

Privatized Immigration Enforcement

Jennifer M. Chacón*

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* Professor of Law, U.C. Irvine School of Law. The author would like to thank Dean Erwin Chemerinsky and the U.C. Irvine School of Law for support for this research.

INTRODUCTION

The sizeable and well-developed literature on privatization has generally paid little attention to immigration enforcement as a site of privatization. A number of immigration scholars have engaged the issue of privatization in the context of immigration detention,¹ as well as in employment-related immigration surveillance² and other delegations of immigration enforcement responsibilities.³ Notwithstanding this useful and growing body of work, the privatization of immigration law may be worthy of further examination as a discrete phenomenon for at least two reasons.

First, we lack a roadmap for immigration law's privatization. Such a roadmap is an essential precursor to any meaningful evaluation of the desirability of the various facets of privatized immigration enforcement. Although the immigration law literature includes excellent analyses of many aspects of immigration enforcement that have been privatized, existing accounts do not provide comprehensive descriptions of the forms that privatization has taken in immigration law and of the diverse analytical questions raised by the varied forms of privatization. Second, the existing literature in the area of immigration law is almost universal in its condemnation of privatization. But the critiques of privatization are often embedded within and entangled with broader normative claims about immigration enforcement and related exercises of state power. A more systematic framework for evaluating privatization in the area of immigration law is needed.

As a first step toward evaluating immigration law's privatization, a preliminary roadmap is sketched out in Part I. As this Part reveals, three simultaneous but distinct trends have emerged in immigration privatization over the past three decades. First, private actors have come to play a more substantial role in an enforcement system that designedly precludes many of the noncitizens regulated by immigration law from receiving the benefits of the tax dollars of U.S. residents. Second, federal, state and local governments have increasingly used laws and regulations to require private individuals and entities to operate as unfunded front-line agents of immigration enforcement. Finally, in more recent years, private entities have played an increasingly prominent role in building and staffing the immigration enforcement infrastructure. Part I examines each of these trends in turn in an effort to provide a full picture of the varied and complex privatizations of immigration law.

¹ César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1507–11 (2015); Mariela Olivares, *Intersectionality at the Intersection of Profiteering and Immigration Detention*, 94 NEB. L. REV. 963, 976–91 (2016).

² Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1112–25 (2009).

³ See generally Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008) (discussing and criticizing delegation of private immigration enforcement responsibilities to employers, common carriers, and landlords).

The analysis in Part I leaves no doubt that privatization in its many forms is an important component of the recent growth in immigration enforcement, but it does not answer the question of whether that privatization is normatively desirable. With a small handful of exceptions,⁴ most of the literature assessing the desirability of various aspects of immigration privatization has provided a negative assessment. Part II uses the cases of immigration detention to illustrate the ways in which broader concerns about the legitimacy of immigration enforcement and the carceral state can become embedded within — and sometimes obscured by — critiques of privatization. Part II divides critiques of immigration detention into three broad categories: 1) arguments critiquing detention conditions, 2) arguments against the moral legitimacy of private immigration detention, and 3) arguments that the privatization of detention subverts democratic values and processes. In addition to describing and assessing these critiques of private detention, this Part explains the significance of the private detention analysis for other areas of immigration privatization. In the detention context, and in many other immigration enforcement contexts, privatization can facilitate the development of structural mechanisms that undermines governmental accountability for individual rights deprivations. But privatization's failures in the immigration contexts are largely symptomatic, not causal. Private enforcement mechanisms are too harsh and lack accountability by design.

I. MAPPING THE PRACTICAL AND THEORETICAL TERRAIN OF PRIVATIZED IMMIGRATION ENFORCEMENT

Using immigration law as a lens through which to explore questions of privatization helps to illustrate the many forms that privatization can take. The ubiquity of privatization and the absence of a clear line between public and private actor have been noted in a great deal of the prior scholarship on privatization.⁵ Part A of this Section creates a typology of privatized immi-

⁴ Lee's *Private Immigration Screening* is critical of the incentive structures inherent in the current system, but suggests alternatives that could be effectuated within that structure. Lee, *supra* note 2, at 1141–44 (proposing to remedy deficiencies in employer screening through back-end audits of employer reporting and exclusion of evidence obtained through bad-faith employer reporting). For additional discussion of the potentially positive role that could be played by private actors in the context of worker and labor protections in low-wage workplaces, see Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, 38 POL. & SOC. 552, 555–62 (2010).

⁵ See, e.g., MARTHA MINOW, PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 6–28 (2002); William J. Novak, *Public-Private Governance: A Historical Introduction*, in GOVERNMENT BY CONTRACT 23, 24 (Jody Freeman & Martha Minow eds., 2009) (arguing that the distinction between public and private entities is socially constructed and historically contingent); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000); Ralph M. Kramer, *Voluntary Agencies and the Contract Culture: Dream or Nightmare*, 68 SOC. SERV. REV. 33, 35 (1994); Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003); Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 51 THEORETICAL INQUIRIES IN LAW 1, 1 (2014) (arguing that “the private and public spheres keep changing, and intermin-

gration law actors. A bevy of private actors help implement immigration law, but the reasons for their involvement are varied, as are the terms of their participation. In the discussion that follows, private involvement is broken down into three categories. The first category includes voluntary private initiatives that have developed in response to federal policies, but that are not funded or substantially structured by federal immigration laws and policies. The second category includes private organizations and individuals whose participation in immigration enforcement is required by law, but who receive no compensation for that participation. The third category includes private organizations and individuals that receive federal funds for their immigration law implementation efforts.

A. *Voluntary Private Actors*

Some examples of the private implementation of immigration law fall outside what is typically considered “privatization” because they do not involve the delegation of traditionally public functions or funding to private actors. Some of these private actors play an indispensable role in the implementation of immigration law enforcement, however, and are worth mentioning at the outset because their presence (and absence) shapes the contours of immigration enforcement.

Individuals and organizations that represent noncitizens in immigration proceedings are an important example of private actors engaged in the process of immigration law enforcement. Migrants⁶ have a right to counsel in removal proceedings, but not at the government’s expense.⁷ Congress has expressly prohibited the use of Legal Services Corporation funds for the representation of unauthorized migrants in removal proceedings.⁸ To the extent it occurs at all, deportation defense work is generally privately funded

gling in new ways”); Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 147 (2012) (arguing that public employees and private contractors are capable of providing the same level of service).

⁶ As used in this article, a “migrant” is an individual who was not a United States citizen when she entered the United States and who has not become a naturalized citizen. See Nicholas De Genova, *The Legal Production of Mexican/Migrant “Illegality,”* in GOVERNING IMMIGRATION THROUGH CRIME 41, 41–42 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013). In contrast, “immigrant” has a specialized and narrower definition. See Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2012). I nevertheless use the term “immigrant” at times throughout the piece because it is a term that is commonly used in the literature to cover the diverse category of migrants who have entered on immigrant visas, those who have entered on nonimmigrant visas, and those who entered without inspection.

⁷ See Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2012) (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (“[A]liens have a due process right to obtain counsel of their choice at their own expense.” (citation omitted)).

⁸ Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, 96 Stat. 1833; Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321; see also Use of Non-LSC Funds, Client Identity and Statement of Facts, 61 Fed. Reg. 45740 (Aug. 29, 1996) (codified at 45 C.F.R. pts. 1610, 1636).

and provided by private attorneys, including attorneys working for nonprofit organizations.⁹ Because there are not enough nonprofit organizations to provide direct legal services to indigent migrants in need of representation, most individuals in removal proceedings are unrepresented.¹⁰ The rest are represented by private lawyers at their own expense, or receive representation through nongovernmental organizations that are not federally funded.

While not public in nature or as defined by their funding stream, it is still difficult to categorize private immigrant defense as entirely private. Like other lawyers, individuals representing noncitizens in immigration proceedings are regulated substantially by federal and state law.¹¹ As such, their work falls into the vast grey area that is neither entirely “private” nor truly “public.” But it is clearly not a conventional example of “privatization.” There is no history of publicly sponsored representation for noncitizens in civil proceedings.¹² Nor are these private actors displacing public actors in assuming these functions.

⁹ One important exception is that, as a result of litigation in the case of *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010), the government is required to provide counsel in cases involving detained migrants with serious mental disabilities. The federal government has consequently developed a national program for appointing counsel in such cases. Press Release, U.S. Dep’t of Justice, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), <http://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguards-unrepresented-immigration-detainees.pdf>, archived at <https://perma.cc/R7P5-AWVB>. Federal funds are used to pay nonprofits that provide representation to eligible migrants. *Id.* This constitutes a classic example of privatization. See discussion *infra* at Section I.A.2.

Ongoing litigation seeks to secure similar rights for unrepresented minors in immigration proceedings. See *infra* note 16.

¹⁰ See, e.g., Ingrid V. Eagly & Stephen Shafer, *A National Study of Access to Counsel in Immigration Courts*, 164 PENN. L. REV. 1, 2 (2015) (finding that only 37% of migrants had counsel in the study period of 2007–2012); see also CALIFORNIA COALITION FOR UNIVERSAL REPRESENTATION, CALIFORNIA’S DUE PROCESS CRISIS: ACCESS TO LEGAL COUNSEL FOR DETAINED IMMIGRANTS 1 (June 2016), <http://www.publiccounsel.org/tools/assets/files/0783.pdf>, archived at <https://perma.cc/98DL-22YJ> (finding that 68% of immigrants in California are unrepresented in removal defense); STUDY GROUP ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 1 (Dec. 2012), http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf, archived at <https://perma.cc/X5NN-8662> (describing shortage of qualified attorneys representing indigent immigrants in removal proceedings and providing state-level statistics).

In the vast majority of cases, removal orders are issued or reinstated without any hearing by an immigration judge, let alone a hearing in which the immigrant is represented. See ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 2 (2014), https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf, archived at <https://perma.cc/G2B L-B2FE> (noting that in more than 83% of cases, removal orders are issued by immigration officers, not by immigration judges, as the vast majority of removal cases now involve expedited removal and reinstatement of removal, which do not involve proceedings before an immigration judge).

¹¹ Federal regulations specify who can represent individuals in immigration proceedings. See 8 C.F.R. § 1292.1. These regulations, in turn, reference state law requirements for bar admission. *Id.*

¹² For arguments that indigent immigrant representation ought to be a public function, see Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63,

On the other hand, it is worth noting that the private nature of deportation defense work has never been fixed, and is undergoing changes even now. First, recent federal litigation brought on behalf of sub-populations of unrepresented immigrants has secured the right to federally funded counsel in some immigration proceedings.¹³ The federal government has reacted by developing a national program for appointing counsel in such cases.¹⁴ Federal funds are used to pay nonprofits that provide representation to eligible immigrants.¹⁵ Ongoing litigation seeks to secure similar rights for unrepresented minors in immigration proceedings.¹⁶ In the interim, ongoing governmental efforts to provide counsel to unaccompanied children have been undertaken through public-private collaboration. For example, the government has contracted with the Corporation for National and Community Service to create “Justice AmeriCorps” to provide lawyers to unaccompanied children.¹⁷

Second, some states and localities with large numbers of noncitizen residents have begun to provide funding for immigrant representation. New York City is now involved in funding deportation defense counsel for immigrants within its jurisdiction, including through the use of City funds.¹⁸ In California, immigrant advocacy organizations are trying to generate political support for a similar initiative at the state level.¹⁹ Thus, while many areas of immigration regulation are characterized by increasing privatization, it is worth noting that access to counsel recently has been an area where the trend runs in the other direction. Aside from these existing and potential pockets of public funding, most removal defense work is still performed by private

68 (2012). See also Caren Shannon, *Immigration is Different: Why Congress Should Guarantee Access to Counsel in All Immigration Matters*, 17 UNIV. DIST. OF COL. L. REV. 165, 166 (2014).

¹³ See *supra* note 9.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *J.E.F.M. v. Lynch*, No. C14-01026, slip op. at 2–4 (W.D. Wash. Aug. 27, 2015). Federal legislation has been introduced to provide for such representation, but has not passed. Fair Day in Court for Kids Act, H.R. 4646, 114th Cong. (2015–2016).

¹⁷ Such representation is not universal. See Press Release, U.S. Dep’t of Justice, Justice Department and CNCS Announce \$1.8 Million in Grants to Enhance Immigration Court Proceedings and Provide Legal Assistance to Unaccompanied Children (Sept. 12, 2014), <https://www.justice.gov/opa/pr/justice-department-and-cnsc-announce-18-million-grants-enhance-immigration-court-proceedings>, archived at <https://perma.cc/D83Y-CD5F>.

¹⁸ Press Release, Vera Institute of Justice, New York City Becomes First Jurisdiction in Nation to Provide Universal Representation to Detained Immigrants Facing Deportation (June 26, 2014), <https://www.vera.org/newsroom/press-releases/new-york-city-becomes-first-jurisdiction-in-nation-to-provide-universal-representation-to-detained-immigrants-facing-deportation>, archived at <https://perma.cc/4SDR-7WAN>.

¹⁹ A group of nonprofit organizations that frequently represent noncitizens in removal proceedings and other legal matters has joined together to lobby for statewide legislation that would provide public funding for statewide universal representation in removal defense cases. CALIFORNIA COALITION FOR UNIVERSAL REPRESENTATION, CALIFORNIA’S DUE PROCESS CRISIS: ACCESS TO LEGAL COUNSEL FOR DETAINED IMMIGRANTS at 1 (June 2016), <http://www.publiccounsel.org/tools/assets/files/0783.pdf>, archived at <https://perma.cc/2J5Z-92WB>.

attorneys.²⁰ The election of Donald J. Trump likely imperils the future of public engagement in immigration representation beyond the very minimum required by constitutional law. His election heralds a likely retrenchment in public funding for immigrant representation that is both swift and significant.

Another set of private actors involved in implementing immigration law is private border militia. The best known of these is the “Minutemen” organization launched in 2005,²¹ although there are many groups that have splintered off from this group or appropriated the name.²² These private individuals band together to monitor the U.S.-Mexico border. The extent to which they do so independently has been a source of internal disagreement within these groups. Some see themselves as adjuncts to federal border agents, while others view themselves as empowered to enforce immigration law independently, at least in certain cases.²³

Like the private bar, these entities do not occupy a theoretical space that would conventionally be labeled “privatized.” They appear purely private and, as a legal matter, they do not derive their power or resources from public sources. However, many clearly strive to present themselves as adjuncts to federal agencies. Unlike the private bar, private militia have had great difficulty maintaining coherence and cohesion over the years and currently play little if any meaningful role in shaping immigration enforcement on the ground.²⁴ On the other hand, they have played a role in reshaping the discourse surrounding immigration law reform.²⁵ Mainstream acceptance²⁶ of empirically dubious notions that the southern border is “out of control”

²⁰ The quality of this private representation varies widely, and includes a great deal of unauthorized practice of law. Indeed, reputable organizations that represent immigrants in proceedings acknowledge the need to structure their own legal advice and service provision in ways that reduce the likelihood of reliance on ineffective, unauthorized providers. *See, e.g.,* Sameer Ashar, Edeline M. Burciaga, Jennifer M. Chacón, Susan Bibler Coutin, Alma Garza, & Stephen Lee, *Navigating Liminal Legalities along Pathways to Citizenship: Immigrant Vulnerability and the Role of Mediating Institutions* 8–9, 23 n.11 (U.C. Irvine Sch. of Law, Legal Studies Research Series 2016–05) [hereinafter “Navigating Liminal Legalities”].

