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## Private Prisons & Human Rights: Examining Israel's Ban on Private Prisons in a US Context

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PRIVATE PRISONS & HUMAN RIGHTS: EXAMINING ISRAEL’S BAN ON PRIVATE PRISONS IN A U.S. CONTEXT

*Brandy F. Henry\**

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INTRODUCTION

The United States (U.S.) policy on federal prison privatization has recently undergone a major change. In February of 2017, the Office of the Attorney General issued a memorandum which rescinded the previous administration’s order to eliminate the use of federal private prison contracts.<sup>1</sup> The original order to eliminate federal private prisons was based

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<sup>1</sup> See Memorandum from Att’y Gen. Jefferson B. Sessions III on Rescission of Memorandum on Use of Private Prisons to Acting Dir. Fed. Bureau of Prisons (Feb. 21, 2017) [hereinafter

on a report by the Department of Justice's Office of the Inspector General, which found that federal privately contracted prisons compared poorly with Bureau of Prison facilities.<sup>2</sup> The report found that these private prisons did not provide substantial cost savings, had worse safety outcomes, and offered less rehabilitative services.<sup>3</sup> However, under the Trump administration these changes were rescinded with the issuance of a new directive that swung the pendulum of policy back in favor of using private facilities to "meet the future needs of the federal correctional system."<sup>4</sup> Issues of safety and rehabilitation were not addressed in this memorandum.<sup>5</sup> Additionally, the majority (87%) of the nearly million and a half prisoners in the U.S. are held in state facilities,<sup>6</sup> which were not covered by the original directive.

Meanwhile in Israel, a 2009 Israeli Supreme Court ruling found that private prisons were a violation of human rights.<sup>7</sup> This dismantling of private prisons in Israel will be used as a case study. The legal context and use of private prisons in Israel will be compared to that in the U.S. Due to differences in legal statutes, this analysis will be focused on U.S. state and federal prisons, and therefore will not discuss jails/county detention facilities, juvenile detention facilities, or civil detention facilities (which would include immigration detention centers and psychiatric facilities). However, the line of argument presented here can likely be adapted to the context of these facilities.

This Article will begin by describing the relevance of decommodification theory to analyzing the impact of prison privatization on human rights. Next, it will provide an overview of the historical underpinnings of prison privatization in the U.S. Then, it will present the Israeli Supreme Court case which struck down prison privatization. A comparison of relevant legal statutes between the U.S. and Israel will then follow. Finally, an argument will be made which details how the Israeli case

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Sessions Memo]; *see generally* Memorandum from Deputy Att'y Gen. Sally Q. Yates on Reducing our Use of Private Prisons to Acting Dir. Fed. Bureau of Prisons (Aug. 18, 2016).

<sup>2</sup> EVALUATION AND INSPECTIONS DIV., U.S. DEP'T. OF JUSTICE, 16-06, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS, at 2-3 (Aug. 2016).

<sup>3</sup> *Id.* at ii-iii, 11-13.

<sup>4</sup> Sessions Memo, *supra* note 1.

<sup>5</sup> *See id.*

<sup>6</sup> *See* E. ANN CARSON, U.S. DEP'T OF JUSTICE, NCJ 248955, PRISONERS IN 2014, at 2 (Lynne McConnell & Jill Thomas eds., 2015).

<sup>7</sup> H CJ 2605/05 Academic Center of Law & Business v. Minister of Finance, 27, 27 (2009) (Isr.).

may be applied to a U.S. context. This argument explains how prison privatization serves to strip prisons of the human right to dignity by commodifying them and transferring a core power of the state to a private entity.

