

# PRIVATE PRISONS ARE UNCONSTITUTIONAL

By John R. Dacey, Esq.<sup>1</sup>

Some people consider private prisons to be an attractive solution for strained state budgets. Others view them as no better or worse than public institutions.

With all due respect, these are the wrong considerations. They skip over the deeper and much more important considerations: Are private prisons constitutional? Should they exist at all in the United States?

That private prisons do exist and are authorized by federal and state laws lead many to assume that they are constitutionally sound and are now too ingrained as part of our criminal justice system to be challenged.

But the constitutionality of prison privatization has not been challenged and history tells us it is never too late to do so. A number of long-standing institutions have fallen by the wayside when societal values changed – slavery, apartheid based on race and gender, corporal punishment, and laws that regulated marriage and marital privacy are just some examples. Sometimes Congress acted and sometimes it took decisions of the U.S. Supreme Court to cause change.

Segregated schools, once regarded as legal by the Supreme Court because they were “separate but equal,” were later judged to be unconstitutional, despite no intervening change in the law. What happened in between? Experience: Proof that “separate but equal” was a lie. And our national conscience evolved such that segregation itself became the constitutional insult even if, theoretically, everything else was equal.

Private prisons were reborn in the United States in the 1980s during a period when the country was incarcerating ever larger numbers of people, and was pushing the privatization of governmental functions without asking whether the private prison industry should exist at all.

In 1986, the American Bar Association did ask, and called for a moratorium on private prisons until the “complex constitutional...issues” are resolved.<sup>3</sup> The appeal was ignored and the industry boomed. And the ABA’s concerns remain.<sup>4</sup> In the interim, a number of legal articles have appeared that continue to question the constitutionality of private prisons.

By 2012, the federal government and 31 states contracted with private prison contractors. Today the industry has a powerful political presence, particularly in Arizona.

Arizona places 16-20% of its inmates in private prisons, depending on the statistical source. The state has the 5<sup>th</sup> highest number of inmates in private prisons among the states.<sup>5</sup> In 2010 the Arizona Legislature passed legislation, signed by Governor Jan Brewer, that would have enabled the wholesale privatization of Arizona’s prison system. Fortunately, the law was repealed.<sup>6</sup>

Private prisons hold great potential to undermine the integrity of our criminal justice system. These corporations literally thrive on societal decay. They have no incentives to release prisoners. Longer sentences and high rates of recidivism are

their friends. They will cut costs to enhance profits because – unlike public institutions – their highest obligation will always be to their shareholders.

Corrections Corporation of America (“CCA”), the nation’s largest private prison company, noted as much in its 2010 annual report:

*Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. This possible growth depends on a number of factors we cannot control, including crime rates and sentencing patterns in various jurisdictions and acceptance of privatization. The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws.<sup>7</sup>*

When it becomes very profitable for huge corporations and their political allies to put people in prisons, we will put more people in prisons. Maybe even your child or grandchild. These corporations already command 20-year contracts in Arizona that guarantee payment for 90% occupancy. It is just a matter of time before these corporations become “too big to fail” and even more involved in the front end of law enforcement to make sure that their prisons stay filled. As reported in *Business Insider*, CCA pitches itself as a “unique investment opportunity,” and has valued the existing prisoner “market” at \$70 billion.

The pull of that “market” is so strong that Arizona has private prisons that only house prisoners from other states. In this market prisoners become valuable commodities. Each inmate’s body in a private cell has a specific dollar value to the prison corporation. This dehumanization of prisoners flies in the face of international human rights movements and offends the 5th, 8th, 13th and 14<sup>th</sup> Amendments to the U. S. Constitution. Transporting shackled people across state boundaries—primarily people of color—to enrich private, profitmaking institutions looks a lot like another “peculiar institution”—slavery.

It hasn’t been that long ago that business interests in the former Confederate states corrupted the political and criminal justice systems to convert former slaves into a free prison labor force under post-war laws known as the Black Codes. The Black Codes criminalized African American life – for example, it became a crime to be unemployed; once “convicted” of that crime, former slaves were then assigned to work for private interests for little or no cost, thereby enabling a massive transfer of wealth through abuse of the criminal justice system.

Today’s private prison industry is another form of slavery. Punishment of crime does not permit slavery.<sup>9</sup>

What exactly are the limits to what governments may delegate to private vendors? Some functions that the government performs for “We the People” are the inherent responsibility of government and may not be delegated to private

parties. We cannot outsource the presidency. But where that line may be drawn is not always clear. The taking of life and liberty through our criminal justice system is an inherent governmental responsibility. To delegate such fundamental powers to a financially-biased jailer crosses the line.

#### The Constitutional Argument

In a nutshell, prison privatization is unconstitutional because:

- Incarcerating is a quintessential government function that may not be delegated to private vendors;
- Delegating incarceration to private vendors injects serious financial bias into the criminal justice system that violates due process of law;
- Privatization turns prisoners into property in violation of the prohibitions of slavery and cruel and unusual punishment.

It is not the difference of a prisoner being in one cell versus another, but the status of the jailer that matters. The private jailer makes money and does not feel the burden of incarcerating. The public jailer loses money and has to collect taxes for incarcerating, as must be done for all facets of the justice system relating to crime and punishment.

