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Private Prisons, Private Governance: Essay On Developments In Private-Sector Resistance To Privatized Immigration Detention

Danielle C. Jefferis*

INTRODUCTION

Two diametrically opposed events impacting America's for-profit prison industry occurred within two weeks of each other in 2019. On March 19, 2019, the U.S. Supreme Court announced its opinion in *Nielsen v. Preap*.¹ In that case, a majority of justices upheld a broad interpretation of the federal government's immigration detention authority with respect to certain noncitizens in removal proceedings.² In effect, the Court's decision expanded the category of people subject to mandatory migration-related confinement—a system of incarceration that currently incarcerates more than 50,000 people per day in mostly private prisons and continues to expand.³ The decision marked a victory for the private prison industry.

However, just two weeks prior, the industry experienced a significant loss. In an unprecedented move, JPMorgan Chase, one of the nation's largest banks, announced it would no longer finance or invest in private prison corporations.⁴ Wells Fargo soon followed.⁵ These banks' divestment from the private-prison industry represented a loss of millions of dollars of capital for the corporations managing and profiting from privatized immigration detention, sending a compelling signal from Wall Street that a company's support for the Trump administration's "zero-tolerance" policy of immigration enforcement matters. Stocks of the two largest private-prison companies took a drastic hit in the aftermath of the banks' announcements.⁶ Soon, at least six more of the nation's

* Clinical Teaching Fellow, Civil Rights Clinic, University of Denver College of Law. I am grateful to the work of the *Northwestern Journal of Law and Social Policy* Volume 15 Board of Editors. One of the primary challenges in writing a piece about an industry that is changing as rapidly as the subject of this one is ensuring the accounts, analysis, and sources are as up-to-date as possible. I have endeavored to meet that challenge here but any errors on that front or others are mine.

¹ 139 S. Ct. 954 (2019).

² *Id.*

³ *See infra* Subpart I(B).

⁴ *See, e.g.*, Emily S. Rueb, *JPMorgan Chase Stops Funding Private Prison Companies, and Immigration Activists Applaud*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/business/jp-morgan-prisons.html>.

⁵ Dennis Carter, *Bank of America is Now the Only Big Bank 'Profiting from Family Separation'*, REWIRE NEWS (Apr. 10, 2019), <https://rewire.news/article/2019/04/10/bank-of-america-is-now-the-only-big-bank-profiting-from-family-separation/>.

⁶ Morgan Simon, *In Wake of Wells Fargo Hearing, Private Prison Stocks Take Big Hit*, FORBES (Mar. 15, 2019), <https://www.forbes.com/sites/morgansimon/2019/03/15/in-wake-of-wells-fargo-hearing-private-prison-stocks-take-big-hit/#535e7aa91a3b> (reporting stocks of two largest private-prison companies, GEO Group and CoreCivic, dropped sixteen and eight percent respectively in the day following banks' divestment announcement).

largest banks had committed publicly to ending financing for the private-prison industry, leaving the industry with a reported eighty-seven percent financing gap, falling credit ratings, and investor fallback.⁷ By October 2019, all publicly known banking partners for one of the industry’s leaders had committed to withdrawing their financial support, and the leading stock prices for the industry’s top companies were “near historic lows.”⁸

For advocates of decarceration and more humane immigration-enforcement protocols, the banks’ divestment from the private prison industry is one development in a series of efforts of people and organizations disavowing expectations of humane public governance and, instead, insisting and relying on private governance institutions to impose accountability and push for change. When the government fails to govern, people and groups may turn to private governance mechanisms to challenge the status quo.⁹ Private governance institutions are the means by which individuals, organizations, and communities aim to address the needs that public governance has failed to address.¹⁰ In other words, “[p]rivate governance institutions provide governance without government.”¹¹ As for Chase, Wells Fargo, and the finance companies that followed them, the banks’ exits from the private prison industry came after directed campaigns by advocates and activists demanding the companies cease support for corporations responsible for the Trump administration’s immigration-enforcement policies.¹² Of the numerous recent examples of private governance action in the field of private prisons, this Essay describes certain shareholder actions and divestment activities.¹³

In examining shareholder actions and divestment activities in this Essay, I write through the lens of decarceration—that is, from the premise that the the elimination of privatized confinement on all levels is the goal¹⁴—and I focus on privatized federal immigration detention. I do this for two reasons: first, the U.S. immigration detention system is the most privatized in the world and is significantly more privatized than the system of criminal incarceration.¹⁵ Second, with respect to immigration enforcement, the federal government has demonstrated a recent commitment to governing in a manner

⁷ Morgan Simon, *GEO Group Running Out of Banks as 100% of Known Banking Partners Say ‘No’ to the Private Prison Sector*, FORBES (Sept. 30, 2019), <https://www.forbes.com/sites/morgansimon/2019/09/30/geo-group-runs-out-of-banks-as-100-of-banking-partners-say-no-to-the-private-prison-sector/#63c7c2273298> (last updated Oct. 11, 2019).

⁸ *Id.*

⁹ See, e.g., Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENVTL. L. & POL’Y F. 67, 67 (2011).

¹⁰ *Id.* (citing Charlotte Hess & Elinor Ostrom, *Introduction to UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE* 3, 8-9 (Charlotte Hess & Elinor Ostrom eds., 2008) (“Private governance institutions are limitless in their variety. Political science, sociology, law, and economics literature describes hundreds of variations of private governance institutions throughout the world that have developed their own community-based rules for resource management and conflict resolution.”).

¹¹ Roberts, *supra* note 9.

¹² See Rueb, *supra* note 4.

¹³ Professor Jonathan M. Gilligan refers to these two private governance institutions as carrots and sticks—shareholder actions being the carrots, enticing industry actors to engage for purposes of change, and divestment actions being the sticks, signifying an exit from the industry. See generally Jonathan M. Gilligan, *Carrots and Sticks in Private Climate Governance*, 6 TEX. A&M L. REV. 179 (2018).

¹⁴ See generally Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

¹⁵ MARY SMALL, DET. WATCH NETWORK, *A TOXIC RELATIONSHIP: PRIVATE PRISONS AND U.S. IMMIGRATION DETENTION 2* (2016) (“[I]n addition to being remarkable for its size, the U.S. immigration detention system is an outlier for the degree to which it has been privatized.”).

contrary to the goals of decarceration. The government is also uniquely situated to evade certain public governance measures, particularly efforts by state or local jurisdictions seeking to govern in this area, due in part to issues of federalism.

Private governance actions may be one method to draw attention to the scope of and conditions in for-profit immigration detention centers, to improve those conditions, and to stop the overall growth of the immigration detention apparatus. This Essay has three parts. Part I describes the state of privatized confinement in the United States, from the history of for-profit imprisonment to its modern scope to the conditions in private immigration prisons across the United States. Part II describes the shortcomings of public governance to advance the goal of decarceration or, at minimum, exercise sufficient oversight of the private-prison industry. Part III then examines recent shareholder and divestment actions targeted at the for-profit prison industry, specifically privatized immigration detention.

