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Abstract

The expanding literature on “cimmigration” law has turned academic attention toward the state of carceral immigration detention in the U.S. Immigration detention has increasingly become a private enterprise, which raises new concerns for immigrant rights and the political legitimacy of privatizing carceral institutions. California’s private detention centers have an alarming record of Constitutional violations, and detention corporations are seldom penalized for violating immigrants’ rights. In response, the California legislature passed AB 32 to ban private prisons and detention centers. In *Geo Group v. Newsom* (2020), the Ninth Circuit Court struck down the ban. Laws that dismantle private detention, such as AB 32, serve as the rational next step in Californian immigration reform. With Alternatives to Detention (ATD) programs, immigration activism, and California’s lessening reliance on detention, there is hope for a future restructuring of immigration procedures in the state.

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immigration detention, cimmigration, privatization, political legitimacy

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Abstract

The expanding literature on “crimmigration” law has turned academic attention toward the state of carceral immigration detention in the U.S. Immigration detention has increasingly become a private enterprise, which raises new concerns for immigrant rights and the political legitimacy of privatizing carceral institutions. California’s private detention centers have an alarming record of Constitutional violations, and detention corporations are seldom penalized for violating immigrants’ rights. In response, the California legislature passed AB 32 to ban private prisons and detention centers. In *Geo Group v. Newsom* (2020), the Ninth Circuit Court struck down the ban. Laws that dismantle private detention, such as AB 32, serve as the rational next step in Californian immigration reform. With Alternatives to Detention (ATD) programs, immigration activism, and California’s lessening reliance on detention, there is hope for a future restructuring of immigration procedures in the state.

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Privatized Immigration Detention in California and the Opportunity for Reform

The State of California should phase out privatized immigration detention facilities by ending their contracts. In Section One, this paper discusses the harms privatized detention has placed on detainees, including how the practices of these facilities unlawfully treat immigrants as criminals. Section Two discusses the illegitimacy of this privatization, explaining the power placed in the hands of corrections corporations. Section Three explores the implications and feasibility of phasing out private detention in California. This paper's analysis ultimately directs toward a need for policy changes at the national level.

Several academic sources have provided insights into the state of immigration detention. The expanding literature on "crimmigration" law bears significant relevance. Legal scholars such as García Hernández (2014) have extensively examined the relationship between the criminalization of immigrants and the use of detention. Rubenstein and Gulasekaram (2019) analyze past California immigration reform and litigation. Han and Landeta (2022) describe the immediate impact of AB 32, which aimed to ban private detention in California. Harvard Law Review (2022) explains the eventual striking down of AB 32 by the Ninth Circuit Court of Appeals. Several national and local news outlets have provided insightful field reporting and detainee testimony on conditions in detention centers. Policy briefs from groups such as Immigrant Defense Advocates and the American Immigration Council have advocated for new directions in immigration policy.

The legal purpose of immigration detention in the United States is to ensure an immigrant's appearance in civil immigration court. Immigration trials are held to determine whether a person will be deported or permitted to stay in the country. Stays in detention can last anywhere from a couple of weeks to multiple years, as immigration courts are severely

backlogged. The average detainee's stay in California's Adelanto facility lasts almost two years (California Department of Justice, 2022). Along with trial attendance, the federal government has also pushed detention to preserve national security. Immigration and Customs Enforcement (ICE) and the Department of Homeland Security (DHS) argue that immigration detention is essential in preventing terrorist attacks and transnational crimes such as drug trafficking.

The shift toward private immigration detention in the United States came about as a clear result of policies that expanded the use of mandatory detention. García Hernández (2014) describes the movement toward immigrant criminalization as a part of the Reagan Administration's "War on Drugs." Fears of drug trafficking and violent crime led to stricter immigration policies. The Anti-Drug Abuse Act (ADAA) of 1988 established the concept of an aggravated felony. An undocumented person convicted of an aggravated felony is subject to mandatory detention after their prison sentence. Initially, mandatory detention only applied to immigrants with murder, firearm trafficking, and drug trafficking convictions. Later on, in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) greatly expanded the term "aggravated felony" to include crimes that were not necessarily drug or violence-related, such as fraud. The expansion of mandatory detention led to an influx of immigrant detainees. To meet these demands, the federal government began its reliance on privately contracted detention centers. Most of these centers are run by the companies CoreCivic and GEO Group. Nationally, over 70% of immigrant detainees are held in private facilities (Freedom for Immigrants, 2018).

