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## Legal Obstacles of Detainees in For-Profit Immigration Detention Facilities

Catalina Miller-Booth  
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# Honors Thesis Approval Page

Student Name: Catalina Miller-Booth

Title of Thesis: Legal Obstacles of Detainees in For-Profit Immigration Detention Facilities

Accepted by the Honors Program and faculty of the Department of International Relations,  
University of San Diego, in partial fulfillment of the requirements for the Degree of Bachelor of  
Arts. [or other degree]

## FACULTY APPROVAL

David A. Shirk  
Faculty Project Advisor (Print)

Signature

May 17, 2020  
Date

Dr. Susannah Stern  
Honors Program Director

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Signature

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Date

Legal Obstacles of Detainees in For-Profit Immigration Detention Facilities

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A Thesis  
Presented to  
The Faculty and the Honors Program  
Of the University of San Diego

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By  
Catalina Miller-Booth  
International Relations  
Dr. David A. Shirk  
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## Abstract

In an effort to reshape the US correctional system, one of President Joe Biden's first executive orders ended future contracts between the Department of Justice (DOJ) and private prison corporations. Symbolic at best, this left in place the biggest money-maker of the private prison system, private immigration detention facilities. The contracts that guide US Immigration and Customs Enforcement (ICE) facilities favor profit over detainee well-being. This research showcases the poor quality of private immigration detention facilities with a focus on access to legal representation. With financial and physical barriers preventing detainees from receiving legal help, the US detention system works against due process. As contracts under the DOJ were terminated, contracts under the Department of Homeland Security (DHS) and ICE must end in order to see a change in corrections.

*Key terms:* Alternative to Detention (ATD), Department of Homeland Security (DHS), Department of Justice (DOJ), Immigration and Customs Enforcement (ICE), immigration detention, legal access, privatization

## Introduction

Since the 1990s, countries across the world have demonstrated an increasing reliance on privatization. In the United States, privatization has occurred in all sectors of the government: airport operation, water utilities, waste collection, data processing, and the focus of this research, immigration detention.<sup>1</sup> As a consequence of the War on Drugs, public prisons became overpopulated, giving way for the creation and reliance on private detention facilities to capitalize on mass incarceration and immigration. Private prison corporations have an effect on

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<sup>1</sup> Commission on Government Forecasting and Accountability. (2006). *Government Privatization; History, Examples, and Issues*. Prepared for the State of Illinois.

the design, build, finance, operation, and maintenance of these detention centers. To establish a facility, the government and private prison corporation must enter into a contract. Contracts lay out the ‘terms and conditions’ of the facility and the standards it must meet. The specificities of contracts used by the Department of Homeland Security have been crafted to prioritize profit over detainee well-being. This research will analyze whether the use of private immigration detention facilities is justified from both a humanitarian and business perspective by evaluating both contracts and evidence of structural violence.

Using Johan Galtung’s theory on structural violence, this paper will examine the way violence plays out in private detention facilities. Galtung explores violence and peace and finds three types of violence: structural, cultural, and direct. Cultural violence is used to justify structural violence, and the direct is an outcome of structural violence. Direct violence is the only visible conflict demonstrated by physical violence. Both cultural and structural are left unseen, with cultural violence showing through racism, discrimination, sexism, and structural violence explained as the damage to individuals and groups in the satisfaction of basic human needs: survival, welfare, identity, and freedom.<sup>2</sup> The private immigration detention system is one way structural violence is carried out and allows for instances of direct violence. Using this theory as a starting point, this research seeks to identify the argument for private detention, the structural violence that comes from it (focusing on access to legal counsel), and the opportunity for reform. Private prisons that house United States citizens have been deemed inhumane by President Biden as he is phasing out the contracts under the Department of Justice. The following attempts to prove that the same injustice that called for the cancellation of contracts under the DOJ should apply to those under the DOH.

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<sup>2</sup> Galtung, J. (1969). *Violence, Peace, and Peace Research*. *Journal of Peace Research*, 6.

## History

President Richard Nixon's formal declaration of the War on Drugs was given strong attention beginning in 1971. For the next three decades, the prison population rose by 194%, while the overall country population increased by 36%.<sup>3</sup> With this drastic rise of those incarcerated, overcrowding became prevalent in many facilities across the country. This came to a breaking point with a Tennessee federal court ruling that overcrowding was, in fact, in violation of the 8<sup>th</sup> amendment's cruel and unusual clause.<sup>4</sup> With this ruling, CoreCivic, the country's first private prison corporation, proposed to take over Tennessee's entire prison system.<sup>5</sup> While this proposition was unsuccessful, it did allow for politicians to realize the opportunity for outsourcing correctional and immigration detention services to the private sector. The United States was experiencing a neoliberal privatization shift combined with increased border control that conflated drugs and immigration enforcement. This was only amplified in 1986 under the Anti-Drug Abuse Act that required mandatory detention of all non-citizens who committed aggravated felony charges.<sup>6</sup> Beginning a new era of compulsory immigration detention, private immigration detention centers were formed at an alarming rate, and the number of reported abuses piled up. In response to one of the largest uprisings in private immigration detention, the United States passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA). Together, these laws dramatically increased the number of immigrants in detention from 8,500 in 1996 to roughly 16,000 in 1998.<sup>7</sup> This trend continued for the next decade, and the private

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<sup>3</sup> Dippel, C & Poyker, M. (2019). *How private prisons affect sentencing*. VoxEU.

