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## Editor's Note

# Locked Up: Prison Labor Secrecy Hides Exploitation

David Cuillier, Ph.D., Editor, *University of Arizona* \*

I'm never going to look at my morning eggs the same again. It turns out their production methods are as hidden to the public as their shell-encased yolks.

Alyssa Perloff educated me on the exploitive private for-profit prison complex in my home state of Arizona – shrouded in secrecy because of a public records law interpreted in favor of corporations.

I was astounded by her research findings, published in this issue of *The Journal of Civic Information*. Her paper won the journal's 2021-2022 Student Writing Competition, which came with a \$2,000 cash prize. Perloff, an Arizona native, wrote the piece as a law student at the University of Massachusetts School of Law, mentored by Professors Justine Dunlap and Richard Peltz-Steele, and is now serving as a law clerk for the Supreme Judicial Court of Maine.

She has a great career ahead of her, based on the eye-popping revelations in "Behind Bars: Secrecy in Arizona's Private Prisons' Labor Pool."

Inmates in private prisons, which are funded by taxpayers, are required to work 40 hours a week at miniscule wages – usually no more than \$2 per hour – and they must pay taxes but don't accumulate social security. The prison workers are not protected by safety regulations as they risk their lives lining the profits of corporations, like the farms that provide my local grocery store its eggs. I drive past those farms while headed north from Tucson to the woods. No telling what other products I use that are the result of this exploitation, supported through my own taxes.

All of this is cloaked in secrecy because the courts have said the Arizona public records law does not apply to private prisons. And it's not just in Arizona – other states have long exploited prison labor behind the scenes. Perloff provides excellent suggestions for better public policy, such as the Legislature explicitly making these records public, creating an independent oversight commission, or both.

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The piece follows on previous research exposing the difficulty of getting information about private companies acting in a public capacity, funded in part or fully by taxpayers, whether it is prisons,<sup>1</sup> private universities,<sup>2</sup> or sweetheart economic development deals.<sup>3</sup>

This has simply got to stop.

There was a day when tenacious muckrakers exposed wrongdoings of exploitive industries, such as Ida Tarbell's examination of the Standard Oil Company, Upton Sinclair's expose of the meatpacking industry, and even Louis Brandeis' critical writings about big banks and insurance companies before joining the Supreme Court.

Public record laws focused the light on government agencies, and so, ironically, de-emphasized scrutiny of private businesses that have as much or more influence on the everyday citizen.<sup>4</sup> All the while, corporations lobby behind the scenes to pass further exemptions to hide their indiscretions.<sup>5</sup>

Perloff's suggestion to make these records public is a good start, but more needs to be done, Paul Wright says. Wright is executive director of the Human Rights Defense Center and editor of Prison Legal News, and has been battling secret prisons for decades. He wrote to me while catching a plane to Maine for a public records court hearing:

"As someone who has been both active and adept at using public records laws, I am not sure that is a good substitute because first it implies there is someone interested in getting the records and then once they have them that they have the ability to analyze them and summarize them for public consumption and then have a means to disseminate the information," he wrote via email. "One solution would be to end prison slavery by requiring that prisoners be paid, and actually keep the prevailing wage for the work they perform."

Strengthening the enforcement provisions of public record laws might help, as well as empowering local journalists, nonprofits, and others to acquire and distribute the information.

Meanwhile, until policymakers improve government oversight and transparency, thousands of prisoners will continue to toil in the fields and chicken farms in the Arizona heat for pennies on the dollar, unprotected by safety regulations, to the benefit of corporations and at the expense of taxpayers.

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<sup>1</sup> Aimee Edmondson & Charles Davis, "Prisoners" of Private Industry: Economic Development and State Sunshine Laws, 16 COMM. L. & POL'Y 317, 322 (2011); Mike Tartaglia, *Private Prisons, Private Records*, 94 B.U.L. REV. 1689 (2014); Matthew Bunker & Charles Davis, *Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance*, 75 JOUR & MASS COMM. Q. 464, 466 (Autumn 1998).

<sup>2</sup> Josh Moore, *Out from the Curtains of Secrecy: Private Univ. Police and State Open Records Law*, 2 J. CIVIC INFO. 1 (2020).

<sup>3</sup> Sabrina Conza, *Chasing Smokestacks in the Dark: The Amazon HQ2 Quest Revives Debate Over Economic Dev. Secrecy*, 2 J. CIVIC INFO. 1, 23 (2020).

<sup>4</sup> This phenomenon is explained well by David E. Pozen, *Freedom of Information beyond the Freedom of Information Act*, 165 U. PA. L. R. 1097 (2017).

<sup>5</sup> Jeannine E. Relly & Carol B. Schwalbe, *How Business Lobby Networks Shaped the U.S. Freedom of Information Act: An Examination of 60 Years of Congressional Testimony*, 33 GOV'T INFO. Q. 404 (2016).



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## Behind Bars: Secrecy in Arizona’s Private Prisons’ Labor Pool

Alyssa M. Petroff \*

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### Abstract

Prisons run by private corporations in the United States have at hand a pool of individuals who are, by law, required to work while they are incarcerated. This article examines the secrecy behind the use of inmate labor, including on-the-job injuries sustained by prisoners, focusing on the state of Arizona as a case study. Ultimately, the article recommends that states should create oversight boards of its private prison system or allow private prison records to be accessible through already existing public records laws.

\* Alyssa M. Petroff, J.D., is an Arizona native, recent graduate of the University of Massachusetts School of Law, and currently a law clerk with the Supreme Judicial Court of Maine. This article earned first place in the University of Florida Brechner Center for Freedom of Information 2021-2022 Student Writing Competition. Please send correspondence about this article to [apetroff@umassd.edu](mailto:apetroff@umassd.edu). She would like to thank Professors Justine Dunlap and Richard Peltz-Steele for their continued guidance and mentorship.

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## Introduction

Imagine being expected to work at least forty hours each week, making ten cents per hour, and then you are seriously injured on the job. Your employer is not required to rush you to the hospital or report the injury to any federal or state authority. You have no way of knowing if your type of injury has happened before at your place of work or if the injury could have been prevented. Your employer is not required to pay for your wages while you recover or pay you anything if you become permanently disabled. In fact, you are not even classified as an employee and your employer does not need to treat you as one.

As astonishing as this sounds, that is the exact structure of prison labor in Arizona. Prisoners housed in the state's prisons are required, by statute, to work not less than forty hours a week and operate certain areas within the prison.<sup>1</sup> The state permits private companies to hire prison labor, pay the laborer pennies per hour, and turn around and sell the product of their labor at market prices.<sup>2</sup> At the same time, the state requires all able-bodied prisoners work and excludes them from the protections and benefits of the employer-employee relationship.<sup>3</sup> The exclusion allows "employers" to refrain from paying federal payroll taxes or social security contributions, but requires the prisoner to pay other forms of taxes.<sup>4</sup>

The expectation of prison labor extends to individuals housed in private prisons and Arizona's use of private prisons has exploded in the last two decades. Between 2000 and 2019, the United States experienced a 3% rise in the overall prison population, but a 32% rise in the number of prisoners in private facilities.<sup>5</sup> Eight states have more than doubled their for-profit prison population: Arizona, Florida, Georgia, Indiana, Ohio, Montana, North Dakota, and Tennessee.<sup>6</sup> In 2000, Arizona had 1,430 individuals housed in private facilities, in 2019, the number was 8,291, resulting in a 480% increase in less than 20 years.<sup>7</sup> By number of prisoners, Arizona has the third highest private prison population.<sup>8</sup>

Close to 20% of Arizona's prisoners are housed by private corporations and the state is looking to expand even more.<sup>9</sup> The 2021 legislative session added even more money in the budget for expansion of for-profit prisons.<sup>10</sup> These facilities have a particularly detrimental effect on

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<sup>1</sup> ARIZ. REV. STAT. ANN. § 31-251 (2021).

