

# PRIVATIZATION AND ITS DISCONTENTS

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## INTRODUCTION

The question of what government should control exclusively and what it should delegate to private entities is as old as government itself. In ancient Greece, ownership of forests and mines rested with the government, but the government “contracted out the work to individuals and firms.”<sup>1</sup> And in ancient Rome, the private sector “fulfilled virtually all of the state’s economic requirements,” like tax collection, supplying the army, and feeding the sacred geese of the Capitol.<sup>2</sup> Though privatization is nothing new,<sup>3</sup> it’s becoming an increasingly important issue as government gets bigger and its functions multiply. As the pressure to privatize increases, we must be mindful of its advantages and pitfalls.

Privatization comes in two basic flavors.<sup>4</sup> First is the shift in the production of goods and services from the government to the private sector,<sup>5</sup> such as privatizing Amtrak or the Tennessee Valley Authority. This process belongs to the world of law and economics<sup>6</sup> and won’t be addressed here, except to say

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<sup>1</sup> William L. Megginson & Jeffrey M. Netter, *History and Methods of Privatization*, in INT’L HANDBOOK ON PRIVATIZATION 25, 25 (David Parker & David Saal eds., 2003).

<sup>2</sup> ROBERT SOBEL, THE PURSUIT OF WEALTH: THE INCREDIBLE STORY OF MONEY THROUGHOUT THE AGES 21 (2000); see PLUTARCHUS, THE ROMAN QUESTIONS OF PLUTARCH 161 (H. J. Rose ed. & trans., Arno Press 1975) (1924).

<sup>3</sup> See Germà Bel, *Retrospectives: The Coining of “Privatization” and Germany’s National Socialist Party*, 20 J. ECON. PERSP. 187, 187, 189–91 (2006) (documenting that the term “privatization” goes back to the 1930s).

<sup>4</sup> Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL’Y REV. 6, 13–14 (1988).

<sup>5</sup> See *id.* at 14.

<sup>6</sup> See, e.g., Andrei Shleifer, *State Versus Private Ownership*, 12 J. ECON. PERSP. 133, 135 (1998) (explaining that “advances in the theories of ownership and contracting have reopened the question of state versus private provision”).

that privatization of production is generally a good thing. Moving in the opposite direction—toward communism—doesn't work.

This Article will focus on the second flavor of privatization, meaning the shift of government functions to private control.<sup>7</sup>

As you likely know, privatization offers many benefits. When combined with competition, it can improve efficiency and lower costs.<sup>8</sup> FedEx and UPS compete with each other and drive down prices, while still turning a profit.<sup>9</sup> Contrast that with the U.S. Postal Service, which loses billions of dollars a year.<sup>10</sup>

Privatization also leads to specialization. In fact, the modern administrative state is built on the idea that the government needs agencies to specialize.<sup>11</sup> For example, areas like medicine and air quality are beyond Congress's ability to manage directly, so it established the FDA and the EPA. And sometimes, the experts needed to work in these agencies are easier to find—or at least easier to motivate using market incentives—in the private sector. Thus, by privatizing certain government functions, we can allow private companies with specialized expertise to run them.

When you combine competition and specialization, you get efficiency. Efficiency isn't something you can usually count on in government because the incentives are misaligned.<sup>12</sup> If you're the government and your costs increase, you can just raise taxes. But if you're a private company, you have to figure out how to reduce costs or increase revenue, or you'll go bankrupt.

These benefits mean that privatization of many government functions is not at all controversial. Nobody minds if Atlanta hires a private construction firm to build a city office building. And we don't complain when janitorial services at federal buildings are performed by private contractors rather than government employees. But what about privatizing *core* government functions?

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<sup>7</sup> Starr, *supra* note 4, at 14.

<sup>8</sup> See Shleifer, *supra* note 6, at 138–39.

<sup>9</sup> See Suzanne McGee, *UPS vs. FedEx: Two Plays on (Eventual) Global Recovery—Only One That's Low-Priced*, FORBES (Oct. 31, 2012, 11:02 AM), <http://www.forbes.com/sites/ycharts/2012/10/31/ups-vs-fedex-two-plays-on-eventual-global-recovery-only-one-thats-low-priced/>.

<sup>10</sup> Ron Nixon, *Postal Service Reports Loss of \$15 Billion*, N.Y. TIMES, Nov. 16, 2012, at A22.

<sup>11</sup> See *Weinberger v. Bentex Pharm., Inc.*, 412 U.S. 645, 654 (1973).

<sup>12</sup> *But see* law clerks to Chief Judge Kozinski.

Public institutions are public for a reason. Sometimes, it's because of the tragedy of the commons.<sup>13</sup> We all need clean air and feel that the governing rules should be written with public input and enforced by a politically accountable entity, so we established the EPA. Sometimes, it's a collective action problem.<sup>14</sup> We all need national defense and want to ensure that military power is used at the direction of our elected, civilian commanders, so we formed a public military. And sometimes, it's a moral sensibility. We want to deter crime and punish criminals, but we don't want victims to exact private retribution.

Privatizing such core government functions can give us some gains in efficiency, but we risk forfeiting the benefits of the institutions' public character—in particular, equality and accountability.<sup>15</sup> This Article will focus on areas where the pressure to privatize and the challenges to equality and accountability are most acute—education, prisons, the military, and the justice system. By focusing on each of these in turn, we hope to highlight some of the pitfalls of privatization and suggest some ways to avoid them.

## I. EDUCATION

First, education. The most direct route to privatization is through vouchers. Voucher programs allow parents to send their kids to private schools with taxpayer money.<sup>16</sup> The most famous advocate of school vouchers, Nobel laureate Milton Friedman, argued that giving parents the option to choose their children's school would create free-market competition.<sup>17</sup> “For Friedman and those who follow[] him, the school voucher is a straightforward application of first-year college economics to ameliorating poor school quality.”<sup>18</sup>

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<sup>13</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968) (explaining that individuals, acting independently and rationally, will deplete a shared resource, despite their understanding that depleting the common resource is contrary to the group's long-term interests).

