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Inmates for Rent, Sovereignty for Sale: The Global Prison Market

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INMATES FOR RENT, SOVEREIGNTY FOR SALE: THE GLOBAL PRISON MARKET

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I. INTRODUCTION

In 2009, Belgium and the Netherlands announced a deal to send approximately 500 Belgian inmates to Dutch prisons in exchange for a £26 million annual payment.[1] The arrangement was unprecedented but justified as beneficial to both nations[2]: Belgium had too many prisoners and not enough prisons, whereas the Netherlands had too many prisons and not enough prisoners.[3] It was, the two governments and other observers

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1. *See, e.g.*, Vincent Moss, *Send British Inmates Abroad to Ease Overcrowding Says Labour MP*, THE MIRROR (Jan. 15, 2012, 12:01 AM), http://www.mirror.co.uk/news/uk-news/send-british-inmates-abroad-to-ease-158584#ixzz2Qs7qnREj; *Belgium Sends 500 Inmates to Netherlands After Renting Prison for £26m a Year*, THE DAILY MAIL (Feb. 5, 2010, 8:32 PM), http://www.dailymail.co.uk/news/article-1248947/Belgium-sends-500-inmates-Netherlands-renting-prison-26m-year.html#ixzz2Qs7CFlry [hereinafter DAILY MAIL].

2. As discussed *infra*, convict-leasing was certainly a recognized practice in the United States in the nineteenth and early twentieth centuries, but that model generally involved the leasing of incarcerated individuals to private actors for labor purposes as opposed to the leasing of inmates from one carceral institution to another. *See, e.g.*, ASATAR P. BAIR, PRISON LABOR IN THE UNITED STATES: AN ECONOMIC ANALYSIS 10, 31, 131 (2008); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 48–52 (2006). Similarly, as discussed at length *infra*, domestic transportation of prisoners, fueled at least in part by fiscal interests, is not unheard of. However, regardless of how closely these analogs resemble the Belgian-Dutch exchange, they are clearly distinguishable from an exchange via treaty between nation states.

3. *See, e.g.*, Moss, *supra* note 1; DAILY MAIL, *supra* note 1; *Belgium to Rent Dutch Jail Cells*, BBC (Oct. 31, 2009), http://news.bbc.co.uk/2/hi/8335868.stm; Alan Hope, *Belgian Prisoners to Move to Dutch Jails*, FLANDERS TODAY (May 26, 2009), *available at* http://www.flanderstoday.eu/current-affairs/belgian-prisoners-move-dutch-jail ("The situation in Belgium's jails was highlighted last week when it was revealed that Ypres' prison currently holds 109 prisoners, despite having a nominal capacity of only 55. Also, Bruges' prison has 751 inmates for a capacity of 632. Throughout the system, the situation of men sleeping on a mattress on the floor of a two-man cell is commonplace. Alternatives are beset with difficulties: while there are 748 offenders now on release under electronic surveillance, the waiting list of those suitable for that programme is now over 1,300. While there are enough ankle-bands to go round, there is a shortage of staff to monitor the system.").

explained, simple economics, a case of people helping people (or, more precisely, nations helping nations).[4] Supply had crossed semi-permeable borders to meet demand, yielding an efficient solution to a multinational, carceral dilemma. Unlike the case of Australia or other historical prison colonies,[5] independent sovereign nations had negotiated on equal footing and reached an agreement with mutual benefits.

The prisoners have since changed hands, and the deal has not been replicated (despite reported interest from Britain and some vague comments by then California Governor Arnold Schwarzenegger),[6] nor has it triggered sustained criticism or received significant scholarly treatment. Indeed, outside of a single blog post by international law scholar Eugene Kontorovich,[7] no U.S. legal academic has publicly weighed in on the exchange, its merits, or its potential impact on domestic or international carceral policy. A lone report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") prepared in the spring of 2012 after the transfer had already occurred stands as the authoritative voice on Belgium and the Netherlands' transnational prisoner exchange, providing a brief and largely uncritical account of the situation and its impact on the well-being of the inmates affected.[8]

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4. *See, e.g.*, *Trading Prisoners in the Low Countries: It's a Deal*, THE ECONOMIST (July 22, 2010), http://www.economist.com/node/16636011 ("On February 5th this year, the Dutch and Belgian governments drew the logical conclusion, and agreed on a deal."); Eugene Kontorovich, *Prisoner Offshoring, or Gaolbalization*, THE VOLOKH CONSPIRACY (Nov. 19, 2012, 8:25 AM), http://www.volokh.com/2012/11/19/prisoner-offshoring-or-gaolbalization/ (describing the exchange as an example of a properly functioning market and a demonstration of the power of market transactions to resolve social, political, or economic problems).

5. *See* Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 109–11 (2007).

6. *See* Wyatt Buchanan, *Governor Looks South of the Border for Prisons*, S.F. CHRONICLE (Jan. 26, 2010, 4:00 AM), http://www.sfgate.com/news/article/Governor-looks-south-of-the-border-for-prisons-3274745.php#ixzz2RFq8rLkl ("Gov. Arnold Schwarzenegger said Monday that the state could save $1 billion by building and operating prisons in Mexico to house undocumented felons who are currently imprisoned in California."); Moss, *supra* note 1 (discussing the suggestion that English prisoners might be transported to and incarcerated in Polish prisons).

7. Kontorovich, *supra* note 4.

8. EUR. COMM. FOR THE PREVENTION OF TORTURE & INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, REPORT TO THE GOVERNMENTS OF BELGIUM AND THE NETHERLANDS ON THE VISIT TO TILBURG PRISON CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT) FROM 17 TO 19 OCTOBER 2011 (2012), *available at* http://www.cpt.coe.int/documents/bel/2012-19-inf-eng.pdf [hereinafter "CPT Report"].

This Article begins to fill that critical void by examining the possible implications of this exchange and of a global market in prisoners, and by exploring the troubling ways in which such a market may reflect or mimic domestic criminal justice policies and practices. With scholars in the United States and abroad struggling to define, understand, critique, and remedy ever-accelerating and seemingly unstoppable movements to criminalize and incarcerate,[9] the Northern European prisoner exchange is ripe for the picking, or perhaps picking apart. An explicit end-around by state actors to maintain both prisons and prisoners in the face of economic and socio-political constraints, the exchange provides a real-world example of how the drives to criminalize and incarcerate interact with both economic challenges in increasingly debt-ridden nations and the firmly entrenched industrial complex surrounding the maintenance, staffing, and construction of prisons.[10]

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9. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (assessing the history of and factors behind mass incarceration of African-Americans); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997) (examining the relationship between reported incidence of crimes, levels of support for crime, and public support for punitive measures); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2002) [hereinafter GARLAND, CULTURE OF CONTROL] (considering recent trends in the U.S. and U.K. penal systems); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF THE NATURAL ORDER 196–239 (2011) (exploring the ideas of natural order and legal despotism and their potential influence on the state of the penal system); DOUGLAS N. HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008) (assessing the causes of "overcriminalization"); NICOLA LACEY, THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES (2008) (examining the institutional factors shaping criminal justice policies in democracies); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (describing the impact of the War on Crime on America); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) (detailing the historical circumstances responsible for the current state of the criminal justice system); BERT USEEM & ANNE MORRISON PIEHL, PRISON STATE: THE CHALLENGE OF MASS INCARCERATION (2008) (analyzing empirical data on mass incarceration); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) (explaining social forces driving penalization of the poor); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2007) (detailing the impact of the growth of the penal system on minorities and the poor); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (exploring the roots and development of harsh punishment practices in America).

10. The term "prison industrial complex" has entered the criminological lexicon as a means of describing the relationship between carceral policies and the assorted private and public interests affected by the policy decisions. *See generally* ANGELA DAVIS, THE PRISON INDUSTRIAL COMPLEX (1999). *See also* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84–85 (2003) ("The notion of a prison industrial complex insists on understandings of the punishment process that take into account economic and political structures and ideologies, rather than focusing myopically on individual criminal conduct and efforts to 'curb crime.'"); Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of*

In an effort to begin the conversation about the potential birth of a new, globalized market in prisoners, this Article suggests three frames through which we might view the Belgian-Dutch exchange: (1) prison labor in the realm of globalized labor markets (necessarily complicated by the status of the workers as prisoners); (2) democracy, sovereignty, and the role of community in criminal punishment; and (3) international trade or the exchange and regulation of resources. Accordingly, this Article will proceed in three Parts, with each Part dedicated to addressing the exchange, its significance, and the critical inquiry associated with each legal regime or theoretical area. Further, each Part will take up the question of exceptionality: should concerns about the possibility of a global market in prisoners be viewed as practically and conceptually new and different from current trends in prison policy, or are they simply more easily identifiable or more egregious versions of the same issues that define (or plague) domestic carceral institutions and legal regimes?

The first Part will examine the questions raised by viewing the prisoner as worker. If prisoners are performing work—whether manufacturing, service or other, generally remunerative or compensated tasks—then the exchange should be situated within the broader discourse regarding regulation of the cross-border flow of labor. If we view the exchange of prisoners as a form of labor transportation or trafficking, then how does this market complicate the already troubled global migration of workers? Further, how does the international dimension of the exchange change the calculus regarding the acceptability or desirability of forced prison labor in the United States and other nations? In addressing these questions, this Part will briefly examine the role of prison labor in the United States and the potential doctrinal relationship between its regulation and the treatment of transnational labor.

Social Hierarchy Through Dress, 87 N.Y.U. L. REV. 859, 865 n.26 (2012); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1420 n.1 (2012); Mike Davis, *Hell Factories in the Field: A Prison-Industrial Complex*, THE NATION (Feb. 20, 1995), at 229, http://road-trip.syntone.org/wp-content/uploads/2011/04/davis-mike-hell-factories-1995.pdf (identifying the "prison industrial complex" as "a monster that threatens to overpower and devour its creators, and its uncontrollable growth ought to rattle a national consciousness now complacent at the thought of a permanent prison class"). Viewed through such a descriptive lens, as discussed *infra*, prisons and other carceral facilities are not important institutions simply because of their function as spaces to detain criminals, but also as employers and drivers of local and national economies. *Cf.* Norman R. Cox, Jr. & William E. Osterhoff, *The Public Private Partnership: A Challenge and an Opportunity for Corrections*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 113, 117–20 (Gary W. Bowman, et al., eds., 1993) (describing the interactions between public prisons and private industry in the 1980s and early 1990s).

The second Part will address the prisoner exchange through the broader lens of criminal punishment and its purposes. Specifically, this Part grapples with common theoretical justifications that involve ideals of community or a democratic polity and the necessary challenges to these bases for incarceration posed by a regime in which outsiders are imported for punishment. This line of inquiry ultimately leads to an examination of the U.S. federal system and the cultural differences between those being incarcerated and those doing the incarcerating, even in ostensibly domestic spaces or socio-political units. By challenging the relationship between punishment and socialization/community safety, this Part will begin to raise the possibility that the market in prisoners undermines accepted justification for state authority and state violence. Further, this Part questions how such an exportation of sovereignty or an exchange in community values might affect both prisoners' treatment and their ability to seek legal redress for mistreatment or abuse relating to their confinement.

Finally, the third Part will examine the market for prisoners by considering the function of inmates as a commodity or perhaps a resource—the fuel necessary to support a substantial industry and infrastructure devoted to punishment and incarceration. In doing so, this Part takes a step back from concerns for prisoners or their well-being that necessarily underlie the other two theoretical and legal frameworks explored in this Article. Instead, this frame implicates the peculiar institution of incarceration as is it has come to operate in post-industrial capitalist and quasi-capitalist political economies. Punishment, with all of its moral components and ideological and theoretical foundations, also serves a basic economic function—to support and maintain a set of industries and employment opportunities. Similarly, it has become an almost intransient component of the contemporary nation state, not only because of some concern for public safety, but because of a conception of the state that is inseparable from the social, economic, and legal institution(s) of punishment and incarceration.

By suggesting such a multiplicity of readings, this Article argues that: (1) our normative take on the exchange and on future exchanges requires an honest engagement with the distributive and social-structuring stakes of the market; and (2) an examination of the legal frameworks associated with the lens discussed in each Part forces a set of uncomfortable parallels to U.S. criminal justice policy. In short, this Article ultimately argues that by examining what seems instinctively *wrong* with this globalized market through each frame, we may better identify and correct the policies that

have come to shape the unsustainable and destructive space of the U.S. culture of incarceration as well as appreciate how the institution of "the prison" has taken on a life of its own as an essential component of globalized and globalizing post-industrial economies.[11]

The practice of international leasing of inmates and prison space and the potential for its replication, given U.S. prison crowding[12] and the rise of the carceral state, stand as markers of the close nexus between neoliberal globalization and the entrenchment of the prison industrial complex as a sociolegal entity.[13] By exploring this link, I suggest that the Belgian-Dutch exchange is actually emblematic of a departure from traditional "theories of punishment" and represents a normalization of the prison as a staple of social and economic life.[14] Further, in focusing on U.S. analogs to this exchange, I emphasize that the ostensibly unique Belgian-Dutch treaty bears much in common with contemporary, domestic carceral policy. It

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11. In suggesting this multiplicity of readings, I also mean to take up the challenge posed by David Garland that critics of the criminal justice system should consider "punishment as a social institution." DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 287–90 (1990) [hereinafter GARLAND, PUNISHMENT AND MODERN SOCIETY]. *See also id.* at 287 ("[U]nderlying any study of penality should be a determination to think of punishment as a complex social institution[,] . . . something akin to Mauss's idea of 'total social fact,' which on its surface appears to be self-contained, but which in fact intrudes into many of the basic spheres of social life." (footnote omitted)); *id.* at 290 ("[I]f one wishes to understand to evaluate the prison as an institution . . . it does little good to do so on a single plane or in relation to a single value. Instead, one must think of it as a complex institution and evaluate it accordingly, recognizing the range of its penal and social functions and the nature of its social support.").

12. The increasing problems of inundated U.S. prisons is perhaps best encapsulated in the Supreme Court's condemnation of California state prison conditions in *Brown v. Plata*, 131 S. Ct. 1910 (2011). In concluding that a three-judge district court panel had correctly found widespread constitutional violations in the housing of inmates, the Court summarizes a wealth of statistical evidence of the inhumane conditions that prevailed in California. *Id.* at 1923–24 ("The degree of overcrowding in California's prisons is exceptional. California's prisons are designed to house a population just under 80,000, but at the time of the three-judge court's decision the population was almost double that. The State's prisons had operated at around 200% of design capacity for at least 11 years. Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. As many as 54 prisoners may share a single toilet."(citations omitted)).

