Hasta la Vista?: An Assessment of the California Governor’s Proposal to Send Undocumented Inmates to Mexico

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Abstract: At a press conference in January 2010, California Governor Arnold Schwarzenegger proposed sending undocumented inmates from California prisons to cheaper, privately run prisons in Mexico as a solution to the state’s budget crisis and prison overcrowding problems. Though seemingly far-fetched, the Governor’s proposal represents a creative solution to a nation-wide problem of growing illegal immigrant populations, overburdened penal systems, and increasing pressures to cut costs. National trends in privatization and the offshoring of government functions make exporting inmates to lower cost prisons abroad a tempting remedy, albeit one that is fraught with legal complications. This Note argues that the California Governor’s proposal is infeasible because it does not fit within the existing U.S.-Mexico treaty structure and California is constitutionally prohibited from entering into its own treaty with Mexico. Furthermore, the massive civil liability risk created by a private extra-territorial prison substantially reduces the cost savings incentives.

Introduction

In the 1987 film *The Running Man*, Arnold Schwarzenegger plays a prisoner forced to take part in a gruesome television game show, in which convicted felons compete against deadly gladiator-like “stalkers” for their freedom.¹ Now, as the governor of California, Arnold Schwarzenegger has proposed a similarly “creative solution” to the state’s overstretched budget and overcrowded prison problems—send inmates who are illegal immigrants across the border to new and cheaper prisons in Mexico.²

In January 2010, Governor Schwarzenegger responded to a reporter’s request for examples of “reckless state spending” [Schwar-
zenegger] would like to curtail” by suggesting that the state reduce its prison expenses by building prisons in Mexico to house illegal immigrant inmates: “We pay them to build a prison down in Mexico and then we have those undocumented immigrants be down there . . . [i]t will halve the costs to build the prisons and halve the costs to run the prisons.” The Governor’s spokesman was quick to point out that this was not a formal proposal, and the idea has already drawn criticism from politicians and the press. The California Governor is not the first, however, to propose sending undocumented inmates to cheaper prisons in Mexico. Arizona, another state grappling with illegal immigration problems, proposed a similar plan in 1997 and was still considering it as late as 2005.

Governor Schwarzenegger has proposed a novel solution to a dire problem that warrants consideration; in March 2009, the California State Corrections Secretary Matthew Cate complained that the state prison system is “out of room . . . and out of money.” California is under a federal court order to spend hundreds of millions of dollars to upgrade its prisons and reduce its prison population by 40,000 inmates within the next two years. With time running out, California is in desperate need of innovative solutions to its financial and penological problems.

Meanwhile, the dual forces of shrinking state budgets and economic globalization have driven governments to outsource state functions to private service providers abroad. These government contracts

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3 Id.
4 Id.
5 Id.
7 See James Brooke, With Jail Costs Rising, Arizona Wants to Build Private Prison in Mexico, N.Y. TIMES, Apr. 20, 1997, at 1 (detailing Arizona’s 1997 proposal to send undocumented prisoners to a privately run prison in Mexico).
8 Id.
11 Carlton, supra note 2; Diaz, supra note 6.
12 See Carlton, supra note 2; Diaz, supra note 6.
have created some cost savings, but the concept of sending essential state functions to be carried out abroad has caused political controversy. In 2004, the California State Auditor surveyed thirty-five select state agencies and five University of California campuses with medical facilities and found that in 185 state contracts, which were worth a total of $638.9 million, at least some of the work was being performed offshore. Even if California does not implement the Governor’s plan to send illegal immigrant prisoners to Mexico, national trends of privatization and offshoring, combined with growing populations of illegal immigrants and prisoners, would likely tempt other states to consider similar proposals in the near future.

This Note examines the feasibility of implementing the Governor’s proposal to move undocumented inmates to prisons in Mexico. Part I introduces the situation facing the U.S. and Californian penal systems. Part II discusses the existing U.S.-Mexico prisoner transfer treaty and individual states’ ability to act internationally. Part II also explains the constitutional rights and remedies of individuals detained by U.S. citizens or agents outside the borders of the United States. Part III then analyzes the Governor’s proposal in light of the existing international legal institutions, as well as the potential liability facing state contractors in Mexico and the associated costs facing the state itself. Finally, the Note concludes that Governor Schwarzenegger’s proposal is not practicable because it does not fit within the existing U.S.-Mexico treaty

14 Id. at 173 (noting that New York City awarded a contract for environmental citation processing to a Delaware-based firm that subcontracted the work to Ghana, “where typists typically earn about $70 per month . . . .”); see id. at 172 (noting that Indiana awarded a contract to upgrade a state agency’s computers to an Indian firm whose bid was $8 million below the next lowest bid).
15 Id. at 172, 173–74 (describing Senator Ted Kennedy’s criticism of then-governor Mitt Romney for “jumping on the offshoring bandwagon” and the public debate over offshoring that took place during the 2004 presidential election).
16 Cal. State Auditor, Bureau of State Audits, The State’s Offshore Contracting: Uncertainty Exists About Its Prevalence and Effects 1 (2005). The report notes, however, that state agencies are not required to track or report their offshore contracting, so the full extent to which California outsources its public functions to offshore contractors is unclear. Id.
17 See Zuckerman, supra note 13, at 168.
20 Cf. Brooke, supra note 7 (detailing Arizona’s 1997 proposal to send undocumented prisoners to a privately run prison in Mexico).
structure; additionally, the massive civil liability risk created by an extra-territorial prison substantially reduces the cost savings incentives.

I. Background

Prison populations and costs in the United States have sky-rocketed in recent years. The U.S. prison population increased tenfold in the last four decades, reaching over 2 million in 2008. Including individuals on parole or probation, there were a total of 7.3 million people in the United States in the penal system in 2008, costing the United States $47 billion.

A 2007 study of federal prisons revealed that Latinos constituted one-third of federal prisoners but comprised only thirteen percent of the U.S. population—“a result the study attributed to the sharp rise in illegal immigration and tougher enforcement of immigration laws.” Illegal immigration has increased from 3.9 million new illegal immigrants in 1992 to 11.9 million by 2008. Legal and illegal immigrants also compose seventeen percent of California’s adult prison population. Furthermore, “of the 20,000 undocumented inmates [in California]—about 68 percent . . . are from Mexico.” The large proportion of immigrant prisoners in the United States has “become a major domestic and international issue.”