<sup>14</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 13–15 (1971) (noting that government services “must be available to everyone if they are available to anyone” because it is not feasible “to deny [such services] to those who did not voluntarily pay their share of the costs of government, and taxation is accordingly necessary”).

<sup>15</sup> See Alexander Volokh, *Privatization and the Elusive Employee–Contractor Distinction*, 46 *U.C. DAVIS L. REV.* 133, 147–48 (2012) (discussing the argument that “contracting out for prison management, military services, or other functions violates core commitments of public law”).

<sup>16</sup> See Klint Alexander & Kern Alexander, *Vouchers and the Privatization of American Education: Justifying Racial Resegregation from Brown to Zelman*, 2004 *U. ILL. L. REV.* 1131, 1132.

<sup>17</sup> Aaron Jay Saiger, *School Choice and States' Duty to Support “Public” Schools*, 48 *B.C. L. REV.* 909, 941 (2007).

<sup>18</sup> *Id.*

When you have a single school district, there's often little competition driving the public school to provide children with a better education.<sup>19</sup> Opening up the market leads to competition among schools for funding, which can lead to good results. It can drive down costs. For example, the Milwaukee voucher system saved Wisconsin over fifty million dollars in 2011 alone.<sup>20</sup> Voucher systems can also help kids. In Milwaukee, voucher students were more likely to graduate from high school than their public-school counterparts.<sup>21</sup> And pupils who remain in public schools can benefit too. Even though it undoubtedly drove some strong students to private schools, the introduction of vouchers in Milwaukee is credited with driving up test scores in public schools.<sup>22</sup> Similarly, a study on the Florida voucher program found that public schools facing pressure from voucher programs opted to change the way they taught.<sup>23</sup> They increased instructional time and teacher resources and began targeting high-needs children.<sup>24</sup> However, "once the threat of vouchers goes away, so does the incentive for failing schools to improve."<sup>25</sup>

But privatization can also undermine the advantages of public education. The main reason we've committed to public education is to equalize access, and we've spent decades trying to achieve it. When communities turn to voucher programs, they must be mindful of the disparate effect these programs can have on poor families.<sup>26</sup> If private schools can charge more than the voucher is worth, poor families still face a barrier to entry. The vouchers may not be enough to pay for any private school that's better than the public school

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<sup>19</sup> See *id.* (recognizing that monopolies hurt consumers while competitive markets "harness consumer sovereignty to improve products for everyone").

<sup>20</sup> PATRICK J. WOLF, THE COMPREHENSIVE LONGITUDINAL EVALUATION OF THE MILWAUKEE PARENTAL CHOICE PROGRAM: SUMMARY OF FINAL REPORTS 5 (2012), available at [http://www.uark.edu/ua/der/SCDP/Milwaukee\\_Eval/Report\\_36.pdf](http://www.uark.edu/ua/der/SCDP/Milwaukee_Eval/Report_36.pdf).

<sup>21</sup> JOHN ROBERT WARREN, GRADUATION RATES FOR CHOICE AND PUBLIC SCHOOL STUDENTS IN MILWAUKEE, 2003–2009, at 2 (2011), available at <http://www.schoolchoicewi.org/files/1613/6018/6466/2011-Grad-Study-FINAL3.pdf>.

<sup>22</sup> Rajashri Chakrabarti, *Can Increasing Private School Participation and Monetary Loss in a Voucher Program Affect Public School Performance? Evidence from Milwaukee*, 92 J. PUB. ECON. 1371, 1372 (2008).

<sup>23</sup> Cecilia Elena Rouse et al., *Feeling the Florida Heat? How Low-Performing Schools Respond to Voucher and Accountability Pressure 4–5* (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 13, 2007).

<sup>24</sup> *Id.* at 5.

<sup>25</sup> Jay P. Greene & Marcus A. Winters, *When Schools Compete: The Effects of Vouchers on Florida Public School Achievement*, at Executive Summary (Ctr. for Civic Innovation, Working Paper No. 2, 2003).

<sup>26</sup> See, e.g., Paul Finkelman, *School Vouchers, Thomas Jefferson, Roger Williams, and Protecting the Faithful: Warnings from the Eighteenth Century and the Seventeenth Century on the Danger of Establishments to Religious Communities*, 2008 BYU L. REV. 525, 527.

they'd be leaving.<sup>27</sup> Moreover, if private schools are siphoning money from public schools, they may leave the kids stuck in public schools far worse off.<sup>28</sup>

How do we fix this? One solution is to limit the amount schools can charge on top of vouchers. The Ohio voucher program approved by the Supreme Court in *Zelman v. Simmons-Harris* required that schools not charge the lowest income families more than \$250 over the voucher amount.<sup>29</sup> Or we could require schools to accept a certain percentage of students for the cost of the voucher, perhaps based on need. Or, if we really wanted to level the playing field, we could give out vouchers only to the truly needy.<sup>30</sup>

One other obvious concern with privatizing education is that it increases the state's involvement with religious schools. It's true that a lot of voucher money goes to religious schools. In *Zelman*, for example, ninety-six percent of voucher students enrolled in religiously affiliated schools.<sup>31</sup> Because money is fungible, any funds paid by the government to help run a religious school release an equal amount to support the school's religious mission.

But what's more interesting is the flip-side of the religious concern—accountability. The state may lose a fair amount of control when schools are privatized. One major cause of this is the Supreme Court's understanding of the Establishment Clause: If the government starts messing around with religious schools too much, it might violate the third prong of the Court's *Lemon* test.<sup>32</sup> So states have to be somewhat hands-off when it comes to private schools. This lack of accountability may strike some as problematic, as it may result in students in private schools getting an inferior secular education compared to those in public schools.