<sup>2</sup> ARIZ. REV. STAT. ANN. § 31-261 (2021).

<sup>3</sup> ARIZ. REV. STAT. ANN. § 21-251 (2021).

<sup>4</sup> Stephanie McMahon, *Inmates May Work, But Don't Tell Social Security*, 72 S.C. L. Rev. 757 (2021); Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 15, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/>.

<sup>5</sup> Kevin Muchitch, *Private Prisons in the United States*, SENTENCING PROJECT, <https://www.sentencingproject.org/publications/private-prisons-united-states/> (last visited Jun. 6, 2022).

<sup>6</sup> *Id.* (Each state experienced the following increases: Arizona 480%, Florida 205%, Georgia 110%, Indiana 313%, Ohio 253%, Montana 125%, North Dakota 221%, and Tennessee 118%).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* Arizona is third behind Texas and Florida, respectively, and excluding federal government prison statistics.

<sup>9</sup> *Id.* See also NATIONAL INSTITUTE OF CORRECTIONS, <https://nicic.gov/state-statistics/2019/arizona-2019>.

<sup>10</sup> Muchitch, *supra* note 5. See also Joseph Jaafari & Justin Price, *Arizona Lawmakers Invest More in Private Prisons After Record-High Campaign Contributions*, ARIZ. REPUBLIC (Jul. 30, 2021), <https://www.azcentral.com/story/news/politics/arizona/2021/07/30/az-private-prison-budgets-spike-following-record-campaign-spending/5410211001/>.

prison labor.<sup>11</sup> The prisoner trade allows Arizona's private prisons to import and house more prisoners than are convicted within the state's borders.<sup>12</sup> Prisoners in the private facilities are bound by the work requirement, regardless of whether or not they were convicted by the Arizona criminal justice system.

Records on prison labor within private prisons, and understanding the labor impact, are hard to come by. Arizona's public records laws are relatively broad and generally favor the release of records.<sup>13</sup> However, the state high court created an exception to the presumption of release when doing so would be against the best interests of the state.<sup>14</sup> It is also unclear from the statutes and court cases whether private prison records would fall under the public records law that mandates disclosure.

The Arizona Department of Corrections, Rehabilitation, and Reentry is responsible for the oversight of private facilities and their management of prisoners.<sup>15</sup> But there is no expectation that the records produced by such private contracts be made public, and it is unknown how many prisoners are working within these facilities. Also unknown is the number of prisoners in private prisons who are working for private for-profit corporations that are selling convict-made goods on the open market.

This article explores the nature of Arizona's public records law and the intersection of prison labor within private prisons. Prison labor use is mandatory by state law, but unknown when it comes to private facilities. This article also explores prison labor requirements and the prisoner trade within private facilities. Much is unknown about the private prison labor market because Arizona allows records to be kept from the public eye. And finally, this article proposes two solutions to the transparency deficit: either implement state oversight of the private facilities or expand public records laws to cover private contracts.

## Arizona's mandates

This section will lay out Arizona's public records law, describe the prison labor market in Arizona, and then how the privatization of prisons affects transparency in the system.

### Public records law

The United States was one of the first democracies in the world to institute an individual's right to access government records.<sup>16</sup> When President Lyndon B. Johnson signed into law the Freedom of Information Act (FOIA), he stated: "[o]ur democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."<sup>17</sup> These

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<sup>11</sup> Arizona's entire prison system has been plagued with grievous health and security issues for several years. The problems have spawned numerous lawsuits including class-actions regarding health care and forced labor. This paper will focus on Arizona's public records law and prison labor within private prisons.

<sup>12</sup> ARIZ. REV. STAT. ANN. § 41-1683 (2021). See Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815 (2020).

<sup>13</sup> ARIZ. REV. STAT. ANN. § 39-121 (2021).

<sup>14</sup> *Carlson v. Pima Cty.*, 141 Ariz. 487, 490 (1984).

<sup>15</sup> ARIZ. DEPT. OF CORR. REHAB. AND REENTRY, DEPT. ORDER 106 – CONTRACT BEDS (2020).

<sup>16</sup> See Margaret Kwoka, *Deference, Chenery, and FOIA*, 73 MD. L. REV. 1060 (2014).

<sup>17</sup> Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COM. LAW J. 21, 22 (1999).



1966 amendments to the Administrative Procedure Act created a pro-disclosure statute that would allow anyone to request any records from federal agencies.<sup>18</sup> The law mandated that government agencies comply with requests for information and created only nine enumerated, narrowed exceptions to the presumptive disclosure policy.<sup>19</sup> The purpose of the change was to institute a presumption of disclosure, openness, and transparency.<sup>20</sup> But by the 1980s, some government agencies, along with their records, were no longer accessible to the public.<sup>21</sup>

Privatization of government functions exploded late in twentieth century and concerns over its impact has long been debated.<sup>22</sup> But without a doubt, the impact of privatization on FOIA and access to information has been substantial.<sup>23</sup> Records, once accessible to the public for review and inspection, are now under the provenance of private businesses whose goal is often at odds with the purpose of public records laws.<sup>24</sup> Public scrutiny is especially valuable in public-private entities because such organizations may get sloppy with the public's money.<sup>25</sup>

Each state is responsible for governing its own right of access to state records, including those of public-private entities. State public records law can be a powerful tool, giving insight into government actions and ferreting out corruption.<sup>26</sup> In Arizona, the principal public records law, on its face, is relatively straightforward: "Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours."<sup>27</sup> However, the statute does not define what constitutes a "public record" or "other matter."<sup>28</sup> The law applies to any person elected or appointed to hold a position within a "public body," which includes any department or public agency "supported in whole or in part by monies from [the] state."<sup>29</sup>

A request for records does not need to be submitted in any particular form and a government agency is prohibited from requiring a specific form, however, a public body may ask

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<sup>18</sup> John Brinkerhoff Jr., *FOIA's Common Law*, 36 YALE J. ON REGULATION 575, 576 (2019).

<sup>19</sup> Daxton "Chip" Stewart & Charles Davis, *Bringing Full Disclosure Back: A Call for Dismantling FOIA*, 21 COMM. L. & POL'Y 515 (2016).

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

<sup>21</sup> See Feiser, *supra* note 17 at 22-23.

<sup>22</sup> See Laura Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579, 611 (2018); Alex Friedmann, *Apples-To-Fish: Public and Private Prison Cost Comparisons*, 42 FORDHAM URB. L.J., 503 (2014); Mike Tartaglia, *Private Prisons, Private Records*, 94 B.U.L. REV. 1689 (2014).

<sup>23</sup> See *id.*; Aimee Edmondson & Charles Davis, "Prisoners" of Private Industry: Economic Development and State Sunshine Laws, 16 COMM. L. & POL'Y 317, 322 (2011); Matthew Bunker & Charles Davis, *Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance*, 75 JOUR & MASS COMM. Q. 464, 466 (Autumn 1998).

<sup>24</sup> Bunker & Davis, *supra* note 23 at 466.

<sup>25</sup> Sabrina Conza, *Chasing Smokestacks in the Dark: The Amazon HQ2 Quest Revives Debate Over Economic Dev. Secrecy*, 2 J. CIVIC INFO. 1, 23 (2020).

<sup>26</sup> See Josh Moore, *Out from the Curtains of Secrecy: Private Univ. Police and State Open Records Law*, 2 J. CIVIC INFO. 1 (2020).

