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## Constitutionally Unaccountable: Privatized Immigration Detention

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## Constitutionally Unaccountable: Privatized Immigration Detention

DANIELLE C. JEFFERIS\*

*For-profit, civil immigration detention is one of this nation's fastest growing industries. About two-thirds of the more than 50,000 people in the civil custody of federal immigration authorities find themselves at one point or another in a private, corporate-run prison that contracts with the federal government. Conditions of confinement in many of these facilities are dismal. Detainees have suffered from untreated medical conditions and endured months, in some cases years, of detention in environments that are unsafe and, at times, violent. Some have died. Yet, the spaces are largely unregulated.*

*This Article exposes and examines the absence of a constitutional tort remedy for the people behind the walls of for-profit immigration prisons. Two Supreme Court decisions are relevant: *Correctional Services Corporation v. Malesko* and *Minneeci v. Pollard*. These cases focus on the availability of constitutional tort remedies against private prison operators and their employees for people incarcerated pursuant to the government's criminal law authority, not civil immigration-enforcement authority. Yet, on the federal level, the growth of for-profit civil detention is far outpacing that of for-profit criminal incarceration. And the conditions in today's immigration detention facilities—and the experience of the people in custody—are inherently carceral; there is no meaningful difference between criminal incarceration and civil immigration confinement. This Article asserts that the same values that underpin constitutional jurisprudence regulating criminal incarceration—namely, the constitutional principle of dignity and the inherently governmental function of incarceration, as well as values of transparency and accountability—must allow for a constitutional tort remedy for people whose rights are violated in for-profit immigration prisons. Otherwise, for many thousands of people—the majority of whom are people of color—the Constitution and federal courts are out of reach, leaving some of the most egregious rights violations inflicted on the federal government's watch unremedied.*

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\* Clinical Teaching Fellow, Civil Rights Clinic, University of Denver College of Law. I presented drafts of this Article at the Clinical Law Review Writers' Workshop at New York University School of Law and the Association of American Law Schools Conference on Clinical Legal Education, where I received invaluable feedback from Kaci Bishop, Matthew Boaz, Richard Boswell, Katherine Evans, Daniel Gandert, Valeria Gomez, Mary Gundrum, Lindsay Harris, Mary Holper, Emily Torstviet Ngara, Michele Pistone, Rebecca Sharpless, Stacy Taeuber, and Virgil Wiebe. I would like to also thank César Cuauhtémoc García Hernández for his leading work in this field, as well as Christina Lynn Brown, Bryce Downer, Aaron Elinoff, Nicole B. Godfrey, Olivia Kohrs, Tamara Kuennen, Nancy Leong, Sarah Matsumoto, Alexandra Parrott, Laura Rovner, and Katherine Wallat for sharing their expertise, feedback, and time. Additionally, I owe gratitude to the editors of the *Indiana Law Journal*, including Ben Burdick, Madalyn Clary, Hannah Michalek, Steve Marino, Charles Rice, and Brittni Crofts Wassmer, for their careful work preparing this Article for publication. Any and all errors are mine.

When the history of the United States in the last quarter of the twentieth century is written, it may be recalled as the period of the “second great confinement.”

- Jonathan Simon<sup>1</sup>

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#### INTRODUCTION

Roberto<sup>2</sup> was shot on the streets in June 2016. He sustained multiple gunshot wounds, causing life-threatening internal injuries. At the hospital, doctors performed emergency surgery to repair his organs. They inserted a stent in Roberto’s abdomen to address the internal bleeding. Although Roberto had numerous bullet fragments in his body, removing those objects was a secondary concern to stopping the bleeding and keeping him alive. Surgeons advised Roberto he must undergo a series of surgeries over the next several months to remove the remaining fragments and to monitor the stent.

Three months later, U.S. Immigration and Customs Enforcement (ICE) officials arrested Roberto, charged him with civil immigration law violations, initiated removal proceedings against him, and detained him in a private detention center contracting with ICE. When he arrived at the facility, Roberto informed the staff of his injuries and need for further treatment. He showed them the pieces of bullet protruding from just under his skin over his rib cage. He requested medical assistance repeatedly for his severe back and abdominal pain and his ensuing abnormal weight loss. The only medical treatment the detention center staff provided Roberto was ibuprofen, Pepto-Bismol, and a second mattress for his bed. The bullet-fragment sites turned black and blue and oozed pus. Roberto did not see a doctor or receive further treatment for more than a year. If Roberto had been confined in a state prison or a federal government-run prison, the law would have allowed him to sue the officials responsible for the apparent violation of his constitutional right to adequate medical

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1. Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 577 (1998).

2. This name has been changed to protect the person’s identity.

care and, if successful, recover some compensation for the harm he suffered due to their failure to treat his condition. But Roberto was in a private immigration prison—run by a corporation contracting with the federal government—which meant he had no way to vindicate this apparent past violation of his constitutional right.

A substantial body of law has developed regarding the constitutional limits of incarceration in this country and, specifically, the contours of the Eighth Amendment’s prohibition of cruel and unusual punishment.<sup>3</sup> People convicted of a crime and confined in state prisons, as well as in government-run prisons on the federal level, to wait out their sentence are protected by the constitutional right to adequate medical care, a safe prison environment, and humane conditions. They may vindicate past violations of those rights through lawsuits alleging constitutional torts. The Constitution affords no tort remedy, however, for people like Roberto who suffer from untreated serious medical conditions, risks to their safety, and violence while incarcerated in for-profit, federal immigration prisons. Conditions of confinement in many of these facilities are dismal<sup>4</sup> but the spaces are largely unregulated. As this Article shows, they are constitutionally unaccountable.

This Article has three parts. Part I describes the landscape of the modern federal, civil immigration detention system, including its origins, the government’s authority to confine people, and the rise of the private detention regime. Part II compares and contrasts the constitutional tort remedies available to people incarcerated in state prisons and federal government-run prisons with those available to people confined in for-profit immigration prisons. Part III asserts the remedies available to people in private immigration prisons should at minimum be parallel to those available to people confined in federal government-run prisons. This argument is based on three primary considerations: the constitutional value of dignity, the constitutional function of incarceration, and the constitutional goals of government transparency and accountability.

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3. See, e.g., Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741 (2015); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009); Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815 (2012).

4. See, e.g., Fernanda Echavarri, *Dozens of ICE Detainees Were Pepper-Sprayed by Guards for Protesting at a Louisiana Jail*, MOTHER JONES (Aug. 2, 2019), <https://www.motherjones.com/politics/2019/08/immigrant-detention-ice-bossier-louisiana-pepper-spray/> [https://perma.cc/6MPK-QZ82]; Susan Greene, *GEO-Run Aurora ICE Detention Center Is Isolating Immigrants—Some Mentally Ill—in Prolonged Solitary Confinement*, COLO. INDEP. (Aug. 6, 2019), <https://www.coloradoindependent.com/2019/08/06/ice-geo-detainees-solitary-confinement/> [https://perma.cc/F5VW-T7XX]; Hannah Rappleye & Lisa Riordan Seville, *24 Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019, 11:00 AM), <https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291> [https://perma.cc/9RNN-YBU2]; Devon M. Sayers & Catherine E. Shoichet, *ICE Detainee Dies in Georgia While Waiting to Be Deported*, CNN (July 25, 2019, 1:41 PM), <https://www.cnn.com/2019/07/25/us/georgia-ice-detainee-dies/index.html> [https://perma.cc/3S88-P88E]; Alice Speri, *Detained, Then Violated*, INTERCEPT (Apr. 11, 2018, 12:11 PM), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/> [https://perma.cc/UZC3-YMCQ].

But first, two notes about terminology: One, migration-related confinement is difficult to define consistently, in part because the system is vast and the authority to incarcerate spans many agencies and jurisdictions. Some scholars rely on an expansive definition of immigration detention that includes people who have been charged or convicted criminally with an offense or offenses stemming from their migration activity and are in the custody of the U.S. Marshals Service, the Federal Bureau of Prisons, and state authorities.<sup>5</sup> This Article focuses on one type of migration-related confinement—the confinement imposed by the federal agencies tasked with enforcing civil immigration laws, including ICE and U.S. Customs and Border Protection—but even that definition is imprecise in characterizing the confinement as “civil.”<sup>6</sup> Nevertheless, for purposes of this Article, I focus on so-called “civil” immigration detention to highlight the disparities between people confined for putatively civil reasons and those incarcerated pursuant to criminal law and leave the deconstruction of the term “civil detention” itself for future work.

Two, I deliberately use “detention” and “prison” interchangeably throughout the Article. The conditions in immigration detention, and the experiences of those confined in them, make the use of “prison” appropriate. When I separate the two terms, it is largely to differentiate between the legal powers under which people are confined: immigration detention being pursuant to so-called civil legal powers and prison being pursuant to criminal legal powers.

#### I. CIVIL IMMIGRATION CONFINEMENT: HISTORY, AUTHORITY, PROFITEERING

To fairly assess the significance of a constitutional tort remedy for those confined in private immigration prisons, it is helpful to first understand the history of, authority for, and today’s sheer scope of civil immigration confinement in the United States, as well as for-profit corporations’ roles in overseeing and managing that system. Much like the American criminal law system incarcerates the most people in the world,<sup>7</sup> the United States is also the titleholder for the world’s largest civil immigration detention system. The number of people confined in the custody of civil immigration enforcement agencies each year is approximately double the number of people in federal criminal custody.<sup>8</sup>

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5. See, e.g., César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 248 n.8 (2017) (defining “immigration prisons” as “secure facilities in which migrants are confined due to a suspected or confirmed violation of immigration law,” including spaces confining people under both civil and criminal law powers); *id.* at 252–53 (discussing the “blurry boundary between civil detention and criminal confinement for migration-related activity” and asserting “[w]hether acting under the authority of civil or criminal law, law enforcement officials at every level of government regularly take into custody people who are thought to have violated immigration laws”).

6. See René Lima-Marín & Danielle C. Jefferis, *It’s Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955 (2019); Danielle C. Jefferis, *The Civil Detention Fallacy* (2019) (unpublished manuscript) (on file with the *Indiana Law Journal*).

7. E.g., Evangeline Dech, *Nonprofit Organizations: Humanizing Immigration Detention*, 53 CAL. W. L. REV. 219, 221 (2017).

8. *Id.* at 220 (“The Department of Homeland Security (‘DHS’) detains around 400,000

The civil immigration detention apparatus is the fastest growing component of the American system of mass incarceration.<sup>9</sup> Even by its own measure, the federal government incarcerates an unprecedented and growing number of people each year pursuant to its civil immigration enforcement authority. In 2017, estimates of the average daily population of people confined for immigration-related offenses ranged from more than 38,000<sup>10</sup> to as much as 40,500.<sup>11</sup> By the end of 2018, the daily detention population exceeded 48,000.<sup>12</sup> In early 2019, the number of people confined by ICE alone reached nearly 50,000,<sup>13</sup> and by the middle of 2019, the figure exceeded 52,000—an apparent all-time high.<sup>14</sup> Annually, the government incarcerates nearly 400,000 people under the same authority,<sup>15</sup> a figure that has also grown substantially over the last few years, and one the government is likely to surpass in 2019.

To expand this system of incarceration, the government relies heavily on private, for-profit corporations to operate civil immigration prisons.<sup>16</sup> With no means to

people each year, giving the United States one of the largest immigration detainee populations in the world.”); Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2142 (2017) (“Immigration detention has become one of the most egregious forms of mass incarceration in the United States. Over 440,000 immigrants are detained in this country each year, far more than anywhere else in the world.”); see also Dora Schriro, *Women and Children First: An Inside Look at the Challenges to Reforming Family Detention in the United States*, in CHALLENGING IMMIGRATION DETENTION: ACADEMICS, ACTIVISTS AND POLICY-MAKERS 28, 30–32 (Michael J. Flynn & Matthew B. Flynn eds., 2017); MARY SMALL, DET. WATCH NETWORK, A TOXIC RELATIONSHIP: PRIVATE PRISONS AND U.S. IMMIGRATION DETENTION 2 (2016).

9. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1348 (2014); Anil Kalhan, *Rethinking Immigration Detention*, 110 Colum. L. Rev. Sidebar 42, 44–45 (2010) (“The growth in immigration detention in recent years has been remarkable. In 1994, officials held approximately 6,000 noncitizens in detention on any given day. That daily average had surpassed 20,000 individuals by 2001 and 33,000 by 2008. Over the same period, the overall number of individuals detained each year has swelled from approximately 81,000 to approximately 380,000.”).

10. EMILY RYO & IAN PEACOCK, THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES 6 (2018).

11. DET. WATCH NETWORK & NAT’L IMMIGRANT JUSTICE CTR., ICE LIES: PUBLIC DECEPTION, PRIVATE PROFIT 2 (2018).

12. Erica Werne, Damian Paletta & Seung Min Kim, *Shutdown Looms as Border Talks Break Down over Immigration Enforcement*, WASH. POST (Feb. 10, 2019, 5:51 PM), [https://www.washingtonpost.com/business/economy/border-talks-at-impasse-as-shutdown-looms-friday-officials-say/2019/02/10/aa8ef08c-2d36-11e9-813a-0ab2f17e305b\\_story.html?noredirect=on](https://www.washingtonpost.com/business/economy/border-talks-at-impasse-as-shutdown-looms-friday-officials-say/2019/02/10/aa8ef08c-2d36-11e9-813a-0ab2f17e305b_story.html?noredirect=on) [<https://perma.cc/AS6E-CK5M>].

13. *Id.*

14. Hamed Aleaziz, *More Than 52,000 People Are Now Being Detained By ICE, an Apparent All-Time High*, BUZZFEED (May 20, 2019, 6:58 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/ice-detention-record-immigrants-border> [<https://perma.cc/E9RS-36R3>].