In fact, the Florida Supreme Court struck down a voucher program largely because of the lack of accountability.<sup>33</sup> The court held that the voucher

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<sup>27</sup> *Id.* at 535.

<sup>28</sup> *Id.* at 527 (“Vouchers put the poorest and least-able families at risk because, in the end, vouchers will undermine educational quality in the public schools that those individuals with the fewest resources will still be attending.”).

<sup>29</sup> 536 U.S. 639, 646 (2002).

<sup>30</sup> *See id.* (recognizing that the vouchers were given based on financial need).

<sup>31</sup> *Id.* at 647.

<sup>32</sup> *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 615 (1971) (explaining that a statute violates the Establishment Clause if it fosters “an excessive government entanglement with religion” (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)) (internal quotation marks omitted)).

<sup>33</sup> *See Bush v. Holmes*, 919 So. 2d 392, 409–10 (Fla. 2006).

program violated article IX of the Florida Constitution,<sup>34</sup> which requires the legislature to provide a public school system that is “uniform.”<sup>35</sup> The court found that the voucher program allowed Florida to give money to private schools that were “not subject to the same standards as those in force in public schools.”<sup>36</sup> And since article IX has been interpreted to require “uniform operation throughout the State,” the diversion of money to private schools was deemed to be unconstitutional.<sup>37</sup>

There’s no reason to debate Florida constitutional law here, but how much of a problem is this in practice? Schools, after all, are accountable to customers—the parents who send their children there.<sup>38</sup> We trust parents to make all sorts of decisions regarding the welfare of children, and parents are generally pretty good at it. If parents are unhappy with their children’s education at one school, they’ll pull them out and send them elsewhere. If parents are happy with the school, they’ll keep their kids enrolled, and the school will continue to get money. This system allows parents to hold schools directly accountable.<sup>39</sup>

## II. PRISONS

But there are other kinds of institutions, where there are no customers, or at least no customers who can exercise choice. Prison—where the kids who didn’t get a voucher end up—is a good example. We’ve had some form of private prisons in America since our founding.<sup>40</sup> But today, private prison populations are ballooning. More than 100,000 convicts are in prisons run by private companies.<sup>41</sup> And from 1999 to 2010, the number of federal prisoners in private custody increased by 784%.<sup>42</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> FLA. CONST. art. IX, § 1(a); *Holmes*, 919 So. 2d at 409.

<sup>36</sup> *Holmes*, 919 So. 2d at 409.

<sup>37</sup> *Id.* at 405, 412–13 (quoting *State ex rel. Clark v. Henderson*, 188 So. 351, 352 (Fla. 1939)).

<sup>38</sup> See James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 600 (2007).

<sup>39</sup> See *Davis v. Grover*, 480 N.W.2d 460, 476 (Wis. 1992).

<sup>40</sup> CODY MASON, THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 1 (2012), available at [http://sentencingproject.org/doc/publications/inc\\_Too\\_Good\\_to\\_be\\_True.pdf](http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf).

<sup>41</sup> *Id.*; see also PAUL GUERINO ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUST. STAT. BULL. NO. NCJ 236096, PRISONERS IN 2010, at 30 app. tbl.19 (2011), available at [www.bjs.gov/content/pub/pdf/p10.pdf](http://www.bjs.gov/content/pub/pdf/p10.pdf) (revised Feb. 9, 2012).

<sup>42</sup> MASON, *supra* note 40, at 1.

So we're certainly on the way to prison privatization. But private prisons present a troubling accountability problem. This was illustrated by the private prison near Kingman, Arizona. Back in 2010, two convicted murderers escaped from the privately run prison and murdered a couple taking a camping trip.<sup>43</sup> It turns out the private prison was being run like a "day care," with a broken alarm system and a lax security culture.<sup>44</sup>

These problems are likely the result of a lack of accountability. The lack of state control of private schools isn't such a serious problem because the private schools serve customers who can take their business elsewhere. But with prisons, we don't have that same mechanism. The only real check on private prisons is when the prison renegotiates its contract with the state.<sup>45</sup>

Professor Sasha Volokh has suggested that a prison voucher system might introduce the same sorts of benefits we see with school vouchers.<sup>46</sup> If prisoners could choose where they served their time, prisons would compete for money.<sup>47</sup> According to Professor Volokh, that could increase security, improve the quality of health care, and offer more forms of rehabilitation.<sup>48</sup>

But prisoners are not the only constituents served by prisons. In fact, one might more accurately call prisoners anti-customers. The real customers are the people on the outside who will suffer the detriments of poor prison administration.<sup>49</sup> Treating prisoners as the customers undermines the purpose of punishment.<sup>50</sup> An important aspect of punishment is loss of control. If you're in prison, you're no longer allowed to eat when you want, go to sleep and wake up when you want, watch TV when you want, have sex and visit

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<sup>43</sup> JJ Hensley, *Family of Couple Killed by Arizona Inmates Files Lawsuit Against State*, ARIZ. REPUBLIC (Mar. 18, 2011), <http://www.azcentral.com/arizonarepublic/local/articles/20110318arizona-inmates-kill-couple-lawsuit.html>.

<sup>44</sup> *Id.*; see also Bob Ortega, *Arizona Prison Oversight Lacking for Private Facilities: State Weighs Expansion Even as Costs Run High*, ARIZ. REPUBLIC (Aug. 7, 2011), <http://www.azcentral.com/news/articles/20110807arizona-prison-private-oversight.html>.

<sup>45</sup> See Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 822 (2012) (noting that if prisoners can transfer out, "[o]nce a private provider gets a prison contract, if reputational and contract-renewal concerns are weak, there are strong incentives to reduce quality").

<sup>46</sup> *Id.* at 784. Professor Volokh recognizes that there would be costs to a voucher system. *Id.* at 862–63. His article "is meant to spur further research and debate on the question, not to come down on one side or another." *Id.* at 792.