²¹ *See* PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* 157 (2d. ed. 2009) (discussing the Minutemen and the longer history of such private border policing initiatives).

²² Tim Murphy, *The Meltdown of the Anti-Immigrant Minutemen Militia*, MOTHER JONES, Aug. 4, 2014, <http://www.motherjones.com/politics/2014/08/minuteman-movement-border-crisis-simcox>, archived at <https://perma.cc/PK3B-EEVU>.

²³ *See, e.g.,* Peter Holley, *These Armed Civilians Are Patrolling the Border to Keep ISIS out of America*, WASHINGTON POST, Nov. 25, 2015, <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/25/these-armed-civilians-are-patrolling-the-border-to-keep-isis-out-of-america/>, archived at <https://perma.cc/4AKC-276G> (noting that a vigilante organization’s website reads, “We are not here to replace the Border Patrol. We operate within the scope of the law as citizens, by observing and reporting what we see,” but noting law enforcement skepticism of and concern over the organization).

²⁴ *See* Murphy, *supra* note 22; *but see* Holley, *supra* note 23 (describing a recently formed vigilante organization).

²⁵ *See, e.g.,* Mary Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 *LAW & SOC’Y REV.* 701, 712–17 (2008) (noting the role of the Minutemen in inflaming support for physical border fencing).

and that the federal government has abdicated its responsibility to enforce immigration law is attributable at least in part to these vocal private actors.²⁷ Their views have been echoed in right-of-center media publications and further amplified by the presidential campaign rhetoric of Donald J. Trump.

B. *Private Delegation Through Regulation*

In addition to being shaped by private actors operating relatively independently, immigration law has been shaped in critical ways by private actors acting pursuant to government mandates. The federal government has long regulated migration indirectly through the regulation of private entities. Very early in its history, the U.S. government regulated private carriers in order to control immigration flows indirectly.²⁸ This practice continues today; private carriers are still required to perform screening of their passengers bound for the United States or face potential liability.²⁹

With the expansion of the regulatory state, this type of indirect regulation of migration also expanded significantly. Professor Huyen Pham identifies the starting point of this expansion as 1986, with the enactment of the Immigration Reform and Control Act³⁰ (“IRCA”).³¹ IRCA required private employers to verify that new employees were authorized to work, at the risk of incurring civil and criminal penalties for their failure to do so.³² Pham writes:

For the first time nationwide, private parties were required to deny a benefit — here, employment — based on immigration status. In effect then, IRCA required employers to enforce the employment provisions of federal immigration laws.

In the twenty-one years since IRCA (late 1986 to late 2007), Congress, state legislatures, and even local city councils have passed laws that have required various private parties to enforce immigration laws. The trend has accelerated post-9/11, as immigration policy has been increasingly tied to national security.³³

²⁶ *Arizona v. United States*, 132 S. Ct. 2492, 2522 (2012) (Scalia, J., dissenting) (“[C]itizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy.”).

²⁷ See Holley, *supra* note 23 (describing border militia leader’s sense that the borders were not properly controlled).

²⁸ ARISTEDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 110–24 (2008).

²⁹ Immigration and Nationality Act § 274(a)(1)(A)(ii), 8 U.S.C. § 1324(a)(1)(A)(ii) (2006).

³⁰ Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

³¹ Pham, *supra* note 3, at 779.

³² Immigration and Nationality Act § 274(a)(1)(B)(i), 8 U.S.C. § 1324(a)(1)(B)(i) (2006).

³³ Pham, *supra* note 3, at 779.

As Professor Pham notes, there are two interrelated trends at work in the acceleration of this kind of privatization. First, private entities are increasingly required by law to police immigration, and to face civil or criminal sanctions when they fail to do so. Second, these requirements increasingly are coming not just from federal authorities, but also from a variety of non-federal authorities.³⁴

IRCA provides the paradigmatic — and most frequently discussed — example of this type of privatization through regulation.³⁵ Because IRCA effectively deputizes over a million employers as front-line screeners of immigration status in the workplace, it places tremendous discretionary enforcement power in the hands of employers.³⁶ Given the systemic under-enforcement of employer sanctions, employers can choose to turn a blind eye to immigration status with little fear of enforcement consequences. They can, however, leverage the federal enforcement bureaucracy against employees when doing so is to their economic advantage.³⁷ As such, the goals of private screeners may not actually align with the stated goals of IRCA and the publicly adopted rationale for worksite immigration enforcement.³⁸ This misalignment is further complicated because employers may lack the capacity and training to implement the law's requirements in a non-discriminatory way even when they are not acting in bad faith.³⁹

Despite the potential misalignment of incentives that these enforcement privatizations generate, they have been popular in recent years. Not only the federal government but also state and local governments have enacted (or attempted to enact) laws that rely on private employers as frontline immigration enforcement screeners.⁴⁰ For instance, although there are no federal

³⁴ Pham discusses many of these delegations in her article. *See id.* at 815–27.

³⁵ For critiques of IRCA's employer sanctions provisions, see Lee, *supra* note 2, at 1144–45. *See also* Martha F. Davis, Lucas Guttentag & Allan H. Wernick, *Report of the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York: An Analysis of Discrimination Resulting from Employer Sanctions and a Call for Repeal*, 26 SAN DIEGO L. REV. 711, 738 (1989); Cecelia M. Espenozo, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 388–89 (1994); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 404–05 (2001); Pham, *supra* note 3, at 826; Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 169 (2002); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 214–17 (2007).

³⁶ Lee, *supra* note 2, at 1106.

³⁷ *See* Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1214 n.254 (2008) (citing GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 35 (2005)).

³⁸ *See* Lee, *supra* note 2, at 1107.

³⁹ *See* Davis et al., *supra* note 35, at 721–22; Pham, *supra* note 3, at 811–14, 821–24 (noting that private actors are insufficiently trained to recognize various legal immigration statuses and to properly enforce the law and concluding that they have fallen back on discriminatory screening mechanisms).

⁴⁰ *See, e.g.*, Legal Arizona Workers Act, Ariz. Rev. Stat. Ann. § 23-212 (2009) (imposing state penalties on employers who failed to screen for federal immigration status). The Legal

prohibitions on renting or selling housing to unauthorized migrants, some states and localities have also attempted, sometimes successfully, to extend screening functions to landlords.⁴¹ Federal law⁴² and some state laws⁴³ impose penalties on public carriers that assist unauthorized migrants by transporting them across and within federal borders. Just as federal law prohibits the use of Legal Service Corporation funding for a great deal of immigrant representation,⁴⁴ some states have barred charitable organizations from assisting unauthorized migrants with state funds, and penalize them for doing so.⁴⁵ All of these regulations of private actors, which effectively make them front-line screeners of immigration status, pose some of the same promises and risks as employer screening. While they have a force multiplier effect, they must also rely on individuals who lack the training, and often the motivation, to enforce immigration laws effectively and in a nondiscriminatory fashion.⁴⁶

Not all private delegations through regulation are enforcement-centered. By allowing employers to sponsor their employees for certain employment-based visa categories, U.S. law relies on employers to identify the immigrants best suited to fill domestic labor needs.⁴⁷ Moreover, the vast

Arizona Workers Act (“LAWA”) was upheld by the Supreme Court. *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 587 (2011). See also *Lozano v. City of Hazleton*, 724 F.3d 297, 300 (3d Cir. 2013), *cert. denied*; *City of Hazleton v. Lozano*, 134 S. Ct. 1491 (2014) (invalidating a local ordinance that required city employers and landlords to screen for immigration status); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 539 (5th Cir. 2013) (en banc).

⁴¹ CHEROKEE COUNTY, GA., Ordinance No. 2006-003 (2006) (prohibiting owners from “let[ting], leas[ing], or rent[ing]” or “suffer[ing] or permit[ing] the occupancy” of a dwelling unit by an unauthorized migrant immigrant, “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law”); see also *Keller v. City of Fremont*, 719 F.3d 931, 951 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014) (upholding a local ordinance that required city landlords to screen for immigration status); see also *Arizona v. United States*, 132 S. Ct. at 2522.

⁴² See Immigration and Nationality Act § 274(a)(1)(A)(i)–(ii), 8 U.S.C. § 1324(a)(1)(A)(i)–(ii) (2006) (prohibiting alien smuggling and domestic transportation of unauthorized aliens).

⁴³ See, e.g., *Ariz. Rev. Stat. Ann. § 13-2319* (2010) (criminalizing the smuggling of unauthorized migrants in Arizona). For a discussion of how the law for a time was used systematically to prosecute unauthorized migrants for their own “self-smuggling,” i.e., as means of prosecuting unauthorized migrant presence, see *Ingrid V. Eagly, Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1753 (2011). The Ninth Circuit Court of Appeals ultimately struck this practice down as a violation of the Supremacy Clause. *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011), *aff’d in part, rev’d in part and remanded*, 132 S. Ct. 2492 (2012).

⁴⁴ See *supra* note 8 and accompanying text.

⁴⁵ See *Pham, supra* note 3, at 800, n.125 (discussing Virginia’s 125. H.B. 2937, 2007 Gen. Assemb., Reg. Sess. (Va. 2007)).

⁴⁶ *Id.* at 802.

⁴⁷ See, e.g., *Lee, supra* note 2, at 1115–17 (noting the role of private employer sponsorship in the employment visa context). *Lee* argues that this kind of screening is less problematic because employers have better information about an employee’s fitness for employment than about the technicalities of immigration law. *Id.* at 1116. While IRCA workplace screening relies on the latter, the employment-based visa system relies on the former. Some scholars have urged a greater role for other third party screeners in the visa procurement process. Elea-

majority of immigrant visas are issued to family-based visa holders, meaning that U.S. citizen and lawful permanent resident family members make the initial selection of the bulk of incoming immigrants, although those choices are, of course, further screened by immigration officials.⁴⁸ Private actors thereby play a central, although not dispositive, role in the *ex ante* screening of intending immigrants as well as in their post-entry treatment.

C. Private Entities Funded to Fulfill Public Law Functions

Outside of the immigration context, the most heated public debates around privatization have tended to center not on the first two categories of privatized implementation of public law, but rather on privatization that involves the transfer of public money into private hands to fulfill traditionally public functions. This process has been the source of analysis and critique in the realms of criminal justice (particularly prison privatization,⁴⁹ and to a lesser extent, private policing⁵⁰), medical care⁵¹ and education,⁵² among other areas.

The implementation of immigration law has been another important area of such privatization, but it has not been the subject of much scholarly analysis. Aside from scholars and activists who have trained their attention on privatized immigration detention, there is little work on the subject to date, and many empirical questions about immigration privatization have yet to be resolved. The following sub-sections outline some of the key areas of immigration privatization in recent years. Privatization is prevalent in immigration law, extending from well outside of the border into the interior of the country.

nor Brown, for example, has called for an increased role for sending states as visa guarantors. See generally Eleanor Marie Laurence Brown, *Outsourcing Immigration Compliance*, 77 *FORDHAM L. REV.* 2475, 2491–92 (2009).

⁴⁸ See, e.g., U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Table: Relatives for Whom You (U.S. Citizen) May Petition*, FAMILY OF U.S. CITIZENS (May 1, 2014), <https://www.uscis.gov/family/family-us-citizens>, archived at <https://perma.cc/L6KK-D8TP> (describing the process by which a U.S. citizen can petition for green cards or visas for family members with qualifying relationships).

⁴⁹ See, e.g., DAVID SHICHOR, *PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS* (1995); John J. DiIulio, Jr., *What's Wrong with Private Prisons*, 92 *PUB. INTEREST* 66 (1988); Sharon Dolovich, *State Punishment and Private Prisons*, 55 *DUKE L.J.* 429 (2005); Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 *INDIANA L. REV.* 1401 (2014); Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 *CORNELL L. REV.* 749, 770–71 (2011); Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 *FLA. ST. U. L. REV.* 1 (2010); Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 *U.C. DAVIS L. REV.* 133 (2012).

⁵⁰ See generally Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 *UTAH L. REV.* 573 (2005); David A. Sklansky, *Private Police and Democracy*, 43 *AM. CRIM. L. REV.* 89 (2006); David A. Sklansky, *The Private Police*, 46 *UCLA L. REV.* 1165 (1999).

⁵¹ See, e.g., Metzger, *supra* note 5, at 1380–83 (discussing the privatization of Medicare and Medicaid).

⁵² See, e.g., MINOW, *supra* note 5.

1. *Monitoring Cross-border Movement*

A great deal of cross-border monitoring is privatized in one way or another. Private contractors have helped to develop and maintain the information systems that track cross-border movement. In 2002, then-President George W. Bush issued a statement pledging that “[a]greements with our neighbors, major trading partners and private industry will allow extensive pre-screening of low-risk [cross-border] traffic.”⁵³ Many of the security technologies recently deployed to track individuals entering the country and to detect illegal entries at the U.S.-Mexico land border have been developed and managed by private companies.⁵⁴ The same major defense contractors that have supplied technologies for the U.S. military have also played a significant role in providing the technologies that monitor the U.S.-Mexico border.⁵⁵

Public spending to monitor cross-border movements and activities is substantial. In 2014, the U.S. government spent \$3.73 billion on salaries and expenses relating to border security and control between ports of entry and another \$3.22 billion on inspections at ports of entry.⁵⁶ This figure does not include an additional \$350 million on “border security fencing, infrastructure and technology.”⁵⁷ This seven billion dollar total figure is six times the amount of the *entire* INS budget — including all spending on immigration services, interior enforcement, detention and adjudication — in 1990.⁵⁸ While private companies receive only some of this money, subsidies for private companies that do this work have been an important area of budgetary growth.⁵⁹

2. *Monitoring Immigration Status in the Interior*

As previously noted, when it comes to detecting unauthorized workers in the country, the enforcement system expressly relies on employers, many

⁵³ Press Release, Office of the Press Secretary, Border Security — Smart Borders for the 21st Century (Jan. 25, 2002), *quoted in* PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE 166 (2d. ed. 2009).

⁵⁴ ANDREAS, *supra* note 21.

⁵⁵ ANDREAS, *supra* note 21, at 158 (“Major military contractors, such as Lockheed Martin, Raytheon and Northrop Grummon, have also been recruited to play a larger role in border patrol.”).

⁵⁶ DEPARTMENT OF HOMELAND SECURITY, FISCAL YEAR 2015 BUDGET OVERVIEW 3–4 (2015), <https://www.dhs.gov/sites/default/files/publications/DHS-Congressional-Budget-Justification-FY2015.pdf>, *archived at* <https://perma.cc/945J-V5GJ>. This includes \$115 million on detection technologies. Of course, these large figures are not purely immigration control spending, as they are also aimed at detection of contraband.

⁵⁷ *Id.*

⁵⁸ *See* OFFICE OF NAT’L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT, AN OVERVIEW OF FEDERAL DRUG CONTROL PROGRAMS ON THE SOUTHWESTERN BORDER: IMMIGRATION AND NATURALIZATION BUDGET SUMMARY, https://www.ncjrs.gov/ondc_ppubs/publications/enforce/border/ins_3.html, *archived at* <https://perma.cc/GGS9-JLFA>.