<sup>4</sup> Bauer, S. (2016). *My four months as a private prison guard*. Mother Jones.

<sup>5</sup> Id.

<sup>6</sup> (1988). *The Anti-Drug Abuse Act*. Pub. L. 100-690, 102 Stat. 4181.

<sup>7</sup> *Analysis of Immigration Detention Policies*. American Civil Liberties Union.

immigration detention system saw a 442% increase from 2000 to 2016.<sup>8</sup> Despite numerous reports from those detained of abuse, the government continued to rely on this corrupt system.

As the general prison population began to stabilize, in 2016, the Department of Justice announced their plans to phase out the use of private prisons, which seemed to be a win for those fighting for prioritization of prisoner well-being over profit. The DOJ cited safety issues within the facilities that could be attributed to the profit-led contracts. What this so conveniently left out were the contracts under the Department of Homeland Security. The evaluation report found that consequences of occupancy requirements, which are in both immigration detention and public prisons, included higher rates of incarceration and violence.<sup>9</sup> Despite clear evidence showing the abuse going on in both areas of corrections, only contracts under the DOJ were the focus. This effort was tabled when in February of 2017, Jeff Sessions, under the Trump administration, announced that the Federal Bureau of Prisons would continue to use and rely on private facilities.<sup>10</sup> Due to Trump's hardline approach to immigration, private immigration detention centers became ever prevalent, and private prison corporation campaign donations to Republican candidates rose.<sup>11</sup> Many supporters of President Trump and those within his cabinet have a certain negative perception of immigrants, one that could be argued to be an example of racism. Racism, as an example of cultural violence, is not new to America nor to our immigration system. There is and has been a clear favor given to immigrants of a certain location, ones that

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<sup>8</sup> Mason, C. (2012). *Dollars and Detainees: The Growth of For-Profit Detention*. The Sentencing Project & Bureau of Justice Statistics.

<sup>9</sup> Deitch, M. (2013). *Lockup Quotas and 'Low-Crime Taxes' Helping to Make Money for the Private Prison Industry*. JOTU.

<sup>10</sup> Powell, E. (2017). *Sessions memo: Reversal on private prisons could portend shift on justice*. Bureau of Prisons & US Department of Justice.

<sup>11</sup> Da Silva, C., Walker, J., Jarvis, J. (2020). *Private Prison Lobby Targets House, Senate Races as Biden Pledges Crackdown*. Newsweek.

are typically fairer skinned, than to immigrants from countries of people of color. This cultural violence of racism has played into how the United States structures its detention system and how each detainee is treated. When looking at this treatment specifically, you will find the presence of direct violence in ways that are described in the Structural Violence section. Once Trump left office in January of 2021, one of President Biden's first executive orders aimed at tackling the shortcomings in US corrections was to finish what Obama began, to end private prison contracts. Just like Obama, President Biden left out contracts under the DHS, perhaps an example of how strong cultural violence in the form of racism is embedded in the United States. The hypocrisy of leaving the DHS out of this executive order puts 500,000 immigrants at risk a year. Out of the 215 immigration facilities in the US, 175 are privately operated.<sup>12</sup> This means that 81% of people held in detention are held to the low standards that contracts lay out. In just over a decade, private corporations have doubled the number of detainees under their control. They have been allowed to do so for the public, and most importantly, the government have been convinced that through privatization, costs are cut, and efficiency is improved.

### **Hypocrisy of Economics**

Proponents of privatization argue that taking ownership from the government and putting it in privately owned companies' hands allows for economic efficiency. There are numerous reasons why governments turn to privatization: cost reduction, risk transfer, source of revenue, quality of service.<sup>13</sup> These are all used in the argument for the establishment and use of private prisons, but cost reduction is the most pulling incentive when looking at privatization of immigration. Private sector service providers are able to conduct the same services as those in

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<sup>12</sup> (2020). *Detention Statistics*. Freedom for Immigrants.

