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If You Can't Beat 'Em, Reform 'Em: Expanding Oversight of Privately-Operated Immigrant Detention Centers

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IF YOU CAN'T BEAT 'EM, REFORM 'EM: EXPANDING OVERSIGHT OF PRIVATELY-OPERATED IMMIGRANT DETENTION CENTERS

Katherine Rollins*

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I. INTRODUCTION

In October 2019, Governor Gavin Newsome of California signed a bill barring the state's department of corrections from entering into or renewing contracts with private corporations to run state prisons and immigrant detention centers beginning January 1, 2020.¹ Citing a lack of oversight and

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an improper weighing of profit maximization over livable conditions, California will completely ban the incarceration of inmates in privately-run facilities from 2028 onward.² Of the 9,000 individuals currently detained in California's privately-run facilities, approximately 4,000 are immigrants in Immigration and Customs Enforcement (ICE) detention.³ Illinois, Nevada, and New York imposed bans similar to California's.⁴ It is estimated that as many as seventy-three percent of immigration detainees are housed in privately-run facilities nationally.⁵ This means that the beneficial impact of this legislation will mostly be seen by immigrant communities.

While state legislatures battle with the legality of private immigrant detention centers, this article proposes an expansion and strengthening of federal whistleblower protections to increase oversight and improve conditions at the remaining facilities nationwide. Part II discusses the history of immigrant detention in the United States and the impact of detention on short-term and long-term detainees. Part III analyzes the standards and current oversight mechanisms applicable to immigrant detention centers and proposes that—in addition to legislation specifically aimed at improving detention center standards—whistleblower reform generally will help to protect the civil liberties of detainees. Finally, Part IV looks to the future of immigrant detention centers and the United States' influence on global immigration policy.

II. BACKGROUND AND HISTORY

Immigration detention in the United States is not new.⁶ Throughout our country's history, and up to present day, pressure from nationalist movements has led to exclusionary immigration laws and high detention

for the attorneys, activists, and community members fighting for the rights of immigrants every day. The author thanks Professor Pottratz Acosta for her guidance and mentorship. Prior to joining Mitchell Hamline as an Assistant Teaching Professor, Professor Pottratz Acosta worked in immigration law for twelve years.

¹ 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> [<https://perma.cc/UCW5-YP4T>].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ THE SENTENCING PROJECT, PRIVATE PRISONS IN THE UNITED STATES (Oct. 24, 2019), <https://www.sentencingproject.org/publications/private-prisons-united-states/> [<https://perma.cc/B9S4-EYLP>]. By comparison, inmates in state and federal privately-run prisons amounted for only about 8.2% of the total prison population. *Id.*

⁶ See RICHARD A. BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 5 (4th ed. 2016).

rates.⁷ Starting as early as the second half of the nineteenth century, the United States government has singled out and precluded groups of people from entering the country based on arbitrary ideas of who is worthy enough to reside in our country—let alone participate in our democracy.⁸

A. The History of Immigrant Detention

The first federal restrictions on immigration arose in the nineteenth century after the Civil War and provided for the exclusion of convicts and sex workers.⁹ Following an increase in immigration from Asia, Congress passed the Chinese Exclusion Act,¹⁰ the Public Charge Law of 1882,¹¹ and the Anti-Contract Labor Law of 1885 as part of an expansive effort to curb migration from that part of the world.¹² After the turn of the century, more than twenty million immigrants came to the United States looking for work, led by the development of industry in American cities.¹³ With another influx of immigrants also came additional legislation categorically restricting immigration on the basis of ideology, nationality, health, and mental disabilities.¹⁴

1. Ellis Island

Ellis Island, known as the “Golden Door”¹⁵ to the United States, was both an institution that welcomed immigrants processed there and a detention center for those who were unlucky enough to fall into any of the

⁷ See *id.*; Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 200 (2019) (“The Trump Administration’s immigration policies reflect its white nationalist rhetoric. The Administration has issued a dizzying array of policy changes that explicitly target or disproportionately affect noncitizens of color at the same time that President Trump’s statements reflect racist intent.”).

⁸ Srikantiah & Sinnar, *supra* note 7, at 200.

⁹ BOSWELL, *supra* note 6, at 5; Page Law, ch. 141, 18 Stat. 477 (1875) (repealed 1974).

¹⁰ Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

¹¹ Public Charge Law, ch. 376, 22 Stat. 214 (1882). This law also excluded “any convict, lunatic, [or] idiot . . .” *Id.*

¹² See Anti-Contract Labor Law of 1885, ch. 164, 23 Stat. 332 (1885); see also Louis Anthes, *The Island of Duty: The Practice of Immigration Law on Ellis Island*, 24 N.Y.U. REV. L. & SOC. CHANGE 563, 569 (1998).

¹³ See BOSWELL, *supra* note 6, at 6.

¹⁴ *Id.* at 6, n.25.

¹⁵ See Emma Goldman, *Immigration and Deportation at Ellis Island*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/goldman-immigration-and-deportation-ellis-island/> [https://perma.cc/T3PG-QW3K] (last visited Mar. 21, 2020).

restricted categories of persons at the time.¹⁶ First opened in 1892, Ellis Island operated, though intermittently, until 1954.¹⁷

Initially, Ellis Island was an enforcement tool for federal statutes enacted in the prior decade and this enforcement power was later strengthened by the Immigration Act of 1891 and the creation of the Bureau of Immigration.¹⁸ The Immigration Act of 1891 not only created additional restrictions on who could enter the United States but also provided for the inspection of immigrants upon their arrival to the United States.¹⁹ Inspection officers were “to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record.”²⁰ While a seemingly straightforward directive, together the Public Charge Law of 1882 and the Anti-Contract Labor Law of 1885 created contradictory admission standards for entry into the United States. The Public Charge Law prohibited “any person unable to take care of himself or herself without becoming a public charge,”²¹ while the Anti-Contract Labor Law made it:

unlawful for any person, company, partnership, or corporation . . . [to] in any way assist or encourage the importation or migration of any alien or aliens . . . under contract or agreement . . . made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States²²

In effect, hopeful immigrants were confronted with a contradictory situation: they had to demonstrate they could both support themselves

¹⁶ See *History & Culture*, NAT'L PARK SERV.: ELLIS ISLAND (last updated May 8, 2018), <https://www.nps.gov/elis/learn/historyculture/index.htm> [https://perma.cc/KXM7-4HDJ] (“For the vast majority of immigrants, Ellis Island truly was an ‘Island of Hope’—the first stop on their way to new opportunities and experiences in America. For the rest, it became an ‘Island of Tears’—a place where families were separated and individuals were denied entry into the United States.”); *Ellis Island History*, THE STATUE OF LIBERTY-ELLIS ISLAND FOUND., <https://www.libertyellisfoundation.org/ellis-island-history> [https://perma.cc/4KT9-DHTJ] (last visited Mar. 21, 2020) (“First and second class passengers would disembark, pass through Customs at the piers and were free to enter the United States. The steerage and third-class passengers were transported from the pier by ferry or barge to Ellis Island where everyone would undergo a medical and legal inspection.”).

¹⁷ See *id.* The facility was closed for three years after a fire in 1897, and again during World War I when it was used by the United States military. *Id.*

¹⁸ See Kevin Jennings, *Yes, Your Ancestors Probably Did Come Here Legally—Because ‘Illegal’ Immigration is Less Than a Century Old*, L.A. TIMES (Jan. 14, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-jennings-legal-illegal-immigration-20180114-story.html> [https://perma.cc/FF5U-M3PX].

¹⁹ Immigration Act of 1891, ch. 551, 26 Stat. 1084, 1085 (1891).

²⁰ *Id.*

²¹ Public Charge Law, ch. 376, 22 Stat. 214 (1882).

²² Anti-Contract Labor Law, ch. 164, 23 Stat. 332 (1885).

financially (or be supported by relatives) *and* that they did not have a job, and therefore a source of income, prearranged.²³ Those that failed the inspection process were detained until an exclusion hearing was held by the Board of Special Inquiry.²⁴ Evidence collected by inspectors created a presumption in favor of exclusion, but immigrants could present new, and even directly contradictory evidence, to overcome that presumption.²⁵

Overall, about twenty percent of those inspected at Ellis Island were temporarily detained.²⁶ While the Immigration Act of 1891 provided that detainees are “to be properly housed, fed, and cared for,”²⁷ over 3,500 immigrants died in the hospital on the island.²⁸ After the passage of the Emergency Quota Act of 1921²⁹ and the Immigration Act of 1924,³⁰ the number of immigrants processed through Ellis Island slowed to a trickle, and the facility eventually transitioned into a detention center for prisoners of war in World War II.³¹

2. *Angel Island*

On the other side of the country in San Francisco, hopeful immigrants had a much different experience.³² Angel Island opened in 1910 to primarily house Chinese immigrants awaiting inspection.³³ Separated by nationality, travel class, and perceived health, poor and Asian migrants were taken from the passenger ships to Angel Island for processing and to await interviews

²³ See Anthes, *supra* note 12, at 574.

²⁴ See *id.* at 580.

²⁵ Cf. *id.* at 581. Interestingly, the immigrants who appealed to the Board of Special Inquiry without hiring representation fared better than those who did hire representation. See *id.* at 583. Anthes analyzed 424 cases before the Board and found that unrepresented immigrants won about three-fifths of their cases, while represented immigrants only won about two-fifths of the time. *Id.*

²⁶ Goldman, *supra* note 15.

²⁷ Immigration Act of 1891, ch. 551, 26 Stat. 1085 (1891).

²⁸ Caitlin Johnson, *Remembering the Dark Side of Ellis Island*, CBS NEWS (July 1, 2007), <https://www.cbsnews.com/news/remembering-the-dark-side-of-ellis-island/> [https://perma.cc/KJ8E-BN3E].

²⁹ Emergency Quota Act, ch. 8, 42 Stat. 5, 5 (1921) (“[T]he number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910.”).

³⁰ Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (establishing consular processing and further restricting immigration on the basis of national origin).

³¹ See Goldman, *supra* note 15.

³² *History of Angel Island Immigration Station*, AIISF, <https://www.aiisf.org/history> [https://perma.cc/TQ9Q-KSDW] (last visited Mar. 21, 2020).

