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The Constitutionality of Prison Privatization: An Analysis of Prison Privatization in the United States and Israel

Stacey Jacovetti
Cleveland-Marshall College of Law

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The Constitutionality of Prison Privatization: An Analysis of Prison Privatization in the United States and Israel

Stacey Jacovetti

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ABSTRACT

This note analyzes the constitutionality of the current state of prison privatization in the United States under the non-delegation doctrine and the due process clause. Furthermore, this note analyzes the Israeli Supreme Court's ruling holding prison privatization as unconstitutional under the Basic Law of the Right to Human Dignity and Liberty. Subsequently, an argument is made that the current authority for the utilization of private prisons in the United States is insufficient to establish the use of private prisons as constitutional. As such, this note argues the overall scheme of privatization should provide for more detailed contracts, similar to those proposed under the Israel privatization authority, to include outcome based goals, rehabilitative efforts, and proper supervisory oversight by the governmental authority to ensure compliance. If such reforms are made, then the utilization of private prisons in the United States would become a constitutional method to manage the prison population in the United States.

I. INTRODUCTION

A life without liberty and the freedom to make even the most mundane decision such as what time to get up in the morning was reality for a total of 1,561,500 Americans incarcerated in prisons throughout the country at the end of 2014.²²⁸ Although this number represents a decrease of 1% from the previous year, it still represents a significantly large prison population.²²⁹ With so many Americans behind bars the question arises as to how the United States can effectively manage the prison population given its' constrained resources. The answer to this question has increasingly turned to the utilization of private prisons. Private prisons are purported to be of advantage because they offer low-cost, economically efficient, incarceration services that conserve government resources.²³⁰ In fact, the utilization of for-profit private prisons to house inmates is not unique to the United States.²³¹ In 2013, at least 11 countries employed the use of

²²⁸ E. ANN CARSON, *PRISONERS IN 2014*, BUREAU OF JUST. STATS. NCJ 248955, (U.S. DEP'T OF JUSTICE, WASHINGTON, D.C.), SEPT. 2015 AT 1. The statistics reported were based on the Bureau of Justice Statistics' National Prisoner Program. This program collects data annually from state department of corrections as well as the federal Bureau of Prisons on prisoner counts, prisoner characteristics, admissions, releases, and prison capacity.

²²⁹ *Id.* This 1% decrease equates to approximately 15,400 prisoners. Slightly over one-third (34%) of the decrease was due to fewer federal prisoners under the custody of the Bureau of Prisons.

²³⁰ CODY MASON, *INTERNATIONAL GROWTH TRENDS IN PRISON PRIVATIZATION*, (THE SENTENCING PROJECT, WASHINGTON, D.C.), AUG. 2013 AT 1. It should be noted that privatization has continually been criticized for failing to provide better services or save money.

²³¹ *Id.*

private prisons to some extent, with the United States engaging in the highest total number of prisoners held in private prisons.²³²

However, the appeal of private prisons is not without its concerns. Significant constitutional issues are raised by the use of private corporations to carry out a typically governmental function.²³³ The first concern involves the constitutionality of the delegation of a governmental function to a private party.²³⁴ The constitutional doctrine of non-delegation involves the notion that the government cannot assign certain functions to private persons.²³⁵ The limits and bounds of this doctrine have changed significantly overtime to seemingly permit greater deference by the courts to the delegation of governmental functions.²³⁶ Although the

²³² *Id.* At least 11 countries spread across North America, South America, Europe, Africa, and Oceania are reported to have some level of privatization. The United States has the highest number of prisoners in private facilities; however, Australia, Scotland, England and Wales, and New Zealand hold a larger proportion of their prisoners in private facilities. The highest percentage, at 19%, is found in Australia.

²³³ Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 914 (1988).

²³⁴ Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 Pub. Cont. L. J. 113, 120 (2009).

²³⁵ *Id.* at 121.

²³⁶ Robbins, *supra* note 6, at 919-25 (noting contrast of Supreme Court holdings, i.e.: Supreme Court initially held delegation to private parties as unconstitutional; however, the vast majority

courts have not yet fully addressed the issue of the non-delegation doctrine in context to the utilization of for-profit private corporations to manage the prison population, current legislation and the body of case law regarding the delegation of other governmental functions provides a framework from which to analyze the constitutionality of private prisons.

The second constitutional concern involves the potential impact on an inmate's due process because of the economic implications inherent in for-profit prisons managing prisoners.²³⁷ Notably, the U.S. Supreme Court has established the Due Process Clauses of the Fifth and Fourteenth Amendments to prohibit the delegation of discretionary governmental functions to private entities that ultimately have a financial interest in the way a discretionary function may be carried out.²³⁸ Despite this principle, the court has permitted some delegation to such private entities according to prescribed standards established over the years through case law.²³⁹ Whether these standards apply to the private prison context and whether the private prison structure satisfies the standards are questions that have not yet been answered.

Private prisons continue to be employed in the United States despite these unresolved constitutional considerations. Unlike the United States, the Israeli Supreme Court has resolved

of cases upheld delegations as constitutional. Notably, delegation to a private party has not been held as unconstitutional since the New Deal era).

²³⁷ Anderson, *supra* note 7, at 120.

²³⁸ *Id.*

²³⁹ Robbins, *supra* note 6, at 923-25.

very similar issues to find the privatization of prisons unconstitutional.²⁴⁰ In 2009, the Israeli Supreme Court struck down legislation that sought to establish a privately operated prisons as being unconstitutional because the execution of governmental powers by a for-profit corporation would violate basic rights to liberty and human dignity.²⁴¹ The decision of the Israeli Supreme Court is relevant to the discussion of prison privatization in the United States as it considered related constitutional concerns that have been left primarily unaddressed in the United States, and accordingly, it provides another context from which to explore the constitutionality of privatization in the United States. In fact, a few states in the United States, namely Illinois and New York, have discussed banning the use of private prisons for reasons similar to those underlying the Israeli Supreme Court's decision.²⁴²

In light of the varying decisions regarding prison privatization as to the fundamental constitutional concerns involved, and in considering that there appears to be a trend towards privatization, it becomes important not only to fully address the constitutionality of privatization, but also to consider ways to protect the constitutional rights of prisoners while effectively managing the prison population. Part II of this article will trace the history of the movement towards privatization in the United States and Israel. Initially, the section will discuss the

²⁴⁰ Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT'L J. CONST. L. 690 (2010).

²⁴¹ *Id.*

²⁴² Anderson, *supra* note 7, at 117 (arguing Illinois and New York have rightly abolished private prisons contracts under the notion that the care of prisoners involves an inherently governmental function and that the federal government and states should follow suit).

definition of privatization and the contracting process before turning to an exploration of the factors driving the privatization movement in the United States, including court orders to correct overcrowding and poor prison conditions, tough on crime political initiatives, and economic considerations.²⁴³ Secondly, this section will address the history and development of Israel's Prisons Ordinance Amendment Law of 2004 that sought to provide for the utilization of a private prison.²⁴⁴ Finally, this section will provide an overview of the legislative authority for privatization in the United States.

Section III of this article will address the constitutional concerns raised by prison privatization. This will include a discussion of the non-delegation doctrine, and the various legal tests employed to determine the validity of delegation of governmental functions, and any implications these tests may have on the privatization of prisons. This section will also address potential due process concerns raised by the economic consideration of for-profit corporations being responsible for an inmate's life and liberty.

Section IV will examine the failure of the privatization movement in Israel pursuant to the Supreme Court's ruling on the constitutionality of the delegation of governmental power as applied to the context of private prisons. The discussion will include a look at the court's reasoning behind the decision holding privatization in the prison context as unconstitutional.