13. Bernard Harcourt has recently offered a compelling account of the interdependence between neoliberal orthodoxies that favor lack of economic regulation and sharply accelerating criminalization and incarceration. *See generally* HARCOURT, *supra* note 9. *Cf.* GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 11, at 289–92 (discussing punishment as a social institution).

14. In constructing this argument, I adopt a similar posture to the one staked out by Sharon Dolovich in her treatment of private prisons. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 542–46 (2005) (arguing that the private prison, although perhaps a more clear example of the troubling confluence of private interests at play in the U.S. criminal justice system, is less exceptional than it is a "canary in a coalmine," a sign of broader trouble in the structuring of carceral policy).

may be that entering a global market in prisoners would raise a number of constitutional questions or logistical challenges. Indeed, despite his positive take on the exchange, Kontorovich recognizes that such a practice would face substantial issues in the United States because of "constitutional difficulties."[15] But is such a system so far-fetched in a nation where states already send inmates across borders via contracts with private prisons?[16]

II. THE PRISONER AS WORKER: UN-FREE PRISON LABOR

Given the limited literature on the Belgian-Dutch exchange, the dynamics of how prisoners subjected to this exchange are assigned to and compensated for tasks remains somewhat unclear. Nevertheless, it is clear from the CPT Report that prison labor remains a component of incarceration under both the Dutch and Belgian models and on either side of the cross-border exchange.[17] The Report states that "[e]ach prisoner benefits from four hours of work per day in a workshop."[18]Additionally, in its limited range of recommendations and critiques of the exchange, the CPT identifies problems with rates of inmate compensation:

> [A] number of prisoners complained of a considerable wage reduction—in some cases to one-third—as compared to the pay that can be received in prisons in Belgium. This reduction stems, in part, from the fact that the number of hours of work in the workshops is limited to 4 hours per working day. Aware of the situation, the Dutch prison management has said that it was seeking ways of increasing the supply of work. The CPT wishes to receive information about the results subsequently achieved in this respect.[19]

Thus, while we can only speculate as to what role inmate labor might play in other transnational exchanges or how it might be modified or negotiated, it would be unwise to disregard carceral labor as a component of a global prison market given its prevalence and role in the Belgian-Dutch exchange. Therefore, the role of inmate labor in the global prison market remains a necessary realm of exploration. Accordingly, this Part

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15. Kontorovich, *supra* note 4.

16. *See* Shymeka L. Hunter, Note, *More Than Just a Private Affair: Is the Practice of Incarcerating Alaska Prisoners in Private Out-of-State Prisons Unconstitutional?*, 17 ALASKA L. REV. 319, 319–20 (2000) ("Because of overcrowding, the Department of Corrections . . . entered into a contract with Corrections Corporation of America ["CCA"] . . . whereby CCA would transfer approximately 200 Alaska prisoners to its Central Arizona Detention Center in Florence, Arizona.").

17. *See* CPT Report, *supra* note 8, at 14.

18. *Id.*

19. *Id.*

examines the transnational exchange of inmates through the lens of prison labor and international labor regulation.

A. "FACTORIES WITH FENCES"

In the United States, prison labor has attracted significant academic attention of late,[20] as an increasing portion of the population engages in forced labor behind bars, outside of the purportedly free market.[21] Indeed, while convict labor is far from a new phenomenon,[22] it has received greater

20. *See, e.g.*, DONALD F. TIBBS, FROM BLACK POWER TO PRISON POWER: THE MAKING OF JONES V. NORTH CAROLINA PRISONERS' LABOR UNION (2012) (examining the "Prison Union Movement"); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2008) (detailing the manner in which county court systems facilitated forced labor through convictions); Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869 (2012) (comparing prison labor to enslavement); Micah Globerson, *Using Border Trade Adjustments to Address Labor Rights Concerns Under the WTO*, 3 AM. U. LAB. & EMP. L.F. 48, 68–71 (2013) (describing international treatment of goods produced by prison labor); Steve Fraser & Joshua B. Freeman, *In the Rearview Mirror: Barbarism and Progress: The Story of Convict Labor*, 21 NEW LAB. F. 94 (2012) (providing a brief history of inmate labor); Genevieve LeBaron, *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*, 15 WORKING USA J. LAB. & SOC'Y 327 (2012) (explaining capitalist society's dependence on prison labor); Alex Lichtenstein, *A "Labor History" of Mass Incarceration*, 8 LAB: STUD. IN WORKING CLASS HIST. OF THE AM. 5 (2011) (detailing the recent history of prison labor in the U.S. economy); Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison*, 18 WM. & MARY BILL OF RTS. J. 395 (2009) (criticizing courts' treatment of prison labor under the Eighth and Thirteenth Amendments); Jenifer Rae Taylor, *Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights*, 47 GONZ. L. REV. 365 (2011-2012) (pointing out the disparate impact of laws and the criminal justice system on minorities); Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimensions of Employment Relationships*, 61 VAND. L. REV. 857 (2008) (using prison labor to illuminate economic aspects of employment law); Colleen Dougherty, Comment, *The Cruel and Unusual Irony of Prisoner Work Related Injuries in the United States*, 10 U. PA. J. BUS. & EMP. L. 483, 485 (2008) (arguing that the Supreme Court should resolve the disagreement among circuit courts about the applicability of the Eighth Amendment to prisoner injuries as a result of faulty prison equipment); Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191 (2002) (examining various court decisions regarding the coverage of prisoner-laborers by the Fair Labor Standards Act); Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL OF RTS. J. 213, 215 (2009) (arguing that, given the Thirteenth Amendment's history and the current state of private prison contracts, inmates who work in privately owned facilities have a constitutional claim with regards to the "Punishment Clause"); Chris Weaver & Will Purcel, Comment, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349, 353 (1998) (concluding the "prison industrial complex is a continuation of the legacy of slavery and the exploitation of African people in America").

21. *See* Zatz, *supra* note 20, at 868 ("Although laments over the 'idleness' of prisoners are not uncommon, well over 600,000, and probably close to a million, inmates are working full time in jails and prisons throughout the United States." (footnotes omitted)).

22. *See* BAIR *supra* note 2, at 31, 131; GOTTSCHALK, *supra* note 2, at 48–52.

treatment and criticism in the peculiar contemporary economic moment in which employment numbers are floundering and industry in the United States (and many other Western democracies) is waning, while increasing members of the population are confined in extra-market labor relationships. Further, the commonality of labor in correctional facilities combined with the facilities' growing populations has led to a body of uncertain and unsettled case law as courts grapple with how to define these work relationships and how they should relate to state and federal legal regimes governing the workplace.[23]

Writing for a unanimous Seventh Circuit panel, for example, Judge Richard Posner has strongly denounced arguments that prisoners should be protected by the wage and hour provisions of the Fair Labor Standards Act ("FLSA"):

> People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress.[24]

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23. *See generally* Zatz, *supra* note 20. *See also* Danneskjold v. Hausrath, 82 F.3d 37, 44 (2d Cir. 1996) ("[P]rison labor is not in all circumstances exempt from the FLSA and that an economic reality test is to be used in determining whether payment of FLSA wages is required. . . . We hold that prison labor that produces goods or services for institutional needs of the prison, whether voluntary or involuntary, inside or outside the institution, or in connection with a private employer, is not an employment relationship within the meaning of the FLSA. Where a prisoner's work for a private employer in the local or national economy would tend to undermine the FLSA wage scale, as in *Watson*, the FLSA applies. Intermediate cases will be resolved as they arise."); McMaster v. Minnesota, 30 F.3d 976, 980 (8th Cir. 1994) (holding that inmates assigned to work in internal prison industries were not covered by FLSA); Watson v. Graves, 909 F.2d 1549, 1554–56 (5th Cir. 1990) (holding that work-release inmates were employees under the FLSA and that inmate status does not automatically prevent the FLSA from applying); Vanskike v. Peters, 974 F.2d 806, 810 (7th Cir. 1992) (holding that a prisoner was not an "employee" under the FLSA).

24. Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005). *See also* Tourscher v. McCullough, 184 F.3d 236, 243 (3d Cir. 1999) (holding that a pretrial detainee who performed intra-prison work was not entitled to wage protection under the FLSA); Franks v. Oklahoma State Indus., 7 F.3d 971, 972 (10th Cir. 1993) (holding that inmates working in prison were not FLSA employees); Harker v. State Use Indus., 990 F.2d 131, 133 (4th Cir. 1993) (holding that prisoners working in prison for state industry were not FLSA employees); Miller v. Dukakis, 961 F.2d 7, 9 (1st Cir. 1992) (holding that prisoners working at unit of incarceration were not FLSA employees of unit); Wentworth v. Solem, 548 F.2d 773, 775 (8th Cir. 1977) (ruling that the FLSA did not cover convicts working in state prison industries).

However, commentators and other courts have expressed skepticism as to whether the rejection of employment regulations' applicability to prison labor as "outlandish" is either correct in the case of FLSA, correct in the context of other statutory schemes, or relevant to relationships that involve private prisons.[25]

Regardless of whether we adopt Judge Posner's categorical approach, viewing the Belgian-Dutch prisoner exchange through the lens of prison labor from a U.S. perspective necessarily implicates a specific historical and social meaning of the convict as worker. The Thirteenth Amendment to the U.S. Constitution explicitly exempts unpaid labor as a punishment for a crime from the broader prohibition on slavery,[26] and the image of prison labor—from *Cool Hand Luke*,[27] to the "men working on the chain gang,"[28] to the nameless, faceless license-plate-maker[29]—has become firmly ensconced in the U.S. cultural lexicon.

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25. *See, e.g.*, Dougherty, *supra* note 20, at 504–07 (listing states whose workers' compensation laws, at least in some circumstances, treat inmates as employees); Lang, *supra* note 20, at 197–206 (noting that, while inside prison work is not covered by the FLSA, two cases have granted FLSA coverage to prisoner workers who contracted to do work outside prison walls); Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 YALE L. & POL'Y REV. 49, 78–79 (1996) (noting "it is not certain" whether inmates who work in prison are covered by the Civil Rights Act of 1964); Jackson Taylor Kirklin, Note, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 COLUM. L. REV. 1048, 1048 (2011) ("For nearly fifty years since the enactment of the Civil Rights Act of 1964, the federal courts have disagreed about whether the powerful employment protections of this Act apply to one of the largest workforces in American society: prison inmates. Despite numerous court opinions, as well as several investigations by the Equal Employment Opportunity Commission (EEOC), there has been no resolution of this issue. Depending on the circuit in which an inmate is incarcerated, prison work may or may not be subject to Title VII coverage." (footnotes and internal quotation marks omitted)); James J. Misrahi, Note, *Factories with Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective*, 33 AM. CRIM. L. REV. 411, 429 (1996) ("It is unclear . . . whether a prison worker has the same protections against discriminatory employment practices as a free worker. Despite the advancements in convict labor relations, many of these concerns still need to be addressed in order to ensure that inmates will not be exploited." (internal citation omitted)).

26. U.S. CONST. amend. XIII, § 1 ("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.").

27. COOL HAND LUKE (Warner Bros. 1967).

28. SAM COOKE, *Chain Gang*, *on* I FALL IN LOVE EVERY DAY (RCA Victor 1960). *See also* THE BOBBY FULLER FOUR, *I Fought the Law* (Mustang 1965) ("Breakin' rocks in the hot sun/I fought the law, and the law won").

29. *See generally* Melvin Gutterman, *"Failure to Communicate": The Reel Prison Experience*, 55 SMU L. REV. 1515 (2002) (discussing representations of incarceration in mass culture).

Perhaps influenced by the Protestant Work Ethic or simply by rehabilitationist sentiments,[30] treatments of inmates often focus on the need for them to be engaged in productive projects.[31] In 1981, before the federal government embarked on its War on Drugs or the phrase "mass incarceration" became a staple of law reviews or editorial pages, then Chief Justice Warren Burger delivered a speech at the University of Nebraska entitled "More Warehouses, or Factories with Fences," emphasizing the industrial potential of the prison.[32] A decade later, Chief Justice Burger hailed the possibility of "experimentation in the employment of the private sector in promoting prison industries."[33] He described a childhood visit to the Stillwater Prison in Minnesota, during which he had been horrified, not necessarily at the mistreatment of the prisoners, but rather at his impression that they were being "warehoused."[34] For Chief Justice Burger, carceral institutions that failed to put inmates to work were driving a process of "human deterioration," leaving "the nation's wrongdoers" unproductive and untrained.[35]

Chief Justice Burger's support for prison labor may have been couched in altruistic terms,[36] but the history of convicts at work in the

30. *See, e.g.*, James Kilgore, *The Myth of Prison Slave Labor Camps in the U.S.*, COUNTERPUNCH (Aug. 9, 2013), http://www.counterpunch.org/2013/08/09/the-myth-of-prison-slave-labor-camps-in-the-u-s/ ("[T]he shift of the prison system's emphasis from rehabilitation to punishment in the last three decades has blocked opportunities for people to upgrade skills and education while incarcerated . . . . As a result purposelessness and excruciating boredom, not overwork, are the dominant features of most prison yards."). *See generally* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., Charles Scribner's Sons 1958) (1905) (detailing the origins and history of the Protestant Work Ethic).

31. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 154 (Alan Sheridan trans., Pantheon Books 1977) (1975) (arguing that under the court-imposed "principle of non-idleness," "it was forbidden to waste time, which was counted by God and paid for by men . . . a moral offence and economic dishonesty").

32. Warren E. Burger, *Forward*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS ix (1993), *supra* note 10.

33. *Id.*

34. *Id.*

35. *Id. See also* Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1326 (9th Cir. 1991) (holding that the purposes of prison labor are to provide vocational training and improve work habits).

