

The new penal state: globalization, history, and American criminal justice, c. 2000

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In recent years labour organizers, civil and human rights activists, journalists, and scholars of criminal justice have drawn attention to what appears to have been a radical transformation of the American penal system. Pointing to spiralling incarceration rates, commentators have tended to emphasize the quantitative aspects of the transformation. The numbers are striking: since 1980, the US prison population has grown to be the largest in the world, with the aggregate number of men and women in state, federal, and local prisons quadrupling from 500 000 in 1980 to 2 million in November 2000.¹ Just under half of these convicts are African American men, while just 7% of the American population are African American² (Donziger 1996: 102). With 668 of every 100 000 of the population behind bars, the US is second only to Russia (with a rate of 690/100 000); historically, only apartheid South Africa and the Union of Soviet Socialist Republics have boasted higher rates of incarceration as punishment for crime.³ On the administrative side, the number of Americans working in law enforcement has increased rapidly, with twice as many people employed as police officers in 1990 as in 1980, and more people employed by American prisons and jails than by any Fortune 500 company save General Motors (Marable 2000: 58).

Descriptive statistics such as these indicate the increasing magnitude of the state's raw coercive capacity (its ability to detain people) and the velocity at which that capacity has expanded; they also signal the extent of the crisis into which certain groups of Americans (most conspicuously, black Americans) have been cast in the last 20 years. However, as is

often the case with statistical modes of description, the numbers also tend to promote the view that the present penal system is simply an intensification and expansion of a pre-existing institution; that is, they imply that the American penal system of the 1990s is substantively the same as that of the 1960s and 1970s, only larger. The tendency of certain statistical approaches to misrepresent two distinct penal systems as one and the same is echoed and reinforced by the markedly ahistorical quality of much of the scholarly literature. Although, in the last five years, many commentators have begun to address the qualitative changes that have taken place in American prisons, (Gilmore *et al.* 2000; Davis 2000; Parenti 2000; Rosenblatt 1996) most offer no historical perspective of any kind; those few who have explored the relationship between past and present penal practice have tended either to describe (rather than explain) the changes, to offer analyses that are teleological and deterministic (in the metaphysical sense that the present system is treated as a preordained outcome or working-out of transcendently oppressive forces), or to emphasize without qualification that certain features of the present system constitute a 'repetition' or reincarnation of past penal practice, most particularly that of nineteenth century America.⁴

All three views of the recent transformation of US penal practice (the expansion, predetermination, and repetition theses) are troubled both by fundamental changes that have taken place in the structure and ideology of punishment in the last 20 years and by the history of incarceration. The employment of

prison labour by private corporations, the proliferation of private prisons and of transnational prison corporations, the privatization of food, medical, telecommunicative and other prison services, the retrenchment of convict educational programmes, and the striking of the progressive doctrine of rehabilitation from official penal discourse, cumulatively attest that the American penal system has undergone a profound qualitative transformation. As I will argue here, rather than constituting either an expansion of a pre-existing system or a 'return' to nineteenth century penal practice, these innovations signal the ascent of a new penal state.

The historical substance and significance of this new penal state — including the circumstances of its genesis, its relation to prior practice, and its broader political significance — comprise the principal problems of this paper. I proceed from the intuition that, just as previous penal systems were wrought in times of profound social upheaval (such as the American Revolution), the quantitative and qualitative characteristics of the current penal state are likely to be tightly bound up with the social forces that have worked in recent years to pry certain realms of social activity — most critically, activities serving the pursuit of profit — away from the oversight of America's federal (and also state and local) government and legal system. In this regard, my paper explores the relationship between recent changes in the American penal system and the forces of economic globalization (Hardt and Negri 2000: 8–9; Weiss 2000: 2).⁵ Less a full excavation than a profile cut, my paper marks out some of the potentially rich sites for historical research into what I will argue is the common ground of economic globalization and penal reconstruction.

One of the most significant developments in US prisons in the last two decades of the twentieth century, and one that has invited comparison with previous penal regimes, has been the employment of prisoners by the manufacturing and service sectors of both public and private enterprise.⁶ This constitutes an innovation of the US manufacturing and service sectors, as much as of the penal system. Since 1980, over 30 states have passed

legislation authorizing private enterprise to use convict labour (Lafer 1999: 66); the process was hastened by the passage of federal law (Prison Industry Enhancement Act (1979)), which effectively overthrew the federal government's 1929 ban on interstate commerce in prison-made goods, thereby permitting private enterprises to contract for prisoner labour and to transport and sell prison-made goods across state lines.⁷ Other states have authorized state correctional services to oversee the production, distribution, and sale of prison-made goods. Today, prison labourers are producing a wide range of commodities, from computer parts to blue jeans, and participating in a number of commercial services, from telemarketing to the restocking of the shelves in retail stores. A wide range of corporations, including Microsoft, Eddie Bauer, J.C. Penney, Victoria's Secret, Best Western Hotels, TWA, AT&T, Toys 'R' Us, and Honda have leased convict labourers in the past five years (Lafer 1999: 66; O'Meara 1999: 14; Muwakkil 2000: 90–92). The extent to which prison labourers are engaged in private commercial activity is quite limited: today, only a fraction of American prisoners are engaged in commercial activity (approximately 80 000 of 2 million) (Lafer 1999: 66). Nonetheless, both the number and the percentage of convicts engaged in prison labour have been steadily increasing since 1990, and seem set to increase further.

