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Abstract  This article compares the private use of prison labor in the United States to the protections against forced labor in international law. The United States plays a prominent role in promoting labor rights and standards in its interactions with economic competitors such as China. Despite this, it violates its own international legal commitments both by allowing private companies to use prison labor and by allowing labor to occur within privately run prison facilities. This paper argues that this contradictory phenomenon is a symptom of neoliberal responses to globalization. Global competition increases the economic insecurity of American workers and gives political support to neoliberal economic ideologies, and in turn allows for the ideological construction of vulnerable foreign workers abroad and “rightless” workers at home.

Although their current trade relationship spans several decades, civil society actors and many politicians in the United States maintain fears that trade with China will harm the US’s economic and social well-being. Imported toxic food additives, poisonous children’s toys, and tainted fish and pharmaceutical products recently prompted a wave of recalls, import bans, and special delegations to monitor the quality of Chinese imports. These concerns have increased as China has become the US’s number one source of imports, with an estimated $321.5 billion worth of products consumed by Americans in 2007. More recently, an Obama cabinet designate stated during confirmation hearings that China was engaging in currency manipulation as a way to undermine the strength of the US dollar. These recent events are the latest chapter in a long history of Western anxieties about trade with China.

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Because of these fears, the relationship between the US and Chinese governments remains contentious over social standards relating to trade, especially labor standards and rights. Before China was granted permanent normal trade relations status in 2000, the US annually evaluated China’s trade access based on free market and human rights conditions.\(^4\) Perhaps the most vivid example was the heavily publicized controversy surrounding China’s use of prison labor for exports in the early 1990s. When horror stories of work camp survivors appeared in the news, international human rights groups urged the US government to take swift action. Negotiations to address this controversy resulted in a memorandum of understanding between the two countries. As a result, US trade officials reserved the right to investigate any companies or products associated with the use of prison labor.\(^5\)

This concern over prison labor did not fade when China was granted Most Favored Nation status in 2000.\(^6\) State and civil society actors continue to monitor the possible use of prison labor in products imported from China. For example, in 2002, the US–China Security Review Commission recommended that Congress should more assertively monitor the importation of any Chinese prison labor-made goods.\(^7\) Another example includes the recent hearings on toxic, Chinese-made toys. Worker advocates told the Senate panel that the use of prison labor and poor oversight were responsible for the unsafe toys.\(^8\) The United States’s condemnation of Chinese prison labor exemplifies the way the US has appointed itself a moral policeman of the global economy. This moral position is neither limited to prison labor concerns nor to China.\(^9\) Labor rights within trade agreements remain a politically resonant issue, as recently illustrated by the controversies surrounding labor rights provisions in the proposed free trade agreements with Colombia, Panama, Peru, and South Korea. Democratic Congressman from Michigan, Sander Levin, spoke for many when he said in 2007, “We believe that putting worker rights into trade agreements is a critical piece of shaping globalization in the world today.”\(^10\)

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\(^6\) This is another term for permanent normal trade relations, in which a state is granted the reciprocal trading rights of all of the United States’ other trading partners. Prior to this designation, China’s Most Favored Nation status was reviewed and renewed every year. See Robert C. Berring, “Chinese Law, Trade and the New Century,” \textit{Northwestern Journal of International Law and Business} 20:3 (2000), pp. 425–446.


\(^9\) There are many other examples of the US’s role in promoting labor rights through trade. For example, the United States Generalized System of Preferences, which grants duty free import access for eligible products from developing countries that follow certain requirements, includes “worker rights” within its criteria. See Office of the United States Trade Representative, \textit{U.S. Generalized System of Preferences Guidebook} (Washington, DC: Executive Office of the President, 2008), available online at: <http://www.ustr.gov/assets/Trade_Development/Preference_Programs/GSP/asset_upload_file666_8359.pdf>.

within free trade agreements even became an issue of contention during the 2008 debates between presidential candidates.11

Yet despite the activist role taken by the United States government, the US has also been scrutinized for failing to protect labor rights within its own borders.12 Prison labor, in different forms, is a basic element of the US criminal justice system. Additionally, the United States has the highest incarcerated population in the world, with over 2 million persons in prison or jail. This is half a million more than China, despite China’s larger overall population. This increase in absolute numbers is a recent phenomenon, as the US’s incarceration rate has doubled since 1996.13 This combination of domestic labor rights violations, international labor rights activism, and exceptional incarceration rates makes the United States an important case to investigate.

This article draws attention to the contrasts between the United States’s promotion of international labor standards and its own domestic record on forced prison labor protection.14 Specifically, I discuss the increasing use of labor within privatized prisons and the private use of prison labor. The international norm against forced labor, which includes the prohibition of the private use of prison labor, is an important component of the international labor rights regime. The United States’ domestic policies not only contradict its foreign policies, but also violate its international legal obligations. Specifically, they violate the International Labor Organization’s Convention on the elimination of forced labor. While it may not be obvious how fears about the competitive effectiveness of globalization may relate to fear of crime, a literature in criminology explains how people’s perceptions of economic precariousness caused by neoliberal globalization have led to the popularity of new punitive attitudes toward certain categories of people.15 This linkage between macroeconomic economic conditions and individual level narratives of blame and desert can explain why Americans feel concern and anxiety over prison labor in China and the popular support for prison labor at home.


14 These are typically called worker rights with various US laws.

15 The linkage between perceptions of socio-economic security and penal populism in the United States has been theorized and tested by a number of scholars. For example, Costelloe, Chiricos and Getz link these attitudes to conceptions of race and blame among those who feel marginalized under the economic conditions. Others stress that a conservative and rightward political cultural shift, more than individual levels of economic security, may be responsible for these punitive attitudes. See Michael T. Costelloe, Ted Chiricos, and Marc Gertz, “Punitive Attitudes Towards Criminals: Exporting the Relevance of Crime Salience and Economic Insecurity,” Punishment and Society 11:1 (2009), pp. 25–49; Willem de Koster, Jeroen van der Waal, Peter Achterberg, and Dick Houtman, “The Rise of the Penal State: Neoliberalization or New Political Culture?” British Journal of Criminology 48:6 (2008), pp. 720–734; Loïc Wacquant, “The Penalisation of Poverty and the Rise of Neo-Liberalism,” European Journal on Criminal Policy and Research 9:4 (December 2001), pp. 401–412.
The United States’s condemnation of Chinese prison labor began at roughly the same moment that the United States legalized its own private use of prison labor. In the context of contemporary globalization, changes in international economic policies and domestic criminal policies have been intimately related. The US incarceration rate, for instance, was at its lowest point just one year before average wages peaked in 1973. With the economic and political challenges of the 1970s and ‘80s, people began to feel conditions of economic precariousness, such as stagnating wages, outsourcing of jobs, de-industrialization, and a downward push on benefits and pensions. Yet since the dominant neoliberal political ideology has affirmed the importance of market solutions and marginalized the social provisions of “big government,” citizens do not demand social guarantees and solidarity from the state. Instead, individual citizens’ feelings of economic insecurity have translated into punitive attitudes toward vulnerable segments of the population.16 This is called “penal populism” by a number of observers because these policies often serve electoral functions without solving underlying problems.17 These policies may pacify sentiments related to the economic and social insecurity felt by Americans in this period of economic decline, but they do not address the economic roots of the public’s anxieties.18 Popular demands for regulating labor rights in China stem from nationalist fears of a race to the bottom, just as punitive attitudes stem from the anxieties of economic displacement under the post-industrial new economy. As a result, policy-makers and an insecure public can express concern and demand action about potential exploitation of prison labor overseas as violating fundamental human rights, while the same practice in the United States is considered a fiscally responsible and apolitical “good practice.” The state intervenes to protect local industries from the “unfair” practices abroad and intervenes domestically to punish the criminal and dangerous elements at home.