#### I. THE FRAMEWORK: FROM COST EFFECTIVENESS TO HUMAN RIGHTS

The line of analysis used in this Article builds on previous work by Dolovich, which urged a move away from the use of a comparative efficiency approach in the analysis of private prisons.<sup>8</sup> In order to employ a human rights lens, the intersections of dignity and decommmodification, as related to the privatization of prisons, will be examined. The use of dignity and human rights have been suggested as a potential legitimizer for penal reform.<sup>9</sup> Decommmodification theory views public assets, such as prisons, as entitlements, not commodities.<sup>10</sup> Furthermore, according to Esping-Anderson, the decommmodification of individuals is necessary to grant them social rights.<sup>11</sup> This is because the commodification of an individual, such as a prisoner in a private prison, inherently objectifies the person.<sup>12</sup> Therefore, without the decommmodification of individuals, there can be no right to dignity;<sup>13</sup> the right to dignity denotes the special worth of a person, whereby they are granted human rights.<sup>14</sup>

Prisons may appear to be designed to curb fundamental human rights, such as freedom. However, according to the United Nations (UN), the role of a prison within a society is to encourage personal reformation and social rehabilitation.<sup>15</sup> Therefore, the associated loss of freedom to prisoners does not signify acceptance of infringing on the human rights of prisoners. Rather, it signifies the use of the state's duty to protect the human rights of its citizens, through initially separating and then rehabilitating prisoners. A focus on the

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<sup>8</sup> See generally Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 544–45 (2005).

<sup>9</sup> See Sonja Snacken, *Punishment, Legitimate Policies and Values: Penal Moderation, Dignity and Human Rights*, 17 PUNISHMENT & SOC'Y 397, 398 (2015).

<sup>10</sup> Gøsta Esping-Anderson, *The Three Political Economies of the Welfare State*, 20 INT'L J. SOCIOLOGY 92, 105–07 (1990).

<sup>11</sup> See generally *id.*

<sup>12</sup> See generally *id.*

<sup>13</sup> See generally *id.*

<sup>14</sup> See generally Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L., 655, 679 (2008).

<sup>15</sup> OFFICE OF UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *HUMAN RIGHTS AND PRISONS*, 9 (2005).

human rights of prisoners is of particular importance. Due to the nature of their status, prisoners are particularly vulnerable to human rights abuses. Evidence of abuses of prisoners' human rights has been detailed in the Belmont Report, which now provides additional protections to prisoners as research subjects.<sup>16</sup> While the vulnerabilities of prisoners to human rights abuses is certainly not new or limited to exploitation resulting from privatization, the particular problems of human rights violations as related to commodification and related financial incentives for exploitation is of importance.

It is recognized that any U.S. approach should be sensitive to the cultural context of the local judicial and legislative systems. However, the feasibility of adapting an Israeli Supreme Court strategy to the U.S. has potential. The Israeli and U.S. judicial systems are similar in that they were both adapted from the United Kingdom's system.<sup>17</sup> While there are some major differences between the two systems (no capital punishment in Israel, no jury system in Israel, less formal constitution), these differences do not impact the substance of this case study.<sup>18</sup> Rather, in this case, the Israeli Supreme Court appears to have acted very similarly to the U.S. Supreme Court by applying a constitutional argument to nullify a law. Additionally, while some legal challenges have been brought against private prisons in the US, none have followed the argument used in Israel. Given the similarities between the two systems, a close comparison of how the Israeli argument may extent to the U.S. context is needed and will follow by describing the two systems.

## II. HISTORY OF PRIVATE PRISONS IN THE US

In the early days of the US, the use of private prisons was adopted from England.<sup>19</sup> Yet, by the early 1900s the state administration of secure correctional facilities was internationally accepted as essential to the role of the state.<sup>20</sup> Despite this, there has been a growing privatization of prisons in

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<sup>16</sup> See Office of the Sec'y, U.S. Dep't of Health, Educ., and Welfare, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research*, J. AM. C. DENTISTS, Summer 2014, at 4, 9.

<sup>17</sup> Amnon Straschnov, *The Judicial System in Israel*, 34 TULSA L.J. 527, 527 (1999).

<sup>18</sup> *Id.*; see also Malvina Halberstam, *Judicial Review, A Comparative Perspective: Israel, Canada, and the United States*, 31 CARDOZA L. REV. 2393, 2431 (2010).

<sup>19</sup> See DOUGLAS McDONALD ET AL., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE, at 4 (1998).