36. While a broader discussion of Chief Justice Burger's motives or views of the criminal justice system is well outside of the scope of this Article, it is worth noting the absence of any discussion of re-entry in his encomium to the socializing power of work. *See* Burger, *supra* note 32. That is, Chief Justice Burger couches his support for the privatization and industrialization of U.S. penitentiaries in terms of the rehabilitation or socialization (or, perhaps, disciplining) of inmates, yet he in no way addresses the question of how prison labor might actually advance some sort of socially desirable, post-release outcome. He mentions "literacy" as an object, but it is unclear how greater literacy will result from a "factory" mentality. *Id.* In his model, is work *qua* work an end in itself because idle inmates cannot be engaged in self-improvement or cannot re-enter society as functioning, law abiding

United States hardly stands as a paragon of humanitarian treatment. While in many ways distinct from current trends in prison labor, the U.S. practice of leasing convicts has an ignominious history.[37] For instance, during the latter part of the nineteenth century and the early part of the twentieth century, some states and localities in the American South allowed private citizens to lease inmates.[38] Prisoners were then used as un-free and unpaid laborers by the lessees, who were notorious for subjecting leased convicts to brutal, often fatal labor conditions.[39] In 1871, the Virginia Supreme Court firmly emphasized the link between punishment and forced labor in *Ruffin v. Commonwealth*, holding that an incarcerated individual "is for the time being a slave, in a condition of penal servitude to the State."[40]

Much ink has already been spilled recounting this history of inmate labor in the U.S. context,[41] so this Article will not go further over this well-worn ground. When viewed through this lens, though, the contemporary transnational prisoner trafficking becomes particularly striking, as it superimposes the "peculiar institution" of un-free prison labor against not only the racialized and deplorable practices of slave labor and convict leasing, but also against the already troubled landscape of international labor regulation.[42] That is, if prisons operate—or should operate—as

individuals? *Cf.* Christopher Angevine, *The Consociative Value of Work: What Homelessness-To-Work Programs Can Teach Us About Reforming and Expanding Prison Labor*, 4 CRIM. L. BRIEF 19, 19 (2009) (arguing that "work serves as a valuable social anchor through which Americans strive to gain not only income, but also a sense of self-worth and respect in their community"). Or is prison labor designed to train inmates so that they might be marketable and employable upon their release? *Cf. id.* ("Traditional rehabilitative labor programs, such as those instituted in America's first penitentiaries, are designed to instill the 'habits' and 'virtue' necessary to make inmates better men upon their return to free society. Vocational training programs concern themselves less with inmates' virtue, preferring instead to focus on imparting the job skills that many prisoners lack. Modern prison labor programs, though part and parcel of a wider rehabilitative effort, belong almost exclusively to the latter category. No longer do prisons view work as a character changing endeavor. Instead, prisons focus their main rehabilitative efforts in education, psychiatric and drug treatment programs. Labor is now used as a vocational, rather than a purely rehabilitative, tool." (footnotes omitted)); *Gilbreath*, 931 F.2d at 1326.

37. *See supra* note 2.

38. *See* GOTTSCHALK, *supra* note 2, at 48–52.

39. *Id.*

40. Ruffin v. Commonwealth, 62 Va. 790, 793 (1871).

41. *See supra* text accompanying note 20; MARY BOSWORTH, THE U.S. FEDERAL PRISON SYSTEM 147 (2002); Steven P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 339 (1998) (arguing that labor has "virtually vanished from today's prison" and should be reincorporated into the prison regime).

42. *See generally* James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85 (2004) (exploring the possibility of international labor laws); William B. Gould IV, *Labor Law for a Global Economy: The Uneasy Case for International Labor Standards*, 80 NEB. L. REV. 715 (2001) (outlining debate over the proper way to regulate labor in global markets); Katherine Van Wezel Stone, *Labor and the Global Economy: Four*

"factories with fences,"[43] an international market in prisoners would operate as a market for factory workers.

B. GLOBALIZING PRISON LABOR

What should we make, then, of an international market for this special class of "factory workers"? Critics of the neoliberal globalization project have long focused on the semi-permeable nature of borders: how the free movement of capital is not mirrored by a free movement of labor.[44] Indeed, labor activists and others concerned with declining wages and working conditions have focused on the absence of meaningful workplace regulations and the "race to the bottom" that has defined global, post-industrial labor markets.[45]

When viewed in this light, a new market space in which laborers do not even retain the modicum of self-determination generally ascribed to market participants becomes all the more troubling.[46] Examined through

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Approaches to Transnational Labor Regulation, 16 MICH. J. INT'L L. 987 (1995) (finding the four existing approaches to transnational labor regulation inadequate, and calling for a new model to address obstacles to globalization).

43. Burger, *supra* note 32.

44. *See, e.g.*, ROBERTO MANGABEIRA UNGER, FREE TRADE REIMAGINED: THE WORLD DIVISION OF LABOR AND THE METHOD OF ECONOMICS 193–98 (2007); David Graeber, *The Globalization Movement: Some Points of Clarification*, *in* THE ANTHROPOLOGY OF DEVELOPMENT AND GLOBALIZATION: FROM CLASSICAL POLITICAL ECONOMY TO CONTEMPORARY NEOLIBERALISM 169, 169–70 (Marc Edelman & Angelique Haugerud eds., 2005); Benjamin Levin, *Made in the U.S.A.: Corporate Responsibility and Collective Identity in the American Automotive Industry*, 53 B.C. L. REV. 821, 871–74 (2012); Christopher McCrudden & Anne Davies, A Perspective on Trade and Labor Rights, 3 J. INT'L ECON. L. 43, 49 (2000). *Cf.* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 557–67 (1933) (Brandeis, J., dissenting) (expressing concern about a race to the bottom in the domestic context, with states providing increasingly fewer regulations and protections for public welfare in an attempt to attract industry).

45. *See, e.g.*, RAPHAEL KAPLINSKY, GLOBALIZATION, POVERTY, AND INEQUALITY: BETWEEN A ROCK AND A HARD PLACE 163–232 (2005); Levin, *supra* note 44, at 871–74.

46. It is worth pausing for a moment to consider the question of "choice." It is conceivable that the prison-labor frame (and to a lesser extent each of these suggested frames and indeed our views of the normative desirability or acceptability of prison markets) might be complicated by the ability of inmates to exercise some agency or to have some input in their transfer. In the Belgian case, the CPT noted that "for the majority of inmates, including those who had arrived recently, transfer had been affected [sic] on a non-voluntary basis," and "most of the prisoners had been notified in the morning or the night before their transfer." CPT Report, *supra* note 8, at 10. The CPT therefore recommended that notice and some input on the part of inmates should become procedural requirements of transfer. *Id.* This suggestion finds purchase in recent work by Alexander Volokh suggesting the possibility of prison vouchers—a system analogous to school vouchers whereby inmates would be able to act as consumers in a market to obtain the optimal carceral institution. Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 820 n.200 (2012). In Volokh's model, inmates would exercise agency in the prison system, selecting traits that they found most appealing and helping to drive prison reform and institutional reform from the inside. *Id.* Putting aside deeper discussion of Volokh's work, I note his

the lens of prison labor, the international inmate exchange can be seen as embodying an unholy marriage of two already questionable practices: (1) forced labor by incarcerated individuals; and (2) largely unregulated, undercompensated labor by individuals who are unable to equalize the background conditions that shape the terms of their employment and their ability to opt out.[47] Individuals with no bargaining power, who are not legally recognized as market participants, are being transported across borders to spaces where they may be forced to perform various tasks for the financial benefit of others. In short, we are left with what has many properties of—or at least the makings of—a new slave trade.[48]

But should the international nature of this movement of coerced and un- (or under-) compensated labor change our view of it or the way that we might wish to see it regulated or legally re-conceptualized/reformed? That is, the essential question to ask when viewing the Belgian-Dutch exchange through this frame—as through each frame—is what (if anything) is actually wrong with the exchange or with a market that uses this transaction as its model? In the context of prison labor, if it is the lack of fair contracting and wages and the inability to exert any control over one's conditions of "employment," then this is necessarily an objection to prison labor in general, or at least prison labor as it exists in the United States, not just prison labor that crosses borders.

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article as a means of highlighting the role of "choice" in prison reform. Are our concerns about the prisoner as labor or commodity or about the prison as an entrenched institution dependent on the inability of the prisoners to behave as "rational actors?" If so, is there any way to remedy this situation, whether through a more libertarian voucher model or a more syndicalist inmate union model? Is it even possible to discuss choice in this context without entirely casting aside Robert Hale's concern for "background conditions" and the illusory qualities of freedom of contract? *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 474–75 (1923).

47. On background conditions of employment, see for example, Hale, *supra* note 467, at 474–75; Cass R. Sunstein, *Symposium on Classical Philospohy and the American Constitutional Order: Republicanism and the Preference Problem*, 66 CHI.-KENT L. REV. 181, 194–97 (1990); CHARLES FRIED, CONTRACT AS PROMISE 103–09 (1981).

48. The potential for such an unrestrained market and the rebirth of a quasi-slave class is particularly noteworthy given the tendency to treat prisoners or convicted criminals as clearly other, social outsiders defined by their deviance and lack of adherence to social mores or cultural values. *See* Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 294 (2011) ("if criminal offenders do bad things, it is because of who they are and what they therefore choose to do, and no interventions, however well-meaning, can change them. And if individual actors choose to do wrong, not only is there no help for them, but the rest of us need have no sympathy for them, since, by their own criminal choices, they reveal themselves, like Agamben's 'wolfman,' as beyond the required scope of moral consideration."); Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALB. L. REV. 1777, 1783–88 (2012/13) [hereinafter Levin, *De-Naturalizing Criminal Law*] (explaining the rhetorical treatment of criminals as "other" in U.S. mass culture and political discourse).

When we are confronted with a situation in which individuals incapable of exercising agency are transported abroad against their will in exchange for money and forced to perform manual labor,[49] the slavery analogy is a powerful one. This case provides a striking illustration, but is the inclination to identify the labor situation across borders as worse based on specific substantive objections? Or is the temptation to cringe at the Belgian-Dutch exchange and the global market that it portends rooted more in the aesthetics or cultural resonance of the situation?

Indeed, as previously discussed, not only does the U.S. Constitution explicitly allow inmate labor,[50] but federal courts have also repeatedly withheld protections from inmates that might have ensured that inmates were paid decent wages or that they were not subjected to working conditions that would be outlawed in markets outside of prison walls.[51] An inmate in the United States who, like some of the Belgian inmates,[52] felt as though she were not receiving sufficient wages, would not necessarily have access to FLSA protections, to the right to organize or bargain collectively under the National Labor Relations Act,[53] or to invoke the assistance of the Department of Labor or the National Labor Relations Board. Therefore, in the case of prison labor, the fact that a work relationship is purely "domestic" does not eliminate concerns that workers may be exposed to unrestrained market forces or to possible abuses.[54]

Notably, there may be reason to believe that inmates actually might enjoy *greater* protections under international regulatory regimes than they currently do in the United States. Worker's rights and labor activists in the U.S. generally treat globalized labor policies with an air of skepticism, in part because of the comparatively robust labor and employment regulations that American workers can access at home.[55] Yet U.S. regulations and

49. That is, exercising agency once they are incarcerated. As discussed *supra* and *infra*, it may be that we decide that individuals who have broken the law have abused their powers of agency and that, through their misfeasance, they have forfeited any agency once they are incarcerated. Regardless of whether we view this characterization as either descriptively accurate or normatively desirable, however, agency is clearly lacking in the work situations of U.S. prisoners.

50. *See supra* note 26.

51. *See supra* notes 23–24 and accompanying text.

52. *See supra* note 19 and accompanying text.

53. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2011)).

54. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977) (denying inmates rights to unionize under the NLRA because "[p]risons, it is obvious, differ in numerous respects from free society").

55. *See, e.g.*, Richard M. Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 215 (2007) ("Some of those features are of relatively recent

protections have not been extended to cover inmate laborers.[56] When it comes to international trade, such restrictions on convict labor—if enforced—may actually have more bite.[57] Despite the free movement of U.S. convict labor and convict-labor-produced products domestically, the Tariff Act of 1930 specifically declares that "[a]ll goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States."[58] Further, pursuant to § 307 of the Tariff Act, the United States barred the importation of goods manufactured by convict labor from both Mexico and China.[59] Similarly, while the General Agreement on Tariffs and Trade ("GATT") and World Trade Organization ("WTO") notoriously fail to regulate labor conditions among member nations, "[o]nly where prison labor is involved does any provision of GATT become applicable to the WTO and its jurisdiction."[60] In some sense, the GATT/WTO regime operates as an inverse of the U.S. treatment of employment: the treaties offer little to no regulation of labor conditions outside of the carceral sphere, whereas U.S. law has constructed a web of statutory protections for many American workers that evaporates once an individual enters a correctional facility.

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vintage, notably the multitude of changes we associate with the concept of 'globalization'—developments with respect to labor markets, production practices, and the regulatory capacity of the nation-state."); Stephen Franklin, *AFL-CIO Jumps into Protests*, CHI. TRIB., Sept. 11, 2001, *available at* http://articles.chicagotribune.com/2001-09-11/news/0109110233_1_afl-afl-cio-anti-globalization (describing the AFL-CIO's rationale in joining anti-globalization protests); KAPLINSKY, *supra* note 45, Pt. III.

56. To the extent that an inmate might be able to challenge her labor situation, based on the current state of the law, she would probably have to resort to an Eighth Amendment claim relating to her conditions of confinement as opposed to the statutory protections afforded to "employees."

57. *See Developments in the Law–Jobs and Borders*, 118 HARV. L. REV. 2202, 2211 n.41 (2005) (collecting sources providing "discussion of possible incompatibilities between U.S. law and practice regarding prison labor and the ILO core convention on forced labor").

58. 19 U.S.C. § 1307 (1997).

59. *See* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 46–47 (2001) ("During the 1990s, Section 307 of the Tariff Act prohibiting the importation of goods produced with prison or forced labor was invoked to exclude certain Mexican products. In June 1993, the United States barred specified leather imports from China following a determination by the U.S. Customs service that goods produced at the Qinghai Hide and Garment Factory were produced with convict labor. In April 1996, the Customs Service again acted under Section 307 to bar importation of certain iron pipe fittings from the Tianjin Malleable Iron Factory in China, based on a determination that the goods were being produced with prison labor." (footnotes omitted)).

60. Gould, *supra* note 42, at 742 (citing General Agreements on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 1887).

If the concerns about agency and coercion outlined in this Part form the basis of an objection to a global market in prisons, what should we make of the fact that prison labor (or at least goods produced by inmate laborers) is nominally regulated in the international context, but remains largely unregulated in the domestic context? The description above of the treatment of prison labor in international treaties and trade regulations is not intended to suggest that the concerns outlined in this Part have been or could be solved easily by reliance on international law or some mechanism of global governance. Rather, these provisions are raised here as a means of emphasizing that, from a labor perspective, a global market for prisoners may be no more normatively problematic or theoretically flawed than the current, domestic prison labor regime.

