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## **AB 32 is a Ban: California Takes the Right Approach But Must Still Take Further Action Against For-Profit Corporations in our Prison System**

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# **AB 32 IS A BAN: CALIFORNIA TAKES THE RIGHT APPROACH BUT MUST STILL TAKE FURTHER ACTION AGAINST FOR-PROFIT CORPORATIONS IN OUR PRISON SYSTEM**

*Jonathan Barrera\**

*In 2019, California passed Assembly Bill 32, which is described as an outright ban on the use of private prisons in the state. However, the bill has several exceptions that apply to the ban, and some of these exceptions are not well defined in scope or applicability. In fact, there are commentators who have criticized the law for perceived expansive loopholes to the ban due to these exceptions. As the law is relatively new, courts have not had a chance to interpret the scope or applicability of these exceptions. This Note argues that despite the vagueness of Assembly Bill 32's exceptions, California enacted a true ban because (1) the legislative history of Assembly Bill 32 makes it clear that the exceptions were not meant to be applied broadly, and (2) California courts have held that language in statutes should not be read in a manner that would contradict the legislative intent behind the passing of the statutes. In addition, this Note argues that California must expand the scope of the private prison ban if the state, as it claims, truly wants to end the exploitation of inmates by for-profit private corporations.*

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## I. INTRODUCTION

In 2021, a new president took office, and with this change in administration came vows for various changes and reforms.<sup>1</sup> President Joseph R. Biden made several promises as to how he will govern.<sup>2</sup> One of his promises is to end the federal government's reliance on private prisons.<sup>3</sup> President Biden has already, through executive order, taken some action on this promise by directing the Department of Justice (DOJ) to cease entering into new contracts with private prisons and preventing the renewal of current contracts.<sup>4</sup>

Furthermore, some states have also taken steps to reduce their reliance on private prisons.<sup>5</sup> For example, New York, a state that has already banned the use of private prisons,<sup>6</sup> recently proposed a law banning state-chartered banking institutions from investing in and providing financing for private prisons.<sup>7</sup> In 2019, the law passed the state Senate, but failed to pass the state Assembly.<sup>8</sup> However, at the start of 2021, the state Senate took the initial steps needed to reintroduce and pass the bill.<sup>9</sup> Some commentators view this action as historic because it would make New York the first state in the country to completely ban state-sponsored private prison financing.<sup>10</sup>

California has also recently taken steps to cease its reliance on private prisons.<sup>11</sup> In 2019, California passed Assembly Bill 32 ("AB

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1. Gregory Korte, *Biden's Promises for Day One Could Take Months to Fulfill*, BLOOMBERG (Jan. 14, 2021, 11:00 PM), <https://www.bloomberg.com/news/articles/2021-01-15/biden-promises-for-day-one-could-take-months-to-fulfill> [<https://perma.cc/X527-NENC>].

2. *Id.*

3. Lauren-Brooke Eisen, *Breaking Down Biden's Order to Eliminate DOJ Private Prison Contracts*, BRENNAN CTR. FOR JUST., (Aug. 27, 2021), <https://www.brennancenter.org/our-work/research-reports/breaking-down-bidens-order-eliminate-doj-private-prison-contracts> [<https://perma.cc/AKG9-R6K2>].

4. *Id.*

5. Catherine Kim, *Private Prisons Face an Uncertain Future as States Turn Their Backs on the Industry*, VOX (Dec. 1, 2019, 3:53 PM), <https://www.vox.com/policy-and-politics/2019/12/1/20989336/private-prisons-states-bans-california-nevada-colorado> [<https://perma.cc/822D-337G>].

6. N.Y. CORRECT. LAW § 121 (McKinney 2021).

7. Morgan Simon, *New York Takes Next Historic Step Away from Private Prisons*, FORBES (Feb. 13, 2020, 12:52 PM), <https://www.forbes.com/sites/morgansimon/2020/02/13/new-york-takes-next-historic-step-away-from-private-prisons/> [<https://perma.cc/5PML-HG8T>].

8. *Id.*

9. Ryan Tarinelli, *NY Lawmakers Advance Bill to Stem Private Prison Investment*, N.Y.L.J. (Jan. 26, 2021, 1:23 PM), <https://www.law.com/newyorklawjournal/2021/01/26/ny-lawmakers-advance-bill-to-stem-private-prison-investment/> [<https://perma.cc/8C3N-VYED>].

10. Simon, *supra* note 7.

11. Alexei Koseff, *California Bans Private Prisons and Immigration Detention Centers*, S.F. CHRON. (Oct. 11, 2019, 5:03 PM), <https://www.sfchronicle.com/politics/article/California-will-stop-using-private-prisons-by-14515257.php> [<https://perma.cc/F8QK-8Z44>].

32”), which prevents the state of California from entering into new contracts with private prisons and prevents the state from renewing existing contracts with private prisons.<sup>12</sup> California also banned the operation of privately run federal immigration detention centers, which has set the state up for a first of its kind legal battle over the federal government’s right to regulate federal detention centers.<sup>13</sup>

On its surface, AB 32 appears to be a complete ban on private prisons. After all, both California Governor Gavin Newsom (“Governor Newsom”) and Assemblymember Rob Bonta (“Assemblymember Bonta”), the author of AB 32, claim that AB 32 ends California’s use of all private prisons in California.<sup>14</sup> However, some commentators have expressed concerns over the exceptions listed in AB 32.<sup>15</sup> In fact, these commentators argue that some of these exceptions are so broad that they raise the question of whether California’s private prison is truly a real ban.<sup>16</sup> This Note proposes, for reasons that will be explained below, that California did well in deciding to take an unequivocal stance against the use of private prisons at both the state and federal level. Furthermore, this Note also discusses the scope of the exceptions to the private prison ban listed in AB 32 in order to evaluate the veracity of the claims that there are “specific carve-outs that will allow private prison companies to continue to do business in California.”<sup>17</sup> However, regardless of the scope of AB 32’s exceptions, it is

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12. *Id.*

13. Technically, Illinois passed the first bill banning the operation of federal immigration detention centers, but unlike California, the federal government does not currently have any federal immigration facilities in Illinois. Sophia Tareen, *Advocates Hope Illinois Private Detention Ban Sparks Change*, AP NEWS (July 13, 2019), <https://apnews.com/article/d6ec44532d9840a3a7455b47a6540b07> [<https://perma.cc/G6LZ-CWDW>]. For an understanding of the legal dispute between the federal government and California, see *GEO Grp., Inc. v. Newsom*, 493 F. Supp. 3d 905 (S.D. Cal. 2020).

14. *Governor Newsom Signs AB 32 to Halt Private, For-Profit Prisons and Immigration Detention Facilities in California*, OFF. OF GOVERNOR GAVIN NEWSOM (Oct. 11, 2019) [hereinafter *Governor Newsom Signs AB 32*], <https://www.gov.ca.gov/2019/10/11/governor-newsom-signs-ab-32-to-halt-private-for-profit-prisons-and-immigration-detention-facilities-in-california/> [<https://perma.cc/6Y5W-LRWP>].

15. Chandra Bozelko & Ryan Lo, *California’s Private Prison Ban Isn’t a Ban at All*, ORANGE CNTY. REG. (Oct. 20, 2019, 8:45 PM), <https://www.oregister.com/2019/10/20/californias-private-prison-ban-isnt-a-ban-at-all/>; see also Edward Lyon, *California Begins Weaning Itself from Private Prisons—More or Less*, PRISON LEGAL NEWS (Feb. 4, 2020), <https://www.prisonlegalnews.org/news/2020/feb/4/california-begins-weaning-itself-private-prisons-more-or-less/> [<https://perma.cc/8QDM-K24V>] (noting that a distinction in AB 32, of whether the federal government itself can continue to operate privately-owned prisons, will have to be resolved in court because it may provide several loopholes for private companies to continue operating detention centers).

16. Bozelko & Lo, *supra* note 15.

17. *Id.*

important to realize that AB 32 only addresses part of the issue of private for-profit companies making profit off of California's prison system. To that end, this Note argues that California must take further action if it truly wishes to end the financial exploitation of inmates by private for-profit companies.

The Note is organized as follows: Part I explains the historical circumstances that led to the rise of private prisons in the United States, with an emphasis on California; Part II discusses how private prisons operate, the findings on the treatment of inmates in these facilities, and how the state and federal government and U.S. companies have responded to these findings; Part III looks at the language used in AB 32 and discuss the different ways in which courts can interpret the exceptions to the private prison ban; and Part IV discusses why California's prison ban is necessary and discusses the next steps California must take to end the financial exploitation of the state's inmates by private for-profit companies.

## II. BACKGROUND

Today, the operation of private prisons is a multibillion-dollar industry—\$5 billion to be specific.<sup>18</sup> The first private prison opened up in Tennessee in 1984, during the midst of the War on Drugs.<sup>19</sup> The prison was permitted in order to accommodate the overwhelming number of people that were being convicted at the time.<sup>20</sup> The number of people being arrested was so great that a federal judge in Tennessee ordered the state to stop admitting people to prison due to the severe overcrowding in the prisons.<sup>21</sup> Thus, private companies began to claim that they could design and construct facilities that could hold more prisoners while requiring less staff, which in turn would reduce costs for the state.<sup>22</sup> Thus, to states like Tennessee, which was under a federal mandate to reduce the severe overcrowding of its prisons,<sup>23</sup> there was a strong appeal towards private prison use. In fact, similar trends

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18. *The Private Prison Industry, Explained*, THE WEEK (Aug. 6, 2018), <https://theweek.com/articles/788226/private-prison-industry-explained> [<https://perma.cc/D9BH-NVXR>].