³³ *Id.*

with federal officials, which were more like interrogations.³⁴ Some interviews lasted days, testing applicants' knowledge of the intimate details of their lives, and were meant to root out and deport Chinese immigrants who lied about meeting the criteria for exempt status under the Chinese Exclusion Act.³⁵ Inconsistencies in testimony could put both the applicant and any of his or her family members in the United States at risk of being deported.³⁶

While the exact numbers relating to immigrant detention at Angel Island are unknown (the Administration Building, along with all of its records, burned down in 1940),³⁷ it has been estimated that the average length of detention for all arrivals in San Francisco (including those who were not sent to Angel Island at all) was 7.1 nights.³⁸ Living conditions at Angel Island were poor, as detainees were denied anything more than minimal recreation time and fed rations that were "barely edible."³⁹ The poor conditions in the barracks were evidenced by the poems etched into the wooden walls.⁴⁰ One detainee wrote:

Imprisoned in the wooden building day after day,
My freedom withheld; how can I bear to talk about it?
I look to see who is happy, but they only sit quietly.
I am anxious and depressed and cannot fall asleep.
The days are long and the bottle constantly empty;
my sad mood, even so, is not dispelled.

³⁴ *Id.*

³⁵ *Id.*; Exclusion of Chinese Laborers Act, ch. 1015, 25 Stat. 476, 476 (1888) (repealed 1943) ("Chinese officials, teachers, students, merchants, or travelers for pleasure or curiosity, shall be permitted to enter the United States, but in order to entitle themselves to do so, they shall first obtain the permission of the Chinese Government, or other Government of which they may at the time be citizens or subjects."). Exclusionary policies continued through the turn of the century and included the so-called "Gentlemen's Agreement" of 1907, in which the United States government "agreed to pressure the San Francisco authorities to withdraw the measure, and the Japanese Government promised to restrict the immigration of laborers to the United States." *Japanese-American Relations at the Turn of the Century, 1900-1922*, OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE (2016), <https://history.state.gov/milestones/1899-1913/japanese-relations> [https://perma.cc/45J3-ZRY6]; see also Immigration Act of 1917, ch. 29, 39 Stat. 874, 875-76 (1917) (providing that "the following classes of aliens shall be excluded from admission into the United States . . . unless otherwise provided for by existing treaties, persons who are natives of islands not possessed by the United States adjacent to the Continent of Asia . . . or who are natives of any country, province, or dependency situate on the Continent of Asia . . .").

³⁶ AIISF, *supra* note 32.

³⁷ *Id.*

³⁸ Robert Barde & Gustavo J. Bobonis, *Detention at Angel Island: First Empirical Evidence*, 30 SOC. SCI. HIST. 103, 113 (2006).

³⁹ AIISF, *supra* note 32.

⁴⁰ *Id.*

Nights are long and the pillow cold; who can pity my loneliness?
 After experiencing such loneliness and sorrow,
 Why not just return home and learn to plow the fields?⁴¹

Despite the fire in 1940, Angel Island was still used to detain immigrants during World War II.⁴² After the attack on Pearl Harbor, many Japanese immigrants living in Hawaii were sent to the mainland; about 600 of those individuals were detained at Angel Island and labeled as “enemy aliens.”⁴³ After the war ended, the detention center was abandoned by the United States’ military and remained that way until it was established as a California state park.⁴⁴

3. *The Switch from Parole to Detention*

From the closure of Ellis Island in 1954 until the early 1980s, the federal government generally opted for alternatives to detention of immigrants.⁴⁵ “Physical detention of aliens [was then] the exception, not the rule, and [was] generally employed only as to security risks or those likely to abscond.”⁴⁶ One of the most commonly used alternatives at the time—parole—is defined as “a device that allows a person’s physical admission to the United States, yet treats the person in a legal sense as if he or she were still at the border seeking admission.”⁴⁷ While parole is a form of statutory

⁴¹ Unknown Author, *Poem 43*, in ISLAND: POETRY AND HISTORY OF CHINESE IMMIGRANTS ON ANGEL ISLAND, 1910–1940 68 (University of Washington Press 2d ed. 2014).

⁴² AIISF, *supra* note 32.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See IMMIGR. & NATURALIZATION SERV., 1955 ANNUAL REPORT 17 (1955) (“The total number of aliens detained during the year was only 184,000, of which 173,000 were Mexican nationals who were detained for extremely brief periods pending their return to Mexico.”); IMMIGR. & NATURALIZATION SERV., 1960 ANNUAL REPORT 8 (1960) (“6,694 aliens were taken into custody under warrants of arrest. . . . At the end of the fiscal year, 6,976 aliens under proceedings were on bond, supervision, or released on their own recognizance.”); IMMIGR. & NATURALIZATION SERV., 1965 ANNUAL REPORT 14 (1965) (“There were 17,041 aliens initially admitted to Service detention facilities and 29,918 to non-Service facilities.”); IMMIGR. & NATURALIZATION SERV., 1970 ANNUAL REPORT 23 (1970) (“There were 94,053 aliens initially admitted to Service detention facilities and 121,670 to non-Service facilities.”); IMMIGR. & NATURALIZATION SERV., 1975 ANNUAL REPORT 19 (1975) (“Aliens admitted to Service and non-Service facilities during fiscal year 1975 numbered 109,138 and 103,888 respectively.”); IMMIGRATION & NATURALIZATION SERV., 1982 ANNUAL REPORT 14 (1982) (“During this period, 229,135 aliens were admitted in detention: 143,616 to these INS facilities and 85,519 to non-Service facilities.”).

⁴⁶ *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (holding that immigration parole is merely used to avoid needless detention of immigrants and does not constitute a change in status).

⁴⁷ BOSWELL, *supra* note 6, at 11 n.48; see *id.* at 36; 8 U.S.C. § 1182(d)(5).

relief still available today, it is a discretionary decision left up to the attorney general.⁴⁸

a. Haitian and Cuban Migration and the Federal Government's "Solution"

Starting in the early 1970s, Haitians began making their way to Florida in order to escape a repressive dictatorship.⁴⁹ At that time, refugee status was primarily granted only to those fleeing communist governments.⁵⁰ The Refugee Act of 1980, however, expanded the definition of "refugee" to align with the 1951 U.N. Convention⁵¹ and the 1967 Protocol Relating to the Status of Refugees,⁵² allowing for a grant of conditional status for individuals "who [are] unable or unwilling to return to [their country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁵³

However, to circumvent the newly enacted law and to deter further migration from Haiti, the federal government began by first classifying those fleeing the Haitian Duvalier regime as economic migrants, making them

⁴⁸ See 8 U.S.C. § 1182(d)(5)(A); 8 U.S.C. § 1226(a)(2). After the creation of the Department of Homeland Security (DHS) in 2003, the discretion to parole now also lies with DHS and Immigration and Customs Enforcement. See *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (last updated Dec. 16, 2019), <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-individuals-outside-united-states> [https://perma.cc/NDB3-VYDR].

⁴⁹ GEN. GOV'T DIV., U.S. GEN. ACCOUNTING OFFICE, DETENTION POLICIES AFFECTING HAITIAN NATIONALS 1 (June 16, 1983); Carl Lindscoog, *How the Haitian Refugee Crisis Led to the Indefinite Detention of Immigrants*, WASH. POST (Apr. 9, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-indefinite-detention-of-immigrants/> [https://perma.cc/ZL4R-SQ2S].

⁵⁰ See Immigration and Nationality Act, amendments, Pub. L. No. 89-236, 79 Stat. 911, 913 (1965). This amendment also provided for conditional status for individuals fleeing "the general area of the Middle East."

⁵¹ Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 2545 ("[T]he term refugee shall apply to any person who: . . . As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, . . . unwilling to avail himself of the protection of that country . . .").

⁵² Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 8791 (expanding the definition of refugee to individuals persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion after January 1, 1951).

⁵³ Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102, 102 (1980).

ineligible for asylum.⁵⁴ In contrast, after thousands of Cubans sought asylum in the Peruvian embassy in Cuba, President Jimmy Carter invited them to seek refuge in the United States.⁵⁵ In the summer of 1980, the relatively gradual influx of migrants grew into a crisis as more than 100,000 Cuban and 15,000 Haitian nationals arrived in the United States.⁵⁶ Newcomers were held in detention centers, which were established by the Carter administration, while they were processed.⁵⁷ The majority of Cubans were released on parole after processing, while the remaining were held to await deportation.⁵⁸ Haitians, on the other hand, were deemed to lack ties to the community and, for the most part, remained in detention.⁵⁹ During this time period, approximately 1,620 immigrants were held in detention daily.⁶⁰

In 1981, President Ronald Reagan started a program meant to deter illegal immigration, part of which “provided for detention of aliens involved in or awaiting exclusion proceedings as [a] means of restricting employment opportunities.”⁶¹ The change in policy led to “critical” overcrowding at detention centers in South Florida.⁶² At one infamous facility, Krome North, as many as 1,530 detainees were housed in a space meant for 524 people.⁶³ An Immigration and Naturalization Service official noticed substantial

⁵⁴ See Lindskoog, *supra* note 49.

⁵⁵ Yvette M. Mastin, Comment, *Sentenced to Purgatory: The Indefinite Detention of Mariel Cubans*, 2 THE SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 137, 142-43 (2000). As a result of the invitation, Fidel Castro opened Cuba's borders to allow Cubans to travel to the United States. *Id.* at 143. After thousands of Cubans began their journey to southern Florida, “the Mariel Cubans became the victims of a propaganda campaign that made them appear dangerous and undesirable.” *Id.* at 144. Despite reports that many of the Mariel Cubans were “convicts, robbers, murders, homosexuals and prostitutes,” the large majority were paroled to families or other support groups. *Id.* at 145, 146. Yet, the nation's view of these immigrants remained largely negative, resulting in the continued detention of excluded Cubans “to await further evaluation.” *Id.* at 146.

⁵⁶ *Id.*

⁵⁷ See Lindskoog, *supra* note 49.

