NOTES

"He's the Uterus Collector" The Reproductive Rights of Women in ICE Detention: An Opportunity to Protect the Constitutional Rights of Federal Detainees in Privately Run Facilities

Helen Jennings*

Abstract

In September 2020, a shocking account of reproductive violence emerged from an ICE detention center in rural Georgia. Whistleblower Dawn Wooten told the stories of dozens of women who had suffered unnecessary and non-consensual gynecological surgery at the hands of the detention center's physician, Dr. Amin, whom she called "the uterus collector." A class-action Bivens claim for the victims of Dr. Amin is currently in progress in the District Court for the Middle District of Georgia. This article closely considers one aspect of this claim, namely the vindication of the plaintiffs' Fifth Amendment Due Process rights. As detainees within a privately run federal detention facility, the plaintiffs are effectively precluded from bringing a successful Bivens action against the private company running the immigration detention center, or its employees. This article argues that the plaintiffs should be permitted to bring their claim and should not face an unduly high burden of proof in respect of the defendants' failure to provide adequate medical treatment. Should it reach the U.S. Supreme Court, this case could present the Court with two monumental opportunities: to extend constitutional protection to individuals in federal detention run by for-profit private companies, and also to challenge the legacy of eugenics toleration fostered by U.S. courts since the 1970s.

* Pupil Barrister, 25 Bedford Row Chambers, London. New York University School of Law, LLM '21 — Fulbright Scholar, George Moore Scholar, Jerome Lipper Award. University of Cambridge, BA Honors Law '19. My sincere thanks to the tenacious and diligent GJGL staff for their hard work editing this article for publication. My admiration, always, to all who advocate for reproductive justice everywhere.

I. INTRODUCTION

In September 2020, accounts of non-consensual and unnecessary gynecological and reproductive surgery carried out on women in ICE detention in Irwin County, Georgia made national and global headlines. On December 21st, a class-action lawsuit was brought on behalf of the victims in the District Court for the Middle District of Georgia against, among others, U.S. Immigration and Customs Enforcement ("ICE"), Irwin County Detention Center ("ICDC"), LaSalle LLC—the private company that runs Irwin County Detention Center—and individual employees of these entities. The case, *Oldaker v. Giles*, asserts twenty-one separate bases for relief including claims against federal, county, and local defendants, for harm relating to the treatment of the alleged victims in detention and retaliation against the detainees for speaking out about the abuses committed against them.[1]

This note places a magnifying lens on one strand of argument alleged by the plaintiffs in *Oldaker v. Giles*. Rather than analyzing the arguments asserted by the plaintiffs at this early stage of litigation—response to the plaintiffs' class action complaint has not yet been filed—this note takes a broad view of some of the obstacles faced by immigration detainees seeking to vindicate their constitutional due process rights under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[2] against violations related to their medical treatment while

1. Consolidated Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Declaratory and Injunctive Relief and for Damages at i–iii, Oldaker v. Giles, No. 7:20-cv-00224 (M.D. Ga. Dec. 21, 2020).

2. 403 U.S. 388 (1971).

in privately run federal detention facilities. In the particular factual circumstances of *Oldaker v. Giles*,[3] such a case could present the U.S. Supreme Court with two monumental opportunities: to extend constitutional protection to individuals in federal detention run by for-profit private companies, and also to challenge the legacy of eugenics toleration fostered by U.S. courts since the 1970s. This note will introduce novel arguments which plaintiffs should bring in *Oldaker v. Giles* regarding the standard of fault to which private companies managing federal detention centers should be held, and recognition of the unique harm caused to women by denial of their reproductive autonomy.[4] The detainees' constitutional rights under the Fifth Amendment Due Process Clause have been violated, and they should be offered a constitutional tort remedy. A successful claim along the lines drawn by this note would actively challenge the legacy of legal support in the United States for the eugenics-based forced sterilization of minority women throughout the twentieth century.

II. THE PROJECT SOUTH COMPLAINT

The news broke on September 14, 2020. Project South, an Atlanta-based social justice organization, had filed a complaint with the U.S. Department of Homeland Security on the basis of shocking allegations made by a whistleblower within an immigration detention center in rural Georgia.[5] Ms. Dawn Wooten's account detailed conduct by medical officials within Irwin County Detention Center, an ICE facility run by a private prison company, LaSalle Corrections.

Ms. Wooten's account asserted various acts taken by officials employed by LaSalle Corrections. Project South alleged that these acts amounted to "jarring medical neglect" and revealed a "hazardous and reckless . . . disregard for public health guidelines" within the facility.[6] The allegations were numerous, but this note will focus on one group of complaints—those of unnecessary and non-consensual gynecological medical treatment conducted on several detainees. Project South's complaint "rais[ed] red flags regarding the rate at which hysterectomies [were] performed on immigrant women under ICE custody at ICDC," and several named victims have since given statements confirming the details of their

3. *See infra* Sections II–III.

4. This article discusses denial of reproductive autonomy relating to the termination of pregnancy, specifically relating to the plaintiffs in *Oldaker v. Giles*—who, to the author's knowledge all identify as women. The author therefore uses the umbrella term "women" to describe any individual who may experience pregnancy. The author acknowledges that it is not just women who may experience pregnancy, and that denial of reproductive autonomy can take various forms, many of which are unrelated to pregnancy.

5. Email from Project South et al. to Joseph V. Cuffari, Inspector Gen., Off. of the Inspector Gen., Cameron Quinn, Officer for C.R. and C.L., Dep't of Homeland Sec., Thomas P. Giles, Acting Dir. of Atlanta ICE Field Off., and David Palk, Warden of the Irwin Cnty. Det. Ctr., U.S. Immigr. and Customs Enf't Atlanta Field Off., Re: Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center (Sept. 14, 2020), https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf [hereinafter *Project South Complaint*].

6. *Id.* at 2.

experiences to news outlets.[7] As of October 2020, the number of women alleging similar experiences at ICDC had risen to fifty-seven, many of whom came forward following the publication of Project South's original complaint.[8] The allegations were reported globally, sparking outrage.[9] In light of global media attention, one hundred and seventy-three Members of the U.S. House of Representatives wrote to Mr. Joseph Cuffari, Inspector General at the Department of Homeland Security, to express "grave concern for the violation of the bodily autonomy and reproductive rights of detained people" at ICDC.[10] The Members' call for an investigation into reproductive surgery practices upon detainees at ICDC by the Department of Homeland Security was successful,[11] but it is likely that any such investigation will be influenced by ICE's unwillingness to characterize Ms. Wooten's account and those of named victims as anything other than "anonymous, unproven allegations."[12]

While the investigation was ongoing, ICE moved to deport several of the individuals upon whom gynecological surgery was performed while they were detained at ICDC. A consent motion filed in November 2020 facilitated the prevention or reversal of several of these deportations[13] and the release of all the complainants pending a final decision on their immigration status was eventually granted.[14] However, the implication remains that investigation within the Department of Homeland Security, ICE's parent agency, will not result in adequate recognition of the harm caused to victims of the alleged abuses, nor will it lead to proper protection of detainees in the future.

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7. Jose Olivares and John Washington, *Number of Women Alleging Misconduct by ICE Gynecologist Nearly Triples*, THE INTERCEPT (Oct. 27, 2020), https://theintercept.com/2020/10/27/ice-irwin-women-hysterectomies-senate/.

8. *See* Angelina Chapin, *57 Migrant Women Say They Were Victims of ICE Gynecologist*, THE CUT (Oct. 28, 2020), https://www.thecut.com/2020/10/migrant-women-detail-medical-abuse-forced-hysterectomies.html.

9. Jose Olivares and John Washington, *"He Just Empties You All Out": Whistleblower Reports High Number of Hysterectomies at ICE Detention Facility*, THE INTERCEPT (Sept. 15, 2020), https://theintercept.com/2020/09/15/hysterectomies-ice-irwin-whistleblower/). The allegations were first reported in *The Intercept* before being picked up by global and national news sources.