<sup>20</sup> *Id.*

the U.S. since the 1980s.<sup>21</sup> In addition, juvenile rehabilitation, vocational rehabilitation, and direct service contracts continue to be held in exception to the state's role.<sup>22</sup>

As a result of the war-on-drugs and tough-on-crime policies of the late twentieth century, the number of U.S. prisoners began to grow rapidly, nearly doubling between 1988 and 1997.<sup>23</sup> The booming U.S. prison population in the 1980s and 1990s created an opportunity to reevaluate the exclusivity of the state in administering secure correctional facilities.<sup>24</sup> Private prison corporations offered to solve many of the problems created by the rapid growth of the prison population.<sup>25</sup> These corporations were able to quickly build new facilities to expand bed capacity and offered to provide the same services for less cost through increased efficiencies.<sup>26</sup> In order to take advantage of these strategies, some state and federal agencies began shifting their custodial duties towards private corporations.<sup>27</sup> Additionally, some jurisdictions responded by privatizing contracts for services, but retained the essential duties of housing and supervision.<sup>28</sup>

In 1992, President George H. W. Bush formalized this privatization strategy through an executive order that encouraged the privatization of prisons, and other state infrastructure assets.<sup>29</sup> Additionally, the role of private prison corporations in contributing to a favorable political climate for private prisons cannot be ignored. Private prison corporations have been involved in political campaign contributions and legislative lobbying that supports the very policies that led to their gaining a foothold in the U.S. prison system in the first place.<sup>30</sup> Their continued political presence makes them a powerful stakeholder in maintaining the use of private prisons in the U.S.

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at iii.

<sup>23</sup> See Rachel Christine Bailie Antonuccio, *Prisons for Profit: Do the Social and Political Problems Have a Legal Solution?*, 33 J. CORP. L. 577, 579 (2007).

<sup>24</sup> See *id.*

<sup>25</sup> Dolovich, *supra* note 8, at 457.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 507.

<sup>29</sup> See Exec. Order No. 12,803, 57 Fed. Reg. 19,063 §§ 2–3 (Apr. 30, 1992), reprinted in 31 U.S.C. § 501 app. at 39 (2006).

<sup>30</sup> See BRIGETTE SARABI & EDWIN BENDER, *THE PRISON PAYOFF: THE ROLE OF POLITICS AND PRIVATE PRISONS IN THE INCARCERATION BOOM* 7–9 (2000).

The U.S. houses the greatest number of prisoners of any nation,<sup>31</sup> thus the actual total number of U.S. prisoners housed in private facilities is the highest in the world.<sup>32</sup> However, the overall percentage of U.S. state and federal prisoners held in private prisons is relatively low (8.4% in 2014).<sup>33</sup> However, this relatively low aggregate number also masks variation across U.S. states. As of 2014, 20 states did not house any prisoners in private state facilities, while 10 more states held less than 5% of their state's prison population in private facilities.<sup>34</sup> In addition to geographic variation in the impacts of prison privatization in the US, there are also demographic disparities. Within U.S. state and federal prisons, there is an overrepresentation of the impoverished,<sup>35</sup> people of color,<sup>36</sup> and individuals with mental health disorders.<sup>37</sup> The human rights issues laid out in this Article likely have a magnified impact on these marginalized populations. Internationally, the use of private prisons has varied and will be detailed in the next section.

### III. CASE STUDY: LEGAL CHALLENGE TO PRIVATE PRISONS IN ISRAEL

Despite the fact that the U.S. houses the greatest number of prisoners in private prisons, as of 2013, Australia, New Zealand, Scotland, Wales, and England had proportionally higher numbers of privately held prisoners.<sup>38</sup> Internationally, at least 11 other countries operate some form of private prisons.<sup>39</sup> These countries include: England, Scotland, Wales, Germany, France, South Africa, New Zealand, Australia, Japan, Brazil, and Chile.<sup>40</sup> However, the degree of privatization varies within these countries. England, Scotland, Wales, South Africa, New Zealand, and Australia operate a high

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<sup>31</sup> Tyjen Tsai & Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, PRB (Aug. 10, 2012), <https://www.prb.org/us-incarceration/>.

<sup>32</sup> Cody Mason, *International Growth Trends in Prison Privatization*, THE SENT'G PROJECT (Aug. 20, 2013), [www.sentencingproject.org/publications/international-growth-trends-in-prison-privatization/](http://www.sentencingproject.org/publications/international-growth-trends-in-prison-privatization/).

