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Title

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Journal

Chicana/o Latina/o Law Review, 38(1)

ISSN

1061-8899

Authors

Han, Yuri
Landeta, Katrina

Publication Date

2022

DOI

10.5070/cllr.v38i1.58437

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HOW STATES CAN PLAY A ROLE IN ABOLISHING IMMIGRATION PRISONS

YURI HAN* AND KATRINA LANDETA**

ABSTRACT

On October 11, 2019, California Governor Gavin Newsom signed the strictest ban on private prisons in the country. California Assembly Bill (AB) 32 would phase out all privately-run prisons, including immigration prisons, by 2028. As the first prison abolition legislation of its kind in the United States, AB 32 brought to light the mounting concern regarding the cruel nature of immigrant detention as well as increasing outrage over serious abuses at for-profit prisons.

This article is the first to explore this landmark legislation and analyze its legal and policy implications in the movement for immigrant prison abolition. After setting forth a brief history on the growth of private detention, this article discusses AB 32's pathway through the courts. The article concludes by arguing that AB 32 can serve as an important illustration for other states where federal action has fallen short. While in 2021 President Biden signed an executive order to end Department of Justice contracts with private prisons for criminal detention, the order did not apply to immigration detention. States can adopt legislation like AB 32 to play a role in eradicating immigrant prisons across the country.

* J.D., David J. Epstein Program in Public Interest Law and Policy, UCLA School of Law, 2020; M.P.P., UCLA Luskin School of Public Affairs, 2020; B.S. Northwestern University, 2015. I extend my sincerest gratitude to Professor Ingrid Eagly who inspired me to write this paper and provided thoughtful guidance and support. I thank my co-author Katrina Landeta for her invaluable input and help in writing this article. I also acknowledge Andrew Hwang, Heejin Hwang, Tony Chan, Joanne Kang, and the staff and editors of *Chicanx-Latinx Law Review* for their time, feedback, and thoughtful contributions.

** J.D., David J. Epstein Program in Public Interest Law and Policy and Critical Race Studies Specialization, UCLA School of Law, 2019. I am grateful to Yuri Han and Jason Lawler for their encouragement and feedback, and I extend sincere thanks to Professor Jerry López for his thoughtful and generous guidance. Finally, many thanks to my mom and family for all their love and support. We would like to express our wholehearted gratitude to Viviana Arcia, Marc Jácome, Zachary Maldonado, Christina Avalos, Emmanuel Mauleon, Byron Barahona, Marissa Nava, Jorge Guerreiro, Megan Kinney, David Leyva, Xochitl Chaul, Mitzi Marquez-Alvitz, and the *Chicanx Latinx Law Review* editors and staff for their assiduous support, insights, and coordination of the review and edits of the Article.

TABLE OF CONTENTS

INTRODUCTION 126

I. HISTORY OF IMMIGRATION IMPRISONMENT 133

 A. *Unprecedented Growth in Immigration Imprisonment as a Tool for Control* 133

 B. *Private Prison Industry’s Entanglement with Immigration Imprisonment* 139

II. A CASE STUDY OF CALIFORNIA’S ASSEMBLY BILL 32 TO END PRIVATE DETENTION 144

 A. *The Road from Nation’s Largest Prison System to Abolition* 145

 B. *Aftermath of AB 32* 149

 1. *PRIVATE COMPANIES RESPOND TO AB 32* 149

 2. *LEGAL CHALLENGES TO AB 32* 151

 3. *OTHER STATES PASS SIMILAR LEGISLATION* 156

CONCLUSION 158

INTRODUCTION

After residing in the United States for nearly twenty years, Casey Kapijimpanga lost everything—his savings, his apartment, and all his belongings.¹ For over a year, U.S. Immigration and Customs Enforcement (ICE) detained Casey at three immigration prisons² in California: the James A. Musick Facility, the Theo Lacy Facility, and the for-profit Adelanto Detention Facility.³ Through Casey’s detention, ICE separated him from his loved ones, including his U.S. citizen girlfriend.⁴ Casey thought he had come to the United States, the “land of the free,” only to be taken away from his home and “put into jail like livestock.”⁵ He says, “mak[ing] money” off his detention “is the shame of America.”⁶

¹ Casey Kapijimpanga, *Kapijimpanga: The U.S. is Trying to Deport Me, But You Can’t Deport My Story*, VOICE OF OC (June 21, 2017), <https://voiceofoc.org/2017/06/kapijimpanga-the-u-s-is-trying-to-deport-me-but-you-cant-deport-my-story>.

² Immigration prisons have been called immigration detention centers or facilities, “family residential centers,” or “service processing centers.” See *infra* note 13. As discussed below, however, calling immigration prisons by other names obscure their true carceral nature. See *infra* note 14.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Casey is one of the tens of thousands of people detained by ICE every year. In 2018, ICE detained on average 40,075 adults and 2,133 families daily in its facilities.⁷ In June 2021, ICE detention facilities held 24,100 individuals.⁸ A majority of these detained individuals are men from Mexico or Central America.⁹ About seventeen percent of detainees are children under the age of 18.¹⁰ Due to the unprecedented growth of immigration imprisonment by both federal and state governments in recent years, the United States holds the world's largest immigration detention system.¹¹

ICE detains individuals with a range of immigrant status, including those seeking asylum and U.S. citizens.¹² Immigration prisons are euphemistically called “family residential centers” or “service processing centers.”¹³ These names, however, mask their true carceral nature and the punitive experiences of individuals imprisoned in those spaces.¹⁴ Violations of immigration law are characterized as civil, not criminal, meaning the government can detain people for immigration-related reasons pursuant to its civil legal powers.¹⁵ In reality, immigration detention closely resembles punitive detention, as detainees are “locked behind barbed wire, often in remote facilities, and subjected to the detailed control emblematic of all secure environments.”¹⁶ Little distinguishes the

⁷ *Id.*

⁸ *ICE Detainee Statistics*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (June 11, 2021), <https://www.ice.gov/coronavirus>.

⁹ Emily Ryo & Ian Peacock, *The Landscape of Immigration Detention in the United States*, AMERICAN IMMIGRATION COUNCIL (Dec. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf.

¹⁰ *Id.*

¹¹ CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISONS: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* 11 (The New Press 2019).

¹² Complaint, *Brian Bukle v. United States*, No. 5:21-cv-1973 (C.D. Cal. Nov. 22, 2021); Colleen Williams, *U.S. Citizen Who Says He Was Held in ICE Custody for More Than a Month Wants Accountability*, NBC LOS ANGELES (Dec. 16, 2021), <https://www.nbclosangeles.com/news/local/u-s-citizen-who-says-he-was-held-in-ice-custody-for-more-than-a-month-wants-accountability/2780842>.

¹³ See *Adelanto ICE Processing Center*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 29, 2020), <https://www.ice.gov/detention-facility/adelanto-ice-processing-center>; *South Texas Family Residential Center*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Oct. 24, 2019), <https://www.ice.gov/detention-facility/south-texas-family-residential-center>.

¹⁴ René Lima-Marín & Danielle C. Jefferis, *It's Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955, 956 (2019).

¹⁵ 8 U.S.C. § 1103.

¹⁶ César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014); see generally MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* (University of California Press, 2004).

experiences of those incarcerated under government's penal powers from the civil immigration detention regime.¹⁷

For more than three decades, private companies have owned a significant and growing percentage of the nation's immigration detention facilities and services.¹⁸ As of September 2021, seventy nine percent of people detained in ICE custody are held in privately-owned facilities.¹⁹ As federal and state governments began detaining individuals more quickly than they could find space in their own facilities, leaders of private companies like CoreCivic, Inc. ("CoreCivic") and GEO Group, Inc. ("GEO Group") led the market for locking up undocumented immigrants.²⁰ CoreCivic founder Thomas W. Beasley likened locking up immigrants to "selling cars or real estate or hamburgers."²¹ Through immigrant imprisonment, CoreCivic and GEO Group collectively manage more than half of the private prison contracts in the country.²² In fiscal year 2019, the two companies earned a combined revenue of over \$4 billion.²³

A poll by the American Civil Liberties Union (ACLU) and YouGov found that sixty-eight percent of voters want the federal government to stop pursuing contracts with private prison corporations.²⁴ While immi-

¹⁷ See Dow, *supra* note 16; Lima-Marín & Jefferis, *supra* note 14, at 965 (discussing how in some situations, the immigration detention experience is even more punitive than incarceration).

¹⁸ Clyde Haberman, *For Private Prisons, Detaining Immigrants Is Big Business*, N.Y. TIMES, (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html>.

¹⁹ Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration* (Oct. 5, 2021), <https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration>; Eunice Cho, *Biden is Holding as Many Immigrants in Private Prisons as Trump*, NEWSWEEK (Oct. 2, 2021), <https://www.newsweek.com/biden-holding-many-immigrants-private-prisons-trump-opinion-1634834>.

²⁰ *Id.*

²¹ Erik Larson, *Captive Company: Customer Service, Quality Control, Employee Morale – Business Is a Whole Different Ball Game When You're Running a Prison for Profit*, INC. (June 1, 1988), <https://www.inc.com/magazine/19880601/803.html>.

²² Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POLICY INSTITUTE (May 2, 2018), <https://www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention>.

²³ Keith Sanders, *GEO Group and CoreCivic Lose Critical Financial Support*, PRISON LEGAL NEWS (Apr. 16, 2022), <https://www.prisonlegalnews.org/news/2020/oct/1/geo-group-and-corecivic-lose-critical-financial-support>.

²⁴ Brian Tashman, *Two-Thirds of Voters Want to Stop the Expansion of For-Profit Immigrant Detention*, ACLU (Jan. 12, 2022), <https://www.aclu.org/news/civil-liberties/two-thirds-of-voters-want-to-stop-the-expansion-of-for-profit-immigrant-detention>; *Registered Voter Omnibus*, YOU GOV BLUE (2021), https://www.aclu.org/sites/default/files/field_document/

gration prisons are largely criticized, much of the public outrage centers around the treatment of detained individuals in for-profit immigration prisons.²⁵ Motivated to limit expenditures, private corporations have pursued cost-saving measures to the detriment of detainee health and well-being. For example, in 2018, the Office of Inspector General (OIG) for the Department of Homeland Security (DHS) published a report that Adelanto Detention Facility failed to provide timely and adequate medical care to detainees; from November 2017 to April 2018, detainees filed eighty medical grievances with Adelanto Detention Facility for not receiving urgent medical care, not being seen for months for persistent health conditions, and not receiving prescribed medications.²⁶

The human rights violations in privately-run facilities have not gone unnoticed or unchallenged.²⁷ Since 2014, a series of lawsuits allege that corporations like GEO Group and CoreCivic operate detention centers that are violating minimum wage, unjust enrichment, and antislavery laws. These centers force detainees to work for free or for as little as \$1 per day.²⁸ Prisoners' experiences of malnourishment due to rotting food, inadequate training for guards, and hiring shortages at privately run detention prisons are well documented.²⁹

Ramshackle in ordinary circumstances, the conditions of detention worsened with the arrival of COVID-19. According to ICE, as of July 7, 2020—around an early peak of COVID-19 in the U.S.—835 detainees

yougov_blue_poll_results.pdf.

²⁵ See, e.g., Glenn C. Altschuler, *For-profit immigration detention centers are a national scandal*, THE HILL (Aug. 12, 2019, 11:30 AM), <https://thehill.com/opinion/immigration/457067-for-profit-immigration-detention-centers-are-a-national-scandal>.

²⁶ OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF HOMELAND SECURITY, REPORT 18–86, MANAGEMENT ALERT – ISSUES REQUIRING ACTION AT THE ADELANTO ICE PROCESSING CENTER IN ADELANTO, CALIFORNIA 7 (Sept. 2018).

²⁷ Luan, *supra* note 22.