10. Letter from Pramila Jayapal et al., Members, U.S. House of Rep.s, to Joseph V. Cuffari, Inspector General, DHS (Sept. 15, 2020) http://jayapal.house.gov/wp-content/uploads/2020/09/DHS-IG-Letter.pdf.

11. Caitlin Dickerson, *Inquiry Ordered Into Claims Immigrants Had Unwanted Gynecology Procedures*, N.Y. TIMES (Sept. 16, 2020), https://www.nytimes.com/2020/09/16/us/ICE-hysterectomies-whistleblower-georgia.html.

12. Emiene Wright, *DHS Announces Investigation Into Claims of ICE Detainees Being Sterilized Without Their Consent*, COURIER NEWS (Sept. 17, 2020), https://couriernewsroom.com/2020/09/17/dhs-investigation-ice-detention-center-hysterectomies/ (quoting Dr. Ada Rivera, the Medical Director of ICE Health Services Corps).

13. Colin Dwyer, *US Agrees to Pause Deportations for Women Alleging Abuse at ICE Facility*, NPR (Nov. 24, 2020), https://www.npr.org/2020/11/24/938456423/u-s-agrees-to-pause-deportations-for-women-alleging-abuse-at-ice-facility.

14. *Last Petitioner in Georgia Gynecological Abuse Class Action Secures Release from ICE Custody*, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD (Jan. 22, 2021), https://nipnlg.org/pr/2021_22Jan_oldaker-v-giles.html.

Amidst the ongoing federal investigation, in May 2021 it was announced that President Biden's administration had ordered the closure of ICDC.[15] By September 2021, all ICE detainees were transferred from ICDC to other detention facilities in Georgia.[16] This is evidently a positive development to prevent further abuses specific to that facility—however, the broader injustices related to for-profit federal detention across the U.S. persist. President Biden pledged on the campaign trail to end the running of federal detention facilities for profit, but this pledge has not been realised.[17] As such, despite the termination of ICE detention at ICDC, detainees in privately run, for-profit federal detention facilities are still at risk of the injustices addressed in this note, including the denial of satisfaction for violations of their constitutional rights.

III. THE ALLEGATIONS

The majority of allegations made by the Project South complaint on ICDC regarded the failure of ICDC staff and management to ensure the safety of detainees in the context of the COVID-19 pandemic, including failure to quarantine individuals arriving at the facility, and lack of access to medical care for detainees experiencing symptoms.[18] The allegations regarding forced, non-consensual or unnecessary gynecological surgery, on the other hand, span only three pages in the complaint.[19] Still, these allegations have been the central point of outrage for those taking political and social action against the Department of Homeland Security in relation to ICDC.[20] This is partly because the actions described are so egregious in their own right. The reproductive violence committed upon the detainees also triggered a large public response due to the volatility of

15. Molly O'Toole, *ICE to Close Georgia Detention Center Where Immigrant Women Alleged Medical Abuse*, LA TIMES (May 20, 2021), https://www.latimes.com/politics/story/2021-05-20/ice-irwin-detention-center-georgia-immigrant-women-alleged-abuse.

16. Jeremy Redmon, *All ICE Detainees Moved out of South Georgia Jail*, THE ATLANTA JOURNAL-CONSTITUTION (Sept. 4, 2021), https://www.ajc.com/news/all-ice-detainees-moved-out-of-south-georgia-jail/XJ6XIUTVBFCN3IALTUCUFUNBX4/.

17. Casey Tolan, *Biden Vowed to Close Federal Private Prisons, but Prison Companies are Finding Loopholes to Keep them Open*, CNN (Nov. 12, 2021), https://edition.cnn.com/2021/11/12/politics/biden-private-prisons-immigration-detention-centers-invs/index.html; Charles Davis, *Despite Biden's Pledge, a Private Prison is Becoming a For-Profit Immigration Detention Center in Pennsylvania*, INSIDER (Sept. 30, 2021), https://www.businessinsider.com/despite-biden-pledge-ice-gets-for-profit-jail-in-pennsylvania-2021-9?r=US&IR=T.

18. *Project South Complaint*, *supra* note 5, at 7–10.

19. *Id*. at 18–20.

20. Caitlin Dickerson, Seth Freed Wessler and Miriam Jordan, *Immigrants Say They Were Pressured into Unneeded Surgeries*, N.Y. TIMES (Sept. 29, 2020), https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html; Chapin, *supra* note 8; Georgina Lee, *Were 'mass hysterectomies' performed on detainees at a US immigration centre?*, CHANNEL 4 NEWS (UK) (Sept. 18, 2020), https://www.channel4.com/news/factcheck/factcheck-were-mass-hysterectomies-performed-on-detainees-at-a-us-immigration-centre; *ICE Whistleblower: Nurse Alleges 'Hysterectomies on Immigrant Women in US*, BBC NEWS (Sept. 15, 2020), https://www.bbc.co.uk/news/world-us-canada-54160638; Victoria Bekiempis, *More Immigrant Women Say They Were Abused by ICE Gynecologist*, THE GUARDIAN (Dec. 22, 2020, 11:40 AM), https://www.theguardian.com/us-news/2020/dec/22/ice-gynecologist-hysterectomies-georgia.

reproductive rights as a political question in the U.S., and amidst growing fears over regression in provision for these rights (and the rights of immigrants to the United States generally) since the inauguration of President Trump just a few years earlier.[21]

In the Project South complaint, Ms. Wooten expressed serious concern at the rate of hysterectomies and sterilization procedures performed by one, unnamed gynecologist, who LaSalle Corrections routinely used as their regular doctor treating detainees at ICDC for reproductive healthcare issues. This doctor, characterized by Ms. Wooten as "the uterus collector," was later identified as Dr. Mahendra Amin.[22] Ms. Wooten's statement, the subsequent testimonies of detainees, and a report by a team of eleven medical experts reviewing Dr. Amin's records[23] raise two distinct issues:

i. Detainees were not receiving adequate information to consent in a full, informed manner to hysterectomy/sterilization/reproductive surgery procedures;[24]
ii. Hysterectomy/sterilization/reproductive surgery procedures were being performed unnecessarily, on patients who could have been treated using other, non-invasive methods.[25]

The next section will argue that both allegations deserve to be treated as violations of the detainees' constitutional rights under the Fifth Amendment Due

21. Izabela Tringali and Martha Kinsella, *Forced Sterilization Accusations at ICE Facility Fit with Trump's Poor Treatment of Immigrants*, BRENNAN CTR. (Sept. 18, 2020), https://www.brennancenter.org/our-work/analysis-opinion/forced-sterilization-accusations-ice-facility-fit-trumps-poor-treatment.

22. *Project South Complaint*, *supra* note 5, at 19.

23. Molly O'Toole, *19 Women Allege Abuse in Georgia Immigration Detention*, LA TIMES (Oct. 22, 2020), https://www.latimes.com/politics/story/2020-10-22/women-allege-medical-abuse-georgia-immigration-detention.

24. In the Project South complaint, Ms. Wooten stated, "I've had several inmates tell me that they've been to see the doctor and they've had hysterectomies and they don't know why they went or why they're going." *Project South Complaint*, *supra* note 5, at 19. Mbeti Ndonga, one of the women treated by Dr. Amin while detained at ICDC, stated that when she inquired as to what procedure was going to be carried out, she received three different answers from three different individuals. She claims that she underwent a dilation and curettage procedure without ever understanding that she was to have surgery. When "[a]sked at what point she first understood she'd had a surgery, Ndonga said, 'When I woke up and saw the incisions.'" Gianna Toboni et al., *Woman Says Georgia ICE Facility Gave Her Unwanted Gynecological Surgery. Now She's Being Deported*, VICE (Nov. 23, 2020, 11:27 AM), https://www.vice.com/en/article/pkdgpk/woman-in-ice-gynecology-scandal-faces-deportation-almost-a-death-sentence.

