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Prison Privatization and Inmate Labor in the Global Economy: Reframing the Debate Over Private Prisons

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PRISON PRIVATIZATION AND INMATE LABOR IN THE GLOBAL ECONOMY: REFRAMING THE DEBATE OVER PRIVATE PRISONS

Alfred C. Aman, Jr. & Carol J. Greenhouse***

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INTRODUCTION

The pragmatics of privatization are terrain for a critical understanding of the relationship between government and business under the conditions associated with the globalization of neoliberal capitalism.¹ Prison privatization is especially significant in this context, given the fact that—for privatization advocates and critics alike, in the United States and elsewhere—prisons represent a bellwether for broader questions about the scope of government.² As John Donohue writes, “[f]ew roles in our American society seem more inherently ‘public’ than those of the police, the judges and the jailers.”³ Given the traditional association of prisons with core governmental functions,⁴ prison privatization is strategically key to

1. Our usage of these terms is explained below. As Leibling and Sparks have observed: “[T]he changing distribution of powers and responsibilities for the allocation or delivery of punishment and quasi-penal control (most obviously imprisonment and cognate forms of detention and segregation) between states and other actors cannot but be a matter of fundamental interest.” Alison Liebling & Richard Sparks, *Editors’ Preface*, 4 PUNISHMENT & SOC’Y 283, 283 (2002).

2. For an extensive summary of policy and legal issues encountered in states’ prison privatization initiatives, see generally JUDITH HACKETT ET AL., *THE COUNCIL OF STATE GOV’TS & THE URBAN INST., ISSUES IN CONTRACTING FOR THE PRIVATE OPERATION OF PRISONS AND JAILS* (1987). For comprehensive histories of prison privatization and critical accounts of current debates, see generally CAPITALIST PUNISHMENT: PRISON PRIVATIZATION & HUMAN RIGHTS (Andrew Coyle et al. eds., 2003); MICHAEL A. HALLETT, *PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE* (2006); *PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE* (David Shichor & Michael J. Gilbert eds., 2001); BERT USEEM & ANNE MORRISON PIEHL, *PRISON STATE: THE CHALLENGE OF MASS INCARCERATION* (2008).

3. JOHN D. DONAHUE, *PRISONS FOR PROFIT: PUBLIC JUSTICE, PRIVATE INTERESTS* 3 (Econ. Policy Inst. ed. 1988).

4. This Article concerns the U.S. experience, but the British debates are to some extent parallel. Regarding prison privatization, Sir Leon Radzinowicz has stated:

[I]n a democracy grounded on the rule of law and public accountability the enforcement of penal legislation . . . should be the undiluted responsibility of the state. It is one thing for private companies to provide services for the prison system but it is an altogether different matter for bodies whose motivation is primarily commercial to have coercive powers over prisoners.

Elaine Genders, *Legitimacy, Accountability and Private Prisons*, 4 PUNISHMENT & SOC’Y 285, 289 (2002) (citation omitted). Genders’s article concerns the private prison debate in the United Kingdom—a strong parallel involves incarceration as a constitutional preserve. See generally *id.* Genders is critical of the idea of core governmental functions as an inherent obstacle to privatization, in that privatization—as delegation by the executive—does not automatically remove imprisonment from the aegis of the state. See *id.* at 286. The Supreme Courts of Israel and India have recently ruled private prisons unconstitutional. See Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT’L J. CONST. L. 162, 162 (2013). On Israeli debates over core governmental functions as limits to privatization, see generally Richard Harding, *State Monopoly of ‘Permitted Violation*

privatization proponents, as a test of the very notion of core government.⁵ Core government—implying a non-delegable “duty to govern”—is itself an issue in debate.⁶ The centrality of prison privatization to wider debates about privatization gives us our starting point in this Article. We agree with Frank Michelman’s assessment that privatization raises constitutional questions in a way that globalization does not, at least not automatically.⁷ Taken to an extreme, or in its most ideological form, one might imagine—with Michelman—that privatization makes government an “empty shell.”⁸ However, as Elaine Genders and others have noted, in the prison context, privatization does not automatically challenge the idea of core governmental functions since it does not automatically remove the state altogether from the process.⁹ Setting up contractual terms, standards, monitoring procedures, accountability, and conditions for rescission may all remain with the state.¹⁰ What, then, is the problem with prison privatization? In what follows, rather than discuss this question in traditional binary terms—public versus private, or more efficient versus less efficient—we read the private prison debate as a test of the government’s ability to mediate the public’s responsibility for the human conditions of citizenship. This enables us to take a

of Human Rights: The Decision of the Supreme Court of Israel Prohibiting the Private Operation and Management of Prisons, 14 PUNISHMENT & SOC’Y 131 (2012). On the constitutionality of privatization in the United States, see Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1437–39 (2003).

5. Charles H. Logan formulates the position in this way:

The privatization of corrections, or punishment, is an especially significant part of the broader privatization movement. By challenging the government’s monopoly over one of its ‘core’ functions, the idea directly threatens the assumption that certain activities are essentially and necessarily governmental . . . Thus, privatization in the area of criminal justice generally, and of imprisonment particularly, plays an important part in a broad, ideological debate over the proper scope and size of government.

CHARLES H. LOGAN, PRIVATE PRISONS: CONS & PROS 4 (1990).

6. “Domestic law scholars and policymakers have long debated the question of whether privatization undermines core public law values in the United States.” Laura A. Dickinson, *Public Values/Private Contract*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND DEMOCRACY 335, 335 (Jody Freeman & Martha Minow eds., 2009). On the “duty to govern,” see generally Paul Verkuil, *Outsourcing and the Duty to Govern*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND DEMOCRACY, *supra*, at 310.

7. See Frank I. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063, 1073 (2000).

8. See *id.* at 1065.

9. Genders, *supra* note 4, at 289–90.

10. See *id.* at 300; see also Alexander Volokh, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1870 (2002).

broader perspective on what is at stake in these debates, especially for the prisoners involved, when the state decides to privatize.

Our findings, thus, challenge assumptions that would situate prison privatization as a test of government's scope. For one thing, privatization itself is a form of governmental action, and may involve various forms of control on the part of the contracting agencies.¹¹ More fundamentally for our purposes, the history we relate shows that privatization is not a unified phenomenon; prison privatization has a long and particular history that compels attention to diverse rationales and approaches.¹² Moreover, that same history shows that prison privatization became a test of government's scope only *after* a priority on limiting government was politicized and set in place as a matter of policy under the Reagan and Bush Administrations (and continued thereafter). In relation to prisons, then, privatization should not be seen as a *necessary* response to a contemporary state of affairs, but a *favored* response, for reasons that predate the inmate explosion.¹³ Accordingly, we suggest that the key factors usually credited with causing the *demand* for private prisons arguably include the *effects* of a neoliberalization of public administration already well under way by the early 1980s. These are among the issues pursued in the following sections.

11. "When private regulation is harnessed by public regulation, structures of private governance are embedded and integrated into a broader framework of public oversight." Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENV'T'L & ADMIN. L. 291, 317 (2014) (internal quotation marks omitted).

12. On the diversity of privatization in relation to public law, see generally Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006). On public law values in privatization, see also Michelman, *supra* note 7, at 1073; see generally Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003). For analysis of democratic challenges, and human rights challenges, in prison privatization, see generally Alfred C. Aman Jr., *Privatization and Democracy: Resources in Administrative Law*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND DEMOCRACY, *supra* note 6, at 261 [hereinafter Aman, *Privatization and Democracy*]; Alfred C. Aman Jr., *Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEGAL STUD. 511 (2005) [hereinafter Aman, *Democracy Deficits in the U.S.*]; Alfred C. Aman Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477 (2001). On democracy deficit in globalization, see generally ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM (2004) [hereinafter AMAN, THE DEMOCRACY DEFICIT].

13. See NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS (2014), available at <https://www.fas.org/sgp/crs/misc/R42937.pdf>.

The “privatization of prisons” is a phrase that refers to many spheres of activity that are contractually separate and, in some ways (as we shall see), conceptually distinct—as some involve direct substitution of private-for-public providers, whereas others involve reconfigurations of purposes and policies. As areas of activity and related potential for reform—prison labor, prison services, prison construction, and management—may all involve quite distinct forms of enterprise. In this Article, we emphasize the human side of prison privatization—that is, those aspects of private sector involvement that affect inmates directly, such as their health care, nutrition, living conditions, and, especially for purposes of this Article, their labor. Looking ahead to our conclusions, one implication of our analysis is that direct human services—such as those that affect the dignity of the person, the integrity of the body, and the value of personal labor—should be treated differently by the law governing privatization. In these areas, in which people may be irreparably harmed, additional safeguards are warranted, along with more public involvement, and more provision for public involvement at the initial contract negotiation stages as well as rescission. Direct human vulnerability mandates more direct forms of public participation than those more impersonal domains of government contracts dealing with, for example, the construction of roads or bridges, and routine service contracts in which expenses and revenues may be more definitive. It is in this respect—namely, the human dimensions of prison contracts—that prison privatization may be more appropriately considered a bellwether for the provision of basic services, not just to inmates in public prisons, but also to other populations made vulnerable by confinement or other constraints, including labor precarity (structural underemployment), persistent poverty, chronic illness, or immigrant status.

Our aim, therefore, is to reexamine some of the key terms of discussion surrounding prison privatization. We propose a resetting of those terms in three respects. First, we argue that the context of prison privatization should include the privatization movement and its relevance to the globalization of capital in the 1970s (and continuing today). Second, resetting the context in this way lengthens the modern history of prison privatization from its conventional starting point in the prison-overcrowding crisis of the late 1980s and 1990s,¹⁴ to show its emergence at least a decade earlier, as part of the

14. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-91-21, PRIVATE PRISONS: COST SAVINGS AND BOP'S STATUTORY AUTHORITY NEED TO BE RESOLVED 8-12 (1991), available at <http://www.gao.gov/assets/160/150187.pdf>; U.S. GEN.

broader movement to privatization in state and federal government. Seen from that longer perspective, prison privatization is integral to privatization in other sectors, and, in turn, to the neoliberalization of government and global markets. The longer view also leaves room for an account of prison privatization that considers aspects of privatization affecting the prison sector in addition to prison privatization per se. In this Article, we discuss prison labor as a key element of that larger picture.

Thus, third, we turn to prison labor. We discuss two federal initiatives that involved the private sector in corrections well prior to prison privatization. Both of these involved prison labor, though under substantially different models, and with different aims. These initiatives—their similarities as well as their differences—shed light on the privatization of prison labor as a crucial through-line of reform from the 1970s, and even earlier, through the present day. The more complete chronology that we advocate is rooted to debates—within government and between business and labor—about prison labor as a sector of the national and global work force. Issues related to inmate labor are relevant to the analysis of prison privatization as well as to the potential for improving this aspect of our justice system through law. In particular, they make visible the wider situation of those who labor in the current “post-Fordist” era outside of the prison walls.¹⁵ We argue for acknowledging inmate labor as labor, as a fresh starting

ACCOUNTING OFFICE, GAO/GGD-90-1BR, PRISON CROWDING: ISSUES FACING THE NATION’S PRISON SYSTEMS 4–5 (1989), *available at* <http://www.gao.gov/assets/80/77582.pdf>.

15. “Post-Fordism” refers to a periodization of capitalism that, since the 1970s, has put a premium on flexibility—i.e., maximizing the mobility of capital for purposes of strategic investment and offloading of risk—as a key to successful competition in the global economy. In contrast to Fordism (the mass production of the assembly line), post-Fordist enterprises retain their capacity for “flexible [capital] accumulation” by developing “flexible labor markets and geographies of production”—i.e., moving production to locations where labor and supplies can be found at minimal cost, and setting labor conditions such that workers themselves absorb the risks of fluctuating demand (by cyclical unemployment or suppressed wages). While the specifics of such periodization (including its causes and effects) are issues of debate, we use the term as a general reference to the historical conditions that made “heightened competition, entrepreneurialism and neo-conservatism” central to the social organization of the economy in the United States. On post-Fordism as flexible accumulation, labor markets and geographies, see ASH AMIN, *Post-Fordism: Models, Fantasies and Phantoms of Transition*, in POST-FORDISM: A READER 1, 6 (Ash Amin ed., 1994). On post-Fordism as heightened competition, entrepreneurialism, and neo-conservatism, see DAVID HARVEY, *THE URBAN EXPERIENCE* 13 (1989). On “post-Fordist corrections,” see DARIO MELOSSI, *CONTROLLING CRIME, CONTROLLING SOCIETY: THINKING ABOUT CRIME IN EUROPE AND AMERICA* 237–41 (2008).

point for debates currently defined by the polarity of punishment and rehabilitation. Revising the terms of discussion in these three ways (resetting context, lengthening the chronology, and focusing on the privatization of labor) improves one's understanding of the development of prison privatization in relation to other aspects of the relationship between government and business under conditions of globalization.

Our analysis proceeds in three main steps, each one providing the theme of one of the Article's three main Parts. Part I provides background by filling in the relevant connections between the globalization of capital and privatization in the United States—resetting the privatized prison context and lengthening its timeline, as mentioned above.¹⁶ We emphasize the modern origins of prison privatization—that is, prison privatization since the 1970s—in the larger privatization movement. In the first sections of Part I, we argue that the context of modern prison privatization is appropriately placed in the economic restructuring associated with the globalization of neoliberal capitalism. The reforms associated with privatization are not just illustrative of a swing of the regulatory pendulum from liberal to conservative; rather, they represent a fundamental shift in the governing role now played by the state in this age of globalization.¹⁷ Appreciating the connections between globalization and privatization is thus key to the rest of the discussion, as prison privatization emerges as a domestic “face” of globalization.¹⁸

16. For additional background to legislative, executive, and judicial responses to globalization at the federal level, see ALFRED C. AMAN, JR., ADMINISTRATIVE LAW IN A GLOBAL ERA 125–30 (1992) [hereinafter AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA]; ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT, *supra* note 12, at 124–27; Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1193–1201 (1988) [hereinafter Aman, *Progress, Deregulatory Change, and the Rise of the Administrative Presidency*]; Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 49 UCLA L. REV. 1687, 1697–1700 (2002); see also CAROL J. GREENHOUSE, THE PARADOX OF RELEVANCE: ETHNOGRAPHY AND CITIZENSHIP IN THE UNITED STATES 52 (2011). Aman has dubbed these trends as indicative of “the global age” of regulatory reform, carried out by a “globalizing state.” Greenhouse has tracked the political mainstreaming of an approach to social policy that favored marketization as a regulatory mechanism in the 1980s and 1990s. See generally GREENHOUSE, *supra*.

17. For discussion of the “globalizing state” and the “global era” of administrative law, see AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra* note 16; Aman, *Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, *supra* note 16.

18. See Alfred C. Aman, Jr., *Globalization from the Ground up: a Domestic Perspective*, in THE IMPACT OF GLOBALIZATION ON THE UNITED STATES: LAW AND GOVERNANCE 5–17 (Beverly Crawford et al. eds., 2008); Alfred C. Aman, Jr.,

In the second part of Part I, we pursue those connections more specifically in relation to prison privatization. Most discussions of prison privatization in the United States—among politicians, academics, and advocates alike—take as a given the development of prison privatization as a cost-efficient solution to the interrelated problems of prison population explosion and taxpayer resistance to expanding government budgets.¹⁹ These are important factors, but we suggest that additional sources of the various forms of prison privatization lie elsewhere. We emphasize the early years of the prison privatization movement, as various paths for reforming an outmoded system eventually drew the attention of every branch of the federal government, many states, various business sectors, and other organizations in the United States. These early efforts focused on prison labor as a primary site of private sector involvement.²⁰

In Part II, we turn to two major prison privatization initiatives, both of which involved key actors within the federal government, and both of which predate the prison-crowding crisis of the late 1980s. We compare these initiatives as distinct models of privatization, noting the federal uptake of the privatization movement's emphasis

Private Prisons and the Democratic Deficit, in PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS 87 (Simon Chesterman & Angelina Fisher eds., 2009); see also, AMAN, THE DEMOCRACY DEFICIT, *supra* note 12, at 7, 101–105.

19. See *infra* Part II. For examples especially relevant to policy issues affecting prison privatization, see generally GAIL S. FUNKE, NAT'L CTR. FOR INNOVATIONS IN CORRECTIONS, NATIONAL CONFERENCE ON PRISON INDUSTRIES: DISCUSSIONS AND RECOMMENDATIONS (Gaile S. Funke ed., 1986), available at <https://www.ncjrs.gov/pdffiles1/Digitization/102295NCJRS.pdf>; PRESIDENT'S COMM'N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT (1988), available at http://pdf.usaid.gov/pdf_docs/PNABB472.pdf; *Prison Privatization*, CORRECTIONS PROJECT, http://www.correctionsproject.com/corrections/pris_priv.htm (last visited June 27, 2014). For a different starting point, cast in terms of the rise of managerialism and a concomitant policy shift toward punishment, see DAVID GARLAND, THE CULTURE OF CONTROL 105–06 (2001).