²⁸ Madison Pauly, *Immigrant Detainees Claim They Were Forced to Clean Bathrooms to Pay for Their Own Toilet Paper*, MOTHER JONES (Apr. 18, 2018), <https://www.motherjones.com/politics/2018/04/immigrant-detainees-claim-they-were-forced-to-clean-bathrooms-to-pay-for-their-own-toilet-paper>; Madison Pauly, *A Judge Says Thousands of Detainees May Sue a Prison Company for Using Them as a “Captive Labor Force,”* MOTHER JONES (Dec. 5, 2019), <https://www.motherjones.com/crime-justice/2019/12/immigration-detainee-geo-forced-labor-lawsuit>.

²⁹ Haberman, *supra* note 18; Colleen Long, *Rotten Food, Mouldy Bathrooms Found at ICE Detention Facilities: Watchdog*, THE ASSOCIATED PRESS (June 6, 2019), <https://globalnews.ca/news/5361546/rotten-mouldy-ice-detention-facilities>; OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF HOMELAND SECURITY, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 4 (June 3, 2019).

out of the 11,828 detainees who were tested had contracted COVID-19.³⁰ This suggests that the infection rate was as high as seven percent in immigration prisons,³¹ whereas the infection rate in the United States as of July 9, 2020 was less than one percent.³² In protest, detainees have gone on hunger strikes, demanding immigration prisons take measures to protect them from COVID-19 and immediately release sick, elderly, and high-risk detainees.³³ Detainees and immigrant rights advocates have also sued ICE officials at immigration prisons across the country and called for the release of detainees who suffer chronic medical conditions and face an imminent risk of death or serious injury.³⁴ Some individuals and organizations have gone further and called for the release of all detainees. For example, the Detention Watch Network has demanded that governments release all people from detention immediately.³⁵

³⁰ *ICE Guidance on Covid-19*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (July 7, 2020), <https://www.ice.gov/coronavirus>.

³¹ *Id.*; see Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA, 602–03 (2020) (finding that COVID-19 case rates have been substantially higher and escalating much more rapidly in prisons than in the United States population).

³² *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (“More than 3,071,600 people in the United States have been infected with the corona virus, and at least 132,200 have died[.]”); *U.S. and World Population Clock*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/popclock> (finding that there are over 329.9 million people in the United States).

³³ See Rebecca Plevin, *Immigrants in California detention centers launch hunger strikes to call for COVID-19 protections, advocates say*, DESERT SUN (Apr. 19, 2020), <https://www.desertsun.com/story/news/health/2020/04/19/immigrants-california-detention-centers-launch-hunger-strikes-call-covid-19-protections-advocates-sa/5162354002>; Seth Freed Wessler, *Fear, Illness and Death in ICE Detention: How a Protest Grew on the Inside*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/04/magazine/covid-ice.html>.

³⁴ *Flores v. Barr*, No. CV 85–4544-DMG (AGRx), 2020 WL 3488040, at *1 (C.D. Cal. June 26, 2020) (describing Family Residential Centers as being “on fire” and adding that “there is no more time for half measures”); *Ernesto La O Munoz v. Wolf*, 4:20-cv-02206 (S.D. Tex. June 23, 2020) (“The design and operation of detention facilities . . . make it impossible for those inside to engage in these and other prophylactic measures. If anything facilities that house pre-trial detainees . . . are at a particularly high-risk for contagion because of substantial daily turnover among the population inside. Nor are detainees in such facilities safe from infection by a virus that originates outside the facility itself, in light of the large number of staff, contractors, and vendors who come and go on a daily basis. Moreover, detention facilities typically are not well-equipped to contain the spread of, or to treat inmates or detainees sick with, a hyper-contagious infectious disease like COVID-19.”); Temporary Restraining Order, *Basank v. Decker*, 449 F.Supp.3d 205 (S.D.N.Y. Mar. 26, 2020) (ordering the immediate release of petitioners and restraining ICE from arresting petitioners for civil immigration detention purposes during the pendency of their immigration proceedings).

³⁵ *COVID-19: Free Them All*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/covid-19>.

A developing body of scholarship examines whether the modern system of immigration imprisonment is distinct from that of punitive incarceration. Many immigration scholars have criticized immigration detention as a form of punishment.³⁶ In response to the current state of immigration detention, some scholars and government officials have suggested reforms to shape immigration detention to more closely resemble a civil system of confinement.³⁷ Others regard civil detention as an oxymoronic and unsustainable set of practices.³⁸ Immigration detention was first rationalized as a necessary adjunct to deportation, but this traditional justification has proved to be flawed, as detention is used today to further criminal policy.³⁹

A growing number of scholars have also paid attention to the privatization of immigration enforcement and how privately run immigration prisons further strain immigration detention's legitimacy.⁴⁰ Jennifer Chacón, for example, has noted how privatizing immigration imprisonment is morally objectionable on the "very notion that private companies can profit from institutions that deprive human beings of their liberty."⁴¹ Others criticize the dominant role and financial stake private

³⁶ See Mark Dow, *Designed to Punish: Immigration Detention and Deportation*, 74 SOC. RES. 533 (2007); Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11 (2010); Raff Donelson, *Who Are the Punishers?*, 86 UMKC L. REV. 259 (2017); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017); Emily Ryo, *Fostering Legal Cynicism through Immigration Detention*, 90 S. CAL. L. REV. 999 (2017); César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353 (2012).

³⁷ See, e.g., Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1522–23 (2011); Dora Schriro, U.S. DEPT OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009).

³⁸ Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 58 (2014).

³⁹ *Id.* at 90.

⁴⁰ See Sarah Lopez, *From Penal to "Civil": A Legacy of Private Prison Policy in a Landscape of Migrant Detention*, 71 AM. Q. 105 (2019); Antonio Iglesias, *Abolishing the Private Prison Industry's Evolving Influence on Immigrant Oppression*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 293 (2019); Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L.L. REV. 1 (2017); Roxanne Lynne Doty & Elizabeth Shannon Wheatley, *Private Detention and the Immigration Industrial Complex*, 7 INT'L POL. SOC. 426 (2013); Fiona O'Carroll, *Inherently Governmental: A Legal Argument for Ending Private Federal Prisons and Detention Centers*, 67 EMORY L.J. 293 (2017).

⁴¹ Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L.L. REV. 1, 33 (2017).

prison corporations have in imprisoning and dehumanizing Black and brown migrants.⁴²

In response to academic and popular critiques of privately run prisons, California Governor Gavin Newsom signed the strictest ban on private prisons in the country on October 1, 2019.⁴³ Assembly Bill (AB) 32 would phase out all privately-run prisons, including immigration prisons, in California by 2028.⁴⁴ However, it has not been immune from legal challenges. Nevertheless, AB 32 created a ripple effect on other states who have proposed similar bills that would abolish privately-run prisons.

Until now, no article has specifically explored the implications of AB 32 in the immigration detention context. This article is the first to conduct this kind of case study and will promote a better understanding of the unjustifiable nature of immigration prisons as well as the capacity of states to curtail immigration enforcement and imprisonment by discussing how AB 32 carves a path towards abolishing immigration detention across the country.⁴⁵

⁴² See, e.g., Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1817 (2020) (discussing how states previously objected to out-of-state punishment but prison officials invented a practice of transferring prisoners to other states' public prisons and out-of-state private prisons); *Locked Up Far Away*, HUMAN RIGHTS WATCH (2009), https://www.hrw.org/sites/default/files/reports/us1209webwcover_0.pdf ("Although non-citizens are often first detained in a location near to their place of residence, for example, in New York or Los Angeles, they are routinely transferred by ICE hundreds or thousands of miles away to remote detention facilities"); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 286 (2017).

⁴³ *Governor Newsom Signs Order to Extend California National Guard Redeployment to the Border*, OFFICE OF GOVERNOR GAVIN NEWSOM (Oct. 1, 2019), <https://www.gov.ca.gov/2019/10/01/governor-newsom-signs-order-to-extend-california-national-guard-redeployment-to-the-border>.

⁴⁴ See Madison Pauly, *California Now Has the Nation's Strictest Private Prison Ban*, MOTHER JONES (Oct. 11, 2019), <https://www.motherjones.com/crime-justice/2019/10/california-newsom-private-prison-ban>.

⁴⁵ The movement for prison abolition and its core values have evolved over time. See, e.g., HISTORY, CRITICAL RESISTANCE, <https://criticalresistance.org/mission-vision/history> (outlining the formation of Critical Resistance to challenge the idea that imprisonment is a solution for social, political, and economic problems); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019) (describing abolitionist justice as "one where punishment is abandoned in favor of accountability and repair, and where discriminatory criminal law enforcement is replaced with practices addressing the systemic bases of inequality, poverty, and violence."); DETENTION WATCH NETWORK, ENDING IMMIGRATION DETENTION: ABOLITIONIST STEPS VS. REFORMIST REFORMS, https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms_DWN_2022.pdf (considering whether an action is abolitionist based on whether it reduces the scale of detention and surveillance, chips away at the current system without creating new harms or

This article proceeds in two parts. Part I traces the history of immigration imprisonment that has culminated in increasing public backlash and legislation to limit reliance on detention at the state level. Part II presents a case study of AB 32, a law that received support ranging from nonprofit community organizations to law enforcement agencies that recognized the imprisonment of immigrants and immigrant families was morally repugnant.⁴⁶ Part II also discusses how private corporations have challenged AB 32 to skirt the restrictions the bill poses. In addition to filing lawsuits against the state, private corporations signed new ICE contracts less than two weeks before AB 32's ban on such contracts went into effect.⁴⁷ Finally, the conclusion posits that legislation that ends private prison contracts—like AB 32—is one important step towards abolishing immigration imprisonment. It argues that while legislation like AB 32 may face legal challenges, such legislation can work in tandem with other advocacy efforts to abolish carceral systems that have profited off the imprisonment of migrants and communities of color.

I. HISTORY OF IMMIGRATION IMPRISONMENT

A. *Unprecedented Growth in Immigration Imprisonment as a Tool for Control*

Immigration imprisonment in the U.S. is not new. It is as old as American immigration law itself but has grown in unprecedented breadth and scope in recent decades.⁴⁸ According to the United States Supreme Court, the primary purpose of non-punitive immigration detention has been “assuring the [immigrant’s] presence at the moment of removal,” and its secondary purpose has been “protecting the community from dangerous aliens,” though this is addressed more often through criminal law.⁴⁹ In general, government detention violates the Fifth Amendment Due Process Clause, “unless the detention is ordered in a criminal proceeding with adequate procedural protections or, in certain special ‘narrow’ non-punitive ‘circumstances,’ where a special justification, such

helping some at the expense of others, and provides relief to people who could be or are currently detained or under surveillance).

⁴⁶ Senate Judiciary Com., Analysis of Assem. Bill. No. 32 (2019–2020 Reg. Sess.).

⁴⁷ Andrea Castillo, *ICE signs contracts extending private immigrant detention centers ahead of California ban*, L.A. TIMES (Dec. 23, 2019), <https://www.latimes.com/california/story/2019-12-23/ice-signs-contracts-extending-private-immigrant-detention-centers-ahead-of-california-ban>.

⁴⁸ Benson, *supra* note 36, at 12.

⁴⁹ *Zadvydas v. Davis*, 533 U.S. 678, 697, 699 (2001).

as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical constraint.’”⁵⁰ Civil detention, thus, must be justified by an immigration judge’s special finding that an individual presents a “flight risk” or “danger to society.”⁵¹ United States policies over the last forty years, however, have taken discretion away from the immigration judge to make this special finding. Instead, policymakers now use detention more broadly to control and deter individuals from crossing the United States’ borders.⁵²

Prior to the 1980s, immigrants held precarious positions in the United States, but were welcomed as low-wage workers.⁵³ An immigrant’s arrest, detention, and deportation were a threat, but not a reality.⁵⁴ The United States had effectively abolished immigration imprisonment during the 1950s and 1960s.⁵⁵ Further, a number of criminal justice scholars questioned the necessity and purpose of incarceration more broadly.⁵⁶ In his 1975 book, *A Nation Without Prisons: Alternatives to Incarceration*, Calvin Doge urged, “All inmates currently held in institutions who do not require confinement should be moved to community programs.”⁵⁷ At the time, the National Advisory Commission on Criminal Justice Standards and Goals also recommended against building new major correctional institutions.⁵⁸

Starting in the 1980s, U.S. presidents and cabinet officials claimed that immigration detention was a necessary ingredient to a functional immigration system.⁵⁹ The rapid rise of immigrant detention grew amidst racially charged debates following the Civil Rights Movement of

⁵⁰ *Id.* at 690.