This dual approach to prison labor has several effects. First, this political dynamic supports the very American concept that labor rights, and social and economic rights more broadly, can only be violated “over there,” in non-democratic or developing countries. Secondly, this punitive attitude has resulted in the creation of a category of “rightless” workers, which includes prison labor, although welfare recipients and

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16 Ibid., p. 393. Wacquant notes this phenomenon more broadly throughout the post-industrial West, with the US as the most obvious case in which “the neoliberal ideology of submission to the ‘free market’ has spread, we observe a spectacular rise in the number of people being put behind bars as the state relies increasingly on the police and penal institutions to contain the disorders produced by mass unemployment, the imposition of precarious wage work and the shrinking of social protection.” Wacquant, op. cit., p. 404.

17 Julian Roberts, Loretta J. Stalans, David Indermauer, and Mike Hough, Penal Populism and Public Opinion: Lessons from Five Countries (New York: Oxford University Press, 2003), p. 3. Penal populism is defined as “the promotion of policies which are electorally attractive, but unfair, ineffective or at odds with a true reading of public opinion,” p. 5.

18 As illustrations, the New York Times and the Washington Post both report that an overwhelming majority of Americans feel a strong degree of economic insecurity, pessimism about their material future, and strong recognition that their family income is stagnant and unable to keep up with increasing costs of living. Michael J. Hogan, Ted Chiricos, and Marc Gertz, “Economic Insecurity, Blame, and Punitive Attitudes,” Justice Quarterly 22:2 (2005), p. 394.
undocumented immigrants are also included. Since violations of workers' rights are not understood as possible in the United States, these workers are seen as legitimately forfeiting protections, rights, and entitlements due to their misbehavior, for example illegally entering the country in the case of undocumented immigrants, or breaking the law in the case of criminals. In this paper, I outline the historical development of international and domestic norms on the use of prison labor. Ultimately I argue that there is a basic contradiction in neoliberal ideology that allows these practices and understands labor rights violations as a foreign problem, while denying basic rights to very vulnerable groups of domestic workers.

**International Labor Standards and Workers’ Rights**

International labor standards, also called “core labor standards” or “international labor rights,” make up the key rights for humans in their capacities as workers. International organizations, such as the International Labor Organization (ILO), regard these rights as the most fundamental protections for workers. They are the only human rights that have an international organization devoted entirely to their protection. Labor rights are also relevant for international trade debates because they relate to concerns about social dumping and unfair trade advantages. States have expressed fears over this issue during trade negotiations, such the 1947 Havana Charter negotiations. In these meetings, some participants proposed measures to protect against exports from countries with low labor standards. If basic labor

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19 The undeserving poor has long been a powerful concept within anti-welfare circles in the United States.

20 Admittedly, it is difficult to use the terms labor standards and labor rights interchangeably. Labor standards deal with minimum standards regarding “fair” trade, whereas labor rights are inherent to individuals’ humanity. Labor rights are in content the same as labor standards, but their justifications are different. There is much controversy over the use of these terms. For a discussion on the controversy over labor rights as human rights, see David Montgomery, “Workers’ Rights as Human Rights,” in Lance Compa (ed.), *Human Rights, Workers Rights and International Trade* (Philadelphia: University of Pennsylvania Press, 2003), pp. 3–21.

21 The International Labor Organization was established in 1919 as a tripartite organization (representing workers, employers, and governments) committed to protecting labor rights and standards. Its members create and ratify most of the world’s international law on labor rights and standards. The United States has played a significant leadership role, but temporarily left in 1977 over Cold War concerns, joining again in 1980. See Robert Cox, “Labor and Hegemony,” *International Organization* 31:3 (1977), pp. 384–424.


standards are not universally protected, so the argument claims, international trade may lead to a “race to the bottom,” disadvantaging those economies that do protect labor rights.25

Core labor rights, as designated by the international community in the 1998 Declaration on Fundamental Principles and Rights at Work26 include four provisions: freedom from forced labor; non-discrimination in the workplace; effective abolition of child labor; and freedom of association, including the rights to organize and engage in collective bargaining.27 The creation of a hierarchy of labor rights was the result of a contentious debate about linking labor standards and trade, as proposed by the US and other Western states. Despite their efforts, the enforcement of labor standards was not incorporated into the WTO at the 1996 Singapore Ministerial Meeting. The WTO stated that this was the responsibility of the ILO, and as a result, the ILO began a campaign to encourage universal ratification of the core labor conventions. By 2006, the campaign had achieved an 88% ratification rate.28 Core labor rights are codified in relevant ILO Conventions—nos. 29, 87, 98, 100, 105, 111, and 138—which have been adopted through a state-by-state ratification process. The importance of these core labor standards has been re-affirmed by other institutions such as the World Trade Organization (WTO), World Bank, and the Organization for Economic Cooperation and Development.29 These rights are also considered achievable for all countries, despite different levels of development, because they involve labor processes, not outcomes.30

However, the core labor standards regime is often critiqued for allowing the possibility of trade protectionism, reinforcing North–South inequality, and lacking strong enforcement provisions.31 If the protection regime of universal labor rights prioritized the rights of Global South workers, stronger mechanisms to protect these rights might be established. But for the most part, the ILO lacks the strong enforcement mechanisms that would raise the costs of non-compliant state behavior. “Enforcement” is limited to state report-based

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26 Alston, op cit., p. 458.
27 This was not ratified by any countries because the 1998 Declaration on Fundamental Principles and Rights at Work is a soft law instrument. It is not an official treaty that can be ratified by member states, but rather a declaration much in the manner of the Universal Declaration of Human Rights to which countries publicly “commit” themselves, albeit in a non-binding manner. This contrasts with the ratification-based International Labor Organization Convention system, which is binding law.
monitoring, technical assistance, and moral shaming. 32 While the WTO had incorporated intellectual property rights into its institutional mandate, the failed attempt to incorporate labor rights at the WTO has maintained this soft law approach to labor rights.