<sup>33</sup> *Id.*

<sup>34</sup> CARSON, *supra* note 6, at 14.

<sup>35</sup> See JEFFREY REIMAN & PAUL LEIGHTON, *THE RICH GET RICHER AND THE POOR GET PRISON* 237 (Routledge 2016) (2001).

<sup>36</sup> Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. CRIMINOLOGY 1259, 1259 (1982).

<sup>37</sup> See Seth J. Prins, *Prevalence of Mental Illnesses in U.S. State Prisons*, 65 PSYCHIATRIC SERV. 862, 862 (2014).

<sup>38</sup> Mason, *supra* note 32.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

percentage of completely privatized prisons.<sup>41</sup> The remainder of the countries using privatized prisons operate some blend of private-public partnership.<sup>42</sup> Despite this rapid proliferation, Israel and several U.S. states have taken a legal stand against private prisons through legal rulings, state legislation, and refusal to commodify their prisons.

#### IV. PRIVATE PRISONS IN ISRAEL

In 2009, the Israeli Supreme Court ruled that private prisons violate the human right of dignity.<sup>43</sup> This ruling came after the passage of the 2004 Prisons Ordinance Amendment Law, or Amendment 28.<sup>44</sup> Amendment 28 established the creation of a single prison which would be operated via private contract.<sup>45</sup> The Court's argument against the amendment was based on the idea that the privatization of prisons commodifies the prisoner, which inherently violates their rights to dignity and liberty.<sup>46</sup> A related thread of this argument was the prohibition of privatizing core government powers.<sup>47</sup> This argument was brought before the Costa Rican Constitutional Court in 2004. However, the Costa Rican Constitutional Court dismissed the argument due to the fact that only the construction of the prison was privatized, not the core function of operating the facility.<sup>48</sup>

The Israeli Court decision was based on the violation of their Basic Law: Human Dignity and Liberty of the State of Israel.<sup>49</sup> According to this Israeli law, the constitutional right to dignity and liberty can only be violated to further essential public interests.<sup>50</sup> Therefore, it was necessary to couple

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> HCJ 2605/05 Academic Center of Law & Business v. Minister of Finance, 27, 27 (2009) (Isr.).

<sup>44</sup> *Id.*

<sup>45</sup> Prisons Ordinance Amendment Law (no. 28), 5764–2004, SH No. 1935 (Isr.) (set aside 2013).

<sup>46</sup> 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, 488 (2015).

<sup>47</sup> Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT'L J. CONST. L. 690, 699 (2010).

<sup>48</sup> Richard Harding, *State Monopoly of 'Permitted Violation of Human Rights': The Decision of the Supreme Court of Israel Prohibiting the Private Operation and Management of Prisons*, 14 PUNISHMENT & SOC'Y 131, 143 n.3 (2012).

<sup>49</sup> HCJ 2605/05 Academic Center of Law & Business v. Minister of Finance, 27, 57 (2009) (Isr.).

<sup>50</sup> *Id.* at 28.

the violation of human rights argument with that of a transfer of the core function of the state, known as delegation. The Israeli Court ruled that the delegation of the state power to restrict a person's liberty necessarily strips a person of their right to dignity.<sup>51</sup> This was the first time that this argument had been used anywhere as a legal challenge to private prisons.<sup>52</sup>

#### V. PRIVATE PRISONS IN THE US

The legal arguments used in Israel and Costa Rica have not been attempted in the U.S.<sup>53</sup> Additionally, those arguments against private prisons that have been attempted have not been successful.<sup>54</sup> As a result, within the US, the successful opposition to private prisons has come in the form of state law.<sup>55</sup> Past legal scholars in the U.S. have examined the potential for the non-delegation doctrine to be used in the U.S. to challenge private prisons.<sup>56</sup> As no direct case law in the U.S. exists for this challenge, these authors presented arguments for potentially applicable case law and critiqued its use in this context.<sup>57</sup> While scholars disagree about the utility of applying a non-delegation based challenge, they have not examined its potential in conjunction with a human rights approach, as used in Israel.