I. THE STATE OF PRIVATE CONFINEMENT IN AMERICA

Commercial interests in American incarceration have existed for centuries, gaining prominence first with the emergence of prison labor exploitation on plantations throughout the antebellum South.¹⁶ While America's system of incarceration is arguably more regulated today than it was then, the private sector has nonetheless retained a significant stakehold in all confinement systems, including immigration-related confinement.¹⁷ This Part provides a brief history of privatized confinement and sketches the scope of modern private immigration detention, as well as the conditions in the prisons where the federal government confines people for putatively "civil" reasons.¹⁸

A. History

The private sector has played a notable role in American confinement since at least the Reconstruction era.¹⁹ As criminal punishment in the United States transitioned from the use of capital punishment, banishment, and public flogging to the use of incarceration, state and local governments began searching for ways to account for the cost of confining people for lengthier periods of time.²⁰ One way to do this was to force the people in the government's custody to work. The modern private prison industry grew out the antebellum practice of forced labor on prison plantations, which themselves grew out of slavery and other labor-driven industries.²¹ As Professor Sharon Dolovich explains in her

¹⁶ SHANE BAUER, AMERICAN PRISON 16–21 (Penguin Press eds. 2018); Sharon Dolovich, *supra* note 14, at 450–51 (“In the early [American] penitentiaries, prison labor was introduced as part of rehabilitative programs, but it quickly became the means through which state governments could recoup the costs to the state treasury of imprisoning criminals. Indeed, the history of nineteenth-century American prisons is a history of contracting between the state and private interests for the use of convict labor in efforts on both sides to achieve financial gain.”).

¹⁷ See, e.g., EMILY RYO AND IAN PEACOCK, *The Landscape of Immigration Detention in the United States*, AM. IMMIGR. COUNCIL 1, 14 (2018) (approximately two-thirds of the daily population of immigration detainees are confined in for-profit prisons).

¹⁸ See generally René Lima-Marín & Danielle C. Jefferis, *It's Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955 (2019).

¹⁹ SHANE BAUER, *supra* note 16, at 16–21; Sharon Dolovich, *supra* note 14, at 450–51.

²⁰ Dolovich, *supra* note 14, at 450–51.

²¹ Bauer, *supra* note 16, at 19; Dolovich, *supra* note 14, at 451 (“Although convict leasing was found

detailed account of the history of commercial interests and American incarceration, “At the [Civil War]’s end, demand for convict labor was high, as those who had previously relied on slave labor found themselves in need of a pool of cheap workers.”²² Some plantations and factories were privately owned; others were government-run.²³ All, however, profited from enslaved labor.²⁴

Later, from the end of the nineteenth century to the early-to-mid twentieth century, prison labor contracts became fraught with controversy and corruption.²⁵ Conditions for the people in the prisons and the labor camps were dreadful and featured severe abuse and “utter indifference to whether [prisoners] lived or died.”²⁶ Private companies also began to take advantage of the governments with which they contracted, failing to perform to the contracts’ full terms and then fighting states’ legal battles in court.²⁷ This era of commercialized incarceration soon gave way to the modern system that emerged in the 1980s. This was a system that bears simultaneously different and similar features when compared to the one of the last century, much like the American carceral enterprise as a whole.²⁸

throughout the nineteenth-century United States, it was most widely used in the Southern states after the Civil War. This development was in part a function of the serious financial straits of the former Confederate states in the postwar years; convict leasing offered a way both to defray the costs of incarceration and to rebuild the shattered Southern economy.”).

²² Dolovich, *supra* note 14, at 451.

²³ Bauer, *supra* note 16, at 19; Dolovich, *supra* note 14, at 451 (“These contracts [between state and private interests] took many forms. In some cases, as with New York’s Auburn penitentiary, contractors would supply the raw material and collect the finished product at the end, with the work taking place at the prison. In others, as in Louisiana, the state leased its entire penitentiary to a private contractor, who then assumed the cost of running the facility in exchange for the labor of its inmates. The most common arrangements, however, involved the leasing of convict labor for work on plantations, on railroads, in mines, or in other labor-intensive industries.”).

²⁴ Bauer, *supra* note 16, at 19 (“Like prison systems throughout the South, Texas’s grew directly out of slavery. After the Civil War the state’s economy was in disarray, and cotton and sugar planters suddenly found themselves without hands they could force to work. Fortunately, for them, the Thirteenth Amendment, which abolished slavery, left a loophole. It said that ‘neither slavery nor involuntary servitude’ shall exist in the United States ‘except as punishment for a crime.’ As long as black men were convicted of crimes, Texas could lease all of its prisoners to private cotton and sugar plantations and companies running lumber camps and coal mines, and building railroads. It did this for five decades after the abolition of slavery, but the state eventually became jealous of the revenue private companies and planters were earning from its prisoners. So, between 1899 and 1918, the state bought ten plantations of its own and began running them as prisons.”).

²⁵ Dolovich, *supra* note 14, at 452–53 (detailing conflict between public and private interests as prison labor contracts grew more and more popular).

²⁶ *Id.* at 452 (“Because the prisons ensured a steady supply of convicts, from the contractors’ perspective one convict was as good as another. Many contractors therefore routinely worked their charges literally to death.”); *see also* Bauer, *supra* note 16, at 16–20 (recounting the experience of Albert Race Sample, a man in prison in Texas and forced to work on a cotton plantation in 1956).

²⁷ Dolovich, *supra* note 14, at 452–53 (“Historical accounts of inmate labor contracts in nineteenth-century America reveal that the practice was plagued by more than inmate abuse. In addition, state after state found itself being outmaneuvered and taken advantage of by the private parties with whom the state had contracted for the labor of its convicts . . . The predominant theme of accounts of prison labor contracts gone awry is the state’s vulnerability to nonperformance by its contracting partner once the state had divested itself of responsibility for its prisoners.”).

²⁸ *Id.* at 454 (“It would be a mistake to draw too many conclusions from this history for the current chapter of private sector involvement in prisons. The contemporary experience is governed by a set of norms, not in place a century ago, forbidding the economic exploitation and physical abuse of inmates. Today, there is

The 1980s saw a rise in incarceration on a mass scale on the criminal and civil sides as well as a reemergence of privatized confinement.²⁹ As state governments began throwing more people behind bars, they needed space to confine them. Publicly run jails and prisons were soon filled to capacity.³⁰ Thus, the private sector stepped in to provide that space.³¹

B. Privatized Immigration Detention

The modern for-profit prison sector is linked inextricably with immigration detention.³² Indeed, the first privately owned prison in the United States was an immigration prison.³³ The early 1980s saw the arrival of large numbers of Cuban and Haitian migrants and refugees.³⁴ As a result the Corrections Corporation of America (CCA), now known as CoreCivic,³⁵ opened the Houston Processing Center, a motel that was converted to an immigration detention center, in Houston, Texas.³⁶ CCA co-founder Tom Beasley described on national radio the casual manner in which he launched his exceedingly profitable business model in partnership with former pastor and prison plantation warden, T. Don Hutto:³⁷

Don Hutto and I went down to Houston on New Year's Eve in 1983. We rented a car at the airport and drove around the major thoroughfares to find

also a stricter standard of political accountability, an extensive public bureaucracy with the capacity to regulate and administer complex institutions, and the default expectation that the state bears the burden of financing the prison system. But as will be seen, this history does introduce certain themes arising from private involvement in corrections that are still relevant today.”).