⁵¹ *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009) (clarifying an immigration judge may not release a person on bond if they have not met their burden of demonstrating that their “release would not pose a danger to property or persons”); *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

⁵² Benson, *supra* note 36, at 12.

⁵³ See generally BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990* (1993); KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992); see also HERNÁNDEZ, *supra* note 11, at 53.

⁵⁴ HERNÁNDEZ, *supra* note 11, at 53; see also Benson, *supra* note 36, at 21.

⁵⁵ HERNÁNDEZ, *supra* note 11, at 53.

⁵⁶ *Id.*

⁵⁷ CALVERT R. DODGE, *A NATION WITHOUT PRISONS: ALTERNATIVES TO INCARCERATION*, 32 (Lexington Books, 1975).

⁵⁸ *Id.* at xii.

⁵⁹ HERNÁNDEZ, *supra* note 11, at 12.

the 1950s and 1960s.⁶⁰ Migrants from Central America and the Greater Antilles were characterized as “depraved purveyors of death and moral decay,” “Marxist-aligned peasants” disrespectful of America’s laws, “economic migrants” who “lack respect for the rule of law,” and “illegal aliens” that “have developed a massive criminal organization that imports and distributes narcotics.”⁶¹ In the early 1980s, Cuban and Haitian refugees arrived on the United States’ shores and, in response, the Reagan Administration adopted a detention policy to “more effectively deter illegal immigration to the United States.”⁶² The administration adopted this policy even though the Attorney General cautioned that “[d]etention could create an appearance of ‘concentration camps’ filled largely by blacks.”⁶³

Along with other factors, this rhetoric led to legislation that would increase the number of immigrants in detention. Beginning in the mid-1980s, Congress passed a number of laws that made it easier to detain immigrants. The Anti-Drug Abuse Act of 1988, for example, introduced the concept of the “aggravated felony” into the immigration-law lexicon.⁶⁴ Conviction of an aggravated felony is grounds for deportation and bars eligibility for most kinds of relief that would halt deportation.⁶⁵ In 1988, an “aggravated felony” included a limited subset of crimes such as: “murder, drug trafficking crimes, or illicit trafficking in firearms or destructive devices.”⁶⁶ The Immigration Act of 1990 then purported to expand this list of “serious crimes” to include lesser drug crimes and crimes of violence for which the term of imprisonment was five years.⁶⁷ Six years later, the Antiterrorism and Effective Death Penalty Act (AED-PA) again expanded the aggravated felony “grab-bag of convictions”

⁶⁰ *Id.* at 58.

⁶¹ *Id.* at 61–62, 69.

⁶² Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 238 (2019); Hernández, *supra* note 11, at 12 (“With all the hysteria about drugs, terrorism, and gangs, it’s no wonder that the vast majority of people locked inside immigration prisons are people of color. Not only does policing disproportionately focus on black and brown migrants, but immigration enforcement does too, despite the presence of plenty of Canadian and European migrants who are also violating immigration law.”).

⁶³ *Id.* at 238; *Louis v. Nelson*, 544 F. Supp. 973, 980 n.19 (S.D. Fla. 1982).

⁶⁴ HERNÁNDEZ, *supra* note 11, at 67.

⁶⁵ Kathy Brady, *Aggravated Felonies*, IMMIGRANT LEGAL RES. CR. (Apr. 2017), https://www.ilrc.org/sites/default/files/resources/aggravated_felonies_4_17_final.pdf.

⁶⁶ H.R. 1520 – Anti-Drug Abuse Act of 1988.

⁶⁷ See Immigration Act of 1990, Pub. L. No. 101–649, 501, 104 Stat. 4978, 5048 (1990).

that bar eligibility for relief.⁶⁸ Six months after the passage of AEDPA, Congress made it even easier to detain immigrants by passing the Illegal Reform and Immigrant Responsibility Act (IRIRA), which made any addition to the list of “aggravated felonies” retroactively applicable to prior convictions.⁶⁹ Consequently, even if the crime was not considered an “aggravated felony” at the time of conviction, a prior conviction could still be grounds for mandatory detention and deportation. Today, aggravated felonies include selling as little as ten dollars worth of marijuana and a failure to appear at a criminal hearing.⁷⁰ As a result of these changes, the number of individuals detained for “aggravated felony” convictions has boomed.⁷¹

Courts have contributed to the increase in immigration imprisonment. In the wake of 9/11, the Supreme Court issued a ruling that reinforced the mandatory detention of non-citizens. The Supreme Court held in *Demore v. Kim*, that mandatory detention of a lawful permanent resident (a green card holder) while awaiting a deportation hearing does not violate the Due Process Clause of the Fifth Amendment.⁷² In upholding the lawful permanent resident’s mandatory detention, the Supreme Court found Congress was “justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers.”⁷³ After *Kim*, the federal government can detain lawful permanent residents without providing the individual with the opportunity to challenge the detention.⁷⁴

A congressional mandate has also contributed greatly to the expansion of immigration detention and private prisons’ stronger foothold in America’s immigration law-enforcement apparatus. This mandate requires that ICE maintain a certain number of beds and was first introduced under the Obama Administration in 2009 with certain goals in

⁶⁸ Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 305 (2003).

⁶⁹ 8 U.S.C. § 1101(a)(43) (2016)); *but see Zivkovic v. Holder*, 724 F.3d 894, 911 (7th Cir. 2013); *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1065 (9th Cir. 2010) (finding that an aggravated conviction is grounds for removal only if the conviction occurred after November 19, 1988).

⁷⁰ Brady, *supra* note 65.

⁷¹ 8 U.S.C. § 1226(c)(1)(B) (2020).

⁷² *Demore v. Kim*, 538 U.S. 510, 513–14, 523, 531 (2003).

⁷³ *Id.* at 513.

⁷⁴ *See id.*

mind, such as securing the United States' borders and protecting the American people from terrorist threats and other vulnerabilities.⁷⁵ The mandate today requires that DHS “maintain a level of not less than 34,000 detention beds.”⁷⁶ Some members of Congress have interpreted this language of the DHS Appropriations Act of 2016 to require ICE to maintain 34,000 beds daily. Representative John Culberson, R-Texas, said that he expected the Obama Administration to find enough “illegal immigrants” to fill the detention beds Congress funds because the agency is required to fill the beds, not merely have them on hand.⁷⁷ Along with congressional pressure, the bed mandate sustains the existence and growth of immigration detention facilities.

The Trump Administration further intensified U.S. immigration enforcement and detention practices.⁷⁸ The Administration's rationale for expanding detention echoes the rationale of the Reagan Administration: deterring migration. President Trump has stated, “Under my administration, anyone who illegally crosses the border will be detained until they are removed out of our country and back to the country from which they came.”⁷⁹ During the summer of 2018, the Trump Administration's “zero tolerance” policy sought to deter asylum applicants from exercising their right to seek asylum, which was codified in the 1980 Refugee Act.⁸⁰ While this policy was in place, nearly 3,000 children were separated from their parents and detained.⁸¹

⁷⁵ Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 81, 87 (2017).

⁷⁶ Department of Homeland Security Appropriations Act, Pub. L. No. 114-4, 129 Stat. 39, 43 (2015).

⁷⁷ Sinha, *supra* note 75, at 83.

⁷⁸ *Id.* at 78 (noting that “the great bulk of contemporary immigration policymaking stems not from Congress, but rather from executive branch agencies and states”).

⁷⁹ Philip Bump, *Here's What Donald Trump Said in His Big Immigration Speech, Annotated*, WASH. POST (Aug. 31, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/08/31/heres-what-donald-trump-said-in-his-big-immigration-speech-annotated>.

⁸⁰ Kate Evans & Robert Koulish, “Under Trump, ICE No Longer Recommends Release for Immigrants in Detention,” CRIMMIGRATION (July 26, 2018), [http://crimmigration.com/2018/07/26/under-trump-ice-no-longer-recommends-release-for-immigrants-in-detention; Q&A: Trump Administration's "Zero-Tolerance" Immigration Policy, Human Rights Watch \(Aug. 16, 2018, 8:00 AM\), https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy#](http://crimmigration.com/2018/07/26/under-trump-ice-no-longer-recommends-release-for-immigrants-in-detention; Q&A: Trump Administration's 'Zero-Tolerance' Immigration Policy, Human Rights Watch (Aug. 16, 2018, 8:00 AM), https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy#).

⁸¹ *Trump Migrant Separation Policy: Children 'in Cages' in Texas*, BBC NEWS (June 18, 2018), <https://www.bbc.com/news/world-us-canada-44518942>; Nomann Merchant, *Immigrant kids seen held in fenced cages at border facility*, AP NEWS (June 18, 2018), <https://apnews.com/6e04c6ee01dd46669eddb9d3333f6d5/Immigrant-kids-seen-held-in-fenced-cages-at-border-facility>;

As a presidential candidate, President Biden campaigned on the promise of ending the federal government's use of private prisons, including for immigrant detention.⁸² Since assuming office, he has affirmed "There should be no private prisons, period, none, period . . . Private detention centers[,] [t]hey should not exist. And we are working to close all of them."⁸³ On January 26, 2021, President Biden's Administration signed an executive order directing the Attorney General to "not renew Department of Justice (DOJ) contracts with privately operated criminal detention facilities . . ."⁸⁴ Although Biden's executive order affected eleven private prisons currently under contract by the DOJ, it did not affect facilities contracted by DHS and ICE, nor states' ability to continue contracting with private prisons.⁸⁵ For instance, although in May 2021, ICE announced it would close two immigrant detention centers in Massachusetts and Georgia, it also awarded new ICE detention contracts to private facilities whose contracts expired under President Biden's executive order.⁸⁶ Moreover, DHS has also extended or renewed contracts with privately-owned immigration detention facilities in Florida, Colorado, Texas, Pennsylvania, and New Jersey.⁸⁷ This shift is in part due to the way ICE structures its facilities contracts, which guarantee it will pay for a minimum number of beds whether or not they are filled. According to ICE, these guarantees "allow the federal government to procure beds

Hundreds of Immigrant Children Wait in Cages, ASSOCIATED PRESS (June 18, 2018), <https://www.youtube.com/watch?v=eaXSQIyY9J4>; Sunlen Serfaty et al., *Capitol Hill Politics Feature Children with Thermal Blankets, Sit with Cages*, CNN (June 21, 2018), <https://www.cnn.com/2018/06/21/politics/capitol-hill-protest-immigration-family-separations/index.html>.

⁸² *The Biden Plan for Strengthening America's Commitment to Justice*, Biden Harris Democrats, <https://joebiden.com/justice>.

⁸³ Joel Rose, *Biden Wants to End For-Profit Immigrant Detention. His Administration Isn't So Sure*, NPR (Jun. 15, 2021), <https://www.npr.org/2021/06/15/1006728924/biden-wants-to-end-for-profit-immigrant-detention-his-administration-isnt-so-sur>.

⁸⁴ *Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities*, THE WHITE HOUSE (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities>.

⁸⁵ Madeleine Carlisle, "Much More Work to Be Done." *Advocates Call for More Action against Private Prisons after Biden's "First Step" Executive Order*, TIME (Jan. 29, 2021), <https://time.com/5934213/private-prisons-ban-joe-biden>.

⁸⁶ *ICE to Close Two Detention Centers*, Department of Homeland Security (May 20, 2021), <https://www.dhs.gov/news/2021/05/20/ice-close-two-detention-centers>.