In 2017, the California legislature passed SB 54, making the state a sanctuary state. Under this law, California state and local law enforcement agencies cannot support the federal government's investigation or detention of undocumented immigrants for reasons relating to their immigration status. In California, private companies operate the six remaining operating

detention facilities. California's public detention centers were eventually all closed, influenced by legislative and public pressures. The state's last public facility at Yuba County Jail announced its closure in December of 2022 (Hendricks, 2022).

In 2019, the California legislature passed AB 32 to ban private detention and private prisons. The federal government and the GEO Group challenged the private detention ban, which was nullified in a Ninth Circuit Court of Appeals decision (Harvard Law Review, 2022; *GEO Group, Inc. v. Newsom*, 2021). California officials argued that AB 32 rightfully exercises the state's police powers through a compelling interest to protect the well-being of immigrants. The majority opinion in *GEO Group v. Newsom* disregards this argument, stating that the law interferes with federal actions and therefore violates the Supremacy Clause.

This paper calls for a policy similar to AB 32, which requires the nonrenewal of detention center contracts with private companies in California. While this policy leaves much work to be done, it takes an important step toward respecting human rights in immigration enforcement.

Literature Review

Dangerous and Punitive Conditions in Detention Centers

Immigrant detainees are often subjected to dangerous and unjust living conditions. Detainees have described a lack of proper sanitation and difficulty accessing nutritious food and personal hygiene items (Immigrant Defense Advocates, 2021). When detainees protest peacefully to these conditions, often in hunger strikes, they are met with retaliation from the detention officers. ICE has set clear quality standards for detention facilities through the Performance-Based National Detention Standards (PBNDS). Cases of PBNDS violations are rampant, and facilities rarely receive a penalty for noncompliance. Oversight has improved in California under AB 103, which allows the California Department of Justice to survey detention

facilities yearly (Rubenstein and Gulasekaram, 2019). The federal government has consistently pushed back against California's detention reforms, including AB 103. Due to the state's legal limitations, the state legislature has been unable to pass legislation ensuring compliance and accountability. State limitation, along with the federal government's inaction, allows detention centers to continue violating ICE standards. While public and private facilities usually have poor conditions, these cases occur more often in private facilities.

Strong evidence of sexual assaults has been found in detention centers across the country. Private facilities have higher rates of reported sexual assault, and detention centers in California have some of the worst rates in the country (O'Leary, 2019). The five detention centers with the highest rates in the country are all private facilities, and two of those, the Adelanto and Otay Mesa detention centers, are from California (CIVIC, 2017). Strikingly, ICE rarely ever investigates sexual assault cases. Thousands of reports were sent through the ICE sexual and physical abuse hotline from California from 2000 to 2016, yet only 1% were ever investigated (O'Leary, 2019). Detainees as a population are especially at risk of sexual assault. Like prison inmates, detainees are forcibly held in a building with others and have to follow the orders of officers. Unique to immigrant detainees is the threat of deportation occurring before they can testify about any abuse (Thorndyke, 2021). The DHS has applied the Prison Rape Elimination Act (PREA) to detention centers, yet it does not enforce it enough. The rates of reported sexual assault seen in detention centers are unacceptable and mandate action from the state and federal governments. If ICE is unwilling or unable to handle these cases, then the only other solution is to close down the facilities out of the interest of human rights.

The COVID-19 pandemic exposed the insufficient medical care available in detention centers. During the pandemic, many California facilities ignored or outright refused to follow

local public health requirements (Immigrant Defense Advocates, 2021). Detention officers neglected to test people for COVID-19, implement social distancing practices, or properly quarantine exposed individuals. Due to the lack of action taken to prevent exposure, immigrant detainees experienced infection rates that were higher than those of the general public. Access to medical care was already limited before the spread of COVID-19, as detainees from the Adelanto Detention Facility filed 80 grievances from November 2017 to April 2018 “for not receiving urgent medical care, not being seen for months for persistent health conditions, and not receiving prescribed medications” (Han and Landeta, 2022). Medical care is often more difficult for detainees to receive in private detention centers since detention companies would like to cut medical costs. The direct influence of this economic factor over the health and well-being of immigrant detainees is inhumane. The ability to receive medical care and make personal decisions about receiving that care is an important personal liberty. There is no reason that this personal liberty should be retained from detainees, especially since this liberty would not interfere with ICE’s stated goals of tracking undocumented immigrants and preserving national security.

