A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond

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INTRODUCTION

Eight months after his famous and lonely objections to *Plessy v. Ferguson*,[1] Justice Harlan again dissented alone. Once more, the Court was hollowing out the Reconstruction Amendments' promises of liberty and equality, but unlike *Plessy*, *Robertson v. Baldwin*[2] is an obscure decision. It holds no place in the anticanon of constitutional error, not even a nomination. To the contrary, courts continue to rely upon it, though always in passing.

What provokes this Essay is an occasion to attend more carefully to Justice Harlan's wisdom, which quietly haunts Thirteenth Amendment jurisprudence. That provocation is the routine threat and actual practice of incarcerating Americans for not working, or not working hard enough; a practice visited disproportionately on low-income communities of color. This practice represents an extreme extension of broader patterns that construe racial and economic inequality as manifestations of personal vice and thus as occasions for inflicting further punishment.[3] These occasions involve not just the withdrawal of the social welfare state, but also its substitution with the carceral state, which "depends for its legitimacy on the widespread belief that all those who appear trapped at the bottom actually chose their fate."[4]

This Essay offers a provocation of its own. I suggest that these practices are constitutionally dubious, despite being widely implemented and actively embraced by mainstream Democrats, hardly obscure authoritarian outposts. These doubts emerge through redescribing, in labor terms, a set of policies that generally are analyzed under quite different rubrics: child support enforcement and criminal justice debt collection, as well as probation, parole, and related techniques of "community supervision." In each case, work is offered for noble purposes and as a benevo-

1. 163 U.S. 537 (1896).

2. 165 U.S. 275 (1897).

3. *See, e.g.*, JOE SOSS ET AL., DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE (2011).

4. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 248 (2012).

lent "alternative to incarceration." But when low-income communities, of disproportionately people of color, are offered incarceration as the alternative to work, Thirteenth Amendment jurisprudence should go to high alert.

These coercive labor practices are redolent of peonage, one component of the Jim Crow South's broader system of racial labor control, which leveraged a racist criminal justice system into an institution of labor subordination. That system, too, often flew the banner of disciplining the dissolute laborer and containing his threat to social order. This Essay is no attempt at a comprehensive treatment of either the present situation or the historical analogy. Instead, it is a call for such examination.

Robertson's obscure vitality suggests the divergent paths followed by the constitutional jurisprudence of race and labor.[5] With no apparent connection to the Jim Crow South, *Robertson* never faced a reassessment in light of the Court's peonage jurisprudence, which traditionally has been situated in the jurisprudence of racial justice.[6] Indeed, the case arose far away in miles and context. Robert Robertson was a San Francisco seaman,[7] apparently white,[8] who thought better of his voyage on the barkentine *Arago*.[9] Upon arrival in Oregon, he exercised with three shipmates what one might have thought was their constitutional right to quit.[10] But instead, they were jailed until the *Arago* set sail again, hauled back to the ship by a marshal, forced to work the remainder of the voyage, and criminally prosecuted for their insubordination upon return to San Francisco. All this occurred pursuant to federal statute, and all this was forcefully upheld by the Supreme Court.[11]

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5. *See generally* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007).

6. *See, e.g.*, Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 662 n.58 (1982). *But see* Aziz Z. Huq, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 380 (2001); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1487–88 (2010).

7. *See* Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275, 279 n.16 (2004) (discussing terminology of "seamen" versus "sailor").

8. Robertson's race was not explicitly stated by the Court or in the briefing, but given that the Court took pains to distinguish the case from several contexts characterized in racial terms, it seems likely that only whiteness could have seemed unnecessary to note. *See* Robertson v. Baldwin, 165 U.S. 275, 283 (1897).

9. *Id.* at 275.

10. *See* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 496 (1989).

11. To be sure, *Robertson*'s obscurity may also derive from the fact, instructive in its own right, that the statutes it upheld were repealed shortly thereafter. *See, e.g.*, Tucker v. Alexandroff, 183 U.S. 424, 431 (1902); White, *supra* note 7, at 293 n.70. Then again, that fact enhances *Robert-*

Robertson's significance lies in its unique crack in the wall between penal compulsion and the private labor market. Justice Harlan decried it for that reason, objecting that,

> In my judgment, the holding of any person in custody, whether in jail or by an officer of the law, against his will, for the purpose of compelling him to render personal service to another in a private business, places the person so held in custody in a condition of involuntary servitude, forbidden by the constitution of the United States.[12]

Larger breaches of Harlan's principle are invited by today's era of proliferating criminal justice control and shrinking labor rights.

I. PRESENT DAY INCARCERATION FOR NONWORK

Three contemporary contexts generate requirements to work for a private business on pain of arrest or incarceration, contrary to Justice Harlan's principle. Although not typical of low-wage work today, neither are they marginal. Moreover, they either are on the rise or show substantial growth potential. Each involves legally authorized physical violence—arrest and incarceration. Thus, like *Robertson*, they raise none of the subtleties associated with contemporary Thirteenth Amendment controversies over what conduct constitutes compulsion.[13] Instead, the only issues are whether the thing compelled is "servitude" and, if so, whether the resulting involuntary servitude nonetheless falls outside the Thirteenth Amendment's prohibition on just that.

A. Probation, Parole, and Other Community Supervision

The most straightforward example is the duty to seek and maintain employment as a standard condition of probation and parole.[14] As with any such condition, a violation—not working—may trigger (re)incarceration. The scope of these work requirements is vast. Nearly five million adults are on probation or parole at any time,[15] and that number increases if one considers all who pass through these systems in the course of a year, decade, or lifetime. Black and Latino inmates con-

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son's peculiarity insofar as the opinion rested on the notion that forced labor was a timeless and necessary feature of seafaring.

12. *Robertson*, 165 U.S. at 303.

13. United States v. Kozminski, 487 U.S. 931, 944–53 (1988); Kathleen C. Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011).

14. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 310 (2015).

15. ERINN J. HERBERMAN, PH.D. & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248029, PROBATION AND PAROLE IN THE UNITED STATES, 2013, at 1 (rev. ed. 2015), *available at* http://www.bjs.gov/content/pub/pdf/ppus13.pdf.

stitute a large majority of those incarcerated for probation or parole violations, and the disproportionality increases further when considering only violations related to nonwork or, closely related, nonpayment of financial obligations.[16]

Despite the penal exception to the Thirteenth Amendment,[17] the Amendment may still apply to these work conditions because they arguably are not imposed as a "punishment," but rather as a means to promote social integration and prevent future offending.[18] That separation from the "punishment" exception is particularly clear for closely related and increasingly popular forms of community supervision that operate as "diversions" designed to *avoid* a criminal sentence, not as part of such a sentence.[19] Nonetheless, the proximity to criminal sentencing makes these work requirements less legally provocative than the next.

B. Criminal Justice Debt

Second, the nation is rightly awash in concern over modern-day debtors' prisons. The primary focus has been on debt arising from assessment of fines and fees through the criminal justice system.[20] Such exactions range from financial punishments accompanying imprisonment,[21] tickets for minor quality of life offenses or traffic violations,[22] to the obligation to reimburse the state for the costs of providing criminal defense counsel under *Gideon*.[23] Unlike most ordinary private debts, these often are not dischargeable in bankruptcy, and unlike all private debts, criminal justice debts can subject the debtor to imprisonment for nonpayment.[24]

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16. NOAH D. ZATZ ET AL., UCLA INST. FOR RESEARCH ON LABOR & EMP'T, UCLA LABOR CTR. & A NEW WAY OF LIFE REENTRY PROJECT, GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT (2016), *available at* http://www.labor.ucla.edu/publication/get-to-work-or-go-to-jail/.

17. U.S. CONST. amend. XIII, § 1 (abolishing involuntary servitude "except as a punishment for crime").

18. *See* Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 415–16 (2009).

19. *See* Allegra M McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012).

20. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756–60 (2010); *see also* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014).

21. *See* Harris et al., *supra* note 20.

22. *See* LAWYERS' COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 13 (2015) [hereinafter LAWYERS' COMM. FOR CIVIL RIGHTS], *available at* http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf.

23. *See* Beth A. Colgan, *Paying for* Gideon, 99 IOWA L. REV. 1929, 1932–33 (2014).