In 1990, Illinois passed the Private Correctional Facility Moratorium Act, which states that administration of correctional facilities is inherently governmental due to the obligatory use of coercive police powers which cannot be privatized.<sup>58</sup> The argument presented in the Illinois statute is similar to that made in the Costa Rican Constitutional Court.<sup>59</sup> The Illinois law also cites issues of liability, accountability, and cost as prohibitive factors in the decommodification of the state prison system.<sup>60</sup> However, the law explicitly makes exception for specialized residential juvenile facilities,

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<sup>51</sup> *Id.* at 27–28.

<sup>52</sup> Harding, *supra* note 48, at 134.

<sup>53</sup> *Id.*

<sup>54</sup> See Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 657–60 (1987).

<sup>55</sup> *Id.*

<sup>56</sup> See generally Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PU. CONT. L.J. 113, 114–39 (2009); see also Field, *supra* note 54.

<sup>57</sup> *Id.*

<sup>58</sup> 730 Ill. Comp. Stat. Ann. 140/2 (West 2012).

<sup>59</sup> See Harding, *supra* note 48.

<sup>60</sup> 730 Ill. Comp. Stat. Ann. 140/3 (West 2012).

work-release programs, and service provision within correctional centers.<sup>61</sup> This exception is in line with the previously discussed historical exceptions for these types of carve outs within the U.S. prison system.

New York followed with their own 2007 law prohibiting the private ownership or operation of correctional facilities.<sup>62</sup> The sponsoring senator of the New York law stated “public safety should never be linked to private-sector profit motives.”<sup>63</sup> Although not explicitly stated within the statute, this argument against the privatization of prisons is similar to that employed in Israel, in that the linking of profits to incarceration inherently commodifies the prisoner.

Additionally, both New Hampshire and Vermont have proposed state bills to ban private prisons.<sup>64</sup> Most recently, in 2015, Senator Bernie Sanders introduced a bill into the U.S. Senate to ban private prisons.<sup>65</sup> In a press release discussing the bill, Senator Sanders implied that human dignity and liberty cannot be upheld in a for-profit prison.<sup>66</sup> Finally, while other U.S. states have not adopted laws banning the privatization of prisons, many have nonetheless failed to privatize their prisons.

## VI. HUMAN DIGNITY

Despite its widespread use to justify legal rulings, human dignity remains a vague legal concept.<sup>67</sup> The origins of the word dignity trace back to the Romans, who commonly used dignity to denote status, which afforded respect and honor.<sup>68</sup> This understanding of status was not inherently linked to a person and was often used to refer to the state.<sup>69</sup> Less commonly, the Romans used dignity to denote a special status unique to humans, where this status indicated an inherent worth of the person.<sup>70</sup> It is this second definition

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<sup>61</sup> *Id.*

<sup>62</sup> Michael F. Nozzolio, *Nozzolio Bill Signed into Law Prohibits For-profit Prisons in New York*, N.Y. STATE SENATE (Aug. 1, 2007) <https://www.nysenate.gov/newsroom/in-the-news/michael-f-nozzolio/nozzolio-bill-signed-law-prohibits-profit-prisons-new-york>.

<sup>63</sup> *Id.*

<sup>64</sup> H.B. 443-FN, 2013 Reg. Sess. (N.H. 2013); H.B. 28, 2013 Leg. Sess. (Vt. 2013).

<sup>65</sup> S. Res. 2054, 2015 Leg., 114<sup>th</sup> Cong. (2015) (enacted).

<sup>66</sup> John Wagner, *Sanders to Push a Plan to Ban Private Companies from Running Prisons*, WASH. POST, Sept. 17, 2015.

<sup>67</sup> Doron Shultziner & Itai Rabinovici, *Human Dignity, Self-Worth, and Humiliation: A Comparative Legal–Psychological Approach*, 18 PSYCHOL., PUB. POL’Y Law 105 (2012).

<sup>68</sup> McCrudden, *supra* note 14, at 656–57.

<sup>69</sup> *Id.* at 657.

<sup>70</sup> *Id.*

which pertains to the widespread modern legal use of dignity to confer human rights.