⁵⁸ See Mastin, *supra* note 55, at 144. Another example of the preferential treatment of Cubans included the Cuban Adjustment Act of 1966, which allowed admitted Cuban nationals to apply for lawful permanent residence status after residing in the United States for just one year. See Cuban Refugees, Adjustment of Status Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161, 1161 (1966).

⁵⁹ GEN. GOV'T DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 6 (“Haitian nationals were disproportionately affected by the detention action—in terms of both the numbers detained and the length of detention.”).

⁶⁰ See Emily Kassie, *Detained*, THE MARSHALL PROJECT (Sept. 24, 2019), <https://www.themarshallproject.org/2019/09/24/detained> [https://perma.cc/W6ES-XASH].

⁶¹ GEN. GOV'T DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 6.

⁶² See *id.* at 18.

⁶³ *Id.*

issues in living conditions at Krome North, including an inadequate supply of clothing, inoperable washing machines due to sewage capacity, “debilitating idleness,” “severe” dental problems, and lack of shade.⁶⁴ Detainees were affected physically and mentally, as noted by Red Cross representatives who “concluded that mental disorders [were] one of the principal medical problems” detainees faced, and these “problems were a factor of the length of confinement and could not be resolved by improved detention conditions.”⁶⁵ The daily average number of immigrants subject to these conditions reached 2,868 in 1982.⁶⁶

b. The Cold War by Proxy and Resulting Migration

Ever worried about the spread of Marxism, the Reagan administration provided support to the governments in El Salvador and Guatemala fighting a leftist movement and to the contra rebels in Nicaragua fighting against the socialist Frente Sandinista.⁶⁷ As a result, the increasingly violent civil wars led an estimated one million Central Americans to make the journey to the United States.⁶⁸ Declining to label the El Salvadoran and Guatemalan governments as violators of human rights (and therefore labeling the United States as a human rights violator by proxy), the Justice Department and the INS overwhelmingly denied asylum to Salvadorans and Guatemalans.⁶⁹ Instead, Central American migrants arrested at the United States-Mexico border were detained, pressured into voluntarily departing, or were deported without access to legal services.⁷⁰

In an attempt to deal with the overcrowding and pressure from lobbyists, the Reagan administration sought help from the new private prison industry to open and run additional immigrant detention centers.⁷¹ The United States’ first privately-run immigrant detention center opened in Texas in 1984 and was owned and operated by the Corrections Corporation

⁶⁴ *Id.* at 18-19.

⁶⁵ *Id.* at 20-21.

⁶⁶ See Kassie, *supra* note 60.

⁶⁷ See Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POLICY INST.: MIGRATION INFO. SOURCE (Apr. 1, 2006), <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era> [<https://perma.cc/9FTL-RG82>].

⁶⁸ *Id.*

⁶⁹ *Id.* (“[A]pproval rates for Salvadoran and Guatemalan asylum cases were under three percent in 1984. In the same year, the approval rate for Iranians was sixty percent, forty percent for Afghans fleeing the Soviet invasion, and thirty-two percent for Poles.”)

⁷⁰ *Id.*

⁷¹ Michael Flynn, *There and Back Again: On the Diffusion of Immigration Detention*, 2 J. ON MIGRATION & HUM. SECURITY 165, 171 (2014).

of America.⁷² That same year, the daily average number of immigrants held in detention reached 3,380.⁷³

c. The War on Drugs

President Richard Nixon declared a “war on drugs” in 1971, but it was not until the rise of the Medellín cartel and the election of President Reagan that the war on drugs truly ramped up.⁷⁴ First Lady Nancy Reagan introduced her “Just Say No” campaign in 1984, and two years later, President Reagan signed the Anti-Drug Abuse Act of 1986.⁷⁵ In addition to the bill’s arguably most controversial provision, which established mandatory minimum sentences, it expanded the drug-related offenses that could result in a finding of inadmissibility or deportability.⁷⁶ Moreover, the bill also enabled local law enforcement to communicate with INS if it believed it had arrested a non-citizen for a drug-related offense.⁷⁷

⁷² *Id.* at 171 n.8. The Corrections Corporation of America is still in business today, renamed CoreCivic—one of the largest private detention companies in the country. See Smita Ghosh, *How Migrant Detention Became American Policy*, WASH. POST (July 19, 2019), <https://www.washingtonpost.com/outlook/2019/07/19/how-migrant-detention-became-american-policy/> [https://perma.cc/YYG2-386M].

⁷³ See Kassie, *supra* note 60.

⁷⁴ See *Timeline: America’s War on Drugs*, NPR (Apr. 2, 2007), <https://www.npr.org/templates/story/story.php?storyId=9252490> [https://perma.cc/BMN3-VJ3T].

⁷⁵ *Id.*; Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207 (1986).

⁷⁶ 100 Stat. 3207 at 47. Grounds of inadmissibility apply to individuals who are seeking to enter the United States at a border or port of entry, and to those who are looking to adjust their immigration status, like when applying for a “green card.” See BOSWELL, *supra* note 6, at 30–31. Grounds of deportability, on the other hand, apply when a noncitizen has been formally admitted to the United States and may face removal to their country of origin. *Id.* at 30.

⁷⁷ Section 1751 of the Anti-Drug Abuse Act of 1986 provides:

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)—(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States, (2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and (3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

100 Stat. 3207 at 47–48.

Further escalating the impact of the drug war on immigrants, the Anti-Drug Abuse Act of 1988 mandated detention of non-citizens convicted of an aggravated felony, which at the time was defined as “murder, any drug trafficking crime . . . or any illicit trafficking in any firearms or destructive devices”⁷⁸ This “aggravated felony” rule not only applied to undocumented immigrants, but to individuals who were in the United States legally.⁷⁹ After serving their criminal sentences, these immigrants were then taken into custody by immigration officials.⁸⁰

With more enforcement, the population of detainees continued to grow, and it expanded faster than the federal government could build livable detention facilities and hire adequate personnel.⁸¹ In 1989, the average daily population of immigrants in INS custody reached 6,438.⁸² As a result, detention centers started using tent-like structures to house immigrants, and reports of abuse by INS and private security officers in detention facilities were not uncommon.⁸³

4. The Passage of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)

Between 1988 and 1996, new immigration laws were marketed as focusing on increasing opportunities for legal immigration. The Immigration Act of 1990, for example, increased the quota numbers for employment-based and family-based immigration, and it created the visa program for highly skilled workers and the diversity visa lottery that is still in use today.⁸⁴ This law also granted Temporary Protected Status for Salvadoran nationals living in the United States.⁸⁵ Up to this point, non-citizens with a final removal order could not be detained longer than six months.⁸⁶ Yet, after the passage of the 1990 law, non-citizens labeled as “aggravated felons” were exempt from this six-month limit.⁸⁷ However, anti-

⁷⁸ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, § 7342 (1988).

⁷⁹ *Id.* (“The Attorney General shall take into custody *any* alien convicted of an aggravated felony upon completion of the alien’s sentence for such conviction.” (emphasis added)).

⁸⁰ *Id.*

⁸¹ See Kassie, *supra* note 60.

⁸² *Id.*

⁸³ See *id.*

⁸⁴ See 27 Pub. L. No. 101-649, 104 Stat. 4978, 4986-5001 (1990).

⁸⁵ *Id.* at 5036-38.

⁸⁶ See *Analysis of Immigration Detention Policies*, ACLU, (2020) <https://www.aclu.org/other/analysis-immigration-detention-policies> [https://perma.cc/FVB4-JFX3]. Unless the detainee was obstructing deportation, they had to be released under supervision after this six-month limit was reached. *Id.*

⁸⁷ Immigration Act of 1990, 104 Stat. 4978, 5050 (1990).

immigrant sentiment continued to spread, especially after the 1993 World Trade Center bombing,⁸⁸ as shown by California's passage of Proposition 187.⁸⁹

In 1996, President Bill Clinton signed into law what would become the groundwork for the immigrant detention apparatus that we have today.⁹⁰ The Antiterrorism and Effective Death Penalty Act (AEDPA)⁹¹ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)⁹² greatly expanded the use of detention for immigrants by broadening the definition of "aggravated felony" and by introducing the expedited removal process.⁹³ Prior to the passage of IIRAIRA, an average of 6,785 immigrants were held in detention daily.⁹⁴ Just after the passage of IIRAIRA, however, the daily number of immigrants in detention nearly doubled to 11,871, and

⁸⁸ See Kassie, *supra* note 60. The 1993 World Trade Center bombing killed six people, and more than 1,000 were injured. *1993 World Trade Center Bombing Fast Facts*, CNN (updated Feb. 10, 2020), <https://www.cnn.com/2013/11/05/us/1993-world-trade-center-bombing-fast-facts/index.html> [https://perma.cc/M5QP-TDF4].

⁸⁹ See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (1995) ("The initiative's provisions require law enforcement, social services, health care and public education personnel to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care, and education."). Proposition 187 passed by a vote of 59 percent to 41 percent. *Id.*

⁹⁰ See *Mandatory Detention*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/mandatory-detention> [https://perma.cc/GK36-6XMF] (last visited Feb. 19, 2020).

⁹¹ Pub. L. No. 104-132, 110 Stat. 1214, 1271 (1996) ("If the [asylum] officer determines at the time of the interview that an alien has a credible fear of persecution . . . the alien *shall* be detained for an asylum hearing before an asylum officer under section 208." (emphasis added)).

⁹² 110 Stat. 3009, 3009-585 (1996) ("The Attorney General *shall* take into custody any alien who—(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2), (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D), (C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or (D) is inadmissible under 212(a)(3)(B) or deportable under section 237(a)(4)(B), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." (emphasis added)).

⁹³ See DETENTION WATCH NETWORK, *supra* note 90.