²⁹ See, e.g., Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 INDIANA L.J. ____ (forthcoming 2019) (on file with author); Dolovich, *supra* note 14, at 455 (“The reemergence of private contractors in American corrections is traceable to the dramatic growth in incarceration nationwide over the past three decades. In 1985, there were over 740,000 people behind bars, up from 226,000 ten years previously.”).

³⁰ Dolovich, *supra* note 14, at 455 (“Initially, state officials nationwide responded to the first of these problems—finding room for all the bodies—by shipping convicted offenders to existing penal facilities and letting the wardens sort it out themselves. The limitations of this approach, however, were soon clear, as prisons and jails quickly came to be operating well over capacity.”).

³¹ *Id.* at 455–56.

³² For a fuller account of the rise of modern immigration confinement, see Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 INDIANA L.J. ____ (forthcoming 2019) (on file with author).

³³ *Id.*

³⁴ *Id.*

³⁵ Devlin Barrett, *Private-Prison Firm CCA to Rename Itself CoreCivic*, WALL STREET J. (Oct. 28, 2016), <https://www.wsj.com/articles/private-prison-firm-cca-to-rename-itself-corecivic-1477666800> (last visited Dec. 8, 2018).

³⁶ DETENTION WATCH NETWORK & CENTER FOR CONSTITUTIONAL RIGHTS, BANKING ON DETENTION: LOCAL LOCKUP QUOTAS AND THE IMMIGRANT DRAGNET 3 (2015); Madison Pauly, *A Brief History of America's Private Prison Industry*, MOTHER JONES (Aug. 2016), <https://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline/>; CHRISTINE BACON, THE EVOLUTION OF IMMIGRATION DETENTION IN THE UK: THE INVOLVEMENT OF PRIVATE PRISON COMPANIES, REFUGEE STUDIES CENTRE WORKING PAPER NO. 27 10 (2005).

³⁷ Shane Bauer, *supra* note 16, at 21 (“Before running prisons, Hutto had been a pastor, studied history, spent two years in the US Army, and did graduate work in education at the American University in Washington, DC.”).

somewhere to put 200 illegal criminal aliens by February 1st. Literally, we stopped in ten motels, then finally about 3am found one that might work. I asked if they would be interested in selling or leasing the motel. And after negotiating with the owner for several hours, he finally agreed.³⁸

Three years later, the Wackenhut Corrections Corporation, now known as the GEO Group, Inc. (GEO), received its first contract to run an immigration detention center.³⁹ And with that, the industry's two primary players today launched what has become an empire.⁴⁰

C. Scope

Not only is the American immigration detention system the largest in the world, it is the most privatized in the world.⁴¹ Nearly 400,000 people are incarcerated under the government's immigration detention authority each year, an annual figure that has seen consistent, substantial growth.⁴² The average daily population of people in immigration confinement has also increased exponentially in the past two decades,⁴³ reaching nearly 40,500 people per day in 2017.⁴⁴ The federal government anticipated an even greater need to fund additional confinement when U.S. Immigration and Customs Enforcement (ICE) requested additional funding for up to 52,000 daily beds in fiscal year 2019.⁴⁵ After an intense budget debate during the federal government shutdown that began in 2018 and carried into 2019, Congress declined ICE's request and authorized detention-bed funding at 2018 levels—40,500 per day—in spite of Democrats' efforts to reduce the number of detention beds even further.⁴⁶ Notwithstanding Congress's appropriated numbers, ICE regularly detains more people than its funding permits.⁴⁷

³⁸ BACON, *supra* note 36, at 10. *See also* Bauer, *supra* note 16, at 14–15 (describing CoreCivic training video: "In the video Hutto and Beasley tell their company's origin story. In 1983, they recount, they won 'the first contract ever to design, build, finance, and operate a secure correctional facility in the world.' . . . [Hutto] recalls the story of obtaining their first prison contract like an old man giving a blow-by-blow accounting of his winning high school touchdown. Rushed for time, he and Beasley convinced the owner of a motel in Houston to lease it to them, eventually hiring 'all his family' as staff to seal the deal. They then quickly surrounded the motel with a twelve-foot fence topped with coiled barbed wire. They left up the Day Rates Available sign. 'We opened the facility on Super Bowl Sunday the end of that January,' Hutto recalls. 'So about ten o'clock that night we start receiving inmates. I actually took their pictures and fingerprinted them. Several other people walked them to their 'rooms,' if you will, and we got our first day's pay for eighty-seven undocumented aliens.' Both men chuckle.").

³⁹ Pauly, *supra* note 36.

⁴⁰ For a fuller account of the history of immigration detention, including its privatization, *see, e.g.*, Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 INDIANA L.J. ____ (forthcoming 2019) (on file with author).

⁴¹ DETENTION WATCH NETWORK, *A TOXIC RELATIONSHIP: PRIVATE PRISONS AND U.S. IMMIGRATION DETENTION 2* (2016) ("[I]n addition to being remarkable for its size, the U.S. immigration detention system is an outlier for the degree to which it has been privatized.").

⁴² *See, e.g.*, Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 INDIANA L.J. ____ (forthcoming 2019) (on file with author).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ DEP'T OF HOMELAND SECURITY, *FY 2019 BUDGET IN BRIEF* at 36 (2019), <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf>.

⁴⁶ Dara Lind, *Congress's Deal on Immigration Detention, Explained*, VOX (Feb. 12, 2019), <https://www.vox.com/2019/2/12/18220323/immigration-detention-beds-congress-cap>.

⁴⁷ *See, e.g.*, Caitlin Emma & Jennifer Scholtes, *Trump Administration Aims to Shift Money to Immigration*

According to a 2018 report, ICE relies on more than 630 sites throughout the United States to confine people under its immigration-enforcement authority.⁴⁸ Many of these facilities are state prisons or local jails that contract with the federal government to confine people among its own authority.⁴⁹ Others are for-profit prisons run by private corporations and designed exclusively (or nearly exclusively) to detain people in the custody of immigration-enforcement authorities.⁵⁰

D. Conditions

Conditions in private immigration prisons are poor. Detainees have succumbed to limb amputations, serious illnesses, and infections, and some have even died.⁵¹ ICE has acknowledged at least 185 deaths in immigration prisons and jails between October 2003 and July 2018.⁵² At least twenty-two people have died in ICE custody in the last two years.⁵³ Others, still, have endured physical abuse at the hands of staff and otherwise harsh conditions of confinement.⁵⁴

Indeed, the Department of Justice reported in 2019 that the number of people who had applied for voluntary departure since the 2016 election had risen significantly,

Enforcement, POLITICO (Aug. 14, 2019), <https://www.politico.com/story/2019/08/14/trump-administration-federal-funding-ice-1662256>.

⁴⁸ EMILY RYO & IAN PEACOCK, *supra* note 17, at 1.

⁴⁹*Id.* at 11 (“In fiscal year 2015, ICE used 638 facilities to detain noncitizens, including juveniles. By far, the largest category—43 percent—were facilities with intergovernmental service agreements (IGSAs). IGSAs are agreements between the federal government and a state or local government to provide detention beds in jails, prisons, or other local or state government detention facilities. These facilities are government owned, but they may be operated by either local or state agencies or by for-profit companies.”).