This development has been assailed by a number of critics as a 'return' or 'recapitulation' of the industrial convict lease practices that prevailed in many of the Northern states through much of the nineteenth century; in light of the disproportionate numbers of black Americans in today's prisons, some commentators have also likened the contemporary resurgence of penal labour to the penal system of the post Civil War South, where thousands of convicts, mostly former slaves and their children, were leased out to employers and, later, put to work on state penal farms (Davis 2000: 72). Others have referred to contemporary penal labour as the 'new slavery'. Closer comparison of these forms of labour suggests that while all four are unfree, both the conditions under

which contemporary penal labour has arisen and its structural and ideological significance, diverge from previous systems of forced labour.

Under the republican prison system, which arose in the industrializing states of the Northeast in the 1820s and prevailed across the Northern and Western regions of the US until the 1890s, penal servitude in the form of convict leasing quickly became the linchpin of penal order. This convict lease system had not been envisioned by the prison's American founders, who imagined that the convict could be brought to his moral senses through isolation, silent labour, and repentance before God (Rothman 1990: 86–87, 92–94, Meranze 1996, Panetta 1999) but, in large part because of the fiscal and administrative frailty of the antebellum states and the Northern states' uniquely tight labour supply, prison wardens increasingly turned to leasing-out convicts as a means of building self-sustaining prison economies. Beginning in the 1830s, but especially after the 1850s, convict leasing was practised in many of the state prisons of the North, and a majority of some states' convicts were engaged in it at any one time. Not only did the contracting of prisoner labour to private manufacturers significantly subsidize many states' penal systems, it became the foundation of prison order. Convict leasing had become so commonplace by the 1860s that the Constitutional amendment that formally abolished chattel slavery (the 13th Amendment to the US Constitution), also recognized, protected, and lent a degree of moral authority to it: 'Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction' (emphasis added) (Constitution of the United States of America 1865). That convicts were, by implication, the state's bondsmen was confirmed by Virginia's Supreme Court in 1871, when Judge Christian found that prisoners were, 'for the time being, slaves of the state.'⁸

Convict leasing may have been the officially sanctioned *modus operandi* of many state penal systems in the North through much of the nineteenth century, but it was far

from secure. Wherever it took root in spheres of production in which civilian labour was organized in some shape or form, it was strenuously contested. Within months of the leasing of state prisoners to private enterprise in New York in the early 1830s, workers petitioned and struck against the practice; workers in other states joined them in protest at convict leasing through the middle of the nineteenth century (Panetta 1999: 258–307, Petchesky 1993: 595–561, Rothman 1990: 104–105). In concrete terms, their efforts met with only moderate success; nonetheless, their actions forewarned penal administrators, as well as manufacturers, that leased convict labour was vulnerable to ongoing political, and even physical, attack. Convict leasing — and with it, prison order — was in this sense understood to be on shaky ground.

The apparent instability of convict leasing in the industrial states was exacerbated after the Civil War, as American industrial labour and capital entered a protracted series of bloody struggles. Convict leasing was one of several points of contest in these conflicts (Petchesky 1993: 595–611).⁹ At stake was not only the Northern system, but also a new, extremely exploitative variation of convict leasing that was emerging in the former slave states of the South. An invention of the North, convict leasing moved South of the Mason-Dixon line in the early years of post-Civil War Reconstruction, where it proceeded to proliferate in the late 1870s. Southern convict leasing — and the entire complex of legal and extra-legal punishment that emerged after Reconstruction — was deeply influenced by the revolutionary circumstances in which the land-owning and commercial classes found themselves after the destruction of chattel slavery (Foner 1988, 1998: 95–113). Chattel slavery had been the foundation of Southern economy, social hierarchy, and culture; the effects of its destruction and eventual legal abolition were manifold. As slaves cast their bonds aside, both the wealth of the South (the preponderance of which consisted of chattel slaves) and the source of wealth (the productive and reproductive labour of three million men, women, and children) were demolished; with these, went the rudimentary 'protections'

of slavery (provision of food, shelter, clothing, medical care), the distinctive social hierarchy of the antebellum South, and the foundation of a tenuous cross-class alliance between large slave-holding planters and the white upcountry yeomanry (Genovese 1976: 91–92).¹⁰

It was under these conditions of social collapse that the sword of the law was sharpened and wielded on behalf of planters' and developers' efforts to return black Southerners to a position of vulnerability, and hence to economic exploitability.¹¹ In conjunction with a law wave (which made serious crimes of petty offences and petty crimes of breaches of etiquette) (Oshinsky 1996: 40–41),¹² which essentially separated the freedmen from independent means of prosperity as well as of legal protection, convict labour came to play a critical role in the New Southern order (Litwack 1998: especially 217–278, Myrdal 1942: 523–572). A small but significant minority of former slaves were siphoned back into forced labour through the new criminal justice system: performing the unskilled — and very often life-endangering — physical labour that civilian labour, whether black or white, was reluctant to undertake, small armies of penal labourers drained malarial swamps, tapped trees for turpentine, laid thousands of miles of roads, and mined the earth in the drive to build New Southern infrastructure, industry, and agriculture. Not only did convict labour (in both its leased and state-use forms) contribute directly to Southern economic development, but perhaps even more crucially, the threat of conviction and detention at hard labour, combined with the legal and extralegal pressures mitigating against black Southerners' ownership of land and businesses, helped create a more compliant *civilian* labour force whose toilers were neither fully enslaved nor perfectly 'free'.¹³