⁹⁴ Donald Kerwin & Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, MIGRATION POL'Y INST. 6 (Sept. 2009); cf. *Immigration Detention 101*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> [https://perma.cc/5SM6-XGD8] (last visited Apr. 30, 2020).

continued to rise.⁹⁵ In addition to an increase in detainees generally, the average length of detention also increased, as migrants whose country from whence they came would not accept them back were held indefinitely.⁹⁶ More detainees also fell into this expanded definition of “aggravated felon,” making them exempt from the six-month limit on detention.⁹⁷ In order to implement IIRAIRA, the INS had to work quickly to increase the capacity of immigrant detention and began relying heavily on private prison companies.⁹⁸

Yet, there did appear to be some public pushback on these restrictive policies. In the summer of 2001, the United States Supreme Court found that holding immigrants in detention indefinitely raised serious constitutional concerns.⁹⁹ This decision, while meaningful at the time, would prove to be construed narrowly, applying only to migrants who had been ordered deported but did not have a country that would accept their repatriation.¹⁰⁰ Shortly after that decision was issued, the United States would experience the worst terrorist attack in its history, perpetrated by foreign nationals who obtained valid visas, leading anti-immigrant sentiment to rise yet again.¹⁰¹

5. *The Effect of 9/11 on Immigrant Detention Policies*

Just as the 1993 bombing of the World Trade Center impacted immigration policy, the devastation of 9/11 led to an entire overhaul of the Immigration and Naturalization Service that oversaw immigration and immigration enforcement.¹⁰² The first changes to the United States' immigration system after 9/11 came from the USA PATRIOT Act.¹⁰³ This Act greatly increased the number of border patrol agents and immigration

⁹⁵ Kerwin & Yi-Ying Lin, *supra* note 94, at 6.

⁹⁶ See Kassie, *supra* note 60.

⁹⁷ See ACLU, *supra* note 86.

⁹⁸ *Id.*

⁹⁹ See *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (“Based on our conclusion that indefinite detention of aliens [who were admitted to the United States but subsequently ordered removed] would raise serious constitutional concerns, we construe the statute to contain an implicit ‘reasonable time’ limitation, the application of which is subject to federal-court review.”).

¹⁰⁰ *Id.*

¹⁰¹ See Michelle Mittelstadt et al., *Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade Since 9/11*, MIGRATION POL'Y INST. 1 (Aug. 2011).

¹⁰² *Id.*

¹⁰³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

inspectors, led to the creation of an identification verification system for individuals entering the country, including the use of biometric tools, and permitted indefinite detention after obtaining a removal order.¹⁰⁴

Immediately following 9/11, and in the name of national security, immigrant detainees of “high interest” could not contact attorneys, and those deemed to be of “special interest” were subject to closed deportation hearings.¹⁰⁵ Furthermore, the INS instituted a policy that allowed for immigrants to be detained without charge for forty-eight hours, or, if due to some extraordinary circumstance, for a reasonable period of time.¹⁰⁶ After determining that al-Qaeda perpetrated the attacks, the Department of Homeland Security (DHS), created in 2002, quickly instituted policies that focused on individuals arriving into the United States from countries where al-Qaeda was known or rumored to operate. It required men from twenty-four Muslim-majority countries to register with legacy INS or the newly created DHS.¹⁰⁷ Operation Liberty Shield, for example, while temporary, mandated the detention of asylum-seekers from such countries.¹⁰⁸

The United States’ Supreme Court upheld many of these new, seemingly unconstitutional policies, specifically noting that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”¹⁰⁹ In *Demore v. Kim*, the Court held that the Fifth Amendment did not guarantee immigrant detainees the right to a bond hearing while awaiting their removal proceedings.¹¹⁰ As the dissent in that case points out, however, Kim was a lawful permanent resident at the time of his detention, and therefore, “entitled . . . to the safeguards of the Constitution”¹¹¹ Further complicating the matter is the fact that a substantial number of immigrants in detention do not have final orders of removal.¹¹² For example, in June of

¹⁰⁴ Mittelstadt, *supra* note 101, at 1; *see also* Boswell, *supra* note 6, at 18.

¹⁰⁵ Mittelstadt, *supra* note 101, at 7.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 6; *see National Security Entry-Exit Registration System (NSEERS)*, ARAB AM. INST. (2018), <https://www.aaiusa.org/nseers> [<https://perma.cc/N9HY-X46N>] (“More than 13,000 men who *complied* with call-in registration were placed in removal proceedings.” (emphasis added)).

¹⁰⁸ Mittelstadt, *supra* note 101, at 7.

¹⁰⁹ *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)).

¹¹⁰ *Id.* at 531.

¹¹¹ *Id.* at 544 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893)).

¹¹² *See* CARL TAKEI ET AL., AM. CIVIL LIBERTIES UNION, SHUTTING DOWN THE PROFITTEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS, 15 (Sept. 2016).

2016, “more than 25,000 of the 37,000 people in ICE detention” did not have such orders.¹¹³

Arguably, the largest change after the 9/11 attacks was the creation of the DHS, a new cabinet-level agency approved by Congress in 2002 through the passage of the Homeland Security Act.¹¹⁴ DHS’s focus was national security, specifically “[p]reventing terrorist attacks and reducing vulnerability to terrorism in the United States.”¹¹⁵ With the creation of this agency, immigration enforcement and administrative functions of the INS, a sub-agency of the Department of Justice, were transitioned to DHS.¹¹⁶ Additionally, DHS created three sub-agencies, Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and Citizenship and Immigration Services, to manage different immigration specific missions of the agency.¹¹⁷ In particular, CBP¹¹⁸ and ICE¹¹⁹ are the enforcement arms of the immigration apparatus, while Citizenship and Immigration Services handles the administrative arm and is tasked with “efficiently and fairly adjudicating requests for immigration benefits.”¹²⁰

The REAL ID Act of 2005¹²¹ is most commonly known by the general public as having changed the standards for state identification cards.¹²² However, it also made substantial changes to judicial review and jurisdiction in immigration cases.¹²³ Further, the Act greatly increased the burden on asylum-seekers to show—not only that they have been or will be persecuted on account of their race, religion, nationality, membership in a particular

¹¹³ *Id.*

¹¹⁴ Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002); *see also* Mittelstadt, *supra* note 101, at 2.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See About CBP*, U.S. CUSTOMS & BORDER PROT. (Sept. 18, 2019), <https://www.cbp.gov/about> [<https://perma.cc/BK6B-UHWF>] (“With more than 60,000 employees, U.S. Customs and Border Protection, CBP, is one of the world’s largest law enforcement organizations and is charged with keeping terrorists and their weapons out of the U.S. while facilitating lawful international trade and travel.”).

¹¹⁹ *See What We Do*, U.S. IMMIGR. & CUSTOMS ENF’T (Dec. 4, 2018), <https://www.ice.gov/overview> [<https://perma.cc/DAQ3-2G3J>] (“ICE’s mission is to protect America from the cross-border crime and illegal immigration that threaten national security and public safety.”).

¹²⁰ *See About Us*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 28, 2020), <https://www.uscis.gov/aboutus> [<https://perma.cc/8QZG-QUX8>].

¹²¹ REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, 302-23 (2005).

¹²² *See* Mittelstadt, *supra* note 101, at 7.

¹²³ 119 Stat. at 302-23.

social group, or political opinion—but that one of these grounds is the “central reason” for their persecution.¹²⁴

B. The Privatization of Detention Centers

Since the first privately-run facility opened in 1984, the government’s reliance on private corporations to run the immigrant detention apparatus has continued to grow.¹²⁵ Today, ICE utilizes and contracts with four types of adult detention facilities: service processing centers, contract detention facilities, dedicated Intergovernmental Service Agreement facilities, and non-dedicated ISA facilities.¹²⁶ Service processing centers are owned and operated by ICE.¹²⁷ Contract detention facilities are owned and operated by private corporations that contract with ICE.¹²⁸ Both dedicated and non-dedicated Intergovernmental Service Agreement facilities are operated by state or local governments under a contract with ICE, but the state or local governments may choose to further subcontract out to private corporations.¹²⁹ Additionally, non-dedicated Intergovernmental Service Agreement facilities may house immigrant detainees with other populations of detained persons, such as inmates.¹³⁰ Today, the majority of immigrants in detention are housed in facilities operated by private companies.¹³¹ The increased proportion of immigrants held in privately operated facilities, combined with the fact that such corporations are for-profit,¹³² has led to increased criticism from immigrant advocacy groups.¹³³

¹²⁴ *Id.* at 303.

¹²⁵ See Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POLICY INST. (May 2, 2018), <https://www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention> [https://perma.cc/JMH7-LJZD].

¹²⁶ JOHN V. KELLY, OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES 1 (Dec. 11, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf> [https://perma.cc/X9JU-EH5W].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224, 225–26 (2019).

¹³⁰ KELLY, *supra* note 126, at 1.

¹³¹ See Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It’s Alarming.*, NAT’L IMMIGRANT JUSTICE CTR. (Mar. 13, 2018), <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet> [https://perma.cc/QJ2R-5J8M].

¹³² See, e.g., CoreCivic, Inc., Annual Report (Form 10-K) (Feb. 23, 2017); The GEO Group, Inc., Annual Report (Form 10-K) (Feb. 25, 2016).

¹³³ See generally TAKEI ET AL., *supra* note 112.

Generally, immigration detention facilities are not meant to be punitive but to provide merely civil detainment as immigrants await admission or orders of removal.¹³⁴ However, most facilities are at least jail-like in nature, if not actual jails.¹³⁵ The two largest private prison companies in the United States, CoreCivic, Inc. and the GEO Group, Inc., maintain contracts with ICE and had a combined value of \$765 million in revenue as of 2015.¹³⁶ Despite the benchmarks these private prison companies agreed to meet, there is little transparency, and the goal of maximizing profits has often led to cutting corners, resulting in substandard conditions at many detention centers around the country.¹³⁷

C. Human Rights Abuses at Immigrant Detention Centers

Much of the argument that supports keeping immigrants in custody as they await their proceedings has to do with public safety.¹³⁸ But often, the individuals making those arguments fail to take into account the safety of the migrants in detention.¹³⁹ Overcrowding in detention centers has led to

¹³⁴ *Id.* at 8.

¹³⁵ *Id.* “With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons.” *Id.* (quoting Dora Schriro, *Immigration Detention Overview and Recommendations* 2–3 (Oct. 6, 2009)).

¹³⁶ *Id.* at 10.

¹³⁷ *Id.* at 12–15.