24. *See generally* Christopher D. Hampson, The New American Debtors' Prisons (Aug. 4, 2015) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract

Notwithstanding the close historical connection between imprisonment for debt and forced labor, the contemporary discourse on debtors' prisons has largely ignored the complementary phenomenon of debt peonage.[25] That connection is forged most directly when the debtor's inability to pay becomes the basis for being ordered to work, typically without payment, in what is commonly termed "community service."[26] Thus, the indigent debtor's choice between paying and going to jail is gloriously expanded to embrace the choice between jail and forced, unpaid labor.

Criminal justice debt has been subjected to far less academic study and systematic data collection than probation and parole, so its precise scope is unknown. Nonetheless, it clearly is enormous and has been growing.[27] In California alone, each year about 500,000 people have their driver's licenses suspended just for unpaid citations and subsequent fees.[28] Given the massive racial disproportionality in everything ranging from traffic citations to felony convictions, there is every reason to expect similar disparities in criminal justice debt and its consequences.[29] In Los Angeles, well over 50,000, and likely over 100,000, people are assigned to court-ordered community service each year.[30]

Although courts have long assumed that a sentence of hard labor in lieu of a fine falls within the Amendment's penal exception,[31] modern authorities have refused to extend that principle to administrative fees.[32] "Consequently, a statute requiring a convicted defendant who is unable to reimburse the State for such expenses to satisfy his debt by performing uncompensated labor for the State would be proscribed by the [T]hirteenth [A]mendment."[33] It is unclear how much influence this principle has had in practice and, in any event, it does not apply to fines.

_id=2639709.

25. One recent article squarely connects contemporary criminal justice debt to the Jim Crow practice of peonage. *See* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015). However, its analogy relies entirely on the role of criminal justice, cycles of debt, and economic and racial stratification without making any connection to forced labor, even when directly suggesting the relevance of the Thirteenth Amendment. *See id*. at 1603, 1638–40. Indeed, the article appears to embrace certain forms of compulsory labor as an alternative to incarceration. *See id*. at 1676.

26. *See, e.g.*, CAL. PENAL CODE § 1209.5 (West 2016); ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), a*vailable at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf (advocating community service as an alternative to incarceration for nonpayment).

27. *See* Harris et al., *supra* note 20, at 1756.

28. LAWYERS' COMM. FOR CIVIL RIGHTS, *supra* note 22, at 13.

29. *Id.* at 19; Harris et al., *supra* note 20, at 1760–63.

30. Zatz et al., *supra* note 16.

31. *See* United States v. Reynolds, 235 U.S. 133, 149 (1914).

32. *See* Opinion of the Justices, 431 A.2d 144, 151 (N.H. 1981) (surveying authorities).

33. *Id.* at 151.

Given that this form of forced labor originates in an independent criminal proceeding,[34] as well as the potential application of other *ad hoc* exceptions to the Amendment's scope,[35] I defer the topic in favor of lower-hanging fruit closer to the problem of *Robertson*. Another distinction is that compelled labor originating in criminal justice debt thus far appears to be concentrated in the public and non-profit sectors.

C. Child Support Enforcement

Of principal interest here is a third context of contemporary work coerced under threat of incarceration: child support enforcement. Like criminal justice debt, child support obligations occupy a special status among debts. Nonpayment exposes the obligor to incarceration through civil contempt proceedings[36] or through criminal prosecution.[37] This is no idle threat.[38] To the contrary, in larger U.S. cities, a shocking 15% of African-American fathers are at some point incarcerated for nonpayment of child support.[39]

The intersection between race and poverty affects not only which obligors are unable to pay, but also which obligors are targeted for enforcement. Enforcement, both with regard to establishing child support obligations and then collecting payment, focuses heavily on noncustodial parents of children who receive some form of public assistance because their custodial household has very low income.[40] The state has a special financial interest in these cases because it seizes child-support payments to reimburse itself for public assistance spending, and so the politics of child support are intimately linked to those of welfare reform, themselves thoroughly shaped by racial antagonism.[41] Thus, the racial dynamics of threatening incarceration for nonwork do not begin with the carceral

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34. For an important case on the scope of the penal exception, see *United States v. Reynolds*, 235 U.S. 133 (1914) (holding that an agreement to work for a surety who assumed financial responsibility for a fine was independent of the prior criminal proceeding and thus fell outside the penal exception).

35. *See infra* Part III.

36. *See, e.g.*, Turner v. Rogers, 564 U.S. 431, 431 (2011); Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 618 (2012); Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 121 (2008).

37. *See Criminal Nonsupport and Child Support*, NAT'L CONFERENCE STATE LEGISLATURES, http://www.ncsl.org/research/human-services/criminal-nonsupport-and-child-support.aspx#50 (last updated June 2015).

38. *See* Brito, *supra* note 36.

39. *See* Zatz, *supra* note 16.

40. *See generally* Brito, *supra* note 36.

41. *See* SOSS ET AL., *supra* note 3; MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY (1999).

threat but must be traced to the sources of the duty to work, whether in the racial profiling of police stops, the racial disproportionately that runs from prosecution to sentencing, or the welfare retrenchment that "privatizes dependency."[42]

The link from debt to labor is forged by the legal consensus that the duty to pay child support includes a duty to work in order to pay.[43] This principle provides the basis for incarcerating obligors who are too poor to pay, and poverty is endemic among obligors in arrears.[44] One study found that in California, over 80% of those in arrears had annual incomes below $20,000, and over 60% had annual incomes below $10,000.[45]

Because the duty to pay encompasses a duty to work, refusing or quitting a job can be construed as refusing to pay, as indeed can the bare fact of unemployment.[46] One of the leading cases for that proposition is the California Supreme Court's 1998 decision in *Moss v. Superior Court*. *Moss* concerned a defendant whose unemployment elicited incarceration on the assumption that he, like any able-bodied adult, surely "could get a job flipping hamburgers at MacDonald's [sic]."[47] The court's use of civil contempt to produce compliance embraces just what Justice Harlan believed should be forbidden, "the purpose of compelling [the child support obligor] to render personal service to another in a private business."[48] And McDonald's, of course, is no exceptional or marginal type of business, as the 19th century merchant marine might seem to be;[49] rather, it is the heartland of the modern service economy.[50]

This focus on participation in existing low-wage labor markets also shapes current policy initiatives to translate the general duty to seek and maintain employment into a duty to participate in work programs that

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42. *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 108 (2004).

43. *See* United States v. Ballek, 170 F.3d 871, 874 (9th Cir. 1999); Moss v. Superior Court, 950 P.2d 59, 73 (Cal. 1998).

44. *See* ELAINE SORENSEN ET AL., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION (2007), *available at* https://aspe.hhs.gov/sites/default/files/pdf/75136/report.pdf; Elaine Sorensen & Chava Zibman, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, 75 SOC. SERVICE REV. 420, 422 (2001).

45. DR. ELAINE SORENSEN ET AL., EXAMINING CHILD SUPPORT ARREARS IN CALIFORNIA: THE COLLECTIBILITY STUDY 7 (2003), *available at* http://www.urban.org/research/publication/examining-child-support-arrears-california-collectibility-study/view/full_report.

46. *See* sources cited *supra* note 43.

47. *Moss*, 950 P.2d at 63.

48. Robertson v. Baldwin, 165 U.S. 275, 303 (1897) (Harlan, J., dissenting).

49. On the exceptionalism of labor law at sea, see White, *supra* note 7.

50. Today, the presumption of job availability may be shifting toward an even lower baseline: the sporadic "gig" with Uber. *See* Cesar Conda & Derek Khanna, *Uber for Welfare*, POLITICO (Jan. 27, 2016, 7:02 AM), http://www.politico.com/agenda/story/2016/1/uber-welfare-sharing-gig-economy-000031#ixzz3zSO8rSGy.

direct, monitor, and discipline those efforts.[51] For instance, the Obama administration recently proposed new child support regulations that promote a "Work First" approach that prioritizes "rapid labor force attachment" over "promot[ing] access to better jobs and careers."[52] Notably, this program also embraces incarceration for failure to participate in such programs.