20. By prison labor, we refer to the paid work of inmates. Prison staff salaries are relevant to a larger discussion of prison finances and potential cost efficiencies; however, that is not our purpose in this Article. On prison staff salaries as a factor in assessments of prison privatization, see JAMES AUSTIN & GARRY COVENTRY, U.S. DEP'T OF JUSTICE, EMERGING ISSUES ON PRIVATIZED PRISONS iii (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/181249.pdf>. In 1995, as privatization advocates in Congress and elsewhere pressed to increase privatization, the growth of staff salaries and expanding expenditure for salaries represented the largest source of the Federal Bureau of Prisons' growth in expenditures. *Bureau of Prisons: Recent Concerns and Challenges for the Future: Hearing Before the H. Subcomm. on Crime, Comm. on the Judiciary*, 104th Cong. 3 (1995) (statement of Norman J. Rabkin, Director, Administration of Justice Issues, General Government Division), available at <http://www.gao.gov/assets/110/106064.pdf> [hereinafter *Bureau of Prisons: Recent Concerns*].

on reforming the financialization of government, as this was applied to the prison sector.²¹ Taking these early initiatives into account, we argue that the more convincing chronology for prison privatization would start the story in the modern efforts to privatize prison labor—specifically in relation to Federal Prison Industries in the 1970s and 1980s, and Congress’s creation of the Prison Industry Enhancement Certification Program (PIECP) in 1979.²² We review these developments, emphasizing their similarities and differences as privatization initiatives, and linking on-going debates about prison labor (particularly regarding minimum wage and the role of organized labor) to the global economic situation. The focus on labor yields a more appropriate context for approaching prison privatization as part of the economic restructuring and deregulatory trends associated with globalization.²³

In Part III, we consider the implications of rethinking prison privatization in relation to the privatization trends of the 1970s and 1980s. Most importantly, attention to prison labor underscores the relevance of social conditions beyond prisons to the social conditions

21. By “financialization,” we refer to an administrative priority on converting capital into marketable financial assets so as to maximize opportunities for profit and/or minimize fixed costs. In the prison sector, for example, privatization advocates argued for broadening the role of the private sector in prison construction and management both to support efficiency and as a means of freeing up government assets for other uses with more growth potential. See THE SENTENCING PROJECT, PRISON PRIVATIZATION AND THE USE OF INCARCERATION (2004), available at http://www.sentencingproject.org/doc/publications/inc_prisonprivatization.pdf (discussing and critiquing the efficiency argument raised by advocates of privatization).

22. PIECP was established under the Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 827, 93 Stat. 1167, 1215. Federal Prison Industries (FPI) was established in 1934 by Pub. L. No. 73-461, 48 Stat. 1211 and Exec. Order No. 6917, and was reauthorized in 1948 by the 1948 Act, ch. 645, 62 Stat. 851 (codified as amended at 18 U.S.C. §§ 4121, 4122). Since 1977, FPI has been known by the trade-name “UNICOR.” See UNICOR, FACTORIES WITH FENCES: 75 YEARS OF CHANGING LIVES 24 (2009), available at https://www.unicor.gov/information/publications/pdfs/corporate/CATMC1101_C.pdf.

23. On prison privatization as integral to economic restructuring in globalization, see Rebecca M. McLennan, *The New Penal State: Globalization, History, and American Criminal Justice*, 2 INTER-ASIA CULTURAL STUD. 407, 408 (2001) [hereinafter McLennan, *The New Penal State*]. In this Article, we do not address the long history of prison labor in the United States prior to the privatization movements of the 1970s and 1980s, although it remains relevant to debates, then and now, as the object of reform. For detailed accounts, see REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941, at 87–192 (2008) [hereinafter MCLENNAN, THE CRISIS OF IMPRISONMENT], on the history of partnerships between business and prison agencies, and various prison labor regimes, particularly those involving contracts and leased labor.

of the prison itself—in particular, as breadwinners, family members, community members, and, more generally, the “civil rights landscape” of citizenship.²⁴ Thus, the revision of chronology established in Parts I and II gives more prominence to prison labor as integral to wider trends affecting domestic labor markets under pressure from global competition. Acknowledging the wider context of prison privatization clarifies the scope and substance of regulation, and the potential for improvements through law and law reform, including but not limited to issues of contracting. In Part III, we conclude our analysis in these terms and apply our findings regarding prison privatization to potential areas of improvement through law. Our aim is to contribute to the private prison debate by shifting the terms of debate from the financialization of government to the status of labor. Doing so widens the scope for thinking of prisoners not as revenue streams, but as beneficiaries of the corrections system and as members of communities beyond prison walls, even while incarcerated.²⁵ In this regard, Mary Katzenstein suggests that “prisons as institutions can serve as a mirror refracting the values and politics of a nation.”²⁶ To Katzenstein’s observation, we would only add the global context that affects the status of labor, even within the walls of U.S. prisons.

I. PRISON PRIVATIZATION AS A DOMESTIC FACE OF GLOBALIZATION

Prison privatization refers to a broad array of privatized construction, management, services, and inmate programming. Each of these areas is a piece of a much larger picture of the privatization of government functions in the United States. As such, prison privatization is part of a broader regulatory phenomenon characteristic of globalization. In this Part, we discuss privatization as

24. On citizenship as the “more encompassing” rubric for discussion of prison reform (relative to rights claims), see Mary Fainsod Katzenstein, *Rights Without Citizenship: Activist Politics And Prison Reform In The United States*, in ROUTING THE OPPOSITION—SOCIAL MOVEMENTS, PUBLIC POLICY AND DEMOCRACY 236–37 (David S. Meyer et al. eds., 2005) (arguing for restoring the franchise to inmates); see also Mary Fainsod Katzenstein et al., *The Dark Side of American Liberalism*, 8 PERSP. ON POL. 1035, 1039–45 (2010).

25. On prison reforms and programs that cross prison walls in this way, see Michelle Brown, *Of Prisons, Gardens, and the Way Out*, 64 STUD. L. POL. & SOC’Y (SPECIAL ISSUE) 67, 82–83 (2014); Rebecca Ginsburg, *Knowing That We Are Making a Difference: A Case For Critical Prison Programming*, 64 STUD. L. POL. & SOC’Y (SPECIAL ISSUE) 33 (2014); Doran Larson, *Introduction*, 64 STUD. L. POL. & SOC’Y (SPECIAL ISSUE) 1 (2014); see also UNICOR, *supra* note 22, at 9.

26. Katzenstein et al., *supra* note 24, at 1036.

a feature of globalization, before returning to issues raised by prison privatization.

For purposes of this Article, we take *globalization*—a term in wide and diffuse usage—to refer to myriad measures aimed at accelerating the flow of capital and maximizing competitive opportunities for accumulation.²⁷ In this Article, we refer to *neoliberal* globalization, and sometimes to *neoliberalization*—signaling a now-pervasive capitalist culture predicated on disembedding the market from government, including maximum marketization of government services.²⁸

27. For general background on neoliberalization as a “distinctive form of globalization” (in Harvey’s phrase), see DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 152–72 (2005). Harvey defines “neoliberalism” as:

[A] theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the [neoliberal] state is to create and preserve an institutional framework appropriate to such practices.

Id. at 2. In this Article, our concern with neoliberal globalization is primarily with governmental and non-governmental interventions aimed at maximizing access to capital markets and trade—acknowledging the asymmetries of power and influence that enter into the establishment of global trade conditions and its selective benefits. For a classic analysis of globalization in these terms, see generally JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002); Alfred C. Aman, Jr., *Law, Markets and Democracy: A Role for Law in the Neo-Liberal State*, 51 N.Y.L. SCH. L. REV. 801 (2006-2007).

28. “There has everywhere been an emphatic turn towards neoliberalism in political-economic practices and thinking since the 1970s.” HARVEY, *supra* note 27, at 2. With respect to private prisons, Martha Minow writes: “[F]or-profit prisons . . . are simply part of a larger pattern A sea change is at work Private and market-style mechanisms are increasingly employed to provide what government had taken as duties.” MARTHA MINOW, *PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* 2–3 (2002). But the pervasiveness of neoliberalism does not imply a homogeneity of experience within neoliberalism. For a critique of “convergence narratives” of globalization from African perspectives, see JAMES FERGUSON, *GLOBAL SHADOWS: AFRICA IN THE NEOLIBERAL WORLD ORDER* 28–29 (2006). For Asian perspectives, see generally AIHWA ONG, *NEOLIBERALISM AS EXCEPTION: MUTATIONS IN CITIZENSHIP AND SOVEREIGNTY* (2006). For a discussion of alternatives to neoliberal globalization from diverse critical standpoints situated in the global south, see generally LAW AND GLOBALIZATION FROM BELOW: *TOWARDS A COSMOPOLITAN LEGALITY* (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005). The importance of specificity is not limited to national or regional experience; it is also relevant in the analysis of domestic policy fields. For a discussion of neoliberalism and welfare administration reform, see Alfred C. Aman, Jr., *Globalization and the Privatization of Welfare Administration in Indiana*, 20 IND. J. GLOBAL LEGAL STUD. 377, 377–78 (2013) (discussing Karl Polanyi and various ways in which markets can be re-embedded into society).

A. The Global Context: Privatization and Neoliberalization

In the United States, privatization should be understood as both a driving and principal effect of globalization.²⁹ The increasing reliance on marketized forms of administration and corporate self-regulation in lieu of regulation by government is commonly referred to as “the new governance.”³⁰ The new governance is indicative of recent transformations in the relationship between the market and the state itself—transformations that are inseparable from global economic competition and other forms of interdependence between state and non-state actors, domestically and transnationally, as these have developed in recent decades.³¹

Neoliberalization of government in the United States puts a political premium on the financialization of public administration, government services, and other government functions, in turn lending

29. “Governing by contract in the United States today should be understood as integral to the processes, both political and economic, that made privatization a major domestic response to as well as driver of globalization.” Aman, *Privatization and Democracy*, *supra* note 12, at 261.

30. See LESTER M. SALAMON, *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* vii (2002). “The new governance” is Salamon’s term for an approach to problem solving in the public sphere. It refers to an analytical

[F]ramework [emphasizing] the collaborative nature of modern efforts to meet human needs, the widespread use of tools of action that engage complex networks of public and private actors, and the resulting need for a different style of public management, and a different type of public sector, emphasizing collaboration and enablement rather than hierarchy and control.

Id.

31. On transformations of the public sphere, see Ali Farazmand, *Globalization, Privatization and the Future of Modern Governance: A Critical Assessment*, 2 PUB. FIN. MGMT. 151, 152 (2002) (“With sweeping privatization of public enterprises and other major governmental functions, the capacity and ability of governments in public management are seriously diminished even as challenges and crises multiply in both number and intensity. Globalization has not ended the state and public administration, but it has caused a major qualitative change and alteration in the nature, character, and role of the state and public management; in fact, state continuity persists because it is instrumental to the functioning of capitalism.”). On transformations in private life, see CAROL J. GREENHOUSE, *Introduction, in ETHNOGRAPHIES OF NEOLIBERALISM* 3 (2010) (“In its valorization of the individual, its preference for markets over rights as the basis for social reform, and its withdrawal of the state from the service sector, neoliberalism overwrites older notions of the public based in organic solidarity with a strong mechanical overlay – as an improvement, or modernization, of more traditional social bonds. Understanding this inversion is crucial to understanding the nature of the interpretive questions to which neoliberalism gives rise in everyday life, since neoliberal reform reshapes the relationship between society and the state without eliminating what came before.”). For the impact of neoliberalization on the crime policy and practice in recent decades, see GARLAND, *supra* note 19, at 105–06.

rhetorical heft to two principal distinctions: between the public and private sectors, and, correspondingly, between law and markets as regulatory tools.³² The realities of financing government are far more complex than these rhetorical distinctions imply. Whereas the rhetoric implies complementarity (more private sector equals less government, for example), the diverse complexity of the state's roles in privatization, as well as the variety of businesses and business models involved, defy neat boundaries.³³ To the extent that maximizing the financialization of government through privatization entails deregulation or outsourcing, one should keep in mind the fact that these tools for minimizing government (as the rhetoric implicitly claims) actually extend government into new areas of the private sector, through contracts, monitoring, and other means.³⁴ A relevant example is prison privatization, which at its inception had already involved a complex cooperative arrangement between government and business, developed over the course of years.³⁵

Privatization by contract became politically popular in the United States as an approach to the governmental provision of social services, especially for the poor, for immigrants, and for prisoners—i.e., dependent populations whose situations expose them extensively

32. On the connections between the politics and rhetoric in the neoliberalization of the federal government in the United States, see GREENHOUSE, *supra* note 16, at 76, 231. On the dilemmas of the public/private distinction as related to globalization, see SALAMON, *supra* note 30, at vii. On the distinction between state law and markets as sources of regulation, see COLIN CROUCH, *THE STRANGE NON-DEATH OF NEO-LIBERALISM* 24–48 (2011); Farazmand, *supra* note 31, at 152. Michelman notes the binary ideological distinction between these terms among some proponents and critics of privatization, in contrast to the pragmatic impossibility of neatly separating them as actions or effects. See Michelman, *supra* note 7, at 1080.

33. See Farazmand, *supra* note 31, at 153; Genders, *supra* note 4, at 286–87. See generally GARLAND, *supra* note 19.

34. On the expansion of the state's role in relation to the privatization of prisons and prison alternatives in the United States, see Malcolm Feeley, *Entrepreneurs of Punishment: The Legacy of Privatization*, 4 *PUNISHMENT & SOC'Y* 321, 322–23 (2002). For a discussion of how deregulation results in a new form of regulation, see AMAN, *THE DEMOCRACY DEFICIT*, *supra* note 12, at 48–53.

35. On the development of cooperation between government and business in the prison sector, see DONNA SELMAN & PAUL LEIGHTON, *PUNISHMENT FOR SALE: PRIVATE PRISONS, BIG BUSINESS, AND THE INCARCERATION BINGE* 77–104 (2010). See also KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS*, 100–01 (1997); BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 233–39 (2011). See generally DONAHUE, *supra* note 3; Mona Lynch, *Selling 'Securityware': Transformations in Prison Commodities Advertising, 1949–1999*, 4 *PUNISHMENT & SOC'Y*, 305 (2002).

to managed care of various kinds.³⁶ Such marketization became a sort of political common sense as electorates, led by politicians and advocacy groups, became aware of global economic competition in the 1980s and 1990s.³⁷ Municipal, state, and federal contracts with private providers are not new in the United States, but—as in the prison context—such contracts were now put to new ends, with the government as both contractor and client.

Federal and state commitments to privatization are integral to the neoliberalization of global capital, even when the relevant activities are located entirely within the domestic territory of the United States.³⁸ Understanding domestic privatization in global terms clarifies the scope for law in relation to privatization—though we do not suggest that law alone (for example, in the form of legislation or contracts) will offer solutions to all the problems that currently encumber the systems of corrections in the United States.³⁹ It also introduces fresh perspectives on the situation of imprisoned people beyond their status as inmates (e.g., as wage earners, family members, citizens, and so forth). Moreover, it highlights a potentially significant role for political engagement involving diverse stakeholder communities—including inmates' families and communities.⁴⁰

36. Martin Sellers refers to the public “production” of prisons—distinguishing between production (which may be public or private, or both) and provision (which is governmental). MARTIN P. SELLERS, *THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS* 16–17, 33–36 (1993).

37. On the relevance of global economic competition to Congressional debates over immigration, welfare, and civil rights, see GREENHOUSE, *supra* note 16, at 74.

38. See GARLAND, *supra* note 19, at 127, 131–32 (discussing privatization and globalization as the context for transformations in the penal field in Great Britain and the United States).

39. See *supra* note 2 and accompanying text.

40. To the extent that the public has been involved in such decisions, the question has been framed around taxation and public expense. Commentators note that state and local prison construction has been constrained by voters' rejections of general bond issues. See *infra* note 82 and accompanying text. Michael Hallett notes that this is not the only means available to governors and local executives for raising revenues for new projects such as prison construction; lease-payment bonds are an alternative means, not subject to a referendum. See Michael Hallett, *Race, Crime, and for Profit Imprisonment: Social Disorganization as Market Opportunity*, 4 PUNISHMENT & SOC'Y, 369, 375–76 (2002) (noting lease-payment bonds are an alternative to public bonds, not subject to a referendum, available to governors and local executives for raising revenues for new projects such as prison construction). To our knowledge, the public has not been effectively involved in questions on the other side of the coin, in particular, questions arising from the fact of profit-making corporations performing the day-to-day functions of government. In the conclusions, we argue for broader public engagement on such questions, which vary with the different settings in which they arise. For example, privatizing a prison is very different than entering into a contract for the construction and maintenance of buildings, bridges or roads.