15. Dech, *supra* note 7, at 220.

16. See RYO & PEACOCK, *supra* note 10, at 14.

enforce detention standards<sup>17</sup> and few mechanisms to hold them accountable for violating those standards, for-profit immigration prisons are the subjects of the highest number of grievances the federal government receives from the people confined in its custody.<sup>18</sup>

### A. Confinement History

So-called civil detention<sup>19</sup>—that is, nonpunitive incarceration—in the United States is nearly as old as the country’s founding.<sup>20</sup> From the enslavement of millions of people from Africa to the forced displacement of indigenous people to the internment of Asian Americans and others during the first half of the twentieth century, the federal government has a long history of confining people pursuant to powers outside of the criminal process.<sup>21</sup>

But in the immigration sphere, the federal government did not always default to detention.<sup>22</sup> Indeed, the federal government stayed out of immigration regulation almost entirely for much of the country’s first century, leaving the matter to the states.<sup>23</sup> In the middle of the nineteenth century, however, federal government officials began requiring transatlantic companies to detain migrants on arriving ships while assessing whether to allow the noncitizens to “enter” the United States.<sup>24</sup> This arrangement soon turned into detention at onshore sites operated by the shipping companies<sup>25</sup>—where conditions were nightmarish<sup>26</sup>—and then at government-run

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17. See Steven Neeley, Comment, *Immigration Detention: The Inaction of the Bureau of Immigration and Customs Enforcement*, 60 ADMIN. L. REV. 729, 738 (2008).

18. See RYO & PEACOCK, *supra* note 10, at 28.

19. I say “so-called” here because I question the premise that nonpunitive detention is possible. See generally Jefferis, *supra* note 6; Lima-Marín & Jefferis, *supra* note 6, at 11.

20. Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN’S L.J. 55, 62 (2014).

21. Schiro, *supra* note 8, at 29; see generally Stephanie J. Silverman, *Immigration Detention in America: A History of Its Expansion and a Study of Its Significance* (Ctr. on Migration, Policy, & Soc’y, Univ. of Oxford, Working Paper No. 80, 2010), <http://ssrn.com/abstract=1867366> [<https://perma.cc/EER4-LYD9>].

22. Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 601, 610 (2010); Ana Raquel Minian, *America Didn’t Always Lock Up Immigrants*, N.Y. TIMES (Dec. 1, 2018), <https://www.nytimes.com/2018/12/01/opinion/sunday/border-detention-tear-gas-migrants.html> [<https://perma.cc/MZX4-FXB>]; see also CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 240 (2015); Dech, *supra* note 7, at 223–24.

23. CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON* 21 (2019).

24. GARCÍA HERNÁNDEZ, *supra* note 23, at 24.

25. See, e.g., GARCÍA HERNÁNDEZ, *supra* note 23, at 24–25 (describing how the federal government created the legal “entry fiction” to permit shipping companies to allow passengers to disembark but remain confined in onshore private detention sites while the government processed their admission to—or exclusion from—the United States).

26. *Id.* at 25–26 (“Soon conditions inside early immigration prisons were atrocious. ‘The air is impure, the place is crowded,’ wrote one visitor to a San Francisco ‘Chinese jail,’ as the dockside facilities were often described. ‘I have visited quite a few jails and State prisons in this country, but have never seen any place half so bad,’ he added.”).

Ellis and Angel Islands by the late nineteenth century.<sup>27</sup> Immigration confinement on the mass scale did not emerge, however, until the 1980s.<sup>28</sup> Three primary developments over the course of the 1980s and 1990s spurred this emergence of the modern system of immigration incarceration: the arrival of thousands of Cuban and Haitian refugees and exiles during the 1980 Mariel Boatlift and migration movements that soon followed,<sup>29</sup> the evolution of the government's "detention as deterrence" platform,<sup>30</sup> and growth of "crimmigration" law and its attendant mandatory detention provisions.<sup>31</sup>

Through the early and middle twentieth century, the detention of people for migration-related reasons in the United States declined in comparison to the era of Ellis and Angel Islands.<sup>32</sup> Immigration rates fell over those decades, due in part to the Great Depression and harsh U.S. immigration policies.<sup>33</sup> By the middle of the twentieth century, detention was reserved for unusual circumstances—usually "migrants who were deemed likely to abscond or who posed a threat to national security or public safety."<sup>34</sup> Indeed, by January 1955, fewer than five people in immigration custody were seeking entry into the country.<sup>35</sup> What had once been the

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27. *E.g.*, GARCÍA HERNÁNDEZ, *supra* note 22, at 240; Dech, *supra* note 7, at 223 ("The Ellis Island facility in New York Harbor was the first federally operated immigration detention center in the United States."); Simon, *supra* note 1, at 579; Stumpf, *supra* note 20, at 64.

28. Minian, *supra* note 22; Simon, *supra* note 1, at 579.

29. Minian, *supra* note 22; Simon, *supra* note 1, at 579.

30. Minian, *supra* note 22; Simon, *supra* note 1, at 583 ("The new imprisonment policy was aimed at substituting the deterrent of the prison for the removal discretion lost to the Refugee Act.")

31. GARCÍA HERNÁNDEZ, *supra* note 22, at 240–42 ("By way of comparison, the INS had the capacity to detain approximately 1,700 migrants on average per day in 1982 and about 7,000 in 1990. By the end of the century, the agency held just shy of 20,000 each day. Ten years later . . . the average daily population had again grown by 10,000. . . . Much of this growth can be attributed to the increasingly punitive views of immigration law violators that started in the 1980s and have yet to abate. In the last three decades . . . Congress and multiple presidential administrations have intertwined criminal law and immigration law so that tactics traditionally associated with one are now prominent features of the other. In this case, criminal punishment's long reliance on incarceration as a means of deterring—theoretically at least—and punishing undesirable conduct has become an accepted part of immigration law enforcement.")

32. Minian, *supra* note 22 ("The United States first imposed immigration detention in the late 19th century. But by the early 1950s, detaining migrants no longer seemed necessary.")

33. *Id.* ("European and Asian migration had fallen drastically as a result of the Immigration Act of 1924 and the Great Depression.")

34. *Id.*

35. GARCÍA HERNÁNDEZ, *supra* note 22, at 8 ("Indeed, from the 1950s until the 1980s, the [Immigration and Naturalization Service (INS)] had a policy of not using detention except in unusual circumstances."); Simon, *supra* note 1, at 579 ("A few cases of immigration imprisonment made their way through the courts in the 1940s and 1950s, mainly involving aliens suspected of subversion on behalf of the Axis powers and later the Soviet Union. In 1954 Ellis Island closed its doors as an active immigration center, and with it closed the last federal facility for imprisoning immigrants."); Minian, *supra* note 22 ("Reflecting . . . this change, in 1958 the Supreme Court, in *Leng May Ma v. Barber*, held that 'physical detention of aliens is now the exception, not the rule,' pointing out that 'certainly this policy reflects the



rule at the height of the use of Ellis and Angel Islands—confinement—became the exception.<sup>36</sup>

This measured approach to immigration confinement came to an end with the Mariel Boatlift in the early 1980s and the arrival of thousands of Cuban and Haitian migrants and refugees to the shores of the United States.<sup>37</sup> As for the former, more than 120,000 Cubans fled Cuba for the United States en masse “in a highly politicized migration that garnered national and international media attention and inspired fear among many Americans”<sup>38</sup> that was “the single largest Cuban exodus in history.”<sup>39</sup> That public fear of the arriving Cubans was likely sparked by inaccurate accounts that many or most of the arrivals were criminals, political prisoners, and “anti-socials.”<sup>40</sup>

This manufactured and propagandized fear of the Cuban migrants and refugees<sup>41</sup> intersected with the federal government’s perception that the immigration system

humane qualities of an enlightened civilization.”) (footnote omitted).

36. García Hernández, *supra* note 9, at 1372 (“Detention has long been part of the immigration law enforcement arsenal, but before the 1980s it was never a central feature of immigration policing. Instead, it was always the exception. Indeed, from 1954 until the early 1980s the INS tended to release individuals suspected of violating immigration laws.”).

37. *Id.* at 1360 (“The 1980s proved to be a crucial period in enacting the legislation that laid the groundwork for today’s massive immigration incarceration. This was the period when Haitians boarded rickety rafts in large numbers hoping to make their way to the United States, and Cubans left the port of Mariel looking to join South Florida’s prospering émigré community.”); Simon, *supra* note 1, at 579 (“Immigration imprisonment was reinvented in 1981 in response to the massive immigration flow to south Florida in the spring of 1980 that became known as the Mariel boatlift.”); Minian, *supra* note 22.

38. Minian, *supra* note 22; see also MARK S. HAMM, *THE ABANDONED ONES: THE IMPRISONMENT AND UPRISING OF THE MARIEL BOAT PEOPLE* 51–52 (1995).

39. HAMM, *supra* note 38, at 50 (citations omitted).

40. *Id.* 50–51 (“While it is cavalier to make generalizations, accounts indicate that some of the refugees were ‘anti-socials,’ former political prisoners, and petty criminals. However, the same accounts of the Freedom Flotilla reveal that the vast majority of Cubans passing through Mariel were upstanding family members who were students, government employees, professionals, or laborers. They were farmers, mechanics, fishermen, truck drivers, seamstresses, accountants, construction workers, plumbers, carpenters, and professional baseball players. It is estimated that 75 percent of the refugees were of working age and, of those, 57 percent were men.”) (citations omitted); Simon, *supra* note 1, at 590–91 (“The racial stereotypes triggered by their physical appearance were even further distorted by early and erroneous press reports that the Mariel Cubans included a large number of physically and mentally disabled persons and criminals. The Mariel immigrants were viciously and largely inaccurately stamped from the start with the stigma of dangerousness. The public perception was of an overwhelmingly unskilled mass likely to be dependent, if not predatory, on American society. In fact, the Marielitos were a highly diverse lot in terms of economic potential.”) (citations omitted).

41. Simon, *supra* note 1, at 582–83 (“The Mariel Cuban refugees, after all, fit the same ideological position in the then-reactivated cold war of the 1980s (as did Nicaraguans a few years later), yet they were also quickly stigmatized as criminals and deviants. In addition to the weakening of the cold war logic, refugees in the 1980s were increasingly seen in a new framework of threat. The new nexus was not the superpower rivalry, but the mass of poor (both domestic and foreign) perceived as a new dangerous class whose unconstrained needs

was incapable of processing large numbers of people en masse. Although the newly enacted Refugee Act of 1980, which marked the nation's adoption of the international definition of "refugee,"<sup>42</sup> provided for provisional admission of the people arriving to the United States, the refugees had to be processed and screened extensively by officials before the government permitted them to reside lawfully within the United States.<sup>43</sup> The assessment and processing, which included an individualized medical examination with X-rays and lab tests, was in contrast to the government's swift removal of migrants who could not satisfy admission requirements.<sup>44</sup> To manage screening tens of thousands of new arrivals, the federal government resorted to incarceration.<sup>45</sup>

The arrival of the Cubans coincided with increased migration from Haiti, with more than a thousand Haitians arriving in the United States each month during the same period.<sup>46</sup> Soon the government's "detention as the exception" reverted back to detention as the rule.<sup>47</sup>

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and desires threatened to overwhelm the nation.").

42. Simon, *supra* note 1, at 583 ("The new law for the first time adopted the prevailing international law definition of a refugee. The relevant legal question became whether the immigrant as an individual had a credible fear of persecution on the grounds of religion, race, or politics, not what race or nationality they belonged to."); *see also* Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269, 271 (1993) ("The Refugee Act of 1980 was meant to bring United States law into conformity with international treaty obligations and to establish a permanent, systematic procedure for meeting the humanitarian needs of refugees and those seeking asylum in the United States.").

43. HAMM, *supra* note 38, at 54 ("The Refugee Act required that each Cuban undergo a medical examination (complete with X-rays and lab tests) and interviews with agents of the INS, the FBI, the Pentagon, and the CIA. If it was determined that a[ noncitizen] posed no threat to the safety of the general public, then he or she was placed on 'parole' by the INS with the understanding that if there was no violation of the law, he or she would become eligible for permanent U.S. residence after seven years. But if convicted of a crime during that seven years, a[ noncitizen] would be deported.") (citations omitted).

44. *See* Simon, *supra* note 1, at 583 ("The immediate effect of the [Refugee Act of 1980] was to make it possible for those refugees who could find legal advice to file claims that would at least delay their removal. In short, the INS was not able to quickly remove those inconvenient and threatening asylum seekers as it had through the late 1970s.") (citation omitted).

45. *Id.*; Minian, *supra* note 22 ("During the 1980s, Americans came to see . . . hundreds of other Cuban exiles as such a dangerous threat that they once again turned to detention as an acceptable way to manage immigration. . . . News had spread swiftly that Mr. Castro's government had sent criminals and mentally ill people among the arriving exiles. Although very few of the exiles had committed crimes, much less serious ones, fear of this wave of immigrants became widespread. This fear, fueled by rising crime rates in Miami and other communities where the Cuban exiles settled, led many Americans to demand the detention of the new arrivals. . . . Americans had come to fear these exiles so much that few of them protested their imprisonment and only a small number of legal workers tried to help them. The practice of detention was seen as necessary and normal.").

46. Carlos Ortiz Miranda, *Haiti and the United States During the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 32 SAN DIEGO L. REV. 673, 681 (1995).