In the 1870s and 1880s, then, convict leasing was practised in various forms across the nation. But at the same time that the system of penal labour for private gain was more extensive than it had been before, it was also more precarious. The widespread campaigns of organized industrial labour (most notably, the Knights of Labor) in combination with the

growing number of manufacturers who complained of unfair advantage in the convict leasing system, and the remnants of a Southern yeomanry vigilant against unfair competition from the planter class, ensured that convict leasing — in both the South and the North — became an important electoral issue in the 1870s and 1880s. By 1880, the political parties of eight states, including the important penal states of Massachusetts and New York, had undertaken to abolish contract labour.¹⁴ Through the 1880s most Northern states moved to abolish convict leasing; following waves of investigations into the abject conditions of convict leasing in the South in the late 1880s, and a mounting chorus of protest from both organized labour and small farmers who opposed larger planters' and industrialists' monopoly of cheap labour (which most famously involved civilian Tennessee coal miners repeatedly razing prisoners' stockades to the ground and liberating their occupants) (Shapiro 1998) most Southern states followed suit in the 1890s and 1900s (Oshinsky 1996: 52). Penal servitude did not disappear with convict leasing (it was reinvented as state-use), but its use in profit-making enterprises was drastically curtailed.¹⁵

Although 21st century penal labour resembles the prison labour of the nineteenth century, there are certain substantive characteristics that distinguish it from its forebears and undermine the commonplace argument that prisons are simply 'regressing' or somehow repeating history. Most importantly, there are critical differences in their structural characteristics. Some of the principal preconditions of nineteenth century American industry were the tight labour supply (relative to Europe and Asia), its location within the United States, and the relatively high cost of labour. American industries engaged labour within the territorial jurisdiction of the state and federal government and were consequently subject in theory, if not always in practice, to political oversight. Similarly, in an age in which those who were entitled to vote did so to the fullest extent of the law (and sometimes more so), prison administrations and the employers of penal labour, were constantly susceptible to the demands of

'popular' (i.e. majority enfranchised) opinion.¹⁶ The fact that workers, small farmers, and small manufacturers ultimately succeeded in overthrowing convict leasing is testament both to the absence of bureaucratic insulation in the nineteenth century penal system as well as to the social and political power of skilled workers in the North and small farmers in the South at that time. (As I have argued elsewhere, bureaucratization of the prisons in the 1910s and 1920s insulated the daily management and overall policy of the penal state from elections, strikes, philanthropic reform, and most other kinds of action undertaken by private citizens in the nineteenth century; this insulation persists to the present day, McLennan 1999: 422–470).

Today, with American industry fleeing first the Northern states, and then the Southern, for third world labour markets, the penal population has become one pool of potential labour within a larger, more heterogeneous (and 'flexible') ocean of potential labour. With extremely low relative wages, the absence of organized labour and protective labour regulations, and (in many cases) a *de facto* oversight of national labour policies by the World Trade Organization and World Bank, the labour of industrializing third world nations has been attracting US- and European-registered corporations since the late 1970s. Given that territorial boundaries also mark the limits of the aegis of US law, US-registered corporations are now only incompletely subject to US law. Most significantly, American corporations have been able to set up shop in labour markets that are well beyond the oversight of US liberal democratic institutions and, by extension, the political will of American citizens. (That these institutions and liberal democratic citizenship are being enfeebled in the course of economic globalization is a separate, albeit related and extremely important, question.) In this respect, American industry seems to be freeing itself from the three pillars of the New Deal state: liberal democratic politics, the Keynesian regulatory and welfare state, and the rights-based, liberal legal system. The historical social struggles of which these institutions bear the traces¹⁷ are in the same moment left for dead on home soil: American industry has

partially freed itself from the influence and collective force of American workers (at least to the extent that they organize on an exclusively national basis).

Where, then, does the pool of actual and potential penal labour lie in this new ocean of labour? As Gordon Lafer has noted, the cost of penal labour is extremely low by comparison with civilian US labour; typically, the private corporation pays the state between approximately fifty cents and two dollars per hour for each convict 'hired', whereas a civilian worker would be paid anywhere between approximately \$4.35 and \$8 per hour (Lafer 1999: 66). Like most other laws intended to guarantee the rights and well-being of citizens, the ambit of hard-won minimum wage laws stops at the prison gates: by employing convicts, private employers are able to escape the thicket of US employment laws to which they have been subject in the civilian US labour market through the second half of the twentieth century. Employers of convicts do not have to pay health insurance, unemployment insurance, payroll or Social Security taxes, sick leave, workers' compensation, over-time, or (it need hardly be noted), vacation time. Above all, employers do not have to contend with organized workers: prison labourers have no right to organize or strike, call press meetings, or openly communicate with co-workers; indeed, as wards of the state who are deprived of many of the fundamental rights of US citizenship, prison labourers are left with only very circumscribed avenues of complaint and action, if any at all (Lafer 1999: 66–67).