¹³⁸ See, e.g., *Why Immigration Detention is Necessary*, CTR. FOR IMMIGRATION STUDIES (Jan. 24, 2019), <https://cis.org/Fact-Sheet/Why-Immigration-Detention-Necessary> [<https://perma.cc/Y746-PMPX>] (“[W]hile aliens [that are merely here illegally] don’t . . . represent the same kind of risk as alien criminals or national security threats, simply by volume they pose a real possibility of collapsing the nation’s system of immigration control if they are not dealt with effectively.”); see also Donald J. Trump (@realDonaldTrump), TWITTER, (July 14, 2019, 9:45 AM), <https://twitter.com/realDonaldTrump/status/1150400995177959427> [<https://perma.cc/ZA5L-XL6F>] (“The adult single men areas were clean but crowded – also loaded up with a big percentage of criminals.....”).

¹³⁹ See CTR. FOR IMMIGRATION STUDIES, *supra* note 138.

inhumane conditions, condemned by human rights organizations,¹⁴⁰ the United Nations,¹⁴¹ and even the United States government itself.¹⁴²

CBP facilities maintain temporary detention facilities to hold migrants who are arriving to the United States without proper documentation.¹⁴³ Border patrol agents and these facilities are often a migrant's first encounter with the United States government.¹⁴⁴ CBP facilities are meant for short-term detention, typically no longer than seventy-two hours, while the migrants undergo initial processing and are transferred to the custody of another agency.¹⁴⁵ However, before these migrants can be released into the custody of other agencies, such as ICE or the Department of Health and Human Services, there must be space available at those agencies' facilities.¹⁴⁶ Yet, as the acting inspector general of the DHS has pointed out, "because both ICE and [Health and Human Services] are operating at or above capacity, CBP has experienced increasing instances of prolonged detention in its facilities."¹⁴⁷

As these short-term facilities are now being used for long-term detention, some children and families have experienced limited access to a change of clothes and do not have access to showers or hot meals.¹⁴⁸ At adult

¹⁴⁰ See *The Nightmarish Detention of U.S. Immigrants*, AMNESTY INT'L (last visited Oct. 14, 2019), <https://www.amnestyusa.org/the-nightmarish-detention-of-us-immigrants/> [https://perma.cc/4H8F-Y8H6] ("Investigative news reports have exposed a litany of human rights abuses in the detention facilities . . . Amnesty International has launched a campaign to pressure our government to honor its human rights obligations. . . . The time has come for the U.S. government to apply the rule of law to those within its own borders."); Human Rights Watch, *US: Substandard Medical Care in Immigration Detention*, YOUTUBE (May 7, 2017), <https://www.youtube.com/watch?v=j6a3t61tflI> [https://perma.cc/73YV-AMAE].

¹⁴¹ See Deanna Paul & Nick Miroff, *U.N. Human Rights Chief 'Deeply Shocked' by Migrant Detention Center Conditions in Texas*, WASH. POST (July 8, 2019), <https://www.washingtonpost.com/immigration/2019/07/08/un-human-rights-chief-deeply-shocked-by-migrant-detention-center-conditions-texas/> [https://perma.cc/4NZN-TS24] ("The high commissioner singled out the treatment of migrant children, saying she was 'deeply shocked that children are forced to sleep on the floor in overcrowded facilities, without access to adequate healthcare or food, and with poor sanitation conditions.'").

¹⁴² See generally JENNIFER L. COSTELLO, OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., MANAGEMENT ALERT—DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY (REDACTED) (July 2, 2019).

¹⁴³ *Id.* at 3.

¹⁴⁴ See *CBP Enforcement Statistics Fiscal Year 2019*, U.S. CUSTOMS & BORDER PATROL, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics> [https://perma.cc/D2LD-JBJY] (last visited Feb. 20, 2020).

¹⁴⁵ COSTELLO, *supra* note 142, at 3 n.5.

¹⁴⁶ *Id.* at 3.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 6.

facilities, the inspector general found that some detainees were held in confinement that allowed for standing room only, sometimes for a week.¹⁴⁹ Further, some adults did not have access to a shower for as long as a month, and were instead given “wet-wipes to maintain personal hygiene.”¹⁵⁰ Additionally, meals provided to single adults did not take into consideration any dietary restrictions and many had been fed only bologna sandwiches, leading to digestive issues.¹⁵¹

The conditions at ICE detention centers, which are meant for longer lengths of stay, have also been heavily criticized.¹⁵² Starting at intake, some detention centers required a strip search of all detainees, in violation of the standards set by ICE, which require “‘reasonable suspicion’ based on ‘specific and articulable facts that would lead a reasonable officer to believe that a specific detainee is in possession of contraband.’”¹⁵³ Furthermore, the center in question was not documenting these strip searches, making it impossible to determine whether the strip search was warranted upon review.¹⁵⁴ Detainees reported delayed medical care, even for painful conditions, “such as infected teeth and a knee injury.”¹⁵⁵ During inspections, some facilities were observed to have mold in the bathrooms, no hot water, and leaking pipes.¹⁵⁶ Hygienic supplies were in limited supply, and in some instances, detainees “were advised to purchase more at the facility commissary.”¹⁵⁷ Food appeared spoiled, and standard food handling procedures were not followed.¹⁵⁸ There are also reports of detainees held in solitary confinement for as much as twenty-two hours a day, for days or weeks at a time.¹⁵⁹

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 8-9.

¹⁵¹ *Id.* at 9.

¹⁵² *See generally* KELLY, *supra* note 126.

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 7.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 8 (“We observed spoiled, wilted, and moldy produce and other food in kitchen refrigerators, as well as food past its expiration date. We also found expired frozen food, including meat, and thawing meat without labels indicating when it had begun thawing or the date by which it must be used. Finally, at one facility, we observed food service workers not wearing required nets to cover facial hair to ensure food safety.”).

¹⁵⁹ Maryam Saleh & Spencer Woodman, *A Homeland Security Whistleblower Goes Public About ICE Abuse of Solitary Confinement*, THE INTERCEPT (May 20, 2019), <https://theintercept.com/2019/05/21/ice-solitary-confinement-whistleblower/> [<https://perma.cc/5KBJ-DFAH>].

To make matters worse, detainees who complained about conditions at some facilities were retaliated against, and in facilities operated by private corporations, detainees had limited contact with ICE officers to whom they could report their concerns.¹⁶⁰ In alleging mistreatment by guards, improper discipline,¹⁶¹ or even just poor living conditions, detainees have little recourse if there is not a proper procedure for handling these complaints. Federal employees who reported maltreatment in detention centers faced silence, isolation, and bureaucratic red tape.¹⁶²

III. ANALYSIS

Until immigration policies that emphasize deterrence and detention are changed, the number of immigrant detainees will likely continue to grow. With large government contracts at stake, the corporations that run these detention centers will continue to lobby for punitive measures for the undocumented.¹⁶³ In 2018, GEO Group and CoreCivic, Inc, the two largest players in the private prison industry, spent over \$4 million on political contributions and lobbying efforts.¹⁶⁴ Their substantial political power has led to a lack of transparency and accountability, requiring substantial reform.

¹⁶⁰ KELLY, *supra* note 126, at 5.

¹⁶¹ *Id.* at 6 (“Staff did not always tell detainees why they were being segregated, nor did they always communicate detainees’ rights in writing or provide appeal forms for those put in punitive lock-down or placed in segregation. . . . [O]ne detainee reported being locked down for multiple days for sharing coffee with another detainee.”).

¹⁶² See Saleh & Woodman, *supra* note 159.

¹⁶³ While lobbying efforts focus on the detaining “illegal immigrants,” there are multiple reports of lawful permanent residents and even United States citizens winding up in immigration detention. See, e.g., Eyder Peralta, *You Say You’re An American, But What If You Had to Prove It Or Be Deported?*, NPR (Dec. 22, 2016), <https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported> [https://perma.cc/9WS7-T6D7]; Brittany Mejia, *It’s Not Just People In the U.S. Illegally—ICE Is Nabbing Lawful Permanent Residents Too*, L.A. TIMES (June 28, 2018), <https://www.latimes.com/local/lanow/la-me-ln-lawful-resident-20180628-htmstory.html> [https://perma.cc/Q97B-TU4C].

¹⁶⁴ Yuki Noguchi, *Under Siege and Largely Secret: Business That Serve Immigration Detention*, NPR (June 30, 2019), <https://www.npr.org/2019/06/30/736940431/under-siege-and-largely-secret-businesses-that-serve-immigration-detention> [https://perma.cc/E7DI-JPR8].

A. Current Oversight Mechanisms & Standards

Of the 211 immigrant detention facilities, only five are directly owned and operated by ICE.¹⁶⁵ ICE maintains that “[t]hrough a robust inspections program, ICE ensures detention facilities used to house ICE detainees do so in accordance with ICE national detention standards.”¹⁶⁶ However, these standards may differ depending on whether the facility is operated by ICE or by a private corporation.¹⁶⁷ Incentivized by shareholders to maximize profit, private corporations have and will continue to negotiate for the least costly standards to apply.¹⁶⁸ As such, detainees in those facilities will be subjected to noticeably worse living conditions. Furthermore, “twenty-two percent of immigrant detention centers are smaller detention centers which were permitted to conduct their own inspections, known as Organizational Review Self-Assessments,”¹⁶⁹ reducing the impact of any incentive to maintain habitable conditions, let alone conditions that live up to the standards set by ICE.

An in-depth analysis of the differences of these negotiated standards is beyond the scope of this article. It is important to illustrate, however, how different the standards are. The least stringent of the federal detention standards utilized by ICE and the private corporations contracted to operate ICE detention facilities is the 2000 National Detention Standards (2000 NDS).¹⁷⁰ As of 2018, twenty-four percent of immigrant detainees are held in facilities that are inspected according to this standard.¹⁷¹ The Pests and Vermin provision of these standards is a useful comparison. The 2000 NDS required facilities to bring in “licensed pest-control professionals to perform monthly inspections” to “identify and eradicate rodents, insects, and

¹⁶⁵ JOHN V. KELLY, OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS 3 (Jan. 29, 2019), <https://www.oversight.gov/sites/default/files/oig-reports/OIG-19-18-Jan19.pdf> [<https://perma.cc/28SQ-ESRZ>].