III. THE PRISONER AS SUBJECT: SOVEREIGNTY, CITIZENSHIP, AND THE PURPOSES OF PUNISHMENT

Although the labor frame provides insight into the potential collateral consequences of a market for prisoners while raising questions about U.S. inmate labor policies, it does not explain how a market for convicts relates to the theoretical justifications for criminal law and punishment.[61] In order to situate the exchange more clearly in discussions about criminalization and the role (and effects) of incarceration, this Part considers the Belgian-Dutch exchange through the lens of state sovereignty and representative governance, focusing on the relationship between the governed and the governing.

By necessity, prisoners are subject to state authority.[62] To have been sentenced to a prison term, an individual must have been under the jurisdiction of the state authority that convicted and sentenced her.[63] The Belgian exchange essentially involved the leasing of individuals who were

61. On the relationship between the purposes of punishment and the political economy and institutional dynamics of social control, see generally ALEXANDER, supra note 9. *See also* CRIME AND DEVIANCE: ESSAYS AND INNOVATIONS OF EDWIN M. LEMERT 26–41, 61–66 (Charles C. Lemert & Michael F. Winter eds., 2000); GARLAND, CULTURE OF CONTROL, *supra* note 9; HARCOURT, *supra* note 9; HUSAK, *supra* note 9; STEVEN HALL, THEORIZING CRIME & DEVIANCE: A NEW PERSPECTIVE (2012); LACEY, *supra* note 9; SIMON, *supra* note 9; STATE, POWER, CRIME (Roy Colemanet al. eds., 2009).

62. This portion of the Article puts aside for a moment the question of whether the theoretical justifications for criminal (and civil) punishment remain as compelling when applied to those who are not formally citizens or subjects of a state (e.g., undocumented immigrants, "enemy combatants," etc.). This issue is discussed further in Part III.C.2, *infra*.

63. This excepts those individuals in jails or incarcerated pursuant to some form of pretrial detention where a judge or prosecutor may have yet to make a determination of the court's, arresting officer's, or prosecutor's office's jurisdiction to detain or proceed with the case.

incarcerated for breaking Belgian law and were under Belgian jurisdiction to another nation, where they were subject to punishment at the hands of a sovereign to whom they owed no allegiance, and where neither Belgian law nor Belgians governed:

> The terms of the exchange made it clear that the prison, which stands in the territory of the Netherlands, houses prisoners sentenced by Belgian courts in pursuance of a convention concluded on 31 October 2009 between the authorities of the Kingdom of the Netherlands and those of the Kingdom of Belgium, on the making available of a prison in the Netherlands for the execution of criminal sentences imposed in Belgium under Belgian law.[64]

And, as described by the CPT, the prison operates as a space subject to dual sovereign interests:

> In application of the Interstate Convention, the Netherlands makes available the prison premises and the prison and medical staff and transfers the prisoners. Dutch criminal law is applicable within the prison. On the other hand, all the inmates present in the prison are serving final sentences imposed by Belgian courts, in pursuance of Belgian legislation, and the prison regime is Belgian. All the staff working in the prison are Dutch with the exception of the Prison Director, two Deputies and the staff from the Penitentiary Psychosocial Service. Taking account of the Interstate Convention, and particularly the aforementioned elements, there is clearly shared jurisdiction where Tilburg Prison is concerned.[65]

That is, prison governance becomes an international hybrid, but the legal regime itself remains decidedly Dutch.

While the CPT Report does not comment on the desirability of this legal landscape that shifts with the inmates' forced international migration,[66] the Report does focus on the problem of agency.[67] "[F]or the majority of inmates, including those who had arrived recently," the Report explains, "transfer had been affected [sic] on a non-voluntary basis. The transfer notice had, in most cases, been seen as an arbitrary decision, or even an injustice."[68] Despite its largely uncritical tone, the CPT Report

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64. CPT Report, *supra* note 8, at 7.

65. *Id.*

66. *See id.*

67. *See id.* at 10. *Cf.* the discussion of agency and the hypothetical institutional remedy of "prison vouchers" in note 46, *supra*.

68. CPT Report, *supra* note 8, at 10. It is unclear from the phrasing in the Report whether these transfers were viewed as an injustice by the visiting delegation from the CPT or by the inmates

does note that "as a matter of principle, a prisoner who has been sentenced to imprisonment in one State should not, on the basis of an administrative decision, be forced to serve the sentence in another State."[69] This single sentence buried deep within the report is remarkable for what it does not say and for the question it raises: what principle should prevent such transfers from taking place?[70] This Part suggests that the principle is rooted in the theoretical link between punishment and community, between the state's authority to punish and its legitimacy as a governing body.[71] Viewed through this framework, the market in prisoners becomes a peculiar

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themselves. If the former, then, as discussed in note 69, *infra*, this raises more troubling questions about the Report itself and the role that it should play in legitimating the exchange.

69. *Id.* It is worth noting that, as discussed in *supra* note 46, this observation focuses less on the problematic issue of sovereign legitimacy—the source from which the foreign state's authority to punish and incarcerate might be derived—and instead focuses on the role of prisoner choice or agency. The problem is not the extraterritorial punishment or the imprisonment at the hands of possibly unaccountable jailers but rather that this all occurred "on the basis of an administrative decision." *Id.* The implicit negative corollary of the CPT's observation, one might well imagine, is that, as a matter of principle, a prisoner *could be* incarcerated in or punished by a foreign state if this extra-national punishment were the product of a more deliberative decision-making process.

70. This sentence raises two other questions—less noteworthy for purposes of this Part—that might be worth considering in assessing the normative desirability and theoretical defensibleness of a market in prisoners. First, if the CPT stands as a sort of watchdog over the prisoner exchanges, investigating whether they are humane and in accordance with international or national norms, then why does the Report not make more of the fact that what is going on is unacceptable "in principle?" Perhaps the lack of overall condemnation of the exchange is the result of realpolitik, a concession to the political, social, and economic forces that might make nullifying the international agreement or substantially re-shaping it impossible. Or, perhaps that this appears as just a single suggestion in an otherwise positive Report stands as a marker of the comparatively positive situation in the prison—*i.e.*, it may not be theoretically defensible, but at least the inmates are treated fairly well and are not in an overcrowded prison. Second, is the problem, in the eyes of the CPT, actually the international nature of the exchange at all, or is it that individual transfers might be occurring as a result of careless bureaucratic decision-making? Is the principle that is being violated simply that prisoner transfers should be preceded by advanced notice or some sort of more involved procedure? *Cf.* Duncan Kennedy, *Three Globalizations of Law and Legal Thought 1850-2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David Trubek & Alvarvo Santos eds., 2006) (identifying a focus on procedural rules as a hallmark of civil libertarian, rights-based legal argumentation and reforms).

71. In addressing the question of whether a prisoner's domicile changes when she is incarcerated and transferred, the Sixth Circuit has articulated an analogous principle:

> It makes eminent good sense to say as a matter of law that one who is in a place solely by virtue of superior force exerted by another should not be held to have abandoned his former domicile. The rule shields an unwilling sojourner from the loss of rights and privileges incident to his citizenship in a particular place, such as, for example, paying resident tuition at a local university, invoking the jurisdiction of the local divorce courts, or voting in local elections.

Stifel v. Hopkins, 477 F.2d 1116, 1121 (6th Cir. 1973).

exchange of sovereignty and post-democratic subjects, where one nation-state is effectively selling its authority over its citizens.[72]

A. PUNISHMENT AND THE POLITY

Regardless of which traditional theory of punishment we might prefer, the most commonly accepted textbook (or, for that matter, political) justifications for criminal sanctions rely upon an explicit or implicit baseline assumption that the polity must respond to deviant or unacceptable behavior by its members.[73] Criminal punishment, argues David Garland, "is more than an instrument of crime control. It is also a sign that the authorities are in control, *that crime is an aberration* and that the conventions which govern social life retain their force and vitality."[74] Indeed, this particular characterization of criminal law as embodying, or at least purporting to embody, community values and the need to eliminate deviant behavior finds purchase throughout wide swaths of scholarship focused on both criminology and social theory of law.[75]

In re-interpreting the influential criminological theories of Emile Durkheim, Garland describes "the rituals of criminal punishment—the

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72. If "to govern means to govern things," MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977–78, 97 (Graham Burchell trans., 2007), this exchange cuts at the very heart of governance and the nature of state authority.

73. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), *reprinted in* THE WORKS OF JEREMY BENTHAM 86–87 (John Bowring ed., 1962).

74. GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 11, at 67–68 (emphasis added). *Cf.* Overton v. Bazzetta, 539 U.S. 126, 143 (2003) (Thomas, J., concurring) (discussing the rise of the prison in the United States as a means of segregating "the 'deviant' (*i.e.*, the criminal)" from the rest of society).

75. *See, e.g.*, PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 11–12 (2009) ("[I]t's how all federal criminal cases are styled: the U.S. against the defendant."); HALL, *supra* note 61; John Pratt, *Dangerousness and Modern Society*, *in* DANGEROUS OFFENDERS: PUNISHMENT AND SOCIAL ORDER 35, 38–47 (Mark Brown & John Pratt, eds., 2000); GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 104–05 (1998); Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 478–84 (1995); Phil Scraton & Kathryn Chadwick, *The Theoretical and Political Priorities of Critical Criminology*, *in* THE POLITICS OF CRIME CONTROL 161, 163–65 (Kevin Stevenson & David Cowell eds., 1991); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 208 (1984) (arguing that "the moral education which punishment effects is at least part of punishment's justification"); Joel Feinberg, *The Expressive Function of Punishment, in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 98 (1970) (arguing that "punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation"); KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 13 (1966) (arguing that "each time the community moves to censure some act of deviation, then, and convenes a formal ceremony to deal with the responsible offender, it sharpens the authority of the violated norm and restates where the boundaries of the group are located"); Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. OF SOC. 420, 420–24 (1956).

court-room trial, the passage of sentence, the execution of punishment" as "the formalized embodiment and enactment of the conscience collective."[76] Viewed through this lens, "these procedures . . . giv[e] formal expression to the feelings of the community—and by being expressed in this way those feelings are both strengthened and gratified."[77] Criminal law, then, is not simply geared toward deterring, toward rehabilitating, or toward embodying the appropriate quantum of retributive force. Rather, it is a collection of rituals imbued with a "didactic" quality[78]: "[T]he rituals of criminal justice . . . are ceremonies which, through the manipulation of emotion prompt particular value commitments on the part of the participants and the audience and thus act as a kind of sentimental education, generating and regenerating a particular mentality and particular sensibility."[79]

Courts have explicitly endorsed such an understanding of criminal law as enforcing and defending community norms and values. In *United States v. Grayson*,[80] the Supreme Court went so far as to quote approvingly an article contending that "sentencing must accurately reflect the community's attitude toward the misconduct of which the offender has been adjudged guilty, and thereby ratify and reinforce community values."[81] Similarly, in *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*,[82] the Supreme Court announced that criminal trials performed an important "community

76. GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 11, at 67 (emphasis omitted). Durkheim defines the "collective consciousness" as "the totality of beliefs and sentiments common to average citizens of the same society." EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 79 (George Simpson trans., 1964).

77. GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 11, at 67. *See also* DURKHEIM, *supra* note 76, at 58 ("As James Fitzjames Stephen once put the point: ' . . . the sentence of law is to the moral sentiment of the public in relation to any offense what a seal is to hot wax.'" (alteration in original; footnote omitted)).

78. GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 11, at 67.

79. *Id.* Garland acknowledges the limitation to this focus on the ritual in Durkheim's work, but notes that this description is fairly accurate of the "'show-case' trials and punishments" that "tend to be the ones which are relayed by the media to the public to represent the meaning of justice." *Id.* Further, as a necessary limit on theories hinging on "collective consciousness," it is important to note that absent complete homogeneity in a community, "there will tend to be different audiences for such public ceremonies [of criminal punishment] and different responses" to them. *Id.* at 70. *See also* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 58 (1983) (critiquing the treatment of law and legal decision-making as embodying "social condemnation" by arguing that: "The extent of 'social condemnation' is also not clear, and such a perception seems based on the views of only part of the community. 'Deep-seated community sentiments' are sometimes cited to justify results that reflect the views of only portions of the community . . . .").

80. United States v. Grayson, 438 U.S. 41 (1978).

81. *Id.* at 48 n.8 (quoting Melvin Shimm, *Foreword*, 23 LAW & CONTEMP. PROB. 399 (1958)).

82. Press Enter. Co. v. Superior Court, 464 U.S. 501 (1984).

therapeutic" role.[83] "Criminal acts, especially violent crimes," the Court stated:

> often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.[84]

Perhaps even more strikingly, the Fourth Circuit, in *United States v. Bakker*,[85]

> recognize[d] that a sentencing court can consider the impact a defendant's crimes have had on a community, and can vindicate that community's interests in justice. To a considerable extent, a sentencing judge is the embodiment of public condemnation and social outrage. As the community's spokesperson, a judge can lecture a defendant both as a lesson to that defendant and as a deterrent to others.[86]

The criminal trial, the conviction, and the sentencing, then, become spaces of great import to the community—spaces where values are affirmed and the legitimacy of the state, the law, and the criminal justice system are affirmed by the ritual of punishment.[87]

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83. *Id.* at 508 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570 (1980)).

84. *Id.* at 509.

85. United States v. Bakker, 925 F.2d 728 (4th Cir. 1991).

86. *Id.* at 740 (citations omitted). *See also* United States v. Madison, 689 F.2d 1300, 1314–15 (7th Cir. 1982) ("In order to render justice to all the judge must be able to impress upon a defendant through the expansive contents of an all encompassing presentence report that we are a country of laws and not men. The criminal must learn that with every cherished right he enjoys he also assumes a corresponding obligation to live according to the law of the land. Our laws are for the protection of all mankind and not just the criminal."). In vacating the defendant's sentence, however, the court in *Bakker* noted that it could not "sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it." *Bakker*, 925 F.2d at 740.

87. *See* GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 11, at 67.

None of this is meant to downplay the real-world, concrete effects of criminal law.[88] That the crafting of criminal statutes or handling of criminal cases may have a powerful expressive,[89] didactic, or legitimating[90] function certainly does not alter the fact that at the end of a criminal prosecution, a defendant may be incarcerated or executed.[91] Rather, I highlight this underlying moral or community-based quality of criminal law *because of* the severity of criminal sanctions. In order for the state to deprive an individual of her liberty (or her life), the state must possess some authority to exercise legal and physical violence. As a result, the rhetorical or discursive identification of criminal law as reflective of collective consciousness becomes particularly powerful as a means of legitimating and authorizing the exceptional show of state violence. Further, much as the CPT Report expresses skepticism towards the alteration of a prisoner's

88. *See* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (arguing that legal interpretation is not merely an academic exercise and cannot be divorced from the realities of legal violence).