In addition to immigration, global integration of trade and politics has fostered a globalized approach to criminal justice. The United States signed a treaty with Mexico in 1976 to permit voluntary prisoner

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21 See Anderson, supra note 19; Solomon Moore, Study Shows High Cost of Criminal Corrections, N.Y. Times, Mar. 3, 2009, at A13 (describing state and national growth in prison spending) [hereinafter High Cost].
22 Id. supra note 19.
23 Id.
24 Id. supra note 21.
25 Hispanics, supra note 18.
26 Id.
28 Diaz, supra note 6.
30 See David S. Finkelstein, “Ever Been in a [Foreign] Prison?”: The Implementation of Transfer of Penal Sanctions Treaties by U.S. States, 66 Fordham L. Rev. 125, 137 (1997) (“[T]he NAFTA agreement signifies the beginning of a larger economic integration and globalization; these economic forces can combine with political integration to bring about supranational approaches to cooperation in criminal law and, specifically, the transfer of prisoners.”).
transfers. This Treaty has “served as a model” for numerous subsequent bilateral and multilateral prisoner transfer agreements with other countries. The United States also has extradition agreements with over a hundred countries, which require the parties to apprehend foreign nationals within their borders and hand them over to stand trial for alleged crimes abroad.

On top of the challenges posed by illegal immigration and growing prison populations, tighter state budgets have left policymakers scrambling for ways to cut costs. In recent decades, politicians who wanted to show that they were tough on crime implemented mandatory minimum sentences that drastically increased prison populations and expenses. Most states have now reduced sentences and costly parole programs, but others have taken more drastic measures.

Many states are now privatizing prisons and exporting inmates to reduce prison costs and overcrowding. In 2007, the New York Times reported that “[c]hronic prison overcrowding has corrections officials in Hawaii and at least seven other states looking increasingly across state lines for scarce prison beds, usually in prisons run by private companies.” At that time, California was planning to send over 8,000 prisoners out of state. This approach has been politically popular because it reduces prison overcrowding without the need to increase taxes, issue bonds, or hold a referendum.

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34 See Steinhauer, supra note 10 (quoting the President of the National Council on Crime and Delinquency: “[W]hen dollars are as tight as they are now, you have to make really tough choices”).
35 See id.
36 Id.
37 See Solomon Moore, States Export Their Inmates as Prisons Fill, N.Y. Times, July 31, 2007, at A1 (“Chronic prison overcrowding has corrections officials in Hawai’i and at least seven other states looking increasingly across state lines for scarce prison beds, usually in prisons run by private companies.”) [hereinafter States Export].
38 See id.
39 Id.
40 Id.
41 See Anderson, supra note 19, at 115.
Both corrections officials and the legal community, however, have criticized prison privatization and inmate exports. “[E]xcessive prisoner churn” reduces access to training programs. Private prisons have also raised concerns about the legitimacy of delegating “inherently governmental function[s]” to private parties.

Private prisons are part of a larger national trend of privatizing public functions, and some states and government contractors are now sending contracts for public services abroad to further reduce costs. Privatization, or contracting with the private sector to perform public functions, began in the 1980s and increased through the 1990s. In 2008, state and local governments in the United States spent $12 billion on outsourcing, which is expected to increase to $20 billion by 2011. Offshoring, the practice of relocating all or part of an entity’s operations to a foreign country, has been a prominent trend in the private sector, and it is now “creeping . . . into the arena of government.” Reliable data on public sector offshoring is lacking, but national estimates of state spending range from $2 to 3.8 billion.

Most states now offshore public services to some degree, although the extent of this practice varies greatly across states. According to a study by the Government Accountability Office in 2006, forty-three out of fifty states offshored some portion of their work related to child support enforcement, food stamps, temporary assistance for needy families, and unemployment insurance. Within those programs, states most frequently delegated customer service and information technology functions to offshore contractors. India and Mexico were the

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42 See States Export, supra note 37 (discussing concerns raised by prison officials about “excessive prisoner churn, consistency among private vendors and safety in some prisons”).
43 See Anderson, supra note 19, at 117 (criticizing private prisons in the Public Contract Law Journal published by the American Bar Association).
44 States Export, supra note 37.
45 See Anderson, supra note 19, at 121–25. Anderson argues: “When a private company assumes responsibility for the administration of inmate punishment and rehabilitation, it improperly undertakes to perform an inherently public discretionary function at the expense of inmates’ fundamental liberty interests.” Id. at 115–16.
46 See Zuckerman, supra note 13, at 168.
47 Id.
48 Id.
49 Id.
50 Id. at 169.
51 Id. at 170.
52 Gov’t Accountability Office, Offshoring in Six Human Services Programs 2–3 (2006).
53 Id. at 17–20. For detailed examples of state and municipal offshoring, see Zuckerman, supra note 13, at 171–73.
most common recipients of offshore government contracts, but public functions were also offshored to Argentina, Canada, Chile, France, Ireland, Poland, and Spain.\(^{54}\) One scholar writes that “state officials rarely contracted directly with foreign companies; instead, offshoring generally occurred when state contractors either hired foreign subcontractors or used their own offshore operations.”\(^{55}\)

Although Governor Schwarzenegger’s proposal to offshore correctional services directly to a foreign contractor is unusual,\(^{56}\) he is not the first American governor to propose offshoring as a solution to a state budget and prison overcrowding problem.\(^{57}\) In 1997, Governor Fife Symington of Arizona proposed building a privately-run prison in Mexico to house the majority of the state’s Mexican prisoners.\(^{58}\) Under the proposal, Mexican inmates would be transferred to a private prison in Mexico run “according to American standards, just the way major American corporations operate in Mexico.”\(^{59}\) The Chief Operating Officer of a private prison corporation estimated that by taking advantage of lower labor costs, the state could run the prison for half of what it would cost in the United States.\(^{60}\) Although state officials were confident that the proposal would survive any legal challenges,\(^{61}\) Arizona Governor Janet Napolitano eventually vetoed the proposal in 2005.\(^{62}\)

Transferring Mexican inmates to prisons in Mexico is an attractive prospect for both the state and the prisoners.\(^{63}\) Labor constitutes seventy percent of prison expenses, and the cost of labor in Mexico is substantially lower than in the United States.\(^{64}\) For the Mexican inmates, repatriation for the remainder of their sentence has many benefits—familiar language and food, as well as easier access to family.\(^{65}\) Furthermore, “Mexican prisons are much more lenient in the area of fam-

\(^{54}\) Gov’t Accountability Office, supra note 52, at 21–22.

\(^{55}\) Zuckerman, supra note 13, at 171 (internal quotations omitted).

\(^{56}\) See supra notes 53, 55 and accompanying text (explaining that offshored functions are typically in the fields of IT services and customer service and that states rarely directly contract with a foreign service provider).

\(^{57}\) Brooke, supra note 7.

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Id.

