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Dear Prison Roundtable participants,

I look forward to discussing with you the attached draft article on prisons, economic development, and post-apartheid criminal justice reform in South Africa. It is a work in progress so I welcome your thoughts on the argument’s strengths and weaknesses. I’d particularly appreciate your feedback on ways to narrow the paper’s scope. The paper is long and covers a lot of ground—I’d love your thoughts on how to distill the argument and shorten this into a more focused, accessible read.

This paper began as a chapter of my history dissertation, Democracy Dispossessed: Land, Law & the Politics of Redistribution in South Africa. The larger project examines a number of institutions that shaped the politics of land, economic development, and citizenship in South Africa over the last century. An earlier chapter recasts the history of apartheid pass laws, showing how vagrancy laws were one piece of a continuum that stretched through jails and prisons to rural plantations, supplying labor to farms and subsidizing agricultural development. In this paper, I try to situate post-apartheid prison reform within this historical nexus, and to link two areas that are generally considered separately: 1) market-driven development and “service delivery” and 2) prisons and criminal justice.

Thank you in advance for reading. I look forward to our conversation.

Amanda Alexander
"To All Who Live In It": Crime, Prisons, and Development in Post-Apartheid South Africa

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I visited the new Kokstad Prison facility this morning and could not help but reflect on the irony of the potential of a prison to unleash such an abundance of opportunities for so many sectors of our society.

-- Deputy President Thabo Mbeki, April 17, 1999²

I. Introduction

On the morning of April 17, 1999, Deputy President Thabo Mbeki visited Kokstad, a large town near the border of KwaZulu-Natal and the Eastern Cape, two of South Africa’s poorest provinces. Mbeki had arrived to hail the town as a frontier of opportunity and a model for how the new South Africa would achieve economic growth in the years to come. The engine of that growth—the first and largest super-maximum prison in the southern hemisphere—was unusual, and Mbeki’s task was to garner support. In his post-

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² Address by the Executive Deputy President, Thabo Mbeki, on the Site Tour of the New Kokstad Prison and Launch of the Skills Development Programme, Apr. 17 (1999).
site tour address, Mbeki briefly noted the prison’s role in addressing the problem of crime. He stated that the “efficient management of convicted persons under maximum-security conditions” would “fundamentally address what could be termed a societal ‘burning issue.’” Nonetheless, Mbeki did not dwell upon the crime and safety concerns—and recent prison escapes—that had drawn newspaper headlines and raised questions about the ANC’s ability to maintain order. The Deputy President turned quickly to how the new prison fit into the ANC’s visions for governance and economic development.

Mbeki explained that the prison would be a “launching pad for changing the lives of the people of Kokstad,” and he outlined the “socio-economic objectives” of the prison project. The Department of Public Works, he stated, would create more than 7500 jobs in the construction phase of the Kokstad prison facility, with more opportunities to follow once the prison was built. Mbeki touted plans to train youth in construction skills, and he made much of tremendous, if undefined, “downstream potential” for secondary industry goods and services. He hoped the prison project, and the government’s targeted procurement process that brought it about, would be a model for how local-level endeavors could generate “a substantial redistribution of wealth and opportunities to the poor and historically disadvantaged.” In Mbeki’s framing, the prison was a promise kept. He stated that the ANC government’s R350 million expenditure in the local economy “re-affirms the commitment of our government to deliver critical infrastructure and to meet your needs.” Echoing the language of the Freedom Charter that guided the

3 Ibid.

4 See, e.g., “Ambush Frees South African Prisoners,” BBC News, Jan. 4, 1999 (“Twenty-one prisoners escaped from police custody in South Africa after the convoy in which they were travelling was ambushed by armed men. … The incident follows the reported escape of 11 prisoners from a Johannesburg jail on Christmas Day.”) According to official statistics, South Africa had 1,069 prison escapes in 1997 and 480 in 1998 (Ibid.).

5 Ibid.

6 Ibid.
ANC through decades of struggle, Mbeki declared, “For the first time in the history of this country, we can say with confidence that opportunity in South Africa belongs to all who live in it.”

Early on in his speech Mbeki acknowledged the uncomfortable tension of answering the calls of the Freedom Charter with a prison town. He stated that he “could not help but reflect on the irony of the potential of a prison to unleash such an abundance of opportunities for so many sectors of our society.” Yet, Mbeki maneuvered the contradiction by deflecting attention away from the brick, mortar, and barbed wire structure that would soon loom on the edge of Kokstad, and focusing instead on the metaphorical prison of South Africa’s apartheid past. He had opened his address with a quote from U.S. Supreme Court Chief Justice Warren Burger: “the greatest prison is not the one with the most imposing walls but that which locks in our identity, potential for growth and a sense of self-worth.” For Mbeki, this quote “captures the essence of the challenges we face in South Africa.” He compared apartheid to a prison with imposing walls that had locked in the full potential of the country and its people. Freed from centuries of colonialism and decades of apartheid social engineering, South Africa could now chase economic growth, development, and opportunity. Now, at the Kokstad prison site, the country had “come out of the prison of despair into the radiant light of hope.”

The question of how the ANC reached this point—of promoting a new super-maximum prison as a triumph of economic development and service delivery—is this article’s focus. Given that so many individuals in the party’s leadership—and so many in the country’s black majority—had experienced prison, criminalization, and miscarriages of justice in the courts, it is odd, on first glance, that the party would herald the Kokstad

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7 Ibid. The Freedom Charter, adopted by the ANC at the Congress of the People in 1955, opens with the line: “We, the People of South Africa, declare for all our country and the world to know: that South Africa belongs to all who live in it, black and white[.]” African National Congress, The Freedom Charter (1955).

8 Ibid.

9 Ibid.
super-maximum prison as fulfilling the dreams laid out in the Freedom Charter. Yet this development was in line with a broad range of criminal justice and prison reforms adopted in the first five years after the end of formal apartheid. Within four years of the transition from formal apartheid, the government had passed legislation that imposed mandatory minimum sentences, made bail more difficult, imposed ‘truth-in-sentencing’ and limited parole, and allowed the government to enter into contracts for private prisons. The result of this and other legislation was a dramatic rise in the country’s prison population. Between 1996 and 2003 South Africa’s incarceration rate rose from 280 to 402 per 100,000.10 By 2000, sentences of seven to 10 years, 10 to 15 years, 15 to 20 years and 20 years to life had increased by 50 percent, 67 percent, 70 percent and 124 percent respectively.11

While there is much to be said and understood about the intense period of criminal justice reform in the first five years after apartheid and the resulting increase in the incarceration rate, this article will focus on an aspect that has received little scholarly attention. Other studies of post-apartheid criminal justice and prisons have tended to focus on prison conditions (with a heavy focus on violations of Constitutional law and human rights),12 prison privatization,13 or critical (most often Foucauldian) analysis of crime discourses and governance.14 While these studies have contributed much, few studies link the broad literature on service delivery and market-driven development


through austerity to prisons and criminal justice. I do so here. I contribute to the literature on private prisons, but also push further to understand the place of prisons and harsh new criminal procedure and sentencing laws within a broader shift toward neoliberal economic development strategies. Since the vast majority of South Africa’s prisons remained under public control—only two of the country’s 240 prisons were privately-run—a focus on private prisons can overshadow more systemic trends. The relationship between criminal justice reform and neoliberal development goes far beyond the small number of “public-private” partnerships with U.S. and British consortia and companies such as Wackenhut and Geo Group.

I argue that “tough-on-crime” criminal justice reforms and prison expansion helped to propel a neoliberal approach to economic development in the years immediately after South Africa’s democratic transition (1995-2000). While public safety and crime were no doubt valid concerns in this period, there are many possible solutions to these problems. South Africa adopted a particular solution, borrowing heavily, as we shall see, from carceral technology and “war on crime” rhetoric developed in the United States. Indeed, there exists no better model than the United States for expanding a national prison economy during an era of neoliberal austerity. I argue that, in South Africa, prisons and harsh criminalization were meant to spur the economy in two ways:

15 Neoliberalism is a political economic theory and policy approach characterized by privatization, market deregulation, and fiscal austerity. In David Harvey’s definition, “neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices” David Harvey, A Brief History of Neoliberalism (Oxford: Oxford University Press, 2005), 2. Brenner, Peck, and Theodore have cautioned that “the widespread use of the concepts of neoliberalism and neoliberalization has been accompanied by considerable imprecision, confusion, and controversy—in effect, they have become ‘rascal concepts.’” Neil Brenner, Jamie Beck, and Nik Theodore, “After Neoliberalization?” Globalizations 7(3) (2010): 328. I have been careful to avoid such imprecision here, and my working definition of the concept hews close to Harvey’s definition throughout. My research also builds upon Brenner et al.’s concept of “variegated neoliberalization,” which recognizes that neoliberalization processes are never pure, unified or all-encompassing. To the contrary, “neoliberalization represents an historically specific, unevenly developed, hybrid, patterned tendency of market-disciplinary regulatory restructuring.” Ibid., 330.
first, by showing that the ANC was “tough on crime” and committed to making the country safe for foreign investment and white commercial farming; and second, by generating development through the punishment economy. That is, prison contracts were framed as a form of “service delivery,” as they were meant to create jobs in construction and corrections as well as secondary markets such as prison food vending. In reality, however, towns like Kokstad—where the government pinned its plans for economic growth on high-tech new prisons—continue to struggle to meet their residents’ basic needs. As for private prisons, they proved to be a costly and unexpectedly short experiment. Meanwhile, the neoliberal approach to economic development and harsh criminal justice reforms have the combined effect of delegitimizing popular calls for widespread, direct redistribution and criminalizing dissent.

Deputy President Mbeki’s declaration that the super-maximum prison at Kokstad was a “radiant light of hope” begs the question: what are prisons for in post-apartheid South Africa? Historians and social theorists from a range of disciplines have grappled with the role that mass incarceration plays within neoliberal democratic societies. While punishment and confinement are certainly part of prison’s function, historians and theorists (particularly scholars of late 20th century United States, the most heavily incarcerated country on the planet) have sought to contextualize exploding incarceration rates within broader economic shifts—namely, the intensification of neoliberal deregulation and privatization over the past 30 years.16 Within this focus, scholars have expanded on Foucault’s call to understand incarceration as a form of statecraft,17 focusing on penal expansion as a political project, one that is fundamentally about the state’s continued control of poor, predominately black people. Specifically, this literature

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17 Foucault, *Discipline & Punish*. 
focuses on the role of prisons in: warehousing surplus labor;\textsuperscript{18} maintaining a racial caste system;\textsuperscript{19} and constituting a market for private interests.\textsuperscript{20} In the South African context, Gail Super has made a compelling argument for understanding the ANC’s crime discourse as a way of consolidating power and defining “criminals” as traitors of the new nation in the years after the transition from formal apartheid.\textsuperscript{21} Building on these interventions, I will examine how prisons came to be framed as a mechanism for nation-building and economic development by the ANC in the first years of its rule.

This article examines the interplay of several factors that shaped the direction of prison and criminal justice reform during the first five years of ANC rule. Part I provides a broader discussion about South Africa’s economic trajectory during these years, and some theoretical framing with regards to neoliberalism, race, and politics. Part II examines the move to public-private partnerships in the prison industry in the first years after the transition. Part III examines parliamentary debates that culminated in the passage of criminal justice reform legislation including the Criminal Law Amendment Act of 1997. These sections will focus on understanding how prisons fit into broader economic reforms, as well as the role of international (largely American) influence on the direction of criminal justice and prison policy. As we shall see, this influence was both direct, taking the form of consultants and exchange visits, and indirect, in terms of the popular notions of crime and punishment that often shaped the terms of parliamentary debate. The concluding section will examine how South Africa’s experiment with private prisons failed, bringing the discussion up to 2011, when the Minister of Corrections decided to scrap plans for any more private prison contracts. I conclude with a brief discussion of implications for social movements and political change.