89. *See* Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 414 (1999) (examining the "expressive" function of law).

90. On the legitimating function of law, *see, e.g.*, DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 347 (1998) ("[T]he legal system creates as well as reflects consensus (this is true both of legislation and of adjudication). Its institutional mechanism 'legitimates,' in the sense of exercising normative force on the citizenry."); RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL 59 (1981) ("To say that the members of the society take a basic social institution to be 'legitimate' is to say that they take it to 'follow' from a system of norms they all accept[,] . . . a set of general beliefs (normative beliefs and other kinds of beliefs) which are organized into a world-picture which they assume all members of the society hold. So a social institution is considered legitimate if it can be shown to stand in the right relation to the basic world-picture of the group.")); Peter Gabel, *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEO. WASH. L. REV. 263, 269–70 (1984) (discussing the way that judicial opinions attempt to ascribe a broader ideology to the nation, effectively creating an artificial "we" and then purporting to speak for it); Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 HARV. C.R.-C.L. L. REV. 105 (2013) [hereinafter Levin, *American Gangsters*] (exploring the legitimating functions of the criminal law, specifically related to the Racketeer Influenced and Corrupt Organizations Act (RICO)); Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559 (2011/12) (exploring the legitimating and cultural functions of the criminal law, specifically related to RICO); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429–32 (1995) (examining the legitimating function of Supreme Court death penalty jurisprudence); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 589–90 (1984) ("American labor law . . . [is] the embodiment of a 'moral and political vision,' which contains a 'powerfully integrated set of beliefs, values, and political assumptions' (i.e., a world view) and which serves as a 'legitimating ideology' that reinforces the dominant institutions and hegemonic culture of our society.") (citation omitted); Tom R. Tyler, *Psychological Perspective on Legitimacy and Legitimation*, 575 ANN. REV. PSYCHOL. 375 (2006) (describing legitimacy in various contexts, including legal systems).

91. *See* Cover, *supra* note 88, at 1618–22.

conditions and place of confinement because of a mere "administrative decision,"[92] we expect, or at least hope, that criminal punishment results from a grave breach of important societal proscriptions and is reserved for those truly deserving of at least some degree of moral opprobrium. Once again, the suggestion that criminal law stands as both an aspirational and descriptive embodiment of community values becomes a critical means for the polity to justify how and why the state can and should exercise punitive force.

What happens, then, when a different polity is responsible for punishing another society's deviants? Assuming for argument's sake that it is fair to consider a state as representative of the nation, polity, or population that it governs,[93] punished citizens transported to another nation cease to be punished by their state and according to (what at least purport to be) their community values.[94] The initial rituals of punishment—the pretrial appearances, the trial, and the sentencing—may have occurred in the nation whose law was broken. But the final, lasting ritual—the punishment itself—has been exported. If the law in a democratic society purports to represent a codification of popular values, norms, or aspirations,[95] how is it appropriate for a different polity with potentially different values, norms, and aspirations to be responsible for enacting this socializing discipline, this ultimate ritual?

B. WHICH VALUES? AND WHOSE COMMUNITY?

The question of transporting the locus of punishment across borders raises some highly troubling hypotheticals. Imagine that Nation A does not prohibit the use or sale of cocaine, and, indeed, cocaine is a commonly used narcotic in Nation A. On the other hand, Nation B imposes strict prison sentences for the possession of even small amounts of cocaine. Now imagine that Bob, a citizen of Nation B, is convicted of cocaine possession

92. CPT Report, *supra* note 8, at 10.

93. *Cf.* FERNANDO ENRIQUE CARDOSO & ENZO FALETTO, DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA 208 (Marjory Mattingly Urquidi trans., 1979) (discussing the distinction between "nation" and "state" as the potential for a structurally ensconced disconnect between the interests of the ruling elite and the populace).

94. *See supra* note 79.

95. *See* DURKHEIM, *supra* note 76, at 44; FOUCAULT, supra note 72, at 56–57 (suggesting that "the law [purportedly] refers to a norm, and that the role and function of the law therefore—the very operation of the law—is to codify a norm, to carry out a codification in relation to the norm"); *Cf.* Donald Braman et al., *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531 (2010) (discussing the absence of universal norms in determining what behavior to punish and how severely to punish it).

in his home country, but is shipped to a prison in Nation A. The guards in the Nation A prison are frequent cocaine users, and the citizenry of Nation A engages with impunity in the same behavior for which Bob is incarcerated. In short, the punishers (i.e., the jailers and those responsible for prison governance) are presumably not punishing out of any concern for their own community, its safety, or its values.[96] Rather, they are punishing because it is their job, because they are being paid to extract another polity's vengeance or act out another polity's moral condemnation.[97] Bob is certainly being punished; his incarceration has caused him to lose liberties and privileges associated with citizenship and even basic freedoms of mobility. The ritual that Durkheim and others identified as critical to the process of criminal law is being performed,[98] but Nation B does not have to confront the ugly realities (aside from the cost) of Bob's incarceration. Further, it is a stretch to suggest that he is being socialized to renounce his behavior as deviant and unacceptable while being governed or incarcerated by individuals who do not view his conduct as such.

Perhaps even more troubling is the question of conditions of confinement. Now, imagine that Nation B has very strict restrictions on the use of corporal punishment or on the treatment of prisoners, whereas Nation A does not and generally grants its corrections officers free reign to supervise and treat prisoners as they see fit.[99] Had Bob been incarcerated in

96. It is conceivable that citizens of Nation A would see some inherent good or national interest in the punishment of Bob, even if he were being punished for behavior that was lawful in Nation A. Perhaps, for instance, such punishment furthers global interests in rule of law. The citizens of Nation A and Nation B may disagree about what constitutes lawful behavior, but they can all agree that obeying the law is important. Such an understanding of the shared interest in rule of law might be seen as at least a partial justification for extradition policies or expansive, international jurisdictional reach.

97. *But see supra* note 96.

98. *See supra* notes 76–85 and accompanying text.

99. Such a hypothetical finds purchase in the suggestion by British Member of Parliament Ian Austin, that Britain should conduct an inmate exchange like the Belgian-Dutch one with Poland or another Eastern European nation with a reputation for harsh or inhumane prison management. *See* Moss, *supra* note 1. This concern has also been raised regarding the U.S. treatment of suspects during the War on Terror via the process of "extraordinary rendition." *See* James J. Saulino, *Strategic Choices: Four Legal Models for Counterterrorism in Pakistan*, 2 HARV. NAT'L SEC. J. 247, 267–68 (2011). "An extraordinary rendition involves no cooperation from, and possibly no prior notification to, the government where the suspect is located. It amounts to a forcible abduction of an individual inside the sovereign territory of another state, followed by the delivery of that individual back to the United States, or into a third country's custody." *Id.* at 267 (footnotes omitted). During the presidency of George W. Bush, allegations swirled in the media that the United States was rendering prisoners to nations in which it would be easier for investigators to resort to torture. *Id.*; Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails*, N.Y. TIMES (Mar. 6, 2005), http://www.nytimes.com/2005/03/06/politics/06intel.html?pagewanted=1&_r=2; Charlie Savage, *Obama's War on Terror May Resemble Bush's in Some Areas*, N.Y. TIMES (Feb. 17, 2009),

a Nation B prison and been subjected to abuse, he might have: (1) sought to contact his elected representatives in B; (2) joined family, friends, or fellow inmates in advocating for policy change in Nation B; or (3) brought suit in a Nation B court.[100] While Bob might not be legally knowledgeable or savvy about his rights or his ability to bring suit,[101] it is possible that a friend or family member might have some baseline familiarity with the legal system or be able to contact a lawyer.

In Nation A, however, it is unclear whether any of these possible remedial paths might be available to Bob. Certainly, we could imagine that the treaty or contractual terms that formed the framework for a market in prisoners could provide for the conditions of confinement, but this would entail international agreements and would not be easily resolved by referring to domestic constitutional or statutory protections. In short, it is unclear how such a system would clearly ensure accountability in the proper or humane maintenance of a prison system.[102] While both nations might be signatories to an agreement on the humane treatment of prisoners, whether Bob would have legal recourse if the international treaty terms were violated would remain a live question, perhaps dependent on the laws of the place of incarceration (and the terms of the treaty). Similarly, even if an international treaty established a baseline for the treatment of prisoners, this would not necessarily guarantee that Nation A's standards would be as high as those of Nation B.[103] Finally, where the lack of familiarity with the

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http://www.nytimes.com/2009/02/18/us/politics/18policy.html?pagewanted=all; Chris Jenks & Eric Talbot Jensen, *All Human Rights Are Equal, But Some Are More Equal Than Others: The Extraordinary Rendition of a Terror Suspect in Italy, the NATO SOFA, and Human Rights*, 1 HARV. NAT'L SEC. J. 171 (2010); Erik Luna, *The Bin Laden Exception*, 106 NW. U. L. REV. COLLOQUY 230, 232 (2012); Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71, 105–09 (2009); Francesco Messineo, *The Abu Omar Case in Italy: "Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture under the UN Torture Convention*, 7 J. INT'L CRIM. JUST. 1023, 1023–24 (2009).

100. Assuming, of course, that Nation B law at least loosely mirrored U.S. domestic law regarding conditions of confinement and inmate civil rights litigation.

101. U.S. courts generally acknowledge *pro se* inmates' lack of familiarity with the legal system and accordingly construe their pleadings liberally or afford them some degree of special solicitude in the interests of justice. *See, e.g.*, Tracy v. Freshwater, 623 F.3d 90, 101 (2d Cir. 2010) ("It is well established that a court is ordinarily obligated to afford a special solicitude to pro se litigants.") (citing, *inter alia*, Estelle v. Gamble, 429 U.S. 97, 106 (1976)); Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009); Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir. 2008).

102. In the Belgian-Dutch exchange, this concern appears to be less of an issue than it might be in other hypothetical exchanges. As previously noted, human rights inquiries have revealed no evidence of abuse and even some positive prisoner responses, and the Netherlands is not notorious for atypically harsh prison conditions.

103. It, of course, might be that Nation A's standards for prisoner treatment were higher than those of Nation B.

legal system might certainly serve as a barrier to justice if Bob were incarcerated in Nation B,[104] the possibility that he might overcome this hurdle when faced with a foreign legal order (and perhaps a different official language) in Nation A appears even less likely.

C. DOMESTIC ANALOGS

As with the prison labor framework, however, this institutional perspective raises the question of exceptionality: if there is something wrong with the global prison market or the international exchange of inmates, is it actually unique to this method of exchange, or can the problem be identified in domestic carceral spaces? Are the concerns about representativeness, community, and sovereign authority that underlie the exchange of prisoners across national borders absent when we consider the ways in which the U.S. prison system operates? As in the context of prison labor,[105] this Article argues that the problems encountered in examining the global prison market are really just more noticeable, unfamiliar, or perhaps egregious versions of the same practices that plague U.S. penal policies.

1. Felon Disenfranchisement

First, widespread disenfranchisement of felons in the United States has already raised the specter of punishing individuals who have no democratic recourse and no means of exercising agency over the mechanisms and institutions responsible for their punishment.[106] The Supreme Court has repeatedly emphasized the importance of the right to vote as fundamental to the preservation and exercise of other civil rights.[107] In *Reynolds v. Sims*,[108] the Court stated:

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104. *See supra* note 100.

105. *See supra* Part II.B.

106. *See* Scott M. Bennett, Note, *Giving Ex-Felons the Right to Vote*, 6 CAL. CRIM. L. REV. 1, 1 (2004) ("All but two states punish convicted felons by taking away their right to vote, either for a limited period or for the rest of their lives. As a result, 3.9 million adult Americans—about 2 percent of the voting-age population—have lost their right to participate in a fundamental part of the political process. The racial impact of these laws is even more staggering: 13 percent of black men in America cannot vote because of a felony conviction."); Richardson v. Ramirez, 418 U.S. 24, 41–53 (1974) (discussing Section 2 of the Fourteenth Amendment's allowance of vote denial based on a felony conviction); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1155 (2004).

107. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (referring to "the political franchise of voting" as "a fundamental political right, because it is preservative of all rights"); *infra* note 106 and accompanying text.

108. 377 U.S. 533 (1964).

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[109]

Despite this proclamation of the importance of electoral democracy and the threat of strict scrutiny,[110] the Court continues to recognize the right of states to disenfranchise felons.[111] Indeed, as of 2002, forty-eight states practiced some form of felon disenfranchisement.[112]

If individuals convicted of certain crimes are stripped of a fundamental right that is "preservative of other basic civil and political rights,"[113] then they also necessarily occupy a tenuous relationship to the rest of the polity. Assuming that former felons' ability to vote stands as the epitome of their ability to participate in democratic self-governance, then without the ability to vote, they are no longer engaged (and may no longer engage) in the act of shared self-sovereignty that grants legitimacy to the state. If, as discussed at length previously,[114] the legitimacy and significance of criminal punishment are wrapped up in shared values and the preservation of a given community (and the state's authority over the community),[115] then what does it mean when those who have been punished cease to be a part of that community and become incapable of formally expressing their values, commitments, and preferences?

Perhaps this can be viewed as a societal judgment that the polity should operate on a "one-strike" basis: when an individual commits a sufficiently serious crime, she has forfeited her full membership in the polity.[116] Even aside from the troubling race and class-based implications

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109. *Id.* at 561–62.

110. *See id.* at 561–62; David Zetlin-Jones, Note, *Right to Remain Silent: What the Voting Rights Act Can and Should Say About Felony Disenfranchisement*, 47 B.C. L. REV. 411, 417 (2006).

111. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 54 (1974); Fincher v. Scott, 352 F. Supp. 117, 119 (M.D. N.C. 1972), *aff'd*, 411 U.S. 961 (1973); Beacham v. Braterman, 300 F. Supp. 182 (S.D. Fla.), *aff'd*, 396 U.S. 12 (1969); Green v. Bd. of Elections, 380 F.2d 445, 451–52 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968).

112. *Developments in the Law—The Law of Prisons: One Person, No Vote: The Laws of Felony Disenfranchisement*, 115 HARV. L. REV. 1939, 1942 (2002); Zetlin-Jones, *supra* note 110, at 412.