47. Little, *supra* note 42, at 277.

To implement this new detention-as-rule policy, the government needed spaces in which to confine the thousands of people seeking admission to the United States. The federal agencies began by opening up two large relocation camps in southern Florida.<sup>48</sup> The camps were soon filled to capacity, so the government opened more camps and, soon, “service processing centers.”<sup>49</sup> Thousands of Cuban and Haitian migrants and refugees languished for years in prisons across the country, some makeshift on military bases, others in Bureau of Prisons facilities—including the maximum-security prison in Atlanta—alongside people serving criminal sentences, with little to no mechanism to challenge their detention or to adjudicate their immigration status in the United States.<sup>50</sup>

The arrivals of the Cuban and Haitian refugees also sparked the government’s “detention as deterrence” platform, the second primary contributor to the rise in immigration confinement.<sup>51</sup> In his article *Refugees in a Carceral Age*, Professor Jonathan Simon describes how the federal government modeled its detention-as-deterrence platform off the practice of “humane deterrence” in Thailand:

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48. HAMM, *supra* note 38, at 53; García Hernández, *supra* note 9, at 1360–61.

49. HAMM, *supra* note 38, at 53–54 (“Yet the massive influx of Cubans to the U.S.—which approached nearly sixty thousand during the week of May 20 alone—demanded supplemental receiving and processing facilities beyond these two camps. Accordingly, the INS established additional relocation facilities at Elgin Air Force Base and Fort Walton Beach, Florida; Fort McCoy, Wisconsin; Fort Indiantown Gap, Pennsylvania; and Fort Chaffee, Arkansas.”) (citations omitted); Simon, *supra* note 1, at 579 (“To address the potential for unauthorized immigration to south Florida, the [INS] opened the Krome Avenue Detention Center on a former Nike missile site twenty miles from downtown Miami, on the edges of the Florida Everglades. By the early 1990s the INS operated nine such ‘service processing centers’ with a combined capacity of about 2,500 persons.”) (citations omitted).

50. HAMM, *supra* note 38, at 52; García Hernández, *supra* note 9, at 1360–61 (“To deal with the approximately 125,000 Cuban ‘marielitos’ who came to the United States in 1979 and 1980, the INS moved rapidly to set up immigration detention camps as well as to find space in the federal penitentiary in Atlanta to house the new arrivals.”) (footnote omitted); Minian, *supra* note 22 (“[T]he exiles waited to be sponsored by someone (or some institution) who agreed to take care of them until they could settle on their own. As the months went by, most exiles left the military bases, but those who had no family members or acquaintances in the United States often had difficulty finding sponsors. This placed them in an impossible situation. Without sponsorship, the only way they could leave the camps was by leaving the United States. But government officials could not deport them because the Castro government refused to take them back. These exiles, many of whom were labeled ‘antisocial’ but not accused of having committed any crime, were to remain in cages in the United States on an indefinite basis, with no prospects of being set free. . . . By 1982, about 400 Mariel Cubans who still had not been sponsored were sent to prison, primarily to the maximum-security penitentiary in Atlanta.”).

51. Simon, *supra* note 1, at 583 (“The new imprisonment policy was aimed at substituting the deterrent of the prison for the removal discretion lost to the Refugee Act.”); Minian, *supra* note 22 (“[The federal government] also conceived of detention as a way to deter migrants—particularly Haitians, who had been fleeing their country since 1971—from setting sail to the United States. Up to that point, immigration officials still tended to follow the policy of releasing Haitians on parole pending a hearing and status determination, although they intermittently detained arriving Haitian migrants. By 1981, immigration officials were detaining all Haitians who arrived without offering them the possibility of parole.”).

Faced with large numbers of “boat people” fleeing the chaos of postwar Vietnam and Cambodia, and constrained by Western nations from forcibly repatriating refugees, the Thais established imprisonment camps. The challenge of this strategy was to make conditions uncomfortable enough to discourage refugees from some of the poorest and most oppressive countries in the world. Despite outcry from Western human rights groups, Western governments were distinctly reluctant to pressure the Thais to halt this approach.<sup>52</sup>

In other words, to stop others from seeking admission to the United States—to send a message—the government would incarcerate large numbers of those who tried.<sup>53</sup>

The third factor contributing to the rise of the country’s mass immigration incarceration system was the emergence and growth of “cimmigration” law. Cimmigration law refers to the intersection of “criminal law and procedure with immigration law and procedure.”<sup>54</sup> Describing its emergence, Professor César Cuauhtémoc García Hernández writes:

For most of the nation’s history, [criminal law and immigration law] operated almost entirely free of the other. Criminal law and procedure was thought to be the province of prosecutors, criminal defense attorneys, and the state and federal judges who oversee criminal prosecutions every day. Immigration law, in contrast, was confined to immigration courts housed within the executive branch of the federal government and staffed by immigration attorneys, immigration judges, and prosecutors employed for many years by the Immigration and Naturalization Service (INS) and now the Department of Homeland Security (DHS) or Department of Justice.

That division has undeniably become a historical relic. The world of criminal courthouses has collided with the world of immigration courthouses. The substantive criminal law that defines what constitutes a state or federal crime has increasingly come to turn on a person’s immigration status. Criminal procedure norms embodied in court rules and constitutional amendments have made special allowances for immigration law enforcement concerns and the citizenship status of defendants. Meanwhile, immigration law now frequently turns to a migrant’s criminal history to dictate whether imprisonment is merited while the government decides whether to mete out immigration law’s greatest sanction, deportation, and its close cousin, exclusion from the United States.<sup>55</sup>

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52. Simon, *supra* note 1, at 584.

53. García Hernández, *supra* note 9, at 1361 (“According to Attorney General William French Smith, there was no other way to stop them from coming: ‘Detention of aliens seeking asylum was necessary to discourage people like the Haitians from setting sail in the first place.’”); Simon, *supra* note 1, at 584.

54. GARCÍA HERNÁNDEZ, *supra* note 22, at 1.

55. *Id.* at 1–2.

As the law began to treat violations of immigration law more harshly and more punitively, and in many ways linked them to violations of criminal law, the carceral component of enforcement began to take shape.<sup>56</sup>

The integration of criminal and immigration enforcement began in the 1980s, during the height of the War on Drugs, when Congress enacted a series of laws requiring the detention of a certain group of noncitizens.<sup>57</sup> Confinement authority grew again in 1996 with the federal government's enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>58</sup> These two laws "marked a 'seismic change' in immigration detention—one from which the federal government has not turned."<sup>59</sup> While AEDPA and IIRIRA may have had the greatest impact in the shortest amount of time, through all of these laws—enacted and implemented over the course of under two decades—the government expanded the categories and types of crimes that could trigger removal proceedings and the classes of noncitizens for whom detention was mandatory.<sup>60</sup>

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56. *Id.* at 240–42 (“By way of comparison, the INS had the capacity to detain approximately 1,700 migrants on average per day in 1982 and about 7,000 in 1990. By the end of the century, the agency held just shy of 20,000 each day. Ten years later, . . . the average daily population had again grown by 10,000. . . . Much of this growth can be attributed to the increasingly punitive views of immigration law violators that started in the 1980s and have yet to abate. In the last three decades, . . . Congress and multiple presidential administrations have intertwined criminal law and immigration law so that tactics traditionally associated with one are now prominent features of the other. In this case, criminal punishment's long reliance on incarceration as a means of deterring—theoretically at least—and punishing undesirable conduct has become an accepted part of immigration law enforcement.”).

57. García Hernández, *supra* note 9, at 1361–62 (“Relying in large part on the growing desire to fight drugs, Congress enacted a series of laws between 1986 and 1994 that set the legislative groundwork for the expansive immigration detention apparatus that exists today: the Anti-Drug Abuse Act (ADAA) of 1986, the Immigration Reform and Control Act (IRCA) of 1986, the Refugee Assistance Extension Act of 1986, a 1986 joint congressional resolution, the ADAA of 1988, the Crime Control Act of 1990, the Immigration Act of 1990 (IMMACT 90), and the Violent Crime Control and Law Enforcement Act of 1994.”); Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1005–06 (2017).

58. García Hernández, *supra* note 9, at 1369–70 (“It was simply a matter of time before the vast increase in the penal prison population experienced in the 1980s came to immigration. Fifteen years after the INS subjected Haitians to mandatory detention and ten years after the ADAA of 1986 began entangling immigration detention and the drug war, the well-known duo of 1996 laws, AEDPA and IIRIRA, changed the face of immigration law.”) (footnotes omitted).

59. *Id.* at 1370, 1370–72 (detailing impact of AEDPA and IIRIRA on U.S. immigration detention legal framework).

60. RYO & PEACOCK, *supra* note 10, at 6; Heeren, *supra* note 22, at 610–11 (“In the wake of the 1995 Oklahoma City bombing, Congress passed two laws that toughened deportation provisions and immigration detention. The Anti-Terrorism and Effective Death Penalty Act of 1996 (‘AEDPA’) greatly expanded both the definition of ‘aggravated felony’ and the categories of immigrants subject to mandatory detention. After the passage of AEDPA, immigrants who had been convicted of multiple crimes involving moral turpitude, controlled substances offenses, firearms offenses, and certain national security-related offenses became

As a result of these three developments beginning in the 1980s, the modern U.S. immigration detention system emerged from nearly nothing to become one of the most significant components of this country's system of mass incarceration in five decades. In 1955, the government held just four people in immigration custody.<sup>61</sup> In 1973, the average daily number of people detained was 2,370; in 1980, it was 4,062.<sup>62</sup> By 2001, more than 200,000 people were being confined each year.<sup>63</sup> By 2011, that total had doubled.<sup>64</sup> Annual figures have grown steadily since then in response to the government's sweeping authority to take away people's liberty while they are awaiting a decision as to whether they will be permitted to remain within this country's borders.<sup>65</sup>

### B. Confinement Authority

Today, the federal government's system of immigration incarceration is a sweeping, multi-agency affair. Multiple components of executive-branch agencies are responsible for executing federal civil immigration laws and are statutorily authorized—and in some cases required—to confine people whose lives in some way touch those laws. Of those components, the Department of Homeland Security's U.S.

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subject to detention during removal proceedings without possibility of bond. Soon after the passage of AEDPA, Congress passed another law that expanded the scope of mandatory detention: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ('IIRIRA'). IIRIRA expanded the increasingly bloated aggravated felony category, and thus mandatory detention, to encompass still more types of crimes. After the passage of IIRIRA, Congress codified the immigration detention provision at 8 U.S.C. § 1226.”) (footnotes omitted); Ryo, *supra* note 57, at 1006 (“In 1996, the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act significantly broadened the use of mandatory detention by widening its net over a larger class of noncitizens.”) (footnotes omitted).

61. Minian, *supra* note 22.

62. GARCÍA HERNÁNDEZ, *supra* note 23, at 10.

63. GARCÍA HERNÁNDEZ, *supra* note 22, at 8 (“By 2001, over 200,000 people were being detained each year while they waited to learn whether they would be allowed to remain in the United States.”).

64. García Hernández, *supra* note 9, at 1348 (“In fiscal year 2011, for the first time in the nation's history, more than 400,000 people were confined while they waited to learn whether they would be allowed to remain in the United States.”).

65. GARCÍA HERNÁNDEZ, *supra* note 22, at 8 (“The immigration detention population has continued to grow steadily since [2001]. In fiscal year 2011, for example, 429,247 people were detained pending immigration proceedings. Meanwhile, Congress now requires that ICE pay for a minimum of 34,000 beds per night, almost guaranteeing that the historically anomalous annual detention population of recent years will not become a momentary blip.”); García Hernández, *supra* note 9, at 1382 (“Today, immigration detention represents the single most common confinement that occurs in the United States. In fiscal year 2012, the Department of Homeland Security detained 477,523 individuals while removal proceedings were pending or as they waited for actual removal from the country. . . . [R]ecent years have seen similarly large numbers confined: 429,247 in FY 2011, 363,064 in FY 2010, and 383,524 in FY 2009. In 2008 ICE claimed a ‘record total of 378,582, representing a 22 percent increase from 2007.’ That year, in turn, it reported detaining 311,169, a 21 percent rise from the previous year and itself a record at the time.”) (footnotes omitted).

Immigration and Customs Enforcement (ICE) is the one responsible for the largest numbers of people in immigration confinement.<sup>66</sup>

ICE's authority to incarcerate people falls into two distinct categories: mandatory detention authority and discretionary detention authority.<sup>67</sup> Between the two forms of authority, a significant proportion of people whose lives intersect in some way with the nation's immigration-enforcement system are at risk of detention.

Pursuant to its so-called mandatory detention authority,<sup>68</sup> the government *shall* take into custody<sup>69</sup> any noncitizen who the government has "reason to believe is removable for almost every crime-based reason, including crimes involving moral turpitude, controlled substance offenses, and aggravated felonies,"<sup>70</sup> as well as "certain classes of 'arriving aliens,' including those seeking asylum who have not yet passed their credible fear determination."<sup>71</sup> This provision provides no basis for an immigration judge or other independent arbiter to consider bond or otherwise release someone who is detained.<sup>72</sup> More than half of the people experiencing immigration confinement are held pursuant to this sweeping detention authority.<sup>73</sup> The law also obligates the government to confine people who have been ordered removed during the period between the entering of the final removal order and the

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66. García Hernández, *supra* note 9, at 1382 ("Today, immigration detention represents the single most common confinement that occurs in the United States. In fiscal year 2012, the Department of Homeland Security detained 477,523 individuals while removal proceedings were pending or as they waited for actual removal from the country. . . . [R]ecent years have seen similarly large numbers confined: 429,247 in FY 2011, 363,064 in FY 2010, and 383,524 in FY 2009. In 2008, ICE claimed a 'record total of 378,582, representing a 22 percent increase from 2007.' That year, in turn, it reported detaining 311,169, a 21 percent rise from the previous year and itself a record at the time.") (footnotes omitted).

67. GARCÍA HERNÁNDEZ, *supra* note 22, at 95–102; Ryo, *supra* note 57, at 1009–10 (describing discretionary and mandatory detention authority).