²⁴³ Alfred C. Aman, Jr. & Carol J. Greenhouse, *Prison Privatization and Inmate Labor in the Global Economy: Reframing the Debate over Private Prisons*, 42 Fordham Urb. L.J. 355 (2014) [hereinafter *Prison Privatization and Inmate Labor*].

²⁴⁴ Medina, *supra* note 13, at 694.

Lastly, an argument will be made in Section V that the Israeli Supreme Court decision can be criticized for a number of reasons. Furthermore, it will be argued the current state of the privatization of prisons in the United States is unconstitutional according to the modern test invoked to inquire as to proper delegation of authority. However, this violation of the non-delegation doctrine can be accounted for by enacting more detailed statutory authority and providing for proper oversight of private prisons. Similarly, the due process issue raises a legitimate concern that must be addressed through initiatives for private prisons to pursue adequate rehabilitative efforts. If private prisons are to continue to be used in the United States, it is imperative to address these concerns in order to effectively manage the prison population in accordance with important governmental interests and goals.

II. THE HISTORY OF THE MOVEMENT TOWARDS PRIVATIZATION IN THE UNITED STATES AND ISRAEL

A. Definition of Privatization and the Existing Contracting Processes for Private Prisons

Privatization can be defined as a “contract process that shifts public functions, responsibilities, and capital assets, in whole or in part, from the public sector to the private sector.”²⁴⁵ In relation to the correctional services area, privatization involves the government contracting out services to private companies, who perform the activities associated with the managing and operation of prisons.²⁴⁶ Ultimately, although the private company oversees the day

²⁴⁵ James Austin & Garry Coventry, *Emerging Issues on Privatized Prisons*, Nat’l Council on Crime and Delinq., NCJ 181249, (U.S. Dep’t of Justice, Washington, D.C.), Feb. 2001 at 2.

²⁴⁶ *Id.*

to day operations of the facility, the governmental agency retains “policy control over the type and quality of services provided.”²⁴⁷

There are two existing approaches to the contracting process associated with privatization. The first approach, which is the more prevalent method, involves a government agency making a decision to contract out prison beds, and then seeking a private company willing to provide the necessary services.²⁴⁸ Under this approach, the state or governmental agency typically either owns the facility and then contracts with a private company to manage it, or the private company is charged with the “design, construction, and operation of a new facility.”²⁴⁹ In contrast to this approach, a private company may build a prison and then advertise their availability to correctional agencies.²⁵⁰ Such process encompasses a national market, meaning that a facility may end up holding prisoners from all over the country, and not just from the state in which they are located.²⁵¹

The discussion of the contracting process of privatization not only entails how a contractual agreement comes to be formed between a private agency and the government, but

²⁴⁷ *Id.*

²⁴⁸ Douglas S. McDonald & Carl Pattern, *Government’s Management of Private Prisons*, Doc. No. 203968, 10 (Jan. 2004), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/203968.pdf> (unpublished final report prepared by the authors using federal funds provided by the U.S. Department of Justice).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

also includes exploring the contract itself, which may provide for varying models to guide the compensation arrangement. There are two types of compensation models. The first model involves what is termed an indefinite quantity contract that permits a government to pay only for the beds and services they need.²⁵² Whereas in fixed price contracts, the government pays the contract agency a set amount regardless of how many beds or services are needed.²⁵³ Compensation can further be based on specified performance objectives. Performance can either be defined as compliance with explicitly stated procedures and standards, or as achieving a certain outcome (such as improved public safety or prisoner rehabilitation).²⁵⁴ It is important to note that many contracts for private prisons in the United States evaluate performance under ACA accreditation standards, which prescribes *procedures*. As a result, many contracts fail to address the goals or interests to be achieved by the services contracted.²⁵⁵

B. Historical Overview of the Prison Privatization Movement in the United States

²⁵² *Id.* at 11.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* At the time the article was written in 1997, a reported 57 of the 91 contracts existing required private facilities to achieve ACA accreditation. ACA standards primarily outline procedures, such as requiring a facility to have a written policies and procedures manual. Standards ultimately fail to provide for performance in the sense that they do not discuss goals (such as rehabilitation) or tools to assess progress. It was argued an alternative approach would be to base performance on accomplishing objectives that focused on desired outcomes.

The movement towards privatization in the United States began to take force in the 1980s and was driven primarily by three factors which included the growing prison population, economic pressures on governmental funds, and political pressures motivated by changing attitudes regarding the criminal justice system.²⁵⁶ Moreover, the political change in attitudes was interrelated to the increased prison population as the rise in the prison population was due not to the general rise in criminal activity, but rather to policy shifts that expanded criminalization and laws that increased the rates and lengths of prison sentences.²⁵⁷ Particularly, the expansion of criminalization was due in large part to the War on Drugs movement evident in the Comprehensive Crime Control Act of 1984 and the Anti-Drug Abuse Acts of 1986 and 1988.²⁵⁸

²⁵⁶ *Aman & Greenhouse, supra note 16, at 377*. Privatization was actively promoted by the Reagan, Bush, and Clinton Administrations. In 2003, privatization was embraced fully by President Bush as he directed according to the President's Management Agenda, the mandating of all federal agencies to privatize administrative services to the "maximum extent possible." The adoption of privatization as an approach to the carrying out of government sources is based on an apparent assumption that competition produced in the private sector will equate to more efficient services. *Id* at 374. This assumption is referred to as the efficiency story and is based on three premises: (1) government services are burdened with costs and "red tape"; (2) market competition produces an effect in which only the better companies will thrive and succeed; and (3) competition is a feature of a private market. *Id*.

²⁵⁷ *Id*.

²⁵⁸ U.S. GEN. ACCOUNTING OFFICE, PRIVATE PRISONS: COST SAVINGS AND STATUTORY AUTHORITY NEED TO BE RESOLVED (1991) [hereinafter GAO REPORT]

The enactment of the sentencing guidelines established in 1987 by the U.S. Sentencing Commission also resulted in more offenders being incarcerated, some for longer sentences than was previously the case.²⁵⁹ As a result of these initiatives, the prisoner population increased significantly. In fact, between 1973 and 1990, the number of prisoners in custody in the United States increased almost fourfold.²⁶⁰ The substantial cost of expanding and operating prisons, in light of constrained federal and state budgets, created economic pressure on governments.²⁶¹ The convergence of these factors ultimately led to overcrowded prisons that governments were unable to efficiently manage.

The overcrowding of the U.S. prison system due to the spike in incarceration rates and lengths posed a serious problem for the government. According to the Federal Bureau of Prison Statistics, between January 1981 and August 1990, the federal prison population increased from 23,783 inmates to 57,688 inmates.²⁶² In August 1990, the Bureau of Prisons reported the federal prison system was operating at 172% of the stated capacity.²⁶³ Similar overcrowding problems faced state prison systems.²⁶⁴ As a result, “in the 1980s, federal courts found large numbers of correctional facilities, and even entire state prison systems to be in violation of the Constitution’s prohibition of ‘cruel and unusual punishment’ because of overcrowding and inadequate

²⁵⁹ *Id.*

²⁶⁰ David E. Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 *J.L. & POL.* 253, 263 (2003).

²⁶¹ *GAO Report, supra* note 31, at 9.

²⁶² *Id.* at 8.

