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3 The Political Economy of Work in ICE Custody

THEORIZING MASS INCARCERATION AND FOR-PROFIT PRISONS

Jacqueline Stevens

This chapter explains how the work of people held by private prison firms under immigration laws is crucial to the profitability of these enterprises.[1] Using a case study of legal challenges to for-profit prisons' use of detainee labor, the chapter shows how analyses foregrounding practices of kleptocracy—that is, unlawful conduct by private prisons—may succeed in thwarting mass incarceration. To evaluate the advantages of this approach in comparison with other theories of mass incarceration, the chapter addresses the following three questions. First, what sort of work is performed by those in custody under immigration laws, and what is its role in the profitability of private prison firms contracting with federal immigration enforcement agencies since the 1980s? Second, what are the legal differences between the work performed by those held in Immigration and Customs Enforcement (ICE) facilities and that ordered or elicited by those convicted of a crime and held in county, state, or federal prisons? Third, under tests that use "process tracing" (Bennett 2010), do inferences from localized observations of economic exploitation, procurement practices, and prison financing fare better as explanations of mass incarceration than theories emphasizing behaviors, attitudes, and discourses?

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This chapter proposes that scholarship debating value-laden theories of the carceral state may improve our understanding of narratives influencing and influenced by political subjectivities and yet contribute little to causal explanations of mass incarceration.[2] A careful review of evidence has falsified key causal claims, a point made previously by James Forman (2012) and Marie Gottschalk (2016) in their critiques of accounts of mass incarceration that emphasize racism or neoliberalism, as discussed below. Although one might simply rely on idiomatic conventions of inference and logic to eliminate popular explanations, along the lines pursued both by Forman and Gottschalk, political scientists have developed a more formal approach. "Process tracing" is a qualitative method that assists scholars in rejecting theories falsified by data and selecting those with strong proximate evidence of validity (Bennett 2010). It is one of the few social science methods consistent with the definition of "science" or knowledge making (*Wissenschaft*) propounded by Karl Popper ([1934] 1959), discussed below. Scholars have quite a bit of relevant evidence of conditions that might drive mass incarceration. This chapter will advance a theory that the term *kleptocracy* best describes the causes of ICE's use of mass incarceration, if not the prison industry more generally.[3]

Discussions of harms wrought through some combination of the Protestant work ethic (PWE) discourse, neoliberalism, and racism by scholars theorizing prison work are helpful for organizing our knowledge of the subjectivities associated with the commitment of resources to locking people up and stigmatizing those who are now or have in the past been in criminal custody. But when it comes to explaining the operational details of the enactment and persistence of the carceral state for purposes of its disestablishment, the three dominant theories of mass incarceration, including prison work, may be less useful. The PWE explanation of US penal policy goes back to early modern England and suggests that those in power thought that disordered populations when locked up could benefit from work (McLennan 2008, 18–27). Erin Hatton has documented the pervasiveness of this discourse among not only ideologues but also those actually incarcerated (2018). Corporate welfare and corruption are both incompatible with this discourse, yet they are hallmarks of how Congress appropriates funding of for-profit prisons and many other programs at the state and federal level, discussed below. If the PWE were truly influential on federal

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policy, then this would not be the case. Moreover, immigrants have a different profile in public discourse than native-born people of color: "Immigrants, unauthorized or not (in contrast to 'convicts' and 'welfare queens') are generally seen as prototypically diligent. But the high marks assigned immigrants in the neoliberal scale of work ethic and personal discipline have produced only weak protection in recent years against the heavy hand of state and public retribution" (Katzenstein 2012, 990). According to Bennett's four-square taxonomy, the PWE ideology passes the "Straw in the Wind" test but fails the "Hoop Test" (Bennett 2010, 201). In other words, the PWE is a plausible explanation, but it is missing from key contexts in which its proponents suggest it should appear—that is, the halls of popular assemblies on whose appropriations for-profit prisons depend and the discourse on the demographic targeted for mass incarceration.

Some scholars define "neoliberal" policies—the second paradigm for reflecting on the carceral state considered here—as encompassing an insistence on the individualist work ethic. But the two are more usefully disaggregated so as to distinguish a bona fide belief in the virtues of individual effort versus a blind faith in the benefits of the unfettered market. The truly neoliberal framework attributes the explosion of people in custody under criminal laws in the United States since the 1970s to US-based firms moving production outside of the United States, along with hiring non-US citizens for domestic production, a dynamic that has nothing to do with individual subjectivity or effort (e.g., Brown 2005, 2010, 2015; Wacquant 2001, 2009). In her analysis of prison labor Susan Kang insightfully attends to the multifaceted and contradictory views on prison labor, in particular US policy that promotes close monitoring of prison exploitation in China while turning a blind eye domestically (2000, 140). Drawing on work by Loïc Wacquant and others who attribute to neoliberal globalization a causal role in mass incarceration, she writes: "Since the dominant neoliberal political ideology has affirmed the importance of market solutions and marginalized the social provisions of 'big government,' citizens do not demand social guarantees and solidarity from the state. Instead, individual citizens' feelings of economic insecurity have translated into punitive attitudes toward vulnerable segments of the population" (Kang 2009, 140). According to this widely held contemporary analysis (Kang 2010, notes 16–18), the unrelenting market society produces precarity and

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a sensitivity to exposures of disorder that we treat by building prisons. However, the neoliberal account is falsified if markets are distorted by corruption, as is the case with for-profit prison contracts.

Finally, a third paradigm employed by scholars from W. E. B. Du Bois (1910) to Michelle Alexander (2012) ties US penal practices to the legacy of racialized slavery. Du Bois quotes political scientist John Burgess, "(whom no one accuses of being negrophile) . . . : 'Almost every act, word or gesture of the Negro, not consonant with good taste and good manners as well as good morals, was made a crime or misdemeanor, for which he could first be fined by the magistrates and then be consigned to a condition of almost slavery for an indefinite time, if he could not pay the bill'" (Burgess quoted in Du Bois 1910, 784). Untethered to any specific causal theories except for the metanarrative of racism, Alexander discusses in her section titled "Origins" in *The New Jim Crow* the findings of historians William Cohen and Douglas Blackmon, in particular that vagrancy laws that effected a "system of forced labor," such as those discussed by Du Bois.[4] Alexander devotes her attention to associations between policies that incarcerate a vastly disproportionate number of African American men with racist attitudes and practices mobilized by White US-Americans, as does Wacquant (2001, 2009). And yet when Alexander looks for the proximate mechanism behind mass incarceration, she focuses not on long-standing fears and hate, but the pressures to criminalize behaviors by the private prison industry: "Prison profiteers must be reckoned with if mass incarceration is to be undone" (232). In light of Forman's (2012) and Gottschalk's (2016) falsifications of the racism explanation of criminal mass incarceration—Forman points out the ground-level push for increased sentencing by Black communities and African American political attitudes consistent with this (2012)—a process-tracing study of the causes of mass incarceration should attend to the prison profiteers Alexander highlights.

In sum, using Bennett's typology of four tests of causation (2010, 210) it appears that all three dominant causal explanations of mass incarceration fail the Hoop Test—they are falsified by strong evidence inconsistent with the theories and thus don't make it through "the hoop" necessary for further consideration of probative evidence in their support. Immigrants are in ICE custody because they *want* to work and will work harder and for less compensation than US citizens, even those who arrive with

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skills and education (Abramitzky and Boustan 2017, 22–23). The racism or xenophobia account also fails the Hoop Test because large portions of communities affected by these policies themselves support them, as discussed below. The balance of this chapter explores the political economy or kleptocracy behind for-profit prisons' exploitation of the labor of those in their custody and lays out an alternative explanation of the mechanisms behind mass incarceration and the tools for their "reckoning," as Alexander puts it.

WORK PROGRAMS FOR THOSE HELD UNDER IMMIGRATION LAWS

This section describes the current practices, protocols, and laws that organize work for those in custody under immigration laws and highlights differences from the laws authorizing this for those convicted of a crime.

Working for CoreCivic, GEO, and County Jails

> "Volunteer Work Program," the way I describe it, is basically doing the same as working in the outside world. But with a chip labor with no benefits. For e.g., I am assign as "Dorm Porter," meaning that I do the sweeping and mopping the floors of the dorm we [detainees] are house in or assign to. I clean and scrub the toilets, urinals, showers and sinks, clean tables, windows, and have trash ready for pick-up by "Hall Porters." I perform other tasks, if necessary at the direction of a CCA staff member, such as working both shift, day and nights, although I am assigned to work at nights, only 8 hrs I'm assign to work. . . . During the past 3 month I have been assign to work night shift, stating from 6:00 pm to Breakfast, which is about 4:00 am or at times about 5:00 am. Out of those hrs. I approx work 4 hrs. because I refuse to work the whole 8 hrs. 3 There's many different jobs and hours, but some of them are the same job title, some are call "Hall Porters," "Recreation Porters," "Dorm Porters," "Kitchen Workers" ect. . . . The function of Recreation work is cleaning up the rack room, gather the all balls left out-side, bring-in the water jar (5 gallons), sweep and mop the restroom and other duties directed by the staff. There's also kitchen workers where you prepare food trades for the male detainees, wash dishes, although a machine washes the dishes . . . just as working in a restaurant. You clean-up the kitchen area, by sweeping and moping the floor and other work requested by the staff.

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> Basically the kitchen work is as working out-side. Hours, I have an understanding they work from 8:00 am to 2:00 pm, from 2 pm to 7:00 pm and from 3:00 am to 7:00 am. Now there's also "Hall Porters," they work the hall ways, do painting at times, sweep and mop the hall way floors, buffing and waxing, help out with the commissary cards by pushing them to the dorms to be deliver accompanied with staff and any other job as directed by the staff, clean offices, take care of the trash, bring-in cleaning supply, etc. . . . Basically they perform more of the work than any other job mention above. . . . All jobs are paid one dollar/day except Kitchen workers, I believe they get paid differently from the rest of the job. There is also laundry workers, they work in the laundry but are call "Hall Porters," they work 8 hrs and perform the watching of detainee's cloth, (uniforms), sheets, blankets etc. . . . They perform other duties at the direction of staff, e.g., if staff needs the detain to some type of cleaning and that detainee is close by, the staff will ask him to do that cleaning. (Robinson Martinez, on the work he performed for the Correction Corporation of America [now CoreCivic] in 2012 [Stevens 2016, 395]).