⁵⁰ Some immigration detention centers, such as the Aurora ICE Processing Center in Colorado, also confine people in the custody of the U.S. Marshals. *See* Our Locations: Aurora ICE Processing Center, THE GEO GROUP, INC., <https://www.geogroup.com/FacilityDetail/FacilityID/31> (last visited May 8, 2019).

⁵¹ *See, e.g.*, Conor McCormick-Cavanagh, *Democrats Probe ICE About Medical Conditions at Aurora Detention Facility*, VICE NEWS (Feb. 28, 2019), <https://www.westword.com/news/jason-crow-sends-ice-letter-about-medical-conditions-at-aurora-detention-facility-11252339> (last visited Mar. 2, 2019); Chris Walker, *There’s Been Another Chicken Pox Outbreak at Immigrant Detention Facility*, WESTWORD (Jan. 31, 2019), <https://www.westword.com/news/second-chicken-pox-outbreak-at-aurora-immigrant-detention-center-puts-two-pods-in-quarantine-11210867> (last visited Mar. 2, 2019); Lisa Riordan Seville et al., *22 Immigrants Died in ICE Detention Centers During the Past 2 Years*, NBC NEWS (Jan. 6, 2019), <https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781> (last visited Mar. 2, 2019); Pauly, *supra* note 36; Kassi Nelson, *Trans Woman Dies in ICE Custody; Family Sues*, KOB4 (Nov. 27, 2018), <https://www.kob.com/albuquerque-news/trans-woman-dies-after-detained-at-new-mexico-ice-facility/5157737/> (last visited Mar. 2, 2019); Chris Walker, *ICE Defends a Chicken Pox Quarantine at Immigrant Detention Facility in Aurora*, WESTWORD (Oct. 25, 2018), <https://www.westword.com/news/varicella-outbreak-leads-to-a-quarantine-at-ice-detention-center-in-aurora-10941507>. *See generally*, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION, Human Rights Watch, *et al.* (2018), https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf.

⁵² Ryo & Peacock, *supra* note 17, at 5.

⁵³ Lisa Riordan Seville et al., *supra* note 51.

⁵⁴ *See, e.g.*, Nina Shapiro, *What Happened to Mergensana Amar? The Russian Immigrant’s Handwritten Note Raises Questions about Treatment at Northwest Detention Center*, SEATTLE TIMES (Nov. 30, 2018), <https://www.seattletimes.com/seattle-news/russian-immigrants-handwritten-note-leaves-many-questions-about-treatment-at-northwest-detention-center/> (last visited Mar. 2, 2019); Alice Speri, *At Largest ICE Detention Center in the Country, Guards Called Attempted Suicides “Failures”*, INTERCEPT (Oct. 11, 2018), <https://theintercept.com/2018/10/11/adelanto-ice-detention-center-abuse/>.

suggesting that for some people, the conditions in immigration detention are so dire that they would prefer to self-deport than stay in detention to fight their immigration cases.⁵⁵ Laura Rivera, an attorney with the Southern Poverty Law Center, told *Politico Magazine*, “It speaks to the desperation of people in detention that they’d be trying to sign up in droves for this thing that actually causes them to be removed. They’ve got to be thinking that there’s no way out [of detention].”⁵⁶ Alejandra Garcia Zamarrón, a woman whose case *Politico* featured, told the publication of the women with whom she was detained at the for-profit Irwin County Detention Center:⁵⁷ “They’re tired of living here, of dealing with ICE, dealing with guards, dealing with injustice . . . They give up. They’d rather be deported than fight their case. We’re not criminal[s]. We just don’t have options.”⁵⁸

E. Profits

Notwithstanding the conditions in private immigration prisons, the companies overseeing and managing the facilities have yielded substantial profits and growing revenue in recent years. GEO has reported regular profit increases over the last few years.⁵⁹ In 2018, GEO reported more than \$2.3 billion in revenue, compared to just above \$2.2 billion in 2017 and nearly \$2.18 billion in 2016.⁶⁰ CoreCivic reported more than \$1.8 billion in total revenue for 2018 after generating more than \$1.7 billion in 2017⁶¹ and reported continued growth through the first quarter of 2019.⁶² In recent years, whenever the Trump administration has announced a new tough-on-immigration policy, these companies’ shareholders have seen a rapid spike in stock value.⁶³ Their contracts with ICE totaled approximately \$2 billion each year.⁶⁴

II. THE SHORTCOMINGS OF PUBLIC GOVERNANCE

While conditions in private immigration prisons are poor, the industry continues to

⁵⁵ Christie Thompson & Andrew R. Calderon, *The Surprising New Effect of Trump’s Immigration Crackdown*, POLITICO (May 8, 2019), <https://www.politico.com/magazine/story/2019/05/08/self-deportation-trump-immigration-policy-trend-226801>.

⁵⁶ *Id.*

⁵⁷ The Irwin County Detention Center is run by LaSalle Corrections, a private corporation operating prisons in Louisiana, Texas, and Georgia. *See generally*, LaSalle Corrections, <http://www.lasallecorrections.com/about-us/> (last visited May 8, 2019).

⁵⁸ Thompson and Calderon, *supra* note 55.

⁵⁹ THE GEO GROUP, INC., 2018 ANNUAL REPORT 1 (2018).

⁶⁰ *Id.*

⁶¹ CORECIVIC, ANNUAL REPORT 54 (2018).

⁶² GlobeNewswire, *CoreCivic Reports First Quarter 2019 Financial Results*, YAHOO! FINANCE (May 8, 2019), <https://finance.yahoo.com/news/corecivic-reports-first-quarter-2019-201500242.html> (reporting total Q1 revenue was \$484.1 million, up ten percent from prior quarter year).

⁶³ *See, e.g.*, John Washington, *Trump’s Immigration Policy ‘Fever Dream,’* THE NATION (Oct. 5, 2018), available at <https://www.thenation.com/article/trumps-immigration-policy-fever-dream/> (last visited March 2, 2019) (“[B]etween the announcement of the ‘zero tolerance’ policy and DHS’s June 22 request for information about the possibility of detaining an additional 15,000 people in family jails, the stocks of Geo Group and CoreCivic, the two largest for-profit immigration-detention corporations, increased 5.9 percent and 8.3 percent, respectively.”).

⁶⁴ *See, e.g.*, John Burnett, *Big Money as Private Immigrant Jails Boom*, NPR (Nov. 21, 2017), <https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom> (last visited March 2, 2019) (“ICE spends more than \$2 billion a year on immigrant detention through private jails”).

expand and reap profits at record levels.⁶⁵ Calls for change and effective public governance have largely fallen short at the federal level; however, some activity on state and local levels has been more promising. Still, those efforts have yet to make substantial progress toward stalling or shrinking the scope of the privatized immigration-detention apparatus.