Dignity as a concept denoting special rights to humans entered legal doctrines in the early 1900s.<sup>71</sup> From this time forward, as new constitutions were drafted, dignity was often explicitly incorporated as a central tenet guaranteeing human rights.<sup>72</sup> Countries incorporating dignity in their constitutions included: Mexico (1917), Weimar Germany (1919), Finland (1919), Portugal (1933), Ireland (1937), Cuba (1940), Spain (1945), Japan (1946), Italy (1948), West Germany (1949), India (1950), and Israel (1992).<sup>73</sup> The original charter of the UN also explicitly declared dignity to be a human right within its Universal Declaration of Human Rights.<sup>74</sup> Dignity has continued to be a central tenet of UN guidelines for human rights.<sup>75</sup> Despite the widespread use of dignity as a human right, there are differences in how dignity is defined. Given these differences, it is important to distinguish how Israel and the U.S. define dignity.

#### VII. HUMAN DIGNITY & ISRAELI LAW

The first time that dignity was used in Israeli legal texts was in the 1980 case *Katalan v. Prison Authority*.<sup>76</sup> This case used language similar to what would later become the Basic Law on Human Dignity and Liberty.<sup>77</sup> The ruling in the case mandated that all people in Israel have the right to dignity, including prisoners.<sup>78</sup> The passage of the Basic Law on Human Dignity and Liberty in 1992, makes Israel unique as it is one of the few places that explicitly guarantees dignity as a human right.<sup>79</sup> The stated purpose of the law is to “protect human dignity.”<sup>80</sup> In order to achieve this purpose, the law outlines 10 basic human rights guaranteed to all people in Israel, and explicitly states that imprisonment does not void these rights.<sup>81</sup> The passage

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<sup>71</sup> *Id.* at 664.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 664–65.

<sup>74</sup> *Id.* at 667.

<sup>75</sup> *Id.* at 669.

<sup>76</sup> H CJ 355/79 *Katalan v. Prison Authority*, 34(3) PD 294 (1980) (Isr.).

<sup>77</sup> *Id.* at 304; *see* Prisons Ordinance Amendment Law (no. 28), 5764–2004, SH No. 1935 (Isr.) (set aside 2013).

<sup>78</sup> H CJ 355/79 *Katalan v. Prison Authority*, 34(3) PD 294, 304 (1980) (Isr.).

<sup>79</sup> *Id.*

<sup>80</sup> *See* Prisons Ordinance Amendment Law (no. 28).

<sup>81</sup> *Id.*

of this law sparked a trend in judicial activism in which dignity was used as the legal basis to protect human rights.<sup>82</sup> The successful 2009 legal challenge to private prisons was among this trend.<sup>83</sup> The function of the Israeli Basic Law on Human Dignity and Liberty is similar to that of the U.S. Bill of Rights.

#### VIII. HUMAN DIGNITY & U.S. LAW

Legal scholars in the U.S. have argued that like the Israeli law, the very purpose of the U.S. Bill of Rights is to safeguard human dignity.<sup>84</sup> There are also three U.S. states which explicitly include a right to dignity: Louisiana, Illinois, and Montana.<sup>85</sup> The Puerto Rican Constitution also contains a dignity clause.<sup>86</sup> Louisiana's section on dignity prevents unreasonably discriminatory laws, involuntary servitude, and slavery—except for prisoners.<sup>87</sup> The Constitution of Illinois' section on dignity condemns hateful communication.<sup>88</sup> Montana's dignity clause protects all people from discrimination from any entity, without exception.<sup>89</sup> Puerto Rico's dignity clause is almost identical to Montana's because Montana used Puerto Rico's clause as a model for their own.<sup>90</sup>

Within the US, this human right to dignity has been explicitly extended to prisoners, as evidenced by the establishment of case law on the subject. The 8<sup>th</sup> Amendment of the U.S. Constitution prohibits the use of cruel and unusual punishment.<sup>91</sup> Furthermore, cruel and unusual punishment was directly linked with a failure to uphold the human dignity of the prisoner by U.S. Supreme Court Justice Brennan in his concurring opinion in *Furman v. Georgia*.<sup>92</sup> Case law has recognized the human rights of prisoners through dignity in U.S. courts in at least three other instances. In the 1974 U.S.