Solitary confinement, while a punitive practice, is often used in immigration detention. While not legally recognized in the U.S. as cruel and unusual punishment, solitary confinement has severe impacts on detainee mental health. The practice is far overused in California detention facilities. The United Nations classifies solitary confinement over 15 days at a time as a form of torture, yet many California detainees are held in isolation for months (Romero, 2022). Detention centers do not always screen people they put in solitary confinement for medical or mental health concerns, which has led to medical emergencies (Immigrant Defense Advocates, 2021). According to several different testimonies, solitary confinement has been used in California

facilities as a form of retaliation toward peaceful protests (Romero, 2022; Immigrant Defense Advocates, 2021). Retaliation to detainee protests is banned through ICE's PBNDS, yet California facilities have repeatedly violated this ban. Among California detainees who participate in hunger strikes, 77% report experiencing retaliation. Unlike government organizations, private detention companies are not required to uphold detainees' Constitutional right to peaceful protest. Private facilities more often employ solitary confinement as retaliation because of this legal blind spot and out of an effort to run facilities efficiently.

Many detainees become employed in the facilities where they are housed. The detainees are severely under-compensated for their work, earning only \$1 per day. ICE refers to detainee work as "voluntary work programs," but detainees are often coerced to perform this labor by detention officers (Law, 2019). According to detainee testimony, officers have threatened to take away necessities such as hygiene products or food if work was not completed. Given that those in detention cannot leave to work elsewhere, the \$1/day programs are typically the only option for detainees to earn any money. This money usually goes back to the detention company when detainees are charged high rates for phone calls. Many aspects of the voluntary work program parallel prison labor. While forced labor is constitutional for those convicted of crimes, there is no clear legal justification for the low wages and coercion observed in immigration detention labor.

The lack of sufficient, enforced standards for immigration detention centers benefits detention companies at the expense of immigrant detainees' rights. Carceral practices are more often used by private companies to maintain control over facilities and cut costs. The use of \$1/day wages and the expansion of the private detention system at large directly benefit the companies' economic interests. Trapped in mandatory immigration detention for months or years

at a time, the people subjected to the harmful conditions of immigration detention experience a major overhaul of their rights. The influence of private detention companies only intensifies these issues.

The Political Illegitimacy of Privatized Detention

Private companies are incentivized to maximize their profits, which influences their operations. Most private facilities are paid per inmate per day, meaning profits are directly tied to the number of detainees. The expansion of immigration detention provides profits for the companies at the expense of the U.S. government. Regardless, the federal government has continued to support the operations of private detention centers. The current quasi-governmental system of privatized detention hands an excessive amount of power over to private companies, which allows for the immigrant rights violations discussed in the previous section.

Immigration detention is unjustly punitive in both theory and practice. Private immigration detention facilities are run by the same companies, and sometimes within the same buildings, as punitive prisons. An immigration detention center holds people awaiting a civil trial, while a prison mostly holds people convicted of criminal offenses. Despite the legal differences between civil and criminal law, immigration detention and prison have come to share many characteristics. Much of the push toward what legal scholars have named “cimmigration law” is influenced by the criminalization of immigrants in political rhetoric (García Hernández, 2014). The image of the “criminal alien” presents an easy political target whose existence is used to justify the entire detention system (Cházaro, 2016). However, it is unjust for detainees to receive criminal punishment. All detainees either have already completed a prison sentence or have never been sentenced to incarceration. The carceral practices used in detention erase the distinction between civil and criminal procedure. In doing so, detention breaches the due process

protections of detainees. Lima-Marín and Jefferis (2019) describe how government-sanctioned confinement has become synonymous with punishment in modern criminal justice. Therefore, confinement is inherently punitive. In practice, many detainees describe immigration detention as even more restrictive and as having worse living conditions than prison (Lima-Marín & Jefferis, 2019; Ryo, 2017). Unlike in post-conviction incarceration, immigrant detainees experience added stress from indefinite detention sentences and uncertain case outcomes.