A. Federal Oversight

A primary means of federal government oversight is through each agency's Office of Inspector General (OIG). The Department of Homeland Security's (DHS) OIG has attempted to investigate and report on conditions and concerns in private immigration prisons, but the effect of those efforts has been nearly imperceptible.⁶⁶ In September 2018, for example, the OIG issued a report after a surprise visit documenting troubling conditions in GEO's Adelanto Processing Center, an immigration detention facility.⁶⁷ The report detailed inspectors' discovery of nooses in cells, misuses of solitary confinement, and delayed medical care.⁶⁸ Two weeks later, in a rebuke of the OIG's report, GEO hired a private company to conduct another inspection of the Adelanto Processing Center.⁶⁹ The inspector of the private company, the Nakamoto Group, disagreed with the OIG's report,

⁶⁵ See, e.g., DETENTION WATCH NETWORK, *supra* note 3, at 4; Norman Merchant, *New deal keeps open facility that detains immigrant families*, WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/national/new-deal-keeps-open-facility-that-detains-immigrant-families/2018/10/17/31f50118-d22b-11e8-a4db-184311d27129_story.html; Jackie Speier, *Immigration detention is a profitable business*, S.F. CHRON. (Oct. 24, 2018), https://realm.hearstnp.com/connect/authorize?client_id=hdn.js&redirect_uri=https%3A%2F%2Fwww.sfchronicle.com%2Fhdn%2Fhrlm%2Fp%2Fcallback.html&response_type=id_token%20token&scope=openid%20email%20hdn.sanfrancisco&state=dcc4a7c671134b7ba6c3aa63b41bf0ad&non; Carli Pierson, *Don't be Fooled by Trump's Caravan Rhetoric - it's Much More Profitable to Incarcerate Migrants Than to Stop Them at the Border*, INDEPENDENT (Oct. 31, 2018), <https://www.independent.co.uk/voices/trump-caravan-migrants-detention-centres-ice-child-separation-a8610146.html> (last visited Dec. 8, 2018); Pauly, *supra* note 36; CARL TAKEI ET AL., SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS, ACLU 10, https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf ("These trends have enriched private prison investors. In 2008, the two biggest private prison companies—Corrections Corporation of America (CCA) and GEO Group (GEO)—received a combined \$307 million in revenue from ICE detention contracts. By 2015, that number had more than doubled, to more than \$765 million."); Esther Fung, *Donald Trump Has Been Very Good for Publicly Listed Prison Owners*, WALL ST. J. (Feb. 26, 2019), <https://www.wsj.com/articles/donald-trump-has-been-very-good-for-publicly-listed-prison-owners-11551189601> (last accessed March 2, 2019).

⁶⁶ See, e.g., Katherine Hawkins, *POGO Testimony on Oversight of ICE Detention Centers*, PROJ. ON GOV'T OVERSIGHT (Sept. 26, 2019), <https://www.pogo.org/testimony/2019/09/pogo-testimony-on-oversight-of-ice-detention-centers/> (describing "serious flaws in ICE's inspection and oversight system and inhumane conditions in ICE detention centers").

⁶⁷ Office of Inspector GEN., *Management Alert—Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California* (Sept. 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf>.

⁶⁸ Catherine E. Shoichet, *Inspectors Found Nooses Hanging in Cells at an ICE Detention Facility*, CNN (Oct. 3, 2018), <https://www.cnn.com/2018/10/03/politics/immigrant-detention-adelanto-oig-report/index.html>.

⁶⁹ Katherine Hawkins, *At Immigration Detention Facilities, 'Inspectors for Hire' Miss Signs of Neglect, Say Critics*, YAHOO! NEWS (Mar. 12, 2019), https://news.yahoo.com/at-immigration-detention-facilities-inspectors-for-hire-miss-signs-of-neglect-say-critics-090000015.html;_ylt=AwrC1DG_qodcniUAlg7QtDMD;_ylu=X3oDMTByOHZyb21tBGNvbG8DYmYxBHBvcwMxBHZ0aWQDBHNiYwNzeg--.

calling it “erroneous and inflammatory.”⁷⁰ The company recommended that the OIG should “use inspectors with detention and corrections backgrounds for future inspections to avoid . . . embarrassment to their office and ICE, especially since the inaccuracies have now been reported by the news media as fact.”⁷¹ Notwithstanding the company’s representations, Nakamoto’s report contradicts not only the OIG’s report but also evidence of advocacy groups and the primary accounts of formerly detained individuals.⁷²

Another primary means of exercising oversight and imposing measures of accountability on private immigration prisons is through congressional action. Members of Congress have attempted to exercise oversight over private immigration prisons, only to be rebuffed by the DHS. Representative Jason Crow, whose Colorado district serves as home to GEO’s Aurora ICE Processing Center, attempted numerous times to visit the facility after hearing of infectious disease outbreaks and other concerns about conditions among individuals detained there and other concerns about conditions.⁷³ ICE and GEO refused to permit his inspections until a pre-approved visit was scheduled twenty-four days after his first attempt.⁷⁴ He and fellow members of Congress sent a letter in February 2019 to then-Secretary of DHS Kirstjen Nielsen, requesting documentation and information about ICE’s infectious disease protocol.⁷⁵ This request went unanswered.⁷⁶ Crow is now leading an effort that would require immigration detention prisons to allow members of Congress to inspect their facilities within forty-eight hours of their request for such an inspection.⁷⁷ The coalition’s letter to the Appropriations Subcommittee on Homeland Security details the myriad concerns with private immigration prisons across the country.⁷⁸

Lastly, with the possible exception of labor rights and wage theft class action lawsuits around the country,⁷⁹ the judiciary is largely ill-equipped to provide oversight with respect to private immigration prisons because there are few federal causes of action available to bring private-prison actors into federal court.⁸⁰

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Conor McCormick-Cavanagh, *Crow Pushes Congress to Stengthen Immigration Detention Facility Inspections*, WESTWORD (Apr. 8, 2019), <https://www.westword.com/news/jason-crow-pushes-congress-to-strengthen-immigration-detention-facility-inspections-11302198> [hereinafter McCormick-Cavanagh, *Crow*].

⁷⁴ *Id.*

⁷⁵ Letter from Jason Crow, Member of Congress, to Kristjen M. Nielsen, Sec’y of Homeland Security, Feb. 20, 2019), <https://crow.house.gov/sites/crow.house.gov/files/02-20-2019-Crow-Letter-to-DHS-regarding-Denver-Contract-Detention-Facility.pdf>.

⁷⁶ Conor McCormick-Cavanagh, *Democrats Probe ICE About Medical Conditions at Aurora Detention Facility*, WESTWORD (Feb. 28, 2019), <https://www.westword.com/news/jason-crow-sends-ice-letter-about-medical-conditions-at-aurora-detention-facility-11252339>.

⁷⁷ Conor McCormick-Cavanagh, *Crow*, *supra* note 73.

⁷⁸ Letter to Chairwoman Lucille Roybal-Allard and Ranking Member Chuck Fleischmann, Appropriations Subcomm. on Homeland Security, U.S. H.R. (Apr. 4, 2019), https://images.westword.com/media/pdf/fy_2020_ice_detention_center_oversight_letter_w_sigs__1_.pdf.

⁷⁹ See, e.g., Complaint (Doc. 1), *Menocal v. The GEO Group, Inc.*, No. 1:14-cv-02887-JLK-MEH (D. Colo., Oct. 22, 2014).