68. The contention that this provision mandates *detention* is dubious. As Professor García Hernández explains, the statute provides that the government shall take into *custody* any person falling into one or more of the enumerated categories. Custody, however, does not traditionally or necessarily mean detention but includes any number of ways in which the government may deprive a person of her liberty. See GARCÍA HERNÁNDEZ, *supra* note 22, at 101.

69. Immigration and Nationality Act (INA) § 236(c)(1), 8 U.S.C. § 1226(c)(1) (2012).

70. GARCÍA HERNÁNDEZ, *supra* note 22, at 99–100; see also 8 U.S.C. § 1226(c); Ryo, *supra* note 57, at 1009 (explaining that the INA requires detention of "noncitizens, including lawful permanent residents, convicted of certain crimes enumerated in the INA," also known as "triggering offenses").

71. Ryo, *supra* note 57, at 1009.

72. GARCÍA HERNÁNDEZ, *supra* note 22, at 100; see also 8 U.S.C. § 1226(e) ("No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."). *But see* Ryo, *supra* note 57, at 1010.

73. Ryo, *supra* note 57, at 1009–10 ("According to one report, about 66% of noncitizens in immigration detention were held under the mandatory detention provisions in 2009.")

actual removal<sup>74</sup> and those who the government has “reasonable grounds to believe” pose a national security threat.<sup>75</sup>

Pursuant to its discretionary authority, the government may arrest anyone it believes is removable from the United States and detain the person pending a decision on his or her removability.<sup>76</sup> Under this authority, an authorized ICE officer may release the noncitizen on conditional parole or a bond<sup>77</sup> upon a showing by the noncitizen that he or she is not a flight risk or a danger to the community.<sup>78</sup> If ICE denies that initial custody determination, the person may seek the immigration court’s review of ICE’s decision.<sup>79</sup> The immigration court’s bond decision may be appealed to the Board of Immigration Appeals (BIA).<sup>80</sup> The BIA’s bond determination is not subject to further review and is therefore final.<sup>81</sup>

Critically, all of the above-discussed authority under which the federal government may detain people is purportedly civil in nature. That is, immigration confinement is somehow different than punitive incarceration because immigration laws are civil, sanctions for violating immigration laws (for example, deportation) are civil, and, therefore, detention in furtherance of executing immigration laws is civil.<sup>82</sup> This premise on which immigration detention authority is exercised is discussed more in Part III.

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74. 8 U.S.C. § 1226(c)(1)(B); *see also* GARCÍA HERNÁNDEZ, *supra* note 22, at 102 (“Not surprisingly, the INA requires detention of migrants ordered removed. According to the statute, DHS is to remove individuals from the United States within ninety days of a removal order becoming final, a window of time called the ‘removal period.’ After that ninety-day removal period, a detained migrant may be released under DHS supervision. Through a complicated review process governed by both the statute and regulations, designated immigration officials essentially gauge a detained migrant’s likelihood to endanger the public. Naturally, a detainee’s criminal record forms a significant part of this assessment.”) (citations omitted).

75. 8 U.S.C. §§ 1226(a)(1)–(3) (authorizing the Attorney General to take into custody a noncitizen suspected of terrorism “if the Attorney General has reasonable grounds to believe that the [noncitizen] (A) is described in [one of the relevant sections] of this title; or (B) is engaged in any other activity that endangers the national security of the United States.”).

76. 8 U.S.C. § 1226(a)(1).

77. 8 U.S.C. § 1226(a)(2)(A)–(B).

78. Detention of Aliens Prior to Order of Removal, 8 C.F.R. § 236.1(c)(8).

79. 8 C.F.R. § 236.1(d)(1).

80. 8 C.F.R. § 1003.19(f).

81. 8 U.S.C. § 1226(e). *But see* Ryo, *supra* note 57 at 1009 (explaining that while the bond determination is not judicially reviewable, a detainee may seek habeas review to challenge the legality of his or her detention).

82. *See* Lima-Marín & Jefferis, *supra* note 6, at 11.



*C. Confinement Profiteering*

Not only is the U.S. immigration detention system the largest in the world,<sup>83</sup> it is the world's most privatized.<sup>84</sup> Nearly 400,000 people are incarcerated under the government's immigration detention authority each year, an annual figure that has seen substantial growth annually.<sup>85</sup> The average daily population of people in immigration confinement has also increased exponentially in the past two decades,<sup>86</sup> reaching nearly 40,500 people per day in 2017.<sup>87</sup> The government requested funding for 52,000 daily beds in fiscal year 2019;<sup>88</sup> after an intense budget debate during the 2018–19 government shutdown, Congress declined ICE's request and authorized detention-bed funding at 2018 levels—40,500 per day—in spite of Democrats' efforts to reduce the number of detention beds to 35,400 per day.<sup>89</sup> Notwithstanding Congress's appropriation, ICE regularly detains more people than its funding permits.<sup>90</sup>

According to a 2018 report, ICE relies on more than 630 sites throughout the country to confine people under its immigration-enforcement authority.<sup>91</sup> Many of these facilities are state prisons or local jails contracting with the federal government to confine people for immigration-related reasons among those the jurisdiction confines under its own authority.<sup>92</sup> Others are prisons managed directly by the federal government. Others still, are for-profit prisons run by private corporations and

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83. GARCÍA HERNÁNDEZ, *supra* note 23, at 10–11 (“During the last thirty years, both the federal and state governments have increasingly tapped their powers to incarcerate people for how they move across borders. As a result, the United States has the world’s largest immigrant detention system, in which upward of half a million people annually now spend time locked up because the government claims they violated immigration law.”).

84. SMALL, *supra* note 8, at 2 (“[I]n addition to being remarkable for its size, the U.S. immigration detention system is an outlier for the degree to which it has been privatized.”).

85. *See supra* notes 8, 64 and accompanying text.

86. *See supra* notes 8, 64 and accompanying text.

87. MARY SMALL & HEIDI ALTMAN, DET. WATCH NETWORK & NAT’L IMMIGRANT JUSTICE CTR., ICE LIES: PUBLIC DECEPTION, PRIVATE PROFIT 2 (2018).

88. *See, e.g.*, Nick Miroff, *Why Immigration Detention Beds Became a New Issue in Trump Border Wall Fight*, WASH. POST (Feb. 12, 2019, 8:00 AM), [https://www.washingtonpost.com/national/why-immigration-detention-beds-are-the-new-front-in-trump-border-wall-fight/2019/02/11/9c8e6d2a-2e15-11e9-813a-0ab2f17e305b\\_story.html](https://www.washingtonpost.com/national/why-immigration-detention-beds-are-the-new-front-in-trump-border-wall-fight/2019/02/11/9c8e6d2a-2e15-11e9-813a-0ab2f17e305b_story.html) [https://perma.cc/724Y-TNDV].

89. *Id.*

90. *Id.* (“At a time when record numbers of Central American families have been showing up at the border, the number of people held in ICE custody has soared to nearly 50,000 per day, far above the number of beds Congress has funded.”).

91. RYO & PEACOCK, *supra* note 10, at 1.

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

designed exclusively to detain people in the custody of immigration-enforcement authorities—the focus of this Article.

Today, approximately two-thirds of the people comprising the annual detained population total are confined in private, for-profit immigration prisons at some point during their incarceration.<sup>93</sup> Likewise, on any given day in the United States, a similar two-thirds of all people in the government’s civil custody for migration-related reasons are living behind the walls of a prison constructed to generate income and turn a profit for its shareholders.<sup>94</sup> Those people in private facilities are often confined for significantly longer periods of time than people in ICE-run prisons or facilities run by state or local governments.<sup>95</sup>

The private, for-profit prison sector and the immigration incarceration system are inextricable. Private migration-related confinement dates as far back as the nineteenth century, when the federal government required shipping companies to keep noncitizen passengers on board arriving ships while officials processed their admission into the country.<sup>96</sup> The first privately owned prison in the United States was an immigration prison.<sup>97</sup> In 1994, in the wake of the above-discussed migration of Cuban and Haitian migrants and refugees,<sup>98</sup> the Corrections Corporation of

93. Madison Pauly, *Trump’s Immigration Crackdown Is a Boom Time for Private Prisons*, MOTHER JONES (May–June 2018), <https://www.motherjones.com/politics/2018/05/trumps-immigration-crackdown-is-a-boom-time-for-private-prisons/> [https://perma.cc/95Q8-4DGW].

94. Marouf, *supra* note 8, at 2142–43 (“On any given day, 37,000 noncitizens are held in immigration detention centers across the country, of whom 25,000 do not yet have a final order of removal. Nearly three-quarters of these detainees are held in facilities run by private prison corporations.”); GARCÍA HERNÁNDEZ, *supra* note 23, at 15 (“In immigration enforcement, private prisons have an outsized presence. Sixty-five percent of ICE detainees are held in private facilities.”).

95. RYO & PEACOCK, *supra* note 10, at 3 (“Confinement in privately operated facilities . . . was associated with significantly longer detention.”).

96. GARCÍA HERNÁNDEZ, *supra* note 23, at 24 (“With the federal government’s demand that ships keep passengers on board, immigration imprisonment had begun, and it started in the hands of private corporations.”).

97. SILKY SHAH, MARY SMALL & CAROL WU, DET. WATCH NETWORK & CTR. FOR CONSTITUTIONAL RIGHTS, *BANKING ON DETENTION: LOCAL LOCKUP QUOTAS AND THE IMMIGRANT DRAGNET* 3 (2015); see Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 457 (2005). *But see id.* at 450–452 (discussing eighteenth- and nineteenth-century leasing and other arrangements between governments and private contractors to incarcerate people).

98. While the formation of CoreCivic was in response to Cuban and Haitian migration in the early 1980s, the private prison industry grew out the antebellum practice of forced labor on prison plantations, which itself grew out of the practice of slavery. Some plantations were privately owned; others were government-run. All, however, profited from the labor of enslaved people, primarily from black men. See, e.g., SHANE BAUER, *AMERICAN PRISON* 19 (2018) (“Like prison systems throughout the South, Texas’s grew directly out of slavery. After the Civil War the state’s economy was in disarray, and cotton and sugar planters suddenly found themselves without hands they could force to work. Fortunately for them, the Thirteenth Amendment, which abolished slavery, left a loophole. It said that ‘neither slavery nor involuntary servitude’ shall exist in the United States ‘except as punishment for a crime.’ As long as black men were convicted of crimes, Texas could lease all of its prisoners to private

America (CCA), now known as CoreCivic,<sup>99</sup> opened the Houston Processing Center, a hotel converted to an immigration detention center, in Houston, Texas.<sup>100</sup> CCA co-founder Tom Beasley described on national radio the casual manner in which he launched his exceedingly profitable business model in partnership with former pastor<sup>101</sup> Don Hutto:

Don Hutto and I went down to Houston on New Year's Eve in 1983. We rented a car at the airport and drove around the major thoroughfares to find somewhere to put 200 illegal criminal aliens by February 1st. Literally, we stopped in ten motels, then finally about 3am found one that might work. I asked if they would be interested in selling or leasing the motel. And after negotiating with the owner for several hours, he finally agreed.<sup>102</sup>

Three years later, the Wackenhut Corrections Corporation, now known as the GEO Group, Inc., received its first contract to run an immigration detention center.<sup>103</sup>

cotton and sugar plantations and companies running lumber camps and coal mines, and building railroads. It did this for five decades after the abolition of slavery, but the state eventually became jealous of the revenue private companies and planters were earning from its prisoners. So, between 1899 and 1918, the state bought ten plantations of its own and began running them as prisons.”).

99. Devlin Barrett, *Private-Prison Firm CCA to Rename Itself CoreCivic*, WALL ST. J., (Oct. 28, 2016, 11:00 AM), <https://www.wsj.com/articles/private-prison-firm-cca-to-rename-itself-corecivic-1477666800> [<https://perma.cc/M3BQ-U4W5>].

100. SHAH, SMALL & WU, *supra* note 97, at 3; Christine Bacon, *The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies* 10 (Refugee Studies Ctr., Working Paper No. 27, 2005); Madison Pauly, *A Brief History of America's Private Prison Industry*, MOTHER JONES (July–Aug. 2016), <https://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline/> [<https://perma.cc/BT82-JCSD>].

101. BAUER, *supra* note 98, at 21 (“Before running prisons, Hutto had been a pastor, studied history, spent two years in the US Army, and did graduate work in education at the American University in Washington, DC.”).

102. Bacon, *supra* note 100, at 10; *see also* BAUER, *supra* note 98, at 14–15 (describing CoreCivic training video: “In the video, Hutto and Beasley tell their company’s origin story. In 1983, they recount, they won ‘the first contract ever to design, build, finance, and operate a secure correctional facility in the world.’ . . . [Hutto] recalls the story of obtaining their first prison contract like an old man giving a blow-by-blow accounting of his winning high school touchdown. Rushed for time, he and Beasley convinced the owner of a motel in Houston to lease it to them, eventually hiring ‘all his family’ as staff to seal the deal. They then quickly surrounded the motel with a twelve-foot fence topped with coiled barbed wire. They left up the Day Rates Available sign. ‘We opened the facility on Super Bowl Sunday the end of that January,’ Hutto recalls. ‘So about ten o’clock that night we start receiving inmates. I actually took their pictures and fingerprinted them. Several other people walked them to their ‘rooms,’ if you will, and we got our first day’s pay for eighty-seven undocumented aliens.’ Both men chuckle.”).