While I consider the broader international labor rights regime important, this article focuses on prison labor. The prohibition against prison labor is a component in the norm against forced labor, which may be the oldest, strongest international norm within the whole human rights regime. According to the traditional historical narrative, a transnational group of dedicated abolitionists and other norm entrepreneurs helped to bring down the lucrative international slave trade through transnational networks and the strategies of domestic parliamentary coalition members. 33 The transnational abolitionist movement helped to create an international norm encapsulated in a number of international and regional human rights treaties and non-binding instruments. These legal instruments include the following:

- Slavery Convention of 1926 (under the League of Nations)
- ILO Convention 29 (1931)
- United Nations Charter (1945)
- Universal Declaration of Human Rights (1948)
- Supplementary Convention of the Abolition of Slavery, Slave Trade and Institutions and Practice Similar to Slavery (1957)
- ILO Convention 105 (1959)
- UN International Covenant on Civil and Political Rights (1977)
- American Convention on Human Rights (1978)
- Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accords) 1975
- ILO Declaration on Fundamental Principles and Rights at Work (1998). 34

Like other provisions within the international labor rights regime, the norm against forced and slave labor has been instituted to protect vulnerable people within the employment process. Regulations on the labor of prisoners, who are an especially vulnerable population in that they come from economically marginalized social groups, are included within the purview of this norm. But not all prison or inmate labor is considered forced labor, and the language of these treaties specifies

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which types of prison labor fit into the protected category.\textsuperscript{35} ILO Convention 29, which I use as the standard, has the most comprehensive specification of which kinds of prison labor qualify as forced labor. It is also the most widely ratified of the ILO treaties. As of 2008, there were 173 ratifying countries.\textsuperscript{36}

While the 1957 Convention 105 is the only binding legal obligation on the United States with respect to forced labor, it does not specify which activities qualify as forced labor. Convention 105 was a Cold War relic, prohibiting forced labor in the case of political disagreement or as any form of political punishment.\textsuperscript{37} The language of the convention references Convention 29, which explicitly outlines the scope of forced labor. States that have ratified Convention 105 are held to the standards of the earlier convention. Convention 29, the Convention Concerning the Abolition of Forced Labor, was written and adopted in 1930. It 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.” The convention further specifies the types of non-voluntary labor that are exempt.\textsuperscript{38} These exemptions include military and civil service, emergency and community/civic work, and finally specific forms of prison labor.

Prison labor is exempt from forced labor only if it comprises “any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies, or associations.”\textsuperscript{39} Lack of public authority is a key qualification of “forced” prison labor. During the drafting of this convention, a representative from the administration of a colonial country argued to strike this clause, in order to allow “philanthropic” organizations to aid in prisoner rehabilitation. This motion was rejected by a large majority of International Labor Conference representatives.\textsuperscript{40} Based on the convention, there are two categories of prison labor that are prohibited. The first category is prison labor done for private purposes (enterprises) with intent for profit,


\textsuperscript{38} Fenwick, op cit. Fenwick argues that it is important to understand this as an exemption as different from an “exclusion,” meaning that such provisions for exemption do not exclude these activities from a larger category of slavery and slavery-like practices.


instead of public purposes. The second is prison labor within private prisons, which are outside of the supervision and control of public authorities. Since I focus on the types of prison labor prohibited under international law, I do not examine public prison labor, prison-made products or services purchased only by a state or federal government, or prison labor involving the maintenance of public prisons.

Prison Labor: The Domestic Debate

First, for contextual purposes, it is useful to determine the degree of incarceration and imprisonment in the United States, which is the largest number in the world. These numbers do not include detainees outside of the regular criminal justice system, including those held at Guantanamo or in immigration centers. According to the United States Department of Justice’s Office of Justice Programs, there were 2.3 million persons held in federal and state prisons and local jails as of June 2007. This number had increased by 1.8% since 2006, but at a lower rate.
} Placed in a global perspective, the United States’s population makes up about 5% of the world’s population, but the US currently has almost one-quarter of the world’s incarcerated population.\footnote{Adam Liptak, “U.S. Prison Population Dwarfs That of Other Nations,” International Herald Tribune, April 23, 2008.}

Furthermore, the racial makeup of the United States prison population is notable. Of the 2.1 million American male inmates who self-identified as belonging to one or two races, the racial breakdown of the prison population is as follows: approximately 36.1% white (755,500), 39% African American (814,700), and 20.4% Hispanic (410,900). African Americans and Hispanics make up a significant majority of the male prison population, and based on their population in the general public, represent a disproportional percentage of the prison population. Males are also over-represented in the prison population. There are only 208,300 female inmates, about 10% of the total prison population in 2007. Distorted racial proportions are less pronounced in the female population.\footnote{William Sabol and Heather Coutoure, “Prison Inmates at Midyear 2007,” US Department of Justice Office of Justice Programs, NCJ 221994, June 2008.}

While the norm against slavery became accepted in the US as important and legitimate, the regulation of prison labor has been less clear. Slavery was outlawed in the US Constitution through the 13th Amendment, but the language of the amendment specifically allowed for “involuntary servitude” in the case of individuals convicted of crimes.\footnote{Richard L. Lippke, “Prison Labor: Its Control, Facilitation and Terms,” Law and Philosophy 17:5–6 (1998), pp. 533–557.} The historic debate regarding the use of prison labor has since remained very controversial. A number of prominent legal arguments have made the use of prison labor possible. The first was the decision that prisoners, after receiving a fair trial and sentence, have forfeited fundamental rights and freedoms because of the crimes they committed. Therefore they cannot claim basic protections such as the freedom of association, the right to organize and the right to strike. In \textit{Ruffin v. Commonwealth of Virginia} (1871), a Virginia court ruled that a prisoner, during his term of conviction, “is for the time being the slave of the state.”\footnote{Wendy Imatani Peloso, “Les Miserables: Chain Gangs and the Cruel and Unusual Punishment Clause,” California Law Review 70 (1992), p. 1463.} Likewise, in the 1977 case \textit{Jones v. North Carolina Prisoners’ Labor Union}, the US Supreme Court upheld the refusal of a North Carolina warden to recognize a trade union. The Court ruled that under conditions of “confinement and the needs of the penal institutions,” limitations on constitutional associational rights (under Amendments 1 and 14) were justifiably curtailed.\footnote{Jones v. North Carolina Prisoners’ Labor Union 433 US 199 (1977), 3.}

There have been many politically resonant arguments in favor of using prisoners’ labor, especially for private purposes.\footnote{Quigley, op. cit.} As a result, these practices endure despite concerns about possible exploitation. A prominent argument
claims that work is central to rehabilitation, reform, and the effectiveness of prison time. “Honest labor” has long been associated with the rehabilitation of criminals, as a means of curing deviance, and making prison environments safer for both prison guards and inmates. Reform-based arguments also see prison labor as important for prisoners’ familial responsibilities. Almost all prisoners will be released at some point and have dependent families. Therefore they should receive employment training and have income to provide for such families. In addition, prison labor supposedly cuts down on recidivism, as it provides “real world” work experience applicable in the post-sentence outside world.