⁸⁷ Marcia Sacchetti, *ICE holds growing numbers of immigrants at private facilities despite Biden campaign promise to end practice*, WASHINGTON POST (Dec. 1, 2021), <https://www.washingtonpost.com/national-security/2021/12/01/ice-country-jails-migrants>.

at a reduced rate.”⁸⁸ “In other words,” says ACLU Senior Staff Attorney Eunice Cho, “the Biden Administration is filling empty prison and jail beds with immigrant detainees.”

Over the last four decades, immigration detention has departed from its original purpose of detaining individuals in narrow, non-punitive circumstances. Congressional action expanded the number of immigrants who could be mandatorily detained, and presidential administrations used detention as a means for general deterrence of unwanted immigrants. As political interest in detention grew, private prison industries stepped up and filled the market for detention facilities.

B. Private Prison Industry’s Entanglement with Immigration Imprisonment

Private corporations were prepared to meet the growing appetite for locking up immigrants and minorities in the early-1980s. During this decade, Haitian refugees, threatened by Jean-Claude Duvalier’s dictatorship, fled to the United States’ shores. In response, state and local officials protested the arrival of overwhelming poor and Black refugees.⁸⁹ Attorney General William French Smith declared, “[d]etention of aliens seeking asylum was necessary to discourage people like the Haitians from setting sail in the first place.”⁹⁰ In 1981, the Reagan Administration opened the McAllen Detention Center in Puerto Rico to detain Haitian refugees and deter immigration of Haitians and Cubans to the United States.⁹¹ In 1983, the Reagan Administration formed its Mass

⁸⁸ Joel Rose, *Beyond The Border, Fewer Immigrants Being Locked Up But ICE Still Pays for Empty Beds*, NPR (Apr. 1, 2021), <https://www.npr.org/2021/04/01/982815269/beyond-the-border-fewer-immigrants-being-locked-up-but-ice-still-pays-for-empty->.

⁸⁹ Carl Lindskoog, *How the Haitian Refugee Crisis Led to the Indefinite Detention of Immigrants*, THE WASHINGTON POST (Apr. 9, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-indefinite-detention-of-immigrants>; Clare Deck, “*Give Me Your Tired . . .*” and the Government Will Decide Who Stays: Examining the U.S.’s Inconsistent Responses to Immigrant Groups Seeking Protection, FORDHAM UNIVERSITY, SENIOR THESIS, 25.

⁹⁰ Alex Stepick III, “The Refugees Nobody Wants: Haitians in Miami,” MIAMI NOW! IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE, 57 (Guillermo J. Grenier & Alex Stepick III eds., 1992).

⁹¹ Robert Pear, *Report on Refugees Urges a Crackdown*, N.Y. TIMES (Apr. 28, 1981), <https://www.nytimes.com/1981/04/28/us/report-on-refugees-urges-a-crackdown.html>; *Reagan Aid Defends Detention of Haitians*, N.Y. TIMES (Dec. 16, 1981), <https://www.nytimes.com/1981/12/16/us/reagan-aid-defends-detention-of-hatians.html>.

Immigration Emergency Plan that required that 10,000 immigration detention beds be ready for use.⁹²

In addition to setting the groundwork for the indefinite detention of refugees, the Reagan Administration launched a war on crime, focused primarily on drugs.⁹³ Reagan adopted a number of “tough on crime” laws, such as truth-in-sentencing laws, three strikes laws, and mandatory minimum sentencing laws that punished possession of 500 grams of powder cocaine identically to five grams of crack cocaine.⁹⁴ These laws had a devastating impact on Black and brown communities, even though most crack users and dealers were white.⁹⁵ As a result, Black, Latinx, and Native Americans are overrepresented in prisons.⁹⁶ For instance, although Black Americans and other Americans of African descent make up 13 percent of the national population, they make up 38 percent of individuals in prison.⁹⁷

As pressures on correctional facilities mounted and overcrowding became more severe, state and federal governments relied more heavily on private corporations. In 1979, the Immigration and Naturalization Service (INS) began contracting with private firms for services like food preparation, vocational training medical assistance, and inmate transportation. By the mid-1980s, private corporations began to construct privately owned and managed detention facilities.⁹⁸ In 1983, the world’s first private prison company Corrections Corporation of America, known today as CoreCivic, Inc., entered into its first federal government contract for an immigration detention facility in Texas.⁹⁹ In 1984, the Wackenhut

⁹² *A Short History of Immigration Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-timeline>.

⁹³ Tara Joy, *The Problem with Private Prisons*, WESLEYAN ARGUS JUSTICE POLICY INSTITUTE (Feb. 2, 2018), <http://www.justicepolicy.org/news/12006>.

⁹⁴ David Shapiro, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION, ACLU 10–11 (2011); Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207–047 (1986).

⁹⁵ See Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER, RACE & JUST., 391, 396–400 (2002).

⁹⁶ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POLICY INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html#slideshows/slideshow6/2>.

⁹⁷ *Id.*

⁹⁸ Sarah Lopez, *From Penal to “Civil”: A Legacy of Private Prison Policy in a Landscape of Migrant Detention*, 71 AM. Q. 105, 122 (2019).

⁹⁹ Madison Pauly, *A Brief History of America’s Private Prison Industry*, MOTHER JONES (2016), <https://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline>.

Corporation, known today as GEO Group, Inc., was established. In 1987, the GEO Group entered into its first federal contract for the Aurora Detention Facility, an immigration detention facility in Colorado.¹⁰⁰

To obtain these contracts, private companies argued they could save the government money in constructing facilities and housing detainees.¹⁰¹ These companies also promised areas suffering from declining agricultural and oil industries that prisons would provide “economic benefits, without seasonal changes, from incoming jobs and handsome profits.”¹⁰² In general, prison facilities are concentrated disproportionately in economically disadvantaged communities.¹⁰³ One report about counties in Arizona summarized a common sentiment: “[r]ural towns and counties have eagerly embraced the arrival of immigrant prisoners for the attendant economic benefits, including tax revenues and jobs . . . The expanding prison populations have allowed small towns to carry budget surpluses in a state that has otherwise been pummeled by the recession.”¹⁰⁴ The intermingled forces of the political economy have played a significant role in the growth of immigration detention in the U.S.¹⁰⁵

Initially, in the 1980s, the development of the U.S. Immigration and Naturalization Services (INS) sparked little controversy because private-sector involvement in correctional management was still limited in

¹⁰⁰ *GEO Group History Timeline*, THE GEO GROUP, INC. (2001), https://www.geogroup.com/history_timeline; see also *Aurora Contract Detention Facility*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (June 8, 2021), <https://www.ice.gov/detain/detention-facilities/aurora-contract-detention-facility>.

¹⁰¹ Lopez, *supra* note 99 at 118.

¹⁰² *Id.* At 122.

¹⁰³ See Emily Ryo & Ian Peacock, *Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983–2013*, 54 L. & Soc’y REV. 66 (2020).

¹⁰⁴ *Id.* At 74 (quoting Chris Kirkham, *Private Prisons Profit from Immigration Crackdown Federal and Local Law Enforcement Partnerships*, HUFFPOST, (Dec. 6, 2017), <https://perma.cc/UFJ8-8F3P>).

¹⁰⁵ *Id.* At 90–91 (“Our regression analysis indicates that economic factors play an important role in local involvement in immigration detention, a finding that is generally consistent with prevailing popular accounts of why local jurisdictions engage in immigration detention Our findings, however, also underscore the importance of considering economic factors in tandem with changes in the relative size of the local criminal inmate population to fully understand the emergence of immigration detention in local jails. More specifically, our regression analysis results suggest that county labor market conditions, together with relative fluctuations in the local criminal inmate population, may generate a policy environment that is particularly conducive to immigration detention. Thus the fate of criminal mass incarceration and civil immigration detention may be tied in ways that pose fundamental challenges to the decarceration movement aimed at reducing the correctional population.”)

size and scope.¹⁰⁶ In 1974, the United States held 229,721 individuals in its prisons and jails—a tenth of today’s 2.2 million prison and jail population.¹⁰⁷ As more and more people were placed behind bars, private prison populations skyrocketed; between 1980 and 2000, the number of people incarcerated in private prisons increased by more than 1,600 percent.¹⁰⁸ Private prisons also hold a vast number of immigrant detainees.¹⁰⁹

Though entrusted with ensuring the safety and well-being of hundreds of thousands of people, private corporations are focused mainly on protecting their bottom lines. Private prison employees earn about \$5,000 less than their government-employed counterparts and receive fifty-eight fewer hours of training.¹¹⁰ The result is that private corporations risk the safety and health of their detainees. According to a 2016 Department of Justice report, private contract prisons had “higher rates of assaults, both by inmates on other inmates and by inmates on staff” than state-run prisons.¹¹¹ The report found that inmates in contract prisons submitted about 32.2 grievances per month on a range of issues, such as medical care, food, conditions of confinement, institutional operations, sexual abuse or assault, and complaints against staff.¹¹² In his book, *American Gulag: Inside U.S. Immigration Prisons*, Mark Dow wrote scathing accounts of how privately run immigration detention facilities treated their employees and detainees.¹¹³ In one CoreCivic facility, the warden, assistant warden, program director, and chief of security all received year-end bonuses if overtime pay to wage-earning staff was

¹⁰⁶ JAMES AUSTIN & GARRY COVENTRY, NAT’L COUNCIL ON CRIME AND DELINQ., *Emerging Issues on Privatized Prisons*, 12, (2001), <https://www.ncjrs.gov/pdffiles1/bja/181249.pdf>.

¹⁰⁷ Chet Bowie, U.S. CENSUS BUREAU, *Bureau of Justice Statistics Bulletin: Prisoners 1925–81*, Prisoners 3 (1982), <https://www.bjs.gov/content/pub/pdf/p2581.pdf>.

¹⁰⁸ Heather C. West, et al., BUREAU OF JUST. STATISTICS, *Prisoners in 2009*, 2011 PRISONERS 33 (2011), <https://bjs.ojp.gov/content/pub/pdf/p09.pdf>.

¹⁰⁹ DEP’T OF HOMELAND SEC., U.S. IMM. AND CUSTOMS ENFORCEMENT, *Budget Overview, Fiscal Year 2020* 16 (2020); *The Influence of the Private Prison Industry in the Immigration Detention Business*, DETENTION WATCH NETWORK (May 2011), <http://www.detentionwatchnetwork.org/privateprisons>.

¹¹⁰ Cody Mason, *Too Good to Be True: Private Prisons in America*, THE SENTENCING PROJECT (Jan. 2012), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Too-Good-to-be-True-Private-Prisons-in-America.pdf>.

¹¹¹ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹¹² *Id.*

¹¹³ Dow, *supra* note 16.

kept to a minimum.¹¹⁴ Senior officials in the same facility were accused of using “terror rather than sufficient numbers of adequately trained staff” to maintain order.¹¹⁵

Across the country, objections to private prison corporations and their immigration detention facilities have grown in number.¹¹⁶ Such objections have notably gained attention in California. Three private companies—GEO Group, CoreCivic, and Management & Training Corporation—operate four private detention facilities in California: Adelanto ICE Processing Center, Mesa Verde ICE Processing Center, Otay Mesa Detention Center, and Imperial Regional Detention Facility.¹¹⁷ Immigrants held in these detention facilities and advocacy groups have filed numerous lawsuits against the private prison companies. Detainees filed a lawsuit challenging GEO Group’s Adelanto Detention Facility for violating minimum wage, unjust enrichment, and antislavery laws as well as the Trafficking Victims Protection Act, by forcing civil detainees to work for free or as little as \$1 per day.¹¹⁸ Advocacy group *Al Otro Lado* filed a lawsuit alleging that detention facilities, including the Otay Mesa and Adelanto detention facilities, fail to monitor and oversee detainees’ medical and mental health care.¹¹⁹ The complaint alleges the plaintiffs—“many of whom have fled torture—are packed into immigration prisons in which they are denied healthcare; refused disability accommodations; and subjected to arbitrary and punitive isolation, a practice that is increasingly considered torture.”¹²⁰ In 2020, advocacy groups also filed lawsuits challenging ICE’s failure to prevent the spread of COVID-19 and calling for the release of certain at-risk detainees.¹²¹ On August 8, 2020, statewide protests decried California immigrant

¹¹⁴ *Id.* at 104.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Elly Yu, *California Banned Private Immigrant Detention Centers. So How Could Some Exist for Another 15 Years*, LAIST (Dec. 27, 2019), <https://laist.com/2019/12/27/california-new-private-for-profit-immigration-detention-center-contracts.php>.