²⁶³ *Id.*

²⁶⁴ *Id.*

conditions of confinement.”²⁶⁵ Accordingly, by mid-1991, the courts had declared the operation of prisons in 40 states as having unconstitutional conditions.²⁶⁶

Court orders to fix the poor, overcrowded prison conditions put pressure on the government to build prisons quickly; however the government was limited economically in doing so. “Most U.S. state governments finance prison construction through bond issues, which

²⁶⁵ Pozen, *supra* note 33, at 263. For example, the Supreme Court in *Brown v. Plata*, 131 S.Ct. 1910 (2010) held that courts have the ability to order a reduction of prison population to remedy Eighth Amendment constitutional violations. The case was filed in 2001 and the State of California conceded the deficiencies in prisoners’ medical care violated the Eighth Amendment and ordered remedial injunction. The State had not complied with the injunction by 2005, and subsequently, the Court appointed a Receiver to oversee the efforts. Three years later, the Receiver described continuing deficiencies to address the constitutional violations due to overcrowding. The Court then ordered California to reduce its prison population to 137.5% of the designed capacity within two years. The Supreme Court ultimately decided in 2010 that the remedy for constitutional violations, would not be effective without a reduction in prison population.

²⁶⁶ *Id.* While many factors, including deteriorating prison conditions, played a role in the movement towards privatization, interestingly, the issue of improving prisons and the correctional scheme did not play a significant role due to increasingly negative attitudes regarding whether rehabilitation was effective and a shift toward more punitive attitudes embracing deterrence and incapacitation as the primary justifications for incarceration. *Id.* at 267.

are usually subject to voter approval by referendum.”²⁶⁷ During the late 1970s and early 1980s, citizens were voting down prison bonding proposals to fund construction of prisons.²⁶⁸ Thus, state officials began to utilize “lease-buyback arrangements with private firms for the design, construction, management, and financing of prisons.”²⁶⁹ This enabled the funding to come out of a different state budget, effectively bypassing the need for voters to pass bond proposals.²⁷⁰ Moreover, resorting to private corporations to build the needed prisons allowed government officials to avoid significantly raising taxes because private firms paid the initial costs of construction.²⁷¹

The drive towards privatization was not only due to the expectation that private prisons were able to build prisons faster than could the government, but also because private prisons were expected to provide a cost savings through being able to manage the operation of prisons at a reduced cost.²⁷² It is noted, however, a number of studies that have attempted to compare the costs and benefits associated with private prisons have been inconclusive due in part to methodological deficiencies.²⁷³ Despite these inconclusive findings, many U.S. states utilized

²⁶⁷ *Id.* at 264.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Prison Privatization and Inmate Labor*, *supra* note 16, at 378.

²⁷² Aman & Greenhouse, *supra* note 16, at 377.

²⁷³ Richard J. Kish & Amy F. Lipton, Do Private Prisons Really Offer Cost Savings Compared with Their Public Counterparts?, 33 *ECON. AFF.* 93, 99 (2013). According to a meta-analysis of cost

private prisons with the expectation they provided cost savings, and accordingly, many states mandated that private prisons document a savings of at least 5-10% per year in order for the contract to be continued.²⁷⁴

Private prisons are purported to bring about cost savings primarily through a reduction of labor costs.²⁷⁵ “Labor costs are controlled by reducing one or more of the following personnel cost factors: (1) number of staff, (2) wages, or (3) fringe benefits.”²⁷⁶ The reason the reduction of labor costs was so impactful on the overall cost of operations was because approximately 65-70% of the cost of operating a prison is due to labor related factors such as staff salary, benefits, and overtime.²⁷⁷ Thus, the move towards privatization was driven in part by the notion of cost savings in that the private sector, unlike the government, could reduce labor costs by offering lower salaries and benefit packages to employees.

As a result, the movement toward the utilization of private prisons as an alternative to managing overcrowded prison populations made financial sense to governments. The Bureau of

comparisons, seven studies demonstrated definitive cost savings while 13 studies were either inconclusive or had ambiguous results. The authors noted there is a lack of reliable data which makes obtaining an accurate public-private comparison problematic. Furthermore, certain characteristics, such as size and custody level of the prison may have an impact on the quality and cost of incarceration that affect the cost comparison analysis.

²⁷⁴ *Id.*

²⁷⁵ Austin & Coventry, *supra* note 18, at 16.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

Prisons expected state and federal prison populations to continue to grow.²⁷⁸ In fact, it was projected that the federal inmate population was expected to increase from approximately 58,000 inmates in August 1990, to over 100,000 by 1995.²⁷⁹ Accordingly, with the expectation of continual growth in the prison population, combined with increasingly tight federal and state budgets, the movement towards privatization in the United States had firmly taken root.

C. Historical Overview of the Prison Privatization Movement in Israel

The movement towards privatization of prisons in Israel was driven by factors similar to those in the United States; however, unlike the United States, prison privatization never took root in Israel. Israel turned towards the consideration of private prisons in 2003 due to a shortage of prison space, poor prison conditions, and rising administrative costs.²⁸⁰ The cost savings rationale was even more dominant in Israel than in the United States, as a 25% reduction in costs of operating prisons was anticipated.²⁸¹ However, the need for alternative prison solutions in Israel was driven in large part by the deplorable, and arguably uninhabitable, prison

²⁷⁸ GAO REPORT, *supra* note 31, at 9.

²⁷⁹ The federal prison population in 1995 was 64,936, and in 1995 the prison population rose to 100,958 inmates. FEDERAL BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops (last visited Feb. 21, 2016).

²⁸⁰ William Paul Simmons & Leonard Hammer, *Privatization of Prisons in Israel and Beyond: A Per Se Violation of the Human Right to Dignity*, 13 SANTA CLARA J. INT'L. L. 487, 491 (2015).

²⁸¹ Uri Timor, *Privatization of Prisons in Israel: Gains and Risks*, 39 ISR. L. REV. 81, 81 (2006).

conditions.²⁸² In fact, in 2005, the Israel Prison Service reported the overcrowding and poor conditions in Israel's prisons were among the worst in developed countries.²⁸³ Further demonstration of the growing problem in Israel was evident in the existence of the Damoun Prison, which was initially opened only as a temporary facility and closed in 2000 because of the deplorable living conditions. However, the prison was forced to re-open just one year later because of the shortage of prison beds.²⁸⁴

In March 2004, due to the lack of much needed prison space and the continuing growth of the prisoner population, the Knesset (Israeli Parliament) passed an amendment to the Prison Law.²⁸⁵ The amendment essentially presented a detailed guide for the utilization of private prisons. After the amendment was passed, a contract was awarded to ALA Management and Operation Ltd. to build a prison; however, in 2005, the Human Rights Division of the Academic Center of Law and Business filed suit alleging the unconstitutionality of private prisons.²⁸⁶ In the meantime prior to the Israeli Supreme Court issuing a decision on the matter, ALA Management

²⁸² Yonatan Preminger, *Incarceration for Profit: Prison Privatization in Israel*, CHALLENGE, JULY-AUG. 2008, http://www.challenge-mag.com/en/article__223/incarceration_for_profit.

²⁸³ *Id.* As of March 2008, there were 22,788 inmates, including 9,068 security prisoners in Israel. Many prisons held up to eight inmates per cell, with the average space allotted to a prisoner being 2.9 square meters. In Europe, that figure was 4.5 square meters.

²⁸⁴ *Id.*

²⁸⁵ Simmons & Hammer, *supra* note 53, at 491.

²⁸⁶ *Id.* at 492.

completed the construction of the private prison and was in the process of hiring employees.²⁸⁷ Ultimately, the facility was never opened as a private prison due to the Israeli Supreme Court striking down as unconstitutional the amendment that established the authority for the utilization of private prisons.²⁸⁸ Thus, unlike the embrace of the movement towards prison privatization evident in the United States, Israeli's movement was halted and never brought to realization.