A second set of arguments is economically based. Prisoners’ work for the private sector can help subsidize the high costs of running a prison, attractive reasoning for politicians and the public alike. This argument is popular because the increasingly punitive attitudes toward criminals held by American politicians and large segments of its public have led to overcrowded prisons. But these “prison populist” policies have been difficult to fund in the anti-tax, anti-spending, “small government” political context of the late-20th century United States. Even though these policies were not economically sustainable, they were bipartisan efforts that remain popular and difficult to overturn. The use of prison labor to cover operational costs has become more popular as the overcrowding of prisons rendered the already insufficient funding and facilities unsustainable. Prisons operate above capacity, and federal judges have ruled that certain overcrowded conditions are “cruel and unusual punishment.” Cost considerations are especially important for state governments, which must maintain balanced budgets. As a result, fiscal reasons, not rehabilitation, have been the most politically popular arguments for private use of prison labor. Political leaders have become public proponents, such as US Senator Phil Gramm of Texas, who once argued that prisoners should pay 50% of the cost of their incarceration. The popularity of such

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53 Quigley, op. cit.
57 This punitive approach is well expressed by Michael K. Block, an economist and legal scholar, who explained, “there are too many prisoners because there are too many criminals committing too many crimes.” The most draconian minimum sentencing laws have been a bipartisan effort, pioneered by moderate Republican New York State Governor Nelson Rockefeller and introduced at the federal level in 1986 by liberal Democratic Congressman Tip O'Neill. See Eric Schlosser, “The Prison-Industrial Complex,” Atlantic Monthly, December, 2008, available online at: <http://www.theatlantic.com/doc/199812/prisons>.
policy prescriptions was demonstrated by the electoral success of an Oregon prison ballot initiative, Measure 17 (The Inmate Work Act of 1994), which required prisoners to work 40-hour weeks as a means of subsidizing public costs.59

Another economic argument for the private use of prison labor claims that access to prison labor markets could lead to greater economic growth. One study stated that full participation of the prison population could increase the total productivity of the US by an estimated $20 billion a year.60 Some proponents even compare the situation of prisoners to the potential labor force in low-wage, politically repressed developing countries. For example, Garvey claims that policy-makers should free all “trade barriers” on prison-made goods, just as the standard liberal trade arguments urge free trade with less developed, undemocratic countries.61 Allowing for the unregulated sale and trade of prison-made goods will benefit prisoners and consumers alike. Other proponents of prison labor argue that the high-intensity, low-skill labor done by prisoners fills a labor market void, as this work is typically not an attractive option for “free” labor. Since this type of production is often contracted out to the Global South or undocumented migrant workers, most prison labor does not compete with free workers.62

In contrast to the politically popular fiscal arguments, critics of prison labor make claims based on rights. Organized labor has historically been the most prominent opponent, as the use of prison labor directly threatens job security, wages, conditions, and the strength of unions.63 Trade unions have long sought to limit the use of prison labor, but their membership and political influence has waned in recent decades. Trade unions oppose prison labor for both material and ideological reasons. Not only is the use of prison labor typically cheaper, but also labor unions oppose how the use of prison labor creates a disciplined and flexible workforce that lacks basic rights. The production needs of the employer are prioritized and there are few opportunities for recourse against employers that abuse, fire or lay off prison workers. For example, a representative of a shirt company using prison labor told reporters that the company could freely lay off workers, while shielding their workforce from competing employers. In California, two private sector prison workers claimed to have been placed in solitary confinement because of their complaints about working conditions.64 Since there are no protections against discrimination, some inmate workers are even more vulnerable when working for private companies. Studies have documented racial disparities within job assignments in prisons. White prisoners are under-represented in prisons, yet they tend to receive better work assignments and more highly paid jobs.65

59 Vivian McInerny, “Prison Blues Inmates’ Denim goes to Italy,” The Oregonian, July 1, 2001. The second version of this bill, Measure 49, was passed in 1997 with 91% of the vote and the endorsement of almost every Oregon newspaper.
62 Misrahi, op. cit.; Garvey, op. cit.
63 Chang and Thompkins, op. cit.
64 Leonhardt, 2000, op. cit.
Another key opposing argument claims that the primary goal of prison labor is not the “reform” of prisoners, but private profits. For example, private companies tend to prefer long-term prisoners—“lifers” and long-term inmates—in order to limit worker turnover and maximize productive efficiency. In addition, there has not been a simultaneous increase in education and job-training expenditures while the private employment of inmates has expanded, despite claims by proponents that prisoner rehabilitation is an important goal of prison labor programs. Training is usually not necessary because prisoners who already have skills are typically chosen for projects, leading to no real training for less skilled inmates. This factor may skew the statistics that show lower recidivism rates for former inmates who had engaged in private prison employment. These domestic arguments emphasize how the private use of prison labor may lack the proper mechanisms to protect against profit-related exploitation.

Critics of private prison labor also claim that it does not effectively reduce the public’s burden for covering the costs of incarceration. In fact, prisons and states do not advocate higher wages when seeking bids from companies for use of their inmates’ labor. Rather, states that allow for private use of prison labor mostly use lower labor costs as a means to attract investment and business. This suggests that reducing public costs is not nearly as important a motivating factor. Instead, the private use of prison labor is quite attractive to companies because the state pays for food and housing, and workers do not have to use their low wages to pay for living expenses. For example, a recent pamphlet circulated by the Georgia Correctional Industries urged businesses to relocate production within prisons for a number of reasons, including “reduced operating costs,” “reduced security costs due to the presence of assigned security personnel,” and other financial incentives. Instead of private companies subsidizing public costs, as proponents claim, the reproductive costs of the inmates’ labor are externalized and subsidized by the state. The promotion of prison labor for private companies becomes another form of corporate welfare. Businesses recognize their interest in this political fight, especially those using labor-intensive production. For example, a major proponent of the Oregon prison initiative Measure 17 was a local business association called the Oregon Roundtable. This group had a long history of conservative positions, such as supporting regressive tax measures and opposing unions, worker protections, and public employee pensions.

Finally, proponents of prison labor claim that labor-intensive jobs can justifiably be given to prisoners without undermining “free” labor, because such jobs are not widely available outside of the developing world. However, if this is true, then the job skills developed during prison work would not be useful to former inmates seeking employment in the outside world.