<sup>13</sup> *Id.* 1

the public sector and claim they do so at a lower price, not constrained by “restrictions of the civil system and public employee bargaining collective.”<sup>14</sup> With greater flexibility, the private sector is argued to operate with greater efficiency. Applying this argument to privatized corrections is not as seamless as it may be for other private industries. There is a divide in the statement that private correctional facilities are run with economic efficiency and cut costs, especially when looking to immigration detention.

Numerous studies have been conducted to test the theory that private corrections are more cost-effective than their public counterparts. Looking at the Department of Justice’s report to justify the reversal of the Obama-era order ending the use of private prisons, research is greatly exaggerated in comparing private vs. public facilities. The report asserts that private prisons do save money and do not provide worse quality while providing no hard evidence to support this claim.<sup>15</sup> It is defensive when discussing the alleged complications and safety issues that come with cutting costs by prefacing each statement with “if” – *If the reports about the shortcomings of our private prisons are true, we should fix it, not end it.*<sup>16</sup> A similar issue of misleading reports is found when looking at private detentions held under ICE. Despite barriers in place to cover the mishandling of budgets and detainees, there are congressional watchdogs in place, like the Government Accountability Office (GAO), who help provide transparency.

Of the 49.8 billion allocated to the Department of Homeland Security, 14% is set aside for ICE. Of this 14% or 10.4 billion, a majority is set aside for expansion and detention. Trailing far below any money set aside for beds or new facilities is the limited budget going towards

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<sup>14</sup> Gotsch, K. & Batsi, V. (2018). *Capitalizing on Mass Incarceration: US Growth in Private Prisons*. The Sentencing Project.

<sup>15</sup> Volokh, S. (2016). *Don’t end private prisons; the DOJ’s announcement*. Washington Post.

<sup>16</sup> Id.

successful, less oppressive programs like the Alternative to Detention (ATD) program or the Migrant Protection Protocol.<sup>17</sup> This budget is problematic for the countless inconsistencies and errors in calculations found by the GAO. ICE uses the formula: *projected average daily population x projected bed rate x 365 days = projected detention costs*, to help guide their congressional budget justifications. This formula has allowed for miscalculations that cost taxpayers millions. ICE claims their budgets undergo multiple reviews to ensure accuracy, but when documents were requested to justify 40 of their newest contracts, ICE could not produce the proper documentation for 28.<sup>18</sup> In just one month in 2020, ICE spent nearly \$21 million for 12,000 unused beds each day.<sup>19</sup> Underestimation and misrepresentation are driven by ICE's need to showcase efficiency. This effectively misleads stockholders, the public, and the government, all while keeping detainees suffering. The budget for ICE continues to grow each year, no matter the party in office. If the primary justification of private immigration detention use is that it is cost-effective, there needs to be a reevaluation of these contracts. There is irrational economics at play facilitated by a complete lack of oversight in one of the most expensive yet destructive correctional systems in the US.

## **Structural Violence**

### *Oversight*

ICE's mission statement ensures that "detainees reside in safe, secure, and humane environments under appropriate conditions of confinement."<sup>20</sup> This cannot be assumed to be true when an extreme lack of oversight plagues private immigration detention facilities. In a public

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<sup>17</sup> Wolf, C. (2021). *FY 2021 Budget in Brief*. The Department of Homeland Security.

<sup>18</sup> (2021). *Immigration Detention: Actions Needed to Improve Planning, Documentation, and Oversight of Detention Facility Contracts*. US Government Accountability Office.

<sup>19</sup> Id.

<sup>20</sup> (2021). *ICE's Mission*. US Immigration and Customs Enforcement.

prison, the public can easily access information for a detailed account of when an instance of abuse has occurred. It is difficult to hold the guards, facility, corporation, or government accountable for any mistreatment in private facilities when reports are hidden. In an attempt to fight this, the Freedom of Information Act (FOIA) is a freedom of information law that requires the total or partial disclosure of unreleased documents under the control of the United States government.<sup>21</sup> However, as a private company, groups like GEO group or Core Civic can claim fear of information harming competition and effectively evade transparency. One of the only ways the public has gotten access to recent facility reports is thanks to a three-year-long litigation brought by the National Immigrant Justice Center through the FOIA.<sup>22</sup> What should be an act that gives accountability simply allows private detention corporations to respond in a delayed manner, not respond at all, or take on costly prolonged litigation.

As an added barrier to transparency and accountability are the varying contractually obligated detention standards of detention facilities. Data obtained via the FOIA by request of the Immigrant Legal Resource Center includes information on the type of contracts, demographics, medical care providers, and inspection history for over 1,000 federal detention facilities. What this displayed were the 11 different detention standards used by facilities and the consistency at which they passed inspection. ICE has three sets of detention standards: the 2000 Nation Detention Standards (NDS), 2008 Performance-Based National Detention Standards (PBNDS), and the 2011 PBNDS, yet only 65% of their detention centers are actually contractually bound by one of these three.<sup>23</sup> This has left an average of 5,000 immigrants a day

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<sup>21</sup> (1967). *Freedom of Information Act*. US Department of Justice.