¹⁶⁶ *Facility Inspections*, U.S. IMMIGR. & CUSTOMS ENF'T, (last updated Feb. 18, 2020) <https://www.ice.gov/facility-inspections> [<https://perma.cc/WJ8W-5TEX>].

¹⁶⁷ *Id.* (“Depending on the negotiated contract or agreement, detention facilities that house ICE adult detainees operate under one of three sets of ICE detention standards.”).

¹⁶⁸ *See Investor Relations*, CORECIVIC, INC., <http://ir.corecivic.com/> [<https://perma.cc/2P6B-K2NA>] (last visited Mar. 20, 2020) (“[CoreCivic, Inc.] is a diversified government solutions company with the scale and experience needed to solve tough government challenges in cost-effective ways.”).

¹⁶⁹ *See* Cullen, *supra* note 131, at ¶ 6.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

vermin.”¹⁷² These standards also required “a preventative spraying program for indigenous insects.”¹⁷³

In 2008, ICE sought to revise its detention standards, and “in coordination with agency stakeholders,” released the 2008 Performance-Based National Detention Standards (“2008 PBNDS”).¹⁷⁴ Thirteen percent of immigrant detainees are housed in facilities that are inspected under this standard.¹⁷⁵ The Pests and Vermin provision of the 2008 PBNDS improved slightly since the 2000 NDS, requiring a “provision for callback services as necessary,” in addition to the monthly inspections and preventative spraying.¹⁷⁶ A similar provision is incorporated into the Family Residential Standards released by ICE in 2007.¹⁷⁷

ICE revised its standards yet again in 2011, this time “incorporat[ing] the input of many agency employees and stakeholders, including the perspectives of nongovernmental organizations and ICE field offices.”¹⁷⁸ In 2016, ICE further revised this iteration of the detention standards to remain in line with federal laws and regulations.¹⁷⁹ These standards are considered the most stringent standards applicable to immigration detention facilities¹⁸⁰ as sixty-three percent of immigrant detainees are housed in facilities held to these standards.¹⁸¹ As for the prevention of pests and vermin after these revisions, the 2011 Performance-Based National Detention Standards now also require that “[d]oors to the outside should be tight fitting and door

¹⁷² *2000 Detention Operations Manual*, U.S. IMMIGR. & CUSTOMS ENF'T 9 (Sept. 20, 2000), <https://www.ice.gov/doclib/dro/detention-standards/pdf/envirom.pdf> [<https://perma.cc/AWH5-2YJF>].

¹⁷³ *Id.*

¹⁷⁴ *2008 Operations Manual ICE Performance-Based National Detention Standards*, U.S. IMMIGR. & CUSTOMS ENF'T, (last updated Dec. 18, 2019) <https://www.ice.gov/detention-standards/2008> [<https://perma.cc/59NR-4U2V>].

¹⁷⁵ See Cullen, *supra* note 131.

¹⁷⁶ *2008 Operations Manual ICE Performance-Based National Detention Standards*, U.S. IMMIGR. & CUSTOMS ENF'T 4 (Dec. 2, 2008), https://www.ice.gov/doclib/dro/detention-standards/pdf/environmental_health_and_safety.pdf [<https://perma.cc/Z3Z9-F3EK>].

¹⁷⁷ *Family Residential Standards*, U.S. IMMIGR. & CUSTOMS ENF'T 18 (Dec. 21, 2007), https://www.ice.gov/doclib/dro/family-residential/pdf/rs_environmental_health_andZ_safety.pdf [<https://perma.cc/6S2J-L3HA>].

¹⁷⁸ *2011 Operations Manual ICE Performance-Based National Detention Standards*, U.S. IMMIGR. & CUSTOMS ENF'T, (last updated Dec. 18, 2019) <https://www.ice.gov/detention-standards/2011> [<https://perma.cc/C4M9-RUUG>].

¹⁷⁹ *Id.*

¹⁸⁰ See Cullen, *supra* note 131.

¹⁸¹ *Id.*

sweeps should be installed.”¹⁸² Such a requirement may require renovation of facilities, making it unlikely for private prison companies to agree to such standards when there are lesser standards considered acceptable to ICE.

1. Use of Inspection Waivers

Detention facility compliance with contracted standards is monitored through Office of Detention Oversight inspections, Nakamoto Group, Inc. inspections, and Custody Management's Detention Service Manager inspections.¹⁸³ If it is determined that a facility is deficient in some way, the Custody Management division of the Enforcement and Removal Operations office will typically work with the facility to determine a plan to correct the deficiency.¹⁸⁴ However, the DHS's Office of Inspector General found that this process is ineffective in holding facility contractors accountable.¹⁸⁵ For example, during the inspection process, “a facility can assert that it could not remedy the deficiency because complying with the standard can create a hardship, because of a conflict with a state law or a local policy, a facility design limitation, or another reason” and apply for a waiver to Custody Management.¹⁸⁶

Even with this limited guidance, the DHS Office of Inspector General found that “ICE has no formal policies and procedures to govern the waiver process and has allowed ERO officials without clear authority to grant waivers.”¹⁸⁷ Between September 2016 and July 2018, ninety-six percent of these waiver requests were approved, “including waivers of safety and security standards.”¹⁸⁸ Further, it was found that waivers rarely had an expiration date, allowing facilities to circumvent detention standards indefinitely.¹⁸⁹ One of the most egregious waivers ICE granted allowed a contracted facility to use a tear gas that was ten times more toxic than the pepper spray allowed by the contracted standard.¹⁹⁰ The conclusion of the DHS Office of Inspector General report gave ICE multiple

¹⁸² 2011 Operations Manual ICE Performance-Based National Detention Standards, U.S. IMMIGR. & CUSTOMS ENF'T 21 (revised Dec. 2016), <https://www.ice.gov/doclib/detention-standards/2011/1-2.pdf> [<https://perma.cc/88AX-X7D7>].

¹⁸³ See KELLY, *supra* note 165, at 5-6.

¹⁸⁴ See *id.* at 5, 9.

¹⁸⁵ *Id.* at 7.

¹⁸⁶ *Id.* at 9.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 10.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (“Custody Management granted a waiver authorizing a facility (a CDF [Contract Detention Facility]) to use 2-chlorobenzalmalononitrile (CS gas) instead of the OC (pepper) spray authorized by the detention standard.”).

recommendations to increase compliance in these contracted facilities, including imposing financial penalties for failure to maintain standards, finalizing a procedure for waiver approval, and increasing the number of contracting officers' representatives who oversee day-to-day operations at these facilities.¹⁹¹ ICE appeared receptive to the recommendations, but DHS Office of Inspector General declined to close any of its recommendations until further steps were taken by ICE to improve compliance and oversight.¹⁹²

2. Flores Settlement

The Flores Settlement Agreement (Flores Settlement) was signed in 1997 and arose out of a class action lawsuit brought by the American Civil Liberties Union on behalf of immigrant children who were detained by the INS.¹⁹³ The lawsuit sought to change INS's treatment of children in detention and the timing of their release from detention.¹⁹⁴ Some groups argue that the Flores Settlement created a "loophole" in our immigration laws, loosening asylum rules and driving up the number of "apprehended aliens who claim credible fear (the first step in applying for asylum) . . . up over 10-fold from a decade ago."¹⁹⁵ The Flores Settlement, however, focuses almost exclusively on the conditions of detention facilities in which children are held, the care they should receive there, and when and to whom they should be released.¹⁹⁶ The Flores Settlement was meant to be a temporary solution to give time for legacy INS, and later the DHS, to pass final regulations relating to juvenile immigrant detention.¹⁹⁷ To this day, the Flores Settlement remains the basis for juvenile detention standards, but lacks

¹⁹¹ *Id.* at 15.

¹⁹² *Id.* at 18–20. ICE's response to each recommendation by DHS OIG was that it "concurred with the recommendation." *Id.*

¹⁹³ See Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQUETTE L. REV. 1635, 1648 (2012).

¹⁹⁴ *Id.* at 1648–49.

¹⁹⁵ See Matthew Sussis, *The History of the Flores Settlement: How a 1997 Agreement Cracked Open Our Detention Laws*, CTR. FOR IMMIGR. STUDIES (Feb. 11, 2019), <https://cis.org/Report/History-Flores-Settlement> [<https://perma.cc/42KJ-SX5D>].

¹⁹⁶ See Abbie Gruwell, *Unaccompanied Minors and the Flores Settlement: What to Know*, NCSL: THE NCSL BLOG (Oct. 30, 2018), <http://www.ncsl.org/blog/2018/10/30/unaccompanied-minors-and-the-flores-settlement-agreement-what-to-know.aspx> [<https://perma.cc/UT34-9H28>].

¹⁹⁷ See López, *supra* note 193, at 1650.

enforcement mechanisms and is at substantial risk of being terminated altogether.¹⁹⁸

The Trump administration proposed ending the Flores Settlement as a way to keep immigrant families together in detention.¹⁹⁹ Arguing that, because Flores requires that children must be released after twenty days in detention, DHS must separate families, releasing the children while parents or other family members stay in custody, in order to comply with the terms of the agreement.²⁰⁰ There are, of course, other options the administration could and should consider, like releasing the family unit as a whole on parole or supervised release, for example. Indeed, the practice of conducting initial credible fear screening and releasing family units from detention within twenty days has been used successfully since 2015, with over ninety percent of families complying with ICE check-in appointments and attendance at court hearings after their release from detention.²⁰¹ Pulling out of the Flores Settlement altogether would likely result in children needlessly being held in custody indefinitely in unsafe and unsanitary conditions with little, if any, recreational or educational programs, risking severe mental and physical harm to these children as a result.²⁰² As the Flores Settlement has not yet been codified, the risk of an anti-immigrant administration withdrawing from the agreement remains.²⁰³

B. Proposed Oversight Mechanisms

Immigration reform has been a long-standing bipartisan goal, but exactly what “immigration reform” means differs widely between the

¹⁹⁸ See *id.* at 1661; Katie Reilly & Madeleine Carlisle, *The Trump Administration's Move to End Rule Limiting Detention of Migrant Children Rejected in Court*, TIME (Sept. 30, 2019), <https://time.com/5657381/trump-administration-flores-agreement-migrant-children/> [<https://perma.cc/6HGG-DFSM>].