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66 Misrahi, op. cit.
70 Wright, op cit.
71 Lafer, 1999, op. cit.
72 Ibid.
Deindustrialization, associated with the loss of stable and often unionized quality jobs, has been strongly linked to increased crime rates.\footnote{See Mike Davis, “Los Angeles: Civil Liberties between the Hammer and the Rock,” *The New Left Review* 170 (1988), pp. 37–60; Mike Collison, “In Search of the High Life: Drugs, Crime, Masculinities and Consumption,” *British Journal of Criminology* 36:3 (1996), pp. 428–444.} It is unlikely that giving inmates industrial work experience will somehow overcome this structural problem if most industrial production has gone overseas. Instead, private actors’ access to prison labor grants these companies access to a low-wage, disciplined labor force without the added costs of overseas production. The ineffectiveness of private prison labor in meeting its stated purposes demonstrates how this policy is primarily a populist political response, not actually a revenue-raising or rehabilitation program.

**Domestic Regulations of Prison Labor**

Even though the private use of prison labor enjoys popular support, the American public remains anxious about competition from places with worse labor practices, including foreign prison labor. These fears include concerns over interstate and international trade. Historically, this controversy dates back to the struggle over slavery in the South, as free workers and business interests in both the North and South saw the use of slavery as a direct threat to their well-being. Workers and employers petitioned the federal government for protection. As a result, the US established a comprehensive body of law regulating both interstate and international trade of forced labor-made products. In the following section, I survey this body of US laws regulating the production and interstate sale of prison labor products and services.

While the US has not ratified ILO Convention 29, Convention 105 refers specifically to Convention 29 as defining which types of prison labor qualify as forced labor. As I have argued earlier, this makes the United States accountable to the standards within Convention 29. There are two ways in which the US violates international labor rights laws regarding prison labor: one, by using prisoners’ labor for private enterprise; and two, by using the labor of inmates within privately operated facilities. Currently, both of these violations are relatively rare within the large prison system, although their legalization is recent. According to statistics from the Prison Industry Enhancement Certification, the board that runs the program for state certification, about 5,362 inmates were employed in 38 states for private prison labor. In 2007, the Department of Justice Bureau of Justice Statistics reported that 113,791 (about 8%) of American inmates were held in private facilities.\footnote{Quigley, op. cit.; Bureau of Justice Statistics, “One in Every U.S. Adults Was in a Prison or Jail or on Probation or Parole at the End of Last Year,” BJS08004, December 5, 2007, available online at: <http://www.ojp.usdoj.gov/bjs/pub/press/p06ppus06pr.htm>.} While forced prison labor remains marginal, it is still a significant factor because the absolute numbers are quite high and the practice has become normalized and considered a good policy.
Prison labor began in the US during the late 18th century, with several types of prison labor systems at the state level. The most popular—the lease system—was often used as a substitute for African slavery in agricultural production. Often, the lease system was racialized, unsafe, and targeted organized labor. In many instances, only black prisoners were recruited for convict leasing, and often times they were used to break strikes. Conflicts between organized labor and prison labor sometimes resulted in violent clashes. Since prison workers lacked protection, hundreds of prisoners died under this system. Until the first quarter of the 20th century, the use of prisoners for private production was quite commonplace, though popular contention from labor unions led to some local changes. The success of efforts to curb the use of prison labor and the strength of trade unions were closely connected. Middle class reformists of the Progressive Era also sought to regulate the use of prison labor. Starting in 1908, they urged law-makers to allow prisoners to work only on public works projects. This argument fits within the standards that international law would later define as an acceptable type of prison labor. Efforts to quell the use of prison labor domestically were more successful in the North than the South, and various protections emerged on a state-by-state basis.

The first federal level regulation on the private use of prison labor sought to protect workers from the interstate trade of prison labor-produced goods, a matter that found particular relevance during the Great Depression. The Hawes-Cooper Convict Labor Act of 1929 was the first comprehensive federal law to limit states’ use of prison labor. This allowed states to protect their industries from competition from imports of another state’s prison labor-made products, requiring that “all goods . . . manufactured . . . wholly or in part, by convicts . . . [and] transported into any State . . . and remaining therein [shall be] subject to the operation and effect of the laws of such State.” Much of the support for this federal legislation came from manufacturers in states without use of prison labor. States

75 Federal prisoners are not allowed to do any labor for private production, although they do produce goods and services for purchase by the federal government. This has been controlled by the Federal Prison Industries since 1931, and this organization is considered a very efficient bureaucracy. The law allows for payment and compensation for industries but it does not mandate it. See Jonathan Cowen, “One Nation’s Gulag is Another Nation’s Factory within a Fence: Prison-Labor in the People’s Republic of China and the United States of America,” UCLA Pacific Basin Law Journal 12 (1993), pp. 190–210.

76 The International Labour Organization concluded that the use of the lease and contract system constituted violations of Convention 29 in 1955, although this statement did not specifically mention the United States’ past practices. See de Jong, op. cit.


could now seize or ban the importation of other states’ prison-made goods. Soon afterwards, the 1935 Ashurst-Sumners Act strengthened Hawes-Cooper by further criminalizing the transit of prison labor-made products into any state that illegalized their sale. In 1940, Congress amended this law with the passing of the Ashurst-Sumners Act of 1940, which criminalized the interstate transportation and sale of inmate-made goods, irrespective of existing state laws. This act also limited the use of prison labor-made products within states.82

The legal restrictions on the private use of prison labor were made at a time when organized labor was at its strongest. Conversely, popular sentiment in support of the private use of prison labor increased around the same time that organized labor’s influence waned. In the late 1970s, as prison incarceration costs became a burden during a period of stagflation, proponents called for a more business-like approach to the costs of incarceration.83 Congress passed the Prison Industry Enhancement Certification Program (PIECP) as a part of the Justice System Improvement Act of 1979.84 The PIECP program allowed exemption from the Summers-Ashurst Act of 1940, allowing the sale, interstate commerce, and international export of goods made by prison labor.

Each state program had to meet certain conditions and receive certification by the relevant federal agency. Companies needed to guarantee the following conditions: (1) “prevailing wages,” paid to prisoners, although deductions could be taken for room and board, victim restitution, and family support (with at least 20% reserved for the inmate); (2) the provision of the same benefits for prison workers under state/federal government (specifically workers’ compensation); and (3) “voluntary” participation of prisoners and consent to pay deductions.85 These conditions, under the authority of the Bureau of Justice Assistance, were established to prevent the kinds of exploitation and harm suffered by prison workers during the turn of the 20th century by ensuring workers’ compensation and minimum wages. In addition, the prevailing wage clauses were meant as means to prevent competition between free and inmate labor over jobs.86 The PIECP was framed as a means of prisoner rehabilitation, but does not apply to privatized prisons or non-private production. According to the Department of Justice’s Bureau of Justice Assistance, there are 37 states and four county-based programs certified by PIECP, in partnership with 175 private sector businesses. Between 1979 and 2005, the PIECP was estimated to have collected $33 million for victim restitution, $21 million for family support, $97 million toward the costs of incarceration, and $46.6 million in federal and state taxes.87