In light of the transnational (and thereby translegal) expansion of labour markets in the last quarter of the twentieth century, it appears that the conditions of contemporary penal labour in the US bear a resemblance less to the industrial prisons of the nineteenth century than to the labour markets of today's industrializing third world. Under conditions of economic globalization, American prisoners tread water in an ocean of real and potential labour that stretches from Vietnam and the Philippines to New York and Georgia; from Mexico and Honduras to Michigan and Quebec. Within this ocean may also be found

significant pools of migrant labourers from the third world, now subsisting on US territory. The role of these large communities of illegal and generally unskilled immigrants from Mexico and East Asia in the American economic structure also bears a resemblance to that of penal labour. Amongst other effects, the pernicious combination of *de facto* tolerance and aggressive policing of these migrant workers and the 'shadow economies' (Weiss 2000: 12) in which they subsist has placed them in the uncertain juridical category of what might be best described as 'outlaw labour' — that is, they enjoy semi-legitimacy as wage labourers but little or no legitimacy as rights-bearing subjects entitled to the protections of labour, civil rights, and welfare law. Arguably, these practices have contributed to the corrosion of American labour, civil rights, and welfare law *per se*, to the extent that the reach of the law has contracted relative to the total population, both 'alien' and 'national', living and working on US soil.¹⁸ That 'illegal aliens' are both indispensable to the American economy and not entitled to legal protections has become more or less politically acceptable in the United States; the extent to which their bifurcated status may have fostered widespread acceptance of the civil disfranchisement and conscription to labour of other sectors of the American (national) population — most notably prisoners and welfare beneficiaries — is worthy of consideration.¹⁹

Whatever the structural similarities between industrializing third world labour, illegal immigrants, and American prisoners, certain sectors of American industry are at least conceiving of the industrializing third world and US prisons as comparable sites of production. As Kelly Patricia O'Meara has noted, many of those US corporations who joined the flight of capital South to Mexico, Honduras, and other central American states in the 1980s, are today showing heightened interest in America's prisons (O'Meara 1999: 14). Not only are the cost benefits and geographical location of prisons within the US thought to be attractive, but the fact that prison labour manages to remain within the territorial boundaries — while outside the

(costly) political and civil boundaries — of the United States enables the employers of prison labour to add a certain kind of value to their product: they are able to sell their goods under the popular (and increasingly global) fetish of the 'Made in USA' label (O'Meara 1999: 14).²⁰

Under today's conditions, prisoners are not only potential labourers in a transnational labour market; they are also the consumers of goods and services,²¹ and the objects of an apparently novel contractual relation that has arisen with the establishment of prisons that are privately owned and operated. In the last ten years, US-based companies such as Wackenhut Corrections Corporation, Corrections Corporation of America (CCA), and Kensani Corrections (KC), have become directly involved in the penal system through the construction, management, and maintenance of 'private prisons'.²² The number of American prisoners held in privately owned and managed prisons rose from 15 000 in 1989 to approximately 121 000 in 2000. 100 000 of these prisoners are being held in prisons owned and operated by either Wackenhut or CCA (Haddad 2000: 95; Smalley 1999: 18).²³ The private prison industry experienced tremendous growth in the 1980s, with average annual growth rates of over 20%; in 1997, annual revenue generated by private corrections in the US amounted to more than one billion dollars.²⁴ Although growth has slowed in the last three years, and stock analysts have warned investors about recent 'instability' and 'uncertainty' in the industry, penal corporations have steadily expanded their operations both in the US and abroad (Haddad 2000: 95).

Unlike the state prison authorities — and the convict lease companies of the nineteenth century — Wackenhut, CCA, and others have been able to benefit from two sources of profit: first, by operating the prison for less than what the state pays them, they extract profit from the state; second by hiring out 'their' convict labour to other private enterprises, or by putting convicts to work for their own enterprises, they extract profit from prisoners' labour (Lafer 1999: 66). Amongst other things, the juridical status of convicts has be-

come more uncertain under privatization. Whereas the state administrators of prisons were restricted territorially (i.e. their penal facilities and legal authority ended at their state's borders), Wackenhut and other carceral corporations, like ordinary corporations, are effectively non-territorial in character: they can (and do) operate prisons and exercise authority in many different (US) states and overseas countries (Supra n51). Moving prisoners from one state to another, much as the objects of commerce flow between states, further complicates what is already the very ambiguous civil status of the prisoners.²⁵ (The question of whether or not these corporations can transfer prisoners between national territories may well arise in the near future.)