D. An Exploration of the Legislative Authority for Privatization in the United States

Unlike Israel, who initially passed an amendment to provide for the authority to use private prisons, the United States effectively turned to privatization without a clear mandate of such authority. Specifically, in February 1991, at a time in which private prisons were already being employed at the state level, a report by the United States General Accounting Office (GAO) declared after reviewing the statutory language and legislative history on the federal level, that the Bureau of Prisons (BOP) lacked statutory authority to resort to private prisons.²⁸⁹ At the time of the report, there were a number of concerning questions regarding privatization of prisons that had prevented the BOP from employing them. In March 1988, the President's Commission on Privatization recommended the BOP contract for the private sector operation of a prison.²⁹⁰ In response to this recommendation, the BOP submitted in the 1989 fiscal budget, a

²⁸⁷ *Id.*

²⁸⁸ Medina, *supra* note 13, at 690.

²⁸⁹ GAO REPORT, *supra* note 31.

²⁹⁰ *Id.* at 19.

request to use a private contractor to build and operate a minimum security prison.²⁹¹ The Senate Committee on Appropriations denied this request.²⁹²

Despite the denied request, the BOP ultimately asserted it had sufficient statutory authority to contract with the private sector based on two separate provisions in its enabling legislation that allowed the agency to designate places of prisoner confinement.²⁹³ However, the GAO determined the first provisions of the enabling legislation, 18 U.S.C. §§ 4002 and 4003, provided only two courses of action to obtain incarceration facilities. The first being the Attorney General could contract out with *state and local* governments under specific terms and conditions.²⁹⁴ Critically, the legislation did not explicitly state the Attorney General could contract with private entities. Secondly, new federal facilities could be constructed if such contracts could not be made.²⁹⁵ Accordingly, the GAO determined there was clear inference from the statute that “Congress intended to preclude any other measure not *expressly* authorized.”²⁹⁶

The BOP also argued a second provision of its enabling legislation, found in 18 U.S.C. § 3621(b), authorized the use of private facilities. The statute enables the BOP to designate any facility as a place of confinement if it “meets minimum standards of health and habitability

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 22.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

established by the Bureau, whether maintained by the Federal government or otherwise.”²⁹⁷ The GAO determined if it was the case the phrase “or otherwise” was not in any way limited in scope, then the BOP would have open ended authority to place federal prisoners wherever they desired.²⁹⁸ As such, the GAO found according to the legislative history, the provision was limited by the other provisions of the statute, which authorized only state and local facilities as non-federal facilities that could be utilized.²⁹⁹

Due to the uncertainty as to whether the enabling statutory provision authorized the use of private facilities, the statute was amended, effective November 2, 2002.³⁰⁰ The statute now authorizes the Attorney General to make payments from funds appropriated for Federal prisoner detention for “the housing, care, and security of persons held in custody of a United States marshal pursuant to Federal law under agreements with State or local units of government or contracts with private entities.”³⁰¹ While the revision retained the ability to contract with state or local governments, it expanded the scope of the Attorney General’s authorization to include private entities. In addition to doing so, it provided guidance as to a private entity’s eligibility for a contract for the housing, care, and security of prisoners. Of importance to the discussion, the additional language required private facilities to meet the standards of the American Correctional Association; comply with all applicable state and local laws and regulations; have approved fire,

²⁹⁷ *Id.* at 23. (quoting 18 U.S.C. § 3621(b)).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ 18 U.S.C. § 4013 (2016). Support of United States prisoners in non-Federal institutions.

³⁰¹ *Id.*

security, escape, and riot plans; and comply with any other regulations that the Marshals Service deems appropriate.³⁰² While these revisions to the statute seemingly provide guidance on the utilization of private entities, it is important to note that they fail to address a number of noteworthy public policy issues of privatization such as the contracting process, governmental oversight of private prisons, and performance objectives to be sought.

E. An Exploration of the Legislative Authority for Privatization in Israel

Unlike the enabling legislation existent in the United States, the amendment passed to Israel's Prison Law provided explicit guidance on the use of privatization. Specifically, "the Amendment provided means for submitting private bids, the conditions that must be maintained in the prison, the scope of jurisdiction held by the private facility over prisoners, and the scope of oversight to be maintained by the state over the private concern operating the prison."³⁰³ In accordance with the guidance provided in the amendment the Knesset authorized private prisons to construct and operate the facility, but sought to limit the scope of the private entity's authority in a number of ways.³⁰⁴ For one, the amendment provided the State was to "retain supervision and control by placing in every privately run facility a comptroller, or a team of comptrollers, who alone exercise the authority to judge and punish prisoners."³⁰⁵ Secondly, the State would continue to have the sole ability to classify offenders and designate them to the private facility.³⁰⁶

³⁰² 18 U.S.C. §§ 4013(c)(2)(B)-(E).

³⁰³ Simmons & Hammer, *supra* note 53, at 491.

³⁰⁴ *Id.*

³⁰⁵ Preminger, *supra* note 55.

³⁰⁶ *Id.*

Lastly, the private facilities would not be afforded the authority to grant or withdraw prisoner's benefits.³⁰⁷ The final amendment passed by the Knesset was the result of a long process of discussions between the Israel Prison Service, the State, and a number of human rights and welfare organizations, and was ultimately a measure to afford adequate protection of prisoner rights.³⁰⁸

III. THE CONSTITUTIONALITY OF PRISON PRIVATIZATION IN THE UNITED STATES

A. Constitutional Concerns of Prison Privatization in the United States under the Non-Delegation Doctrine

The use of private prisons in the United States is troubling due to a number of constitutional concerns, one of those being the non-delegation doctrine. The concept of non-delegation refers to the idea that Congress may not delegate its' powers to other branches of government or to private parties.³⁰⁹ Although this doctrine is not explicitly stated in the U.S. Constitution, the principle has been implied under Article I, Section I of the Constitution which states "all legislative powers herein granted shall be vested in a Congress of the United States."³¹⁰ In relation, Article I, Section I demonstrates an underlying foundation of the Constitution, the principle of separation of powers. This principle was meant to prevent the

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 915 (1988).

³¹⁰ *Id.*

arbitrary exercise of power by one branch of government in order to protect the liberties of the people.³¹¹ In accordance with this principle, it has been argued the “purpose of the delegation doctrine should be to provide needed protection against uncontrolled discretionary power.”³¹² Over the years, the non-delegation doctrine has served to both validate and invalidate the delegation of governmental functions.

Historically, the delegation of governmental functions has primarily been addressed by the Supreme Court in three different domains, all of which are typically involved to some extent in the use of private prisons. The first concerns the “delegation of the management of government property and programs.”³¹³ The second category encompasses the delegation of rule-making authority.³¹⁴ The last category in which the delegation doctrine has been invoked is the

³¹¹ *Id.*

³¹² *Id.* at 916.

³¹³ *Id.* at 932. In *People v. Chicago Railroad Terminal Authority*, the Supreme Court upheld delegation permitted under a statute that authorized railroad terminal authorities to contract with private entities to maintain and operate terminals. In doing so, the court established the principle that a “governmental body can constitutionally delegate the management of a government enterprise to a private company if the governmental body retains ultimate control over the program.”

³¹⁴ *Id.* at 936 (arguing the inherent problem with the practice of delegating rule making authority and enabling a private company to actually manage a governmental program is that it authorizes the private company to essentially exercise governmental power, outside of legislative or administrative control, that could potentially affect an individual’s liberty interests).

delegation of adjudicative powers.³¹⁵ All of these three categories of delegation are implicated in the context of private prisons. For example, as previously discussed, many private companies manage government property and programs in various ways outlined in contracts. Accordingly, private prisons may be involved in rule-making in order to not only maintain order in the prison, but also to accomplish objectives outlined in the contracts, such as maintaining ACA accreditation. Further, private prisons may be delegated the authority to adjudicate individuals through means such as taking away good time credits or placing an individual in solitary confinement.