103. Pauly, *supra* note 100.

And with that, the industry's two primary players today launched what has become an empire.<sup>104</sup>

Immigration confinement is an increasingly lucrative business.<sup>105</sup> In 2018, the GEO Group reported more than \$2.3 billion in revenue, compared to just above \$2.2 billion in 2017 and nearly \$2.18 billion in 2016.<sup>106</sup> CoreCivic reported more than \$1.8 billion in total revenue for 2018 after generating more than \$1.7 billion in 2017,<sup>107</sup> and reports continued growth through the first quarter of 2019.<sup>108</sup> GEO's CEO received compensation totaling \$7 million in 2018.<sup>109</sup> In recent years, often when the Trump administration announces a new tough-on-immigration policy, these companies' shareholders see a rapid spike in stock value.<sup>110</sup> While both GEO and CoreCivic operate in an array of jurisdictions around the world—they do not profit

104. See, e.g., CARL TAKEI, MICHAEL TAN & JOANNE LIN, ACLU, SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS 10 (2016).

105. See, e.g., SHAH, SMALL & WU, *supra* note 97, at 3–4; TAKEI, TAN & LIN, *supra* note 104, at 10 (“These trends have enriched private prison investors. In 2008, the two biggest private prison companies—Corrections Corporation of America (CCA) and GEO Group (GEO)—received a combined \$307 million in revenue from ICE detention contracts. By 2015, that number had more than doubled, to more than \$765 million.”); Esther Fung, *Donald Trump Has Been Very Good for Publicly Listed Prison Owners*, WALL ST. J. (Feb. 26, 2019, 9:00 AM), <https://www.wsj.com/articles/donald-trump-has-been-very-good-for-publicly-listed>

-prison-owners-11551189601 [<https://perma.cc/8CK8-L76U>]; Nomaan Merchant, *New Deal Keeps Open Facility That Detains Immigrant Families*, AP NEWS (Oct. 17, 2018), <https://www.apnews.com/cfe75057db534f28aecd0a01e04f9786> [<https://perma.cc/FX3H-BJT8>]; Pauly, *supra* note, 93; Carli Pierson, *Don't Be Fooled by Trump's Caravan Rhetoric – It's Much More Profitable to Incarcerate Migrants Than to Stop Them at the Border*, INDEPENDENT (Oct. 31, 2018, 11:30 AM), <https://www.independent.co.uk/voices/trump-caravan-migrants-detention-centres-ice-child-separation-a8610146.html> [<https://perma.cc/3727-4JJ>]; Jackie Speier, *Immigration Detention Is a Profitable Business*, S.F. CHRON. (Oct. 24, 2018), <https://www.sfchronicle.com/opinion/openforum/article/Immigrant-detention-is-a-profitable-business-13334050.php> [<https://perma.cc/YAL6-NC5L>]. But see Danielle C. Jefferis, *Private Prisons, Private Governance: Essay on Developments in Private-Sector Resistance to Privatized Immigration Detention*, 15 NW. J.L. & SOC. POL'Y (forthcoming 2019) (discussing recent developments with respect to financing withdrawal and other private-sector resistance to privatized immigration detention).

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

107. CORECIVIC, INC., CORECIVIC 2018 ANNUAL REPORT: FORM 10-K 54 (2018).

108. *Id.*

109. Simply Wall St., *How Much Is The GEO Group, Inc.'s (NYSE:GEO) CEO Getting Paid?*, YAHOO! FINANCE (May 8, 2019), <https://finance.yahoo.com/news/much-geo-group-inc-nyse-163819269.html> [<https://perma.cc/2WVZ-MY7P>].

110. See, e.g., John Washington, *Trump's Immigration Policy 'Fever Dream'*, THE NATION (Oct. 5, 2018), <https://www.thenation.com/article/trumps-immigration-policy-fever-dream/> [<https://perma.cc/S8JQ-LHTN>] (“[B]etween the announcement of the ‘zero tolerance’ policy and DHS’s June 22 request for information about the possibility of detaining an additional 15,000 people in family jails, the stocks of Geo Group and CoreCivic, the two largest for-profit immigration-detention corporations, increased 5.9 percent and 8.3 percent, respectively.”).

exclusively from immigration confinement—their contracts with ICE total approximately \$2 billion each year.<sup>111</sup>

The driving force behind the private-prison industry’s ballooning profits is ICE’s “detention quota” system. Since 2007, Congress has appropriated funding for DHS on the condition that the agency maintains a certain number of detention beds.<sup>112</sup> While the agency is not required to consistently *fill* the beds, ICE has interpreted the provision to function as a *de facto* quota, using it to justify its detention practices.<sup>113</sup> The assumption that all funded detention beds must be filled at all times incentivizes ICE to arrest and detain whenever possible to fill the beds, many of which are in for-profit prisons. The more beds that are filled, the more the prison corporation collects.

The U.S. system of immigration confinement is unparalleled around the world, both in its scope and its privatization. Driven by the agency’s perception that every bed must be filled, ICE continues to arrest and incarcerate more and more people every year. And with the government’s increasing reliance on for-profit prisons, the executives and shareholders of the corporations managing those prisons reap significant monetary rewards, while the people inside the prisons suffer in abysmal conditions of confinement with few remedies to hold their jailers accountable, as the next Part demonstrates.

## II. THE ACCOUNTABILITY PROBLEM: GOVERNMENT-RUN VERSUS FOR-PROFIT PRISONS

The U.S. Constitution is the nation’s bulwark in ensuring the conditions in which the government confines people are safe and humane. To be sure, “the Constitution does not mandate comfortable prisons . . . .”<sup>114</sup> But “neither does it permit inhumane ones . . . .”<sup>115</sup> Carceral punishment is bound by “broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . .”<sup>116</sup> Those bounds, many of which are enshrined in the Eighth Amendment’s prohibition on cruel and unusual punishment,<sup>117</sup> ensure the government does not inflict punishments that are

111. See, e.g., John Burnett, *Big Money as Private Immigrant Jails Boom*, NPR (Nov. 21, 2017, 5:00 AM), <https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom> [<https://perma.cc/QEX8-6CXN>] (“ICE spends more than \$2 billion a year on immigrant detention through private jails . . .”).

112. Marouf, *supra* note 8, at 2145.

113. *Id.*

114. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

115. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

116. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (Cal. Ct. App. 1968)).

117. This Part focuses on the Eighth Amendment because that provision embodies most of the Constitution’s substantive due process protections for prisoners and is the one on which most prisoners rely when seeking to regulate the conditions of their incarceration. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 849–50 (1998); *Whitley v. Albers*, 475 U.S. 312, 327 (1986). Other Bill of Rights provisions apply in prison as well, though to varying degrees. See, e.g., *Ky. Dep’t of Corrs. v. Thompson*, 490 U.S. 454, 459–463 (1989) (discussing prisoners’ procedural due process protections under Fourteenth Amendment); *Turner v. Safley*, 482 U.S. 78 (1987) (applying First Amendment to prisoner’s speech-related claims); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (setting forth Fourth Amendment balancing

“incompatible with ‘the evolving standards of decency that mark the progress of a maturing society’ . . . or which ‘involve the unnecessary and wanton infliction of pain.’”<sup>118</sup> And while it is the Fifth Amendment that protects civil, immigration detainees, many courts have concluded that detainees must be afforded *at minimum* the Eighth Amendment’s protections.<sup>119</sup>

Jurisprudence regarding the application of the Eighth Amendment to carceral conditions has evolved. Courts have expanded and constricted the contours of the right, as well as the remedies available to prisoners who prove a violation of the right, in response to public policies concerning crime, sentencing, and incarceration. But what has remained constant as the doctrine has developed is that remedies are available to incarcerated people to address certain elements of their environment that society deems incompatible with social and constitutional values. Among those paramount values are the right to adequate medical care and a safe prison environment.

One of the government’s primary responsibilities in ensuring its carceral punishment scheme adheres to the Eighth Amendment’s prescription is to “provide medical care for those whom it is punishing by incarceration.”<sup>120</sup> Confinement, by definition, subjects a person to near-total reliance on the government to meet her needs: “if the authorities fail to do so, those needs will not be met.”<sup>121</sup>

In the worst cases, such a failure may actually produce physical torture or a lingering death, . . . the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.<sup>122</sup>

Such unnecessary suffering, according to the Supreme Court, was long incompatible with “contemporary standards of decency.”<sup>123</sup> Thus, prisons and prison officials who are deliberately indifferent to a person’s serious medical needs violate the Eighth Amendment.<sup>124</sup>

Prisons and prison officials also violate the Eighth Amendment when they fail to protect a person from violence at the hands of other prisoners.<sup>125</sup> “[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.”<sup>126</sup> Again, a person’s unnecessary suffering, even a person behind prison

test for claims of invasion of privacy).

118. *Estelle*, 429 U.S. at 102–03 (citations omitted).

119. *See, e.g.*, *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000).

120. *Estelle*, 429 U.S. at 103. The Fourteenth Amendment incorporates the Eighth Amendment’s “cruel and unusual punishment” clause as applicable to the states. *See generally* *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (tracing history of incorporation of Eighth Amendment protections).

121. *Estelle*, 429 U.S. at 103.

122. *Id.* (citations and quotations omitted).

123. *Id.*

124. *Id.* at 106; *see also* *Helling v. McKinney*, 509 U.S. 25, 32 (1993).

125. *See generally* *Farmer v. Brennan*, 511 U.S. 825, 833 (1993).

126. *Id.*

walls, does not align with contemporary standards of decency.<sup>127</sup> Thus, prisons and prison officials violate the Eighth Amendment when they are deliberately indifferent to conditions posing a substantial risk of serious harm to a prisoner.<sup>128</sup>

While the Constitution states no limits on its application of the rights above, the U.S. Supreme Court has interpreted the document's text in ways that limit the scope of this protection based on the type of prison a person finds him or herself in. The consequences of this jurisprudential interpretation fall disproportionately on one class of prisoners—those in the federal government's custody but confined in for-profit prisons. People incarcerated in public prisons (that is, the facilities operated directly by the government), no matter whether they are run by local, state, or federal authorities, have more robust remedies at their disposal to enforce their rights to humane conditions of confinement than do federal prisoners in for-profit prisons. And today, most of those federal prisoners are people held under the federal government's so-called civil detention authority for alleged violations of immigration law.

This Part outlines the constitutional remedies available to prisoners in public prisons and prisoners in for-profit prisons operating under federal authority. The Part then concludes by comparing the remedies available to each category of prisoners, demonstrating the Constitution's disparate reach.

#### *A. Constitutional Tort Remedies and Government-Run Prisons*

Broadly speaking, federal courts have the power to award two types of relief for violations of the law: money damages for past violations and equitable relief for ongoing violations (usually in the form of an injunction or declaratory relief). And this is generally true for people confined in government-run prisons who seek to enforce their constitutional rights in federal courts: depending on the nature of the constitutional violation they allege, they may seek relief in the form of monetary damages and/or equitable relief.

Remedies for constitutional violations are the most robust for state prisoners who may bring constitutional actions in federal court under 42 U.S.C. section 1983. Congress passed section 1983 “at the height of the tumultuous Reconstruction era that followed the Civil War . . . to provide a federal forum for civil rights claims.”<sup>129</sup> Section 1983 provides a cause of action for any state prisoner<sup>130</sup> seeking to enforce his constitutional rights against state officials in the form of monetary *and* equitable

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127. *Id.* (“Prison conditions may be restrictive and even harsh, . . . but gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective.” (citations and quotations omitted)).

128. *Id.* at 834.

129. Nicole B. Godfrey,  *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 931 (2018) (internal quotations and footnotes omitted).

130. The law is not limited to claims brought by prisoners. Rather, it permits anyone within the United States to sue government officials acting under color of state or local law for constitutional violations. *See* 42 U.S.C. § 1983 (2012); *Monroe v. Pape*, 365 U.S. 167, 191–192 (1961) (first recognizing availability of damages remedy for actions brought against state and local officials under Section 1983).

relief.<sup>131</sup> Although the history of section 1983 reaches back to the nineteenth century, the availability of a constitutional tort remedy for state prison officials' violations of prisoners' constitutional rights has been unquestioned for decades.<sup>132</sup>

For federal prisoners in government-run prisons, the remedies are not as robust as those available to state prisoners under section 1983.<sup>133</sup> Federal prisoners may bring actions in federal court for equitable relief—injunctions and declaratory judgments—directly under the Constitution, and they may seek damages under certain “implied” causes of action for constitutional torts.<sup>134</sup> This implied damages remedy to redress federal officials' constitutional violations derives from the Supreme Court's *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>135</sup> Explaining the lead-up to *Bivens*, Professor Nicole B. Godfrey writes,

Prior to *Bivens*, victims of constitutional violations by federal officers could seek relief only in state courts through common law suits for trespass against the federal agents. Yet, by the time *Bivens* reached the Court, several flaws in the original model had crystallized.

....

In a 5–3 opinion, the Court held the Constitution itself provides a cause of action for damages for violations of the Fourth Amendment by individual federal agents. Specifically, the Court determined that so long as Congress had not provided an adequate alternative remedy for violation of the right at issue and so long as there were no special factors counseling the Court to hesitate acting in an area where Congress had not, private individuals whose constitutional rights had been violated by federal officers were entitled to pursue damages remedies in the federal courts.<sup>136</sup>

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131. The sweeping scope of Section 1983 is worth repeating. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

132. *See id.* at 931 (“While § 1983 lay largely dormant for just under a century, the legislative history makes clear Congress intended the law provide monetary relief to victims of constitutional rights violations by state and local authorities.”).

133. *See* 42 U.S.C. § 1983) (applies only to officials acting under color of state or local law).

134. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971).

135. 403 U.S. at 389.

136. Godfrey, *supra* note 129, at 932–34 (internal quotations and footnotes omitted).



Since *Bivens*, the Supreme Court has expanded the damages remedy in two other contexts, one of which is especially significant to federal prisoners.<sup>137</sup> In *Carlson v. Green*, the mother of a prisoner who died while in Federal Bureau of Prisons custody due to inadequate medical care sued federal prison officials on behalf of the prisoner's estate for the injuries her son endured while in their custody.<sup>138</sup> After assessing whether any special factors counseled hesitation in recognizing a damages remedy, and analyzing whether Congress had created any adequate alternative remedies,<sup>139</sup> the Court concluded the plaintiff could pursue a damages remedy for the constitutional tort.<sup>140</sup> *Carlson* has been a landmark holding for federal prisoners seeking to enforce their Eighth-Amendment right to adequate medical care.