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

occurred throughout the United States with incarceration rates rising and the private prison industry promising to have the solution.<sup>24</sup>

### A. *The Federal Impact*

During the War on Drugs, the private prison industry grew rapidly.<sup>25</sup> During the 1980s and '90s, the majority of the U.S. population was very afraid of what it perceived as rising crime rates throughout the nation.<sup>26</sup> Drugs were blamed for the rise in crimes rates, and drug convictions increased almost tenfold from 1980 to 1996 as a result.<sup>27</sup> State and federal legislators responded by enacting “increasingly harsh sentencing laws.”<sup>28</sup> People serving longer sentences served a key role in the need for more prison beds throughout the country.<sup>29</sup> However, there was a second, equally important factor in play as well, which was “a sharp increase in the tendency of prosecutors to ask for prison sentences.”<sup>30</sup> During this timeframe, arrests increased in high numbers, with state incarceration rates increasing by 148 percent.<sup>31</sup> Between 1982 and 1998, the state and federal prison population went from approximately 400,000 to over 1 million people.<sup>32</sup> Overall, a scared U.S. population coupled with responsive legislators led to the passing and enforcement of some of the strictest criminal laws that the country had ever passed.<sup>33</sup>

For example, beginning in the 1980s, two harsh drug sentencing laws were passed.<sup>34</sup> According to some commentators, the laws were

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24. andré douglas pond cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL'Y 407, 415 (2016).

25. See JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUST. ASSISTANCE, NCJ No. 181249, EMERGING ISSUES ON PRIVATIZED PRISONS iii, 1 (2001), <https://www.ojp.gov/pdffiles1/bja/181249.pdf> [<https://perma.cc/FC8K-FA27>].

26. See RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 17–18 (2007).

27. Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 229–30 (2015).

28. Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 131 (2017).

29. Robert Weisberg, *The Wild West of Sentencing Reform: Lessons from California*, 48 CRIME & JUST. 35, 58 (2019).

30. *Id.*

31. Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER, RACE & JUST. 315, 322–23 (2012).

32. German Lopez, *Why You Can't Blame Mass Incarceration on the War on Drugs*, VOX (May 30, 2017, 9:00 AM), <https://www.vox.com/policy-and-politics/2017/5/30/15591700/mass-incarceration-john-pfaff-locked-in>.

33. See Takei, *supra* note 28, at 130–31.

34. Baradaran, *supra* note 27, at 249.

passed in response to a belief that drug use was a direct link to increases in violence throughout the country.<sup>35</sup> The perception of the U.S. population at the time was that drug use was one of the most prolific issues in the nation.<sup>36</sup> Therefore, in 1986, President Ronald Reagan signed the Anti-Drug Abuse Act of 1986 (ADAA), which continued with a then-precedent of establishing mandatory minimum sentences for certain drug crimes.<sup>37</sup> Before the passage of the ADAA, judges had discretion on the length of the sentence to impose on drug offenses.<sup>38</sup> However, the ADAA took this discretion away and imposed five and ten year minimums for possessing certain quantities of a selected group of drugs.<sup>39</sup> In addition, second time offenders could have their sentences doubled.<sup>40</sup>

Another example of legislation that passed in response to perceived threats of crime is the 1994 Crime Bill, signed into law by President Bill Clinton.<sup>41</sup> This bill also continued the then-trend of creating more mandatory minimum sentences.<sup>42</sup> Just like the ADAA, the 1994 Crime Bill was passed over a perceived threat of rising crime rates.<sup>43</sup> Social scientists like James A. Fox, a criminologist, warned of “a blood bath of violence” that would occur across the country.<sup>44</sup> Moreover, there was a belief that there was a wave of youths that was devoid of impulse control and remorse, and that these youths’ numbers were “ready to explode cataclysmically.”<sup>45</sup> It was believed that these youths would overrun society and commit unprecedented acts of violence, a

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35. *Id.* at 229–30.

36. *See id.* at 248. Notably, during the time frame in which these mandatory minimum sentencing laws were being passed, drug use was already decreasing. *Id.* at 249 n.136. The 1980’s media was instrumental in framing the perception that drug use was a national crisis, with the issue receiving constant airtime. *Id.* at 250. Sensational media and a scared U.S. population made it easy to pass laws targeting drug use. *See id.* at 249–50. Even U.S. Congress members, despite statistics showing the contrary, pushed the narrative that drug use was a national crisis by sharing stories of murders in which drug use was a factor. *Id.* at 251.

37. *Id.* at 249.

38. Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 929–30 (2002).

39. *Id.* at 930.

40. *Id.*

41. Takei, *supra* note 28, at 155–56.

42. *Id.* at 156.

43. *Id.* at 155–56.

44. Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES (Apr. 6, 2014), <https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html> [<https://perma.cc/T8YS-2Z83>].

45. *Id.*



concept which was known as the Superpredator Theory.<sup>46</sup> The 1994 Crime Bill was prepared to combat this by “dramatically” increasing the mandatory sentences and authorizing billions of dollars in funding for new prisons.<sup>47</sup> One of the new sentences added was the “three-strikes-you’re-out” provision, which mandated a life sentence for defendants who were convicted of a federal offense and had two prior qualifying state or federal court convictions.<sup>48</sup>

Overall, due to the 1994 Crime Bill, the ADAA, and other harsh sentencing legislation, by the year 2000, the Justice Policy Institute estimated that the United States incarcerated more people in the 1990s than in any other decade in the country’s history.<sup>49</sup>

### B. California’s Impact

In the midst of this perceived national crisis, California began passing laws that led to historically high incarceration rates in the state, which peaked in 2006.<sup>50</sup> California’s trend towards a tough-on-crime approach can be traced back to the passing of the 1977 Uniform Deterrence Sentencing Act (“the Act”),<sup>51</sup> which stated that “[t]he purpose of imprisonment for crime is punishment.”<sup>52</sup> The Act also directed the California Department of Corrections (CDCR) to forecast future prison bed needs,<sup>53</sup> which made it clear California was ready to start imprisoning many more people than it had up to that point and for much longer sentences.<sup>54</sup> Two of California’s tough-on-crime laws that fueled higher incarceration rates during the 1980s and 1990s were the Street Terrorism Enforcement and Prevention Act (STEP Act),

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46. *Id.* Notably, between 1994 and 2011, violent crimes committed by youths aged 10 to 17 fell by approximately two thirds. *Id.* This decline in violence by youths sparked debate among experts for the reasoning behind the decrease, but the 1994 Crime Bill does not appear to be one of the primary reasons given for the decline. *Id.* Even the political scientist from Princeton who championed the theory, John J. Dilulio Jr., admitted that this perceived threat was plainly wrong. Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), <https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html> [https://perma.cc/GJL4-XQXT].

47. Takei, *supra* note 28, at 156.

48. Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 351–52 (1995).

49. Takei, *supra* note 28, at 156.

50. Magnus Lofstrom & Brandon Martin, *How California Reduced Its Prison Population*, PUB. POL’Y INST. OF CAL. (Feb. 6, 2015), <https://www.ppic.org/blog/how-california-reduced-its-prison-population/> [https://perma.cc/C2NL-LYPU].

51. GILMORE, *supra* note 26, at 91.

52. *Id.*

53. *Id.* at 91–92.

54. *Id.* at 89–91.

which was passed in 1988, and Proposition 184, which was passed in 1994.<sup>55</sup>

### 1. The STEP Act

In 1988, California became the first state in the country to adopt anti-gang legislation with the passing of the STEP Act, legislation intended to increase prosecutors' ability to prosecute gang activity.<sup>56</sup> However, the STEP Act did much more than just that. The STEP Act also increased the penalties for ordinary felonies committed by gang members.<sup>57</sup> For example, most felonies categorized as "serious" felonies carry a maximum sentence of three years or less, but that same offense, if gang related, receives an additional five-year enhancement.<sup>58</sup> Some of these enhancements were lengthy, such as the enhancement for witness intimidation that goes from a maximum penalty of three-years to life imprisonment when the offense is found to be gang related.<sup>59</sup> Furthermore, Penal Code section 186.22 of the STEP Act has two provisions, criminalizing active participation in a criminal street gang and enhancements for committing crimes that benefit or promote criminal street gangs, that can be prosecuted simultaneously.<sup>60</sup> The effect was that a defendant could receive two strikes counting towards California's three strike law in one proceeding.<sup>61</sup>

Despite these efforts by the California Legislature to combat criminal street gangs, the number of criminal street gangs increased from 600 in 1988, the year the STEP Act was passed, to 6,642 by 2010.<sup>62</sup> Yet, as the number of gangs continued to grow, instead of seeking alternate solutions to combat gang membership, the California Legislature instead kept increasing the punishments associated with the STEP Act.<sup>63</sup> In March 2000, in response to the Superpredator Theory, Proposition 21, which enhanced criminal punishments under the

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55. *Id.* at 5–7.

56. Samuel DiPietro, Comment, *STEPping into the "Wrong" Neighborhood: A Critique of the People v. Albillar's Expansion of California Penal Code Section 186.22(a) and a Call to Reexamine the Treatment of Gang Affiliation*, 110 J. CRIM. L. & CRIMINOLOGY 623, 626 (2020).

57. Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California's Anti-Gang STEP Act*, 11 BERKELEY J. CRIM. L. 101, 104–05 (2006).

58. *Id.* at 105.

59. *Id.*

60. DiPietro, *supra* note 56, at 628.

61. *Id.*

62. *Id.* at 653.

63. See Sara Lynn Van Hofwegen, Note, *Unjust and Ineffective: A Critical Look at California's STEP Act*, 18 S. CAL. INTERDISC. L.J. 679, 681 (2009).

STEP Act, was passed.<sup>64</sup> In addition, the California Supreme Court lowered the burden of proof required to prosecute people under the STEP Act. In *People v. Castenada*,<sup>65</sup> the California Supreme Court held that defendants could be convicted under the STEP Act's provision for gang association for any degree of involvement above "nominal or passive" participation.<sup>66</sup> Prior to this standard, case law precedent held that defendants needed to demonstrate substantial involvement in and devotion to a criminal street gang.<sup>67</sup>

Another provision of the STEP Act stated that a defendant charged under the STEP Act needed to be aware that the gang had previously committed two statutorily-defined extremely serious offenses.<sup>68</sup> Thus, a defendant could be charged under the STEP Act for actions committed after their gang's members commit two predicate acts.<sup>69</sup> Yet in *People v. Gardeley*,<sup>70</sup> the California Supreme Court held that a defendant could be charged under the STEP Act simultaneously with the second predicate act that is required to be charged under the STEP Act.<sup>71</sup>

These amendments and appellate opinions significantly broadened the STEP Act and increased its severity.<sup>72</sup> The overall effect being that prosecutors were able to punish more people and keep them in prison for longer periods of time.<sup>73</sup>

## 2. Proposition 184

However, before the STEP Act, there was another piece of legislation passed that greatly affected how California sentenced defendants. In 1994, California citizens passed Proposition 184 ("Prop. 184"), the three strikes law.<sup>74</sup> This law is viewed as the culmination of

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64. See *Robert L. v. Superior Ct.*, 109 Cal. Rptr. 2d 716, 719–21 (Ct. App. 2001) (discussing how Proposition 21 was "designed to overhaul the juvenile justice system and crackdown on juvenile offenders").