<sup>47</sup> See *id.* at 790 (hypothesizing that a prisoner voucher system would move prison administrators, "as if by an invisible hand, to make their prisons better places").

<sup>48</sup> *Id.* at 796, 798–99.

<sup>49</sup> See *id.* at 784–85.

<sup>50</sup> See *id.* at 792.

with family when you want. Your life is—to a great degree—controlled *for* you. Prison vouchers ameliorate and undermine punishment by giving prisoners some control over their lives. The prisoner now gets to choose where he serves his time and under what conditions, making the sentence easier to bear.<sup>51</sup>

And when it comes to accountability, prison vouchers cater to the wrong customer.<sup>52</sup> If prisons compete for funding based on what prisoners prefer, prisons will start offering amenities that may be inconsistent with the goals of punishment and security.<sup>53</sup> Just imagine: “Come to Paradise Prison! We’ve got the hottest showers in town, bed checks only every other week, and free WiFi access at every bunk.”

Still, prisons do have important responsibilities to prisoners, and private prisons do need to be held accountable if they fail to fulfill those duties. Civil liability is one route.<sup>54</sup> And until recently, that seemed like an effective tool for holding private individuals doing government work accountable.<sup>55</sup> But last term, the Supreme Court told us that’s not always possible because of the doctrine of qualified immunity.<sup>56</sup>

The case was *Filarsky v. Delia*.<sup>57</sup> Nicholas Delia was a firefighter who got sick when he responded to a toxic spill. He stayed home to rest, or at least that’s what he told the city. While he was supposedly at home, Delia was spotted buying building supplies. The city launched an investigation to see if Delia was actually sick or just taking time off at government expense to remodel his house. The city engaged an employment lawyer, Steve Filarsky, to help with the investigation. While he was interviewing Delia, Filarsky ordered him to produce the construction materials, the theory being that if Delia were

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<sup>51</sup> According to Professor Volokh, “nothing in this proposal requires treating prisoners as *morally entitled* to choose.” *Id.* at 828. But whatever the motivations for allowing prisoners to choose, the end result is that prisoners gain more control over their lives and may exercise preferences. The concern isn’t *why* we allow prisoners to choose, but that the choice itself is incompatible with the purpose of prison.

<sup>52</sup> *See id.* at 845–52 (“Solving the agency problem by allowing prisoners to choose may exacerbate these negative externalities.” (footnote omitted)).

<sup>53</sup> *See id.* at 844.

<sup>54</sup> *See Richardson v. McKnight*, 521 U.S. 399, 401–02 (1997).

<sup>55</sup> *See Delia v. City of Rialto*, 621 F.3d 1069, 1081 (9th Cir. 2010) (holding that a private attorney retained by a city was not shielded from civil suit), *rev’d sub nom. Filarsky v. Delia*, 132 S. Ct. 1657 (2012).

<sup>56</sup> For general background on the Supreme Court’s qualified immunity cases, see generally Alexander Volokh, *Supreme Court Clarifies Standards for Qualified Immunity in Civil Rights Cases—Or Does It?*, REASON FOUND. (Apr. 5, 2013), <http://reason.org/news/show/privatization-qualified-immunity>.

<sup>57</sup> 132 S. Ct. 1657.

indeed sick, he wouldn't have used any of the materials. Delia complied but later sued Filarsky under 42 U.S.C. § 1983 for violating his Fourth Amendment rights.<sup>58</sup>

It's well established that government officials have qualified immunity, but Filarsky was a private citizen.<sup>59</sup> Was he, too, immune from suit? When Filarsky came to the Ninth Circuit, we held that he had no immunity.<sup>60</sup> But the Supreme Court, as it likes to do, reversed us, 9–0.<sup>61</sup>

Now before you say, “Oh, that's just the Ninth Circuit—it includes Stephen Reinhardt,” it's important to know that the case wasn't so cut and dried. A recent Supreme Court case involving a private prison, *Richardson v. McKnight*,<sup>62</sup> seemed to require denying Filarsky immunity. There, the Supreme Court held that prison guards employed by a private firm were not entitled to qualified immunity under § 1983.<sup>63</sup> Perhaps you can see why the Ninth Circuit came out the way it did in Filarsky. If the private actors in Richardson weren't immune, then it would seem neither was Filarsky.

But Chief Justice Roberts, writing for the full court, held that Filarsky was different.<sup>64</sup> To show how, he went back to 1871—when Congress passed § 1983.<sup>65</sup> Back then, it would not have been unusual for a shopkeeper to serve as the postmaster or for a ferryman to collect fees as a public wharfmaster.<sup>66</sup> In fact, private lawyers like Abraham Lincoln conducted criminal prosecutions.<sup>67</sup> Since private citizens were so involved in carrying out public functions, immunity didn't depend on the defendant being a full-time government employee.<sup>68</sup> According to the Chief Justice, Filarsky was a modern-day

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<sup>58</sup> *Id.* at 1661.

<sup>59</sup> *Id.* at 1661–62.

<sup>60</sup> *Delia*, 621 F.3d at 1081.

<sup>61</sup> *Filarsky*, 132 S. Ct. at 1659, 1668.

<sup>62</sup> 521 U.S. 399, 401–02 (1997); *see also Delia*, 621 F.3d at 1080 (declining to rely on a Sixth Circuit case which suggested that, in light of *Richardson*, private citizens may be entitled to qualified immunity); *Gonzalez v. Spencer*, 336 F.3d 832, 835 (9th Cir. 2003) (per curiam) (holding that the private citizen defendant was not entitled to qualified immunity because “no special reasons significantly favor[ed] an extension of governmental immunity” (quoting *Richardson*, 521 U.S. at 412) (internal quotation marks omitted)).

<sup>63</sup> *Richardson*, 521 U.S. at 401–02.