¹⁹⁹ *Id.*

²⁰⁰ *Id.* Regardless of these proposed rule changes, any changes to the Flores Settlement, including through regulation, would have to be approved by Judge Dolly Gee, the overseer of the settlement. See Maria Sacchetti, *Federal Judge Blocks Trump Administration from Detaining Migrant Children for Indefinite Periods*, WASH. POST (Sept. 27, 2019), https://www.washingtonpost.com/immigration/federal-judge-blocks-trump-administration-from-detaining-migrant-children-for-indefinite-periods/2019/09/27/49a39790-e15f-11e9-b199-f638bf2c340f_story.html [<https://perma.cc/J4HH-EK5S>].

²⁰¹ *Fast Check: Asylum Seekers Regularly Attend Immigration Court Hearings*, HUMAN RIGHTS FIRST (Jan. 25, 2019), <https://www.humanrightsfirst.org/resource/fast-check-asylum-seekers-regularly-attend-immigration-court-hearings> [<https://perma.cc/7FQW-RPKY>].

²⁰² See Reilly & Carlisle, *supra* note 198.

²⁰³ López, *supra* note 193.

parties.²⁰⁴ Those on the right would place enforcement of current immigration laws higher on the priority list, which would include an expansion of border security and increasing exclusions and deportations.²⁰⁵ Those on the left would like to see a focus on creating a “path to citizenship” for undocumented immigrants currently in the United States, clearing the wait list of visa applicants, and deporting only those who have committed criminal offenses.²⁰⁶ These differences in priorities make comprehensive immigration reform difficult to negotiate and implement and ultimately leads to the question: Are there reforms that are politically feasible, in that they do not touch directly on immigration, but that would, in effect, reform our immigration policies?

1. Whistleblower and Anti-Retaliation Law Reform

Whistleblowing is an important and underutilized mechanism of reform, both in the private and public sector.²⁰⁷ In the article, *Combating Corruption: The Development of Whistleblowing Laws in the United States, Europe, and Armenia*, authors David Schultz and Khachik Harutyunyan point to four main justifications for whistleblowing.²⁰⁸ Generally, these justifications boil down to exposing bad behavior, reforming entire organizations, and seeking justice by exposing wrongdoers and holding them accountable.²⁰⁹ Despite protections, however,

²⁰⁴ See Theresa Cardinal Brown, *Getting to Enactment: The Political Obstacles to Immigration Reform*, BIPARTISAN POLICY CENTER (Oct. 21, 2016), <https://bipartisanpolicy.org/blog/political-obstacles-to-immigration-reform/> [https://perma.cc/W83D-ST6C].

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CINN. L. REV. 183, 199 (2007); Daniel Van Schooten, *Gov't Watchdog Finds Flaws in Implementation of Contractor Whistleblower Law*, PROJECT ON GOV. OVERSIGHT (Mar. 7, 2017), <https://www.pogo.org/analysis/2017/03/govt-watchdog-finds-flaws-in-implementation-of-contractor-whistleblower-law/> [https://perma.cc/NAP5-XCG9].

²⁰⁸ David Schultz & Khachik Harutyunyan, *Combating Corruption: The Development of Whistleblowing Laws in the United States, Europe, and Armenia*, 1 INT'L COMP. JURIS. 87, 88 (Dec. 2015), <https://reader.elsevier.com/reader/sd/pii/S2351667415000141?token=9925E3D4C213B974A6F07B809C42B6C67F7A294161B8B51833C4E646D0A4351EAF88CADA8A1004FEFE785F374F15415D> [https://perma.cc/U98S-KSK9].

²⁰⁹ *Id.*

whistleblowers are often afraid to come forward, fearing adverse employment consequences or hostility from their co-workers.²¹⁰

For employees of the federal government, whistleblowers are protected by the Federal Whistleblower Protection Act (WPA).²¹¹ To succeed with a whistleblower reprisal claim under the WPA, the employee must show that he or she made a protected disclosure, the disclosure was a contributing factor in a personnel action, and that the person who made the personnel action had knowledge of the disclosure.²¹² If the employee is successful in meeting this burden, the agency can still avoid liability if it can show by clear and convincing evidence that the personnel action would have been taken regardless of the protected disclosure.²¹³ This statute does not apply, however, to employees of federal contractors.²¹⁴

In 2016, Congress passed legislation that many lauded as a substantial expansion of federal whistleblower law by broadening permanent protection to employees of federal contractors.²¹⁵ It also provided a private right of action in the event of retaliation against whistleblowers but charging employees must first exhaust all administrative remedies available to them under the statute before an action may be brought against the contractor in federal court.²¹⁶ Furthermore, employees are only protected from reprisal for disclosing information that the employee:

²¹⁰ Starting in October 2019, similar hostility has been directed at a federal government whistleblower by the President of the United States. Despite following the procedure as required by the statute, this anonymous whistleblower is experiencing significant pressure for their good faith effort to expose what many consider to be blatant corruption. *See* Dennis Wagner, *Trump's Allies Want to ID the Whistleblower, Who May Learn the Price of Speaking Out*, USA TODAY (Nov. 6, 2019), <https://www.usatoday.com/story/news/politics/2019/11/06/impeachment-federal-whistleblowers-face-retaliation-abuse/2497666001/> [<https://perma.cc/T4ZD-MHK4>].

²¹¹ *See* 5 U.S.C. § 2302(b)(8).

²¹² *Id.*; *see also* Mark P. Cohen & John J. Lapin, *The United States of America: Federal Whistleblower Protection*, COMMITTING TO EFFECTIVE WHISTLEBLOWER PROTECTION, OECD 203 (Mar. 16, 2016), https://read.oecd-ilibrary.org/governance/committing-to-effective-whistleblower-protection_9789264252639-en#page201 [<https://perma.cc/XP6K-JCSX#page201>].

²¹³ *See* Cohen & Lapin, *supra* note 212, at 203-04.

²¹⁴ *See* 5 U.S.C. § 2302(b)(8).

²¹⁵ *See* 41 U.S.C. § 4712; Anna C. Haac, *Federal Contractor Whistleblowers Now Permanently Protected from Retaliation*, NAT'L L. REV. (Dec. 20, 2016), <https://www.natlawreview.com/article/federal-contractor-whistleblowers-now-permanently-protected-retaliation> [<https://perma.cc/EWR9-7NGP>]. Congress initially passed this law in 2013 as a temporary pilot program that was to last four years. Act of Jan. 2, 2013, 126 Stat. 1632, 1837-41 (2013). The 2016 legislation made this permanent.

²¹⁶ 41 U.S.C. § 4712(c)(2).

reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract . . . or grant.²¹⁷

As evidenced by the proposed Whistleblower Act of 2019,²¹⁸ it is unclear whether the 2016 legislation includes protections for subcontractors and subgrantees.²¹⁹

The United States Office of Special Counsel, the agency with jurisdiction over whistleblower complaints from federal employees, typically releases such complaints and related agency reports when the cases have been closed.²²⁰ The Office of Special Counsel does not, however, handle complaints by employees of federal contractors.²²¹ Employees of federal contractors must instead make their “complaint to the Inspector General of the executive agency involved.”²²² The Inspector General is only required to investigate if it finds that the complaint is not frivolous and reports misconduct that meets the standard under the statute, and the employee’s complaint must not have been previously addressed.²²³ Since 2017, there has only been one investigative report released by the DHS relating to immigration functions within the department.²²⁴

²¹⁷ 41 U.S.C. § 4712(a)(1). “The term ‘abuse of authority’ means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract or grant of such agency.” 41 U.S.C. § 4712(g)(1).

²¹⁸ S. 2315, 116th Cong. (2019).

²¹⁹ *Id.*

²²⁰ Office of Special Counsel, *Know Your Rights When Reporting Wrongs* (rev. Mar. 2019), <https://osc.gov/Documents/Outreach%20and%20Training/Handouts/Know%20Your%20Rights%20When%20Reporting%20Wrongs%20Handout.pdf> [https://perma.cc/TQC3-CKWQ]. After initially disclosing the alleged wrongdoing, the Office of Special Counsel will interview the employee and evaluate the information to determine whether it is “substantially likely” that the complaint can be proven and whether it constitutes a severe enough violation of law or mismanagement to require the agency to investigate. If so, the agency will have to submit a report after an investigation, and the employee will then have an opportunity to respond. The report and comments are then sent to the President and Congress before being released to the public. *Id.*

²²¹ *See* 41 U.S.C. § 4712(b)(1).

²²² *Id.*

²²³ *Id.*

²²⁴ *See* Office of Inspector General, Department of Homeland Security, *Whistleblower Retaliation Reports of Investigation* (Sept. 24, 2019), <https://www.oig.dhs.gov/reports/whistleblower-retaliation-reports-of-investigation> [https://perma.cc/LCS6-9RWE]. The report discussed allegations made by a Customs and Border Patrol (CBP) officer of racial profiling by CBP at the Port of Detroit. The complainant alleged that black Americans were more likely to be stopped and searched at

In addition to federal laws, states have enacted whistleblower protections with varying degrees of breadth and effectiveness. An analysis of every state whistleblower retaliation statute is beyond the scope of this article, but it is important to note their potential impact in Texas, the state with, by and large, the highest population of immigrant detainees.²²⁵ This article also looks to the Minnesota Whistleblower Act as a potential model for federal reform.

a. Texas

For the fiscal year of 2018, Texas held almost 16,000 immigrants in detention each day.²²⁶ Comparatively, the state with the next highest number of immigrants in detention per day was California, at 6,527 detainees.²²⁷ Many of the recent reports of unsanitary and inhumane conditions have come out of these Texas facilities, some operated by CBP and others operated by GEO Group and CoreCivic, Inc.²²⁸ With the relatively narrow whistleblower protections for federal employees²²⁹ and employees of federal

the border, even after informing CBP officers they approached the border in error. After reporting this to his supervisors, a letter of reprimand was placed in his file. The Office of the Inspector General concluded that this was in fact a violation of the Whistleblower Protection Act, 5 U.S.C. § 2302. Whistleblower Retaliation Report of Investigation, Office of Inspector General, Department of Homeland Security, No. I16-CBP-DET-17715 (Sept. 29, 2017), <https://www.oig.dhs.gov/reports/whistleblower-retaliation-reports-of-investigation> [<https://perma.cc/LCS6-9RWE>].