¹¹⁸ *Novoa v. Geo Grp., Inc.*, 2018 U.S. Dist. LEXIS 117129 (June 21, 2018).

¹¹⁹ *Fraihat v. United States Immigration & Customs Enf’t*, 445 F. Supp. 3d 709, 718 (C.D. Cal. 2020).

¹²⁰ Complaint at 1, *id.*

¹²¹ See *Roman v. Wolf*, No. 20–00768 TJH (PVCx), 2020 U.S. Dist. LEXIS 72080 (C.D. Cal. 2020); Petition, *Yanez-Montoya v. Wolf*, No. 5:20–00713 (C.D. Cal. 2020); Scott Bixby, *Lawyers Petition to Spring Asylum Seekers from Detention Amid Houston COVID Surge*, DAILY BEAST (June 26, 2020), <https://www.thedailybeast.com/lawyers-petition-to-spring-asylum-seekers-from-detention-amid-houston-covid-surge>.

detention centers and called for Governor Gavin Newsom to take more steps to protect immigrants from ICE and its detention centers.¹²²

Advocacy groups, California Assemblymembers, and law enforcement agencies have taken note of rampant abuses in California's privately run detention centers. In recognition of the fact that private prison companies are guided by profits to the detriment of immigrant lives, the California legislature passed Assembly Bill (AB) 32 to phase out and ultimately ban private prisons in California.

II. A CASE STUDY OF CALIFORNIA'S ASSEMBLY BILL 32 TO END PRIVATE DETENTION

AB 32 was born in a swell of protests,¹²³ divestment from the private prison industry,¹²⁴ and calls for its abolishment.¹²⁵ Although other states passed legislation banning private immigration prisons or private state prisons,¹²⁶ California's AB 32 was hailed as the "strictest private prison ban" in the country.¹²⁷ AB 32 sought the end of the operation of for-profit private prison facilities that hold individuals against their will

¹²² *Statewide Protests Target California's Immigrant Detention Centers*, CAPITAL & MAIN (Aug. 10, 2020), <https://capitalandmain.com/statewide-protests-target-californias-immigrant-detention-centers>.

¹²³ Gabriela Resto-Montero, *Mayors and protestors remain defiant ahead of ICE raids: "You're going to have to come through us,"* VOX (July 13, 2019), <https://www.vox.com/policy-and-politics/2019/7/13/20693099/ice-raids-trump-chicago-new-york-san-francisco-denver-mayors-protesters>.

¹²⁴ Morgan Simon, *GEO Group Running Out of Banks as 100% of Known Banking Partners Say 'NO' to the Private Prison Sector*, FORBES (Sept. 30, 2019), <https://www.forbes.com/sites/morgansimon/2019/09/30/geo-group-runs-out-of-banks-as-100-of-banking-partners-say-no-to-the-private-prison-sector/#26b6c7e03298>.

¹²⁵ Evan Halper, *Democratic Candidates Vow to Ban Private Prisons and Detention Centers*, L.A. TIMES (June 21, 2019), <https://www.latimes.com/nation/la-na-pol-presidential-candidates-push-private-prison-ban-20190621-story.html>.

¹²⁶ On June 21, 2019, Illinois Governor J.B. Pritzker signed HB 2040 into law, banning private immigration detention centers in Illinois, although Illinois did not have any privately-owned immigrant detention centers. See H.B. 2040, 101st Gen. Assembly (Ill. 2019); Natalie Feeney, *United States v. Newsom: California's Fight Against Privatized Immigration Detention*, MINNESOTA L. REV. (Apr. 30, 2020), <https://minnesotalawreview.org/2020/04/30/united-states-v-newsom-californias-fight-against-privatized-immigration-detention>. AB 32 also bears similar qualities to New York's 2007 bill A 4484-B / S4118, which prohibits the operation of private prisons with the New York state prison system. See NDSmith, *New York State Deconstructs Private Prisons; Becomes First State to Make Move*, THE SOURCE (Jun. 24, 2019), <https://thesource.com/2019/06/24/new-york-state-private-prisons>.

¹²⁷ Pauly, *supra* note 44.

pursuant to not only criminal but also immigration laws.¹²⁸ It has not, however, been immune from legal challenges in the courts.

A. *The Road from Nation's Largest Prison System to Abolition*

A decade ago, California had the nation's largest and the world's third largest prison system.¹²⁹ While California's prisons held 115,500 men and women in thirty-five prisons, their facilities were designed to hold only half that number of people.¹³⁰ Prison administrators, the correctional officers' unions, and various commissions were nearly unanimous that the level of overcrowding caused serious and sometimes deadly harm to inmates and staff.¹³¹ In August 2009, a panel of three federal judges found that California's prisons had reached a breaking point and ordered that within two years, the state would have to reduce their inmate population to 137.5 percent of capacity.¹³² The decision went to the United States Supreme Court, which held that the court-mandated population "is necessary to remedy the violation of prisoner's constitutional rights and is necessary under the [Prison Litigation Reform Act]."¹³³ As a result, the U.S. Supreme Court ordered California to reduce its state population by February 2016.¹³⁴ The state met its goal in 2015, in part by relying on private prisons in other states; the state kept about 8,900 inmates in out-of-state private prisons.¹³⁵

California then-Assemblymember Rob Bonta, now Attorney General of California, has made multiple efforts to end California's reliance on private prisons. In 2017, Bonta submitted a bill that was largely identical to AB 32—AB 1320 of the 2017–2018 Legislative Session. Bonta introduced AB 1320 to prohibit the renewal of state government

¹²⁸ Senate Judiciary Com., Analysis of Assem. Bill. No. 32 (2019–2020 Reg. Sess.).

¹²⁹ Donald Specter, *Everything Revolves around Overcrowding: The State of California's Prisons*, PRISON LAW OFFICE (Feb. 2010), <https://prisonlaw.com/wp-content/uploads/2015/09/OvercrowdingArticle2010.pdf>.

¹³⁰ Harris et al., *Just the Facts: California's Prison Population*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (July 2019), <https://www.ppic.org/publication/californias-prison-population>.

¹³¹ *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009).

¹³² Sam Stanton, *Supreme Court rejects Brown's appeal in prison crowding case*, THE SACRAMENTO BEE (Jan. 29, 2015), <https://www.sacbee.com/news/local/crime/article8581391.html>.

¹³³ *Brown v. Plata*, 563 U.S. 493, 501 (2011).

¹³⁴ Ian Lovett, *Court Gives California More Time to Ease Prison Crowding*, N.Y. TIMES (Feb. 10, 2014), <https://www.nytimes.com/2014/02/11/us/court-gives-california-more-time-to-ease-prison-crowding.html?auth=login-google>.

¹³⁵ *Id.*

contracts with for-profit, private prisons and to completely phase out their use by 2028.¹³⁶ AB 1320 passed both houses, but was vetoed by Governor Jerry Brown.¹³⁷ Governor Brown reasoned that “to maintain the prison population at or below 137.5% of design capacity, as required by the Federal courts, the Department of Corrections and Rehabilitation needs to maintain maximum flexibility in the short-term.”¹³⁸ In other words, California relied too heavily on private prisons in order to maintain its prison population to be able to abolish them.

A year later, while California’s reliance on private prisons to control overcrowding was high, Assemblymember Bonta introduced AB 32. Like AB 1320, AB 32 was designed to prohibit the California Department of Corrections and Rehabilitation (CDCR) “from entering into, or renewing contracts with for-profit private prisons after January 1, 2020,” and to ultimately eliminate the state’s use of for-profit prisons by January 1, 2028.¹³⁹ The Assembly Committee on Public Safety’s bill analysis raised concerns “whether CDCR will be able to maintain a durable solution to prison overcrowding without housing inmates at in-state private facilities” within the bill’s timelines.¹⁴⁰ By June 2018, CDCR planned to return 1,821 prisoners housed in Arizona back to California.¹⁴¹ The Assembly Committee on Appropriations’ analysis similarly noted that “almost half of CDCR’s prisons individually exceed the 137.5% population gap” and “[o]vercrowding conditions and further litigation may endanger CDCR’s efforts to eliminate the use of private prison beds.”¹⁴² The California State Sheriff’s Association also argued that private prisons have been “one part of a multi-pronged approach to reduce overcrowding, promote better outcomes, and protect public safety” and

¹³⁶ *Bonta to Introduce Bills Ending State’s Involvement in For-Profit, Private Prison Industry*, CALIFORNIA STATE ASSEMBLY DEMOCRATIC CAUCUS (2020), <https://a18.asmdc.org/press-releases/20181114-bonta-introduce-bills-ending-states-involvement-profit-private-prison>.

¹³⁷ See Assemb. Comm. on Appropriations, Analysis of Assemb. B. No. 32 (2019–2020 Reg. Sess.).

¹³⁸ Edmond G. Brown, Jr., OFFICE OF THE GOVERNOR (Oct. 5, 2017), https://www.ca.gov/archive/gov39/wp-content/uploads/2017/11/AB_1320_Veto_Message_2017.pdf.

¹³⁹ *AB-32 Detention facilities: private, for-profit administration services*, CALIFORNIA LEGISLATIVE INFORMATION, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB32.

¹⁴⁰ Assemb. Comm. on Public Safety, Analysis of Assemb. B. No. 32 (2019–2020 Reg. Sess.).

¹⁴¹ *Id.*

¹⁴² *Id.*

that “it remains a challenge to continue to meet the federal three-judge panel mandate to relieve prison overcrowding.”¹⁴³

A supporter of the bill, the American Federation of State, County and Municipal Employees (AFSCME), however, countered that California’s prison population had been steadily declining since 2006 and that California “no longer [needed] to rely on private prisons to meet the demand of inmate housing.”¹⁴⁴ As of January 2019, the in-state adult institution population decreased to within the 137.5 percent of design capacity in part due to 1) California’s Public Safety Realignment initiative, which shifted many correctional responsibilities for lower-level felons from the state to counties, and 2) Proposition 47, which reduced penalties for many drug and property offenses.¹⁴⁵ Further, recidivism rates decreased for felony offenders.¹⁴⁶ All in all, the Senate Committee on Public Safety said it “[could] not predict how AB 32 will impact California’s overcrowding problem.”¹⁴⁷

While the potential effect of AB 32 on prison overcrowding remained unclear, other concerns regarding the continued use of private prisons weighed more heavily. The Assembly Committee on Public Safety noted that private prisons were “less safe than federal prisons, poorly administered, and provided limited long-term savings for the federal government.”¹⁴⁸ In addition, the committee said that private prisons may lack transparency, as they are “accountable to their shareholders and not the people of the State of California.”¹⁴⁹ Private prisons, for example, “claim exemptions to the public disclosure requirements under the Freedom of Information Act (FOIA) (5 U.S.C. § 552) because they are private corporations[.]”¹⁵⁰

Similarly, the Assembly Committee on Appropriations raised concerns that “[p]rivate, for profit corporations may harbor corporate values not consistent with the values of the State of California.”¹⁵¹ The California State Auditor reported in February 2019 that GEO Group’s

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Sen. Com. on Public Safety, Analysis of Assemb. B. No. 32 (2019–2020 Reg. Sess.).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Assemb. Comm. on Public Safety, *supra* note 144.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Assemb. Comm. on Appropriations, *supra* note 141.

private facilities house ICE detainees in “arguably unsafe and unhealthy facilities with no city, county or state oversight.”¹⁵² The Senate Judiciary Committee Analysis found that there are “[d]ocumented serious abuses at for-profit detention facilities, including facilities in California” and that “AB 32 protects Californians from serious harms, including harms to their safety and welfare.”¹⁵³

In addition to the problems inherent in privately run prisons, the legislature was concerned about private prison’s role in detaining immigrant children. While AB 1320 “only sought to end the operation of for-profit run private prison facilities that hold Californians against their will pursuant to criminal laws,”¹⁵⁴ AB 32 sought to dismantle private immigration detention centers. Bonta was motivated to introduce AB 32 after the “Trump administration introduced cruel immigration policies separating innocent children from their families” and “[t]housands of adults and children [were] detained in two for-profit private prison facilities operating outside of San Antonio, Texas.”¹⁵⁵ Bonta went on to conclude, “[w]e’ve seen the current humanitarian crisis play out along the southern border . . . It’s clearly not enough to focus our legislation solely on criminal detention facilities.”¹⁵⁶

The California legislature also recognized that there was little meaningful distinction between the lived experiences of those under civil immigration detention versus criminal imprisonment. The California Attorney General’s report found common issues among private facilities, including restrictions on liberty, language barriers, issues with access to medical and mental health care, obstacles to contacting family and other support systems, and barriers to adequate legal representation.¹⁵⁷ In both criminal and immigration contexts, private companies cared more about profit than the dignity and respect of the individuals they detained. The bill was amended to apply to all Californians and abolish all privately run detention facilities.¹⁵⁸ The final version of the bill includes a more expansive definition of “detention facility”: “any facility

¹⁵² *Id.*

¹⁵³ Sen. Judiciary Comm., Analysis of Assemb. B. No. 32 (2019–2020 Reg. Sess.).