⁵⁹ *See supra* notes 53–55 and accompanying text.

of them private, as the front-line detection system.⁶⁰ In recent years, the U.S. government has moved to centralize and automate these employee checks, and this process also has relied heavily on privatization. Increasingly, checks of a prospective employee's work authorization status are run through the government's electronic employment verification system known as E-Verify, along with related systems, all of which are run by a private contractor.⁶¹ In 2014, the U.S. government spent \$109 million on E-Verify, with planned increases for 2015 and 2016.⁶²

In the period following the federal government's roll out of its automated employment check, other forms of electronic immigration surveillance have also proliferated. The DHS budget allocated \$1.6 billion for domestic immigration investigations in 2014.⁶³ As Anil Kalhan has observed:

[E]specially in the aftermath of the 2001 terrorist attacks, information sharing and interoperability of database systems have become high government priorities — particularly for national security purposes, but increasingly for other purposes as well.[] Accordingly, both Congress and the executive branch have directed the development of a variety of systems and processes to disseminate and share information that might be relevant for security-related purposes among various actors, including intelligence agencies, law enforcement, immigration authorities, international entities, foreign governments, and other institutions, both public and private. In some instances, these efforts have involved the creation of new institutional forms altogether, such as the “fusion centers” authorized by Congress to “co-locate” federal, state, and local officials together to work collaboratively, along with private contractors, on the collection and analysis of intelligence concerning a broad array of potential threats.⁶⁴

When it comes to developing and operating database systems and providing technological assistance for coordinated intergovernmental enforce-

⁶⁰ Lee, *supra* note 2, at 1106.

⁶¹ WESTAT, FINDINGS OF THE E-VERIFY PROGRAM EVALUATION, xlii, 4, 17, 27, 34 (2009), https://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf, archived at <https://perma.cc/M235-PTRP> (noting that “a contractor” runs E-Verify and related Transactional Database and EV-Star technologies). The 338-page assessment of these programs, commissioned by the government, never reveals the name of that “USCIS contractor.” For critiques of electronic employment eligibility systems, including the privacy and fairness concerns that the systems raise, see, e.g., Juliet Stumpf, *Getting to Work: Why Nobody Cares About E-Verify and Everybody Should*, 2 U.C. IRVINE L. REV. 381 (2012).

⁶² DEP'T OF HOMELAND SEC., FISCAL YEAR 2015 BUDGET OVERVIEW, *supra* note 56, at 11.

⁶³ *Id.* at 5.

⁶⁴ Anil Kalhan, *Immigration Surveillance*, 74 MD L. REV. 1, 39–40 (2014) (internal citations omitted).

ment efforts, private companies play a significant and integrated role in these increasingly lucrative fields.

3. *Immigrant Assistance and Integration*

Private actors also play a substantial role in immigrant integration and assistance efforts. Refugee resettlement is handled by non-profit volunteer agencies (known as VOLAGs), most of which are private. After screening by Department of Homeland security agents, refugees are assigned to a VOLAG. VOLAGs are primarily faith-based organizations, including the Church World Service, Ethiopian Community Development Council, Episcopal Migration Ministries, Hebrew Immigrant Aid Society, International Rescue Committee, US Committee for Refugees and Immigrants, Lutheran Immigration and Refugee Services, United States Conference of Catholic Bishops, and World Relief.⁶⁵ VOLAGs are responsible for integrating refugees into their new communities — doing everything from greeting them at the airport to helping settle them in homes to assisting with their job seeking efforts and their English language learning.⁶⁶ Interestingly, although the transfer of public funds to the religiously-affiliated VOLAGs might raise some of the same First Amendment concerns that have been raised in the context of medical care or school vouchers, there does not appear to be any systematic analysis of the sufficiency of structural checks in place to alleviate these concerns.

Unaccompanied child migrants are in the public charge of the Office of Refugee Resettlement (“ORR”).⁶⁷ Much of the time, unaccompanied minors are entrusted to the care of responsible family members and sponsors as their status is adjudicated.⁶⁸ ORR has been criticized for failing to properly vet and monitor these private placements,⁶⁹ and the agency faces a challenge

⁶⁵ Voluntary Agencies, OFFICE OF REFUGEE RESETTLEMENT (July 17, 2012), <http://www.acf.hhs.gov/programs/orr/resource/voluntary-agencies>, archived at <https://perma.cc/NU4Y-RUQR>.

⁶⁶ See Immigration Regulations, 8 C.F.R. § 207.2(c) (“Each applicant must be sponsored by a responsible person or organization”); The Reception and Placement Program, U.S. DEP’T OF STATE, <http://www.state.gov/j/prm/ra/receptionplacement/>, archived at <https://perma.cc/4DTZ-3ASE>.

⁶⁷ *Unaccompanied Children’s Services*, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/programs/ucs>, archived at <https://perma.cc/E9P5-V78S>.

⁶⁸ See OLGA BYRNE & ELISE MILLER, VERA INSTITUTE OF JUSTICE CENTER ON IMMIGRATION AND JUSTICE, *THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS* 4 (2012), <http://archive.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>, archived at <https://perma.cc/SDP4-2449> (providing overview of the flow of unaccompanied minor children through the system).

⁶⁹ A January 2016 Senate investigation revealed an instance where children placed with approved guardians wound up working under coercive conditions on an Ohio farm, for example. PERMANENT SUBCOMM. ON INVESTIGATIONS, U.S. SENATE, *PROTECTING UNACCOMPANIED ALIEN CHILDREN FROM TRAFFICKING AND OTHER ABUSES: THE ROLE OF THE OFFICE OF REFUGEE RESETTLEMENT* 1 (2016).

in trying to meet the legal requirement of promptly placing youth in the least restrictive setting, while also properly vetting and supervising the steadily ballooning number of placements in private homes. This example of public-private collaboration highlights the fact that even when private placements are generally the optimal outcome, appropriate oversight by public entities remains critically important.

When unaccompanied immigrant youth are not placed with families, they are generally placed in privately managed facilities.⁷⁰ ORR has relied even more heavily on private group homes with experience in providing youth services since 2014, when the numbers of unaccompanied minor children rapidly increased.⁷¹ These placements have been the subject of some criticism.⁷² It is quite possible that larger problems exist; ORR has limited monitoring capacity, and youth in the system have limited capacity to express their concerns and have only recently gained broader access to counsel. It is worth highlighting the extent to which ORR's reliance on private actors reflects an effort to provide more appropriate services — both in housing and in representation — by turning to private providers. Interestingly, some of the sharpest recent criticisms — in both governmental and nongovernmental reports — have actually been aimed not at private providers of services, but at the facilities and practices of Customs and Border Protection, which manages the holding facilities that are the first place of detention for unaccompanied minors.⁷³

Efforts to combat human trafficking are another area of robust public-private collaboration and privatization. In some ways, the role of private entities in trafficking prevention relies on voluntary private actors akin to those mentioned in subpart A. For example, no federal assistance is available for victims of crime and trafficking who are neither citizens nor lawful permanent residents (“LPRs”) and have not yet been certified by the federal government.⁷⁴ This gap is sometimes filled by NGOs or, in rare cases, by

⁷⁰ THE WOMEN'S REFUGEE COMM'N, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 4* (2009), <http://www.refworld.org/pdfid/498c41bf2.pdf>, archived at <https://perma.cc/455F-U97T> (“Today, most unaccompanied children in immigration proceedings are in the custody of DUCS [ORR's Division of Unaccompanied Children' Services], and are housed in youth facilities operated by private entities.”).

⁷¹ WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, *UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW*, CONGRESSIONAL RESEARCH SERVICE 13 (2016).

⁷² *Id.* at 27–29. Notably, public facilities are also the subject of criticism, and in the case of facilities operated by Customs and Border Protection, the criticism is generally sharper than the criticisms of privately run DUCS facilities.

⁷³ *See, e.g.*, OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., *OIG-10-117, CBP'S HANDLING OF UNACCOMPANIED ALIEN CHILDREN 1* (2010) (reporting that CBP needed to improve its handling of UACs).

⁷⁴ Federal trafficking assistance is available to all noncitizens — regardless of immigration status — once the federal government certifies them as trafficking victims. But prior to certification, noncitizens who are not permanent residents as defined by the immigration law are not eligible for federal benefits. This includes noncitizens lawfully present on nonimmigrant visas as well as unauthorized migrants.

states using their own funds.⁷⁵ Similarly, Customs and Border Protection (“CBP”) partners with numerous private entities in their effort to achieve a force multiplier effect in their anti-trafficking efforts. The agency trains U.S. commercial airline crew to identify human trafficking in airports and during flights, and even provides online anti-trafficking training for private passengers.⁷⁶

But not all anti-trafficking initiatives involve the voluntary cooperation of self-funded private actors; some anti-trafficking efforts squarely fit the formula of the direct transfer of public funds into private hands to administer statutorily defined services. For example, while governmental officials are charged with certifying trafficking and crime victims eligible for public services, the organizations that actually supply services to these certified victims are often private providers that receive grants issued by the U.S. Department of Health and Human Services (HHS).⁷⁷ Federal grants make up a sizable portion of these operating budgets of some of the organizations that supply these services.⁷⁸

4. *Immigration Adjudication*

Adjudication is generally conceived of as a public function, and immigration courts are publicly run. Immigration adjudication also involves a whole host of private actors. Translators — an essential feature in many immigration cases — are supplied by private contractors.⁷⁹ This arrangement has been criticized in the past for failing to provide adequate services to immigrants in court.⁸⁰ Similarly, because the government does not have

⁷⁵ U.S. DEP’T OF HEALTH AND HUMAN SERVICES, SERVICES AVAILABLE TO HUMAN TRAFFICKING VICTIMS: A RESOURCE GUIDE TO SOCIAL SERVICE PROVIDERS 1–4 (2012), https://www.acf.hhs.gov/sites/default/files/orr/traffickingservices_0.pdf, archived at <https://perma.cc/U2LT-VM5X>. Some states have also enacted laws to fill this gap. See *id.* at 5. In this way, assistance for pre-certified noncitizen victims closely resembles the type of private initiatives outlined in Part I.A.1.

⁷⁶ DEP’T OF HOMELAND SEC., CONGRESSIONAL BUDGET JUSTIFICATION FY 2015 507 (2015), <https://www.dhs.gov/sites/default/files/publications/DHS-Congressional-Budget-Justification-FY2015.pdf>, archived at <https://perma.cc/86HN-JVH8>.

⁷⁷ *Id.* at 6.

⁷⁸ The Heartland Alliance financial statement notes, for example, that “[f]ederal grant funding from one specific contract with the U.S. Department of Health and Human Services represented approximately 24 percent of total revenue for the years ended June 30, 2015 and 2014.” HEARTLAND ALLIANCE FOR HUMAN NEEDS & HUMAN RIGHTS, CONSOLIDATED FINANCIAL REPORT 15 (2015), <https://www.heartlandalliance.org/wp-content/uploads/2016/02/final-client-heartland-alliance-2015-consol-no2594.pdf>, archived at <https://perma.cc/33DK-MKB7>.

⁷⁹ See, e.g., *SOS International to Provide Language Interpreter Services for the Department of Justice Executive Office for Immigration Review*, SOSi NEWS (Jul. 22, 2015), <http://www.sosi.com/news/press-releases/sos-international-provide-language-interpreter-services-department-justice-executive-office-immigration-review/>, archived at <https://perma.cc/CG8D-Y84M> (announcing SOSi’s receipt of \$80 million government contract to provide translation services to the Executive Office of Immigration Review (EOIR)).

⁸⁰ See, e.g., Laura Abel, *Language Access in Immigration Courts*, BRENNAN CTR. 1 (2011), http://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf, archived at <https://perma.cc/AD8Z-8DHL>

proprietary equipment or communications systems for videoconferencing, private contractors develop and administer the videoconference systems that are used in a great number of immigration adjudications,⁸¹ despite recurring questions as to whether these remote adjudications allow for adequate communication and due process.⁸²

These private actors play a relatively small role in the implementation of immigration law. They are still integral to the adjudication process. For example, immigration courts would grind to a halt without translation services because about 85% of noncitizens appearing in immigration courts have limited English proficiency.⁸³ Relative to the rest of the immigration enforcement budget, however, the adjudication budget is quite small. The Executive Office of Immigration Review (“EOIR”), the agency within the Department of Justice responsible for immigration adjudication, had a budget of \$308 million in FY 2014.⁸⁴ While a sizeable amount of money, it does not even amount to one-twentieth of the funds spent on monitoring and apprehensions at and between ports of entry.

5. *Immigration Detention*

In contrast to immigration adjudication, which is a relatively small part of the immigration law budget, immigration detention is a site of robust public spending. The federal government spent \$2.6 billion on immigration detention in 2014.⁸⁵ Detention is the most oft-discussed privatization in the realm of immigration enforcement, and for good reason. The immigration detention system is made up of a haphazard collection of publicly and privately run facilities, and many hybrid models that involve contractual relationships among ICE, private contractors, and sub-federal governmental entities. Private companies supply a large and growing percentage of the nation’s immigration detention facilities and services.⁸⁶ A small percentage of immigrants subject to detention are paroled, released on bond or released

(“[T]here have been many incidents in which interpreters made mistakes and acted unprofessionally. This may be due in part to the Immigration Courts’ decision not to require their interpreters to obtain the rigorous certifications administered by either the Administrative Office of the U.S. Courts or the state courts’ Consortium for Language Access in the Courts.”).

⁸¹ See, e.g., U.S. Department of Justice Executive Office for Immigration Review Office of the Chief Administrative Judge, Chief Immigration Judge Initiative, Immigration Court VTC Review at 3 (discussing the installation of Cisco System’s Tandberg 3000 MXP videoconferencing systems in six of its courtrooms).

⁸² Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NORTHWESTERN L. REV. 936 (2015). See also Abel, *supra* note 80, at 8–9.

⁸³ Abel, *supra* note 80, at 1.

⁸⁴ U.S. DEP’T OF JUSTICE, SUMMARY OF BUDGET APPROPRIATIONS 1 (2014), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/26/ba.pdf>, archived at <https://perma.cc/Q4US-932C>.

⁸⁵ DEP’T OF HOMELAND SEC., *supra* note 56, at 5.

⁸⁶ García Hernández, *supra* note 1, at 1507–09; see also discussion *infra* at notes 95–98.

on their own recognizance, but most are not.⁸⁷ An increasing number of immigrants not covered by mandatory detention provisions are being placed under restrictive intensive supervision programs supplied by private companies.⁸⁸ Individuals who are covered by mandatory detention requirements generally are not even given the option of these restrictive supervised release programs, notwithstanding the fact that they likely satisfy the statutory requirements.⁸⁹

D. Conclusions

In short, a great deal of immigration enforcement's "formidable machinery" is run by private actors funded with public money. Many other immigration law objectives are achieved through regulatory privatization or through the operation of purely private actors. Obviously, the role of these private actors varies greatly, and there is no paradigmatic case of privatization in immigration enforcement. Nevertheless, to get some sense of the concerns that immigration privatization can raise, it may be useful to focus on one area where privatization is widespread, and increasingly subject to substantial criticism: the case of immigration detention.

II. DISENTANGLING CRITIQUES: THE CASE OF IMMIGRATION DETENTION

At the intersection of migration control and criminal law enforcement, the United States and other Western nations have engaged in legal practices that have resulted in expansive carceral control over migrants. Rapidly growing numbers of migrants are now detained in prisons, jails, and other detention facilities. Outside of criminal and civil detention facilities, migrants are increasingly subjected to control in the form of electronic monitoring and alternative punitive sanctions. This expanding web of controls is a result of developments in both the criminal and civil spheres.

On the criminal justice side, migrants are increasingly the focus of criminal punishment. Not only are migration-related actions increasingly criminalized and prosecuted in criminal courts,⁹⁰ but immigration policy has also become so criminalized that immigration status rather than criminal culpability "drives the adjudicatory logics and practices" in some non-immigration criminal prosecutions,⁹¹ convictions, and sentences.