\textsuperscript{18} Wacquant, Punishing the Poor; Western, Punishment and Inequality.

\textsuperscript{19} Alexander, The New Jim Crow.


\textsuperscript{21} Super, Governing Through Crime.
My sources include *Hansard* parliamentary records, speeches, governmental reports, newspaper archives, and secondary literature. The parliamentary debates and media coverage from the time allow for an understanding of legislative moves toward private prisons and harsh criminalization as they unfolded. This allows us to see how media hype over rising crime rates created a sense of pressure to address crime. At the same time, the debates show the extent to which Cabinet ministers and parliamentarians were constrained by an overall push for austerity and budget cuts. The debates provide insight into how the government’s neoliberal economic approach, namely its extensive involvement of the private sector in traditional state functions, was chosen and rationalized. The debates also show a heavy U.S. influence on the terms of the debate and in the solutions adopted; the U.S. was a reference point for how to fight an ambitious “war on crime” while also entrenching austerity and an increased reliance on the private sector.

II. Neoliberalism, race, and foreclosed political claims

Before diving into an examination of post-apartheid criminal justice and prison reform, it is necessary to provide broader context about the ANC government’s approach to economic development in the Mandela and Mbeki years. Under apartheid, many South Africans had devoted their lives to fighting for, not just the right to vote, but a complete overhaul of the socio-economic order including widespread redistribution of land, equal education, and a decent quality of life for all. However, economic stratification deepened following the democratic transition. Rather than undertaking widespread, direct redistribution, the state became an “enabler” of market forces, as I will discuss in more detail below. After the ANC came to power in 1994, millions of people were hooked up to water, electricity, and phone lines within a few years. Millions, however, were later disconnected for being unable to pay their bills. At least 40 percent of new phone lines
were out of service by 2003 and ten million people had been disconnected from water.\textsuperscript{22} Municipalities’ moves to privatize service provision and implement ‘cost-recovery’ mechanisms—with prepaid water meters as the most extreme example—gave rise to a number of social movements beginning in 1999, including Johannesburg’s Anti-Privatisation Forum.\textsuperscript{23} Minister for Safety and Security Charles Nqakula reported that there were more than 6,000 recorded protests across the country in the 2004/2005 financial year.\textsuperscript{24} Quieter protests abounded as well; some people disconnected their prepaid water meters and re-connected their households and neighborhoods to the city supply, circumventing the meters. Others reconnected their electricity following cut-offs.\textsuperscript{25} Of course, battles over urban governance and service provision were not new to South Africa; rent boycotts and calls for ‘one city, one tax base’ were key features of urban anti-apartheid activism from the mid-1980s.

The ANC’s approach to urban governance and service provision aimed to overcome the spatial inequalities created by apartheid legislation. However, by adopting a range of techniques circulating at the international level, the ANC’s approach rapidly became a model for “public-private partnerships.” The ANC government adopted a neoliberal approach to development that foreclosed a large role for the state in directly redistributing land and other economic resources. South Africans who were once dispossessed of land and relegated to poverty now also were dispossessed of their claims


\textsuperscript{23} See e.g., Richard Ballard et al., \textit{Voices of Protest: Social Movements in Post-apartheid South Africa} (Durban: University of KwaZulu-Natal Press, 2006). See also Steven Robins. \textit{From Revolution to Rights in South Africa: Social Movements, NGOs & Popular Politics after Apartheid} (Suffolk: James Curry Press, 2008), 20.


for redistribution. South Africa’s neoliberal democracy required that they give up their claims as dispossessed, landless subjects and instead compelled them to look to the market to ‘deliver’ services and jobs. The government would be an “enabler” of market forces and, rather than redistribute land and wealth, it would enter into “public-private partnerships for service delivery.” For local economic development, this might mean a new super-maximum prison compound and promises of jobs and skills development, as it did in Kokstad. For the water supply in Soweto townships, this meant the government contracting with a French company to install pre-paid water meters.\textsuperscript{26} For urban landless, it meant awaiting ‘housing delivery’ and facing eviction and demolition of one’s informal housing settlement in the meantime; it did not mean land redistribution. In each case, one’s relationship with the state was meant to be closer to customer than citizen.\textsuperscript{27}

In fact, through a limitation within the country’s Constitution, the ANC government could deny any problems that could not be solved by the market. As Michael Neocosmos has observed, and Constitutional Court jurisprudence has affirmed,\textsuperscript{28} resources such as housing, land, water, and electricity “are provided as ‘human rights’ in the South African constitution, although it is quickly added that such provision is contingent on the state having the financial and administrative capacity to do so. As a result, legal arguments revolve around the ‘reasonableness’ of such provision in specific


\textsuperscript{28} See, e.g., \textit{Mazibuko and Others v. City of Johannesburg and Others}, 2009. Constitutional Court of South Africa (CCT 39/09) (holding that prepaid water meters were consistent with the Constitution. The Court held that Johannesburg’s free water allocation was reasonable and that prepaid meters were introduced in a manner that was lawful, procedurally fair, and not unfairly discriminatory).
circumstances. Political issues are in this manner turned into legal ones.”

A contradiction thus emerged between the state’s conception of rights as “deliverables” (along with the passive subjectivity this implied and entailed for its citizens) and social movements’ conceptions of rights as something to be defined and demanded through popular struggle and ultimately to be won, not given. The subjectivity associated with the latter conception of rights remains deeply politicized. The state’s conception entailed the death of the subject as constituted by popular anti-apartheid struggle documents such as the Freedom Charter (which held that the people shall govern, the land shall be shared by all who work it, etc.). Thus it became possible to deem supermaximum prison construction an example of “delivering” on the promises of the Freedom Charter, as President Mbeki did in Kokstad. In essence, such “delivery” solidifies a certain truncated conception of rights—rights to jobs or services that could be “delivered” but not rights to land, which would require a complete restructuring of the distribution of wealth and privilege, a distribution that was largely left untouched during the transition to democracy.

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30 For more on institutionalized vs. politicized concepts of rights and the critiques of power which each entail, see Raj Patel, “Transgressing Rights: Via Campesina’s Call for Food Sovereignty,” Feminist Economics 13(1) (2007); Neocosmos, “Development, Social Citizenship.”


32 Of course, popular experiences and demands regarding redistribution consistently overflowed the bounds of official post-apartheid policy and discourse well into the Mbeki years. The rise of the Landless People’s Movement, Anti-Privatisation Forum, Western Cape Anti-Eviction Campaign, and a range of other movements demonstrated that demands for widespread redistribution had not disappeared, even though such demands lay outside the official political framework of a neoliberal and officially non-racial post-apartheid South Africa.
As I will discuss in the next section, the development of neoliberal approaches and experiments to implement them—for example, through public-private partnerships for prison construction—often were rife with difficulties. While the imposition of the Washington Consensus is frequently billed as a slick endeavor in global economic re-ordering, the reality was much more of a stumbling process. The flurry of international consultants that came to shape the transition from apartheid regularly worked at cross-purposes and without clear long-term blueprints, resulting in a patchwork of various policy trends that were not always consistent across sectors. Neoliberal austerity measures came out on top, but the process was not as smooth as some would have imagined or as writers have since depicted it. Often the adoption of such measures had less to do with the ANC’s susceptibility to neoliberal ideas and more to do with certain policy areas (like criminal justice reform and prisons) being low on a dauntingly long list of priorities, or of a particularly passionate individual stepping in to fill a void in leadership.

Thinking about post-apartheid prisons and criminal justice reform in the context of neoliberal economic development also helps us to understand how conceptions of race continue to be mobilized in an ostensibly “non-racial” South Africa. In terms of the political economy of race, scholarship on post-apartheid South Africa was surprisingly weak, well into the Mbeki years, when it came to theorizing the ongoing articulations between race and class. Given the rise of a small black middle class in the country, some theorists writing a decade into ANC rule argued that we had seen a shift “from race to class apartheid.” However, such formulations are unable to capture the reality of how


34 See discussion of Sipho Mzimela, first Minister of the Department of Correctional Services, below.

neoliberalism has created, consolidated, and mobilized certain racial formations. Fortunately, some theorists have begun to examine what Jodi Melamed has called ‘neoliberal multiculturalism’ by examining how “race remains a procedure that justifies the nongeneralizability of capitalist wealth.”36 Achille Mbembe has argued that race in South Africa “did not simply become a crucial, pervasive dimension of colonial domination and capitalist exploitation. Turned into law, it was also used as a privileged mechanism for turning black life into waste—a race doomed to wretchedness, degradation, abjection and servitude.”37 In the face of a neoliberal capitalist regime that produces both immense wealth and “entire categories of unwanted people,” Mbembe argues that the challenge ahead “is nothing less than the re-foundation of democracy as a community of life.”38 I build upon work in this vein by analyzing how neoliberal democracy in South Africa has depended upon ongoing articulations of race.

South Africa is a compelling site to engage such scholarship on post-colonialism, neoliberalism, and race, since many narratives of post-apartheid South Africa have relied on teleological notions of progress from the “racist” apartheid era to a “non-racial” present and future post-apartheid country.39 Contemporary social movements have often questioned such narratives by arguing that there are important continuities between the


37 Mbembe, “Democracy as Community Life,” 1-2. Expanding on his conception of “waste,” Mbembe continues: “In order to grasp the particular drama of the human in the history of South Africa, we should broaden this traditional definition of ‘waste’ and consider the human itself as a waste product at the interface of race and capitalism. Squandering and wasting black lives has been an intrinsic part of the logic of capitalism, especially in those contexts in which race is central to the simultaneous production of wealth and of superfluous people” (at 3).

38 Ibid., 6.

39 Farred, “The Not-Yet Counterpartisan.”
apartheid and post-apartheid eras, especially around the perpetuation of racialized economic inequalities. The differences in these historical narratives are critically significant, as they help to either negate or support the basis for continued, post-apartheid struggle.

As a liberal ideology of inclusion, the ANC’s “non-racialism” has proven particularly well-suited to legitimating South Africa’s political economy and managing a neoliberal, market-based project. Rather than being an “anti-racist” ideology, “non-racialism” did not actually break with apartheid categorizations of race, but instead accepted the idea of distinct, biologically-defined “national groups.” It merely asserted the liberal desire for equality between these groups, and thus has proven useful in creating a small black middle class and simultaneously denying claims for more widespread redistribution.\(^\text{40}\) Michael MacDonald has examined the role of liberal racial ideology and racial nationalism in spurring the ANC’s Black Economic Empowerment (BEE) program,\(^\text{41}\) while simultaneously suffocating opposition to neoliberal capitalism.\(^\text{42}\) As MacDonald writes, the ANC “can absorb the political costs of maintaining neoliberal economic policies because it draws on racial solidarities, because it appeals to Africans as

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\(^\text{41}\) BEE policies set targets for businesses to diversify their management, investment, and procurement practices. Despite over a thousand “empowerment deals” taking place between 1995 and 2005, minority whites continued to dominate the corporate sector. In 2005, as Tangri and Southall write, “only five of the Johannesburg Securities Exchange (JSE) top 200 companies had black ownership of more than 51 per cent, only 27 companies had more than 25 per cent, and these 32 companies together accounted for less than 2 per cent of the JSE’s market capitalisation. After over a decade of ANC rule and hundreds of BEE transactions, empowerment has made very little difference to the ownership and control of corporate South Africa.” Roger Tangri and Roger Southall, “The Politics of Black Economic Empowerment in South Africa,” *Journal of Southern African Studies* 34(3) (2008): 699-716; Stefano Ponte, Simon Roberts, and Lance Van Sittert, “‘Black Economic Empowerment,’ Business and the State in South Africa,” *Development and Change* 38(5) (2007): 933-955; Xolela Mangcu, Gill Marcus, Khehla Shubane, and Adrian Hadland, eds., *Visions of Black Economic Empowerment* (Johannesburg: Jacana, 2007).