⁸⁰ See, e.g., Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. ____ (forthcoming 2019) (on file with author).

B. State and Local Efforts

Public governance on the state and local levels may provide some measure of accountability, but have likewise fallen short, particularly in terms of advancing the goal of decarceration. Recently, activists in Illinois successfully lobbied the state legislature to extend a state-wide ban on private prisons to apply to immigration detention facilities.⁸¹ The City of Adelanto, California decided to end its contract with GEO for the Adelanto ICE Processing Center, just weeks after the Orange County Sheriff announced he would no longer detain people in ICE custody in the county jail.⁸² Several weeks after the City's announcement, however, ICE suggested it would contract directly with GEO to keep the prison open while members of the city council asked to revisit the decision, questioning whether the city manager has the authority to unilaterally withdraw the locality from its contract with GEO.⁸³ In response, California's Governor Gavin Newsom signed into law a commitment to ending most forms of privatized confinement in the state, including privatized immigration detention.⁸⁴ Reportedly, ICE "stands to lose four privately run detention facilities holding roughly 4,000 people in California, unless the ban is challenged in court."⁸⁵ The law is slated to go into effect next year.⁸⁶

But days after the law's passage, ICE posted a solicitation notice for three new detention facilities, with a total capacity of 6,750 people, seemingly in an attempt to open new private immigration detention facilities before the law takes effect.⁸⁷ The notice seeks "turnkey ready" facilities and clarifies that the agency "will not accept proposals for constructing new facilities."⁸⁸ The notice gave about two weeks for response.⁸⁹ California's legislation prevents the state from entering into any new contracts with private prison companies or renewing existing contracts—but only once the law takes effect.⁹⁰ If ICE succeeds in securing the three new contracts in response to its solicitation, it appears those agreements would not be subject to the new law.⁹¹

These efforts at the state and local level in Illinois and California are promising

⁸¹ James Goodman, *Saying 'No' to Immigrant Detention*, PROGRESSIVE (May 8, 2019), <https://progressive.org/dispatches/saying-no-to-immigrant-detention-goodman-190508/>.

⁸² Roxana Kopetman, *Adelanto To End Immigrant Detention Contract with ICE, GEO Group*, SAN BERNARDINO SUN (Mar. 28, 2019), <https://www.sbsun.com/2019/03/28/adelanto-to-end-immigrant-detention-contract-with-ice-geo-group/>.

⁸³ Rebecca Plevin, *Adelanto Moves To Revisit Ending Ccontract for Troubled Immigration Detention Facility*, DESERT SUN (Apr. 11, 2019), <https://www.desertsun.com/story/news/politics/immigration/2019/04/11/adelanto-wants-revisit-decision-ending-immigrant-detention-facility-contract/3437933002/>.

⁸⁴ See, e.g., Steve Gorman, *California Bans Private Prisons and Immigration Detention Centers*, REUTERS (Oct. 11, 2019), <https://www.reuters.com/article/us-california-prisons/california-bans-private-prisons-and-immigration-detention-centers-idUSKBN1WQ2Q9>.

⁸⁵ *Id.*; see also Darwin Bond Graham, *California Governor Signs Ban on Private Prisons, Setting Up Fight with Trump*, GUARDIAN (Oct. 12, 2019), <https://www.theguardian.com/us-news/2019/oct/11/california-private-prison-ban-courts>.

⁸⁶ *Id.*

⁸⁷ See, e.g., Nuria Marquez Martinez, *ICE Is Rushing to Open For-Profit Detention Centers—Right Before California's Ban Goes Into Effect*, MOTHER JONES (Oct. 29, 2019), <https://www.motherjones.com/politics/2019/10/ice-california-new-detention-facilities-private-profit/>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

advances toward enforcing oversight mechanisms, resisting privatized immigration detention, and furthering the decarceration goal; however, they can go only so far. To date, issues of federalism and company strategy have precluded state and local efforts from having a substantial impact. Turning to private governance institutions may be necessary.

III. TURNING TO PRIVATE GOVERNANCE INSTITUTIONS

When the government fails to govern in a manner certain people or groups desire, those people and groups may turn to private governance institutions to govern or try to change the status quo.⁹² Private governance institutions are the means by which individuals, organizations, and communities aim to address the needs public governance has failed to address.⁹³ In other words, “[p]rivate governance institutions provide governance without government.”⁹⁴ This Part provides an overview of modern private governance movements and then discusses recent developments of private governance efforts with respect to privatized immigration confinement. Although nascent, these recent developments suggest private governance is one means by which people and groups have opposed to federal immigration-enforcement authorities’ increased reliance on migration-related detention. The efforts may put meaningful pressure on the companies on which the government relies, in turn, to slow the growth of the immigration-detention apparatus.

A. *Private Governance, Generally*

Private governance institutions may take many forms.⁹⁵ One area in which private governance institutions have been particularly active in recent years is with respect to environmental regulation. In this space, private entities have engaged in varied efforts across industries to advance environmental policies and practices that public regulation has failed to do.⁹⁶ Within this movement, scholars have focused largely on two areas of private activity: shareholder actions and divestment campaigns.⁹⁷

These two areas highlight two primary means of private governance: divestment versus engagement, or “carrots” versus “sticks.”⁹⁸ Each serves different but related goals.

⁹² See, e.g., Roberts, *supra* note 9, at 67; Jonathan M. Gilligan, *supra* note 13, at 182 (“Private governance occurs when private entities—businesses, not-for-profit organizations, individuals, etc.—pursue a goal traditionally associated with public governance, such as reducing greenhouse gas emissions, through actions that produce broad influence over others.”).

⁹³ Roberts, *supra* note 9, at 67 (“Private governance institutions are limitless in their variety. Political science, sociology, law, and economics literature describes hundreds of variations of private governance institutions throughout the world that have developed their own community-based rules for resource management and conflict resolution.”).

⁹⁴ *Id.* at 67. For a full account and analysis of the theory of private governance institutions, see Professor Roberts’s full piece. See *generally id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 68 (describing “education and mobilization initiatives, firm contractual agreements, corporate social responsibility programs, socially responsible investment, codes of conduct, environmental management systems, disclosure and reporting initiatives, learning initiatives, models and meta-standards, cooperatives, and voluntary standards, certification, and labeling mechanisms”).

⁹⁷ See *generally* Jonathan M. Gilligan, *supra* note 13; Surbhi Sarang, *Combating Climate Change Through a Duty To Divest*, 49 COLUM. J.L. & SOC. PROBS. 295 (2016); Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013).

⁹⁸ Gilligan, *supra* note 13, at 188–89.