<sup>22</sup> NJIC, DWN. (2015). *Lives in Peril: How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse*. The Immigration Detention Transparency and Human Rights Project.

<sup>23</sup> *Id.*

that are being held in facilities running under different guidelines, most often ones that allow for worsened conditions. ICE claims that regardless of standards listed in the contract, all facilities are inspected using one of their three standards. What the GAO found in 2014 was that ICE simply obtains a facility's agreement to be inspected according to newer standards but fails to explicitly incorporate the new standards into the contract.<sup>24</sup> This allows ICE to avoid opening contract negotiations and creates a complicated web of multiple guidelines that make it difficult to hold each facility accountable for its sub-standard conditions. As a result, no matter the number of abuse reports of detainees in ICE's care, their facilities continue to pass inspection.

Since 2012, each ICE facility has passed nearly every inspection – even those where multiple people have died as a result of medical neglect, an example of direct and structural violence as there is a destruction of survival and welfare. The Immigration Detention Transparency and Human Rights Project report of 2015 shows a continuation of this pattern where only one out of 100 facilities was given a non-passing rating.<sup>25</sup> This is only propelled by who is conducting the inspections and when. First addressing the latter, scheduled inspections should be unknown to those running the facilities, yet facilities often have ample time to make superficial changes to appear to meet standards. At Winn Correctional Center, an asylum seeker with disabilities affecting his mobility made multiple requests for a wheelchair that were left unmet. This violation of a legal requirement to provide him with reasonable accommodation was covered by placing the detainee in a medical unit under heavy sedatives when inspectors came.<sup>26</sup> Obstructing this detainee's right to welfare, which by definition includes health and happiness, is

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<sup>24</sup> Id. 18

<sup>25</sup> Id. 22

<sup>26</sup> ACLU, Human Rights Watch, NIJC. (2020). *Justice-Free Zones; US Immigration Detention Under the Trump Administration*. ACLU Research Report.

proof of structural violence. Similarly, in the controversial centers that house children who have been cruelly separated from their families, reports of teddy bears being given out right before inspections were scheduled have been given. Part of the reason these centers are made aware of when inspections are scheduled has to do with the previously mentioned issue of who is giving the inspections. Inspections by the ICE Office of Enforcement and Removal Operations (ERO) and the Office of Detention Oversight (ODO) inform facilities of inspections in advance, adding to the issue of superficial fixes.<sup>27</sup> Additionally, the inspections lack independent oversight as they are often paid and vetted through contracts or are direct employees of ICE. The lack of transparency does not stop there. Even after initial inspection reports are given, there is an opportunity to edit said reports before they are finalized and submitted to the monitoring unit. Overall, inspections of ICE detention facilities are not designed to capture actual conditions at any given facility but are designed to pass inspection with a simple checklist of bare minimum criteria.

Producing a similar effect that the various detention standards have are the different levels where privatization can occur. ICE's detention system involves more than 200 facilities that can contract with private prison companies, country and city jails, state prisons – all of whom can use private companies for varying sectors. Guards, food, transportation, medical services, cleaning services, and more can all be contracted to the private sector. When some facilities have privatization occur at only certain levels, it again creates a complicated web that allows for lack of transparency and accountability when trying to evaluate standards and corruption.

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<sup>27</sup> (2012). *Northwest Detention Center Tacoma WA*. ERO and ODO Inspection.

Having transparency regarding the instances of direct and structural violence in private detention centers would allow for a complete analysis of how privatization encourages harm. However, with many records being inaccessible to the public, this research relies on the limited available data. Thanks to non-profit organizations such as Freedom for Immigrants or the American Civil Liberties Union (ACLU), there is insight into the type and prevalence of the various levels of violence. The structural violence ranges from a lack of medical care, prolonged detention, solitary confinement, and legal access. The direct includes cleanliness issues and sexual and verbal abuse. The non-profit organization, The Intercept, filed a FOIA request for detailed records of sexual abuse in detention. ICE reports that it investigates all reports of abuse, but of the 1,224 sexual abuse complaints between 2010 and 2017, only 43 were investigated.<sup>28</sup> This direct abuse is only possible through the culturally rooted racism and discrimination combined with structural barriers to welfare and freedom. The Washington Post and The New York Times delivered groundbreaking exposés in 2008 that revealed the lack of adequate medical care, the most reported structural abuse within detention centers.<sup>29</sup> Adding to the argument, the same year, a report described various detention centers' deplorable medical care, food, living conditions, and barriers to legal information, something found in ICE facilities across the country. Medical care is not a priority to these private corporations for it is expensive, and they need not worry about failing an inspection when the checklists inspectors use fail to include all components of detention standards. At the Houston Processing Center in Texas, ERO inspectors found no shortcomings of the facility but failed to interview anyone kept in solitary confinement, a mandated inspection process. As a result, a 31-year-old man who was kept only

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<sup>28</sup> Speri, A. (2018). *Detained, Then Violated*. The Intercept.