<sup>27</sup> ARIZ. REV. STAT. ANN. § 39-121 (2021).

<sup>28</sup> ARIZ. REV. STAT. ANN. § 39-121 (2021).

<sup>29</sup> ARIZ. REV. STAT. ANN. § 39-121.01(A) (1-2) (2021). Full text: (1) "Officer" means any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." (2) "Public body" means this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state. See Bunker & Davis, *supra* note 23 at 466 (referencing Arizona's statutory definition of public body "makes it unlikely that private entities performing government functions would be brought within" the meaning of the definition and would be protected from disclosure.).

the reason for request.<sup>30</sup> Records which are subject to disclosure must have a “substantial nexus with a government agency’s activities to qualify as public record.”<sup>31</sup> The broad nature of public records law in Arizona is to allow any individual access to government information “so that the public may monitor the performance of government officials and their employees.”<sup>32</sup> Although broad in both purpose and language, the interpretation and application of the law has been to curtail access.<sup>33</sup> Both the courts and the state Attorney General have narrowed the presumption to disclose.<sup>34</sup>

Unlike FOIA with its nine exemptions, the Arizona public records law does not have any exemptions within its statutes. The state high court, however, created three exceptions to the presumption to disclose.<sup>35</sup> The three judicially created exceptions are: (1) withholding records based on confidentiality and when some other statute or regulation specifically protects records from disclosure, (2) when disclosure would be detrimental to the best interests of the state, and (3) when it is necessary to protect the privacy of persons.<sup>36</sup> The paper explores the confidentiality and best interests of the state exceptions.

The “confidentiality” exception applies to private contractors that work with government agencies.<sup>37</sup> The Court has held that documents containing trade secrets are protected from the public records laws and are not eligible for review.<sup>38</sup> The state Attorney General issued an opinion that found financial statements filed by contractors are confidential and not subject to the public records law.<sup>39</sup>

The exception for when disclosure is “against the best interests of the state” is of particular interest. The state high court held that a records disclosure which would be “detrimental to the best interests of the state” is prohibited.<sup>40</sup> The state Attorney General has interpreted that the “detrimental to the best interest of the state” standard “permits an agency to designate a record as confidential only when effectiveness of the agency in the performance of its duties will be significantly impaired if disclosure of the information is made.”<sup>41</sup> The state agency has the burden of proof when arguing the disclosure of records is against the best interests of the state.<sup>42</sup> “When

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<sup>30</sup> ARIZ. PUBLIC RECORDS LAW – CITIZEN AIDE, ARIZ. OMBUDSMAN (Jun. 2020), <https://www.azoca.gov/wp-content/uploads/Public-Records-Law-Booklet-2020.pdf>.

<sup>31</sup> *Griffis v. Pinal Cty.*, 214 Ariz. 1, 4 (2007).

<sup>32</sup> *Phx. Newspapers, Inc. v. Keegan (Keegan)*, 201 Ariz. 344 (2001).

<sup>33</sup> ARIZ. PUBLIC RECORDS LAW – CITIZEN AIDE, *supra* note 30.

<sup>34</sup> *See Cox Ariz. Publ’g, Inc. v. Collins*, 175 Ariz. 11 (1993) (Public records laws have a “strong policy favoring open disclosure and access.”).

<sup>35</sup> *See Phx. Newspapers, Inc. v. Ellis (Ellis)*, 215 Ariz. 268 (2007); *Keegan*, 201 Ariz. at 348; *Carlson v. Pima Cty.*, 141 Ariz. 487 (1984).

<sup>36</sup> *Carlson*, 141 Ariz. at 487.

<sup>37</sup> *Keegan*, 201 Ariz. at 348.

<sup>38</sup> *Id.* at 353. *See also* ARIZ. REV. STAT. ANN. § 44-401 (2021) (“trade secret” means information, including a formula, pattern, compilation, program, device, method, technique or process, that both: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.); Aimee Edmondson and Charles Davis, “*Prisoners*” of *Private Industry: Economic Development and State Sunshine Laws*, 16 COMM. L. & POL’Y 317, 322 (2011) (at least twenty-seven states have similar exemptions. Theoretically, the exemptions are there to protect the state’s economic interest.).

<sup>39</sup> Ariz. Att’y Gen. Op. 179-140 (1979) <https://azmemory.azlibrary.gov/digital/collection/agopinions/id/12694/rec/3>.

<sup>40</sup> *Carlson*, 141 Ariz. at 490 (finding there is a limitation based in common law and a “conflict between the public’s right to openness in government and important public policy considerations relating to protection of the state.”).

<sup>41</sup> Ariz. Att’y Gen. Op. 183-006 (1983) <https://azmemory.azlibrary.gov/digital/collection/agopinions/id/13415/rec/4>.

<sup>42</sup> *Ellis*, 215 Ariz. at 268.

the release of information would have an important and harmful effect on the duties of the officials or agency in question, there is discretion not to release the requested documents.”<sup>43</sup>

How the judicial exceptions play out in records requests is still unsettled. Neither the state Supreme Court nor the Attorney General have directly spoken about whether private prison records and their resultant prison labor records are disclosable under the law. By statute, the director of the Arizona Department of Rehabilitation and Reentry (ADC) can make the determination of what records are to be released, but even the director’s determination may be limited by contractual obligations. Several news organizations have written about the inability to receive information from ADC and the privately run facilities.<sup>44</sup> An even bigger question is how prison labor is being used – and profited from – in private for-profit prisons.

### The prison labor market

Prison labor in Arizona appears to be flourishing and provides incredibly cheap labor for private corporations. Arizona has enacted statutes that require all able-bodied prisoners under ADC’s commitment to engage in hard labor for at least forty hours per week, allowing for reductions only when the individual participates in an educational, training, or treatment program.<sup>45</sup> ADC is required to assess and classify prisoners based on ability and skill level, as well as medical and mental capacity, and then assign the classification of persons to a designated job.<sup>46</sup> Prison labor is required to be used in the construction, renovation, conversion, and maintenance of specific buildings within all prison facilities in the state.<sup>47</sup> Exceptions to these rules only apply when either public or institutional security is at risk, when highly technical skills are required to complete the work, or when there is a bed shortage that requires emergency construction of new beds.<sup>48</sup>

State law simultaneously mandates prisoners work and disqualifies them as employees.<sup>49</sup> “None of the rights or privileges otherwise accorded to employees shall accrue to [working] prisoners.”<sup>50</sup> By prohibiting the creation of an employer-employee relationship, the state has exempted prison labor from the protections typically given to employees including a guaranteed minimum wage, rights to workers compensation benefits, and federal benefits such as Medicare and Social Security.<sup>51</sup> Prison labor is also exempted from statutes governing workplace safety and reporting requirements.<sup>52</sup>

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<sup>43</sup> Ariz. Bd. of Regents v. Phx. Newspapers, Inc., 167 Ariz. 254 (1991).

<sup>44</sup> See Elizabeth Stuart, *Poor Living Conditions Sparked Kingman Prison Riots*, PHX. NEW TIMES (Jul. 31, 2015), <https://www.phoenixnewtimes.com/news/poor-living-conditions-sparked-kingman-prison-riots-7531256>.

<sup>45</sup> ARIZ. REV. STAT. ANN. § 31-251 (A) (2021).

<sup>46</sup> ARIZ. REV. STAT. ANN. § 31-251 (B) (2021); ARIZ. DEPT. OF CORR. REHAB. AND REENTRY, DEPT. ORDER 903 – INMATE WORK ACTIVITIES (2021).