Divestment or “exit” “can serve to disassociate investors from firms they find morally repugnant or embarrassing to be publicly associated with.”⁹⁹ Critics often view “exit” as a crude, all-or-nothing tool, “with little nuance and prone to backfiring.”¹⁰⁰ The impact is driven largely by the scope of divestment. If the campaign is one involving individual activist-investors, and their fraction is small, their divestment will likely not effect the corporation’s market value in any meaningful way.¹⁰¹ Such efforts may embolden the corporation to continue on the path that inspired the divestment in the first place, while rendering the once-activist-investors voiceless and unable to make any further impact.¹⁰² The “exit” may have “sent a message” but the impact of that message is often difficult to measure or impermanent unless the “exiter” is large enough to garner attention or inflict reputational harm.¹⁰³

Engagement, on the other hand, may provide a more nuanced form of private governance than divestment or “exit.” That is, when shareholders remain engaged in the corporation and take action from within, their voice may be louder.¹⁰⁴ “Voice-centered engagement offers greater opportunity for nuance and give-and-take than divestment . . . Not only among investors but more broadly throughout society, voice has been an under-utilized response to dissatisfaction. Thus, voice is more likely to be noticed when it is used.”¹⁰⁵

Recent shareholder and divestment actions targeted at the for-profit prison industry and, specifically, privatized immigration detention show that these private governance efforts may be more effective than the public governance activities discussed in Part II when it comes to detention oversight and advancing decarceration.

B. Private Governance of Privatized Incarceration

1. Shareholder Actions

Corporate shareholders have taken action recently in at least two notable ways with respect to privatized immigration confinement. In late 2018, shareholders of GEO and CoreCivic filed shareholder resolutions against both companies seeking to prevent the entities from separating migrant families apprehended at or near the U.S.-Mexico border.¹⁰⁶

⁹⁹ *Id.* at 189.

¹⁰⁰ *Id.* at 190.

¹⁰¹ *Id.*

¹⁰² *Id.* (“If demand for shares is inelastic, and if activists constitute a small fraction of investors, then divestment will not affect a firm’s market value. Therefore, the effect of an exit would largely be to remove dissidents from the conversation without providing any offsetting financial pressure. This would ultimately reduce, rather than increase, the incentives for the firm to change.”).

¹⁰³ *Id.* at 190–91 (“Proponents of divestment argue that the most important and influential consequences of divestment are not its direct impacts on share prices, but the message it sends. Divestments by large investors tend to get significant media coverage, which can damage companies’ reputations.”).

¹⁰⁴ *Id.* at 191.

¹⁰⁵ *Id.*

¹⁰⁶ Press Release, Prison Legal News, *Family Separation Shareholder Resolution Filed with CoreCivic, GEO Group*, PRISON LEGAL NEWS (Dec. 4, 2018),

<https://www.humanrightsdefensecenter.org/action/news/2018/family-separation-shareholder-resolution-filed-corecivic-geo-group/> [hereinafter Prison Legal News, *Family Separation*]; see also Press Release, Prison Legal News, *GEO Group Objects to Shareholder Resolution on Immigrant Family Separation*, HUMAN RIGHTS DEFENSE CENTER (Jan. 7, 2019),

The supporting statement detailed the track record of systemic concerns over conditions in GEO and CoreCivic immigration prisons, outlining a history of sexual abuse complaints, hunger strikes, deaths in custody, and labor violations.¹⁰⁷ Both companies objected to the proposed resolutions and asked the Securities and Exchange Commission (SEC) to issue a “no-action” ruling, meaning the SEC would not recommend or take enforcement action against the companies.¹⁰⁸ They also requested the SEC exclude the proposed resolutions from the shareholder’ packets distributed at the companies’ annual meetings and from a shareholder vote.¹⁰⁹ The SEC upheld the companies’ objections, precluding the resolutions from reaching the shareholders. However, these shareholder actions placed both companies under public scrutiny, drawing SEC and media attention.¹¹⁰

In 2019, GEO shareholders successfully passed a resolution demanding GEO to better report human rights policies and violations to investors.¹¹¹ Specifically, the proposed resolution “asks GEO’s board [to] report annually on how the Company implements the portion of its Global Human Rights Policy that addresses ‘Respect for Our Inmates and Detainees.’”¹¹² The two paragraphs that comprise this portion of the policy describe the company’s vision with respect to ensuring the safety and well-being of the people whom it incarcerates, as well as its commitment to “support the ability of inmates and detainees to develop the values and skills needed to complete their terms, and upon release, become productive and law abiding members of society.”¹¹³ Much like it did with the earlier resolution, GEO responded to the proposal by requesting a “no-action” ruling but on this proposal, the SEC disagreed.¹¹⁴ The proposed resolution went before the shareholders at the company annual meeting. A majority of the shareholders passed the resolution, which required GEO to release a human rights report—or, a Human Rights and Environmental, Social & Governance (“ESG”) report—by September 2019.¹¹⁵

<https://www.humanrightsdefensecenter.org/action/news/2019/geo-group-objects-shareholder-resolution-immigrant-family-separation/>.

¹⁰⁷ Prison Legal News, *Family Separation*, *supra* note 106.

¹⁰⁸ THE OFFICE OF INVESTOR EDUCATION AND ADVOCACY, *No Action Letters* (modified March 23, 2017), <https://www.sec.gov/fast-answers/answersnoactionhtm.html>.

¹⁰⁹ Travis Loller, *Companies Argue Against Proposal Not To House Separated Kids*, AP NEWS (Jan. 8, 2019), <https://www.apnews.com/4769fe3da531446cba1f08c313e5ab00>.

¹¹⁰ Letter from Kasey L. Robinson, Special Counsel, U.S. Securities & Exch. Comm’n, to Esther Moreno, Akerman LLP (Mar. 15, 2019), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/alexfriedmangeo031519-14a8.pdf>; *see also* Jerry I Press Release, Prison Legal News, *Private Prison Companies Successfully Oppose Shareholder Resolutions Against Housing Separated Immigrant Children and Parents*, Prison Legal News (Mar. 20, 2019), <https://www.prisonlegalnews.org/in-the-news/2019/private-prison-companies-successfully-oppose-shareholder-resolutions-against-housing-separated-immigrant-children-and-parents/>.

¹¹¹ Jerry Iannelli, *GEO Group’s Own Shareholders Concerned About Human Rights in the Company’s Prisons*, MIAMI NEW TIMES (May 7, 2019), <https://www.miaminewtimes.com/news/geo-group-shareholders-concerned-about-human-rights-violations-at-private-prison-giant-11166775>.

¹¹² Letter from Reverend Bryan V. Pham, USA W. Soc’y of Jesus, to U.S. Secs. & Exch. Comm’n Jesuits West (Feb. 15, 2019), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/usawestetal031519-14a8.pdf>.

¹¹³ GEO GROUP, GLOBAL HUMAN RIGHTS POLICY at 3,

https://www.geogroup.com/Portals/0/PREA_Certifications/Human_Rights_Policy.pdf.

¹¹⁴ Letter from Frank Pigott, Attorney-Adviser, U.S. Secs. & Exch. Comm’n, to Esther Moreno, Akerman LLP, U.S. Securities and Exchange Commission (Mar. 15, 2019), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/usawestetal031519-14a8.pdf>.