<sup>64</sup> *Filarsky*, 132 S. Ct. at 1659.

<sup>65</sup> *Id.* at 1662–63.

<sup>66</sup> *Id.* at 1663.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1664.

Abraham Lincoln, contracted by the state to conduct an investigation.<sup>69</sup> In fact, it's a well-kept secret that Steven Spielberg's next movie is called *Filarsky*.

Thus, the Supreme Court concluded, *Filarsky* should be entitled to the same immunity as if he'd been a full-time city employee.<sup>70</sup> This is clearly the right result, and not just because it was nine–zip. It just makes sense to extend immunity to those who do the government's bidding.

But what's troubling about *Filarsky* is where it leaves *Richardson*, the prison guard case. It seems that *Richardson* was wrongly decided and should have been overturned in *Filarsky*. As Justice Scalia said in dissent in *Richardson*, the majority's "holding is supported neither by common-law tradition nor public policy, and contradicts our settled practice of determining § 1983 immunity on the basis of the public function being performed."<sup>71</sup> The right result in *Richardson* was to hold the prison guards immune from suit. But instead of overruling *Richardson* in *Filarsky*, Chief Justice Roberts attempted to cabin the *Richardson* decision, saying it involved private individuals employed by a private corporation.<sup>72</sup> But those private individuals were still performing government functions at the behest of the government and being funded by taxpayer dollars. The tension between *Filarsky* and *Richardson* will likely cause no end of trouble.

In any event, as far as *Filarsky* and *Richardson* are concerned, it doesn't matter whether they're immune or not. As long as they know the rule, they can build their contracts around it.<sup>73</sup> Let's say a company that contracts with Georgia to run a prison knows that it's going to face lawsuits from prisoners—some justified, some not. If the company isn't immune, it will demand more money from the state to cover the cost of insuring against those lawsuits. If it's immune, the company's price will be lower.

What this means is that by not providing immunity to the private prison guards, we're passing that cost on to Georgia. In essence, we're penalizing Georgia for privatizing, and this will diminish the efficiency gains from privatizing prisons. It also creates a curious inequality problem: prisoners who are housed in state-run prisons will face an immunity hurdle if they try to sue,

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<sup>69</sup> *Id.* at 1667.

<sup>70</sup> *Id.* at 1667–68.

<sup>71</sup> *Richardson v. McKnight*, 521 U.S. 399, 414 (1997) (Scalia, J., dissenting).

<sup>72</sup> *Filarsky*, 132 S. Ct. at 1667.

<sup>73</sup> *Cf.* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8 (1960) (explaining that without an "initial delimitation of rights there can be no market transactions to transfer and recombine [those rights]").

while those in privately run prisons will not. Thus, from the victim's perspective, recompense will depend entirely on the prison's public or private character.

### III. MILITARY

Another area where privatization creates difficult accountability problems is the military. Privatization of war is nothing new; mercenaries go back thousands of years.<sup>74</sup> And in America, the private sector has often been contracted to supply the military.<sup>75</sup> Nonetheless, we've seen a rapid increase in the use of private contractors during the wars in Iraq and Afghanistan.<sup>76</sup> So it's more important than ever to figure out how to keep them accountable.

The Department of Defense maintains that “[c]ontractor personnel are civilians accompanying the U.S. Armed Forces.”<sup>77</sup> In other words, they “are not part of the operational chain of command.”<sup>78</sup> And a bipartisan congressional commission found that the reliance on contractors is “overwhelming the government’s ability to effectively manage and oversee contractors.”<sup>79</sup> So if the military can’t manage them, who will? The commission suggested one possible route: The Department of Defense could require contractors to consent to U.S. civil jurisdiction as part of every contract.<sup>80</sup> The problem with that approach is that jurisdiction means nothing if contractors can’t be held liable.

And it seems that contractors are virtually never liable. To see why, we must go back half a century to *Feres v. United States*.<sup>81</sup> In the Federal Tort Claims Act (FTCA), Congress waived the government’s sovereign immunity for certain tort claims.<sup>82</sup> In *Feres*, a soldier (and some soldiers’ estates) tried to

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<sup>74</sup> Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT’L L. 395, 399 (2009).

<sup>75</sup> Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 130 (2004).

<sup>76</sup> Finkelman, *supra* note 74, at 399–400.

<sup>77</sup> 48 C.F.R. § 252.225–7040(b)(3) (2011).

<sup>78</sup> U.S. DEP’T OF THE ARMY, REG. 715–19, OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT ch.4-1(d) (20 June 2011).

<sup>79</sup> COMM’N ON WARTIME CONTRACTING IN IRAQ & AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 2 (2011).

<sup>80</sup> *Id.* at 160.

<sup>81</sup> 340 U.S. 135 (1950).

<sup>82</sup> 28 U.S.C. § 2674 (2006).

sue the United States under the FTCA.<sup>83</sup> But the Supreme Court held that soldiers weren't entitled to sue the government under the FTCA for injuries they suffered while on duty.<sup>84</sup> This concept became known as the *Feres* doctrine.<sup>85</sup>

But the *Feres* doctrine doesn't bar suits against government contractors,<sup>86</sup> which means they could be sued under a number of laws, including the Alien Tort Statute<sup>87</sup> and state tort law.<sup>88</sup> Nonetheless, these claims are largely D.O.A. because of the military contractor defense the Supreme Court crafted in *Boyle v. United Technologies Corp.*<sup>89</sup> Boyle died when his helicopter crashed off the coast of Virginia.<sup>90</sup> While he survived the impact, he couldn't get the escape hatch open and drowned.<sup>91</sup> His father filed suit under Virginia state tort law against the contractor who built the helicopter, but the contractor claimed immunity because it was working for the U.S. military.<sup>92</sup>

The Supreme Court explained that while the *Feres* doctrine immunized the United States from suits brought under the FTCA, it didn't protect contractors from liability under other laws.<sup>93</sup> Nonetheless, the FTCA played a prominent role in *Boyle*. Congress didn't fully waive the United States' sovereign immunity in passing the FTCA but instead preserved immunity for discretionary functions and combatant activities.<sup>94</sup>

The *Boyle* Court explained that there is a "uniquely federal interest" in "civil liabilities arising out of the performance of federal procurement contracts."<sup>95</sup> There was also a significant conflict between state tort law and a

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<sup>83</sup> 340 U.S. at 136–37.