¹⁵⁴ *Id.*

¹⁵⁵ *Bonta to Introduce Bills Ending State’s Involvement in For-Profit, Private Prison Industry*, *supra* note 128.

¹⁵⁶ *Id.*; Sen. Judiciary Comm., *supra* note 154.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

in which persons are incarcerated or otherwise involuntary confined for purposes of execution of a punitive sentence . . . or detention[.]”¹⁵⁹ Such private detention facilities include civil detention centers housing immigrant detainees.¹⁶⁰

In introducing this bill, Bonta hoped not only to end private prisons, but also to “redirect our criminal justice system to value and prioritize effective prison rehabilitation programs which will help minimize recidivism rates and maximize successes for inmates upon their reentry into society.”¹⁶¹ Ultimately, a coalition of sixty-two organizations, including sponsor Riverside Sheriff’s Association, wrote in support of the amended version of AB 32.¹⁶² Ultimately, the bill passed in both legislative houses with a majority vote.¹⁶³ After the bill garnered much public support, Governor Gavin Newsom signed AB 32 on October 11, 2019.

B. Aftermath of AB 32

1. PRIVATE COMPANIES RESPOND TO AB 32

AB 32 went into effect on January 1, 2020. Shortly after, the bill was met with criticism and pushback from private prison companies, which stand to lose much financially if forced to close their detention centers. Specifically, GEO Group said that they “would lose an average of \$250 million a year in revenue over the next fifteen years, plus the \$300 million invested in acquiring and setting up those buildings.”¹⁶⁴ Around the time that California passed AB 32, major banks including JPMorgan Chase, Wells Fargo, and Bank of America, announced they would end their financing relationships with the private prison industry, closing an estimated \$2.4 billion in credit lines and term loans to GEO Group and CoreCivic.¹⁶⁵ Consequently, private companies took steps to

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Assemb. Comm. on Public Safety, *supra* note 141.

¹⁶² Sen. Judiciary Comm., *supra* note 154.

¹⁶³ *AB-32 Detention facilities: private, for profit administration services*, California Legislative Information (2020), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB32.

¹⁶⁴ Andrea Castillo, *Judge Largely Upholds California Ban on Private Prisons in Tentative Ruling*, L.A. TIMES (July 16, 2020), <https://www.latimes.com/california/story/2020-07-16/california-private-prisons-immigrant-detention-centers-ban-lawsuit>.

¹⁶⁵ Morgan Simon, *GEO Group Running Out of Banks as 100% of Known Banking Partners Say ‘No’ to the Private Prison Sector*, FORBES (Sep. 30, 2019), <https://www.forbes.com/sites/morgansimon/2019/09/30/geo-group-runs-out-of-banks-as-100-of-banking-partners-say-no-to-the-private-prison-sector/?sh=479717a43298>; Gin Armstrong, *Private Prisons Now Face*

counteract AB 32, including securing contracts with existing detention center operators prior to January 1, 2020 and filing lawsuits seeking to block the implementation of AB 32.¹⁶⁶

Prior to the bill's implementation, U.S. immigration officials also hurried to secure new contracts for the four private immigration detention facilities in California.¹⁶⁷ DHS posted a solicitation for four contract facilities with approximately 6,750 beds.¹⁶⁸ It required that the facilities be "turnkey ready at the beginning of contract performance" and that "proposals for new construction will not be accepted."¹⁶⁹ The solicitation gave bidders two weeks to respond.¹⁷⁰ Given the fast turnaround, it is likely that the solicitations for four contract facilities referred to the four already existing private detention centers in the state.¹⁷¹ The governor's office and California lawmakers decried the federal government's efforts as violating the spirit of AB 32.¹⁷² Some legal experts say that DHS's solicitation violated the federal Competition in Contracting Act

87.4% Financing Gap as Banks Continue to Flee Industry, *EYES ON THE TIES* (Aug. 14, 2019), <https://news.littlesis.org/2019/08/14/private-prisons-now-face-87-4-financing-gap-as-banks-continue-to-flee-industry>.

¹⁶⁶ Andrea Castillo, *Firm sues California over law banning private prisons and immigration detention centers*, *L.A. TIMES* (Dec. 31, 2019), <https://www.latimes.com/california/story/2019-12-31/prison-company-sues-california-over-law-banning-private-immigration-detention-centers>.

¹⁶⁷ Rebecca Plevin, *Feds trying to circumvent Calif. Law barring private immigrant detention centers, lawmakers say*, *DESERT SUN* (Oct. 29, 2019), <https://www.desertsun.com/story/news/2019/10/29/california-legislators-say-u-sofficials-try-circumvent-ban-private-prisons/2499295001>; Rebecca Plevin, *ICE signs long-term contracts worth billions for private detention centers, dodging new state law*, *DESERT SUN* (Dec. 20, 2019), <https://www.desertsun.com/story/news/2019/12/20/ice-signs-long-term-contracts-private-detention-centers-two-weeks-ahead-state-law/2713910001>.

¹⁶⁸ Rebecca Plevin, *Feds trying to circumvent Calif. Law barring private immigrant detention centers, lawmakers say*, *DESERT SUN* (Oct. 29, 2019), <https://www.desertsun.com/story/news/2019/10/29/california-legislators-say-u-sofficials-try-circumvent-ban-private-prisons/2499295001>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Rebecca Plevin, *ICE signs long-term contracts worth billions for private detention centers, dodging new state law*, *DESERT SUN* (Dec. 22, 2019), <https://www.desertsun.com/story/news/2019/12/20/ice-signs-long-term-contracts-private-detention-centers-two-weeks-ahead-state-law/2713910001>.

¹⁷² Harris, Lofgren, Nadler Lead Letter Questioning ICE's Move to Circumvent CA Law Banning Private Detention Facilities, *KAMALA D. HARRIS: U.S. SENATOR FOR CALIFORNIA* (Nov. 15, 2019), <https://www.harris.senate.gov/news/press-releases/harris-lofgren-nadler-lead-letter-questioning-ices-move-to-circumvent-ca-law-banning-private-detention-facilities->

(CICA),¹⁷³ which requires that the federal government provide potential bidders a “reasonable opportunity,” typically at least thirty days to respond.¹⁷⁴

In addition, AB 32’s opponents raised several practical concerns. An ICE spokesperson suggested that AB 32 would lead to the transfer of detainees from facilities in California to those out-of-state. The spokesperson said, “The impact of such a state law would be felt almost exclusively by residents of California who would be forced to travel greater distances to visit friends and family in custody.”¹⁷⁵ Nevertheless, ICE has long had the practice of transferring immigrant detainees from one prison to another across the county.¹⁷⁶

2. LEGAL CHALLENGES TO AB 32

In response to the bill’s passage, private companies and the federal government sued Governor Gavin Newsom and former California Attorney General Xavier Becerra, arguing AB 32 is unlawful. On December 30, 2019, GEO Group filed a lawsuit alleging, “AB-32 will impact at least ten (10) of the privately managed facilities totaling 10,925 beds,” including seven of the facilities managed by GEO Group.¹⁷⁷ Twenty-four days after the bill went into effect, the Trump Administration also sued California in federal court, seeking “a declaration invalidating, and order enjoining, enforcement of A.B. 32 against the government and those with whom it contracts for private facilities.”¹⁷⁸ The complaints assert that AB 32 interferes with federal supremacy, discriminates against the federal government, and obstructs its ability to carry out operations.¹⁷⁹

¹⁷³ *The Competition in Contracting Act (CICA)*, GSA INTERACT (Dec. 11, 2012), https://interact.gsa.gov/blog/competition-contracting-act-cica?_ga=2.232138588.2126021455.1599022831-1582442029.1599022831.

¹⁷⁴ Rebecca Plevin, *Homeland Security’s solicitation for detention facilities could violate law, experts say*, DESERT SUN (Nov. 5, 2019), <https://www.desertsun.com/story/news/2019/11/05/homeland-security-solicitation-detention-facilities-could-violate-law/4159290002>.

¹⁷⁵ Pauly, *supra* note 45.

¹⁷⁶ HUMAN RIGHTS WATCH, *A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES* (2011), <https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united>.

¹⁷⁷ Complaint at 2, *Geo Grp., Inc. v. Newsom*, 493 F. Supp. 3d 905 (S.D. Cal. 2020).

¹⁷⁸ Complaint at 1, *United States v. Newsom*, No. 20–0154 MMA (AHG) (S.D. Cal. 2020).

¹⁷⁹ *Geo Grp., Inc. v. Newsom*, 493 F. Supp. 3d; *United States v. Newsom*, No. 20–0154 MMA (AHG) (S.D. Cal. 2020).

On October 9, 2020, a federal district judge in the Southern District of California upheld most of the state's private prison ban.¹⁸⁰ Though GEO Group and the United States DOJ argued AB 32 was unconstitutional for violating the federal government's intergovernmental immunity and as conflict preempted by federal law,¹⁸¹ the court found that AB 32 does not conflict with the U.S. government's enforcement authority, except as applied to private facilities used by the U.S. Marshals Service.¹⁸² GEO Group also sought a preliminary injunction enjoining California from enforcing AB 32 as well as a "declaration that its current contracts with the Federal Government are valid for their entire periods of performance, including all option extensions."¹⁸³ However, since the court found that GEO Group and the United States failed to state a plausible claim for relief for the relevant claims, it also concluded they were unlikely to succeed on the merits as to those claims, and denied the motion for a preliminary injunction.¹⁸⁴

GEO Group and the Trump Administration appealed the decision to the Ninth Circuit Court of Appeals.¹⁸⁵ They argued AB 32 is preempted by federal immigration law and that the presumption against preemption does not apply.¹⁸⁶ They further argued AB 32 violates the intergovernmental immunity doctrine, since it directly regulates the federal government's immigration operations and unlawfully discriminates against the federal government.¹⁸⁷ In response, California argued that such claims are not justiciable.¹⁸⁸ It also argued that AB 32 is a valid

¹⁸⁰ *Geo Grp., Inc. v. Newsom*, 493 F. Supp. 3d.

¹⁸¹ *Id.* at 933.