\(^\text{42}\) MacDonald, “The Political Economy of Identity Politics.”
In the next section I examine parliamentary debates over prison privatization and legislation that lengthened prison sentences and made the criminal justice system more “tough on crime.” Here too ANC members of parliament defended the process of awarding private prison contracts because such contracts would “contribute to the black empowerment,” as some of the private consortia included black partners. While prisons generally epitomize a lack of freedom, the MPs suggested that prison contracts would lead to black empowerment on two fronts; they argued that black-owned consortia would be enriched and that conditions for black people, who were the majority of those crowded in the country’s prisons, would improve. This may have been a convenient talking point (deployed to defend against accusations of corruption) or an actual conception of economic development—or both. Either way, it chimes with the ANC’s overall BEE approach, which mandated black representation on private consortia bidding for government contracts, thereby increasing the number of blacks among the millionaire ranks. This is but one example of how liberal racial ideology—which sought equal representation of all “racial groups” among the highest economic ranks—has provided justification for neoliberal policies that continued to exclude the majority of South Africans from economic prosperity. By this logic, black tenders for private prison construction can be presented as evidence of inclusivity and transformation. Meanwhile, more black South Africans are serving prison terms, with longer sentences, in institutions that, under apartheid and after, exemplify unfreedom.

III. Crime, criminal justice & prisons during the transition period

A. Visions & key players

As with nearly all policy changes during the transition from apartheid, the move to adopt harsh criminal justice and prison policies took place in a very compressed

43 Ibid., 634.
In its years as a freedom movement, the ANC had not developed clear policy prescriptions on crime, policing, courts, and prisons. Yet there is evidence that the party’s position on crime and punishment was once more skeptical of prisons as a solution for criminal activity. A 1992 ANC policy document on crime, crime control, and the role of the police characterized crime as linked to poverty and declared that prisons would not solve the country’s crime problem. The policy document “referred to ‘crimes of the poor such as street crime’ and attributed these to ‘the structural violence of the apartheid era.’ It stated that ‘our crime problems are NOT being solved by large-scale imprisonment’ and that ‘however much one condemns those deeds’ the State response should show compassion for the perpetrator.”

The ANC’s Reconstruction and Development Programme (RDP), the socio-economic policy framework it adopted in 1994, included a short section on prisons. The RDP stated that prisons must not only restrain but also rehabilitate and train convicted persons; that the military command structure of the prison service must be transformed; that prisoners must enjoy human rights and that punishment that infringes basic human rights (including solitary confinement and

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44 It must be noted that the post-apartheid prison system was hardly invented out of whole cloth in 1991. Beginning in the 1970s, the National Party government made a series of liberal reforms to the judicial and prison systems, and the 1980s saw a distinct shift in penological focus toward rehabilitation. (For an in-depth discussion of these reforms, see Super, Governing through Crime, chapter 6; Dirk van Zyl Smit, South African Prison Law and Practice [Durban: Butterworths, 1992].) The political changes of the early 1990s—including Nelson Mandela’s release from prison and the unbanning of the ANC and other banned organizations—also brought changes in the prison service. The government repealed racially discriminatory legislation regarding the treatment of prisoners, and began to desegregate prisons. In 1991 the Prisons Service was separated from the Department of Justice and renamed the Department of Correctional Services. The new department was tasked with managing prisons and administering a new category of non-custodial sentence called “correctional supervision.” (See Human Rights Watch, The Human Rights Watch Global Report on Prisons (New York: Human Rights Watch, 1993), 227.) While apartheid prisons remained horribly overcrowded and prisoners endured gross indignities and human rights violations, the government had moved toward liberal reforms, some of which—including the “correctional services” appellation and approach—would endure through the democratic transition process.

dietary punishment) must be ended; that the Prison Act must be substantially reformed
to allow the public to be informed about prison conditions; that all children should be
released from prisons and police cells; and that special accommodations should be made
for pregnant women and mothers with small children in prison. These were specific
recommendations, but the space given to prisons paled in comparison to other socio-
economic issues.

Ultimately, the direction of post-apartheid prison reform would be decided in
large part by a political outlier: Dr. Sipho Mzimela, an Anglican priest who spent 33 years
in exile, and had a tumultuous relationship with the ANC. He was an ANC loyalist until
the late 1980s when he abruptly joined the IFP. In 1993, he published *Marching to Slavery: South Africa’s Descent to Communism*, a book in which he denounced Mandela and the
ANC, charging that they were marching the country down a communist path that would
spell “the end of civilization in all of black Africa.” He would later distance himself from
the book, but his career in the coming years would focus on proving his main political
point: “a small decentralized government is best.” After delivering an impassioned
prayer to open the IFP’s national congress in 1993, Mzimela became a fiery party leader
who, within two years, would become national deputy chair. After the 1994 election,
President Mandela appointed Mzimela as Minister of Correctional Services. Despite the
ANC’s landslide victory, the interim constitution had provided for a controversial
“government of national unity,” mandating that any opposition party that received more
than 5 percent of the vote be represented in the cabinet. The Correctional Services


48 Ibid; Sipho Mzimela, *Marching to Slavery: South Africa’s Descent to Communism* (Dunwoody:
Soundview, 1993).

49 Gevisser, “Priest Who Takes No Prisoners.”

portfolio was not a high priority for the ANC, and leadership over the portfolio was given to Dr. Mzimela.\textsuperscript{51} Thus, Mzimela had little allegiance to the ANC’s vision or to President Mandela. Rather, Mzimela came into his post with strong U.S. connections and an affinity for U.S.-style incarceration, acquired from his years as a former prison chaplain in the U.S.\textsuperscript{52} During his years in exile, he had met Goltz Wessmann, a businessman specializing in the use of technology to modernize prison systems, who would become his Special Advisor in 1995.\textsuperscript{53}

Still, the ANC did not cede the ground entirely to Mzimela. Responding to pressure from outside the department, Deputy President Thabo Mbeki convened a meeting in early 1995 of all key players in the corrections field, including the Department, the Minister, the parliamentary portfolio committee, and the newly formed Penal Reform Lobby Group.\textsuperscript{54} In July 1995, a Transformation Forum, funded by the Danish Government, was created to bring various stakeholders together to reshape the Department of Correctional Services.\textsuperscript{55} The forum was chaired by ANC politician Carl Niehaus, a former political prisoner who also chaired the parliamentary portfolio committee on correctional services. The forum was made up of “a strange mixture of old-regime prison staff generals, former ‘common law’ prisoners, trade union activists and idealistic penal reformers.”\textsuperscript{56} In preparation for the forum’s work, a group of 22

\textsuperscript{51} See Giffard, \textit{Out of Step?}, 32.

\textsuperscript{52} Sloth-Nielsen, \textit{Overview of Policy Developments}, 5.


\textsuperscript{54} Giffard, \textit{Out of Step?}, 34. The Penal Reform Lobby Group (PRLG) included the trade union Police and Prison Officer’s Civil Rights Union (POPCRU), the South African Prisoners Organization for Human Rights (SAPOH), the National Institute for Crime and the Rehabilitation of Offenders (NICRO), Lawyers for Human Rights and research groups (Ibid.).

\textsuperscript{55} van Zyl Smit and van der Spuy, “Importing Criminological Ideas,” 194-5; Giffard, \textit{Out of Step?}, 34.

\textsuperscript{56} Van Zyl Smit et al., “Importing Criminological Ideas,” 195. See also Giffard, \textit{Out of Step?}, 34.
individuals representing the Department, NGOs involved in correctional services, and members of the parliamentary committee on correctional services took a two-week tour to Denmark, Holland and Britain to visit prisons and institutions.\textsuperscript{57}

Virtually from the start, the Transformation Forum was plagued by a total lack of coordination between it and Minister Mzimela’s office. The ministry did not send representatives to forum meetings as promised, and by February 1996 it announced that it was terminating the Department of Correctional Services’ participation in the forum.\textsuperscript{58} After a media fight between the forum and the department, President Mandela instructed the Minister to re-engage with the forum, which he did.\textsuperscript{59} Even so, the lack of communication and coordination continued. By late 1996 Niehaus had been appointed ambassador to the Netherlands and the forum collapsed.\textsuperscript{60} With the collapse of the forum, idealistic reformers who clung to hopes for a prison system modeled after “more communitarian continental European notions” were upstaged by Minister Mzimela and his plans for American-style prisons.\textsuperscript{61}

While members of the would-be Transformation Forum toured Western Europe in 1995, Minister Mzimela had traveled to the U.S. That year Minister Mzimela went to the U.S. to attend the American Corrections Association conference and visit various prisons to, as he put it, “find solutions to overcrowding, poor building design and lack of programmes in our prisons.”\textsuperscript{62} He visited the U.S. and U.K. with senior Correctional


\textsuperscript{59}Giffard, \textit{Out of Step?}, 35.

\textsuperscript{60}Van Zyl Smit et al., 195.

\textsuperscript{61}See ibid.

Services officials again in 1997 and, according to accounts, the 1997 trip confirmed his ideas that private prisons would be a cost-effective option for South Africa. Mzimela and his staff delegation returned from these trips with two clear recommendations for South Africa: the privatization of prisons and the adoption of American-style super-maximum security (“supermax”) prisons. As we shall see, he was a particularly strong proponent of private prisons. He played an enormous role in determining the direction that prison reform would take in South Africa, and he was eager to pattern the country’s system after the United States.

Minister Mzimela wasted little time before opening a new high-security CMax prison in Pretoria in September 1997. The prison was described as a forerunner to super-maximum prisons, with prisoners being kept locked up in a cell for 23 hours a day, with only one hour of exercise per day. Only minimal Constitutional rights were to be allowed, with all meals served inside cells, only three non-contact visits per month, and prisoners handcuffed at all times when moving around outside cells. Minister Mzimela kept the CMax prison a secret from even top Department officials until a week before it was put into operation, reportedly out of fear that it might provoke protests or halt the project. Afterward Mzimela said that he could not risk discussing the project before implementation, stating, “If you think what you are doing is good, you act first and apologize later. The reason why we could not develop the mine-shaft prison idea was that we said it first. We learned from that.” Mzimela was referring to a controversial

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65 Ibid.


68 Ibid.
plan to house prisoners down defunct mine-shafts. He had let the plan slip at a press conference several months earlier, and was met with enough backlash that the project could not go forward.\textsuperscript{69} Indeed, CMax drew criticism from human rights groups as soon as it was revealed, drawing charges that the 23-hour lockdowns equated to solitary confinement, a contravention of international human rights conventions. Mzimela denied that this was solitary confinement, instead calling it “high security.”\textsuperscript{70} While human rights groups may have been upset by the opening of the CMax prison, politicians from all parties were quick to praise Mzimela during parliamentary sessions for being tough on crime and assuring against prison escapes.

The similarities between the CMax prison (and the super-maximum prisons that followed in its wake) and US maximum and super-maximum facilities was no accident. As Buntman and Munthing write in their study of the adoption of super-maximum facilities in South Africa, “The two South African supermaximum security facilities were strongly modeled on U.S. supermaximum security facilities.”\textsuperscript{71} They continue:

Then minister Mzimela spent part of his years in exile (early 1960s through early 1990s) in the United States, where he met up with his future advisors, Golz Wessman and Sishi Mthabela. When Ebongweni [the super-maximum prison at Kokstad] was still at a conceptual stage, both Wessman and Mthabela returned to the United States on a study tour, including to a supermaximum security facility in Colorado. Once the idea for Ebongweni was approved, a team including architects was also dispatched to the United States to study supermaximum-prisons.

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\item \textsuperscript{69} “South Africa: Plans to Turn Disused Mines into Prisons,” AP Archive, Mar. 6, 1997.
\item \textsuperscript{70} Edmunds, “CMax Prison Hatched in Secret.”
\end{itemize}
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security prisons; Ebongweni was ultimately modeled on Marion, a supermaximum prison in Illinois.\textsuperscript{72} \textsuperscript{73}

While the move to construct super-maximum prisons was largely driven by Minister Mzimela and his advisors, the broader shift toward tough-on-crime criminal procedure and sentencing legislation was a more communal effort, with support from across the political spectrum. This adoption of a “War on Crime,” driven from the highest levels of the ANC, is the focus of the next section.