Although the courts and executive agencies make this connection between debt and work, the existing scholarship generally has focused on obligors' lack of income, their procedural rights, and child support's interaction with the social welfare system for children and custodial parents.[53] To the extent that obligors' employment is considered, the primary focus has been on the potential for the support obligations to deter work by effectively taxing earnings that the obligor must hand over in support.[54] No attention has been given to *Moss* and other leading Thirteenth Amendment cases stemming from child support enforcement.[55]

II. INCARCERATION FOR NONWORK IN THE PAST: LESSONS FROM PEONAGE

Contemporary incarceration for nonwork is illuminated by its historical analogues. In Thirteenth Amendment jurisprudence, the obvious foil is peonage. In a series of cases from 1905 to 1944, the Supreme Court consistently found Thirteenth Amendment infirmity when workers faced public or private violence for failing or refusing to work for an employer to whom they owed a debt.[56] These cases primarily concerned

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51. *See* Elaine Sorensen, *Rethinking Public Policy Toward Low-Income Fathers in the Child Support Program*, 29 J. POL'Y ANALYSIS & MGMT. 604 (2010).

52. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 79 Fed. Reg. 68,548, 68,558 (Nov. 17, 2014) (to be codified at 45 C.F.R. pts. 301–309).

53. *See, e.g.*, Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127 (2011); Daniel L. Hatcher, *Don't Forget Dad: Addressing Women's Poverty by Rethinking Forced and Outdated Child Support Policies*, 20 AM. U. J. GENDER SOC. POL'Y & L. 775 (2012); Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006); sources cited *supra* note 36. *But see* Yiyoon Chung, *Child Support As Labor Regulation*, 38 J. SOC. & SOC. WELFARE 73 (2011).

54. *See, e.g.*, Maria Cancian et al., *Discouraging Disadvantaged Fathers' Employment: An Unintended Consequence of Policies Designed to Support Families*, 32 J. POL'Y ANALYSIS & MGMT. 758 (2013); Harry J. Holzer et al., *Declining Employment Among Young Black Less-Educated Men: The Role of Incarceration and Child Support*, 24 J. POL'Y ANALYSIS & MGMT. 329 (2005); Daniel P. Miller & Ronald B. Mincy, *Falling Further Behind? Child Support Arrears and Fathers' Labor Force Participation*, 86 SOC. SERVICE REV. 604 (2012).

55. For instance, they are not cited, let alone discussed, in any of the articles listed *supra*, notes 36, 53, and 54.

56. *See* Clyatt v. United States, 197 U.S. 207 (1905); Bailey v. Alabama, 219 U.S. 219, 245 (1911); United States v. Reynolds, 235 U.S. 133, 149–50 (1914); Taylor v. Georgia, 315 U.S. 25, 29

"false pretenses" statutes that created a separate criminal offense for fraudulently obtaining an advance on a labor contract, where criminal intent was presumed based on the bare fact of quitting before the advance was repaid; another statute criminally enforced a surety arrangement in which the employer paid off a defendant's criminal justice debt in exchange for a promise to repay through labor.[57] These statutes were part of a broader web of legal devices, including vagrancy laws, that leveraged both racial targeting in the criminal justice system and the economic vulnerability that was the legacy of slave emancipation without forty acres and a mule.[58]

The peonage cases established a number of principles that suggest how carceral child support enforcement might be analogized to peonage and likewise run afoul of the Thirteenth Amendment. More generally, these principles help sensitize the modern reader to the rationalizations once offered for a racist system of entangled criminal justice and labor subordination, a system now abhorred yet echoed in "common sense" justifications for today's criminalization of unemployment.

A. The Present Involuntariness Principle

One important principle firmly established by the peonage cases is that the requisite "involuntariness" is determined by the worker's willingness to work *at the time the work is performed or refused*.[59] The baseline is that even a legally binding contractual commitment to work in the future—a commitment voluntarily undertaken—cannot be enforced by compulsion. "It is the compulsion of the service that the [antipeonage] statute inhibits, for when that occurs, the condition of servitude is created, which would be not less involuntary because of the original agreement to work . . . ."[60] Thus, the presence of even a *legal obligation to work*, including one voluntarily assumed, is irrelevant.

My three examples above all involve legally imposed duties to work that attach to the voluntary conduct of procreation or criminal offending. Even if we take those systems at face value, without interrogat-

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(1942); United States v. Gaskin, 320 U.S. 527, 529–30 (1944); Pollock v. Williams, 322 U.S. 4, 25 (1944); *see also* Peonage Cases, 123 F. 671, 691–92 (M.D. Ala. 1903); United States v. McClellan, 127 F. 971, 974–75 (S.D. Ga. 1904); Toney v. State, 37 So. 332, 334 (Ala. 1904); *Ex parte* Drayton, 153 F. 986, 997 (D.S.C. 1907); State v. Armstead, 60 So. 778, 780–81 (Miss. 1913); Taylor v. United States, 244 F. 321, 330 (4th Cir. 1917); Pierce v. United States, 146 F.2d 84, 86 (5th Cir. 1944).

57. *Reynolds*, 235 U.S. at 139–40.

58. *See* Huq, *supra* note 6, at 354–55, 358–63, 387 (reviewing literature); Birckhead, *supra* note 25, at 1609–26 (same).

59. This resolves legally a variant of the classic problem in contract theory of whether binding oneself to extended servitude expresses or violates the relevant notion of freedom. *See* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 794–96 (1983).

60. *Bailey*, 219 U.S. at 242; *accord Pollock*, 322 U.S. at 7–9.

ing selective or trumped-up enforcement, the peonage cases specifically distinguish the legal validity of duties to work from their means of enforcement. An obligation to work may be enforced through an action for damages, but its fulfillment may not be physically coerced.

B. The Unjustified Quit Principle

The peonage cases went beyond the right to quit in defiance of a legal obligation voluntarily assumed. Not only did they focus on present involuntariness, they also rejected any substantive review of the validity of the worker's present reasons for quitting. The statutes that the peonage cases struck down generally limited prosecution to individuals who failed to work "without good and sufficient cause"[61] or "without good and sufficient excuse."[62] These limitations did not save the statutes by reserving coercion for those without good reason to refuse work. Instead, the worker's right to quit in breach of contract applied "however capricious or reprehensible" that action might be.[63] Among other things, this principle reflected a practical concern for the uncertain resolution of claims to just cause. "The law provides no means for determining the justice of his excuse, at any time, in any mode, in any tribunal, unless he first risks the penalty of hard labor" by quitting.[64]

C. The Work-Under-Threat Principle

This emphasis on practical effects also underlies the approach taken in the peonage cases to the legally relevant concept of coercion. That conception embraces an *ex ante* perspective focused on work in the shadow of *threats*, not an *ex post* perspective focused on labor procured once the threat is carried out. The prototypical peonage case involves the criminal prosecution of a worker who quits. The result of that prosecution is *not* the return of the worker to the original employer. Instead, the result is incarceration or a sentence to hard labor for the state or some other third party to the original contract.

Thus, the Thirteenth Amendment is not limited to situations where the law "authorize[s] the employing company to seize the debtor, and hold him to the service" or authorizes the "constabulary to prevent the servant from escaping, and to force him to work out his debt."[65] To the contrary, it reaches situations that "make criminal sanctions available for

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61. *See, e.g.*, *Taylor*, 315 U.S. at 29.

62. *See, e.g.*, *Reynolds*, 235 U.S. at 142.

63. *Taylor*, 315 U.S. at 30.

64. Peonage Cases, 123 F. 671, 686 (M.D. Ala. 1903); *accord* Toney v. State, 37 So. 332, 334 (Ala. 1904).

65. *Bailey*, 219 U.S. at 244.

holding unwilling persons to labor."[66] When "labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract . . . and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict."[67]

Moreover, threats can render work involuntary, even if actually carrying out those threats would not cause the work to be performed. Once a worker is thrown in jail, he might not be forced to perform the work he had been obligated to do, nor any other work at all. In peonage and in my three contexts, what matters is the work that must be done *to avoid the threatened incarceration or prosecution*. Whether any work would be extracted once the threat was carried out is beside the point.