A contention thus far buried in my discussion of the 'new penal state' is that American penal practice has been historically tied to changes in the character, reach and supporting ideologies of the state; after all, since its inception, the prison has been both symbol and enforcer of the legislated right of the state to use force against those who transgress the laws. In this very concrete sense, the prison is the state's bulwark. But the prison has posed dangers to the state as well, for much like the elaborate public executions of the *anciens regimes* of the West, punitive incarceration has also always possessed the potential to deny the state the legitimacy it requires. Originally justified as an 'enlightened alternative' to the 'tyrannical' practices of corporal punishment and public execution, through most of the nineteenth century, the prison's inescapably coercive nature and its tendency to promote degraded conditions and physical abuse, constantly threatened to expose the republican state as tyrannical. The prison's potential to delegitimize the state became particularly acute in the late nineteenth and early twentieth centuries, as American prisons underwent a process of deindustrialization following the decline of convict leasing. As manufacturers packed up their machinery and left the prisons, the key disciplinary mechanism of incarceration was lost, while conditions of extreme misery and degradation attended the convicts' enforced idleness (McLennan 1999).²⁶ The efforts of prisoners, philanthropists, and jour-

nalists to publicize the increasingly horrifying conditions of the prisons propelled the penal system (and by extension, the state) into a thorough-going crisis of legitimacy.

An understanding of this crisis and of the ways in which it was resolved in the 1910s and 1920s is vital to the account of the recent transformation of the American penal system, and to any explanation of how and why the penal system that prevailed between the 1920s and 1960s went into decline. Two brief points may be made here: as far as the daily regimen of the prison is concerned, in the 1910s and 1920s, a series of make-shift solutions to the problem of penal order — the introduction of mass culture, organized athletics, formal education, psychiatry, and prisoner welfare associations and clubs — cohered to produce an entirely new penal order built on distraction, incentive, consumption, and sublimation (McLennan 1999: 460). This system effectively ameliorated most of the more extreme conditions of the late nineteenth century prison and became the keystone of penal order through the twentieth century. At the same time, penologists, bureaucrats, jurists, reformers, and state political leaders published an expansive and markedly national literature on the operation, objectives, and social significance of the new penal system. (They also produced a surprisingly extensive series of films, plays, and exhibitions about the 'New Penology'.) This literature, which claimed to describe, but more nearly prescribed, the new penal order, construed the prison specifically as a kind of welfare agency that aimed to 'correct' convicts by socializing them as good Americans and returning them to the national community (McLennan 1999: 422–470).

Significantly, this particular formulation of the prison's place in society relied upon working concepts of national community and national mission. (Here, it stands in contrast to the 'isolate-and-repent' [or what I call the 'moral'] model of early nineteenth century penology, as well as to the justificatory discourses of the contemporary penal system.) For it to adhere amongst the general population to the extent that it did, there had to exist a robust, widely held conception of national community and a feeling of shared na-

tional destiny, whose vitality in turn relied upon that conception's resonance with people's experience of their everyday lives and social relations. Through the first half of the twentieth century, and into the early years of American deindustrialization and economic globalization, the concept of shared national destiny and the affiliated concept of the welfare rehabilitation of convicts to membership in a national community, made common (if not good) sense of American society, at least in the eyes of the majority of its citizens.

Arguably, it was precisely during the years in which the ideological touchstone of rehabilitative penology — the nation-state — began to fracture under new pressures in the 1960s and 1970s, that the official version of rehabilitative penology, with its emphasis upon shared national destiny, was rendered incoherent. The structural erosion of the legal, territorial, economic and *affective* boundaries of the American nation, and the subsequent evisceration of national ideology, seem likely to have been the crucible of the crisis and eventual demise of the national penal system. An account of why, how, and to what extent these boundaries crumbled will be crucial to understanding the subsequent transformation of the meaning and practice of incarceration. The history of punishment's close affiliation with social conflict around the question of freedom, equality, and the distribution of resources recommends the great social struggles of the 1960s as an obvious starting point for such an enquiry.

Earlier in this paper, I noted the relative contraction of the sources of authority in the New Deal state under the pressures of economic globalization; I want to turn at last to the state's coercive capacity (that is, its capacity to enforce law and policy, both beyond its borders and within) and the means by which the state's monopoly of penal violence might be legitimated. In the same period in which the national penal state declined and the new penal state took shape, the distinction between military force and police force, which for many decades had been the ordering principle of the coercive capacity of most Western nation states appears to have blurred. Michael Hardt and Antonio Negri's observation that,

beginning with the Persian Gulf war of 1991, war *per se* began to be reconceived of and executed specifically as *police* action designed to affect an ethical end, suggests that the basis of legitimation for the military state is rapidly becoming the same as for the police/penal state (Hardt and Negri 2000: 12–13). In both cases, the putative objective is to prevent or repress social conflict, very often on behalf of a perceived or actual victim, and to restore social equilibrium in the name of that which is 'right'. (As the wide range of protest activities that have been staged at the meetings of the WTO, World Bank, and G-8 attest, the exact contents of 'right' are heavily contested. Notably, American penal practices [most especially the death penalty] have featured quite prominently in recent protests.)

While war may have taken on 'policing' functions (where policing is understood as prevention and repression of social disequilibrium in the name of the right); in the United States, policing itself appears to have taken on some of the characteristics of military action. Certainly, some of the leading advocates of the new penal state have argued that the prison system is, and ought to be, military or 'paramilitary' in structure. For example, John DiIulio, a prominent conservative scholar and President George W. Bush's chief advisor for 'faith-based' welfare initiatives, has observed that the prison workforce (of employees) is, in effect, a paramilitary bureaucracy and that it should therefore actively recruit employees from the armed forces — more specifically, those soldiers who have successfully completed a tour of duty. In DiIulio's view, these service men and women are far preferable to college-educated candidates who lack a military background: soldiers are motivated, comfortable with working in strictly hierarchical organizations, and skilled in the conduct of violent coercion (DiIulio 1987).