Since *Carlson*, however, the Court has been increasingly reluctant to extend *Bivens* further.<sup>141</sup> The recent decision in *Ziglar v. Abbasi* brings the future of *Bivens* squarely into question.<sup>142</sup> A full analysis of *Ziglar* and the future of *Bivens* is beyond the scope of this Article. What remains the case, however, is federal prisoners confined in government-run prisons still have a tort remedy available to them for certain constitutional rights violations.

#### B. Constitutional Tort Remedies and Private Prisons

Two of the Court's post-*Bivens* decisions limited the availability of constitutional tort remedies for prisoners confined in for-profit prisons while in the federal

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137. *Id.* at 934–35 (“In the period immediately following *Bivens*, both the Supreme Court and the lower federal courts extended the *Bivens* remedy to other constitutional violations. Notably, the federal courts extended *Bivens* to First Amendment Free Speech claims, First Amendment Freedom of Association claims, Fifth Amendment Equal Protection claims, Fifth Amendment Due Process claims, Sixth Amendment right-to-an-attorney claims, and Eighth Amendment prison-conditions claims. Of these, the Supreme Court itself expressly expanded *Bivens* to include employment-discrimination claims brought under an Equal Protection theory encompassed by the Fifth Amendment's Due Process Clause and cruel-and-unusual-conditions claims brought under the Eighth Amendment.”) (footnotes omitted).

138. 446 U.S. 14, 16 (1980).

139. See Godfrey, *supra* note 129, at 936–37.

140. *Carlson*, 446 U.S. at 18–23, 25.

141. Godfrey, *supra* note 129, at 937 (“Despite the Court's unequivocal articulation of the need for a *Bivens* remedy in *Carlson*, the three-plus decades since *Carlson* reveal a Court reluctant to extend *Bivens* to new contexts. In some instances, the Court determined special factors exist which preclude an extension of *Bivens*. . . . In other instances, the Court conflated the special-factors exception and the adequate-alternative-remedy exception to conclude the existence of a congressional statute in a particular area is itself a factor ‘counseling judicial hesitation.’”) (footnotes omitted); see also Schweiker v. Chilicky, 487 U.S. 412, 421–22 (1988) (“Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts. The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.”).

142. 137 S. Ct. 1843 (2017).

government's custody:<sup>143</sup> *Correctional Services Corporation v. Malesko*<sup>144</sup> and *Minneci v. Pollard*.<sup>145</sup>

In *Malesko*, the plaintiff, John Malesko, was a federal prisoner in the custody of the Federal Bureau of Prisons (BOP) who was designated to wait out the remainder of his criminal sentence in the Le Marquis Community Correctional Center (Le Marquis), a New York City halfway house<sup>146</sup> operated by the for-profit prison company, Correctional Services Corporation (CSC).<sup>147</sup> While in BOP custody, Mr. Malesko was diagnosed with a heart condition, for which he was prescribed medication.<sup>148</sup> Because of his condition, Mr. Malesko was not supposed to engage in physical activity, including climbing stairs.<sup>149</sup> Once he arrived at Le Marquis, however, halfway house officials assigned him to a room on the fifth floor and precluded him from using the elevator to reach his room from the lobby.<sup>150</sup> While climbing the five flights of stairs on one occasion, Mr. Malesko suffered a heart

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143. Although the focus of this Article is on people in for-profit immigration prisons, federal prisoners waiting out a criminal sentence in private federal prisons also do not have a constitutional tort remedy at their disposal to address past violations of their rights. This is one example in the ever-expanding field of the ways in which federal prisoners are disadvantaged as compared to their state and local counterparts. A full discussion of this phenomenon is beyond the scope of this Article; I and others, however, have addressed aspects of the disparate treatment of federal prisoners in other work. *See generally* Godfrey, *supra* note 129, at 974 (“[T]he Fourteenth Amendment rightly requires the states to protect and secure the individual rights and liberties enshrined in the Bill of Rights in the same way it requires the federal government to do so. . . . [B]y imposing inconsistent remedial consequences for violations of those rights on state actors vis-à-vis federal actors, the federal courts ignore constitutional history and design meant to protect individuals from rights infringement by the *federal* government. In the prison setting, this results in federal prison officials escaping with no repercussions for violations of federally protected constitutional rights while state prison officials are held liable for the very same acts. Such a result stands constitutional design on its head . . . .”); Danielle C. Jefferis & Nicole B. Godfrey, *Chapman v. Bureau of Prisons: Stopping the Venue Merry-Go-Round*, 96 DENV. L. REV. F. 9, 9 (2018) (“The Federal Bureau of Prisons (BOP) is in a unique position to frustrate the federal venue statute. In contrast to most state departments of corrections, the BOP bears the unilateral power to transfer prisoners in its custody to prisons across federal judicial districts.”) (footnotes omitted); *id.* at 16 (“The consequences of this practice are significant; often, it risks leaving the prisoner-plaintiff in a district in which he does not have the means to continue to litigate his claim and, thus, permits the BOP to evade judicial review.”) (footnotes omitted); Allison L. Waks, *Federal Incarceration by Contract in a Post-Minneci World: Legislation to Equalize the Constitutional Rights of Prisoners*, 46 U. MICH. J.L. REFORM 1065, 1066 (2013) (“The privatization of prisons has stripped certain federal prisoners of the ability to seek redress for violations of their constitutional protection against cruel and unusual punishment.”).

144. 534 U.S. 61 (2001).

145. 565 U.S. 118 (2012).

146. For purposes of this discussion, a halfway house is treated just like a prison. While people assigned to a halfway house are under fewer liberty restrictions, they are nonetheless still in government custody and under government supervision.

147. 534 U.S. at 63–64.

148. *Id.* at 64.

149. *Id.*

150. *Id.*

attack, fell, and injured himself.<sup>151</sup> Several days prior to the fall, Mr. Malesko alleged, CSC staff had failed to refill his prescription medication.<sup>152</sup>

Mr. Malesko filed a pro se action against CSC and several of its employees.<sup>153</sup> The district court dismissed the claim against the individual employees on statute of limitations grounds,<sup>154</sup> so by the time the case reached the Supreme Court, the question presented was “whether the implied damages action first recognized in *Bivens* . . . should be extended to allow recovery against a *private corporation* operating a halfway house under contract with the Bureau of Prisons.”<sup>155</sup>

In a 5–4 decision authored by Chief Justice Rehnquist, the Court refused to extend *Bivens* to constitutional tort claims brought against private prison corporations.<sup>156</sup> First, relying on *FDIC v. Meyer*,<sup>157</sup> the Court reasoned the core purpose of *Bivens* is to deter the officer who violates the constitutional right at issue, not the entity employing the officer.<sup>158</sup> In *FDIC*, the Court recounted,

We reasoned that if given the choice, plaintiffs would sue a federal agency instead of an individual who could assert qualified immunity as

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151. *Id.*

152. *Malesko v. Corr. Servs. Corp.*, 229 F.3d 374, 376 (2d Cir. 2000).

153. *Malesko*, 534 U.S. at 64.

154. *Id.* at 65.

155. *Id.* at 63 (emphasis added) (citation omitted).

156. *Id.* (“We decide here whether the implied damages action first recognized in *Bivens* . . . should be extended to allow recovery against a private corporation operating a halfway house under contract with the Bureau of Prisons. We decline to so extend *Bivens*.”) (citation omitted). Whether the Court should have even reached this question is, itself, questionable. According to the Court, Mr. Malesko’s complaint alleged CSC and the other defendants were “negligent in failing to obtain requisite medication for [respondent’s] condition and were further negligent by refusing [respondent] the use of the elevator.” *Id.* at 64–65 (quoting appellate record). The district court treated the complaint as raising claims under *Bivens*, despite the fact that Mr. Malesko plead negligence. *See id.* at 65. The Eighth Amendment’s standard for inadequate medical care has always been greater than negligence. *See Estelle*, 429 U.S. at 105–106 (“[I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute ‘an unnecessary and wanton infliction of pain’ or to be ‘repugnant to the conscience of mankind.’ Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”). However, one reason the Court declined to extend the *Bivens* remedy was the availability of alternative remedies to Mr. Malesko: “[F]ederal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities. . . . This case demonstrates as much, since respondent’s complaint in the District Court arguably alleged no more than a quintessential claim of negligence.” *Malesko*, 534 U.S. at 72–73 (citation omitted). The Court suggested the district court’s construction of Mr. Malesko’s complaint as one brought under the Eighth Amendment may have been wrong but then stated Mr. Malesko “accepted this theory of liability, and he has never sought relief on any other ground.” *Id.* at 73. Had the district court adhered to the liberal construction canon for pro se litigants, Mr. Malesko may have prevailed.

157. 510 U.S. 471 (1994).

158. *Malesko*, 534 U.S. at 69 (citing *Meyer*, 510 U.S. at 484–86).

an affirmative defense. To the extent aggrieved parties had less incentive to bring a damages claim against individuals, “the deterrent effects of the *Bivens* remedy would be lost.”<sup>159</sup>

Second, the Court noted that Mr. Malesko and other federal prisoners like him have alternative remedies available to redress injuries in federal court: “It was conceded at oral argument that alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*.”<sup>160</sup> For the Court, these adequate alternative remedies include a state tort negligence action, a federal suit for injunctive relief, and the BOP’s grievance program.<sup>161</sup> According to the Court, the availability of these purported alternative remedies to a constitutional tort made Mr. Malesko’s situation “altogether different from *Bivens*, in which [the Court] found alternative state tort remedies to be ‘inconsistent or even hostile’ to a remedy inferred from the Fourth Amendment.”<sup>162</sup>

According to the *Malesko* Court, Mr. Bivens may not have had a choice to resist the requests of federal law enforcement officers knocking on his door; doing so may have implicated criminal charges.<sup>163</sup> But not resisting their requests—letting them into his home—likely defeated any state tort remedies he would have had against those officers, such as trespass or invasion of privacy.<sup>164</sup> Mr. Bivens, therefore, did not have the option to pursue alternative state tort remedies for the officers’ wrongful conduct, so recognition of the implied constitutional action was warranted.<sup>165</sup> Mr. Malesko, in contrast, must merely make a “strategic choice” between pursuing a constitutional claim for deliberate indifference and a state tort claim for negligence. In that situation, the state tort claim is an adequate alternative to the implied constitutional tort.<sup>166</sup>

Accordingly, Mr. Malesko was “not a plaintiff in search of a remedy.”<sup>167</sup> Rather, he sought “a marked extension of *Bivens*, to contexts that would not advance *Bivens*’ core purpose of deterring individual officers from engaging in unconstitutional wrongdoing. The caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades, forecloses such an extension here.”<sup>168</sup> Mr. Malesko’s constitutional tort claim against the for-profit prison corporation that confined him when he suffered his injury was dismissed.<sup>169</sup>

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159. *Id.* (quoting *Meyer*, 510 U.S. at 485).

160. *Id.* at 72.

161. *Id.* at 72–74.

162. *Id.* at 73 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971)).

163. *Id.*

164. *Id.*

165. *Id.* (“Therefore, we reasoned in *Bivens* that other than an implied constitutional tort remedy, ‘there remain[ed] . . . but the alternative of resistance, which may amount to a crime.’”) (alteration in original) (quoting *Bivens*, 403 U.S. at 395).

166. *Id.* at 73–74 (“Such logic [from *Bivens*] does not apply to [Mr. Malesko], whose claim of negligence or deliberate indifference requires no resistance to official action, and whose lack of alternative tort remedies was due solely to strategic choice.”).

167. *Id.* at 74.

168. *Id.*

169. *Id.* at 65–66.

The next case before the Court concerning the liability of for-profit prisons and federal prisoners was *Minneci v. Pollard*.<sup>170</sup> In *Minneci*, the question presented for the Court was “whether [to] imply the existence of an Eighth Amendment-based damages action (a *Bivens* action) against employees of a privately operated federal prison.”<sup>171</sup> In yet another blow to the constitutional rights of federal prisoners in private prisons, the Court resolved the circuit court split on the issue in the negative.<sup>172</sup>

Mr. Pollard was a federal prisoner confined in a facility owned and operated by the Wackenhut Corrections Corporation, now known as GEO.<sup>173</sup> He slipped on a cart left in a doorway in the prison and, as he later learned, broke both elbows.<sup>174</sup> Mr. Pollard sued Wackenhut employees working in the prison for varying ways in which, he alleged, the employees violated his Eighth Amendment rights while he was injured.<sup>175</sup>

Mr. Pollard argued there was no need for the Court to ask whether an extension of *Bivens* was warranted because the Court had already decided in *Carlson* that federal prisoners may bring an Eighth Amendment claim against prison officials.<sup>176</sup> This premise—that federal prisoners are federal prisoners, no matter the type of facility in which they are confined (which is typically through no choice of their own)—was not as obvious to the Court. Justice Breyer, writing for the majority, stated, “*Carlson* . . . was a case in which a federal prisoner sought damages from personnel employed by the *government*, not personnel employed by a *private* firm. And for present purposes that fact—of employment status—makes a critical difference.”<sup>177</sup>

The critical difference was, similar to in *Malesko*, the existence of adequate alternative state tort remedies.<sup>178</sup> The Court acknowledged state torts may not be on par with constitutional tort remedies but discounted that disparity quickly, finding that state tort law remedies provide “roughly similar incentives” for potential defendants to comply with the law and “roughly similar compensation” for victims of violations as constitutional torts do.<sup>179</sup> In dispensing with the claim, the Court nodded to Mr. Pollard’s argument that there “may” be situations in which state tort law does not cover Eighth Amendment violations but dispensed with the notion quickly, concluding the issue of the adequacy of state tort law as a substitute for constitutional claims was better left “to another day.”<sup>180</sup> Accordingly, a federal prisoner confined in a for-profit prison may not bring a constitutional tort action

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170. 565 U.S. 118 (2012).