D. The Insufficient Alternative Principle, At Least With Regard to Payment

Underlying the work-under-threat principle is the more general point that work cannot be rendered "voluntary" in the constitutionally relevant sense merely because the worker had available a "choice" other than the work in question.[68] A robbery can proceed by offering the choice "your money or your life." Similarly, offering the choice between work and incarceration imposes involuntary servitude. The fact that a worker rejected the alternative—incarceration—and chose work makes it no less involuntary.

This principle relies on a judgment about the inadequacy of the alternative to work. That judgment requires some challenging line-drawing along a continuum of slightly less unpleasant alternatives, stretching from incarceration to a criminal fine to a public condemnation. Indeed, this is a general problem with notions of involuntariness and coercion. This line-drawing difficulty leads, in one direction, to the notion that all work under capitalism is "involuntary" insofar as the proffered alternative is starvation.[69] In the other, it leads to Justice Holmes's able *Bailey* dissent in which he reasoned that criminal penalties for breach differ only in degree, not in kind, from the "disagreeable consequences" of civil damages.[70]

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66. Pollock v. Williams, 322 U.S. 4, 18 (1944).

67. *Reynolds*, 235 U.S. at 146.

68. *See generally* ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY (2001); Pope, *supra* note 6.

69. On "wage slavery," *see, e.g.*, AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); Vandervelde, *supra* note 10.

70. *Bailey*, 219 U.S. at 246.

The peonage cases draw a constitutional line across the slippery slope. They establish that if nothing else, exposure to criminal prosecution—and ultimately to physical custody—constitutes an alternative insufficient to bless a choice to work as "voluntary." But there is an additional difficulty in these cases, one facilitated specifically by the linkage to debt.

The statutes in question generally allowed the worker to escape criminal liability by paying off his debt to the employer. Thus, the workers faced three choices: work, jail, or pay. This third option received remarkably little scrutiny in the cases, presumably because of the obvious structural fact that the workers in question had no resources with which to pay. That was why they were vulnerable to peonage premised on the employer's advance of wages at the outset of employment. Nonetheless, the courts were explicit that this formal payoff option made no difference.[71] This rule cohered with the principle, widely enshrined in state constitutions, abolishing imprisonment for nonpayment of private debts.[72] Thus, if a worker could not be forced to choose between payment and jail, nor between work and jail, then putting them all together in a three-way choice could not improve matters.

This inability of a payoff option to immunize forced labor from Thirteenth Amendment condemnation has been strengthened by subsequent constitutional developments. As a matter of substantive due process, someone cannot be incarcerated for nonpayment if she lacks the ability to pay.[73] Indeed, in the current child support and criminal justice debt contexts, the present inability to pay is the *premise* of the obligation to work. For child support, the source of the duty to work is the duty to acquire the means to pay even if one presently lacks those means. For criminal justice debt, mandatory work operates to satisfy in-kind a debt that cannot be satisfied in cash; it typically is confined to circumstances in which the present inability to pay has been established.[74]

Accordingly, the formal option to avoid both work and jail by paying off the debt makes no difference. For the worker who has no ability to pay, it would be unconstitutional to jail her for nonpayment. Adding an independently unconstitutional option—pay or jail—cannot cure the infirmity of an otherwise unconstitutional choice between work and jail.

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71. Clyatt v. United States, 197 U.S. 207, 215 (1905); *Reynolds*, 235 U.S. at 144.

72. *See, e.g.*, Peonage Cases, 123 F. 671, 687 (M.D. Ala. 1903); *see also* Ann K. Wagner, *The Conflict over* Bearden v. Georgia *in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors' Prison*, 2010 U. CHI. LEGAL F. 383, 383 (2010).

73. *See* Tate v. Short, 401 U.S. 395, 398–99 (1971); Bearden v. Georgia, 461 U.S. 660, 674 (1983); Turner v. Rogers, 546 U.S. 431 (2011).

74. *See* sources cited *supra* note 26.

III. SEAMEN AND PEONS: THE CONSTITUTIONAL MARGINALIZATION OF *ROBERTSON*

These principles from the peonage cases erect a wall between private employment and state violence, a wall in which *Robertson* appears as a crack. The peonage cases culminated in *Pollock*, where the Supreme Court declared flatly that "no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor."[75] That principle is essential "to maintain a system of completely free and voluntary labor throughout the United States" because "[w]hen the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."[76] Consistent with the unjustified quit principle, this notion avoids case-specific inquiries into the conditions of work. Instead, it specifies the worker's baseline bargaining position within a private labor market.[77]

Robertson is flatly inconsistent with *Pollock's* principles. But *Robertson* came first, and so the early peonage cases faced the opposite problem: before the Thirteenth Amendment could be used to strike down criminal enforcement of private labor contracts, the Supreme Court's then-recent pronouncement in *Robertson* would have to be distinguished. The courts managed this problem by sequestering *Robertson* to a pile of Thirteenth Amendment exceptions. Just before the Supreme Court first took up the topic,[78] a leading lower court peonage opinion had already posed the problem of *Robertson* thus: "There are many persons, other than those duly convicted of crime, who may be compelled against their will to perform 'labor or service.'"[79]

A. The Two General Exceptions: Work for the Family or the State

These Thirteenth Amendment exceptions, now routinely recited by the courts,[80] generally fall into two categories that carry through to the subsequent case law. First, there are children, who could be compelled to

75. Pollock v, Williams, 322 U.S. 4, 18 (1944).

76. *Id.* at 17–18.

77. *See* Huq, *supra* note 6, at 363–67 (discussing the complementarity between Thirteenth Amendment peonage jurisprudence and the constitutionalization of *laissez-faire* during the same time period).

78. *See* Clyatt v. United States, 197 U.S. 207 (1905).

79. Peonage Cases, 123 F. 671, 681 (M.D. Ala. 1903).

80. United States v. Kozminski, 487 U.S. 931, 943 (1988) ("Our precedents reveal that not all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment.").

work by their parents or, when apprenticed, by their master.[81] Second, and continuous with the textual exception for penal servitude, there is the discharge of duties owed to the state—principally military service—but also the ancient custom of the corvée, by which adult citizens were taxed in labor and obligated to join crews on public works, especially roads.[82]

Robertson's seamen, however, do not fit easily into either of these two conceptually coherent categories of children subject to paternalistic governance and duties owed to the state. Instead, as waged labor in the market, they were in public, vis-à-vis the family, and in private, vis-à-vis the state.[83] Positioned this way, *Robertson*'s authorization of compelling private seamen's labor came to stand as a bare holding unsupported by any general principle, an exception without any apparent rationale. In the *Peonage Cases*, the district court simply tacked on the acknowledgement that "[t]he law also permits the exaction of involuntary service in cases of sailors in the merchant marine who have signed a contract to perform in voyage, etc."[84] Of course, the contractual nature of the obligation was

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81. *See id.* at 944 (noting that the Thirteenth Amendment did not disturb "the right of parents and guardians to the custody of their minor children or wards"); Robertson v. Baldwin, 165 U.S. 275, 298 (1897) (Harlan J., dissenting) (noting that apprentices were free to leave upon reaching adulthood). On the limitations on applying the Thirteenth Amendment to a patriarchal master's control over the labor of his wife and children, see VanderVelde, *supra* note 10, at 454–57; STANLEY, *supra* note 69; James Gray Pope, *The Thirteenth Amendment at the Intersection of Class and Gender:* Robertson v. Baldwin*'s Exclusion of Infants, Lunatics, Women, and Seamen*, 39 SEATTLE U. L. REV. 901 (2016).

82. *See generally* Arver v. United States, 245 U.S. 366 (1918) (military conscription); Butler v. Perry, 240 U.S. 328 (1916) (public road work); Hurtado v. United States, 410 U.S. 578 (1973) (pretrial material witness); *Kozminski*, 487 U.S. at 944. James Gray Pope suggests that these cases need not be construed as exceptions at all, but rather could be understood to flow from a distinction between, on the one hand, "servitude," which involves work under a master's direction and for his benefit, and, on the other, "civic duties, which are performed under the direction of representative government for the benefit of the people." *See* Pope, *supra* note 6, at 1515. I doubt that construction can hold because it obscures distinctions between immediate and ultimate purposes and between agents and principals. To test the intuition, consider whether the government could conscript citizens into employment in government enterprises providing ordinary consumer services, the revenue from which funded general government operations. This would be work under the direction of democratic government and for the benefit of the people, but I doubt that would save it from being "servitude." Some more particularized account of the specific forms of work and the specific obligations to perform it seems necessary to support the "public duties" cases. Pope's interpretation of "servitude" also invites the further question of whether parental authority to compel children to work productively, authority that involves neither democratic control nor a public beneficiary, falls outside of "servitude" or instead represents an implied exception. *See* Pope, *supra* note 81. Similar problems arise in circumscribing the legal category of "employment," which likewise struggles at once to confine its purview to labor markets and to recognize the permeability and ambiguity of their boundaries. *See generally* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008).