<sup>47</sup> ARIZ. REV. STAT. ANN. § 31-253 (B) (2021) (buildings include: administrative, warehouse, vehicle and maintenance, educational and vocational, Arizona correctional industries, multipurpose, and laundry.).

<sup>48</sup> ARIZ. REV. STAT. ANN. § 31-253 (2021).

<sup>49</sup> ARIZ. REV. STAT. ANN. § 31-251 (2021).

<sup>50</sup> ARIZ. REV. STAT. ANN. § 31-251 (e) (2021).

<sup>51</sup> McMahon, *supra* note 4; Lauren Castle & Maria Polletta, *Some Prisoners in Ariz. Make 10 cents per hour – should they get a \$3 minimum wage?*, ARIZ. REPUBLIC (Feb. 8, 2020), <https://www.azcentral.com/story/news/local/arizona/2020/02/07/arizona-lawmaker-proposes-3-per-hour-minimum-wage-prisoners/4681453002/>. See also *S. Tucson v. Indus. Comm’n*, 156 Ariz. 543 (1988).

<sup>52</sup> See ARIZ. REV. STAT. ANN. § 23-908, 23-1061 (2021).

Arizona statutorily exempts prison laborers from worker's compensation.<sup>53</sup> The state's high court held the exemption does not deprive prisoners of the equal protection of the law and found the exclusion of prisoners from worker protections was constitutional.<sup>54</sup> Protections not given to prisoners include payment of all medical expenses caused by a work-related injury or illness, and coverage of missed wages in the event of an injury or illness.<sup>55</sup> Further, if an injury sustained by a prison laborer does happen, the employer is not required to report the injury to the state's department of occupational health and safety.<sup>56</sup> Employers are required to report serious injuries of *employees*, but an inmate performing work cannot be classified as an employee and is thus exempt from reporting.<sup>57</sup> A state senator recently proposed a bill that would create a reporting requirement for injuries sustained by prisoners on the job, but the bill failed in committee.<sup>58</sup>

The exemption of prison labor from participating in social security is particularly harsh. Wages earned through prison labor are not taxed through the typical tax system.<sup>59</sup> Federally required taxes such as payroll tax or the Federally Insured Contributions Act (FICA) contributions are not withheld from inmate pay and "employers" of prison labor do not pay the employer-required portion of such taxes.<sup>60</sup> Since neither side pays the federally required taxes, it is the prisoner that gets the short end of the stick. The time spent working while incarcerated is not counted as a contribution toward social security benefits.<sup>61</sup> And if an inmate is serving a particularly lengthy sentence during the person's working years, that individual might not have enough working years left in their life to earn social security benefits once released from incarceration.<sup>62</sup>

Setting aside the potential of being unable to collect social security, being exempt from paying taxes is not as promising as it might sound. The state of Arizona mandates inmates pay a different kind of "tax."<sup>63</sup> A 25% tax is assessed on all wages for inmates who have less than \$250 saved, or less than \$50 saved if the inmate is serving a life sentence.<sup>64</sup> If an inmate earns more than \$2.00 per hour, an additional 30% for room and board is deducted regardless of how much the inmate has been able to save.<sup>65</sup> Additionally, if an inmate initiates a lawsuit, 20% is collected from all prison deposits and wages until the court costs are collected.<sup>66</sup> Inmates convicted of driving under the influence are also required to have 67% of their pay deposited into an Alcohol Abuse

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<sup>53</sup> ARIZ. REV. STAT. ANN. § 31-254 (J) (2021) ("the prisoner does not come within any of the provisions of the workers' compensation provided in [Arizona law] and is not entitled to any benefits ... whether on behalf of the prisoner or of any other person.").

<sup>54</sup> S. Tucson, 156 Ariz. at 543.

<sup>55</sup> ARIZ. REV. STAT. ANN. § 23-901 et seq. (2021).

<sup>56</sup> ARIZ. REV. STAT. ANN. § 23-908, 23-1061 (2021); Elizabeth Whitman, *More Ariz. Inmates Report Serious Injuries While Working at Hickman's Egg Farm*, PHX. NEW TIMES (Oct. 4, 2019), <https://www.phoenixnewtimes.com/news/arizona-inmates-report-serious-injuries-hickmans-egg-farm-osha-11367976>.

<sup>57</sup> ARIZ. REV. STAT. ANN. § 23-908, 23-1061 (2021); Whitman, *supra* note 56.

<sup>58</sup> Castle & Polletta, *supra* note 51.

<sup>59</sup> McMahan, *supra* note 4, at 764.

<sup>60</sup> *Id.* at 765-67.

<sup>61</sup> *Id.* at 759.

<sup>62</sup> *Id.* An inmate's family could also be excluded from benefits that are offered to dependents upon death.

<sup>63</sup> ARIZ. REV. STAT. ANN. § 31-254 (2021).

<sup>64</sup> ARIZ. REV. STAT. ANN. § 31-254 (D)(1) & (E)(1) (2021) (the statute does not refer to this as a "tax," rather the statute states this is a "mandatory deduction.").

<sup>65</sup> ARIZ. REV. STAT. ANN. § 31-254 (E) (2021) (the statute also requires a 30% reduction in cases of court ordered child support).

<sup>66</sup> ARIZ. REV. STAT. ANN. § 31-254 (D)(2) & (E)(2) (2021).

Treatment Fund.<sup>67</sup> It is only after all deductions have been made that a prisoner may have access to his or her earnings.<sup>68</sup>

Prison labor fares no better when it comes to wages earned. State statute dictates a *maximum* wage prison laborers may earn when working within a prison.<sup>69</sup> Compensation for work performed inside the prison is determined based on quantity and quality of work performed and the skill required but cannot exceed \$1.50 per hour.<sup>70</sup> This type of work typically includes inmates who work to maintain the prison, which, as noted above, is required by state law.<sup>71</sup> Jobs that keep the prison operating typically pay between forty to eighty cents per hour, but start as low as ten cents per hour.<sup>72</sup> Prisoners working through the state owned and operated Arizona Correctional Industries (ACI) are excluded from the \$1.50 per hour maximum, but ADC has set wage rates to start at twenty-three cents per hour.<sup>73</sup> ACI contracts with private corporations which hire prison labor through ACI under the guise of giving inmates “work opportunities.”<sup>74</sup> In 2020, a state senator introduced a bill to create a \$3.00 per hour minimum wage for prison labor, but the bill did not move past the committee.<sup>75</sup>

For prisoners working for a private company, compensation is required to be at least \$2.00 per hour.<sup>76</sup> State law further authorizes prison labor to be used for the production of goods to be sold in the open marketplace. In the 1930s, the U.S. Congress banned the interstate or foreign transport of goods made by convict labor.<sup>77</sup> However, the ban did not apply to agricultural commodities or parts for the repair of farm machinery.<sup>78</sup> In Arizona, farming employs some of the largest numbers of prison labor – and has some of the grisliest injuries to make it to the news.<sup>79</sup> One of the largest farming operations with the highest number of inmate labor is Hickman’s Family

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<sup>67</sup> ARIZ. DEPT. OF CORR. REHAB. AND REENTRY, DEPT. ORDER 106 – 903 INMATE WORK ACTIVITIES (2021).

<sup>68</sup> ARIZ. REV. STAT. ANN. § 31-254 (F) (2021).

<sup>69</sup> ARIZ. REV. STAT. ANN. § 31-254 (A) (2021).

<sup>70</sup> ARIZ. REV. STAT. ANN. § 31-254 (A) (2021).

<sup>71</sup> ARIZ. REV. STAT. ANN. § 31-253 (B) (2021) (buildings include: administrative, warehouse, vehicle and maintenance, educational and vocational, Arizona correctional industries, multipurpose, and laundry.).

