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Prisoners for Hire Towards a Normative Justification of the ILO's Prohibition of Private Forced Prisoner Labor

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ARTICLE

PRISONERS FOR HIRE: TOWARDS A NORMATIVE JUSTIFICATION OF THE ILO'S PROHIBITION OF PRIVATE FORCED PRISONER LABOR

Faina Milman-Sivan *

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INTRODUCTION

Private entities were first legally prohibited from coercively exacting prisoners' labor in 1930, when the ILO Forced Labour Convention (No. 29) concerning Forced or Compulsory Labour ("Convention No. 29" or "Forced Labor Convention") came into force.¹ This momentous convention² brought to an end the legality of a long and mostly exploitive practice (prevalent, for example, in the European colonies and post-Civil War United States), whereby prisoners were forced to work for private companies, motivated by greed and perhaps racism, in harsh and inhumane conditions. At the time of the Convention's enactment, the notion of the involvement of private entities in the administration of prisons and, in particular, in prisoner labor, had lost its legitimacy. It is no surprise, then, that Convention No. 29 took an exceptionally hostile stance towards private forced prisoner labor, in comparison with other international instruments addressing the work conditions of prisoners. Indeed, "no other binding standard offers the same level of protection to workers"³ This relatively highly

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^{1.} Convention Concerning Forced or Compulsory Labour (ILO No. 29), Jun. 28, 1930, 39 U.N.T.S. 55 [hereinafter Convention No. 29].

^{2.} Conventions and Recommendations, INT'L LAB. ORG. ("ILO"), http://ww.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-

recommendations/lang-en/index.htm (last visited May 24, 2013) (noting that Convention No. 29 is one of the eight "fundamental" conventions). The core International Labour Organization ("ILO") conventions are one of the clearest manifestations of the worldwide consensus on the need to ensure some minimal labor standards globally. These core conventions refer to four core rights, namely the right to be free from forced labor, the right of children not to work, the right to be free of discrimination in employment and occupation, and the right to freedom of expression and collective bargaining. The majority of workers' rights arrangements at the international law level adopt these rights as their baseline, such as the EU Charter of Fundamental Rights, which was incorporated into the Treaty of Lisbon. See Charter of Fundamental Rights of the European Union arts. 5, 11, 21, 32, 2012 O.J. C 326/391, at 396, 398, 400, 402 [hereinafter Charter of Rights]; Consolidated Version of the Treaty on European Union art. 6, 2012 O.J. C 326/13, at 19 [hereinafter TEU post-Lisbon]. Convention No. 29 was ratified by 177 of the ILO's 185 member states, more than any other ILO convention. The United States is a notable exception to this. Further information on the ratification of ILO conventions in general is available on the ILO website, http://www.ilo.org/dyn/normlex/en/f?p=1000:12001:0::NO::: (last visited Oct. 5, 2013).

^{3.} Colin F. Fenwick, Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law, 27 HUM. RTS. Q. 249, 289 (2005). The author mentions that the only

protective approach is expressed in two key legal arrangements in the Convention: (1) the Convention maintains a clear distinction between the public and private realms and affords significantly better protection to prisoners who work for *private* entities as opposed to *public* entities; and (2) the Convention sets a particularly rigorous criterion for establishing that prisoners' work is, indeed, voluntary. As a result of this strict standard, a number of work arrangements that would be otherwise exempt fall under the Convention's application.⁴

This robust protection has drawn harsh criticism, with doubts raised as to the Forced Labor Convention's relevance and effectivity in the current reality of the "globalized state."5 Such claims of anachronism stem from the clash between the Convention's fundamental distrust of the employment of prisoners for private interests, on the one hand, and the modern reality of the proliferation of employment arrangements that involve the private sector in prisons, on the other. The wave of privatization of prisons and prison labor that had begun in the 1970s spread across the world⁶ and cast doubt on the applicability of the imperative promulgated in the Convention. This is still relevant today, when, in the United States, more than six percent of the prisoner population in state prisons and eighteen percent of the federal inmate population are incarcerated in private prisons, an industry whose combined revenue in the United States alone exceeds US\$2.9 billion.⁷ Thus, the question still stands: Should private entities be allowed to exact labor from prisoners?

This article suggests a novel normative justification for prohibiting private forced labor. Historically, the International Labour Organization ("ILO") has offered two central

possible exception to this statement could be the American Convention on Human Rights. *Id.*

^{4.} See discussion infra Part II.A.

^{5.} See, e.g., Fenwick, supra note 3, at 289 ("[I]t might be asked whether the instrument can continue to hold up in light of the changing character of the globalized state."); *id.* at 290 (identifying the clear distinction between the public and private spheres and the strict definition of voluntariness as the Convention's central difficulties).

^{6.} For an elaborate description of the expansion of the private prisons industry and the privatization of prison labor in key industrial states, see *infra* Part I.A.

^{7.} See infra Part I.A.

justifications for the prohibition enshrined in Convention No. 29. The first is the "abuse of power" justification, namely, the increased risk of exploitation of prisoners when employed by private entities. The second justification relates to concerns over unfair competition between prisoners, on the one hand, and workers in the free market, on the other, referred to as the "competition" rationale. However, the abuse of power justification seems to lose force in light of the increasing number of allegedly successful experiments in the private employment of prisoners as well as the changing patterns of prison labor in recent decades, with the abandonment of historical exploitative systems of private labor. A normative reevaluation of the prohibition on private forced labor is, therefore, vital. The implications of such an analysis stretch well beyond the context of the ILO and Convention No. 29 and could inform policy discussions on the conditions and constraints to be set for the involvement of private interests in prisoner labor at both national and international levels.

Surprisingly, the academic literature on prison privatization and prisoner rights in the international sphere has generally failed to engage in normative debate over the legitimacy of private forced prisoner labor.⁸ The extensive literature on prison privatization has tended to focus on empirical work, assessing whether private prisons are less costly and more efficient than public prisons and measuring the quality of confinement.⁹ Moreover, the issue of prisoner labor has been absent¹⁰ even from the few references to discussions of

^{8.} ILO, A Global Alliance Against Forced Labour, Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work para. 116, Report I(B), ILC 93rd Session (2005), *available at* www.ilo.org/public/english/ standards/relm/ilc/ilc93/pdf/rep-i-b.pdf ("It is perhaps curious that so little attention has been given worldwide to the way in which the principle of eradicating forced labour might apply to convicted prisoners and other detained persons."). This is particularly true regarding international regulation of the matter. Notable exceptions include Fenwick, *supra* note 3, at 289; Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111 (2001); Susan Kang, *Forcing Prison Labor: International Labor Standards, Human Rights and the Privatization of Prison Labor in the Contemporary United States*, 31 NEW POL. SCI. 137 (2009).

^{9.} David E. Pozen, Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom, 19 J. L. & POL. 253, 271 (2003).

^{10.} Some attention, however, has been given to the matter of whether prisoners should be considered "employees." For an excellent review of this debate in the United

normative, non-empirical arguments in the context of prison privatization.¹¹ Much of the existing consideration of private prisoner labor turns on the interests of free laborers in the market, in particular the potential of prisoner labor to undercut their wages, and touches less on the rights of the prisoners.¹²

On the international law level, the meager attention to this issue has been confined mostly to internal debates amongst ILO member states, with the industrialized states persistently attacking the Organization's resistance to forced prisoner labor for private entities as inflexible and obsolete. They protest the uncompromising position articulated in Convention No. 29, which generally casts states as violators of a core ILO convention for allowing prison privatization and private prison labor.¹³ The ILO, however, steadfastly reasserts its position, mainly by

11. See, e.g., Alon Harel & Ariel Porat, Commensurability and Agency: Two Yet-To-Be-Met Challenges for Law and Economics, 96 CORNELL L. REV. 749 (2011).

13. Australia, Austria, and the United Kingdom, for example, were reprimanded by the ILO supervisory system of monitoring compliance. *See infra* note 78.

States, see Noah D. Zatz, Working at the Boundaries of the Markets: Prison Labor and the Economic Dimension of Employment Relationships, 61 VAND. L. REV. 857 (2008). The question of how to regulate prison labor for business interests on the international level has been generally overlooked. This is surprising in light of the strong interconnection between the ascent of the modern prison and industrial production and, in particular, Rusche & Kirchheimer's theory on the close relations between labor markets and penal change. See GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1968); see also DARIO MELOSSI & MASSIMO PAVARINI, THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM (Glynis Cousin trans., 1981).

^{12.} There is extensive literature on the impact of prisoner labor on free market workers. Richard Freeman, for example, suggests that this impact could be analogized to the impact of trade increase or immigration. Richard Freeman, Making the Most from Prison Labor *2 (1999) (presented at the 1999 National Symposium on the Economics of Inmate Labor Force Participation), available at http://www.caselaw.org/ Secondary%20Pages/InmateLabor.html (under "Available Files") ("In trade/ immigration analysis an increase in imports due to freer trade or increased competence of foreign labor or of immigrants from overseas raises national output and lowers the earnings of competing domestic factors. From the perspective of the free labor market, an increase in the work of prisoners is equivalent to an increase in imports/immigration from some foreign country."). In addition, there is a significant body of literature on the link between labor markets and penal change, mostly analyzing Rusche and Kirchheimer's theory. For a brief review, see Robert Weiss, "Repatriating" Law-Wage Work: The Political Economy of Prison Labor Reprivatization in the Postindustrial United States, 39 CRIMINOLOGY 253, 253-56 (2001). This strand of literature has had, however, little, if any, role in the recent burgeoning of legal literature on prison privatization.

reference to the original justifications behind the drafting of Convention No. 29 in 1930.

This Article addresses the lack of normative discussion of the issue of private forced prison labor in the legal literature, particularly in international law, and attempts to fill this vacuum. Adopting a broad comparative approach in exploring the working conditions of prisoners who are employed by private corporations in key industrial states, including the United States, the United Kingdom, New Zealand, and Australia, the Article exposes the weakness of the abuse of power justification in the current global reality. It proposes, as an alternative, supplementing the normative justifications for prohibiting forced private prison labor with the reasoning set forth by the Israel Supreme Court in a 2009 judgment relating to privatization of prisons. In this globally unprecedented decision, the Court declared a legal provision allowing the establishment of a private prison in Israel to be constitutionally invalid.¹⁴ In so doing, it made Israel the first and, thus far, only state in which prison privatization has been deemed unconstitutional. The decision was grounded, in part, on the symbolic harm of incarceration in a private prison to prisoners' rights to human dignity and autonomy, regardless of the actual conditions in the private prison.¹⁵

This Article develops an analogous argument in the context of private forced prisoner labor. It distinguishes between two components of the symbolic harm rendered to prisoners from this practice: the harm that ensues from the retreat of the state and the harm that ensues from the profits garnered by the private entities from the prisoner labor. The civic republican understanding of the symbolic harm of the state's withdrawal from administering prisons is that "private" considerations of the market sphere contaminate the inherently "public" sphere of criminal punishment. I apply this "contamination argument"

^{14.} HCJ 2605/05, Academic Ctr. for Law & Bus. v. Minister of Fin., 9(33) PD 483 [2009](Isr.).

^{15.} Another key point in the Court's reasoning, albeit less pertinent to our discussion, resembles the abuse of power argument: that there is an inherently greater risk of abuse of power over prisoners in private prisons, and thus it is in the prisoners' best interests to be incarcerated in public prisons. *Id.* at 123–25 (Procaccia, J.); *id.* at 164–65 (Naor, J.).

to the prisoner labor context, but assert that it operates in the reverse direction here: the coercive elements of prisoner labor are incompatible with the free labor market, unsuited to both the principles of free exchange and workers' dignity. As such, they contaminate the market sphere. I then analyze the substantive and procedural aspects of exploitation, demonstrating that profits gained from coerced prisoner labor are indeed exploitative. The Article concludes that both exploitation and the contamination of the market sphere can be avoided by adhering to the conditions of voluntariness set in Convention No. 29.

The Article proceeds as follows. Part I presents the historical origins of the ILO's position on the involvement of private interests in prison labor and situates this stance relative to international law's regulation of prisoners' rights. This overview sheds light on the ILO's approach, which is deeply rooted in the circumstances leading up to its adoption. The decline of the abuse of power justification in recent decades is explored in the second section of this Part and sets the stage for the reevaluation of the normative debate on the issue of private coerced prison labor. Part II presents the legal regime of prison labor in Israel as background to the Israel Supreme Court prison privatization decision. This is followed by a discussion of the reasoning underlying this judgment, with particular focus on the assertion of symbolic harm to prisoners' human dignity and autonomy caused by incarceration in a private prison. This sets the foundation for the normative justification developed in Part III, which draws heavily on the libertarian tradition and its understanding of the market and the right to control of one's own labor. It is perhaps ironic that libertarians, who are generally enthusiastic proponents of prison privatization, offer the strongest substantiation for the argument against forced prison labor for private interests.

I. ILO REGULATION OF PRISON LABOR FOR PRIVATE ENTITIES: THE PRIVATE-PUBLIC DIVIDE

A. Convention No. 29: Traditional Justifications

At the time that Convention No. 29 was adopted, private entities were extensively involved in the operation of prisons in both Europe and the United States.¹⁶ In the European context, private entities had employed prisoners throughout the nineteenth century, and this was an especially common practice in the European colonies during this period as well.¹⁷ In the French colonies in West Africa and Vietnam, for example, there are documented cases of the "leasing" of prisoners for work in private companies, which was performed in horrific conditions.¹⁸ Forced labor prevailed throughout the European colonies, inside as well as outside prison walls. It was therefore not surprising that the colonies were the focus of an independent expert commission set up by the ILO in 1926 to conduct a

^{16.} In the United States, for example, the state became primarily responsible for prisons only in the twentieth century. *See* White, *supra* note 8, at 122–23. In 1885, the state prison labor systems in only four US states operated exclusively under public control and partially so in eleven states. In contrast, in 1923, only in fifteen states were these systems mostly under private control. Howard B. Gill, *The Prison Labor Problem*, 157 ANNALS AM. ACAD. POL. & SOC. SCI. 83, 86 (1931).

^{17.} See White, supra note 8, at 123–24 ("Convict 'transportation'. . . . saw the forced removal of tens of thousands of 'criminals' . . . from Europe to places like Australia, North America, and New Caledonia, where they spent their terms laboring for private contractors."). Of course, the involvement of private entrepreneurs in the employment of prisoners began prior to the nineteenth century. In Europe, as early as the seventeenth and eighteenth centuries, entrepreneurs were exploiting the prisons for cheap labor. *Id.* at 124 (noting the sixteenth century "house of correction" which merged "the functions of poorhouse, jail, and manufactuary"). In 1709, for instance, an arrangement was reached in the City of Tile, whereby an entrepreneur could provide wool, soap, and coal to a prison and receive the processed wool in exchange if he splits the profits with the prison.

^{18.} BABACAR FALL, SOCIAL HISTORY IN FRENCH WEST AFRICA: FORCED LABOUR, LABOUR MARKET, WOMEN AND POLITICS 11 (2002); PETER ZINOMAN, THE COLONIAL BASTILLE: A HISTORY OF IMPRISONMENT IN VIETNAM 1862-1940, at 85, 89 (2001). An example of the leasing system is the more than six hundred prisoners in Tonkin, Vietnam, who in 1895 were "leased" to a private coal mining company that was active on the Island of Koh Boh. These prisoners worked between nine- and thirteen-hour shifts, seven days a week. They suffered from malnutrition, disease, and prolonged exposure to the elements, leading to a high death rate. Id. at 90. There were examples of employment of prisoners in private companies in the British colonies as well. In the Cape Colony, for instance, the Colonial Government signed a contract in 1884 for the supply of prisoners to De Beers Consolidated Mines, a private diamond-mining company. See William H. Worger, Convict Labour, Industrialists and the State in the US South and South Africa, 1870-1930, 30 J. SOUTHERN AFR. STUD 63, 72 (2004). In the De Beers case, the prisoner-labor was provided free of charge to the entrepreneur, who was required only to bear the cost of the maintenance and supervision of the prisoners. The prisoners worked long hours-thirteen-hour shifts, six days a week-but their health conditions were relatively good. Id. at 74-77.

comprehensive inquiry into the extent of forced labor.¹⁹ Eventually resulting in the drafting of Convention No. 29, the commission uncovered the incredible scope of forced labor in the European colonies. In a discussion of the commission's report at the general meeting of the ILO Conference, the majority of speakers expressed horror at the exploitation in the colonies, with the phenomenon of forced labor for business purposes drawing the loudest protest.²⁰ A delegate representing French workers' organizations emphasized the aversion to forced labor for private entities: "In my country I have met people who were surprised to learn that forced labour could possibly exist in our colonies, and more than surprised to hear that it might possibly exist for private interests."²¹

The condemnation of forced labor for commercial purposes was anchored in two central arguments, which are often invoked to condemn forced prison labor for private commercial interests. First, applying what I referred to above as the "competition" argument, labor organizations often raise concerns over unfair competition between forced prisoner labor, on the one hand, and workers in the free market, on the other.²² In the ILO proceedings, the French workers'

^{19.} N. VALTICOS & G. VON POTOBSKY, INTERNATIONAL LABOUR LAW para. 222 (2d rev. ed. 1995). Convention No. 29 primarily addressed forced labor practices based on economic interests, Convention No. 29, *supra* note 1, art. 4(1), while later conventions, such as Convention No. 105 on the Abolition of Forced Labour, adopted in 1957, dealt primarily with forced labor based on political motivations, Abolition of Forced Labour Convention (ILO No. 105), July 4, 1957, 320 U.N.T.S. 291 [hereinafter Convention No. 105].