171. *Id.* at 120.

172. *Id.* at 122, 125 (“[W]e conclude that Pollard cannot assert a *Bivens* claim.”).

173. *Id.* at 121. *See supra* notes 103–104 and accompanying text.

174. 565 U.S. at 121.

175. *Id.* at 121–22.

176. *Id.* at 126.

177. *Id.* (citing *Carlson v. Green* 446 U.S. 14, 25 (1980)).

178. *Id.* at 127.

179. *Id.* at 130.

180. *Id.*

against the employees of the prison corporation for violating his rights; his remedies are relegated to state tort law.<sup>181</sup>

With these two decisions, the Court carved out a class of prisoners for whom there is no constitutional tort remedy. Effectively, the Court marked these prisoners as those to whom the Constitution does not apply. The decisions dealt with constitutional tort claims brought by federal prisoners waiting out a sentence in for-profit prisons after a criminal conviction. But in the years since the decisions, another class of prisoners has grown increasingly relevant—those held in for-profit prisons by federal immigration authorities—and they, likewise, are left with no constitutional tort remedy to seek redress of violations of their rights in custody.

### C. “Incongruous and Confusing”

Justice Stevens, dissenting in *Malesko*, predicted that recognizing different constitutional standards for federal prisoners based purely on the type of prison confining them would be “incongruous and confusing.”<sup>182</sup> Justice Ginsburg, dissenting in *Minnecci*, echoed these concerns: “Were Pollard incarcerated in a federal- or state-operated facility, he would have a federal remedy for the Eighth Amendment violations he allege[d]. . . . I would not deny the same character of relief to Pollard, a prisoner placed by federal contract in a privately operated prison.”<sup>183</sup> Yet, this incongruous and confusing space is exactly where the state of the law for federal prisoners—including those in ICE custody—lies. The Eighth Amendment protects federal prisoners in the same way it protects state prisoners, and people in ICE custody are entitled to *at least* the same measure of constitutional protection.<sup>184</sup> Yet, the mechanisms for enforcing those rights markedly differ depending solely on the entity running the site of the constitutional violations.

Roberto’s story at the outset of this Article is just one among many people’s struggles to obtain adequate medical care in private immigration detention facilities. Others have fared worse in recent months, succumbing to limb amputations, serious illnesses and infections, and even death.<sup>185</sup> ICE has acknowledged at least 185 deaths

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181. *Id.* at 131 (“For these reasons, where, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner *must seek a remedy under state tort law*. We cannot imply a *Bivens* remedy in such a case.”) (emphasis added).

182. *See* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting) (“The Court, however, has recognized sound jurisprudential reasons for parallelism [between Section 1983 and *Bivens*], as different standards for claims against state and federal actors ‘would be incongruous and confusing.’”).

183. *Minnecci*, 565 U.S. at 132 (Ginsburg, J., dissenting).

184. *See, e.g.,* *Hubbard v. Taylor*, 399 F.3d 150, 165 (3d Cir. 2005) (relying on *Bell v. Wolfish*, 441 U.S. 520 (1979), to conclude pretrial detainees are entitled to greater protections than those afforded under Eighth Amendment).

185. *See, e.g.,* Conor McCormick-Cavanagh, *Democrats Probe ICE About Medical Conditions at Aurora Detention Facility*, WESTWORD (Feb. 28, 2019, 1:54 PM), <https://www.westword.com/news/jason-crow-sends-ice-letter-about-medical-conditions-at-aurora-detention-facility-11252339> [<https://perma.cc/EYE2-CJNR>]; Kassi Nelson, *Trans*

in immigration prisons and jails between October 2003 and July 2018.<sup>186</sup> Twenty-two people have died in ICE custody in the last two years.<sup>187</sup> Others, still, have endured physical abuse at the hands of staff and otherwise harsh conditions of confinement.<sup>188</sup> If Roberto had found himself in a facility run directly by ICE or in a state or local facility contracting with ICE—that is, a government-run prison—he would have had legal options to pursue relief against the personnel who were responsible for his suffering. But because Roberto happened to find himself in a private facility, he was relegated to state court remedies. Roberto’s and his counterparts’ remedies are incongruous and confusing; the for-profit prisons and their staff are constitutionally unaccountable.

### III. THE NEED TO CONSTITUTIONALIZE PRIVATE IMMIGRATION DETENTION

There is little to no tangible difference in the experience of people in for-profit, federal immigration detention and people incarcerated in federal and state prisons and local jails.<sup>189</sup> The latter is held to a constitutional standard; the former is not. But

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*Woman Dies in ICE Custody; Family Sues*, KOB4 (Nov. 27, 2018, 4:13 PM), <https://www.kob.com/albuquerque-news/trans-woman-dies-after-detained-at-new-mexico-ice-facility/5157737/> [<https://perma.cc/U9E2-U485>]; Madison Pauly, *A Private Prison Company Says Georgia’s Investigation into a Detainee’s Death Must Stay Secret*, MOTHER JONES (Nov. 29, 2018), <https://www.motherjones.com/politics/2018/11/corecivic-immigration-detention-suicide-investigation/> [<https://perma.cc/8EYR-DKQE>]; Lisa Riordan Seville, Hannah Rappleye & Andrew W. Lehren, *22 Immigrants Died in ICE Detention Centers During the Past 2 Years*, NBC NEWS (Jan. 6, 2019, 7:10 AM), <https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781> [<https://perma.cc/5UH6-VG93>]; Chris Walker, *ICE Defends a Chicken Pox Quarantine at Immigrant Detention Facility in Aurora*, WESTWORD (Oct. 25, 2018, 3:27 PM), <https://www.westword.com/news/varicella-outbreak-leads-to-a-quarantine-at-ice-detention-center-in-aurora-10941507> [<https://perma.cc/GG7A-T64L>]; Chris Walker, *There’s Been Another Chicken Pox Outbreak at Immigrant Detention Facility*, WESTWORD (Jan. 31, 2019, 1:47 PM), <https://www.westword.com/news/second-chicken-pox-outbreak-at-aurora-immigrant-detention-center-puts-two-pods-in-quarantine-11210867> [<https://perma.cc/WL46-9BQ2>]. See generally HUMAN RIGHTS WATCH, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION (2018), [https://www.hrw.org/sites/default/files/report\\_pdf/us0618\\_immigration\\_web2.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf) [<https://perma.cc/2KUQ-8R9P>].

186. RYO & PEACOCK, *supra* note 10, at 5.

187. Seville, Rappleye & Lehren, *supra* note 185.

188. See, e.g., Nina Shapiro, *What Happened to Mergensana Amar? The Russian Immigrant’s Handwritten Note Raises Questions About Treatment at Northwest Detention Center*, SEATTLE TIMES (Nov. 30, 2018, 5:00 AM), <https://www.seattletimes.com/seattle-news/russian-immigrants-handwritten-note-leaves-many-questions-about-treatment-at-northwest-detention-center/> [<https://perma.cc/X3KF-J6LB>].

189. See García Hernández, *supra* note 9, at 1383–84 (“In addition to detaining many more people under immigration law authority, the United States relies heavily on detention facilities that resemble the nation’s penal institutions. Both are secure environments in which guards monitor each resident’s movements. Meals, personal and legal visits, access to medical providers, and every other aspect of social life are regulated.”) (footnotes omitted); *id.* at 1387 (“From the perspective of individuals confined in immigration detention centers, the civil or

conditions in for-profit immigration prisons and jails are comparable—if not worse—than conditions in federal and state prisons and local jails across the country.<sup>190</sup> Invasive strip searches, restricted and controlled movement, round-the-clock monitoring, overuse of solitary confinement: these are all features of criminal- and immigration-related incarceration, all features in government-run and for-profit prisons.<sup>191</sup> Why, then, should the law not permit people in for-profit immigration prisons and jails to assert and vindicate their constitutional rights for past harms in federal court, in at least the same manner in which it permits people incarcerated in federal and state government-run prisons to do?

From a constitutional values and goals perspective, there is no defensible answer to this question. This is so for three primary reasons: First, the theories underpinning the Supreme Court's decisions in *Malesko* and *Minnecci*, as outlined above, fail to contemplate the dignity principle that underpins our nation's constitutional norms, particularly with respect to confinement and incarceration. Second, the *Malesko-Minnecci* doctrine fails to consider the inherently governmental function of incarceration. And third, the doctrine neglects the constitutional goals of government transparency and accountability.

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criminal distinction is easily lost. Detainees regularly envision themselves as confined.”) (footnote omitted); Lima-Marín & Jefferis, *supra* note 6, at 7 (“[D]eaths due to poor medical care and suicide in immigration confinement are on the rise. ICE has reported more than seventy-four deaths in immigration detention since 2010. The agency reported six deaths in fiscal year 2018, albeit in dubiously incomplete fashion. People refer to many immigration detention facilities as kennels because prisoners are held in chain-link cages and treated like animals by facility staff. Lights are left on in housing units constantly, making sleep difficult for many prisoners. In many facilities, people have no choice but to sleep on the concrete floor.”) (footnotes omitted).

190. See García Hernández, *supra* note 9, at 1384 (“Meanwhile, the most invasive features of penal imprisonment resonate through the immigration detention estate.”); Lima-Marín & Jefferis, *supra* note 6, at 8–9 (“There is little meaningful difference in the lived experiences of incarceration under a government’s criminal legal powers and its civil confinement. . . . In some situations, the immigration detention experience is even more punitive than incarceration.”).

191. See García Hernández, *supra* note 9, at 1384–85 (“[T]he most invasive features of penal imprisonment resonate through the immigration detention estate. Some individuals have been subjected to strip searches upon being taken into immigration custody pursuant to institutional policies requiring strip searches of all inmates. Most are required to wear uniforms color-coded to their security classification. Movements around the grounds are tightly limited and observed by guards; many detainees must spend ‘all or most of the day in their housing units,’ with as little as one hour of recreation time. Visits from family and friends are limited to thirty minutes a few days a week and contact is prohibited (detainees and visitors speak through telephones while separated by Plexiglas dividers). One facility prohibits contact visits even with attorneys. Others are reportedly placed in solitary confinement where they are locked in cells for twenty-three hours a day without contact with other detainees. A recent review of government data reported that several dozen were held in solitary confinement for more than seventy-five days, well above the fifteen days that a United Nations representative found to be the point at which ‘some of the harmful psychological effects of isolation can become irreversible.”); Lima-Marín & Jefferis, *supra* note 6, at 8–10 (discussing first-hand experience of criminal incarceration and immigration confinement).



Underneath each of these considerations is the premise that the disparate classification of people incarcerated for punishment and people confined pursuant to the federal government's immigration-enforcement authority—that is, the law's distinction between punitive incarceration and civil detention—may no longer be justifiable.<sup>192</sup> While the nature of the legal frameworks under which the government imposes confinement differ, the conditions in immigration detention, and the experiences of the people who are incarcerated, are inherently carceral.<sup>193</sup> And there are questions as to whether nonpunitive incarceration is even possible.<sup>194</sup> While I reserve a full exploration of this concept for future work,<sup>195</sup> I call this two-pronged faulty premise the “civil detention fallacy.”<sup>196</sup> The current state of immigration detention is nothing close to civil, and the entire act of confining a person civilly may be impossible. Both considerations demonstrate that when it comes to conditions of confinement in the United States, there is no meaningful difference between criminal incarceration and immigration confinement. Therefore, the same values that form the foundation of our constitutional jurisprudence regulating criminal incarceration—namely, dignity, the inherently governmental function of incarceration, and the need for transparency and accountability—must allow for a constitutional tort remedy for people whose rights are violated in for-profit immigration prisons.<sup>197</sup>

#### A. Dignity as a Constitutional Value

Dignity exists at the heart of the Constitution. Time and again, the Supreme Court has stated that constitutional protections of prisoners are girded by the concept that all people bear dignity, no matter their station in life:<sup>198</sup> “By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the

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192. Lima-Marín & Jefferis, *supra* note 6, at 12–14.

193. *Id.*; see also García Hernández, *supra* note 9, at 1382–1388.

194. See Lima-Marín & Jefferis, *supra* note 6, at 12–13 (“With the exception of the death penalty, incarceration is the most extreme form of punishment that modern, democratic societies tolerate. Physical confinement is so inextricably intertwined with punitive authority that it has become, for most liberal governments, the *definition* of punishment.”).

195. Jefferis, *supra* note 6.

196. *Id.*

197. See García Hernández, *supra* note 9, at 1393 (“Imprisonment is unquestionably an awesome power that the government is authorized to wield in limited circumstances. To reduce the incidence of abuse by government officials, the U.S. Constitution imposes significant procedural obstacles to imprisonment. If immigration detention is to be reconceptualized as punishment, then it becomes necessary to consider the logical legal outcome: Imposition of punishment would be subject to the constitutional constraints on governmental action that apply to all criminal prosecutions.”) (footnotes omitted).

198. *Hall v. Florida*, 572 U.S. 701, 708 (2014) (citing *Roper v. Simmons*, 543 U.S. 551, 560 (2005)); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”). See generally Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2141–42 (2016) (“Since 1958, the Supreme Court has emphasized that the Eighth Amendment’s prohibition on cruel and unusual punishments is focused on preserving the dignity of man. . . . Overall, the Court has remained quite consistent in tying the Eighth Amendment to this concept of dignity.”).

government to respect the dignity of all persons.”<sup>199</sup> “Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”<sup>200</sup> The Eighth Amendment “embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . .”<sup>201</sup> All of the constitutional jurisprudence derived from the Eighth Amendment is animated, at least in part, by this fundamental recognition: no matter the brutality of the crimes for which a person is convicted, he nevertheless is still a human being, and the government must treat him as such.