The advantage of understanding globalization’s “domestic face”—i.e., its embeddedness in the local—is the light shed on the major roles local actors and institutions can potentially play when it comes to creating a more humane conception of globalization and its practices.⁴¹ This in turn draws attention to the role of contracts in the privatization process, and their potential for introducing more specificity, transparency, and accountability into what is otherwise treated as atypical government contracts dealing, for example, with bridge or road construction.⁴² The human emergency that by definition accompanies imprisonment makes these issues vivid and urgent.

The idea that globalization and domestic law are interrelated in the private prison context may seem counter-intuitive, given that criminal law enforcement is traditionally considered a domestic function. The recent history of prison privatization, however, is fascinating precisely because it reveals how fundamental questions, such as the significance of territoriality, the scope of government, and other such basic matters actually are undecided at any given point in time.

Appreciating privatization as integral to globalization fosters a multi-centered approach to reform, open to multiple institutions and communities. As we review policy paths taken and not taken in the discussion below, our concern is not to endorse or condemn any particular approach, but to highlight the contemporary complexity of the question of how government defines its beneficiaries. Looking

Thus, distinguishing between what is public, and what is private, is highly contingent on the extent to which the interests of government, the private sector, and specific political communities (voters and others) align. We leave this point, for now, as a terminological note: throughout, we refer to government and firms—rather than public and private producers—to avoid prejudging the extent to which public and private values and interests are commensurable in any given situation.

41. See Aman, *Democracy Deficits in the U.S.*, *supra* note 12, at 7; see also SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 1 (2006) (“The epochal transformation we call globalization is taking place inside the national to a far larger extent than is usually recognized. It is here that the most complex meanings of the global are being constituted . . .”).

42. For a detailed and critical analysis of the contracting process in the context of prison health care, see Alfred C. Aman, Jr., *An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City*, 14 IND. J. GLOBAL LEGAL STUD. 301, 304 (2007) (“The least-bid government contract has its variants, such as those that provide governments some discretion when social services are involved. Such approaches, however, remain focused primarily on cost and an open bidding procedure. They may be appropriate for infrastructure projects such as roads, bridges, or public buildings, or services such as building cleaning, copy machine repair, or even food services. But they take on a negatively transformative effect when applied to more fundamental human needs such as health.”).

ahead in that spirit, one role for law might be in the development of infrastructures for reforms—e.g., contributing to the development of new forums for deliberation and stakeholder participation in relation to decisions not only regarding whether to outsource, but also how and with whom. Another role might be in forging channels across policy domains, as a corrective to the politicization of rhetoric, and the gap between rhetoric and pragmatic effects, both of which occur more easily when contentious issues are left in isolation. In this regard, labor may be seen as a major connection between the prison world and the world outside of prisons.

B. Privatization, Outsourcing, Deregulation, and Globalization: A Historical Perspective

In the United States, privatization usually means some form of outsourcing, that is, the contracting out of some or all of an administrative agency's regulatory responsibilities to a private firm.⁴³ The primary governance tool in privatization is the contract.⁴⁴ The management of prisons has been increasingly outsourced to the private sector at both the federal and state levels since its inception in the late 1980s and 1990s.⁴⁵

Privatization of government by contracting out, or outsourcing, has been a trend since the 1980s and through the 1990s—actively

43. U.S. privatization has occurred primarily in the form of outsourcing; elsewhere—in the United Kingdom and other countries where utilities and other services such as transportation are state-owned—privatization has involved the sale of government assets. Mathew Blum proposes a distinction between privatization (as sale), out-sourcing (as contract), and competitive sourcing (as a tool that is neutral as between privatization and out-sourcing). See Mathew Blum, *The Federal Framework for Competing Commercial Work between Public and Private Sectors*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND DEMOCRACY, *supra* note 6, at 64. In the context of this Article, privatization of prisons largely takes the form of outsourcing, often with a competitive sourcing rationale.

44. Federal contracts with private firms are covered by the Service Contract Act of 1965, 41 U.S.C. §§ 351–58 (2006), and the Procurement Integrity Act, 41 U.S.C. § 423 (2006). Specific authority to contract for private prisons has been the subject of debate over the years. In its 1988 report, the President's Commission on Privatization found authority for prison privatization in the Attorney General's discretion regarding the means of detaining prisoners. PRESIDENT'S COMM'N ON PRIVATIZATION, *supra* note 19, at 147; see 18 U.S.C. § 4082(a) (1988); Pub. L. No. 89-176, 79 Stat. 674 (1965) (amending § 4082). However, in 1991, and reiterated in 1995, the U.S. General Accounting Office felt this authority was insufficient, and recommended that Congress give the Bureau of Prisons explicit authority to "conduct and evaluate a pilot test of federal prison privatization." *Bureau of Prisons: Recent Concerns*, *supra* note 20, at 1.

45. AUSTIN & COVENTRY, *supra* note 20, at 3.

promoted by the Reason Foundation,⁴⁶ and the Reagan and Bush Administrations, embraced by the Clinton Administration, and accelerated by President George W. Bush's directive, the President's Management Agenda 2003, mandating all federal agencies to privatize administrative services to the maximum extent possible.⁴⁷ State legislatures have similarly mandated administrative reviews of operations and, in some cases, assets, to assess the potential for conversions to private ownership or management.⁴⁸ The Obama Administration has sought to reverse the trend towards offshore outsourcing by various means, including significant tax relief for firms that relocate to the territorial United States;⁴⁹ however, privatization through outsourcing remains a feature of government operations. Privatization is one of the primary mechanisms governments have for aligning the financialization of government with neoliberalization of the global economy.⁵⁰ In this section, we explain in broad terms how that alignment works.

46. See REASON FOUND., ANNUAL PRIVATIZATION REPORT: TRANSFORMING GOVERNMENT THROUGH PRIVATIZATION 1–2 (2006), available at <http://reason.org/files/d767317fa4806296191436e95f68082a.pdf>. SourceWatch attributes the Reason Foundation's position on privatization to the influence of George C. Zoley, CEO of GEO Group. See *George C. Zoley*, SOURCEWATCH, http://www.sourcewatch.org/index.php/George_C._Zoley.

47. See FED. ACQUISITION COUNCIL, MANAGER'S GUIDE TO COMPETITIVE SOURCING 16–22 (2d ed. 2004), available at http://www.whitehouse.gov/sites/default/files/omb/assets/procurement_guides/fac_manager_guide.pdf; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, COMPETITIVE SOURCING: REPORT ON THE USE OF BEST VALUE TRADEOFFS IN PUBLIC-PRIVATE COMPETITION 2–5 (2006), available at http://georgewbush-whitehouse.archives.gov/omb/procurement/comp_src/cs_best_value_report_2006.pdf;

OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, COMPETITIVE SOURCING: CONDUCTING PUBLIC-PRIVATE COMPETITION IN A REASONED AND RESPONSIBLE MANNER 1 (2003), available at http://www.whitehouse.gov/sites/default/files/omb/procurement/comp_sourcing_072403.pdf; REASON FOUND., *supra* note 46, at 7, 23; REASON PUB. POLICY INST., PRIVATIZATION: A COMPREHENSIVE REPORT ON CONTRACTING, PRIVATIZATION, AND GOVERNMENT REFORM 1–4 (1997).

48. See REASON FOUND., *supra* note 46, at 55–60; Robert D. Boerner, *Privatization of State Government Services*, NAT'L CONG. ST. LEGISLATURES LEGISBRIEFS, Jan. 1998. See generally KIMBERLY BANDY & STEPHEN GRIMES, PRIVATE CONTRACTS, PUBLIC SERVICES: WEIGHING THE CHOICES (1995), available at <http://www.comptroller.tn.gov/Repository/RE/private.pdf>.

49. See *Administration Support For Insourcing and Increasing Investment in the United States*, WHITE HOUSE http://www.whitehouse.gov/sites/default/files/1_10_2012_fact_sheet_on_past_support_for_insourcing_final_2.pdf (last visited Aug. 13, 2014).

50. Thus, William Novak relates privatization to larger policy trends, referring to the turn to privatization [as] the tendency of policymakers to increasingly rely on the private sector, through out-sourcing, contracting, disinvestment, and the selling and leasing of governmental properties and resources, to

When privatization takes the form of outsourcing, it is also a form of deregulation. Deregulation in the form of outsourcing is one of the predominant modes of domestic regulatory reform today, such that private firms now provide many services once provided by governments.⁵¹ Privatization and its close cousin, deregulation, are the hallmarks of U.S. regulation, in what author Alfred Aman has called the era of globalization.⁵²

Early signs of the global era were the attempts to substitute market-oriented rules for New Deal-like regulatory regimes that began as early as the Carter Administration⁵³ and accelerated greatly

meet obligations formerly thought of as distinctly public. Part of a larger set of neoliberal policy shifts that includes deregulation and an increased reliance on market mechanisms, this preference for exploring private over public solutions has permeated current policy issues ranging from international security and prisons to welfare and public health to highways and public parks.

William Novak, *Public-Private Governance: A Historical Introduction*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND DEMOCRACY, *supra* note 6, at 23; *see also* Michelman, *supra* note 7, at 1063 (“‘Privatization’ [refers to] . . . roughly, a shift toward provision by nongovernmental organizations of certain classes of goods and services, or performance by those organizations of certain classes of functions, for the provision or performance of which we’ve been accustomed to relying exclusively or mainly on government offices and agencies.”).

51. *See* PRIVATIZATION AND THE WELFARE STATE (Sheila B. Kamerman & Alfred J. Kahn eds., 2014). Privatization as it is practiced in the United States can sometimes result in a complete form of deregulation, as when Congress deregulated the price of oil at the wellhead. But deregulation can also include outsourcing since this approach seeks to substitute private actors and firms for government employees and administrative agencies. For a detailed discussion of deregulation and the ways that administrative agencies responded to and shaped the global era of regulation, *see* AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra*, note 16, at 47–53; Aman, *Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, *supra* note 16, at 1153–64.

52. *See* PRIVATIZATION AND THE WELFARE STATE, *supra* note 51. Viewed through the lens of the history of regulation in the United States, neoliberalization as an approach to globalization may be seen as a successor to earlier eras marked by their own iconic regulatory trends—the natural monopoly regulation of the New Deal era, and the tragedy of the commons that so absorbed regulators during the Environmental Era. But any such comparisons also highlight key differences. One difference is the role of Congress—much less direct now than it was when the reforms of the New Deal and the Environmental Era were put in place. Both of those eras were typified by major legislation passed by Congress, whereas today’s deregulatory reforms and their calibrations come primarily through administrative agencies and presidential executive orders. *See* Aman, *Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, *supra* note 16, at 1108–41 (providing a detailed history of these regulatory periods); *see also* AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra*, note 16, at 42–43.

53. *See* AMAN, THE DEMOCRACY DEFICIT, *supra* note 12, at 93; Alfred C. Aman, Jr., *Deregulation in the United States: Transition to the Promised Land, A New Regulatory Paradigm, or Back to the Future?*, in THE LIBERALIZATION OF STATE

under the Reagan and Bush Administrations in the 1980s. The nature of this process is perhaps best exemplified by the reforms that occurred at the Federal Communications Commission (FCC) at that time.⁵⁴ Throughout the 1980s, the FCC recalibrated its regulatory approaches to replace New Deal regulatory actions with more market-oriented rules. For the most part, courts allowed this, recognizing that the broad public interest language of New Deal statutes such as the Communications Act of 1934 allowed the agency the flexibility to substitute a new conception of what the public's interest required, especially in light of changes in the structure and competitive capacity of the industries involved.⁵⁵

Environmental regulation reform followed a somewhat similar regulatory reform path, as market regulatory approaches gradually replaced so-called command and control rules.⁵⁶ Once again, though the statutes involved were not as open-ended as New Deal legislation, there was enough interpretive room in many cases to introduce market means toward regulatory ends. There were limits to this approach,⁵⁷ but for the most part agencies themselves did most of the deregulating involved. The New Deal regulation of markets in the public interest left as part of its legacy a discourse in which deregulation in today's different economic circumstances is now similarly justified by some as if it were a corrective swing of the regulatory pendulum. However, the image of the swinging pendulum understates the differences between the Depression era and the current economic environment.

A major difference between those earlier regulatory eras and our own is that natural monopolies and the tragedy of the commons involved market *failures*, in which the government sought to protect the public's interest by intervening in particular market sectors. In the global era, the focal point of regulation is not market failure per se, but competitiveness on a global scale, resulting in a comprehensive

MONOPOLIES IN THE EUROPEAN UNION AND BEYOND 267 (Damien Geradin ed., 2000).

54. AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra* note 16, at 53–62.

55. There were limits to how far the Supreme Court would go with agency deregulation. *See, e.g.*, MCI Telecomm. Corp. v Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994) (concluding that the statutory term “modify” connotes only moderate change, not complete deregulation).

56. *See* AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra* note 16, at 24–41, 47.

57. *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983) (holding that the agency could not rescind its rule requiring airbags without providing adequate reasons for this decision).

transformation of the rationales for government itself. The neoliberalization of government means reformulating the government as a market actor suited to competition on a global scale—one appropriations budget, one agency, one entitlement at a time (to choose just some examples). Such transformations are responsive to political pressures—including strong populist pressures—to maximize the circulation of wealth by eliminating, to the extent possible, the fixed costs of government.⁵⁸

Among the reasons for the popularity of privatized approaches to the provision of government services is a basic, often untested, assumption that efficiencies will result from competition attainable only in the private sector. We call this “the efficiency story.” The efficiency story rests on three premises: first, that government services are characteristically unduly encumbered with unnecessary costs and so-called red tape; second, that market competition produces a sort of Darwinian effect of favoring the fittest; and third, that competition is consistently a feature of private sector markets.

None of these premises is valid in relation to the prison sector. With respect to the relativity of public and private efficiency, a popular assumption promoted by the industry is that private prisons are more cost-efficient than public prisons. However, more neutral studies, for example, a 2001 report under the auspices of the Bureau of Justice Assistance (BJA),⁵⁹ indicate that the cost differential between private and public prisons is minimal.⁶⁰ With regard to market competition: the prison market consists of few private sector providers and only very limited competition (in prison privatization, two main firms among approximately a score of others).⁶¹ These

58. See *supra* note 13 and accompanying text (discussing post-Fordist capitalism); see also Alfred C. Aman, *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism and Democracy*, 31 VAND. J. TRANSNAT'L L. 769, 787 (1998).

59. The BJA, a federal agency charged with monitoring prisons and other aspects of the U.S. justice system, was established by the Justice Assistance Act of 1984, Pub. L. No. 98-473, §§ 401–08, 98 Stat. 1837, 2080–85.

60. AUSTIN & COVENTRY, *supra* note 20, at iii, 59 (comparing industry “proponents” claims to twenty percent savings over public prisons, with a BJA study showing savings closer to one percent, largely due to lower labor costs, and indicating other potential gains with respect to private prisons, especially the relatively greater openness of private prison administrators to positive reforms). Overall, studies comparing the relative cost efficiency of public and private prisons are not conclusive, even to some advocates of privatization. See Geoffrey Segal, *Comparing the Performance of Private and Public Prisons*, REASON FOUND. (Apr. 4, 2008), <http://www.reason.org/news/show/comparing-the-performance-of-p.html>.

61. AUSTIN & COVENTRY, *supra* note 20, at 4. For the entrepreneurial history of the major corporations involved in international, federal, state, and local

providers are a subset of the larger and more rapidly growing private security industry.⁶² With regard to competition: the major public-private partnerships in the corrections field have long histories of multi-sided relationships. But competitiveness is not a fixed notion, nor is it automatically limited to strictly economic issues.

Privatization advocates have framed their appeals largely in terms of benefits to national, state, and local economies, while remaining relatively silent on the global context that today defines the very terms of economic competitiveness. The purpose of this subsection has been to highlight the extent to which a global context is subsumed within the idea of competitiveness itself.

C. Private Prisons and the Myth of Efficiency

Let us now return to prison privatization, in light of the observations in the previous sections. The discussion so far suggests that outsourcing in the United States occupies a dynamic political space brought about by the diversity of ways in which government is today positioned in relation to private enterprise on a global scale. There is a vein of contradiction that runs through this space. On the one hand, core governmental functions impose obligations on government budgets. On the other hand, governments are also held to account—administratively and by electorates—to minimizing those budgets and, directly or indirectly, the functions they support. Seen in this light, privatization in the form of outsourcing is, in effect, a structural compromise—maintaining governmental functions while performing them through the private sector.