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<sup>82</sup> See generally Shultziner & Rabinovici, *supra* note 67, at 37–40.

<sup>83</sup> HCJ 2605/05 Academic Center of Law & Business v. Minister of Finance, 27, 27 (2009) (Isr.).

<sup>84</sup> Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 17; see also Shultziner & Rabinovici, *supra* note 67, at 20.

<sup>85</sup> Jackson, *supra* note 84, at 21, n.21.

<sup>86</sup> *Id.* at 22.

<sup>87</sup> LA. CONST. art. I, § 3.

<sup>88</sup> ILL. CONST. art. I, § 20.

<sup>89</sup> MONT. CONST. art. II, § 4.

<sup>90</sup> Jackson, *supra* note 84, at 22.

<sup>91</sup> U.S. CONST. amend. XIII.

<sup>92</sup> *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (concurrence).

Supreme Court Case, *Procunier v. Martinez*, the justices stated that, “the needs for identity and self-respect are more compelling in the dehumanizing prison environment.”<sup>93</sup> Twenty years later the court, in *Farmer v. Brennan*, ruled that prisoners shall retain their right to self-esteem,<sup>94</sup> which scholars have argued, equates to dignity.<sup>95</sup> Recently, there has been a return to the use of dignity in U.S. jurisprudence as exemplified by the 2011 U.S. Supreme Court ruling in *Brown v. Plata*. In this case Justice Kennedy explicitly stated that, “prisoners retain the essence of human dignity.”<sup>96</sup> This recent shift toward the recognition of the dignity of prisoners in U.S. case law suggests a possible shift toward penal reform.<sup>97</sup> This case law provides the foundation for which U.S. prisoners are guaranteed the right to dignity. However, it does not explicitly describe the ways in which it might be violated. By borrowing from Esping-Anderson’s de commodification theory, we can explore how privatization of prisons can lead to the loss of dignity for prisoners.

#### IX. COMMODIFICATION OF PRISONERS & DECOMMODIFICATION THEORY

In a capitalist society, individuals rely on the market to access goods and services necessary for survival.<sup>98</sup> Inherent in this exchange is the commodification of either the individual, the services, or both.<sup>99</sup> In this process a commodified individual becomes inherently objectified.<sup>100</sup> In his seminal article on political economies, Esping-Andersen describes how the de commodification of individuals is necessary in order to grant them social rights.<sup>101</sup> In a privatized prison system, both the prisoners and state asset of the prison system are commodified, thereby violating human rights.

An example which elucidates the commodification of prisoners within private prisons is the recent “Cash for Kids” scandal in the state of Pennsylvania.<sup>102</sup> In this situation, two judges accepted millions of dollars’

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<sup>93</sup> *Procunier v. Martinez*, 416 U.S. 396, 428 (1974).

<sup>94</sup> *Farmer v. Bernann*, 511 U.S. 825, 853 (1994).

<sup>95</sup> McCrudden, *supra* note 14, at 667.

<sup>96</sup> *Brown v. Plata*, 563 U.S. 493, 510 (2011).

<sup>97</sup> David A. Green, *US Penal-reform Catalysts, Drivers, and Prospects*, 17 PUNISHMENT & SOC'Y 271, 271 (2015).

<sup>98</sup> See Esping-Andersen, *supra* note 10, at 100–105.

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

<sup>101</sup> See generally *id.*

<sup>102</sup> Sarah L. Primrose, *When Canaries Won't Sing: The Failure of the Attorney Self-Reporting System in the Cash-for-Kids Scheme*, 36 J. LEGAL PROF. 139, 140 (2011).

worth of bribes to deny juveniles counsel, over sentence them, and send them to private detention centers who benefitted from increased profits.<sup>103</sup> This example illustrates how the financial incentives inherent in private prisons stripped children of their fundamental right to liberty and dignity.