²²⁵ *Detention by the numbers*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-statistics> [<https://perma.cc/2J23-LU9D>] (last visited Apr. 30, 2020).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See, e.g., Martin Garbus, *What I Saw at the Dilley, Texas, Immigrant Detention Center*, THE NATION (Mar. 26, 2019), <https://www.thenation.com/article/dilley-texas-immigration-detention/> [<https://perma.cc/6FQU-NBC6>]; Amanda Holpuch, *Migrant Children Held in Texas Facility Need Access to Doctors, Says Attorney*, THE GUARDIAN (July 8, 2019), <https://www.theguardian.com/us-news/2019/jul/08/migrant-children-detention-center-texas-attorney-health-crisis> [<https://perma.cc/AC5D-H263>]; Maria Sacchetti, *ICE's Chief Called Family Detention "Summer Camp." Here's What it Looks Like Inside.*, THE TEX. TRIBUNE (Aug. 25, 2019), <https://www.texastribune.org/2019/08/25/inside-ice-family-detention-facility-texas/> [<https://perma.cc/6D3C-N6Y4>].

²²⁹ See 5 U.S.C. § 2302 *et seq.* ("Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to authority . . . take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of . . . any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences . . . any violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such

contractors under federal law,²³⁰ such employees may instead try to look to state statutes in the event of retaliation after what they considered to be a protected report. Unfortunately, Texas' whistleblower protections provide no additional recourse than that provided by federal law, as they apply only to employees of state or local governments or other public employers.²³¹

Furthermore, to be considered a "protected report," it must be made in good faith and to "an appropriate law enforcement authority."²³² Texas courts have held that the "good faith" test is dual prong, requiring both a subjective and an objective component.²³³ Even if the Texas Whistleblower Act protected private employees from retaliation, it does not protect violations of internal policy or rules not "adopted pursuant to a statute or ordinance."²³⁴ Furthermore, at least in the preemption context, "federal contracts do not qualify as 'Laws.'"²³⁵ As such, it is unlikely that Texas courts would recognize a report of a violation of the standards promulgated by ICE or the Flores Settlement and contracted out to the privately-operated detention centers to be a protected report under Texas state law. The inadequacies of whistleblower protection under Texas state law speak to the necessary reform that is needed to federal whistleblower protections.

b. Minnesota and the Future of the Federal Statute

In contrast to both Texas and federal law, the Minnesota Whistleblower Act gives much broader protections to whistleblowers.²³⁶ Both private and public employees are protected from retaliation if they have "report[ed] a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official."²³⁷

disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs . . .").

²³⁰ See generally 42 U.S.C. § 4712.

²³¹ See TEX. GOV'T CODE § 554.002.

²³² *Id.*

²³³ See *Wichita Cty. v. Hart*, 917 S.W.2d 779, 784 (Tex. 1996) ("'Good faith' means that (1) the employee believed that the conduct reported was a violation of law and (2) the employee's belief was reasonable in light of the employee's training and experience.").

²³⁴ *Ruiz v. City of San Antonio*, 966 S.W.2d 128, 130 (Tex. Ct. App. 1998).

²³⁵ See David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, STAN. L. REV. (Mar. 2019), <https://www.stanfordlawreview.org/online/privatized-detention-immigration-federalism/> [https://perma.cc/E7WW-UNFW].

²³⁶ See generally MINN. STAT. § 181.932 (2019).

²³⁷ MINN. STAT. § 181.932, subdiv. 1(1).

While, like the Texas Whistleblower Act, the MWA does require the report to be made in good faith. However, the Minnesota legislature has defined “good faith” much differently than Texas courts.²³⁸ In Minnesota, a good faith report merely requires that the report not violate subdivision three of the MWA, which states, “This section does not permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth.”²³⁹ The Minnesota Supreme Court has further clarified this definition by not requiring that the “putative whistleblower act with the purpose of exposing an illegality.”²⁴⁰

Compared to the Texas Whistleblower Act and federal whistleblower statutes, the Minnesota Whistleblower Act goes the furthest to protect individuals who are looking to hold the organizations for which they work accountable, while still protecting the organizations themselves from lawsuits based on frivolous or false reports. Some—likely including those who passed the Texas whistleblower statute—would argue that the creation of broad governmental protections for those who are outing wrongdoing at private corporations is an unacceptable expansion of governmental power.²⁴¹ However, as government and the private sector continue to comele through contractual relationships and lobbying efforts, it is important to ensure the public’s tax dollars are spent by those private entities in a way that aligns with our nation’s values and complies with applicable law. In addition to the accountability that is encouraged through governmental oversight, the individuals who work in those private corporations every day have intimate knowledge of day-to-day operations and can provide firsthand insight into any wrongdoing.

The federal definition of the severity of the reported violation for the report to be protected must also be clarified and expanded. The statute currently requires that the violation must be “gross” or the public risk must be “substantial and specific.”²⁴² With such a high bar, even among employees who witness severe violations that may rise to this level, few are likely to report wrongdoing for fear of retaliatory acts that have no recourse under the statute. Further, employees who witness minor violations will

²³⁸ Compare MINN. STAT. § 181.931, subdiv. 4 with *Wichita Cty. v. Hart*, 917 S.W.2d 779, 784 (Tex. 1996).

²³⁹ MINN. STAT. § 181.932, subdiv. 3.

²⁴⁰ *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162, 166 (Minn. 2017).

²⁴¹ See Gerard Sinzdak, Comment, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1652 (2008) (“Another argument occasionally used to justify an external reporting requirement is that the employer-employee relationship is private and should thus be beyond the purview of the judicial system.”).

²⁴² See 41 U.S.C. § 4712(a)(1).

likely refrain from making a report immediately, opting instead to wait until the violation rises to the level of severity defined by the statute, at which point, substantial damage may have been done to the persons affected by such wrongdoing. As seen in almost all fields, from healthcare to software development, prevention and early detection cost significantly less than reactive measures taken to correct the problem.²⁴³ Here, the costs involve human life and dignity, making it even more crucial that we take proactive measures to prevent and quickly correct violations of basic rights.

The Minnesota Whistleblower Act's definition of a protected report could be adopted at the federal level, in order to encourage the prevention and early detection of wrongdoing at the hands of federal contractors. Reports of even suspected violations of rules or laws, including common law, would encourage these contractors to enact and enforce the standards that we have asked of them and that they have agreed to. Until these standards are codified and with the proposed protections, employees could report violations of contracted standards under a breach of contract theory.²⁴⁴ Enhancing whistleblower protections is just one step towards reform of immigrant detention centers. Uniform standards should also be enacted nationwide, along with increased unannounced inspections, as proposed in the Dignity for Detained Immigrants Act of 2019.²⁴⁵ Enacting policies that encourage alternatives to detention would decrease the detained population and prevent overcrowding at detention facilities. Until that can occur, we must protect whistleblowers who help expose the

²⁴³ See, e.g., Bill Frist & Alice Rivlin, *The Power of Prevention*, U.S. NEWS (May 28, 2015), <https://www.usnews.com/opinion/blogs/policy-dose/2015/05/28/focus-on-prevention-to-cut-us-health-care-costs> [<https://perma.cc/RE2H-DTK9>] ("Prevention can reduce the risk factors that lead to chronic diseases, slow their progression, improve overall health and reduce health care spending."); Matt Warcholinski, *The Cost of Quality in Software Development—Is the Quality Worth It?*, BRAINHUB, <https://brainhub.eu/blog/cost-of-quality-in-software-development/> [<https://perma.cc/4SPT-HQD9>] (last visited Mar. 22, 2020) ("[I]n software development quality should be planned and implemented, not inspected afterwards. The reason is in clear sight—the cost of preventing errors is less than the cost of correcting errors found on final stages or by customer complaints.").

²⁴⁴ See *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 204–05 (Minn. 2000) (holding whistleblower reports must implicate a violation of federal or state law), *superseded by statute*, Minnesota Whistleblower Act, H.F. 542, 88th Leg., Reg. Sess. (Minn. 2013), *as recognized in* *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162, 166 (Minn. 2017) (holding that the MWA does not require the whistleblower to "act with the purpose of exposing an illegality").

²⁴⁵ 116 H.R. 2415, 116th Cong. (2019). This Act would require "the Secretary of Homeland Security [to], by rulemaking, establish detention standards for each facility at which aliens in the custody of the Department of Homeland Security are detained." *Id.* at § 2. Furthermore, this Act would require yearly, unannounced inspections at every facility to ensure compliance with DHS's standards. *Id.* at § 3.

corruption and abuse that has become commonplace in immigrant detention.

IV. CONCLUSION

In an ideal world, rates of immigrant detention in the United States would fall to a level at which private prison companies are no longer needed and public detention centers are used only sparingly. Opting for alternatives to detention, such as release on recognizance, bond, or monitoring programs,²⁴⁶ and repealing *HRAIRA*'s mandatory detention provision would likely get us to that point. As for the former, the DHS merely needs to change its policies. However, under the current administration, that is improbable.²⁴⁷ As for the latter, it is unlikely that any substantial immigration reform will occur anytime soon. In the meantime, proper oversight in immigrant detention centers, both public and private, is crucial to ensure detainees receive proper care. Expanding whistleblower protections on a federal level would benefit not only the immigrants in detention centers but would also promote transparency and efficiency. In turn, this would lead to better decision making and reduce corruption at *all* levels of government.

²⁴⁶ These options cost less to the American taxpayer, but most importantly, are far more humane. ACLU, *Alternatives to Immigration Detention: Less Costly and More Human than Lock-up*, https://www.aclu.org/sites/default/files/field_document/aclu_atd_fact_sheet_final_v.2.pdf [https://perma.cc/VFT8-8F58] (last visited Apr. 30, 2020).

²⁴⁷ See generally Srikantiah & Sinnar, *supra* note 7.

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