Including prison privatization within the ambit of privatization overall was critical to the privatization movement's strategists, for whom "the ideological stakes in the debate over correctional contracting [were] high."⁶³ For at least some critics, the sticking point was not privatization per se, but, more concretely, the risk of introducing new vested interests into the criminal justice system.⁶⁴

privatization in the corrections sector, see *The CCA Story: Our Company History*, CCA, <http://www.cca.com/our-history> (last visited June 23, 2014); *The Wackenhut Corporation History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/the-wackenhut-corporation-history/> (last visited June 23, 2014); see also discussion *infra* Part II.

62. See DONAHUE, *supra* note 3, on the relative weakness of the private prison market.

63. LOGAN, *supra* note 5, at 5.

64. See Michael Janus, *Bars on the Iron Triangle: Public Policy Issues in the Privatization of Prisons*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS* 86 (Gary W. Bowman et al. eds., 1993); see also SELMAN & LEIGHTON, *supra* note 35, at 77–104

For others, with the privatization of prisons apparently now “here to stay,”⁶⁵ the concern is the emergence of a new bureaucratic form—only ambiguously accountable to the public—at the juncture of government and business, broadening the scope of the state into ever-expanding areas of the private sector.⁶⁶ These contradictions and the complex environment within which private prisons function require that we revisit the rationales for prison privatization.

1. *Revisiting the Rationales for Privatizing Prisons*

Prison privatization emerged as a subject of debate among academics, advocates, and policy makers in the late 1980s—a time when prisons were dramatically overcrowded, with pressures building in favor of experimentation with new forms of funding to accommodate the radical increase in demand for prison space. In his classic account, David Garland analyzes this period as marked by a dramatic and comprehensive shift in crime policy and public attitudes on both sides of the Atlantic—abandoning older ideas of rehabilitation in favor of punishment.⁶⁷

(detailing a range of vested interests in a variety of prison contracts, including the real estate investment trust arrangements of the main private corrections firms (guaranteeing tax relief to the firms and a large return on profits to shareholders), and the IPO offerings of all the U.S. corrections firms that sell shares on the stock exchange)).

65. See Alexander Volokh, *A Tale of Two Systems: Cost, Quality and Accountability in Private Prisons*, 115 HARV. L. REV. 1838, 1868 (2002). On privatization as a durable element of corrections, see Feeley, *supra* note 34, at 339–40.

66. Sarah Armstrong calls it “entrepreneurial bureaucracy.” Sarah Armstrong, *Punishing Not-For-Profit: Implications of Nonprofit Privatization in Juvenile Punishment*, 4 PUNISHMENT & SOC’Y 345, 347 (2002). For Shichor and Gilbert, the relevant term is “subgovernment.” See David Shichor & Michael J. Gilbert, *Introduction to PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT AND FUTURE*, *supra* note 2. On the extension of the state into the entrepreneurial sector through prison privatization and alternatives to incarceration, see Feeley, *supra* note 34, at 322.

67. For an analysis of mass incarceration in the context of transnational neoliberal capitalism, see David Downes, *The Macho Penal Economy: Mass Incarceration in the United States—a European Perspective*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 51, 51–65 (David Garland ed., 2001). See generally NILS CHRISTIE, *CRIME CONTROL AS INDUSTRY: TOWARD GULAGS, WESTERN STYLE* (3d ed. 2000); GARLAND, *supra* at note 19; THOMAS MATHIESEN, *PRISON ON TRIAL* (1990); JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990* (1993) [hereinafter SIMON, *POOR DISCIPLINE*]; Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implication*, 30 CRIMINOLOGY 449 (1992); Jonathan Simon, *Rise of the Carceral State*, 74 SOC. RES. 471 (2007) [hereinafter Simon, *Rise of the Carceral State*]. On mass incarceration in the United States, see generally Natasha

Discussion of prison privatization usually begins with the convergence of three developments: a burgeoning prison population, economic pressures on government coffers, and the mood of the electorate (e.g., pressing for more effective prosecution of street crime and longer sentences, and resistance to adding to tax burdens with construction of new facilities for inmates). This is a standard narrative well established in academic and policy literatures. In this context, it is worth emphasizing that the explosion of population growth in jails and prisons was not due to a general rise in criminal activity. Rather, it was due to specific policy shifts that expanded criminalization, particularly of drug offenses, and approaches to punishment embodied by so-called three-strikes laws. The legislative sources are the Comprehensive Crime Control Act of 1984 (which created the U.S. Sentencing Commission, whose guidelines went into effect on November 1, 1987) and the Anti-Drug Abuse Acts of 1984 and 1987.⁶⁸ These Acts resulted in new convictions, longer sentences and reduced availability of parole—filling prisons well beyond their designed capacity.⁶⁹

The spike in federal incarceration in the decade between the late 1980s and the late 1990s is generally ascribed to the increase in convictions of non-violent drug offenders under the 1984 and 1988 legislation cited above. By the end of 1997, sixty-eight percent of all minimum-security federal prisoners were non-violent drug

A. Frost & Todd R. Clear, *Understanding Mass Incarceration as a Grand Social Experiment*, 47 *STUD. L. POL. & SOC'Y (SPECIAL ISSUE)* 159 (2009); Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 *LAW & SOC'Y REV.* 33 (2011). Austin and Coventry suggest that given the intensity of contemporary cost-efficiency pressures, there is “little need” for industry promoters to make claims regarding their rehabilitative capacity. See AUSTIN & COVENTRY, *supra* note 20, at 13. On mass incarceration in the United Kingdom, see generally GARLAND, *supra* note 19; Genders, *supra* note 4.

68. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181. The periodization of the dramatic rise in the inmate population to the effects of this legislation is well established by the separate studies of mass incarceration. See Gary W. Bowman et al., *Introduction* to PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 64, at 1–2; see also Hallett, *supra* note 40, at 371. See generally GARLAND, *supra* note 19; *Bureau of Prisons: Recent Concerns*, *supra* note 20; SIMON, POOR DISCIPLINE, *supra* note 67.

69. See *Bureau of Prisons: Recent Concerns*, *supra* note 20, at 1. Meanwhile, Congress continued to hold hearings on prison crowding, considering recommendations for reducing incarcerations by promoting alternatives to prison, such as electronic supervision, split sentences, half-way houses, and privatization.

offenders.⁷⁰ At the state level, forty-four percent of the increase in the prison population between 1986 and 1991 was due to the rise in non-violent drug offense incarcerations.⁷¹ In South Carolina correctional facilities alone, between 1989 and 1993, there was a thirty-three percent increase in inmates.⁷² By 2001, a Department of Justice report estimated that some two million inmates were incarcerated in the United States.⁷³

Pressure against capacity became a persuasive rationale for privatization, at least among policy makers. The policy scenario includes expanding accommodations for inmates with minimal investment on the part of government, by virtue of the government's participation in corrections as a client rather than as provider. One way to build new prisons without raising taxes is to outsource their construction and management to private firms. Private firms pay the upfront construction costs and amortize them over a number of years. In this way, new prisons can be built without significantly affecting state taxes or budgets, although, as Hallett points out, taxpayers are involved eventually in all state expenditures.⁷⁴

Since at least the 1970s—well prior to the crowding crisis of the late 1980s—federal capacity shortages were chronic in an episodic way, resulting in periodic demands for Congressional appropriations for Bureau of Prisons budgets and authorizations for new construction. In 1975, for example, Congressional hearings on the shortage of federal capacity considered a recommendation to transfer all federal prisoner administration to the states—along with other recommendations (some of them still under consideration today) regarding alternatives to incarceration.⁷⁵ Congressional moratoria on new prison construction and reductions in block grants to states strained the Federal Bureau of Prisons and state agencies prior to the

70. JOANNE O'BRYANT, CONG. RESEARCH SERV., IB92061, PRISONS: POLICY OPTIONS FOR CONGRESS 7 (2000), available at <http://research.policyarchive.org/835.pdf>.

71. *See id.*

72. *See* GEORGE SEXTON, U.S. DEP'T OF JUSTICE, WORK IN AMERICAN PRISONS: JOINT VENTURES WITH THE PRIVATE SECTOR 5 (1995), available at <https://www.ncjrs.gov/pdffiles/workampr.pdf>.

73. AUSTIN & COVENTRY, *supra* note 20, at iii.

74. *See* Hallett, *supra* note 40, at 376.

75. *Federal Bureau of Prisons Institutions Prison: Construction Plans and Policy: Hearings Before the Subcomm. on Courts, Civil Liberties, and Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., 383 (1975), available at <http://congressional.proquest.com/congressional/docview/t29.d30.hrg-1975-hjh-0027?accountid=13314> (login required).

dramatic spike in the inmate population that has been well-noted for the later 1980s and subsequently.⁷⁶

But one should not assume that prison privatization originated as an initiative within the government; it was an idea that circulated between actors in government and business firms long before the first private prisons were authorized. The development of the market for private prison services and management was complex over at least a decade prior to the initiatives that resulted in the full privatization of prisons—multi-faceted collaborations between federal, state, and local governments, and the private sector: businesses developing their competitive capacity and promoting their services while governments (in effect) warranted their investment by delivering legislation that allows for contracts in those service sectors.⁷⁷ A governmental Request for Proposals (RFP), which solicits bids for a contract, is in this sense the culmination of a collaboration, not the beginning of one. Successful bids on contracts are, in turn, warrants (in effect) of the value of shareholder investment through public offerings. The U.S. corrections field came into view as an untapped market from within the fast-paced development of the private security industry in the 1980s,⁷⁸ and after other countries began to contract for security and corrections facilities with U.S. corporations.⁷⁹ It is not surprising that “the market” may consist of very few firms. Within the United States, the vast majority of prison privatization contracts have been awarded to just two firms: Corrections Corporation of America (CCA) and The GEO Group (GEO) (formerly Wackenhut

76. The importance of Congressional attempts to discipline the Bureau of Prisons with funding limits and bans on new construction in the 1970s is two-fold: one, to highlight the relevance of states as resources available to the federal government to address deficiencies at the federal level, and two, to underscore the extent to which the public’s later reluctance to fund new prison construction with bond issues followed Congressional action. See *infra* notes 99–107. On reductions of block grants to states, see SELLERS, *supra* note 36, at 14–16, tbl.1.3.

77. See SELLERS, *supra* note 36; see also SELMAN & LEIGHTON, *supra* note 35, at 89–90, 101.

78. See BECKETT *supra* note 35, at 101. For a state-level case study of the complexities of private interests in law and order, see Michael C. Campbell, *Politics, Prisons, and Law Enforcement: An Examination of the Emergence of “Law and Order” Politics in Texas*, 45 LAW & SOC’Y REV. 631 (2011).

79. GEO’s website gives prominence to its contracts elsewhere in the English-speaking world—South Africa, Australia, and the United Kingdom. Indeed, GEO had extensive international clients prior to the expansion of its corrections sector in the United States. See *Historic Milestones*, GEO GROUP, INC., <http://www.geogroup.com/history/> (last visited June 23, 2014); see also *The Wackenhut Corporation History*, *supra* note 61.

Corrections Corporation).⁸⁰ These are large corporations that build and operate private prisons, among other services and products that pre-dated the emergence of opportunities for private prison construction and management.⁸¹

2. *The Chronology of Prison Privatization*

The efficiency story usually associated with discussions of prison privatization has two elements—inmate crowding and cost control. However, as indicated in the previous section, it is not at all clear that prison privatization—at its inception—*followed* the dramatic increase in prosecutions in the late 1980s that led to higher rates of conviction and incarceration, and prison crowding. A more agnostic view of the crowding crisis would acknowledge that prison crowding was the *result* of federal policies, not, initially, their justification. Indeed, the rationales for prison privatization were developed—in think tanks, boardrooms, and private offices—at least a decade before the current overcrowding crisis became evident in the late 1980s and 1990s. Support for prison privatization among politicians and policy makers emerged earlier than—and independently of—the carceral explosion and voter resistance to bond issues, even if it later became inseparable from those developments.⁸²

80. See AUSTIN & COVENTRY, *supra* note 20, at 4, tbl.3. For the entrepreneurial history of one major corporation involved in international, federal, state, and local privatization in the corrections sector, see *The Wackenhut Corporation History*, *supra* note 61.

81. GEO was founded in 1984, *Historic Milestones*, *supra* note 79, and now runs 106 facilities around the world, claiming a cost savings of thirty percent over the public sector. *Welcome to the GEO Group, Inc.*, GEO GROUP, <http://www.geogroup.com/> (last visited Apr. 15, 2015). Its first federal partnership was with ICE in 1987, in connection with the Aurora ICE Processing Center. *Historic Milestones*, *supra* note 79. Its first federal contract to build and run an entire prison involved the demonstration project discussed below, at the Taft Correctional Institution, in California. See *id.* CCA has been a long-time participant in public-private sector dialogues over prison privatization (including Congressional hearings and the President's Commission on Privatization, cited below). GEO's CEO, George C. Zoley, has been active in promoting prison privatization to government since the early to mid-1980s. See *id.*

82. The Federal Bureau of Prisons' 1990 budget submission called for doubling prison capacity by 1995. The federal inmate population increased by fifty percent between 2000 and 2012—more than double the Bureau of Prisons' targeted rate for reducing crowding. See U.S. GOV'T ACCOUNTING OFFICE, GAO-12-743, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF AND INFRASTRUCTURES 1 (2012), available at <http://www.gao.gov/assets/650/648123.pdf>. On the disconnections between political decision-making and the problems affecting the prison system, see Janus, *supra* note 64, at 86.

At this same time, just ahead of the prison crowding crisis, crime and fear of crime became political issues as successive Republican Party platforms claimed policy credit for declines in the crime rate in 1984 and 1988, as the Reagan and Bush Administrations expanded the scope of criminalization.⁸³ The strategic gambit of controlling crime while controlling budgets continued throughout the 1990s. The Republican Party's platform in 1992 promoted privatization under the rubric of "managing government in the public interest"; it also noted President Bush's freeze on regulation, new taxes, and commitment to balancing the budget.⁸⁴ The pledge to expand privatization continued in the Republican Party's platform in 1996, under the rubric of "streamlining government."⁸⁵ But streamlining government, in practice, primarily took the form of reductions of federal grants to states.⁸⁶

The practice of setting budget restrictions and imposing moratoria on new construction were consistent with strategies outlined by the GAO as likely to "encourage" agency managers to take privatization seriously:

Governments may need to enact legislative changes and/or reduce resources available to government agencies in order to encourage greater use of privatization. Georgia, for example, enacted legislation to reform the state's civil service and to reduce the operating funds of state agencies. Virginia reduced the size of the state's workforce and enacted legislation to establish an independent state council to foster privatization efforts. These actions, officials

83. The Republican platforms mentioned declines in the crime rate in both years. See *Republican Party Platform of 1984*, AM. PRESIDENCY PROJECT (Aug. 20, 1984), <http://www.presidency.ucsb.edu/ws/?pid=25845> (last visited Nov. 8, 2014); *Republican Party Platform of 1988*, AM. PRESIDENCY PROJECT (Aug. 16, 1988), <http://www.presidency.ucsb.edu/ws/?pid=25846> (last visited Nov. 8, 2014).

84. See *Republican Party Platform of 1992*, AM. PRESIDENCY PROJECT (Aug. 17, 1992), <http://www.presidency.ucsb.edu/ws/?pid=25847> (last visited June 22, 2014).

85. See *Republican Party Platform of 1996*, AM. PRESIDENCY PROJECT (Aug. 12, 1996), <http://www.presidency.ucsb.edu/ws/index.php?pid=25848> (last visited Nov. 10, 2014). Earlier Republican platforms did not mention privatization. In 1996, the director of the Bureau of Prisons, Kathleen Hawk Sawyer, supported privatization in her budget request on the grounds that it would be a means of complying with the Federal Workforce Restructuring Act, without reducing prison capacity. For information on Kathleen Hawk Sawyer, see *Historical Information*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/history/past_directors.jsp (last visited Nov. 10, 2014). Her successor, Harley G. Lappin (Director of the Bureau of Prisons from 2003 to 2011), left the government to take a position as Executive Vice-President and Chief Corrections Officer at CCA. On Lappin's move to the private sector, see *PA Prison Report*, HUM. RTS. COALITION, (June 13, 2011), <http://www.hrcoalition.org/node/144>.