113. *Reynolds*, 377 U.S. at 561–62.

114. *See supra* notes 75–87, 98, and accompanying text.

115. *See* GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 11, at 67 (arguing that criminal punishment and public rituals of criminal punishment operate as "a sign that the authorities are in control").

116. This rule finds purchase in *Ruffin*, the Reconstruction-era Virginia case, in which the court stated, "The bill of rights is a declaration of general principles to govern a society of freemen, and not

of such a rule,[117] the immediate disenfranchisement of felons flies in the face of purported goals of rehabilitation and socialization. If a society concludes that voting is the essential empowering right of citizenship and then denies it to felons, there is no way that rehabilitation and socialization can be complete. The prisoner can never be welcomed back into the polity as a full citizen.

If one of the more disturbing components of Bob's hypothetical plight was his inability to exercise political voice through the electoral process,[118] then what makes Bob different from the millions of felons in the United States who have been stripped of this privilege?[119] If ours is a system that views felons as having forfeited the critical rights of citizenship and political participation due to her criminal conduct, then the same disenfranchisement and alienation from self-governance that an international market portends is already in full effect in the United States and has already received U.S. judicial approval.[120]

2. Domestic Prisoner Transfers

Similarly, the widespread movement of federal prisoners throughout the United States, and the interstate[121]—and even intrastate—movement of state prisoners, raise similar questions about whether the prisoners are being punished according to the standards of their "community" or are even within the same political unit whose inhabitants they were incarcerated for endangering. That is, the distinction based simply on the logistics of movement between a global market in prisoners, wherein inmates are shipped across borders, and a domestic carceral system, which purports to incarcerate inmates in the place where they committed a crime, may be largely illusory given the way that domestic prison transfers currently operate.

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of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen. They are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land. While in this state of penal servitude, they must be subject to the regulations of the institution of which they are inmates, and the laws of the State to whom their service is due in expiation of their crimes." Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

117. *See* ALEXANDER, *supra* note 9, at 139.

118. *See supra* Part III.B.

119. *See* Bennet, *supra* note 106, at 1.

120. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

121. *See* Hunter, *supra* note 16, at 329–41 (detailing the development of the right to transfer federal prisoners and State of Alaska prisoners).

In *Meachum v. Fano*,[122] the Supreme Court declined to bar the involuntary intrastate transfer of prisoners, holding that the Fourteenth Amendment does not, by itself, "create a liberty interest in prisoners to be free from intrastate prison transfers."[123] Subsequently, in *Olim v. Wakinekona*,[124] the Court extended this rationale to situations in which states prisoners were transferred across state lines to facilities in other states[125]: "Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State."[126] Further, this rationale has been extended to apply to federal prisoners transported from state to state.[127]

While it is tempting to focus on the interstate/intrastate distinction in comparing the Belgian-Dutch exchange with quotidian, domestic prison transfers, such a distinction may overvalue borders and undervalue cultural and legal differences within political units (either states or nation-states). On the one hand, Belgium and the Netherlands may share certain cultural and legal values,[128] rendering a transfer of prisoners between the two

122. Meachum v. Fano, 427 U.S. 215 (1976).

123. Sandin v. Conner, 515 U.S. 472, 478 (1995) (citing *Meachum*, 427 U.S. at 225). The Court narrowed this holding in subsequent cases. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 221–22 (1990); Vitek v. Jones, 445 U.S. 480, 489 (1980). It then returned to a broader reading of *Meachum* in *Sandin*. *See* 515 U.S. at 483–84; Donna H. Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner*, 72 FORDHAM L. REV. 785, 794–97 (2004); Philip W. Sbaratta, Note, *Sandin v. Conner: The Supreme Court's Narrowing of Prisoners' Due Process and the Missed Opportunity to Discover True Liberty*, 81 CORNELL L. REV. 744, 753–54 (1996).

124. Olim v. Wakinekona, 461 U.S. 238 (2003).

125. *Id.* at 245.

126. *Id.*

127. *See, e.g.*, Burke v. Romine, 85 F. App'x 274, *10–11 (3d Cir. 2003) ("There is no reason to apply a different rule to the transfer of a prisoner from one location to another within the federal system. Although we sympathize with Burke's desire to be imprisoned where he can remain in contact with his family, the transfer of a prisoner for reasons related to a legitimate penological interest is a matter within the discretion of the prison authorities. Burke has no constitutional basis on which to ground his lawsuit."); Tighe v. Wall, 100 F.3d 41, 42 (5th Cir. 1996) ("A prisoner has no constitutionally protected interest in a particular facility.").

128. From 1815 until 1830, Belgium was a part of the United Kingdom of the Netherlands. *See* Rick Torfs, *Church and State in France, Belgium, and the Netherlands: Unexpected Similarities and Hidden Differences*, 1996 B.Y.U.L. REV. 945, 946 (1996). While the two nations certainly have significant legal and cultural differences, *id.* at 947, they are party to a number of treaties that have harmonized legal regimes in both countries, and they also share a number of legal and cultural similarities. *See, e.g.*, Sonia Bychkov Green, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. PA. J.L. & SOC. CHANGE 53, 90 (2011) (noting that Belgium and the Netherlands had both legalized same-sex marriage); Peter W. Schroth & Ana Daniela Bostan, *International Constitutional Law and Anti-Corruption Measures in the European Union's Accession Negotiations: Romania in Comparative Perspective*, 52 AM. J. COMP. L. 625, 639

nations less explicitly problematic when viewed through the lenses discussed in this Article than other hypothetical international exchanges. On the other hand, a nation as massive and diverse as the United States contains countless political, legal, and social divisions that might make a transfer across state lines even more pronounced than one across national borders.[129] Similarly, even the transfer of prisoners within a single state may well entail substantial transitions in social and cultural norms.

In New York, for example, a large number of state prisons are located in less populous, rural or semi-rural upstate communities,[130] where a large number of inmates who lived in the New York City metropolitan area prior to their incarceration are confined as punishment for crimes committed downstate.[131] According to a 2002 study by the Prison Policy Initiative, approximately 44,000 state prisoners (two-thirds of the entire state prison population) are from New York City.[132] However, a mere 3,000 of these New York City based inmates were incarcerated in state-run jails located in New York City.[133]

Further, given the racial demographics of New York, the outcome of these prison arrangements is that many people of color from either largely non-white or ethnically diverse urban communities end up incarcerated in largely white, rural, or exurban communities.[134] While the same state laws may govern Harlem and Malone, New York,[135] are we really comfortable

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(2004); Tracy A. Kaye, *European Tax Harmonization and the Implications for U.S. Tax Policy*, 19 B.C. INT'L & COMP. L. REV. 109, 128–29 (1996) (discussing the terms of a tax treaty between the nations). *But cf.* GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES 228 (1984) (stating that Belgium and the Netherlands have substantial cultural differences).

129. Such an observation does not, of course, vitiate the important issues relating to jurisdiction and political and legal agency that an international exchange implicates and that might make such an exchange substantially different in effect than a domestic transfer.

130. *See, e.g.*, Hunter, *supra* note 16; Andrew Beveridge, *Imprisoned in New York*, THE GOTHAM GAZETTE (Feb. 19, 2004), http://www.gothamgazette.com/index.php/demographics/2317-imprisoned-in-new-york; Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York*, PRISON POLICY INITIATIVE REPORT (Apr. 22, 2002), http://www.prisonpolicy.org/importing/importing.html#_ftnref1; Nonprofit Voter Engagement Network, *About the Census: Prison Inmates Redistricting and the 2010 Census* (2011), *available at* http://www.prisonpolicy.org/scans/Counting-Prison-Inmates.pdf.

131. *See, e.g.*, Beveridge, *supra* note 130; Wagner, *supra* note 130.

132. Beveridge, *supra* note 130; Wagner, *supra* note 130.

133. Beveridge, *supra* note 130; Wagner, *supra* note 130.

134. *See* Wagner, *supra* note 130 ("The majority of New York's prisoners are urban and non-white, but the majority of New York's 70 prisons are in predominately white, rural areas.").

135. Malone, a town near the Canadian border, is home to the maximum security Upstate Correctional Facility. *See* N.Y. State Dep't of Corrections & Community Supervision, *Department of*

treating these spaces as the same community?[136] Put another way, voters in Malone and Harlem may vote in the same gubernatorial election and may be governed by the same state and federal constitutions,[137] but is the transfer of a young black man convicted of drug trafficking in Harlem to a prison in Malone immune from the concerns that might weigh against expansion of the Belgian-Dutch exchange?

In terms of conditions of confinement, the mobility of prisoners within the federal system may also raise important concerns about the constitutional protections that purport to maintain a shared set of assumptions about humane punishment.[138] While in theory there may be only one body of constitutional law, in practice, courts diverge as to the constitutionality of an inmate's housing conditions, the sufficiency of prison disciplinary procedure, or the definition of abusive conduct by a corrections officer and ultimately when such conduct is so egregious as to preclude qualified immunity.[139] Prison litigation is often fact-intensive,

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Corrections and Community Supervision Facility Listing (last visited Feb. 18, 2014), http://www.doccs.ny.gov/faclist.html.

136. Such a question is beyond the scope of this Article and raises numerous legal and political questions regarding vote apportionment and the basic composition and continued political feasibility of many states given demographic migrations and economic distributions. Without entering into broader discussion of the normative desirability of further subdividing states as political units, I raise this question here in light of the theoretical grounding of criminal law and criminal punishment in conceptions of the community and the collective consciousness. *See* GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 11, at 67. *See generally* DURKHEIM, *supra* note 76. Because of this strong theoretical link between social norms and criminal law, Levin, *De-Naturalizing Criminal Law*, *supra* note 48, at 1789–90, the potential for heterogeneity within political units and communities becomes critical to our understanding of what punishments "the community" requires and what punishments are actually normatively required to achieve such ends, *cf. supra* note 79 (discussing the underappreciated role of fractiousness within the "collective consciousness").

137. While a discussion of the practice of "prison-based gerrymandering" falls outside of the scope of this Article, it is worth noting that these transfers and the incarceration of prisoners many miles from their homes and from the location of their transgressions has raised serious issues relating to the counting of populations for voting purposes. *See generally* Wagner, *supra* note 130; *Criminal Justice Fact Sheets: Prison Gerrymandering*, PRISON POL'Y INITIATIVE, *available at* http://www.prisonpolicy.org/factsheets.html#Prison-Based_Gerrymandering (last visited July 18, 2013). Not only might a prisoner be incarcerated in a community much different from her own, but her presence in the new community might strengthen its legislative clout. Wagner, *supra* note 130. That is, "[b]y crediting rural prison towns with urban prisoners, the New York Legislature is helping to postpone, for at least another decade, a democratic debate over the best way to address crime, drugs and unemployment. . . . In essence, these rural whites will be able to 'speak for' the incarcerated urban prisoners in ways counter to their interests." *Id.*

138. *See* Inmates of Occoquan v. Barry, 844 F.2d 828, 837 (D.C. Cir. 1988) ("It is cruel conditions, defined by reference to community norms, to which the Constitution speaks.").

139. *See, e.g.*, Jordan v. Fed. Bureau of Prisons, 191 F. App'x 639, 650–51 (10th Cir. 2006) ("When considering whether the conditions, duration or restrictions of confinement are atypical as compared with other inmates, this court has inconsistently used comparisons either with inmates in the

requiring courts to assess whether the amount of force an inmate is subjected to or the conditions in which she is housed rise above the level of unpleasantries to the realm of constitutional injuries.[140] Such decision-making, therefore, tends to be less suited to broadly applicable or categorical rules, allowing for great variation across courts as to what claims might give rise to a suit that would survive a motion to dismiss or for summary judgment.

The mutability and uncertainty of constitutional protections is highlighted by the fact that an inmate transferred from, say, New York to Wyoming, may become the migratory victim of a circuit split.[141] That is, a federal inmate might bring suit to vindicate her rights under *Bivens v. Six Unknown Named Agents*[142] in the U.S. District Court for Wyoming just as she would have in the U.S. District Court for the Western District of New

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same segregation or those in the general prison population. The Supreme Court has recognized, without deciding the issue, that the circuit courts are split on which baseline comparison to use. In this circuit, regardless of which baseline we have utilized, this court 'has never held the conditions, duration or restrictions of the detentions presented on appeal created a liberty interest . . . .' Similarly, the majority of other circuits have also held no liberty interest arose in administrative detentions presented on appeal, while a few others have rendered contrary decisions. Admittedly, none of these cases involved a detention lasting almost five years or 1,825 days. Nonetheless, we generally rely on their rudimentary principles and discussion to assist in our analysis of the issues presented in this case." (citations omitted)); McLaurin v. Morton, 48 F.3d 944, 949 (6th Cir. 1995) ("Plaintiff's Eighth Amendment claim remains pending before the District Court. The dissent raises an important issue on which the circuits are split. There are two competing interests here. Granting qualified immunity on only one of the claims may reduce discovery but it does not eliminate it. Additionally, defendant will nonetheless be exposed to trial, albeit a more limited one. Thus, an immediate appeal of less than all claims does not afford defendant complete relief. To the extent that it affords a defendant relief, the purpose recognized [by the Supreme Court] of relieving public officials from the cost of litigation is advanced. However, since there is still discovery and trial of the remaining issues, the value of the final judgment rule is lost." (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)); Schrob v. Catterson, 967 F.2d 929, 939 (3d Cir. 1992)).

140. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (conditions of confinement, "alone, or in combination, may deprive inmates of the minimal civilized measure of life's necessities"); *Jordan*, 191 F. App'x at 650–51; Olsen v. Layton Hills Mall, 312 F.3d 1304, 1316 (10th Cir. 2002) (analyzing medical symptoms in the context of an Eighth Amendment claim); Union Cnty. Jail Inmates v. DiBuono, 713 F.2d 984, 999 (3d Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984) ("The totality of circumstances relevant to this [Eighth Amendment] inquiry comprises all those circumstances that bear on the nature of the [food, clothing, shelter, sanitation, medical care, or protection] afforded to sentenced inmates."); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2453 n.245 (2003) (discussing the administrative exhaustion requirement in prison litigation cases as responsive to the "fact-intensive" nature of such cases).

141. Wilkinson v. Austin, 545 U.S. 209 (2005) (noting a circuit split on the characteristics of confinement that amounted to a constitutional violation). *See also* Wagner, *supra* note 130.