\(^{62}\) Arizona Governor, supra note 9.

\(^{63}\) See Brooke, supra note 7 (describing benefits of lower prison operating costs in Mexico and the benefits of easier access to family and familiar language and food for prisoners).

\(^{64}\) See id.

\(^{65}\) Id.
ily visitation and, unlike most U.S. correctional institutions, Mexican prisons permit conjugal visits.\textsuperscript{66}

Despite these apparent benefits and privileges, Mexico has a poor reputation for its treatment of prisoners.\textsuperscript{67} High profile cases of Americans incarcerated in Mexico and investigations by the State Department in the 1990s revealed widespread physical abuse of prisoners, extortion, and corruption.\textsuperscript{68} Prisons are often overcrowded, and prisoners depend on relatives to supply them with food.\textsuperscript{69} A large and violent prison population combined with insufficient security leads to dozens of deaths each year in violent prison riots\textsuperscript{70}—all of these facts illustrate the need for legislators to evaluate Governor Schwarzenegger’s proposal cautiously before agreeing to send California inmates to prisons across the border without their consent.\textsuperscript{71}

II. Discussion

A. International Law

The California Governor’s proposal is not the only means by which prisoners could be transferred internationally; there is already a treaty governing prisoner transfers between the United States and Mexico.\textsuperscript{72} The Treaty on the Execution of Penal Sentences (Treaty) was enacted in 1977 as a response to reports that U.S. citizens incarcerated in Mexico were subjected to inhumane treatment and corrupt prison conditions.\textsuperscript{73} The Treaty was intended to resolve both the heavily publicized


\textsuperscript{67} See Diaz, \textit{supra} note 6 (“Prison management is not exactly Mexico’s strong suit.”).


\textsuperscript{69} See Diaz, \textit{supra} note 6 (highlighting prison conditions depicted in the documentary \textit{Presumed Guilty} (Abogados con cámara 2009)).


\textsuperscript{71} See Carlton, \textit{supra} note 2 (“‘Think about it,’ Schwarzenegger said. ‘California give [sic] Mexico the money . . . We pay them to build a prison down in Mexico and then we have those undocumented immigrants be down there in a prison with their prison guards and all this.’”) (ellipsis in original).

\textsuperscript{72} See Treaty, \textit{supra} note 31.

\textsuperscript{73} See Abramovsky, \textit{supra} note 68, at 454–55.
humanitarian concerns, as well as the diplomatic tension caused by the public outcry.\footnote{74}{Olivarez, supra note 66, at 396–97.}

Specifically, the Treaty permits Mexican nationals sentenced in the United States to serve their sentence in Mexico, and vice-versa,\footnote{75}{Treaty, supra note 31, art. I.} in order to promote the “social rehabilitation of the offender.”\footnote{76}{Id. art. IV(4).} Consistent with this humanitarian purpose, the Treaty states that “[t]he Receiving State shall not be entitled to any reimbursement for the expenses incurred by it in the completion of the offender’s sentence.”\footnote{77}{Id. art. V(4).}

Transfers are subject to a number of conditions.\footnote{78}{Id. art. II.} The Treaty requires the crime to be punishable in both states.\footnote{79}{Id. art. II(1); see Sherman, supra note 29, at 519–20 (explaining the principle of double criminality).} Furthermore, the offense for which the offender was convicted and sentenced cannot be a “political offense” or “an offense under the immigration . . . laws of a party.”\footnote{80}{Treaty, supra note 31, art. II(4).} Additionally, the offender “must be a national of the Receiving State”\footnote{81}{Id. art. II(2).} and not a “domiciliary of the Transferring State.”\footnote{82}{Id. art. II(3).}

Procedurally, transfers are initiated by the authority of the transferring country through diplomatic channels, though the offender may submit a request to the authority where he or she is held.\footnote{83}{Id. art. IV(1)–(2).} Exercising the Treaty requires the consent of: the federal authority of the receiving country; the federal authority of the transferring country; the authority of the transferring state, if sentenced by a state court; and the consent of the offender.\footnote{84}{Id. art. IV(2)–(3), (5).}

Once transferred, the offender’s sentence is “carried out according to the laws and procedures of the Receiving State.”\footnote{85}{Id. art. V(2).} Furthermore, under Article VI of the Treaty, the “[t]ransferring State [retains] exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts.”\footnote{86}{Treaty, supra note 31, art. VI.} U.S. courts have interpreted the offender’s consent to consti-
tute a waiver of the right to challenge the foreign conviction in U.S. courts. 87

The Treaty does not prescribe a procedure for consent, but it does permit the receiving country to “verify, prior to the transfer, that the offender’s consent to the transfer is given voluntarily and with full knowledge of the consequences thereof . . . .” 88 The U.S. implementing legislation requires a hearing before a U.S. magistrate to verify that the offender’s consent is “voluntary and with full knowledge of the consequences.” 89 The courts have also required that the offender “have access to competent council.” 90

The Treaty requires implementing legislation. 91 Even though the Treaty acknowledges the federal nature of Mexico and the United States, 92 individual states cannot be party to the Treaty. 93 Therefore, the federal government and each state must enact separate pieces of enabling legislation. 94 To effect an international prisoner transfer, a state must transfer the prisoner to the federal government, and the federal government may then transfer the individual to his or her home country. 95

California’s current implementing legislation is particularly proactive in encouraging prisoners to take advantage of the transfer option. 96 The state’s legislation requires the appropriate agency to “devise a method of notifying each foreign born inmate . . . that he or she may be eligible to serve his or her term of imprisonment in his or her nation of citizenship” 97 and to “actively encourage each eligible foreign born in-

87 See Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873, 876 (9th Cir. 1980) (“[T]he Treaty and its implementing legislation provide that, prior to transfer, an offender must first consent to the conditions of the Treaty. This consent constitutes a waiver of, or at least an agreement not to assert, any constitutional rights the offender might have regarding his or her [foreign] conviction. The issue is whether this consent is obtained in a manner that meets the constitutional tests for a valid waiver.”).
88 Treaty, supra note 31, art. V(1).
90 Pfeifer, 615 F.2d at 876.
91 See Treaty, supra note 31, art. IV(9).
92 See id. art. IV(5) (“If the offender was sentenced by the courts of a state of one of the Parties, the approval of the authorities of that state, as well as that of the Federal Authority, shall be required.”).
93 See Finkelstein, supra note 30, at 143.
94 Id.
95 Id.
96 See id. at 150 (“California is the only state other than New York which has enabling legislation that formally addresses the prisoner’s ability to obtain information regarding his options and the possibility of transfer under an international treaty.”).
mate to apply” for a transfer.”