65. 3 P.3d 278 (Cal. 2000).

66. Baker, *supra* note 57, at 109–10.

67. *Id.* at 109.

68. *Id.* at 114.

69. *Id.* at 115.

70. 927 P.2d 713 (Cal. 1996).

71. Baker, *supra* note 57, at 115–16 (arguing that the California Supreme Court's holding that the second predicate act could be charged simultaneously with the STEP Act's penalties was a clear violation of the legislative intent of the STEP Act).

72. *Id.* at 102.

73. See *id.* at 114–15.

74. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 976 (2016).

over a decade of tough-on-crime legislation.<sup>75</sup> As originally enacted, the proposition called for the mandatory imposition of a twenty-five-years-to-life sentence if a defendant committed any felony so long as the defendant had two previous “serious” or “violent” felony convictions.<sup>76</sup> However, the law contained many other provisions. For example, it required the doubling of any sentence associated with a felony conviction if the defendant had a prior serious or violent felony conviction.<sup>77</sup> In addition, courts were required to sentence defendants to consecutive rather than concurrent sentences in some instances.<sup>78</sup>

According to at least one commentator, the law led to “astounding sentences.”<sup>79</sup> For example, a defendant who shoplifted golf clubs and had never been convicted of an act of violence received a life without parole sentence under Prop. 184.<sup>80</sup> In another case, a defendant who had never been convicted of an act of violence shoplifted videotapes and received a fifty-years-to-life sentence for that offense.<sup>81</sup> Both sentences were upheld when challenged.<sup>82</sup>

Additionally, under Prop. 184, it was possible for a defendant, depending on the order of their criminal history, to receive drastically different sentences even if they committed the exact same offenses.<sup>83</sup> This was possible because, if a defendant had two prior felonies where only one was a serious or violent felony and was now facing a second serious or violent felony conviction, they would not get a life sentence.<sup>84</sup> On the other hand, if the defendant had two prior felonies that were serious or violent but was now facing a felony that was not serious or violent, they would get a life sentence.<sup>85</sup> This means that the latter would get a harsher sentence despite a criminal history that is decreasing in severity, while the former would get a much more lenient sentence even though their criminal activity was increasing in

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75. Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 395 (1997).

76. Kleinfeld, *supra* note 74, at 976.

77. Vitiello, *supra* note 75, at 406–07.

78. *Id.* at 404.

79. Kleinfeld, *supra* note 74, at 976.

80. *Id.*

81. *Id.*

82. *Id.*

83. Cole F. Heyer, Note, *Comparing the Strike Zones of “Three Strikes and You’re Out” Laws for California and Georgia, the Nation’s Two Heaviest Hitters*, 45 SUFFOLK U. L. REV. 1217, 1233–34 (2012).

84. *Id.*

85. *Id.* at 1234.

severity.<sup>86</sup> Thus, the three-strikes law was heavily reliant on the sequences of the crimes committed as opposed to the actual crimes themselves, which meant that people could get lengthy incarceration sentences for actions that, if committed before Prop. 184, would have resulted in a shorter prison sentence.<sup>87</sup> Therefore, it is not difficult to see how California came to require so many additional prison beds as Prop. 184 was making it possible to give life without parole sentences to crimes that traditionally had much lower prison sentences attached to them.

### 3. The Effects

What were the results of all these tough-on-crime measures? At the national level, the size of the private prison population grew 90 percent, going from 69,000 prisoners in 1999 to 131,000 in 2014.<sup>88</sup> Part of the reason for this rise in private prison reliance was due to the sheer amount of people that were being arrested.<sup>89</sup> For example, during President Clinton's two presidential terms alone, the total population of federal and state prisons rose by 673,000.<sup>90</sup> In 1985, the prison population was approximately 740,000, but by 2003 that number had risen to over 2.1 million.<sup>91</sup> The growth of private prisons mirrors this growth in the prison population. In 1996, thirteen states housed their prisoners in private prisons.<sup>92</sup> However, by 2004, thirty-four states housed their inmates in private prisons.<sup>93</sup>

The numbers only continued to grow. From 2000 to 2011, the number of federal prisoners in private facilities increased almost 150 percent, and the number of state prisoners in private facilities increased by approximately 23 percent.<sup>94</sup> To put these numbers in perspective, CoreCivic, by 2014, controlled 92,500 prison beds across 67

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86. *Id.*

87. *Id.*

88. Cynthia Elaine Tompkins, *Private Prisons: Profiting from, and Contributing to, Mass Incarceration*, 8 L.J. SOC. JUST. 1, 19 (2017).

89. *Id.* at 17.

90. *Id.* at 15–16.

91. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 455 (2005).

92. James F. Blumstein et al., *Do Government Agencies Respond to Market Pressures? Evidence from Private Prisons*, 15 VA. J. SOC. POL'Y & L. 446, 454 (2008).

93. *Id.*

94. Mike Tartaglia, Note, *Private Prisons, Private Records*, 94 B.U. L. REV. 1689, 1695 (2014).

prisons.<sup>95</sup> That same year, GEO Group controlled 61,000 prison beds across 56 facilities.<sup>96</sup> It is estimated that private prisons housed more than 8 percent of the nation’s prisoners in 2014.<sup>97</sup> While the number seems small, this translates to billions of dollars in profits for the private prison corporations.<sup>98</sup>

In California, between 1982 and 2000, despite the crime rate peaking in 1980, the California state prisoner population grew nearly 500 percent.<sup>99</sup> Additionally, since 1984, California built twenty-three major new prisons, with each costing between \$280 and \$350 million.<sup>100</sup> The cause of California’s mass incarceration was a combination of lengthy prison sentences and an increase in the amount of people being prosecuted.<sup>101</sup>

The rise in incarceration rates in California eventually led to *Brown v. Plata*,<sup>102</sup> a Supreme Court of the United States case. In *Plata*, the Supreme Court made several findings about California’s prisons. For example, the Court noted that at its peak, California prisons held 156,000 inmates, an amount nearly double the capacity that the prisons were designed to hold, which was 80,000.<sup>103</sup> The Court further found that California’s prisons were run at nearly double the capacity for at least eleven years prior to 2011.<sup>104</sup> Before the case reached the Supreme Court, a three-judge federal panel ordered California to reduce its prison population to 137.5 percent of design capacity, which meant that California had to release 46,000 inmates.<sup>105</sup> Yet, by the time the case got to the Supreme Court, only 9,000 inmates had been released, meaning the state still had to figure out the release of 37,000 inmates.<sup>106</sup> The Court noted that “[f]or years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’

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95. *Id.*; CORECIVIC, INC., FORM 10-K: ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934, at 5 (Feb. 23, 2017), <https://www.sec.gov/Archives/edgar/data/1070985/000119312517053982/d310578d10k.htm> [<https://perma.cc/WG5L-MBUR>].

96. Tartaglia, *supra* note 94, at 1695.

97. *Id.*

98. *Id.* at 1695–96.

99. GILMORE, *supra* note 26, at 7.

100. *Id.*

101. Weisberg, *supra* note 29, at 57–59.

102. 563 U.S. 493 (2011).

103. *Id.* at 501–02.

104. *Id.* at 502.

105. *Id.* at 501.

106. *Id.*

basic health needs.”<sup>107</sup> The Court also noted that “these serious constitutional violations” amounted to the well-documented “[n]eedless suffering and death” of inmates without an adequate solution to the issue.<sup>108</sup>

In a failed effort to address its overcrowding prisons, California, in 2006, entered into a contract between the California Department of Corrections and the private prison corporations GEO Group Inc. and CoreCivic, formerly known as Correctional Corporation of America.<sup>109</sup> This contract allowed California to send inmates to out-of-state private prisons in four other states.<sup>110</sup> The CDCR stated that at its peak, its prison population consisted of more than 172,000 inmates.<sup>111</sup> It also noted that over 17,000 inmates were forced to live in areas not designed to be living spaces, such as gymnasiums and dayrooms.<sup>112</sup> Thus, by 2010, there were more than 10,400 inmates held in out-of-state private facilities due to overcrowding.<sup>113</sup> This almost certainly led to many inmates being cut off from visits from their loved ones, a severe concern considering that even top correction officials suggest that communication between inmates and their loved ones contributes to their rehabilitation.<sup>114</sup> In addition, “[t]he CDCR was [CoreCivic’s] only state partner that accounted for 10% or more of [CoreCivic’s] total revenue” in recent years,<sup>115</sup> showing how much California came to rely on private prisons.

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107. *Id.*

108. *Id.*

109. *CDCR Signs Contracts to House Inmates Out-of-State*, CAL. DEP’T. OF CORR. & REHAB. (Oct. 20, 2006), <https://web.archive.org/web/20200829233839/https://www.cdcr.ca.gov/news/2006/10/20/cdcr-signs-contracts-to-house-inmates-out-of-state>; CORECIVIC, INC., *supra* note 95, at 5.

110. *CDCR Signs Contracts to House Inmates Out-of-State*, *supra* note 109.

111. *Id.*

112. *Id.*

113. *California Department of Corrections and Rehabilitation Exits Last Out-of-State Prison*, CAL. DEP’T. OF CORR. & REHAB. (June 25, 2019), <https://www.cdcr.ca.gov/news/2019/06/25/california-department-of-corrections-and-rehabilitation-exits-last-out-of-state-prison> [<https://perma.cc/YY7Y-5G5E>].

114. See Alex Friedmann, *Apples-to-Fish: Public and Private Prison Cost Comparisons*, 42 FORDHAM URB. L.J. 503, 548 (2014).