^{20.} The Government Adviser for the British Empire, Reporter of the Committee on Forced Labour, stated, "The Draft Convention which we are submitting to you provides very expressly and emphatically that there is to be no forced labour for private interests of any kind, or for the purpose of any private concessions; and this is a provision which, I may say, had the unanimous and enthusiastic support of all the three Groups represented on the Committee, and which, I am sure, will have the enthusiastic support of all those Groups here." ILO, 14th Sess., 15th Sitting, League of Nations 270 (1930) [hereinafter ILO Record of Proceedings, 14th Sess.].

^{21.} Id. at 282.

^{22.} This justification plays a particularly significant role in the United States *See* generally, e.g., Weiss, *supra* note 12. In the context of Convention No. 29, representatives of employers and of labor organizations joined forces in voicing the concern regarding unfair competition between forced laborers (in general) and workers in the free market. In the discussion at the ILO Conference, a Belgian employers' advisor stated, "[L]ast year I came here to make a unanimous declaration on behalf of the Employers, that all forced labour for private employers should be suppressed. No one has a right to

representative espoused a broader economic perspective, linking the practice of forced labor to the severe economic difficulties plaguing both the colonial and global economies, in particular the global economic crisis of 1929:

[W]e object to forced labour for cultivation for industrial purposes. It has given rise to speculation, and to crises which affect not only the Colony concerned, but the economic situation around the world. I can give you one example, the output of rubber, which is largely worked by forced labour, increased from 1913 to 1928 by 412 per cent. throughout the world. We know the crisis that exists at present, and we can thus see how the use or abuse of forced labour affects not only the natives, but the economic situation in other countries. . . . [P]rofiteering from exploitation of this forced labour is not only detrimental to the natives, but harmful to the economic and social development of the native population and harmful to the economic position of the world at large.²³

Later in the proceedings, the Indian workers' adviser referred to the rights of the "free workers of India" in objecting to more leniency with regard to the involvement of private interests in forced private labor:

[T]hree months ago, in a big railway strike in India on the G. I. P. Railway, the Government used convict labour, at least at one big station, for purposes of breaking that strike. There were organised protests from the Union of G. I. P. Railway workers, and questions were even asked in the House of Commons. I want to ask the Conference whether it is going to permit, under the cover of a Draft Convention of this Organisation, the forging of a new weapon to be used against the free workers of India, who are struggling against great forces in asserting their elementary rights.²⁴

The second argument expressed at the ILO was the "abuse of power" claim: namely, the increased risk of exploitation of prisoners by private entities.²⁵ The baseline assumption of this

question that declaration." ILO Record of Proceedings, 14th Sess., *supra* note 20, at 294.

^{23.} ILO Record of Proceedings, 14th Sess., supra note 20, at 322.

^{24.} Id. at 302.

^{25.} This concern, which addressed the acute and widespread history of the exploitation of laborers by private entities in the colonies even beyond prisons, was

argument is that private entities are, first and foremost, profitseeking and, as such, pose an increased risk to prisoner welfare, as opposed to the state, which represents public interests that are ostensibly devoid of personal interests.²⁶ The ILO described the tension between the two contradictory goals of profit-making and rehabilitating prisoners, which is what underlay its rejection of forced prison labor for private bodies: "[H]ere too the contractor and his staff come between the prison authorities and the prisoner. The prisoner is thus exposed to two influences: the reformative aims of the state and the business interests of the contractor. Their incompatibility seriously jeopardizes the reformative side of the prison system."²⁷

These concerns were reinforced by the fact that the two most common systems of prisoner employment for the private sector at the time—the "leasing" system and the "general contract system"—involved per capita payments to the state for each prisoner. This feature incentivized the private entities to squeeze a maximum amount of labor from each prisoner, often at the expense of deplorable work conditions. Under the leasing system, which has historically been the prevalent arrangement in the United States, particularly in the South, the private contractor pays the state per capita per prisoner and is responsible for managing the prison, in exchange for all the labor the contract.²⁸ Under the general contract system, although the private contractor pays for each prisoner, the prison and its management retain the state's responsibility. The

succinctly articulated in an unambiguous statement by the French workers' representative: "The Conference cannot accept forced labour for private interests. Colonial development must not be such that people suffer and die from it." *Id.* at 283.

^{26.} League of Nations, *Prison Labour: I*, 25 INT'L LAB. REV. 311, 320 (1932) [hereinafter Prison Labor: I].

^{27.} Id. at 321.

^{28.} The leasing system has historically flourished in the United States, especially in the South, and was considered one of the significant methods of upholding white supremacy in the post-bellum period. For further information, see DAVID OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996); MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996); ALEX LICHTENSTEIN, TWICE THE WORK OF LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2009).

private contractor, however, is responsible for providing the prisoners with food, work equipment, and materials, and, in exchange, the state transfers the fruits of the prisoners' labor to the contractor.²⁹ As opposed to these two arrangements, under a third type of arrangement, known as the special contract system, the contractor pays no fee to the state for the prisoners.³⁰ The state administers the prison, but the prisoners are under the full responsibility of the private contractor, which manages the labor, pays the wages, and collects the profits for itself. All three systems have resulted in inhumane treatment of prisoners, underscoring the force of the abuse of power argument.³¹

Convention No. 29 reflects both the competition and abuse of power arguments, in the deep suspicion it shows regarding private entities in the context of prison labor practices. Section 2 (2)(c) makes a sharp distinction between the employment of prisoners in the private realm versus the public realm and is focused on the eradication of forced prison labor on behalf of private entities.³² On the one hand, the involvement of private entities in prisoner employment will generally, unless under voluntary terms, constitute a violation of the Convention. On the other hand, by allowing a number of exceptions to its general prohibition on forced labor, the Convention permits states to compel their convicted offenders to work.33 This "state exception" is set in Article 2(2)(c) of the Convention, and the majority of international instruments for eliminating forced labor adopted after the Convention reiterate this exception.³⁴ Indeed, a broad international consensus exists as to the right of

^{29.} See Prison Labour: I, supra note 26, at 319.

^{30.} Id.

^{31.} For a discussion of prison labor conditions, see generally League of Nations, *Prison Labour: II*, 25 INT'L LAB. REV. 499 (1932).

^{32.} Convention No. 29, supra note 1, art. 2(2)(c).

^{33.} The other exceptions to the Convention include work relevant to military service, normative civilian obligations, and states of emergency such as war or natural disaster. *Id.* art. 2(2). Fenwick describes this as a paradox, since the legal defense that international labor law grants to prisoners employed by private entities is far superior to that allowed in the context of a state penitentiary. Fenwick, *supra* note 3. Fenwick further criticizes the Convention for referring only to prisoners convicted in a court of law and not to detainees. *Id.* at 288.

^{34.} See, e.g., Convention to Suppress the Slave Trade and Slavery, Sept 25, 1926, art. V, 46 Stat. 2183, 60 L.N.T.S. 253, *amended by* Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 162 U.N.T.S. 51 (permitting public institutions to impose forced labor for public purposes).

the nation state to force prisoners to work. Industrial states generally legally require their prisoners to work,³⁵ and refusal to work will result in a variety of sanctions.³⁶ Article 2(2)(c) stipulates that for such work to fall within a "state exception," it must be "carried out under the supervision and control of a public authority" and under the condition that the prisoner "is not hired to or placed at the disposal of private individuals, companies or associations."³⁷ The practical implication is that virtually any involvement of a private entity in forced prison labor, however rigorously supervised, is likely to be prohibited.³⁸

Several interpretations of Convention No. 29 have been suggested that would allow for strict supervision by public institutions of the private hiring of prisoners so as to sufficiently guarantee the latter's rights. The ILO has rejected all such readings of the Convention. The body authorized to interpret ILO conventions, the Committee of Experts on the Application of Conventions and Recommendations, has repeatedly ruled that the need for supervision by a public authority of forced prison labor and the prohibition on placing prisoners at the disposal of private enterprise are cumulative conditions and not interchangeable.³⁹ The ILO interprets strictly the term "under

37. Convention No. 29, *supra* note 1, art. 2(2)(c).

38. ILO, Eradication of Forced Labour: General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) (Feb. 15, 2007), (articles 19, 22 and 35 of the Constitution), Report III Part 1B (ILC 96th session, 2007), para. 26 [hereinafter General Survey 96th Sess.], *available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_089199.pdf. Again, the involvement of private entities in prisoner labor can be justified when the labor is voluntary and not compulsory, as will be discussed later.*

39. ILO, Report of the Committee of Experts on the Application and Recommendations, General Report, Report III Part 1A, 86th Sess., para. 116. (1998). The Committee has reiterated this position many times, such as in the General Survey 96th Sess., *supra* note 38, para. 55: "It seems clear from the wording of Article 2, paragraph 2(c), of the Convention that the two conditions apply cumulatively: the fact that the prisoner remains at all times under the supervision and control of a public

^{35.} See, for example, in the United Kingdom, Prison Act, 1952(1), 15 & 16 Geo. 6 & 1 Eliz 2, c. 52, § 47 (U.K.); Prison Rules, 1999, S.I. 1999/728, art. 31, ¶ 1 (U.K.); *id.* at art. 51, ¶ 21. In Western Australia, moreover, see *Prisons Act 1981* (WA)(CI) s 95(4); and in Victoria, *Corrections Act 1986* (Vic) s 84 H.

^{36.} Examples of sanctions imposed for refusal to work include the denial of benefits that the working prisoner is otherwise entitled to, the refusal to recommend early release, and other measures of coercive physical or psychological power. See *infra* note 118 for the sanctions imposed in the Israeli system.

the supervision and control" and asserts that periodical supervision of prison labor is inadequate.⁴⁰ Similarly, it has consistently rejected the notion that broad and wholesale limitations on the private entity's administrative discretion can serve as a guarantee against prisoner exploitation.⁴¹

This is not to say that private entities are never allowed to employ prisoners under any conditions. If voluntary, prisoner labor for private benefit is permitted, as it does not fall under the scope of the Convention's definition of forced labor.⁴² The ILO has recognized that prisoner consent to work is necessarily "constrained consent," as it is given within the confines of the modern-day prison, where every aspect of prisoners' lives—their behavior, bodily integrity, mental state, ability to work, and so forth—is fully controlled. Yet it is the ILO's position that despite this "constraint," "genuine" consent to work in prison is theoretically possible and cannot be preemptively rejected wholesale.⁴³ To ensure that the consent is sufficiently genuine, the Committee of Experts has set several strict conditions that must be met.

The first condition is that contractual consent be obtained from the prisoner; in other words, a written work agreement

authority does not in itself dispense the government from fulfilling the second condition, namely that the person is not hired to or placed at the disposal of private individuals, companies or associations."

^{40.} ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Report and Observations Concerning Particular Countries, Report III Part 1A, 87th Sess., 109 (1999) (Observation concerning Australia); ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Report and Observations Concerning Particular Countries, Report III Part 4A, 83rd Sess., 80 (1996) (Observation concerning France); Report of the Committee of Experts, 86th Sess., *supra* note 39, para. 130–36 (Observation concerning United Kingdom); ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), Observation Concerning Forced Labour Convention, 1930 (No. 29) United Kingdom, adopted 1997, published 86th ILC session (1998) [hereinafter Comments of the Committee of Experts, 86th Sess.].

^{41.} See Report of the Committee of Experts, 86th Sess., supra note 39, paras. 56–58, 109–11.

^{42.} Convention No. 29 defines forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." Convention No. 29, *supra* note 1, art. 2(2).

^{43.} See Report of the Committee of Experts, 86th Sess., *supra* note 39, paras. 128–31; Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 8, para. 122.

must be signed.⁴⁴ This condition is usually the easiest to meet, for prisoners are generally interested in working because, among other reasons, it often connects them with the external world and offers various benefits, such as acquiring new skills or maintaining existing ones.⁴⁵ Thus, if the work enables the prisoner to develop skills and abilities that are likely to serve him or her after release, this is further indication of the voluntary nature of the consent.⁴⁶

The second condition, which derives from the Convention's definition of forced labor, is that the work be conducted freely without fear of penalty.⁴⁷ The ILO has held that such "penalty" includes not only punishment but also the loss of rights or privileges, including the impact of refusal to work on decisions regarding early parole. Any potential loss of rights based on a refusal to work negates the "authenticity" of a prisoner's consent to work.⁴⁸

A third and final requirement is that prisoners' work conditions resemble as closely as possible work conditions

46. ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Report and Observations Concerning Particular Countries, Report III Part 1A, 98th Sess., 204 (2009) [hereinafter Report of the Committee of Experts, 98th Sess.] (Observation concerning Austria).

47. Convention No. 29, supra note 1, art. 2.

48. Record of Proceedings, 14th Sess., *supra* note 20, at 691. For a philosophical justification of this position, see Richard L. Lippke, *Prison Labor: Its Control, Facilitation, and Terms*, 17 L. & PHIL. 533, 540 (1998).

^{44.} ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Report and Observations Concerning Particular Countries, Report III Part 1A, 89th Sess., para. 132 (2001 [hereinafter Report of the Committee of Experts, 89th Sess.]).

^{45.} Dirk Van Zyl Smit & Frieder Dunkel, *Conclusion: Prison Labour—Salvation or Slavery?*, *in* PRISON LABOUR: SALVATION OR SLAVERY? INTERNATIONAL PERSPECTIVES 335, 346 (Dirk Van Zyl Smit & Frieder Dunkel eds., 1999). In a large-scale study of British prisons, Frances Simon interviewed 150 prisoners, inquiring upon their arrival at the prison, what type of work they wanted to do. Only three of the 150 prisoners responded that they would prefer not to work at all. Nearly half of the interviewees specified particular prison jobs they preferred; just under one-quarter answered full-time education; and just over one-quarter preferred a course that would give them vocational training. The most common reason prisoners gave for their preferences was that they would acquire new skills or preserve existing ones. Reasons such as "passing the time, being with friends, access to prison perks or simply enjoying the preferred activity," were mentioned far less often." These interviews were conducted when prisoners received extremely low remuneration for their labor, and thus compensation could not have been a primary incentive to work. FRANCES H. SIMON, PRISONERS' WORK AND VOCATIONAL TRAINING 59 (1999).

outside the prison walls—in other words, the free market conditions.⁴⁹ Thus, the Committee of Experts held:

[O]nly when carried out in the framework of a free employment relationship that work for private enterprises and individuals may be considered to be compatible with the specific prohibition of *Article 2, paragraph 2(c)*. That necessarily requires the formal consent of the person concerned and, bearing in mind the circumstances of this consent, there must be supplementary guarantees covering the essential elements of a labour relationship, including a level of remuneration and social security corresponding to a free labour relationship for the employment to be outside the scope of *Article 2, paragraph 2(c)*, which prohibits unconditionally that persons obliged to perform prison labour be hired to, or placed at the disposal of, private enterprises.⁵⁰

What exactly would qualify as work conditions that are "sufficiently similar" to market conditions has yet to be precisely defined.⁵¹ Wages that are slightly below the minimum wage are acceptable, but on the condition that they are not so low as to be considered exploitative.⁵² In addition, the ILO Committee of Experts permits private entities to deduct certain sums from the employed prisoners' wages (based on their consent) for the purpose of paying for their housing or paying compensation to victims.⁵³ These deductions are in accordance with Articles 8 and 10 of the ILO Protection of Wages Convention No. 95, 1949, which allows deductions from wages for alimony payments or

^{49.} According to the Report of the Committee of Experts, 89th Sess., *supra* note 44, para. 143, this is the most reliable indication of consent.

^{50.} Id. para. 6.

^{51.} The factors that must be considered in this context include the claim made by private entities that prisoner productivity is lower than that of free market workers. Additionally, private companies that employ prisoners are limited in advance in various aspects, including their work timetable. The prisoner workers are, naturally, also not selected by the private company, and the prison is likely to both send prisoners and terminate their employment based on its own considerations. It is thus indisputable that there are significant differences between prisoner labor and that of free market workers, but it is important to remember that the differences in productivity do not necessarily correspond to the wages received by prisoner laborers. *See* Swepston, *Human Rights at Work: Prison Labour and International Human Rights*, HUM. RTS. WORK, http://www.leeswepston.net/prison.htm (last visited Oct. 20, 2013).

^{52.} General Survey 96th Sess., supra note 38, para. 116.

^{53.} Report of the Committee of Experts, 89th Sess., *supra* note 44, para. 142.

compensating victims.⁵⁴ Nevertheless, the requirement of free market conditions is, for most states, particularly challenging to meet. There is no such requirement in the context of prisoner employment in the public realm, emphasizing again the ILO's more favorable approach towards the public sector. Below, I will demonstrate why now, more than ever, additional justifications are needed for this position of the ILO.

B. Convention No. 29: The Need for Additional Justifications

In recent years, as the issue of prison labor reemerged on the ILO's agenda, the abuse of power justification regarding forced prisoner labor for private interests has come under fierce attack within the ILO itself,⁵⁵ as well as in the literature.⁵⁶ In contrast to the continued pertinence and force of the competition justification expressed in Article 2 (2)(c) of Convention No. 29,⁵⁷ there has been mounting criticism of the validity of the concern of abuse of power in this context. A full

^{54.} Convention Concerning the Protection of Wages (ILO No. 95) arts. 8, 10, July 1, 1949, 138 U.N.T.S. 225.