¹¹⁵ Iannelli, *supra* note 111. *The GEO Group Publishes First-Ever Human Rights and ESG Report*, Yahoo

2. Divestment Activity

In March 2019, in an unprecedented move, JPMorgan Chase, one of the nation's largest banks, announced it would no longer finance or invest in private prison corporations.¹¹⁶ In a written statement announcing the divestment, the company said, "JPMorgan Chase has a robust and well-established process to evaluate the sectors that we serve. As part of this process, we will no longer bank the private-prison industry."¹¹⁷ Wells Fargo soon followed.¹¹⁸ Stocks of the two largest private-prison companies took a drastic hit in the aftermath of the banks' announcements.¹¹⁹ Soon, at least six more of the nation's largest banks had committed publicly to ending financing for the private-prison industry, leaving the industry with a reported eighty-seven percent financing gap, falling credit ratings, and investor fallback.¹²⁰ By October 2019, all publicly known banking partners for one of the industry's leaders had committed to withdrawing their financial support, and the leading stock prices for the industry's top companies were "near historic lows."¹²¹ By one report, the stock prices dipped to their lowest point since 2016, when the Obama administration announced it was ending the use of private prisons on the federal level.¹²²

Here, the voice of the "exiters" is a loud one. Unlike, perhaps, the exit campaigns of individual activist-investors in other industries, the big banks' divestment from the prison industry has made a statement. The actions have garnered significant media coverage.¹²³ And others have taken notice, leading to the divestment or likely divestment of several other major investors in the companies.¹²⁴

Finance (Sept. 26, 2019), <https://finance.yahoo.com/news/geo-group-publishes-first-ever-123000649.html>. The seventy-seven page report appears to focus on the second paragraph of the "Respect for Our Inmates and Detainees" policy, as it addresses only the company's "Continuum of Care" program, a subset of programs with a stated focus on "improved offender rehabilitation, and assisting individuals reenter society as productive citizens." GEO Continuum of Care: 2018 Annual Report, <https://www.geogroup.com/Portals/0/CoC%20Annual%20Report%202020719%20FINAL.pdf>.

¹¹⁶ See, e.g., Emily S. Rueb, *JPMorgan Chase Stops Funding Private Prison Companies, and Immigration Activists Applaud*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/business/jp-morgan-prisons.html>.

¹¹⁷ AMERICAN BANKER, *JPMorgan Ends Financing of Private Prisons After Criticism* (Mar. 5, 2019), <https://www.americanbanker.com/articles/jpmorgan-ends-financing-of-private-prisons-after-criticism>.

¹¹⁸ Carter, *supra* note 5.

¹¹⁹ Morgan Simon, *In Wake of Wells Fargo Hearing, Private Prison Stocks Take Big Hit*, FORBES (Mar. 15, 2019), <https://www.forbes.com/sites/morgansimon/2019/03/15/in-wake-of-wells-fargo-hearing-private-prison-stocks-take-big-hit/#535e7aa91a3b> (reporting stocks of two largest private-prison companies, GEO Group and CoreCivic, dropped sixteen and eight percent respectively in the day following banks' divestment announcement).

¹²⁰ Simon, *supra* note 7.

¹²¹ *Id.*

¹²² Manuel Madrid, *Facing Widespread Divestment and Public Outcry, GEO Group Tries to Soothe Shareholders*, MIAMI NEW TIMES (Nov. 6, 2019), <https://www.miaminewtimes.com/news/geo-group-q3-fy19-shareholder-call-discusses-divestment-from-banks-prison-abuse-and-protestors-11310719>.

¹²³ See, e.g., Madison Pauly, *The Private Prison Industry Just Suffered a Major Blow. And It Could Just Be the Beginning*, MOTHER JONES (March 7, 2019), <https://www.motherjones.com/crime-justice/2019/03/jp-morgan-chase-divestment-private-prisons-lauren-brooke-eisen/>.

¹²⁴ See, e.g., Julia Ainsley, *Biggest public pension fund in U.S. dumps private prison firms that run ICE Migrant Detention Centers*, NBC NEWS (Oct. 21, 2019), <https://www.nbcnews.com/politics/immigration/biggest-public-pension-fund-u-s-dumps-private-prison-firms-n1063231>; Alex Greenberger, *'These Prisons Punish for Profit': At MoMA Conference, Academics Call on Museum, Board Member to Divest From Private Prisons*, ARTNEWS (April 28, 2019),

Indeed, the impacted private prison firms have had no choice but to also take notice. In a quarterly earnings call, for example, GEO's founder and CEO told shareholders, "We recognize that media coverage of overcrowded border patrol facilities and the announcement by a handful of our financial institutions discontinuing future financing has caused volatility in our equity and debt markets."¹²⁵ He continued, "Our shareholders should take comfort in knowing that we continue to have strong banking relationships with several dozen lenders and financial institutions in our senior credit facility."¹²⁶ CoreCivic's CEO called the divestment actions "a result of politically motivated threats."¹²⁷

CONCLUSION

Immigration detention is expanding rapidly, with more than 52,000 people confined pursuant to the federal government's immigration-enforcement authority every day, and approximately two-thirds of those people behind the walls of for-profit prisons.¹²⁸ Conditions in the for-profit prisons are dreadful, leading to untreated medical conditions, infectious disease outbreaks, and deaths.¹²⁹ As described above, public governance has come up short in recent years with respect to advancing the goal of decarceration and improving conditions inside private immigration prisons.

Recent efforts of private governance institutions may fill in the gap. Shareholder actions and divestment activity with respect to the private prison industry have garnered significant attention. The GEO shareholders resolution led to the company's first-ever release of a social responsibility report. The major banks' divestment from the private-prison industry represents a loss of millions of dollars of capital for the corporations managing and profiting from privatized immigration detention, and sends a compelling signal from Wall Street that a company's conduct, not just its bottom line, matters. Stocks of the two largest private-prison companies took a drastic hit in the aftermath of the banks' announcements. Perhaps signalling that the strategy is advancing certain goals, GEO warned its investors that growing public pressure to divest from the private prison industry "could have a material adverse effect" on its business.¹³⁰ In light of the ineffectiveness of public governance institutions in this space, early outcomes suggest these sorts of private governance institutions may be one promising method to draw attention to the scope of and conditions in for-profit immigration detention centers, to improve those conditions, and to stop the overall growth of the immigration detention apparatus.

<http://www.artnews.com/2019/04/28/moma-larry-fink-statement-cmap/>.

¹²⁵ Manuel Madrid, *Facing Widespread Divestment and Public Outcry, GEO Group Tries to Soothe Shareholders*, MIAMI NEW TIMES (Nov. 6, 2019), <https://www.miaminewtimes.com/news/geo-group-q3-fy19-shareholder-call-discusses-divestment-from-banks-prison-abuse-and-protestors-11310719>.

¹²⁶ *Id.*

¹²⁷ Renae Merle & Tracy Jan, *Wall Street pulled its financing. Stocks Have Plummeted. But Private Prisons Still Thrive*, WASH. POST (Oct. 3, 2019), <https://www.washingtonpost.com/business/2019/10/03/wall-street-pulled-its-financing-stocks-have-plummeted-private-prisons-still-thrive/>.

¹²⁸ RYO & PEACOCK, *supra* note 17, at 14 (approximately two-thirds of the daily population of immigration detainees are confined in for-profit prisons).

¹²⁹ See McCormick-Cavanagh, *Crow*, *supra* note 73.

¹³⁰ Asher Stockler, *Private Prison Company GEO Group Says Activists Pose Risk to Bottom Line*, NEWSWEEK (May 8, 2019), <https://www.newsweek.com/private-prison-company-geo-group-says-activists-pose-risk-bottom-line-1420371>.