Do the provisions of the PIECP program really allow for a free relationship of employment? The ILO’s Committee of Experts, which evaluates member states’
compliance with labor rights commitments, has established standards to evaluate this question. Within the context of private enterprise, prison labor can only be considered voluntary if there is formal consent, with appropriate conditions in place to ensure that this is a free relationship. Furthermore, workers should be under the supervision of public or state-employed prison authorities and receive pay and benefits, commensurate to free workers. The ILO has specified social security as one of the benefits prison workers should receive. However, as Fenwick argues, given their captive circumstances, it is hard to determine the “free consent” of prisoners. Inmates lack the same protections and access to labor law and courts of free workers, and prison or company management unilaterally set the conditions. Also, the option of not working needs to be a “true option,” without any detriments or penalty, such as the loss of good performance incentives that might reduce an inmate’s prison sentence. Since such provisions often exist, the possibility of a “free choice” is difficult to defend. Workers in the PIECP program are the highest paid of all prison workers, but most of their wages are garnished, as per the provisions in the laws. Prisoners, before working in a PIECP enterprise, must give consent to the deductions, and the remaining 20% of the original wages are theirs to keep. Yet prisoners working for private companies do not receive better lodging, food, or other conditions than non-working inmates, despite the fact they “pay” for their incarceration.

The processes by which states have adopted PIECP are very different, but the situation in Washington state illustrates the tension between concern for protecting workers and popular demands for private use of prison labor. Washington had established a PIECP program since 1981, with its inmates employed in textile production, product packaging, a computer company, concrete works, and metal fabrication. One water jet cutting company business, Microjet, had free access to a 56,000 square foot industrial space, built specifically for private prison industries. While the private companies paid higher wages to prisoners, activists reported that some of these businesses used questionable disciplinary techniques, including sensory deprivation. An association of Washington water jet cutting businesses brought a suit against the Washington correctional facilities in 2003. They argued that Microjet’s free use of a correctional facility’s space and access to cheap labor had given the company an unfair advantage. This case went to the Washington State Supreme Court, where it was initially dismissed. The association brought the suit to the Court again in 2004, and this time the Court ruled in favor of the plaintiffs, based

89 Fenwick, op. cit. The alternative of sitting in one’s cell all day constitutes work “exacted under the menace of penalty” as specified by ILO Convention 29.
90 In addition, because of the lack of recourse, it is difficult for inmate workers to address working conditions that may be exploitative. This limited possibility for recourse, typically through judges and litigation, has become less available to inmates since the passing of the 1996 Prison Litigation and Reform Act. Sullivan, op. cit.
91 Chang and Thompkins, op. cit. PIECP participants averaged $27.04–$43.23/day, with an average of 64% of wages deducted for taxes, room and board, and family support.
92 Wright, op. cit., p. 115.
94 Wright, op. cit., p. 115. One of the interviewed former Washington state inmates compared the conditions of work to serfdom.
on new evidence regarding the state constitution’s historical prohibitions of private prison labor. The Court’s opinion was that since the Corrections Department tried to “entice” employers with lower labor and overhead costs, leading to a higher profit margin, this violated the intentions of the states’ founders, who had prohibited the private use of prison labor for three reasons: fears over the unfair competition to free labor, the conditions of “brutality” for inmates, and the possible “corruption and favoritism [towards certain private interests] associated with private convict labor.”95 This court decision was significant because it designated this federal provision unconstitutional at the state level.

The interesting aspect of this story, however, was the swift political response. The state prison chief Joe Lehman immediately expressed his regret over the decision, telling the press that the ruling would result in a huge revenue loss for the state. He estimated an annual loss of $600,000 for covering incarceration costs for the inmates, and a loss of up to $150,000 for victims’ funds. The $600,000 came from garnishing workers’ wages, not as a subsidy to the state from the employers.96 A few years later, a ballot initiative proposing a constitutional amendment to allow the private use of prison labor was approved by the Washington legislature for the November 2007 election, Senate Joint Resolution 8212. This ballot initiative passed with over 65% of the vote and earned the endorsement of virtually all the major state newspapers.97 This direct democratic process of overturning court decisions that upheld rights demonstrates how both political elites and a majority of the public valued fiscal concerns, desert, and punishment over protecting vulnerable workers.

In addition to the PIECP, the second way in which the US violates the prison labor subset of forced labor protections is through the use of prison labor of privately run facilities, which have their own labor and industry programs. As stated above, about 8% of the total US prison population is currently held in privately run prison facilities, including some federal prisoners.98 All the work done in these prisons qualifies as forced labor, because public authorities do not oversee this work. The US has the largest number of private prison facilities in the world.99 Seventeen percent of these inmates work in private prison industries and 57% work in maintenance labor. Maintenance labor in private prisons gets paid less on average than maintenance workers in public state and federal prisons.100

Prison privatization also emerged around the same time as the private use of prison labor.101 As mentioned above, when the Reagan-era American public began

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98 Bureau of Justice Statistics, op. cit.
99 Fenwick, op. cit.
100 Chang and Thompkins, op. cit. According to the Criminal Justice Institute’s 2000 Corrections Year Book, the daily wage of federal non-industry work was $0.12–$0.40/day; in state prisons, daily wages ranged from $1.03–$4.38/day; private prison workers made a daily wage ranging from $0.08–$3.20.
101 It should be noted that private use of facilities to detain immigrants also began around this time. Under George W. Bush’s administration, the privatization of immigrant detention centers also increased. See Robert Koulish, “Privatization the Leviathan Immigrant State,” Monthly Review, July 20, 2007, available online at: <http://www.monthlyreview.org/mrzine/koulish200707.html#.ednref6>.
to support “tough on crime” and minimum sentencing policies, incarcerated populations grew rapidly, despite decreasing crime rates. Existing public facilities were incapable of dealing with the increased numbers of prisoners, and state budgets were stretched thin as federal aid dried up. This resulted in states turning to the private sector. Originally, such privatization was seen as politically risky, but these political and economic circumstances made this possible. The first private prison company, the Corrections Corporation of America (CCA), was established in 1983 in Nashville, Tennessee. The CCA’s first contract was a detention facility for immigrants, but the company also wanted to take over Tennessee’s crowded penitentiary system. Although this did not happen, eventually the CCA negotiated a contract to start a prison labor farm near Chattanooga in 1985. In the same year, Wackenhut Corporation, a private, Florida-based security company, won a contract to build a detention center in Denver. Privately run prison facilities allow for greater budget flexibility, as the costs of paying a private company may come from an operating budget instead of a capital budget. This makes contracting out to the CCA and Wackenhut more attractive to states, particularly those under court order to lessen overcrowding in their facilities. By 1990, there were 35 private prison facilities. By 2000, there were 158 privately run prisons. This rapid growth of private prison facilities has largely been curbed because of controversy, but they are considered by many to be good public policy.