^{55.} See infra notes 88-97 and accompanying text.

^{56.} The claim that private prisons may perform better, or at least just as well, pertains to both prisoners' rights in general and the private employment of prisoners in particular. With regard to the former, see Barak Medina, Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization, 8 INT'L J. CONST. L. 690, 697 (2010) ("[W]hile this concern may well justify imposing restrictions on the legitimate form of prison privatization, and may even justify declaring invalid specific privatization practices that have proved to excessively violate human rights, it cannot justify determining that all prison privatization will cause an unjustified infringement of prisoners' human rights and is thus unconstitutional per se."); David E. Pozen, Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom, 19 J. L. & POL. 253, 281 (2003) ("To the surprise of their critics and the satisfaction of their supporters, private prisons have a reasonable track record in the United States and the United Kingdom so far. In each country, private prisons appear to have performed as well as or possibly better than public prisons in terms of both cost-efficiency and quality of service."); Clifford J. Rosky, Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States, 36 CONN. L. REV. 879, 946 (2004) ("[T]he claim that private punishment violates human rights more often than public punishment . . . has been vigorously and carefully contested, and there is very little empirical evidence to support it."). Referring particularly to the Israeli case, discussed below, Harding commented that "the existing public sector Israel prison system was below acceptable standards and in some respects breaches international human rights laws." Richard Harding, State Monopoly of "Permitted Violation of Human Rights": The Decision of the Supreme Court of Israel Prohibiting the Private Operation and Management of Prisons, 14 PUNISHMENT & SOC. 131, 143 (2012).

^{57.} See General Survey 96th Sess., supra note 38, para. 122.

and comprehensive analysis of the arguments for and against the abuse of power rationale is beyond the scope of this Article. For our purposes, I will suffice with presenting the key assertions made in the debate, as well as discuss the ILO's steadfast refusal to renegotiate its position regarding prisoner labor.⁵⁸ I argue that this questioning of the abuse of power rationale gives rise, at the very least, to a need to find an additional justification for Convention No. 29's prohibition on forced prison labor for private interests.

The backdrop to recent calls for a revision of ILO policy on for-profit forced employment in prisons are recent legal and economic policies in key industrial states that have led to the proliferation of two distinct, albeit related, phenomena: the increase in the privatization of prisons and the involvement of private entities in employing public prison inmates.59 The United States is often cited as a leading example of the former development, with a growing number of industrial states following in its footsteps.⁶⁰ The private prison industry in the United States has expanded significantly in recent years, with a steady growth in the number of prisoners incarcerated in private facilities. In 2011, 130,941 inmates were being held in private prisons, a significant increase from 2000, when only 90,815 prisoners were in such prisons.⁶¹ These data refer to both federal and state inmates: 6.7% of the states' inmate populations and 17.8% of the federal prisons' population are incarcerated in private prisons.⁶² From a global perspective, the number of

^{58.} The Organization has reiterated both the competition and abuse of power arguments as justifying its prohibition on private involvement in forced labor. These concerns are referred to in both its 1998 comprehensive report, Report of the Committee of Experts, 86th Sess., *supra* note 39, and subsequent 2001 and 2005 Global Reports. These reports survey the status of all four of the fundamental rights in every country in the world, and they are part of the ILO's general enforcement of the fundamental rights. Report of the Committee of Experts, 89th Sess., *supra* note 44; Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 8. The most recent report on forced labor devoted almost no discussion to forced labor in prisons. Report of the Committee of Experts, 98th Sess., *supra* note 46.

^{59.} See Report of the Committee of Experts, 89th Sess., *supra* note 44, para. 144 ("The Committee is fully aware that there is a trend in some countries towards increased use of privatized prison labour.").

^{60.} General Survey 96th Sess., supra note 38, para. 22 & 101 n.261.

^{61.} E. Ann Carson & William J Sabol, U.S. Dep't of Justice, Prisoners in 2011, at 32 (2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf.

^{62.} Id.

inmates in fully privatized prisons remains relatively low,⁶³ but the prison industry is, nonetheless, growing steadily, controlled primarily by a limited number of international corporations.⁶⁴ In the United States alone, the combined annual revenue in 2010 of two of the prison industry's leading companies (CCA and the GEO Group) was over US\$2.9 billion.⁶⁵

The United Kingdom is considered another path-breaker in prison privatization, second only to the United States in the number of private prisons currently operating in its territory.⁶⁶ While in 1992 there was only one private prison in operation in the United Kingdom, by 2012 this had increased to fourteen private prisons in England and Wales, out of a total of 141 prisons.⁶⁷ In the United Kingdom, 12.9% of all prisoners are

65. For data from 2010, see GEO GROUP, *supra* note 64, at 3; Corrections Corp. of Am., 2010 Annual Report on Form 10-K 32, http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-reportsannual. In 1999, the prison industry had a circulation of US\$1.6 billion a year. Fenwick, *supra* note 3, at 260–61. In the United States, according to 2001 data for the 2000 fiscal year, CCA's revenue was US\$238.3 million, while Wackenhut made US\$135 million in profits. However, these are only two of the main private prison companies in the United States. *See* Dina Perrone & Travis C. Pratt, *Comparing the Quality of Confinement and Cost-Effectiveness of Public Versus Private Prisons: What We Know, Why We Do Not Know More, and Where to Go from Here, 83 PRISON J. 301, 302 (2003), available at http://www.d.umn.edu/~jmaahs/Correctional%20 Continuum/Online%20Readings/PerroneandPratt_privatization.pdf.*

66. INSTITUTE FOR GOVERNMENT, COMPETITION IN PRISON 1 (2012), available at http://www.instituteforgovernment.org.uk/sites/default/files/publications/Prisons%2 0briefing%20final.pdf.

67. *Id.* In England alone, there were eleven private prisons out of a total of 131 prisons, according to data from 2011. U.K. JUSTICE DEP'T, *supra* note 64. For data concerning the number of prisons in total in the United Kingdom, see U.K. MINISTRY OF JUSTICE, POPULATION BULLETIN (Nov. 2012), *available at* https://www.gov.uk/government/publications/prison-population-2012 (follow "Population Bulletin - Monthly November 2012" hyperlink).

^{63.} In 2005, the ILO estimated that out of eight million prisoners in the world, about 150,000 were being held in fully privatized facilities. Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 8, para. 116.

^{64.} Amongst the leading private prison companies in the world is the GEO Group, which provides correctional and detention services in several countries including the United States, Australia, and the United Kingdom. Another large private prison company is Corrections Corporations of America ("CCA"), which holds around 80,000 inmates in the United States. In the United Kingdom, in 2011, five private prisons were controlled by G4S, four by Serco, and three by Kalyx. GEO GROUP, 2011 Annual Report 3 (2011), available at http://www.geogroup.com/documents/2011-report.pdf; CORRECTIONS CORPORATION OF AMERICA, http://www.cca.com/about (last visited Mar. 13, 2013). Information on the United Kingdom can be found at Contracted-Out Prisons, U.K. JUSTICE DEP'T, http://www.justice.gov.uk/about/hmps/contracted-out (last updated Mar. 19, 2011).

incarcerated in private prisons, compared to 8.2% in the United States⁶⁸ There are no signs of this trend waning, with plans to privatize an additional nine UK public prisons in the future.⁶⁹

Similarly, the New Zealand experience exemplifies the recent shift in approach regarding private management of prisons. The 2004 Corrections Act, accompanied by the Corrections Regulations in 2005, had terminated all agreements with privately managed prisons and, effectively, the use of private prisons in the country.⁷⁰ However, in 2009, the Corrections (Contract Management of Prisons) Amendment Act⁷¹ was enacted, which allowed for privately-run prisons to operate in New Zealand once again, subject to compliance with international standards and the submission of frequent reports to the Minister of Corrections.⁷² The decision to reinstate private prisons was tied, inter alia, to concerns over the swell in the prisoner population and resulting rising costs of incarceration.73 Despite growing criticism from academic circles,⁷⁴ which, interestingly enough, has tended to invoke Convention No. 29,75 two new facilities for use by private contractors were opened in 2011 and two new private prisons are to be built by 2014.⁷⁶

Private entities are involved in prisoner labor not only in the context of the construction and operation of private prisons,

75. Amanda Reilly, *Privatised Prisons and Forced Labour*, 7 N.Z. L.J. 247 (2009); REPORT ON HUMAN RIGHTS, *supra* note 70.

^{68.} For the data on the United Kingdom, see INSTITUTE FOR GOVERNMENT, *supra* note 66, at 1. For data on the United States, see Carson & Sabol, *supra* note 61, at 13.

^{69.} Birmingham was the first public sector prison to be transferred to private sector management in 2011. CRIMINAL JUSTICE ALLIANCE, DELIVERING JUSTICE 7 (Vicki Helyar-Cardwell ed., 2012), *available at* http://www.criminaljusticealliance.org/delivering_justice.pdf.

^{70.} Corrections Act 2004 (N.Z.); HUMAN RIGHTS COMM'N, REPORT ON HUMAN RIGHTS AND PRISONS 123 (Elizabeth Stanley ed., 2011) [hereinafter REPORT ON HUMAN RIGHTS].

^{71.} Corrections (Contract Management of Prisons) Amendment Act 2009 (2009 No. 59) [N.Z.].

^{72.} REPORT ON HUMAN RIGHTS, supra note 70, at 123.

^{73.} Id. at 20.

^{74.} Elizabeth Chan, Prisons for Profit: The Corrections (Contract Management of Prisons) Amendment Act 2009, 16 AUCKLAND U. L. REV. 303 (2010); Naomi Cervin, Private Prisons: Should Crime Pay?, 9 AUCKLAND U. L. REV. 48 (2000).

^{76.} REPORT ON HUMAN RIGHTS, supra note 70, at 20.

but also in the framework of public prisons.⁷⁷ In general, states allow private involvement in forced prison labor without insisting on the safeguards set in Convention No. 29. The ILO has noted this with regard to the United Kingdom, Austria, and Australia,⁷⁸ and other states, such as New Zealand, Germany, and Israel, demonstrate a similar approach. In 2009, Germany reported to the ILO that almost twelve percent of its prison population had been employed with the participation of private companies due to job shortages in public prisons.⁷⁹ In Israel, as of 2007, private bodies were involved in the employment of about one thousand prisoners a year, working in a variety of trades, such as apparel, printing, and woodworking.⁸⁰

In some states, however, the involvement of the private sector in forced prison labor is likely more in compliance with Convention No. 29. France is one such case in point. Most of the inmates there work for private companies; in 2000, 11,300 prisoners were employed in industrial jobs in private companies, whereas only 1275 were working directly for their prison.⁸¹ Yet such private prisoner employment might, at times, fall outside the scope of the Convention's definition of forced labor.⁸² Since 1987, in accordance with Section 720 of the French Code of Criminal Procedure Act, inmates have not been required to work.⁸³ French prisoners who do choose to work are estimated

79. Report of the Committee of Experts, 98th Sess., supra note 46, at 215.

80. PRISON SERVICE, Duach Shnatei 2007 [ANNUAL REPORT 2007] 186–94 (2007) (Isr.), *available at* shabas.gov.il/NR/rdonlyres/BD00D218-703A-4A36-99D6-BF86BC2A F0C8/0/report2007a.pdf.

81. SHEA, supra note 77, at 12.

^{77.} EVELYN SHEA, A COMPARATIVE STUDY OF PRISON LABOUR IN FRANCE, GERMANY AND ENGLAND 12 (2005), *available at* http://www.cesdip.fr/IMG/pdf/PI_06_2005-2.pdf.

^{78.} Report of the Committee of Experts, 86th Sess., *supra* note 39, at 130–36; Report of the Committee of Experts, 98th Sess., *supra* note 46; ILO, Comments of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Observation Concerning Forced Labour Convention, 1930 (No. 29) Australia, adopted 1998, published 87th ILC session (1999).

^{82.} ILO, Direct Request on the Forced Labour Convention, 1930 (No. 29) France (CEACR), adopted 2009, published 99th ILC session (2010) [hereinafter CEACR France, 99th Sess.].

^{83.} SHEA, *supra* note 77, at 12. However, the ILO is concerned with the possible application of recent legal amendments enacted in France, in particular the Prisons Act adopted on October 13, 2009, which obligates convicted defendants to engage in some activity offered them. In its 2012 report, the CEACR noted, "Under section 27(1), all convicted persons are under the obligation to carry out at least one of the activities

to have the highest rate of productivity in Europe.⁸⁴ Moreover, extensive social rights have been secured for prisoners employed by private companies.⁸⁵ Both the working prisoners and private contractors contribute to the prisoners' social security payments, retirement fund payments, workplace accident allowances, maternity benefits, and health benefits.⁸⁶ Despite this progress in social rights, however, the ILO still considers the matter of prisoner remuneration in France regulated.⁸⁷

Given this reality, opponents of the abuse of power rationale try to empirically refute the claim that public prisons are better at protecting prisoners who work in the prison, basing their argument on a careful elaboration of the generally miserable conditions in public prisons and the poor quality of the work offered to inmates. There is extensive documentation

84. ILO, A Global Alliance Against Forced Labour, Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work 28, Report I(B), ILC 93rd Session (2005), *available at* www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf.

85. Id.

86. Id.

87. Contrôleur Général des Lieux de Privation de Liberté, Rapport Annuel D'Activité 2011, at 4–6 (2011), available at http://www.cglpl.fr/wp-content/uploads/2012/02/RA-2011_dossier-presse2.pdf. Prisoners' wages vary according to the type of regime in which they are employed and their level of qualification. Each level is regarded as a "class" and accorded a different wage rate. When employed inside the prison itself by the public authorities, the prisoners are paid the following wage per hour: For production activities, they receive EU€4.15/hour. The wage rates for "general services," which includes laundry, technical maintenance, and cleaning of the prison common grounds, are determined by qualification and divided into three "classes": "class I" is paid EU€3.04/hour; "class II" is paid EU€2.30/hour; and "class III" inmates receive EU€1.84/hour. However, in prisons where a number of private companies employ prisoners in production inside the prison itself, wage rates have diverged. For example, in one prison where seven different private companies employed prisoners in production, some prisoners were paid under EU€3.5/hour, whereas others received almost EU€5.50/hour. Id.

offered to them by the head of the establishment and the director of the Prison Probation and Reintegration Service given that these activities are designed to reintegrate the person concerned and are adapted according to their age, skills, handicap and personality. Among the activities which may be offered to prisoners, paragraph 2 mentions learning to read and write, arithmetic, and the French language, where the prisoner has not mastered these skills. The Committee notes that, although work is not expressly mentioned among the activities which may be imposed on convicted persons, it emerges from the discussion of the bill in the Senate and the National Assembly that, for the legislator, work is among the activities which the convicted person may be obliged to carry out." CEACR France, 99th Sess., *supra* note 82.

in the literature of the deficient conditions of public prisons in the United States and the United Kingdom, for example, although comprehensive comparisons with private prisons have reached no definite conclusions about whether private prisons are more or less efficient and with regards to the quality of service they provide, compared with public prisons. In the United Kingdom, the growth in the number of prisoners in recent years led to overcrowding in fifty-nine percent of the public prisons by 2008.⁸⁸ In addition, research shows that prison staff in public prisons often treat prisoners worse than do private prison staff.⁸⁹ Poor conditions prevail in public prisons in the United States as well, with troubling suicide rates⁹⁰ and overcrowding.⁹¹ More relevant to our purposes, however, is the grim reality of prisoner labor in public prisons. In the United States, prisoners receive generally low wages for working in the

^{88.} European Federation of Public Service Unions, Public Service Workers United Against Overcrowded Prisons Briefing to Affiliates (2008), *available at* http://www.epsu.org/a/3551; Criminal Justice Alliance, Crowded Out? The Impact of Prison Overcrowding on Rehabilitation 3 (Vicki Helyar-Cardwell ed., 2012), *available at* http://www.criminaljusticealliance.org/Crowded_Out_CriminalJusticeAlliance.pdf.

^{89.} Guy Shefer & Alison Liebling, Prison Privatization: In Search of a Business-Like Atmosphere?, 8 CRIMINOLOGY & CRIM. JUST. 261, 264 (2008).

^{90.} Christopher J. Mumola, U.S. Dep't of Justice, Suicide and Homicide in State Prisons and Local Jails 1 (2005), *available at* http://www.bjs.gov/content/pub/pdf/ shsplj.pdf. In 2002, the suicide rate in local jails was forty-seven per 100,000 inmates and, in state prisons, fourteen per 100,000 inmates. *Id*.

^{91.} Charles E. Samuels, Jr., U.S. Dep't of Justice, Rising Prison Costs: Restricting Budgets and Crime Prevention Options 2 (2012), available at http://www.justice.gov/ ola/testimony/112-2/08-01-12-bop-samuels.pdf. Overcrowding had reached such worrying dimensions that, in 2012, the US Department of Justice recognized the urgent need to contend with it. Despite the 128,800-bed capacity in Federal Bureau prisons in the United States, there were a total of 176,000 prisoners held in these prisons. As a result, prisoners were housed in areas such as television rooms and program spaces. The overcrowding also had an effect on infrastructure facilities, such as water and power systems. Id. Similarly, in Australia, in 2000, an independent investigation into the management and operation of Victoria's private prisons, upon the request of the Minister for Corrections, found that the quality of provisional services had decreased due to overcrowding resulting in increased assaults and suicide attempts. The Australian prison authorities introduced double-bunking into the public prisons, and researchers from the Federation of Community Legal Centers presume this to be one of the causes of the increase in the incidence of assaults in these prisons. In addition, during this period, self-mutilation increased amongst prisoners, as did the rate of suicide attempts. Austl. Dep't of Justice, Independent Investigation into the Management and Operation of Victoria's Private Prisons 77 (2000), available at http://www.justice.vic.gov.au/resources/a12357e4-fe7e-4440-8bc4f441ae605628/kirbypart2.pdf.