86. See SELLERS, *supra* note 36, at 14–15.

told us, sent a signal to managers and employees that political leaders were serious about implementing privatization.⁸⁷

Even with this surge of political interest in crime, prisons filling beyond capacity, and campaigns to promote privatization within the government, uptake of the private prison option was apparently slow to take hold. A brief on prisons by the Congressional Research Service in 2000 indicates that the idea of contracting private management for the entirety of a prison's operations was new and "controversial."⁸⁸ GAO reports at the time indicated that a key concern was a perceived lack of clear statutory authority for outsourcing; fear of walkouts and strikes on the part of private sector prison staff were among the concerns raised by critics.⁸⁹ In the United States today, roughly ten percent of all prison and jail inmates are housed in privatized facilities—approximately 200,000 individuals.⁹⁰ Approximately ten percent of federal inmates are housed in private facilities.⁹¹ By 2001, there were 158 private prison facilities in the United States.⁹² Most states have at least one private prison, with the largest numbers of privatized facilities in California, Florida, and Texas.⁹³ Privatized detention facilities have also developed for the detention of juveniles and unregistered immigration.⁹⁴

Some states were ahead of the federal government in their experiments with privatization, encouraged in part by President Bush's authorization to states and local governments receiving federal

87. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-87, PRIVATIZATION: QUESTIONS STATE AND LOCAL DECISIONMAKERS USED WHEN CONSIDERING PRIVATIZATION OPTIONS 12 (1998), available at <http://www.gao.gov/assets/200/198870.pdf>.

88. See O'BRYANT, *supra* note 70, at 8.

89. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-96-158, PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE: REPORT TO THE SUBCOMM. ON CRIME, COMM. OF THE JUDICIARY 1 (1996), available at <http://www.gao.gov/archive/1996/gg96158.pdf>.

90. On total prison and jail population, see *Prison Privatization*, *supra* note 19. On federal prison population, see *Bureau of Prisons: Recent Concerns*, *supra* note 20, at 6.

91. See *Bureau of Prisons: Recent Concerns*, *supra* note 20, at 6–7.

92. See AUSTIN & COVENTRY, *supra* note 20, at iii. The same report indicates that 3100 inmates were housed in private prisons worldwide in 1987, and 132,000 worldwide in 1998. *Id.*

93. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 89, at 40 tbl.IV.1. For analyses of citing decisions suggest the complexity of such processes, see generally Mona Lynch, *Punishment, Purpose, and Place: A Case Study of Arizona's Prison Siting Decisions*, 50 STUD. L., POL., & SOC'Y 105 (2009).

94. See *Prison Privatization*, *supra* note 19.

aid to privatize.⁹⁵ By 1996, the GAO reported that “some states [had] contracted with private corporations for prison operations.”⁹⁶ The fiscal year 1996 budget of the Federal Bureau of Prisons expanded its request for appropriations in this area.⁹⁷ Finally, in 1997, GEO was awarded a five-year demonstration project to build and manage a private prison in Taft, California, bringing to fruition a long campaign, involving multiple parties within the federal government and in the private sector, in support of experimentally expanding the role of the private sector in corrections.⁹⁸

In sum, several policy and political developments converged to create the conditions that yielded prison privatization: a broad-based policy search for alternatives to incarceration;⁹⁹ constraints on supply in the form of court-ordered ceilings on prison population in states;¹⁰⁰ failed bond issues for prison construction in states and municipalities;¹⁰¹ fluctuating appropriations to federal and state agencies;¹⁰² congressional caps on the federal budget and restrictions on new prison construction;¹⁰³ rising demand resulting from Congressional legislation mandating new areas of federal prosecution and specific sentencing guidelines;¹⁰⁴ and a Congressional mandate that shifted all D.C. prisoners into the federal system.¹⁰⁵ Prison privatization became a new area of venture capital¹⁰⁶ as privatization

95. See *Republican Party Platform of 1992*, supra note 84.

96. O'BRYANT, supra note 70, at 1.

97. See *id.* at 6.

98. See *id.*

99. See *id.* at 1, 7.

100. See TODD R. CLEAR ET AL., *AMERICAN CORRECTIONS* 474 (10th ed. 2013) (discussing court-ordered ceilings).

101. See *Prison Privatization*, supra note 19.

102. O'BRYANT, supra note 70, at 2.

103. See JAMES, supra note 13, at 30 (“[R]ecent reductions in funding for the New Construction decision unit . . . mean that the BOP will lack the funding to begin any new prison construction in the near future, which could result in increased overcrowding in the federal prison system if the federal prison population does not continue to decrease . . .”).

104. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf.

105. See *Inmate Legal Matters*, FED. BUREAU PRISONS, http://www.bop.gov/inmates/custody_and_care/legal_matters.jsp (“The National Capital Revitalization and Self-Government Improvement Act of 1997 transferred responsibility of District of Columbia Code felony offenders to the BOP.”).

106. See *The Prison Boom Produces Privatization*, CORRECTIONS PROJECT, http://www.correctionsproject.com/corrections/pris_priv.htm (last visited June 17, 2014).

more broadly took hold as a philosophical/political commitment¹⁰⁷—both developments taking place prior to the crowding of prisons and funding and resource shortages that are the more usual start to narratives on this subject. An appropriate chronology is key to understanding the context of prison privatization in relation to neoliberal globalization, and its current stakes in human terms.

To conclude Part I, we suggest that while there is obvious relevance to the fact of prison crowding and the reality of taxpayer resistance to funding expansions of government obligations, one must consider the possibility that the loss of political support for funding the government and the popularity of marketization were the result of the neoliberal policies rather than its driving cause. In our view, explaining the origins of prison privatization in the situation of underfunding and overcrowding risks mistakes effects as causes.

By 1988, the push to privatize prisons, in one form or another, involved every branch of government at the highest levels, revealing significant tensions between them, as well as between and within the two main political parties. It is crucial to appreciate the differences

107. The first two wholly private prisons under contract to the federal government were in Leavenworth, Kansas. On Leavenworth, see J. Duncan Moore, *Federal Prison To Be Built, Run By Private Firms*, S.F. CHRON., Dec. 18, 1990, at A10. Leavenworth is a project of the Corrections Corporation of America (CCA). CCA specializes in maximum security, and is the fifth largest corrections system in the United States (after its competitor, GEO, and three states). It manages sixty-one facilities nationwide. See *CCA's Nationwide System of Correctional Centers*, CCA, <https://www.cca.com/locations> (last visited Nov. 10, 2014). In 1990, the Director of the Bureau of Prisons was Michael Quinlan (director 1987–1992), whose previous professional experience included service as executive assistant to the warden at Leavenworth Penitentiary. See *J. Michael Quinlan*, FED. BUREAU PRISONS, http://www.bop.gov/about/history/past_directors.jsp (last visited Nov. 10, 2014). Leavenworth is currently under contract to the U.S. Marshals Service. See *U.S. Facts Sheet*, U.S. MARSHALS SERVICE, <http://www.usmarshals.gov/duties/factsheets/general-1209.html> (last visited June 22, 2014). Taft Correctional Institution was established by Congress in 1997, as a five-year federal demonstration project, under contract with GEO. See *Historic Milestones*, *supra* note 79. A demonstration project of this kind was a longstanding recommendation of the GAO. See U.S. GEN. ACCOUNTING OFFICE, GA/GGD-91-21, PRIVATE PRISONS: COST SAVINGS AND BOP'S STATUTORY AUTHORITY NEED TO BE RESOLVED 4-5 (1991), *available at* <http://www.gao.gov/assets/160/150187.pdf>; U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-1BR, PRISON CROWDING: ISSUES FACING THE NATION'S PRISON SYSTEMS 19 (1989), *available at* <http://www.gao.gov/assets/80/77582.pdf>; see also U.S. GOV'T ACCOUNTING OFFICE, *supra* note 82, at 5. The project evaluation was contracted to a private consulting firm, Abt Associates. See DOUGLAS C. McDONALD & KENNETH CARLSON, ABT ASSOCS., INC., CONTRACTING FOR IMPRISONMENT IN THE FEDERAL SYSTEM: COST AND PERFORMANCE OF THE PRIVATELY OPERATED TAFT CORRECTIONAL INSTITUTION v (2005), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/211990.pdf>.

between the visions and values that guided these efforts; this is the theme of Part II.

II. PRISON PRIVATIZATION AND PRISON LABOR

The previous discussion argues for lengthening the chronology of prison privatization so as to include the privatization movement in history in an integral way. Doing so adds at least a decade to the story. It also broadens and enriches the context around prison privatization, to include more of the complex social, legal, and political tectonics of the period. Prisons were at the crux of the contradictory crosscurrents discussed above, as demand for stronger measures against offenders (and corresponding demand for new prisons) was at odds with the simultaneous demand for leaner government and brakes on public expenditure. Whatever the appeal of privatization as a structural compromise in theory, the substantive consequences were dramatic as a practical matter. Rates of imprisonment soared even as crime rates declined.¹⁰⁸ Concerned by the unprecedented levels of incarceration that heavily disfavored young black men, some socio-legal scholars saw the situation as a fundamental transformation of state and society—as prisons filled with young men who had been displaced from the labor force in a new climate in which economic risk was displaced onto workers, for whom persistent under- and unemployment became the norm.¹⁰⁹ However, crime policies turned away from rehabilitation, and increasingly toward confinement and punishment.¹¹⁰ As David

108. On privatization as part of the context for mass imprisonment, see GARLAND, *supra* note 19, at 131–35. The phrase “mass imprisonment”—now in general usage—was Garland’s coinage. In Garland’s analysis, mass imprisonment—“the systematic imprisonment of whole groups” (in the United States, young black men)—was the “overdetermined outcome of a converging series of policies and decisions” that included prison privatization and “Reaganomics.” David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES, *supra* note 67, at 2 [hereinafter Garland, *Introduction*].

109. On the need for attention to the restructuring of the economy, see McLennan, *The New Penal State*, *supra* note 23, at 407, 415. On income inequality, see generally Martina Morris & Bruce Western, *Inequality in Earnings at the Close of the Twentieth Century*, 25 ANN. REV. SOC. 623 (1999). On globalization, see generally Ruth Wilson Gilmore, *Globalisation and U.S. Prison Growth: From Military Keynesianism to post-Keynesian Militarism*, 40 RACE & CLASS 171 (1998/1999).

110. Major analyses are now classics in socio-legal studies. In addition to GARLAND, *supra* note 19 and MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES, *supra* note 67. See generally CHRISTIE, *supra* note 67; MATHIESEN, *supra* note 67; SIMON, POOR DISCIPLINE, *supra* note 67; Feeley & Simon, *supra* note 67; Simon, *Rise of the Carceral State*, *supra* note 67. On privatization and welfare policy, see Downes, *supra* note 67, 61–63; see also JONATHAN SIMON, MASS

Garland observes, incarceration was no longer a matter of reforming individual offenders, but of newly normal selective effects that made prison “a shaping institution for whole sectors of the population.”¹¹¹

These were major changes; however, from the vantage points afforded by the longer timeframe we propose for prison privatization, the budget constraints and prison overcrowding subsequent to the late 1980’s may be seen as relatively late developments. The prison crisis may account for the conditions that made prison privatization (like privatization more generally) politically saleable, but the context, the idea, its rationales and strategies for implementation, and even the firms themselves were already explicitly circulating by that time. In this Part, we look to that earlier period—to two earlier prison reform initiatives that are part of the longer history that made privatization integral to the globalization of capital. Both initiatives involve prison labor. Their similarities and differences are relevant to an analysis of privatization as entailing diverse means and ends, as well as diverse political locations within and beyond government.

These initiatives were Federal Prison Industries, now known as “UNICOR,” and Prison Industry Enhancement, or PIE. UNICOR is a government owned corporation that manages inmate production of goods and services available for sale to the government and, under some circumstances, on the open market.¹¹² In its current incarnation, UNICOR is a form of outsourcing in the sense that it draws on labor segregated from the domestic labor force by a state border (i.e., prison walls) that demarcates a legal differential of wages and hours, among other things.¹¹³ UNICOR is not a private enterprise, but it has been increasingly pressed to “act” like a private sector firm since its re-establishment by Congress as a self-supporting agency in 1988, and

INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 73–108 (2014).

111. Garland, *Introduction*, *supra* note 108, at 1.

112. UNICOR, FED. BUREAU PRISONS, http://www.bop.gov/inmates/custody_and_care/unicor.jsp.

113. See Stephanie Overby, *Prison Labor: Outsourcing’s “Best Kept Secret,”* CIO.COM (May 27, 2010), <http://www.cio.com/article/2417888/outsourcing/prison-labor--outsourcing-s--best-kept-secret-.html> (“Since 1999, private corporations in the U.S. have outsourced a variety of business services to federal prison inmates, who today earn around \$1 an hour for call center work. Proponents of the practice claim prison labor is a low-cost alternative to offshore outsourcing, but critics say it takes jobs away from law-abiding U.S. citizens.”).

on-going pressures in the direction of increased competition and absorption of financial risk.¹¹⁴

By contrast, PIE brings private firms into prisons, giving private sector employers access to inmates as a work force.¹¹⁵ UNICOR produces goods and services for an essentially governmentally-guaranteed market (as we shall see); PIE relies on the open market.¹¹⁶ Together, consideration of these programs (discussed separately in the following sections) lends fresh prominence to the role of labor in relation to privatization in the prison context. Once the integral relation of prison labor and global capital is appreciated, prison privatization and the new pressures on labor to absorb the risk in economic fluctuations may be understood in turn as related developments. By attending to the government's diverse efforts to position prison labor in relation to privatization, the connections between globalization, privatization, and prisons are themselves clarified—in turn clarifying the context of prison reform as entailing issues beyond prisons, particularly in relation to the vulnerability of the labor force to fluctuating market conditions.

A. Prison Industry Enhancement (PIE)

PIE is a key development in prison privatization that dates from the 1970s, ultimately taking the form of the Prison Industry Enhancement Certification Program (PIECP) in 1979. PIECP is a federal program set up under the Justice System Improvement Act of 1979¹¹⁷—legislation sponsored by Senator Edward Kennedy (D-MA), with co-sponsors from both sides of the aisle.¹¹⁸ The Act set up the main federal agencies charged with research and evaluation of criminal justice programs, including corrections: the National Institute of Justice, the National Criminal Justice Research Center, the Law Enforcement Assistance Administration, and the Bureau of Justice

114. Cf. Nate C. Hindman, *Unicor Under Fire for Dominating Small Competitors with Cheap Prison Labor*, HUFFINGTON POST (Aug. 15, 2012, 12:48 PM), http://www.huffingtonpost.com/2012/08/15/unicor-prison-labor_n_1778765.html.

115. See DOMINGO S. HERRAIZ, BUREAU OF JUSTICE ASSISTANCE, PROGRAM BRIEF: PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM (2004), available at <https://www.ncjrs.gov/pdffiles1/bja/203483.pdf>.

116. See *id.* at 3 (describing program criteria, including “[a]uthority to involve the private sector in the production and sale of inmate-made goods on the open market”).

117. Justice System Improvement Act of 1979, Pub.L. 96–157, 93 Stat. 1167 (1979).

118. The bill was co-sponsored by Republican Robert McClory of Illinois. *H.R. 2061 (96th): Justice System Improvement Act of 1979*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/96/hr2061> (last visited Apr. 15, 2015).

Statistics.¹¹⁹ The final section of the Act set up the PIECP, a program designed to give authorization, on a limited and prescribed basis, to state and local corrections agencies to contract with private sector firms for purposes of running those firms' operations within prisons.¹²⁰

Subsequently expanded to offer broader participation, eligibility for enhanced prison industry certification entails specific conditions. In particular, if prison-made goods are to be sold on the open market, wages must be on a par with other local producers, and there must be no displacement of local workers.¹²¹ These restrictions have tended to reinforce niche production, i.e., in sectors where there is no local competition. Partners must further demonstrate that their venture will not impair existing contracts.¹²² Labor unions must be informed and consulted.¹²³ Once certification is complete, the PIE model involves two main features. First, it brings a private sector enterprise fully within the prison walls, to be run on standard business principles, for profit.¹²⁴ Second, prisoners are employees of the company, earning wages that are subject to various forms of withholding (FICA, Medicaid, taxes, child support, and required personal savings for the inmate's use, post-release).¹²⁵ There are a variety of employment models; some inmates work directly for the company, while others are employed by prison management and assigned to the company. States write their own guidelines for enhanced prison industry programs.¹²⁶

119. *About the Bureau of Justice Statistics*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=abu> (last visited Apr. 15, 2015).

120. Individual enhanced prison industry programs set up under PIECP are known by the nickname "PIE"—for Prison Industry Enhancement. Description of the Act, PIECP, and individual PIEs is based on the Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167. The best and most comprehensive analysis of PIECP, and a detailed assessment of South Carolina's experience with PIE, is an unpublished doctoral dissertation by Marie Fajardo Ragghianti. Marie Fajardo Ragghianti, *Prison Industries in South Carolina: 1996-2005, Why and How the PIE Model prospered* 128-232 (2008) (unpublished manuscript), available at <http://drum.lib.umd.edu/bitstream/1903/8178/1/umi-umd-5360.pdf>; see also SEXTON, *supra* note 72.

121. See Ragghianti, *supra* note 120, at 187.

122. *Id.*

123. *Id.* at 46.