<sup>29</sup> Bernstein, N. (2008). *Few Details on Immigrants Who Died in Custody*. The New York Times. *A Closer Look at 83 Deaths*. The Washington Post.

for six days died in confinement for the ERO did not follow up on the many filed grievances.<sup>30</sup> Inspectors are sticking to the bare minimum while turning an eye to the reality of inhumane treatment. At a detention center in Georgia, both the ERO and ODO inspections were able to identify a significant disregard of medical care: examinations were not reviewed by physicians in a timely manner. Despite evidence showing the understaffed medical team and an unnecessary detainee death, both inspection agencies ruled the medical staffing was adequate.<sup>31</sup> The most concerning example of lack of accountability comes from the Tri-County Detention Center in Illinois. After receiving a recommended rating of “does not meet standards,” when the official rating was released in 2012, it suddenly was confirmed that the facility “meets standards.”<sup>32</sup> For troubling findings regarding needles and inadequate staff, suddenly, the facility was back to a passing grade. This goes back to what was mentioned earlier in that detention centers are able to change their rating before the official publication. What happened to change this rating is left unknown for again, as a private corporation, records can be kept hidden. The 5<sup>th</sup> and 14<sup>th</sup> Amendments of the US Constitution entitle detainees to be free of abuse at the hands of the state. Private detention facilities have effectively gone against this right and continuously promote structural violence.

### *Covid-19*

Access to proper medical care has become increasingly relevant in the midst of the Covid-19 Pandemic. Private detention centers make the most money with each bed full and the center at capacity. As businesses around the world closed and changed occupancy allowance, ICE was still operating at populations far above the recommended amount. Carlos Mejia, a 57-

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<sup>30</sup> (2012). *Exposé & Close: Houston Processing Center*.

<sup>31</sup> Pulaski. (2012). *Prisoners of Profit: Immigrants and Detention in Georgia*. ACLU.

<sup>32</sup> *Id.*

year-old man from El Salvador, was the first to die of Covid-19 in ICE's custody on May 6, 2020.<sup>33</sup> 2020 saw the highest annual death toll of people in ICE custody in 15 years, largely due to Covid-19. Of the 21 reported deaths, eight were attributed to Covid-19.<sup>34</sup> Under the Covid-19 Immigration Detention Data Transparency Act, ICE has been releasing their reported data. In true ICE fashion, the data available has been reported not to reflect the true scope of the spread of the virus.<sup>35</sup> Vera researchers have reported that the actual number of Covid-19 cases in detention may be 15 times higher than what ICE revealed. As overcrowding and a lack of resources have been constant in ICE detention, it can be assumed that much of the spread could have been prevented under the proper standards, but again, a hindrance of welfare is perpetuated by the structure of this system. Working as its own call for an end or shift away from detention use, Covid-19 demands a change in our detention system to avoid future spread.

As the number of reported grievances rises, there is an increasing need for legal counsel. The accusations of abuse are countless and oftentimes only brought to light with the help of pro-bono, non-profit work that is limited to begin with. Reliance on these stretched-out organizations is partly due to the lack of legal access by detainees within detention facilities, a form of structural violence that blocks freedom.

### *Legal Access*

The rights of immigrants in the United States are characterized by limitations and qualifications. Current laws, detention standards, and oversight have all had a hand in the level of access detainees have to legal counsel. The Freedom from Arbitrary Detention Act within Article

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<sup>33</sup> (2021). *Immigration Detention and Covid-19*. Brennan Center for Justice.

<sup>34</sup> (2021). *Death Detainee Reports Released by ICE*. American Immigration Lawyers Association.

<sup>35</sup> Smart, N., Garcia, A., Siulc, N. (2021). *One Year Later, We Still Don't Know How Many People in ICE Detention Have Been Exposed to Covid-19*. Vera Institute of Justice.