142. 403 U.S. 388, 389, 397 (1971) (holding that an arrestee could bring suit and recover damages for a Fourth Amendment violation by federal agents).

York.[143] However, it is possible that the Second and Tenth Circuits will have differing interpretations of the constitutional rights the prisoner might seek to vindicate, yielding substantially different outcomes in each place of incarceration.[144]

Further, the change in demographics that results from both interstate and intrastate prisoner transfers necessarily affects the composition of jury pools for prisoners' civil rights cases. Even if an inmate's claim regarding the conditions of confinement or the use of force by a correctional officer survives motions to dismiss and for summary judgment, she still must face a jury composed not of members of *her* community,[145] but of members of *the prison's* community. Much as the upstate New York prison guard may come from a culture and community very different from those of the downstate inmate, so too might the upstate jury, which consequently may view with suspicion people who look, act, sound, and live the way that the downstate inmate-plaintiff does. Additionally, particularly in rural communities that rely on prisons for much of their local economies,[146] jury pools may abound with the children, spouses, friends, and acquaintances of prison guards. A Dutch court might well be more sympathetic toward a Dutch guard than a Belgian inmate; similarly, an upstate jury may have much more in common with an upstate correctional officer than a downstate (or out-of-state) inmate.

In short, if the peculiarity of the global prison market or prison exchange system causes us to revert to aspirational statements about how a properly functioning or just carceral system operates, it should also force us to confront the glaring absence of these same aspirational or normative commitments from current practices in the U.S. criminal justice system. If we fear the creation of transient inmate populations, unmoored from their communities, and the socio-legal spaces that deemed them worthy of punishment, we must address the way in which these same dynamics are at

143. *Bivens* has fallen into disfavor in the decades following its introduction, yet it remains the basis under which a federal prisoner may attempt to bring a constitutional claim against federal prison staff. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., dissenting) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition"). *See generally* T. Ward Frampton, *Bivens's Revisions: Constitutional Torts After* Minneci v. Pollard, 100 CAL. L. REV. 1711 (2012) (describing the manner in which courts have modified *Bivens* over the past few decades).

144. *See, e.g.*, *supra* notes 139, 141.

145. That is, the community in which she originally committed an offense and was charged.

146. *See, e.g.*, Beveridge, *supra* note 130; Wagner, *supra* note 130.

play in domestic transfers lacking the fanfare or intrigue of an international treaty.

IV. THE PRISONER AS RESOURCE: INTERNATIONAL TRADE IN A POST-INDUSTRIAL MOMENT

Up to this point, my discussion of markets in prisoners has focused primarily on the prisoners themselves and the potential harms visited upon them by a market that ships them across borders, or even by domestic transfers that dislocate them from their communities. This Part, however, shifts focus from the prisoner and her role in this market to *the prison* and the *prison employees*. Given that this Article aims to examine a specific market, it is important to consider what forces are actually driving this market, what conditions brought about the Belgian-Dutch exchange, what conditions might cause this market to expand, and whether these forces are reflective of or reflected in domestic prisoner transfers.

A. MARKET FORCES RATHER THAN THEORIES OF PUNISHMENT

By all accounts, the drivers of the Belgian-Dutch exchange were an excess of prisoners and an excess of prisons. In his discussion, Kontorovich framed the exchange as dictated by principles of efficiency.[147] Each nation exploited its comparative advantage[148]: Belgium as producer of prisoners and consumer of prison services, and the Netherlands as consumer of prisoners and provider of prison services.[149] Putting aside other logistical, legal, and theoretical concerns,[150] the Belgian-Dutch exchange would not have been possible absent the Netherlands' surplus of prisons.[151] This is not to discount the two prior frames as critical to our understanding of the potential consequences of a global market in prisoners or of such a market's similarities to U.S. penal policies. Rather, acknowledging the stated drivers of the exchange suggests that the frames discussed in the

147. *See* Kontorovich, *supra* note 4.

148. *See, e.g.*, David Ricardo, *On The Principles of Political Economy and Taxation* 133–34 (3rd ed. 1821), *reprinted in* THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 133–34 (Piero Sraffa ed., 1951); Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 U. MO.-KAN C.L. REV. 733, 750–56 (2001).

149. Kontorovich situates this exchange in the context of international prosecutions for privacy, contending that this is endemic of a positive trend in seeking the "cheapest justice provider." *See* Kontorovich, *supra* note 4 ("Sending prisoners to the cheapest justice provider really went global in the past few years with Somali piracy.").

150. *See supra* Parts II–III.

151. *See supra* notes 1–4 and accompanying text.

prior Parts illustrate side effects, but not the impetus for the exchange and the nascent market that it may portend.

A market for inmates based on the availability of unpaid or underpaid labor or the need to incapacitate a growing universe of social deviants conceivably might exist primarily due to the epidemic of mass incarceration,[152] but until now the functionality of such a market has been premised on the availability of unused prison space.[153] Indeed, the CPT Report contains no suggestion that the Belgian prisoners were subjected to unusually harsh labor conditions and no facts to support a conclusion that harnessing inmates' low-skill labor was a tacit driver of the exchange.[154] On the contrary, the Report explicitly states that transferred inmates were upset at being denied the opportunity to work as many hours as they had worked in Dutch penal facilities.[155]

Certainly, the convict leasing comparison discussed above is an interesting one that raises numerous questions about the necessity of regulating the usage or treatment of inmates in their host nation or institution.[156] But it is also important to note a distinction central to this Article and its project of understanding contemporary markets in forced migration of inmates: the prisoners may be useful as labor, but the Belgian exchange, at least on its face, was not designed to secure inexpensive labor.[157] Rather, the nations designed the exchange explicitly to deal with space concerns and the continued viability of two prison systems.[158]

Similarly, while Member of Parliament Austin (and to some extent, Governor Schwarzenegger) suggested that inmates might be exported to

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152. *But cf.* Kilgore, *supra* note 30 (arguing that "the prison-industrial complex remains driven by an agenda that is more about politics than profits").

153. *Cf.* Hans-jörg Albrecht, *Sentencing in Germany*, 76 L. & CONTEMP. PROBS. 211, 216 (2013) ("[T]he Dutch prisons over the last six years have been rapidly emptied, which resulted in the closing of prisons.").

154. *See* CPT Report, *supra* note 8.

155. *See id.* at 14.

156. *See supra* Part II.

157. *See also* CPT Report, *supra* note 8, at 14.

158. We might imagine an alternate international exchange in which inmate labor were actually a driver of the transaction. For instance, a nation with a dwindling population seeking to fill low-skill, low-wage positions might seek out convict labor as a means of avoiding unions or other market forces that might otherwise drive up costs in this sector of the market. Indeed, the purpose of addressing the exchange through the prison labor frame in Part II was not only to highlight the inherent flaws with forced carceral labor but also to suggest that such a labor-driven exchange—analogous to convict leasing—might become a feature of the international landscape if a global market in inmates were to expand.

nations with harsher penal policies,[159] this intention is not evident in the terms (or the reality) of the Belgian-Dutch exchange.[160] As an empirical matter, the threat of transferring prisoners across borders may have some added deterrent or retributive effect for would-be offenders. But in the very limited international press coverage of the exchange, no government official from Belgium or the Netherlands suggests that the exchange was designed to further any particular philosophical ends or to achieve specific results with regard to the prisoners themselves.[161] Therefore, this final Part addresses the exchange through a broader frame of prisons as institutions, and individual prisoners not as criminological or penological subjects, but as necessary components of the institutional and legal structure of the prison.

In a moment of post-industrial struggle, where the U.S. and many other developed nations are coming to grips with the post-industrial service economy, the global prison market powerfully speaks to the peculiar and unsettling nexus between criminal punishment and economic stability. For nations that no longer thrive as manufacturing centers or that are seeing the decline of industry, prisons have come to stand as a remaining space of economic viability, an institution that continues to hire and provides a social service. In light of this, perhaps the most instructive frame through which to view this exchange may not be one in which the "traditional" theories of punishment play a part,[162] but rather one in which the political economy of the prison takes center stage.

From the perspective of any of the traditionally accepted theories of punishment,[163] closing a prison for lack of prisoners would be a clear success for society or at least a marker of a desirable social climate.[164] To the rehabilitationist, closure would signify no further need to socialize or cure previously troubled or deviant inmates and presumably, as a corollary,

159. *See* Buchanan, *supra* note 6; Moss, *supra* note 1.

160. *See generally* CPT Report, *supra* note 8 (expressing a generally uncritical view of the prison conditions faced by the transferred Belgian inmates). *But cf. supra* note 99 (discussing the practice of extraordinary rendition and the suggestion that it has been employed by the United States in an effort to evade restrictions on the use of torture in interrogation).

161. *See* Buchanan, *supra* note 6; Moss, *supra* note 1.

162. *See, e.g.*, 18 U.S.C. § 3553 (2006) (listing, *inter alia*, the nature of the crime, deterrence, public safety and offender rehabilitation as purposes of punishment).

163. *Cf.* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315 (2000) ("Four purposes are usually ascribed to criminal punishment: retribution, deterrence, incapacitation, and rehabilitation.").

164. Assuming that the criminal justice system were otherwise functioning properly so that the lack of prisoners stemmed from a lack of individuals committing crimes and not from a failure to apprehend, convict, or punish law-breakers.

a more stable and healthy society.[165] The deterrence advocate would see that those who needed to be deterred had been,[166] just as the retributivist would view the closure as a sign that the members of the polity had stopped committing bad acts for which discipline was needed.[167] Similarly, by the logic of incapacitation, when society no longer requires facilities to contain individuals posing a risk to public safety, it would follow that there are no such risks and that society has achieved a secure state.[168]

But considering the prison and the market in prisoners through any of these theoretical frameworks, or even the frameworks taken together, misses the reality of the modern penitentiary. Prisoners—how they are treated and how they benefit or suffer from their periods of incarceration—are far from the only interest of penal institutions. The prison system is not just a space that houses inmates; rather, prisons are employers, workplaces, landmarks, and foundations of communities across the United States and around the globe.[169] Where a factory or a mill once might have served as the community center and marker of social and economic sustainability, today, in many localities, the prison stands in its place.

Perhaps an instructive analog to the case of the Belgian-Dutch exchange is a hypothetical nation with a sharply-declining youth population but a massive educational infrastructure that decides to import children to fill its schools. The children, like prisoners, become a sort of commodity, the fuel necessary to sustain an otherwise-endangered economy. Schools, like prisons, have no reason to exist in the abstract. Were there no children, there would be no need for a school; were there no law-breakers, there would be no need for a prison. Yet, in the hypothetical nation, schools have become a fundamental component of society upon which the national economy and nation's psyche depend, making their abolition both impracticable and also a political impossibility.

In terms of national self-preservation, then, a rational nation would import children to the extent that the nation could fill its classrooms with

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165. *See* Cotton, *supra* note 163, at 1316–17.

166. *See* BENTHAM, *supra* note 73, at 158–60.

167. *See, e.g.*, MICHAEL MOORE, PLACING BLAME (1997); Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815 (2007).

168. *See* FRANK ZIMRING & GORDON HAWKINS, INCAPACITATION (1995).

169. *See* Bernard E. Harcourt, *Radical Thought from Marx, Nietzsche, and Freud, Through Foucault, to the Present: Comments on Steven Lukes's In Defense of "False Consciousness"*, 2011 U. CHI. LEGAL F. 29, 36 (2011) (linking the relationship between mass incarceration and "the political needs of adjacent counties whose economies depend entirely on guard labor and prison-related industries").

foreign students at a lesser cost than it would require to establish a new industry or support those who would lose their jobs if the schools closed.[170] The purpose of the school in this model would no longer be to enrich students to become better adults and better members of the polity (a sort of analog to the rehabilitative justification for incarceration) or even to keep potentially unruly young people off the streets and out of trouble (more analogous to the incapacitation justification); rather, it is to allow the schools to survive and to perpetuate a dominant political economy and set of institutions. With apologies to George Orwell, the object of prisons may well be *prisons*.[171]

The hypothetical scenario that the Belgian-Dutch exchange conjures up and that is generally implicated by the market in prisoners becomes a sort of extreme version of "the new penology" described just over two decades ago by Malcolm Feeley and Jonathan Simon.[172] According to Feeley and Simon, the goal of the criminal justice system had shifted away from a rehabilitative model to a perverted form of incapacitation where prisons serve "to manage populations of marginal citizens with no concomitant effort toward integration into mainstream society."[173] The new penology, in this account that has found purchase in much subsequent criminological work, embraces a total separation of prisoner from society, drawing stark lines between the community, and a new subclass or underclass of criminals.[174]

To a certain extent, the Belgian-Dutch exchange, as proxy for what might become a broader market in prisoners, exhibits elements of the new penology. The extra-community punishment discussed at length in Part III,

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170. Alternatively, the nation might attempt to increase the demand for education by increasing degree or educational requirements for adults. While it falls outside of the scope of this Article, this alternative solution raises a troubling possibility in the prison context: what if, instead of importing prisoners, the Netherlands had passed more criminal statutes or criminalized more lawful behavior in an effort to increase the number of criminals? That is, instead of using criminal law to preserve public safety, to enforce moral views, or even to reform social practices, the Netherlands (or the prison state/community) would be using criminal law to preserve the institutions and infrastructure of criminal punishment.

171. *See* GEORGE ORWELL, 1984, 263 (1949) ("Power is not a means; it is an end. One does not establish a dictatorship in order to safeguard a revolution; one makes the revolution in order to establish the dictatorship. The object of persecution is persecution. The object of torture is torture. The object of power is power.").

172. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on an Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 449 (1992).

173. *Id.* at 463.

174. *Id.* at 467. *See also* Sharon Dolovich, *Confronting the Costs of Incarceration: Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 252–54 (2009).

supra, speaks powerfully to the lack of "concomitant effort toward integration into mainstream society" identified by Feeley and Simon.[175] But if we focus on the role of preserving and filling vacant prisons as essential to the maintenance of a prison industrial complex, then the exchange and such a nascent market may actually take the new penology to new extremes. The prisoners have become so expendable, so divorced from any understanding of community or political agency, that nations may trade and traffic in them.

The Virginia Supreme Court, in its dismissal of concerns for prisoners' rights in *Ruffin*, spoke of the prisoner as "civiliter mortuus," or "civilly dead."[176] When we consider the importation of prisoners to preserve industry, it appears that the market in prisoners takes seriously this de-humanization of prisoners, perhaps even extending beyond the case of the supermax prisons that have been highlighted as emblematic of new penology.[177] Like Gogol's "dead souls," the prisoners cease to have significance outside of their status as property or chips that can be exchanged.[178] Incapacitation has ceased to be a theoretical justification for punishment and has become a job in itself.