\textbf{B. Perceptions of a ‘crime wave’}

The debate over a post-apartheid “crime wave”—its existence, its size, its cause and its implications—was, and remains, hotly contested. But without a doubt, nearly immediately after taking power, the ANC government faced increased pressure to deal with what press was reporting as a “crime wave.” Whatever the ANC’s position on the appropriate response to crime before taking power and during the transition period, it was now compelled to respond with decisive action. According to the typical narrative, the transition to democracy led to an increase in crime, with some press reports going so far as to call it a “descent into barbarism.”\textsuperscript{74}

An in-depth discussion of whether and to

\textsuperscript{72} Buntman and Muntingh, “Supermaximum Prisons in South Africa.” Buntman and Muntingh’s account is based on interviews with F.J. Venter, a staff officer in the commissioner’s office at the time the Department of Correctional Services began the move to super-maximum facilities and Golz Wessman, advisor to Minister Mzimela.

\textsuperscript{73} The Marion super-maximum prison in Illinois was the first super-maximum prison in the world. The super-maximum security level began after two prison guards were killed in 1983. The prison went into “permanent lockdown” for the next 23 years, with prisoners being confined to their cells for the majority of the day. See Stephen C. Richards, “USP Marion: The First Federal Supermax,” \textit{The Prison Journal}, 88(1) (2008): 6-22.

\textsuperscript{74} D. Cassere, “A Harrowing Week Listening to the Pain of Our Crime Ravaged City,” \textit{Cape Times}, Aug. 23, 1996, cited in Gail Super, \textit{Governing through Crime}, 19. Cassere writes: “At one stage, right after our first democratic elections, we were the envy of the world … if you have been following the Crime Line stories this week you will know that people are being raped, mugged, murdered, hijacked and burgled. They are screaming for the death penalty to be reinstated and some have even suggested resorting to more old-fashioned methods, such as hanging, drawing and quartering and whipping with the cat o’ nine tails … As the country descends into barbarism, so the people call for barbaric solutions … The streets are filthy, transport is dodgy, many areas are
what extent crime increased after the transition from apartheid lies outside the scope of this article. Nevertheless, several caveats about the post-apartheid crime wave narrative are worth noting.

First, apartheid statistics did not include the Bantustans, thus resulting in an unknown amount of unrecorded crime during apartheid. In the same vein, crime in Black townships (which had low police resources) went greatly undercounted. Thus post-apartheid crime statistics included vast locations that were previously unaccounted for, making comparisons between apartheid and post-apartheid crime rates dubious at best. Similarly, the Institute for Security Studies, among others, has argued that South Africa’s spiraling crime rate may be a statistical illusion, the product of improved reporting. ISS’s 2002 study of police statistics found that commonly underreported crimes were on the increase after 1994, but those most likely to be reported (murder, car theft, and business burglary) declined between 1994 and 2001.

Second, social theorist Gail Super has written at length about how official statistics show a rise in crimes such as murder, housebreaking, and robbery dating back to the mid-1980s, with a dramatic rise in official crime statistics in the 1980s. Such data refutes the notion that it was the transition to democracy that caused an increase in crime, and instead pushes the timeline back, locating some causes of increased crime in the late 1980s.

not safe to go to at all, people are ripped off by business as a matter of course, even before the muggers can get to them, the unemployed and homeless have taken over public areas and people are taking the law into their own hands in the absence of justice. Our peacekeepers are demotivated because as soon as they arrest someone he or she is out on bail.”


77 Ibid.

apartheid era. Finally, as Super has highlighted, there was an increase in two types of crimes beginning in the early 1990s that reflected a shift in the patterns of victimization: 1) attacks on ‘civilians in their own homes’ (ie. white senior citizen victims); and 2) car hijacking and cash-in-transit heists. Khehla Shubane dates the first use of car hijackings back to the 1980s—a tactic used by “comtsotsis” who argued that they were advancing the goals of struggle. It is no wonder that home invasions and carjackings would draw more attention than other types of crimes, so this may have contributed to the sense of a dramatic rise in crime.

Indeed, whether there was an overall increase in crime or not, popular perceptions about crime and the government’s ability to control it did change between 1994 (when the ANC was elected to power) and 1995. Whatever the reality of crime, these perceptions demanded a response from the government. A 1994 Human Sciences Research Council survey found that 75 percent of South Africans believed that government had crime largely under control. By early 1995, more South Africans believed that government had little or no control over crime than believed the contrary. When President Nelson Mandela gave an extended address at the opening of parliament in mid-February 1995, he was compelled to address the problem of crime at length, as I will expand upon in the next section.

By 1997, reports of South Africa’s “crime wave” filled national and international media. Consensus said that the crime wave was bad for business and tourism, thereby

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threatening prospects for international investment and economic growth. In the first half of 1997, South Africa’s four largest banks faced a wave of robberies; almost 300 banks were robbed, nearly three for each day the banks operated.\footnote{83 “Focus on South Africa: Surge in Armed Robberies Propel Banks to Action,” \textit{The Wall Street Journal Europe}, Jun. 10 (1997), p. 24.} In an unprecedented move, Nedcor announced that it would close nine of its branches in central Johannesburg, “in response to the reputation earned by the country’s main commercial hub as a popular weekend robbing ground.”\footnote{84 Ibid.} The Council of South African banks reported that the bank industry would spend about R376 million to protect bank branches and cash-in-transit operations, but maintained that private security expenditure would not do anything to abate crime rates. For that, the Council called for “a far more diligent, less corrupt, law-enforcement system.”\footnote{85 Ibid.}

In a response to public demands for decisive action,\footnote{86 Ibid. See also COSATU statement on the Appointment of Meyer Kahn, May 26, 1997, http://www.cosatu.org.za/docs/pr/1997/pr0526a.html (“Whilst we welcome Mr Kahn, he should also bear in mind that managing an institution for profit is different from managing an institution which deals with the delivery of services to the communities. We also note the fact that the South African Breweries (SAB) has not always been at the forefront for the respect of workers rights.”).} the government named Meyer Kahn, the head of South African Breweries Ltd., one of South Africa’s largest industrial conglomerates, as new chief executive of the national police force. The New York Police Department’s former chief Bill Bratton, notorious for implementing “broken windows” policing, had offered his services, but the government declined.\footnote{87 “Beer Cop,” \textit{The Economist}, May 29, 1997.} Kahn’s appointment as chief executive of the South African Police Service (SAPS) resulted, as van Zyl Smit writes, in “the importation of many familiar managerial credos. The SAPS was introduced to ‘policing by objectives’ and ‘performance-based indicators’ intended to increase the efficiency of this intractable bureaucracy. [T]he latest managerial
techniques that South African big business had adopted from its western counterparts were deployed—with limited success—towards the goal of improving policing capacity.”

When it came to prisons and criminal reform legislation, proponents of private prisons and new super-maximum security technologies—including officials in the Department of Correctional Services—drew a straight, causal line from the post-transition crime wave to the need for more prisons and ‘modern’ technology. In this framing, the transition to democratic rule precipitated a crime wave, which led to overcrowded prisons and a need for more prisons, which would lead to a budget crisis, which led to the solution of public-private sector partnerships for constructing new prisons. This is the narrative favored by, for example, Goltz Wessmann, Special Advisor to the Minister of Corrections:

A dramatic increase in the crime rate severely overcrowded prisons. This led to a chain reaction because as more prison space was required, constant staff shortages emerged due to poorly designed prisons, which in turn resulted in more prison escapes and therefore increased pressure from the community. An increase in staff and prison space meant higher budgets, which was not available and still is not. Alternatives had to be found and the Minister turned to the Private Sector, who jumped at the opportunity to participate in the process.

However, there is reason to doubt this “chain reaction.” In the next section, I argue that the plan to move toward public-private partnerships in prison construction existed earlier, and that it was not a direct outgrowth of a rising crime rate. Although crime was a serious problem during the transition period, public-private partnerships in prisons were part of a larger development strategy. When government officials declared a “war on crime” and passed legislation to help fight that war, there were larger socio-economic objectives at hand beyond just decreasing crime rates.

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88 Van Zyl Smit and van der Spuy, “Importing Criminological Ideas,” 189.

C. Declaring a ‘War on Crime’

In February 1995 South Africa’s first democratic and non-racial parliament was new and still finding its way—its first members had been sworn in just nine months before. President Mandela delivered an address to open the parliamentary session in which he outlined the central problems facing the country and the work that lay ahead. The government faced monumental tasks: creating and staffing institutions; attempting to “bring the government to the people” by opening up national and provincial legislatures to scrutiny and accountability; drafting and passing legislation; rooting out corruption; building infrastructure for upcoming local elections; transforming the judiciary; creating a budget that would balance fiscal discipline with the need to provide basic infrastructure for millions who were previously un-served.90 The tasks were enormous and, Mandela wished to reiterate, resources were not. Already the ANC government was focused on budgetary and economic policies that privileged deficit reduction, foreign direct investment, and privatization; at the same time, this would require a tamping down of popular expectations about the government’s ability to directly provide for its citizens.91

President Mandela asked people to lower their expectations for what the government could deliver because the government did not have “a big bag full of money.”92 Instead, given binding contractual obligations and carry over expenditure, the government had “extremely limited resources to address the many and urgent needs of our people.” Mandela urged people to rid themselves of the “culture of entitlement which leads to the expectation that the government must promptly deliver whatever it is that we demand, and result in some people refusing to meet their obligations such as rent and


92 “Address by President Nelson Mandela on Occasion of Opening of Parliament.”
service payments or engaging in other unacceptable actions such as the forcible occupation of houses.” At the same time, the government would continue to “ensure the creation of an investor-friendly climate” and continue its commitment to fiscal discipline and reducing the budget deficit.

Near the middle of his address, President Mandela turned to what he portrayed as related problems that had the potential to interrupt the government’s progress on many fronts: anarchy and crime. Mandela condemned “the attempt by some in our country to introduce anarchy into our society.”

He continued, “I speak of those who engage in such totally unacceptable practices as the murder of police officers, the taking of hostages, riots, looting, the forcible occupation of public buildings, blocking of public highways, vandalization of public and private property and so on. Some of those who have initiated and participated in such activities have misread freedom to mean license.” Mandella warned such elements that his government and the masses who put them in office were not afraid of struggle; “we are, after all, a product of confrontation and struggle.”

In doing so, he framed his opposition as enemies of the government and the people, and made it clear that his government would battle and defeat them. “In the same vein,” he continued:

[W]e must address the question of crime. The situation cannot be tolerated in which our country continues to be engulfed by the crime wave which includes murder, crimes against women and children, drug trafficking, armed robbery, fraud and theft. We must take the war to the criminals and no longer allow the situation in which we are mere sitting ducks of those in our society who, for whatever reason, are bent to engage in criminal and anti-social activities.

Mandela explained that the Minister of Safety and Security, the National Commissioner of the Police Service, and the security organs as a whole had already been instructed to

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93 Ibid.

94 Ibid.

95 Ibid.

96 Ibid.
take all necessary measures to bring down crime levels. But he also stressed that the matter of safety and security should not be left to law enforcement alone. The police would need the full and active support of communities, and Mandela lauded the police-community fora that had already been established as important to increasing the capacity of the country to deal with the problem of crime.\footnote{Community police fora had already become a statutory requirement, enshrined in both the interim Constitution and the South African Police Service Act 1995 (Section 212 of the interim Constitution; ss. 18 and 19 of the South African Police Service Act). See van Zyl Smit and van der Spuy, “Importing Criminological Ideas,” 188.} Already crime and crime control were high on the agenda, and President Mandela had declared a war on crime. As we shall see, the concept of a “war on crime” introduced by President Mandela would become a familiar refrain from Cabinet members and members of parliament.