In 2019, about fifty-two thousand people each day across the United States were in the custody of Immigration and Customs Enforcement (ICE), up from twenty-seven thousand in Obama's last year in office and a few dozen in the 1970s (Aleaziz 2019).[5] That's about four hundred forty thousand people each year in detention under immigration laws (Greenwold 2016; US ICE 2018).[6] The immigration courts lack the capacity to hear so many new cases. As a result, the average amount of time people spend in ICE custody also is on the rise (Alvarez 2017). The facilities are holding people to insure they are present for their immigration hearings or for government-paid transportation to their countries of origin. ICE custody is legally entirely distinct from punishment.[7] And no one is in ICE custody to serve time for a criminal violation.[8]

Contracts, interviews, reimbursement accounts, e-mail, grievances, and numerous other documents obtained from ICE since 2010 through litigation under the Freedom of Information Act suggest that if Mr. Martinez found himself in a different for-profit prison a few years earlier or later, his narrative would be quite similar.[9] Overall, most of the work in these facilities is undertaken by people who have no one on the outside to fund commissary accounts on which people rely for basic foodstuff, clothes, and hygiene products. Mr. Martinez and others are therefore forced to work

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for a single employer offering wages of $1 to $5 per day. Furthermore, ad hoc reports, including for one of the facilities now being sued for violating laws against forced labor and unjust enrichment, reveal CoreCivic committing wage theft of the small amounts owed its detained workers.[10]

ICE detention facilities operate without regulations. The Bureau of Prisons (BOP), housed in the Department of Justice (DOJ), has no jurisdiction over ICE.[11] In 1979, in response to a *New York Times* report on conditions in the Port Isabel Service Processing Center, Congress held hearings that resulted in a directive that the Immigration and Naturalization Service (INS) produce policies for managing detention facilities. Over twenty years later, INS implemented this advisal with its first "National Detention Standards," followed by the 2008 Performance Based National Detention Standards (PBNDS) and the 2011 PBNDS.[12] These Standards lack the legal authority of regulations. The PBNDS stipulate the obligations of private and government organizations, typically county sheriffs, that contract with ICE, including Section 5.8, the so-called Volunteer Work Program (VWP).[13] The VWP authorizes people to "volunteer" at a rate to be determined by the facility, but "at least one dollar per day," for shifts of up to eight hours a day, five days a week, for the stated purpose of first, to "enhance . . . essential operations," and second, to reduce through "decreased idleness, improved morale and fewer disciplinary incidents" the "negative impact of confinement."[14]

A 2014 lawsuit filed in a Denver federal court against GEO Corp. by workers held in Aurora, Colorado, tracks Mr. Martinez's observation that some of the labor required was outside the formal work program. Plaintiffs in *Menocal et al. v. GEO Corp.* accused GEO of requiring a rotating crew to perform janitorial work each week dedicated to deep cleaning common spaces, including bathroom facilities.[15] In the privately owned or managed facilities ICE refers to as Contract Dedicated Facilities (CDFs), people in custody, such as Mr. Martinez, provide the labor for all of the facility's operations except guard duties. In contrast, county jails with ICE contracts have their criminal inmates doing the vast bulk of the kitchen work, laundry, and maintenance (Urbina 2014; Stevens 2016, 414–27; Stevens 2019). Among the legal problems of the VWP is that its definition of a "volunteer" contradicts that of the regulation on volunteers Fair Labor Standards Act (FLSA).[16]

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In the CoreCivic CDF in Stewart County, Georgia, men may wake up in a large room with rows of metal bunk beds inches apart, as well as the showers, toilets, and tables for their meals. They call this housing section "the chicken coop."[17] The prison conditions are part of the mise-en-scène that normalizes unlawful work and employment conditions by encouraging those in and outside the walls to think of those housed as inmates, not administrative detainees awaiting immigration or deportation processing. In the county jail in Butler County, Ohio, those in ICE custody will wait for their morning meals in stacked, locked rooms until their shift is released to the central area of the pod of ninety-six men or women, where they may eat from trays a cold piece of white bread and a cold, hard-boiled egg. If they want tea or coffee they must pay for teabags or packages of instant coffee, or they may be paid twenty packages per week if they work five days per week, as is the case for those in the rest of the county jail (Stevens 2019).

The processed meat CoreCivic uses in its meals might be moldy, rancid, or otherwise inedible, according to a report by the Office of Inspector General (OIG).[18] The OIG stated: "Multiple detainees at the Hudson County Jail and Stewart Detention Center also complained that some of the basic hygienic supplies, such as toilet paper, shampoo, soap, lotion, and toothpaste, were not provided promptly or at all when detainees ran out of them. According to one detainee, when they used up their initial supply of certain personal care items, such as toothpaste, they were advised to purchase more at the facility commissary, contrary to the PBNDS, which specify that personal hygiene items should be replenished as needed" (US ICE OIG 2017, 10). When meals are inedible or insufficient, then people are forced to purchase food through the commissary maintained by the same firm serving the meals. The commissary sells instant soups, canned chili, or candy bars, as well as hygiene products. A can of chili is $2.25. One must also pay for soap (1 bar, Ivory, $1.10), toothpaste (Colgate 4 oz. $2.20), and any other hygiene product.[19] Yet contracts require hygiene products to be provided at no cost in addition to edible food.[20] The need to pay for such items incentivizes the work performed (Stevens 2016, 396n7, 402–3). A complaint from GEO's Tacoma facility indicated GEO was increasing its commissary prices and speculated this was to recruit people to perform kitchen work required by GEO's contract.[21]

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How Administrative Detention Became (Unlawful) Punishment

This section first explains the effective similarity of the custody for people being held under immigration laws with that of convicted criminals. Second, it compares how these current conditions are quite different from those for people held under immigration laws before the 1980s. And finally, it describes how the takeover of immigration custody by for-profit prison firms changed the conditions from those akin to residential dormitories or motels to those of prisons, absent any legal basis for these changes and indeed contracts specifically requiring otherwise. Among the conditions lawful only for those held as a condition of punishment but no one else are the work programs described above. The following section will describe how attorneys in recent years have been filing lawsuits challenging this.

Similar to prisons, the paid staff in ICE facilities are guards or sheriffs. The officials call the facilities "correctional" and refer to those in immigration custody as "inmates" or "prisoners" (Stevens 2019). The warden of the Butler County Jail said that his contract with ICE does not obligate him to treat anyone in civil custody differently from those in the section of the jail reserved for accused or convicted criminals:

> Sheriff Jones had referred to "immigration prisoners" and Chief Wyden said any emphasis on the distinction between ICE and criminal detainees was "an invalid point." He stated that the IGSA [Intergovernmental Service Agreement] with ICE stated that as long as the porters held for ICE are "compensated like anybody else," i.e., the porters convicted of crimes, then the jail had no legal worries. I asked if he could read the portion of the text that stated this. He stated he had seen a picture of this section of the contract but could not read it to me. He reiterated that the "IGSA says we should compensate for whatever you do the same as you do for anyone else in the facility." (Stevens 2019)

These places may sound like a prison, look like a prison, operate based on the same American Correctional Association Handbook (2004) used for a prison, and even be built and owned by for-profit prison firms.[22] But according to statute and Constitutional case law they are not prisons, and those inside are not prisoners (e.g., Stevens 2016; Sinha 2015).

The contract for Butler County emphasizes the difference, along similar lines in all ICE detention contracts: "All persons in the custody of

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BICE will be referred to as an 'Administrative Detainee.' This term recognizes that BICE detainees are not charged with criminal violations and are only held in custody to assure their presence throughout the administrative hearing process."[23] Those found guilty of a crime may be punished only insofar as the government adheres to procedures in the Sixth Amendment. Those who are not charged much less convicted of any crimes may not be subject to treatment akin to punishment that is otherwise unlawful.

This means that despite the physical resemblance and often co-location of prisons and ICE facilities, the enslavement and forced labor that are legal for inmates are prohibited for people in administrative custody. The Thirteenth Amendment implements a corollary of the Sixth Amendment: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[24] Case law for the Sixth and Thirteenth Amendments, discussed below, interprets "hard labor" as "punishment" and, along with emerging interpretations of the Trafficking Victim Protection Act (TVPA) protects those in custody under immigration laws from the forced labor required of prisoners. As a result of the jurisprudence elucidating this distinction between criminal and administrative custody, government policy in the first part of the twentieth century was to bestow on those in custody under immigration laws the hospitality befitting guests, and not the suspicion of unwanted trespassers, much less criminals. A 1915 report to Congress states:

> For a satisfactory administration of the immigration laws, the character and condition of immigrant stations at ports of entry are of prime importance. So far, therefore, the Department of Labor is permitted by law and equipped for the purpose, it aims to make these stations as much like temporary homes as possible. While regulation and exclusion and therefore detention, are necessary in respect of immigration laws, it should be understood by all who participate in administering these laws that they are not intended to be penalizing. It is with no unfriendliness to aliens that immigrants are detained and some of them excluded, but solely for the protection of our own people and our institutions.
>
> Indifference, then, to the physical or mental comfort of these wards of ours from other lands should not be tolerated. Accordingly, every reasonable effort is made by the department, within the limits of the appropriations, to

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> minimize all the necessary hardships of detention and to abolish all that are not necessary. (US Secretary of Labor 1915, 69–70)

A hundred years later, US ports of entry are convenient to ICE holding cells and rented jail space, and it was the policy of President Barack Obama, a Democrat, to mandate harsh detention and the separation of families in order to deter asylum seekers (Dominguez, Lee, and Leisero 2016).

The 1952 law on the conditions of detention are the ones in place today, but the operationalization of work in these facilities is entirely different from current work programs. Before the takeover of immigrant detention by the for-profit prison industry, the US government paid service workers prevailing wages or fees for labor devoted to the care of those detained under immigration laws—including maintenance, food preparation, cleaning, and laundry. A *New York Times* magazine article in 1950 chronicled the delays of days or weeks for those attempting to enter the United States. The headline was: "New Role for Ellis Island: The One-Time Gateway of Hope Has Become a Hotel of Detention" (Raskin 1950).