Despite decades of reliance on the dignity principle, there has been little consistency in the understanding of this concept and the values animating it.<sup>202</sup> Professor Meghan J. Ryan traces the development of scholarly attention to constitutional dignity, explaining that some scholars have focused on the Kantian conception of dignity, which focuses on the individual.<sup>203</sup> Others have asserted the Eighth Amendment’s concept of dignity focuses rather on society—a form of “collective . . . dignity.”<sup>204</sup> For the scholars on this latter side of the debate, dignity focuses “on what society has deemed ‘civilized, decent, and virtuous.’”<sup>205</sup> After engaging in an in-depth analysis of the Court’s jurisprudence on the issue, Professor Ryan concludes the “core of the Eighth Amendment dignity demand” is, in fact, the individual person.<sup>206</sup> Under this formulation, the dignity principle is a manifestation of the right to self-determination—that is, the reflection of every human being’s autonomy and self-worth.<sup>207</sup> The right to dignity is a “pivotal right deeply rooted in any notion of justice, fairness, and a society based on basic rights.”<sup>208</sup>

Surely, the fundamental nature of dignity—recognized in all people, “even those convicted of heinous crimes”<sup>209</sup>—applies with at least equal force to people in immigration confinement. If the Court is going to regulate the constitutionality of penal prisons and prison conditions with dignity in mind, it must do the same for immigration prisons, including those prisons managed and operated by for-profit companies. Without a remedy to redress violations of that principle, however, prisoners whose rights and, accordingly, dignity were violated have no means to present these claims to the federal courts. And without a remedy, the right means very little.<sup>210</sup>

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199. *Roper*, 543 U.S. at 560.

200. *Brown v. Plata*, 563 U.S. 493, 510 (2011) (citing *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)).

201. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation and quotations omitted).

202. Ryan, *supra* note 198 at 2142.

203. *Id.* at 2142–43.

204. *Id.* at 2143.

205. *Id.* at 2144.

206. *Id.* at 2167, 2178 (“The core of the Eighth Amendment focuses on the dignity of the [person]. This translates into recognizing and safeguarding the individual in punishing.”).

207. Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 67–68 (2011).

208. *Id.* at 69 (internal quotations omitted).

209. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

210. As James Madison wrote, “But a right implies a remedy . . . .” THE FEDERALIST NO. 43, at 237 (James Madison) (J.R. Pole ed., 2005).

### B. Incarceration as a Constitutional Function

In principle, incarceration is an inherently constitutional—or public—function.<sup>211</sup> That is, from a moral and philosophical view, depriving a person of his liberty for purposes of punishment is something only a government may rightfully do.<sup>212</sup> Delegating that responsibility “represents the government’s abdication of one of its most basic responsibilities to its people.”<sup>213</sup> Indeed, delegating this necessarily public function with few mechanisms in place to hold the private actors accountable eviscerates the oversight and accountability structure inherent to the U.S. system of government, with coequal branches of government imposing checks and balances on each other in furtherance of adhering to constitutional standards and norms. By not permitting prisoners to assert constitutional tort claims against private prison officials, the government evades responsibility for one of its core functions.

### C. Transparency and Accountability as Constitutional Goals

Prisons are opaque institutions.<sup>214</sup> Prisoners exist behind locked gates and barbed wire, on the other side of iron bars and steel doors. Journalists and lawmakers are often refused access; the public (excluding attorneys meeting with clients) almost certainly is not permitted inside most facilities to inspect the conditions or speak with prisoners.<sup>215</sup> Acquiring information about the conditions inside prisons is inherently

211. See, e.g., Dolovich, *supra* note 97 at 442–43 (compiling literature among private-prison critics relying on incarceration and punishment as inherently public function).

212. Federal law as it has been interpreted does not view incarceration as inherently governmental, however, which is in part the reason for the flourishing private-prison industry. There are compelling reasons for a reinterpretation of this principle. See generally Fiona O’Carroll, *Inherently Governmental: A Legal Argument for Ending Private Federal Prisons and Detention Centers*, 67 EMORY L.J. 293 (2017).

213. Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 668 (1987).

214. See, e.g., Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL’Y REV. 435, 436 (2014) (“The public has little idea what happens behind prison walls. Prisons and jails are essentially ‘closed institutions holding an ever-growing disempowered population.’”); Derek Borhardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 469 (2012) (“For much of American history, federal courts considered prisons’ internal operations off limits.”); David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1453 (2010) (“Prisons are closed environments, largely hidden from public view.”); Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 472–73 (2018).

215. See, e.g., Armstrong, *supra* note 214, at 462 (“Currently, prisons and jails are shrouded in secrecy. Media access to prisoners and prisons is extremely limited and completely discretionary. Moreover, investigative reporting is generally in decline given the changing nature of media, news, and reporting. In combination with the high barriers to obtaining prison related information, media coverage is less able to fill the prison transparency gap.”); Fathi, *supra* note 214, at 1453 (“For obvious reasons, the public and press cannot be allowed the same degree of access to prisons as they are allowed to other government facilities, and security concerns require some monitoring and control of contacts between prisoners and

difficult.<sup>216</sup> Recounting the struggles of prisoners to shine a light on their conditions of confinement, Professor Laura Rovner offers two quotes from prisoners that make this point especially poignant:

The law does forbid the methodological use of torture. . . . [B]ut how can anyone prove such practices exist when only convicts witness it?<sup>217</sup>

and

We inmates look to the public as sheep look toward their shepherd, we're crying wolf but you don't see him. That doesn't mean the wolf's not there. He's just wearing sheep's clothing so you don't see him. We can't understand why you don't see him but we see him and we smell him, and he stinks like death and repression.<sup>218</sup>

The Constitution provides one key mechanism,<sup>219</sup> however, with which to shine a light on prisons, expose the conditions inside the facilities, and, if necessary, impose change to ensure U.S. prisons adhere to constitutional norms.<sup>220</sup> Professor Rovner describes the many ways in which constitutional litigation exposed conditions inside the federal government's supermax prison in Florence, Colorado—the U.S.

the outside world.”); Kara Mason, *Aurora ICE Prison Refuses to Let Congressman, City Lawmaker in for Unannounced Tour*, SENTINEL (Feb. 20, 2019), <https://www.sentinelcolorado.com/news/metro/aurora-ice-prison-refuses-to-let-congressman-city-lawmaker-in-for-unannounced-tour/> [<https://perma.cc/RS9Z-ATSW>]; Rovner, *supra* note 214, at 472 (“Journalists similarly have been prevented from accessing ADX. The Amnesty International report, citing a *Westword* article from 2007, noted that ‘from January 2002 through May 2007, officials denied every single media request for face-to-face interviews with ADX prisoners, or tours of the facility. . . .’ Only after mounting ‘criticism of lack of access’ did the BOP arrange a restricted tour of the prison in 2007 for some journalists with major media outlets. But, the Report noted, ‘no similar tours are believed to have been arranged since then.’”).

216. See Rovner, *supra* note 214, at 470–71.

217. *Id.* at 470 (alteration in original).

218. *Id.* at 471.

219. Of course, even for the prisoners for whom the law permits a constitutional tort remedy, the Constitution is not as robust as it should be due to laws designed to limit prisoner litigation, including notably the Prison Litigation Reform Act. See generally Fathi, *supra* note 214; Mike Tartaglia, *Private Prisons, Private Records*, 94 B.U. L. REV. 1689, 1693 (2014) (“Litigation has historically been the most common and effective means of improving prison operations and conditions, but its effectiveness in recent years has been curtailed by statutory reform and judicially imposed limitations. Over the past two decades, the Prison Litigation Reform Act (“PLRA”) drastically restricted judicial prison oversight and the ability of prisoners to file suit.”) (footnotes omitted).

220. See Borchardt, *supra* note 214, at 469 (“But in the 1960s and 1970s, courts began to look inside prison walls. They were shocked by what they saw. Courts declared some prisons to be ‘unfit for human habitation,’ ‘a dark and evil world completely alien to the free world,’ and ‘so inhumane and degrading as to amount to cruel and unusual punishment.’”) (footnotes omitted); Rovner, *supra* note 214, at 481–82.

Penitentiary Administrative Maximum, also known as ADX.<sup>221</sup> After explaining how difficult breaking through the shroud of secrecy over ADX is for journalists, family members of men confined inside, and members of the public, she asserts constitutional litigation “is all the more necessary when the prison in question is, like ADX, so deeply shrouded in secrecy.”<sup>222</sup> For centuries, unspeakable abuse of men and women has been allowed to happen behind prison walls because the public had no access, and still, the cloak of secrecy over America’s prisons in part permits the abuse to continue. “[L]itigation, however difficult or imperfect a tool, is a critically important one, not only as a mechanism for vindicating rights violations, but also because of its capacity to bring some of what has been kept in darkness into the light.”<sup>223</sup>

As the federal government’s “most secure prison,” ADX is notoriously difficult to penetrate.<sup>224</sup> For-profit immigration prisons are likewise impervious, though for different reasons.<sup>225</sup> The scope of immigration detention has grown substantially in recent years, but information about the conditions inside the prisons is often hard to come by. One primary reason for this opaqueness is that unlike government-run prisons, open records laws do not apply to private prisons.<sup>226</sup> Journalists, advocates, and others have no legal mechanism with which to demand private companies’ records concerning the conditions inside the facilities. Constitutional litigation, therefore, effectuates dual mutually reinforcing purposes: bringing claims for violations of constitutional rights against prison officials shines a light on the conditions inside prisons, and shining a light on the conditions inside prisons reinvigorates—and sometimes reimposes—constitutional standards on the facilities.<sup>227</sup>

If the law permitted a prisoner confined in a for-profit immigration prison to bring a constitutional tort claim against the facility doctor who ignored his pleas for medical treatment, for example, the litigation would serve each of these three constitutional aims: Asserting a constitutional tort claim against the doctor reaffirms that person’s fundamental dignity—the Constitution applies to him, too. Holding the

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221. *See generally* Rovner, *supra* note 214.

222. *Id.* at 481.

223. *Id.*

224. *Id.* at 465.

225. *See* Fathi, *supra* note 214, at 1461–62 (“Private facilities present a special oversight problem. While the profit motive may increase the temptation to cut corners on staffing, medical care, and other essential services, private prisons are subject to even less scrutiny than their public counterparts.”).

226. *Id.* at 1462 (“As private corporations, they are typically not subject to open meeting and freedom of information laws that apply to state and local departments of corrections.”); Tartaglia, *supra* note 219, at 1691 (“In the vast majority of United States jurisdictions, private prisons are not required to disclose information pursuant to public records requests in the same manner as government prisons.”).

227. *See, e.g.,* Tartaglia, *supra* note 219, at 1699 (“Transparency enhances accountability by permitting interested parties to focus more attention on government operations. In the prison context, information about things like staffing ratios, provision of medical and mental health care, use of solitary confinement, rates of violence, and protection of prisoners’ fundamental rights such as access to the courts and correspondence with the outside world can shed much-needed light on prison conditions and operations.”) (footnotes omitted).

private prison's doctor to constitutional standards reiterates that incarceration is an inherently governmental function and, accordingly, private companies that engage in the business will be held to the same standards. And much like the litigation concerning the conditions in ADX, the constitutional challenges to conditions inside for-profit immigration prisons would impose some transparency and, ultimately, accountability on the officials who work inside and the companies who manage and oversee the project. Each of these aims is crucial to ensuring prisoners across the United States—no matter the agency that incarcerates them nor the entity that operates the prison in which they are confined—are afforded equal access to the Constitution and the federal courts.

#### CONCLUSION

Justice Stevens predicted dire circumstances for federal prisoners in private prisons when he dissented from the majority's opinion in *Malesko*: "Indeed, a tragic consequence of today's decision is the clear incentive it gives to corporate managers of privately operated custodial institutions to adopt cost-saving policies that jeopardize the constitutional rights of the tens of thousands of inmates in their custody."<sup>228</sup> The Court's decisions in *Malesko* and *Minneeci* disallowing prisoners a constitutional tort remedy against private prisons and their employees have created a differentiated system of constitutional accountability among America's prisons. Prisoners in government-run prisons may bring tort claims against the prison officials who violate their constitutional rights; prisoners in for-profit federal prisons may not bring the same claims against the prison officials who violate those same rights. Indeed, the consequences of these decisions are "incongruous and confusing," as Justice Stevens predicted.<sup>229</sup>

No group of prisoners feels this on a larger scale than those people confined in for-profit immigration prisons. The daily population of people in immigration confinement is growing each year, and a large majority of those people will at one time during their confinement be in a private prison. Should their constitutional rights be violated in those spaces—as they were for Roberto, who pleaded for more than a year for medical treatment for the painful symptoms of his gunshot injuries—they will have no remedy to hold the responsible people accountable. Indeed, the spaces are constitutionally unaccountable.

The punitive nature of modern immigration confinement—premised on the civil detention fallacy—renders this incongruence among people in federal for-profit immigration prisons and those in government-run prisons unjustifiable. The inability of people in for-profit immigration confinement to hold their jailers constitutionally accountable undermines the constitutional value of dignity, permits the abdication of the constitutional function of incarceration, and impedes the constitutional goals of transparency and accountability. In future work, I will show how for-profit immigration prisons should be "constitutionalized" through a reframing of the current debate regarding immigration confinement and the for-profit prison industry to achieve incremental doctrinal shifts geared toward dismantling the public-private

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228. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 81 (2001) (Stevens, J., dissenting).

229. *Id.* at 82.

prison divide. The Constitution, and its promise of dignity for all, demands nothing less.