<sup>72</sup> Castle & Polletta, *supra* note 51; ARIZ. DEPT. OF CORR. REHAB. AND REENTRY, DEPT. ORDER 903 – INMATE WORK ACTIVITIES (2021).

<sup>73</sup> ARIZ. REV. STAT. ANN. § 31-254 (A); Castle & Polletta, *supra* note 51.

<sup>74</sup> ARIZ. DEPT. OF CORR. REHAB. AND REENTRY, CAPITAL PROJECTS FUNDING & DEPT. FINANCES REPORT 20-109 (2020).

<sup>75</sup> Castle & Polletta, *supra* note 51; Laura Gomez, *Democrats Pushing Package of Crim. Just. Reform Bills in 2020*, ARIZ. MIRROR (Jan. 21, 2020), <https://www.azmirror.com/2020/01/21/democrats-pushing-package-of-criminal-justice-reform-bills-in-2020/>.

<sup>76</sup> ARIZ. REV. STAT. ANN. § 31-254 (A) (2021). Prisoners are excluded from the federal minimum wage because prisoners are not classified as employees and do not receive the federal right to a minimum wage.

<sup>77</sup> Ashurst-Sumners Act, Pub. L. No. 74-215, 49 Stat. 494 (1935); 18 U.S.C. § 1761 (2021).

<sup>78</sup> 18 U.S.C. § 1761 (b) (2021). A 1979 amendment to the law created the Prison Industries Enhancement Certification Program which allows the sale of certain prisoner made goods. The program requires a jurisdiction to be authorized to participate, wages to be at a rate not less than that paid for similar work in the same locality’s private sector, worker benefits including worker’s compensation, and a guarantee that not more than 80% of the gross wages be deducted for taxes, room and board, family support, and contribution to the victims of crime. Arizona was among the first jurisdictions to be certified and continues to participate in the program.

<sup>79</sup> Chad Marks, *Hickman’s Egg Farm Puts Prisoners to Work at High Cost to the Community, Residents Say*, PRISON LEGAL NEWS (Dec. 10, 2019), <https://www.prisonlegalnews.org/news/2019/dec/10/hickmans-egg-farm-puts-prisoners-work-high-cost-community-residents-say/>; Whitman, *supra* note 56. See CAPITAL PROJECTS FUNDING & DEPT. FINANCES REPORT, *supra* note 74; Claire Brown, *How Corps. Buy – And Sell – Food Made With Prison Labor*, THE COUNTER (May 18, 2021), <https://thecounter.org/how-corporations-buy-and-sell-food-made-with-prison-labor/>.

Farms.<sup>80</sup> Between 2019 and 2020 alone Hickman was sued by nine different inmates for injuries each sustained while working at the company's egg farm.<sup>81</sup>

Exacerbating the prison labor issue is the prison's ability to house prisoners sentenced outside the state of Arizona. Under Arizona statute, private prisons are authorized to accept prisoners who are convicted outside the state.<sup>82</sup> A prison corporation that brings an out-of-state prisoner into the state is required to notify the state of the number of prisoners being transferred, their names, the dates of transfer, and the security level of each prisoner.<sup>83</sup> The organization importing prisoners to the state is simply required to notify the governor and the director of ADC at least 48 hours before the prisoners arrive, or at least seven days if more than eleven prisoners are transferred at one time.<sup>84</sup> Nowhere in the statute is the governor or any official from ADC authorized to block the importation of prisoners from another state.

The prisoner trade is a relatively recent practice that has emerged throughout the U.S. Cautious of the British tradition of shipping convicts to distant lands, the U.S. initially banned the exportation of prisoners from one state to another with the idea that criminals should be confined to a local prison and transformed through solitude or labor.<sup>85</sup> But by the 1930s the restriction on prisoner transfers became a problem for the states and Congress ultimately lifted the ban.<sup>86</sup> Today, states, including Arizona, participate in an interstate corrections compact that allows states to trade prisoners and establish expectations regarding payment, procedure, and jurisdiction.<sup>87</sup>

A prisoner does not have a federally protected right to confinement in any specific prison, even if that means a transfer of long distances.<sup>88</sup> And being housed in Arizona is no exception. The state has become home to many prisoners that were convicted of crimes that had nothing to do with Arizona. In 2007, California contracted with a private prison company to build and house some 3,000 California prisoners in Eloy, Arizona.<sup>89</sup> Arizona continues to accept prisoners from California, as well as Hawaii, Vermont, and Colorado.<sup>90</sup>

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<sup>80</sup> CAPITAL PROJECTS FUNDING & DEPT. FINANCES REPORT, *supra* note 74; Chad, *supra* note 79; Whitman, *supra* note 56.

<sup>81</sup> Josh Kelety, *Hickman's Family Farms' Reliance on Prison Labor is Starting to Yield Lots of Lawsuits*, PHX. NEW TIMES (Jun. 18, 2021), <https://www.phoenixnewtimes.com/news/hickmans-family-farms-hit-with-new-lawsuits-over-inmate-worker-injuries-11563930> (Prisoner lawsuits include: Amanda Engler v. Hickman's Egg Ranch, CV2020-013621 (Ariz. Sup. Ct. 2020) (inmate sustained a compound fracture in her leg and a fractured knee); Robert McLaughlin v. Hickman's Egg Ranch, CV2020-005542 (Ariz. Sup. Ct. 2020) (inmate fell and fractured his leg); Noah Moore v. Hickman's Egg Ranch, CV2020-014088 (Ariz. Sup. Ct. 2020) (inmate suffered mangling and extensive fractures to his right hand); Nathan Peshlakai v. Hickman's Egg Ranch, CV2019-014790 (Ariz. Sup. Ct. 2019) (inmate sustained permanent disfigurement and lack of function in right hand and fingers); Mary Stinson v. Hickman's Egg Ranch, CV2019-011910 (Ariz. Sup. Ct. 2019) (inmate lost a finger fixing a chicken feeder); Michael Gerhart v. Hickman's Egg Ranch, CV2019-012698 (Ariz. Sup. Ct. 2019) (inmate crushed hand and lost function)); Elizabeth Whitman, *Barely Trained Inmate Loses Finger Working at Hickman's Egg Farm*, PHX. NEW TIMES (Sept. 12, 2019), <https://www.phoenixnewtimes.com/news/inmates-maricopa-county-arizona-injured-labor-hickman-egg-farms-11354362>.

<sup>82</sup> ARIZ. REV. STAT. ANN. § 41-1681 esq. (2021).

<sup>83</sup> ARIZ. REV. STAT. ANN. § 41-1683 (2021).

<sup>84</sup> ARIZ. REV. STAT. ANN. § 41-1683 (2021)

<sup>85</sup> Kaufman, *supra* note 12, at 1823. *See also* Rebecca McLennan, *THE CRISIS OF IMPRISONMENT* 19 (2008).

<sup>86</sup> Kaufman, *supra* note 12, at 1827-1829.

<sup>87</sup> *Id.* at 1831.

<sup>88</sup> *Olim v. Wakinekona*, 461 U.S. 238, 246-47 (1983).

<sup>89</sup> *Id.* at 1837. In 2020, the La Palma Correctional Center ended its contract with the state of California and has since been contracted with the U.S. Bureau of Immigration and Customs Enforcement. The facility houses adult, undocumented individuals.

<sup>90</sup> *Id.*

No matter where the prisoner was convicted, if he or she is housed in a prison within the state of Arizona, they are subject to the prison labor laws. The full extent of the state's reliance on, and exploitation of, prison labor is not fully known, and Arizona's expanding usage of private prisons creates a transparency issue.