124. See HERRAIZ, *supra* note 115, at 3 ("The program provides a stable and readily available workforce. In addition, many correctional agencies provide manufacturing space to private-sector companies involved in the program.").

125. See *id.* ("Corrections departments may opt to take deductions from inmate worker wages. Permissible deductions are limited to taxes, room and board, family support, and victims' compensation.").

126. Ragghianti ascribes some of South Carolina's success to the Division of Corrections Industries director's inclusion of organized labor in a revision of the state

Uptake of PIE has been selective—perhaps an indication of the particularity of the circumstances favoring such joint ventures.¹²⁷ The most successful PIEs in terms of private sector response and profitability of their enterprises are in South Carolina, Kansas, and Texas.¹²⁸ South Carolina's program has been the largest and most successful program from the outset in the vanguard of recruiting private sector ventures and developing successful partnerships with firms.¹²⁹ In South Carolina, the Division of Corrections Industries' private sector partners include Fortune 500 companies such as Escod Industries (a cable manufacturing firm whose clients include IBM), as well as commercial enterprises that include Third Generation (a luxury lingerie manufacturer for retailers such as Victoria's Secret and J.C. Penney) and Jostens, Inc. (the nation's largest manufacturer of graduation gowns).¹³⁰ Other states have successfully engaged other partners. California's enhanced prison industry ventures at one time included a Trans World Airlines reservations call center in a youth detention center.¹³¹ Arizona's ventures included a Best Western reservation call center in a women's prison.¹³² Connecticut's included the Chesapeake Cap Company (a manufacturer of baseball caps).¹³³ By 1993, thirty-two correctional agencies were participating in the private sector market through PIECP.¹³⁴ By the end of 2000, a total of some 3700 state inmates were participating in PIE,¹³⁵ by the end of

guidelines. Ragghianti, *supra* note 120, at 157. In some states, guidelines were less well received; the Washington State Supreme Court declared the state's PIE unconstitutional. Wash. Water Jet Ski Workers Ass'n v. Yarbrough, 90 P.3d 42 (Wash. 2004); see Ragghianti, *supra* note 120, at 273–76.

127. See generally SEXTON, *supra* note 72.

128. Figures are as of 2008. See Ragghianti, *supra* note 120, at 322.

129. See *id.* at 9.

130. See SEXTON, *supra* note 72, at 7–8.

131. See *id.* at 9–10.

132. See *id.* at 9.

133. See *id.* at 10–11. For additional partnerships, see also *FPI Inmate Programs*, UNICOR, http://www.unicor.gov/About_FPI_Programs.aspx (last visited Nov. 10, 2014).

134. See SEXTON, *supra* note 72, at 3.

135. See THOMAS W. PETERSIK ET AL., IDENTIFYING BENEFICIARIES OF PIE INCOMES: WHO BENEFITS FROM WAGE EARNINGS OF INMATES WORKING IN THE PRISON INDUSTRY ENHANCEMENT (PIE) PROGRAM 1 (2003), available at <http://www.nationalcia.org/wp-content/uploads/researchfullrpt1.pdf>; see also MARILYN C. MOSES & CINDY J. SMITH, FACTORIES BEHIND FENCES: DO PRISON 'REAL WORK' PROGRAMS WORK? 33 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/jr000257h.pdf>.

2005, 6555 inmates were in the program, bringing the total inmate participation to 70,000 since its inception.¹³⁶

In South Carolina and elsewhere, enhanced prison industries under PIECP are more profitable than the older Federal Prison Industries program (further discussion below), and both are more profitable than traditional prison work programs (license plates, road signs, etc.).¹³⁷ However, the private sector has not been responsive to enhanced prison industry initiatives in many states, and a study by Thomas Petersik et al., sponsored by the National Corrections Institute of America (NCIA) found that the benefits and beneficiaries of prison industry enhancement are neither well known nor understood.¹³⁸

The Petersik et al. study remains the principal source on the question of the benefits of the PIE program. The research team asked two questions: Who are the financial beneficiaries of PIE wages? And, what would be the effect of paying PIE employees on par with the civilian work force? The answer to the first question was very broad. Petersik et al. found that fifty-three to fifty-seven cents on every dollar of inmate wages goes to beneficiaries other than the inmate.¹³⁹ Non-inmate beneficiaries prominently include the corrections system, with approximately one third of inmate wages going to his or her room and board costs.¹⁴⁰ Other beneficiaries include the taxpayers who derive indirect benefit from reduced pressure on state budgets due to inmates' wage contributions. With regard to the effects of improving wages and expanding the program, Petersik's team found that PIE's profitability and benefits would likely increase under both conditions.¹⁴¹

While PIE's advocates in corrections and in the private sector are attentive to the prospects for assimilating prison labor into the economy,¹⁴² the thrust of their concerns has mainly been in directions other than raising wages. PIE offers entrepreneurs a competitive advantage over the alternative of moving to Mexico or offshore, depending on the location of a prison factory relative to its markets, among other factors. One corporate head reported using his PIE

136. See MOSES & SMITH, *supra* note 135.

137. See Ragghianti, *supra* note 120, at 12.

138. PETERSIK ET AL., *supra* note 135, at 7.

139. *Id.* at xii. PIE inmates in South Carolina have sued over deductions. See Ragghianti, *supra* note 120, at 168.

140. See PETERSIK ET AL., *supra* note 135, at xiii.

141. See *id.* at xvi.

142. See Ragghianti, *supra* note 120, at 178.

plant for lower-end products (involving low skill), especially in areas of unsteady demand—reserving higher-end products with steadier demand for his “civilian” labor force.¹⁴³ In his view, PIE offered him a cushion in the global economy, absorbing fluctuations in demand in a way that allowed his firm to maintain maximum profitability in a highly competitive global environment. The director of South Carolina’s PIE program, Tony Ellis, also emphasizes the flexibility of the prison labor force in his references to PIE as a form of “leased labor.”¹⁴⁴

The conditions that have made PIE successful in South Carolina involve an approach to prison labor as labor in the global economy. The small scale of the PIE program, and the relatively small role of organized labor in South Carolina, feature among these conditions, as well.¹⁴⁵ Following a 1977 U.S. Supreme Court ruling, inmate workers are not allowed to organize, and, under South Carolina state law, have no private rights in the labor context.¹⁴⁶ Proposals to raise wages or shift to higher-skilled job training (to maximize post-release job opportunities for inmates) have not prevailed—nor have proposals to restrict PIE to sectors in which there is no domestic competition (i.e., for which there is only an off-shore alternative).¹⁴⁷

To the extent that PIE delivers financial benefits to individuals beyond the inmate/employees, the program is apparently most successful as a sustainability mechanism for corrections agencies, and least successful when it is set up as a means of revenue generation for

143. See SEXTON, *supra* note 72, at 6–7, 9 (quoting Pat Timms, Escod’s Vice President of Operations).

144. See Raghianti, *supra* note 120, at 168, 171 (quoting Tony Ellis).

145. See *id.* at 168 (quoting Tony Ellis).

146. See *Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119, 136 (1977); see also Susan Blankenship, *Revisiting the Democratic Promise of Prisoners’ Labor Unions*, 37 *STUD. L. POL. & SOC’Y* 241 (2005) (proposing that prisoners’ labor unions would give a constructive voice to inmates in relation to the prison crisis).

147. See, e.g., BARBARA J. AUERBACH, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, *EMERGING PRACTICES: WAGE POLICIES AND PRACTICES FOR THE PRISON INDUSTRIES ENHANCEMENT CERTIFICATION PROGRAM (PIECP) 2* (2001) (“PIECP wages tend to be set at, or slightly above, the Federal minimum wage . . . reflecting the entry level, labor intensive nature of PIECP work.”). Far from limiting production to sectors that lack domestic competition, PIECP operations have included, *inter alia*, aluminum screen and circuit board production, glove manufacture, alfalfa production, papaya packing in Hawaii, potato processing, and boat building. See Marilyn C. Moses & Cindy J. Smith, *Factories Behind Fences: Do Prison ‘Real Work’ Programs Work?*, *NAT’L INST. JUST.* (June 2007), <http://www.nij.gov/journals/257/pages/real-work-programs.aspx>.

other parts of state budgets.¹⁴⁸ In some states, PIE revenues are diverted by the legislature into other programs besides corrections—a controversial practice that tends to compromise the viability of PIEs in those states.¹⁴⁹ Such issues and debates underscore the extent to which PIE should be understood as a privatization initiative shaped by an ongoing restructuring of state economies within globalization.

The benefits of PIE are not limited to revenue, however. The program has been presented as contributing to lowered rates of recidivism and improvements in post-release employment. A 2006 National Institute of Justice study confirmed positive effects for PIE alumni/ae in terms of higher rates of employment and lower rates of recidivism than those of inmates whose work experience was in other prison programs.¹⁵⁰ The authors indicate that—given methodological constraints—these positive outcomes cannot be conclusively attributed to PIE experience specifically, since inmates are not randomly assigned to PIE and the other programs.¹⁵¹ Still, they emphasize that PIE yields positive outcomes for inmates after release, and that it remains an “underutilized option.”¹⁵²

The NIJ studies of Petersik et al. and Cindy J. Smith et al.¹⁵³ implicitly raise the question as to why the PIE model has not been

148. Raghianti’s study of South Carolina’s experience with PIE emphasizes the importance of personal and institutional commitment, clarity of objectives, and continuity as additional factors in PIE success. *See* Raghianti, *supra* note 120, at 315. A full section of her dissertation charts the highly effective involvement of Tony Ellis, director of the state Division of Correction Industries, and former state director of procurement. *See id.* at 161–81. Ellis had a long and successful tenure as director of South Carolina’s PIE program, and was personally involved in recruiting firms. Raghianti credits his success with inspiring other southern corrections agencies—formerly resistant to PIE—to participate. At the time of her writing, Ellis had just retired, so the long-term success of the South Carolina PIE program beyond his directorship remained to be seen. *See id.* at 295, n.33.

149. *See id.* at 281.

150. *See* CINDY J. SMITH ET AL., CORRECTIONAL INDUSTRIES: PREPARING INMATES FOR RE-ENTRY: RECIDIVISM AND POST-RELEASE EMPLOYMENT 9 (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/214608.pdf>; *see also* MOSES & SMITH, *supra* note 135, at 33–34.

151. *See* MOSES & SMITH, *supra* note 135, at 33. PIE is a voluntary program. South Carolina’s eligibility requirements include a GED (or current participation in a GED program) and no recent disciplinary infractions in prison. *See* Raghianti, *supra* note 120, at 104. Overall, Petersik et al. find that PIE inmates tend to serve longer sentences for more violent crimes, but have a far lower rate of drug-related offenses than the general prison population. PETERSIK ET AL., *supra* note 135, at 96, tbl.A5. Longer sentences mean that PIE inmates may have benefitted from other prison work programs, and other forms of support. *See* Raghianti, *supra* note 120, at 302.

152. *See* PETERSIK ET AL., *supra* note 135, at 84; *see also* MOSES & SMITH, *supra* note 135, at 34–35.

153. SMITH ET AL., *supra* note 150.

more widely adopted. Marie Fajardo Ragghianti's evaluation study points to the gap between the politics and realities of corrections as one possible reason¹⁵⁴—or rather, a set of reasons including the politicization of a distinction between rehabilitation and security¹⁵⁵ and a pervasive disregard for benefits to prisoners. In spite of the favorable outcome assessments by NIJ studies cited above, Congress reduced funding for the Bureau of Justice Assistance, resulting in cuts to the National Center on Institutions and Alternatives and, in that connection, to the PIECP national coordinator's office.¹⁵⁶

The PIE program was saved, but by that time the national politics of privatization had shifted from the sustainability model offered by PIE to the revenue-generation model.¹⁵⁷ The difference between these was, in effect, the difference between treating prisoners as earners in a global economy—with all the precarity of non-inmate workers in their same employment sector—and prisoners as revenue streams flowing directly to state treasuries. Debates over parity and efficiency as competing values in the corrections labor setting remain intense.¹⁵⁸

154. Ragghianti, *supra* note 120, at 292–93.

155. *See id.* at 5.

156. *See id.* at 291.

157. See Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 869 (2008) (“[P]rison industries’—prison labor programs producing goods or services sold to other government agencies or to the private sector—are the highest-profile and most controversial form of prison labor. Since roughly the New Deal era, prison industries have been tightly regulated, most prominently through the Ashurst-Sumners Act’s criminal prohibition on the sale of inmate-produced goods in interstate commerce. Government purchasers always have been exempted, however, as part of the broader New Deal-era compromise permitting prison labor for ‘state use.’ Limits on other purchases gradually have relaxed over the past thirty years. Additionally, few restrictions apply to the growing sale of services performed by prisoners. Today, prison industries generate \$2 billion in revenue annually.” (footnotes omitted)); *cf.* Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 214 (2009) (“Private prisons . . . mimic their public counterparts in one interesting aspect: prison labor. As in state jail, prisoners confined by the state to a privately owned facility must perform menial tasks for little to no pay. The point of such work, consequently, is reformation and rehabilitation. By doing such work in the private context, however, prisoners directly contribute to the profit-making function of the corporation. At the very least, therefore, inmate labor in private prisons constitutes ‘involuntary servitude.’ If the state is characterized as ‘contracting out’ inmates to these corporations who subsequently aid the prison in earning corporate revenue, the system begins to resemble a modern day form of slavery.” (footnotes omitted)).

158. See Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should be Extended to Prison Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 194–96 (2002); *see also* U.S. GEN. ACCOUNTING OFFICE,

B. Federal Prison Industries (UNICOR) and the Debate Over Prison Labor

PIE is just one initiative aimed at reforming prison labor—one whose uptake by states and localities remained highly limited even after Congress expanded the maximum PIE certifications from seven to fifty.¹⁵⁹ But by far the largest prison industries program is the one run by the federal government—Federal Prison Industries, Inc., now known by its trade name UNICOR.¹⁶⁰ All federal prisoners are required to work, unless they are physically unable or exempted as security risks.¹⁶¹ Most prison work involves inmates in the work of the prison itself, or in production of goods for other state agencies with limited market value, such as license plates and road signs, among other things. This type of prison labor is conventionally referred to as “traditional” prison labor. UNICOR, which employs about twenty-two percent of all federal prisoners,¹⁶² involves a different model,

GAO/GGD-93-98, PRISONER LABOR: PERSPECTIVES ON PAYING THE FEDERAL MINIMUM WAGE 1–2 (1993) *available at*, <http://www.gao.gov/assets/220/217999.pdf>. The GAO’s report is a response to a request by Senator Harry Reid (D-NV), for a projection as to how paying the minimum wage to inmate workers would affect the corrections system. *See* U.S. GEN. ACCOUNTING OFFICE, *supra*. Prison professionals anticipated “millions” of unrecoverable expenses if they were required to pay minimum wage; other organizations participating in PIE or similar programs saw advantages in parity. *See id.* Senator Reid’s request was in the context of a recent Ninth Circuit Court of Appeals three-judge panel holding that prisoners employed in private companies were employees of the state, entitled to protection under the Fair Labor Standards Act of 1938. *See id.* Reid wanted to know if Congress should specifically exclude inmate workers from FLSA. *See id.* Senator Reid subsequently was among the co-sponsors of a bill to amend the FLSA to exempt prison labor from its provisions; however, the bill never reached the floor of the Senate. *See* S. 1943, 104th Cong. (1996).

159. On expansion of the program, see UNICOR, <http://www.unicor.gov> (last visited June 27, 2014). Even on this expanded scale, participation remains marginal. In 1997, less than 0.2% of federal prisoners were participating in PIE. *See Options to Improve and Expand Federal Prison Industries: Hearing before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 59 (1997) [hereinafter *Options to Improve and Expand Federal Prison Industries*], *available at* http://commdocs.house.gov/committees/judiciary/hju58956.000/hju58956_of.htm. Florida developed its own program, Prison Rehabilitative Industries and Diversified Enterprises, Inc. (PRIDE) to bring private enterprise into the physical space of state prisons. *See* PRIDE, <http://www.pride-enterprises.org> (last visited June 27, 2014); *see also Prison Rehabilitative Industries and Diversified Enterprises, Inc.*, FLA. DEP’T CORRECTIONS, <http://www.dc.state.fl.us/pub/annual/1011/pride.html> (last visited Sept. 28, 2014).

160. *See About UNICOR*, UNICOR, <http://www.unicor.gov/about.aspx> (last visited Mar. 24, 2015).

161. *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 2905, 104 Stat 4789, 4914.

162. *See* UNICOR, *supra* note 22, at 28.

conventionally known as “prison industries.”¹⁶³ Inmates involved in UNICOR produce goods for sale on the open market—under specific conditions aimed at minimizing competition with the private sector, and avoiding displacement of civilian labor. Its market is protected by a mandatory sourcing rule, requiring all federal agencies to give preference to UNICOR’s goods and services in their own procurement practices (with certain exceptions).