UNICOR program (federal prison industries),⁹² and wages paid to state inmates are also quite low.⁹³ A similar situation prevails in England and Wales. Over a ten-year period, from 1994 to 2004, there was a dramatic increase in the number of inmates, from 47,000 prisoners to 75,000 prisoners, but with no accompanying expansion of work opportunities. This has resulted in a decline in the availability of work for prisoners in public prisons.⁹⁴ Moreover, those prisoners who do receive work are generally paid fairly meager wages: twenty-five percent of the wages paid to prisoners who are employed by private corporations.⁹⁵ In addition, work in public prisons usually involves low-skilled tasks, is menial, and provides little opportunity for career development.⁹⁶

^{92.} NATHAN JAMES, CONG. RESEARCH SERV., RL 32380, FEDERAL PRISON INDUSTRIES 3 (2007), available at http://www.fas.org/sgp/crs/misc/RL32380.pdf. During the year 2006, there were 21,250 prisoners (which constitute eighteen percent of the eligible prisoners in the federal prison) working for UNICOR (the federal prison industries). Prisoners who work for these industries generally receive low wages Although UNICOR sales in 2006 amounted to US\$718 million, only five percent of the revenue went to prisoners' salaries, resulting in very low wages. The minimum wage for a prisoner employed in UNICOR was US\$0.23/hour and the maximum wage US\$1.15/hour, with wages varying according to the prisoner's education and proficiency. *Id.*

^{93.} Since most prisons in the United States pay a range of wage rates to prisoners depending on the job performed, the average minimum wage per day in 2006 for a non-industry job was a very low US\$0.93. The average maximum wage for non-industry work performed by prisoners was quite low as well, at only US\$4.73 per day. WESTERN PRISON PROJECT & PRISON POLICY INITIATIVE, THE PRISON INDEX: TAKING THE PULSE OF THE CRIME CONTROL INDUSTRY (Peter Wagner ed., 2003), *available at* http://www.prisonpolicy.org/prisonindex/toc.html.

^{94.} U.K. PARLIAMENT HOME AFFAIRS, SUPPLEMENTARY MEMORANDUM BY THE HOWARD LEGAUE FOR PENAL REFORM (2003), available at http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhaff/193/ 193we27.htm.

^{95.} *Id.* at 3. While about a third of the prisoners in England and Wales who were interviewed by the Howard League claimed that the most important factor for them in employment was earning a good salary, the finding regarding their salaries was quite disappointing. Prisoners who were employed received a very low "token salary" of UK£8–UK£12/week, while unemployed prisoners received a very low wage of UK£2.50 on average. Prisoners who were employed by private entities inside the prison received an average wage of UK£40–UK£50/week, four times the salary rate of a prisoner employed by the public prison. *Id.* at 3.

^{96.} *Id.* at 3. (noting that in the United Kingdom, for example, only five percent of all prisoners reach the level of National Vocational Qualifications, and that public prison work does not teach useful skills as the machinery is usually outdated).

The international legal instruments concerning prison labor address this grim reality only partially, maintaining a generally mixed approach to the private employment of prisoners. The more traditional approach, supporting the private-public distinction, is manifested, for example, in the 1926 UN Convention to Suppress the Slave Trade and Slavery, under which forced labor is allowed only where the work is performed for public purposes.⁹⁷ Similarly, the American Convention on Human Rights provides that where a prisoner is required to work in execution of a sentence, that work shall be supervised and controlled by public authorities and that no prisoner can be put at the disposal of a private company.⁹⁸

A universal set of minimum requirements is laid out in the Standard Minimum Rules for the Treatment of Prisoners,⁹⁹ which was drafted by the UN Economic and Social Council ("ECOSOC") in 1957. These rules state that while all prisoners should be required to work, they should also be allowed to choose the type of work they will engage in.¹⁰⁰ Although reiterating that prisoner labor should be administered by public authorities and not private entities "to the extent possible," the Rules do allow private labor, but only in exceptional circumstances and on the condition that it is authorized and supervised by the public prison. Additionally, Rule 73(2) allows for the employment of prisoners by private entities, so long as they are supervised by the prison administration and they pay the administration "full normal wages for such work."¹⁰¹

The European equivalent of the ECOSOC Rules was the Standard Minimum Rules for the Treatment of Prisoners,

^{97.} Convention to Suppress the Slave Trade and Slavery, *supra* note 34, art. 5(1) ("Subject to the transitional provisions laid down in paragraph (2) below, compulsory or forced labour may only be exacted for public purposes."); *see also id.* art. 5(2) (stipulating that transitional provisions allow forcible labor of individuals if they receive "adequate remuneration" and as long as they are not forced to change their usual place of residence).

^{98.} American Convention on Human Rights art. 6(3)(a), Nov. 22, 1969, 1144 U.N.T.S. 123, *available at* http://treaties.un.org/untc//Pages//doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf.

^{99.} Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663(C), U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *amended by* E.S.C. Res.2076, U.N. ESCOR, Supp. No. 1, at 35, U.N. Doc. E/5988 (1977).

^{100.} Id. art. 71(6).

^{101.} Id. art. 73(2).

adopted by the European Council in 1973 and replaced in 1987 by the European Prison Rules,¹⁰² amended in 2006. The Prison Rules take a more lenient approach, allowing the employment of prisoners by private entities both within and outside the prison,¹⁰³ so long as the work is conducted in coordination with the prison authorities.¹⁰⁴ No other restrictions apply specifically to private prison labor. Accordingly, the Rules' requirement for "equitable remuneration" is applicable to prisoners employed not only by private entities but also through the public authorities.¹⁰⁵ In addition, in contrast to Convention No. 29, the Prison Rules do not stipulate that prisoners consent to working, even in regard to employment by private companies outside the prison walls. The Rules also require the implementation of health and safety precautions similar to those in the free market106 and that the prisoners' working hours be in compliance with local rules or customs regulating the employment of free workers.¹⁰⁷ Employers must allow prisoners one day of rest a week,¹⁰⁸ and where possible, working prisoners should be covered by the national social security system in the relevant country.¹⁰⁹ All of these protective provisions apply regardless of whether the employer is a private entity or the public authorities.

This rather lenient approach aligns with the argument against the relevant abuse of power justification that objects to any comparison between prisons in the past and the modern-day prison, particularly in relation to the private entities' involvement in prisons and prisoner employment. As opposed to

^{102.} Council of Europe, Comm. of Ministers, Recommendation R (87) 3 on the European Prison Rules (1987), art. 73(1)(b); NANCY LOUCKS, PRISON RULES: A WORKING GUIDE 13 (2000). It is important to note that the Prison Rules are not strictly legally binding internationally or nationally. *Id.* at 13.

^{103.} Council of Europe, Comm. of Ministers, Recommendation R (06) 2 on the European Prison Rules art. 26.9 (2006) [hereinafter European Prison Rules].

^{104.} Id. art. 26.10.

^{105.} *Id.* art. 26.10 ("In all instances there shall be equitable remuneration of the work of prisoners.")

^{106.} Id. art. 26.13; see also id. art. 26.14 (stipulating that assurance be provided for prisoners against industrial injury and occupational disease, in conditions resembling those provided to free-market workers under national law).

^{107.} Id. art. 26.15.

^{108.} Id. art. 26.16.

^{109.} Id. art. 26.17.

past practices, the modern nature and context of prison labor largely mitigate concerns of prisoner exploitation. Accordingly, various states that have been accused of violating Article 2(2)(c)of Convention No. 29 have asserted that the ILO must differentiate between two types of private involvement in prisons by interpreting "hired to" versus "placed at the disposal of."110 The distinction between these two terms rests on the question of whether the private entity pays the state for the prisoners' services or the state pays the private entity. Austria and the United Kingdom have claimed that the first term, "hired to," refers to a number of different employment arrangements, including convict leasing and the general contract system.¹¹¹ Under these two latter systems, a private entity pays the state for the prisoners' work, whether the fee is determined by output, on a daily labor basis, or on the number of prisoners who work for the private company. In contrast, the term "placed at the disposal of" is claimed to refer to types of work in which the state subsidizes the private entity as part of the remuneration for providing prison services. While the concern about prisoner exploitation via the "hired to" method is certainly not unfounded, the "placed-at-the disposal-of" arrangements, in which the state pays the private entity for the prisoners' labor, pose a significantly lesser risk to prisoners' well-being and should not be objected to.

The ILO, however, stands firm in its stance that there is no meaningful distinction between these two terms and that neither should be interpreted in a lenient manner. The Organization insists that the most relevant factor is that in neither type of arrangement does the prisoner actually consent to the employment, and both therefore constitute forced labor.¹¹² Despite the fact that cases in which the state subsidizes the prison labor are arguably less problematic from an "abuse of power" perspective, Convention No. 29's exception to its general prohibition on forced labor is reserved solely for the

^{110.} Both Austria and the United Kingdom have raised this claim. For Austria, see Report of the Committee of Experts, 98th Sess., *supra* note 46. For the United Kingdom, see Report of the Committee of Experts, 86th Sess., *supra* note 39.

^{111.} See supra Part I.A. for a full description of these prisoner employment arrangements.

^{112.} Report of the Committee of Experts, 86th Sess., supra note 39, para. 56.

state.¹¹³ Under this approach, then, the formal arrangement for the private employment of prisoners is irrelevant.¹¹⁴

In sum, whereas the ILO steadfastly asserts the relevance of both the competition and abuse of power justifications in the context of prison labor, the latter rationale has been heavily criticized in light of the changing patterns of private management of for-profit prisons and the harsh incarceration conditions and prisoner labor conditions in public prisons worldwide. In addition, the involvement of private corporations in prison labor has been found to produce several advantages, including expanded work opportunities and higher wages for inmates. These factors, alongside the lack of international consensus regarding the validity of a strict stance towards the private sector, imply that the ILO should either reevaluate its position adopted in Convention No. 29 or bolster it with additional normative justifications. Seeking such additional justifications for this position, the next Part will turn to consider the legal regime governing prisoner labor in Israel.

II. THE ISRAELI EXPERIENCE: PRISON LABOR IN ISRAEL AND THE ISRAELI SUPREME COURT'S INVALIDATION OF PRISON PRIVATIZATION

The Israeli Supreme Court's judgment nullifying the legislation allowing for the privatization of prisons in Israel addressed the issue of prison labor only marginally.¹¹⁵ Nevertheless, I contend that it can be situated within the legal scheme governing prison labor in Israel. The Supreme Court decision had an overwhelming impact on prison labor in Israel by precluding private prisons. A ruling that would have allowed prisons to be privatized would have greatly expanded the scope of prison labor for private interests, as it would have turned all the prison maintenance work, such as cleaning, kitchen duty,

^{113.} This interpretation gains support in light of the "travaux preparatoires" for the for the drafting of the Convention, according to which the abovementioned words were added based on the workers' suggestion, in order to strengthen the Convention rather than weaken it. Record of Proceedings, 14th Sess., *supra* note 20, at 302–06.

^{114.} See Report of the Committee of Experts, 86th Sess., supra note 39, paras. 56, 58, 109–11.

^{115.} See infra note 124.

and maintenance, into work conducted for a private entity.¹¹⁶ In addition, I contend that the Court's symbolic argument against prison privatization might be analogously applicable to prison labor and thus provide an additional justification for the prohibition on forced prison labor in Convention No. 29. This Part presents the Supreme Court's decision, beginning first with a brief description of the prison labor system in Israel and the normative and legal regulatory principles that underlie it. Part III will then assess the possibility of the application of the Court's symbolic reasoning against privatizing prisons to the prison labor context.

A. Prison Labor in Israel: An Overview

In Israel, all prisoners are required to work by law.¹¹⁷ Only the parole board has discretion to exempt prisoners from working due to health problems or if they fall into one of the categories of exception. Refusal to work or disrespect for the assigned work constitutes a violation of the prison rules,¹¹⁸ which could lead to a warning, fine, or even solitary confinement and/or reduced chances of early release.¹¹⁹ The law leaves the determination of wages and conditions of employment to regulations enacted in accordance with the Prisons Ordinance.¹²⁰ The Commission Ordinance sets such rules as the maximum number of hours per day for which a prisoner may be

^{116.} See *infra* notes 129–41 and accompanying text for an explanation of the different tiers of work prisoners' conduct. For concerns that allowing private prisons to operate in New Zealand will expand the use of prisoner labor that is prohibited under Convention No. 29, see AMANDA REILY, SUBMISSION ON CORRECTIONS (CONTRACT MANAGEMENT OF PRISONS) AMENDMENT BILL TO THE LAW AND ORDER COMMITTEE 2 (2009). Specific objections are made in Reily's report to work where "contractor managers are empowered to direct prisoners to be employed within the prison, for example, doing cooking, cleaning or maintenance" as in contradiction of the Convention, for "it is arguable that prisoners thereby are being placed at the disposal of 'private individuals, companies or association." *Id.*

^{117.} Penal Law, § 48, 5737-1977, S.H. No. 2369 (Isr.).

^{118.} Prison Ordinance [New Version], § 56(30), 5722-1971, S.H. No. 2365 (Isr.), states that a prisoner who refuses to work or "has become idle, careless, or negligent at work" has committed a prison offense.

^{119.} Id. § 58(a).

^{120.} Id. § 48(a).

employed and prisoners' entitlement to one day of rest a week and vacation during national holidays.¹²¹

The total number of inmates employed in Israeli prisons over the last decade has stood at approximately 85% of the prisoners potentially capable of working, and they are employed in a variety of capacities.¹²² However, no prisoner, regardless of the work he or she performs and including externalrehabilitation jobs (in which the prisoner works for private employers outside the prison) is legally considered an "employee," and neither the private entity for which the work is performed nor the Israeli Prison Service is legally considered an "employer."¹²³ Prisoners are thus denied the full protection of Israeli labor law in being denied the status of an employee. As a result, for example, they are not entitled to minimum wages.¹²⁴

The Prison Service regards prisoner labor to be an activity that contributes significantly both to the lives of the prisoners and to the management of the prison, for several reasons.¹²⁵ Firstly, working furthers the rehabilitation of the prisoners by giving them practical and professional skills that are apt to be of assistance after their release. Secondly, prisoner labor is seen to restore a prisoner's dignity in that it educates him or her regarding the value of labor. Acquiring work habits also restores

^{121.} Israeli Prison Commission Ordinance: Rules on Employment of Prisoners Within and Outside of Prison Facilities, 2001, KT 04.62.00, 1, §§ 10, 16. The Prison Commission ordinances are enacted by the Prison Commissioner, based on his authority under section 80A(b) of the Prison Ordinance. Their primary objective is to direct the administration of the service of the Prison Service, management procedures, and discipline in prisons.

^{122.} PRISON SERVICE, *supra* note 80, at 185; IDO DAVIDESCO & DROR WALK, PRISONER LABOR AS A REHABILITATIVE TOOL 5 (2011) (Isr.).

^{123.} However, a recently proposed bill from 2011 may partly rectify this if enacted, in that it recommends that prisoners who work in the individual external rehabilitation tier should be deemed "employees" and thereby covered by most protective labor legislation. Draft Bill Amending the Prison Ordinance (Employment of Prisoners) (No. 41), 2011, HH 26, 29-36 (Isr.) [hereinafter Draft Bill].

^{124.} HCJ 147/63 Katib v. Mgmt. Central Ramle Prison, 17 PD 2412, 2413 [1963] (Isr.); HCJ 1163/98 Sadot v. Isr. Prison Service 55(4) P.D. 817, 842 [2001] (Isr.) (Zamir, J.). Nonetheless, in *Sadot*, the Israel Supreme Court held that several employment protective laws, such as the Insurance at the Workplace Ordinance, intended to include prisoners in the scope of the term "employee" and this status should therefore apply to prisoners as well in the context of the application of these laws. Accordingly, it is possible that in the future additional employment laws will be applied to prisoners as well.

^{125.} PRISON SERVICE, *supra* note 80, at 183.

a prisoner's sense of control over his or her life.¹²⁶ In addition, on what the Prison Service refers to as the "administrativesecurity plane," labor fills up a prisoner's day and leaves less time for negative activities; in fact, it has been shown to have a positive impact on prisoners' physical and mental health.¹²⁷ Lastly, labor improves a prisoner's economic welfare, as the wages earned are used "for purchases from the canteen, pocket money for vacations, financial assistance to their families, and even savings that will assist them in their rehabilitation upon release."¹²⁸

These advantages to providing prisoners with work are realized through a system of three "labor tiers," which differ both in type of work performed and work conditions.¹²⁹ Every prisoner deemed capable of working starts out at the first tier and is subsequently advanced to the next tier according to his or her skills and by the decision of the Prison Service. The annual Prison Service reports define the first two tiers as involving the provision of maintenance and kitchen services.¹³⁰ The third labor tier involves external-rehabilitation jobs, divided into two categories: collective, where the prisoners work in groups, and individual, where the individual prisoner works outside of prison independently.