At the same time, developments in the civil sphere also have expanded carceral control of migrants. Every year, hundreds of thousands of migrants

⁸⁷ Fatmah Marouf, *Community Based Alternatives to Immigration Detention* at draft pages 22–25 (forthcoming).

⁸⁸ *Id.* at 25–26.

⁸⁹ *Id.* at 27–28.

⁹⁰ Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 635–40 (2012).

⁹¹ Mona Lynch, *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High Volume U.S. Court*, BRIT J. CRIMINOLOGY 5 (2015).

are detained civilly as part of their immigration adjudication processes. The United States is the global leader in civil immigration detentions and for the past few years has incarcerated about 400,000 migrants per year in immigration detention facilities.⁹² Many detainees are housed in federal, state, and county prison and jail facilities, which are both publicly and privately owned and operated.⁹³ Other immigrants, including thousands of young children, have been detained in the nation's "family residential facilities" surrounded by barbed wire and staffed by armed guards.⁹⁴

The expansion of social control over migrants has been quite profitable for some private companies. Private prison companies such as the GEO Group, Inc. ("GEO Group") and Corrections Corporation of America ("CCA")⁹⁵ have more than doubled total revenues stemming from immigrant detention from 2005 through 2013.⁹⁶ These companies have been at the forefront of the development of family detention facilities⁹⁷ and restrictive alternatives to immigration detention.⁹⁸ The same companies have also profited from the increasing number of migrants convicted and sentenced to prisons and jails in the criminal justice system. For example, private companies manage over 17% of federal prisoners,⁹⁹ and federal prisons have been

⁹² See DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013 5 (2014), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf, archived at <https://perma.cc/X53G-FA97>. This number appears to have peaked in 2012 and has declined steadily since that time, but remains at historically high levels.

⁹³ See *Financial Incentives*, DETENTION WATCH NETWORK (Sept. 20, 2016), <https://www.detentionwatchnetwork.org/issues/financial-incentives>, archived at <https://perma.cc/PS7U-NAEM> (noting that private companies control 62% of immigration detention bedspace and that they "provide medical, transportation, security, food and other services within the facilities. Often, there are layers of contracting between the federal government and these service providers . . .").

⁹⁴ See discussion *infra* at Part II.A.3.a.2; Hylton, *infra* note 133; Olivares, *supra* note 1; see also MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 231 (2015) (describing the Hutto detention facility as a "retrofitted former state prison" where children were kept behind barbed wire, and parents were separated from their children as punishment for not obeying the detention facility's rules").

⁹⁵ In late 2016, CCA "rebranded" itself CoreCivic. See Bethany Davis, *Corrections Corporation of America Rebrands as CoreCivic*, (Oct. 29, 2016), <http://www.cca.com/insidecca/corrections-corporation-of-america-rebrands-as-corecivic>, archived at <https://perma.cc/H84C-VJYY>. Because the branding change is a change in name only and because all current reports refer to CoreCivic by its previous name, this article continues to use CCA to refer to the CoreCivic company.

⁹⁶ See Sasha Chavkin, *Immigration Reform and Private Prison Cash*, COL. JOURNALISM REV. (Feb. 20, 2013), http://www.cjr.org/united_states_project/key_senators_on_immigration_get_campaign_cash_from_prison_companies.php, archived at <http://perma.unl.edu/H4CP-YF3J>.

⁹⁷ See discussion *infra* notes 141–142.

⁹⁸ Marouf, *Community Based Alternatives*, *supra* note 87, at 25–26 (draft).

⁹⁹ E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, NCJ 239808, PRISONERS IN 2011 32 tbl.15 (2012). The Department of Justice recently announced its intention to phase out private prisons in the federal system. See *infra* at note 103. It is unclear whether this decision will survive the upcoming transition from President Obama to President-Elect Trump.

filled increasingly with migrants as the federal government has prioritized the prosecution of immigration crimes over the past decade.¹⁰⁰

Unsurprisingly, there is a growing literature laying out the concerns raised by immigration detention and the criminal incarceration of immigrants.¹⁰¹ Much of this literature urges reduced reliance on immigration detention and improvements in the conditions of detention in the cases where it is necessary. Critiques of increasingly privatized immigration detention can generally be characterized as falling into three broad categories: 1) conditions of detention critiques, 2) arguments of moral opposition to private immigration detention, and 3) arguments concerning the distorting effects of privatization on democratic accountability.¹⁰² The subsections below de-

¹⁰⁰ Emma Kaufman, *Legitimate Deference in Constitutional Prison Law* (forthcoming) at 15 (estimating that somewhere between 60% and 76% of the noncitizen population in federal prisons are housed in prisons that exclusively house foreign nationals and that all of these are low security facilities operated by private companies).

¹⁰¹ On immigration detention, see, e.g., Roxanne Lynne Doty & Elizabeth Shannon Wheatley, *Private Detention and the Immigration Industrial Complex*, 7 INT'L POL. SOC. 426, 427 (2013) (critiquing the rise of a profit-driven immigration detention system); Tanya Golash-Boza, *The Immigration Industrial Complex: Why We Enforce Immigration Policies Destined to Fail*, 3 SOC. COMPASS 295, 306 (2009) (same); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010) (criticizing the rise of an excessively punitive system of "imarceration"); Olivares, *supra* note 1, at 1027 (discussing the rise of family detention in response to the influx of Central American migrants in 2014 and arguing that "[t]he social and political subordination of immigrants, who embody the marginalized identities of criminal, non-citizen and person of color, feed the profit-seeking carceral machine"); Emily Ryo, *Legal Attitudes of Immigrant Detainees*, LAW & SOCIETY REVIEW, Vol. 51 (forthcoming) (2017) (documenting attitudes of detainees in the detention system); Emily Ryo, *Developing Legal Cynicism Through Immigration Detention*, SOUTHERN CAL. L. REV., July 2017 (Vol. 90) (forthcoming) (arguing that immigration detention generates legal cynicism toward the legitimacy of U.S. immigration policy). On immigrants in prisons that house exclusively foreign nationals, see, e.g., Kaufman, *supra* note 100 (raising constitutional arguments against the foreigners-only prisons currently proliferating in the U.S.). On both immigration detention and the criminal incarceration of foreign nationals, see García Hernández, *supra* note 1, at 1451–53 (critiquing "immigration imprisonment," which he defines to include both immigration detention and criminal incarceration relating to migration); see also Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a Post-Racial World*, 76 OHIO ST. L.J. 599, 650–53 (2015).

¹⁰² See, e.g., García Hernández, *supra* note 1, at 84 (criticizing the expansive scope and lack of rationale for much immigration incarceration and noting the role of private profiteering in generating pressures for expanded detention); Sarah Gryll, *Immigration Detention Reform: No Band-Aid Desired*, 60 EMORY L.J. 1211, 1255 (2011) (arguing that immigration detention has been needlessly expanded and urging a scaling back of immigration detention to cases where it is needed to protect the community or to prevent flight prior to removal proceedings); Kalhan, *supra* note 101, at 58 (arguing that private profit motives have played a role in creating an immigration detention system that often violates due process and is overly punitive); Marouf, *supra* note 87 (arguing that detention on its current scale violates international law in that it extends well beyond what is necessary to effectuate legitimate immigration law goals); Olivares, *supra* note 1, at 1027 (criticizing reliance on family detention); Ryo, *supra* note 101 (recording detained immigrants' own perceptions of the procedural unfairness that detention generates); Dora Schriro, *Immigration Detention Overview and Recommendations 2* (Oct. 6, 2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>, archived at <https://perma.cc/LH73-FLMQ> (raising concerns regarding detention conditions and due process); Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEENS L.J. 55, 98 (2014) (arguing that overly broad detention authority has resulted from the legal inapplicability of the

scribe and assess each of these arguments against privatization in the detention literature and then explore the extent to which these assessments have applicability beyond the sphere of immigration detention.

A. *Conditions of Detention Critiques*

Outside of the immigration detention context, operators of private prison facilities recently came under public fire. In August 2016, the Department of Justice (DOJ) revealed that it would not renew its contracts with private prisons because private facilities “simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office of Inspector General, they do not maintain the same level of safety and security.”¹⁰³ In that case, the weakness of private prisons when compared to public facilities was used to justify the eventual phasing out of private prison facilities at the federal level.

On August 29, 2016, eleven days after the DOJ announcement concerning its decision to phase out private prisons, Department of Homeland Security Secretary Johnson announced that DHS would also undertake a review of its use of private facilities.¹⁰⁴ The turnaround time for this evaluation was expeditious; Secretary Johnson indicated that a committee would report to him on the question by November 30, 2016.¹⁰⁵

There is literature — much of it in the form of reports from nongovernmental organizations, immigrants’ rights advocacy organizations and government agencies, but also including academic articles — arguing that

presumption against detention in the context of immigration, and arguing that the result is a punitive system that drives deportation); Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit and the Meaning of “Custody,”* 48 U. MICH. J. L. REFORM 879, 913 (2015) (arguing that an overly expansive interpretation of the Immigration and Nationality Act’s use of the term “custody” in Section 236(c) has resulted in the detention of many individuals who, legally and practically, should be subjected to alternatives to detention instead); see also INTER-AMERICAN COMM’N ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 130–43 (2010), <http://cidh.org/pdffiles/ReportOnImmigrationInTheUnitedStates-DetentionAndDueProcess.pdf>, archived at <https://perma.cc/M8N6-PK2D> (discussing the negative effect of detention on due process).

¹⁰³ Memorandum from Sally P. Yates, Deputy Attorney General, to the Acting Director of the Federal Bureau of Prisons (Aug. 18, 2016), <https://assets.documentcloud.org/documents/3027877/Justice-Department-memo-announcing-announcing.pdf>, archived at <https://perma.cc/5VZA-BQ7V>.

¹⁰⁴ Statement by Secretary Jeh C. Johnson on Establishing a Review of Privatized Immigration Detention, (Aug. 29, 2016), <https://www.dhs.gov/news/2016/08/29/statement-secretary-jeh-c-johnson-establishing-review-privatized-immigration>, archived at <https://perma.cc/KU5R-S3R3> (“On Friday, I directed our Homeland Security Advisory Council, chaired by Judge William Webster, to evaluate whether the immigration detention operations conducted by Immigration and Customs Enforcement should move in the same direction. Specifically, I have asked that Judge Webster establish a Subcommittee of the Council to review our current policy and practices concerning the use of private immigration detention and evaluate whether this practice should be eliminated. I asked that the Subcommittee consider all factors concerning ICE’s detention policy and practice, including fiscal considerations.”).

¹⁰⁵ *Id.*

conditions in private immigration detention are problematic, unlawful, or both.¹⁰⁶ “Conditions” in this context refers to the day-to-day circumstances affecting the safety and well-being of immigrants in detention. Criticisms of conditions appear in numerous reports coming out of private detention facilities across the country, which take aim at the daily indignities of substandard living arrangements in private facilities, as well as the ways that private detention interferes uniquely with detainees’ due process rights. These arguments suggest that public facilities provide better detention conditions. These arguments are explored and assessed below.

1. *Substandard Living Conditions*

Both public and private immigration detention facilities have been criticized on the ground that, in their efforts to save on costs, private detention operations generate conditions of detention that are unlawful, indecent or both. Reports on immigration detention centers often highlight specific problems relating to the conditions of immigrants’ confinement.¹⁰⁷ However, as discussed in further detail below, conditions problems described in this section have been identified in both publicly and privately operated facilities, and although some reports make comparative claims, in general, the reports do not offer rigorous comparative analyses of conditions of detention in public and private facilities.¹⁰⁸

Reports document migrants’ experiences with inadequate, unacceptable, or religiously inappropriate food in detention facilities.¹⁰⁹ They also describe the problems detainees have in accessing fresh water and hot water, sanitary toilets, and hygiene products like underwear and sanitary napkins.¹¹⁰ Inade-

¹⁰⁶ See reports cited in notes 107–40, *infra*.

¹⁰⁷ See, e.g., LIVES IN PERIL: HOW INEFFECTIVE INSPECTIONS MAKE ICE COMPLICIT IN IMMIGRATION DETENTION ABUSE 2 (Oct. 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/THR-Inspections-FOIA-Report-October-2015-FINAL.pdf>, archived at <https://perma.cc/49PX-87UK>; WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM 2–6 (June 2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>, archived at <https://perma.cc/CRZ7-7KYW> [hereinafter LIVES IN PERIL].

¹⁰⁸ See discussion *infra* at notes 131–135 and accompanying text.

¹⁰⁹ See, e.g., DETENTION WATCH NETWORK, EXPOSE AND CLOSE, ONE YEAR LATER 8–9 (Nov. 2013), <http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20One%20Year%20Later%20Report.pdf>, archived at <https://perma.cc/QT94-TMYA> [hereinafter EXPOSE AND CLOSE ONE YEAR LATER]; see also WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS IN IMMIGRATION DETENTION FACILITIES, BRIEFING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS 41 (Sept. 2015), http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf, archived at <https://perma.cc/ETZ4-M8TJ> (largely reiterating claims made in Detention Watch Report) [hereinafter USCCR, LIBERTY AND JUSTICE].

¹¹⁰ EXPOSE AND CLOSE ONE YEAR LATER, *supra* note 109, at 4–5; Alexandra Cole, ACLU FOUNDATION REPORT: PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA 16–17 (Mar. 2012), https://www.prisonlegalnews.org/media/publications/georgia_aclu_prisoners_of_profit_immigrants_and_detention_in_georgia_2012.pdf, archived at <https://perma.cc/QCE8-XJRV> [hereinafter ACLU, PRISONERS OF PROFIT].

quate medical care is the target of frequent criticism in these reports.¹¹¹ Lack of access to physicians is a common criticism, as are complaints of guards interfering with medical services, lack of access to mental health care, and mistreatment of individuals with mental illness.¹¹²

Observers of immigration detention facilities have also found that detainees sometimes lack access to adequate recreational facilities and libraries.¹¹³ They may be isolated from and deprived of visitation with their family members. Detainees are often transported to detention centers hundreds of miles from home, and even when loved ones can visit, immigrants in detention may be denied contact visits.¹¹⁴ Some facilities also have contracts with private providers that charge rates far higher than market for the videoconferencing services that detainees must use to communicate with family members.¹¹⁵

Reports provide evidence that some populations have particular vulnerabilities while in detention, yet are often insufficiently protected. Immigrants who identify as LGBT are at greater risk of sexual assault and other physical and emotional mistreatment by other detainees and by guards. Governmental standards for detention recognize that sexual orientation and gender identity can render detainees particularly vulnerable, and proscribe steps to address these vulnerabilities,¹¹⁶ but immigration detention facilities have not always adhered to these guidelines.¹¹⁷ Immigrants with mental illness also may require special solicitude and medical attention, but facilities

¹¹¹ See, e.g., FATAL NEGLIGENCE, HOW ICE IGNORES DEATHS IN DETENTION 3 (Feb. 2016), <https://www.detentionwatchnetwork.org/sites/default/files/reports/Fatal%20Neglect%20ACLU-DWN-NIJC.pdf>, archived at <https://perma.cc/7Z3C-TWBG>; EXPOSE AND CLOSE ONE YEAR LATER, *supra* note 109, at 3–5; see also USCCR, LIBERTY AND JUSTICE, *supra* note 109, at 33–36 (aggregating the reports of inadequate medical care compiled by several nonprofit organizations).