In order to better understand the impact of the delegation doctrine on the constitutionality of private prisons it is important to briefly discuss the development of the doctrine through case law. Initially, in *Carter v. Carter Coal Co.* the Supreme Court held the delegation of power to a private party as unconstitutional. In a widely cited quote, as to the delegation of power to a private party, Justice Sutherland stated, “This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in

³¹⁵ *Id.* at 942 (the delegation of adjudicative powers goes one step further than the delegation of rule-making authority in that it allows private companies to exercise judgment that may affect only one individual, thus bringing in the potential for an arbitrary exercise of power that is not easily checked through the normative political process).

the same business.”³¹⁶ Despite this strong stance against delegation, *Carter v. Carter Coal Co.* represents one of the last instances in which the court struck down the delegation of power. The Supreme Court has since primarily upheld delegation to private and public bodies.³¹⁷ In upholding such delegation, the court has utilized various tests, which may ultimately be applied to the context of private prisons.

For example, one such test developed to determine the constitutionality of delegation has been referred to as the Todd test. The Todd test was developed in *Todd & Co. v. SEC.* whereby the Court considered provisions of the Maloney Act which was part of the Securities Exchange Act and was designed to provide for the self-regulation of the securities industry.³¹⁸ The Act was challenged on the grounds that it unconstitutionally delegated legislative power to a private entity. In upholding the delegation of power, the Court effectively established a three part test based on inquires as to whether: (1) the legislative or executive agency has the power to approve or disapprove the private entity’s rules; (2) the oversight agency in a disciplinary hearing must make de novo findings aided by additional evidence if necessary; and (3) the oversight agency

³¹⁶ *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1971) (Court considered the constitutionality of a statute that made the maximum hours and minimum wages agreed to by a majority of the coal miners binding on the minority).

³¹⁷ Robbins, *supra* note 82, at 919.

³¹⁸ *Todd & Co. v. SEC.*, 557 F.2d 1008, 1012 (3rd Cir. 1977).

must make an independent decision on the violation and penalty.³¹⁹ Accordingly, this test suggests that, despite previous Court holdings as to the unconstitutionality of delegation to a private entity, such delegations can be constitutional if they meet these specific structural requirements.

A second test consistently applied to the context of delegation to private authorities be found in *Mistretta v. United States*, 109 S.Ct. 647 (1989). The Court in *Mistretta* emphasized that the non-delegation doctrine “is rooted in the principle of separation of powers that underlies our tripartite system of government.”³²⁰ The court went on to declare that given an “increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”³²¹ Accordingly, the Court held as long as Congress “shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to

³¹⁹ *Id.* at 1012-13. The court found constitutional the delegation of power because the private “Association’s rules and disciplinary actions were subject to full review by the S.E.C., a wholly public body.”

³²⁰ *Id.* at 654. In *Mistretta*, the court held as constitutional the delegation to an independent Sentencing Commission the power to promulgate sentencing guidelines for every federal criminal offense in light of the fact that Congress’s delegation of authority was sufficiently specific and detailed, directing the Commission to consider specific goals and purposes in developing such guidelines.

³²¹ *Id.* at 655.

conform, such legislative action is not a forbidden delegation of legislative power.”³²² This test has been referred to as the “intelligible principle” test, and essentially, at least in the context of delegation to public bodies, seemingly requires an inquiry as to the type of guidance provided by Congress to the independent body. Accordingly, the Court has upheld broad delegations of power under this test.³²³

Whether the court would employ the intelligible principle test, or the Todd test, or even a different test in the context of private prisons, is unknown due to the lack of cases addressing the issue of the constitutionality of private prisons. In fact, one of the only considerations of the constitutionality of private prisons on the federal level has turned not upon a consideration of whether delegation of the function of housing federal prisoners is constitutional, but rather more narrowly on whether a private corporation has the authority to sanction, i.e. to take away good time credits. The unreported opinion in *Rivera v. Pugh* in the form of a Magistrate Judge’s Report and Recommendation is one of the sole instances in which a federal court has considered the constitutionality of authority provided to private prisons. In *Rivera*, the petitioner challenged the constitutionality of the Bureau of Prison’s contract with a private corporation, the Corrections Corporation of America (CCA), as an unlawful delegation of the BOP’s authority to house federal prisoners.³²⁴ The court stated that “it is well-established that federal agencies may not delegate their statutory authorities to private parties. However, the ultimate test of the validity of an agency’s delegation of responsibility to a private party is whether the delegating agency

³²² *Id.* at 655.

³²³ *Id.* at 656.

³²⁴ *Rivera v. Pugh*, No. CV 305-128, 2005 WL 3867482, at *1 (S.D. Ga. Dec. 13, 2005).

retains final decision-making authority.”³²⁵ Accordingly, it was determined the BOP did not unlawfully delegate its authority to CCA because it retained final decision-making authority in the imposition of disciplinary sanctions. Ultimately, the court did not directly answer the broader question of whether it is constitutional to delegate authority to house federal prisoners to private corporations.

In light of the Court’s history of upholding the constitutionality of broad delegations of power in general, the government has seemingly turned to the utilization of private entities more frequently. This notion is evident by the publishing of Circular A-76 by the Office of Management and Budget in 1966. Circular A-76 directed federal agencies to rely on private sector sources when it is “cost effective and would not adversely impact governmental functions.”³²⁶ One exception to this general policy is that a governmental agency cannot delegate a function that is inherently governmental.³²⁷ According to the Federal Acquisition Regulations definitions section, an inherently governmental function is defined as a “function that is so intimately related to the public interest as to mandate performance by Government employees.”³²⁸ It goes on to state in relevant part that an inherently governmental function includes the interpretation and execution of the laws of the United States so as to significantly affect the life, liberty, or property of private persons.³²⁹ While Circular A-76 may provide a

³²⁵ *Id.*

³²⁶ Anderson, *supra* note 7 at 123.

³²⁷ *Id.*

³²⁸ 31 U.S.C. § 501 (2006).

³²⁹ *Id.*

legitimate argument as to when delegation to a private party is *appropriate*, the determination of the constitutionality of delegation based on an inquiry into whether a function is inherently governmental appears to be absent from court decisions. The inquiry seemingly turns in large part not on the *type of function* involved, but rather the *nature of the guidance* provided by a governmental agency.

Thus, although the non-delegation doctrine has primarily served to uphold the broad delegation of governmental authority, it has not directly been applied to the context of private prisons. As such, despite the contention that the non-delegation doctrine presents a legitimate challenge to the question of whether the delegation of authority to private prisons is constitutional, the courts have failed to directly address the question.

B. Constitutional Concerns of Prison Privatization in the United States under the Due Process

Clause

A related issue similar to the constitutional concern regarding the delegation of power to a private entity is that the delegation of power to a for-profit private entity raises inherent due process concerns about prisoners' rights due to implications that stem from economic factors and the constitutional structure. The principle of due process is found in the Fifth Amendment to the Constitution which states that no one shall be "deprived of life, liberty, or property without due process of law." In the context of private prisons, due process becomes an important consideration because prisoners' fundamental rights of life and liberty are involved.

The constitutional structural concerns that arise under the due process clause in the context of private prisons is due to the focus on accountability in the constitution. The clause provides that the government must afford an individual a fair procedure before the deprivation of

life, liberty or property.³³⁰ Critically then, the due process clause provides for accountability to governmental actors and it is “expected that the government entities act for the greater good instead of for private gain.”³³¹ Private entities operate outside of the scope of the due process clause, and thus, the constitutional procedures on the exercise of power do not constrain private entities as they do with public bodies. As a result, there is a risk that a private entity can exercise delegated power in a way contrary to the greater good of the individual. In the context of private prisons, in which a private for-profit corporation has power over an individuals’ life and liberty, the risk an individual may be deprived of fair procedures may be great.