<sup>84</sup> *Id.* at 146.

<sup>85</sup> *See, e.g.,* *United States v. Johnson*, 481 U.S. 681, 687–88 (1987) (explaining that "the *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries").

<sup>86</sup> *See, e.g.,* *Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267, 271 (9th Cir. 1990) (concluding that the *Feres* doctrine was inapplicable because the defendant contractor was a "distinct entity" that could not be described as a government employee).

<sup>87</sup> *Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009).

<sup>88</sup> *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988).

<sup>89</sup> *Id.* at 501; *see generally* VIVIAN S. CHU & KATE M. MANUEL, CONG. RESEARCH SERV., R41755, TORT SUITS AGAINST FEDERAL CONTRACTORS: AN OVERVIEW OF THE LEGAL ISSUES 12–15 (2011) (explaining the government contractor defense).

<sup>90</sup> 487 U.S. at 502.

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* at 502–03.

<sup>93</sup> *See id.* at 509–10.

<sup>94</sup> 28 U.S.C. § 2680(a), (j) (1982).

<sup>95</sup> 487 U.S. at 505–06 (internal quotation marks omitted).

federal law, namely the discretionary functions exception to the FTCA.<sup>96</sup> The Court held that “the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision.”<sup>97</sup> Thus, the unique federal interest and the conflict between state and federal law meant that the state law was preempted, providing the contractor with a defense.<sup>98</sup>

While *Boyle* dealt with a procurement contract,<sup>99</sup> Boyle’s logic was extended to service contracts by the D.C. Circuit in *Saleh v. Titan Corp.*<sup>100</sup> The contractors in that case provided interrogation services at the infamous Abu Ghraib prison.<sup>101</sup> This, by the way, must be a great line on somebody’s résumé: 2003–2004, Interrogation Services, Abu Ghraib, Iraq. There are probably many jobs where that credential will come in handy (mainly in New Jersey).

In *Saleh*, several Iraqis asserted various tort claims against the contractors,<sup>102</sup> but the D.C. Circuit held that the combatant activities exception served to preempt those claims because the contractors were “integrated into combatant activities over which the military retain[ed] command authority.”<sup>103</sup> Perhaps this is right: Contractors should be effectively immune in the vast majority of cases. Nevertheless, sovereign immunity is built on the assumption that the government is accountable to the people through the political process.<sup>104</sup> Because military contractors aren’t accountable to the people, liability seems to be an appropriate tool for holding them accountable. No doubt what’s animating these decisions are the concerns expressed earlier, namely that the cost of liability borne by the contractor will inevitably be passed on to the government.<sup>105</sup> If we hold contractors liable, we effectively

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<sup>96</sup> *Id.* at 511.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* at 511–13 (“[W]e are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a ‘significant conflict’ with federal policy and must be displaced.”).

<sup>99</sup> *Id.* at 502, 505.

<sup>100</sup> 580 F.3d 1, 5 (D.C. Cir. 2009).

<sup>101</sup> *Id.* at 2.

<sup>102</sup> *Id.* at 2–3.

<sup>103</sup> *Id.* at 9.

<sup>104</sup> *See* Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 900 (2010) (“[F]ederal sovereign immunity fits comfortably with popular sovereignty, divided and diminished government power, and political accountability for public officers.”).

<sup>105</sup> *See* *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511–12 (1988); Trevor Wilson, Comment, *Operation Contractor Shield: Extending the Government Contractor Defense in Recognition of Modern Warfare Realities*, 83 TUL. L. REV. 255, 273 (2008).

undermine the government's immunity.<sup>106</sup> And even though the Court has held contractors can't sue the United States for indemnity,<sup>107</sup> contractors can still build the cost of insurance into their contracts.

#### IV. JUSTICE

One final area of privatization that illustrates problems of both inequality and accountability is the justice system. I'm sure you all know about alternative dispute resolution, or ADR. That's where you and your opponent go (sometimes you're ordered to go) to work out your problems with a mediator or arbitrator. Even if ADR is a foreign word to you, you've surely seen Judge Wapner or Judge Judy meting out justice on TV.

ADR is often court-sanctioned. For example, in the Ninth Circuit we have a very successful mediation program.<sup>108</sup> But you can also hire private companies to mediate your disputes.<sup>109</sup> In California, you can actually have a private trial. For a fee, ADR Services, Inc. will give you a retired state judge, and the jury's verdict will be "entered in the court as if the trial were conducted there."<sup>110</sup>

The benefits are obvious. First, the trial is private and can be kept private.<sup>111</sup> For example, if Apple and Microsoft have a nasty dispute about software and don't want the bad publicity that goes with a lawsuit, they can go have a private trial. Also, parties can handpick the judge.<sup>112</sup> It might be useful to have someone who knows something about computers and technology presiding over the trial, rather than a random judge down at superior court.<sup>113</sup>

In addition, cases are typically resolved faster through ADR. In Los Angeles, it usually takes more than a year to get to trial, which is still better

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<sup>106</sup> See *supra* text accompanying notes 70–73.

<sup>107</sup> *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673–74 (1977).

<sup>108</sup> Alex Kozinski, *Mediation in the United States Court of Appeals for the Ninth Circuit: A Message from the Chief Judge*, U.S. CT. APPEALS FOR NINTH CIRCUIT, <http://www.ca9.uscourts.gov/mediation/> (last visited Dec. 11, 2013).