UNICOR is the trademark of what is also known as Federal Prison Industries, Inc. (FPI).¹⁶⁴ FPI was established in 1934 by President Roosevelt as an effort to coordinate prison industries nationwide so as to minimize disruption of civilian labor in any one sector of production.¹⁶⁵ The program was reauthorized in 1948.¹⁶⁶ FPI supported defense industries during the Second World War, the Korean War, and the war in Vietnam.¹⁶⁷ After the end of the Vietnam War, it developed a diversified portfolio of goods and services for sale.¹⁶⁸ In some respects, FPI took its modern form as a corporation (i.e., independent spending authority, without Congressional appropriation) with the passage of the Anti-Drug Abuse Act of 1988.¹⁶⁹ Under this statute, it was required to be self-supporting, and to comply with several conditions before selling its products on the open market—legislative efforts that reflected larger concerns with tax burdens and private sector competitiveness in the national and international economy.

Federal Prison Industries, Inc., is now known both as FPI, Inc. and UNICOR. UNICOR’s in-house historical narrative credits Chief Justice Burger’s “factories with fences” concept as the inspiration for its current form, although it is not clear that UNICOR represents a specific implementation of the Task Force’s recommendations.¹⁷⁰ The Chief Justice’s Task Force is discussed in the next section. One principle difference between the Task Force recommendations and UNICOR as practiced is that UNICOR does not claim rehabilitation

163. *FPI General Overviews FAQs*, UNICOR, http://www.unicor.gov/FAQ_General.aspx (last visited Mar. 24, 2015).

164. *See id.*

165. The FPI was authorized by the Act of June 23, 1934, Pub. L. 73-461, 48 Stat. 1211, and Exec. Order No. 6917; *see also* O’BRYANT, *supra* note 70, at 12.

166. NATHAN JAMES, CONG. RESEARCH SERV., RL32380, FEDERAL PRISON INDUSTRIES 10 (2007), *available at* <https://www.fas.org/sgp/crs/misc/RL32380.pdf>.

167. ROBERT D. HANSER, INTRODUCTION TO CORRECTIONS 391 (2013).

168. *Id.*

169. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §7011, 102 Stat. 4181, 4395.

170. UNICOR, *supra* note, at 22 at 2.

as its primary goal; indeed, UNICOR is explicit in stating that rehabilitation is not the primary goal that it was in the past.¹⁷¹ Rather, UNICOR has adopted what the website refers to as a “balanced model”—combining “punishment, deterrence, and incapacitation” with rehabilitation.¹⁷² Another key difference involves the prison industries themselves, which are not owned by the private sector as envisioned in the Task Force report.

UNICOR is self-supporting, and there is no federal appropriation for its operations. The principal source of its revenue is sales. Approximately seventy-four percent of sales revenues are used for the purchase of materials.¹⁷³ Inmates are paid wages, but their net share is considerably less than that of PIE participants (six percent, compared to about forty-three to forty-seven percent in PIE).¹⁷⁴ Still, UNICOR is more remunerative for inmates than traditional forms of prison labor; most wages under traditional prison labor regimes are charged back to the agencies for the prisoner’s upkeep.¹⁷⁵

UNICOR is a product of the New Deal rather than the age of neoliberalism, and its recent history is indicative of tensions between these two paradigms of liberalism. In the 1980’s, fifty years after its inception, UNICOR became controversial, subject to a spate of Congressional legislative initiatives, hearings, and evaluation projects; these continue today. The main debates involve competition with the private sector, the enforcement of (and exceptions to) the mandatory source rule, the level of wages of inmate workers, and overall effectiveness as a prison program. The effectiveness questions appear to have been settled by independent studies of recidivism and other aspects of former inmates’ post-release experiences.¹⁷⁶ An independent study, mandated by Congress in 1991, confirmed minimal displacement of civilian labor,¹⁷⁷ but competition and mandatory sourcing have remained contentious. In key respects, the debates reflect wider policy debates (i.e., outside of the prison context) over wages, social security, and free trade—with UNICOR’s

171. *Id.* at 23.

172. *Id.*

173. JAMES, *supra* note 166, at Summary.

174. *Id.*

175. *See* MOSES & SMITH, *supra* note 135, at 34; PETERSIK ET AL., *supra* note 135, at 19.

176. UNICOR, *supra* note 22, at 26; *see also* JAMES, *supra* note 166, at 7.

177. *See* UNICOR, *supra* note 22, at 26 (referring to a mandated Congressional study that found competition with the private sector to be “negligible”); *see also* JAMES, *supra* note 166, at 1 (reporting study findings on recidivism as “inconclusive”).

reliance on market protections coming under steady challenge, as its critics (from the right and the left, for different reasons) pushed for more competitive sourcing for government agencies, and for wage parity under the Fair Labor Standards Act.¹⁷⁸

Almost immediately after passage of the 1988 law that repositioned UNICOR in relation to private sector markets, bills from both sides of the aisle—most of which failed—were repeatedly introduced in Congress in an effort to revise or repeal the mandatory sourcing rule.¹⁷⁹ Congressional hearings in 1997 were intended to resolve tensions between UNICOR and its various critical camps by recalibrating the linkage between mandatory sourcing and civilian competition—in part by adjusting the sourcing rule, and in part by promoting UNICOR’s production of goods and services that had migrated offshore.¹⁸⁰ The hearings made plain the wide range of views—from a critique of prison industries as “quasi-slave’ labor,”¹⁸¹ to endorsements of PIE¹⁸² and PRIDE,¹⁸³ to advocacy for specific proposals to eliminate the mandatory sourcing rule,¹⁸⁴ among other reforms of UNICOR. Subsequent hearings and revisions of the mandatory source rule led to greater procurement flexibility on the

178. H.R. 2965, 109th Cong. (2d Sess. 2006), had it become law, would have given prison workers 50% of the minimum wage in 2008, and 100% of the minimum wage in 2013, with a guarantee that not more than 80% of wages would be subject to deductions. For a review of legislative initiatives that would have established minimum wage protection for federal prison workers under FLSA, see generally WILLIAM G. WHITAKER, CONG. RESEARCH SERV., RL30993, THE FAIR LABOR STANDARDS ACT MINIMUM WAGE IN THE 108TH CONGRESS TO AMEND THE FAIR LABOR STANDARDS ACT (2005), *available at*, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1201&context=key_workplace.

179. *See, e.g.*, H.R. 2965, 109th Cong. (2d Sess. 2006); H.R. 1829, 108th Cong. (1st Sess. 2003); S. 766, 109th Cong. (1st Sess. 1999); H.R. 2558, 106th Cong. (1st Sess. 1999); H.R. 2965, 106th Cong. (2d Sess. 1999); H.R. 2758, 105th Cong. (1st Sess. 1997) (reintroduced in 2006, 2011, and 2013); S. 200, 103d Cong. (1st Sess. 1993); S. 183, 102nd Cong. (1st Sess. 1991); S. 254, 101st Cong. (1st Sess. 1989); H.R. 4994, 100th Cong. (2d Sess. 1988); H.R. 4021, 100th Cong. (2d Sess. 1988); H.R. 3526, 100th Cong. (2d Sess. 1988).

180. *See Options to Improve and Expand Federal Prison Industries*, *supra* note 159, at 8–11 (statement of Rep. McCollum, Chairman, Judiciary Subcomm. on Crime).

181. *See id.* at 14–16 (statement of Rep. Jackson Lee, Member, H. Comm. on the Judiciary).

182. *See id.* at 34–36 (statement of Robert Sanders Division of Prison Industries, S.C. Dep’t of Corrs.).

183. *See id.* at 24–33 (statement of Michael N. Harrell, Gen. Manager of New Bus. Dev., Pride Enters.); *id.* at 42–49 (statement of Kenneth Mellem, President & CEO, Geonex Corp.).

184. *See id.* at 50–56 (statement of Morgan O. Reynolds, Director, Crim. Justice Ctr., Nat’l Ctr. for Policy Analysis).

part of federal agencies, particularly the Department of Defense and the CIA.¹⁸⁵

While the prison population continued to increase in the 2000's,¹⁸⁶ prison industries slumped in 2010 and suffered a loss of profitability over at least the next three fiscal years¹⁸⁷—reflecting the impact of the global economic crisis on consumers (even large institutional consumers such as government agencies), as well as prison industries' new exposure to competition. The political rhetoric surrounding federal prison industries shifted increasingly to a financialized model at the same time that it reduced the market protections for prison-made goods and services—and during the same period when prison industries themselves shifted increasingly away from both the discourse and practice of inmate rehabilitation.¹⁸⁸ While a causal link between these two broad developments (financialization and punishment) is unlikely to be found, they may be seen as related historically and functionally—given the simultaneous pressures on correctional agencies to both discipline offenders and capitalize on inmates' potential to contribute to corrections revenue streams.¹⁸⁹

C. Reforming Prisons Through Privatization: Two Models

1. *Privatizing Inmate Labor: Chief Justice Burger's Task Force Model*

As noted in Part I, privatization was well-established as a principle of government administration long before private prisons were on the horizon. In the 1970s, the Department of Justice developed a package of reforms of the prison labor system, envisioning a role for private industry within prisons—as an innovation in rehabilitation,

185. See JAMES, *supra* note 166, at 2; O'BRYANT, *supra* note 70, at 1.

186. See JAMES, *supra* note 13, at 3.

187. See *id.* at 3–4.

188. See Marie Gottschalk, *Hiding in Plain Sight: American Politics And The Carceral State*, 11 ANN. REV. POL. SCI. 235, 252 (2008) (noting the absence of rehabilitation from current discourses of incarceration); cf. Michelle Phelps, *Rehabilitation In The Punitive Era: The Gap Between Rhetoric And Reality In U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 38 (finding that rehabilitative programming may be “more stable” than “widely assumed”).

189. For example, beyond their direct contributions through wages for their own upkeep, prisoners generate revenue when they occupy beds leased out by corrections agencies or firms, by fees assessed for complaints deemed frivolous or found to be without merit, by fees assessed for bad conduct, and by other means. See Aman, *Privatization and Democracy*, *supra* note 12, at 274–75.

and an improvement on the Federal Industries System.¹⁹⁰ Chief Justice Warren Burger was personally committed to prison labor reform along these lines and is credited with having formulated the “factories with fences” phrase that was widely associated with the concept.¹⁹¹ He was instrumental in convening a meeting in 1984, co-sponsored by the Johnson Foundation and the Brookings Institutions, that led to the development of a National Task Force on Prison Industries in February, 1985.¹⁹² The Task Force led in turn to an extensive deliberation process involving representatives of the bench, the bar, corrections professionals, academics, business and labor leaders, and members of the Senate and House of Representatives; their meetings resulted in a series of principles and recommendations that were published in June, 1986.¹⁹³ Their recommendations resulted in the formation of the National Center for Innovations in Corrections, an advisory group for states and localities interested in reform.

The overall purpose embraced by the Task Force was to transform prison labor into a platform for reforming the entire prison system around principles of rehabilitation and improvement of inmates’ post-release prospects.¹⁹⁴ The recommendations included an organizational structure combining internal and external governance structures for prison industries, with inmate participation in both bodies.¹⁹⁵ A strong role for organized labor alongside business was also envisioned. Overall management of the prison would remain with the corrections agency.

Meanwhile, Congressional hearings on prison industries reform, including members of Congress and witnesses who were also participating in the Task Force as members of the advisory board or as committee members, followed in 1985.¹⁹⁶ The proposed reforms by the Task Force sought an expansion of the private sector role

190. See Barbara Auerbach, *Federal Government Involvement In Private Sector Partnerships Prison Industries*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS*, *supra* note 64, at 91.

191. See FUNKE, *supra* note 19, at 17; U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-93-98, *PRISONER LABOR: PERSPECTIVES ON PAYING THE FEDERAL MINIMUM WAGE* 11 (1993), available at <http://www.gao.gov/assets/220/217999.pdf>.

192. See *id.* at 17–18.

193. See *generally id.*

194. See *id.* at 44.

195. See *id.* at 21.

196. See *id.* at 9–16, app. A (detailing the membership of the task force). See *generally Privatization Of Corrections: Hearings Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 99th Cong. (1985).

established for states by the Justice Systems Improvement Act of 1979,¹⁹⁷ for all levels of the correction system. The recommendations also included reforms aimed at developing parity of conditions for inmate workers relative to the civilian workforce—setting limits to the work day and work week, wages at the federal minimum wage, affirming the right to organize, and other measures aimed at bringing to an end the exploitation and abuses of the old contract labor and leasing practices.¹⁹⁸ As we have discussed above, Congress established PIE and subjected UNICOR to the constraints of privatization, but it did not include prison workers under the Fair Labor Standards Act.

2. *Privatizing Prison Financialization: President Reagan's Privatization Commission Model*

Privatization drew the interest of President Reagan, as well, though on different terms crafted primarily around economic competitiveness as a driver of innovation and efficiency. The President's Commission on Privatization was created by Executive Order 12607 on September 2, 1987.¹⁹⁹ The Commission Report's discussion of prison privatization opens with reference to prison crowding,²⁰⁰ but makes no mention of the Congressional legislation that established mandatory minimum sentences in 1984. The section on prison privatization consists of eight recommendations supporting privatization as "effective and appropriate" for federal, state, and local governments.²⁰¹ The Commission encourages experimentation and research involving contracting at the Bureau of Prisons and the Immigration and Naturalization Service, including the federal demonstration project²⁰² that a full ten years later—after much debate—yielded the Taft Correctional Institution.²⁰³

The President's Commission report acknowledges criticisms of prison privatization, particularly with respect to the idea of corrections as a core governmental function appropriate for the

197. Justice Systems Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat 1167.

198. *See generally* McLENNAN, THE CRISIS OF IMPRISONMENT, *supra* note 23.

199. Exec. Order No. 12607, 52 Fed. Reg. 34190 (Sept. 9, 1987).

200. PRESIDENT'S COMM'N ON PRIVATIZATION, PRIVATIZATION: TOWARD A MORE EFFECTIVE GOVERNMENT 146-55 (1988), *available at* pdf.usaid.gov/pdf_docs/PNABB472.pdf.

201. *Id.* at 149-55.

202. *See id.* at 153.

203. The Bureau of Prisons followed up with a proposal for a demonstration project, but the Senate Appropriations Committee rejected it. *See Bureau of Prisons: Recent Concerns*, *supra* note 20, at 6.

public sector, as well as issues of liability and accountability.²⁰⁴ They dealt with these via assurances of experts. Regarding standards, the Commission relied on the testimony of public and private corrections professionals, among others, to affirm that the standards of the American Corrections Association, as well as Constitutional and other legal requirements, could hold private corrections to appropriate performance.²⁰⁵ Liability could also be dealt with contractually. Regarding accountability, their position was that “contract prison operations can add another layer of accountability” to corrections.²⁰⁶

Overall, the section of the Commission report on prison privatization was almost wholly given over to the financialization of prison production, up to and including the ownership and operation of an entire prison and its operations.²⁰⁷ This emphasis is consistent with the priorities of the privatization movement, as discussed in previous sections. We underscore this parallel as evidence of support for prison privatization independent of—and earlier than—the prison crowding crisis.

3. *The Task Force and the President’s Commission, Compared*

The labor orientation of the Chief Justice’s Task Force was focused primarily on internal reform of the corrections system, to eliminate abuses and improve the post-release prospects for inmates. While the Task Force did not ignore the potential for relief of tax burdens with broader participation of the private sector, its principles and recommendations were largely devoted to reorganizing institutional structures, lines of communication and accountability, and system-wide relationships—all aimed at improving a person’s life after release from prison. The Task Force dealt specifically with prison labor; its path mapped a terrain of labor reform.²⁰⁸ As noted above, Congress did not implement its full recommendations, particularly those most immediately affecting the prisoner as worker—i.e., wages, hours, and the right to organize. As also noted above, Congress

204. PRESIDENT’S COMMISSION ON PRIVATIZATION, *supra* note 200, at 150–51.

205. *Id.* at 150.

206. *Id.* at 147.

207. At the same time, the conservative Heritage Foundation promoted prison privatization in similar terms, in a “backgrounder” dated May, 1988. Dana Joel, *A Guide to Prison Privatization*, HERITAGE FOUND. (May 24, 1988) <http://www.heritage.org/research/reports/1988/05/bg650-a-guide-to-prison-privatization>.

208. *See* FUNKE, *supra* note 19, at 30–32; *see also supra* notes 68 and 159 and accompanying text.

adopted PIECP in 1979, introducing privately owned factories into prisons as envisioned by the Task Force—a partial success.