83. *See generally* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

84. *Peonage Cases*, 123 F. at 671, 681–82; *see also Kozminski*, 487 U.S. at 944.

irrelevant on the court's own reasoning in adopting the present involuntariness principle,[85] and so all that was left was simply *Robertson*'s holding. Similarly conclusory are the Supreme Court's references to *Robertson* in *Clyatt*, which expressly refused to "stop to consider any possible limits or exceptional cases, such as the service of a sailor."[86]

B. Constructing the Seamen Exception

The exceptional character of seamen specifically, however, had to be constructed by the subsequent cases. *Robertson* had offered several rationales for its holding, rationales that arguably applied quite widely throughout the labor market and well beyond the merchant marine. The first rationale—that service was not involuntary when pursuant to prior agreement[87]—was quite general and would have applied to all labor contracts. The peonage cases, however, thoroughly repudiated this holding with the principles of present involuntariness, unjustified quitting,[88] and work under threat. At that point, it was necessary to address more specific aspects of service at sea.[89]

1. The Public Interest in Orderly Labor

Robertson offered two other rationales for coercing sailors that might readily have been extended to Black agricultural labor in the Jim Crow South. First, there was the functional justification that ships were vulnerable to sailors' desertion "at a critical moment" or "at some place where seamen are impossible to be obtained."[90] The concern, in other words, is that when a right to quit actually delivers substantial bargaining power to labor, namely when workers are not readily replaceable, labor markets become markedly less appealing to employers.[91] Implicitly, while the Thirteenth Amendment might be meant to shield workers from

85. *Peonage Cases*, 123 F. at 680.

86. Clyatt v. United States, 197 U.S. 207, 216 (1905).

87. Robertson v. Baldwin, 165 U.S. 275, 280–81 (1897) (Harlan, J., dissenting).

88. In *Bailey*, the Court noted that the "sufficient cause" provisions could be construed merely as limiting liability to actual breaches and thereby to conduct within the scope of obligation undertaken in the contract. *See* Bailey v. Alabama, 219 U.S. 219, 234 (1911). *Bailey* then took pains to reject compulsory compliance with such obligations. *See id.* at 236–38.

89. On this aspect of the transition from *Robertson* to the peonage cases, see Pope, *supra* note 81, at 148–88.

90. *Robertson*, 165 U.S. at 283. Of course, the reverse is also true, that seamen are structurally vulnerable to abuses when they have no practical ability to leave, find other work, and return home. *See* White, *supra* note 7, at 287. *Cf.* ROBIN D. G. KELLEY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION 161 (2015) (1990) (noting sharecroppers' similar vulnerabilities).

91. On the authoritarian aspects of shipboard labor relations, see generally White, *supra* note 7, at 281–89.

the worst abuses,[92] the right to quit was not meant to deliver a degree of power that would disrupt the basic structure of workplace hierarchy and employer control over labor.[93]

This concern about maintaining hierarchical labor discipline was very much alive in the Jim Crow agricultural South, where it obviously intersected with racial hierarchy.[94] Courts grappled with these considerations explicitly and seriously, but ultimately they did not follow *Robertson*'s approach. In the *Peonage Cases*, Judge Jones accepted that "[e]very reflecting man recognizes the great evils resulting from the abandonment of farms by laborers and renters, without justifiable excuse, after obtaining advances and incurring indebtedness to the employer, sometimes leaving the crops when it is almost impossible to secure other labor to save them."[95] Having conflated the timing question with the issue of advances, the court upheld an Alabama false pretenses statute.[96]

Just four years later and emboldened by the Supreme Court's intervening *Clyatt* opinion, Judge Brawley, struck down an identical false pretenses law in South Carolina.[97] He did so after rejecting the state's argument that "the case of the petitioners here is analogous to that of sailors who had embarked on a voyage; that their continuance in the service of their employer was as essential to the safety of the crop as the service of sailors to the safety of the ship."[98] As Judge Brawley noted, the functional concern about employers' vulnerability to gouging is vastly narrower than a general prohibition on quitting.[99] He dryly observed that the sailor analogy lacked credibility in a case in which workers were "arrested and imprisoned in January, when probably there is not seed in the ground."[100]

Judge Jones' earlier *Peonage Cases* opinion also acknowledged another functional concern, one arising from safety considerations. In extreme cases it could be appropriate to criminalize a sudden and unreasonable quit when necessary to "prevent the endangering of life, health,

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92. Pollock v. Williams, 322 U.S. 4, 18 (1944).

93. *Cf.* Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. (forthcoming 2016) (arguing that late nineteenth and early twentieth century courts subjected labor organizing to antitrust law in part to preserve class hierarchy).

94. KELLEY, *supra* note 90, at 37.

95. Peonage Cases*,* 123 F. 671, 690 (M.D. Ala. 1903).

96. *See id.* Unlike those later struck down by the Court, the Alabama statute imposed no presumption of fraudulent intent from the bare fact of quitting, though even that would not have saved it under *Pollock*'s reasoning. *See Pollock*, 322 U.S. at 19–20, 23–24.

97. *Ex parte* Drayton, 153 F. 986 (D.S.C. 1907).

98. *Id.* at 994.

99. *Id.*

100. *Id.*; *see also Pollock*, 322 U.S. at 22 (noting that none of the peonage cases seen by the Court involve plausible factual allegations of fraudulent intent).

or limb, or inflicting other grievous inconvenience and sacrifice upon the public."[101] The hypothetical demonstrating this involved a railroad dispatcher who abandons his post while trains are speeding toward collision. The *Clyatt* Court glancingly acknowledged this "power of the legislature to make unlawful, and punish criminally, an abandonment by an employee of his post of labor in any extreme cases."[102] Notably, however, it drew no connection between that concern and its earlier citation of *Robertson*, which it characterized purely as a case involving sailors.

In short, just a few years after *Robertson*, courts refused to use it as a template for allowing various extreme scenarios to justify routine compulsion throughout an entire occupation. Instead, at most, criminal penalties would have to be narrowly tailored to circumstances that actually reflected criminal intent to exploit vulnerabilities in the production process either for personal gain or in endangerment of public safety. *Robertson* itself contained no such limitations.

2. Labor Paternalism

The second potentially generalizable feature of *Robertson* was its contemptuous view of the capacities and liberties of sailors. Extending the comparison to children's compulsion by parents and masters, the Court explained that

> seamen are treated by congress, as well as by the parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians.[103]

Seamen, in other words, were not the sort of people for whom the Thirteenth Amendment's "system of free labor" was designed, free and equal citizens who could look after their own interests in the market.[104]

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101. *Peonage Cases*, 123 F. at 685.