<sup>109</sup> See ADR SERVICES, INC., <http://www.adrservices.org> (last visited Dec. 11, 2013); RESOL. REMEDIES, <http://www.resolutionremedies.com> (last visited Dec. 11, 2013).

<sup>110</sup> *Private Trials*, ADR SERVICES, INC., <http://www.adrservices.org/private-trials.php> (last visited Dec. 11, 2013).

<sup>111</sup> *Id.*

<sup>112</sup> *The ADR Process—Private Trials*, RESOL. REMEDIES, [http://www.resolutionremedies.com/adr\\_process/private-trials.asp](http://www.resolutionremedies.com/adr_process/private-trials.asp) (last visited Dec. 11, 2013).

<sup>113</sup> *Id.* ("Some cases present complex legal and technical issues, and it will often serve the interests of all parties [to] have an arbitrator who has particular expertise in the area of law involved.").

than what it used to be: five years.<sup>114</sup> With court funding slashed because of budget shortfalls, the time to trial will inevitably increase.<sup>115</sup> A private trial can happen as soon as the parties are ready.<sup>116</sup> And here's where the inequality comes in: Apple and Microsoft can afford to buy their way out of the justice system, but the average litigant can't.

Whether litigants should be able to do this is a tough question, but health care presents a useful analogy for consideration. In Canada, health care is delivered through a publicly funded health care system.<sup>117</sup> Each province is responsible for financing and regulating a statewide health insurance program.<sup>118</sup> Some provinces, including Quebec, made it illegal to buy private medical insurance, which meant that everyone had to use the same publicly funded services.<sup>119</sup> Think of it like the transplant list here in the United States. If you need a heart, you have to wait your turn; you can't buy one legally.<sup>120</sup>

The prohibition on private health care in Quebec translated into long lines. As one doctor put it, while "dogs can get a hip replacement in under a week . . . humans can wait two to three years."<sup>121</sup> A few years ago, though, the Canadian Supreme Court struck down the prohibition for the province of Quebec.<sup>122</sup> The bitterly divided court held that the long waits and inability to access private health insurance violated the Quebec Charter for Human Rights and Freedoms.<sup>123</sup>

In America, we tend to favor money as the way to ration; other countries, like Canada, focus on equality.<sup>124</sup> Both forms of rationing have their drawbacks. Rationing by money means the poor suffer. Indeed, if we ration based solely on money, poor people could be shut out entirely.

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<sup>114</sup> Kevin O'Leary, *And Justice for Some: L.A.'s Shrinking Court System*, TIME (Mar. 21, 2010), <http://www.time.com/time/nation/article/0,8599,1973909,00.html>.

<sup>115</sup> *Id.*

<sup>116</sup> Cf. Christopher Baum, *The Benefits of Alternative Dispute Resolution in Common Interest Development Disputes*, 84 ST. JOHN'S L. REV. 907, 924 (2010) (recognizing that disputes in arbitration are resolved more quickly).

<sup>117</sup> Raisa Berlin Deber, *Health Care Reform: Lessons from Canada*, 93 AM. J. PUB. HEALTH 20, 20 (2003).

<sup>118</sup> *Id.* at 21.

<sup>119</sup> *Chaoulli v. Québec (Att'y Gen.)*, [2005] S.C.R. 791, 805 (Can.).

<sup>120</sup> See Amy Harmon, *Auction for a Kidney Pops Up on Ebay's Site*, N.Y. TIMES, Sept. 3, 1999, at A13.

<sup>121</sup> Clifford Krauss, *Canada's Private Clinics Surge as Public System Falts*, N.Y. TIMES, Feb. 28, 2006, at A3 (quoting Dr. Brian Day, president and medical director of the Cambie Surgery Centre).

<sup>122</sup> *Chaoulli*, [2005] S.C.R. at 793, 842.

<sup>123</sup> *Id.*

<sup>124</sup> See Deber, *supra* note 117, at 21.

But rationing on the basis of strict equality means that the system misses out on the money that the rich would have paid into the system. Those dollars could be used for research or to provide free care for poor people. In addition, allowing the rich to buy their way out takes them out of the public line, meaning poor people move up in line. Then again, if too many people are able to buy their way out of the system, the system will lose its public support and funding, leaving less for those stuck in it. This is much the same problem as with school vouchers.

It's also the same challenge we face when we allow people to buy their way out of the judiciary. Rich people get justice faster, and perhaps better; poor people have to wait years to see their case go to trial. As we increase our reliance on ADR, we have to be mindful of who gets to use it, and whether it's fair to those left behind.

So far, we've been discussing only civil litigants, but you might be surprised to learn that criminals, too, can sometimes bypass the public court system.

Last year at a KFF,<sup>125</sup> we screened an Australian film called *Face to Face*.<sup>126</sup> It follows the story of a guy who crashes into his boss's car in a fit of anger, but instead of going through the criminal court system, he participates in something called restorative justice, where all the parties to the dispute are encouraged to work out their differences.<sup>127</sup> We don't want to give away what happens, but the movie provides an introduction to the concept.

Now, you're probably thinking: Of course Australia is soft on crime; the country was founded by criminals. The United States would never have a program like that. In fact, several U.S. cities, like Baltimore and Minneapolis, already have such programs.<sup>128</sup>

So does restorative justice work? There's not much data because there aren't many programs, but one study found that it does have benefits.<sup>129</sup> Victims see a reduction in post-traumatic stress disorder symptoms.<sup>130</sup> And

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<sup>125</sup> Kozinski's Favorite Flicks. This is a regular event where members of the Ninth Circuit community are invited to see a film selected by Chief Judge Kozinski.

<sup>126</sup> FACE TO FACE (MouseTrap Films 2011).

<sup>127</sup> *Id.*

<sup>128</sup> Paul Tullis, *Forgiven*, N.Y. TIMES MAG., Jan. 6, 2013, at 28, 32.