¹¹² USCCR, LIBERTY AND JUSTICE *supra* note 109, at 33–36.

¹¹³ See, e.g., USCCR, LIBERTY AND JUSTICE, *supra* note 109, at 43 (aggregating evidence from NGO reports that detainees in Georgia facilities are denied sufficient access to libraries and information about legal services); see also ACLU, PRISONERS OF PROFIT, *supra* note 110, at 15 (“[M]any detainees complained about delays in gaining access to the law library.”).

¹¹⁴ See, e.g., Conditions of Detention 2015, IMMIGRATION EQUALITY (Nov. 20, 2016) <http://www.immigrationequality.org/get-legal-help/our-legal-resources/detention-deportation/conditions-of-detention/>, archived at <https://perma.cc/U8ZP-6XYT> (describing no-contact visits as a common practice in immigration detention facilities).

¹¹⁵ EXPOSE AND CLOSE ONE YEAR LATER, *supra* note 109, at 7 (“For example, Tri-County, which operates video conferencing similar to Skype, charges \$.50 per minute and there is a \$.50 processing fee for any purchase. These fees are exorbitant when compared to regular Skype rates: \$.023 per minute or \$2.99 for unlimited calls per month.”).

¹¹⁶ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 82 (2011), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>, archived at <https://perma.cc/4M7C-CCFZ>; Memorandum from Thomas Homan on Further Guidance Regarding the Care of Transgender Detainees, U.S. Customs and Immigration Enforcement 1 (June 19, 2015), <https://www.ice.gov/sites/default/files/document/2015/TransgenderCareMemorandum.pdf>, archived at <https://perma.cc/FTR8-BKY2>.

¹¹⁷ See, e.g., USCCR, LIBERTY AND JUSTICE, *supra* note 109, at 37–39; EXPOSE AND CLOSE ONE YEAR LATER, *supra* note 109, at 10.

often reportedly fall short of providing the necessary care.¹¹⁸ Finally, the hundreds of children in detention have special needs. Yet facilities are frequently faulted for failing to have adequate child care support, for treating children inappropriately, and for failing to accommodate the needs of parents to care for their children.¹¹⁹

2. *Due Process Concerns*

Some of the criticisms of detention conditions focus not upon the daily indignities of confinement, but rather, on the broader due process concerns that detention conditions generate.

Some facilities reportedly lack adequate libraries, and many lack legal materials in languages other than English and Spanish. Because about 86% of detained immigrants represent themselves,¹²⁰ this lack of resources is a particularly significant impediment to an immigrant's ability to defend her case. Some facilities also have been criticized for detaining immigrants in ways that interfere with their ability to access counsel or have been faulted for interfering with attorney-client privilege by frustrating the possibility of confidential discussions.¹²¹ Because nearly one-third of detained immigrants adjudicate their claims remotely from within detention facilities,¹²² the conditions in facilities can have a direct (and negative) impact on the quality of those hearings.¹²³

Other constitutional concerns, including involuntary servitude,¹²⁴ are also identified in the literature. Facilities have been criticized for exploiting immigrant detainees through forced labor.¹²⁵ This can take the form

¹¹⁸ See, e.g., EXPOSE AND CLOSE ONE YEAR LATER, *supra* note 109, at 4–5; ACLU, PRISONERS OF PROFIT, *supra* note 110, at 18–19.

¹¹⁹ See, e.g., USCCR, LIBERTY AND JUSTICE, *supra* note 109, at 106.

¹²⁰ A recent, careful study revealed that only 14% of immigrant detainees nationwide are represented in their removal proceedings, although there is a great deal of regional variation in rates of representation. Eagly & Shafer, *Access to Counsel in Immigration Courts*, *supra* note 10, at 8 (“Across the six-year period studied [2007–2012], detained respondents went without counsel 86% of the time.”).

¹²¹ See, e.g., USCCR, LIBERTY AND JUSTICE, *supra* note 109, at 110–115; EXPOSE AND CLOSE ONE YEAR LATER, *supra* note 109, at 5–6.

¹²² See Eagly, *supra* note 82, at 934, 954.

¹²³ *Id.* at 165–71.

¹²⁴ The Thirteenth Amendment contains a prohibition on slavery and involuntary servitude “except as a punishment for crime whereof the party shall have been duly convicted.” U.S. CONST. amend. XIII, § 1.

¹²⁵ See *Private Prison Allegedly Forced Immigrant Detainees Into Labor, Paid Them Just \$1 Per Day*, THINKPROGRESS, July 11, 2017, <https://thinkprogress.org/private-prison-allegedly-forced-immigrant-detainees-into-labor-paid-them-just-1-per-day-7f55c77c5123#.hrfytibnl>, archived at <https://perma.cc/GBT3-AFPF> [hereinafter *\$1 Per Day*]; see also Jacqueline Stephens, *Colorado Judge Swats Down GEO’s Motion to Reconsider Class Action Lawsuit Brought by Captive Labor Force, New Evidence of GEO Labor Violations*, STATES WITHOUT NATIONS BLOG (Sept. 17, 2015), <http://stateswithoutnations.blogspot.com/2015/09/colorado-judge-swats-down-geos-motion.html>, archived at <https://perma.cc/HD32-5VNG>.

of uncompensated but mandatory tasks, or wildly undercompensated work.¹²⁶

3. *Assessing the Conditions Critiques*

The problems discussed above, and others, have been noted in voluminous literature from advocacy groups, government investigators, and scholars. But how do concerns about privatization intersect with these conditions critiques? One possibility is that the problems of detention conditions described above are generally worse in facilities run by private contractors than in public facilities. Indeed, several reports and articles suggest this is sometimes the case.¹²⁷ A recent study by Caitlin Patler and Nicolas Branic points to systematic evidence that detainees in private facilities are less likely to receive visits from their children than those in publicly-run facilities, for example.¹²⁸ Other data suggests that detained asylum seekers in private facilities are less likely to win their cases than those in other kinds of facilities.¹²⁹

But in many cases, systematic comparative evidence is lacking. Problems found in privately run facilities have also been reported in public facilities.¹³⁰ Some facilities are worse than others, and the documentation of violations from some facilities is more robust than from others. But allegations of conditions problems have surfaced across a wide variety of facilities, both public and private. Whether private facilities are characterized by worse conditions than public ones remains contested, and at least some evidence suggests that the situation may sometimes and with respect to certain conditions be the other way round.¹³¹

¹²⁶ See, e.g., Anita Sinha, *Slavery by Another Name: 'Voluntary' Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. CIV. RTS. CIV. LIB. 1 (2015) (describing the practice and arguing that it violates the constitution); see also *\$1 Per Day*, *supra* note 125.

¹²⁷ See, e.g., CENTER FOR AMERICAN PROGRESS, HOW FOR-PROFIT COMPANIES ARE DRIVING IMMIGRATION DETENTION POLICIES (Dec. 18, 2015), <https://www.americanprogress.org/issues/immigration/report/2015/12/18/127769/how-for-profit-companies-are-driving-immigration-detention-policies/>, archived at <https://perma.cc/V5PR-KDAS> (urging passage of legislation that would prohibit private contracting of detention and supporting interim measures to increase private accountability) [hereinafter CAP, FOR-PROFIT COMPANIES DRIVING DETENTION]; USCCR, LIBERTY AND JUSTICE, *supra* note 109 (criticizing detention for profit throughout).

¹²⁸ Am. Sociological Ass'n, *Private detention of immigrants deters family visits, study finds*, SCIENCE DAILY, Aug. 23 2016, www.sciencedaily.com/releases/2016/08/160823083211.htm, archived at <https://perma.cc/S8MF-DN88>.

¹²⁹ CENTER FOR AMERICAN PROGRESS, HOW FOR-PROFIT COMPANIES ARE DRIVING IMMIGRATION DETENTION POLICIES, *supra* note 127, at 8.

¹³⁰ See generally USCCR, LIBERTY AND JUSTICE, *supra* note 109 (aggregating allegations of poor conditions in both public and private facilities); ACLU, PRISONERS OF PROFIT, *supra* note 110 (same with regard to Georgia facilities); EXPOSE AND CLOSE ONE YEAR LATER, *supra* note 109 (calling for the closing of ten detention facilities, both public and private).

¹³¹ Compare USCCR, LIBERTY AND JUSTICE, *supra* note 109, at 41 (criticizing conditions in private facilities as worse than public ones) with Dissenting Statement of Commissioner Gail Heriot, USCCR, LIBERTY AND JUSTICE, *supra* note 109, at 180 ("[T]he distinction drawn in the Report between government-run and privately run facilities is especially misguided.

Complicating comparative efforts is the fact that it is sometimes difficult to engage in meaningful comparative analysis of conditions violations across public and private facilities. Two closely related but distinct examples highlight the problems and opportunities for comparative evaluation: family detention facilities and youth detention facilities.

a. Comparison Difficulties: Family Detention

Family detention facilities run by private companies are incredibly controversial. It is not hard to imagine why family detention might be the focus of a substantial critical discourse. Children in detention are a particularly sympathetic population. Several years ago, as the public learned that children in the private immigration detention facility in Hutto, Texas, were required to wear prison uniforms and eat on a prison timetable, and were also deprived of access to education,¹³² there was widespread disapproval. The Hutto family detention facility was ultimately closed after protracted negotiations over conditions.¹³³

Many activists who had fought against Hutto's family detention practices thought that the closure of Hutto meant the end of family detention in the United States.¹³⁴ That assumption was wrong. In 2014, there was an increase in the number of unaccompanied minors and family groups arriving at the southern U.S. border (and elsewhere) from the Northern Triangle countries of Central America.¹³⁵ The Obama Administration needed to process the legal claims of incoming migrants while also responding to the critics who accused the administration of failing to enforce the nation's immigration laws. The Administration settled on family detention — first in Artesia, New Mexico and then, when persistent criticism shut that facility down, in two new “family residential centers” in Karnes, Texas, and Dilley,

Curiously, the only non-rumor evidence of food services problems at immigration detention centers that I have been able to uncover is against a government-run location (the ICE-run Florence Service Processing Center in Florence, Arizona, not a privately run one.) and *id.* at 181 (“It is not clear why rumors about unsanitary conditions at privately run facilities made it into this report, while documented unsanitary conditions at ICE-run facilities did not.”).

¹³² Anabelle Garay, *As Detention Center Shuts Down in Texas, Advocates Worry About Future for Immigrant Families*, ASSOCIATED PRESS WIRE, Sept. 9, 2009, <http://tdonhutto.blogspot.com/2009/09/ap-as-detention-center-shuts-down-in.html>, archived at <https://perma.cc/VKG4-EVG3>; Margaret Talbot, *The Lost Children*, NEW YORKER, Mar. 3, 2008, www.newyorker.com/magazine/2008/03/03/the-lost-children, archived at <https://perma.cc/6RT5-AXGA> (describing conditions in the Hutto facility).

¹³³ Garay, *supra* note 132; see also ACLU, *ACLU CHALLENGES PRISON-LIKE CONDITIONS AT HUTTO DETENTION FACILITY* (Aug. 27, 2009), <https://www.aclu.org/aclu-challenges-prison-conditions-hutto-detention-center>, archived at <https://perma.cc/Y7VL-PZLF>; Wills S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG. 8, Feb. 4, 2015.

¹³⁴ See *id.* (“As co-director of the Immigration Law Clinic at the University of Texas, Hines helped lead the 2007 lawsuit against the Hutto facility, which brought about its closure in 2009 and the abolition of widespread family detention until last summer. When the Obama administration announced plans to resume the practice in Artesia, Hines was outraged. . . .”).

¹³⁵ *Id.*

Texas.¹³⁶ The federal government operated Artesia with the assistance of private contractors that provided goods and services, and the private companies GEO Group and Corrections Corporation of America (“CCA”) operated the Karnes and Dilley facilities.¹³⁷ Perhaps for this reason, criticisms of family detention often merge with criticisms of private immigration detention.¹³⁸

But fundamental criticisms of family detention apply regardless of whether the facility is publicly or privately operated. Research has highlighted the psychological harms that incarceration of any kind imposes on children. Children in detention exhibit high levels of stress, often lose weight, and are frequently sad.¹³⁹ Regardless of who runs the facility or how good the conditions are, detention appears to be psychologically difficult for children and families. The situation likely worsens when detention conditions are poor, but good conditions do not solve the problem. Simply put, detention under *any* conditions is simply not optimal for human beings in general, and for vulnerable populations like children in particular. Comparative conditions analysis may obscure that point.

Moreover, it may be particularly difficult to compare public and private family detention facilities because there are only three of these facilities in the country. Two are privately run, and management of the youth population in the government-run Berks facility is contracted out to a private company — the Nakamoto Group.¹⁴⁰ Thus, all critiques of family detention centers are inherently critiques of privatized facilities, and all conditions problems are attributable at least in some sense to private companies. It is not clear, however, that publicly-funded and publicly-run family detention facilities would produce better conditions. Indeed, for the few short months that the federal government did run a family detention facility in Artesia, New Mexico, criticism of conditions were widespread and condemnatory.¹⁴¹ Private

¹³⁶ *Id.*

¹³⁷ Olivares, *supra* note 1, at 964 (noting at Artesia was government-run) & at 990 (noting that Karnes and Dilley are run by GEO Group and CCA respectively).

¹³⁸ See generally Olivares, *supra* note 1; see also CHRISTINA PARKER, ET AL., GRASSROOTS LEADERSHIP, FOR PROFIT FAMILY DETENTION: MEET THE PRIVATE COMPANIES THAT ARE MAKING MILLIONS BY LOCKING UP REFUGEE FAMILIES (Oct. 2014), <http://grassrootsleadership.org/sites/default/files/uploads/For-Profit%20Family%20Detention.pdf>, archived at <https://perma.cc/5CZJ-A9K9> [hereinafter PARKER, FOR PROFIT FAMILY DETENTION].

¹³⁹ See Hylton, *supra* note 133 (reporting the existence of these issues in the Artesia facility); see also FAMILY DETENTION STILL HAPPENING, STILL DAMAGING, HUMAN RIGHTS FIRST (Oct. 2015), <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf> at 8-10 archived at <https://perma.cc/Y43D-UER8>.

¹⁴⁰ NAKAMOTO GROUP, INC., BERKS FAMILY RESIDENTIAL CENTER BI-ANNUAL COMPLIANCE REVIEW REPORT 4-5 (Feb. 27, 2009), <https://www.ice.gov/doclib/foia/dfra-ice-dro/compliance-report-berks-family-residential-center-0714172008.pdf>, archived at <https://perma.cc/KHL4-ZDNX>.

¹⁴¹ See, e.g., Hylton, *supra* note 133, at 8 (“Many of the volunteers in Artesia tell similar stories about the misery of life in the facility. ‘I thought I was pretty tough,’ said Allegra Love, who spent the previous summer working on the border between Mexico and Guatemala. ‘I mean, I had seen kids in all manner of suffering, but this was a really different thing. It’s a jail, and the women and children are being led around by guards. There’s this look that the kids

family detention is a problem, but at the core, this is because detention is a problem, not because the conditions of private family detention are comparatively worse than conditions of public family detention.

b. Missed Comparison Opportunities: Youth Detention

Over the past three years, tens of thousands of unaccompanied minor children — mostly from El Salvador, Guatemala, Honduras and Mexico — have been apprehended by CBP along the U.S.-Mexico border. This includes 27,754 children apprehended between the six month period of October 2015 through March 2016 alone.¹⁴² Conditions in the CBP-run facilities along the Southern border that house these recently arrived immigrants have been the subject of conditions-related litigation that suggest that these particular publically operated facilities are far from ideal.¹⁴³ But do the private facilities in which young immigrants thereafter find themselves, and in which they can spend substantially more time, raise similar concerns?