25. According to the Project South complaint, "[e]verybody [Dr. Mahendra Amin] sees has a hysterectomy—just about everybody. He's even taken out the wrong ovary on a young lady . . . That's his specialty, he's the uterus collector . . . Everybody he sees, he's taking all their uteruses out or he's taken their tubes out. What in the world." *Project South Complaint*, *supra* note 5, at 19. Reporting on an expert report submitted to Congress and unavailable to the public, the *LA Times* explained that "medical experts found an 'alarming pattern' in which Amin allegedly subjected the women to unwarranted gynecological surgeries." O'Toole, *supra* note 15.

Process Clause, for which the victims should be offered a constitutional tort remedy.

IV. CONSTRUCTING A CLAIM

Dr. Amin's alleged conduct exposes him to liability for medical negligence. Individual patients of Dr. Amin's could sue him for medical negligence and obtain damages, but this remedy would not change the policy or attitude of LaSalle Corrections, ICE, or the Department of Homeland Security towards detainees in immigration detention centers. The victims allege that each of these entities are also responsible for their failure to provide adequate medical care, and ought to be held to account for this failure.[26]

The alleged victims should not be limited to medical negligence claims in their search for relief. Instead, the harmed detainees should bring a *Bivens* claim, which asserts that a person exercising federal authority deprived them of a right secured by the Constitution of the United States.[27] As a matter of strategic litigation, a *Bivens* claim is necessary to establish the obligations owed by the United States government to civil and pre-trial detainees in its custody under the Constitution.

A *Bivens* claim is preferable over a medical negligence claim for a few reasons. First, it has a dignitarian function in honoring the constitutional rights of the victims and compensating them for violation of these rights.[28] Using a *Bivens* claim, the alleged victims can seek monetary damages to compensate for the harm caused to them personally and they can also change the state of the law for other detainees in privately run federal detention facilities. The alleged victims of Dr. Amin have made clear that this is an outcome they wish to pursue by including a *Bivens* claim within their petition in *Oldaker v. Giles*.[29]

This note argues that the *Oldaker* plaintiffs' Fifth Amendment rights were violated when LaSalle Corrections, acting with federal authority, sent them into Dr. Amin's medical practice for unnecessary or non-consensual reproductive surgery, knowing or reckless to the fact of his history of performing these procedures on previous detainees. Therefore, the plaintiffs should be able to mount a successful *Bivens* claim against LaSalle Corrections and they should also be able to mount a *Bivens* claim against individual correctional officers at ICDC. To make this case, however, it must first be established that non-U.S. citizen detainees in privately

26. *See* O'Toole, *supra* note 15 ("Both Dr. Amin and the referring detention facility took advantage of the vulnerability of women in detention to pressure them to agree to overly aggressive, inappropriate, and unconsented medical care.").

27. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 399 (1971).

28. In a legal context, the term "dignitarian" refers to law which, apart from or alongside other functions or purposes, is protective of the human dignity of its subjects. *See generally* Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 1 (2012).

29. Oldaker v. Giles, No. 7:20-cv-00224-WLS-MSH, at 116–18 (M.D. Ga. Dec. 21, 2020).

run federal immigration detention possess constitutional rights to adequate treatment in detention that may be vindicated through a *Bivens* claim.

A. THE LEGAL FRAMEWORK

This Section considers the constitutional protections afforded to ICE detainees in privately run federal immigration detention centers, such as the plaintiffs in *Oldaker v. Giles*.

1. Fifth Amendment Due Process Rights

In challenging their treatment as detainees in ICDC, the plaintiffs in *Oldaker v. Giles* will not be able to rely directly on the prohibition of "cruel and unusual punishment" under the Eighth Amendment. This is because, like most individuals in ICE detention, none of these women are serving criminal sentences.[30] In fact, the overwhelming majority of ICE detainees have never been convicted of a crime.[31] The Eighth Amendment prohibition of "cruel and unusual punishment" only applies to those being "punished" by the state, namely convicted prisoners. However, like pre-trial detainees, who are also not considered to be enduring "punishment" by the state, immigration detainees are to be afforded *at least* the same constitutional protections afforded to convicted prisoners.[32] The Fourteenth Amendment ensures that pre-trial and civil detainees in *state* detention facilities are afforded the same rights as criminally convicted prisoners. The Fifth Amendment ensures the same due process protections for pre-trial and civil detainees in *federal* detention. Therefore, as ICDC is a federal detention center, not a state jail, the Fifth Amendment Due Process Clause applies to the rights of ICE detainees in ICDC.

In order to establish that Dr. Amin's victims experienced "cruel and unusual punishment" sufficient to violate their Fifth Amendment rights, they must show that they experienced "unnecessary and wanton infliction of pain."[33] They can do this by proving that those in charge of their care displayed "deliberate indifference" to their "serious medical needs."[34] The "deliberate indifference" test has been consistently applied[35] by courts considering constitutional

30. Lunn v. Commonwealth, 78 N.E.3d 1143, 1149 (Mass. 2017) ("Significantly, the administrative proceedings brought by Federal immigration authorities to remove individuals from the country are civil proceedings, not criminal prosecutions."). Most ICE detainees are held subject to the Immigration and Nationality Act of 1952, which makes clear that their detention is only for the purpose of determining whether the individual detained "belong[s] to the excluded classes," or is removable, and that removal proceedings are not criminal proceedings. *See* 8 U.S.C. § 1226.

31. *Growth in ICE Detention Fueled by Immigrants with No Criminal Conviction*, TRAC IMMIGRATION (Nov. 26, 2019), https://trac.syr.edu/immigration/reports/583/.

32. Bell v. Wolfish, 441 U.S. 520, 545 (1979); Hare v. City of Corinth, 74 F.3d 633, 639 (5th Cir. 1996); City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

33. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

34. Estelle v. Gamble, 429 U.S. 97, 104–06 (1976).

35. Jolly v. Klein, 923 F. Supp. 931, 944 (S.D. Tex. 1996) (first citing Banuelos v. McFarland, 41 F.3d 232, 235 (5th Cir. 1995); then citing Mendoza v. Lynaugh, 989 F.2d 191, 193 (5th Cir. 1993); then

damages claims[36] from prisoners and pre-trial detainees alike, alleging lack of adequate medical treatment as violation of their Eighth, Fourteenth or Fifth Amendment rights respectively.[37] This note argues that on the alleged facts, LaSalle Corrections and its employees can be found to have demonstrated "deliberate indifference" to the detainees' "serious medical needs" when they failed to protect the detainees from Dr. Amin.[38]

2. The Constitutional Rights of Non-U.S. Citizens

The Fifth Amendment Due Process Clause applies to foreign nationals in ICE detention just as it would if they were U.S. citizens. Since the passage of the Alien and Sedition Acts of 1798, the prevailing narrative in U.S. constitutional theory has been to favor the extension of constitutional rights to resident non-citizens and foreign nationals on U.S. soil.[39] Scholars and the courts suggest that the Framers, in delineating only the right to vote and to run for political office to citizens, did not intend other rights under the Constitution to be limited to citizenry.[40] This is certainly the case for the Fifth Amendment, which has been held to apply "to all 'persons' within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent,"[41] with the Due Process Clause specifically declining to "acknowledge any distinction between citizens and resident aliens."[42] United States non-nationals have specifically invoked the Due Process Clause in cases similar to the one brought by detainees in *Oldaker v. Giles*.[43] In *Belbachir v. Co. of McHenry,* the Due Process Clause was held to ensure non-nationals "protection from harm caused by a defendant's deliberate indifference to the detainee's safety or health."[44]

B. THE BARRIERS TO SUCCESS

There are three major hurdles standing in the way of the alleged victims of ICDC mistreatment making an arguable claim for protection of their constitutional rights. The first is the Supreme Court's persistent annexing of

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citing Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991); then citing Jackson v. Cain, 864 F.2d 1235, 1246 (5th Cir. 1989); and then citing Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985)).

36. Such complaints might be brought under a *Bivens* claim or pursuant to 42 U.S.C. § 1983. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 406 (1971).

37. *See infra* Section V(C) for discussion of where Fifth Amendment rights might be invoked against lack of adequate medical care in detention.

38. *See infra* Section V(C).

39. *See generally* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367 (2003).