The phrase “war on crime” will be familiar to many readers, particularly those in the U.S. who have heard it echo for decades. It followed alongside President Johnson’s “war on poverty” and was a forerunner to the “wars” on drugs and terror. Indeed, the notion of a “war on crime” originated with President Johnson in the mid-1960s.\footnote{See Lyndon B. Johnson, “Special Message to the Congress on Crime and Law Enforcement,” Mar. 9, 1966 (“The front-line soldier in the war on crime is the local law enforcement officer;” “The war on crime will be waged by our children and our children’s children.”) See Elizabeth K. Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America (2016).} His Omnibus Crime Control and Safe Streets Act of 1968 increased federal funding and involvement in state and local law enforcement. President Nixon famously reiterated the ‘war on crime’ rhetoric in his 1970 State of the Union address. Nixon said there would be no increases in the forthcoming federal budget, save for one area—law enforcement agencies, and specifically federal spending to assist local law enforcement. He asserted, “We must declare and win the war against the criminal elements which increasingly threaten our cities, our homes and our lives.”\footnote{Associated Press, “Nixon Declares War on Crime, Pollution,” The Miami News, Jan. 22, 1970.} Addressing the members of the legislature in the audience, he added: “I doubt if there are many members of this Congress who live more than a few blocks from here who would dare leave their cars in the Capitol Garage
and walk home alone tonight.” Playing on visceral fears, Nixon urged Congress to pass anticrime legislation that would give the executive “new and stronger weapons” in the fight against crime.

As the next section shows, South Africa’s war on crime did not entail a massive spending outlay but instead involved new “public-private partnerships” and tougher criminal procedure and sentencing legislation. Rather than justifying huge budgets for policing and prisons, the post-apartheid war on crime justified austerity, a focus on creating secure conditions for foreign investment, and experiments in privatization. Although department ministers and parliamentarians called for larger policing and corrections budgets, it was nonetheless clear that the private sector would have a large role to play. Indeed, Minister Mzimela moved fastest of all. As we shall see, when he presented his budgets to parliament, he stated that he had anticipated that there would not be sufficient public funds, so he had taken the initiative to bring the private sector on board.

IV. Fighting the ‘War on Crime’: Post-apartheid criminal justice legislation and parliamentary debates

After the Transformation Forum collapsed in late 1996, Minister Mzimela was freed to pursue his vision for an American-style prison system with little distraction or interference. Still, his department needed budget approval and some of his proposals required legislation—for that, he needed to work with parliament. This section will examine parliamentary debates about criminal justice reform legislation and appropriations for policing and prisons. These texts reveal much about the level of debate and its terms, but especially about the level of consensus. Debates over appropriations also show how prisons—and the budget for them—fit into broader, neoliberal economic development priorities. In the first five years after the end of formal apartheid, the parliament passed a wave of legislation reforming the criminal justice system. In this section, I will examine two types of parliamentary debates: appropriation debates tied to specific departments (e.g. corrections, safety and security) and debates over proposed
legislation (e.g. the Correction Services Amendment Act and Criminal Law Amendment Act of 1997). The debates show how a focus on austerity, combined with loud calls for a stepped up war on crime, would see departments across the justice system turning toward privatization. This privatization took different forms across various departments—for policing and the courts, this meant a push for “community policing” and “community fora” to handle and resolve disputes within communities, rather than relying on state bureaucracies. For correctional services, this meant “public-private partnerships” to build and maintain prisons.

A. 1996 budget debates: Police, courts, and prisons

i. Police

In May 1996, the Minister for Safety and Security, Sydney Mufamadi, described the budget he had proposed and expressed a strong need for the country to deal with crime. He noted that high levels of crime were “not uncommon for a society in transition.” Crime had become “the common enemy of all citizens of South Africa, so it is not an overstatement to say that we are fighting a war against crime.” Mufamadi used the metaphor of waging a war on crime repeatedly, and pointed out that the Cabinet had “reaffirmed its belief that crime poses a serious threat to our democracy itself” by adopting a National Crime Prevention Strategy the previous week. He highlighted the importance of this war against crime, stressing its financial costs. Although the exact figures were disputed, the South African Police Service had estimated the value of commercial crime reported in 1995 at R2.6 billion, with some in the private sector claiming the true figure was five times as high. Mufamadi expressed gratitude that the

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102 Ibid., 1851.

103 Ibid.
private sector had stepped in to help the government in waging the war on crime. A consortium called Business Against Crime had paid for an international management consultancy to assist 100 of the country’s poorest-performing police stations. “This,” Mufamadi declared, “is an example of the kind of public-private sector partnership that is essential if we are to wage this war successfully.”

In the parliamentary debate that ensued, there was little disagreement over what was at stake. Opposition party parliamentarians and the ANC alike were clear that crime was a test of the ANC’s ability to govern, the new democracy’s ability to function, and the economy’s potential to expand. What is striking is the language of the debate, both here and in debates in the following weeks about appropriations for the court system and prisons. There is an indisputable U.S. influence, with references to New York-style policing, U.S. city curfew policies, former New York Police Chief William Bratton, and more. As one official remarked, “My initial feeling is that it looks very much like the American system. I am just wondering whether the [honorable] Minister got his inspiration from LA Law.”

This influence resonated across the political spectrum—from the Freedom Front (FF), National Party (NP), and African Christian Democratic Party (ACDP) on the right, to the Democratic Party (DP) in the middle, to the ANC, and to the Pan African Congress (PAC) on the left. For example, MP Andre Fourie of the NP stated:

A lot has been written about the so-called New York option. Perhaps we should seriously consider the New York option, as opposed to the Washington option, and create an anticrime culture in the hearts and minds of every single South

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104 Ibid., 1857.

105 MP D M Bakker: “Certain cities in the United States of America, in an effort to combat crime, have introduced a teenage curfew in terms of which teenagers are not allowed on the streets after a certain time at night. I do not regard this as the answer and believe that a teenage curfew would be against the nature of our Constitution. However, it illustrates creative thinking in an effort to combat crime. These are the types of practical measures that are now necessary in our country to address crime.” Hansard, “Appropriation Bill,” Debate on Vote no 19—Justice, Vols. 9-10, col 2923, Jun. 13, 1996.

106 Ibid., 2874.
African. New York, once the crime capital of the United States of America, through the perseverance of newly-elected mayor Rudolf Giuliani, who fought with vigour any attempt to cut the budget of the police, and with his police chief William Bratton pursuing crime aggressively, saw crime dropping by 11% in 1994 and 17% in 1995.

In contrast, Washington mayor Marion Barry, with a lukewarm approach, campaigning with promises of giving conjugal visits to convicts and more exit money on their release, is trailing far behind in combating crime.

The question is: What is the philosophy and approach of the Minister? Is he going to opt aggressively for the New York option or is he going to stick to the Washington recipe? We say, and we would like to advise him, that if he wants to be totally committed to eradicating crime in South Africa, let him opt for the New York option. [Interjections.] It is no good for the Minister to say that he has declared war on crime when he is not prepared to shoot in that war. [Laughter.]¹⁰⁷

Notably, the references to “New York” and “Washington” options were not fleshed out with any specific recommendations for what the Minister could be doing differently to be more in line with either approach. The two options were rhetorical devices used to ask whether the Minister and his party would be tough or soft on crime. The takeaway was that the Minister must have the guts and political will to ask for a robust budget for the police service, and demonstrate that he would not be soft. Tying the fight against crime to prospects for economic development, MP Fourie stated: “[The Minister] will have to prove to the international community, potential investors, the bankers of the world and potential tourists that South Africa can become a sound and safe country to come to and invest in.”¹⁰⁸

**ii. Courts**

Two weeks later a debate over court system appropriations showed the difficult tension between the challenge to focus on a “rising crime wave” while also making budget cuts. ANC MP Fatima Hajaig’s comments are indicative of the way in which many

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¹⁰⁸ Ibid., 1866.
members framed the problem of crime (heavily couched in concerns for business investment and economic growth) and the problem of a lack of funding to deal with it:

As we all know, the most challenging and formidable problem facing us in our country is the stranglehold crime has on our people and on the growth of our economy. Figures put forward by Nedcor in a recent study are devastating. A staggering R31 billion per year is lost through crime.

… [U]nless crime is addressed in a meaningful way, nothing, but nothing, will grow in terms of our economy and providing a better life for all our people.

We all recognize that we need to combat crime. It therefore seems illogical that State Expenditure has cut the Justice budget by more than R500 million. This means that more or less 1,400 posts which are sorely needed in the Justice Department have to be shelved. I must point out that if we are serious about crime and serious about entrenching the rule of law in South Africa, we need to increase the budgets of departments which are involved in minimizing crime.109

MP Hajaig went on to discuss two related solutions for addressing this problem, namely, increasing the legitimacy of community policing and establishing a system of lay judicial participation to “link up with a community law-and-order system.”110 In one of the few mentions of rural areas in the appropriation debates on criminal justice, Hajaig argued that efforts to enhance access to justice would have to take a “rural bias,” as those areas were previously neglected.111 She pointed out that traditional or customary courts in rural areas had suffered a degree of illegitimacy in the past because they had been abused by “repressive tribal authorities.” Yet, such courts had several advantages, including opportunity for mediation, informal inquisitorial procedures (rather than a public trial with a win-or-lose result), and low running costs. With this in mind, she proposed that “a conscious program of reconstruction to restore legitimacy should be undertaken. These courts can be adapted to meet the new challenges of a constitutional State and a


110 Ibid.

111 Ibid., 2915.
human-rights culture by serving as lay community courts for the rural sector of our society.”\textsuperscript{112}

\textit{iii. Prisons}

In June 1996, Minister Mzimela of the Department of Correctional Services would have his turn to present his budget to parliament. The most striking thing about the budget discussion is how far along the move to public-private partnerships in prison construction and management had come in the short period since Mzimela had assumed leadership. Mzimela began by pointing out that the country’s prisons were highly overcrowded and that the department was under budget. The department’s budget catered for 97,000 inmates and 33,000 probationers while the projected number of inmates for 1996 was 125,000, along with 47,000 probationers.\textsuperscript{113} While the department was already bracing for another year of overcrowding, Commissioner Fivaz of the Department of Safety and Security had announced just days before that he had “identified some 10,000 criminals” to be arrested in the next 30 days. If convicted at previous rates, 60-70% of those would be found guilty and sent to prison.\textsuperscript{114} While the sweep of arrests never happened,\textsuperscript{115} the move toward private prisons to deal with overcrowding and budget shortfalls did.

Indeed, cost was a huge factor in decisions about how to reform the prison system the country had inherited from apartheid. Given the need for drastic change in other areas of the economy such as housing, education, and healthcare, prisons were low on

\begin{footnotesize}
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\item[\textsuperscript{112}] Ibid., 2915-6.
\item[\textsuperscript{114}] Ibid.
\item[\textsuperscript{115}] Commissioner Fivaz’s promise to arrest the 10,000 criminals within 30 days fell flat. Safety and Security secretary Azhar Cachalia criticized the announcement as “ill-conceived … media hype.” Another senior player told the Mail & Guardian that “because the 10 000 weren’t caught, and could not even be identified, it was a disaster, leading the public to believe that the whole excellent 12-month plan—of which it was really only a small component—was a failure. It had the exact opposite of its intended effect: it demoralised the public and the police alike.” See “Craig Kotze, Police Commissioner George Fivaz’s Communications Adviser,” Mail & Guardian, Aug. 2 (1996).
\end{itemize}
\end{footnotesize}
the list of budgetary priorities and received a relatively small budget.\textsuperscript{116} Meanwhile, prison overcrowding was a pressing concern.\textsuperscript{117} In August 1992, Human Rights Watch found that Pollsmoor Prison in Cape Town held 6,631 people in a space designed to accommodate 4,598—an overcrowding of 48 percent.\textsuperscript{118} Overcrowding was even worse in Pollsmoor’s maximum security section, which had an overcrowding of 97 percent.\textsuperscript{119} Although the government undertook several large-scale amnesty and mass release efforts, this did not solve the problem of crowding. The Correctional Services Department saw a need to embark on a rapid prison-building program to alleviate overcrowding.\textsuperscript{120} Faced with these problems and an inadequate corrections budget, it is unsurprising that private-sector alternatives were appealing to department officials and policymakers.