115. CORECIVIC, INC., *supra* note 95, at 11.

### III. HOW PRIVATE PRISONS OPERATE

#### A. Financial Incentives

The end goal of private prisons is to maximize profits for shareholders while minimizing expenses.<sup>116</sup> Private prisons make money by housing inmates for state governments, which pay these corporations via government contracts.<sup>117</sup> Typically, the amount of profit gained by private prisons is directly dependent on the number of people incarcerated in them.<sup>118</sup> Thus, the goal is to maintain inmates for less money than the amount the government pays these companies to house the inmates.<sup>119</sup> Therefore, in order for private prisons to maximize their profits, they need to keep their beds filled with inmates.<sup>120</sup> The result being that the prisons require a constant stream of inmates to replace the prisoners who have finished serving their sentences.<sup>121</sup> Thus, the rehabilitation of inmates, which involves reducing recidivism and lowering incarceration rates, is problematic for private prisons that are paid based on the number of inmates they house.<sup>122</sup> Furthermore, as for-profit institutions, private prisons are incentivized to provide the bare minimum of service to inmates as required by law.<sup>123</sup> After all, providing anything more than that would cut into the profits of shareholders. This necessarily raises the question of whether we can expect private prisons to offer the most effective services aimed at reducing recidivism.

Private prisons have promoted themselves with the argument that they can house inmates for states at lower costs than it would cost the state itself to house the inmates.<sup>124</sup> However, some studies conducted on comparing the costs to maintain inmates in public versus private prisons have found little to no savings.<sup>125</sup> For example, the state of

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116. Tompkins, *supra* note 88, at 5.

117. Dolovich, *supra* note 91, at 460, 473 n.129.

118. *Id.* at 533.

119. *Id.* at 460.

120. *Id.* at 533.

121. *See id.* at 518.

122. *See* Tompkins, *supra* note 88, at 21.

123. *See id.* at 5.

124. Dolovich, *supra* note 91, at 457.

125. *See, e.g., Audit: Private Prisons Cost More Than State-Run Prisons*, AP NEWS (Jan. 1, 2019), <https://apnews.com/article/af7177d9cce540ab9f2d873b99437154> [<https://perma.cc/G8XU-X9WW>]; Liberty Vittert, *The Cold Hard Facts About America's Private Prison System*, FOX NEWS (Dec. 19, 2018), <https://www.foxnews.com/opinion/the-cold-hard-facts-about-americas-private-prison-system> [<https://perma.cc/V9MJ-LV35>]; cummings & Lamparello, *supra* note 24, at 423–24.



Arizona conducted a study where it “found that their minimum-security public and private prisons cost virtually the same amount per prisoner.”<sup>126</sup> Notably, a separate study conducted by Temple University found savings of approximately 14 percent for Arizona’s privately-run minimum security prisons.<sup>127</sup> However, it was later discovered that the funding for the latter study came from three major private prison companies that used this study as evidence that their facilities are more affordable.<sup>128</sup> Thus, measuring the actual cost savings of private prisons is problematic because the source of the funding for the study can sometimes be biased.

Furthermore, there are issues involving the accuracy of the studies in assessing the actual cost-saving benefits private prisons offer. In California, a facility operated by the GEO Group was investigated, and one study said the savings were only 3 percent while the other study said the savings were 15 percent.<sup>129</sup> Thus, it is difficult to get an accurate measure of the savings that private prisons provide over their public counterparts, if any, due to the difficulties in establishing a universal metric to compare public and private prisons. However, at least some studies suggest the savings provided are not there.

Thus, there are legitimate reasons to be concerned with the prevailing approach to funding private prisons. Even alternate methods of funding, such as leasing a facility to a public agency to use and operate, contain similar incentives like quotas or requiring full payment per bed even if the beds are empty.<sup>130</sup> For example, in Arizona, the private prison company Management & Training Corp. (MTC) threatened to sue the state of Arizona over a contractual obligation between the two parties that stated that Arizona had to keep MTC’s prison beds at 97 percent capacity.<sup>131</sup> Eventually, Arizona had to pay MTC \$3 million because Arizona was not arresting enough people to keep MTC’s prison beds full.<sup>132</sup>

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126. Megan Mumford et al., *The Economics of Private Prisons*, BROOKINGS INST.: HAMILTON PROJECT 4 (Oct. 20, 2006), [https://www.hamiltonproject.org/assets/files/economics\\_of\\_private\\_prisons.pdf](https://www.hamiltonproject.org/assets/files/economics_of_private_prisons.pdf) [<https://perma.cc/6XTM-XA6X>].

127. *Id.* at 4.

128. *Id.*

129. *The Private Prison Industry, Explained*, *supra* note 18.

130. Bozelko & Lo, *supra* note 15.

131. Chris Kirkham, *Prison Quotas Push Lawmakers to Fill Beds, Derail Reform*, HUFFINGTON POST (Sept. 20, 2013, 9:14 PM), [https://www.huffingtonpost.co.uk/entry/private-prison-quotas\\_n\\_3953483](https://www.huffingtonpost.co.uk/entry/private-prison-quotas_n_3953483) [<https://perma.cc/J9SC-UMU9>].

132. *See id.*

Thus, given the current modes of paying private prisons, there is either an incentive for private prisons to keep their beds full, or in other cases, states end up paying private prisons because there are not enough prisoners to house.

### B. Findings as to the Faults in Private Prisons

However, even if the economic argument is conceded, there are still various other issues to be concerned about. A 2016 report by the DOJ found that privately run prisons had higher incidences of contraband, violence, and excessive use of force than publicly-run federal prisons.<sup>133</sup> For example, the report found that assaults by inmates on other inmates and assaults by inmates on staff members were more common in private prisons.<sup>134</sup> Furthermore, the report also indicated that much more contraband was making its way into private prisons than publicly-run prisons.<sup>135</sup> Notably, this was the case despite the fact that private prisons tend to house mostly non-violent offenders.<sup>136</sup> Overall, the report found that private prisons had more safety and security-related incidents per capita than publicly-run federal prisons.<sup>137</sup> These findings only increase the legitimacy of the arguments that private prisons are not well-staffed, which of course goes back to the issue of maximizing profits. Because of these findings, the DOJ ordered that all contracts with private prisons be rejected for renewal or have their scope substantially limited.<sup>138</sup>

Then, in 2019, the Office of Inspector General found significant health violations in a private immigration detention facility in California and in two other private immigration detention centers in other states, all of which are owned by GEO Group.<sup>139</sup> In the GEO-owned private prisons, inmates were being provided improper uniforms, were

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133. Kim, *supra* note 5.

134. OFF. OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS 18 (2016), <https://oig.justice.gov/reports/2016/e1606.pdf> [<https://perma.cc/2JFJ-BX8R>].

135. *Id.* at 14, 15.

136. AUSTIN & COVENTRY, *supra* note 25, at ix.

137. OFF. OF THE INSPECTOR GEN., *supra* note 134, at 14.

138. Matt Zapotosky & Chico Harlan, *Justice Department Says It Will End Use of Private Prisons*, WASH. POST (Aug. 18, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/08/18/justice-department-says-it-will-end-use-of-private-prisons/> [<https://perma.cc/6SKP-4NUK>].

139. OFF. OF INSPECTOR GEN., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 2–3 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf> [<https://perma.cc/4DTC-59H6>].

not provided hygiene products, and were forced to use shower stalls and bathrooms that contained mold, mildew, and peeling paint.<sup>140</sup> The mold found in the California facility was a significant health hazard for detainees.<sup>141</sup> Furthermore, the bathrooms were in non-working order.<sup>142</sup> Overall, the Department of Homeland Security Office of Inspector General found that the detention center had “egregious violations.”<sup>143</sup>

Thus, even if private prisons do offer housing at a lower cost, which is a disputed claim, findings like the ones mentioned above show the risks involved with a system where maximizing profits is the main goal. It is difficult to look at these findings and not think that the private prison corporations’ desire to increase profits is a driving force behind these bad conditions.

### C. *The Responses to Private Prisons*

Due in part to these criticisms, an increasing number of states that once used private prisons have started to roll back their reliance on them.<sup>144</sup> For example, New York has banned the use of private prisons in its state since 2008.<sup>145</sup> Other states, such as Nevada and Illinois, have recently banned private prisons in some capacity as well,<sup>146</sup> and even more states, such as Colorado and Minnesota, have introduced legislation to ban the use of private prisons in their states.<sup>147</sup> However, it is not just states taking action against the use of private prisons. U.S. banks, which traditionally provided lines of credit to private prison corporations, have announced that they will or have cut ties with private prison corporations.<sup>148</sup> For example, well-known large banking institutions such as JPMorgan Chase and Bank of America, among others, have said that they would no longer provide lines of credit to GEO Group.<sup>149</sup> Many private prisons rely on debt financing for their day-to-day operations, so having financial partnerships like the ones GEO Group has lost is very important.<sup>150</sup>

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140. *Id.* at 8–10.

141. *Id.*

142. *Id.*

143. *Id.* at 3.

144. Kim, *supra* note 5.

145. N.Y. CORRECT. LAW § 121 (McKinney 2021).

146. Kim, *supra* note 5.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

However, these are measures taken against private prisons by only a handful of states and private companies. Things are very different at the federal level. When the Trump Administration came into power in 2017, then-Attorney General Jeff Sessions rescinded the 2016 DOJ memo ordering the reduction of the federal government's reliance on private prisons.<sup>151</sup> Jeff Sessions cited the federal government's "future needs" of the federal correctional system as the primary reason for the rescission of the 2016 memo.<sup>152</sup> Notably absent from this memo was any discussion of the findings made in the 2016 DOJ report. Thus, despite the 2016 DOJ findings, Jeff Sessions allowed the federal government to resume its contracts with private prisons, with no recourse against the private prison corporations for the findings of inadequate inmate care.

President Trump's Administration didn't stop there. By April 2017, the DOJ began requesting bids for contracts to house federal inmates again, and that same month, GEO Group was awarded a \$110 million contract to build a new detention center.<sup>153</sup> All of this came during a time when President Trump had significantly increased and expanded the detention of immigrants in the country.<sup>154</sup> Since 2007, CoreCivic and GEO Group have been competing to take advantage of the federal government's growing reliance on privately-run immigration detention centers.<sup>155</sup> Between 2000 and 2016, the number of immigrants housed in private prisons increased by 442 percent.<sup>156</sup> In 2016, the federal government detained approximately 26,249 individuals in private detention centers.<sup>157</sup> By 2017, over three-fourths of all immigrant detainees were held in privately run immigration detention centers.<sup>158</sup> Also, the number of immigrants in private detention centers

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151. Memorandum from Jefferson B. Sessions III, Att'y Gen., Off. of the Att'y Gen., to the Acting Dir., Fed. Bureau of Prisons (Feb. 21, 2017), [https://www.bop.gov/resources/news/pdfs/20170224\\_doj\\_memo.pdf](https://www.bop.gov/resources/news/pdfs/20170224_doj_memo.pdf) [<https://perma.cc/P9RW-NDCH>].