The President's Commission, on the other hand, was concerned with privatization in general, very much along the lines of the privatization movement as articulated by the Heritage Foundation and the Reason Foundation, which continue to promote prison privatization in the context of broader reforms of government.²⁰⁹ The Commission report included prison privatization as one section among many. In general, the Commission's recommendations—in the prison context as well as others—mapped a terrain involving a new financialization of government, so as to better meet the challenges and opportunities of global economic competition, as defined by the Commission's members.

The financialization model—essentially aimed at reducing fixed costs (such as prisoner upkeep), maximizing economic efficiencies, and, where possible, expanding revenue streams—has become familiar to anyone who has been following public affairs in even the most casual way, given the dominance of that model in public policy since the late 1980s. But the labor reform model is likely less familiar, given the extent to which minimum wage and collective bargaining remain points of controversy and resistance within the Congress and in many states.²¹⁰ Thus, a comment like the following—the opening lines of the Chief Justice's Task Force report—presents terms of debate that might be unfamiliar to readers whose experience of the privatization debate has been entirely in terms of competitiveness and efficiency:

Public attention to prisons, the kinds of people in them, and the activities that take place “behind the walls” is at an unprecedented high level in our nation. Perhaps at no other time in our history has such interest been manifested simultaneously by citizens and public and private leaders at federal, state and local levels. Of highest interest is the work inmates perform in prison, or prison industries.²¹¹

209. Boerner, *supra* note 48, at 2–4 (RPPI is now the Reason Foundation); REASON FOUND., *supra* note 46, at 21–23.

210. On current minimum wage debates, see Eric Morath et al., *Wage-Rise Report Sees Fewer Jobs, Less Poverty: Losses in Employment Partially Offset by Increased Purchasing Power*, WALL ST. J., Feb. 20, 2014, <http://online.wsj.com/articles/SB10001424052702304675504579391201355442502>. On “right to work” controversies, see, for example, *Sunday Dialogue: State Laws on Unions*, N.Y. TIMES, Jan. 21, 2012, <http://www.nytimes.com/2012/01/22/opinion/sunday/sunday-dialogue-state-laws-on-unions.html>.

211. FUNKE, *supra* note 19, at 17 (paragraph break omitted).

The differences between these approaches remain unresolved within the federal government—debates over prison industries continuing to contend over wages and competitiveness, and debates over full privatization struggling over the monetization of incarceration rates, among other things.

In conclusion to Part II, we have discussed two principal approaches to privatization that developed within the federal government over the course of the 1970s and 1980s. The more recent program, PIE, emphasizes private enterprise production for consumption on the open market. The older model, Federal Prison Industries/UNICOR, emphasizes prison enterprise within a market guaranteed by a mandatory sourcing rule as applied to government agencies. Both models operate within public prisons, underscoring the extent to which prison privatization does not automatically distinguish private prisons from public ones, but links them through the prison labor context. Prison labor has a far longer history than either of these modern initiatives, but we have emphasized these because of the insights they afford with respect to contemporary issues in prison privatization, bridging public and private prisons, and in relation to the broader significance of privatization in relation to the neoliberalization of global capital.

CONCLUSION

Our purpose in the previous sections has been to contribute to a reframing of the discussion of prison privatization by exploring its American formation in the privatization movement, particularly in relation to prison labor. Part I reviewed privatization in the form of outsourcing as a mode of governance that is central to the contemporary ways in which government now operates. In Part II, we explored the roots of prison privatization in relation to the privatization movement, as it was diversely taken up within the federal government. We found that labor was the context in which privatization—for better or for worse—was first and most enduringly incorporated into the prison system. Adjusting the chronology of modern prison privatization to correspond to the history of the privatization movement makes visible the extent to which the subsequent deepening of the prison crisis was—in terms of resources—at least in part a consequence of the application of the financialization model to prison management, governmental budgeting, contracting, and monitoring. That policy choice was well

rehearsed (so to speak) in other areas of the government reshaped by neoliberalization.²¹²

Seen in light of this larger and more complex context, prison labor is—to a degree that might be surprising—continuous with the civilian labor force in its vulnerabilities to fluctuations in demand, pricing, social supports, and various forms of rights.²¹³ Indeed, some proponents of prison industries have advocated for managing wages and barring union activity so as to maintain competitive advantage over the off-shore alternatives. Debates over UNICOR highlight controversies over wages, collective bargaining, and free trade.²¹⁴ Debates over PIE highlight the narrow conditions under which U.S. labor is able to maintain a competitive advantage over offshore labor in the global marketplace. Throughout this same period, minimum wage, benefits, protections, and the right to organize were subjects of debate with respect to the civilian labor force as well. To this extent, we may look to prison labor to see what global competitive advantage looks like from domestic ground.

From this standpoint, debates surrounding the privatization of inmate labor are of a piece with debates over wages, benefits, and collective bargaining outside of the prison context. We emphasize the importance of this finding, as it suggests that the appropriate context for analyzing prison privatization cannot be set wholly within prison walls. In particular, the issues of competition with the private sector and incentivizing firms to “insource”²¹⁵ are reminders of the extent to which inmate labor is—in these respects—a difference of degree, and

212. In the prison context, it is worth noting the apparent disconnect between this policy choice and the legislation of 1984 and 1988 that resulted in the massive increase in incarcerations and incarceration rates noted above. In that context, no one—to our knowledge—claimed that private prisons could close the gap between the supply and demand for prison capacity, only that the situation called for experimentation. See Bowman et al., *supra* note 68, at 2 (“A bold solution is required, and it may be in the hands of the private sector.”).

213. On conditions at the carceral margins of the civilian workforce in relation to the precarity of social supports for the urban working poor, see generally Dora M. Dumont et al., *Public Health and the Epidemic of Incarceration*, 33 ANN. REV. PUB. HEALTH 325 (2012); Stephanie Kane & Theresa Mason, *AIDS and Criminal Justice*, 30 ANN. REV. ANTHROPOLOGY 457 (2001).

214. An extended illustration of such debates may be found in witnesses’ testimony before a House committee hearing on Federal Prison Industries. See *generally Options to Improve and Expand Federal Prison Industries*, *supra* note 159.

215. See Press Release, Office of the Press Sec’y, The White House, President Obama Issues Call to Action to Invest in America at White House “Insourcing American Jobs” Forum (Jan. 11, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/01/11/president-obama-issues-call-action-invest-america-white-house-insourcing>.

not of kind, with civilian labor. Wages, benefits, social security, and other protections, as well as the right to organize, are issues in political contention that affect the workforce at large. Moreover, prisons are not the only context in which labor is highly constrained. The maquiladoras of northern Mexico, the high-tech workshops of China, and other locations where offshore workers' labor for U.S. firms in highly constrained living and working conditions, may be usefully compared to the inmate labor situation.²¹⁶ Military prisons are also part of the FPI/UNICOR system, but beyond that specific connection, military work—as work—also invites productive comparisons.²¹⁷

This broader context suggests some limitations to approaching prison privatization primarily as a contrast with public prisons, beyond the fact that privatized labor spans both regimes. To be sure, the conceptual distinction between public and private is of value philosophically in relation to the different accountabilities of government and business, to democracy, and to shareholders, respectively. For this very reason, in more pragmatic terms, public and private values or interests may not be on the same spectrum, since government and private companies are held to different accountabilities and rationales; they are also subject to different formulations of success.

The debates over prison labor underscore the extent to which “privatization” and “neoliberalism” are not monoliths, except perhaps in their most ideologically framed terms. They are rubrics for diverse models and approaches, and as such, they are open to different values, expectations, and institutional norms.²¹⁸ From this standpoint, standard keywords from the privatization movement and its critics—binaries such as public/private and law/market, and monoliths such as neoliberalism and globalization—do not do justice to the specifics associated with particular sectors of governmental or

216. On maquiladoras, see KATHRYN KOPINAK, *DESERT CAPITALISM: MAQUILADORAS IN NORTH AMERICA'S WESTERN INDUSTRIAL CORRIDOR* 7–20 (1996); see also Mary Beth Mills, *Gender and Inequality in the Global Labor Force*, 32 ANN. REV. ANTHROPOLOGY 41, 44–45, 53–54 (2003). On labor conditions at the social margins, see generally Sutti Ortiz, *Laboring in the Factories and the Fields*, 31 ANN. REV. ANTHROPOLOGY 395 (2002). On the global restructuring of labor, see Sarah Babb, *The Social Consequences of Structural Adjustment: Recent Evidence and Current Debates*, 31 ANN. REV. SOC. 199, 202–14 (2005).

217. For an ethnographic study of a U.S. military base as an urban workplace, see CATHERINE A. LUTZ, *HOMEFRONT: A MILITARY CITY AND THE AMERICAN TWENTIETH CENTURY* (2002).

218. On accountability structures in privatization, see generally Laura Dickinson, *Privatization and Accountability*, 7 ANN. REV. L. SOC. SCI. 101 (2011).

entrepreneurial activity, nor to the history by which financialization came to the fore as the prevailing policy concern. Such binary approaches limit our imaginations when it comes to reforming prisons, both public and private. The roads not taken—or paths that may yet emerge—become more visible once prison labor is taken into account. Viewed as a workplace, corrections cannot be fully or automatically assimilated to private enterprise, given that inmates are required to work, and do not participate in setting the value of their own labor. That said, constraints on the non-prison workforce in terms of choice in a precarious labor market are not of a wholly different order.

Overall, refocusing discussion of prison privatization to include the wider relevance of prison labor underscores the constraints of a concept of privatization limited to financialization, and to prison privatization solely in terms of efficiencies in prison construction and management. In what appears to be the prevailing model for federal and state prisoners, inmates are cost points to be mitigated by various strategies for minimizing costs, including their own contributions to revenue generation. Financialization extends to contracts and monitoring as well, as private firms may be held to a certain capacity—or as firms in turn hold the contracting state agency to maintaining a certain rate of capacity.²¹⁹

Our analysis points to the vital importance of contracts and monitoring as sites where prisoners' wellbeing and post-release prospects can be protected in the private prison context.²²⁰

The contracting process can be constructed in ways that enhance such prospects, as well as the democratic process surrounding corrections. In this regard, a first and crucial step would be to acknowledge that private prisons involve a special form of procurement that requires more than regulation of the bidding process and conditions for payment. Prisoners—human beings with human needs—cannot reasonably be covered with the same sort of

219. HACKETT ET AL., *supra* note 2, at 62–64.

220. We refer to post-release prospects rather than rehabilitation to avoid the social engineering implications analyzed by Mona Lynch in the parole context, in which she finds that the term *rehabilitation* “indicates an aim to reform the parolee.” Mona Lynch, *Rehabilitation as Rhetoric: The Ideal of Reformation in Contemporary Parole Discourse and Practices*, 2 PUNISHMENT & SOC’Y 40, 45 (2000). Some contracts, as well as other privatization experiments such as “social impact bonds,” are now shifting the performance requirements for capacity to the effectiveness of pre-release programming, as measured by recidivism rates. The government contracts to repay the firm if recidivism declines. Leonard Gilroy, *Criminal Justice Reforms Prompt Evolution in Private Sector Rehabilitation Offerings*, REASON FOUND. (Apr. 30, 2014), <http://reason.org/news/show/justice-reforms-privatization>.

contract and contract processes that are used, for example, to construct a bridge or build a road.²²¹ Non-marketized values are not easily expressed in contract form, and private providers are therefore unlikely to face checks—even with the most robust monitoring—if they are required only to cut costs so as to maintain profitability and shareholder value. Contracts for private prisons should be open to fully informed public debate, especially when it comes to advocating for provisions that might add additional protections and services for prisoners.²²²

To this end, the public needs to be more fully involved when it comes to certain procedural and substantive contract provisions involving prisons. Procedurally, the proposed contract itself should be made public, perhaps on the contacting agency's own website, not unlike a proposed agency rule made available for comment. What arrangements have been made for prison health care? Such provisions should be made public before such decisions are made and members of the public should have a chance to comment on them. More substantively, the comments might also include advocacy for the inclusion of certain provisions dealing with, for example, the enhancement of the educational opportunities for the prisoners involved, or specifically, what might be done to decrease the rates of recidivism overall? What benchmarks and goals are written into these contracts that require such efforts?

For the public to be effectively involved, information must be gathered and made public concerning the track records of those competing for these contracts, and information and monitoring must occur throughout the duration of the contract once it is awarded. This may involve innovative forms of monitoring and information sharing. Contracts could, at a minimum, include liability rules that incentivize the private firms to carry out their responsibilities in a constitutionally appropriate way. While it may be difficult at present for courts to hold private prison providers constitutionally liable for

221. For an analysis of these contracting processes and why they are not adequate when human rights issues may be involved, see Aman, *supra* note 42, at 315–16.

222. There is a case to be made, for this reason, for private prisons to be run as non-profit enterprises. One study comparing public, for profit, and non-profit juvenile detention in terms of recidivism found that recidivism rates after non-profit detention were significantly lower than public prisons and private for-profit prisons. Patrick Bayer & David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549 (2005). At the time of the study, no adult prisons were managed on a non-profit basis. See David Pozen, *The Private, Nonprofit Prison*, YALE LAW SCHOOL (Mar. 1, 2006), <http://www.law.yale.edu/news/1691.htm>.

the negligent behavior of prison guards,²²³ such liability rules can be spelled out in the contracts involved. By negotiating for contractual provisions that extend liability for constitutional torts to the private corporations now managing prisons, stronger incentive for private providers to minimize the kinds of behavior that can adversely affect the health and wellbeing of prisoners would result. Monitoring should also be public—including attention to human rights and fair labor standards. To this end, the contracts might also include clauses designating the prisoners themselves as third party beneficiaries of these contracts, thereby authorizing them to sue if they believe its provisions have been breached.²²⁴ There should be no penalty against inmates who file legal complaints, even if their claim is subsequently dismissed or not granted.

While the political mainstreaming of privatization has involved constant repetition of the mantra favoring markets over government as reflecting values of competition and individual liberty over constraints and state control, the relevance of privatization in the prison context has been more obviously in relation to developments elsewhere—trumping organized labor and sidestepping political opposition to government expenditures for social security and various forms of protection for workers in state legislatures and the Congress. Inmate laborers in this sense share very directly in the condition of the general labor force in their common sectors of industry, and improving their status as beneficiaries of their own labor cannot be separated from the parallel question on the other side of the prison walls. A focus on their post-release integration highlights such parallels, as inmates face re-incorporation into workplaces as well as their families and communities. The restoration of voting rights for prisoners should also be considered.²²⁵

223. See *Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 786, 799 (7th Cir. 2014) (affirming lower court grant of summary judgment, and holding that no constitutional claim was stated. The majority noted, however, that “our prior cases hold, but without explanation, that the *Monell* standard extends from local governments to private corporations. As we explain . . . however, that conclusion is not self-evident.” (citing *Monell v. Department of Social Services*, 436 U.S. 658 (1978))).

224. See Aman, *supra* note 42, at 323–25. See generally Alfred C. Aman Jr., *Information, Privacy, and Technology: Citizens, Clients, or Consumers?*, in *FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION: ESSAYS IN HONOUR OF SIR DAVID WILLIAMS* 325 (Jack Beatson & Yvonne M. Cripps eds., 2000).

225. The United States' restriction of suffrage for prisoners and ex-prisoners increased with the expansion of incarceration. See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 22–25 (Marc Mauer & Meda Chesney-Lind eds., 2002). Such restrictions yield a disparate effect on minorities: “There is clear evidence that state felony disenfranchisement laws have a

Our analysis also implies that discussion of approaches to regulating prison privatization should not be focused solely on prisons per se, but should also extend to privatization and outsourcing more generally, *and* to the social security of underserved communities, including labor security. This may mean developing a new approach to regulation—one that is more open to due process and democratic participation—to ensure maximum fairness for inmates, together with their communities, whatever the entity may be that carries out the public's charge. Our goal in this analysis has been to suggest the extent to which private prisons belong to a larger set of trends by which collective forms of social responsibility—whether for prisoners or others—has been increasingly placed by the government into the hands of private firms along lines consistent with prevailing forms of neoliberal capitalism. In the prison labor context, this has resulted in a paradoxical situation in which the advantages claimed for privatization cannot be achieved without legislative supports of various kinds—to make work a requirement, suppress wages, and manipulate market competition. Appreciating privatization in relation to globalization draws attention to the wider significance of that paradox—and, we hope, to the relevance of rethinking the limits of privatization for all of us, from the prisoners' side of the wall.

disparate impact on African-Americans and other minority groups In three states, at least one out of every five African-American adults is disenfranchised: Florida (23%), Kentucky (22%), and Virginia (20%).” AM. CIVIL LIBERTIES UNION, DEMOCRACY IMPRISONED: A REVIEW OF THE PREVALENCE AND IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2 (2013), *available* at http://sentencingproject.org/doc/publications/fd_ICCPR%20Felony%20Disenfranchisement%20Shadow%20Report.pdf. *See generally* Katzenstein et al., *supra* note 24.