<sup>129</sup> See LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 4 (2007).

<sup>130</sup> *Id.*

perhaps most importantly, when restorative justice is offered to arrestees, more offenses are brought to justice.<sup>131</sup>

But is there a limit to the type of crime that can be dealt with through restorative justice? Let me tell you a recent story that comes from the Florida Panhandle.<sup>132</sup> Conor and Ann had been dating for three years.<sup>133</sup> Her parents thought that Conor was going to be the father of their grandchildren. So it's not surprising that when Ann's mother got word that her daughter had been shot, her first thought was to ask whether Conor was with her. He was indeed. It was the culmination of a nearly two-day fight. Ann was on her knees pleading, "No, don't," when Conor pulled the trigger.<sup>134</sup>

After Conor had been arrested and charged with first-degree murder, Ann's parents said they didn't want Conor to spend his life in prison and began looking for an alternative path.<sup>135</sup> Eventually, together with Conor's parents, they contacted Sujatha Baliga, who runs a restorative justice program.<sup>136</sup> Baliga said restorative justice would never work in Florida, at least not for a homicide.<sup>137</sup> "We do burglaries, robberies," Baliga said.<sup>138</sup> "There's never been a murder case that's gone through restorative justice."<sup>139</sup> Nonetheless, Ann's parents persisted and eventually organized a pre-plea conference—a meeting where everything is off the record and anyone can attend.<sup>140</sup>

At the meeting, Ann's parents spoke first and related how Ann's death had affected them.<sup>141</sup> In the words of the prosecutor, "It was excruciating to listen to them talk . . . . It was as traumatic as anything I've ever listened to in my life."<sup>142</sup>

Then Conor spoke about what had happened, how he and Ann had started fighting and how he'd wanted to scare Ann with the gun so they'd stop fighting.<sup>143</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> *See* Tullis, *supra* note 128, at 30.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 31.

<sup>136</sup> *Id.* at 32.

<sup>137</sup> *Id.* at 32–33.

<sup>138</sup> *Id.* at 33.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 34.

<sup>143</sup> *Id.*

At the conclusion of the conference, everyone gave their recommended sentence. Ann's mom said five to fifteen years. Ann's father, ten to fifteen. Conor's parents agreed with ten to fifteen years. And "Conor said he didn't think he should have a say" in the matter.<sup>144</sup>

The prosecutor refused to come up with a figure, and with that the conference was over. Ann's parents were devastated and feared that all their work had been for naught. But after some time, the prosecutor came around and offered Conor twenty years in prison plus probation, which Conor accepted.<sup>145</sup>

While Conor's story isn't a complete privatization of criminal justice, it's an illustration that private justice can work. Ninth Circuit mediators have even managed to resolve capital cases.<sup>146</sup>

Restorative justice offers a number of benefits. It saves court resources, which is good for taxpayers.<sup>147</sup> The defendant may get a better plea deal than if his sentence were up to the prosecutor alone.<sup>148</sup> And it allows the victims to be hands-on participants instead of helpless bystanders.<sup>149</sup>

Nonetheless, the effects on equality and accountability could be serious. First, the system doesn't work with all crimes. For example, what do we do with victimless crimes?<sup>150</sup> It's hard to imagine what a restorative justice meeting would look like where the defendant was accused of drug possession, hunting bald eagles, or being in the United States illegally.

More importantly, restorative justice makes equalizing sentences among criminals more difficult. Certain segments of society (Wall Street bankers) are more likely to go through restorative justice than others (gang members). And this will exacerbate inequalities already present in the criminal justice system.<sup>151</sup>

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<sup>144</sup> *Id.* at 35.

<sup>145</sup> *Id.*

<sup>146</sup> Kozinski, *supra* note 108.

<sup>147</sup> SHERMAN & STRANG, *supra* note 129, at 86.

<sup>148</sup> *See id.* at 23.

<sup>149</sup> *See id.* at 4, 62.

<sup>150</sup> *See id.* at 8.

<sup>151</sup> *See generally* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 1-8 (2006) (discussing the prison boom from 1970 to 2003 and its effects on racial inequality).

Accountability is also a problem in this system. By diverting criminals to restorative justice, society loses some ability to hold them accountable. Although Conor went to prison, Florida lost something in the process. There was no public trial, and no jury decided on guilt or punishment. Instead, a deal was struck in private with only the victim's parents, the perpetrator and his family, and the prosecutor participating. Then again, the process was no less public than an ordinary plea bargain, which is how most criminal cases are resolved these days.<sup>152</sup>

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No question about it, privatization has benefits: competition, specialization, and efficiency among them. But privatization of government functions also raises a number of serious challenges, some of which we've tried to illustrate by reference to various examples. To summarize, these challenges are:

1. The difficulty of maintaining accountability when those affected by the activity, positively or negatively, have no economic control because the contractor is compensated by taxpayer dollars.

2. The risk that the incentives or disincentives of private contractors will not align with the interests of the public, and the private contractors will therefore undermine the focus of the governmental mission.

3. The disadvantages and benefits of allowing some people to opt out of governmental services by buying their way out of the system, leaving other (usually poorer) participants to rely on what may be second-rate public services.

4. The problem of governmental immunity as applied to government contractors who perform public functions.

5. The risk that some activities that are public in character will be made private and disappear from public scrutiny.

These problems aren't intractable. At least we hope they're not. By remembering to protect the essence of public institutions, we can develop systems that not only reap the rewards of the open market but also preserve the equality and accountability that these institutions require. *Emory Law*

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<sup>152</sup> See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1121 (2011) ("From the 1970s through the early 2000s, plea bargains resolved the vast majority of criminal cases in the United States.").

*Journal's* symposium is an important step toward meeting these challenges, and the contributions made by the distinguished panelists will serve to better equip all of us as we move toward more and more privatization.