102. Clyatt v. United States, 197 U.S. 207, 216 (1905).

103. Robertson v. Baldwin, 165 U.S. 275, 287 (1897).

104. In this way, paternalism in *Robertson* played a role exactly opposite the one Huq attributes to it in his analysis of the peonage cases. *See* Huq, *supra* note 6. Huq imports into his Thirteenth Amendment analysis an approach to paternalism grounded in the *Lochner* era when courts struck down protective labor regulations. *See id.* at 369–76. Because those regulations were themselves understood as paternalist interventions in market outcomes freely chosen by independent adults, they were upheld only when protective of people deemed appropriate objects of paternalism, like women and children. *See id.*; ALICE KESSLER-HARRIS, A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES (1990). But Thirteenth Amendment protection was not treated as *intervention* in the free market, but rather as *establishing* a free market. In that context, the appropriate objects of paternalism, who lacked the autonomy necessary for free market action, were placed *outside* Thirteenth Amendment protection as in *Robertson*. In other words, being *excluded* from Thirteenth

Such a view of sailors was hardly distant from, or less self-serving than, white Southern elites' views of Black laborers.[105] In *Ex parte Drayton*, South Carolina defended the need for compulsion by invoking the "peculiar conditions of agricultural labor," conditions that included not only the vulnerability of harvest time but also the fact that "[t]he great body of such laborers . . . are negroes."[106] Their "[b]eing without any financial responsibility,"[107] the ordinary civil remedies for breach were of no use, and so the whip was needed. Similarly, the Mississippi Supreme Court, while striking down a labor enticement statute, sympathized with the legislature's effort to deal with the "fickle laborers in our cotton country" in order to achieve "more stable labor conditions."[108]

Here, of course, was the point at which the peonage cases, though formally insistent on their race neutrality,[109] most directly integrated race and labor. Consider Justice Harlan's dissent from the *Robertson* majority's view of sailors, remarking:

> To give any other construction to the constitution is to say that it is not made for all, and that all men in this land are not free and equal before the law, but that one class be so far subjected to involuntary servitude as to be compelled by force to render personal services in a purely private business, with which the public has no concern whatever.[110]

This passage could just as well have been directed at peonage's justification as an institution of white supremacy.

The irony in this was that poverty, racial hierarchy, and employment instability—all of which were marshaled to justify compulsion—also were invoked to opposite effect by critics of peonage. The poverty that rendered laborers judgment-proof also left them vulnerable to schemes that leveraged debt into compulsion or that cut off the ability to change employers. As Judge Jones explained,

> It is a matter of common knowledge that nearly all the farm laborers and land renters in the counties of this state to which the statute is applicable are men of very little means, and must rely upon advances or have work to support themselves and their families at all

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Amendment protection and being *included* in statutory protective legislation were both marks of paternalistic location outside the system of free labor.

105. *See* Huq, *supra* note 6, at 377; Pope, *supra* note 6, at 1498.

106. *Ex parte* Drayton*,* 153 F. 986, 988 (D.S.C. 1907).

107. *Id.*

108. State v. Armstead, 60 So. 778, 780 (Miss. 1913).

109. *See* Bailey v. Alabama, 219 U.S. 219, 231, 241 (1911); Pollock v. Williams, 322 U.S. 4, 11 (1944).

110. Robertson v. Baldwin, 165 U.S. 275, 299–300 (1897).

> times. . . . He must stay there, or else, leaving, must starve, or go to work elsewhere . . . .[111]

The need for "more stable labor conditions" attributed to Black workers' "fickle[ness]" was instead attributed by Judge Brawley to labor conditions themselves:

> Unceasing toil, scant remuneration, and dreary isolation have a natural tendency to drive him to more inviting fields. Manufacturing establishments, the railroads, lumber camps, and phosphate mines drain the best laborer from the fields of agriculture, and whatever may be the remedy for existing conditions, certainly the remedy is not to be found in statutes which claim him to the soil and force him to labor, whether he will or not. Human nature revolts at it, and he will escape it if he can. It is by improving his condition, and not still further degrading it, that the remedy may be found.[112]

Judge Jones's references to "men of little means" and Judge Brawley's to "the best laborer[s]" and "human nature" seem to incorporate Black workers into the class deemed eligible for "free labor," attributing their labor conditions not to their "irresponsibility" or "fickleness" but instead to rational action under oppressive conditions.[113] *Pollock*'s insight continued in this vein, reasoning that "improving his condition" required protecting "the right to change employers" and thereby providing a potent weapon in "defense against oppressive hours, pay, working conditions, or treatment."[114]

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111. Peonage Cases, 123 F. 671, 687 (M.D. Ala. 1903).

112. *Ex parte* Drayton, 153 F. 986, 996-97 (D.S.C. 1907).

113. Notably, Huq's contrary critique does not rely on the opinions striking down peonage but instead on dissents and opinions on other topics. *See* Huq, *supra* note 6, at 382–83. This is not to say that the peonage cases deserve uncritical celebration. In addition to severe limits on their scope and enforcement, *see id.* at 379, 387; GOLUBOFF, *supra* note 5; Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2001), they can be seen as consistent with both *Lochner* and the anti-civil rights canons of the era, just for reasons different than Huq's. Although the Court readily could have adopted an even narrower view of coercion but did not, the approach it did take still fell well short of questioning the baseline property distribution on which *Lochner* depends, *see* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987), including its specifically racial character as a legacy of slavery. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993). Nor did it incorporate any account of racial discrimination within labor markets. On later, unsuccessful efforts to articulate racial discrimination continuously with peonage, see GOLUBOFF, *supra* note 5. Merely incorporating African-Americans into the "free labor" right to quit thus remains compatible with a project of legitimizing the substantial structural inequalities that remain and were immunized elsewhere in the jurisprudence of that era. That reading is strengthened by the Court's painstaking, and almost surely dishonest, efforts to characterize its peonage jurisprudence in colorblind terms. *See* cases cited *supra* note 109; Kennedy, *supra* note 6, at 1647.

114. *Pollock*, 322 U.S. at 18.

Finally, it bears noting that agricultural exceptionalism, grounded in the South's system of racial labor subordination, was itself no stranger to labor policy during precisely the period when the anti-peonage principles took root. Agricultural exceptions ran through all the major New Deal labor statutes.[115] Accordingly, it was an interesting, important, and hardly inevitable feature of constitutional development during this period that no analogous exception festered in the Thirteenth Amendment,[116] despite the door *Robertson* had left ajar.

C. Traditional Servitude

By the time the peonage cases were through with it, *Robertson* seemingly had been reduced to a bare exception for sailors, stripped of legal relevance by the repeal of the statutes it upheld, and unadorned by a rationale that could apply elsewhere. Indeed, by 1944 when *Pollock* paused to duly acknowledge that "[f]orced labor in some special circumstances may be consistent with the general basic system of free labor," it limited itself to the penal and public duty exceptions and did not deign to cite *Robertson*.[117]

The most that remained to be said for *Robertson* was the majority's reliance on historical practice. "[E]ven if the contract of a seaman could be considered within the letter of the thirteenth amendment, it is not within its spirit"[118] because "the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor child or wards."[119]

Justice Harlan was rightly withering in his attack on the majority's appeal to continuity and custom. After all, the whole point of the Thirteenth Amendment was to transform the nation's system of labor and to eradicate practices that had long been deeply embedded in law, and indeed, in the Constitution itself.[120] The majority sought to deflect the point by appealing not just to the historical practice of involuntary servitude at

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115. *See generally* SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL SOCIAL POLICY (1998); Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 J. POL'Y HIST. 416 (1995).

116. Indeed, Risa Goluboff has shown how the Department of Justice attempted to use its antipeonage authority to fill the gaps left by the New Deal statutes. *See* Goluboff, *supra* note 113, at 1678–80.

117. *Pollock*, 322 U.S. at 17.

118. Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

119. *Id.* at 282; *see also* United States v. Kozminski, 487 U.S. 931, 944 (1988) (favorably citing *Robertson* for the proposition "that the Thirteenth Amendment was not intended to apply to 'exceptional' cases well established in the common law at the time of the Thirteenth Amendment").

120. VanderVelde, *supra* note 10.

sea, but to its historical treatment as *exceptional*. But the merchant marine and the majority's other examples seemed exceptional relative only to the *post*-Thirteenth Amendment baseline of free labor. Antebellum, that was far less clear, as Justice Harlan pointed out by noting the continuity between provisions governing deserting sailors, "runaway servants," and fugitive slaves.[121] Furthermore, the patriarch's control over his family members' labor had likewise not been exceptional, but rather, entirely of a piece with dominion over a household labor force that included servants and slaves.[122]

The *Robertson* majority was right, of course, that once one admitted exceptions beyond the textual provision for penal labor, some principle was needed to explain which forms of previously bound labor were to be incorporated into the mandated market in "free labor,"[123] and which were not. That remains an important challenge, but whatever the proper answer is—despite several attempts unhelpful to *Robertson* or subsequently abandoned in the peonage cases—"time immemorial" provides a particularly feeble solution.