There are a number of reasons, primarily economic, that suggest delegation to a private corporation may negatively affect an individual’s life and liberty concerns in the context of private prisons. For example, it has been argued that “privatization negatively impacts the

³³⁰ *Due Process*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/due_process (last visited Dec. 10, 2015). The primary test courts have employed to find what process is due to individuals is found in *Mathews v. Eldridge* which provides three factors that courts should analyze. Those three factors include: “first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures that will be used, and the probable value, if any, of additional substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirement would entail.”

³³¹ Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV 507, 524 (2011).

treatment, rehabilitation, and care of prisoners.”³³² Due to the reality that private prisons seek to increase profit margins, it is expected they employ cost-cutting measures such as hiring less expensive, less educated labor, and offering less services to inmates. Furthermore, private prisons are resistant to offer necessary rehabilitative and re-entry services that not only help the inmates, but also the community, by preparing inmates with the tools they need to lead a law-abiding life outside the institution.³³³ Data from the Bureau of Statistics notes that recidivism rates of offenders released from correctional facilities are high, with 77% of offenders being re-arrested within five years of release.³³⁴ Even more concerning, is that two studies have demonstrated that prisoners housed in privately operated prison facilities have higher recidivism rates.³³⁵ Lastly, private prisons rely on there being inmates in the first place in order to make a profit. Thus, there is a motive to donate to campaigns and lobbyists who push for a harsher criminal justice agenda. Over nearly the past three decades, the three major private prison

³³² Anderson, *supra* note 7, at 116.

³³³ *Nation’s Largest Private Prison Firm Objects to Resolution to Fund Rehabilitative, Re-entry Programs*, PRISON LEGAL NEWS (Jan. 12, 2015), <https://www.prisonlegalnews.org/in-the-news/2015/nations-largest-private-prison-firm-objects-resolution-fund-rehabilitative-reentry-programs/> Just recently, “Corrections Corporation of America, the nation’s largest for-profit prison, formally objected to a shareholder resolution that would require the company to spend 5% of its net income on programs and services designed to reduce recidivism rates.”

³³⁴ *Id.*

³³⁵ *Id.*

companies have spent \$45 million on campaign donations and lobbyists to promote legislation at the state and federal level.³³⁶

Arguably, there are legitimate due process concerns in light of the notion that private prisons have motives to reduce costs and increase their profit margin wherever they can. Even CCA, one of the largest private prison companies in the nation, admitted in their 2014 annual report that any efforts toward decriminalization and changes to drug law or immigration laws would ultimately reduce the demand for correctional facilities and adversely impact the private corporation.³³⁷ In light of the very serious economic concerns raised by the utilization of private prisons, it would appear privatization poses a very serious risk to the due process concerns of inmates as private prisons have not demonstrated they operate for the greater good of the individual.

³³⁶ Aviva Shen, *Private Prisons Spend \$45 million on Lobbying, Rake in \$5.1 Billion For Immigrant Detention Alone*, JUSTICE (Aug. 3, 2012, 12:00 PM), <http://thinkprogress.org/justice/2012/08/03/627471/private-prisons-spend-45-million-on-lobbying-rake-in-51-billion-for-immigrant-detention-alone/> A 2011 report discovered that the private prison industry spent millions on campaign and lobbying intended to increase sentences and incarcerate more people. For example, the Arizona Immigration law (now mostly invalid) which would have resulted in more people in detention, was co-sponsored by 36 legislators. Of the 36 legislators, 30 of them received campaign contributions from private prison companies including CCA and GEO.

³³⁷ *The Political Bribe that Turned Prisoners Into Profits*, <https://represent.us/action/private-prisons-1/> (last visited Dec. 18, 2015).

IV. THE CONSTITUTIONALITY OF PRISON PRIVATIZATION IN ISREAL

Unlike the absence of guidance by the courts in the United States on the constitutionality of private prisons under the due process clause, the Israeli Supreme Court has in fact analyzed the constitutionality of private prisons according to similar due process concerns as those provoked by the U.S. Constitution. Although the Israel constitutional structure is different than that found in the United States, the notion of a due process in relation to liberty concerns is found in both. In order to analyze the Israeli Supreme Court's decision on the constitutionality of prison privatization, it is important to first briefly discuss the development of Israel's constitutional structure and the history of delegation of governmental power under the constitutional structure.

A. A History of the Right to Human Dignity and Liberty under the Israeli Constitutional Structure

The history behind the formation of Israel's constitutional structure is rather extensive. Unlike the United States, Israel has no formal constitution.³³⁸ However, Israel has enacted certain constitutional laws that "are among the most liberal and progressive of any Democratic nation."³³⁹ The movement towards a written constitutional law in Israel took root in 1950 when the First Knesset, which is Israel's form of parliament, instructed the Constitution, Law, and

³³⁸ Amnon Rubinstein, *Israel Studies an Anthology: Israel's Partial Constitution-The Basic Laws*, JEWISH VIRTUAL LIBRARY (April 2009), www.jewishvirtuallibrary.org/jsource/isdf/text/Rubinstein.html

³³⁹ *Id.*

Justice Committee with preparing a draft of a constitution.³⁴⁰ The Constitution was to consist of separate chapters called Basic Laws. The draft of this document was not adopted at the time. In fact, it was not until March 13, 1992, when two of the Basic Laws finally went to the Knesset and were passed into law.³⁴¹ One of the two Basic Laws that were passed included what is called the Basic Law of Personal Liberty and Dignity.³⁴² This Basic Law is in a sense comparable to the due process found in the United States Constitution.

The Basic Law of Human Dignity and Liberty has as its' purpose the preservation of life, body, and dignity.³⁴³ The law provides there “shall be no violation of the life, body, or dignity of any person as such.”³⁴⁴ Furthermore, the exceptions clause states that “no violation of rights under the Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose and to an extent no greater than is required.”³⁴⁵ Although, as noted above, the

³⁴⁰ *Id.* Essentially the idea was to create a constitution piece by piece by enacting separate “chapters” over the years that would eventually be combined to form a Constitution. The Knesset has enacted eleven Basic Laws. However, the Knesset failed to provide for what legal force the Basic Laws would carry in the meantime before being combined to form the Constitution.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ ISRAEL MINISTRY OF FOREIGN AFFAIRS, *Basic Law: Human Dignity and Liberty*,

<http://www.mfa.gov.il/MFA/MFA-Archive/1992/Pages/Basic%20Law->

[%20Human%20Dignity%20and%20Liberty-.aspx](http://www.mfa.gov.il/MFA/MFA-Archive/1992/Pages/Basic%20Law-%20Human%20Dignity%20and%20Liberty-.aspx), (last visited Dec. 19, 2015),

³⁴⁴ *Id.*

³⁴⁵ *Id.*

Israeli constitutional structure is more liberal than the United States, the Basic Law of Human Dignity and Liberty, at its core, is similar to the notion of due process found in the United States Constitution as both serve the purpose of protecting the life and liberty of individuals. Similar to the United States Constitution, the Basic Laws have been held as the supreme law of the land.³⁴⁶

B. History of the Delegation of Governmental Authority in Israel

Israel, much like the United States, has a history of utilizing privatization in certain areas in order to save money by providing services at lower costs.³⁴⁷ The Israeli Constitution does not have any explicit provisions that prohibit the power of the Knesset or government to delegate

³⁴⁶ Medina, *supra* note 13, at 696. “The Basic Laws include neither an explicit ‘supremacy clause nor enforcement mechanisms of their provisions over legislation.” However, the Supreme Court held in 1995, in a case called *Bank Mizrahi*, that the Basic Laws are the supreme law of the land.