¹⁸² *Id.* at 939 (agreeing with GEO Group that AB 32 stands as an obstacle to the execution of the full purposes of Congress reflected in 18 U.S.C. § 4013, which authorizes the U.S. Marshals Service to use private detention facilities in limited circumstances, such as where the number of U.S. Marshals Service detainees in a given district exceeds the available capacity of federal, state, and local facilities).

¹⁸³ *Id.* at 960.

¹⁸⁴ *Id.* at 961 (noting that "Section 9505(a) explicitly excludes 'any extensions made to or authorized by that contract'" and that "[i]t appears unlikely that GEO will succeed in arguing that the options are not such extensions").

¹⁸⁵ Notice of Appeal, *Geo Grp., Inc. v. Newsom*, No. 20-56172 (9th Cir. 2021) (appeal consolidated *see* Notice of Appeal, *Geo Grp., Inc. v. Newsom*, Nos. 20-56172, 20-56304 (Dec. 23, 2020)).

¹⁸⁶ Opening Brief for Geo Group, Inc. at 43-49, *Geo Grp., Inc. v. Newsom*, 15 F.4th 919 (9th Cir. 2021) ; Opening Brief for United States, *id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See generally* Answering Brief for California, *Geo Grp., Inc. v. Newsom*, 15 F.4th 919 (9th Cir. 2021).

exercise of the State’s regulatory authority to protect the health and safety of people within its borders.¹⁸⁹

Following the 2020 presidential election, despite President’s Biden’s declared commitment to phasing out federal use of private prisons, the Biden Administration assumed the Trump Administration’s federal lawsuit against California for AB 32.¹⁹⁰ After the Ninth Circuit held oral argument in the case, twenty-four U.S. congresspeople urged Attorney General Merrick Garland to consider dropping DOJ’s challenge of AB 32, arguing the DOJ could undermine the Biden Administration’s stated goal of eliminating the use of privately operated detention facilities.¹⁹¹ A coalition of sixty-six immigrants’ rights organizations wrote to the DOJ: “Continuing this appeal puts the Department of Justice in the way of a future that the administration of President Joe Biden claims to support.”¹⁹²

Eventually, on October 5, 2021, a Ninth Circuit panel reversed the district court’s orders denying the motion for a preliminary injunction and granting California’s motions to dismiss and for judgment on the pleadings.¹⁹³ Reasoning that immigrant detention is an exclusively federal area of regulation and that therefore any presumption against preemption does not apply, the panel held that AB 32 conflicts with the Secretary of the Department of Homeland Security’s statutory power to contract with private detention facilities.¹⁹⁴ For this reason and others, the panel concluded that the United States and GEO Group were likely to prevail on the merits of their motion for a preliminary injunction and therefore remanded the action for further proceedings.

¹⁸⁹ *Id.*

¹⁹⁰ Notice of Entry, *Geo Grp., Inc. v. Newsom*, 493 F. Supp. 3d.

¹⁹¹ *Reps. Torres, Grijalva Urge DOJ to Drop Lawsuit Benefitting For-Profit Prison Industry*, CONGRESS WOMEN NORMA TORRES REPRESENTING CALIFORNIA’S 35TH DISTRICT, (June 10, 2021), <https://torres.house.gov/media-center/press-releases/rep-torres-grijalva-urge-doj-drop-lawsuit-benefitting-profit-prison>; Norma Torres et al., CONGRESS WOMEN NORMA TORRES REPRESENTING CALIFORNIA’S 35TH DISTRICT, (June 10, 2021), <https://torres.house.gov/sites/torres.house.gov/files/documents/Letter%20to%20DOJ%20on%20AB32.pdf>.

¹⁹² ACLU of N. Cal. et al., *Groups Urge DOJ to Withdraw Suit Against California*, HUMAN RIGHTS WATCH (Mar. 12, 2021), <https://www.hrw.org/node/378860/printable/print>.

¹⁹³ *Geo Group, Inc. v. Newsom*, 15 F.4th 919 (9th Cir. 2021), *vacated by Order, Geo Grp., Inc. v. Newsom*, No. 20–56172 (9th Cir. 2022) (granting rehearing en banc).

¹⁹⁴ *Id.* at 924.

Circuit Judge Mary H. Murguia¹⁹⁵ dissented, stating that she would affirm the district court’s ruling.¹⁹⁶ Judge Murguia’s analysis looked to the field AB 32 occupied, concluding that the legislative history confirmed it was primarily aimed at regulating health and safety. Thus, AB 32 “falls within California’s historic police powers, and is entitled to the presumption against preemption.”¹⁹⁷ Acknowledging the district court’s judicial notice of AB 32’s legislative history, she found the district court’s conclusion consistent with binding case law.¹⁹⁸ While the majority in *Geo Group v. Newsom* found that AB 32 “regulates the federal government’s detention of undocumented and other removable immigrants” and “targets in large part the federal government and its detention policy,” Judge Murguia’s dissent responds that “AB 32 says absolutely nothing about immigration, and it does not mention the federal government.”¹⁹⁹

Judge Murguia’s dissent shows that courts’ application of the “presumption against preemption” doctrine may be the best opportunity to recenter the debate around AB 32 to the serious risks that privately run prisons pose to vulnerable populations. Under the presumption against preemption doctrine, courts should assume that federal law does not preempt a state’s police powers unless Congress made such intent clear.²⁰⁰ Here, the wide range of inhumane conditions detainees face in private prisons is well documented.²⁰¹ In an amicus brief, immigrants rights’

¹⁹⁵ Chief Judge Murguia became Chief Judge of the United States Court of Appeals for the Ninth Circuit on December 21, 2021, after the opinion and her dissent in *Geo Group v. Newsom* were published. As such, this article refers to her as Circuit Judge Murguia, consistent with her title at the time her dissent was published.

¹⁹⁶ *Geo Group, Inc.*, 15 F. 4th at 940–41.

¹⁹⁷ *Id.* at 943.

¹⁹⁸ *Id.*

¹⁹⁹ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

²⁰⁰ *Id.*

²⁰¹ See *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL U.S. DEPARTMENT OF JUSTICE (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>; Letter from Project South, Georgia Detention Watch, Georgia Latino Alliance for Human Rights, and South Georgia Immigrant Support Network to Joseph V. Cuffari, Inspector General, Office of the Inspector General, Department of Homeland Security, et al. (Sept. 14, 2020), <https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf>; Alejandra Molina, *Adelanto Detention Facility Ranks High for Sexual Assaults on Immigrants, Group Says*, THE PRESS-ENTERPRISE (May 14, 2017), <https://www.pe.com/2017/05/14/adelanto-detention-facility-ranks-high-for-sexual-assaults-on-immigrants-group-says>; Elizabeth Cohen, *Pediatricians Share Migrant Children’s Disturbing Drawings of their Time in US Custody*, CNN (Jul. 4, 2019), <https://www.cnn.com/2019/07/03/health/migrant-drawings-cbp-children/index.html>.

advocacy organizations documented the experiences of immigrants who suffered because of the lack of adequate medical care at privately-run detention centers in California.²⁰² It should then follow that a state's ability to regulate such conditions in order to protect the health of safety of its people falls within its police powers.²⁰³

This argument is being tested now. On April 26, 2022, the Ninth Circuit granted the California Attorney General Bonta's petition to rehear the case en banc and vacated the panel's split decision reversing the district court's opinion.²⁰⁴ In the petition for rehearing, Bonta wrote, "The record is clear: For-profit, private prisons and detention facilities that treat people like commodities pose an unacceptable risk to the health and welfare of Californians. AB 32 puts people over profits."²⁰⁵ California argued that under established precedent, the presumption against preemption applies to the exercise of state police powers, whether or not the law touches on an area of federal concern such as federal immigration detention.²⁰⁶ In addition, California sought rehearing on the basis that the case involves a question of exceptional importance, noting the need for protections against the dangers to detainees.²⁰⁷ In arguing the importance of the case for rehearing purposes, California also references GEO Group's lawsuit in Washington against a similar law and acknowledges the need for the Court to address important issues of federal and state power.²⁰⁸ The Ninth Circuit's decision on rehearing will help define the future of legislation similar to AB 32.

²⁰² See generally Brief of Immigrant Legal Resource Center, Human Rights Watch & Freedom for Immigrants as Amici Curiae in Support of Defendants-Appellees, *GEO Group, Inc.*, 15 F.4th 919.

²⁰³ See *Wyeth*, 555 U.S. at 565 n.3.

²⁰⁴ Petition for Rehearing En Banc, *Geo Group, Inc. v. Newsom*, No. 20–56172 (Nov. 17, 2021); Order, *Geo Grp., Inc. v. Newsom*, No. 20–56172 (9th Cir. 2022).

²⁰⁵ *Attorney General Bonta Files for Rehearing En Banc in Defense of California's Ban on For-Profit, Private Prisons and Detention Facilities*, State of California Department of Justice (Nov. 17, 2021), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-files-rehearing-en-banc-defense-california%E2%80%99s-ban-profit>.

²⁰⁶ Petition For Rehearing En Banc, *supra* note 207 at 2, 10–16 (furthermore arguing that AB 32 treats different classes of facilities differently based on significant classes between them and therefore AB 32 did not impermissibly discriminate against the federal government).

²⁰⁷ *Id.* at 4, 19–21.

²⁰⁸ *Id.*

3. OTHER STATES PASS SIMILAR LEGISLATION

After California initially passed AB 32, other states followed suit.²⁰⁹ In April 2021, Washington became the third state to pass legislation banning for-profit detention centers, including immigration detention facilities, by 2025.²¹⁰ This legislation came on the heels of a report from the University of Washington Center for Human Rights that details devastating human rights violations at the state's only privately-run immigrant detention center, the Northwest ICE Processing Center in Tacoma, which is operated by GEO Group.²¹¹ Washington's legislature went a step farther than California's AB 32, explicitly including in the language of the bill itself many of the specific health and safety findings underlying the policy. Washington's HB 1090 states, in part:

(2) The legislature finds that profit motives lead private prisons and detention facilities to cut operational costs, including the provision of food, health care, and rehabilitative services, because their primary fiduciary duty is to maximize shareholder profits

(3) The legislature finds that people confined in for-profit prisons and detention facilities have experienced abuses and have been confined in dangerous and unsanitary conditions The United States department of justice office of the inspector general [sic] found in 2016 that privately operated prisons 'incurred more safety and security incidents per capita than comparable BOP [federal bureau of prisons] institutions.' The office of inspector general additionally found that privately operated prisons 'had higher rates of inmate-on-inmate

²⁰⁹ Andrea Castillo, *California Bans For-profit Prisons and Immigrant Detention Facilities*, L.A. TIMES (Oct. 11, 2019), <https://www.latimes.com/california/story/2019-10-11/california-bans-for-profit-prisons-and-immigrant-detention-facilities>.

²¹⁰ Rachel La Corte, *Washington State Governor Oks Bill Banning For-profit Jails*, ASSOC. PRESS. (Apr. 14, 2021), <https://apnews.com/article/legislature-prisons-washington-legislation-immigration-ceda36fec7dfc3a56c8fe8f7a66d3d76>.

²¹¹ *Conditions at the Northwest Detention Center*, CENTER FOR HUMAN RIGHTS UNIVERSITY OF WASHINGTON (last accessed Apr. 16, 2022), <https://jsis.washington.edu/humanrights/projects/human-rights-at-home/conditions-at-the-northwest-detention-center>; Joseph O'Sullivan, 'Secret prisons within a prison': Report details solitary confinement practices at Northwest detention center in Tacoma, SEATTLE TIMES (Nov. 30, 2020), <https://www.seattletimes.com/seattle-news/secret-prison-within-a-prison-report-details-solitary-confinement-practices-at-northwest-detention-center-in-tacoma>.

and inmate-on-staff assaults, as well as higher rates of staff uses of force.’