40. *Id.* at 370.

41. Zadvydas v. Davis, 533 U.S. 678, 697 (2001).

42. Kwong Hai Chew v. Colding, 344 U.S. 590, 598 (1953).

43. Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987) ("[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the Due Process Clauses of the Fifth and Fourteenth Amendments to be free of gross physical abuse at the hands of state or federal officials.").

44. Belbachir v. Co. of McHenry, 726 F.3d 975, 979 (7th Cir. 2013).

constitutional damages claims beyond the reach of federally incarcerated detainees in privately run institutions. The second is the difficulty of proving their case against LaSalle Corrections due to the constraints placed upon all constitutional tort claims for inadequate or negligent medical treatment of detainees. The final obstacle to the success of this case lies in the United States' long history of indifference to the unique harm of denial of reproductive autonomy, and the nation's equally rich legacy of eugenics practice—and judicial toleration thereof. Cumulatively, these erect a formidable challenge to the alleged victims' prospect of success.

1. The Denial of Constitutional Protection for Federal Detainees in Private Facilities

The women detained in ICDC are caught in a lacuna of legal protection. Because they are federal detainees in ICE custody, their constitutional tort claims must be placed under *Bivens*. However, *Bivens* claims are typically filed against the federal government. LaSalle Corrections is a private company contracted to run ICDC, not a body within the federal government. Establishing a *Bivens* claim for the alleged victims in *Oldaker v. Giles* would mean extending the application of *Bivens* to private entities exercising federal authority. Two Supreme Court cases, *Correctional Services Corp. v. Malesko*,[45] and *Minneci v. Pollard*,[46] suggest this will be very difficult because they place the enforcement of constitutional rights beyond the reach of detainees in privately run federal detention facilities.[47] Although the claims brought in these two cases pertain to the Eighth Amendment rights of individuals in federal detention, the rulings in these cases will still apply to the plaintiffs in *Oldaker v. Giles* due to the formulation of Fifth Amendment protection for non-criminal federal detainees.[48]

In *Malesko*, the plaintiff brought an action for the vindication of his rights to adequate treatment in federal custody under the Eighth Amendment,[49] against the Correctional Services Corporation, a private company that operated the halfway house in which he was placed for the latter part of his federal prison sentence.[50] When this case reached the Supreme Court, the question before the Justices became whether *Bivens* could be extended in this way from its original formulation—an

45. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001).

46. Minneci v. Pollard, 565 U.S. 118, 131 (2012).

47. My analysis of these cases is limited by available space. For a more detailed account of *Malesko* and *Minneci,* and how these cases impact detainees in privately run federal institutions, with an account of the rapidly expanding for-profit criminal and civil detention market in the United States, *see* Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 INDIANA L.J. 145 (2020).

48. *See supra* Section IV.A.1.

49. *See* discussion *supra* Section IV.A.1 regarding the Fifth Amendment requirement that immigration detainees are to be afforded at least the same constitutional protections afforded to convicted prisoners via the Eighth Amendment.

50. *Malesko*, 534 U.S. at 63–64.

action exclusively brought against federal officers.[51] The Supreme Court refused to allow *Bivens* claims to extend to allow for recovery against a private corporation with whom the federal agency contracts, for two reasons.[52] First, they considered Mr. Malesko to have adequate alternative remedies that he might pursue at the state level, rather than pursuing a constitutional tort suit at the federal level.[53] Second, the Supreme Court considered that such an extension of *Bivens* could not be justified under its "core purpose of deterring individual officers from engaging in unconstitutional wrongdoing."[54] The Court reasoned that plaintiffs would be incentivized under such an extension of *Bivens* to sue the private company operating the institution in which they had been placed, rather than the individual officers responsible for the violation of their constitutional rights.[55] This would mean that "the deterrent effects of the *Bivens* remedy would be lost."[56]

In *Minneci*, the Court directly considered the question of whether to allow a *Bivens* action against employees of a privately run federal prison.[57] Deciding in the negative, once again the Court placed Eighth Amendment protection beyond the reach of federal detainees in privately run facilities.[58] The Court's reasoning centered on the availability of state tort remedies,[59] congruent with *Malesko*. If the plaintiff had been placed in a federal prison, he could have brought an action against the prison officers in whose charge he was injured.[60] Not so, following *Minneci*, in a privately run facility.

These cases *appear* to cumulatively preclude the detainee victims of Dr. Amin's treatment from bringing actions for constitutional damages under *Bivens* against either LaSalle Corrections or their employees, for failing in their capacity as management of the ICDC federal detention facility to prevent this harm. However, it will be argued below that the distinction established in *Malesko* and *Minneci* between detainees held in federal versus privately run facilities is spurious, and that the Court presented with *Oldaker v. Giles* ought to take this opportunity to extinguish it altogether.

2. Detainees May Not be Protected From Inadequate Medical Treatment

Even if the women treated by Dr. Amin in Irwin County Detention Center were permitted to bring a case under *Bivens* against LaSalle Corrections, they

51. *Id.* at 66.
52. *Id.*
53. *See id.* at 72.
54. *Id.* at 74.
55. *Id.* at 69. By taking this route as a matter of strategic litigation, plaintiffs could avoid confronting the qualified immunity which federal officials may use as a defense.
56. *Id.*
57. Minneci v. Pollard, 565 U.S. 118, 120 (2012).
58. *See id.* at 131.
59. *Id.* at 130.
60. *See* Carlson v. Green, 446 U.S. 14, 25 (1980).

face a legacy of judicial indifference to the suffering of detainees at the hands of medical professionals.[61]

Jolly v. Klein is an illustrative example of the way courts have allowed medical professionals significant discretion in the treatment of their patients when assessing whether they inflicted "cruel and unusual punishment," and highlights several of the barriers facing the plaintiffs in *Oldaker v. Giles* in claiming a violation of their Fifth Amendment rights as proposed above. *Jolly v. Klein* also demonstrates how these issues can interact with reproductive health matters, given the factual matrix of the case, and serves to highlight how the reproductive and sexual health rights of detainees as a vulnerable group can easily be violated by negligent medical treatment. *Jolly v. Klein* will therefore frame the argument made in this section, as persuasive precedent for the District Court of Georgia in *Oldaker v. Giles*, alongside other similar cases which will also be discussed.

Mr. Jolly sued the medical doctor employed at Harris County Jail, Dr. Klein, where Mr. Jolly had been detained pre-trial, and for a period post-conviction, for drug charges.[62] From August 1991, until he was transferred to a different facility in February 1993, Mr. Jolly suffered from urinary problems, genital pain and discharge, and observed changes in the appearance of his genitals.[63] Mr. Jolly only saw Dr. Klein once within that time period, despite numerous attempts to book appointments for medical evaluation.[64] Mr. Jolly filed multiple grievances against Dr. Klein and eventually obtained a court order that he was to receive medical attention.[65] When he was eventually seen and subjected to blood tests by Dr. Klein, Mr. Jolly did not receive a follow-up appointment or test results.[66] Mr. Jolly saw a doctor upon his transfer to a different facility in February 1993, whereupon he was immediately diagnosed with chlamydia.[67] Even with successful treatment, the doctors informed Mr. Jolly that he would continue to suffer from permanent urinary and testicular problems, and that he would be infertile as a result of his lack of timely treatment.[68]

Mr. Jolly sued Dr. Klein under 42 U.S.C. § 1983[69] for violation of his Eighth Amendment right not to be subjected to "cruel and unusual punishment."[70] This

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61. *See* Farmer v. Brennan, 511 U.S. 825, 837, 839–40 (1994); Burnette v. Taylor, 533 F.3d 1325 (11th Cir. 2008); Moon v. Riviere, No. CV 119-217, 2021 WL 3700714 (S.D. Ga. Aug. 19, 2021); Truschke v. Chaney, No. 5:17-cv-93, 2018 WL 814579 (S.D. Ga. Feb. 9, 2018); Baker v. Pavlakovic, No. 4:12-cv-03958, 2015 WL 4756295 (N.D. Ala. Aug. 11, 2015); Jolly v. Klein, 923 F. Supp. 931 (S.D. Tex. 1996).