Many young migrants are detained under the auspices of the Office of Refugee (“ORR”) after they leave CBP custody.¹⁴⁴ Until 2003, the INS was responsible for the long-term detention of immigrant youth, but in that year, the job of detaining youth was transferred to ORR within the Department of Health and Human Services (“HHS”).¹⁴⁵ The Trafficking Victims Protection Reauthorization Act of 2008 expanded and redefined HHS’s statutory re-

have in their eyes. This lackadaisical look. They’re just sitting there, staring off, and they’re wasting away. That was what shocked me most.”).

The problems of cross-facility comparisons are not limited to the case of family detention. Even where there is a much larger number of facilities for potential comparison, as is the case for comparisons of detention conditions for LGBT populations, critical data is often unknown. *See, e.g.*, USCCR, LIBERTY AND JUSTICE, *supra* note 109, at 37–39 (summarizing several allegations of violation of detention conditions for LGBT detainees in federally-run facilities and noting that “[l]ittle documentation or testimony exists as to the compliance or lack thereof to LGBT standards by privately owned detention centers. However, LGBT accommodations within privately owned detention centers are an issue that deserves further investigation.”).

¹⁴² JENS MANUEL KROGSTAD, PEW RESEARCH CENTER, U.S. BORDER APPREHENSIONS OF FAMILIES AND UNACCOMPANIED CHILDREN JUMP DRAMATICALLY (May 4, 2016), <http://www.pewresearch.org/fact-tank/2016/05/04/u-s-border-apprehensions-of-families-and-unaccompanied-children-jump-dramatically/>, archived at <https://perma.cc/5HNN-RZT5>.

¹⁴³ *See, e.g.*, Doe v. Johnson, No. 15-00250 (D. Ariz. filed June 8, 2015); *see also* Wendy Feliz, Photographic Evidence of Conditions in CBP’s Short-Term Detention Facilities “Hieleras” Revealed, AMERICAN IMMIGRATION COUNSEL IMMIGRATION IMPACT (June 30, 2016), <http://immigrationimpact.com/2016/06/30/photographic-evidence-conditions-cbps-short-term-detention-facilities-hieleras-revealed/>, archived at <https://perma.cc/XF8A-WT57> (discussing the photographic evidence of the CBP short term facilities that are often referred to by incoming migrants as *hieleras*, ice-boxes, on account of their bitterly cold temperatures).

¹⁴⁴ Tyche Hendricks, *Hundreds of Migrant Teens Are Being Held Indefinitely in Locked Detention*, KQED, (April 11, 2016), <http://ww2.kqed.org/news/2016/04/11/hundreds-of-migrant-teens-are-being-held-indefinitely-in-locked-detention>, archived at <https://perma.cc/99B4-5R2M> [hereinafter *Migrant Teens*].

¹⁴⁵ Homeland Security Act of 2002, Pub. L. No. 107-296 116 Stat. 2205 § 462; *see also* U.S. DEP’T HEALTH & HUM. SERVICES OFFICE OF REFUGEE RESETTLEMENT, UNACCOMPANIED CHILDREN’S SERVICES, <http://www.acf.hhs.gov/programs/ortr/programs/ucs>, archived at <https://perma.cc/JHQ8-H8GF>.

sponsibilities to detained migrant children. Congress mandated that each child must “be promptly placed in the least restrictive setting that is in the best interest of the child.”¹⁴⁶ In some cases, however, that “least restrictive setting” involves detention.

In 2014, 57,000 children spent time in ORR custody.¹⁴⁷ Most children in ORR custody spend only a short time in custody before being transferred to the care of family members or other sponsors.¹⁴⁸ “[C]hildren in ORR custody receive care through a network of local providers, including private and nonprofit organizations, as well as governmental juvenile justice agencies.”¹⁴⁹ Hundreds spend months in high security “group homes” or jail facilities.¹⁵⁰ For example, the Yolo County Juvenile Detention Facility houses juveniles in ORR custody, and the county’s contract with ORR helps it fill critical budget needs.¹⁵¹

Because both publicly and privately operated facilities house migrant youth under ORR’s auspices, youth detention offers a possible site for useful comparative evaluation. To date, however, no systematic empirical comparison has been undertaken.

The literature on juvenile justice contains relatively little criticism of private facilities, particularly as compared to analyses of private adult facilities. Malcolm Feeley has sanguinely speculated that privatized juvenile detention facilities in the juvenile justice system have “not been on the radar of theorists against privatization” because:

Perhaps they perform satisfactorily, and what little we know about them informs our intuitions that they can provide benefits not so easily replicated in state-run institutions such as small size, home-like settings, greater flexibility, less coercive environments, and more treatment and rehabilitative programming. Certainly this has been conventional wisdom about community corrections among juvenile justice professionals for the past sixty years or so [S]mall-scale housing units with family-like and less threatening forms of control are preferable to larger institutions, and it is generally conceded that private operators are more able to administer such facilities.¹⁵²

¹⁴⁶ 8 U.S.C. § 1232(c)(2) (2008).

¹⁴⁷ Hendricks, *supra* note 144.

¹⁴⁸ *Id.*

¹⁴⁹ BYRNE & MILLER, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM, *supra* note 68, at 13–14.

¹⁵⁰ *Id.*

¹⁵¹ Hendricks, *supra* note 144 (“‘I’m really proud of our juvenile hall,’ [Yolo County probation chief Brent Cardall] told me. ‘We have a lot of great things going on.’ He showed me murals on the walls, and talked about the volunteers who come in to work with the kids. ‘The facility does look like a jail, but we are trying to make it more homelike,’ he said. Yolo County has a \$4 million contract to house up to 30 juveniles for the Office of Refugee Resettlement. That revenue helps Cardall cover the cost of general Probation Department staff.”).

¹⁵² Feeley, *supra* note 49, at 1430–31 (citations omitted).

If, as Feeley speculates, private juvenile detention providers generally avoid criticism because they provide services superior to public providers in this unique context, then perhaps the same could be true of immigration detention facilities that house youth. Like juvenile detention facilities,¹⁵³ immigration detention facilities house populations that are particularly vulnerable to exploitative treatment in detention arrangements that are more flexible and open-ended than traditional forms of adult incarceration. Perhaps private entities do a better job of serving these populations.

Alternatively, it may be the case that private juvenile detention facilities are simply understudied. There is certainly evidence that conditions in some privately run juvenile justice facilities are not good. The nonprofit Grassroots Leadership included a discussion about litigation in 2012 in which federal district judge Carleton Reeves “found that GEO was running one of the worst for-profit youth prisons in the U.S. In his 2012 court order, Judge Reeves wrote that the Walnut Grove juvenile detention center was, ‘a picture of such horror as should be unrealized anywhere in the civilized world.’”¹⁵⁴ GEO is the private company that has the largest share of the private market in providing immigration detention services to adults and children alike, and as of 2014, GEO operated 25% of all immigration detention.¹⁵⁵

In short, it is certain that there are some problems in both private juvenile justice facilities and private juvenile immigration detention facilities, but it is not possible to identify the scope of the problem or the extent to which public facilities do a better job. A third-party monitor for children in immigration detention has been in place systemically since the 1990s as a result of the settlement in *U.S. v. Flores*, which challenged the constitutionality of the conditions in INS detention facilities housing minor children.¹⁵⁶ Carlos Holguin of the Center for Constitutional Rights is the current court-appointed monitor responsible for overseeing children in immigration detention. He regards ORR control over immigrant youth detention as an improvement over the INS custodial system even as he has expressed concerns about the opaque system through which ORR makes its custody decisions.¹⁵⁷ But he (and previous monitors) have not expressed a position on the use of

¹⁵³ *Id.* at 1430 (“[J]uveniles are subject to more discretionary treatment than adults in more regimented prisons. Furthermore, privatization opponents might reasonably argue that because of their vulnerability, young people in custody require more state protection and involvement than adult inmates — not less. Thus [sic] a powerful case can be made that it is even more important that juvenile detention should fall within the scope of the theory against privatization.”).

¹⁵⁴ PARKER, FOR PROFIT FAMILY DETENTION, *supra* note 138, at 8 (citing Order Approving Settlement, *Charleston Depriest et al v. Christopher Epps and Tom Burnham*, U.S. District Court, Southern District of Mississippi, Cause No. 3:10-cv-00663-CWR-57. FKB at 6 (Mar. 2012)).

¹⁵⁵ *Id.* at 4.

¹⁵⁶ *Flores v. Reno*, Case No. CV 85-4544 (C.D. Cal. Jan. 17, 1997) Stipulated Settlement Agreement, https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf, archived at <https://perma.cc/VHJ7-7JSK>.

¹⁵⁷ Hendricks, *supra* note 144.

private providers to detain migrant youth. While the monitor may be well situated to assess the relative merits of public and private facilities, to date, no such empirical assessment exists.

4. *Comparative Conditions Conclusions*

At the moment, there are few existing studies that offer good data concerning the relative strengths of public and private facilities in any context. Sometimes, as with family detention facilities, appropriate comparative frameworks may be difficult to find. But even when potential comparative evaluations seem possible, as with ORR youth detention facilities or adult detention facilities — both of which exist in both state-run and privately-run facilities — there is little systematic comparative data.

It is possible that DHS will assemble this information for purposes of its own comparative assessment, which is scheduled to end in November 2016. But given the dearth of existing data, it seems likely that the comparative conclusions will entail a large element of speculation. It may also be irrelevant. Even if DHS's late 2016 review of private immigration detention facilities yields the conclusion that private facilities are generally inferior to public ones, this seems unlikely to have any meaningful policy effects in the short term. Even for an administration actually committed to phasing out private facilities, the Department of Homeland Security detention system would pose significant practical and political challenges. DHS detention is privatized to a much greater degree than federal prisons are.¹⁵⁸ Barriers to phasing out private immigration detention are significant. One senior ICE official estimated that phasing out private detention would require ICE to increase its detention capacity by 800% and would cost “billions of dollars.”¹⁵⁹ The appetite for this kind of change will be entirely lacking in the administration of Donald J. Trump.¹⁶⁰ Private immigration detention is here to stay for some time.

¹⁵⁸ Only about 12% of DOJ prisoners are in private facilities. Matt Zapatosky & 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/?utm_term=.e361677e4058, archived at <https://perma.cc/ZMD9-DRQ8>. In contrast, about two-thirds of immigration detention facilities are in private hands. Miriam Jordan, *Immigration Detention System Could be in Line for an Overhaul*, WALL STREET JOURNAL (Sept. 27, 2016), <http://www.wsj.com/articles/immigrant-detention-system-could-be-in-line-for-an-overhaul-1475004244>, archived at <https://perma.cc/P7AU-K3D2> (noting that “Roughly 10% of [immigrant] detainees are held in ICE-controlled facilities, more than two-thirds are in private detention centers, and the rest are in state or municipal facilities.”).

¹⁵⁹ Jordan, *supra* note 158.

¹⁶⁰ The stock prices of private prison companies CCA and GEO Corp shot up upon the news of Donald Trump's presidential victory. Debbie Carlson & Rupert Neate, *US Markets React Calmly to Trump Victory After Volatile Night*, THE GUARDIAN, Nov. 9, 2016, <https://www.theguardian.com/business/2016/nov/09/us-markets-react-donald-trump-victory>, archived at <https://perma.cc/FNG4-T2GB> (“Shares in America's biggest private prison operator spiked by more than a third as traders predicted that Trump may row back the US government's

Conditions criticism might be more effectively channeled if they focus on the claim that the literature already does substantiate: conditions in both public and private immigration detention facilities are problematic and need reform. Indeed, persistent criticisms of conditions in detention have already sparked some modest reforms in recent years. The government updated its detention standards with its 2011 Performance-Based National Detention Standards (PBNDS), which attempted to respond to criticisms about detention conditions and procedures. The PBNDS were supposed to “improve medical and mental health services, increase access to legal services and religious opportunities, improve communication with detainees with limited English proficiency, improve the process for reporting and responding to complaints, reinforce protections against sexual abuse and assault, and increase recreation and visitation.”¹⁶¹ However, both nongovernmental and governmental organizations have issued reports suggesting persistent gaps between the standards and actual practice,¹⁶² so much work remains to be done.

DHS recently announced a plan to begin unannounced inspections of detention facilities in an attempt to improve compliance with detention standards.¹⁶³ It is too early to gauge the effect that independent inspections will have on detention conditions. It seems likely that the initiative will be short-lived in light of the upcoming change of administrations. But that only makes it all the more important that advocates for immigrant detainees focus their energies on identifying the worst conditions problems and pressuring and litigating for their reform, regardless of who runs the detention facilities in question.

These same lessons probably apply to many other privatized aspects of immigration enforcement. The new administration is likely to expand the role of private actors in border enforcement and interior enforcement measures. Arguments about the relative merits of public enforcement actors over private enforcement actors are unlikely to move the policy needle. While efforts should be made to compile the best comparative data possible in an effort to build the record for future advocacy for eliminating private enforcement agents (if that is what the data support), current advocacy will likely need to focus on promoting best practices in a context where private detention and private enforcement are expanding, not contracting.

decision to phase out the private sector after finding it is failing prisoners. Shares in Corrections Corp Of America (CCA) were up 41% and rival Geo Group shares were up 18%.”)

¹⁶¹ DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE DETENTION STANDARDS (Feb 24, 2012), <https://www.ice.gov/factsheets/facilities-pbnds>, archived at <https://perma.cc/G6R6-UZUX>.

¹⁶² See, e.g., LIVES IN PERIL, *supra* note 107; USCCR, LIBERTY AND JUSTICE, *supra* note 109.

¹⁶³ Press Release, Office of the Inspector General, Department of Homeland Security, DHS OIG To Periodically Inspect CBP and ICE Detention Facilities (Mar. 15, 2016), <https://www.oig.dhs.gov/assets/pr/2016/oigpr-031516b.pdf>, archived at <https://perma.cc/UV2C-9NAC>.

B. *Moral Objections to Private Detention*

Private immigration detention can also be critiqued on moral grounds based upon objections to the very notion that private companies can profit from institutions that deprive human beings of their liberty. This subsection describes and critiques these arguments and then evaluates their potential applicability to other immigration privatization contexts.

1. *Repurposing the Moral Objections Against Private Prisons*

Moral criticisms of private forms of incarceration are quite common in the context of prison privatization and have also influenced critiques of immigration detention. These arguments do not turn on comparative evaluations of the relative merits and demerits of public and private facilities. It does not matter to proponents of these claims whether private facilities offer conditions that are better or worse than public ones, nor are they concerned with ascertaining which facilities are more cost effective. The core claim is that private profiteering from the deprivation of liberty of another human being is simply wrong. Much of this literature focuses on the punitive dimensions of criminal incarceration and on the state's purportedly unique monopoly on punishment.¹⁶⁴ Critics of the argument both reject the moral claim and point to the line drawing problems that complicate the clear moral reasoning of these arguments.¹⁶⁵ With respect to line drawing, the state is embedded in a capitalist market framework, such that private corporations profit from the construction and servicing of public facilities, even as public employees in detention facilities seek greater rents in the forms of wages and benefits. Indeed, it might be impossible to meaningfully distinguish between delegation to private companies and to public employees when it comes to questions like the motivations that drive them to do their job.¹⁶⁶ Attempts to draw lines between public and private actors in the contemporary market context frequently raise as many questions as they answer.¹⁶⁷

It is also not clear that the core notion that the state has a monopoly on punishment, a notion that often stands at the heart of moral objections to

¹⁶⁴ See, e.g., Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin., HCI 2605/05, 27 (2009) (Isr.) (observing that the “power of imprisonment and the other invasive powers that derive from it are therefore some of the state’s most distinctive powers as the embodiment of government”); see *id.* at 68–71 (concluding that privatization violates “the constitutional right to personal liberty”), http://www.privateci.org/private_pics/Israel_Ruling.pdf, archived at <https://perma.cc/G3KK-8BYH>; see also Dolovich, *supra* note 49 (advancing the state monopoly theory).