9 of the Universal Declaration of Human Rights rules unlawful detention illegal. This occurs when an individual is arrested and detained without due process or any legal basis. With this, the US criminal justice system is mandated to provide detained individuals with the opportunity to challenge their detention in court. Still, this right is denied to those in immigration detention. Mandatory detention is imposed before an immigrant can reach a hearing with an immigration judge. This includes non-criminal asylum seekers to those convicted of certain crimes. Immigrants have a right to due process as prescribed by the Constitution, included in the term “persons.” Despite being guaranteed this right, the US fails to provide due process for detainees consistently. Immigrants are often held without a clear explanation of the charges against them and without gaining timely access to a hearing before a judge.<sup>36</sup>

Opportunity for legal counsel is the best way to ensure due process, but as the US government is not required to provide this to immigrants, far too many go through the process unrepresented. It is a sad truth that oftentimes, a detainee must forego legal representation because they cannot afford to retain one. The costs come from many places, not solely the lawyer’s fee. One of the biggest obstacles to keeping legal counsel is the inability to speak with a lawyer on a consistent basis. Detainees are often moved in the system, on average more than twice. This makes the process from the lawyer’s side extremely difficult. From the detainee, limitations on telephone calls and legal mail put a block on gaining representation. Recall the inspections of facilities that pass despite operating at a sub-standard level. In a 2012 ERO inspection, the detention facility’s phone system was marked as standard, even though the hotline programmed into the phones never reached an operator.<sup>37</sup> Even in facilities that had

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<sup>36</sup> (2009). *US Remote Detainee Lockups Hinder Justice*. Human Rights Watch.

<sup>37</sup> *Id.* 22

operating phones for legal calls, the attorney-client confidentiality is completely erased as facility staff are able to monitor.<sup>38</sup> Confidentiality is hard to come by in overcrowded centers that work at taking away individuals' humanity. This has also shown through in the lack of mandatory outlets where detainees can voice their grievances.<sup>39</sup> The most common found issue, however, is the cost of calls. While the government does not need to provide or even help detainees find legal counsel, they need not actively prevent immigrants from exercising their due process right.

Besides pure cost, private immigration detention centers have limited legal access based on their location. Under the Trump Administration, ICE saw more contracts than ever before. Since 2017, this growth was seen in places where immigrants were far removed from attainable legal counsel and most likely to lose their cases. The ACLU found that when comparing detention centers operating before 2017 to those after, those operating before had four times the amount of available immigration attorneys within a 100-mile radius. More than half of individuals in immigration court are left unrepresented, and 84% in detention are without counsel.<sup>40</sup> Even when a detainee is able to meet with an immigration judge, it does not mean they are given a fair chance. Immigration judges operate with an incentive to move as quickly as possible. They have a pile of cases to get through and face punishment if they do not go through them fast enough. This has created an ineffective system that detains non-criminal immigrants, wastes taxpayer dollars, and provides unfair trials.

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<sup>38</sup> Id. 32

<sup>39</sup> Pulaski. (2011). *Information regarding drop box deficiencies is annotated*. ERO Inspection.

<sup>40</sup> Cullen, T. (2018). *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming*. NIJC, A Heartland Alliance Program.

The United States detains 500,000 immigrants each year and fighting for their right to due process and legal services are approximately 102 organizations. Of these 102, the majority have less than five staff members focused solely on detention work.<sup>41</sup> Financial and geographic obstacles have left a large majority of detainees to understand the intricate US immigration system alone. Conditions have only worsened under ICE's new version of its National Detention Standards. In December 2020, an updated NDS was released to guide the treatment of immigrant detainees. From ICE's webpage itself, it claims the new standards are updated and modernized.<sup>42</sup> What it should say is oppressive and inhumane. The ACLU's National Prison Project team put together a side-by-side comparison of the new NDS to the 2000 NDS. The following were found to be negatively impacted: environmental health and safety, admission and release, security inspections, funds and personal property, hold rooms in detention facilities, food service, disciplinary policy, hunger strikes, medical care, personal hygiene, detainee transfers, recreation, correspondence and mail, law libraries and legal materials, legal rights group presentations, and more.<sup>43</sup> The most relevant for this research are the last three items.

For correspondence and mail, the new NDS removes the provision that mail should be opened in the detainee's presence, again impeding on lawyer-client confidentiality. These standards have also limited the amount of legal mail a detainee can receive to five pieces a week. A detainee can be removed without a given notice in the manner of a few days or hours of initial detention, making this constricted communication a hindrance to their chance of stay. This NDS

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<sup>41</sup> Araujo, D., Berndt, E., McCarthy, M., et al. (2010). *Isolated in Detention; Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court*. National Immigrant Justice Center.

<sup>42</sup> (2019). *National Detention Standards for Non-Dedicated Facilities*. US Immigration and Customs Enforcement.