152. *Id.*

153. Hauwa Ahmed, *How Private Prisons Are Profiting Under the Trump Administration*, CTR. FOR AM. PROGRESS (Aug. 30, 2019, 9:02 AM), <https://www.americanprogress.org/issues/democracy/reports/2019/08/30/473966/private-prisons-profiting-trump-administration/> [<https://perma.cc/6GPH-FUYX>].

154. *Id.*

155. Madison Pauly, *A Brief History of America's Private Prison Industry*, MOTHER JONES, <https://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-time-line/> [<https://perma.cc/8ZR4-GUYP>].

156. Ahmed, *supra* note 153.

157. *Id.*

158. *Id.*

reached a record high of 55,185 in 2019.<sup>159</sup> Reports also show that despite needing funding for 52,000 beds, the Immigration Custody Enforcement agency only had funding for 45,000 detainees.<sup>160</sup> Furthermore, the average amount of time immigrants spent in detention centers increased dramatically, going from twenty-eight to forty-six days.<sup>161</sup>

#### *D. Private Prisons Fight Back*

Private prison corporations benefited significantly from President Trump's stance on immigration, but these corporations have made other moves to combat the resistance against them. For example, a coalition of the largest private prison corporations backed an advocacy group called Day 1 Alliance (D1A).<sup>162</sup> The purpose of D1A, a public information group, is to change the negative perception of private prisons.<sup>163</sup> Yet, the group claims it does not plan on lobbying or advocating for issues.<sup>164</sup> However, the group's backers, the private prison corporations, have donated over \$1 million to the Republican Party in what can only be seen as an effort to keep in place the immigration policies that create more profit for these corporations.<sup>165</sup> In 2019 alone, GEO Group and CoreCivic made approximately \$1.3 billion in revenue from contracts with Immigration and Customs Enforcement.<sup>166</sup> Some of these profits come from ten-year contracts that the Trump Administration signed with these corporations for several private detention centers in Texas and California.<sup>167</sup> GEO Group went as far as to hold a company retreat at the Trump resort in Doral,

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159. Isabela Dias, *ICE Is Detaining More People Than Ever—And for Longer*, PAC. STANDARD (Aug. 1, 2019), <https://psmag.com/news/ice-is-detaining-more-people-than-ever-and-for-longer> [<https://perma.cc/RP7Y-QKHL>].

160. *Id.*

161. *Id.*

162. Kim, *supra* note 5.

163. *Id.*

164. *Id.*

165. Vandana Rambaran, *Private Prisons Bankrolling Trump Campaign as Election Looms*, FOX BUS. (Aug. 14, 2020), <https://www.foxbusiness.com/politics/private-prisons-donate-large-sums-to-trump-campaign> [<https://perma.cc/DD2G-4XAW>].

166. *Id.*

167. *Id.*

Florida.<sup>168</sup> Thus, it should not be surprising that private prison corporations posted record earnings under the Trump Administration.<sup>169</sup>

With regard to funding, private prisons have mitigated the issue of U.S. banks cutting ties with them by turning to overseas funding.<sup>170</sup> For example, CoreCivic has turned to foreign institutions to help raise money for the operation of its private prisons.<sup>171</sup> An example of foreign aid reliance comes from a report that the Japanese investment bank, Nomura, began reaching out to investors regarding a term loan for CoreCivic.<sup>172</sup> Thus, despite strong opposition from states and private companies in the United States, private prison corporations were able to thrive under the Trump Administration due to the Administration's immigration policies and decision to overlook all the negative findings in the DOJ's 2016 report.<sup>173</sup> Other actions private prison corporations took to continue their growth include contracts that they signed with the federal government to open four new private immigration detention centers, which took effect right before AB 32 took effect in California.<sup>174</sup>

GEO Group and CoreCivic shares dropped in 2016 when Hillary Clinton vowed to end government contracts with private prisons.<sup>175</sup> This drop came at a time when the Obama Administration had already ordered a substantial reduction on the federal government's reliance on private prisons.<sup>176</sup> It seemed as if private prisons were nearing the end of their run. Instead, private prison corporations have made over

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168. Nomaan Merchant, *Private Prison Industry Backs Trump, Prepares If Biden Wins*, AP NEWS (Aug. 13, 2020), <https://apnews.com/article/houston-ap-top-news-prisons-immigration-joe-biden-ca7f6e9fac1f287bb79ae55410112c46> [<https://perma.cc/S57V-UYX9>].

169. Sebastian Pellejero & Will Caiger-Smith, *Private Prison Operator CoreCivic Finds New Bankers as U.S. Lenders Pull Back*, FORBES (Dec. 12, 2019, 10:00 AM), <https://www.forbes.com/sites/debtwire/2019/12/12/private-prison-operator-corecivic-finds-new-bankers-as-us-lenders-pull-back/> [<https://perma.cc/QHX6-82AW>].

170. *Id.*

171. *Id.*

172. *Id.*

173. See Ahmed, *supra* note 153.

174. Rebecca Plevin, *ICE Signs Long-Term Contracts Worth Billions for Private Detention Centers, Dodging New State Law*, DESERT SUN (Dec. 22, 2019, 9:01 AM), <https://www.desertsun.com/story/news/2019/12/20/ice-signs-long-term-contracts-private-detention-centers-two-weeks-ahead-state-law/2713910001/> [<https://perma.cc/M69S-2SKX>].

175. Robert Ferris, *Prison Stocks Are Flying on Trump Victory*, CNBC (Nov. 11, 2016, 1:56 PM), <https://www.cnbc.com/2016/11/09/prison-stocks-are-flying-on-trump-victory.html> [<https://perma.cc/39LQ-DTUH>].

176. Zapotosky & Harlan, *supra* note 138.

a billion dollars in 2019 alone through the housing of immigrants in private immigration detention centers.<sup>177</sup>

The aggressive tactics taken by the private prison corporations are the exact reason why California needs to cut all ties with these corporations. With so many exceptions available to California's prison ban, these corporations will surely try to find loopholes to continue making profit in California. Furthermore, even though California seems firm in its opposition to private prisons today, the sudden shift in the federal government's stance on private prisons when President Trump was elected and California's history with harsh sentencing and prison overcrowding show that there is always a potential for resurgence. Therefore, it is critical to determine the scope of the exceptions listed in AB 32.

#### IV. INTERPRETING AB 32

AB 32 was passed with the intent of completely "abolishing" the use of all private prisons in California.<sup>178</sup> Assemblymember Bonta stated that AB 32 "end[s] the use of for-profit, private prisons and detention facilities" in California.<sup>179</sup> The Office of Governor Gavin Newsom website stated that the purpose of AB 32 was to "eliminate [private prisons] in California."<sup>180</sup> Moreover, both the legislature and the governor claim that AB 32 "will phase out the use of all private, for-profit prisons . . . in California."<sup>181</sup> Thus, it must be determined whether these claims by Governor Newsom and the California Legislature are true.

##### A. *What AB 32 Actually Says*

###### 1. Penal Code Sections 9501 & 9502

Section 9501 of the California Penal Code states the following: "Except as otherwise provided in this title, a person shall not operate

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177. See Rambaran, *supra* note 165.

178. S. RULES COMM., SENATE FLOOR ANALYSIS OF ASSEMBLY BILL NO. 32, 2019–2020 Reg. Sess. (Cal. 2019).

179. *Governor Newsom Signs AB 32*, *supra* note 14.

180. *Governor Newsom Takes Action on Legislation to Support California's Immigrant and Refugee Communities*, OFF. OF GOVERNOR GAVIN NEWSOM (Sept. 27, 2020), <https://www.gov.ca.gov/2020/09/27/governor-newsom-takes-action-on-legislation-to-support-californias-immigrant-and-refugee-communities/> [<https://perma.cc/SA9H-7HDU>].

181. *Governor Newsom Signs AB 32*, *supra* note 14.

a private detention facility within the state.”<sup>182</sup> The significant part of section 9501 is the first half of the law. If California claims to be done with private prisons, why are there exceptions? The exceptions are listed under section 9502 of the Penal Code. Here is a list of all the exceptions to California’s ban:

Section 9501 shall not apply to any of the following:

(a) Any facility providing rehabilitative, counseling, treatment, mental health, educational, or medical services to a juvenile that is under the jurisdiction of the juvenile court pursuant to Part 1 (commencing with Section 100) of Division 2 of the Welfare and Institutions Code.

(b) Any facility providing evaluation or treatment services to a person who has been detained, or is subject to an order of commitment by a court, pursuant to Section 1026, or pursuant to Division 5 (commencing with Section 5000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.

(c) Any facility providing educational, vocational, medical, or other ancillary services to an inmate in the custody of, and under the direct supervision of, the Department of Corrections and Rehabilitation or a county sheriff or other law enforcement agency.

(d) A residential care facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code.

(e) Any school facility used for the disciplinary detention of a pupil.

(f) Any facility used for the quarantine or isolation of persons for public health reasons pursuant to Division 105 (commencing with Section 120100) of the Health and Safety Code.

(g) Any facility used for the temporary detention of a person detained or arrested by a merchant, private security guard, or other private person pursuant to Section 490.5 or 837.<sup>183</sup>

At first glance, this list appears to be alarming given how many exceptions are listed towards AB 32. However, if the list is read

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182. CAL. PENAL CODE § 9501 (West Supp. 2021).