Against the backdrop of needing to house, feed, provide with medical care, and supervise the targets of Fivaz’s sweep on top of an already overstretched budget, Minister Mzimela revealed that the department had already approached the private sector. He stated: “Against this background of insufficient funds and rising numbers in our prisons, we have taken the initiative of looking for alternative ways of providing suitable accommodation to inmates. We approached the private sector and discussed with them measures which would lead them to finance, design, construct and maintain new facilities, and lease them to the Government over an agreed period. This would enable the Government to provide up-to-date facilities without getting into too much debt.”\textsuperscript{121} His main argument in favor of bringing the private sector in was that it would be cost effective, and would allow the department to avoid asking for billions of dollars for

\textsuperscript{116} Giffard, \textit{Out of Step?}, 46.

\textsuperscript{117} Ibid., 21.

\textsuperscript{118} Ibid. See also Africa Watch Prison Project, \textit{Prison Conditions in South Africa} (1994).

\textsuperscript{119} Giffard, \textit{Out of Step?}.

\textsuperscript{120} Sloth-Nielsen, \textit{Overview of Policy Developments}, 14-15.

capital projects. He also noted that the department would be able to offer things like “workshops and even factories for inmates to be trained and to work productively in”—what he posed as rehabilitative activities that the government would not be able to finance.

In fact, the government had already begun a pilot program of privately-run juvenile prisons. Mzimela explained that the Department of Correctional Services had approached the private sector and asked, not for a loan, but “an outright donation” to fund a pilot project. A program called the Private Sector Initiative contributed R50 million to build the first juvenile detention center financed entirely by the private sector. According to Mzimela, the project was meant to demonstrate three things: 1) that facilities could be planned and constructed within a period of 15 months, as opposed to previous practices of seven years; 2) that facilities could provide education, training and counseling with the aim of rehabilitation; and 3) that there could be a healthy relationship between the Government and the private sector. Mzimela went on to announce that the first youth detention center financed entirely by the private sector would be opened in Newcastle in September 1996, with the process of admitting the young people already underway. The building had already been built, an education curriculum and staffing plan had been developed, admissions had begun—all within a very short period of time. By Mzimela’s own 15-month timeline, the Private Sector Initiative began less than a year after he assumed the head of the Department of Correctional Services, and before the Transformation Forum had an opportunity to begin its work or chart a course for South Africa’s new prison system.

Carl Niehaus, the Chair of the Portfolio Committee on Correctional Services and Chair of the Transformation Forum, spoke immediately after Minister Mzimela and raised concerns about the privatization model that he had announced. He was concerned that the proposal for private financing and construction of prisons was not

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122 Ibid., 3663-4.

123 Ibid., 3677.
clearly accommodated in the current budget and that it would prove too costly. He pointed out that the private sector borrows at a higher interest rate than the government, and that this cost would have to be covered by the rent that the government would pay. The Department of Finance had also expressed strong concerns, asking questions about the details of the plan which the Department of Correctional Services apparently had not contemplated. Niehaus said he had a Department of Finance document that asked questions about the duration of the required head lease, the prevailing inflation rate over a period of time, and the effective costs of government borrowing, averaged over time. The Department of Finance document concluded that the proposal was “too costly and hence unacceptable” and requested further negotiations.\textsuperscript{124} Notably, there was no discussion of the incentive perversion that privatization would cause.

By November 1996, the Department of Correctional Services and the Department of Public Works had secured Cabinet approval for a joint venture with the private sector to build and operate private prisons.\textsuperscript{125} The program was called Asset Procurement and Operating Partnership Systems (APOPS) and was announced to the public in April 1997.\textsuperscript{126} The press release by Minister Mzimela stated that the new APOPS prisons would ensure that the Department of Correctional Services could house offenders arrested under the National Crime Prevention Strategy, which was “gaining more momentum every day.”\textsuperscript{127} He also highlighted the potential of the APOPS prisons to create jobs, anticipating that they would “create thousands of new jobs as well as other opportunities.”\textsuperscript{128} The press statement also included an addendum with more details

\textsuperscript{124} Ibid., 3678.


\textsuperscript{126} Press Release by the Minister of Correctional Services, Dr. Sipo Mzimela, “Seven New APOPS Prisons for Correctional Services,” April 15 (1997), reprinted in Ibid.

\textsuperscript{127} Ibid.

\textsuperscript{128} Ibid.
about the envisaged features of the new APOPS super-maximum prisons and an invitation for companies to bid for the contracts, with construction of all seven prisons expected to begin before the end of the year.129

B. 1997 Criminal Justice Legislation

i. The Parole and Correctional Supervision Amendment Act

In mid-1997, a package of bills was introduced to make criminal justice punishments harsher and to give the government more ammunition in its “war on crime.” The Parole and Correctional Supervision Amendment Bill, the Correctional Services Amendment Bill and the Criminal Law Amendment Bill all came up for their second reading debate in the last week in October and first week of November 1997. As with the previous appropriation debates, the “tough on crime” sentiment was shared across the political spectrum, and there was near unanimous strong support for all three bills. The Parole and Correctional Supervision Amendment Bill made it more difficult to obtain parole and required that prisoners serve at least half of their sentences before they could be considered for parole. The bill’s premise was similar to “truth in sentencing” laws first adopted in the United States (by some states as early as 1984, and federally in 1994) and in Australia in 1989. The bill did away with the “credit system” which allowed for shorter sentences based on good behavior; since it had been used to advantage only white inmates in the past, the abolishment of the system was presented as a move toward “equality” and “equity” and away from “discriminatory” parole practices.130

Given the extent of the overcrowding problem in the country’s prisons, one might have expected the parliament to move toward shortening sentences, rather than lengthening them. Yet Minister Mzimela began the debate with a sentiment that resonated throughout everyone’s remarks: “We are sending a message to those who want to commit crime, but we are also assuring the South African people that once people have

129 Ibid.

been convicted of crimes, they are going to serve their time.”131 Nearly every speaker spoke of the need for a “hardline attitude” and the need to send a message that the state was not “soft on criminals.”132 The ACDP opposed the bill, but for the reason that it was not harsh enough. The party’s MP Meshoe began his remarks by reminding all present that the Nedcor Project on Crime, Violence, and Investment had released a report in June which calculated that South Africa lost no less than R18.5 billion to crime every year. Explicitly against this background, he stated that the ACDP strongly opposed parole altogether, and that people convicted of crimes should serve their full sentences.133

\[\text{ii. The Criminal Law Amendment Act & the Criminal Procedure Amendment Act}\]

The Criminal Law Amendment Bill introduced minimum sentences of 5, 7, 10, 15, 20, 25 years and life for certain crimes, including categories of rape, murder, assault, theft, drug-related offences, corruption, and arms dealing. The Minister of Justice framed the bill as responding to public demand for more stringent punishment for convicted offenders, helping to restore confidence in the ability of the criminal justice system to protect the public against crime, and confirming the government’s policy which aims to curb the increasing crime rate and protect the community against criminals.134 While the implementation of minimum sentences was portrayed as an emergency measure to address crime rates and the sentences were enacted on a temporary basis, they have been continuously extended.135 As a result, the number of people serving long and life

\[\text{\begin{footnotesize}131} \text{Ibid., 5514.}\text{\end{footnotesize}}\]

\[\text{\begin{footnotesize}132} \text{E.g. Ibid 5515-6.}\text{\end{footnotesize}}\]

\[\text{\begin{footnotesize}133} \text{Ibid., 5523-4.}\text{\end{footnotesize}}\]

\[\text{\begin{footnotesize}134} \text{\textit{Hansard}, “Criminal Law Amendment Bill,” Second Reading Debate, Vol. 15, col 6087, Nov. 6, 1997.}\text{\end{footnotesize}}\]

\[\text{\begin{footnotesize}135} \text{Super, \textit{Governing through Crime}, 123.}\text{\end{footnotesize}}\]
sentences has increased, rising from only 24 percent of the prison population serving a term longer than ten years in 1998 to 48 percent in 2004.\(^\text{136}\)

While the Criminal Law Amendment Act dealt with sentencing, the Criminal Procedure Amendment Bill dealt with the question of bail. The bail legislation made it more difficult to receive bail, a response to public criticisms that arrestees were being released back into communities too easily. In the debate on the bill, the Minister of Justice said that the provisions were comparable to those in other open and democratic societies.\(^\text{137}\) While many noted that the bail provisions were “drastic measures” and that such laws needed to take the rights of the accused into account, several speakers noted that the harsher bail conditions were a temporary measure, which could be adapted later on once South Africa was no longer in the grips of a crime wave.\(^\text{138}\) For now, members reiterated that South Africa was still in the midst of an “increasing crime wave,” pointing to recent media headlines about crime rates and crimes being committed by people released on bail.\(^\text{139}\) This bill, along with the others on parole reform and minimum sentencing, was “being sent out with the message that hardened criminals should be placed in prison and kept there.”\(^\text{140}\)

Of course, the bail provision, like the minimum sentencing and parole reform measures, would only exacerbate the Department of Correctional Services’ overcrowding problem. All of these measures were intended to keep people in prison for longer periods, with less opportunity for release. At the close of the debate on the bail provision bill, the

\(^{136}\) Ibid.


\(^{138}\) Ibid., 6128 (MP De Lange: “We may find that in five years’ time, when crime has subsided somewhat, and we can actually move more freely in our country, we may have a different set of norms and a different set of values. We then draw the line, in terms of the limitation of rights, where we would not draw it today.”); 6133.

\(^{139}\) Ibid., 6130, 6132, 6134.

\(^{140}\) Ibid., 6135 (MP Groenewald, NP).
Minister of Justice acknowledged as much. He stated that the prisons were very overcrowded and that many people who were awaiting trial—not yet convicted of any crime—were contributing to the overcrowding.\footnote{Ibid., 6146.} He described an ongoing project at Mitchells Plain in Cape Town to investigate how many people who had been granted bail had actually paid bail and been released. He stated that “according to the project it has been discovered that over 70% of people to whom bail has been granted have in fact not paid their bail, and are therefore awaiting-trial prisoners at Pollsmoor Prisons. In some instances they are women, and in other instances they are accused of the types of crimes which we would not categorize as serious crimes.”\footnote{Ibid.} Although the Minister did not say the reasons for these people not paying bail, one can assume that a reason for many of these people to continue sitting in jail is that they or their families were too poor to bail them out. The Minister stated that there needed to be a better system “which will result in people who do not have to be in prison being kept out of prison, and the creation of space for those who have actually committed serious crime, or who are charged with having committed serious crime, and who in the interests of the safety of the public ought to be kept behind bars until their trial takes place.”\footnote{Ibid.} He said his department would be looking into this matter with the Department of Correctional Services. In the meantime, however, the problem would remain.