B. AVOIDING EXCEPTIONALISM

As in the context of the other frames, I argue that the Belgian-Dutch case is exemplary more than it is exceptional. In the criminal justice policies of the United States, the role of the prison may increasingly be not just to punish, to rehabilitate, or even simply to incapacitate the social deviant. Rather, the role of the prison may be to *be*.[179] "[I]n the United States today, incarceration is more than just a mode of criminal punishment," contends Sharon Dolovich.[180] "It is a distinct cultural practice

175. Feeley & Simon, *supra* note 172, at 463.

176. Ruffin v. Commonwealth, 62 Va. 790, 796 (1871). The court goes on to hold that the prisoner's "estate, if he has any, is administered like that of a dead man." *Id. See also* William B. Mack III, *Justice for Some: Excessive Force Claims after* Porter v. Nussle, 36 COLUM. J.L. & SOC. PROBS. 265, 267–68 (2003).

177. *See* Dolovich, *supra* note 48.

178. *See* NIKOLAI GOGOL, DEAD SOULS (Richard Pevear & Larissa Volokhonsky trans., Vintage 1997) (1842). In Gogol's novel, the "dead souls" were dead serfs who might still be counted as property and traded by those clever or unscrupulous enough to acquire and deal in them. *See id.*

179. *Cf.* Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 599 (2012) ("Contrarily, in utilizing the services of private prison corporations, governments have not only given up the responsibility to manage inmate populations, they have also allowed the purpose of punishment to shift from its original public objectives to one of profiteering." (citation omitted)).

180. Dolovich, *supra* note 174, at 237.

with its own aesthetic and technique, a practice that has emerged in recent decades as a catch-all mechanism for managing social ills."[181] The prison and the criminal justice system exist (at least in part) to perpetuate themselves and to maintain a culture that views incarceration as an essential component of the state and its survival.[182]

Criminal law scholars, criminologists, and penal reformers have, of late, focused on the rise of private prisons, critiquing this trend as corrupting the carceral system with private interests that are often opposed to prisoners' and society's best interests.[183] Further, by interjecting private interests into the ostensibly public space of criminal punishment,[184] privatization of prisons, critics suggest, detracts from the Durkheimian or quasi-Durkheimian expressive or ritualistic function of criminal law.[185] As Mary Sigler argues, "[t]he delegation of punishment through prison privatization attenuates the meaning of punishment in a liberal state and undermines the institution of criminal justice."[186] However, should these

181. *Id. See also supra* notes 28–29 and accompanying text.

182. *Cf.* Wagner, *supra* note 130 ("By crediting rural prison towns with urban prisoners, the New York Legislature is helping to postpone, for at least another decade, a democratic debate over the best way to address crime, drugs and unemployment.").

183. *See, e.g.*, CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 45–48 (1990); Ira P. Robbins, *Privatization of Corrections: A Violation of U.S. Domestic Law, International Human Rights, and Good Sense*, 13 HUM. RTS. BRIEF 12, 12 (2006) ("Critics argue that as a matter of policy it is inappropriate to operate prisons with a profit motive, which provides no incentive to reduce overcrowding (especially if the company is paid on a per-prisoner basis), to consider alternatives to incarceration, or to deal with the broader problems of criminal justice. On the contrary, critics assert that the incentive would be to build more prisons and jails, which would be filled with more prisoners." (footnote omitted)); Sharon Dolovich, *State Punishments and Private Prisons*, 55 DUKE L.J. 437, 441–42 (2005) ("Incarceration is among the most severe and intrusive manifestations of power the state exercises against its own citizens. When the state incarcerates, it strips offenders of their liberty and dignity and consigns them for extended periods to conditions of severe regimentation and physical vulnerability. Before seeking to ensure efficient incarceration, therefore, it must first be determined if the particular penal practice at issue is even legitimate."); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004) (detailing in depth the drawbacks of prison privatization).

184. For a critique of the public/private distinction in this context, see Levin, *American Gangsters*, *supra* note 90, at 118 ("In some situations (perhaps even in most situations), we may be comfortable with the private interests that are served (e.g., of the victim of an assault) or we may feel as though the private interests are sufficiently representative of broader societal interests (e.g., we are all potential victims). Because the public interest that the criminal law serves is simply a conglomeration of private interests, the criminal law—like other ostensibly public institutions—can be both designed and implemented in such a way as to have a substantial social and economic structuring effect, to skew the balance of power heavily in favor of a given interest, or to marginalize and to delegitimize an opposing interest.").

185. Mary Sigler, *Private Prisons, Public Functions, and the Meanings of Punishment*, 38 FLA. ST. U.L. REV. 149, 151 (2010).

186. *Id.*

concerns about troubling "private" incentives unrelated to theories of punishment be cordoned off from discussions of "public" systems of punishment and reserved only for discussion of private prisons or private contracting?

What the Belgian-Dutch exchange and the potential global market in prisons shows us so powerfully is the fallacy of the distinction between markets, private action, and financial interests on the one hand and an idealized criminal justice system on the other.[187] Indeed, put more simply, what this exchange demonstrates is that it need not take corporate actors or private contractors in order to engineer a system of carceral institutions designed in the interests of financial benefit. The Belgian-Dutch exchange was decidedly public—nation states and not private entities drew up the terms and facilitated the transfer of prisoners. But, as in other legal areas, many governments faced with economic downturns have adopted the view that governments should be "run like businesses" favoring efficiency over other concerns for the public good.[188]

While Sigler's critique hones in on a major shortcoming of private prisons, and while the suggestion of an explicitly identified market in prisoners may rightly cause concern for many already wary of encroaching prison privatization, this Part has argued that the targets of these criticisms are already firmly entrenched in U.S. penal policy. Looking back at the discussion of domestic prison transfers in Part III, *supra*, it is important to recall that the public prison system and the laws that structure it have already attenuated inmates from the community and the sort of idealized liberalism suggested by Sigler.[189] The specter of convict leasing discussed in Part II, *supra*, may well haunt U.S. penal policy and the move to privatize, but convict labor has become firmly entrenched in the public prison infrastructure.

In short, the exchange of inmates as a market within the growing space of the prison industrial complex represents a critical marriage of private and public, an embodiment both of state violence and of its relationship to the preservation of private markets.[190] Under the banner of the new penology, and coupled with the prevalent model of government as

187. *Cf.* Kilgore, *supra* note 30 ("State-owned prisons and political agendas continue to lie at the center of mass incarceration. The combined revenue of CCA and the GEO Group for 2012 was less than half of the California state corrections budget.").

188. *See* Richard Michael Fischl, *"Running the Government Like a Business": Wisconsin and the Assault on Workplace Democracy*, 121 YALE L.J. ONLINE 39, 39–41 (2011).

189. *Cf.* Sigler, *supra* note 185, at 151.

190. *See supra* note 181.

business,[191] prisoners transferred throughout U.S. state and federal systems change hands and homes not because of some societal quest for greater rehabilitative or retributive effect but because of logistical and practical concerns. Prisons must preserve public safety *and* employment. Perhaps Belgium and the Netherlands, much like the United States, have embraced a model of prisons as "factories with fences";[192] however, instead of inmates producing license plates (as in Justice Burger's vision), what we are left with are states, societies, and communities often producing punishment.

C. A MORE POSITIVE GLOSS?

It is worth noting that this Part, like the rest of this Article, has generally treated the Belgian-Dutch exchange and any broader market that it might portend through a critical lens.[193] But, what if a market in prisoners has social benefits? The framework presented in this Part explicitly treats the market as a means of resource allocation and, in so doing, brings us back to the economic analysis presented by Kontorovich and the political economy of the prison. Kontorovich refers to the efficiency-based concept of "the cheapest justice provider," finding some nations better suited to trying (in the case of the Somali pirates) or punishing criminals.[194] If we are concerned with the issues raised in this Article, is it possible that this sort of "comparative advantage" in incarceration might still have an upside?

What if Nation X proved to be exceptionally good at incarceration? Imagine that for $10,000 a year, per prisoner, Nation X could guarantee a recidivism rate that was seventy-five percent lower than any U.S. prison's. In short, for a small fee, the United States could enhance the chances that punishment would work and that incarceration would lead to the socially desired outcome.[195] If feasible, why would we not want a global division of state-labor that would result in Nation X being responsible for reforming U.S. deviants?

First, the positive gloss as represented by the Nation X hypothetical is premised on a single theory of punishment (or at least a confined universe of what we are looking for in incarceration). That is, recidivism rates are

191. *See* Fischl, *supra* note 188, at 39–41.

192. Burger, *supra* note 32.

193. *But see supra* note 170.

194. Kontorovich, *supra* note 4.

195. This outcome would vary depending on our theory of punishment—*i.e.*, greater and more proportional punishment; optimal deterrence; etc.

certainly important if we view prison as a rehabilitationist enterprise or perhaps even from a general public safety perspective, but what if we are retributivists? This response, however, may be more of a dodge than a parry, as we could imagine an alternate hypothetical in which Nation X is not only a model of rehabilitative excellence, with marked declines in recidivism, but its prisons are also fiercely disciplinarian, satisfying the public's desire for retribution. Indeed, we can imagine a nation that is paragon of every theory of punishment or that somehow succeeds in balancing a multiplicity of theoretical commitments. However, the further afield we drift in constructing our optimal carceral nation, the less plausible our hypothetical becomes, rendering that trade-offs between efficiency and other values less clear than in the initial Nation X hypothetical.

Perhaps more importantly, returning to the discussion of the role of punishment in the community, can Nation X actually socialize prisoners to be good members of polity/Nation Y? This is a version of the hypotheticals involving prisoner Bob offered above. In New York state,[196] it may be that we think that largely non-white, higher crime urban communities should look more like Franklin, Malone, or Auburn, New York, so that these distant carceral spaces will help shape better citizens who can reform their hometowns. But such a scenario more closely resembles one community policing and reforming another, rather than a single community policing and punishing for its own internal reform. Criminal law generally may have imperialist or culturally imperialist qualities, but this clear distinction between the punishers and the punished would be an extreme example.

Additionally, what would such a system of criminal nations and carceral nations do to the nation that becomes the punisher?[197] It may be that Nation X has a comparative advantage in punishing, but what happens when Nation X becomes a nation of jailers? Further, what happens when Nation Y ceases to punish its own criminals?

It may be that the expansion of such a market would serve the interests of efficiency and ultimately increase public good by: (1) making

196. *See supra* notes 130–144, and accompanying text.

197. Perhaps the best analog here is to the psychological or social impact on an executioner. On the one hand, it is conceivable that the executioner would become more morally conscious and convinced of the importance of doing good as a result of her job. On the other hand, studies suggest that executioners often experience trauma and psychological issues as a result of their function in carrying out punishment. *See generally* Lauren M. De Lilly, Note, *"Antithetical to Human Dignity": Secondary Trauma, Evolving Standards of Decency, and the Unconstitutional Consequences of State-Sanctioned Executions*, 23 S. CAL. INTERDISC. L.J. 107, 123 (2014) (noting, *inter alia*, that "secondary trauma is prevalent among those who carry out executions").

punishment more successful (using whichever metric or theory we might prefer to gauge success); (2) freeing up resources for other social programs or decreasing the amount of tax revenue that governments must raise; or (3) preventing other, less desirable means of addressing declining prison populations (e.g., criminalizing more previously lawful conduct or increasing the duration of prison sentences).[198] However, as this Article contends, these potential benefits bear with them a range of costs and collateral consequences that would unmoor criminal punishment further from its theoretical justifications and from its accepted place in liberal democratic societies.

V. CONCLUSION

The view of incarceration that I suggest the global prison market ultimately implicates is one that is increasingly detached from theories of retributivism, deterrence, or rehabilitation. Rather, as scholars of the new penology suggest, the critical paradigm is one of incapacitation.[199] However, as I have argued, what makes the global prison market so unnerving is not simply that it is rooted in a segregationist mentality that looks to banishment and extraterritorial punishment as a mechanism for avoiding the economically and morally costly externalities of mass incarceration.[200] Instead, it is that incarceration and incapacitation have increasingly become inextricable from the function of the state and from the essential stability of global markets.

We no longer need jails only so that a community might discipline its members and protect itself by excluding those who have sinned; rather, in parts of the United States and in the nascent global prison market, incarceration has become almost inextricable from governance. In maintaining stable domestic economies, the prison has replaced the factory, and the inmate has replaced the steel and the automobile. Communities

198. *See supra* note 170. As noted above, there has been no suggestion first and third potential benefits identified here (i.e., more effective punishment and preventing a push to incarcerate more individuals to fill empty prison).

199. *See, e.g.*, GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 11; Dolovich, *supra* note 48; Feeley & Simon, *supra* note 172, at 463.

200. The Belgian-Dutch exchange lacks a number of the characteristics of banishment, and, as discussed at length above, the impetus for the exchange was not punitive banishment. Indeed, this is one of the factors that helps distinguish the Belgian-Dutch exchange from historical prison colony arrangements. Nevertheless, in order to contextualize the potential market in inmates in the context of contemporary trends in criminal punishment, it is worth noting that banishment has resurfaced as a form of punishment in a number of U.S. cities. *See* Katherine Beckett & Steve Herbert, *Penal Boundaries: Banishment and the Expansion of Punishment*, 35 LAW & SOC. INQUIRY 1, 5–9 (2010).

across the United States have come to rely upon the carceral system both to employ their members and also to define what it means to be an "American" and a functional member of the polity.[201] In short, the global prison market embodies Foucault's concept of the state as purveyor of security and governance through control of bodies,[202] but as we look at Northern Europe and then back to the prison-dependent communities of Leavenworth, Kansas, Huntsville, Texas, or Malone, New York, it becomes difficult to identify whose security is being preserved and where to draw the lines between morality, economic necessity, and perhaps simply the runaway train of political inertia.

201. *See, e.g.*, Beveridge, *supra* note 130; Wagner, *supra* note 130.

202. *See, e.g.*, FOUCAULT, *supra* note 72, at 110 ("The state of government, which essentially bears on the population and calls upon and employs economic knowledge as an instrument, would correspond to a society controlled by apparatuses of society"); *id.* at 328 ("So, it seems to me that the object of police is everything from being to well-being, everything that may produce this well-being beyond being, and in such a way that the well-being of individuals is the state's strength.").