### Private prison bloat and failures

The private prison industry was established in the 1980s and, quickly, the private prison population grew.<sup>91</sup> Concerns about private prison use grew just as much as their populations.<sup>92</sup> Concerns included operators of private facilities would be more likely to cut corners with security measures, prison quality, and constitutional rights of inmates all in the name of saving money.<sup>93</sup> The likelihood of corruption in prison operators and mistreatment and exploitation of inmates is higher because such actions can be hidden from the public in private prisons because they are not subject to public records laws.<sup>94</sup>

Nationally, the overall prison population has shrunk by 9% since 2009, and currently, about 8% of the total state and federal prison population housed in privately run facilities.<sup>95</sup> A 2021 executive order by President Joseph Biden mandated the end of private prisons within the federal Bureau of Prisons.<sup>96</sup> But the mandate will affect only a portion of the prison population because the order ends *federal* contracts and has no consequence to state arrangements.<sup>97</sup> Many states that have engaged in the privatization of prison functions have since decreased their reliance on such facilities or eliminated them altogether.<sup>98</sup> A handful of states have gone the other way, doubling down and investing even more in privatization.<sup>99</sup>

Arizona stands far outside the national trend. Arizona's prison population has grown by 60% since 2000, becoming the state with the fourth highest incarceration rate and eighth largest prison system.<sup>100</sup> Between 2000 and 2019, Arizona increased its use of private prisons more than 480%, and all signs point to further increasing privatization.<sup>101</sup> In January 2020, Arizona's governor announced that the state-run prison complex in Florence would close, one of the largest prison complexes in the state and home to death row executions.<sup>102</sup> Although the closure was

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<sup>91</sup> A.W. Geiger, *U.S. Private Prison Population Has Declined in Recent Years*, PEW RES. CTR. (Apr. 11, 2017) <https://www.pewresearch.org/fact-tank/2017/04/11/u-s-private-prison-population-has-declined-in-recent-years/>; U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., *Bulletin: Prisoners in 1983* (1983) <https://bjs.ojp.gov/content/pub/pdf/p83.pdf>.

<sup>92</sup> Feiser, *supra* note 17 at 25. *See also* Warren L. Ratliff, *The Due Proc. Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 372 (1997).

<sup>93</sup> Feiser, *supra* note 17 at 24-25.

<sup>94</sup> *Id.* at 24 n.20.

<sup>95</sup> Michele Deitch, *Raising Ariz.'s Commitment to Health & Safety: The Need for Indep. Oversight of Ariz.'s Prison Sys.*, 52 ARIZ. STATE L. J. 811, 812 (2020); Muchitch, *supra* note 5.

<sup>96</sup> EXEC. OFFICE OF THE PRESIDENT, EXEC. ORDER NO. 14006, REFORMING OUR INCARCERATION SYSTEM TO ELIMINATE THE USE OF PRIVATELY OPERATED CRIMINAL DETENTION FACILITIES (2021) (requiring the non-renewal of federal prison contracts and does not affect immigration detention centers.). Detainees in immigration detention centers make up a majority of the federal prison population housed within private facilities.

<sup>97</sup> *Id.*

<sup>98</sup> Muchitch, *supra* note 5.

<sup>99</sup> *Id.*

<sup>100</sup> Deitch, *supra* note 95.

<sup>101</sup> *Id.*; Jaafari & Price, *supra* note 10.

<sup>102</sup> ARIZ. DEPT. CORR. REHAB. & REENTRY, DEATH ROW INFO. AND FREQUENTLY ASKED QUESTIONS (2021) <https://corrections.az.gov/public-resources/death-row/death-row-information-and-frequently-asked-questions>;

announced under the guise of saving the state money by moving prisoners to private facilities, in January 2021, the state legislature increased funding to private prisons, paying even more per day for private prisons than the state would have paid had the Florence prison stayed open.<sup>103</sup> By then, the state's own reporting had found that privatization was in fact costing the state money.<sup>104</sup>

A 2010 report commissioned by ADC found that privately operated prisons were more expensive than those run by the state.<sup>105</sup> The state was in fact paying more per inmate per day for inmates housed at private facilities regardless of the level of security provided.<sup>106</sup> After that report, and an election of a republican governor, the state no longer contracts with an independent firm to research cost comparisons between public and private facilities.<sup>107</sup> In fact, the state repealed the law requiring cost comparisons between private and public facilities.<sup>108</sup> Curiously, the state law mandating that private facilities produce a cost savings to the state still exists.<sup>109</sup>

Direct financial costs aside, there are numerous safety issues with Arizona's private facilities.<sup>110</sup> In July 2010, three inmates escaped from the Kingman Arizona State Prison and murdered two people while on the run.<sup>111</sup> The Kingman facility was operated by the Management and Training Corporation (MTC), and a subsequent investigation showed *numerous* security lapses including failure to cure previously identified security risks such as cell doors that did not lock and inoperable security cameras.<sup>112</sup> Even after an escape that the private entity caused, MTC's contract was not canceled nor was MTC financially punished by the state. In fact, less than a year after the escape, the state paid MTC three million dollars because MTC's contract had guaranteed that the Kingman facility would remain 97% full and when it did not, the state had to pay up.<sup>113</sup>

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Suzanne Adams-Ockrassa, *Governor's Office Provides Answers on Florence Prison Closing*, CASA GRANDE DISPATCH (Dec. 22, 2020), [https://www.pinalcentral.com/casa\\_grande\\_dispatch/area\\_news/governors-office-provides-answers-on-florence-prison-closing/article\\_00d814cc-7b82-5199-b092-b92e6e3d92ac.html](https://www.pinalcentral.com/casa_grande_dispatch/area_news/governors-office-provides-answers-on-florence-prison-closing/article_00d814cc-7b82-5199-b092-b92e6e3d92ac.html).

<sup>103</sup> Jaafari & Price, *supra* note 10; Shaley Sanders, *Closing Florence Prison Could Cost Taxpayers Millions Annually*, KOLD (Mar. 3, 2020) <https://www.kold.com/2020/03/03/kold-investigates-closing-florence-prison-could-cost-taxpayers-millions-annually/>.

<sup>104</sup> Richard A. Oppel Jr., *Private Prisons Found to Offer Little in Savings*, N.Y. TIMES (May 18, 2011), <https://www.nytimes.com/2011/05/19/us/19prisons.html>; *Prison Privatization in Ariz.*, AM. FRIENDS SERV. COMM. (Oct. 2019) [https://www.afsc.org/sites/default/files/documents/AZ\\_Prison\\_Privatization\\_White\\_Paper.pdf](https://www.afsc.org/sites/default/files/documents/AZ_Prison_Privatization_White_Paper.pdf).

<sup>105</sup> D.M. Levine, *What's Costlier than a Gov't Run Prison? A Private One*, CNN (Aug. 18, 2010), [https://money.cnn.com/2010/08/17/news/economy/private\\_prisons\\_economic\\_impact.fortune/](https://money.cnn.com/2010/08/17/news/economy/private_prisons_economic_impact.fortune/);

PRISON PRIVATIZATION IN ARIZ., *supra* note 104. *See also* Appleman, *supra* note 22 at 611; Friedmann, *supra* note 22 at 503. <sup>106</sup> Friedmann, *supra* note 22, at 508 (a weblink to the actual report is no longer available). *See also* Tartaglia, *supra* note 22 at 1706 n. 107 (Arizona Office of the Auditor General stating: "department analysis of private prison and state prison costs indicated that it may be more costly to house inmates in private prisons.").