The *first labor tier* includes cleaning and other services within the prison itself and in its external vicinities.¹³¹ The duration of this stage varies from prisoner to prisoner,¹³² but has

^{126.} Draft Bill, supra note 123, at 11.

^{127.} Foucault criticized this goal, pointing to the manner in which mental and physical health are obtained by imparting habit, turning the "wild" into the "repetitive." The prison, he claimed, "occupies them continually, with the sole aim of filling their moments. When the body is agitated, when the mind applies itself to a particular object, importunate ideas depart, calm is born once again in the soul." MICHEL FOUCAULT, DISCIPLINE AND PUNISH 242 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

^{128.} PRISON SERVICE, *supra* note 80, at 183.

^{129.} The term "labor tiers" is used by the Prison Service. *Id.* at 184. In 2007, the number of prisoners employed in manufacturing stood at approximately 2185 out of a total of 21,359 prisoners. *Id.* at 199.

^{130.} The definition is based on the distinctions made in the annual Prison Service reports throughout the years, through 2009.

^{131.} Prisoners receive payments for this work from the "direct Prison Service" budget. PRISON SERVICE, *supra* note 80, at 184.

^{132.} In its landmark Sadot judgment, see infra Part II.B., the Israel Supreme Court estimated that this stage lasts approximately three months. HCJ 1163/98 Sadot v. Israel

an upper limit of half a year.¹³³ The daily wages paid for these jobs range from the equivalent of US\$1.30 a day for cleaning work to approximately US\$3.30 a day for work as a kitchen or service coordinator.¹³⁴ As of 2010, a total of about 3000 prisoners were working in the first labor tier in Israeli prisons overall.¹³⁵

In the second labor tier, prisoners are entitled to higher wages. This stage involves work inside the prison and includes maintenance and professional services such as librarian services, electrical work, painting, construction, and welding work.¹³⁶ In addition, it includes labor in manufacturing, which is carried out in the framework of the second tier, in two different settings: in Prison Service factories and in manufacturing plants owned by private entrepreneurs.¹³⁷ The Prison Service factories are publicly owned and administered by the Service. The work performed by prisoners in these factories is usually only one stage of a production chain, such as assembly line work and producing packaging for external contracting. As of 2007, the Prison Service factories employed around 1000 prisoners in some 30 factories located across the country.¹³⁸ In addition to the Prison Service factories, there are also privately owned manufacturing plants located within the prisons. In this

135. KNESSET RESEARCH & INFORMATION CENTER, PRISONER REHABILITATION PROGRAMS—BACKGROUND AND OVERVIEW 6 (2010) (Isr.), *available at* www.knesset.gov.il/mmm/data/pdf/m02455.pdf.

136. PRISON SERVICE, *supra* note 80, at 184; Israeli Prison Commission Ordinance, *supra* note 121, § 17 at 5.

Prison Service, 55(4) PD 817, 850 [2001] (Isr.) (Zamir, J.). Nonetheless, the petitioners, who were inmates, complained that their employment in these types of jobs continued for longer periods.

^{133.} Israeli Prison Commission Ordinance: Rules on Employment of Prisoners Within and Outside of Prison Facilities, 2001, KT 04.62.00, 1, \S 21(a).

^{134.} *Id.* at 13. Although the amounts are paid in New Israeli Shekels, they have been converted to US dollars, for purposes of clarity, according to a rate of NIS 4 to US\$1.

^{137.} It is worth noting that the explanatory notes to the 2011 draft bill describe a different internal division amongst the tiers, identifying the third tier as involving only individual rehabilitation employment, whereas the second tier encompasses all manufacturing jobs, including in the Prison Service factories, entrepreneur plants, and group rehabilitation. This categorization reflects the perspective of the bill's drafter, that work in personal rehabilitation is sufficient to recognize the existence of an employer-employee relationship. *See* Draft Bill, *supra* note 123, at 26. The above description in the text is based on how the distinction was described for years in the annual Prison Service reports.

^{138.} PRISON SERVICE, supra note 80, at 193–94.

framework, private entrepreneurs currently employ some 950 prisoners¹³⁹ in about 22 plants in Israel.

The least amount of prisoners work in the *third labor tier*, which includes external-rehabilitation jobs. As of 2007, 27 plants supplied some 129 prisoners with rehabilitation work. Rehabilitation jobs are divided into two categories: collective and individual. In collective rehabilitation, prisoners set out in groups to work outside the prison. Individual rehabilitation is a more advanced stage; prisoners go out to work on their own outside the prison walls, and there is a far lesser extent of supervision over the prisoners by the prison authorities.¹⁴⁰ Wages for work in these private factories stood at US\$3.35 per hour for the previous decade, increasing to only US\$3.56 in 2011. Prisoners receive higher wages for overtime work and bonuses for increased output.¹⁴¹

In the last ten years, there has been a marked increase in the revenue produced by prisoner labor, along with a growth in the extent of their employment in manufacturing plants. Recently, there has been a tendency towards reducing externalrehabilitation employment while increasing employment in private entrepreneur industries and Prison Service factories. Between 2000 and 2007, employment rates in the latter two internal employment systems rose, respectively, by fifty and eighty percent, while the external employment system shrank by nearly twenty-five percent.¹⁴² Prison Service reports indicate that it is striving to foster relations with private entities in the coming years¹⁴³ and is currently in the process of moving into serial production for private entities.¹⁴⁴ The revenues from the

^{139.} PRISON SERVICE, *supra* note 80, at 194. That said, some of the prisoners are not employed full-time, but rather only an average of one hundred hours per month. 2005 COMPTROLLER OF THE CURRENCY ANN. REP. 46, 112.

^{140.} PRISON SERVICE, supra note 80, at 124.

^{141.} This is according to Appendix B of the Israeli Prison Commission Ordinance, *supra* note 121, and paragraph 14 of Justice Zamir's opinion in HCJ 1163/98, Sadot v. Israel Prison Service, 55(4) PD 817, 830 (2001) (Isr.).

^{142.} PRISON SERVICE, *supra* note 80, at 194. In 2009-2010, the number of employees in the manufacturing industry stood somewhere between 2100 and 2400 prisoners. *Id.* at 103. *See* DAVIDESCO & WALK, *supra* note 122, at 5.

^{143.} PRISON SERVICE, supra note 80, at 103.

^{144.} Eli Avraham, *Prisoner Labor in the Prison Service, in* A WINDOW INTO THE PRISON 10, 26 (2006). The list of entrepreneur plants, contracting activities in Prison Service factories, and external activity in the 2007 annual report is varied and includes

business activities of the production labor in the second tier have gradually been increasing since 2000, when net profits were US\$0.6 million, to US\$0.85 million in 2007.¹⁴⁵ According to data provided by the Prison Service Research Department, the total revenue in 2010 from the entire prison labor system was US\$10 million.¹⁴⁶

Yet this past decade was also characterized by an almost complete stagnation in prisoner wages. During this period, and until recently, prisoners in private enterprises still worked for US\$3.22 an hour, which, in 1998, was about eighty-five percent of the minimum wage. By 2010, however, this constituted only sixty-one percent of the minimum wage. Only recently, on March 1, 2011, was the prisoner wage increased to US\$3.42 per hour, which still amounts to only sixty-two percent of the minimum wage.

B. The Case-Law Foundations of the Issue of Prison Labor in the Private Sector: The Sadot Judgment

The most important judgment handed down thus far in Israel addressing the distinction between prisoner employment in the public sector and the private sector in Israel is the Supreme Court *Sadot* decision. In this judgment, the Court deliberated the petition of three prisoners over the wages they had received for work they had performed in prison. The issue to be determined by the Court was, in essence, whether the minimum wage law applies to prison labor. The starting point of the deliberations was that the answer to whether prisoners are entitled to minimum wage derives from the purpose of the minimum wage law. That is to say, it rests on the interpretation of the term "employee" in the law and determining whether the legislator had intended to include prisoners within the scope of the law's application. This question was responded to in the negative.

entrepreneur plants such as the aerospace industry, Teva-Naot, and Vardinon (Caesarea) and contractors such as Ichilov Hospital, a long list of printing centers, Jafora, Talad, Ketan Dimona, various government ministries, Raphael, and the Airport Authority. The list of external group rehabilitation jobs includes work in factories such as Strauss, Elite, and Haogenplast. PRISON SERVICE, *supra* note 80, at 192.

^{145.} PRISON SERVICE, supra note 80, at 202.

^{146.} DAVIDESCO & WALK, supra note 122, at 4.

In weighing this question, the issue of the interpretation of section 48(c) of the Penal Law arose, which provides, "A prisoner shall be employed in work outside State institutions only with his consent and on customary terms of employment." Presumably, the formulation of this provision corresponds with the ILO's stance and Convention No. 29, as reviewed above.¹⁴⁷

Nonetheless, when the Supreme Court justices were required to rule on the meaning of this provision, their holding was completely inconsistent with the ILO's position.¹⁴⁸ The disagreement that arose in this context revolved around two different interpretations of the term "outside State institutions." The interpretation submitted by the petitioners was identical to that of Convention No. 29; that is, the expression "should be construed as distinguishing between institutions owned by the state and privately owned institutions. In contrast, the state asserted a physical-geographical interpretation of the term: it should be understood as distinguishing between factories located on the premises of the prison (which is a state institution) and factories located off the prison premises. The Supreme Court, for its part, ruled that the expression should be understood in accordance with the state's physical-geographical interpretation. In line with this interpretation, the Court held that in the specific case of the prisoners who had filed the petition, because they were employed in private factories located within the prison premises, their consent was not necessary and they were not entitled, accordingly, to market employment conditions.

Following the Supreme Court's plea in its *Sadot* decision for a more coherent prison labor regime in Israel, a draft bill was submitted to the Israeli parliament (the *Knesset*) in 2011 and is

^{147.} Concerns that underlined the ILO's stance towards private entities were echoed by the Israeli Knesset members ("MKs") during the legislation of the law. One MK noted during the debate over the original draft of the law, "When stating that every inmate will be obligated to work, it is vital to add that if the work is not in a state institution, then it will be permitted only with the prisoner's consent and under regular conditions, that is to say, regular work conditions, of being hired to work, of pay, etc. Otherwise, this could be used to break the workers' organizations, wage level, etc." DK (1954) 2463, 2465 (Isr.). For an argument that section 48(c) should be interpreted in accordance with Convention No. 29, see Faina Milman-Sivan, *Prohibited Work – A Decade Following the High Court of Justice Sadot Decision*, 36 TEL AVIV REV. (forthcoming 2013).

^{148.} For a thorough discussion of the reasons for this misinterpretation, see Milman-Sivan, *supra* note 147, at 36.

currently being debated. This bill, on the one hand, represents several steps forward towards realizing the underlying purpose of Convention No. 29, but, on the other hand, incorporates what I contend to be the erroneous interpretation of section 48(c) of the Penal Law that was set forth in Sadot. The bill is a positive initiative in that it improves labor law protection in the context of prison labor, by recognizing the existence of employer-employee relations in prisoner employment by private employers, in external individual rehabilitation frameworks. Another significant development is the bill's attempt to regulate prisoners' work hours and occupational safety conditions,149 as well as its prohibition on prisoners' working when ill. However, sick prisoners will not receive sick pay, for they do not have to worry about their livelihood when on sick leave.¹⁵⁰ In addition, the bill sets the employment terms of female inmates after giving birth, prohibiting their employment during the first seven weeks following delivery, and absent their consent, even for the first fourteen weeks after giving birth.¹⁵¹ There is also an explicit prohibition on discrimination and sexual harassment at the workplace.¹⁵² Moreover, the bill prescribes that prisoners will not be employed at workplaces where the workers are on strike, in the place of the striking or locked-out workers.¹⁵³ Finally, of particular significance are the systemic rules set in the bill to facilitate the proper supervision and enforcement of the working conditions, a rather sore point in respect to vulnerable populations like prisoners. These rules include the duty to provide prisoners with detailed information regarding their terms of employment and any change thereto,¹⁵⁴ the duty to display the rules in a conspicuous place, and the Minister of Interior's duty to submit an annual report to the Knesset Interior

^{149.} Note that, today, the private entities that employ prisoners are already obligated by contract to fully adhere to all the health and safety regulations that cover non-prisoner employees in Israel. *See* Correspondence between Yaffa Mishor, Officer of Dep't of Prison Service, and Attorney Abir Becher, from May 25, 2010 (on file with author).

^{150.} Draft Bill, supra note 123, at 37.

^{151.} Id.

^{152.} Id. at 34.

^{153.} Id. at 29.

^{154.} Id. at 30.

and Environment Committee on the employment agency's activities.¹⁵⁵

Yet this significant enhancement of the rights of prisoners notwithstanding, the bill's drafters chose, as stated, to adopt the physical-geographical interpretation affirmed in *Sadot*. In so doing, it opted to anchor in legislation the violation of Convention No. 29. Section 24e(b) of the bill provides, "No prisoner will be employed in employment outside the prison walls unless he has consented, in writing, on a form approved by the Minister and after he has received notification as stated in sub-section (a) that he consents to the said employment."¹⁵⁶ The bill thus limits the requirement for a prisoner's consent to work to those instances in which the work is performed "outside the prison walls." This, I hold, reflects acceptance of the erroneous interpretation that identifies "outside State institutions" with "outside the prison walls."

With regard to remuneration for the prisoners, the bill provides that the Minister of the Interior will set a minimum level of pay, detailing the considerations to be taken into account in determining prisoners' wages.¹⁵⁷ The final rate of pay will be determined by the Prison Service Commissioner or whomever he authorizes to do so.¹⁵⁸ The bill does not, unfortunately, set the minimum wage as the baseline for the Prison Service's discretion in the context of jobs in the private sector either.¹⁵⁹ Rather, it lists it as only one of many factors to be considered in setting remuneration. Here, too, the draft bill constitutes a departure from the ILO's stance in Convention No. 29, under which the wages for work performed for a private

^{155.} Id. at 34.

^{156.} Id. at 30.

^{157.} These should include: the nature and substance of the work, terms of employment, the market minimum wage rate, the need to incentivize entrepreneurs to open factories on the prison premises, and the fact that the Prison Service is responsible for providing the prisoners' sustenance. *Id.* at 32.

^{158.} Id.

^{159.} This is the approach adopted by retired Justice Elisheva Barak-Soskin, who adopted Justice Cheshin's stance in *Sadot*, asserting that minimum wage must be provided to all prisoners or at least considered as a starting point in setting prisoners' remuneration. Elisheva Barak-Soskin, *Always Compulsory? The Court's Way of Making More Flexible Routes in Light of the Principle of Good Faith, in* BARAK-SOSKIN – IN HONOR OF JUSTICE (RETIRED) ELISHEVA BARAK-SOSKIN 56 (Stephan Adler et al. eds., 2013) (Hebrew).

entity must be close to the minimum wage. In sum, it appears that the Israeli legal system has, as a rule, distanced itself from what is stated in Convention No. 29; first, with the ruling in *Sadot* that the duty to obtain a prisoner's consent to work and to provide accepted work conditions applies only to factories located outside the prison walls, and, subsequently, with the draft bill that seeks to entrench in legislation this interpretation of the expression "outside State institutions."

C. The Israel Supreme Court Privatization Judgment

In March 2004, the *Knesset* amended the Israeli Prisons Ordinance, in what is commonly known as Amendment 28.¹⁶⁰ This amendment provided for the establishment, for the first time, of a prison to be managed and operated by a private corporation rather than the state. Among other things, Amendment 28 set forth the scope of the corporation's authority and the supervisory measures that the state must implement with regard to the corporation's employees as well as the prisoners incarcerated in the private prison.

The decision to embark on a pilot private prison in Israel came most prominently on the background of the Israeli government's growing tendency towards privatizing social spheres.¹⁶¹ This is consistent with the reemergence of prison privatization in the late 1970s in the United States and, later on, in Australia and the United Kingdom, which correlated with the rise of the neo-liberal ideological notion that the private sector could provide all social services in a more efficient and less wasteful manner than the government.¹⁶² In Israel, another justification offered for prison privatization was the harsh conditions prevailing in the Israeli corrections system at the time of the enactment of Amendment 28.¹⁶³ In particular, the public

^{160.} The Prisons Ordinance Amendment Law (No. 28), 5764-2004, SH No. 1935 p. 348 (Isr.).

^{161.} For a discussion of the general trend towards privatization in Israel during the previous two decades, see Daphne Barak-Erez, *Civil Rights and Privatization in Israel*, 28 ISR. YRBK. HUM. RTS. 203 (1998).

^{162.} See Harding, supra note 56, at 132.

^{163.} PUBLIC DEFENSE, CONDITIONS OF ARREST AND DETENTION IN PRISON FACILITIES OF THE ISRAELI POLICE AND THE PRISON SERVICES IN 2008 (2009); Minister of Public Security, Tzachi Hanegbi DK (2003) 7281 (Isr.).

corrections service was struggling to cope with prison overcrowding and prisoners' cramped living space, which, in Israel, amounts to 3.9 square meters per prisoner, much less than the first-world average of between six and twelve square meters.¹⁶⁴ Moreover, the government estimated that a private prison would, in the long-term, save the state between ten and thirty percent in construction and operational costs.¹⁶⁵ Other considerations may have been at play as well, including political and economic forces pushing privatization for the purposes of their own agenda.¹⁶⁶

In 2005, the Academic Center of Law and Business, together with a prison guard and a prisoner at a public prison, petitioned the Supreme Court, challenging the constitutionality of Amendment 28.¹⁶⁷ The petition was based on two claims. The first claim was that the Amendment constitutes a violation of the constitutional rights to individual autonomy and human dignity and, therefore, does not comply with the limitation clause in the Basic Law: Human Dignity and Liberty.¹⁶⁸ The second claim was that Amendment 28 violates section one of the Basic Law: The Government, which designates the Israeli government as the executive authority of the state.¹⁶⁹ The Supreme Court decided

^{164.} Danny Biran, Prison of the Concessionaire, SEEING SHABAS 8, 8 (2003); Minister of Public Security, Tzachi Hanegbi DK (2003) 7284 (Isr.).