62. *Jolly*, 923 F. Supp. at 939, 943.

63. *Id.* at 940.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 940–41.

69. Claims under Section 1983 allow individuals to sue state government employees and others acting "under the color of state law" for the vindication of the plaintiff's constitutional rights. *See, e.g.*, *id.* at 943. Section 1983 is, as such, the equivalent to a *Bivens* claim against state, rather than federal, employees—it is analogous.

70. *See Jolly*, 923 F. Supp. at 941.

is be the standard to which LaSalle Corrections should be held, under the parity required by the Fifth Amendment between the treatment of convicted prisoners and pre-trial and civil detainees. The damage Mr. Jolly suffered was the "humiliation, embarrassment, frustration, excruciating pain, and mental anguish" caused by Dr. Klein's failure to promptly or properly treat his condition.[71] The court rightly recognized that the correct basis for Mr. Jolly's claim was in fact the due process guarantees of the Fourteenth Amendment because he was a pre-trial detainee while under Dr. Klein's medical authority.[72] The court held that Mr. Jolly was able to state a sufficient claim under § 1983 for Dr. Klein's refusal to see or treat Mr. Jolly until August 1992. This refusal amounted to "deliberate indifference" to Mr. Jolly's "serious medical needs."[73]

At first glance, this case seems persuasive in support of the claim which this note advances against Dr. Amin and LaSalle Corrections. However, in reality the court's reasoning reveals three problems for the plaintiffs in *Oldaker v. Giles*. These problems are entrenched across U.S jurisprudence on the medical treatment of detainees: a deference to the expertise of doctors which threatens to remove any safeguarding of detainees against negligence, abuse and mistreatment; an extremely high threshold for the "deliberate indifference" standard of fault; and the difficulty of proving "infliction of pain" in relation to non-consensual medical treatment. Each of these barriers to the success of the plaintiffs in *Oldaker v. Giles* will be discussed in detail in this section, before confronting and overcoming each to show that the vindication of their Fifth Amendment rights is indeed possible.

a. The "Medical Discretion" Argument. The first barrier to the plaintiffs' success can be described as the "medical discretion" argument—the argument that actions taken within the discretion of medical professionals will rarely amount to violations of their patients' constitutional rights. The defense in *Jolly* used this argument to limit Dr. Klein's liability for refusing to treat Mr. Jolly before August 1992.[74] Dr. Klein's failure to schedule a follow-up appointment, failure to deliver blood test results, and failure to diagnose or administer any treatment for Mr. Jolly's chlamydia was not considered conduct for which he could be held liable under § 1983 (although he could be held so liable for negligence).[75] This is because at the point of his examination of Mr. Jolly and beyond, Dr. Klein was exercising his medical discretion as to how he treated Mr. Jolly.[76] The decision of a prison doctor not to take further action after an examination, or prescribe further treatment, was established in *Estelle v. Gamble* as falling below the threshold of

71. *See id.*
72. *Id.* at 944.
73. *Id.* at 945.
74. *Id.* at 950.
75. *Id.*
76. *Id.* at 949.

"cruel and unusual punishment" under the Eighth Amendment.[77] The court in *Jolly v. Klein* held that at most, subsequent failure to treat can only amount to medical negligence, and "medical malpractice does not become a constitutional violation merely because the victim is a prisoner."[78] Therefore, even negligent treatment may not give rise to a constitutional violation as long as the treatment may be described as the exercise of medical judgment.

The "medical discretion" argument can stretch further to encompass actions taken by federal officers or employees acting according to the advice or treatment plan of a medical professional. This argument will no doubt be offered by LaSalle Corrections to deny the claim of Dr. Amin's alleged victims. LaSalle will likely argue that deference shown by their employees to medical treatment decisions taken by Dr. Amin was appropriate given his expertise as a doctor. Under this argument, LaSalle Corrections' failure to question or oppose his sustained practice of unnecessary and/or non-consensual sterilizations, hysterectomies, and other gynecological surgeries cannot constitute "deliberate indifference" to the medical needs of the detainees treated by Dr. Amin.

This argument has been upheld by the U.S. District Court for the Southern District of Georgia in *Moon v. Reviere*.[79] In this case, a "deliberate indifference" claim was brought on behalf of a detainee who had died in jail, seemingly as a result of acute alcohol withdrawal.[80] The claim was denied by the court outright due to the fact that the sheriff defendants, in disregarding the seriousness of the detainee's alcohol withdrawal, were following a treatment plan which had been ordered by the jail's medical doctor.[81] The District Court in *Moon* relied on a previous Southern District of Georgia case which endorsed the position of the District Court for the Northern District of Alabama;[82] that a "deliberate indifference" claim in regard to medical treatment will "not lie against non-medical personnel unless they were personally involved in the denial of treatment or deliberately interfered with prison doctors' treatment. Prison officials are entitled to rely upon the opinions, judgment and expertise of a prison medical staff."[83]

b. The Standard of Fault. A second legal barrier confronting the plaintiffs in *Oldaker v. Giles* is the standard of fault which applies in Fifth Amendment *Bivens* claims involving allegations of inadequate medical treatment. Again taking *Jolly v. Klein* as persuasive precedent, it was suggested in that case that prison officials could only display "deliberate indifference" to the medical needs of

77. 429 U.S. 97, 105–06 (1976).

78. *Jolly*, 923 F. Supp. at 945 (quoting *Gamble*, 429 U.S. at 106).

79. Moon v. Reviere, No. CV 119-217, 2021 WL 3700714, at *16 (S.D. Ga. Aug. 19, 2021).

80. *Id.* at *4.

81. *Id.* at *10.

82. Truschke v. Chaney, No. 5:17-CV-93, 2018 WL 814579, at *5 (S.D. Ga. Feb. 9, 2018) (quoting Baker v. Pavlakovic, No. 4:12–CV–03958–RDP–JEO, 2015 WL 4756295, at *7 (N.D. Ala. Aug. 11, 2015)).

83. *Id.*

patients by "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."[84] The court also cited a Fifth Circuit case which named "official dereliction" as part of the standard, implying that a refusal to act is important to the analysis.[85] In *Farmer v. Brennan,* a case concerning the decision to house a transgender detainee within the general population of an all-male prison despite the high risk of violence against that individual, the Supreme Court explicitly adopted the recklessness standard used in criminal cases.[86] This standard considers whether an individual (e.g. a prison guard) *consciously disregards* a substantial risk of serious harm towards the detainee.[87] Such a standard may not be satisfied by the plaintiffs in *Oldaker v. Giles*, as they were never *denied* medical care, but rather exposed to negligent, dangerous, and harmful medical treatment.[88] Further, the defendants could argue that they were not sufficiently aware of the risk of serious harm to the detainees in their care created by Dr. Amin. It was held by the U.S. Court of Appeals for the Eleventh Circuit in *Burnette v. Taylor* that "imputed or collective knowledge cannot serve as the basis of deliberate indifference" against an individual.[89] It appears that the test binding on the District Court for the Middle District of Georgia is therefore a subjective one—what did the individual officer, employee or decisionmaker know when making a decision as to the medical care of the detainee?[90]

c. No Pain, No Claim. Finally, an issue for the alleged victims of ICDC lies in the formulation of harm employed by courts considering the Eighth Amendment's prohibition of "cruel and unusual punishment." As stated above, the threshold to be met for "cruel and unusual punishment" is the "unnecessary and wanton infliction of pain" upon the detainee.[91] This is the standard imported into cases brought by pre-trial and civil detainees under the Fourteenth or Fifth[92] Amendments. It is possible that defendants in the *Oldaker v. Giles* case might argue that the detainees have not suffered pain due to the treatment of Dr. Amin. It is true that these women have undergone surgery, but with anesthetics and pain relief medication post-surgery, the physical pain and suffering caused to them by these procedures may have been minimal, and therefore ICE may argue that Dr.

84. Jolly v. Klein, 923 F. Supp. 931, 944 (S.D. Tex. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 104–05 (1976)).