Between 1994 and 2004, California went so far as to offer up to $2000 to receiving states for each year that they held a transferred prisoner.

Overall use of the Treaty has decreased in recent years. In the first fourteen years following the Treaty’s enactment, 968 U.S. citizens and 577 Mexican citizens transferred their sentence to their home country pursuant to the Treaty. From the period between 1990 and 1995, however, California had transferred only four Mexican citizens pursuant to the Treaty.

The United States is party to numerous prisoner transfer treaties and processes around 1500 transfer applications per year. Most prisoners are transferred from the federal penal system, and Mexicans compose a large portion of total transfers. On average, the United States denies approximately sixty percent of transfer applications; Mexican applicants have the highest denial rate because their status as domiciliaries of the United States often renders them ineligible for transfer. Of the prisoners transferred out of the United States pursuant to transfer treaties, it is reasonable to assume that very few are Mexican citizens from California state prisons.

Despite California’s proactive efforts in the field of international prisoner transfers, states are actually quite limited in their ability to act internationally. Article I, § 10 of the U.S. Constitution explicitly withholds the Treaty Power from the states. The third clause states: “No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . .”

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98 Id. § 2912(b)(1).
100 See Olivarez, supra note 66, at 406.
101 Abramovsky, supra note 68, at 452.
102 Olivarez, supra note 66, at 406.
104 Id.
105 Id; see Treaty, supra note 31, art. II(3) (“[T]he offender [must] not be a domiciliary of the Transferring State.”).
106 See Wolff, supra note 103 (explaining that most transfers come from federal, not state, convictions and that Mexicans have the highest application denial rate).
107 Leanne M. Wilson, The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby, 107 Colum. L. Rev. 746,776 (2007) (describing the preemptive power of executive actions and statements); see id. at 771–72 (explaining the limits imposed on states by the “one voice” principle).
108 See U.S. Const. art. 1, § 10, cls. 1 & 3.
109 Id. cl. 3.
Known as the “Compact Clause,” this provision has been broadly interpreted to permit states to enter into some compacts, as long as they are not binding or do not “[i]nappropriately enhance the political power of the states.”

The Dormant Foreign Commerce Clause and the principles of preemption also limit the ability of states to act in the international realm. The Dormant Foreign Commerce Clause is an expansion of the Dormant Interstate Commerce Clause derived from Article I of the Constitution. Under the Dormant Interstate Commerce Clause, state action is invalid if it discriminates against out-of-state commerce either facially or by effect, or if it unduly burdens interstate commerce. The Dormant Interstate Commerce Clause has been applied to international commerce as well, based on a “fear of states interfering with the nation’s foreign affairs, resulting in harm to the nation from the retaliatory actions of foreign governments.” The foreign application of the dormant commerce clause is intended to promote uniformity in the treatment of foreign nations and to permit the federal government to present a single uniform policy towards international trading partners.

The Dormant Foreign Commerce Clause’s exact scope is ambiguous, but it generally prohibits states from interfering with federal commerce. In the most recent cases addressing the international activities of the states, the Supreme Court has applied the principles of the Dormant Foreign Commerce Clause; however, the Court ultimately resolved both cases on preemption grounds. In Crosby v. National Foreign Trade Council, the Court struck down a Massachusetts law directed at trade with Burma because it interfered with authority Congress had

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111 See Wilson, supra note 107, at 771–72, 776.
112 Id. at 753 (explaining the origins and basis of the Dormant Foreign Commerce Clause).
113 Id. at 749–50.
114 Id. at 753.
115 Id.
delegated to the President in that field. In *American Insurance Ass’n v. Garamendi*, the Court struck down a California law requiring insurance companies to disclose their dealings with Germany during the Second World War because the President had already taken executive action in that field. In both cases, the Court considered the “need for the nation to speak with one voice in foreign affairs,” but ultimately decided that the federal action on the specific issues superseded the conflicting state action.

Despite these constitutional limitations, some state action in international affairs is permitted. Traditional state activity in the international sphere falls into one of three categories: entering nonbinding agreements with foreign entities to promote trade and investment; adopting laws and policies pursuant to federally negotiated international treaties; and lobbying the federal government to support the states’ international agenda. Most international state activity relates to promoting trade and investment. For example, with the approval of the Department of Homeland Security, Wisconsin has created a “special economic zone” that is designed to attract foreign investment by offering U.S. residency as an incentive to qualifying investors. Wisconsin has also negotiated a “bilateral trading relationship” with China to offer favorable treatment to Chinese investors. Similarly, many states and municipalities enter “sister city” relationships, which are nonbinding diplomatic arrangements designed to build cultural connections and encourage economic development between U.S. and foreign communities. Despite these developments, the exact limits on states’ international activities remain unclear.

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118 *Crosby*, 530 U.S. at 388 (“Because the state Act’s provisions conflict with Congress’s specific delegation to the President . . . it is preempted, and its application is unconstitutional . . . .”).

119 *Garamendi*, 539 U.S. at 425 (“The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield.”).

120 See *Wilson*, supra note 107, at 766 (addressing the Court’s use of “one voice” analysis), 773 (“*Garamendi*, then, reinforces *Crosby* by showing the Court’s preference for deciding cases on conflict preemption grounds rather than dormant Foreign Commerce Clause grounds.”).

121 See *Schrag*, supra note 110, at 429–30.

122 Id.

123 Id. at 430.

124 Id., supra note 116, at 735.

125 Id.

126 Id. at 748.

127 See id. at 737 (“[T]he history of dormant-foreign-commerce jurisprudence has been inconsistent, leaving ‘much room for controversy and confusion.’”), 759 (“[T]here is no clear delineation of the legitimate bounds of state activity . . . .”).
B. Extra-Territorial Liability

The Constitution is silent regarding its application outside U.S. territory; thus, it is uncertain whether prisoners held abroad under U.S. law can demand constitutional protections and seek civil damages in U.S. courts. In recent years, the question of whether foreign nationals detained outside the United States possess any rights has surfaced repeatedly in the context of the War on Terror. Thousands of foreign nationals have been arrested for suspected terrorist activities and held with U.S. assistance in foreign states. Critics describe this practice of extra-territorial detention and interrogation as a “legal black hole,” where detainees possess no enforceable rights and governments may act unconstrained by their own national laws. For example, at various times during the U.S. detention of suspected terrorists in Guantanamo Bay, Cuba, individuals were denied constitutional habeas corpus and due process rights, as well as the Prisoner of War protections guaranteed by international law.