\textit{iii. The Correctional Services Amendment Act}

The Correctional Services Amendment Act of 1997 amended the 1959 Prisons Act in two key ways: 1) it provided for an inspecting judge to oversee the department and allow for more transparency; and 2) it allowed the Minister of Corrections to partner with the private sector to build and manage prisons.\footnote{Republic of South Africa, Correctional Services Amendment Act, No. 102 of 1997, Enacted Dec. 19 (1997).} In introducing the debate over the bill
in November 1997, Minister Mzimela highlighted several reasons for “bring[ing] the private sector on board in partnership”—he was careful to point out that the government was not privatizing, but was instead entering into a public-private partnership.145 This move was necessary, he argued, to solve the problem of overcrowding; the department simply did not have the financial resources to provide “the kinds of facilities we need.” Those facilities, he said, would be “modern” and would include schools, training schools and vocational schools, skills-training programs and workshops, and counseling—programs that would stretch the department far beyond its budget. He said the department was “convinced that we need people from outside our systems to come in and bring in fresh ideas” and that bringing in the private sector was bringing South Africa into line with “what is done in the rest of the world now.”146 Minister Mzimela stressed that this would bring a “transfer of technology from abroad to South Africa, free of charge” bringing modern skills and modern buildings as well as significant training. He went on: “That means that those who come here from abroad, who have not just the skills but the experience in this field of modern management, will transfer that to us free of charge. From our human vantage point, everything that this project promises is going to be a plus for us.”147

Although the Cabinet had approved the APOPS procurement process a year ago, the Minister acknowledged that the department now needed legislation so that the program could be properly regulated. He reminded the House that the department had already started providing these new facilities, but that they needed a legal framework within which to work. Inserting a new section in the Prisons Act of 1959 would give the Minister legal authority to “enter into a contract with any private entity to – (a) design; (b) construct; (c) finance; (d) manage and operated, any prison…” While the press release


146 Ibid., 6246-7.

147 Ibid., 6249.
about the APOPS program had called for bids for seven prisons, the number for the initial pilot had now dropped (without explanation) to four. The Minister reiterated that, based on “experiences overseas,” these prisons would be better facilities, better managed, and “cost-effective.”

Once again, all the parliamentarians who participated in the debate on the bill offered their support for it. But some raised concerns about irregularities in the tender process; an NP member said that the Committee on Correctional Services had received a letter stated that an ANC Youth League member had an interest in one of the consortia bidding for one of the APOPS contracts. The FF also expressed concerns about “alleged irregularities in the handling of the tender procedure of the APOPS project.” The NP was adamant that the entire process of tendering and short-listing should be reopened so that details about the composition of the private consortia could be made public. They were dismayed that when they raised this concern and called for the process to be reopened, they had been told that that would open the government up to legal action—and that “investors have spent a lot of money up to now and they may pack up and leave the country.”

While a thorough investigation of corruption in the tender process lies outside the scope of this study, the response from members of the ANC in the debate is interesting for what it reveals about its notions of economic development and empowerment. ANC MP Bathabile Dlamini stated that the ANC had taken calls to reopen the tendering process very seriously, but questioned whether the NP was raising this issue “because the Department of Public Works issued an instruction demanding of shareholders that a minimum equity of 40% should be given to black people?” “Is it because consortiums are supposed to be led by African people who have been previously disadvantaged? Is it

148 Ibid., 6248.
149 Ibid., 6251.
150 Ibid., 6256.
151 Ibid., 6252.
because each of these projects is envisaged to generate R15 million per annum?” She went on to reference the Freedom Charter: “The ‘verkrampte boer’ thought that the congress of the people in 1955 was mad when it said that the people should share in the country’s wealth. This is the process of restoring wealth to the previously deprived, and the empowerment of black people.” She closed by stating that the process was going to move forward, and needed to do so quickly because “it is our people who are overcrowded in prisons.” ANC MP Barbara Thompson reiterated this point about the need to move swiftly to ensure black empowerment on two fronts:

At the end of process there were 42 consortia, which were shortlisted to five. Unfortunately, this is not acceptable to the NP, because 40% of the consortia are comprised of black people. This exercise is most welcome as this will certainly contribute to the black empowerment. In conclusion, I would like to stress that both the Department of Correctional Services and the Department of Public Works are moving faster than before in implementing the APOPS process. After all, it is mostly our black people that are suffering because of overcrowding in prisons, and naturally the one who is hardest hit feels it most.

While these arguments serve as handy deflections from the corruption allegations, more relevant here, they also show that members of the ANC saw private prisons as part of a redistributive project and one of racial uplift—i.e. partly Black-owned consortia would be enriched while also improving conditions for Black people who were the majority of those crowded in the country’s prisons. This may have been a convenient talking point or an actual conception of economic development—or both—but it does chime with the ANC’s overall Black Economic Empowerment (BEE) approach, which mandated black representation on private consortia bidding for government contracts, thereby increasing the number of blacks among the millionaire ranks.

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152 Ibid., 6257.
153 Ibid.
154 Ibid., 6258.
155 Ibid., 6260.
Many accounts of the move toward private prisons in South Africa declare that APOPS began with the 1998 Correctional Services Act, which replaced the 1959 Prisons Act entirely and made provision, in one section, for the building and management of private prisons.\footnote{Republic of South Africa, Correctional Services Act of 1998, Act 111 of 1998, Enacted Nov. 27, 1998.} However, as the foregoing account shows, the legislative authority for private sector involvement in prisons came with the Correctional Services Amendment Act of 1997 (which merely amended the 1959 Act), and the process of engaging the private sector came even earlier than that. In 1998, the Correctional Services Act was passed and reiterated the legal framework for the Department’s relationship with private contractors. Civil society groups raised concerns about the policy before parliament, pointing out that the proposal did not have a provision for any regulation or oversight to ensure that the terms of the public-private partnerships would be implemented properly. Nonetheless, the legal framework was approved as proposed (with no oversight mechanisms) over objections.\footnote{Tizina Ramagaga, \textit{Lessons from Prisons}.} I will discuss how that fared (and US involvement) in the article’s conclusion.

V. \textit{Conclusion}

Within just a few years of the parliamentary debates examined above, South Africa would see its first private prisons. The first private prison in post-apartheid South Africa, run by the U.S-based conglomerate Wackenhut (now GEO Group), opened in Bloemfontein in 2001. The same Wackenhut-led consortium (including their South African partner, Kensani Corrections) opened a second prison the following year at Louis Trichardt in North Province. By 2010, MPs on parliament’s correctional services and public works committees were lashing out at Correctional Services Department officials about the costs of the two prisons, which had spiraled beyond all projections.\footnote{“Private prisons not working, says Moyane,” \textit{Times Live}, Oct. 14, 2010.} As we
have seen, this cost spiral was not entirely unanticipated, as Carl Niehaus and the Department of Finance had warned about the danger of high interest rates and untenably high costs. The prisons are both very large maximum-security facilities—the Manguang Prison in Bloemfontein is the second largest private prison in the world. The two private facilities were initially projected to cost the government R143 million a year in 2001-2002, but annual expenditures had swollen to R786 million by 2010. As the MPs also complained, the cost overruns have been enormous. The per diem rate for the Manguang prison at Bloemfontein increased from the originally contracted R154 to R215. While these cost spirals stretched the country’s resources nearly to the breaking point, Geo Group reported a 30 percent profit margin for the Manguang Prison. In order to pay for the two private prisons, the government has been forced to lay off public sector employees. As Kentor and Prior concluded in their study on the globalization of private prisons: “South Africa’s developing government appears to have fallen victim to a contractual obligation that benefitted the private corporation far more than the government.”

Under the terms of the government’s contract with the private consortium, the companies designed, constructed, and managed the prisons and the government would pay in installments, eventually taking ownership of the buildings after 25 years. This lease-purchase arrangement provided a short-term benefit for the government since the private sector covered the costs upfront, but the government would end up paying far

159 Sloth-Nielsen, Overview of Policy Developments, 17 (citing Department of Corrections, Annual Report 2001-2002).
162 Ibid.
163 Ibid.
164 Ibid.
165 Sloth-Nielsen, Overview of Policy Developments.
more in the long term.\textsuperscript{166} In 2011, as the Department of Corrections was considering contracts for four more private prisons, MPs of all parties insisted that parliament would not support the plans until the state could show how it would get value for money from the deals.\textsuperscript{167} Many MPs objected to the cost, raising arguments about the relative efficiency of the public and private sectors, but others voiced moral objections. “We are privatising a security facility, which to my mind in principle is wrong,” said ANC MP Salam Abram. He added an objection about this core state function being handed over to others: “A security facility should be controlled by the state, not by a private entity.”\textsuperscript{168} Vincent Smith, chair of the correctional services committee, demanded to know why the government was so keen to delegate its responsibility to private firms: “[F]or some reason [the] government is trying to force this thing through,” he said. “Everybody is kicking and therefore the question that was raised initially—whose agenda are we pushing here?—becomes very critical for me.”\textsuperscript{169} As we saw in the previous section, veiled (and less so) accusations of graft and of undue foreign influence had been buzzing for years.

By October 2011, the Minister of Corrections scrapped all plans for more private prisons. Local and foreign investors, who had awaited a decision on the tender process since being shortlisted in 2008, were incensed.\textsuperscript{170} The tender procurement process had been initiated in 2003, and the new Correctional Services Minister, Nosiviwe Mapisa Nqakula, inherited it when she took office in 2009. Rather than evaluating the bids, she undertook a review of the entire public-private partnership model and found a number

\textsuperscript{166} Ibid., 15. See also K. C. Goyer, \textit{Prison Privatisation in South Africa}. By some estimates, the government would have paid almost R16-billion for the two facilities at the end of the 25-year contracts. “MPs Slam Brakes.”

\textsuperscript{167} “MPs Slam Brakes.”

\textsuperscript{168} Ibid.

\textsuperscript{169} Ibid.

of problems. Her review found that the model conflicted with policy stipulating that the state could not hand over certain security and custodial operations to third parties. Her objections were not only technical; she also insisted that South Africa needed to find new solutions to dealing with people convicted of crimes besides incarceration.

This article has shown the variety of forces that kept the ANC from pursuing that kind of criminal justice model in the first five years of democratic rule. By 2011, the experiment with public-private partnerships in prison construction and maintenance had proven costly and was ended. However, even though prison privatization ultimately failed, the overall neoliberal approach was embedded in various aspects of South Africa’s “war on crime,” including the framing of projects like the construction of the super-maximum prison at Kokstad as an instance of black economic empowerment and service delivery. In this way, the post-apartheid “war on crime”—and the harsh criminal justice legislation and public-private prison ventures that it spurred—was an integral part of the move to shrink the state and to shrink expectations of the state when it came to directly meeting the needs of citizens. The fact that prison construction via a private sector tender process could be framed as service delivery exemplifies a neoliberal approach to economic development. As people looked to the government to provide houses, electricity, and clean water, they were met with assurances that the government was indeed meeting their needs—by creating the conditions for trickle-down local economic revitalization.

Perhaps nowhere else is this more apparent than in the town of Kokstad itself. Thus, we return to where we began, in that town of 50,000 people limning the border of two of South Africa’s poorest provinces. Deputy President Mbeki had made his site tour and address in April 1999 and the super-maximum prison was slated to open in early

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172 Ibid.
Yet the project was delayed and, even after construction was completed in August 2000, the prison could not open. The R500 million prison stood empty until May 2002. The reason Kokstad municipality gave for the delay was that it could not sustain the water and electricity supply to both the high-tech prison and the town. Poignantly, the town was struggling to supply water to both the prison and a new low-cost housing development. Kokstad municipality borrowed R20 million from the central government to upgrade its infrastructure in an attempt to meet the demands of both the prison and the residents of 3,000 newly built low-cost houses in town. Still, the municipality could not afford further upgrades that were needed to supply the prison’s state-of-the-art electronic and hydraulic facilities. The municipality proposed in March 2001 that the Department of Correctional Services and the Department of Public Works take over its loan repayments for three years, so that the town could stabilize its finances. The Kokstad municipal spokesman cited “documented proof of correspondence in which we warned them (the departments) that they should not build a super-max prison in Kokstad,” yet the prison had been built over the municipality’s objections. By 2005 the prison was operating far below capacity, with a “skeleton staff” and sections closed off.

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173 When the super-maximum prison project was announced in April 1999, reports indicated that it had a design capacity of 1440 beds and would require a staff of 516 to ensure operations. Republic of South Africa, 1999. Invitation to Tender for the Provision of a Selection Battery and to Select and Train the Entire Staff for the Management and Operation of the New Empangeni Prison and the New Kokstad Super Maximum Prison, Kwa-Zulu/Natal Province. Tender Number RT 959 GP, 1999-08-20. Pretoria: State Tender Board. See also WFM Luyt, “Contemporary Corrections in South Africa After More Than A Decade of Transformation,” Acta Criminologica 21(2) (2008), 184.