^{165.} Knesset, Record of Proceedings No. 120 of the Internal Affairs and Environment Committee 48 (Dec. 31, 2003) (Isr.).

^{166.} An analysis of the factors promoting privatization of prisons in Israel is beyond the scope of this article. For an initial analysis of this issue, see Haifa Bar Ass'n, *Between the Privatization of Prisons and the Privatization of Law, in* IN OPEN DOORS 35, 19 (2010) ("Privatization increases the concentration of capital in the hands of a small group, which the more it has at stake in the market, the more it has an interest to increase its influence in the governance regime. The primary rationale of privatization is to annul and perhaps dismantle the welfare state that increased social democracy and the political influence of the general public, and regain control over the social and economic spheres and later on, the political sphere to these small elite groups.").

^{167.} HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin., 9(33) PD 483, paras. 1–4 [2009] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/05/050/026/ n39/05026050.n39.pdf.

^{168.} *See id.* paras. 2–4; Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1392 § 8 (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

^{169.} See Academic Ctr. of Law & Bus., 9(33) PD paras. 2–4 (providing additional details regarding the alleged violation of the Basic Law: The Government); Basic Law: The Government, 5762-2003, SH No. 1780 § 1, available at http://www.knesset.gov.il/laws/special/eng/basic14_eng.htm.

in favor of the petitioners and ruled to strike down Amendment 28.¹⁷⁰ This decision is especially intriguing as the Court based its ruling on the injury to prisoners' human rights, rather than on the more common argument made against prison privatization in the literature, namely, the extent to which government authority can be delegated to private bodies.¹⁷¹ A key line of reasoning in the decision referred to the harm caused to prisoners' human rights irrespective of the actual prison conditions, which was termed the symbolic and nearly unprecedented argument on the human rights landscape.¹⁷² The Court also referred to the high probability of deterioration in incarceration conditions as a result of full privatization. Below, I will briefly elaborate on both arguments, beginning with the consequential line of reasoning regarding prison conditions, as it is important background to understanding the symbolic argument. A presentation of the symbolic argument will then follow.

As can be expected, the argument focusing on the worsening of prisoners' conditions in private prisons is tied to concern over a potential shift in the priorities of the decisionmaking body, as well as the subordination of relevant considerations of rehabilitation and prisoner welfare to economic considerations: the corporation's pursuit of financial profit. Justice Arbel reflected this concern in her concurrence, expressing:

Introducing economic considerations as independent considerations and even paramount ones, without it being necessary to reconcile the profit considerations with those underlying the imprisonment and the manner of implementing it, subordinates those considerations that are normally of the greatest importance to business considerations and allows them to be realized only in so far as they are consistent with the economic purpose, which constitutes the premise.¹⁷³

In addition, when prisoners are the "service receivers," there is a built-in market failure, for the desire to reduce costs,

^{170.} Academic Ctr. of Law & Bus., 9(33) PD para. 69.

^{171.} See Medina, supra note 56, at 691.

^{172.} Id.

^{173.} Academic Ctr. of Law & Bus., 9(33) PD para. 5 (Arbel, J., concurring).

which, as a rule, is constrained by the "invisible hand" of the free market and competition, is in no way restrained in this context due to the lack of competition and obvious inability to switch suppliers. Accordingly, Arbel added, the corporation's goal of minimizing costs is likely to conflict with the need to protect prisoners' rights, which usually costs money.¹⁷⁴ In addition, the Court rejected state supervision as a sufficient guarantee of prisoner rights, despite the state's explicit declaration that it would establish a designated unit for this purpose.¹⁷⁵ Supervision would be of doubtful effectiveness, due to the unique characteristics of the prisoner population as a vulnerable group:

[I]t should be remembered that prison inmates are often a particularly weak sector of the population, and while in the prison they are in a susceptible and vulnerable position.... [S]ince the activity that takes place in the prison is hidden from the light of day, it is questionable whether some of the components of the supervision mechanism, which depends upon a direct flow of information from the victim to the supervisory body so that the latter can exercise its authority, will be effective.¹⁷⁶

Furthermore, there were also the particular features of the private concessionaire: namely, its operational mode of commercial confidentiality conflicts with the public modes of transparency and openness deriving from the social principle of accountability. The resulting gaps in information between the concessionaire and the state, even as supervisor, risk being exploited for the self-interest of the private body and to the detriment of the prisoners under its control. Lastly, by its very nature, the supervisory mechanism (or at least some of its components) constitutes relief after the fact.¹⁷⁷ The passage of time until some relief is granted undercuts the supervisory power to prevent harmful practices towards prisoners.¹⁷⁸ Justice Procaccia, in his judgment, noted the difficulty with the fact that the supervisory mechanism deals primarily with the general

^{174.} Id.

^{175.} Id. para. 5 (majority opinion).

^{176.} Id. para. 6 (Arbel, J., concurring).

^{177.} See id.

^{178.} See id.

normative aspect of prison activity, as opposed to day-to-day routine, which is where the majority of risks for prisoners actually lie.¹⁷⁹ As an aside, Justice Naor noted that exploitation of prison labor is also a concern when private bodies are involved because of the tension between economic activity and rehabilitative activity.¹⁸⁰ Turning to what seems a more symbolic aspect of the argument, Chief Justice Beinisch also asserted that there is a real danger that prisoner labor for private interests would transform prisoners into a means of profit-making.¹⁸¹ This brings us to the symbolic argument raised by the Court.

The symbolic argument links the harm to prisoners' human rights with the identity of the entity that would operate the prison as a private corporation, irrespective of the future living conditions in such private institutions. Chief Justice Beinisch grounded this argument in the injury caused to prisoners due to the very transfer of powers of management and operation from the state to the private concessionaire.¹⁸² Specifically,

[W]hen the state, through the Israel Prison Service, denies the personal liberty of an individual—in accordance with the sentence that is imposed on him by a competent court it thereby discharges its basic responsibility as sovereign for enforcing the criminal law and furthering the general public interest. By contrast, when the power to deny the liberty of the individual is given to a private corporation, the legitimacy of the sanction of imprisonment is undermined, since the sanction is enforced by a party that is motivated first and foremost by economic considerations considerations that are irrelevant to the realization of the purposes of the sentence, which are public purposes.¹⁸³

Thus, Beinisch concluded, the state cannot be permitted to transfer its imprisonment authority to private bodies, due to the private character of the entity that would operate and manage the private prison. She grounded this stance on two central lines of reasoning. First, the state, as the body that imposes the punishment of incarceration through its legal system, must bear

^{179.} Id. para. 21 (Procaccia, J., concurring).

^{180.} Id. para. 17 (Naor, J., concurring).

^{181.} Id. para. 36 (majority opinion).

^{182.} Id. paras. 18, 29-30.

^{183.} Id. para. 29.

full responsibility for the execution of that punishment. Otherwise, injury will be caused both to the human rights of the prisoners and the legitimacy of the punishment itself.¹⁸⁴ This conception erases the distinction often made in the literature between imposing punishment and executing punishment.¹⁸⁵ The underlying premise here is that the conception of the negation of a prisoner's liberty when incarcerated encompasses not only the initial act of his or her imprisonment, but each and every moment of imprisonment, over the course of the daily management of the prison.¹⁸⁶

Second, Beinisch's stance is anchored in the substantive differences between the set of interests that guide private bodies—first and foremost the economic-business interest—and the interests the state weighs when it operates state prisons. Exposing prisoners to the different aspects of the private bodies' interests system in itself constitutes serious injury to his or her liberty and dignity. Incarceration in a privately-run prison results in a situation where the clear public purpose of incarcerating merges with the corporation's desire to maximize profits. In this context, the very incarceration of prisoners in an institution that is a for-profit prison expresses a lack of respect for the prisoners as human beings. This is not a subjective injury to those prisoners, but, rather, an objective injury to their constitutional right to human dignity:

[T]he very existence of a prison that operates on profitmaking basis reflects a lack of respect for the status of the inmates as human beings, and this violation of the human dignity of the inmates does not depend on the extent of the violation of human rights that actually occurs behind the prison walls . . . This conduct of the state violates the human dignity of the inmates of a privately managed prison, since . . . their imprisonment becomes a means for a private corporation to make a profit. This symbolic significance derives, therefore, from the very existence of a private corporation that has been given powers to keep

^{184.} See id. para. 30.

^{185.} See id. para. 31.

^{186.} See id. para. 21 (Procaccia, J., concurring).

human beings behind bars while making a financial profit from their imprisonment.¹⁸⁷

In sum, the Israeli Supreme Court has rendered a globally unprecedented decision grounded on, amongst other things, the symbolic harm inflicted on prisoners' rights to liberty and human dignity when incarcerated in institutions run by forprofit entities. In light of the criticism of the abuse-of-power argument in the context of prison labor, the Supreme Court's unique symbolic reasoning against prison privatization is particularly appealing because it does not rest on the actual conditions of prisoners.¹⁸⁸ In Part III below, I will proceed to explore some possible directions for developing an analogy to the symbolic argument in the context of prisoner labor.

III. AN ADDITIONAL JUSTIFICATION: SOCIAL MEANING

Part II presented the Israel Supreme Court's symbolic argument against prison privatization, which focused on the symbolic harm to prisoners' rights to liberty and dignity. Yet due to their non-empirical nature, symbolic arguments are commonly considered inherently vague.¹⁸⁹ In this Part, therefore, I will first explore the two different meanings that a symbolic argument could have. I then will examine the manners in which these two different understandings of a symbolic argument play out in the labor context.

One possible understanding of the symbolic argument centers on the absence of the state—the natural" administrator of criminal punishment—from the administration of punishment in private prisons.¹⁹⁰ Under this interpretation, the

^{187.} Id. paras. 36-39 (majority opinion).

^{188.} For criticism of the notion that symbolic arguments should prevail regardless of the actual work conditions of prisoners, see generally Alexander Volokh, *Prisons, Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133 (2012).

^{189.} See Medina, supra note 56, at 702–03 ("It is not clear what exactly the social message that the inflicting of punishment should convey as a prerequisite for its legitimacy."); Rosky, supra note 56, at 965 ("[C]ritics rarely bother to explain the normative importance of commoditization.").

^{190.} Alon Harel, Why Only the State May Inflict Criminal Sanctions: The Case against Privately Inflicted Sanctions, 14 LEGAL THEORY 113, 115 (2008) ("Under this view, the replacement of the state with other agents is not merely impractical or contingently

meaning of punishment and incarceration are distorted when a non-state entity substitutes the state in the execution of the prison sentence. Because, under this line of reasoning, the state alone must administer punishment, no distinction is made between for-profit and not-for-profit agents in its prohibition on involvement of non-state entities. A second interpretation of the symbolic argument looks to the profit-making goal of private corporations: it is the profits garnered from the prisoners' incarceration that are objectionable under this interpretation.

These two understandings of the argument are clearly closely related. Yet they have distinctly different implications in the labor context, specifically with regard to the delegation of prison administration to not-for-profit corporations. I argue that the first interpretation could suggest that coercive elements of prisoner labor are incompatible with the free labor market and should be rejected, as they are ill-suited to the principles of free exchange and workers' dignity. I base this claim on a civic republican understanding of the symbolic argument, explained below. I argue that understanding the symbolic harm to prisoners as deriving from making them a profit-making means through coerced labor could indeed hold if exploitation is involved. Applying both procedural and substantive conceptions of exploitation, I conclude that when private entities do not conform to the requirements of Convention No. 29, they are engaging in an exploitative practice.

A. The State's Retreat from Administering Criminal Punishment

Yoav Peled and Doron Navot, two Israeli political scientists, have proposed an intriguing and plausible civic republican interpretation of the symbolic argument in the Israel Supreme Court prison privatization decision,¹⁹¹ which could be insightful

undesirable; instead, state-inflicted sanctions are essential to the legitimacy of criminal sanctions.").

^{191.} See generally Yoav Peled & Doron Navot, Private Incarceration—Towards a Philosophical Critique, 19 CONSTELLATIONS 216 (2012). For a liberal understanding of the symbolic message of punishment as a retributive measure that corrects the messages sent by criminals and asserts the value of the victim, see generally Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. REV. 1659 (1992); Mary Sigler, Private Prisons, Public Functions, and the Meaning of Punishment, 38 FLA. ST. U. L. REV. 149, 174 (2010). The punishment is a communication to the offender, expressing society's deep condemnation of his or her

in the context of prisoner labor. Their starting point is the conception of law in the civic republican tradition as the supreme expression of the will of the community. This includes the will of the offender, since "[r]eason would . . . bring him to the realization that the punishment imposed on him by the community is actually an expression of his own free will as a citizen and thus is not a deprivation but an affirmation of his freedom."¹⁹² Peled and Navot insist, however, that in order for the criminal punishment to be a true expression of the offender's free will, it must be free of mercenary interests. Put differently, since the criminal justice system is inherently public, the infiltration of private interests and considerations is inappropriate and should be considered a "contamination" of the public sphere, which should, ideally, remain pure and unaffected by mercantile considerations.¹⁹³

The inherent danger of introducing market considerations into the criminal justice sphere is what lies at the heart of the civic republican reading of the Supreme Court's symbolic argument. This interpretation begins with Waltzer's theory of social spheres, whereby each sphere has its own distinct goods and principles of justice, and principles of justice cannot be formulated or justified independently of the practice they regulate.¹⁹⁴ Waltzer articulates the good of the political sphere as

192. Peled & Navot, supra note 191, at 226.

criminal behavior. The message that is communicated does not end with the articulation of the conviction and the verdict that follows. It continues throughout the execution of the sentence, and the clarity of the message depends on, among other factors, the identity of the speaker. Thus, the message would carry an inherently different meaning coming from a private entity as opposed to public prison personnel. To claim that prison personnel are outside this dialogue would be to disregard the breadth of their discretion over the execution of the sentence, including its length and character, and thus to draw an unjustifiable line between the legislative and judicial elements of the criminal process and those determined by prison personnel. The broad discretion of prison personnel underscores the extent to which the execution of the punishment is integral to the criminal process. It follows, then, that privatization of prisons is a distortion of the symbolic message of punishment and that it is the state that must convey the message as the entity that stands in for the community and for the private victims. In Sigler's words, "The voice of the community is clearest when it speaks for itself." *Id.* at 174.

^{193.} As will be discussed below, they also point to the possibility of the contamination of the free market, but do so only in passing, without elaboration. *Id.* at 228.

^{194.} See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 6 (1983); see also Andrea Sangiovanni, Justice and the Priority of Politics to

based on membership in a common political community, solidarity, and civic virtue, in contrast to the primary legitimating principle of market relations: the free exchange of goods.¹⁹⁵ Prisoners in private prisons are thus left wondering whether the various small decisions that, in aggregate, control their lives are based on "punishment" or "economic calculations."196 Peled and Navot explicitly point out that in the blurring of boundaries, both spheres will be corrupted. Yet the academic literature and case law have thus far revolved around the manner in which the market corrupts the criminal justice sphere and overlooked the possible corruption of the market sphere. As discussed, a central concern in the prison privatization debate is that private entities might cut rehabilitation programs to save on costs. Concentrating on how the market could corrupt the political sphere is understandable, as the debate was initiated from the perspective of the desirability of prison privatization in general-namely, how market considerations would impact the mostly public realm of prisons. Yet I contend that in the prisoner labor context, focus should be instead directed at how the public sphere impacts the market.

The attempt to borrow the civic republican understanding of the symbolic argument and apply it in the context of the delegation of prisoner labor to private entities runs the risk of reaching the conclusion that the contamination argument is irrelevant. In general, in liberal democracies, the labor sphere falls clearly within the realm of market relations (i.e. the private sphere); the state is not expected to control the sphere of labor. Therefore, the contamination argument could, presumably, emerge as entirely irrelevant when the labor sphere shares the free market's legitimizing principle. Delegating prisoner labor to private entities and even privatizing prisons should, it would seem, elicit no objection from this particular perspective.¹⁹⁷

Morality, 16 J. POL. PHIL. 137, 144–46 (2008) (discussing Walzer's work as "[t]he paradigmatic form of cultural practice-dependence").

^{195.} Navot & Peled, supra note 191, at 227-28.

^{196.} *Id.* at 228 (citing a brief filed by Walzer in support of the plaintiffs in the Israeli prison privatization case, HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin., 9(33) PD 483 [2009] (Isr.), that is on file with Navot & Peled).

^{197.} Moreover, market considerations could even seem beneficial. One could assert that the private sphere would provide significantly better work and rehabilitation

The crux of my argument, however, is that it is the private sphere of labor that is in danger of being contaminated by coercion, as coercion clashes with the most fundamental features of the private sphere in general: free exchange and the expression of the autonomous will of the parties to the labor contract. In other words, if we focus on contamination of the private, rather than the public, sphere, the civic republican version of the symbolic argument supports a conclusion of injury to the autonomy and dignity of prisoners who are forced to work for private entities.