Although the law regarding prisoners’ rights is not totally clear, recent cases have held that foreign nationals held abroad under color of U.S. law do possess some constitutional rights. In Boumediene v. Bush, Justice Kennedy wrote that three factors ought to be used to determine whether aliens in U.S. custody outside U.S. borders have the right to petition the courts for a writ of habeas corpus: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” The holding in Boumediene, which stipulates that Guantanamo Bay detainees have habeas rights, implies that aliens in U.S. custody elsewhere have some constitutional rights as well.

128 See Cabranes, supra note 33, at 1662.
129 Id. at 1664–65.
131 See id. at 772–75.
132 Id. at 773–74.
133 See id. at 775.
Although the scope of constitutional rights of alien detainees remains contentious, Congress has clearly prescribed causes of action for harms committed under the color of U.S. law, some of which have been applied to harm caused abroad.\footnote{136}{See Scott J. Borrowman, Comment, Sosa v. Alvarez-Machain and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors, 2005 BYU L. Rev. 371, 376–89 (discussing various civil remedies available to victims of abuse at Abu Ghraib prison).} The Court’s holding in \textit{Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics} created liability for federal employees who violated constitutional and statutory rights under color of federal law,\footnote{137}{See 403 U.S. 388, 395–97 (1971) (reasoning that a victim is entitled to monetary damages for violations of his Fourth Amendment rights by federal agents).} and the Court has suggested that such liability extends to violations committed outside U.S. borders.\footnote{138}{See Borrowman, \textit{ supra} note 136, at 416 (discussing inferences drawn from Justice Souter’s decision in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)).}

Liability for constitutional torts committed by state actors is enshrined in 42 U.S.C. § 1983.\footnote{139}{42 U.S.C. § 1983 (2006).} \textit{Monroe v. Pape} established that the statute also applies to violations of state law,\footnote{140}{365 U.S. 167, 183 (1961).} and in \textit{Johnson v. Larabida Children’s Hospital}, the Seventh Circuit held that the statute applied to private actors acting under the direction of the state or performing a delegated state function.\footnote{141}{372 F.3d 894, 896 (7th Cir. 2004) (“While generally employed against government officers, the language of § 1983 authorizes its use against private individuals who exercise government power; that is, those individuals who act ‘under color of state law.’”).} In \textit{West v. Atkins}, the Supreme Court applied this principle to individuals contracted to provide services to prisoners, holding that a doctor hired to treat prisoners was acting under state law and thus was liable for Eighth Amendment claims under § 1983.\footnote{142}{See 487 U.S. 42, 56 (1988).} The Court has also found § 1983 liability for violations of state law committed outside the state by a private agent of that state.\footnote{143}{26 F. Supp. 2d 1256, 1264–66 (D. Colo. 1998).} In \textit{Gwynn v. TransCor America, Inc.}, the court permitted a Colorado prisoner to bring a claim under § 1983; the prisoner alleged that her Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendment rights were violated outside of Colorado by employees contracted by the Colorado Department of Corrections to transport her from Oregon to Colorado.\footnote{144}{Id. at 1259, 1264–66 (describing and upholding the plaintiffs § 1983 claims).} This case law demonstrates that § 1983 could be a remedy for constitutional violations occurring outside the United States by private parties acting under state law.\footnote{145}{See \textit{West}, 487 U.S. at 56; \textit{Gwynn}, 26 F. Supp. 2d at 1264–66.}
III. Analysis

A. International Law

The Governor’s proposal to forcibly export undocumented Mexican inmates to Mexican prisons would not work under the existing U.S.-Mexico Treaty because the Treaty requires consent,\(^\text{146}\) is expressly for rehabilitative purposes,\(^\text{147}\) and excludes domiciliaries of the transferring state.\(^\text{148}\) First, either eliminating the consent requirement of the Treaty or ignoring it, as the Governor seems to propose, would render both the Treaty and the transfer unconstitutional.\(^\text{149}\) A major concern at the drafting of the Treaty was that Americans transferred from Mexico would be incarcerated under U.S. law, but without the due process protections guaranteed by the Constitution.\(^\text{150}\) The constitutionality of the present Treaty is supported by the consent requirement because it represents a critical waiver of due process rights.\(^\text{151}\) The elimination of the consent requirement from the Treaty altogether would likely render the Treaty and any nonconsensual transfers unconstitutional.\(^\text{152}\)

Even if the Governor retained the consent requirement, complying with the required legal procedures could be prohibitively burdensome.\(^\text{153}\) If the Governor’s plan required consent, the prisoner would be entitled to legal counsel,\(^\text{154}\) would have to appear before a magistrate judge to declare his consent,\(^\text{155}\) must receive federal approval,\(^\text{156}\) and then would have to be transferred to federal custody to effect the transfer to Mexican authorities.\(^\text{157}\) Providing counsel and holding a magistrate hearing for the thousands of inmates that the Governor proposes to transfer in order to adjudicate their consent\(^\text{158}\) could be logistically prohibitive if the Governor intends to meet the federally

\(^\text{147}\) Treaty, \textit{supra} note 31, art. IV(4).
\(^\text{148}\) \textit{Id.} art. II(3).
\(^\text{150}\) \textit{Id.} at 237.
\(^\text{151}\) \textit{See id.} at 240.
\(^\text{152}\) \textit{See id.} at 239–40.
\(^\text{153}\) Treaty, \textit{supra} note 31, art. II(3).
\(^\text{154}\) \textit{Pfeifer v. U.S. Bureau of Prisons}, 615 F.2d 873, 876 (9th Cir. 1980).
\(^\text{156}\) Treaty, \textit{supra} note 31, art. IV(5).
\(^\text{157}\) Finkelstein, \textit{supra} note 30, at 143.
\(^\text{158}\) \textit{See 18 U.S.C.} § 4107 (requiring Magistrate hearings for consent); \textit{Pfeifer}, 615 F.2d at 876 (requiring access to counsel for transfer proceedings).
mandated two year deadline to ameliorate state prison conditions. The dual requirements of federal consent and transfer to federal authority would also allow the federal government to block the Governor’s plan or, at a minimum, add significant administrative delay.

Second, forced transfers without consent would frustrate the humanitarian and rehabilitative goals and spirit of the existing Treaty. Article IV of the Treaty states, “[i]n deciding upon the transfer of an offender the Authority of each Party shall bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender . . . .” Transferring prisoners purely for financial reasons would impermissibly ignore this term of the Treaty. Consistent with Article IV’s humanitarian purpose, the Treaty also specifically disregards financial considerations. Article IV asserts that “[t]he Receiving State shall not be entitled to any reimbursement for the expenses incurred by it in the completion of the offender’s sentence.” This language indicates that the drafters of the Treaty did not intend financial motivations or incentives to be a consideration in the decision to transfer or accept prisoners. Thus, exploitation of the Treaty to expand the California penal system into Mexico purely for financial and logistical reasons would be outside the Treaty’s scope and purpose.