¹⁶⁵ Feeley, *supra* note 49, at 1434–36 (critiquing the state monopoly on punishment argument generally and the Academic Center decision particularly, and countering that there is no empirical basis for the state monopoly theory); Volokh, *supra* note 5, at 205 (finding the state monopoly theory untenable because of the impossibility of meaningfully distinguishing between delegation to public employees and private contractors).

¹⁶⁶ See generally Volokh, *supra* note 5.

¹⁶⁷ *Id.*

private prisons, translates neatly to immigration detention. Immigration detention is not legally considered to be punishment at all.¹⁶⁸ And private actors play a large role in nominally civil, quasi-punitive detentions like the long-term civil commitment of mentally ill, individuals deemed dangerous to society, and juveniles in detention in the juvenile justice system. Perhaps the state should be charged exclusively with all of these functions, and should maintain a monopoly wherever liberty is infringed, but this is a different and broader argument than the one often made against prison privatization.

Perhaps the state also has to have a monopoly on its defense of its sovereign borders. In support of this position, one might look to the Court's repeated insistence that state power is at its apex when it is defending its sovereign borders.¹⁶⁹ But strong power need not be exclusive power, and it does not seem to preclude shared or delegated power. Given the longstanding role that private companies have played in assisting states with border control — from private carriers to private companies that screen their own employees to ensure their legal work status — it is difficult to maintain that the sovereign responsibility of border control (to the extent that it actually exists¹⁷⁰) cannot be shared.

It is still possible, of course, to maintain that the state monopoly argument applies in the context of purportedly civil immigration detention. One might do this by rejecting the Court's repeated and problematic mantra that immigration detention is not punishment. The rejection of the false legal dichotomy of punishment and civil detention opens the door to the broader abolitionist critique that the use of detention is almost always illegitimate — no matter who manages it and no matter who is subjected to it, or why.

As Allegra McCleod has noted, although numerous theorists have strongly criticized the failures of the U.S. criminal justice system, the solutions that they have offered have not called for an abolition of that system.¹⁷¹ Swimming against this tide, she argues that, given the weight and consistency of these critiques, abolitionism, not incremental or cultural reform,

¹⁶⁸ *Wong Wing v. United States*, 163 U.S. 228 (1896) (distinguishing criminal punishment from administrative immigration detention).

¹⁶⁹ *See, e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 537–38 (1985).

¹⁷⁰ Although it seems firmly entrenched in domestic law, the theoretical claim that sovereign states have an absolute right to control their borders as against potential entrants is contested, and there are many examples internationally in which courts have required a state's border control prerogative to cede to individual interests. The European Court of Human Rights, for example, has found deportation unlawfully disproportionate in cases involving long-term residents with family members in EU member states. *See, e.g., Boulif v. Switzerland*, 33 Eur. Ct. H.R. 50 (2001); *Üner v. Netherlands*, App. No. 46410/99, Eur. Ct. H.R. (2006). Similarly, the Inter-American Commission of Human Rights has found the U.S. deportation of individuals with U.S. citizen family members to violate international legal norms. *Wayne Smith and Hugo Armendáriz v. United States of America*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10 (2010), <http://www.refworld.org/docid/502ccca62.html>, archived at <https://perma.cc/H7V5-RL5H>.

¹⁷¹ Allegra McCleod, *Prison Abolition and Grounded Justice*, 62 U.C.L.A. L. REV. 1156, 1160–61 (2015).

ought to be the central goal with regard to the criminal justice system. She defines “abolitionism” as:

a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement. These institutional alternatives include meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare; decriminalizing less serious infractions; improved design of spaces and products to reduce opportunities for offending; urban redevelopment and “greening” projects; proliferating restorative forms of redress; and creating both safe harbors for individuals at risk of or fleeing violence and alternative livelihoods for persons otherwise subject to criminal law enforcement.¹⁷²

Drawing on the framework offered by abolitionists opposed to slavery, she calls for the adoption of a prison abolitionist framework that focuses on creating a path toward “decarceration and substitutive social — not penal — regulation.”¹⁷³ This framework encompasses all state-mandated confinement — not just criminal incarceration but civil detention as well,¹⁷⁴ including immigration detention.¹⁷⁵ McLeod urges the creation of a roadmap for the dismantling of the criminal justice system as we know it and the substitution of robust social regulation aimed at optimizing human thriving and freedom.

2. *Assessing the Moral Claims*

Ultimately, abolitionist grounds seem to offer the stronger axis around which to frame a moral critique of both immigration detention and immigration imprisonment than do arguments about the illegitimacy of private detention. This is not to say that arguments against privatization and the profit motive in detention are inconsistent with abolitionist goals.¹⁷⁶ Many critics of private immigration detention have couched their claims in ways that are

¹⁷² *Id.* at 1161.

¹⁷³ *Id.* at 1163.

¹⁷⁴ *Id.* at 1164.

¹⁷⁵ The focus of McLeod’s argument is about the criminal justice system and related civil detention. She does not focus explicitly on immigration detention, although she mentions it at scattered points in her article. *See id.* at 1178, 1181 at n.88 & n.110 (discussing the use of solitary confinement in immigration detention) and at 1196 (discussing the role of private companies in supporting the carceral state). But the abolition of human cages is the broader objective, and immigration detention certainly falls under this rubric.

¹⁷⁶ Indeed, McLeod’s discussion of abolitionism expressly critiques the role of private actors in the carceral state, although she offers this critique as one piece of evidence among many of “[t]he deep, structural, and both conscious and unconscious entanglement of racial degradation and criminal law enforcement.” McLeod, *supra* note 171, at 1196–97. The closing of private DOJ prisons, to the extent that it decreases prison capacity and reliance on incarceration, is entirely consistent with a gradual abolitionist position.

entirely consistent with broader abolitionist claims, and that indeed rest upon similar concerns over the racialized and degrading nature of the carceral state.¹⁷⁷ But arguments that center private detention facilities as the site of immigration detention's woes can be read to implicitly endorse publicly operated detention facilities and migrant incarceration.

In an abolitionist frame, privatization is symptomatic, not causal, as it is only one component of a broader illegitimate system that must be dismantled. Privatization facilitates the kind of ad hoc instrumentalism that pervades immigration enforcement.¹⁷⁸ Such instrumentalism does not just involve opportunistic choices of legal tools (criminal, immigration, or national security, for example), but also opportunistic choices of actors — federal, state and local, public and private. Privatization provides one way for the state to obscure its wrongs and evade its responsibilities, and as such, its eradication may be a desirable goal along the road to abolition. But its eradication will not be sufficient to eradicate the underlying conditions problems — let alone problems of transparency and accountability — in immigration detention because the controlling governmental bodies are not motivated to solve those problems. Even if conditions and accountability problems could be solved, a carceral system rooted in the illegitimate and racialized commodification of human beings would remain in place. Technocratic fixes improve the situation, but solving the root problems of immigration detention requires that its mundane usage be rejected entirely.

3. *Generalizable Lessons*

The moral claims against private detention turn on particular claims about state power and morality in the context of liberty interests. Other areas of immigration privatization seem removed from this sphere. But this review of the moral debate around private detention may offer some generalizable lessons about privatization discussions.

Like moral objections to private prisons, moral objections to private detention are intuitively appealing. Profiteering off of the incarceration of a human being seems intuitively wrong. These arguments also have the potential for pragmatic payoff since any effort to phase out private facilities will shrink detention capacity, at least temporarily. But these arguments have downsides. Most significantly, the argument implicitly validates the moral standing of the state to administer immigration detention facilities — a concession that might inadvertently encourage the expansion of the public carceral state in certain political moments.

¹⁷⁷ See generally García Hernández, *supra* note 1.

¹⁷⁸ For a discussion of ad hoc instrumentalism in immigration law, see generally David Alan Sklansky, *Crime, Immigration and Ad Hoc Instrumentalism*, 15 *NEW CRIM. L. REV.* 157 (2012).

C. *Democratic Accountability Arguments*

A final set of private detention critiques falls somewhere between the pragmatic comparative conditions claim and the more absolute moral claims. These critiques take aim at the ways that private actors have distorted the democratic process by lobbying for a profitable but unjustifiable carceral expansion in the immigration enforcement sphere while simultaneously decreasing the democratic accountability of immigration detention practices across detention facilities. This section describes and assesses these arguments and then explores their broader significance.

1. *Assessing Systemic Claims*

For critics focused on the political dimensions of privatization, it is not necessary to compare public and private detention facilities to assess the relative harms of privatization. They argue instead that the existence of poor detention conditions and overly broad reliance on detention serve as evidence that private companies have successfully and harmfully commoditized immigrant detainees, thereby manipulating policies affecting these vulnerable populations in ways that serve their own economic ends.¹⁷⁹ Expanded reliance on private prison companies to run immigration detention facilities (and particularly family detention facilities) not only accounts for some of the inadequacies of the conditions of immigration detention but more fundamentally explains why immigration detention has expanded as rapidly and harshly as it has in recent years. In this framing, privatization is problematic precisely because of its important role in fueling the expansion of immigration enforcement, including immigration detention, and in decreasing incentives for public accountability.

Roxanne Doty and Elizabeth Wheatley, for example, theorize a contemporary public-private collaboration that amounts to an “immigration industrial complex”¹⁸⁰ in which the state “is increasingly mobile and fluid, often blurring boundaries between public and private sectors and in the process increasing the power of both, especially *vis-a-vis* the population of persons in detention or potentially subject to detention.”¹⁸¹ Other scholars and activists have developed similar critiques, arguing that private prison companies have driven the rapid expansion of immigration detention through political efforts undertaken in the face of criminal justice reform that could portend declining criminal incarceration rates.¹⁸² Private companies operate as part

¹⁷⁹ See Olivares, *supra* note 1, at 1005 (“The immigrant, then, is simply a commodity, representing profits to be gained or lost depending on whether or not governmental policy shifts towards alternatives to detention rather than continued imprisonment.”)

¹⁸⁰ Doty & Wheatley, *supra* note 101, at 427.

¹⁸¹ *Id.* at 428.

¹⁸² Olivares, *supra* note 1, at 985–90 (charting the story of increased private involvement in immigration detention as demand for criminal incarceration decreased). Judith Resnick also notes the pivot of GEO group from convicts to immigrant detainees at the time that California

of a broader network of third parties — including “a host of private prison corporations, local- and foreign-government entities, financial investors, service providers, and prison employees”¹⁸³ — who exploit the path dependency and the classic bureaucratic expansionism of federal government actors.¹⁸⁴ Expanding immigration detention is therefore a questionable policy choice that is promoted by particular private entities precisely because those entities stand to profit from the expansion.¹⁸⁵ In this way, it has been likened to the famed military-industrial complex first described by President Eisenhower.¹⁸⁶ The expansion of detention is undertaken without regard to the public good in response to private demand.¹⁸⁷

In these accounts, private actors involved in the expansion of the carceral immigration control system also contribute to the opacity of that system. One clear difference between private and public facilities is that privately-managed facilities add an additional layer of bureaucracy to an already opaque system. This suggests that there may be unique accountability problems in private facilities.¹⁸⁸ Marie Gottschalk notes that:

entered its era of realignment. Judith Resnick, *Globalization(s), Privatization(s), Constitution-alization and Statization*, 11 I-CON 11 162 (2013). See PARKER, FOR PROFIT FAMILY DETENTION, *supra* note 138, at 10 (“Since 2003, CCA and the GEO Group have combined to spend more than \$32 million lobbying the federal government, including direct lobbying of the Department of Homeland Security, the agency responsible for contracts to detain immigrant families. GEO Group and CCA have employed an impressive mix of influential Republican and Democratic lobbyists, including former high-ranking DHS officials.”); see also Gottschalk, *supra* note 94. For a discussion of the limits of decarceration efforts in the form of decriminalization, see generally Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015).

¹⁸³ García Hernández, *supra* note 1, at 1507.

¹⁸⁴ *Id.* at 1498.

¹⁸⁵ Sasha Chavkin, *Immigration Reform and Private Prison Cash*, COLUM. JOURNALISM REV. (Feb. 20, 2013), http://www.cjr.org/united_states_project/key_senators_on_immigration_get_campaign_cash_from_prison_companies.php, archived at <http://perma.unl.edu/H4CP-YF3J> (documenting the significant increases in private prison corporate revenue and lobbying expenditures); Olivares, *supra* note 1, at 990; Resnick, *supra* note 182, at 184.

¹⁸⁶ See Golash-Boza, *supra* note 101, at 295, 306 (“The discord between rhetoric and reality when it comes to immigration policy points to the importance of using a framework similar to that of the prison industrial complex and the military industrial complex to understand the immigration industrial complex. These three complexes share three major features: (a) a rhetoric of fear; (b) the confluence of powerful interests; and (c) a discourse of otherization. With the military build-up during the Cold War, the ‘others’ were communists. With the prison expansion of the 1990s, the ‘others’ were criminals (often racialized and gendered as black men). With the expansion of the immigration industrial complex, the ‘others’ are ‘illegals’ (racialized as Mexicans). In each case, the creation of an undesirable other creates popular support for government spending to safeguard the nation.”).

¹⁸⁷ This claim is echoed by nonprofit advocacy organizations opposed to private immigration detention. See, e.g., PARKER, FOR PROFIT FAMILY DETENTION, *supra* note 138, at 10. (“How do for-profit, private prison companies with terrible track records keep piling up federal contracts? A timeworn adage says ‘money talks.’ And a handful of the most powerful lobbyists on Capitol Hill do the talking for GEO, as well as for their competitor Corrections Corporation of America. As will be recounted below, CCA was the operator of a disastrous experiment with mass detention of immigrant families that was closed down by the Obama administration just five years ago.”).

¹⁸⁸ See, e.g., USCCR, LIBERTY AND JUSTICE, *supra* note 109, at 157–58 (advancing this claim).