183. *Id.* § 9502.



carefully, most of these exceptions are actually covering situations in which detainment by private non-prison companies could accidentally be interpreted as a violation of section 9501. Section 9502(g) illustrates this point well. This exception ensures that merchants who detain shoplifters in a facility in their stores are not deemed as acting in violation of section 9501.<sup>184</sup> Similarly, section 9502(e) applies to private schools that detain children for disciplinary purposes.<sup>185</sup> Section 9502(f) covers health-related detainments of people in private facilities.<sup>186</sup> Moreover, it is important to note that section 9501 says it applies towards private detention facilities, and while private prisons are considered private detention facilities, not all private detention facilities are private prisons.<sup>187</sup>

## 2. Penal Code Section 9502(c) Exception

However, section 9502(c) appears to be much broader than the other listed exceptions. This exception applies to “[a]ny facility” that provides any one of a wide range of ancillary services to inmates that are “in the custody of, and under the direct supervision of” the CDCR.<sup>188</sup> Section 9502(c) has raised concerns from advocates and commentators as they believe it provides “glaring” “loopholes” that allow private prisons to continue operating in California.<sup>189</sup> This claim is not necessarily meritless. After all, to be considered under the custody of the CDCR, it is not a requirement that you be housed at a state public prison.<sup>190</sup> All inmates of the state, even the ones detained in private prisons, are under the custody of the CDCR.<sup>191</sup>

Furthermore, the language requiring prisoners to be under “the direct supervision of” the CDCR is not dispositive either. After all, there are many ways to achieve direct supervision of inmates without housing them in public prisons. For example, couldn’t the CDCR simply staff one or even a few employees at a private prison to serve in a supervisory role over the housing of inmates in the private prison?

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184. *Id.* § 9502(g).

185. *Id.* § 9502(e).

186. *Id.* § 9502(f).

187. *Id.* § 9501.

188. *Id.* § 9502(c).

189. Lyon, *supra* note 15.

190. CAL. DEP’T OF CORR. & REHAB. ADULT INSTITUTIONS, PROGRAMS, & PAROLE, OPERATIONS MANUAL 11 (Jan. 1, 2020), <https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2020/03/2020-DOM-02.27.20.pdf> [<https://perma.cc/7NEE-3DQH>].

191. *Id.*

This action appears to satisfy the requirement of having direct supervision over inmates. It is difficult to say for sure how this exception would be interpreted given that there are no guidelines or comments as to how these exceptions work or what private detention facilities they apply to. As noted above, section 9502(c) does appear in a list full of exceptions that address the issue of mislabeling other forms of detainment as a violation of section 9501, but the legislature did not say that this was the sole purpose of section 9502. Therefore, when you combine the lack of explicit legislative intent in enacting section 9502 with the fact that section 9502(c)'s language is so broad, it could be argued that section 9502(c) is an exception to the ban of private prisons in California.

### 3. Penal Code Section 5003.1(e) Exception

Although the focus of this Note will be on section 9502(c), it should also be noted that there is another exception to AB 32's claimed private prison ban. This exception is in section 5003.1(e) of the California Penal Code, which states that the CDCR "may renew or extend a contract with a private, for-profit prison facility to provide housing for state prison inmates in order to comply with the requirements of any court-ordered population cap."<sup>192</sup> This is a live exception to the private prison ban because, since 2017, California has been just below the federal mandate of operating at 137.5 percent capacity.<sup>193</sup> Thus, any spikes in crime, like the one Los Angeles County is currently experiencing,<sup>194</sup> could cause future reliance on private prisons. Even though Los Angeles County is seeing progressive reforms in prosecution,<sup>195</sup> there is still strong resistance to the criminal justice reform, which could lead to rises in incarceration rates due to the higher crime rates.

Therefore, section 5003.1(e) could also serve as a way to argue that section 9502(c) applies to private prisons. The argument would be

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192. CAL. PENAL CODE § 5003.1(e).

193. Heather Harris et al., *California's Prison Population*, PUB. POL'Y INST. OF CAL. (July 2019), <https://www.ppic.org/publication/californias-prison-population> [<https://perma.cc/W6MX-RSWD>].

194. Jon Regardie, *With 48 Murders, Los Angeles Sees Deadliest Month in More Than a Decade*, CROSSTOWN (Aug. 11, 2021), <https://xtown.la/2021/08/11/high-murders-los-angeles/> [<https://perma.cc/8ENG-FUZL>].

195. Jaclyn Diaz, *Judge Blocks LA District Attorney's Reforms*, NPR (Feb. 9, 2021, 4:17 AM), <https://www.npr.org/2021/02/09/965673109/judge-blocks-l-a-district-attorneys-reforms> [<https://perma.cc/WDJ8-ZJMM>].

that section 5003.1(e) is direct proof that AB 32 is not a complete private prison ban, which means that private prisons should be encompassed in section 9502(c) since there is no language to even suggest that this exception was not intended to apply to private prisons.

#### 4. Penal Code Section 5003.1(c)

It is important to note that section 5003.1 also contains a provision that states that “[a]fter January 1, 2028, a state prison inmate or other person under the jurisdiction of the [CDCR] shall not be incarcerated in a private, for-profit prison facility.”<sup>196</sup> On its own, this provision seems to put an end to this discussion all together. After all, the language is straightforward in its application. However, how does section 9502 interact with section 5003.1? Section 9502(c) says that “[a]ny facility” can operate for purposes of providing a wide range of services to inmates in the care of the CDCR.<sup>197</sup> Private prisons clearly fall under the umbrella of any facility. If this is how the legislature chose to define what facilities are exempt from section 9501, then “any facility” could include for-profit private prisons. Section 5003.1 appears to be setting a deadline for when all prisoners currently in private prisons must be transferred to public prisons. However, it doesn’t appear to override the continued use of the exceptions in section 9502.

This assertion is confirmed in the Senate Rules Committee report on AB 32. That committee’s report says that it “[p]rovides that the prohibition of the operation of a for-profit detention facility within the state does not apply to facilities that are primarily engaged in specified services such as” all the exceptions in section 9502.<sup>198</sup> The choice of the words “operation of a for-profit detention facility” in its plain meaning encompasses for-profit prisons. However, as discussed above, most of these exceptions appear to apply to private companies that are not private prisons, but that could accidentally be held as violating section 9501 because they are private companies that happen to detain certain individuals under certain circumstances. Furthermore, the digest in the Senate Rules Committee report states the following: “[t]his bill abolishes, in line with California’s interest in ensuring the safety and welfare of its residents, the private for-profit prison industry

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196. CAL. PENAL CODE § 5003.1(c).

197. *Id.* § 9502(c).

198. S. RULES COMM., *supra* note 178.

from our state in order to protect incarcerated individuals from serious harm within our state border.”<sup>199</sup>

Thus, the only remaining critical question to ask is whether section 9502(c) can be read broadly enough to encompass private prisons in the exception of private detention facilities offering ancillary services to inmates. This will be critical in assessing the effectiveness of a law that the legislature claims to be a ban and for the assessment of the response by a legislature that has declared the following:

These for-profit run private prison companies benefit from incarcerating Californians and have no incentive to invest in their rehabilitation or mental and physical health. For-profit prison companies owe a fiduciary duty to their shareholders. Their mission is to maximize profits for their investors. They are able to accomplish this by increasing their inmate population and cutting operational costs, which is dangerous and detrimental to the Californians who are held against their will. Every dollar spent in treating their prisoners and detainees in a way that promotes the health and welfare of the prisoners and detainees is a dollar less in profit for shareholders.<sup>200</sup>

With all of this in mind, the next step is to figure out how courts will grapple with the issue of interpreting AB 32 should the issue arise.

### *B. Methods of Interpretation*

Interpreting section 9502(c) turns on the answer to the following question: how broadly will courts interpret the language that the legislature chose to use in section 9502(c)? Answering this question will involve some discussion of statutory interpretation techniques. Realistically, there are many statutory techniques that could apply, and depending on the ones used, different results would be obtained on how broadly these exceptions would apply. However, practically speaking, there are only two results that are important from a judicial interpretation of AB 32, given the fact that it is supposed to be a ban on the use of private prisons. Either the exceptions will be read broadly, and AB 32 will not accomplish the goal of the governor and legislature, or the exceptions, in line with the legislative intent, will be interpreted as exceptions applying to private companies that are not private prisons.

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199. *Id.*

200. *Id.*

Although there definitely are middle-ground approaches to how broadly the exceptions are interpreted, anything but the strictest interpretation of AB 32's exceptions will necessarily defeat the purported claim that AB 32 is an actual private prison ban. Thus, this Note need only discuss two statutory interpretation techniques; one that leads to a broad judicial interpretation of the exceptions and one that leads to a strict interpretation of AB 32's exceptions. A statutory interpretation technique that would likely lead to a broad reading of section 9502(c) is the Plain Meaning Rule. Another technique for statutory interpretation is legislative history, which would likely lead to a narrow reading of section 9502(c).

### 1. The Plain Meaning Rule

The Plain Meaning Rule of statutory interpretation is simply the idea that statutory language on its own dictates the meaning of a law enacted by the legislature.<sup>201</sup> Under this approach, external evidence such as statutory purpose or legislative intent and history is not ordinarily considered.<sup>202</sup> The only exception for considering extrinsic evidence is when the statute's text is unclear or ambiguous.<sup>203</sup> Thus, if the text of a statute is unambiguous in its meaning, the meaning that the text conveys will be enforced even if the result goes against the legislative intent of the legislature.<sup>204</sup>

### 2. Broad Interpretation of Section 9502(c)

Under the Plain Meaning Rule, the result from litigation over the reach of section 9502(c) would be that the section 9502(c) exception applies to private prisons. This would be the case because the legislature chose the words “[a]ny facility” to describe which kind of facilities are exempt from the section 9501 ban.<sup>205</sup> Therefore, it must necessarily be true that private prisons are included in the exemption. This is because private prisons clearly fall under the category of “any facility.” If section 9502(c) was truly meant to exempt any private detention facility except private prisons, it would have explicitly stated so.

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201. *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 374 n.54 (1992).

202. *Id.*

203. William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 540 (2017).

204. *See id.* at 543.

205. CAL. PENAL CODE § 9502(c) (West Supp. 2021).

Moreover, if section 9502 was only intended to ensure that other private facilities were not accidentally under the purview of section 9501, then the legislature would have had to state that this was the purpose of section 9502(c).