<sup>107</sup> PRISON PRIVATIZATION IN ARIZ., *supra* note 105, at 9.

<sup>108</sup> ARIZ. REV. STAT. ANN. § 41-1609.01 (2021). Original text read: "A proposal shall not be accepted unless the proposal offers cost savings to this state. Cost savings shall be determined based upon the standard cost comparison model for privatization established by the director." 2nd Reg. Sess. Ch. 302 § 8 (2012). *See* Friedmann, *supra* note 22, at 514 n.50.

<sup>109</sup> ARIZ. REV. STAT. ANN. § 41-1609.01 (2021).

<sup>110</sup> *See* Deitch, *supra* note 95.

<sup>111</sup> Marc Lacey, *Manhunt in Ariz. Ends in Arrests*, N.Y. TIMES (Aug. 20, 2010), <https://www.nytimes.com/2010/08/21/us/21inmate.html>; CNN Staff, *Accomplice Helped Convicted Murderer Escape, Ariz. Auth. Say*, CNN (Jul. 31, 2010), <http://www.cnn.com/2010/CRIME/07/31/arizona.prison.break/index.html>.

<sup>112</sup> Matt Clarke, *Report Faults Private Prison Co. for Deadly Ariz. Prison Break*, PRISON LEGAL NEWS (Mar. 15, 2011), <https://www.prisonlegalnews.org/news/2011/mar/15/report-faults-private-prison-company-for-deadly-arizona-prison-break/>.

<sup>113</sup> Chris Kirkham, *Prison Quotas Push Lawmakers to Fill Beds, Derail Reform*, HUFFINGTON POST (Sept. 20, 2013), [https://www.huffingtonpost.co.uk/entry/private-prison-quotas\\_n\\_3953483](https://www.huffingtonpost.co.uk/entry/private-prison-quotas_n_3953483). *See also* Appleman, *supra* note 22.



The state guaranteeing a minimum occupancy within private facilities is not unusual.<sup>114</sup> It is an industry norm to include contract language that requires the state to pay for a minimum number of inmates at any given time.<sup>115</sup> If the state cannot send the specified number of prisoners to the private facilities, the state is still required to pay for the empty beds. Arizona is among the states that have the highest occupancy requirements, including three facilities that have a 100% occupancy requirement.<sup>116</sup> The guaranteed income within these contracts is paid to some of the worst operators. MTC holds a contract for the Marana Community Correctional Treatment Facility which requires the state to pay for 100% capacity regardless of how many prisoners are actually housed in the facility.<sup>117</sup>

MTC's record on safety did not improve after the 2010 escape.<sup>118</sup> In 2015, at the same Kingman facility, a riot erupted. During the three-day riot, prisoners badly damaged several housing units causing more than 1,000 inmates to be evacuated and 13 people to be hospitalized.<sup>119</sup> The state department of corrections had to send in a special tactical team to take back control of the prison.<sup>120</sup> It was only then that the governor deemed MTC unfit to run the facility.<sup>121</sup> After an investigation found that MTC failed to address more than one-third of the problems identified in the 2010 investigation of the inmate escape, MTC's contract for the Kingman facility was terminated and a new corporation was contracted to turn things around.<sup>122</sup>

Responsibility for safety and security for privately run prisons ultimately rests with ADC. The Contract Beds Bureau within ADC is responsible for ensuring private prison operations are compliant with federal and state law, and the terms of the contracts between ADC and the private corporation are being met.<sup>123</sup> In five years, MTC's failures resulted in the death of two innocent people and millions of dollars in damage to one facility. The investigation into MTC after the 2015 riot revealed that ADC was not sufficiently conducting its oversight.<sup>124</sup> Issues such as failure to train staff and provide adequate safety as required under the contract would have been noticeable to ADC well before any riot.<sup>125</sup> Records obtained by *The Arizona Republic* show ADC was aware of the staffing issue because ADC withheld payment to MTC on more than one occasion due to understaffing, but when asked how many employees MTC was short, ADC refused to answer.<sup>126</sup>

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<sup>114</sup> Appleman, *supra* note 22, at 611; Arielle Stephenson, *Private Prison Mgmt. Needs Reform: Shift Private Prisons to a True Public-Private Partnership*, 49 PUB. CONT. L.J. 477, 485 (2020).

<sup>115</sup> *Criminal: How Lockup Quotas and "Low-Crime Taxes" Guarantee Profits for Private Prison Corp.*, IN THE PUB. INTEREST (Sept. 2013), <http://www.njjn.org/uploads/digital-library/Criminal-Lockup-Quota,-In-the-Public-Interest,-9.13.pdf>.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Jerod MacDonald-Evoy and Craig Harris, *Ariz. Sends Special Forces to Quell Kingman Prison Riot*, USA TODAY (Jul. 5, 2015, 5:25 PM), <https://www.usatoday.com/story/news/nation/2015/07/05/quell-kingman-prison-riot/29741193/>.

<sup>119</sup> *Id.*; Stuart, *supra* note 44.

<sup>120</sup> MacDonald-Evoy & Harris, *supra* note 118.

<sup>121</sup> Craig Harris, *Ariz. Cuts Ties with Private-Prison Operator Over Kingman Riot*, ARIZ. REPUBLIC (Aug. 27, 2015), <https://www.azcentral.com/story/news/arizona/politics/2015/08/26/arizona-kingman-riot-cause-corrections-department-report/32432963/>.

<sup>122</sup> Elizabeth Stuart, *Governor Doug Ducey Severs Private Prison Contract Following Riots*, PHX. NEW TIMES (Aug. 27, 2015), <https://www.phoenixnewtimes.com/news/governor-doug-ducey-severs-private-prison-contract-following-riots-7601064>.

<sup>123</sup> ARIZ. DEPT. OF CORR. REHAB. AND REENTRY, DEPT. ORDER 106 – CONTRACT BEDS (2020).

<sup>124</sup> Harris, *supra* note 121.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

Arizona's public records law provides no relief to anyone looking into how these private facilities are operated. Safety issues aside, it is unknown how prison labor is used within these prisons. State law mandates prisoners work within certain areas of the prison and state law allows private, non-correctional corporations to hire prison labor. But many questions remain, such as whether the prison labor requirement contributed to safety issues in private prisons or if the requirement contributed to an increase in costs in private facilities versus public, or how are corporations profiting off the almost-free labor the state mandates.

## What can be done

The state's increased reliance on private prisons serves to hide what is truly happening to prisoners, the labor they are required to perform, and the resultant public safety hazard. The public records law is theoretically structured to allow access to the private prison records, as the statute should apply to any department or agency that is supported, in whole or in part, by money from the state.<sup>127</sup> However, records have not been disclosed, and court interpretations of the statute have curtailed its original meaning. To fully understand the nature and extent of the prison labor market within Arizona's private prisons, the state should institute an oversight board of the private facilities or have the private facility records fall under the purview of the public records laws.

### An oversight board

Oversight of private prisons has long been subject to question and debate. When contracting with private entities, a state can exempt the private entity from certain requirements that are expected of publicly operated prisons.<sup>128</sup> Such exemptions can include the reporting and disclosure requirements that are otherwise mandatory for non-private facilities.<sup>129</sup> And Arizona has been no different.

