KOONSE, THERESA ZHEN, LUCERO HERRERA, HAN LU, STEVEN SHAFER & BLAKE VALENTA, UCLA INST. FOR RSCH. ON LAB. AND EMP., GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT (2016) (exploring the depression of workers' rights due to the pressures of probation and parole, criminal justice debt, and the child support system).

"transparency, regulation, and oversight" and opens the door to abuses.[152] Many states, concentrated in the South,[153] have expanded private probation in response to budgetary shortfalls, since private probation is "offender-funded" through sometimes exorbitant supervision fees.[154]

Private probation companies charge probationers flat monthly supervision fees as well as fees for additional condition-related services like drug testing and electronic monitoring.[155] These companies are incentivized to keep offenders ensnared in the probation system for as long as possible, and burdened by these compounding fees; probationers often find their probation term repeatedly extended for outstanding debt.[156] They may also face reincarceration if they are financially unable to meet their conditions.[157] The Southern Poverty Law Center has filed at least one lawsuit against a private probation company alleging that its web of fees "operat[es] as a racketeering enterprise extorting money from poor defendants."[158]

Because private probation companies profit even more directly from their supervisees than public supervision providers do, they may be more willing to enforce the employment condition when doing so would facilitate payment and consequently, profit. That motivation has become particularly acute as private prison companies, like CoreCivic and GEO Group, contemplate capturing private community supervision.[159] If private prison companies successfully expand into community supervision, they will be able to "achieve vertically integrated control over every non-judicial step in the criminal justice system" by controlling incarcerated populations, populations under community supervision, and the exchange between the two.[160]

Carl Takei describes dual private oversight of both prisons and probation as a shift from mass incarceration to mass control. He writes that the

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152 HUM. RTS. WATCH, "SET UP TO FAIL": THE IMPACT OF OFFENDER-FUNDED PRIVATE PROBATION ON THE POOR 6 (2018).

153 Florida, Kentucky, Tennessee, Missouri, Alabama, Georgia, and Mississippi all have private probation systems. *Id.* at 2.

154 *See* HUM. RTS. WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 16-19 (2014) (estimating that Georgia-based "companies collected more than 1.1 million supervision fee payments from probationers in 2012").

155 *Id.* at 32-33.

156 *See id.* at 3 ("The central problem with offender-funded, pay only probation is this: the longer it takes offenders to pay off their debts, the longer they remain on probation and the more they pay in supervision fees.").

157 *See id.* at 49 (describing probationers' allegations "that their company probation officers routinely threatened to have them jailed for failing to make payments or for falling into arrears").

158 Takei, *supra* note 11, at 127 n.5 (2017) (citing Complaint, Reynolds v. Judicial Correction Services, Inc., No. 2:15-cv-00161-MHTCSC (M.D. Ala. Mar. 12, 2015)).

159 *See id.* at 175 (quoting a GEO Group executive who stated: "We believe that the emphasis on offender rehabilitation and community reentry programs as part of criminal justice reform will create growth opportunities for our company." (internal quotation marks omitted)).

160 *Id.*

companies involved would be incentivized "not just to keep people in prison, but to keep people involved in the criminal justice system generally, whether through expanding the populations subject to probation, extending probation terms, or returning people to prison through probation revocations."[161] The employment condition is an easy tool to use in service of that goal: it both facilitates the collection of fees from probationers and provides a reason to reincarcerate probationers who do not pay.

III. SAND IN THE GEARS: RECOMMENDATIONS FOR REFORM

Reforming community supervision has generated significant discussion in recent years because revocation has been repeatedly identified as a driver of mass incarceration.[162] Many proposed reforms are targeted at avoiding revocation to decrease the net incarceration rate, but they run the risk of introducing other punitive sanctions that increase the vulnerability of people on parole or probation to coercion. Probation reform should be based not only on the foreground of mass incarceration, but also on the horizon: how reforms themselves could be twisted in service of the same hierarchies underlying the existing system.[163] There are several possible avenues through which policymakers and lawyers could preemptively disrupt community supervision's development into a new engine of carceral economic exploitation.

A. *Reforming Probation Sanctions*

Many states and institutions considering probation reform favor the swift-and-certain sanctions (or graduated sanctions) model. This model advocates placing more disciplinary tools at the disposal of probation and parole officers, including the ability to impose short jail or prison stays (often called administrative sanctions) without court approval. "[S]wift and certain sanctions," the argument goes, are an alternative to the "all-or-nothing" process of responding to violations exclusively through inaction or revocation.[164] This view has gained traction with the American Legislative Exchange, which proposed the "Swift and Certain Sanctions Act" as a model under which supervision officers could place a supervisee in a detention

161 *Id.*

162 *See supra* Section II.A.

163 *See* Jones, *supra* note 7, at 67-68 (citing Ruha Benjamin, *Catching Our Breath: Critical Race STS and the Carceral Imagination*, 2 ENGAGING SCI., TECH., & SOC'Y 145, 148 (2016)).