The extension of American policing operations overseas also suggests that the modern police/army distinction is collapsing, or at least undergoing some kind of rationalization. As the escalating incarceration rates and the 'war on drugs' suggest, borders are becoming

increasingly irrelevant to the forces of armed state coercion; police and military are increasingly engaged in the same project. The so-called 'war on drugs', which is at once 'domestic' and 'foreign' in scope, provides a case in point.²⁷ The two-way spillage of police into military, and military into police, may also be observed in the recent expansion of the Federal Bureau of Investigation — founded in the 1920s and traditionally a dedicated domestic police force — overseas. There are numerous instances in which the Federal Bureau of Investigation and police advisors from the largest metropolitan police forces (such as the New York City Police Department, NYPD) have led or participated in 'inquiries' and peace-keeping campaigns beyond US borders. For example, the FBI opened an office in Moscow in 1994; officers from the NYPD, including Police Commissioner Ray Kelly, assisted US armed forces in Haiti in 1994; two hundred NYPD officers joined the 721-officer contingent of the United Nations International Police Task Force in Serbia in 1996; and the FBI dispatched a team of investigators to Yemen, following the bombing of the USS Cole in 2000.²⁸

By way of conclusion, I would like to offer a few hypotheses about the recent history of the American penal system and its relationship to economic globalization. Erected on the grave of a previous penal system, the new penal state is less an extension of the pre-existent national penal system, than it is its tombstone. Not only are its structural characteristics novel, its sources of legitimization appear to be of a different order to those of the national penal system. They are also quite distinct from those of the nineteenth century penal system. The new penal state does not seem to require the modern liberal conception of the nation in order for it to enjoy legitimacy in the eyes of a critical mass of Americans; indeed, just as the legitimacy of the new penal state seems to have been partially enabled by the decline of that conception, this state also seems to be working to further erode the national concept through the excommunication of the poorest, least educated of Americans from the juridical bonds of national membership. In this regard, the

new penal state may be thought of as both effect and an instrument of a process of denationalization whose full significance and extent are as yet obscure.

In light of the rollback and brokering of the state's welfare arm (including education and health services) in the 1980s and 1990s, the penal complex is arguably poised to become the state *per se*: that is, a penal state. Throughout the 1980s and 1990s the practical, day-to-day operations undertaken by, and in the name of, all three local, state and federal governments became increasingly enmeshed in the business of incarceration. That the state, as it is seen through the eyes of several millions of Americans, consists of little more than its penal agencies is grounded in these developments. Those millions of Americans who view the state this way may well include not only prisoners and the communities from which they hail, but the growing numbers of Americans whose livelihoods depend either directly or indirectly on the booming prison commerce. The legitimacy of the system, however, appears to be as much contested as was the crumbling penal system of the immediate post-lease 1890s. Notably, great boosters of the private employment of convict labour, such as Edwin Meese III, have drawn on the rehabilitation models of penology's national period to make an argument for the rehabilitative effects of labour: given the disappearance of much industry from American soil, it is entirely unclear to what it is that convicts will be successfully restored.

The privatization of prisons and prison services appears to have hastened the process of the secular ex-communication of a large section of the labouring poor; this is illustrated most starkly by the vacuum of juridical — and state bureaucratic — authority which has resulted from the relocation of one state's prisoners to another state, and the consequent conflicts that have taken place between state and private penal authorities.²⁹ This last observation forces us finally to confront the troubling and potentially generative relationship between coercion, legitimacy, and economic globalization; as territorial state-based authority threatens to become inadequate to the task of regulating and supervising an

enormous and mobile prison system, we see that what is created is the *need* for new forms of supra-state authority and a new concept of right, which both proceeds from, and legitimizes, new forms of penal coercion. In this respect at least, the new penal state appears to be the blood kin of the new military state, and the orphan of the specifically *national* state.