The "Voluntary Work Program" (VWP) in ICE's PBNDS has its roots in a bill passed in 1950 at the urging of the Department of Justice to respond to World War II prisoner-of-war reforms pursuant to the Geneva Convention (Stevens 2016, 463). Few people in this time frame were in custody under immigration laws. Although immigrants had been held on Angel Island and Ellis Island since the late nineteenth century, their custody was never considered akin to criminals or criminality. The word *detainee* was not used by the federal government until 1941 and was not popularized for arriving immigrants or those in removal proceedings until decades later.[25] In 1950, the *New York Times* magazine described people held in Ellis Island as "newcomers," "travellers," "wayfarers," "persons under detention," or simply "immigrants," but never "detainees" (Raskin 1950), a word that has connotations of criminal inmates or prisoners.

A. H. Raskin's reporting suggested at worst tedium and even malaise, but not the mistreatment and humiliation rampant in the facilities today. Raskin noted that children were receiving milk and cookies and living in dorm-like quarters with their parents. Government employees, not the immigrants, maintained the facility, including cleaning personal quarters. "The authorities do not require any of the immigrants or deportees

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to make their beds or clean their rooms. Some do. Most don't. When they don't, regular civil service cleaners do the job" (Raskin 1950, 75). Immigrants choosing to work in the kitchen received 10 cents per hour (75).[26] The reporter distinguished the conditions on Ellis Island not only from US adversaries, but also from the conditions reported for US facilities today: "Unarmed guards, freedom of communication, second helpings at mealtime, a school for the children, an excellent hospital for the sick, a constant effort on the part of the officials to make themselves approachable, if not always informative—all these are signs we are not aping Hitler's concentration camp methods. Or Stalin's labor camps, either. No one has to work at Ellis Island" (Raskin 1950, 78). Between 1954 and 1981 there was virtually no detention of those in the interior (Wilsher 2011). The VWP that today makes possible vast profits for the private prison industry (Linthicum 2015) did not emerge until 1983, with the opening of the first INS prison in Port Isabel, Texas, run by the newly formed Correction Corporation of America.[27] The protocols initiated by the prisons entirely changed the circumstances of immigration detention to resemble those of prisons, although Congress authorized no such changes.[28] Arriving immigrants were held for days, weeks, and even years in regular travel lodging adjacent the ports of entry, including land border crossings and airports (Lehman 1992).[29]

The shift from housing families in dorms to ad hoc motels to prisons occurred because the private prison industry opportunistically responded to a sui generis event that occurred outside the control of capitalists or the US government—that is, the arrival of thousands of Cubans and Haitians in 1981, many of them Cubans recently released from prisons (Simon 1998). Congressional hearings reveal that in the wake of these new arrivals, officials tied to each other through the BOP revamped immigrant detention into a program far more punitive and restrictive than had previously been the case at Ellis Island or the casual arrangements of the Immigration and Naturalization Service "processing" migrants with an eye toward most of them arriving and remaining in the United States. It was only in the wake of 1982 testimony by then assistant attorney general Rudy Giuliani that we can see the Reagan DOJ repurposing state prisons and county jails for the purpose of indefinite detention and removal. Giuliani's congressional testimony in 1982 makes it clear that the Department of

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Justice, in the same time frame as the emergence of private prisons (see below), was driving an initiative to expand imprisoning asylum seekers and was not considering non-penal alternatives.[30]

FOR-PROFIT PRISON CONTRACTS AS KLEPTOCRACY

In 2016, members of the House and Senate sent letters to the Secretary of the Department of Homeland Security pointing out the direct connection they saw between the poor conditions of the facilities for families seeking asylum and the profiteering of the private prisons.[31] Such letters pointing out the role of prison profiteering in defining an immigration policy that has been increasingly incarcerating people by those with proximity to these policies is akin to what Bennett calls a "Smoking Gun"—that is, direct evidence that a hypothesis of a cause is indeed correct.[32]

Some legal professionals concerned about the harms inflicted by the radical uptick in mass incarceration under immigration laws have attempted specific interventions to deter the cycle of venality wrought by for-profit firms financing groups with political leverage to advance racist and nationalist myths and thus direct billions of dollars into the coffers of for-profit prisons and related industries, especially finance. Since 2014, eight class action lawsuits have been filed against GEO and CoreCivic alleging violations of federal and state employment and labor laws. Before turning to this litigation, the second section discusses the underlying legal and political analyses that made it possible. This includes the federal procurement system. Knowledge of the financial and regulatory context of for-profit prisons allowed one attorney activist to successfully thwart its expansion. This suggests that knowledge of specialized law and regulations may make possible interventions on behalf of precarious communities routinely targeted by attorneys employed on behalf of for-profit prisons, banks, and finance firms, not to mention other industries as well.

To understand these legal and policy dynamics, scholars may need to reconsider conventional causal narratives of mass incarceration. Instead of prison labor revealing one more lawful and inevitable, if abhorrent, consequence of capitalism, neoliberalism, or racism, the successful interventions of these attorneys invite mobilizing against a different framework:

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kleptocracy, a form of government based on old-fashioned greed and corruption. According to theories of capitalism, inequality occurs from owners extracting surplus value by exploiting labor.[33] In contrast, a theory of kleptocracy suggests inequality is driven by a relatively small number of elites knowledgeable about gaming government procurement and other payment protocols, corruptly moving large amounts of funds from taxpayers into their private accounts, typically with no accountability (see, e.g., Painter 2009; Ramirez 2012). This is an entirely different critique of prison labor from that of Marxists Georg Rusche and Otto Kirschheimer (1939) as well as Melossi (1978) and Melossi and Pavarini (1981). ICE jails typically do not produce goods for the market, nor do they structure a threat to coerce workers into low-paying jobs. The profit motive behind the thirty-four-thousand-minimum-bed mandate is ad hoc and not specific to capitalism. If government procurement contracting, a key operational linchpin of mass incarceration under immigration laws, is done officially or effectively in secret, and is not simply embodying nativist or racist values by way of legal policies and practices, then articulating the process by which GEO or CoreCivic are paying (or withholding) slaving wages to (or from) those in custody under immigration laws requires new methods for analyzing how the profits from exploitation in particular are possible and how they might be thwarted.[34]

Federal Procurement Procedures and Kleptocracy

Recent scholarship and journalism have suggested that the cause of the increase in detentions is a shift from government to private prisons for holding people accused of violating immigration laws, a change that incentivizes for-profit prisons and financing firms and banks to lobby Congress for these expenditures.[35] The privatization of government operations initiated in the 1950s, pushed by private prisons and finance firms in the 1980s (discussed below), and fast-tracked by President Bill Clinton in the wake of Performance-Based Budgeting signed into law in 1993 meant a pseudo-neoliberal and in fact kleptocratic takeover of government programs; in turn, this facilitated policy making by a community of MBAs and JDs with specialized expertise in illicitly manipulating the system of creating and bidding on federal contracts (Teachout 2014).[36] Hundreds

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if not thousands of policies designed to assist US residents, from health to transportation, have been eviscerated in the name of "performance" and "efficiency" (Templin 2010; Hill and Painter 2011). Key to attracting funding was the ability of federal contractors to defend expenditures on programs based on self-serving metrics specified to benefit the owners and stockholders of firms producing the targets. Behind the scenes, members of Congress, including the leadership of both parties, signed off on appropriations that kept these firms in business (Templin 2010; Teachout 2014; US GAO 2008). Although privatization is pitched as cost-saving, for decades government audits, including the OIG reports cited earlier in this chapter, reveal widespread failures, while the costs are far higher than government-run facilities.[37] The for-profit prison industry in general and the contracts with components of Homeland Security exemplify this pattern (see, e.g., Michaels 2010).

To thwart federal contractors from using taxpayer funds to buy influence with the government distributing these funds, Congress passed a law prohibiting such firms from "directly or indirectly . . . mak[ing] any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use" (52 U.S.C. 30119(a)). The law also makes it unlawful for "anyone . . . knowingly to solicit any such contribution from any such person for any such purpose during any such period" (52 U.S.C. 30119(b)). In 2016, GEO Corp. and then-candidate Donald Trump violated this law, in the aftermath of which the Trump administration announced a $110 million contract would be awarded to GEO for immigration detention.[38]

Exacerbating the influence of money on policy is the source of the information on which the agencies and Congress rely, an outcome required by regulations these same firms pushed through.[39] The same firms that are providing the government in-house information technology services have components that seek to benefit from this information (Fang 2013). A former White House ethics attorney writes: "Contracting firms may structure government transactions, or advise the government, in ways that are more helpful to their own interests or private clients' interests than the public interest" (Painter 2009, 153). Richard Painter's focus is on the hedge fund Black Rock's role in managing risk assessments for the 2008

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financial bailout (see esp. 153n52); but the observation is on point for firms holding ICE detention contracts as well. For-profit prison firms with multi-year rolling contracts disfavored by procurement regulations easily distort information on their sole-supplier costs.[40] In addition, they, and not government employees, are creating and of course themselves making use of data for potential government detention needs and costs. Firm resources and plans for mergers, and acquisitions, may be shifted by companies with insider access to information in anticipation of new "Requests for Proposals" (RFPs) from the federal government.[41] The firms with the most expertise in federal appropriations and procurement are the ones best positioned to set the policy agenda when it comes to creating federal budgets, a circumstance against which the Obama White House warned, even though President Obama made numerous appointment and signing decisions suggesting he was failing to heed his own advice. Within a year of signing the Executive Order "Economy in Government Contracting," Obama signed a law ordering ICE to house no fewer than 33,400 people daily under immigration laws, shortly after which the United States deported more people in one year than in any prior year in US history.[42] These sorts of laws and contracts do nothing more sophisticated than operationalize narrow programs benefitting repeat visitors to the federal procurement trough. Such Beltway transactions and short-term political maneuvers have little to do with broad ideological commitments of either party much less neoliberalism. They contradict cost-saving and free market commitments of Republicans as well as racial equality norms of Democrats: the worst anti-immigrant laws in recent history were passed with a majority of votes from both parties and signed by Presidents Clinton and Obama, both Democrats.[43]