85. *Id.*; *see also* Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985) (citing Woodall v. Foti, 648 F.2d 268 (5th Cir. 1981)).

86. Farmer v. Brennan, 511 U.S. 825, 837, 839–40 (1994).

87. *Id.*

88. *Project South Complaint*, *supra* note 5.

89. Burnette v. Taylor, 533 F.3d 1325, 1331 (11th Cir. 2008); Moon v. Riviere, No. CV 119-217, 2021 WL 3700714, at *11 (S.D. Ga. Aug. 19, 2021).

90. *Burnette*, 533 F.3d at 1331.

91. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

92. *See infra* Section V(C) for discussion of where Fifth Amendment rights might be invoked against lack of adequate medical care in detention.

Amin did not inflict pain on the alleged victims to the extent necessary to constitute "cruel and unusual punishment." This is especially the case for those victims of Dr. Amin who may not have been fully aware of the procedure to which they were subject, thus minimizing their emotional comprehension of the event at the time it occurred.[93]

3. Historic Indifference to Reproductive Autonomy and Belief in Eugenics

Another barrier to the prospective *Bivens* claim is the United States' long history of indifference to, acceptance of, and even support for the institutional compulsory sterilization of women, especially women of color.[94] These practices, conducted for the purpose of eugenics,[95] were first given statutory authority in Indiana in 1907, with a law proscribing involuntary sterilization of "confirmed criminals, idiots, imbeciles and rapists."[96] That Act was overturned in 1921 for lack of due process,[97] but not before more than thirty states followed Indiana's lead and enacted similar legislation.[98] Endorsement of eugenics was voiced by the courts also. In the now-infamous *Buck v. Bell* decision, Justice Holmes compared compulsory sterilization to vaccination, a necessary sacrifice made by some individuals for the sake of the health of the state as a whole:[99]

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.[100]

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93. Of course, the victims of Dr. Amin may later in time, with access to the full facts of what happened to them, come to a greater emotional comprehension of the event. The victims who brought the claim in *Oldaker v. Giles* are now examples of this latent emotional pain as they have been forced to recount their experiences in a legal setting.

94. Miranda Bryant, *Allegations of Unwanted ICE Hysterectomies Recall Grim Time in US History*, THE GUARDIAN (Sept. 21, 2020), https://www.theguardian.com/us-news/2020/sep/21/unwanted-hysterectomy-allegations-ice-georgia-immigration; *see also* ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA (2005).

95. *See generally* University of Virginia, *Origins of Eugenics: From Sir Francis Galton to Virginia's Racial Integrity Act of 1924*, http://exhibits.hsl.virginia.edu/eugenics/2-origins/ (last visited Sept. 26, 2021).

96. *Indiana Eugenics History and Legacy: Project Overview*, https://eugenics.iupui.edu (last visited Oct. 23, 2021).

97. Williams v. Smith, 131 N.E. 2, 2 (Ind. 1921).

98. PAUL LOMBARDO, A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIMENT TO THE HUMAN GENOME ERA 9 (2011).

99. Buck v. Bell, 274 U.S. 200, 207 (1927).

100. *Id.*

The U.S. Supreme Court has never overturned *Buck v. Bell*. Legislation permitting forced sterilization for eugenics remained in force throughout the U.S. until the 1970s,[101] as did the practice itself. In 1978, ten Chicana women brought a class-action lawsuit claiming they were forcibly sterilized for eugenics purposes in Los Angeles County Hospital at the hands of Dr. James Quilligan and others.[102] The circumstances of their sterilization, through surgery with lack of informed consent including confusion caused by language barriers, are remarkably similar to the treatment inflicted upon ICDC detainees by Dr. Amin.[103] The plaintiffs in *Madrigal v. Quilligan* sought to enforce their rights to reproductive autonomy and parental right to procreate under *Roe v. Wade* and *Griswold v. Connecticut*.[104] These rights were newly constituted in U.S. law, yet the District Court of California refused to recognize the harm caused to these women, ruling in favor of their doctors.[105] In keeping with the "medical discretion" argument identified above in *Jolly v. Klein*, the court ruled that the doctors had taken decisions for treatment in their patients' best interests, and so could not be said to have violated their constitutional rights.[106] Furthermore, Justice Curtis suggested that medically unnecessary sterilizations were not objectionable if carried out to solve "a perceived overpopulation problem."[107]

If the actions of Dr. Amin were carried out for the same reasoning as that which is illustrated in the excerpt above from *Buck v. Bell*, it could be argued that his actions were legally justified. Such an argument would be abhorrent, but there is little doubt that this reasoning has been accepted by U.S. courts for decades. Even if the court does not use this reasoning explicitly, *Buck v. Bell* may influence a judge's perspective on the case. The plaintiffs in *Oldaker v. Giles* face formidable obstacles in bringing the proposed *Bivens* claim, including facing the legacy of indifference to the reproductive autonomy of minority groups in U.S. law. In the next section, each obstacle will be confronted, and arguments made for how they might be overcome.

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101. LOMBARDO, *supra* note 98.

102. Madrigal v. Quilligan, No. CV-75-2057-EC (C.D. Cal. June 7, 1978), *aff'd*, 639 F.2d 789 (9th Cir. 1981).

103. The decision in *Madrigal v. Quilligan* was unpublished, but an account of the facts can be found in a law review article that discusses the case. *See* Antonia Hernandez, *Chicanas and the Issue of Involuntary Sterilization: Reforms Needed to Protect Informed Consent*, 3 CHICANA/O LATINA/O L. REV. 1, 9 (1976).

104. Hernandez, *supra* note 103, at 4–5.

105. *Madrigal*, No. CV-75-2057-EC. *See also 1978: Madrigal v. Quilligan*, LIBR. OF CONG., https://guides.loc.gov/latinx-civil-rights/madrigal-v-quilligan (last visited Nov. 30, 2021) ("The California federal court under Judge Jesse W. Curtis ruled in favor of the county medical center.").

106. *See* Kelly Sweeney, *Race and Reproductive Rights: Eugenics Practices throughout 20th Century American History*, 9 SUSQUEHANNA UNIV. POL. REV. 76, 90–91 (2018).

107. *Id.*

V. SUCCESS IS POSSIBLE

This note has offered an account of the reproductive violence committed against immigrant detainees at Irwin County Detention Center, and argued that these alleged victims should bring a claim for the violation of their Fifth Amendment due process rights. Several major barriers to the success of such a claim have also been elucidated: (1) the Supreme Court's repeated refusal to extend *Bivens* to offer protection for the constitutional rights of the hundreds of thousands of civil and pre-trial detainees in privately run federal detention; (2) the "medical discretion" trend and high standard of proof in Fifth Amendment claims involving medical treatment in detention settings; and (3) the legal legacy of the American eugenics project. This section argues that each of those barriers can be overcome in favor of protecting the due process rights of the plaintiffs.

A. THE BIVENS ISSUE

The Supreme Court's reluctance to extend Bivens to claims against private companies has scarce normative justification. The distinction between federal detainees proper, and federal detainees in privately run facilities, is not one of any substance. It is a distinction made to artificially constrain the growing availability of constitutional tort remedies against actions by public officials. In doing this, the Court is judicially legislating civil wrongs which were not created by Congress nor intended to be enforced by statute.[108] The foundations of the Court's reasoning in *Malesko* and *Minneci* reveal its insecurity about this expanding method by which constitutional rights may be vindicated, and although such insecurity may be well-founded, the correct response is not to prevent one group of detainees the enforcement of their rights afforded to others by a mere quirk of fate.[109]

Any distinction between standards of accountability for government agencies running detention facilities, and private companies doing the same, is not easily justified. LaSalle Corrections is fulfilling ICE's role in managing ICDC. It is fulfilling a public function and is contracted to act in lieu of a public agency, exercising federal authority. It is unacceptable that LaSalle Corrections and other private companies should be held to radically lower standards of oversight and constitutional accountability than the government agencies from which they derive their authority, all while profiting from the incarceration of often innocent individuals.[110]

The Court's reasoning in *Malesko* and *Minneci* focused on the availability of state remedies to justify the distinction made between the plaintiff's case and that of federal detainees in government-run prisons. This aligns with the fact pattern of the original *Bivens* plaintiff, who, by allowing federal officers into his home,

108. *See* Michael L. Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHICAGO-KENT L. REV. 617, 638–39 (1997).