<sup>43</sup> Cho, E. (2019). *Summary of Changes to ICE National Detention Standards*. ACLU Legal Department National Prison Project.

also removes the required list of legal materials that ICE is mandated to provide within their library. Facilities are no longer required to provide a law library that is reasonably large, accessible, and isolated. Most harmful, the clause that officers should provide the maximum amount of time to detainees to use the law library has been removed. Lastly, in addition to being geographically removed from legal rights groups, the NDS has limited their access. The old standard required that all facilities fully cooperate with those seeking to give legal presentations, and that is now removed. What the new standard dictates is that it is up to the discretion of the said facility. How presentations are given, who they let in, and the distribution of material have been left unclear and therefore defer to the local policy. While this could ultimately expand the reach of legal expertise, what it will do is constrict it even further. ICE claims they are “enhancing legal access,” yet every single one of their new standards shows the opposite.<sup>44</sup> Even as ICE added regulation on sexual assault, they take away the chance of legal action regarding that assault. It is a Band-Aid fix that is meant to fool the public, but with just a little digging, true hypocrisy is evident.

### **Alternative to Detention Reform**

As mentioned when discussing ICE’s budget allocation, the Alternative to Detention (ATD) program is receiving an increase yet a relatively small portion of said budget. ATD is defined as: *any law, policy or practice by which persons are not detained for reasons relating to their migration status.*<sup>45</sup> ICE reports that in the first month of FY 2018, 71% of people detained were put in mandatory detention. Over half of this population was marked as non-criminal, no

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<sup>44</sup> (2020). *Legal Access in Detention at a Glance*. US Immigration and Customs Enforcement, Custody Programs Division.

<sup>45</sup> Field, O., Edwards, A. (2006). *Alternatives to Detention of Asylum Seekers and Refugees*. UNHCR. (2015). *There are Alternatives*. International Detention Coalition.

threat, and 23% were classified as the lowest threat. With only 15% classified as the highest threat, there is no explanation for the number of immigrants given mandatory detention. The argument that proceeds claims the ATD program is the best way to shift the United States' overuse of detention to a more effective and cheap process.

Addressing effectiveness, the existing ATD programs consist of parole, bond, check-ins at ICE offices, home visits, telephonic monitoring, and GPS monitoring through ankle bracelets.<sup>46</sup> This current system takes a restrictive approach to alternatives that are focused on control rather than collaboration and engagement. Still, this program proves to be effective not only in the United States but across the world with one stipulation: competent legal counsel. When detainees are released within the ATD program, they have increased rates of finding legal counsel. When gaining this counsel, compliance and appearance rates were significant in several countries. Lawyers are able to work as a point of contact with the authorities and effectively explain and remind their clients of necessary steps. A United Nations High Commissioner for Refugees (UNHCR) study compiled 13 ATD programs and found compliance rates to range between 80-99.9%.<sup>47</sup> From the United States, Canada, Australia, United Kingdom, Hong Kong, Thailand, and more, there is an average compliance rate of 90% when using the ATD program. Where there is an even greater success is with a community-based ATD approach.

In the United States, the Intensive Supervision of Appearance Program (ISAP) community supervision program showed an impressive 99% and 95% appearance rate for court and removal hearings, respectively.<sup>48</sup> ATD programming should not simply be a continuation of

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<sup>46</sup> *Government Alternatives to Detention*. Detention Watch Network.

<sup>47</sup> *Id.* 45

<sup>48</sup> (2014). *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*. US Government Accountability Office.

oppressive monitoring seen within detention facilities but a genuine alternative. Instead of removing immigrant dignity through tactics such as ankle-monitoring, participants should be in contact with community services that range from legal, social, to medical and mental health. When immigrants not only understand the process but believe it to be fair, compliance goes up.<sup>49</sup> This is so important not only from a humanitarian perspective but a business one as well.

Not only is compliance up an average of 90%, but ATD programs are found to cost up to 80% less than detention.<sup>50</sup> Canada found that it costs \$10-12 per day per person in an ATD program, while someone in detention costs \$179 per day. With even more success, the cost of participation in this program in the United States is less than five dollars per day, saving \$125 when compared to in-facility detention. This is not a new concept but a still underused one. Looking back to 1999, a project run by the Lutheran Immigrant and Refugee Services (LIRS) in the United States found that community release cost 3% of what detention would.<sup>51</sup> What is important to mention is the low costs are heavily reliant on pro-bono services from non-profit organizations and their workers. If the US were to simply increase the use of ATD programs, it would overextend these organizations and potentially hamper their success. Instead, the current budget should be reallocated to support some of these services, potentially running them in contract with the government. There is still an opportunity to cut costs, but there must be a risk evaluation done to protect the organizations that have so long served the immigrants that the government has left behind.

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<sup>49</sup> Edwards. (2006). *Alternatives to Detention of Asylum Seekers and Refugees*. UNHCR. (2015). *There are Alternatives*. International Detention Coalition.