164 *See* Sakoda, supra note 86, at 1221.

facility for up to five days.[165] And several states, including Kansas[166] and Hawaii,[167] have put graduated sanction regimes into practice.

The problem with this model, viewed through the analytical lens of discriminatory design, is that it creates more levers through which the carceral system can exert coercive pressure on people on probation and parole, while decreasing procedural protections. Even if graduated sanctions *did* decrease revocation rates and thus incarceration rates—and research suggests that they may not[168]—they make it easier for supervision officers to punish people on probation and parole for violating conditions which should not trigger state punishment, even for a span of five days or less. They also make the *threat* of incarceration more credible to someone on probation or parole, and thus increase the coercive power of the supervising officer.

A more effective approach imposes more limits on supervising officers' discretion, not fewer. In several states, notably Colorado, probation and parole officers are required to "consider all appropriate or available intermediate sanctions . . . before he or she files a complaint for revocation of a parolee for a technical violation."[169] Those intermediate sanctions regrettably include a fourteen-day period of administrative detention, but also require the officers to consider "referrals to any needed treatment or other support services that may help a parolee become compliant with the conditions of parole and succeed in reintegrating into society."[170] Colorado had the largest proportional *decrease* (-57%) in prison admissions for technical violations of any state in 2021.[171] Mandating the provision, or at least the consideration, of supportive services rather than punitive sanctions reduces probation and parole officers' ability to immediately threaten incarceration.[172]

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165 AM. LEGIS. EXCH. COUNCIL, SWIFT AND CERTAIN SANCTIONS ACT § 5(A)(2) (2019) (empowering the Agency to "[p]lace a supervised individual who violates the conditions of community supervision" for up to five consecutive days and up to 30 days in a given year).

166 KAN. STAT. ANN. § 22-3716 (2024) (establishing graduated probation sanctions).

167 HAW. REV. STAT. ANN. § 706-605.1 (2023) (established intermediate sanctions to "place, control, supervise, and treat selected defendants in lieu of" incarceration).

168 An analysis of incarceration in Kansas yielded no evidence that implementing swift and certain sanctions reduced the overall incarceration rate among probationers. *See* Sakoda, *supra* note 86 at 1213 (noting that analysis reflected a large increase in the rate of incarceration); *see also* Stephanie A. Duriez, Francis T. Cullen & Sarah M. Manchak, *Is Project HOPE Creating a False Sense of Hope? A Case Study in Correctional Popularity*, 78 FED. PROB. J. 57, 60 (2014) (finding that although graduated sanctions produced early positive effects in Hawaii, their implementation in at least 40 other jurisdictions has yielded more mixed results and frequently increased revocation).

169 COLO. REV. STAT. § 17-2-103(1.5)(a) (2023).

170 *Id.*

171 *Supervision Violations and Their Impact on Incarceration State Dashboard*, COUNCIL OF STATE GOV'TS. JUST. CTR., https://projects.csgjusticecenter.org/supervision-violations-impact-on-incarceration [https://perma.cc/2VTE-Q6D8] (last visited Feb. 3, 2025).

172 For statutory, mandatory, and optional alternatives to incarceration in other states, see *Supervision Violations: Incarceration Alternatives*, NAT'L CONF. OF STATE LEGISLATURES,

It may also introduce an added level of *de facto* procedural protection, if supervision officers are expected to articulate or document their intermediate efforts at revocation hearings.

B. *Reforming Probation Conditions*

The most obvious response to the concerns raised here about the employment condition would be its flat elimination. There is a growing body of literature calling for the elimination of a wide swath of "boilerplate" probation and parole conditions that "have no nexus to the individual's criminal propensities and may serve as an impediment to the successful completion of supervision."[173] The facial justification for these conditions is that they that are intended to serve a therapeutic or rehabilitative purpose, such as a generally applied requirement that someone receive mental health care.[174] But the benevolent, albeit paternalistic, rationale that probation conditions encourage pro-social behavior is cancelled out by the risk that failure to abide by those conditions leads to incarceration. The employment condition and related conditions (continuing education, for example) fall into the same bucket: although they may be intended to encourage people on community supervision to take rehabilitative steps, the risk of exploitation or incarceration they create for probationers and parolees is too great to justify them.

"Zero-based condition setting" is one proposal for reform that would dispense with the employment condition (and other unnecessary and burdensome standard conditions) in most cases.[175] Rather than imposing a standard set of conditions for probationers, the judge and probation officer would start from scratch and develop a list of conditions related to the crime someone has been convicted of.[176] Those conditions might include restitution or alcohol and drug treatment, but it is difficult to think of circumstances that would justify the inclusion of an employment requirement.[177]

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https://app.powerbi.com/view?r=eyJrIjoiYzE3NzcwMjQtNjU5ZC00Mjc3LThiZWMtYjlmODM4MDlhODExIiwidCI6IjM4MmZiOGIwLTRkYzMtNDEwNy04MGJkLTM1OTViMjQzMmZhZSIsImMiOjZ9 [https://perma.cc/B3AK-MB7U] (last visited May 17, 2024).