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Notes

1. In 1980, there were 501 886 people incarcerated in American prisons and jails. At mid-year (30 June), 1990, 1 148 702 people were incarcerated in state and federal prisons and local jails; 1 931 859 people were incarcerated at mid-year 2000. The annual rate of increase of the prison population for 1999/2000 was the smallest since 1971, suggesting that the rapid expansion of prison populations may be levelling off. Prison and Jail Inmates at Midyear 2000. United States Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. *Bulletin* (March 2001) 1, 3. These numbers do not include immigrants incarcerated by the Immigration and Naturalization Service. There is a surprising degree of consensus amongst conservative and liberal scholars that the incarceration boom has been largely driven by the 'war on drugs', particularly the policing of users of crack cocaine. See, for example, Currie (1998: 12–32) and Blumstein (1995).
2. At midyear 2000, there were 4777 black men (excluding black Hispanic men) per 100 000 residents in American prisons, compared with 683 white men per 100 000 residents and 1, 715 Hispanics per 100 000 residents. The rates for incarcerated black, white, and Hispanic women were, respectively: 63/100 000, 380/100 000 and 117/100 000. *Prison and Jail Inmates at Midyear 2000*, 9.
3. *World Report 2001*, Human Rights Watch (2001, www.humanrightswatch.com/wr2k1/usa/index.html)
4. One notable exception to the generally ahistorical character of the literature is David Garland's *The Culture of Control: Crime and Social Order in Contemporary Society* (Garland 2001), which offers a cultural history of the recent past (1970 onwards) of American and British criminal justice.
5. A rather imprecise concept, 'globalization' demands greater elaboration than the scope of this article affords. I use the term 'economic globalization' here as shorthand for the increasingly easy movement of money, technology, people and goods across national boundaries.
6. For extended discussion see Gordon Lafer (1999: 66) and Kelly Patricia O'Meara (1999: 14). For the views of a leading advocate of the private use of penal labour (Edwin Meese III, former Attorney General of the Reagan Administration and Chairman of the Enterprise Prison Institute) see Meese (1999).
7. Congress moved to abolish interstate commerce in convict-made goods in 1929, with the passage of the Hawes—Cooper Act, which prohibited the transportation of convict goods across state lines and mandated that all convict manufactures be stamped 'Made in prison'. The Ashurst—Summers Act (1940) provided that local correctional agencies must ensure that local business interests are shielded from prison manufacturing and that 'prevailing wages' are paid.
8. *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871). Invoking the archaic doctrine of *civilliter mortuus*, the Virginia court also found that in matters of estate and property the prisoner was to be treated as though 'civilly dead'. See Pollock and Maitland (1895: 434) for a discussion of *civilliter mortuus*. For a full treatment of the nineteenth and twentieth century civil death statutes with regard to convicts, as well as the 'civil disabilities' of convicts, see Mushlin (1993: 156–187).
9. For a discussion of the crisis into which these campaigns threw the penal system see McLennan (1999).
10. As Eugene Genovese was among the first to note, although the relationship between slaveholding planters and the non-slaveholding strata of Southern society 'varied over time and place', in general the latter had their own stake in slavery — and in maintaining reasonably good relations with the slaveholders. The cotton-growing yeomanry, for example, depended upon slaveholding planters to get their produce to market, mechanics were dependent upon the planters for employment, and the unemployed and underemployed drew upon planter philanthropy.
11. Fifty years after its publication, C. Vann Woodward's *Origins of the New South* (Woodward 1951) remains the definitive work on the New South. See Lichtenstein (1996) and Ayers (1984) for extended discussions of the importance of convict leasing to the economic and ideological reconstruction of the South after 1877.
12. Under the Mississippi 'Pig Law' of 1876, for example, grand larceny was redefined as the theft of any farm animals or property worth ten dollars or more. Cruelty to animals and drunk-

- eness also became offences punishable by the hard labour of convict lease or county gang. Convictions rose dramatically: in at least one state, the number of convicts quadrupled in the four-year period 1874–1877.
13. Typically, more minor convictions resulted in impressment into county road building gangs; more serious convictions resulted in a lease to private companies (Oshinsky 1996: 57, Lichtenstein 1996: xv–xvi, 13, 73–104). These works build on Barbara J. Fields's well-known study of the South's transition from chattel slavery to capitalism, which took place between the end of the Civil War and the 1930s: in this period, she argues, Southerners were subject to the pressures of the capitalist market, 'but on the basis neither of the old social relations nor of mature capitalist ones' (Fields 1983).
 14. Contra Petchesky, Panetta's study of Sing Sing strongly suggests that, after the Civil War, organized labour was able to bring about reform (Panetta 1999: 258–264); Shapiro and Ayers have also shown that the actions of free coal miners in Tennessee and Alabama were instrumental in the abolition of convict leasing in the South (Ayers 1984: 213–215, Shapiro 1998). Moreover, as Petchesky's own evidence suggests, one of the principal reasons manufacturers came to oppose convict leasing was that the use of convict labour provoked labour unrest, which manufacturers recognized was costly both to themselves and to the economy in general (Petchesky 1993: 603–604).
 15. Under state-use, the fruits of prison labour could be sold only to other state agencies (typically, city sanitation departments, the military, and government agencies — including the state prisons and hospitals (McLennan 1999: 57–182).
 16. The complaint of Elam Lynds (warden at Auburn and then Sing Sing in the 1820s and 1830s and host to Alexis de Tocqueville and Gustave de Beaumont), that prison wardens were 'slaves to public opinion' and that they were 'obliged to labor at once to captivate public opinion and to carry through [their] undertaking' to direct the prison was typical. Throughout the nineteenth century, wardens and penologists alike bemoaned the vulnerability of prisons to the 'opinion' of voters. Interview with Elam Lynds, in Gustave de Beaumont and Alexis de Tocqueville (1964: 161–165)
 17. Here I draw on the work of Pierre Bourdieu (1998: 33–34) on the fate of the national state under neoliberal globalization. In the US context, the work of New Labor Historians (most notably Lizabeth Cohen) on industrial workers' important and varied influence on the modern liberal state lends empirical weight to Bourdieu's theory (Cohen 1990).
 18. In a move that seems to confirm Bourdieu's expectation that the various arms of government (including legal agencies) will contest the diminution of authority experienced under globalization, the US Supreme Court recently took a step towards extending the (citizen's) right of habeas corpus to all INS prisoners pending deportation. Writing for the majority, Justice Breyer ruled that 'habeas proceedings are available as a forum for statutory and constitutional challenges to post-removal-period detention' and that 'the post-removal-period detention statute, read in light of the Constitution's demands, implicitly limits an alien's detention to a period reasonably necessary to bring about that alien's removal from the United States, and does not permit indefinite detention.' The length of that 'period reasonably necessary to bring about ... removal' was held to be no longer than six months. *Zadydas v. Davis and Ashcroft v. KIM HO MA*, Nos. 99–7791 and 00–38, Supreme Court of the United States, 2001 US (LEXIS 4912; 69 USLW 4626; 14 Fla. L. Weekly Fed. S 442, 21 February 2001, Argued, 28 June 2001). See legal commentator Henry Weinstein's assessment of the implications of this case in *Los Angeles Times* (Weinstein 2001: 27).
 19. The relative contraction of protective legislation is echoed by what many commentators have described as a nationwide rollback of state funding for education in favour of the expansion of state-funded prisons and creation of 'faith-based' welfare; as the National Association of State Budget Officers reported in 1996, state corrections expenditure increased 1200% between 1973 and 1993, while educational expenditure rose only 419% in the same period; in 1994 and 1995, state bond funds for higher education decreased by almost the same amount that corrections bonds increased (\$954 billion and \$926 billion respectively), National Association of State Budget Officers, '1995 States Expenditures Report,' (Washington, DC) 16, 77, in Ambrosio and Schiraldi (1997: 5).
 20. There are also hidden costs in the use of prison labour in certain kinds of production, which have had the effect of dulling any substantial advantage that proximate (to US-based corporations) prisons might have over labour in more distant and under-developed regions. Edwin Meese III argues that local communities of workers would benefit from, rather than be harmed by, penal labour for profit: 'One of the areas we're looking at is how to get corporations that might go overseas to lower their labor cost to substitute prison labor so that the surrounding economic value can still be retained within the United States and actually benefit the small communities ...' (Meese 1999: 15).
 21. Healthcare for corrections is now a \$3.6 billion p.a. business, with projections that it will ex-