As for the “inmate in the custody of, and under the direct supervision of, the [CDCR]” language,<sup>206</sup> the ordinary use of the words are applied in the interpretation. Thus, it must be determined what it means to be “under the direct supervision of.” This portion of the statute could cause judges to turn to the legislative history, as it is not clear what it means to be “under the direct supervision” of someone. However, looking into how the words “direct supervision” are used in other settings could clear up any ambiguities without having to dive into the legislative history. For example, employees typically have supervisors who ensure they are doing their work properly, which is a form of direct supervision. At school, students typically have supervisors who are directly supervising over the safety of the students. Thus, when considering how direct supervision is used in these other settings, it appears that private prisons could be allowed to operate under section 9502(c) if CDCR staff members serve in a supervisory capacity in private prisons to ensure that the private prison staff are doing their jobs adequately, similar to a supervisor in a job or school setting.

Although, even if interpreted under this rule, there is still room to argue for the limited use of AB 32’s exceptions. Under section 9502(c), it could be argued that the facilities exempt from the ban must be offering services to all the inmates in its care. The argument would be that including the language that inmates in these detention centers must be receiving some kind of service means that if the inmates are not receiving such services, those in the latter group could not be housed in private detention centers. This would mean that private prisons could not simply offer services that are only available to a fraction of its inmate population as a method to house many more who do not have access to such services. However, even this limitation in the interpretation of section 9502(c) can be wide-reaching. The statute does not define what “other ancillary services” means. Furthermore, it does not seem outside the realm of possibility for private prisons to set up a system in which all their inmates receive the bare minimum of the listed services, say for example, all inmates receive educational

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206. *Id.*

services in the form of a thirty-minute class, to qualify many individuals under this exception.

The issue is that these services that exempt private prisons under section 9502(c) are not well defined. Section 9502(c) does not have guidelines or requirements for what quality of services would qualify a private prison for an exemption. For example, does offering the previously mentioned half-hour classes to all inmates exempt private prisons from section 9501 under section 9502(c)? A reading of the plain language used in section 9502(c) would seem to suggest the answer is yes. What about the “other ancillary services” portion of the exemption? Does offering anger management or rehabilitation programs once a month for thirty minutes to each inmate count as a service under section 9502(c)? Again, without any guidance, the literal answer when reading the language in 9502(c) would be yes, since under the Plain Meaning Rule, the private prison is offering one of the services listed under it, and because the law does not set out requirements for the quality or length of time that the services need to last.

Overall, at best, AB 32 is conflicting because it is held out as a rebuke against private prisons, yet the language used, if read under the Plain Meaning Rule, creates such broad exceptions. Under the Plain Meaning Rule, situations like this are decided in favor of what the text says because the text is clear as to who is exempt, which is any facility. Furthermore, it is clear what the facilities have to do to be exempt—offer ancillary services to inmates.<sup>207</sup> Finally, direct supervision by the CDCR can be interpreted as non-ambiguous. Overall, a plain reading of section 9502(c) would lead to the result that so long as a private prison offers any level of services to an inmate, which includes the bare minimum since the statute does not define the level of services it requires, then that private prison will be exempt under section 9502(c). Interpretations such as these are not only possible, but they are also probable.

The California Supreme Court has emphasized the use of the Plain Meaning Rule in landmark cases. In *Doe v. City of Los Angeles*,<sup>208</sup> the court stated that it would “follow the Legislature’s intent, as exhibited by the plain meaning of the actual words of the law.”<sup>209</sup> Thus, even if one wanted to argue that the legislature intended to ban

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207. *Id.*

208. 169 P.3d 559 (Cal. 2007).

209. *Id.* at 566 (quoting *Cal. Tchrs. Ass’n v. Governing Bd. of Rialto Unified Sch. Dist.*, 927 P.2d 1175, 1177 (Cal. 1997)).

private prisons and that the use of the exceptions should not apply to private prisons, the language in section 9502, particularly section 9502(c), can easily be construed to show why such a narrow interpretation of the exceptions was not intended, regardless of what any legislators said in a different setting. It will not matter what individual legislators or the governor claim their intent is; what will matter is the language they actually chose to use. Although, it should be noted that *Doe* does discuss legislative history being used to confirm the meaning of the statute.<sup>210</sup> However, the issue here is that an examination of the legislative history reveals absolutely nothing about what facilities the legislature was trying to exempt with any of the exceptions under section 9502.<sup>211</sup>

This exact principle has already been used by other courts in California as well. For example, in *People v. Goodliffe*<sup>212</sup> the prosecutor attempted to argue that despite the language used in a sex offense statute that prevented the defendant from receiving consecutive terms for each of his offenses, the defendant should nonetheless be sentenced with consecutive terms because it was the intent of the voters to increase the punishment of sex offenders.<sup>213</sup> However, the court disagreed with this notion and applied the Plain Meaning Rule, holding that general statements of voter intent cannot trump the plain meaning of the statute as defined by the words the statute actually uses.<sup>214</sup> The court only identified two exceptions: (1) words in a statute will not be followed when it appears clear that it has been erroneously used; and (2) words or meaning of a statute will not be followed where a literal reading would achieve absurd consequences.<sup>215</sup>

Applying this reasoning to section 9502, even though the legislature stated that its intent was to ban private prisons, that general statement will not trump the language in section 9502. Instead, it will be argued that the inclusion of exceptions in AB 32 shows that the legislature intended to have avenues for the continued use of private prisons. Furthermore, reading the exceptions broadly, which section 9502(c)'s language supports, would not lead to any absurd results since section 9502 was intended to be a list of exceptions to section

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210. *Id.* at 566–67.

211. *See* S. RULES COMM., *supra* note 178.

212. 99 Cal. Rptr. 3d 385 (Ct. App. 2009).

213. *Id.* at 388–89.

214. *Id.* at 389–90.

215. *Id.* at 388.



9501. In addition, there is no evidence that any of the words used in section 9502 are erroneous.

Thus, there are statutory interpretation techniques that courts could potentially use to make exceptions like section 9502(c) live. Given how private prison companies have been quick to exploit other opportunities to remain active, such as increasing their involvement in the detainment of people in ICE's custody, it is not difficult to imagine private prisons exploiting section 9502(c) by arguing for this broad interpretation.

### 3. Legislative History

However, judges have many statutory techniques at their disposal, and they have full discretion to choose which techniques they do and do not apply in a particular case. Thus, a court interpreting section 9502(c) could choose to use the statutory technique of legislative history. Legislative history is a term that refers to the documents that are produced as a legislative body introduced, studied, and debated.<sup>216</sup> One of the most important sets of documents in the legislative history of a bill are the committee reports.<sup>217</sup> This is because these documents tend to have the most analysis regarding the bill that is set to be passed.<sup>218</sup> Committee reports typically include the purpose of a bill, its history, and the reasoning for why certain language is chosen.<sup>219</sup> Thus, mining the legislative history can provide a great deal of information and insight as to how a legislature would expect or intend for a statute to be interpreted.<sup>220</sup>

### 4. Narrow Interpretation of Section 9502(c)

Under the legislative history approach, courts interpreting AB 32's exception will likely hold that section 9502(c) does not apply to private prisons. The argument would be that section 9502(c)'s language in the exception applying to inmates "under the direct supervision of" the CDCR means that the inmates receiving the ancillary services must be housed in public prisons. Thus, private prisons are

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216. *Legislative History Research Guide: Overview*, GEO. L. LIBR., [https://guides.ll.georgetown.edu/legislative\\_history](https://guides.ll.georgetown.edu/legislative_history) [<https://perma.cc/8D65-9F7A>] (last updated June 24, 2021, 1:31 PM).

217. *Id.*

218. *Id.*

219. *Legislative History Research Guide: Reports*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=278869&p=1862825> [<https://perma.cc/3MPW-3PFE>] (last updated Dec. 8, 2021, 11:21 AM).

220. *Id.*

inherently disqualified from falling under the purview of section 9502(c). Such a ruling would be backed by the legislative history on AB 32, such as the findings made on private prisons by the Senate Judiciary Committee, which includes the following:

Their fiduciary duty, as a for-profit corporation, and mission is to maximize profits for their investors. They are able to accomplish this by increasing their inmate population and cutting operational costs, which is dangerous and detrimental to the prisoners and staff. Private prison corporations have incentives to drive up reliance on incarceration, often lobbying to drive up policies which increase incarceration in order to drive up demand for their business. This presents a concerning conflict of interest with the state's goals to invest in the rehabilitation and reintegration of people.<sup>221</sup>

This language is powerful in that it serves as a strong showing to the court for why section 9502(c) was not intended by the legislature to apply to private prisons, which is why the language “under the direct supervision, of the CDCR” was selected.

There is precedent for this technique in California. The California Supreme Court has stated that California courts rely on legislative history in “determining whether the literal meaning of a statute comports with its purpose.”<sup>222</sup> In fact, this reasoning was used as justification to use legislative history despite an argument that the Plain Meaning Rule applied to the statute in dispute.<sup>223</sup> The court further stated that “[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.”<sup>224</sup> Additionally, at least one California court has used legislative intent to counter other statutory interpretation rules that would normally apply in a given situation.<sup>225</sup>

Applying this case law precedent here, the argument would be that interpreting section 9502(c) to include private prisons would run completely contrary to the explicit intent stated by both the legislature and the governor. Therefore, because AB 32 was passed with the intent

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221. S. JUDICIARY COMM., ANALYSIS OF ASSEMBLY BILL NO. 32, 2019–2020 Reg. Sess. 6 (Cal. 2019) (hearing July 2, 2019).

222. *Lungren v. Deukmejian*, 755 P.2d 299, 304 (Cal. 1988).

223. *Id.* at 303–04.

224. *Id.* at 304.

225. *Peoples v. San Diego Unified Sch. Dist.*, 41 Cal. Rptr. 3d 383, 388–89 (Ct. App. 2006).

of banning private prisons because the legislature believes that private prisons cannot be trusted to provide the very services section 9502(c) exempts, it can be persuasively argued that private prisons are not a part of section 9502(c). This argument would not be difficult to make given the language that the Senate Judiciary Committee used to describe private prisons and the statements made that the intent of AB 32 is to completely ban the use of private prisons.

### 5. What Will the Courts Actually Hold?

While the language of section 9502(c) is not written as clearly as it could be, the legislative history is a very compelling reason to conclude that the exception would not be interpreted broadly enough to encompass private prisons. Aside from the live exception in section 5003.1(e), California's politicians have sent a strong message through legislative action. It is likely that the concerns by commentators as to the "loopholes" in section 9502(c) will not be an issue. Section 9502(c) is the only exception that is broad enough to potentially allow for the use of private prisons. Yet, despite it not directly stating that private prisons are not part of this exception, it is likely that the language "under the direct supervision of[] the [CDCR]" will be interpreted to mean that these inmates must be housed in public prisons.<sup>226</sup> It cannot be denied that there is a bit of ambiguity in section 9502(c). However, the intent behind the passing of AB 32 is very clear and any courts interpreting section 9502 will likely take note of this.