According to Weber (1919), the state exists as a monopoly of violence. Only the state has the legitimacy to employ physical force or to decide when the use of physical force is acceptable. Incarceration is a form of violence which ought to fall under the sole jurisdiction of the state. Cordelli (2004) expands on this idea, stating that privatizing prisons unjustly allocates punishment to private actors. Privatizing detention disrupts the monopoly of violence, granting private corporations an undue and illegitimate power. Privatization gives companies near complete control over detainees' civil liberties. At the same time, companies are protected from this accusation because detainees are legally in the state's custody.

While private detention companies are meant to follow government guidelines, they often ignore these guidelines and instead employ their discretion. When legislation is carried out by private companies, there is less transparency in policy implementation. Less transparency leads to increased incidences of noncompliance. Detention corporations have repeatedly shown a disregard for national policies intended to protect detainees, even after years of reform from the national and state legislatures. Noncompliance makes privatization even more concerning because detainees are subject to the private companies' standards rather than government standards. This system of privatized control shocks many asylum seekers who come to the United States seeking safety from controlling organizations in their countries.

Privatized detention blurs the line between private and public; civil and carceral. Due to this unique position, private detention centers and their actions have become irrationally protected by the courts. Litigation efforts against detention companies have largely resulted in preserving the status quo and a lack of company liability. As private entities, detention companies are not required to uphold all of the Constitutional rights of detainees. This company protection could legally allow, for instance, the suppression of peaceful protest. As parties in government contracts, detention corporations cannot be held legally responsible for government-approved actions. This “contractor’s defense” has been used to retain the \$1 per day wage for detainees, since \$1 was the minimum set by Congress in 1950 (Rubenstein and Gulasekaram, 2019). Private detention centers contracted by the federal government are also protected from the actions of state governments. Through the intergovernmental immunity doctrine, private detention avoids restrictions on agreements with the federal government. Intergovernmental immunity is one of the main arguments used by the Ninth Circuit Court in *GEO Group v. Newsom* (2021) to overturn AB 32’s private detention ban. In many detention cases, the federal government has exercised its political bias in deciding which state laws to challenge (Rubenstein and Gulasekaram, 2019). For example, the federal administration contested California’s AB 103, a law which allows for a yearly survey of facilities. The administration chose not to contest a Texas policy that gives private detention centers state licenses to detain entire immigrant families. Rubenstein and Gulasekaram (2019) argue that the Texas policy interfered with federal operations to a greater degree.

The privatization of detention centers forces the government to align itself with the centers' interests. Since the federal government's policies rely on the excessive use of detention, and private companies house most detainees, the federal government has had to defend the

economic interests of the detention companies. The willingness of the federal administration and the courts to side with private detention companies perpetuates the violation of immigrant rights. Detention is made a priority while the rights of detainees are virtually ignored.

How to Phase Out Private Detention

The current state of privatized detention in California demands that we seek out new policy solutions. Phasing out private detention through the nonrenewal of facility contracts is a feasible and logical next step in California immigration reform. Many doubts remain over the impacts of releasing thousands from immigration detention. Detention is unnecessary in most cases, and alternatives exist to provide a gradual transition in the immigration system. The end of private detention functions as a step toward ending the detention system as a whole. California's private detention centers provide an opportunity to begin restructuring immigration laws in the United States.

ICE provides two main justifications for the use of immigration detention: immigrants may not attend their deportation hearings, and they may present a threat to national security (García Hernández, 2014). Both lines of reasoning only represent a small fraction of cases, and alternative strategies exist to handle both concerns without blatantly violating immigrants' rights.

The current immigration system relies on the attendance of immigrants at their deportation hearings. The Supreme Court and ICE view detention as a surefire method to uphold immigration law. Given the living conditions in private detention, the detention model should be avoided rather than relied on. ICE has begun transitioning away from detention through its Alternatives to Detention (ATD) program (American Immigration Council, 2022). ATD provides a much better option for immigrant rights in comparison to incarceration, yet the program also has its flaws. The existence of the ATD program is useful from a policy perspective since it is a

well-established and extremely promising path away from old immigration enforcement methods. Some of the alternatives used by ICE include electronic tracking, curfew monitoring, release on bail, and community-based case management. These options come at a far lower cost to the federal government since the programs do not involve housing immigrants. ATD methods have proven highly effective. A case study on family case management ended “with over 99% compliance rates with ICE check-ins and court appearances” (American Immigration Council, 2022). Future policy must remedy the current issues with ATD methods, such as a lack of privacy and the GEO Group’s control over ATD programs. Many academics have called for community-based ATD programs, especially those that offer legal counsel. Currently, most immigrants represent themselves in immigration court. Access to legal counsel has proven more likely to guarantee an immigrant’s court appearance than surveillance.