- pand to \$6.5 billion by 2005; about one quarter of prison healthcare is now privately contracted for. One company, Correctional Medical Services (CMS), based in St. Louis, Missouri, treats over one in every eight (260 000) American prisoners at 315 facilities in 27 states, including the entire prison populations of Massachusetts, New Jersey, and eight other states. For each of the past five years CMS has reaped a 22% growth in revenue (Shinkman 2000: 18).
22. Corrections Corporation of America is a publicly listed company and the parent company of Prison Realty Trust, which owns 55% of the private prisons in the US. Wackenhut Corporation owns 30% of US prisons, and owns private prisons (with a total population of 40 000 prisoners) in Australia, Europe, the Caribbean, New Zealand and South Africa. Revenue from Wackenhut's non-America prisons increased 87% (or US\$3.9 million in the first quarter of 2000, over revenue for the first quarter of 1999).
 23. The US Department of Justice counts 76 010 inmates held in private facilities at midyear 2000: this figure excludes those held in prisons *operated* (but which are presumably privately owned) by State or local authorities. *Prison and Jail Inmates at Midyear 2000*, 4.
 24. Charles H. Haddad has noted a recent turn in the fortunes of the major private prison company (Prison Realty, a subsidiary of CCA): following a downturn in prison construction and a series of well-publicized riots and murders in private prisons, the industry has been subject to a 12-month period of 'uncertainty.' Haddad nonetheless reports that 'criminologists and stock analysts believe the private prison industry will survive' (Haddad 2000: 95).
 25. In 1997, 1700 Washington, DC, maximum security prisoners were transferred to a CCA (now Prison Realty) prison in Ohio; Wackenhut has transferred convicts from Missouri to one of its Texas facilities; private prisons in New Mexico, Tennessee, and Montana house thousands of out-of-state convicts (Smalley 1999: 1168).
 26. For an account of reformers and the penal theory of the early twentieth century see Rothman (1980) and Freedman (1981).
 27. See Peter Andreas, 'The Rise of the American Crimefare State', *World Policy Journal*, Fall 1997: 38–45.
 28. *The Christian Science Monitor*, 5 July 1994, 6; *The New York Times*, 10 October 1994, Monday, Late Edition — Final, A8; *Daily News* (New York) 11 April 1996, 7; *The New York Times*, 27 April 1996, Saturday, Late Edition — Final; *The New York Times*, 29 October 2000, Sunday, Late Edition — Final, 10; *Los Angeles Times*, 26 October 2000, Thursday, Home Edition, Part A; Part 1; 10; *The New York Times*, 13 October 2000, Friday, Late Edition — Final Section A, 1. On the

domestic and global dimensions of the American war on drugs (including the turn to punitive policing of users of street drugs in the 1980s), see Andreas (2000), Friman and Andreas (1999) and Blachman *et al.* (1996).

29. Alphonse Gerhardstein, an attorney who represented DC convicts in a 1999 class action suit against CCA in connection with that company's Youngstown, Ohio prison, points out that there is almost no governmental oversight of multinational prison companies (Gerhardstein in Smalley 1999: 1168).

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