109. *See* Jefferis, *supra* note 47.

110. *Id.*

forfeited his right to state level actions in trespass.[111] However, it is important to note that *Bivens* actions are of wider application; they are not just brought by individuals devoid of tort actions at state level. A *Bivens* action is available to *all* individuals deprived of their constitutional rights by federal officers. Therefore for the Court in *Malesko* and *Minneci* to use the specific facts of *Bivens* to hold this remedy out of the reach of those in privately run detention on these grounds is specious.

It is not in the control of the detained individual whether they are placed in government-run or privately run detention facilities. It is not determined by character, wrongdoing, or any other measure by which one might wish to punish a detainee by the effective removal of their constitutional rights. In fact, nearly 75% of immigration detainees in the U.S. are currently placed in for-profit facilities.[112] Creating an "incongruous and confusing"[113] postcode-lottery wherein an individual's constitutional protection depends upon whether they were lucky enough to land in a government-run detention facility is a cruelty of the Court's own making, and antithetical both to the Framers' intentions, and to the design and evolution of the Constitution itself. The Supreme Court in *Bivens* responded to a clear and pressing need for vindication and enforcement of an individual's constitutional rights against federal authority. Such a need still exists in the case of federal detainees in privately run facilities. The Court acknowledged in *Bivens*, as it has in many other opinions,[114] that "some tort-like harms committed by officials warrant a constitutional damages remedy."[115] The court in *Oldaker v. Giles* should not be afraid to do so again in this case, to remove the fictional distinction created in *Malesko* and *Minneci* and protect all federal detainees against violations of their constitutional rights.

B. THE "MEDICAL DISCRETION" ARGUMENT

As described above, the defendants in *Oldaker v. Giles* might seek to rely on an argument similar to the "medical discretion" deference position taken by courts in cases such as *Jolly v. Klein, Moon v. Riviere*, and *Madrigal v. Quilligan*. They may argue that the deference of LaSalle Corrections employees to medical treatment decisions taken by Dr. Amin is appropriate, given that those decisions are taken under his discretion as a doctor. This deference, correctly adopted, negates any defendant liability for "deliberate indifference" to the medical needs of their detainees treated by Dr. Amin.

Deference to the decision-making capacity of public officials and professionals while carrying out their jobs is a well-established feature of U.S. constitutional

111. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971).

112. 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/ (last visited Oct. 24, 2021).

113. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting).

114. *See* Wells, *supra* note 108, at 630 n.75.

115. *Id.* at 641.

law, particularly in civil claims involving breach of constitutional rights.[116] The justification for this deference is twofold: firstly, the desire not to impede the decision-making capacity or efficacy of those actors by imposing unnecessary threat of liability for their actions; and secondly, genuine deference to their superior expertise.[117] Harm to the subjects, resulting from medical professional's decision-making, is considered a necessary risk to ensure these officials are free to exercise their authority with speed and confidence.

Deference to the medical decisions of doctors is not misplaced. However, deference need not extend to the decision of LaSalle Corrections employees in this case, allowing them to ignore the extreme levels of negligence to which the detainees in their care were being exposed at the hands of Dr. Amin. It does not place undue restraint on the decision-making capacity of immigration detention centers to require them to ensure adequate standards of care for the detainees in their custody. This case does not concern Dr. Amin's negligence. Instead, it is about the choice made by LaSalle Corrections to continue to expose the plaintiff detainees to his negligence when it was no longer reasonable for them to ignore the risks. This decision does not deserve deference. There must have been a point at which Dr. Amin's practices were so obviously harmful that his "expertise" as a doctor should have been overlooked in favour of acting to prevent serious harm to the detainees over which ICDC and LaSalle held a duty of care—Ms. Wooten's whistleblower account suggests that the risks were obvious to all involved in any capacity with the health and care of detainees in ICDC.[118]

Moreover, there is every possibility that the pattern of unnecessary hysterectomies described in Ms. Wooten's complaint may not have reflected the exercise of medical judgment at all. At the very least, it seems plausible that they reflected a desire on Dr. Amin's part to practice eugenics, not medicine. If this were accepted, LaSalle Corrections would not be able to rely upon the medical deference defense.[119]

C. THE STANDARD OF FAULT

The next barrier to the detainee plaintiffs' success is the "deliberate indifference" standard of proof. However, if after discovery of evidence, there is sufficient evidence to suggest that LaSalle Corrections, or individual employee officers at ICDC, knew about the practices of Dr. Amin and the harm caused to the detainees in their care by his administration of unnecessary, non-consensual gynecological surgeries, then the "deliberate indifference" standard can be met. As explained above, the claimants will not be able to rely on a presumption or

116. *See* the doctrine of qualified immunity for law-enforcement and other public officials.

117. *See* Harlow v. Fitzgerald, 457 U.S. 800, 802–20 (1982) (explaining the doctrine of qualified immunity as having the purpose of "avoid[ing] excessive disruption of government and permit[ting] the resolution of many insubstantial claims on summary judgment.").

118. *Project South Complaint*, *supra* note 5.

119. At that point however, *Buck v. Bell* will pose an obstacle to relief, as noted above and explored further below.

imputation of such knowledge on behalf of the defendants.[120] However, given the mass scale of procedures carried out by Dr. Amin, and the clear and evident lack of understanding from the alleged victims about the procedures they were subject to,[121] it appears that there should be enough evidence to show that ICDC and LaSalle employees knew of Dr. Amin's negligence and chose to continue sending detainee women into his surgery. Their failure to act to prevent negligent or deliberately harmful medical treatment is as much an "official dereliction" of their duties as a failure to ensure access to medical treatment (as the standard is traditionally conceived) would be. In fact, it was a positive act on behalf of the defendants to continue sending women into the treatment of Dr. Amin, rather than an omission to provide care—which arguably makes this decision even more "deliberate," even more a "dereliction" of the defendants' duties to provide for the health of the detainees in their care.

If in the alternative, after discovery there is not sufficient evidence to suggest that LaSalle or their employees knew about the practices of Dr. Amin and the harm caused by him to the detainees in their care, the plaintiffs are left in a rather different position. The "deliberate indifference" standard requires knowledge on the behalf of the defendant and without evidence of that knowledge is unlikely to be satisfied.

In either of the above scenarios, the plaintiffs should argue that the court should change the standard of fault required for a Fifth Amendment violation based on a failure to provide adequate medical care to detainees. Instead of importing the "deliberate indifference" standard from Eighth Amendment jurisprudence, the court should adopt a lower standard of fault. This standard would not require the plaintiff to prove knowledge or intent on the behalf of ICDC. Instead, it would require that the officials in charge of the conditions of detention had failed to take reasonable care or steps to ensure that the medical treatment to which the detainees were subject was adequate. This standard would not require the officials to gain or presume specialist medical knowledge or contradict the decisions of doctors as a rule. This standard may, however, require detention center officials to follow-up with detainees undergoing medical treatment to ensure the detainees are adequately informed about what their treatment entails, and are aware of their rights as a patient. Where the detainee is particularly vulnerable, due to a medical condition or external factor such as a language barrier, the duty of care held by the officials may increase, and with it their obligations to ensure adequate treatment. Certainly, if ICDC had made any inquiries whatsoever to their detainee population, or contracted nurses like Ms. Wooten, they would have discovered the horrifying scale of Dr. Amin's negligence and taken steps to remove detainees from his treatment. A higher standard of care would mean that

120. Burnette v. Taylor, 533 F.3d 1325, 1331 (11th Cir. 2008); Moon v. Reviere, No. CV 119-217, 2021 WL 3700714 (S.D. Ga. Aug. 19, 2021).