The effect of these laws is to put immigration detention facilities under the control of for-profit firms, even though for-profit facilities are charging more than twice the rate of county jails or the facilities run by the US Marshals (Table 1). When Congress drafted its first detention policies, tracking those for Ellis Island discussed above, the federal government owned the land and ran the operations. Today, the majority of people detained under immigration laws are in for-profit prisons. According to ICE data collected by the National Immigrant Justice Center, in 2017, 71 percent were in facilities that are operated by privately owned companies.[44] On average,

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Table 1 US Government Analysis: Allocation of Funds and People among ICE Facilities

	Daily Rate	*Person-Days/2019*	*Total Spent*	*Percent Held*
SPC (private operated)	$203.87	1,479,386	$301,602,423	9.1
CDF (privately owned and operated)	$148.43	3,062,683	$454,594,037	18.8
DIGSA (privately operated)	$123.62	4,508,862	$557,385,520	27.9
IGSA (county owned and operated)	$99.99	3,587,693	$358,733,423	22.1
US Marshals (federal)	$89.73	3,358,505	$301,358,653	20.6
Other* (private/govt.)	$155.63	245,370	$38,186,933	1.5
TOTAL		**16,242,499**	**$2,011,860,989**	**100**

Data from DHS, "ICE Budget Overview, FY 2019," Department of Homeland Security, Office of the Secretary (2019).
* This includes juveniles, families, and those in hospitals, the vast majority of whom are in privately operated facilities under contract to the federal government (DHS 2019, O&S, 109).

the cost of the private prison operations is more than 50 percent higher than that of the government-run facilities.[45] The five government-owned and -run "Service Processing Centers" that held arriving immigrants for a few days in the 1970s are now a global sprawl of over six hundred jails, prisons, and holding rooms confining people in harsh conditions up to several years (Simon 1998; Torrey 2015; Misra 2018).

Hacking the For-Profit Prisons' Regulatory System

The project of attorney Bianca Tylek, pursued through various nonprofits over the past several years, has produced results inconsistent with theories of critical legal or critical race scholars that claim government is unfailingly sympathetic to corporate interests, neoliberal priorities, and racist agendas (e.g., Alexander 2012; Brown 2004; Kang 2009; Wacquant 2001, 2009). Relevant to those interested in understanding prison work in the context of larger financial and economic dynamics is a comment Tylek submitted to the Federal Communications Commission (FCC).

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Tylek objected to communications procurement giant Securus taking over a competitor with a phone contract for federal prisons on the grounds that the transaction would violate antitrust laws. Tylek's intervention may seem far afield from the plight of those in custody whose labor is exploited by GEO and CoreCivic. However, Tylek's analysis provides an excellent example of the dependence of prison profiteers on anti-capitalist models of accumulation, including the use of forced labor. And her response demonstrates how highlighting one of the numerous unlawful business practices on which these firms depend may be a more effective means of thwarting exploitation than profiles of behaviors, attitudes, or wide-ranging theories of neoliberalism.

In an open comment to the Federal Communications Commission responding to an application by Securus to transfer control of one private firm to another for prison phone services to the federal government, Tylek observed that the transfer of business would "reduce competition and harm consumers of correctional telephone services" (Tylek 2018a, 1). Crucially, she also tied this objection to the larger mission of the Corrections Accountability Project she founded within the Urban Justice Center and on whose behalf she had filed her protest.[46] Her comment indicated that these same concerns had been made public through a report she and her colleagues copublished with the Marshall Project, a tie-in bringing to the attention of the FCC the imprimatur of a respected, independent organization and thus the appeal of Tylek's analysis to other experts in the public arena. Tylek's letter noted Securus's pattern of "swallowing up its smaller competitors"; hoarding and trolling patent rights "to compel smaller companies to sign expensive, bilateral licensing agreements" to end costly litigation; and the specific harms anticipated if the FCC approved the transaction (Tylek 2018a, 2).[47] In a second comment a few weeks later, Tylek responded to Securus's claims in the firm's reply to Tylek's initial comment.[48]

On April 2, 2019, the FCC Chairman issued a statement: "Based on a record of nearly 1 million documents comprised of 7.7 million pages of information submitted by the applicants, as well as arguments and evidence submitted by criminal justice advocates, consumer groups, and other commenters, FCC staff concluded that this deal posed significant competitive concerns and would not be in the public interest. I agree. I'm

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therefore pleased that the companies have determined that withdrawing their application is the best course."[49] Two days later, Tylek issued a press release with the subject-heading: "VICTORY! A David and Goliath battle against the prison telecom industry."[50] Analyses and criticism from leading theorists of mass incarceration would have predicted Tylek's defeat. The actual outcome, along with the employment class action litigation against private prisons described below, suggests viable responses using the rule of law to counter the kleptocracy in which the for-profit prison firms now operate.

The background and success of Tylek exposes a potential flaw in the causal analysis of critics who blame capitalism and racism for the prison profiteers. Tylek says her "organization is dedicated to ending the exploitation of people targeted by the criminal legal system."[51] But unlike those who find the profiteers as exemplifying capitalism or neoliberalism, Tylek is pointing out that the Securus business model is fundamentally anti-capitalist, and indeed is blatantly violating US antitrust laws.[52] That said, Tylek's campaign very clearly tied her legal attack on the Securus business model to her underlying objective of eliminating mass incarceration by cutting off its profits. Her approach does not fit neatly into traditional social science or law and society analyses of how social movements, interest group lobbying, and strategic litigation change policies. Also of note is that Tylek's intervention was motivated by a personal experience, and her strategy for intervening drew on her professional expertise.[53] In the language of process tracing, Tylek's intervention suggests the causal paths to resisting mass incarceration put forward by Alexander or Wacquant fail the Hoop Test, while her focus on firm misconduct meets the Smoking Gun test for a theory of kleptocracy.

Tylek's interventions that make use of existing laws and procedures to advance larger policy goals that have as their primary target the externalities of illicit arrangements are perhaps best understood as a "forensic intelligence," a process by which a citizen "discovers, elicits, and produces knowledge of law and force with the ultimate objective of thwarting injustice" (Stevens 2015, 725). Tylek's own description of her motives and actions exemplify this. She understood that the work she was doing "could fly under the radar" and how she avoided this: "This might not be something anyone pays attention to. We were writing challenges to the

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FCC and Securus is responding. So what? Who's going to know? I thought we needed more public attention on the deal to be successful. The public has the most power. People power matters. We pushed the Marshall Project into writing an op-ed. They picked it up. We drafted that first with the Marshall Project and then followed with a post on our blog that goes into more detail. . . . From there, we were thankful quite a number of outlets picked up the story."[54] The media coverage elicited additional comments to the FCC critical of Securus. Tylek's interventions name and confront the injustice of prison economies through forensic (i.e., legal) analysis that becomes widely publicized.[55] These are, of course, techniques of large corporations that spend tens of millions on public relations firms, lobbyists, and strategic consulting and many others who market their expertise to the highest bidder. According to this analysis, visible injustice serves as a counterweight to well-resourced groups and causes on the other side.

Tylek is of course attentive to the racialized character of the exploitation, but she sees the firms and their unlawful profits, not racist attitudes, as the linchpin to mass incarceration. Tylek explains her goal is to "end the exploitation of people, to work on every private vendor that exists." She says, "The private industry is seeking to use the criminal industry to extract wealth from communities of color and people in poverty disproportionately affected by this system. We strongly believe that it is this industry that is getting in the way of our reforming the system. There's a massive industry that's pushing back."[56] If Tylek is right about this, then criticism of narratives of personal responsibility, neoliberalism, and nativism and racism may be less relevant to implementing reforms than the scholars writing on prisons and prison work believe (Wacquant 2009, xx).[57]

CLASS ACTION LABOR RIGHTS LITIGATION AGAINST PRIVATE PRISONS WITH ICE CONTRACTS

The current litigation against private prisons for violations of state and federal labor and employment laws exemplifies the perspective and strategy explained by Tylek.[58] This section reviews federal litigation of labor, employment, safety, and contracts advanced on behalf of those forced to work by GEO and CoreCivic. The orders in these cases do not

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preclude a focus on the institutionalization of values of the individualist work ethic, neoliberalism, or nativism and racism. But they should incentivize researchers to consider strategies that have successfully challenged the effects of the policies associated with the broader causal models, and the possibility that these policies may be operationalized in ways only loosely or not at all tied to the attitudes themselves.[59]

Copious scholarship over the past several decades reveals an increasing number of obstacles that prevent plaintiffs in civil cases in general, but especially class action lawsuits regarding employment, from surviving motions to dismiss and going to trial (Berry, Nelson, and Nielsen 2017; Moore 2015, 1205; Staszak 2014).[60] In 2018, .08 percent of all civil cases filed proceeded to a trial (US Courts 2019, Table C4). In this context, the court orders from seven district court judges, one three-member unanimous appellate court panel, and the denials of petitions for review by the Ninth Circuit and the Supreme Court between 2014 and 2019 are truly remarkable. The most legally and economically disadvantaged group in the country has been waging a battle in the courts against firms on the New York Stock Exchange, and the judges are denying almost all the motions to dismiss or deny class certification filed by GEO and CoreCivic.[61]

A Dollar a Day, Forced Labor, and Unjust Enrichment Litigation Highlights

In 2014, attorneys in Denver, Colorado, filed the first lawsuit claiming that a for-profit prison exploited those in their custody to meet contractual obligations to ICE, in violation of both a state minimum wage law, the Trafficking Victims Protection Act (TVPA) (18 U.S.C. § 1589), and common law prohibiting "unjust enrichment."[62] By 2019, eight lawsuits—seven brought by plaintiffs represented by private attorneys and one in 2017 brought on behalf of the State of Washington by the attorney general—were alleging over a dozen violations of state and federal labor, employment, and occupational safety laws by CoreCivic or GEO.[63] None of the lawsuits named ICE as a defendant. The most common claims across the lawsuits were violations of the minimum wage laws, the TVPA, and state common law prohibiting "unjust enrichment," the last being the only one that was in all eight complaints.[64] One suit in New Mexico alleges

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minimum wage law violations but does not have a TVPA claim.[65] A 2015 complaint filed in San Diego also alleges violations of occupational health and safety laws.[66]

In the first case filed, in October 2014, the claim based on the Colorado Minimum Wage Order (CMWO) was dismissed, but the TVPA and unjust enrichment allegations were ordered to proceed.[67] Federal District Court Judge John Kane's order focused on differences between case law in litigation brought by criminal inmates and those awaiting criminal trials alleging working conditions in violation of the Thirteenth Amendment, on the one hand, and the case law of the TVPA, on the other. Cases brought based on the Thirteenth Amendment require allegations of physical coercion. In contrast, the TVPA has a lower threshold for inducements and harm prompting culpability:

> Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) *by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint*. 18 U.S.C.§ 1589(a) (Emphasis added.)