(4) The legislature finds that private prison operators have cut costs by reducing essential security and health care staffing The office of inspector general also found that people confined in private facilities often failed to receive necessary medical care and that one private prison went without a full-time physician for eight months.²¹²

The Maryland legislature passed a similar ban on private immigration detention. But the state governor vetoed the measure, insisting the proposed legislation would have prevented “specified state and local law enforcement agents from inquiring about an individual’s immigration status during the performance of regular police functions.”²¹³ The Maryland legislature then successfully overrode the Maryland governor’s veto in a vote that fell along party lines.²¹⁴

In June 2021, the Oregon legislature passed HB 3265, which has also been referred to as the state’s Sanctuary Promise Act.²¹⁵ That law places limitations on state and local government’s cooperation with immigration enforcement and includes a provision that bans the operation of private immigration detention facilities within the state.²¹⁶

Although New York previously passed legislation prohibiting the operation of private prisons, the ban was limited to state and local correctional facilities, which left open a loophole for privately run immigration detention facilities.²¹⁷ Then, in 2021, lawmakers in New York introduced Assembly Bill A7099A, also known as the “Dignity Not Detention Act”;

²¹² Wash. St. 67th Legis., HB 1090 § 1 (2–4) (2021).

²¹³ Rose Velazquez, *Hogan vetoes bill that would have ended Worcester County contract to house ICE detainees*, DELMARVANOW (May 27, 2021), <https://www.delmarvanow.com/story/news/local/maryland/2021/05/27/gov-hogan-vetoes-dignity-not-detention-act-house-bill-16/7454969002>.

²¹⁴ Ovetta Wiggins & Erin Cox, *Maryland legislature overrides Gov. Larry Hogan’s vetoes of immigration bill*, WASHINGTON POST (Dec. 7, 2021), <https://www.washingtonpost.com/dc-md-va/2021/12/07/maryland-legislature-immigration-reform-hogan>.

²¹⁵ Dirk VanderHart, *Oregon’s sanctuary law will be stronger than ever under newly passed bill*, OPB (Jun. 23, 2011), <https://www.opb.org/article/2021/06/23/oregon-sanctuary-law-bill-3265-immigration-enforcement>.

²¹⁶ Sanctuary Promise Act, Or. Legis. Assemb. HB 3265-B.

²¹⁷ N.Y. Assemb. SB S04118 (2007).

to ban the operation of any immigration detention facility in the state.²¹⁸ The New York state legislature has yet to vote on the bill.

In January 2021, lawmakers in New Mexico similarly introduced the Private Detention Facility Moratorium Act, which would ban private prisons in the state.²¹⁹ New Mexico utilizes four private prisons to hold forty-six percent of the state's inmates, the highest proportion of any state.²²⁰ Otero County, where one privately-run immigrant detention facility is located, owes \$36 million in bonds to be fully repaid in 2028, and a representative for the county stated that it relies on revenue from ICE to repay the outstanding debt.²²¹ Ultimately, the bill failed to pass.²²² One advocate suggested that the strength of private corporations' lobbying power ultimately caused the bill's failure, which exemplifies an additional challenge for abolition advocates.²²³

While some states have faced challenges in their efforts to end the use of private prisons, many states including Illinois, Washington, Maryland, and Oregon play a significant role in abolishing private immigration detention facilities. These states show that certain concerns over the conditions individuals face in privately-run prisons can outweigh economic factors and corporations' profit priorities.

CONCLUSION

With the signing of AB 32, California took an important step towards abolishing immigration detention. Abolition movements have

²¹⁸ Dignity Not Detention Act, N.Y. Senate Assemb. A7099A (2021).

²¹⁹ 2021 Regular Session - *HB 40, NEW MEXICO LEGISLATOR, <https://www.nmlegis.gov/Legislation/Legislation?chamber=H&legType=B&legNo=40&year=21>; Algernon D'Amassa, 'Private Prisons Will End.' Moratorium Bill Clears 1st Committee in New Mexico Legislature, LAS CRUCES SUN NEWS (Jan. 29, 2021), <https://www.lcsun-news.com/story/news/2021/01/29/new-mexico-legislature-bill-for-moratorium-private-prisons-clears-first-committee/4295163001>.

²²⁰ Fiscal Impact Report, NEW MEXICO LEGISLATOR (Jan. 28, 2021), <https://www.nmlegis.gov/Sessions/21%20Regular/firs/HB0040.PDF>; Jonathan Booth, *Ending Forced Labor in Ice Detention Centers: A New Approach*, 34 GEO. IMMIGR. L.J. 573, 582 (2020).

²²¹ D'Amassa, *supra* note 224; Fiscal Impact Report, *supra* note 225.

²²² Taylor Velazquez, *Legislators Put Private Prison Reform On The Back-Burner For Another Year*, KUNM (Mar. 29, 2021, 5:54 PM), <https://www.kunm.org/local-news/2021-03-29/legislators-put-private-prison-reform-on-the-back-burner-for-another-year>.

²²³ *Id.* (Lalita Moskowitz from the ACLU of New Mexico explained, "Legislators, many of whom very much in good faith were worried about some of the details of the bill, of the nitty-gritty of everything. But of course, there's also corporations that have the ability to lobby to stay in business.").

taken many different forms, but such discourse has been necessary when “reform cannot address the inherent immorality of an institution” and in order to “provide alternative moral frameworks upon which a democratic institutional structure can be built.”²²⁴ By banning most private prisons and immigration detention centers, AB 32 acknowledged the cruelty and inherent immorality of immigration detention.²²⁵ AB 32 also acknowledged that private prisons are problematic because they lack transparency and are not accountable to the state government.²²⁶

More states should follow California’s example in enacting the strictest private prison ban in the country. California has already played a major role in shaping the national conversation and influencing other states in many areas of law, including privacy law and minimum wage law.²²⁷ California has also played an influential role in other immigrant rights legislation, paving the way for other states to model similar legislation, such as state sanctuary laws.²²⁸ Further, California has implemented a number of bold reforms to ameliorate the plight of noncitizens entangled in the criminal justice system, such as prohibiting local jails from honoring certain immigration detainers.²²⁹ As California has implemented a number of influential reforms, particularly in the areas of immigration and criminal justice reform, California’s laws have the potential to have a ripple effect across the country.

California’s AB 32 and its journey through the courts illustrates a pathway for legislation in other states. Although the Biden Administration has fallen short in addressing the federal government’s use of private prisons, states can compensate for this shortcoming and pass legislation like AB 32 to end private prisons, including immigration detention centers. Other states should adopt legislation like AB 32 because the bill

²²⁴ César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 262, 265 (2017).

²²⁵ *Bonta to Introduce Bills Ending State’s Involvement in For-Profit, Private Prison Industry*, *supra* note 140.

²²⁶ Assem. Com. on Public Safety, Analysis of Assem. Bill. No. 32 (2019–2020 Reg. Sess.).

²²⁷ See Natalie Sherman, *How California is changing the US*, BBC NEWS (Oct. 16, 2018), <https://www.bbc.com/news/business-45767736> (“Even when California is not the first to take action, its large population and economy—the fifth largest in the world—guarantees people will pay attention.”).

²²⁸ See Jessica M. Vaughan & Bryan Griffith, *Maps: Sanctuary Cities, Counties, and States*, CENTER FOR IMMIGRATION STUDIES (Oct. 26, 2020), <https://cis.org/Map-Sanctuary-Cities-Counties-and-States>.

²²⁹ See Ingrid Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. R. 12, 25–35 (2017).

serves as a critical counterinfluence to factors, such as the congressional bed mandate, that have helped solidify private prisons' foothold in America's immigration law enforcement apparatus. California's AB 32 not only takes a step towards tackling the problems with private prisons, but also addresses the insidious connection between mass incarceration and immigration detention. What's more, California can itself learn from the efforts made in other states, such as the Washington legislature's explicit findings of the harms that private prisons pose to the health and safety of incarcerated individuals.

Additionally, while AB 32 undergoes legal scrutiny and the courts interpret its legal boundaries, other states should take a step towards abolishing immigration detention by passing similar legislation that bans private prisons and immigration detention centers. As more states adopt legislation banning for-profit prisons, ICE will have little choice but to decrease its reliance on private prisons. The consequences of private prison and immigration detention bans are significant; while other aspects of immigration enforcement might change from administration to administration, it is through "buildings, building contracts, and building industry" that "private influences on immigration policy institutionalize punitive enforcement for future generations."²³⁰ Abolishing private prison contracts also "preserves the rights of immigrants who suffer resulting adverse effects," such as "large increases in immigrants in detention, even with minor initial arrest charges such as traffic violations," and "fear of law enforcement."²³¹

AB 32 has already influenced states like Washington, Maryland, New Jersey, New York, and Oregon to adopt or consider adopting similar legislation and should continue to influence other states. State legislators from Minnesota, for example, have announced their intention to introduce a bill to ban for-profit immigration centers in their state.²³² Many states have taken some steps to ban private prisons but need to extend their efforts to ban private immigration prisons.²³³ Indeed, the call for the end of prisons,

²³⁰ Lopez, *supra* note 40, at 107.

²³¹ Antonio Iglesias, *Abolishing the Private Prison Industry's Evolving Influence on Immigrant Oppression*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 293, 294 (2019).

²³² Riham Feshir, *Minnesota lawmakers announce plan to ban for-profit immigration detention*, MPR (Aug. 23, 2019), <https://www.mprnews.org/story/2019/08/23/minnesota-lawmakers-announce-plan-to-ban-for-profit-immigration-detention>.

²³³ Kelly Recker, *California's Ban on Private Prisons Sets Up Constitutional Challenge*, THE MICHIGAN J. ENVIRONMENTAL & ADMINISTRATIVE L. (Apr. 14, 2020), <http://www.mjdeal-online>.

including immigration detention prisons, is not a new idea, nor a radical one. States can choose to become a part of the growing movement to extend abolitionist ideals to immigration detention facilities.

In recent years, individuals from grassroots organizers to political candidates have voiced their support of the “Abolish ICE” movement and have demanded the end of immigration detention.²³⁴ After the U.S. Bureau of Prisons announced in 2016 that it would phase out all contracts with private prison corporations,²³⁵ an ICE report acknowledged, “because legitimate restriction on physical liberty is inherently and exclusively a government authority, much could be said for a fully government-owned and government-operated detention model, if one were starting a new detention system from scratch.”²³⁶ Even so, is restricting physical liberty a fundamental requisite to ensure an individual’s participation in the immigrant enforcement process, in its current form?

Immigration detention has long strayed from its original purpose. The U.S. Supreme Court has held that immigration detention is not punitive and permissible only “in special circumstances.”²³⁷ In reality, detention centers function as extensions of the carceral state and have been used to justify the separation of families and subordination of communities of color.²³⁸ Acknowledging this, California passed AB 32 to end private prisons and immigration detention facilities.²³⁹ Other states can pass similar legislation to dismantle private prisons and immigration detention centers. The collective efforts of these states can combat the unprecedented growth of immigration confinement.²⁴⁰ More importantly, these efforts pave the way towards ending the suffering and exploitative conditions that immigration detention has caused migrants and their communities.

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org/californias-ban-on-private-prisons-sets-up-constitutional-challenge/#_edn20.

²³⁴ See *First We Abolish ICE: A manifesto for immigrant liberation*, CALIFORNIA IMMIGRANT YOUTH JUSTICE ALLIANCE, <https://ciyja.org/wp-content/uploads/2018/07/AbolishICE.pdf>; Daniella Diaz, *These Democrats Want to Abolish ICE*, CNN (July 3, 2018), <https://edition.cnn.com/2018/07/02/politics/abolish-ice-democrats-list/index.html>.

²³⁵ Lopez, *supra* note 40 (noting in 2017, the Trump administration reversed the decision to phase out all contracts with private prisons).

²³⁶ *Id.*

²³⁷ *United States v. Salerno*, 481 U.S. 739, 749 (1987).

²³⁸ HERNÁNDEZ, *supra* note 11, at 12.

²³⁹ AB-32 *Detention facilities: private, for-profit administration services*, *supra* note 143.

²⁴⁰ HERNÁNDEZ, *supra* note 11, at 11.