Finally, the Treaty excludes domiciliaries of the transferring state from eligibility. The Treaty defines a domiciliary as “a person who has been present in the territory of one of the parties for at least five years with an intent to remain permanently therein.” As stated previously, most Mexican applicants for transfer are currently ineligible because they have achieved domiciliary status in the United States.

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159 Carlton, supra note 2; Diaz, supra note 6.
160 See 18 U.S.C. § 4107; Pfeifer, 615 F.2d at 876.
161 Clark, supra note 149, at 239.
162 Treaty, supra note 31, art. IV(4).
163 See id.
164 See id. arts. IV(4) (discussing “social rehabilitation” purpose of transfer) & V(4) (dismissing financial incentives and reimbursements, which indicates that Treaty was not intended to be used for profit).
165 Id. art. IV(4).
166 See id.
167 See id. arts. IV(4) (indicating a humanitarian purpose through exclusive consideration of factors bearing on “social rehabilitation” of the prisoner) & V(4) (indicating that Treaty was not intended to be used for profit by dismissing financial incentives and reimbursements).
168 Treaty, supra note 31, art. II(3).
169 Id. art. IX(4).
170 See Wolff, supra note 103.
Unless the Governor also violates this provision of the Treaty, most of his intended transferees would not be eligible.\textsuperscript{171}

The existing Treaty does not permit the Governor to execute his proposal, and the U.S. Constitution prohibits California from drafting its own treaty to suit its needs.\textsuperscript{172} The Compact Clause of the Constitution prevents states from entering binding agreements with foreign nations.\textsuperscript{173} Most international agreements with states survive constitutional scrutiny because they are “‘nonbinding’ resolutions that call upon the parties to use their best efforts to facilitate trade.”\textsuperscript{174} The Governor’s proposal goes beyond “best efforts” and would require a binding compact with Mexico, which the Constitution forbids.\textsuperscript{175}

A new agreement between California and Mexico would also violate the principles of the Dormant Foreign Commerce Clause and would conflict with the existing federal action in the field, thus subjecting it to preemption.\textsuperscript{176} Under \textit{Garamendi} and \textit{Crosby}, a state action is preempted if there is a specific federal interest that conflicts with the state action.\textsuperscript{177} The federal government has already acted in this specific area by negotiating and ratifying a treaty with Mexico and passing enabling legislation.\textsuperscript{178} Therefore, California’s competing state treaty would be preempted because it conflicts with the existing Treaty and also inhibits the nation’s ability to speak to Mexico with one unified voice on the issue of prisoner transfers.\textsuperscript{179}

As a last resort, California could try to lobby the federal government to amend the existing Treaty.\textsuperscript{180} The current Treaty, however, has been the model for most subsequent bilateral prisoner transfer agreements, so it is unlikely that the federal government would be willing to

\textsuperscript{171} See \textit{id.}.
\textsuperscript{172} See U.S. CONST. art. 1, § 10, cl. 3.
\textsuperscript{173} Schrag, \textit{supra} note 110, at 434.
\textsuperscript{174} Id. at 447–48.
\textsuperscript{175} See U.S. CONST. art. 1, § 10, cl. 3; Schrag, \textit{supra} note 110, at 434.
\textsuperscript{177} See \textit{Garamendi}, 539 U.S. at 425; \textit{Crosby}, 530 U.S. at 388.
\textsuperscript{178} See, e.g., 18 U.S.C. §§ 4107–4108 (enabling legislation requiring verification of consent prior to transfers); see Treaty, \textit{supra} note 31.
\textsuperscript{179} See \textit{Wilson}, \textit{supra} note 107, at 771–72 (explaining the “one voice” principle), 782 (“If the actions of the executive have the force of law, that is if they are constitutionally valid treaties, then the state law should be evaluated against the treaty to see if it is preempted.”).
\textsuperscript{180} See Schrag, \textit{supra} note 110, at 429–30.
The feasibility of the Governor’s plan is weakened further by the fact that the anticipated cost savings of using private prisons in Mexico operated under California law would be negated by the high risk of costly lawsuits. Furthermore, any new treaty that did not require prisoner consent, a key element of the Governor’s plan to move tens of thousands of prisoners out of the country, would be unconstitutional.

B. Extra-Territorial Liability

The Boumediene opinion makes clear that prisoners held outside the territorial United States under the color of U.S. law have some enforceable constitutional rights, specifically the right to habeas corpus and Eighth Amendment protections. The first factor enumerated in Boumediene is status and status certainty; in that case the Court found that the uncertain status of the Guantanamo Bay detainees and the inadequacy of their Combatant Status Review Tribunals supported their claim that a writ of habeas was necessary in order to determine their status and rights. Conversely, in the case of California’s undocumented inmates, U.S. courts would already adjudicated their criminal status prior to incarceration, and Mexican nationals transferred from California prisons to Mexico would have some enforceable rights, including habeas corpus and Eighth Amendment protections.

181 See Emanuel, supra note 32, at 241.
182 See Neuman, supra note 135, at 285–86 (“The Boumediene opinion makes clear that lacking presence or property in the United States does not make a foreign national a constitutional nonperson whose interests deserve no consideration.”).
183 See, e.g., U.S. Const. art. I, § 10, cl. 3 (prohibiting states from forming compacts); Treaty, supra note 31, arts. II(3) (excluding domiciliaries of transferring state), IV(2) (requiring prisoner consent) & (4) (listing humanitarian considerations); Clark, supra note 149, at 240 (explaining that a prisoner transfer treaty without consent would be unconstitutional).
184 See Anderson, supra note 19, at 131–32.
185 See Neuman, supra note 135, at 285–86 (explaining the unique quality and application of the Eighth Amendment).
187 See Borrowman, supra note 136, at 404–06 (explaining the unique quality and application of the Eighth Amendment).
thus entitling them to the same habeas rights and legal protections enjoyed by inmates of the same criminal status retained in California.\(^{189}\)

Second, whereas the Guantanamo Bay detainees were captured and held outside the United States at all relevant times and had to premise their claims to constitutional rights on Guantanamo Bay’s de facto status as a U.S. territory, California inmates would have spent substantial time in undisputed U.S. territory and under U.S. control.\(^{190}\) Prisoners transferred to Mexico would thus have a stronger claim to constitutional protections than the detainees in \textit{Boumediene}, given that California inmates would had lived on actual U.S. territory prior to their arrest and during their detention therein.\(^{191}\)