While ICE constantly uses the justification of a threat to public safety, insisting on the phraseology “illegal criminal aliens,” in reality, most undocumented immigrants pose no threat to public safety at all. Among those detained nationally, 56.7% have no criminal record (Transactional Records Access Clearinghouse, 2023). Many of those who do have a criminal record only have traffic violations, as traffic stops are one of the methods ICE uses to find undocumented people to detain. ICE currently spends its resources to detain thousands of immigrants who pose no clear threat to society. As for those with a criminal record, any threat they pose should be handled through the criminal justice system. Immigrants convicted of crimes should only receive the appropriate consequences as criminal law dictates. Sending immigrants convicted of crimes to immigration detention during or after their sentence interferes with the administration of justice. Rather than upholding public order, using detention as a component of criminal punishment disregards the standards and protections built into criminal law. Using

detention to avoid recidivism among immigrants discriminates against immigrants by assuming they are more likely to become repeat offenders than U.S. citizens.

California is the perfect place to foster the shift away from immigration detention. As a sanctuary state, California has made successful steps toward decriminalizing immigration law. Past reforms have contributed to the current lack of dependence on immigration detention facilities. Many detainees were released during the COVID-19 pandemic to avoid outbreaks, leaving the detainee population at the lowest level recorded since 2001 (Rose, 2021). The decrease in detainees caused California's last public immigration detention center to close in Yuba County. Given these conditions, California is in an appropriate position to allow the expiration of all immigration detention center contracts. Laws like AB 32 are the logical next step in reforming immigration policy in California. California's path towards a humanistic approach to immigration can help inspire similar movements across the country. After the passage of AB 32, many other state legislatures decided to reform or ban private detention (Han and Landeta, 2022).

The long-standing immigrant rights movement in the U.S. has been instrumental in reforming immigration policies in California. Pressure from activists has successfully discouraged or ended local governments' support of the immigration detention system. The closure of California's last public detention facility at Yuba County Jail came after years of activism from detainee families, local activists, the ACLU, and congressional representatives (California Collaborative for Immigrant Justice, 2022). Media coverage of the facility raised concerns over its conditions, encouraging public figures and organizations to call for its closure. The facility, which held over a thousand detainees in 2016, steadily decreased its population until it held its three last detainees in 2021 (Transactional Records Access Clearinghouse, 2016;

California Collaborative for Immigrant Justice, 2022). Since the facility was largely unused, it closed in December of 2022. This success in Yuba, while hard-earned and long fought for, gives hope for the future of immigration detention reform in California. Local governments have made meaningful changes in response to public activism, and many members of our state and national legislatures have pushed policies inspired by the calls of the immigrant rights movement. Now more than ever, there is a chance for meaningful immigration reform at the state and national levels.

Conclusion

It has become increasingly clear through the rampant violations of immigrants' rights and the overwhelming legal power of detention companies that a system of privatization does not pair well with U.S. immigration law and procedure. Therefore, political leaders must advocate for a policy that ends the renewal of contracts with private detention centers. The current state of immigration affairs in California has created an opportune moment for such a policy to take hold.

One limitation of this paper's proposed policy is that ICE could transfer immigrants to out-of-state facilities. Ideally, ICE would turn to the far less expensive ATD options. However, this limitation reminds us of the need to address privatized detention at the national level. The Biden Administration has banned the federal government's renewal of private prison contracts through an executive order but has not released any new policies on the issue of privatized immigration detention. Under current legal precedent, eliminating private detention in California will not be possible without the federal government's cooperation. Given the actions of the past few administrations, a substantial amount of pressure is needed to work toward ending privatized detention. Hopefully, the bills passed in other states after AB 32 and increasing pressure from Congressmembers will continue to advance a future without private detention.

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