IV. APPLYING THE THIRTEENTH AMENDMENT TO THE NEW PEONAGE

I now turn directly to contemporary child support enforcement. My concern is with the state's threat, and actual practice, of imprisoning people for being or becoming unemployed when doing so interferes with their ability to repay debts created by the state through the child support system.

A. The Peonage Analogy and Limits of Debt

In the child support context, imprisonment arises on account of willful failure to pay ordered child support. But the interesting cases are those in which the obligor presently lacks the means to pay. In those cases, courts may still find that the obligor "acted willfully because he failed to maintain employment that would have enabled him to meet his child support obligations."[124] It is clear, therefore, that the substance of the duty to pay includes a duty to work, on pain of imprisonment.

The relationship between these duties resembles the evidentiary presumptions at issue in *Bailey* and other peonage cases. In *Bailey*, the

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121. *Robertson*, 165 U.S. at 294; *see also* White, *supra* note 7, at 331 (noting that mutiny law initially had been continuous with the criminalization of labor organizing generally).

122. *See* Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LAB. & WORKING-CLASS HIST. 56 (1995); STANLEY, *supra* note 69; Vandervelde, *supra* note 10.

123. *Robertson*, 165 U.S. at 282.

124. United States v. Ballek, 170 F.3d 871, 873 (9th Cir. 1999).

Court accepted the propriety of criminalizing fraudulent labor contracts but rejected attributions of fraud that could be sustained purely based on refusal to work.[125] Here, failure to work plays an even more decisive role because it conclusively establishes willfulness rather than merely raising a presumption of it.

To be clear, the bare *obligation* to work does not trigger the Thirteenth Amendment concern. Such a legal obligation is unexceptional, and so the courts have been understandably contemptuous of noncustodial parents who raise constitutional objections to the imposition of the duty to pay child support and its concomitant duty to work.[126] But for this same reason, other courts have confused the issue when they have sought to justify *imprisonment* for nonwork by trumpeting the validity and wisdom of the underlying child support obligation as "not only a moral obligation, but one that is legally enforceable."[127]

Obligations to perform labor contracts are legally enforceable as well, but the Thirteenth Amendment limits the means by which compliance may be obtained. Thus, in *Moss v. Superior Court*, where the obligor conceded that he could be ordered to pay support premised on his earnings capacity, he argued that his failure to work to that capacity nonetheless could not form the basis for imprisonment.[128] A civil money judgment was not at issue. Nor were various methods of enforcement more aggressive than ordinary civil debt collection yet less severe than incarceration for contempt, such as suspension of a driver's license.[129] At first glance, then, *Moss* appears like prototypical involuntary servitude: "[T]he victim had no available choice but to work or be subject to legal sanction,"[130] and the legal sanction of incarceration in particular.

More complicated is the specific relation to peonage. Like peonage, the child support obligation to work is founded in debt. That this obligation traces to a court order rather than a private contract is less important, because peonage includes debts "forced upon the debtor by some provision of law."[131] Nonetheless, this compulsion to work grounded in debt differs insofar as there is no obligation to work *for the creditor* in child support cases. This distinction may exclude the compulsory work pro-

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125. Bailey v. Alabama, 219 U.S. 219, 233–37 (1911); *accord* Pollock v. Williams, 322 U.S. 4, 14–15 (1944).

126. *See, e.g.*, Child Support Enforcement Agency v. Doe, 125 P.3d 461 (Haw. 2005).

127. Moss v. Superior Court, 950 P.2d 59, 67 (Cal. 1998); *see also* White, *supra* note 7, at 340 (distinguishing between a strike's illegality under mutiny law and the withdrawal of labor law protections).

128. *Moss*, 950 P.2d at 64.

129. *See, e.g.*, LAWYERS' COMM. FOR CIVIL RIGHTS, *supra* note 22.

130. *Moss*, 950 P.2d at 69 (quoting United States v. Kozminski, 487 U.S. 931 (1988)).

131. Clyatt v. United States, 197 U.S. 207, 215 (1905).

duced by child support enforcement from the technical scope of "peonage" for the purpose of criminal prosecution under the Antipeonage Act.[132]

That distinction between employer and creditor, however, hardly prevents constitutional classification as involuntary servitude when raised by the worker/obligor as a defense.[133] If an obligation to Person A can be satisfied only by working, and failure to work triggers prosecution and imprisonment, the Thirteenth Amendment problems are scarcely affected by whether the work is for Person A or some other Person B. The core difficulty would remain: the worker would be bound to Person B by the carceral threat, eliminating the leverage that comes with the right to quit and subjecting him to the risk of "a harsh overlordship."[134]

B. Compulsory Work vs. Compulsory Work for a Particular Employer

As the California Supreme Court observed, however, the child-support-derived obligation "to seek and accept employment" differs from the peonage paradigm in a more substantial way. Not only is there no compulsion to work for the creditor, the obligation "does not bind the parent to any particular employer or form of employment."[135] Work at *any* employer will do, and therefore the worker remains "free to leave . . . in favor of another employer."[136] For this reason, the court concluded that there was no need to get into the question of Thirteenth Amendment exceptions because, without subjection "to any particular employer," there was no "servitude" at all.[137]

This is a serious and unusual point, but less impressive than it first appears. To analyze it properly, we may usefully abstract away from the child support context because this point does not depend upon it. Imagine that there were a criminal statute obligating every adult to seek and maintain employment.[138] This duty to work would be enforced by incarcera-

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132. 18 U.S.C. § 1581 (2012).

133. *See* Pollock v. Williams, 322 U.S. 4, 8–10 (1944) (distinguishing between usages of peonage as a "sword" or a "shield"). Moreover, although the peonage prosecutions in the early twentieth- century era ending in *Pollock* all proceeded under the Antipeonage Act, Congress, in 1948, made it a more general crime to hold someone to "involuntary servitude." *See* 18 U.S.C. § 1584 (2012). Thus, the debt-related aspects of peonage appear superfluous in all respects. Indeed, when construing § 1584 in *Kozminski*, the Court took the crucial aspect of the peonage cases to be that "the victim had no available choice but to work or be subject to legal sanction," not debt. *Kozminski*, 487 U.S. at 943.

134. *Pollock*, 322 U.S. at 18.

135. *Moss*, 950 P.2d at 68.

136. *Id.* at 71.

137. *Id*.

138. Vagrancy laws have sometimes functioned in roughly this fashion. *See* STANLEY, *supra* note 69, at 99–127; Goluboff, *supra* note 5, at 1657–58. A full analogy to child support obligation would provide that this employment maximize one's earnings capacity, but we can set that aside.

tion. Interestingly, such a regime splits apart two features of labor markets under capitalism. These often are conflated in discussions of when, if at all, life in such markets amounts to "wage slavery," because the only alternative to wage work is starvation.[139] On the one hand, both scenarios allow for choice among particular employers. On the other, my hypothetical ratchets up the degree and form of compulsion; it substitutes "work or jail" for "work or starve."[140]

Would there be a "system of free labor" if labor market withdrawal were forbidden but free circulation among employers remained? It seems doubtful, though I cannot claim to provide a full analysis here.[141] It may be useful, however, to approach the question by asking whether such a system would preserve the right to quit any particular employer, which is the premise on which *Moss* purported to distinguish the peonage cases.

One of the peonage cases actually considered a closely related question. In *Reynolds*, the Court faced peonage founded in suretyship for criminal debts. A defendant, facing a fine that he could not pay, would be relieved of incarceration by an employer (the surety) who paid for him and to whom he became bound to work off the debt at an agreed rate.[142] Upon quitting work for the surety, the worker faced criminal prosecution, additional debt, and entry into another suretyship. There appeared, so far as the Court was concerned, to be an open market in suretyships. Thus, the worker, once he quit and faced criminal sanction, encountered no particular pressure to return to the previous employer. The functional result was that "under pain of recurring prosecutions, the convict may be kept at labor, to satisfy the demands of his employer."[143]

The distinction between *Reynolds* and a general criminalization of unemployment is hardly apparent. In both cases, the worker is trapped in endless labor, and the most that quitting can accomplish is to change masters—or be incarcerated. In neither case does the worker have the option of withdrawing from the labor market. To be sure, job switching in *Reynolds* was mediated by a criminal prosecution for quitting the first surety, but that prosecution resulted in no penalty other than a new master and deepening debt. Deepening debt meant that there was no way to

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139. *See* Pope, *supra* note 6, at 1533–40.