Private prisons and correctional services are subject to even less accountability and scrutiny than public ones. Like other privatized industries and social services, private jails and prisons are not subject to the federal Administrative Procedures Act (APA) and federal and state Freedom of Information Acts (FOIA). Administrators of private facilities regularly rebuff FOIA and other requests for information regarding key issues such as inmate deaths, health care conditions, the use of deadly force, and the mistreatment of inmates. In at least one case, CCA said it was turning down a request because the information sought was deemed to be a ‘trade secret.’¹⁸⁹

Dora Schriro’s influential 2009 report on immigration detention also notes the accountability problems inherent in private immigration detention. Schriro’s report, which focuses primarily on the problems with a civil detention system that is operating as a punitive regime, has been an important starting point for many later critiques of immigration detention.¹⁹⁰ Privatization does not play a highly visible role in the Schriro report, and yet the report reflects deep skepticism of privatization. On one hand, the report in its entirety suggests that problems in immigration detention are general problems of delegation and accountability. As framed, one could conclude that the same problems arise whether ICE is contracting with a private company or with a local government agency. As Schriro notes, a substantial number of ICE facilities are actually operated by state or local governments pursuant to intergovernmental agency service agreements (“IGSA”) with ICE.¹⁹¹ The remainder are either owned by ICE but operated by private contractors, or owned outright by private companies who operate the facility under contract with ICE.¹⁹²

But Schriro’s report suggests that privatization negatively affects accountability in at least two other ways. First, her report suggests that ICE lacks information about what is happening in private facilities because they do not have adequate monitoring systems for detainees within them. Very

¹⁸⁹ Gottschalk, *supra* note 94, at 72. Although she couches the criticism in the language of “accountability and scrutiny,” her concern here appears to be one of basic transparency — the ability of the public to access information from private facilities.

¹⁹⁰ Schriro, *supra* note 102. Several later commentaries drew upon the framework of this report although they have tended to generate more capacious critiques. See, e.g., García Hernández, *supra* note 1, at 1507–10; Kalhan, *supra* note 101, at 49.

¹⁹¹ Schriro, *supra* note 102, at 9–10. At the time of the report, “50 percent of the detained population is held in 21 facilities. These include seven Service Processing Centers (SPC) owned by ICE and operated by the private sector; seven dedicated Contract Detention Facilities (CDF) owned and operated by the private sector; and seven dedicated county jail facilities, with which ICE maintains intergovernmental agency service agreements (IGSA) The other 50 percent of the population is detained primarily in non-dedicated or shared-use county jails through IGSA.” *Id.*

¹⁹² *Id.*

few of ICE's own agents are actually charged with facility oversight.¹⁹³ Second, even when monitoring occurs and problems are detected, there is no systemic termination of contracts with entities that violate regulations governing conditions.¹⁹⁴ As Schriro frames the problem, ICE lacks the ability to adequately supervise its delegated authority and lacks the independent capacity to replace its delegated designees when they fail to live up to contractual obligations.¹⁹⁵ She accordingly recommends increased ICE monitoring, but also writes that, "ICE should create capacity within the organization to assess and improve detention operations and activities without the assistance of the private sector. ICE should discontinue contracts and IGSA's when the facility's performance is unsatisfactory."¹⁹⁶

Discontinuing contracts with noncompliant contractors is entirely consistent with her insistence on the need for administrative oversight and accountability. Legislation has been introduced to facilitate this goal,¹⁹⁷ but the failure of the legislature to enact and the executive branch to enforce strong contract termination provisions speaks to the limits of political appetite for serious detention reform. Schriro's suggestion that ICE "create capacity within the organization to assess and improve detention operations and activities without the assistance of the private sector" separately suggests that private actors are not reliable and responsive monitors of internal detention conditions, whereas ICE would be. Given all of the problems the Schriro report itself finds in the heavily privatized immigration detention system, it is unsurprising that the report is skeptical of private companies' ability to effectively manage these facilities. But it is not at all clear why ICE should be viewed as a more responsive actor given the problems in ICE-run facilities.

Private actors are not the only ones empowered to avoid accountability in the current system. The lack of accountability in the structure of private detention is a design feature of the system. Government agencies could

¹⁹³ Schriro, *supra* note 102, at 15 (noting the lack of ICE monitors in the vast majority of detention facilities). Monitoring is generally performed by private or IGSA contractors, and ICE does not even independently review many of these agents. *Id.* One report recommendation is that ICE "establish and maintain a presence at each facility in which its population is placed." *Id.* at 29.

¹⁹⁴ *Id.* at 23 ("ICE should affirm the conditions of detention that it seeks to provide for a Immigration Detention population and then assess each facility's performance and physical condition to determine whether to continue to use the facility in its current capacity, modify its mission, or cancel the contract.").

¹⁹⁵ *Id.* at 19. Constitutional concerns arising out of this delegation to private contractors in some ways mirror those create by Congressional delegation to administrative agencies and raise similar constitutional concerns. For a rich discussion of the parallels, see generally Metzger, *supra* note 5.

¹⁹⁶ Schriro, *supra* note 102, at 19.

¹⁹⁷ Accountability in Immigration Detention Act of 2015, H.R. 2314, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/2314/text>, archived at <https://perma.cc/DP5Q-ZQY3> (requiring, among other things, termination of contracts after two consecutive failed inspections).

structure contract terms to include penalties for failed information sharing.¹⁹⁸ The federal government could also open up facilities to public scrutiny by subjecting the private facilities to the same Administrative Procedures Act (APA) and Freedom of Information Act (FOIA) requirements for developing regulations and responding to public requests as is required of public facilities.¹⁹⁹ The fact that they have not done so suggests more than just the recalcitrance of private actors — it points to the complicity of their government supervisors.

Schriro's recommendation to develop public capacity to monitor private detention also highlights another problem with private detention facility accountability: often the government agencies charged with running immigration detention have no alternatives if they are not happy with the way a private facility is being monitored or run. Capacity simply does not exist. But shoring up alternatives to faulty private providers requires either a further expansion of the carceral state or a shrinking of administrative detention. Existing mandatory detention requirements and the bureaucratic imperatives that they have helped to generate have pushed in the direction of expanded state capacity, but supervisory and sanctioning capacity remains insufficient.

The democratic accountability critiques illuminate the complex interactions between public and private entities in the detention sphere. Unlike the moral anti-privatization critiques, which rely on the identification of bounded public and private entities, the democratic accountability critiques highlight the intertwined and hybrid nature of public and private functions. The involvement of private actors does not displace state power, but rather, amplifies state power while deliberately decreasing state accountability. The policy infrastructure surrounding immigration enforcement and detention has been shaped by profit motives advanced in a context of bureaucratic complicity.²⁰⁰

These critiques clarify the important point that private actors are not the only ones who hope to reap profits from federal immigration enforcement initiatives. Certain state, local and federal actors also benefit as market actors from expanded resources in the area of immigration detention.²⁰¹ Public

¹⁹⁸ For a discussion of the promises and pitfalls of government agencies structuring accountability for private actors through contract, see, e.g., Freeman, *supra* note 5, at 667–71; Minow, *supra* note 5, at 1259 n.96 (citing ROBERT D. BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* 6 (2001)).

¹⁹⁹ Freeman, *supra* note 55, at 586–87. The federal government has made several recent moves in this direction in the immigration detention area. See discussion *infra* at notes 206–207.

²⁰⁰ See, e.g., García Hernández, *supra* note 1, at 84.

²⁰¹ *Id.* at 1509–10 (“Border analyst Tom Barry explains that these ‘public-private prison[s]’ are ‘publicly owned by local governments, privately operated by corporations, publicly financed by tax- exempt bonds, and located in [economically] depressed communities.’ The public-private consortium then turns its attention to securing an agreement with one of the various federal government agencies involved in immigration imprisonment — ICE, BOP, or USMS. The federal government receives prison beds while the local governments and private

employees like the prison guards unions, county agencies that benefit (or think they may benefit) financially from contracts with ICE, and under-scrutinized bureaucrats in federal administrative agencies are also key players in these distortions of public policy.²⁰² Many counties have viewed immigration detention as a potential profit or employment center.²⁰³ Even if they are sometimes wrong, that does not mean that they do not have a stake in promoting the expansion of unnecessary detention.

Commentators who view the problems of privatization as a product as well as a driver of market distortions of democracy are skeptical as to whether true accountability in immigration detention is possible. Their analysis helps to make sense of the fact that DHS thus far has failed to impose sufficient requirements for transparency and accountability on private contractors. Ongoing accountability problems appear to be at least as much the responsibility of government agencies as of private contractors.²⁰⁴ Private facilities must, of course, be held responsible for operating facilities in ways that prevent the public from obtaining information about operations and conditions. But in the case of immigration detention, publicly-run facilities have hardly been a model of transparency either, which suggests that the government has not simply failed to check non-transparent operations in private facilities, but has actually helped to create these non-transparent detention operations in the private sphere that accords with the non-transparent approaches that public facilities themselves follow.

Accountability requires not only more systematic governmental inspections of private facilities²⁰⁵ and independent inspections,²⁰⁶ but also more publicly available reports on detention conditions, and more robust griev-

operators receive revenue. Importantly, because public-private prison partnerships leave ownership in the local government's hands, the public entities remain liable for financial shortfalls that arise when the revenue stream falls below the level necessary to operate or maintain the facility — that is, when there are not enough inmates to meet prison expenses. Local officials, therefore, have every reason to pressure the federal government to maintain a steady supply of immigration prisoners.”)

²⁰² García Hernández,, *supra* note 1, at 1507–11.

²⁰³ *Id.* at 1509–11; *see also* Doty & Wheatley, *supra* note 101, at 462.

²⁰⁴ *See, e.g.*, LIVES IN PERIL, *supra* note 107 (alleging that existing governmental oversight agencies like the Office of Detention Oversight (“ODO”) do not perform adequate monitoring of detention facilities). For background on the creation of ODO, *see* *Written testimony of U.S. Immigration and Customs Enforcement Office of Detention Policy and Planning Assistant Director Kevin Landy for a House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement hearing on Performance-Based National Detention Standards (PBNDs) 2011, HOMELAND SECURITY* (Apr. 30, 2014), <https://www.dhs.gov/news/2012/03/27/written-testimony-us-immigration-and-customs-enforcement-house-judiciary>, *archived at* <https://perma.cc/38CY-VWJB>; *see also* Chico Harlan, *Inside the Administration's \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html?hpidHP_rhp-top-table-main_asylumprofit-920pm-1%3Ahomepage%2Fstory, *archived at* <https://perma.cc/42YN-W9SW> (noting the role of ICE in structuring non-transparent contracting processes with private detention operators).

²⁰⁵ *See, e.g.*, BETHANY CARSON & ELEANA DIAZ, GRASSROOTS LEADERSHIP, PAYOFF: HOW CONGRESS ENSURES PRIVATE PRISON PROFIT WITH AN IMMIGRANT DETENTION QUOTA 4

ance procedures.²⁰⁷ But moving these reforms forward in a meaningful way may require a fundamental shift in public sentiment toward immigrants, and particularly toward immigrant detainees. As long as society lacks a commitment to the well-being of human beings who are not citizens but who are subject to the jurisdiction of U.S. laws, both public and private facilities will be able to operate in ways that consume unnecessary public resources, violate the rights of detainees and provide little information to the public about operations and practices.

2. *Generalizable Lessons*

The lessons from the democratic accountability critique of detention has widespread applicability to immigration enforcement privatization. As the government gives more money to private actors to build fences and walls, to supply drones and to provide monitoring technologies, these private actors develop a vested interest in the expansion of these enforcement technologies. Their rent seeking behavior may carry outsized weight in shaping policies that ultimately have significant negative effects on vulnerable populations. But their interests are also bound with that of many public actors. Genuine systemic reform requires attention to the problematic rent-seeking of public and private actors, and to the fluidity of those categories of actors.

CONCLUSIONS: PARADIGMS OF PRIVATIZATION

Immigration detention is only one site of the privatization of immigration law. Numerous aspects of the immigration law system have been privatized, and many of those privatizations do not look like immigration detention. The role of VOLAGs in resettling refugees, of NGOs in assisting trafficking victims, and of private contractors in maintaining the E-Verify database raise concerns of their own, but they are different concerns from the ones highlighted in the example of immigration detention. The literature concerning private immigration detention and the critiques of privatization that emerge in the immigration detention context are unique and specific to detention. Nevertheless, the detention example suggests some broader les-

(2015), http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf, archived at <https://perma.cc/UC2Q-9K4N> [hereinafter PAYOFF].

²⁰⁶ For criticisms of the lack of oversight independence and suggestions for reform, see, e.g., LIVES IN PERIL, *supra* note 107, at 10–13, 29–30. Outside of the government, initiatives are underway to generate networks of independent inspectors. See, e.g., CIVIC-Community Initiatives for Visiting Immigrants in Confinement, *CIVIC Independent Monitor*, IDEALIST (May 12, 2016), <http://www.idealists.org/view/volop/SHB3H433HTW4/>, archived at <https://perma.cc/XE26-Q6F3> (job posting).

²⁰⁷ The 2011 PBNDS do specify guidelines for grievance procedures in detention centers. See ICE DETENTION STANDARDS, GRIEVANCE STANDARDS (Feb. 2013), https://www.ice.gov/doclib/detention-standards/2011/grievance_system.pdf, archived at <https://perma.cc/9V9P-AS2W>. Recent reports suggest implementation may be falling short in at least some facilities. See, e.g., LIVES IN PERIL, *supra* note 107, at 13.

sons for evaluations of privatization in various aspects of immigration law and immigration law enforcement.

First, criticisms of private detention facilities often lack precision. They pivot with insufficient specificity between and among private facilities, public facilities that are run by private companies and public facilities that use private contractors to provide specific services within an otherwise public facility. In this last category, the particular role of private contractors can be quite minor, such as providing food services or telephone services, although these “minor” services can have a substantial impact on the lives of detainees. And contractors can also occupy a much wider swath of services within a facility, as the example of the Nakamoto Group in the Berks “family residential center” demonstrates. To the extent they genuinely seek information about the relative merits of private providers, critiques of privatization across immigration law contexts could offer more precise information about the scope of privatization in particular contexts and could also be more specific about the particular role(s) of private companies when seeking to analyze the specific problems created by the private service provider.

Second, arguments that private providers perform specific tasks worse than do public ones should be grounded in illustrative evidence. Information that a private facility offers poor conditions or that private services are inadequate to the task is important information, but it is often offered as an argument against privatization without adequate demonstration that public facilities or providers would actually do a better job. Given the political vulnerabilities of the immigrants subjected to the practices of immigration enforcement, it may be that public providers have little incentive to provide better services.

Finally and relatedly, critiques of privatization should not be advanced in ways that obscure the underlying question of whether the institution or innovation itself — be it detention, a refugee resettlement program, an employment verification system or trafficking victims assistance — in and of itself is a desirable thing. That question should precede and structure the scope of questions about whether private or public service providers are superior.

It is important to acknowledge the political and practical value of anti-privatization claims. Arguments against privatization have been a useful means through which to advocate for improved detention conditions and to leverage political opposition to the expansion of detention. By not questioning immigration detention — a historically embedded and politically popular practice — but by instead questioning the private provision of immigration detention, anti-detention advocates sometimes shifted the terms of the discussion from an inquiry into the rights of noncitizens into one concerned primarily with the profiteering conduct of a few isolated private companies. This strategy appeared to be vindicated in recent months when DHS initiated a wide-ranging inquiry into the adequacy of private detention. Had that in-

quiry yielded the conclusion that private facilities should be phased out and had that proposal been implemented, the end result could have been a significant curtailing of reliance on immigration detention in a Clinton administration. Such an outcome could have vindicated the decision to focus on private providers as a strategic advocacy choice.

On the eve of a Trump administration, the strategic value of the anti-privatization advocacy around immigration detention is more questionable. Election results will likely be read by the incoming administration to favor the further privatization of a range of governmental activities, including immigration enforcement and detention. Private facilities are also likely to benefit from the emergence of a more aggressive enforcement and detention strategy. Anti-privatization strategies seem far less likely to succeed in this changed political climate.

In recent years, concerns about privatization may have sometimes sapped attention from harder questions about the limits of state power vis-à-vis individual rights. In the months and years to come, it will not be possible to avoid the hard questions.