Finally, the practical obstacles to providing enforceable rights to undocumented California inmates in Mexico are less severe than the obstacles to providing enforceable rights to Guantanamo Bay detainees.\(^{192}\) Although issues related to distance, national borders, and the language barrier present substantial and costly logistical challenges to enforcing the rights of California prisoners transferred to Mexico, these challenges do not surpass the financial and national security concerns that the Government put forth in \textit{Boumediene} and that the Court ultimately rejected.\(^{193}\)

In addition to the habeas rights articulated in \textit{Boumediene}, California prisoners in Mexico would, at a minimum, also be entitled to Eighth Amendment protection from cruel and unusual punishment.\(^{194}\) The

\(^{189}\) Cf. West v. Atkins, 487 U.S. 42, 56 (1988) (“Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State’s prisoner’s of the means to vindicate their Eighth Amendment rights.”). Just as prisoners are entitled to medical care and Eighth Amendment protections, whether served under color of state law by state employees or by state contractors, prisoners would be entitled to the same rights and protections whether held under color of state law in California or in Mexico. \textit{See id.}\n
\(^{190}\) \textit{See Boumediene}, 553 U.S. at 768 (holding that the location of the detainees’ “apprehension and detention [is] technically outside the sovereign territory of the United States,” but that Guantanamo Bay is “[i]n a very practical sense . . . within the constant jurisdiction of the United States”).

\(^{191}\) Cf. \textit{id.} at 768 (Guantanamo Bay detainees’ capture and incarceration outside the territorial United States is “a factor that weighs against finding they have rights under the Suspension Clause”).

\(^{192}\) \textit{See id.} at 768–69.

\(^{193}\) \textit{See id.} at 769 (“While we are sensitive to these [cost] concerns, we do not find them dispositive . . . . [Furthermore, t]he Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”).

\(^{194}\) \textit{See Borrowman, supra} note 136, at 404–06 (explaining the unique quality and application of the Eighth Amendment).
Eighth Amendment is unique in that it regulates specific conduct, and therefore would apply to U.S. actors and agents wherever they are.\textsuperscript{195} Regardless of the outer limits of the constitutional rights and protections of California prisoners detained in Mexico, these prisoners would have a cause of action in U.S. courts for cognizable harm done to them during their Mexican incarceration.\textsuperscript{196} By enacting 42 U.S.C. § 1983, Congress created a cause of action for violations of constitutional rights committed by state actors.\textsuperscript{197} Even though state governments enjoy qualified immunity from claims arising under § 1983,\textsuperscript{198} the courts have extended the coverage of this statute to include violations of state law\textsuperscript{199} and the conduct of private individuals if the state directs their actions or empowers them to perform public functions.\textsuperscript{200}

Section 1983 would apply to Mexican prison operators under the Governor’s plan because state contractors and privately run prisons operate as state actors.\textsuperscript{201} In \textit{West}, the Supreme Court sustained a prisoner’s claim under § 1983 against a doctor whom it found to be acting under the color of state law when he treated a prisoner pursuant to a contract with the state prison.\textsuperscript{202} In \textit{Street v. Corrections Corp. of America}, the Sixth Circuit applied the “public function test” to determine if the conduct of a private prison corporation and its employees was done under the color of state law for the purposes of § 1983.\textsuperscript{203} The court noted that “[t]he public function test requires that the private entity exercise powers which are traditionally exclusively reserved to the state.”\textsuperscript{204} The court determined that the private prison company and its employees could be subject to liability because they were performing a “traditional state function.”\textsuperscript{205} Therefore, employees of Mexican prisons and others associated with the prisons would be acting under state

\textsuperscript{195} See id.
\textsuperscript{197} See id.
\textsuperscript{198} Anderson, \textit{supra} note 19, at 131.
\textsuperscript{200} Johnson v. Larabida Children’s Hosp., 372 F.3d 894, 896 (7th Cir. 2004).
\textsuperscript{202} See \textit{West}, 487 U.S. at 56–57.
\textsuperscript{203} See \textit{Street}, 102 F.3d at 814.
\textsuperscript{204} \textit{Id.} (internal quotations omitted).
\textsuperscript{205} See id.
law and in performance of a traditional state function and, therefore, could be subject to liability under § 1983.\textsuperscript{206}

Prisoners have also successfully brought § 1983 claims against contractors acting under color of state law when the questionable conduct took place outside the state that had hired the contractors.\textsuperscript{207} In \textit{Gwynn}, a female prisoner brought an action under § 1983 in the Colorado District Court against private contractors hired by the Colorado Department of Corrections to transport her from Oregon to Colorado.\textsuperscript{208} The prisoner alleged that she was subjected to dangerous conditions, mistreated, and sexually assaulted throughout Oregon, California, Nevada, Utah, Wyoming, and Idaho.\textsuperscript{209} The court ruled that the transportation employees, “as agents and prison guards of the State of Colorado, pursuant to the contract between TransCor and the Colorado Department of Corrections,” were acting under the color of Colorado state law when they sexually assaulted the plaintiff prisoner whom they were contracted to guard and transport.\textsuperscript{210} The court noted that the contractual relationship with Colorado would have been sufficient to justify venue there, even if none of the tortious conduct had occurred in the state.\textsuperscript{211}

Thus, based on the reasoning of \textit{West} and \textit{Street}, which both opened the door to potential § 1983 liability for state prison contractors,\textsuperscript{212} as well as the \textit{Gwynn} court’s extension of that liability to conduct outside the forum,\textsuperscript{213} privately run prisons and their employees in Mexico would be subject to § 1983 liability in California courts because they would be acting under color of California law.\textsuperscript{214}

The history of violence, corruption, and neglect in Mexican prisons\textsuperscript{215} combined with the fact that private prisons in the United States have a reputation for mismanagement would create dangerous conditions and a high risk of endless and exacting prisoner lawsuits against officials of private Mexican prisons.\textsuperscript{216} Private prisons in the United