The state takes an arms-length approach to monitoring and overseeing the private prisons with which they have contracted. One advocacy group noted that the state of Arizona "has virtually no performance standards for corrections and no mechanism for oversight or accountability."<sup>130</sup> ADC is required to assign a team to every private facility to ensure contractual obligations are met and to note deficiencies, but investigations into the Kingman facility 2010 escape and 2015 riot, as discussed above, indicate ADC is not doing its job.<sup>131</sup> And any purported oversight by ADC excludes the reporting of prisoner transfers into the state, prisoners injured on the job, and the number of contract employees working within each facility, to name only a few.<sup>132</sup>

In 2020, state representative Walter Blackmun introduced a bill that would create an independent prison oversight committee of Arizona's entire prison system.<sup>133</sup> The purpose of the bill was to increase transparency and accountability within ADC by creating an independent

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<sup>127</sup> ARIZ. REV. STAT. ANN. § 39-121.01 (2021).

<sup>128</sup> Stephenson, *supra* note 114, at 485.

<sup>129</sup> *Id.*

<sup>130</sup> Maria Polletta, *Ariz. Gov. Picks Fed. Bureau of Prisons Official David Shinn to Lead State Corrections Agency*, ARIZ. REPUBLIC (Oct. 7, 2019), <https://www.azcentral.com/story/news/politics/arizona/2019/10/07/david-shinn-appointed-director-arizona-department-corrections/3900413002/>.

<sup>131</sup> ARIZ. DEPT. OF CORR. REHAB. AND REENTRY, DEPT. ORDER 106 – CONTRACT BEDS (2020); Clarke, *supra* note 112; Stuart, *supra* note 122.

<sup>132</sup> ARIZ. DEPT. OF CORR. REHAB. AND REENTRY, DEPT. ORDER 106 – CONTRACT BEDS (2020).

<sup>133</sup> H.R. 2894, 54th Leg., 2nd Reg. Sess. (Ariz. 2020).

ombudsman to monitor and inspect all prison facilities and investigate complaints from incarcerated persons.<sup>134</sup> The bill lays out how the independent ombudsman would be selected, authorizes the office to collect data, and – most importantly – give inspection and investigatory powers to the office.<sup>135</sup>

Scholars have found there are eight fundamental criteria for effective oversight of the prison system. They are: (1) an agency independent of the corrections department/body; (2) a mandate to conduct regular, routine inspections; (3) the independent agency must have unfettered access to all areas – both public and confidential; (4) the independent body must have adequate resources; (5) there must be a duty to report; (6) the independent agency must take a multi-pronged approach to evaluating treatment of prisoners; (7) the independent body must have a way to fulfill both investigative and monitoring functions; and (8) the government agency must be required to cooperate fully.<sup>136</sup>

The legislation proposed by Rep. Blackmun would meet the criteria for effective oversight of the prison system.<sup>137</sup> While the proposed legislation is laudable, it does not do enough to oversee what ADC and state law has so far failed to do. The proposal does not specifically authorize investigations into private facilities and does nothing to monitor, track, or report on prison labor.<sup>138</sup> The proposal should incorporate prison labor and labor reporting requirements.

As discussed above, in 2020, a state senator introduced legislation that would create reporting requirements for injuries sustained by prisoners on the job.<sup>139</sup> The bill mandates ADC report when *any* prisoner is injured while working.<sup>140</sup> The requirement applies whether the individual is working within a public or private prison or for a government entity or private person.<sup>141</sup>

Unfortunately, both Rep. Blackmun’s proposed independent oversight of ADC and Sen. Kirsten Engel’s proposed prison worker injury reporting requirements were not passed through the Legislature.<sup>142</sup> But the state should consider looking into an amalgamation of the two proposals. The prison labor requirement in Arizona is particularly punitive and attention must be paid to the work force that is mandated to work for pennies an hour. Requiring oversight and simple reporting expectations is the very least the state can do while it earns millions from the captive labor force.

### Change public records law

An effective alternative to an independent oversight board is a change to public records law. As noted above, public records law in Arizona *should* apply to private prisons. The statute governing disclosure of records applies to any agency supported in whole or in part by monies from the state.<sup>143</sup> Private facilities, whose existence depends solely on state funds, should fall

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Deitch, *supra* note 95, at 833-34. See Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291 (2010).

<sup>137</sup> H.R. 2894, 54th Leg., 2nd Reg. Sess. (Ariz. 2020).

<sup>138</sup> *Id.*

<sup>139</sup> Castle & Polletta, *supra* note 51. See H.R. 2552, 54th Leg., 2nd Reg. Sess. (Ariz. 2020).

<sup>140</sup> H.R. 2552, 54th Leg., 2nd Reg. Sess. (Ariz. 2020).

<sup>141</sup> *Id.*

<sup>142</sup> See H.R. 2552, 54th Leg., 2nd Reg. Sess. (Ariz. 2020); H.R. 2894, 54th Leg., 2nd Reg. Sess. (Ariz. 2020).

<sup>143</sup> Ariz. Rev. Stat. Ann. § 39-121 (2021).

squarely within this requirement. However, in practice, the state high court and Attorney General have limited access to private prison records.<sup>144</sup>

Oversight without records is an insurmountable challenge. “Without information to help answer important questions, watchdog organizations, journalists, advocacy groups, and interested [parties] lose the ability to ... hold the government accountable.”<sup>145</sup> By contracting with private organizations to run governmental functions, the state has implicated the rights of prisoners and access to operational information when it comes to public accountability.<sup>146</sup> Public oversight generally comes from outside the state agency, which necessarily implicates the need to access records and data in order to analyze operational effectiveness.<sup>147</sup>

To gain access to records related to operational effectiveness of private prisons and prison labor, a simple change to the existing statutory scheme could be made. Since private prisons are contracted with, and paid for by, the state of Arizona, they are supported in whole by monies from the state.<sup>148</sup> This distinction should make the private entities records part of the public disclosure requirements. However, because of contract language, judicial interpretations of the public records laws allow private prisons to avoid disclosing records.<sup>149</sup>

To override the court’s exception to disclose when records are against the best interest of the state, the Legislature needs to step up, amending the statute so private prisons records are disclosable. Such a change does not need to be cumbersome. In fact, the Legislature can simply change the definition of “public agency” to receiving fundings in whole or in part to include privately contracted corporations that run whole sections of a government function.<sup>150</sup>

The opacity of prison labor can also be addressed through public records law. The Legislature should outright ban allowing government contracts to be exempt from reporting and disclosure requirements. Through this legislative action, the state should require ADC and the private prisons that have contracted with the state to disclose labor records. Such labor records should include the number of prisoners working with a breakdown of what type of entity they work for as well as the rate of pay.

The state should also direct ADC to collect, maintain, and disclose records of prisoners that are injured on the job. Similar to the bill previously introduced, ADC should be mandated to collect data of prison labor injuries, but the employer should *also* be required to report injuries sustained at their business. Requiring businesses that hire prison labor to report injuries will allow businesses to be held more accountable for how their work force is treated and to allow ADC to determine if engaging with that business is still worthwhile.

## Conclusion

Overall, Arizona’s prisons need oversight regardless of the mechanism. The intersection of private prisons and labor requirements for each prisoner have created an unknown labor market. The prison labor market is excluded from protections typically required of the employer-employee relationship and leaves such individuals open to exploitation and injury. Being exempt from

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<sup>144</sup> ARIZ. PUBLIC RECORDS LAW, *supra* note 30.

<sup>145</sup> Tartaglia, *supra* note 22, at 1692.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1692-93.

<sup>148</sup> *Id.* at 1733.

<sup>149</sup> *Id.*

<sup>150</sup> Ariz. Rev. Stat. Ann. § 39-121 (2021).

reporting requirements allows employers to operate in the shadows, leaving prisoners unable to obtain benefits that are afforded to other types of employees. The state should work to change this structure. An oversight board would allow for greater protections to the prisoner and increase transparency. Additionally, a change to the public records law, specifically incorporating private prisons and prison labor into disclosure requirements, would also allow for more transparency and accountability.