Corruption certainly exists within the public sector; as an example, the judge in the “Cash for Kids” scandal was a public servant. However, the public sector is designed to eliminate opportunities for financial exploitation and has a more robust system of checks and balances than the private sector. The system of for-profit privatized prisons also creates additional financial incentives which do not exist in the private sector. These financial incentives create new opportunities and motivations for human rights abuses of prisoners. Continued vigilance is required to continue to protect prisoners from new forms of potential abuse, such as those posed by commodification and the resultant loss of dignity.

Additionally, even without the involvement of corruption, the very nature of a for-profit, publicly traded prison corporation acts to commodify both the prisoner and the state asset of the prison. As stocks in these corporations are bought and sold for financial gain, the human prisoner becomes a product which is literally traded for financial gain. Percent contained occupancy rates are a common component of private prison state contracts which also lead to the commodification of prisoners. These contractual obligations specify the number of prisoners which the state must supply to the private prison. States which fail to meet this obligation face financial penalties.<sup>104</sup> These policies also clearly commodify the prisoner, essentially turning them into a product which is demanded by the prison corporation and must be supplied by the state. Additionally, where the prison itself is owned or operated by a private corporation, both the asset and the function become commodified. This process also acts to strip prisoners of their dignity through allowing a non-state agent to restrict their rights which, under other circumstances, would be a criminal act.

Under the decommodification theory, the system of commodifying prisoners and prisons inherently strips prisoners of their social rights.<sup>105</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> Llewellyn Hinkes-Jones, *Privatized Prisons: A Human Marketplace*, L.A. REV. BOOKS (Jan. 10, 2013) <https://lareviewofbooks.org/article/privatized-prisons-a-human-marketplace/>.

<sup>105</sup> Esping-Anderson, *supra* note 10, at 105–07.

Additionally, the system also incentivizes the further restriction of prisoners' human rights through the creation of financial disincentives for reform. Private prisons create an entire economic complex which profits off of incarceration. The prison industrial complex includes shareholders of prison corporations, employees of the corporations/institutions themselves, and the communities surrounding the institutions.<sup>106</sup> Economic beneficiaries of this complex are thereby disincentivized to support criminal justice reforms which reduce sentences or recidivism.

#### CONCLUSION

Examining the potential for human rights violations of private prisons addresses the very essence of whether prisons should be privatized in a democratic society, such as the US, with guaranteed human rights. Historically, the U.S. has relied on private prisons to reduce costs associated with its enormous prison population. However, within the U.S. there has been resistance to the privatization of prisons. In early 2017, the Obama administration issued an executive order to phase out the use of private prisons—an order that was later rescinded by the new incoming Attorney General. This occurred in Illinois and New York. National legislation and state legislation, in New Hampshire and Vermont, has also been proposed. Moving forward, using dignity as a foundation for ongoing legislative advocacy could also be fruitful, as it cuts to the very core of the argument against private prisons. This argument also has a history of success, and therefore serves as a promising foundation for future legislative efforts to curb the use of private prisons in the U.S.

By connecting decommodification theory with legal analysis, this Article has also described how Israel's 2009 ruling could apply in a U.S. context. The Israeli argument was unique in that it coupled a constitutional argument regarding human rights violations with the non-delegation doctrine. This argument describes how prison privatization serves to strip prisoners of the human right to dignity by commodifying them and transferring a core power of the state to a private entity. This was the first time this argument had been legally made.

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<sup>106</sup> See Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 603 (2012).

The success of the 2009 Israeli argument established a template which demonstrates how private prisons can legally violate human rights. This ruling has paved the way for other jurisdictions with similar legal definitions of dignity to adapt this legal argument to their judicial context. Louisiana, Montana, and Puerto Rico all have dignity clauses in their constitutions, which could be used to legally challenge the constitutionality of private prisons. While such an argument would need to be tailored to the specific statutory language of the state constitution, enough similarities exist that there is potential for a successful case. Additionally, at a national level, the argument could be made using a mix of constitutional and case law. In summary, the movement to end private prisons in the U.S. could benefit from incorporating a dignity and human rights framework into both the creation of new laws and in future judicial challenges. Given the success that this framework has had in Israel, U.S. legal scholars should incorporate lessons learned from the Israeli case into future legal arguments.