The private jailer does not feel the impact of a failed prison system – recidivism, broken families, families in poverty, lost employment and employability, and the increased criminalization of individuals and gangs. Indeed, individual and collective decay and lack of rehabilitation profit the private jailer. These circumstances create a serious drain on society, communities, families, and taxpayers. The incentives are all wrong.

The U. S. Supreme Court ruled many decades ago in *Tumey v. Ohio*<sup>10</sup> that judges' compensation cannot be based on the fines they levy because such a system of financial reward corrupts the integrity of the justice system. The Court more recently issued a similar ruling in *Young v. United States ex rel Vuitton, et Fills S.A.*,<sup>11</sup> to the effect that a court-appointed prosecutor cannot serve two masters (his private client and the public).

This reasoning is no less compelling when corporations that have control over every minute of an inmate's daily life (including, for example, writing disciplinary reports that affect an inmate's early release time) are paid more for keeping prisoners longer. Prison privatization incorporates perverse financial incentives that are contrary to individual liberty and human dignity.

Mainstream religions have criticized prison privatization as unethical and immoral and have urged governors to discontinue its use.<sup>12</sup> Invocations of natural, human and unalienable rights conveyed upon mankind by the Divine justified eradication of laws that sanctioned and protected slavery, peonage and apartheid.

In 2012 the NAACP passed a resolution calling for abolition of private prisons citing, in part, several church organizations that "have all joined the NAACP in declaring their opposition to profit-making from the punishment of human beings and an abdication of our responsibility to care for our sisters and brothers."<sup>13</sup>

So, why indeed should the constitutionality of private prisons be presumed? Societal values evolve. When they do, they breathe new life into old laws. When the U.S. Supreme Court decided *Brown v. Board of Education* in 1955, it ruled that laws requiring that public schools be segregated violated the Equal Protection Clause of the 14th Amendment. The Court was breathing new life into the very same Equal Protection Clause that the Supreme Court said permitted “separate but equal” public facilities in 1897.

The Supreme Court of Israel recently declared prison privatization to be a violation of the Human Rights Clause in Israel’s Constitution.<sup>14</sup> Indeed, the commodification of prisoners is a human rights violation. Private prisons have no place in the United States. It is time to stop studying the issue and to do something about it.

## Notes

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<sup>2</sup> See, generally 18 U.S.C. § 4013, A.R.S. 41-1609, et seq.

<sup>3</sup> “The Legal Dimensions of Private Incarceration”, 38 Am. U.L. Rev. 531 (April 1, 1989).

<sup>4</sup> Some close observers of private prisons believe strongly that imprisonment is a core governmental function that should not be delegated to the private sector . . . . Standard 23-10.5 is founded on a high degree of discomfort with the idea of profitable prisons where . . . money may gain priority over law, morality and rights.” ABA Criminal Justice Standards on the Treatment of Prisoners (Feb. 2010).

<sup>5</sup> “Annual Privatization Report 2014, Criminal Justice and Corrections”, Reason Foundation (June 2014); “Prison Privatization in Arizona”, American Friends Service Committee (2010).

<sup>6</sup> “Prison Privatization in Arizona” at p. 6.

<sup>7</sup> The Sentencing Project, “Too Good to Be True: Private Prisons In America”, at note 72 (January, 2012).

<sup>8</sup> Craig Harris, “Arizona sheriffs assail costs of private prisons”, Arizona Republic, January 11, 2014.

<sup>9</sup> The Thirteenth Amendment to the United States Constitution was adopted on December 18, 1865. The Amendment was necessary because slavery had been protected by law, including the Supreme Court’s decision in *Dred Scott v. Stanton*, and because Lincoln’s Emancipation Proclamation was a war-time Executive Order that applied only to enemy territory, i.e., the seceding southern states. It was one of three post-Civil War Amendments that were intended to establish “that all men are created equal.”

The Thirteenth Amendment says:

Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

The history of our country, however, is that slavery was not eradicated by the Thirteenth Amendment; it simply took other forms through the Black Codes, Jim Crow, Mexican peonage, the Chinese coolie system, debt bondage and the leasing of prison labor such as described in David Oshinsky’s powerful book, Worse Than Slavery, and the 2012 PBS documentary film, “Slavery by Another Name.” And the “peculiar institution” went to foreign shores.

Regrettably, many decades came and went before the federal government stepped in to eliminate many of these abuses. More regrettably, the federal government is now a principal sponsor of another form of slavery through private prisons.

<sup>10</sup> 273 U.S. 510 (1927)

<sup>11</sup> 387 U.S. 787 (1987)

<sup>12</sup> For example, see: <http://www.phewacomunity.org/images/abolition-of-for-profit-prisons.pdf>; [http://www.ucc.org/justice\\_criminal-justice\\_press-release-from-ucc](http://www.ucc.org/justice_criminal-justice_press-release-from-ucc); <http://www.catholiclabor.org/churchdoc/CBS-2.htm>

<sup>13</sup> <https://www.prisonlegalnews.org/news/publications/naacp-opposes-private-prisons-resolution-2012/>

<sup>14</sup> Academic Center of Law and Business, Human Rights Division v. Minister of Finance (Nov. 19, 2009)