Since these facilities are for-profit, there is reason for genuine concern about exploitation. PIECP provisions, as well as the Fair Labor Standards Act, do not apply to prison labor in private prisons. Because of the lack of public oversight and the physical removal of this work from public officers and facilities, industrial production and maintenance labor within private prisons constitute a violation of ILO Convention 29. In the United States’ reports to the ILO Fundamental Declaration’s review body, the US argued that inmate labor in privately run prison facilities is publicly supervised and controlled since the initial establishment of private prisons requires oversight by public officials at the municipal, county, and state levels. The US further argued that all the private prisons operate under public contracts, which place their labor under public authorities. However, although public authorities can review the performance of the private contractors, often the provisions for public accountability and oversight are inadequate. The authority over daily operations of these prisons is delegated.

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105 Ibid. Only seven more were added in 2001 and 2002, making the period 1996–2000 the time of highest growth of private prison facilities.

106 Chang and Thompkins, op. cit.

to private managers, effectively giving the managers power to “both legislate and adjudicate.”

Another concern regarding exploitation is that work assignments in privately run prisons may be manipulated to increase profits. Even though this raises the potential for exploitative work conditions, very few states have laws to specifically address this concern. Eleven states have specific regulations that prevent private prisons from granting, denying, or revoking good time credits based on work. Likewise, a similarly small group of states prohibit private operators from determining a prisoner’s work assignments or work credits. Only seven states have provisions to prevent private actors from classifying prisoners. Analysis of state laws protecting inmate labor from private exploitation shows that current legislation regarding this human rights provision is quite limited. All these conditions are even more troubling considering the 1996 Prison Litigation and Reform Act, which has limited the ability of prisoners to take legal action in cases of rights violations. This law was meant to “restrain liberal federal judges who see violations of constitutional rights in every prisoner complaint,” by easing the process by which states can end court supervision of prisons. This law has placed the burden of proof for demonstrating violations of constitutional protections on the inmates, whereas in the past the facilities management had to prove that they had made all necessary changes. This law has significantly limited inmates’ access to judges and their ability to voice their grievances in cases of alleged abuse in publicly run and privately run prison facilities.

US Trade Law and International Activism on Prison Labor

Though the United States allows the private sector use of prison labor domestically, it has instituted protections against the import of foreign prison labor-produced goods and promotes international labor standards internationally. The first federal law regulating imports and labor was the McKinley Tariff Act of 1890, which barred importation of any manufactured goods made by forced labor, “convict,” or indentured labor. This provision was also a measure to protect US workers from the low-wage competition of foreign forced labor (Section 51). Section 307 of the Smoot-Hawley Tariff Act (1930) further expanded the categories defined in the 1890 act, including mined goods and

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108 Fenwick, op. cit. The 11 states with laws regarding good time and work in prison are Arizona, Arkansas, Florida, Louisiana, Mississippi, Ohio, Tennessee, Texas, Virginia, West Virginia, and Wyoming. Colorado is included in the 11 states regarding inmate work assignments and work credit, and Texas is not included. The seven states with laws on prisoner classification are Arizona, Florida, Mississippi, Ohio, Tennessee, Virginia, and Wyoming.

109 Ibid.

110 Sullivan, op. cit.


goods made in forced labor, prison labor, or indentured servitude, unless these goods were not readily available in the US. Congress wrote Section 307 to provide protection to domestic workers and industries, although “legislative history” provides evidence that “concern[s about] that inhumane treatment of workers forced to produce goods in certain developing countries,” mattered as well.

In addition to these federal regulations, the United States has been active in promoting the international labor rights regime through its trade relations, including prohibitions on prison labor. A coalition of civil society, trade union, and Congressional pressure advocated the inclusion of a labor side agreement during negotiations over the North American Free Trade Agreement (NAFTA). This led to the establishment of the North American Agreement on Labor Cooperation. The US has also created a number of bilateral trade agreements that condition trade access on labor standards; these agreements include the Generalized System of Preferences (GSP), the Caribbean Basin Initiative, and treaties such as the US–Cambodia Free Trade Agreement and the US–Jordan Free Trade Agreement. These treaties provide selected countries access to US markets, conditioned on improving human rights and labor standards. One important effect of the US’s use of trade conditionality is that these practices have influenced and served as a model for other trade agreements. For example, the European Union adopted labor rights conditions for its Generalized System of Preferences.

These moves toward adding labor conditionality in US trade law are also significant because they have influenced the US’s agenda during multilateral trade treaty negotiations. The United States has been one of the strongest proponents for linking labor standards to trade access, notably advocating for inclusion of labor standards into the World Trade Organization. The United States originally brought up the issue during the Preparatory Committee of the

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117 Ibid.
Generalized Agreement on Tariffs and Trade (GATT) in 1948, and reintroduced it again during WTO ministerial meetings at Punta del Este in 1986, Marrakesh in 1994, Singapore in 1995, and Seattle in 1999. As a hegemonic economic and military actor, the US wields significant influence in global trade talks. As a result, scrutiny of US domestic practices regarding labor rights and standards is particularly important for those interested in promoting better labor practices abroad.

In addition to trade negotiations, the United States has included condemnation of prison labor in its foreign relations, especially with China. These interactions illustrate the political difficulties of promoting international labor through trade and diplomacy. During a fall 2005 visit to China, President George W. Bush critiqued the country’s human rights practices while cautiously engaging the country on an economic level. This represents a continuation of the US’s long and awkward engagement with China on the social question. An earlier key instance of this precarious interaction occurred during the early 1990s when questions about renewing China’s Most Favored Nation (MFN) status became a topic of national debate. In 1991, Senator Jesse Helms of North Carolina, citing Section 307 of the Smoot-Hawley Tariff Act, argued against renewing China’s MFN status by listing its prison-made exports. Section 307 prohibits the importation of any goods made by forced, slave, or prison labor. Helms’s speech gained wide attention when it was profiled on the television news program 60 Minutes, accompanied by undercover photos taken by a former Chinese prison laborer who considered himself to be a political prisoner. Newsweek magazine also did a cover story, calling China’s use of prison labor the last remaining “gulag.” Concerns about Chinese prison labor-made imports to the US found a high degree of resonance among the public. In response, President George Bush blocked the import of Chinese products allegedly made by prison labor, including open-end spanners, socket wrenches, and steel pipes from four factories. China did not respond defensively, but instead took measures to confiscate goods and punish and fine those persons involved in prison labor production. In 1992, China made further concessions during the negotiations of a memorandum of understanding, allowing US officials the right to visit convict labor locations.