140. Once mobility among employers is granted, Pope considers only scenarios in which the worker retains the legal option of leaving the labor market, albeit perhaps only to starve upon exit. *Id.* When Pope does consider legal limitations on leaving the labor market even to starve, it is only in contexts (like peonage) that also involve being bound to a particular employer. *Id.* at 1527.

141. *Cf.* GOLUBOFF, *supra* note 5, at 157 (arguing that during the 1940s federal civil rights enforcers "targeted laws that did not necessarily create a particular employment relationship from which exit was difficult but rather those that made exit difficult from any employment relationship").

142. United States v. Reynolds, 235 U.S. 133, 149–50 (1914).

143. *Id.* at 150.

escape the cycle by accumulating the assets that would allow for labor market withdrawal. That economic barrier to withdrawal, steep as it was, is no *more* difficult to overcome than the absolute prohibition on withdrawal that I am considering. Therefore, if the withdrawal options—pay or jail—in *Reynolds* were constitutionally insufficient, the same would seem to be true for cases like *Ballek* and *Moss*.

Another way to approach the question of a general criminalization of unemployment is to ask whether a system of compulsory labor for no particular employer really is compatible with an unfettered right to quit each particular employer. The work obligation would seem illusory if one could always quit a few hours in, at least if there were any frictional unemployment in the resulting period between jobs. Indeed, *Moss* itself was cautious in its passing reference to this problem. The court implied an unfettered right to *switch* employers but no such unfettered right to *quit* without a new job in hand. Instead, the court allowed that the child support obligor remained "free to resign" *only if* "the working conditions are objectively intolerable."[144] Harking back to the peonage cases, one might say that the worker retained the right to quit so long as he had "good and sufficient cause,"[145] which sounds distinctly more permissive than "objectively intolerable." But recall that the right to quit protected by the peonage cases was precisely an *absolute* right, one not sacrificed because it was exercised in "capricious or reprehensible" fashion.[146]

Although hardly definitive, this discussion suggests that criminalizing unemployment among debtors cannot easily be distinguished from criminalizing debtors' labor mobility between employers—the latter being the evil attacked directly in the peonage cases. At a minimum, pains would have to be taken to avoid using the latter as a method to achieve the former. Thus, the choice to quit a particular job could not provide the basis for establishing inadequate efforts to work. Although such a regime is imaginable, it would be far more protective than the one we have. Moreover, a robust right to quit any particular job would seem to have as its corollary a robust right to refuse any particular job; otherwise, one would be left with the empty formalism of accepting and then immediately quitting.

C. Robertson *Redux: A Child Support Exception in the Private Sector?*

All this suggests that the real action in child support enforcement must lie in the specific purpose for which work is compelled. Involuntary

144. Moss v. Superior Court, 950 P.2d 59, 71 (Cal. 1998).

145. *See* discussion *supra* note 61 and accompanying text.

146. Taylor v. Georgia, 315 U.S. 25, 30 (1942); cases cited *supra* note 56 and accompanying text.

servitude it may be, but this just provides another example of the Thirteenth Amendment not really meaning what is says when declaring that involuntary servitude "shall [not] exist within the United States."[147] *Moss* offered this alternative ground for its holding, and the next year the Ninth Circuit relied upon it exclusively, eschewing, though not rejecting, *Moss*'s "no-servitude" reasoning.

In *United States v. Ballek*, Judge Kozinski relied on *Robertson* and the other canonical exceptions cases for the proposition that "not all forced employment is constitutionally prohibited."[148] To bring forced child support labor within those exceptions, the court relied on the "public duties" line of cases. It reasoned that nonpayment "raises more than a private legal dispute" but instead "is a matter of vital importance to the community."[149] Beyond the general public concern for child welfare, there also is the purely monetary "interest in protecting the public fisc by ensuring that the children not become wards of the state."[150] For this reasoning, *Ballek* relied principally on *Butler*, the public roads case.

The difficulty with *Ballek* is that it threatens to obliterate the public/private distinction on which both *Butler* and Justice Harlan's *Robertson* dissent relied. Previously, the "public duties" exception has been applied exclusively to work performed directly for state entities, whether public road crews, in the courts, or in the military. Moreover, this work proceeded in sectors totally dominated by publicly compelled labor rather than competing with workers not subject to like compulsion. Consequently, such labor avoided triggering *Pollock*'s concern that coerced labor's "depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes into competition."[151] No such limits apply to child support obligations to work.

Without even noting as much, *Ballek* adopts the principle that forced labor for McDonald's or any private employer may be clothed with sufficient public purpose to keep the Thirteenth Amendment at bay. To transform the entire private sector into an exercise in public duty, all that is required is for workers to spend their earnings on matters of public concern—like paying child support. Surely this proves too much.

The public interest in private earnings is pervasive. Not only do workers spend their money supporting family members, but they spend

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147. U.S. CONST. amend. XIII.

148. United States v. Ballek, 170 F.3d 871, 874 (9th Cir. 1999).

149. *Id.*

150. *Id.* at 875. Recall that in much child support enforcement, this fiscal interest is not merely prospective but instead attaches to the state's seizure of payments in reimbursement of past assistance to a low-income child. *See* discussion *supra* note 40 and accompanying text.

151. Pollock v. Williams, 322 U.S. 4, 18 (1944).

their money paying taxes, supporting charitable causes, and much more. Moreover, private employment has long been cast as the foundation of all manner of public virtues, from social integration, to the cultivation of self-discipline, to the instruction of children, to the economic independence on which republican conceptions of political citizenship depend.[152]

In other words, *Ballek* slams a wedge deep into the crack left open by *Robertson*: if the "public duty" class of exceptions can be extended to encompass work for private employers, then it can, in principle, be extended to most modern employment. Doing so, however, threatens the premise that rendered those exceptions tolerable. *Pollock* declared that the Thirteenth Amendment aimed "not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."[153] It countenanced the occasional oddball exception because "forced labor in special circumstances may be consistent with the general basic system of free labor."[154] *Ballek*'s reasoning, however, would allow the exception to swallow the rule.

CONCLUSION

These last observations point to the perpetual frailty of public/private distinctions. As the Realists taught, the "private" economy is a creature of public law, designed to serve public purposes ranging from the sustenance of daily life to the cultivation of individual liberty to the maintenance of democratic politics.[155] Moreover, economically significant work pervades the regions sometimes deemed outside the market, as the cases of public roads and military service readily demonstrate. Indeed, private labor markets routinely are marshaled to supply the labor necessary to advance employers' "noneconomic" purposes.[156] Churches, prisons, and schools all hire janitors and secretaries, including those motivated just to make a living and not by loyalty to the employer's ultimate goals. Similarly, someone flipping burgers for McDonald's may do so to earn wages devoted to child support, college tuition, political or religious

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152. *See generally* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS (1996); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

153. WILSON, *supra* note 152, at 17.

154. *Id.* at 18.

155. *See, e.g.*, Carole Pateman, *Democratizing Citizenship: Some Advantages of a Basic Income*, 32 POL. & SOC'Y 89 (2004); Fred Block & Peter Evans, *The State and the Economy*, *in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 505 (Neil J. Smelser & Richard Swedberg eds., 2005); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

156. *See* Noah D. Zatz, *Does Work Law Have a Future If the Labor Market Does Not?*, 91 CHI.-KENT L. REV. (forthcoming 2016).

donations, and so on, even if the employer is motivated to hire her just to make a buck.

Taking these points fully to heart threatens basic structures in which the Thirteenth Amendment is embedded and which it has helped bring about. Pending a solution to the contradictions of a liberal political economy, perhaps it is worthwhile to try taking the public/private distinction seriously. If we did so, then it would seem that Justice Harlan should again be vindicated, that *Robertson* should be overruled, and that today's criminalization of unemployment should be scrutinized as a new peonage that threatens our most basic freedoms. The conclusion is only strengthened by the ways in which this new peonage, like the old one, emerges from, ratifies, and exploits white supremacy.