"Serious harm" is further elaborated: "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to [render labor] . . . to avoid incurring that harm." 1589(c)(2).[68] Plaintiffs argued that the threats of solitary confinement and the implicit threat of force inherent in their being under the physical control of their employer, if proven, were in violation of the TVPA.[69] Judge Kane agreed.

Kane's historic order noted that the factual allegations underlying the unjust enrichment claim, the third of the three laws the suit alleged GEO violated, tracked those made under the CMWO, which was dismissed (Phillips 2017).[70] Nonetheless, Judge Kane's order held that the plaintiffs' minimum wage claim was distinct from their unjust enrichment claim.

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Unjust enrichment could include profits from practices that may not violate the CMWO but are nonetheless illegal under Colorado common law. Further, if the damages for unjust enrichment track the plaintiff's claims for compensation based on the Service Contract Act (SCA), they will be owed "prevailing wages" for specified occupations such as laundry workers, barbers, and kitchen staff. This pay is considerably higher than the minimum wage.[71] Judge Kane also rejected GEO's claim that the plaintiffs' suit must be thrown out under the "government contractor defense." GEO asserted that the dollar-per-day voluntary detainee work program was established at the behest of the federal government, but the court found that the contract between GEO and the federal government only establishes guidelines for the government's reimbursement of the so-called Voluntary Work Program (VWP), and even for this program, "does not prohibit Defendant from paying detainees in excess of $1/day in order to comply with Colorado labor laws. In fact," Kane continues, "the contract specifically contemplates that the Defendant will perform under the contract in accordance with '[a]pplicable federal, state and local labor laws and codes'; and the contract is subject to the SCA."[72] In sum, the order held that if a jury finds that the facts in the complaint are as alleged, GEO Corp. will need to remediate the damages it caused by its violation of the TVPA and its failure to pay prevailing wages and benefits.

In 2016, the attorneys for Menocal and eight other plaintiffs named in the initial complaint filed a motion requesting the judge certify a class of plaintiffs and allow litigation to proceed on behalf of all those who were forced to work in GEO's Aurora facility and whose exploitation unjustly enriched GEO over the past ten years, the outermost reach for filing charges based on the TVPA.[73] Kane granted the motion. In his order authorizing up to sixty thousand people held in GEO's Aurora facility alone over the last decade to have a jury decide whether GEO's policies violated the TVPA and Colorado's common law prohibiting unjust enrichment, Judge Kane states: "Although Representatives and putative class members have diverse backgrounds, their circumstances are uniquely suited for a class action. All share the experience of having been detained in the Facility and subjected to uniform policies that purposefully eliminate nonconformity. The questions posed in this case are complex and novel, but the answers to those questions can be provided on a classwide basis. Appreciating that

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the class action is a 'valuable tool to circumvent the barriers to the pursuit of justice,' [citation omitted], I GRANT the Motion for Class Certification."[74] Judge Kane's order emphasizes the precarity of the proposed class as key to his rationale for supporting class action litigation: "The putative class members reside in countries around the world, lack English proficiency, and have little knowledge of the legal system in the United States. It is unlikely that they would individually bring these innovative claims against GEO."[75] The plaintiffs had a resounding round-one victory.

GEO then appealed the class certification. On February 9, 2018, the Tenth Circuit in a three-person published opinion unanimously affirmed the class certification.[76] On January 11, 2019, Judge Kane approved the plaintiffs' proposed announcement about the litigation and attorneys began using a list supplied by GEO to inform up to sixty thousand potential class members of the litigation and that they were by default represented but could choose to opt out.[77]

GEO and CoreCivic in their briefs repeatedly emphasized that their exploitation of those in their custody was contractual.[78] The firms also pressed ICE behind the scenes and through Congress to support their cause (January 2018),[79] to enter the litigation as an intervenor,[80] and to reimburse the firms for the costs of litigation as well as payments if they lose.[81] To date, ICE has not entered as an intervenor and has refused GEO's requests for incur fee increases for the litigation or coverage for potential damages.[82]

On April 1, 2019, the US government for the first time weighed in on the litigation. For the purpose of a review by the Eleventh Circuit appellate court of Judge Clay Land's order denying CoreCivic's motion to dismiss a lawsuit alleging its labor policies for those in its custody violated the TVPA and unjust enrichment,[83] the solicitor general filed an amicus brief "in support of neither party."[84] The brief addresses itself primarily to the question raised by CoreCivic and GEO: "Whether the forced labor provision of the Trafficking Victims Protection Act, 18 U.S.C. §§ 1589, 1595, applies to work programs in federal immigration detention facilities operated by private contractors." The solicitor general affirmed the TVPA analysis of the district court judge—that is, that a for-profit prison is not categorically excluded from TVPA coverage, while also claiming that work performed consistent with the PBNDS did not violate the TVPA.[85] The

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Georgia case did not allege minimum wage violations and the analysis does not address any potential conflict between the PBNDS—which are internal agency guidelines—and the FLSA or other wage laws. The US government is essentially supporting the legal pleadings of the plaintiffs in response to the motion to dismiss.

Challenging the illegal externalities of the work assigned to those in their custody, on which the private prisons rely for profits, disregards claims about paternalism, neoliberalism, and civil as well as Constitutional rights, but could bring down the for-profit sector's support for mass incarceration of noncitizens. According to GEO's appeal to the Tenth Circuit, if the class action lawsuits prevail, the firm will no longer be able to do business with ICE: "The district court's novel certification of a class comprising all people detained at the Facility over the past ten years poses a potentially catastrophic risk to GEO's ability to honor its contracts with the federal government. And the skeleton of this suit could potentially be refiled against privately operated facilities across the United States, causing GEO and other contractors to defend them even though GEO firmly believes that policies give the Plaintiffs no legal claim."[86] If GEO and the other firms cannot honor their contracts to detain people under immigration laws, then the logistical challenge is likely to lead to the removal from the prison industry of the for-profit players and, as Tylek hypothesizes, and end the legislative support for funding them and thus mass incarceration more generally.

Although the legal strategy described above is directly useful only for those in custody under civil and not criminal law, the admission by GEO reveals the fundamental centrality of the work by prisoners to the economic viability of prison operations and is therefore relevant to analyzing any facility whose population is forced to work while in custody, including county jails. If those locked up stopped working, prisons would need to pay market wages and these costs would be prohibitive.[87]

CONCLUSION

The process-tracing method for analyzing the mass incarceration of people under immigration law discredits arguments that the Protestant work

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ethic, neoliberalism, or racism/nativism are the primary drivers of mass incarceration: none of these can pass the Hoop Test—that is, the absence of these conditions alongside the flourishing of mass incarceration, especially in the context of ICE jail contracts. The Hoop Test is the equivalent of Popperian falsification, a test he claims to be the sine qua non of knowledge. It is not surprising that social scientists do not rely on this methodological test, with which regressions are incompatible (Stevens 2009, 227–31). According to Popper ([1934] 1959), a theory of gravity is plausible only when every single time one drops the apple it falls toward the ground. If one released an apple 999 times, and on the 1,000th identical drop it flew to the ceiling, the theory of gravity explaining the 999 bruised apples would be falsified. Such a test is clearly incompatible with the study of society, as Popper himself avers: "Long term prophecies can be derived from scientific conditional predictions only if they apply to systems which can be described as well-isolated, stationary and recurrent. These systems are very rare in nature, and modern society is surely not one of them" (Popper [1948] 1972, 339). Katzenstein implicitly relies on this framework in her critique of the multi-method Racial Classification Model put forward in *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race* (Soss, Fording, and Schram 2011): "A broad overarching theory of neoliberal discipline is inevitably in some tension with the attempt to recognize variability" (Katzenstein 2012, 990). Katzenstein references a similar critique of European mass incarceration theorization by Nicola Lacy (2008).

Judge Kane's order basing the class certification on the precarity of those represented seems further evidence challenging the framework of Wacquant (2001, 2009). Meanwhile, the hypothesis that kleptocratic incentives from federal procurement policy make possible the for-profit industry appears to pass the Hoop Test and perhaps the Smoking Gun test as well. The timing of the expansion of private prisons leading to the infrastructure for mass incarceration coincides with two separate activities that push kleptocrats toward the vicious cycle of lobbying state legislatures and Congress to pay for private prisons. The first is the near-contemporaneous analysis shared by a researcher commissioned by the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice in 1985. In testimony for a hearing on "Privatization of Corrections,"

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Professor Ira Robbins notes that privatization of prisons developed in response to counties failing to pass prison bonds, a situation that proved perilous to the finance industry and thus provoked banks and other financial firms that profited from issuing the bonds to seek new customers, namely state and federal legislatures.[88] "The corporation can build the institution and the government can lease it" (Robbins 1985, 77).[89] Robbins points out in a written response added later to the Committee Report that the finance firm E.F. Hutton was pushing private prison investments in its promotional brochures (US House Judiciary Subcommittee on Courts 1985, 103, quoting Robbins).

Robbins also points out a concern by critics of privatization in the 1980s. Its relevance to contemporary debates warrants quoting it at length: "They claim that it is inappropriate to operate prisons with a profit motive, which provides no incentive to reduce overcrowding (especially if the company is paid on a per-prisoner basis), nor to consider alternatives to incarceration, nor to deal with the broader problems of criminal justice. On the contrary, the critics assert that the incentive would be to build more prisons and jails. And if they are built, we will fill them. This is a fact of correctional life. The number of jailed criminals has always risen to fill whatever space is available" (Robbins 1985, 75). These hearing statements suggest, first, that finance firms misrepresenting the nature of the industry sold investors and legislatures on private prisons based on protocols of financing that were anti-democratic and anti-capitalist, but also had little relation to instrumentalizing ideas about personal responsibility, the market, or race. At the very least, this suggests the kleptocracy theory passes the Hoop Test. Meanwhile, GEO's 2018 petition vowing it will be unable to honor its contracts with the government if it must cease practices that several federal judges and an appellate court say are unlawful indicates the profiteering from illegal actions keeps them in business and thus passes the Smoking Gun test.