The California Supreme Court has used the Plain Meaning Rule. However, the court has also made it clear that in the court's view, the Plain Meaning Rule cannot be used as justification for reaching a holding that runs contrary to the purpose of the legislation.<sup>227</sup> Here, it is clear that the legislature's purpose is to ban private prisons from operating in California.

## V. DISCUSSING THE PRIVATE PRISON BAN

### A. A Complete Ban Is Necessary

California politicians have advertised to be done with the for-profit prison industry with the passing of AB 32.<sup>228</sup> More generally,

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226. CAL. PENAL CODE § 9502(c) (West Supp. 2021).

227. *Lungren*, 755 P.2d at 304.

228. *Governor Newsom Signs AB 32*, *supra* note 14.

the state seems to be done with prison profiteers due to the incentives these companies have to promote policies that keep individuals incarcerated.<sup>229</sup> These tactics, of course, disproportionately affect minorities who are the majority of inmates.<sup>230</sup> The executive summary in the Senate Judiciary Committee report states that AB 32 was passed with the intent to “protect vulnerable individuals” from exploitation from private prisons.<sup>231</sup> That summary also states that “[t]hese for-profit run private prison companies benefit from incarcerating Californians and have no incentive to invest in their rehabilitation or mental and physical health.”<sup>232</sup> The summary further states that “[t]here are numerous documented abuses of people held in for-profit run prison facilities in California.”<sup>233</sup> Comments made in the Senate Judiciary Committee Report by advocates of AB 32 state that private prisons lobby “to drive up policies which increase incarceration in order to drive up demand for their business.”<sup>234</sup>

For some reason, many politicians claim to be thoroughly against private prisons but only take minor stances against them. Take, for example, the executive order that President Biden signed directing the DOJ to cease reliance on private prisons for people in federal custody.<sup>235</sup> Notably, despite claiming to end private prison use, this executive order does not cease the detainment of individuals in private prisons if they are under the custody of ICE.<sup>236</sup> This is a glaring omission given the fact that only approximately 27,400, or 16 percent, of inmates under the custody of the DOJ are in private prisons when compared to the 75 percent of individuals being held in privately-run immigrant prisons.<sup>237</sup> In 2019, ICE had approximately 50,000 people in detention centers each day.<sup>238</sup> This means approximately 35,000 or more of these inmates were in privately-run immigrant prisons, which also suffer from poor conditions and inadequate staffing.<sup>239</sup>

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229. S. JUDICIARY COMM., *supra* note 221, at 1.

230. See Madeleine Severin, Note, *Is There a Winning Argument Against Excessive Rates for Collect Calls from Prisoners?*, 25 CARDOZO L. REV. 1469, 1522 (2004).

231. S. JUDICIARY COMM., *supra* note 221, at 1.

232. *Id.*

233. *Id.*

234. *Id.* at 6.

235. Madeline 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, 3:32 PM), <https://time.com/5934213/private-prisons-ban-joe-biden/>.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

This is why California did well in taking a hard stance against private prisons in AB 32. Admittedly, the exceptions in AB 32 are difficult to define in scope and potentially leave room for private prisons to continue to operate. Therefore, courts interpreting this statute must do so with legislative intent in mind. The legislature was accurate in noting that these for-profit private prisons have a duty to maximize shareholder profits; many commentators have provided sufficient evidence to show this is true.<sup>240</sup> They do not have a duty to provide proper housing or health and recidivism services to the inmates they care for.<sup>241</sup> Thus, section 9502(c), an exception regarding these exact services, should not be read to allow for private prisons that offer these services to continue operating.

While this issue is not likely to arise anytime soon, no one can know how California will think of these issues five, ten, or even twenty years from now. Thus, the state's current commitment to banning the use of private prisons must be read as such to ensure that down the line, should the state's mindset change, there is no room for exploitation through the exceptions in section 9502. While some people may think that California could never turn back, California's previous history of defining prison sentences as solely about punishment is a glaring reminder that if the state has gone down this path once, there is no way to know for sure that at some point many years from now the state will not revert to this mindset.

### *B. Financial Savings Is Not Justification to Keep Private Prisons*

Private prisons serve the exact same function as public prisons. The only beneficial reasons to give this duty to private companies would be for better results or for financial savings. Thus, some people may argue that private prison use should continue in California due to the costs-saving benefits associated with them, particularly during a fractured economy caused by the Covid-19 pandemic. This assertion can be backed by the legislative history, which shows that the costs for a complete ban on private prisons is unknown but could be as high as \$133.9 million.<sup>242</sup> However, the Senate Judiciary Committee report does contain counterclaims offered by advocacy groups, which state that: "AB 32 will also save taxpayers tens, if not hundreds of millions

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240. S. RULES COMM., *supra* note 178, at 4, 11.

241. *Id.*

242. *Id.* at 6.

by concluding these contracts. For-profit prisons have been paid billions over the last decade, but have failed to result in the expected cost-savings for California taxpayers when government services are ‘contracted-out.’”<sup>243</sup> These savings are likely to be materialized through lower recidivism rates because state prisons will be incentivized to offer the most effective rehabilitative and educational programs since they do not have to balance this interest against the shareholders’ profits. The effect of this should be effective programming for inmates. The more significant effect of lower recidivism rates is that less people in our society will become victims of crime, which itself can have high costs to society attached to the victimization.

Furthermore, at best, the evidence on whether private prisons are truly more cost-efficient than public prisons is conflicting.<sup>244</sup> Moreover, the majority of expenses associated with AB 32 are likely linked to one-time expenses regarding the transfer of inmates and setting up state-run facilities to house the inmates. It is unclear how much of the expected expenses, if any, are linked to higher costs in publicly run state prisons. However, any savings, if they exist, are not worth the tradeoff of having inmates in facilities where their health, rehabilitation, and safety are second to profits. Overall, regardless of any financial motivations, this cannot serve as a reason to tolerate the significant hardships and subpar living standards inmates face in private prisons.

### C. Keeping AB 32 in Perspective

It is also important to put this reform into perspective. While California has done well in banning private prison use, this is simply not enough to end the exploitation of our state’s inmates. Private prisons are not the only way private for-profit companies profit from the incarceration of inmates. Take, for example, the phone service providers in public prisons, which are for-profit private companies that take in \$1.2 billion annually in revenue.<sup>245</sup> For-profit private commissaries take in \$1.6 billion annually for their services.<sup>246</sup> Notably, California collects a commission from these sales.<sup>247</sup> This means that California itself is directly profiting from the incarceration of its inmates in public

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243. S. JUDICIARY COMM., *supra* note 221, at 6.

244. Friedmann, *supra* note 114, at 505.

245. Bozelko & Lo, *supra* note 15.

246. *Id.*

247. *Id.*

prisons, which is the very act that they condemned private prisons for committing.<sup>248</sup>

In at least one jail in California, inmates must pay twelve dollars just to speak to their loved ones for fifteen minutes.<sup>249</sup> This is alarming because, for many families, this only adds to the burdens associated with having a family member incarcerated. For many families, phone services are the only way to communicate with family members because prisons are often located in remote towns that are too far for families to travel to.<sup>250</sup> In addition, letters are not a good substitute for many families due to issues regarding literacy.<sup>251</sup> Another issue with letters is that they are not a feasible way to develop or maintain relationships with young children in their family.<sup>252</sup> Thus, private for-profit companies are profiteering at the expense of the burden families go through to pay for the fees to call their loved ones. Furthermore, this system sets up barriers for family members who are unable to speak to their imprisoned loved ones due to their inability to pay the high phone rates that these for-profit companies charge.

To make matters even worse, there are no persuasive justifications that private for-profit companies can provide in defense of this system.<sup>253</sup> Thus, California looks even worse because it is taking commission from a system that places a burden on low-income families and blocks access to communication for many of these families, all in the name of profit for private companies. Defenses raised for continuing the current phone service system revolve around the “great expenses associated with prisons.”<sup>254</sup> However, this justification is unpersuasive because it is other aspects of running prisons that are costly when compared to phone services.<sup>255</sup> Moreover, if this was an issue, then the profit made from these services should be going towards the operation of the prisons, and not in the hands of the shareholders.

California should not be participating in systems that allow private vendors to make profit from inmates in public prisons. Such exploitation of inmates places an additional burden on the inmate’s

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248. S. RULES COMM., *supra* note 178, at 4.

249. *Regulating the Prison Phone Industry*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/phones/> [https://perma.cc/9DRD-QPZX].

250. Severin, *supra* note 230, at 1474.

251. *Id.* at 1474–75.

252. *Id.*

253. *Id.* at 1475.

254. *Id.* at 1475–76.

255. *Id.* at 1476–77.

family and is contradictory to the goals of protecting vulnerable inmates from financial exploitation by private for-profit companies, which is the very reasoning given for the passing of AB 32. It should be no different with other services, such as phone services, just because California gets a commission from these sales. For these reasons, California must now take the next step and ban all private for-profit vendors from operating in California's prison system. This next step will help California end the profiteering by private companies on California's prison system. This is how California will truly reach its goal of protecting California residents from the exploitation of private for-profit companies.

## VI. CONCLUSION

California has taken a real stance against private prisons. Private prisons profit from the incarceration of inmates at the expense of the health and safety of the very inmates they house. The exceptions in AB 32, notably section 9502(c), will likely not apply to private prisons, so the concerns raised by commentators that AB 32 has loopholes for private prisons are not an issue. However, it is important to continue to push the California Legislature to act further on this issue. The financial exploitation of our state's inmates goes far beyond housing them in private prisons. The state must now turn to banning for-profit companies from profiteering as vendors in public prisons offering services such as phone services, which is also an exploitation of inmates that burdens them and their family members. Therefore, AB 32 must be expanded to encompass for-profit companies acting as vendors in our public prisons. There is no reason that these companies should have the ability to create billion-dollar industries at the expense of California's incarcerated population.