<sup>50</sup> Id. 48

<sup>51</sup> Id. 45

While the current ATD programs have proven success and cut costs, there are still improvements to be made. First, as mentioned, a shift to community-based approaches to preserve dignity and remain cost-effective. It is important to note that the proposed community-based ATD programs would still require proper evaluation and would only be given to non-criminal immigrants. Next, and most important, is a reevaluation of the process that determines who is eligible for these programs. Mandatory detention is used in cases where the immigrant poses neither a flight risk nor a threat. Partially due to the overwhelmed immigration court system, judges do not give a comprehensive evaluation to each immigrant when processing their eligibility for ATD. This has left many individuals in unnecessary detention for prolonged periods of time. Detainees can request an ATD hearing with a judge but are given one hearing only, with no guarantee they will be granted their request. This was especially prevalent in new detention centers under ICE's New Orleans Field Office. This office denied 99.1% of all applications for release on parole in 2019.<sup>52</sup> The high rate of denial can be attributed to misinformation and the lack of legal representation. Without representation, detainees frequently lose their appeals and can result in faster deportation or more expensive bonds. This brings up the next issue within the ATD system, the cost of a bond. The minimum bond amount is set at \$1,500, but depending on a judge's evaluation, it can reach up to \$20,000 or more.<sup>53</sup> The price is dependent on the immigrant's flight risk, but again, without a comprehensive evaluation system, the price is often set without proper cause and is unattainable.

The ATD system is operating in a cost-effective manner and is a proven success in countries across the world. There is room to improve this efficiency with an appropriate

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<sup>52</sup> Id. 26

<sup>53</sup> 8 USC 1226: *Apprehension and detention of aliens.*

evaluation of each immigrant that crosses the border and even further, with a shift to increased reliance on community services.

### **Conclusion**

The United States immigration detention system, both private and public, perpetuates a system of structural violence. With 81% of detainees being held in private facilities that use outdated and low-standard contracts, focusing on private facilities is the right place to start. However, the 40 facilities that make up 19% of immigration detention that are publicly run are not without their faults. Despite their reports of abuse, what keeps this research from focusing on the detention centers completely run under the government is the accountability that is forced upon them. The biggest problem of privatization is the lack of transparency and accountability, which is why that is the focus of this thesis. Contracts are shaped to encourage profit, with no regard to the reality of conditions for immigrants in ICE facilities. The focus of this research was to uncover if using private detention centers is justified. To do so, the argument that privatization allows for cost reduction was analyzed along with the production of structural violence. Thought to increase efficiency, ICE is continually under investigation for a complete lack of oversight that wastes millions of dollars each month. Private detention is not saving the government or US citizens money, and is in fact, expanding this waste every year with no substantial justification as to why. From a business perspective, ICE's continued and increasing reliance on privatization is a failure. From a humanitarian perspective, this failure is further amplified. Immigrants have very few rights in the United States, but within these few, they are guaranteed due process. ICE's private detention centers have found a way to avoid this right by imposing unnecessary mandatory detention and curbing legal access, therefore obstructing the basic human need of freedom. There is a level of obstruction to freedom with any detention system. The difference

here is that ICE facilities cross a line from what is legally mandated to oppressing even the possibility of fighting for freedom. Legal counsel is vital to the success of detainees and their ability to be granted a stay. To put any obstacles in detainees' path to freedom is to perpetuate structural violence. It becomes even more pertinent when analyzing the various grievances that are reported within detention centers. Detainees experience both physical and mental harm under ICE's watch and are now prevented from bringing these atrocities to light, for they cannot readily access legal counsel. While privatization can bring success in the form of saving costs and improving efficiency, the US immigration and detention system is not a sector where this can be applied.

The United States is already phasing out privatization under the Department of Justice. If this cannot be applied to the Department of Homeland Security immediately, a review of the changes within the US prison system since the cancellation of contracts would be warranted. The contracts were canceled for they promoted profit and left detainees in understaffed facilities that met the lowest standard. To observe improvements in maintenance and detainee care in facilities transitioning out of privatization would show justification for applying this same roll-out to ICE detention centers. A thorough comparison of facilities run under the government and those contracted out is needed to either show the success of privatization or truly showcase the failure. Currently, there is not a system in place to be able to compare these facilities side-by-side, and with that, there would be a stronger argument for a call to action. Full transparency in ICE's budget and thorough, unbiased investigations of their facilities would further this call to action. The government cannot continue to rely on Core Civic and Geo Group, for their numbers and reports are not accurate representations of what detainees experience. In gaining this transparency, the government would be forced to hold ICE accountable. Getting the public and

government to care about immigrants is not an easy task. Death, sexual assault, separated families, and more, yet none of these have been enough to warrant a change. The only way to see the change that is needed is to appeal to what is important to the people in charge: money. As immigration waits for municipalization, the Alternative to Detention program is the best option to act as a cost-saving, humane way to treat the hundreds of thousands of immigrants fleeing to the United States each year with the hope of safety. This paper argues for the removal of private immigration detention facilities altogether and an increased reliance on the Alternative to Detention programs that facilitate community engagement.