Of course, the term "free market" should not be taken literally, as markets are never entirely free and without constraint. Beginning with the English Factory Act of 1802,¹⁹⁸ which set the workday of pauper apprentices at twelve hours, prohibited night work, and introduced provisions on education and religious instruction, legislatures in industrial countries

opportunities for prisoners. Arguably, rehabilitation-a key objective of employing prisoners-would be better performed in the private sphere as the work environment and setting more closely resemble market conditions. See John Gandy & Lorna Hurl, Private Sector Involvement in Prison Industries: Options and Issues, 29 CANADIAN J. CRIMINOLOGY 185, 189-90 (1987). There is general consensus that the private sector, when properly incentivized, has the ability to provide a working environment that more closely resembles the work environment outside prison walls. Id. at 189 ("Advocates of private sector involvement believe that the environment of privately-run prison industries more nearly approximates the free world environment and that private industries maintain closer ties with free world industries. . . . Reports of private industry experiences to date suggest at least partial validation of this assumption."). While it could be expected that such work can provide better training and skills, this assertion is questionable. See id. at 190 ("Some investigators question the practicality of teaching marketable skills, given the fluidity of the labor market, the low level of skills typical to most inmates, and the relatively short periods for which most prisoners are incarcerated."). In addition, serious concerns have been raised as to the rehabilitative value of the skills acquired in the types of work prisoners gained in prison. See id. ("A later study of recidivists indicated that the 12 month recidivist rate of abattoir employees was not significantly different from that of non-employees. . . . [T]here appears to be consensus among American researchers that private employers have not been particularly helpful in securing employment upon the release of inmate workers."). Furthermore, it is doubtful whether coerced work could have a rehabilitative value in the first place, as the coercion aspect may interfere with rehabilitation. See Lippke, supra note 48, at 547 ("[I]t could be argued that inmates will be better off the more their prison work experiences resemble those of free laborers. It is, after all, to the status of free laborers that we hope most inmates will eventually return. . . . [S]tate compulsion of inmate labor may be corrosive to the aims of rehabilitation. Inmates may resent and resist labor that is compelled and feel alienated from labor that cannot be regarded as their own.").

^{198.} The Health and Morals of Apprentices Act, 1802, 42 Geo. 3, c. 73 (U.K.).

gradually expanded the scope and stringency of labor standards throughout the nineteenth and twentieth centuries.¹⁹⁹ The increased regulation of the labor market was grounded on the recognition of the imbalance between employers and employees in the negotiations over contractual arrangements, with workers' bargaining power inherently inferior in a market economy. Privatization, an economic and political ideology espoused most fiercely by the libertarian tradition, was generally seen as tilting the balance of power in favor of employers. It is perhaps ironic, then, that it is the libertarian perspective that provides the strongest argument against coerced prisoner labor for private entities. Indeed, libertarians, who are generally enthusiastic proponents of prison privatization, would apparently be the first to support the assertion that private entities, key players in the free market, should conduct their business operations without involving coercion, even in the context of prisons.

Indeed, the ability to control one's labor is a fundamental human right,²⁰⁰ and it is particularly prominent in the libertarian scholarship of Friedrich Hayek and Milton Friedman, for example. Friedman views cooperation between voluntary individuals as the very essence of capitalist market relations. He stresses that such cooperation "rests on the elementary . . . proposition that both parties to an economic transaction benefit from it, *provided the transaction is bi-laterally voluntary and informed.*"²⁰¹ Moreover, the freedom to enter into contracts, Friedman posits, should be "effective freedom," whereby the individuals parties have alternatives to the transaction and are "effectively free to enter or not to enter into any particular exchange,"²⁰² with the exchange "truly voluntary only when

^{199.} Stanley L. Engerman, *The History and Political Economy of International Labor Standards, in* INTERNATIONAL LABOR STANDARDS: HISTORY, THEORY AND POLICY OPTIONS 9, 9–10 (Kaushik Basu et al. eds., 2003).

^{200.} Lippke, *supra* note 48, at 536 ("Control over labor—or what amounts to the same thing—control over time, energy, attention, and effort, is vital to one's being able to live life on one's own terms. There will be disagreements among political theorists about the limits of the moral right to control one's labor, and about the conditions that must be satisfied if such a right is to be meaningful. But at a minimum, the right to control one's labor requires that one be free to determine when to employ it, with whom, under what conditions, and in exchange for what benefits.").

^{201.} MILTON FRIEDMAN, CAPITALISM AND FREEDOM 13 (1962).

^{202.} Id. at 14.

nearly equivalent alternatives exist."203 Addressing wage labor in particular, Friedman asserts that capitalism protects employees in that they are "protected from coercion by the employer because of other employers for whom he can work."204 Further, the liberty of labor—"the liberty to employ one's body and time in productive activity that one had chosen or accepted, and under arrangements that one had chosen or accepted"²⁰⁵— is one of the essential economic liberties in classic liberalism.²⁰⁶ Under classic liberal theory, liberty of labor, together with such liberties as free use and ownership of property, when supported by market mechanisms, is what makes the free market a bulwark of justice in a free society.207 Robert Nozick would take an even stricter position, treating economic liberties as the most fundamental of liberties and affirming an absolute right to freedom in labor and using labor in production. Interestingly, John Tomasi recently invoked John Rawls' assertion of freedom of occupation as a basic right to argue that liberty of labor is an essential freedom because we express our values and identity through choosing our occupation; if people should be allowed to freely choose their occupation, then by the same token, they should be allowed to choose where they work and the terms of their employment. Otherwise, it would be difficult to claim that they are the self-authors of their lives.²⁰⁸ Although prisoner labor inside prisons is clearly a challenging setting, which perhaps, should alter our basic understanding of work relations and conditions, it seems fair to conclude that libertarians, as the most zealous advocates of prison privatization, would find it difficult to justify coerced work for private corporations, even in the context of prisoner labor.209

^{203.} Id. at 28.

^{204.} Id. at 14-15.

^{205.} Id. at 22.

^{206.} I refer here to the term "classic liberalism" as it was recently defined in JOHN TOMASI, FREE MARKET FAIRNESS 1 (2012).

^{207.} FRIEDMAN, supra note 201, at 26.

^{208.} Id. at 76-77.

^{209.} A full exploration of the place of freedom of occupation in the various branches of political philosophy is beyond the scope of this article.

Consider, for example, Lee and Wollan's hypothetical "libertarian prison."²¹⁰ Such a prison would espouse freedom from coercion as an essential libertarian principle,²¹¹ and, within it, prisoners would be free to enter into any type of voluntary exchange relations they choose.²¹² Work relations would be one example: "The freedom of the individual in the libertarian prison would be extensive enough to enable that individual to choose whether to work or not to work at all and for whom to work, if work is chosen."²¹³ Freedom, claim Lee and Wollan, must be coupled with "elimination of interaction based on force by anyone *except in the administration of the law*."²¹⁴ Prisoners' wages, therefore, would not be centrally determined but instead would fluctuate according to the market. In addition, "[i]n a legal environment in which minimum wage laws obtain in the outside world, they would apply inside as well."²¹⁵

My aim here is not to suggest that a "libertarian prison" should be endorsed but rather to demonstrate that libertarians would be fundamentally averse to the notion of private entities coercing prisoners to work. The most fundamental principle of the private work setting is that the work is voluntary. The very core of the labor sphere, then, is the free nature of the private labor market, as expressed in both political thought and the legal sphere.

The legal aspects of modern employment further bolster this argument, as freedom of contract and, in particular, freedom of labor and the employment contract are among its key features. Following the Industrial Revolution, the employment contract became a primary tool for regulating employment,²¹⁶ replacing the previously prevalent relations whereby servants were bound to their masters.²¹⁷ Modern

^{210.} J. Roger Lee & Laurin A. Wollan, Jr., *The Libertarian Prison: Principles of Laissez-Faire Incarceration*, 65 PRISON J. 108 (1985).

^{211.} Id. at 108.

^{212.} Id.

^{213.} Id. at 110.

^{214.} Id. at 111 (emphasis added).

^{215.} Id. at 120 n.4.

^{216.} Bruno Veneziani, *The Evolution of the Contract of Employment, in* THE MAKING OF THE LABOUR LAW IN EUROPE: A COMPARATIVE STUDY OF NINE COUNTRIES UP TO 1945, at 31, 54 (Bob Hepple ed., 2010).

^{217.} SIMON DEAKEN & GILLIAN MORRIS, LABOR LAW 6 (3d ed. 2001); Katherine Van Wezel Stone, Labor and the American State: The Evolution of Labor Law in the United

employment relations ceased to conceptualize "worker" as a status but as the very antithesis thereof: relations entered into through freely signed contracts. This right to *freely* enter into a labor contract is today a fundamentally required condition of employment relations.²¹⁸ Therefore, it seems reasonable to expect that whenever private for-profit entities are involved in production, they must engage in free exchange with their workers, presumably when operating prisons as well. Yet currently, because most states do not consider prisoners to be employees and prisoners generally do not sign an employment contract, they are deprived of a core component of modern free market exchange.²¹⁹ The absence of an employment contract for prisoners led Colin Fenwick, a prominent scholar of international labor law, to assert that "[s]tatus . . . appears to be the most appropriate characterisation of a prisoner's legal position."220 And since "status is the antithesis of contract"221 and contract (or some other indicator of free entry into the work relations) is the primary organizing principle of market labor, it seems that coerced prisoner labor is incompatible with the principles underlying the private sphere.

Moreover, the coercive nature of prisoner labor is not only due to the involuntariness of the work but is reflected also in the work conditions and organization of labor. In most states, prisoners do not enjoy the right to freedom of association;²²² thus, they are socialized in a work environment that is private, on the one hand, yet deprives them of a voice in that workplace,

States, in THE RISE AND DEVELOPMENT OF COLLECTIVE LABOR LAW 351, 352 (Marcel ven der Liden et al. eds., 2000).

^{218.} Free contract and mutual agreement are at the heart of employment relations, whereby employers are expected to pay workers wages in return for the latter's labor.

^{219.} There is an ongoing debate as to the exact timeframe of this transformation, in particular regarding whether the shift from status to contract was completed by the nineteenth century or if the process continued well into the twentieth century. This debate is beyond the scope of this article; it is sufficient that contract is indisputably a primary legal mechanism of employment relations today. For a recent discussion, see Colin Fenwick, *Regulating Prisoners' Labour in Australia: A Preliminary View*, 16 AUSTL. J. LAB. L. 284, 314 n.210 (2003).

^{220.} Id. at 316.

^{221.} Id. at 317.

^{222.} Successful cases of the unionization of inmates, such as those employed in the abattoir in Guelph, Ontario, are not common. *See* Gandy & Hurl, *supra* note 197, at 196.

on the other.²²³ When private entities are allowed to administer coercive working conditions, the work experience of the prisoners is distorted. The cause for the harm is the very fact that the "employer" is a private entity, which gives rise to the expectation of market relations. When prisoner labor is performed for public prison authorities, coercion can be "explained away" as part of the punishment or as a disciplinary component of prison operations. When private entities coerce prisoners to work, the latter, to paraphrase Michael Walzer, are left wondering whether the various small decisions that control their work are based on coercion or economics. Thus, while the coercive elements of prisoner labor could be consistent with the state as an employer and at the same time an administrator of criminal justice, those same coercive elements are not compatible with the principles of the private sector. In sum, then, the coercive elements of prisoner work should be objected to as contaminating the labor market sphere, undermining both free exchange and workers' dignity.

From the narrower perspective of labor and employment law, this conclusion gains force when we consider the fact that human dignity is a primary aspect of the legitimizing principle of this field of law. Identifying a single legitimizing principle of labor and employment law is challenging, as modern capitalist states pursue a variety of goals in this context.²²⁴ But to broadly generalize, an overall fundamental aspiration of labor and employment law is to reduce the commoditized nature of labor relations so as to guarantee that all workers live in dignity. This branch of law addresses a particular type of economic exchange, whereby the object sold (labor skills) cannot be detached from the subject selling her skills (the worker). If a worker's body and individuality are inseparable from the skills she is selling in return for a wage income, and if it is commonly granted that every person is entitled to dignity, then every worker should be treated with dignity. According to Sinzheimer, "labor law is the law on a mission. 'To . . . uphold human dignity . . . is the

^{223.} For a recent and interesting reevaluation of the importance of voice in the workplace, see Yuval Feldman et al., *What Workers Really Want: Voice, Unions and Personal Contracts* 15 EMP. RTS. & EMP. POL'Y J. 237 (2009).

^{224.} For an elaborate discussion on the plurality of conceptions of labor law, see THE IDEA OF LABOUR LAW 76–81 (Guy Davidov & Brian Langille eds., 2011).

special task of labor law."²²⁵ This idea is also expressed in the dictum "labor is not a commodity," found in the Versailles Treaty and Philadelphia Declaration, produced in 1944 and incorporated into the ILO Constitution in 1946.²²⁶

Before continuing to the profit understanding of the symbolic harm argument, one plausible objection to this contamination line of reasoning can be raised: Does the common prison scenario in modern industrial states truly amount to coercion of labor, or would it in fact be more accurate to term prisoners' most acute problem "coercion of idleness," in light of the scarcity of work in most prisons?227 The latter claim would be based on the premise of prisoners' low productivity rates, which derives from various factors, including administrative barriers to efficient work like repetitive countdowns. Thus, private entities are reluctant to operate in prisons, creating a shortage of private work opportunities. In reality, then, although most inmates are willing to accept any work, they are denied the opportunity of private employment. Under such constraints, prisoners should not be seen as coerced when they work for private entities, even if for meager wages; rather, they should be seen as accepting an offer that benefits them.

An exhaustive discussion of the meaning of coercion and how it should be applied in this particular context would be necessary to fully contend with this claim, which is beyond the scope of this Article. I will, however, delineate some starting points for such a consideration. From a philosophical perspective, a central conception of coercion distinguishes between threats, which are defined as coercive, and offers, which are not construed as coercive. Alan Wertheimer would likely

^{225.} Thomas C. Kohler, *The Disintegration of Labor Law: Some Notes for a Comparative Study of Legal Transformation*, 73 NOTRE DAME L. REV. 1311, 1322–23 (1998).

^{226.} Constitution of the International Labour Organization, June 28, 1919, 49 Stat. 2712, 15 U.N.T.S. 35, annex. The declaration on ILO's aims and purposes is usually referred to as the Philadelphia Declaration. The Declaration is now an annex to the ILO Constitution as amended in 1946.

^{227.} In the United States, for example, only "few prisoners work." William P. Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1162 (2004). The situation is similar in most industrial countries.

support the view that prisoner labor in unacceptable conditions does not amount to coercion. According to Wertheimer, the crux of the distinction between an offer and a threat is that the latter entails a proposal to worsen a person's situation, whereas with an offer, there is a proposal to improve his or her situation, relative to a particular baseline. 228 When a person has turned down a proposal and his or her situation has not worsened relative to that baseline, this is indication that an offer, and not a threat, was made. Under this definition, the current legal situation regarding prisoner labor in most states does, indeed, constitute coercion; yet to cease to be so, even if work conditions are unacceptable, it would presumably be sufficient to eliminate prisoners' obligation to work, by signing a formal work agreement and canceling the sanctions imposed on prisoners who refuse to work. This would then amount to a proposal that augments prisoners' autonomy in that it offers the added option of working and thereby improves, rather than worsens, their situation.

However, the prisoners' baseline is disputable. According to Robert Nozick, the distinction between an offer and threat does not derive from the question of whether the particular person's situation is likely to improve or worsen but, rather, from a normative-value analysis of whether his or her rights are being upheld: That is to say, is the background to the proposal a violation of that person's legal rights? If the proposal does entail a violation of a preexisting right, then this is a threat and not an offer.²²⁹ An analysis of prisoner labor following Nozick's theory will rest on whether the parties are acting in accordance with their rights, and the difficulty will be in identifying the relevant rights. One possible line of analysis, following Lee and Wollan's approach, would be to adopt as a baseline the assertion that when a prisoner enters prison, he relinquishes only his freedom

^{228.} Alan Wertheimer, Coercion 204-06 (1987).

^{229.} Nozick refers to the well-known example of a person who beats his slave every day and then proposes that he will cease to beat him if the slave performs an unpleasant act. From the perspective of the slave, this could be considered an offer (improvement of his situation). But Nozick claims that a classification that distinguishes between an offer and coercion based also on a normative-value analysis, which examines the realization of rights, will lead to the conclusion that this is in fact a threat, since the slave has a preexisting right not to be beaten.

of movement and no other right.²³⁰ Thus, it could be claimed, any violation of a right outside the prison walls is also a violation within the prison walls, and prisoners have the right not to be offered any work that is not legal outside of the prison walls that is to say, under conditions that are significantly worse than the legal minimum. The baseline here is that any person who works in market-like conditions (which derive from the fact that the work is performed for a private entity) has the right to minimum work conditions.²³¹

In sum, assuming that prisoner labor is indeed coerced, the "reverse" contamination argument highlights that coercion, although legitimate as a tool of criminal justice, contaminates the principle of freedom of contract, the autonomy of the worker to freely choose his or her employer, and freedom of exchange. Thus, this understanding of the Israeli Supreme Court's symbolic argument supports the rejection of coerced prisoner labor for the private sector.