\begin{enumerate}
\item \textsuperscript{206} See id.
\item \textsuperscript{207} See \textit{Gwynn v. TransCor Am., Inc.}, 26 F. Supp. 2d 1256, 1259 (D. Colo. 1998).
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Id. at 1260.
\item \textsuperscript{210} Id. at 1265.
\item \textsuperscript{211} Id. at 1263 n.2. The judge ultimately granted venue in Colorado based on an allegation that one of the several sexual assaults took place there. Id. at 1262–63.
\item \textsuperscript{212} See supra notes 201–205 and accompanying text (explaining and applying \textit{West} and \textit{Street}).
\item \textsuperscript{213} See supra notes 207–210 (explaining and applying \textit{Gwynn}).
\item \textsuperscript{214} See \textit{West}, 487 U.S. at 56–57; \textit{Street}, 102 F.3d at 814; \textit{Gwynn}, 26 F. Supp. 2d at 1265.
\item \textsuperscript{215} See Abramovsky, \textit{supra} note 68, at 454–55; Olivarez, \textit{supra} note 66, at 404–06.
\item \textsuperscript{216} See Anderson, \textit{supra} note 19, at 131–32 (describing the high cost of legal challenges related to private prisons in the United States).
\end{enumerate}
States have been accused of providing inferior inmate services in order to maximize profits.\textsuperscript{217} Employees at private U.S. prisons also receive much less training than state prison employees, which has led to riots, injuries, and mistreatment.\textsuperscript{218} Across the border, the Mexican prison system has a reputation for severe mistreatment, corruption, and violence.\textsuperscript{219} The Supreme Court has repeatedly held that “deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment.”\textsuperscript{220} The poor conditions in Mexican prisons,\textsuperscript{221} if coupled with the indifference shown in U.S. private prisons,\textsuperscript{222} would lead to a high risk of Eighth Amendment claims by California prisoners held in private prisons in Mexico.\textsuperscript{223}

One of the primary goals of the Governor’s proposal is to reduce costs; however, the expenses of monitoring privately-run prisons in Mexico in an effort to manage risks and control liability would substantially offset the perceived savings.\textsuperscript{224} The cost to private prisons of insuring against and litigating these types of lawsuits would likely be passed on to the state through higher contract prices which would further reduce or eliminate any potential savings.\textsuperscript{225}

Additionally, offshoring correctional services to Mexico would likely create high political costs, especially if reports of prisoner abuse and

\begin{enumerate}
\item\textsuperscript{217} Id. at 116. “A for-profit prison operator [has] almost no contractual incentive to provide rehabilitation opportunities or educational or vocational training that might benefit inmates after release, except insofar as these services act to decrease the current cost of confinement.” Id. at 130 (internal quotations omitted).
\item\textsuperscript{218} Id. at 126 (“Private prison guards receive thirty-five percent fewer service training hours than public prison employees.”); States Export, supra note 37. Poorly trained guards who had only been working for several days were blamed for a riot at a private prison in Indiana that left two corrections officers and five inmates injured. Id.
\item\textsuperscript{219} See Abramovskv, supra note 68, at 454–55; Olivarez, supra note 66, at 404–06.
\item\textsuperscript{220} See Street, 102 F.3d at 814 (internal quotations omitted); see also Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (holding that a prison guard’s or doctor’s “deliberate indifference to serious medical needs of prisoners” violates the Eighth Amendment and constitutes a cause of action under 42 U.S.C. § 1983).
\item\textsuperscript{221} See Diaz, supra note 6 (“Prison management is not exactly Mexico’s strong suit.”).
\item\textsuperscript{222} See Anderson, supra note 19, at 116 (“Cost-cutting measures promote inferior contract performance, undue safety risks, and poor delivery of inmate services.”).
\item\textsuperscript{223} See Estelle, 429 U.S. at 104–05; Street, 102 F.3d at 814.
\item\textsuperscript{224} See Anderson, supra note 19, at 131 (”[R]ather than reducing levels of red tape that would otherwise exist in a purely public system, private prison systems require costly monitoring and enforcement procedures to keep the symptoms of profit maximization in check as much as possible.”).
\item\textsuperscript{225} See id. at 131–32 (“Litigation expenses, settlement agreements, and adverse court judgments against private prison operators and their employees augment the Government’s expenses by way of contract pricing increases and a higher degree of liability exposure than would exist under a purely public system.”).
\end{enumerate}
mistreatment at the hands of contracted Mexican prison operators became publicized.\textsuperscript{226} Even offshored programs that created substantial state savings have been terminated following public outcry over sending an essential state function out of the country.\textsuperscript{227} For example, the state of Indiana contracted with an India-based consulting firm to provide work visas for sixty-five Indian contractors to upgrade the state’s job placement agency’s computer system.\textsuperscript{228} The contract would have saved the state $8 million, but it was cancelled when the details were publicized.\textsuperscript{229}

Thus, even if the international and constitutional legal barriers of the Governor’s prison proposal were not prohibitive, the exorbitant monitoring and litigation expenses,\textsuperscript{230} as well as the potential political backlash,\textsuperscript{231} would likely make the proposal too costly for the Governor to pursue.\textsuperscript{232}

**Conclusion**

Governor Schwarzenegger’s proposal to relieve California’s budget deficit and overcrowded prisons by sending illegal immigrant inmates to privately run Mexican prisons is fatally flawed. Despite its creativity, it is untenable under international law, and the liability expenses it would pass on to the state would substantially eliminate the anticipated savings. Moreover, Governor Schwarzenegger is only addressing the superficial effect of two much greater underlying causes—international immigration and domestic criminal sentencing. Because of the inherent complications in addressing these effects through offshoring, attacking these problems at their root would likely do more to relieve prison expenses and overcrowding. Instead of pressing the limits of state action in the international arena, California should act within the limits set by

\textsuperscript{226} See Zuckerman, supra note 13, at 172–74 (describing Senator Ted Kennedy’s criticism of then-governor Mitt Romney for “jumping on the offshoring bandwagon” and the public debate over offshoring that took place during the 2004 presidential election).

\textsuperscript{227} See id. at 172 (describing a situation in Indiana in which the Governor canceled a contract with an Indian consulting firm that would have saved the state $8 million after it was publicized).

\textsuperscript{228} Id.

\textsuperscript{229} Id.

\textsuperscript{230} See supra notes 223–224 and accompanying text.

\textsuperscript{231} See supra notes 225–228 and accompanying text.

\textsuperscript{232} See Anderson, supra note 19, at 132 (“These additional indirect financial costs seriously undermine the economic argument in favor of private prison contracts and demonstrate why the privatization ‘solution’ has so far failed to ease governments’ corrections budgets.”); Zuckerman, supra note 13, at 172 (describing how political backlash caused Indiana to cancel a contract with an Indian firm).
the Constitution and Supreme Court. California should lobby the federal government and work with immigration authorities to stop the flow of undocumented immigrants into the state and to deport those already there. This will prevent illegal immigrants from becoming part of the state criminal justice system in the first place. The state should also revise its sentencing guidelines and promote alternative probation and rehabilitation programs to reduce the number of inmates in its prison system and their associated costs. The globalized world is increasingly creating challenges and opportunities that transcend national borders and state lines: state governments must recognize, however, that sending essential public functions abroad will not always solve their problems at home.