³⁴⁷ *Id.* at 691. “Accordingly, a considerably wide range of governmental powers in Israel has been delegated to private persons and corporations in recent years. These include: the serving of a custodial sentence by way of unpaid work in private, not-for-profit institutions; the forcible hospitalization of mental patients in private hospitals; the empowerment of various tax collection authorities to resort to the assistance of private collection companies; the privatization of numerous security services; the assignment of private sector lawyers as prosecutors; and the appointment of private persons to serve in official planning and development committees.” *Id.* at 693.

governmental powers.³⁴⁸ The delegation of power under the Israel scheme is similar to the doctrine developed in the United States in that the doctrine is primarily provoked to establish safeguards against uncontrolled discretionary power.³⁴⁹ Furthermore, Israel requires the “private body to be guided by rules promulgated by governmental agencies and subject to review by a public body.”³⁵⁰ Lastly, unlike the United States, privatization in Israel is subject to what is called the Quasi-Public entities doctrine.³⁵¹ This doctrine provides that any entity which has been given authorization to carry out governmental functions and powers are subject to the norms of

³⁴⁸ *Id.* at 692. Until the judgement in the case regarding the constitutionality of private prisons, existing precedents suggested broad discretion of the legislature to delegate to private entities, subject only to “process requirements such as sufficient guidelines by the relevant public entity.” *Id.* These process-based requirements include things such as providing sufficient guidelines by the public entity to guide the private entity, placing precautionary measures in place to prevent potential conflicts of interests, and establishing a supervisory scheme.

³⁴⁹ *Id.* at 693.

³⁵⁰ *Id.*

³⁵¹ *Id.* Noting the United States does not have a quasi-public doctrine which means that the exercise of government power by a private entity is not subject to the same level of constitutional scrutiny established to ensure accountability to government functions. However, in Israel, private entities are subject to public law norms, and essentially the delegation of a governmental function to a private entity does not change in any way what limitations or norms the function/power is subject to.

public law.³⁵² Accordingly, the move toward privatization of the prison system in Israel was formed under the context of these requirements.

The Knesset enacted the Prisons Ordinance Amendment in 2004 to provide the necessary guidance and satisfy the established requirements for delegating authority to private entities.³⁵³ Furthermore, the Act required that all contracts with private corporations be very detailed, and even more noteworthy, required that private corporations focus on directives and provide services aimed at the rehabilitation of prisoners.³⁵⁴ The Act also sought to protect prisoners' rights by identifying a list of restrictions and by requiring there to be a supervisory scheme in place to provide for close monitoring of the prison for compliance with the Act's directives.³⁵⁵

³⁵² *Id.*

³⁵³ *Id.* at 694. The Act provided for the establishment of only one prison, which was intended to hold 800 prisoners, and would be managed by a private corporation.

³⁵⁴ *Id.* at 694-95. The Act provides that a prison operator "is responsible for the proper construction, management, and operation of the privately managed prison, including: (1) maintaining order, discipline, and public security in the privately managed prison; (2) preventing the escape of inmates that are held in custody in the privately managed prison; and (3) ensuring the welfare and health of inmates and taking steps during the imprisonment that will aid their rehabilitation after their release from imprisonment, including employment training and education."

³⁵⁵ *Id.* at 695. The list of restrictions included establishing that staff members of the prison must act in accordance with all public law norms and respect inmates' human rights.

Accordingly, these requirements were considered adequate to establish the guidance necessary for delegation to be legitimate.

C. Israeli Supreme Court's Ruling on the Unconstitutionality of Private Prisons

Despite the safeguards in place to ensure protection of the life and liberty of inmates in private prisons, in November 2009, the Israeli Supreme Court held the Amendment as unconstitutional.³⁵⁶ The primary reason had to do with the concept that the existence of a privately managed prison inherently violates prisoners' rights of human dignity.³⁵⁷ The reason for this is due to the economic motive that essentially turns prisoners into the means to make a

³⁵⁶ *Id.* at 696. A petition to challenge the constitutionality of the act was filed in 2005; however, the court did not rule on the case for nearly five years due to the fact that there were proposals to repeal the act being discussed in the Knesset. After the proposals to repeal were not accepted, the Court ultimately ruled the entire act was unconstitutional. It is important to note that this is the first time the Israeli Supreme Court utilized the power of judicial review to declare an entire body of legislation, not just certain provisions of it, as unconstitutional. *See also, The Academic Center for Law and Business v. Minister of Finance*, (Nov. 19, 2009), Human Rights Division, HCJ 2605/05, (UK).

³⁵⁷ Medina, *supra* note 13, at 691. The second reason the Court argued prison privatization was problematic was according to the notion of democratic legitimacy, concluding the use of force exercised to further a general public interest should be employed by government actors, not private actors who have their own private interest. Accordingly, by allowing private actors to use force in such a manner undermines the notion such use of force is legitimized by a sense of democracy only in that it furthers public interest.

financial profit.³⁵⁸ The Court noted an economic purpose is problematic because the “public purposes for the imprisonment are blurred and diluted by irrelevant considerations that arise from a private economic purpose, namely the desire of the private corporation operating the prison to make a financial profit.”³⁵⁹ Thus, the Court seemingly found the motives encompassed by for-profit prisons undermines and makes irrelevant whether the conditions in a private prison are better or worse than those in public facilities. Instead, the Court’s analysis did not turn to a consideration of the practical effects of privatization, which could include remedying overcrowded and poor prison conditions. Furthermore, although no injury was actually evident by the violation of the Basic Right, the Court relied upon the future prospect of injury. The dissenting opinion found the majority’s reliance upon future injury not sufficient to justify the holding.³⁶⁰ Regardless, the majority, in holding the Amendment enabling privatization as unconstitutional, brought a halt to the use of privatization in Israel.

³⁵⁸ *Id.* at 705.

³⁵⁹ *Id.* In response, the dissent noted that the state of the Israel prison system at the time of the decision could have been considered an infringement of the inmates’ right to human dignity based on the poor conditions prisoners were living in, and argued privatization may be the only way improvement would be likely achieved.

³⁶⁰ Richard Harding, STATE MONOPOLY OF PERMITTED VIOLATION OF HUMAN RIGHTS’: THE DECISION OF THE SUPREME COURT OF ISRAEL PROHIBITING THE PRIVATE OPERATION AND MANAGEMENT OF PRISONS, *Punishment & Society* 14(2) 131, 139 (2012). Justice Levy in his dissent noted the results of privatization were unknown. In practice, it could produce better or worse conditions, but since it had not yet been implemented, the Court had no violation of a Basic Law to review.

Furthermore, he stated “[P]rospective constitutional scrutiny is possible only when there is a high

PART V. ANALYSIS AND ARGUMENT

The Israeli Supreme Court's holding that the privatization of prisons is unconstitutional *per se* is troubling for two reasons, namely, the apparently inconsistent application of the Basic Law of Human Dignity, and the reliance on the assumption that the inherent nature of private prisons makes them incapable of treating prisoners humanely. As to the first point, the Israeli Supreme Court held private prisons are inherently unconstitutional. However, the court only analyzed private prisons in the abstract and failed to consider the practical effects of privatization. Privatization in Israel was driven in part by the deplorable conditions of the prison system caused by overcrowding. Arguably, prisoners' rights were being violated under these types of conditions; however, the court did not look at the actual injury caused to those prisoners when applying the Basic Law of Human Dignity, but to the seemingly intangible injury under the Basic Law that would be caused by privatization.³⁶¹ Furthermore, the Court held private prisons could not be utilized to correct for these conditions based on the assumption private prisons, due to seeking an economic profit, would be turning prisoners into means to an end. However, this

probability...that the assumptions underlying it will be realized. A concern of a future violation of a protected right can be used to prevent that violation *ab initio*...provided that there is a sufficiently strong basis for this in current data.”