In the wake of the Black Lives Matter protests of 2020, it is possible that county, state, and federal representatives will change police, arrest, and prison-funding policies for those alleged of criminal wrongdoing. But inasmuch as the communities ICE is targeting do not fit the logic of mass incarceration, nothing will change for noncitizens. And because firms and individuals use lobbyists to direct taxpayer funds to private interests,

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the distribution of power and resources will continue to impose exorbitant opportunity costs on the 99 percent in the form of under-resourced public schools, transportation, and housing from which grand theories of mass incarceration direct our attention.

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NOTES

1. It is tempting to simply refer to these populations as "noncitizens," but for decades the US government has been unlawfully detaining and deporting US citizens under immigration laws (Balderrama and Rodriguez 2006; Stevens (2011, 2017a, 2017b Olsen 2017). ICE's work program came to my attention in 2009 through a US citizen, Mark Lyttle, who had just returned from Guatemala after

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having been unlawfully deported to Mexico, despite being born in North Carolina, speaking no Spanish, and having no relatives in Mexico (Stevens 2011). He explained that the Correction Corporation of America (CCA), now CoreCivic, had been paying him one dollar each day for his midnight-to-8 a.m. shift buffing floors, and also kitchen work. He was concerned that CCA owed him $32. (Interview with author, Kennesaw, Georgia, June 22, 2009.)

2. This is an extremely large body of literature. Exemplary of the frameworks I am engaging is work by David Garland (2002), Loïc Wacquant (2001, 2009), and Michelle Alexander (2012). I am especially concerned with evaluating whether theories of ideology (as expressed in attitudes, behaviors, and statements to interviewers) provide robust causal accounts of incarceration. That said, much of the literature on mass incarceration focuses on the racialized effects and not causes of mass incarceration (e.g., Western 2006, 23–34). While producing knowledge of one strain of mass incarceration, the long-standing dependence of this literature on racialized incarceration—and its disregard of the effects on democracy of federal procurement systems that concentrate wealth among kleptocrats—may itself unwittingly contribute to the inertia of mass incarceration.

3. The American Heritage Dictionary definition of *kleptocracy* is "a government characterized by rampant greed and corruption." https://www.ahdictionary.com/word/search.html?q=kleptocracy.

4. Alexander also cites Cohen to describe how laws banned "insulting gestures" and thus "opened up a tremendous market for convict leasing in which prisoners were contracted out as laborers to the highest bidder" (31).

5. TRAC, Syracuse University, "Immigration and ICE Detainees Snapshot," June 30, 2018, https://trac.syr.edu/phptools/immigration/detention/. Reliable figures are elusive. Data provided by ICE to Congress on March 6, 2019, indicated 50,049 people in ICE custody, even though Congress had appropriated funds to pay for the detention of no more than 40,520 (Ackerman 2019).

6. Annual arrest "book-ins" to detention by ICE and Customs and Border Control (CBP) for 2016—ICE: 108,372, CBP 244,510. For 2017—ICE: 134,553, CBP: 184,038. For 2018—ICE 153,670 CBP 242,778 (ICE 2018, 8).

7. Not a single person in ICE custody is held for punishment. See Wong Wing v. United States, 163 U.S. 228 (1896). A study by the state of California notes: "Individuals held in custody before trial on criminal charges, cannot be subjected to punishment at all. Their confinement is governed by the constitution's Due Process Clause, which requires that restrictions on liberty not be "excessive in relation to" their purpose" (Becarra 2019, citing Youngberg v. Romeo 457 U.S. 307, 322 [1982]). The official policy rationale is to ensure people show up for the immigration court hearings and comply with final orders of removal. Data show that the flight risks are quite low. In 2013–2017, 92 percent of asylum seekers were present for their final hearings (Cepala 2019).

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8. Under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRRA), those in mandatory detention due to a criminal conviction have served their prison sentences prior to being released into ICE custody.

9. That said, there is some facility-to-facility variation in the amount of work incentivized through nonmonetary carrots, ranging from extra pieces of chicken, and more flexible visiting arrangements to aversive sticks, most commonly threats of solitary confinement and additional restrictions, stated or implied, though threats of physical force were made as well. Records were obtained through records requests and litigation under the Freedom of Information Act. The litigation that many of the documents are quoted from in this chapter is *Stevens v. ICE*, 1:17-cv-02853 (2014). See links on Source Information, Deportation Research Clinic, https://deportationresearchclinic.org/FOIA-Litigation.html. For original source material, including contracts and litigation, see http:deportationresearchclinic .org. And see Stevens (2016, 426–27).

10. A "Report of Investigation" by the Office of Professional Responsibility states, "On January 24, 2008, the Joint Intake Center (JIC), Washington, D.C. received telephonic notification from Detainee [REDACTED] Stewart Detention Center (SDC), reporting he had not been paid for services rendered while working in the kitchen at SDC. Detainee [REDACTED] claims that he has been in the SDC for three years and has never received compensation for his kitchen duties." FOIA Case 2013-00445, 1. The record shows the complaint was closed the same day it was received and was not investigated.

11. 28 C.F.R. § 5. The current BOP definitions have been in use since 1979.

12. PBNDS, 2011, https://www.ice.gov/detention-standards/2011. For the legislative history with citations, see Stevens (2016, esp. 436). The analysis used for the minimum wage litigation highlights Congress's failure to appropriate funds for the VWP since 1978, despite this being required in the authorizing statute. Without such appropriations, the program might be operationally similar to that on the books in 1978 but nonetheless lack the force of law and thus cannot supersede federal and state wage and employment laws.

13. The PBNDS detail obligations to ICE of the contracting private firms and state and local law enforcement officials running jail space rented out. Violations may result in contracts being severed but the standards alone provide no rights or redress for respondents in ICE custody.

14. PBNDS, 2011, https://www.ice.gov/doclib/detention-standards/2011/5-8.pdf.

15. Menocal et al. v. GEO Group, Inc., 1:14-cv-02887 (D. Colo. Oct 22, 2014). Likewise, in the wing of Arizona's Pinal County Jail rented out to ICE, seven people were detailed each day to clean the showers and could be punished with solitary confinement for refusing (Stevens 2016, 41). The media have noted it was the research of this author "about the volunteer work program [that] prompted the lawsuit" (Phillips 2017; and see Holpuch 2018).

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16. 29 C.F.R. § 553.101(a)—"An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours."

17. Barrientos v. CoreCivic, Order of Judge Clay Land, Middle District of Georgia, 4:18-cv-00070-CDL Doc. 38, 08/17/18, p. 1. Stewart has been assailed for its numerous violations of the PBNDS for several years (pp. 2–4). In 2016 a spokesperson for Rep. Yvette Clarke (D-NY) called the Stewart Detention facility "inhumane" (Glawe 2016).

18. "We observed several problems with food handling and safety at four facilities, some of which did not comply with the [Performance Based National Detention Standards] for food operations and could endanger the health of detainees. 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" (US ICE Office of Inspector General 2017, 8). Stewart was among the six facilities OIG inspected for its report (appendix A, 10).

19. See FOIA Case No. 2015-ICLI-00026-Supp-83. This and other FOIA documents cited in this chapter are available at https://deportationresearchclinic.org. *See* "Source Material on ICE Private Prisons," http://deportationresearchclinic.org/DRC-INS-ICE-FacilityContracts-Reports.html.) A DOJ OIG report also highlights the inferior record of private prisons for federal prisoners (US DOJ Office of Inspector General 2016), https://oig.justice.gov/reports/2016/e1606.pdf.

20. The median wage inside these facilities for jobs available is $1 per day; so, a can of chili requires eighteen hours of labor.

21. FOIA Case No. ICE 2013-32547, released March 21, 2019, http://governmentillegals.org/Stevens-FOIA-ICE-2015-ICLI-00026_03-20-2019.pdf.

22. The Trump administration has discussed new protocols authorizing detention conditions for those in custody under immigration laws identical for those in criminal custody (Dickerson 2017).

23. County governments also turn to for-profit contracts to defray local costs for jails (Regester 2010). The Folkston facility will gross GEO $1.6 million per *month*. It is attractive to the local county because of property taxes and other small perks, including community donations and "buying supplies from vendors in the county" (Redmon 2018), support that is not based on the PWE, market values, or racism/nativism, but local profits.

24. The Supreme Court has held since 1896 that immigration violations are decided without juries by government officials; the lack of protections the Sixth Amendment requires means their custody is only because of findings that they are flight risks or a danger to the community. Wong Wing v. United States, 163 U.S.

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228 (1896) (overturning 1892 law authorizing "hard labor" for violating immigration policies).

25. In 1941 the Immigration and Naturalization Service coined the word *detainee* to refer to Italians and Nazis held in US prisoner of war camps (*New York Times* 1941).

26. Ten cents per hour was 13 percent of the federal minimum wage in 1950 (Elwell 2014, 2), and also less than the rate authorized by Congress in its appropriations act (Stevens 2016). The one dollar/day payments now paid are .8 percent to 1.7 percent of the minimum pay mandated by the Fair Labor Standards Act, depending on the state in which the facility is located. And the minimum wage itself has not kept pace with the cost of living.

27. "The CCA Story: Our Company History." https://web.archive.org/web/20160208192833/https://www.cca.com/our-history.

28. For details on the legislative history of the work program under INS, see Stevens (2016, esp. 458–65).

29. Indeed, ICE still holds small numbers of people in this fashion, such as the Comfort Suites Hotel in Miami, the Red Roof Inn in Seattle, and the Best Western Dragon Gate Inn in Los Angeles. See http://trac.syr.edu/immigration/detention/trans.html.

30. For the legislative history and citations, see Stevens (2016, 468). On balance, immigration law since 1952 has increased the possibilities for people to become legal residents or US citizens while, since 1996, providing more triggers for their deportation and mandatory detention. A description of the bills increasing family-based legal residency can be found in Kandel (2018, 2). The 2000 Child Citizenship Act (Pub. L. 106–395) bestowed US citizenship automatically on foreign-born children. For children born prior to 1999, children adopted by parents who were US citizens were not citizens unless their parents applied for this by submitting a form to the US Citizenship and Immigration Services. As a result, adult foreign-born adopted children who grew up in the United States with parents who are US citizens are deported for minor crimes (Stevens 2017a). This is important because it shows policy preferences of loosening admissions criteria for those who are foreign-born are inconsistent with those implicit in the policies that benefit those who have a financial stake in private prisons.