B. The Profit Argument

An essay written by Michael Walzer, which was submitted to the Israeli Supreme Court by the plaintiffs in the prison privatization case, criticized private incarceration, focusing specifically on the profit-making aspect.²³² His argument identifies the harm to the prisoners as turning on their transformation into a means to an end, the latter being the profits private entities garner from the prisoners' incarceration. What Walzer proposes is that prisoners should be at the center of criminal punishment rather than a means for profit making, for otherwise their right to dignity is compromised. Indeed, basic moral intuition suggests that profiting from prisoners' misfortune is morally wrong.²³³

^{230.} Lee & Wollan, *supra* note 210, at 108. Justice Heshin took a similar position in his *Sadot* judgment. *See* HCJ 1163/98 Sadot v. Israel Prison Service 55(4) IsrSC 817 [2001] (Isr.).

^{231.} Nonetheless, it can be claimed that perhaps the preexisting right test is not of assistance here, for the baseline changes upon incarceration.

^{232.} Michael Walzer, At McPrison and Burglar King, It's . . . Hold the Justice, NEW REPUBLIC, Apr. 8, 1985, at 11.

^{233.} Gandy & Hurl, *supra* note 197, at 195–96 ("The question is frequently raised about the morality of profiting from the misfortune of others, particularly the disadvantaged. Prison inmates . . . are often considered 'perhaps the most

This understanding of the symbolic harm argument does not apply to prisons run by not-for-profit organizations, exempting the entire volunteer sector from its scope. This would have significant pragmatic implications in the United Kingdom and United States, where not-for-profit organizations have been primarily involved in the juvenile detention sector,²³⁴ but recently not-for-profit management of adult prisons became a viable option.²³⁵

Curiously, the legislative history of Convention No. 29 reveals that the General Assembly of the ILO Conference deliberated and explicitly rejected suggestions to limit the prohibition on the involvement of private entities in prison labor entities and to for-profit exempt charitable organizations.236 Such proposals were raised on behalf of India and South Africa, which sought to allow not-for-profit private agencies to coercively employ prisoners as part of their rehabilitation process, which was permitted under Indian law at the time.²³⁷ The proposals included a clause restricting the types of labor that would be conducted by prisoners for not-for-profit entities. According to the Indian government representative, such a provision in Convention No. 29 would benefit the most marginalized workers, including from "criminal tribes" such as the untouchables caste, who would learn through this process to work for a living rather than continue to be a so-called burden on society. These proposals met with great resistance, however, and were ultimately rejected by the Conference. The claim was that such a provision would allow prisoners to be used as cheap

disadvantaged of the disadvantaged.'"); see also David E. Pozen, Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom, 19 J.L. & POL. 253, 256 (2003).

^{234.} For a recent comparison between the for-profit and not-for-profit management of juvenile correctional institutions, see Patrick Bayer & David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549 (2005).

^{235.} Several charitable organizations announced that they had been bidding for prison contracts. In, for example, the United Kingdom, see CRIMINAL JUSTICE ALLIANCE, *supra* note 69, at 7.

^{236.} ILO Record of Proceedings, 14th Sess., *supra* note 20, at 302–06. In this meeting, the assembly rejected the request to permit prisoner labor for philanthropic individuals and entities.

^{237.} The Indian government representative pointed out that the ratification of the existing phrasing of the Convention would render arrangements such as the Good Conduct Prisoners' Probational Release Act contradictory to the Convention. *Id.* at 302.

labor to advance private business and would strip the Convention of its fundamental purpose while preserving the status quo.²³⁸ Yet since it is unclear whether private companies' profit from prisoner labor was a key factor in this rejection, the insight from this legislative history is limited.

The profit-making objection to prisoner labor is particularly tricky as producing profit is generally accepted as a legitimate goal of employment relations. It is not immediately apparent why prisoner labor would be seen as treating prisoners as a "mere" means to an end, regardless of the profits the private company might make, when in fact they gain from their employment similarly to the situation in the free market. For simplicity's sake, I will focus on work performed for private companies by prisoners incarcerated in public prisons.²³⁹ It would appear that in such circumstances, coercing prisoners to work should be considered treating them as purely a means to an end only if the work is in some way exploitative. Yet even in such cases, the question arises as to why the profits made by the private entity are more problematic than profits for the public sector. Setting aside the private-public distinction, then, should coerced prisoner labor conducted in any prison for any entity be considered exploitative?

From a procedural perspective, exploitive work relations exist when one person takes advantage of another person's bargaining weakness, due to the latter's desperate neediness. This is considered exploitation because the stronger party derives a benefit from the weaker party's "difficulty in advancing her interests in interactions in which both participate, in a process that shows inadequate regard for the equal moral

^{238.} The Indian employers' representative remarked that, in actuality, the only not-for-profit entities that forcibly employ Indian workers are tobacco companies, which are legally prevented from making a profit. *Id.* at 304 (Mr. Mehta). In response, the Indian government representative did not deny that some of these entities include the "charitable tobacco company," but, according to him, this fits squarely within the goal of the law, as the workers benefit from being given work that they could not otherwise obtain. At the close of discussion, the Indian proposal was ultimately rejected. *Id.*

^{239.} Thus, the profit that a private corporation makes is not inherently problematic because it is only the side-effect of the criminal courts' decisions to impose criminal punishment, not a deliberate outcome intended by the courts. *See* Medina, *supra* note 56, at 709.

importance of her interests and her capacity for choice."²⁴⁰ Exploitation may occur even if the exploited, weaker person benefits as a result of the interaction between the two parties.²⁴¹ Thus, an employment contract is considered exploitative if the worker's ability to bargain and reject the terms of the contract was significantly limited during the negotiations phase. In the prison labor context, this procedural perspective leads to the conclusion that all coerced work in prison must be deemed exploitative, as prisoners never freely negotiate their terms of work. Strict adherence to the stipulations set out in Convention No. 29 regarding voluntariness could open up the door to prisoner work arrangements that are not exploitative, as they eliminate the element of coercion. It seems, therefore, that prison labor can only be categorized as non-exploitative if coercion is removed.

In contrast, a substantive understanding of exploitation construes it as circumstances in which unfair advantage is taken by one person at the expense of another or others. In such unfair relationships, the exploiter gains more than he or she deserves, while the exploited party receives less than he or she deserves. The determination of what each party is entitled to rests on some standard of fairness by which we should assess the relationship.²⁴² It is important to note that the fact that the victim of exploitation may acquire more under her exploitive conditions than she had in her previous situation does not diminish the level of exploitation in the current relationship.²⁴³ Thus, the mere fact that the prisoner would be better off

242. For criticism of the global economic order from an exploitation-based argument, see MILLER, *supra* note 240, at 58–83; Meyers, *supra* note 241.

^{240.} RICHARD W. MILLER, GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER 60 (2010). In this article, I do not distinguish between exploitation and wrongful exploitation., which was emphasized, for example, in Allen W. Wood, *Exploitation*, 12 SOC. PHIL. & POL'Y 136 (1995), and in JOEL FEINBERG, HARMLESS WRONGDOING (1988).

^{241.} A common example is that of a man lost in the desert, about to die of thirst, when another man on a camel appears and convinces the thirsty man to lead him to a well in return for life-long servitude in the camel rider's household. Although the thirsty man benefited from the agreement, he was nonetheless exploited by the camel rider, who took advantage of the thirsty man's need and benefitted from the latter's inferior capacity to pursue his interests. *See, e.g., MILLER, supra* note 240, at 60–62; Chris Meyers, *Wrongful Beneficence: Exploitation and Third World Sweatshops,* 35 J. SOC. PHIL. 319, 324 (2004).

^{243.} See MILLER, supra note 240, at 61.

working than not working does not, in and of itself, lead to the conclusion that the work relations do not constitute exploitation.

A substantive definition of exploitation in the context of labor usually addresses the disparity between the return the worker receives for his or her labor contribution and the value he or she adds to the end product or service. In modern complex economies, such an outcome-based conception of exploitation is difficult to measure, partly because the total output of labor is usually the aggregate of various types of contributions made by many members of society. National legal norms do not adopt a comprehensive outcome-based conception of exploitation. Rather, protective labor and employment norms rest on a sufficientarian definition of exploitation. Namely, they set a threshold of employment conditions, expressed in protective labor regulations. Under this minimalistic approach, employment relations that fail to meet the protective threshold are deemed exploitive. Therefore, employment regulations should apply to prisoners, assuming that there is no significant difference in productivity between free market workers and prisoner laborers. Otherwise, a "fair deal" baseline would have to be set, one that could be defined in terms of an "imaginary free transaction"-namely, the terms of the transaction absent the exploitative circumstances. I suggest that the terms of Convention No. 29 could serve as a reasonable baseline for such a "fair deal."244

I have established, then, that any coerced prisoner labor should be considered exploitative, whether exacted for the private sphere or public sphere.²⁴⁵ The question that remains is what can justify restricting the prohibition on coerced prisoner labor to work that is conducted for private interests. In other words, only if coerced prisoner work for private entities is exploitative and similar work for the state is not, can the state exemption in Convention No. 29 be supported.²⁴⁶ Otherwise, it

^{244.} The fact that the ILO accepts wages that are slightly below the minimum wage rate, to accommodate deficiency in productivity, underscores this conclusion.

^{245.} For an argument that prisoners should receive decent wages, whether employed in the public or private sphere, see generally Quigley, *supra* note 227. For the need to abolish coercion in general, see generally Lippke, *supra* note 48.

^{246.} See the discussion on the state exemption, supra Part II.A.

seems to follow from the preceding discussion that coerced prisoner work should always be prohibited, regardless of whether it is performed for the state or for commercial interests, as in both cases, it would amount to exploitation.

I am hesitant to defend the state exemption, partly because an elaborate argument goes beyond the scope of this Article. It will suffice to briefly outline some preliminary thoughts in this regard. First, under the substantive understanding of exploitation, one could argue that the contents of a reasonable "fair deal" baseline for prisoner labor will vary according to the identity of the "employer"; namely, the categorization of the work relations as exploitative will be contingent on whether the work is conducted for a private entity or the state. Labor relations between prisoners and private entities in work conditions that fall below the minimum in the free market would be deemed exploitative, while similar work conditions would not be thus deemed when the work is performed for the state. This approach to forced prisoner labor is supported by a basic moral intuition that profits made by private entities should be viewed treated differently than profits made by the state.²⁴⁷ The state's profits from state-owned prison industries can be seen as minimizing its expenses and thus distinguished from the profits made by private prison industries, which should be viewed as pure benefit from the misfortune of others.248 In

CRIMINAL JUSTICE ALLIANCE, supra note 69, at 28.

^{247.} Note, however, that to the extent that moral intuitions are based on "public opinion," they could change rather significantly over time. A recent study conducted in the United Kingdom between the years 2007 and 2010, which included interviews with ninety senior managers of private and public prisons, revealed that managers in the public prison industry are not necessarily opposed to private profit:

[&]quot;I'm not uncomfortable with it as a tax payer or as a member of society. As long as what is being delivered is appropriate, it shouldn't really matter too much whether it's public or it's in the private sector, it doesn't bother me too much" (senior manager 1). Moral arguments were considered less important than quality, effectiveness and value for money: "if it is cheaper and does the job, what's the problem? If the taxpayer can get the same job done for less money, then great, does it matter who is providing it?" (senior manager 63). The new 'moral' discourse of 'taxpayers' money' was powerful in the reasoning of many practitioners. Many considered public sector profligacy as serious a problem as private sector profit.

^{248.} Gandy & Hurl, *supra* note 197, at 195–96 ("[W]hile the state might seek to use inmate labor to minimize the costs of incarceration, it is not morally justified in

addition, it could be argued that profits garnered by private investors are not comparable to state profits from prisoner labor, as the latter "return" to the state, that is, the money is eventually allocated to the benefit of all.²⁴⁹ Moreover, the state's profits are often reinvested back into the prison system and thereby, to some extent, returned to the prisoners themselves. The Israeli Prison Service, for example, operates as a financial unit that aims for, and generally achieves, self-sufficiency.²⁵⁰

Second, a more elaborate argument in favor of the state exemption could be based on a variety of empiric factors, including prisoners' productivity rates (perhaps state profits from prisoner labor are lower than those made by private entities); the investment that private entities have to make in order for their prison enterprise to be profitable; and the indirect benefits of operating a business in a prison, such as the exemption from paying rent and for services provided by the prison. In fully privatized prisons, a close monitoring of the profits private operators make from prisoner labor could help ensure that the work relations do, indeed, constitute a "fair deal" between the private entity and prisoners. In the Australian state of Victoria, for example, private prison operators are obligated to keep prison industry accounts separate and identifiable.²⁵¹ These operators are also required to reinvest the profits from the prison industry into that industry or as otherwise directed.²⁵² Finally, the state exemption could be

250. The employment department in the Prison Service operates as a business organization based on an expenditure model that is based on productivity and income received from the transactions. The income received is used to remunerate prisoners and to improve the operation of the employment department, which includes marketing, sales, and management. DAVIDESCO & WALK, *supra* note 122, at 6.

252. See, e.g., Prison Servs. Agreement between State of Victoria & Australian Corr. Facilities Ltd., Men's Metro. Prison, Annexure T, Prison Mgmt. Specification, cl. 22(c)

seeking to profit from it. Even less are private employers seen to be justified for, unlike the state, they have no moral claim to the benefits of inmate labor.").

^{249.} See id. at 196; Alon Harel, On the Limits of Privatization, 2 MISHPATIM AL ATAR 1, 7 (2010) (Isr.) (Hebrew). Harel gives an example of two prisons, one governmental and the other private, that decide to purchase a less expensive brand of coffee. While the end result is similar from the prisoners' perspective, these two decisions are different, he argues, as the decision in the private prison was driven exclusively by profit considerations. Even if the state's decision is similarly based on economic considerations, the savings from its decision would go towards the general welfare, and it is therefore morally legitimate. *Id*.

^{251.} Fenwick, supra note 219, at 297 n.45.

further justified in that working for the state is more rehabilitative than working for a private entity, in that it provides prisoners with additional gains beyond their wages and a better deal in terms of fairness.²⁵³ These considerations should inform future regulation of both private and public coerced prisoner labor.

In sum, I have established that any coerced prisoner labor should be considered exploitative, whether exacted for the private sphere or public sphere and regardless of whether we support Convention No. 29's state exemption. From both procedural and substantive understandings of exploitation, the assertion holds that involuntary for-profit prisoner labor should, from a moral standpoint, be considered exploitative. This kind of forced prisoner labor should therefore be prohibited, and the stipulations in Convention No. 29 regarding the private sector, at least, upheld.

CONCLUSION

This Article addressed the near nonexistence of normative discussion of private forced prisoner labor in the legal literature, particularly in the field of international law. It attempted to fill this vacuum, to some extent, by presenting a novel normative, non-instrumental justification for the prohibition on forced private prisoner labor in the ILO's 1930 Forced Labour Convention (No. 29). While the ILO's stance is criticized today in light of the proliferation of private prisons and the private prison industry in industrial states, the Article defends the requirement that prisoner labor for private entities be voluntary and performed under market conditions. It did not aim at exhausting but rather encouraging a non-instrumental debate on this issue, pointing to its astonishing absence in the legal academic scholarship.

This Article could be read as a call for further investigation into coerced prisoner labor from the libertarian point of view.

⁽obligation to quarantine profits from prison industry), *available at* www.contracts.vic.gov.au/major/51/Prison3.pdf; *id.* cl. 22(d) (requirement to keep separate accounts for prison industry); *id.* cl. 22(f) (duty to reinvest profits from prison industry in prison industry or as otherwise directed).

^{253.} See discussion supra Part II.A.

The conclusion was reached that the libertarian tradition, particularly the essential value it attaches to the right to control one's own labor, strongly supports the primary assertion in this Article: that prisoner labor for the private sector must be devoid of coercive elements, which are incompatible with the free labor market, free exchange, and workers' dignity. Additional normative analysis could extrapolate the moral implications of forced private prisoner labor, under both procedural and substantive understandings of exploitation and from different constructions of coercion. The discussion in this Article offers a useful starting point for such further study.

Processes of globalization, in particular the globalization of production, increasingly challenge the relevance of the competition justification for prohibiting the involvement of private interests in prisoner labor. In the past, due to the inevitable competition between prison industries and free commerce, especially in the United States, labor and small guarded against the expansion businesses of prison privatization. Today, however, "global markets offer a neoliberal solution to 'the labor problem.'"254 Indeed, in the new post-Fordist economy, marked by mounting global competition in labor-intensive sectors, prisoners could be reconceived as a potential source of a contingent workforce, competing not with free workers in their own countries but with workers in distant countries.²⁵⁵ This underlines the significance of noninstrumental scholarship in informing privatization debates.256 Shifting the focus back to prisoners' rights and the potential harm from being compelled to work for private interests is now more pressing than it has been for decades.

^{254.} Weiss, supra note 12, at 265.

^{255.} See id. For a different prediction, see generally CHRISTIAN PARENTI, LOCKDOWN AMERICA (1999) (arguing that the use of prisoner labor by private entities is not likely to expand in the future).

^{256.} For a recent exposition on the significance of non-instrumental arguments, see Harel & Porat, *supra* note 11, at 768–69 (challenging the law and economic scholarship by asserting, among other things, that choosing a private agent to perform public tasks should not be exclusively based on instrumental cost-benefit considerations).