³⁶¹ Simmons & Hammer, *supra* note 53, at 494, noting that under the Court's reasoning, where two prisoners, one in a public facility and one a private facility, serve identical sentences and are treated the exact same way, a violation of the Basic Right to Human Dignity would still be found under the principle adopted by the Court in that punishment administered in a private prison has less legitimacy than that in a public prison.

argument is unfounded. For one, private prisons do not sentence individuals, thus they have no control over the amount of “means” they oversee. Further, the Prison Ordinance Amendment provided for very detailed guidance (including pursuit of rehabilitative efforts) and supervision over private prisons, making it unlikely prisoners would be treated differently than in a public facility.

However, the evaluation of the constitutionality of privatization in the United States is different than in Israel because unlike the statutory guidance proposed under the Israel privatization scheme, the United States does not have specific statutory guidance. The modern test utilized to evaluate the constitutionality of delegation to a private party is the intelligible principle test previously discussed.³⁶² Under this test, although broad delegation has been upheld by the Court, the Court has looked at whether the delegation of authority is guided by legislative act that is *sufficiently detailed*.³⁶³ The legislative act guiding privatization in the United States merely provides the Attorney General with the option of utilizing private facilities to house prisoners. It does not speak at all to the structure of contracts, objectives to be achieved by a private facility, or supervisory scheme to ensure compliance. As a result, there is a reasonable argument that the utilization of private prisons would not be sufficiently detailed to meet the requirements of the intelligible principle test.

However, the argument that the care of prisoners involves an inherently governmental function according to the Office of Budget and Management and cannot be delegated is insufficient to justify banning privatization. Inherently governmental functions are those that

³⁶² See *Mistretta*, 109 S.Ct. at 654.

³⁶³ *Id.*

involve an exercise of discretion by the public entity which significantly affects an individual's life, liberty, or property.³⁶⁴ Arguably, the care of prisoners does not involve an inherently governmental function because the exercise of discretion as to decisions that involve an inmate's life and liberty are minimally intrusive. Under this degrees approach, things such as the decision to prosecute an individual and the decision to sentence an individual to a serve a period of incarceration involve greater discretionary decision-making that is inherently governmental because of the apparent significant impact on an individual's life and liberty, namely, taking away such liberty. In contrast, decisions involving the care of an inmate after his liberty has already been taken away, would seemingly involve less of an impact on that inmate's life interests. This is not to suggest that decisions regarding an inmate's care are not important; however, it merely is to suggest they are not so important as to rise to level of being the significant impact required by the Office of Budget and Management's definition of "inherently governmental."³⁶⁵

Despite the conclusion that the care of prisoners does not involve an inherently governmental function, the privatization of prisons in the United States does still pose troubling due process concerns brought about by the inherent nature of a for-profit corporation. These concerns are founded in the notion that due process is in part intended to provide for

³⁶⁴ Anderson, *supra* note 7, at 123, arguing the care of prisoners involves an inherently governmental function because prison employees have the authority to decide whether to administer punishment or discipline an inmate which involves a discretionary decision that significantly affects the life and liberty of an inmate.

³⁶⁵ See *Id.* as to the definition of "inherently governmental function."

accountability and direct governmental entities to serve the greater good of the individual and society.³⁶⁶ This goal is threatened by the legitimate concern that private for-profit prisons seek to maximize economic profit and rely on prisoners being incarcerated in order to make such profit. The United States has no statutory guidance to direct private prisons to pursue efforts to rehabilitate inmates and prepare them for successful reintegration into society. As previously noted, recidivism rates of offenders released from correctional facilities is high.³⁶⁷ Without such efforts focused at rehabilitating inmates, private prisons fail to meet the underlying notion of due process of providing for the good of the individual. In fact, the lack of rehabilitative efforts touches upon more than the greater good of the individual incarcerated, but also brings into question the greater good of society as releasing individuals who are unprepared to cope with life outside the prison setting may lead them to recidivate by committing crimes. Many prisoners

³⁶⁶ Krent, *supra* note 104, arguing that the “delegations of decisional authority to private individuals and entities are not easily reconcilable with the focus on accountability in the constitutional structure.” The expectation and theory that governmental entities act for the greater good instead of private gain is provided for in a number of provisions and checks in the constitution including the Appointments and Impeachment Clauses. Krent notes the Supreme Court recently warned the “diffusion of power carries with it a diffusion of accountability.” Further, Krent argues the constitutional framework would suggest the ability of the government to delegate authority to private entities is not absolute, but rather has limitations implied by the notion of accountability.

³⁶⁷ *Nation’s Largest Private Prison Firm Objects to Resolution to Fund Rehabilitative, Re-entry Programs*, *supra* note 106.

lack the necessary education or skills to find legitimate jobs that enable them to provide for their basic needs such as housing and food. Furthermore, many prisoners deal with mental health or substance abuse issues that can become unmanageable outside the prison setting. Failure to properly address these issues and provide prisoners with tools to cope leaves them unprepared to integrate successfully into society and may increase their likelihood of turning to crime. Ultimately, these crimes harm society. Thus, there is a need to provide rehabilitative programs in order to counter these concerns.

Accordingly, it is argued that prison privatization is not inherently unconstitutional; however, the current state of privatization in the United States should be held as unconstitutional. Despite the fact the Israeli Supreme Court held the privatization of prisons as unconstitutional, the Prison's Ordinance Amendment arguably contained legitimate concepts which would be beneficial to developing the scheme of privatization in the United States. For one, statutory authority for the utilization of private prisons should be more detailed so as to include outcome based goals and proper oversight by the governmental entity to ensure compliance with standards. Furthermore, contracts should be sufficiently detailed so as to require certain rehabilitation efforts and programs in private prisons. Lastly, as in Israel, employees in private prisons should be held to the same norms and requirements as employees in public prisons. More detailed statutory authority, detailed contracts, and proper supervisory oversight would resolve the issues apparent with the current enabling statute and with the due process clause.

PART VI. CONCLUSION

With the amount of prisoners in America's prisons, combined with the increasing governmental budget constraints, there is a need to turn to other resources to effectively manage the prison population. A reasonable solution involves the utilization of private prisons. However,

private prisons contain a number of constitutional concerns that include the improper delegation of governmental authority to a private party and concerns regarding inmates' rights under the due process clause. In fact, Israel addressed a similar due process argument to find the use of private prisons in Israel as unconstitutional per se despite the detailed guidance provided by Israeli legislation. Although the use of private prisons in the United States has legitimate constitutional concerns, the scheme of privatization can be developed so as to resolve the constitutional issues in a manner that allows privatization to be a proper means of managing the prison population. For example, the enabling statutory authority should be more detailed so as to meet the requirements under the intelligible principle test as to proper delegation of governmental authority. The enabling legislation should include specific directives on the management of the day to day operations of a private prison and the amount of staff training/experience required, including an acceptable staff to inmate ratio. The due process concerns should be addressed by requiring private prisons to pursue rehabilitative programs and efforts to serve the greater good of not only the individual, but also of society. The overall scheme of privatization should provide for more detailed contracts to include outcome based goals, rehabilitative efforts, and proper supervisory oversight by the governmental entity to ensure compliance. If these reforms are made, then the utilization of private prisons in the United States would become a reasonable and constitutional method to cope with the management of the prison population while conserving government resources.