31. "Payne, Jr. Leads Letter Urging Department of Homeland Security to Consider Ending Use of Private Prisons," October 6, 2016, https://payne.house.gov/press-release/payne-jr-leads-letter-urging-department-homeland-security-consider-ending-use-private. September 26, 2016, Letter from Senator Leahy (D-VT) to Jeh Johnson, signed by delegation of Senators. https://www.leahy.senate.gov/press/leahy-leads-senators-in-demanding-answers-from-dhs-on-use-of-private-prisons. The letter initiated by Senator Leahy (D-VT) states: "In addition to the record profits the private prison industry is reaping from American

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taxpayers, we are troubled by the pivotal role the industry has played in institutionalizing mass family detention and increasing detention of asylum seekers. Starting in 2014, mass family detention facilities were erected in a matter of months, in order to detain children and mothers fleeing brutal violence and persecution in Central America. ICE managed to stand up these mass detention facilities with alarming speed because the nation's two largest private prison companies were ready and eager to make this happen through no-bid, fixed-price contracts that were negotiated without Congressional or public input, resulting in an enormous windfall to the prison industry."

32. "A smoking gun in the suspect's hands right after a murder strongly implicates the suspect, but the absence of such a gun does not exonerate a suspect" (Bennet 2010, 211–12; citing van Evera 1997).

33. "He creates surplus-value which, for the capitalist, has all the charms of a creation out of nothing. This portion of the working day, I name surplus labour-time, and to the labour expended during that time, I give the name of surplus labour" (Marx [1867] 1887, 152).

34. In the fall of 2019 Rep. Lauren Underwood (D-IL) invoked the suffering of immigrants to push through a Customs and Border Protection database that immigrant rights groups did not support and that would benefit contractors such as General Dynamics Information Technology (Washington and Stevens 2020).

35. The latter responded to communities refusing to pass bonds for new state and county prisons and jails by lobbying state legislatures and Congress to use their budgets for this purpose. Private prison firms gave more than $1.6 million to candidates running for Congress in 2018 (Goodkind 2018). For the influence of private prisons on legislative authorization of contracts, see Cohen (2015), Sullivan (2010), Justice Policy Institute (2011), Hodai (2010) and West and Baumgart (2018).

36. Jacob Hacker and Paul Pierson describe the Republican Party's top-down ideological push for privatization by figures such as Karl Rove and Grover Norquist and also discuss the passage of laws for the benefit of small minorities at the expense of the US public, ranging from regressive tax policies to laws that benefit Big Pharma (Hacker and Pierson 2006). For more on interest-group lobbying, see Bartels (2018).

37. In a meta-review of research analyzing organization delegation, the author writes: "It is only in the case of privatization that most of the reviewed articles that present empirical evidence point to a decrease in performance" (Overman 2016, 1239). His review showed that "Privatization . . . has a plethora of negative political associations. . . . These negative associations are not counterbalanced by any evidence for positive political effects associated with privatization in the reviewed articles" (1251). None of the eight articles reviewed indicated a single positive outcome from privatization, in contrast with the three other forms of delegation Overman reviewed (1252). See also Sagers (2007).

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38. Campaign Legal Center v. Federal Election Commission, Case 1:18-cv-00053-TSC, Complaint, Doc.1, 01/10/18 https://campaignlegal.org/sites/default/files/CLC%20v.%20FEC%20Complaint%20GEO%20Delay%20ECF%20No.%201.pdf. In 2016, the Campaign Legal Center (CLC) sued the FEC for failing to penalize GEO for its contribution. In 2018, a federal district court judge relied on precedents from administrative law and granted FEC's motion to dismiss. The court did not claim that GEO's contribution adhered to the letter of the law but reasoned the FEC had "prosecutorial discretion" and had not abused this (p. 158).

39. For instance, "1.102-2. Performance standards . . . (4) The Government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the commercial marketplace. The Government will maximize its use of commercial products and services in meeting Government requirements." https://www.acquisition.gov/content/part-1-federal-acquisition-regulations-system#id1617MD00E7S.

40. "Excessive reliance by executive agencies on sole-source contracts (or contracts with a limited number of sources) and cost-reimbursement contracts creates a risk that taxpayer funds will be spent on contracts that are wasteful, inefficient, subject to misuse, or otherwise not well designed to serve the needs of the federal government or the interests of the American taxpayer. Reports by agency inspectors general, the Government Accountability Office (GAO), and other independent reviewing bodies have shown that noncompetitive and cost-reimbursement contracts have been misused, resulting in wasted taxpayer resources, poor contractor performance, and inadequate accountability for results." "Memorandum of the President of the United States," March 4, 2009, 74 F.R. 9755. https://www.federalregister.gov/documents/2009/03/06/E9-4938/government-contracting.

41. 40 C.F.R. § 3.104-1 prohibits disclosing information related to government procurement, but it is impossible to enforce if the information is actually being generated by a firm bidding on the contract. A firm that exemplifies this pattern is General Dynamics Corporation (GD). In fulfilling its contract to meet the information technology needs of Citizenship and Immigration Services, GD is acquiring non-public data and policy priorities that give GD unique access to agency planning that is useful for shifting to provide a broad range of services. GD's market niche in this sector (Empower LLC 2018, 15, 30, 33, 35, 40, 66) incentivizes its campaign contributions to those who will support increasing deportation and detention operations and thus distorts government policies (Brown 2018). In the last decade it has substantially increased the share of its sales in information technology services to the federal government in general and Homeland Security in particular (General Dynamics 2018, 31, 73).

42. In 2015, a group of Democrats wrote a letter to the Office of Management and Budget requesting it oppose the thirty-four-thousand-bed mandate in its budget for 2016: "No other law enforcement agency is forced to operate

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under a quota for the number of people it must keep in jail each day." https://foster.house.gov/sites/foster.house.gov/files/FINAL%20Letter%20to%20OMB%20on%20Detention%20Bed%20Mandate%20in%20the%20FY16%20Budget%20Request.pdf.

43. In addition to the 2010 minimum bed mandate law, I have in mind the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRRA) and the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA). https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act. IIRRA in particular was pushed through Congress on wheels greased by Democrats in the leadership who wanted the anti-immigrant law to push back in the 1996 reelection bid for the votes of Californians who had passed Proposition 187 and were feared to be amenable to nativist overtures by the Republican candidate Senator Bob Dole. Clinton's political team, led by Rahm Emmanuel, pushed the enormous bill through Congress too quickly for staff and members to thwart its harmful provisions, some of which were later overturned by courts.

44. Using data obtained from ICE through FOIA litigation, researchers from the Sentencing Project in 2017 put the figure substantially higher, at 73 percent (Gotsch and Basti 2018). For an interactive map of the facilities see Misra (2018).

45. The average cost of the three different rates for the privately run facilities (SPCs, CDFs, DIGSAs) is $158.64 per day. The average cost of the county and federal facilities (IGSAs and USMS IGAs, respectively) is just $94.86 per day.

46. Tylek noted the small group's mission was "eliminating the influence of commercial interests in the criminal justice system . . . [and] expos[ing] the harms caused by the commercialization of justice." (Tylek 2018a, 1)

47. "If the deal is approved, forty-seven state prison systems will now contract with a telephone provider that is owned by one of just three national companies: Securus, GTL, or CenturyLink" (Tylek 2018a, 2).

48. Tylek's second comment provides concrete evidence falsifying Securus's denial of patent trolling: "This Statement also conflicts with a 2016 press release in which the company threatened to "outspend" competitors on patent litigation" (Tylek 2018b, 2). She also highlights the anti-competitive effects of Securus's frequent patent fights, and provides evidence refuting Securus's claim the transfer will not reduce competitive bidding (Tylek 2018b, 2).

49. "Chairman Pai Statement on Decision by Inmate Calling Services Providers to Withdraw Merger Application," FCC, April 2, 2019, https://www.fcc.gov/document/chairman-pai-statement-withdrawal-inmate-calling-merger.

50. Tylek writes: "Spurred by our comments and those of our advocacy partners, the FCC demanded that Securus and ICSolutions turn over nearly one million documents. Ultimately, the FCC agreed with our objections, citing the "arguments and evidence submitted by criminal justice advocates" in concluding that this merger was not in the public interest. . . . We won a David-and-Goliath-type victory against a massive prison profiteer. It's impossible to overstate the impact

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that the Securus-ICSolution merger would have had on incarcerated people and their loved ones had it succeeded. Securus, whose exorbitant call rates have led the predatory industry, would have wielded its power to further increase call rates in its existing and acquired contracts—a cost that would have been borne disproportionately by women in communities of color and poverty (Bianca Tylek email to Listserve, April 3, 2019, on file with author).

51. Telephone interview, April 11, 2019, on file with author.

52. Tylek said she learned about the planned merger from a "footnote of a Moody's report behind a paywall." She then "saw merger application go to the FCC" and thought, "We can challenge it at the FCC. We have a good argument to challenge it on the merits, that it's against the public interest." Tylek had never done this before and had "no idea" if she would succeed. "We realized they had to go to the FCC. Every communications deal has to. . . . We knew there was going to be an approval period. We had never challenged a deal. Our legal summer interns were on it. . . . It's a new strategy hadn't tried before. We don't expect Securus to try to acquire more companies in the near term. This one took them for a spin." The work behind the challenge was done by her and a summer law school intern (telephone interview, April 11, 2019, on file with the author).

53. In response to a question about the origin of her interest in prisons, Tylek said she had been "concerned since childhood" and prisons had affected her "very personally" (telephone interview, April 11, 2019, on file with author).

54. Telephone interview, April 11, 2019, on file with author.

55. Forensic intelligence consists of "explaining that which was previously unseen; narrating locations of time and place that may seem distant to reveal their contiguities with injustice of this moment"; improving "access to information from government and elite institutions"; and finally, legal analyses that change the objects of their inquiries (Stevens 2015, 726). Tylek describes how in the wake of the Marshall op-ed, other groups also wrote comments: "Getting public attention in the media is important. . . . It gets people outraged, talking about it, and potentially recruits more folks to challenge the deal" (telephone interview, April 11, 2019, on file with author).

