

Natalie Schultheis '17: 2016 IHRLC Summer Fellow ACLU of Texas

Through the International Human Rights Law Clinic, I was able to spend my second year of law school advising our client, the Fundación para la Justicia y el Estado Democrático del Derecho, a network of NGOs that advocates for the human rights of migrants in Central America. I investigated the procedures that families of migrants can use to search for their loved ones who have gone missing on their trek to the United States. The experience opened my eyes to the importance of regional immigrants' rights activists in the Southwest. I knew that the American Civil Liberties Union (ACLU) of Texas is an organization deeply involved in impact litigation and advocacy for immigrants' rights, so I applied to intern with them this summer. Thanks to the generous summer fellowship from the International Human Rights Clinic alumni, I was able to accept the ACLU of Texas' offer to pursue this work.

As the summer unfolded, I found myself entrenched in research on prisons in the U.S. that are only for non-citizens. These "criminal alien requirement" (CAR) prisons have been of interest to the ACLU and its affiliates for several years because of their record for riots in protest of deplorable medical care. These prisons are also all privately operated. There were two questions that gnawed at me throughout each research assignment this summer: Why does the government continue to contract with private prisons and is it even constitutional to operate immigrant-only prisons?

During the summer, I had the opportunity to travel to a CAR prison and speak to several inmates about their experiences. I was stunned to speak to an inmate who had been a legal permanent resident prior to his arrest for possession of marijuana, only to wind up in an immigrant-only prison when a U.S. citizen would have been sent to a government prison for the same offense. This segregation of prisoners into separate facilities on the basis of nationality grew even more concerning as I learned that the level of care, as unsatisfactory as it may be in government-run facilities, was appalling in private prisons where contractors have a financial incentive to cut costs.

I have heard it said that private prisons exist because they are profitable for the owners of private prisons. However, the U.S. government's incentive for this system remains debatably elusive. Though many have claimed that the U.S. government is able to pay private companies less than what it would cost the government to operate facilities, such estimates neglect to take into account the cost of supervision that the Bureau of Prisons (BOP) must engage in with its many contractors. The result is that private prisons are often as expensive or even more expensive to operate than their federally-run counterparts.

As I dug deeper, I learned that as hard as it is for a prisoner to win a lawsuit against a government employee, the odds of success for prisoners in privately operated prisons to win a lawsuit for inhumane treatment is substantially lower. When the government contracts out to private prisons, liability shifts to the private contractors, and the government is capable of shedding all potential liability. An inmate must prove that the government knew about the inhumane treatment in the private prison and acted with

the intent to force this treatment upon the prisoner. This is a nearly impossible standard to meet.

Shielded by private contractor liability, the government saves on the costs of litigation. But beyond the cost of litigation, the government has another benefit of incalculable worth from its private prison contracts: because the government is nearly untouchable by plaintiffs in the private prison industry, the government is extremely unlikely to ever face a lawsuit that would require it to address nationwide prison reform. This, I believe, is the real reason that the government originally entered into these contracts to create these shadow prisons.

In the weeks following my internship, DOJ released a memo stating that the federal government will be phasing out the practice of contracting with private prisons, including the CAR prison I visited this summer. Finally, after the ACLU of Texas' years of involvement in bringing to light the dangerous inadequacy of these facilities, the federal government is beginning to respond. As advocates continue to chip away at the abolition of private for-profit prisons, I hope lawyers will wrestle with the question of whether BOP has the authority to segregate prisoners into CAR prisons on the basis of alienage.

I am incredibly grateful for the opportunity to have had some small part in the work of the ACLU of Texas to place pressure on the federal government to end these contracts. I am even more grateful for the funding from the International Human Rights Law Clinic alumni to have had the means to do this work. From the bottom of my heart, thank you.