175 Ibid. See also Angela Y. Davis, Are Prisons Obsolete? (New York: Seven Stories Press, 2003), 102.

176 Vapi, “R500m KwaZulu-Natal Prison Stands Empty.”

177 Ibid.

178 Ibid.
and in need of expensive upgrades. Before its opening and for many years, the prison would be criticized as a “white elephant.” Kokstad residents would continue to experience intermittent water shortages and periods when they were forced to drink unpurified water. At times the town’s hospital had to operate without water. Rather than living up to hopes for “service delivery,” the super-maximum prison project had become a direct competitor for scarce essential resources, threatening the well-being of the town’s residents. Far from delivering on the promises of the Freedom Charter, the prison stood as a reminder of the broken promises of the country’s transition.

I will close with a brief discussion of the “tough on crime” approach and its implications for politics and social movements. August 16, 2012, saw the bloodiest massacre by South African police since the apartheid era. Thousands of workers at Lonmin’s Marikana Shaft in Rustenerg had gone on strike to demand higher wages. In the Rustenberg area of North West Province, a handful of corporations run the world’s two largest platinum mines and the world’s largest platinum refinery. About 70 percent of the world’s platinum—used in jewelry and vehicle catalytic converters—originates here. During the platinum boom between 2000 and 2008, mining companies were able to restore old mines and hire more workers. The population of informal settlements outside Rustenburg and Kroondal grew quickly. (Paul Hendler and Tony Wolfson, “The Planning and ‘Unplanning’ of Urban Space 1913 to 2013: Privatised Urban Development and the Role of Municipal Governments,” Paper presented at the “Land Divided: Land and South African Society in 2013, in Comparative Perspective” conference, University of Cape Town, Mar. 24-27, 2013, 24.) When the Lonmin mining company successfully applied for a new-order mining license with the Department of Minerals in 2006, the company agreed, under the Mineral and Petroleum Resources Development Act, to build 5,500 houses for its workers in Marikana within five years. Yet Lonmin only managed to build three show houses, and blamed its failure on the 2008 financial crisis. (“Marikana: Loan Undermines Lonmin’s Arguments, Says Academic,” Mail & Guardian, Nov. 7, 2014.) However, observers noted several realities that undercut Lonmin’s argument about being


182 Mokoena, “Kokstad on the Boil.”

183 In the Rustenberg area of North West Province, a handful of corporations run the world’s two largest platinum mines and the world’s largest platinum refinery. About 70 percent of the world’s platinum—used in jewelry and vehicle catalytic converters—originates here. During the platinum boom between 2000 and 2008, mining companies were able to restore old mines and hire more workers. The population of informal settlements outside Rustenburg and Kroondal grew quickly. (Paul Hendler and Tony Wolfson, “The Planning and ‘Unplanning’ of Urban Space 1913 to 2013: Privatised Urban Development and the Role of Municipal Governments,” Paper presented at the “Land Divided: Land and South African Society in 2013, in Comparative Perspective” conference, University of Cape Town, Mar. 24-27, 2013, 24.) When the Lonmin mining company successfully applied for a new-order mining license with the Department of Minerals in 2006, the company agreed, under the Mineral and Petroleum Resources Development Act, to build 5,500 houses for its workers in Marikana within five years. Yet Lonmin only managed to build three show houses, and blamed its failure on the 2008 financial crisis. (“Marikana: Loan Undermines Lonmin’s Arguments, Says Academic,” Mail & Guardian, Nov. 7, 2014.) However, observers noted several realities that undercut Lonmin’s argument about being
the days before August 16, the strikers gathered at the top of a small hill near the mining compound and demanded that Lonmin management come and negotiate with them. After four days, police moved in, encircled the hill with barbed wire, and attempted to disperse and arrest the strikers. The scene quickly turned violent and the police opened fire, killing 34 miners and injuring 78 others. The Marikana Massacre drew international headlines and comparisons with the Sharpeville Massacre of 1960, where South African police shot into a crowd of pass law protestors, killing 69. As South African author Mark Gevisser wrote, “Both massacres represent thresholds. After Sharpeville, the state clamped down as never before, banning the liberation movement and forcing them into exile and underground; the African National Congress responded by turning to armed struggle. The consequences of Marikana might be less dramatic, but the massacre will nonetheless come to draw a similar line between one era and another, with the suggestion of innocence lost at the crossing. There will be pre-Marikana and post-Marikana, just as there was pre- and post-Sharpeville.”

cash-strapped. For one, Lonmin had accepted a $150-million loan from the World Bank’s International Finance Corporation in 2007, in part for a “comprehensive, large-scale community and local economic development” program. (Ibid.) Two, while Lonmin workers made increasingly insistent demands about the need to raise wages and deliver on housing promises, the company opted to meet its Black Economic Empowerment (BEE) targets instead. Lonmin pleaded that it was too poor to meet wage demands, but the company paid hundreds of millions of rands in dividends to its empowerment partners, including (current South African Deputy President) Cyril Ramaphosa’s Shanduka Group. (Craig McKune, “Lonmin Gives Ramaphosa Priority Over Workers,” *Mail & Guardian*, Oct. 3, 2014.) Meanwhile, sections of Marikana township that Lonmin had previously built went for weeks without electricity and living conditions remained abysmal. (Bench Marks Foundation, “Communities in the Platinum Minefields.”)


186 Gevisser, “South Africa’s ‘Marikana Moment.’”
Immediately, government officials labeled the strike as “illegal” and “criminal.” Police Commissioner Riah Phiyega said that police “shouldn’t be sorry” about the shooting. Two hundred and seventy-nine miners were arrested and jailed on charges of public violence, illegal gathering, possession of dangerous weapons and intimidation. In a move that shocked legal experts and the public, prosecutors also charged the striking miners with the murder of their 34 co-workers under the “common purpose” doctrine. The prosecutors argued that the protesters were complicit in the killings—even though the miners had been shot dead by police—because they were arrested at the crime scene with weapons. The apartheid government had used the law frequently to discourage political demonstrations and secure convictions against march organizers. Legal experts viewed the Marikana murder charges as a politically motivated attempt to stigmatize and intimidate the miners ahead of their bail hearing. The court provisionally withdrew the murder charges in short order, but it was two years before the rest of the charges were dropped.

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187 This characterization began earlier in the strike. On the eve of the massacre, Cyril Ramaphosa, who sat on Lonmin’s board, sent a series of emails to Lonmin management and government ministries. Following a number of casualties after the strike began, Ramaphosa wrote to Lonmin’s chief commercial officer: “The terrible events that have unfolded cannot be described as a labour dispute. They are plainly dastardly criminal and must be characterized as such … There needs to be concomitant action to address this situation.” David Smith, “Lonmin Emails Paint ANC Elder as a Born-Again Robber Baron,” The Guardian, Oct. 24, 2012.


192 See, e.g., ibid.; De Vos, “Marikana: No Common Purpose to Commit Suicide.”

Marikana is an extreme example of the crackdown on and criminalization of protest in recent years. Two years earlier, community leader Andries Tatane was killed by police during a service delivery protest in Ficksburg.194 Footage of his death was broadcast on national television, sparking outrage about police brutality. While many commentators make comparisons to the draconian tactics of the apartheid government, we can also locate the roots of this period in the ‘war on crime’ that the ANC launched shortly after coming to power. In his presentation to the Marikana Commission about how the South African Police Service might prevent another massacre, researcher Gareth Newman identified some of the main problems as politicization of the police force, the close relationship between the police and Lonmin, and the ‘tough on crime’ stance adopted by police leadership. As an example he quoted Deputy Minister of Safety & Security Susan Shabangu who had told police members at a 2008 meeting:

You must kill the bastards if they threaten you or the community. You must not worry about the regulations. I want no warning shots. You have one shot and it must be a kill shot. I want to assure … policemen and women … that they have permission to kill these criminals. I will not tolerate any pathetic excuses for you not being able to deal with crime. You have been given guns, now use them.195

In March 2010, the Minister of Police announced that the police service would re-militarize its rank structure, in line with its approach of “fighting crime and fighting it tough.” The step was necessary, he said, to “ensure we win this war … This is a people’s war against criminals.”196

A study by South Africa’s Socio-Economic Rights Institute (SERI) found an “alarming trend” in which the criminal justice system is being used to suppress popular dissent.197 For instance, in Mitchell’s Plain, Cape Town, in February 2014, the police


196 Ibid.

raided a shack settlement, kicking down doors, breaking windows, and arresting four community leaders. Days before, residents had protested against political parties’ attempts to solicit votes in the neighborhood. The protestors argued that it was insulting to electioneer after ignoring peaceful petitions asking for electricity and more water taps. Mandisi Ngcwanu, secretary of the Siqalo residents’ committee, was one of the arrested leaders; he was jailed for a week and charged with public violence (the charges were later dropped for lack of evidence). Of his arrest, detention, and charges, Ngcawangu said, “We are not surprised. We know that these tactics will be used to intimidate us, because we speak on behalf of the community and we protest against the government ignoring us. We were not arrested as criminals, but as leaders of the community.”

Though the years since Marikana have witnessed the criminalization of dissent, they have also included protests for land inspired by the striking miners. Days after the strike, Durban’s Abahlali baseMjondolo (shackdwellers’) movement released a statement saying, “The progressive middle classes are struggling to defend the freedom and democracy that they received in 1994. We are still struggling for freedom and democracy to come.” In March 2013, about a thousand people occupied land in Durban and called it the “Marikana Land Occupation,” after the strike. In Cape Town, members of the Western Cape Anti-Eviction Campaign occupied land in Philippi East, naming it Marikana and themselves Abahlali baseMarikana. When the municipality demolished

198 Knoetze, “Criminalising Protest and Dissent.”

199 Ibid.

200 Ibid.


the Cape Town Marikana Land Occupation, the Cape Town High Court declared that the demolitions violated the Constitution. Abahlali baseMjondolo welcomed the court victory, saying “We will continue to struggle in the streets, in the communities and in the courts. We will continue to democratize our cities and country from below. We will continue to struggle to ensure that the social value of land is put before its commercial value.”

Protests continued in Marikana as well. In May 2014, sixteen people—14 women and two men—were arrested for “public violence” in Mmaditlokwe, near Marikana. They were protesting against blasting at a nearby chrome mine, and argued that the mine should stop blasting until after they had been relocated to new housing. They also wanted the mine to employ local people and provide them services such as electricity and water. The protestors blockaded roads with burning objects and burned down their ward councilor’s house. It would appear that, in Marikana at least, protestors had given up on the government and were turning directly to the mine, a private corporation, to “deliver services.” In this case, the state was present as enforcer—to arrest and jail—but it was not the target of delivery demands. Here, the Marikana residents seemed to have given up on the claims of citizens.

In South Africa’s dispossessed democracy, the stakes remain high and prospects unclear. In this article, I have attempted to think across dividing lines to uncover links between issues that are not often considered together: criminal law and economic development; land use, prisons and citizenship. A decade after the transition from

203 Fischer and Another v Persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy ERF 150 (Remaining extent), Philippi; In re: Ramahlele and Others v Fisher and Another, 2014. High Court of South Africa, Western Cape Division (297/2014); Abahlali baseMjondolo statement, “Marikana Land Occupation Wins Important Victory in Cape Town High Court,” Mar. 13, 2014.

204 Abahlali baseMjondolo statement, “Marikana Land Occupation Wins Important Victory.”


206 Ibid.
apartheid, social movements insisted that political democracy could not be achieved without rectifying historical and ongoing injustices that dispossessed people of land, economic means, and robust citizenship. Two decades on, those insights and demands persist—in the face of increasing criminalization and persistent inequality—in urban and rural areas and in various registers.