173 Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1060-61 (2013).

174 Doherty, *supra* note 5, at 328-34.

175 *See* Ronald P. Corbett Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 MINN. L. REV. 1697, 1728-29 (2015).

176 *Id.*

177 Haneef Salaam, *Probation and Employment*, ACLU DEL. (Apr. 12, 2023, 9:00 PM), https://www.aclu-de.org/en/news/probation-and-employment [https://perma.cc/2C9W-WDM5].

C. *Revising and Litigating the Thirteenth Amendment*

The legal safe harbor that the Thirteenth Amendment provides for coerced labor in the criminal legal system also shields the employment condition from judicial scrutiny. Recall that its text prohibits slavery and involuntary servitude, "except as punishment for a crime,"[178] which permits mandatory prison labor, often under abusive conditions.[179] Probation and its conditions fall squarely within the punishment exception to the Amendment's ban on involuntary servitude. The multi-state movement to amend the Thirteenth Amendment and parallel state-level efforts, however, would offer strong protections to probationers and parolees if successful.

Some states, including Colorado,[180] Nebraska,[181] and Tennessee[182] have amended their state constitutions to ban forced labor for any reason, *including* as punishment for a crime. The employment condition of community supervision thus poses an unanswered constitutional question in these states. If involuntary servitude is prohibited in all circumstances, coerced employment under the threat of incarceration by the employment condition is arguably impermissible. Asserting that protection in any of those states would of course require an appropriate defendant, facing revocation due to a technical violation of the employment condition. It would also require an understanding of the employment condition as a form of coerced labor, an idea that remains far from central in discussion of probation reform and carceral labor generally. And courts would face a line-drawing problem if they encountered a case that involved *both* a violation of the employment condition and violations of fee or fine requirements. If such a case did emerge in one of these states, however, it would preemptively quash the nascent threat that community supervision could become a new version of the involuntary servitude recent amendments sought to abolish.

D. *Expanding Divestment*

Finally, given the heightened risks of economic exploitation for people supervised by private corporations rather than the state, divestment campaigns focused on private prisons should expand their reach to encompass private probation companies. Although private probation is not yet as dominant of an economic sector as private prisons, preemptive divestment could effectively stunt its growth and discourage expansion. Some nationwide

178 U.S. CONST. amend. XIII, § 1.

179 *See supra* Section I.A.

180 COLO. CONST. art. II, § 26 (amended 2018).

181 NEB. CONST. art. I, § 2 (amended 2020).

182 TENN. CONST. art. I, § 33 (amended 2023).

divestment campaigns, like the Prison Industry Divestment Movement, have expanded their advocacy to include probation services in the umbrella of companies supporting mass incarceration that should be "screen[ed] out."[183] Student groups have followed suit: the Harvard Prison Divestment Campaign has widened its definition of the "prison industry" to encompass private probation companies.[184] If campaigns applying a broader definition of the private prison industry gain traction, it would be a positive step towards disincentivizing the further growth of private probation and the new form of carceral economic exploitation it facilitates.

CONCLUSION

Opponents of prison labor seek to "break the chain of compulsory labor for incarcerated individuals and give them choice, fair wages, and dignity."[185] Nineteenth century abolitionists and twentieth century reformers calling for an end to convict leasing had the same vision. Scholars have developed a clear explanation for the survival of carceral economic exploitation after each of those historical movements. Twenty-first century reformers should use those lessons to secure more lasting change. To truly disrupt the discriminatory design of the American economy, we must try not just to combat the current iteration of forced labor, but also to predict its next iteration.

The risk explored here—that the profit motive of racial oppression will be expressed through the coercive forces of the community supervision system—is one such possibility. The availability of the employment condition, the threat of incarceration unfettered by substantive due process protections, and economic dynamics incentivizing a controlled but non-custodial labor force, taken together, weigh in favor of its development. If we recognize its potential for abuse and work to preemptively curtail it, we have a chance to arrest "an ever-turning wheel of servitude" that has subjugated Black labor in the United States since its inception.[186]

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183 *See Foundations*, PRISON INDUS. DIVESTMENT MOVEMENT, https://prisondivest.com/resources/foundations [https://perma.cc/U3YQ-T8B7] (last visited Feb. 3, 2025) (providing divestment recommendations for philanthropic foundations).

184 Ellen M. Burnstein & Camille G. Caldera, *Harvard and Divestment Advocates Disagree Over How Much the University Puts Into Private Prisons. Here's Why.*, HARV. CRIMSON (Mar. 6, 2020), https://www.thecrimson.com/article/2020/3/6/harvard-prison-divest-analysis [https://perma.cc/K2GF-BW6K].

185 Appleman, *supra* note 19, at 622.

186 United States v. Reynolds, 235 U.S. 133, 146-47 (1914).