This concern with China’s use of prison labor has been a continuing focus for civil society and state leaders. In 2004, the American Federation of Labor/Congress of Industrial Organizations (AFL-CIO), Amnesty International, and Human Rights Watch jointly filed a complaint with the United States Trade Representative. The complaint argued that China’s gross violations of workers’ basic rights

118 The only social provision under the GATT was in Article XX(e) which allowed for member states to discriminate against products made with prison labor.
121 Cowen, op. cit.
122 Wang, op. cit.
constituted an unfair trade practice under Section 301(d) of the United States’ Trade Act of 1974. In addition, domestic courts have ruled on the use of prison labor within China. For example, on February 28, 2001, representatives of the Allied International Manufacturing Stationary Company Ltd. in Nanjing pleaded guilty in a New Jersey federal court to importation of goods manufactured by forced prison labor. The company representatives admitted to the use of women prisoners’ labor in the assembly of metal spring binder clips. The conditions of work included no pay, unsafe working conditions, long hours, and industrial accidents. As a result, the binder clips were seized. In an ongoing effort to monitor prison-made goods, the United States–China Economic and Security Review Commission includes the importation of prison labor-made goods within its concerns. Their efforts include commissioning reports and providing frequent Congressional testimony on the Memorandum of Agreement between the US and China on prison labor products. The Commission conducted its most recent Congressional testimony on June 19, 2008.

Despite expressing concerns about social dumping and the human rights of China’s prisoners, the US does not have a strong bargaining position from which to influence social conditionality. First of all, China and the US have a long-standing, mutually respective and appreciative view of each other’s prison labor practices. As an illustration, Supreme Court Chief Justice Burger advocated for the greater use of prison labor in the US and praised China’s use of prison labor as an example, calling them “factories within fences” in 1981. Secondly, the legal responses to preventing the import of prison-made goods are very weak, suggesting these measures are meant to placate a nervous public more than to significantly regulate the inflow of prison labor goods. Declaring concern for the rights of prison workers in China is cheap talk for any politician, but the US’s cumbersome provisions for enforcing laws against imports of prison-made goods have had little effect on trade.

To enforce the prison labor import ban, it is necessary for agents at the site of US Customs houses to have first hand “credible evidence” of the use of forced labor in production of the goods in question. Yet customs officers and other agents lack access to strong monitoring and inspection data, and the United States has not established such information-gathering mechanisms. Other bodies of the US government can


126 Cowen, op. cit.

127 The term “protectionist populism” or “populist protectionism” is already circulating in conservative political circles, but it relates to broader issues, not just labor rights or labor standards concerns. See Peter Morici, “Commentary: America Prey to China’s Mercantilism,” The Providence Journal (January 19, 2007), p. B4.
also frustrate efforts of the Customs Services, such as the incident in 1988 when the Justice Department refused to allow Customs to deny entry to Soviet products, despite evidence from the State Department, Central Intelligence Agency, and the US Commission on Human Rights on the use of prison labor in Soviet manufacturing. Although the media has highlighted several prolific cases involving the impoundment of prison labor-made goods, for the most part, it is lengthy and difficult to successfully invoke Section 307.128

Additionally, the United States has neither outlawed nor stopped the marketing and export of its own prison labor goods. US politicians knowingly recognize that their prison labor products are exported to other countries. For example, the Nyman Marine Corporation uses prison labor in the production of boatlifts that are exported to countries such as Denmark, Holland, and France.129 The Prison Blues line of denim jeans manufactured in Oregon are exported to Italy.130 The lack of effective enforcement mechanisms to properly sanction the import of prison labor-made goods and the US’s export of its own prison labor products suggest that all the rhetoric and institutional attention paid to labor rights in China’s production practices may only be lip service to satisfy the electorate. This is a troublesome situation, as it complicates the possibility of international trade unions and other advocates promoting international labor rights for human rights purposes.

Conclusions

The United States fails to live up to its labor rights standards in several ways, despite its prominent role in promoting them. The US typically does not ratify the major International Labor Organization’s conventions regarding core international labor standards. Yet the US uses these core international labor standards as the criteria for its own trade conditionality in a number of bilateral and other trade agreements. The US has only ratified two conventions—on child labor and forced labor—and the ILO has cited the US for violations of both its forced labor and child labor commitments.131 Human rights organizations and domestic unions have also widely criticized the United States for its failure to protect fundamental freedom of association and collective bargaining rights, calling the current system for recognizing and protecting unions “broken.”132 Despite some scholars’ enthusiasm for using US trade policy as a way to enforce the largely unenforced ILO conventions,133 problems with the private

128 Zimmerman, op. cit. Customs officials with credible information pass the information to a commissioner, and the Customs Services must conduct an investigation, engage in communications with the importer, who may contest the Commissioner’s finding at the US Court of International Trade, either based on validity of information or under the exemptions allowed under the law. The burden of proof mostly falls on the Customs Services.
129 Wang, op. cit.
130 McInerny, op. cit.
133 Douglas et al., op. cit.
use of prison labor and the general disregard for the labor rights of many American workers undermine this strategy.

Neoliberal policies have enabled the popularity of punitive attitudes toward prisoners and other groups of people who are seen as a threat. These workers have been blamed within political discourses for a range of macro-social problems, such as unemployment, wage and property losses, and straining public resources. As a result, they have been stripped of their rights by law-makers, judges, and electorates in referenda. In this way, Oregon’s Proposal 17 and Washington’s Senate Joint Resolution 8212 are comparable to California’s 1994 Proposition 187, in which the citizens of California voted to exclude undocumented immigrants from many basic social provisions because of their immigration status.134 Likewise, the 2002 Supreme Court decision *Hoffman Plastics Compounds LLC v. National Labor Relations Board* freed employers from providing unemployment benefits to their undocumented former employees. The Court thereby distinguished undocumented immigrants from rights-bearing workers, much in the same manner as recent legal arrangements exclude prison workers from their basic working rights and protections.135

Based on its own practices and commitments, it is difficult for the US to justify limiting trade privileges for China or other developing countries based on the use of forced and prison labor. While concerns about a competitive “race-to-the-bottom” are valid, the manner in which the US government has enforced restrictions on Chinese imports suggests that it lacks a substantive normative commitment to general labor rights. Enforcing Smoot-Hawley is cumbersome and difficult, much like the complaints about protecting workers’ rights at the National Labor Relations Board.136 A multilateral, more accessible, and independently adjudicated mechanism is necessary, especially if it could effectively draw attention to labor rights problems in the Global North. Despite its rhetorical commitments, the United States’ practices create a quandary for activists who wish to promote more just conditions for international trade. According to political theorist William E. Scheuerman, the current strategies for bringing about these conditions are “at best, ineffective and at worst an instrument for problematic attempts to assure the political and economic hegemony of the US.”137 While I do not claim that all prison labor should be abolished, the conditions of prison labor and its protections require greater scrutiny in both the international and domestic contexts, especially since the current economic crisis will likely result in new political responses to economic insecurity.

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