56. Telephone interview, April 11, 2019, on file with author.

57. Tylek explains that the FCC intervention was a one-off and that most of her work targets city councils and state legislatures to end the practice of charging prisoners for phone calls. Telephone interview, April 11, 2019, on file with author.

58. For a discussion of historical changes affecting workers choosing legal strategies of labor versus employment law, see Galvin (2019).

59. Wacquant acknowledges that *Punishing the Poor* is "one-sided and overly monolithic" (2009, xix). He notes in particular that he excludes from his analysis policy fights among elites as well as efforts at resistance from below. Wacquant's explicit dismissal of facts and dynamics inconsistent with his hypotheses means he is at best ignoring outliers that falsify not only his predictions but his worldview.

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(There has been little scholarship on the effect of comments on rule making. It is not clear if Tylek's victory is an outlier or if the intervention is unusual.) By failing to consider any mechanisms and outcomes other than those of a neoliberal, racist state that is monolithically hostile to those who are not rich, White men, Wacquant loses valuable information about causal mechanisms other than those predicted by his theory. For data showing Americans' decreasing concern about immigrants' impact on the labor market inconsistent with Wacquant's scapegoating framework, see Rainie and Brown (2016).

60. The opening sentence of Sarah Staszak's book on the closing of courts to plaintiffs describes the 2011 Supreme Court decision overturning class certification by women employees suing Walmart (2014, 1). The rigidity of prison operations allowed plaintiffs in the ICE litigation to overcome the hurdles the precedent poses for groups that are not under custodial control of their employers.

61. The narrative of the litigation and its iterative revelations draws on documents obtained from ICE since 2010, including four thousand pages of correspondence between ICE and the private firms after the cases were filed. On file with author.

62. Portions of the litigation narrative are from Stevens (2018). For a legislative history of the laws, practices, and canons of interpretation behind the litigation, see Stevens (2016, Part III). For an overview of litigation against private prisons in general under the Trafficking Victims Protection Act, see Levy (2018). For case filing details in the litigation against private prisons contracting with ICE see Stevens (2017b). For related legal research on work programs under immigration laws in private prisons see Marion (2009), Sinha (2014), and Garfinkel (2017).

63. Key filings in these lawsuits and many of the contracts are available at "Private Prison Source Material and Litigation," https://deportationresearchclinic.org. Key legal arguments extracted from these cases appear in a 2018 law review article (Stevens 2018).

64. Unjust enrichment is a common law doctrine that is incorporated into state case law and permits suit for civil damages if a party is found to have induced the transfer of value without payment.

65. In addition, the lawsuits in the Eleventh and Fifth Circuits include only the TVPA and unjust enrichment claims. The lawsuit with the most charges is *Owino v. CoreCivic*. For an overview of the litigation, see Stevens (2018). Filings are periodically updated on the source materials website for the Deportation Research Clinic, https://www.deportationresearchclinic.org/.

66. The variation in charges reflects variation in the work programs, state laws and precedents, and attorney litigation strategies.

67. Menocal v. GEO Group, Inc., 113 F. Supp. 3d 1125, 1132 (D. Colo. 2015). According to the Federal Rules of Civil Procedure, plaintiffs may appeal the dismissal of the CMWO after the trial on the two other claims.

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68. Kane's order highlighted the defendants' reliance on the holding in *United States v. Kozminski*, which is limited to the Thirteenth Amendment, and, unlike the TVPA, prohibits only "physical or legal, as opposed to psychological, coercion." The court also rejected the inferences the defendants drew from *Channer v. Hall*, a decision the court understood to hold that threats of solitary confinement used to compel an immigration detainee to perform kitchen work do not constitute a violation of the Thirteenth Amendment's prohibition against involuntary servitude (*Menocal*, 113 F. Supp. 3d at 1132). See also Channer v. Hall, 112 F.3d 214,219 (5th Cir. 1997), holding "that the federal government is entitled to require a communal contribution by an INS detainee in the form of housekeeping tasks, and that Channer's kitchen service, for which he was paid, did not violate the Thirteenth Amendment's prohibition of involuntary servitude." (*Menocal v. GEO Group, Inc.*, 113 F. Supp. 3d at 1125).

69. In one of its filings CoreCivic itself conceded that Congress passed 18 U.S.C. § 1589 to make it easier to sue and convict individuals for psychological and not just physical coercion. "CoreCivic does not disagree that Congress enacted § 1589 in response to Kozminski, or that § 1589(a)(4) includes a psychological-coercion component" (Case 4:18-cv-00070-CDL Document 37 Filed 08/02/18, Reply in Support of Defendant Motion to Dismiss).

70. In rejecting the CMWO claim, Kane cited a Fifth Circuit decision that came out of a Fair Labor Standards Act (federal) minimum wage claim against then Immigration and Naturalization Service, *Alvarado*, 902 F. 2d at 396, internal citation omitted. However, three other judges for four additional cases have noted that *Alvarado* is not precedential for the Ninth Circuit and have denied motions to dismiss the minimum wage claims. See orders for Nwauzor, et al. v. The GEO Group, Inc., 3:17-cv-05769 (2017); State of Wash. v. The GEO Group, Inc., 17-2-11422-2 (2017); Sylvester Owino and Jonathan Gomez et al. v. CoreCivic, case no. 3:17-cv-01112-jls-nls; and Raul Novoa, et al. v. The GEO Group, Inc., 5:17-cv-02514 (2018).

71. GEO claimed that undocumented immigrants are not eligible for protections under the SCA. Judge Kane's order, however, found that the SCA mandates the contractor (or subcontractor) to provide fringe benefits beyond those mandated by the state or federal minimum wage laws.

72. *Menocal*, 113 F. Supp. 3d at 1125.

73. "Motion for Class Certification under Rule 23(b)(3) and appointment of Class Counsel under Rule 23(g)," Doc. 49, No. 14-CV-02887-JLK, May 6, 2016.

74. Document 57, at 2.

75. Document 57, at 2.

76. Appellate Case: 17-1125 Document: 01019942810. Here, the claims of all the class members—including the representatives—share the same theory: that GEO knowingly obtained class members' labor by means of the Sanitation Policy, which threatened—or was intended to cause them to believe they would suffer.

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77. The advertisement to which the parties stipulated begins: "If you were detained at GEO's Detention Facility in Aurora, Colorado, between October 22, 2004 and October 22, 2014, please read this notice. A class action lawsuit may affect your right." Case 1:14-cv-02887-JLK-MEH Document 162-1 Filed 01/11/19. EXHIBIT A Proposed Announcement.

78. This argument could fail because the FLSA and the SCA obligate the federal government and contractors. Congress expressly foreclosed one employer evading responsibility because its contractor (or subcontractor) was violating these wage laws (Stevens 2016, 444–48).

79. See, e.g., email from GEO law firm Holland and Knight to ICE, "Subject: Great talking to you—Menocal v. GEO Items," April 10, 2017, "It was great talking to you and catching up with you. You are a good man—there is a lot going on in Menocal, and any help and guidance ICE can provide before Thursday would be immensely helpful." See https://deportationresearchclinic.org/04-10-2017GEOEmail_ICE-2018-ICLI-00052.pdf, release March 8, 2019, p. 2499; on February 16, 2018, Holland and Knight shared with ICE a draft of their en banc appeal, *id.*, 863.

80. In an email dated February 15, 2018, with the subject heading "RE: Menocal—10th Cir Affirms class cert," an ICE official writes: "GEO's general counsel has been calling Mike Davis and their executives have also reached out to Tom Homan [ICE, Acting Director] asking us to intervene in the VWP litigation." See https://deportationresearchclinic.org/02-16-2018GEOEmail_ICE-2018-ICLI-00052.pdf, pp. 5163–64.The names of the sender and recipient are redacted.

81. In a letter dated February 14, 2018, GEO requested $2,057,000 Equitable Adjustment to its contract for legal fees anticipated in the Menocal litigation. See https://deportationresearchclinic.org/GEO_2-14-2018_ICLI00052.pdf, p. 2752.

82. Letter from Peter Edge, Homeland Security Investigations, to George Zoley, CEO/President, GEO, July 9, 2018. See https://deportationresearchclinic.org/DenialRequestEquitableAdjustmentContract3999-END_ICE-2018-ICLI-00052.pdf, p. 6062.

83. Wilhelm Barrientos et al. v. CoreCivic, Inc., 4:18-cv-00070 (CDL), Doc. 38, 8/17/2018.

84. Shoaib Ahmed, et al. v. CoreCivic, Inc., Eleventh Cir.,18-15081, solicitor general, amicus brief, filed April 1, 2019.This is the same case as cited in note 83, but with a different lead plaintiff.

85. "As the district court correctly recognized, there is no basis for reading this broad provision to categorically exclude from its coverage facilities operated by private entities that contract or subcontract to provide immigration detention services to the federal government, particularly in light of Congress's repeated efforts to ensure that federal contractors do not provide goods and services to the government through reliance on forced labor. . . . The TVPA, however, does not bar a facility from operating the work program that Congress has authorized for aliens held in immigration detention." *Id.*, 5

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86. The GEO Group, Inc.'s Petition for Permission to Appeal Class Certification, *Menocal v. GEO Grp., Inc.*, No. 1:14-cv-02887 (D. Colo. Mar. 13, 2017), at 30.

87. ICE PBNDS § 3.1 states: "Encouraging others to participate in a work stoppage" may lead to "[d]isciplinary segregation up to 30 days." However, this and other standards are based on the American Correctional Association rules, developed for those punished for a crime. The standard conflicts with other laws and Federal Acquisition Rules and if used against those in ICE custody might be subject to litigation for these violations.

88. Robbins (1985, 77) writes, "In Jefferson County, Colorado, for example, the voters twice rejected a jail-bond issue before E.F. Hutton underwrote a $30 million issue for private jail construction."

89. An additional motive for privatization was the desire to avoid liability. E.F. Hutton informed potential investors: "A final—and significant—anticipated benefit of privatization is decreased liability of the government in lawsuits that are brought by inmates and prison employees" (Robbins 1985, 74). Robbins points out later that courts soundly rejected this analysis (84–87).

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