121. *Project South Complaint*, *supra* note 5, at 18–20; Toboni et al., *supra* note 24.

their failure to do so would properly be understood as violating the Fifth Amendment rights of detainees.

This proposal to lower the standard of proof is not without basis.[122] In *Kingsley v. Hendrickson*, the Supreme Court applied a standard of fault lower than "deliberate indifference" where a pre-trial criminal detainee alleged that jail officers had used excessive force in moving him between cells, including "slamm[ing] his head into the concrete bunk."[123] The Supreme Court, relying upon his Fourteenth Amendment due process rights, decided in the defendant's favor.[124] The Court decided that an objective standard of proof should apply to pre-trial detainees alleging excessive force.[125] The objective standard could be satisfied through a bipartite test: first, whether the official's actions were carried out with "a purposeful, knowing, or possibly reckless state of mind"; and, second, whether the force used was objectively excessive.[126]

The Supreme Court did not specify whether the objective standard of proof should apply to other claims brought by pre-trial detainees—for example, claims in respect of inadequate access to medical care. Since *Kingsley v. Hendrickson*, the question of which standard to apply in these cases has split the circuit courts.[127] Pre-trial detainees bringing inadequate medical care claims in the Eleventh, Eighth, Third or Sixth Circuits must still satisfy the subjective standard of proof, proving "deliberate indifference."[128] Conversely, the Second Circuit has chosen to extend the *Kingsley v. Hendrickson* objective standard to inadequate medical care claims brought by pre-trial detainees.[129] This development bodes well for the plaintiffs in *Oldaker v. Giles*. Still, as they are not pre-trial detainees, but detained within the immigration system, the question of whether the objective standard applies to them remains unanswered. The Second Circuit will have to confront this issue directly when considering their claim under the Fifth Amendment Due Process Clause. The District Court must choose whether to extend the *Kingsley v. Hendrickson* standard of proof not only to inadequate medical care claims within a pre-trial detention setting, but to those claims brought within an immigration detention setting.

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122. *See, e.g.*, Kingsley v. Hendrickson, 576 U.S. 389, 400 (2015).

123. *Id.* at 392.

124. *Id.* at 403–04.

125. *Id.* at 391, 396–97.

126. *Id.* at 395–97.

127. *See* Kate Lambroza, Note, *Pretrial Detainees and the Objective Standard After Kingsley v. Hendrickson*, 58 AM. CRIM. L. REV. 429 (2021), https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2021/04/58-2-Lambroza-Pretrial-Detainees-and-the-Objective-Standard.pdf. This division is also present in the circuit courts as to other claims by pre-trial detainees—in particular, regarding the living standards of detention facilities and officers' failure to protect detainees from harm. *See id.* at 442–45, 447–51.

128. *See id.* at 445; Dang *ex rel.* Dang v. Sheriff, Seminole Cnty., 871 F.3d 1272, 1279 n.2, 1280–83 (11th Cir. 2017); Ryan v. Armstrong, 850 F.3d 419, 425 n.3, 426 (8th Cir. 2017); Moore v. Luffey, 767 F. App'x 335, 340 n.2 (3d Cir. 2019); Powell v. Med. Dep't Cuyahoga Cnty. Corr. Ctr., No. 18-3783, 2019 WL 3960770, at *2 n.1 (6th Cir. Apr. 8, 2019).

129. *See* Bruno v. City of Schenectady, 727 F. App'x 717, 720 (2d Cir. 2018).

Commentators have explained the Court's basis for adjusting the relevant standard in *Kingsley v. Hendrickson* in the following manner:

> "[I]ndividuals awaiting trial are particularly vulnerable to government abuse and should not be forced to prove that their alleged abusers intended to harm them in order to claim their rights were violated."[130]

The argument provides an equally strong normative basis for the extension of the objective standard to claims brought by immigration detainees. It is inappropriate to base pre-trial detainee rights on adequate conditions of detention in the Eighth Amendment, because these detainees are *not being punished*. They have not been convicted of any criminal act, or if they have, they have served their sentence, and are not deserving of punishment. The purpose of their detention is not punitive, and the conditions of their detention will be considered unlawful if they are determined to be punitive.[131] Therefore it is correct that pre-trial detention centers should be held to a lower standard of fault for violations of constitutional rights, and subject to a higher standard of care to the detainees in their facilities—compared to that which exists between criminally convicted prisoners and the officials in charge of their detention. This is even more acutely the case for immigration detainees; as of March 2020, over sixty percent of individuals in ICE detention had no convictions, and the legal basis for their detention is purely under civil immigration law. These individuals have never been held under the criminal legal system and should not be subject to a standard of proof created to operate in criminal detention settings.[132]

If this argument for a lower standard of fault in cases involving pre-trial and civil detainees is accepted, the specific risk of denial of reproductive autonomy inherent in the procedure carried out by Dr. Amin would have required increased diligence on behalf of LaSalle Corrections to satisfy their duty of care towards the detainees in their facility. Their failure to conduct proper evaluations of the detainee's consent to that treatment, and their failure to recognize the alarming rates at which Dr. Amin was carrying out these procedures, would have rendered them liable for violating the Fifth Amendment rights of the plaintiffs in *Oldaker v. Giles*.

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130. Although never appearing in the judgment itself, this quotation is attributed to the court in Kingsley v. Hendrickson by multiple sources. *See* Marina Ilminska, *A U.S. Supreme Court Ruling Strengthens Rights of Pretrial Detainees*, OPEN SOC'Y (July 16, 2015), https://www.justiceinitiative.org/voices/us-supreme-court-ruling-strengthens-rights-pretrial-detainees; *see also United States*, THE LAW ON POLICE USE OF FORCE, https://www.policinglaw.info/country/united-states (Oct. 2021). Regardless of whether this statement came directly from the Justices or is simply an interpretation of the case, it remains a useful argument for the extension of the objective standard.

131. *See* Jones v. Blanas, 393 F.3d 918, 933–34 (9th Cir. 2004).

132. *Decline in ICE Detainees with Criminal Records Could Shape Agency's Response to COVID-19 Pandemic*, TRAC IMMIGR. (April 3, 2020), https://trac.syr.edu/immigration/reports/601/.

D. THE HARM OF PERMANENTLY DENYING REPRODUCTIVE AUTONOMY

Finally, whether the court accepts the above argument to adjust the standard of fault required to find a violation of ICDC detainees' Fifth Amendment rights in this case or not, the Court's evaluation of the plaintiffs' case in *Oldaker v. Giles* must include a recognition of the unique harm inflicted on the victims by denial of their long-term reproductive autonomy through sterilization. This harm was not recognized in *Jolly v. Klein*,[133] and, as detailed above, has not been recognized throughout the history of forced sterilization cases in the United States.

This note argues that the specific harm of denial of long-term reproductive autonomy is so grievous that it must be recognized as satisfying "unnecessary and wanton infliction of pain"[134] requirement imported into Fifth Amendment Due Process Clause claims from Eighth Amendment case law. Importantly for the plaintiffs in *Oldaker v. Giles*, the unique harm caused by denial of long-term reproductive autonomy attaches even if the victim suffers no physical pain or emotional suffering related to the surgery. It applies whether the plaintiff underwent the procedure unnecessarily with consent, or in any case where full, informed consent was not gained. Indeed, this harm should be recognized even where the plaintiff has no knowledge of the procedure having taken place or of its implications.

There are two justifications for the court's recognition of this specific harm in such a manner. Firstly, it would accord with growing international recognition of the affront to basic human dignity posed by the denial of long-term reproductive choice to a person.[135] In numerous cases from the European Court of Human Rights, it has been held that forced sterilization can violate the subject's rights under Article Three of the European Convention on Human Rights to be protected from cruel, inhuman and degrading treatment at the hands of state actors.[136] This is the case even where physical pain is not suffered, or where the maladministered sterilization would have had to properly occur within a short period anyway.[137] The European Court of Human Rights lowered its usual threshold

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133. *See* Jolly v. Klein, 923 F. Supp. 931, 940–41 (S.D. Tex. 1996) (mentioning the plaintiff's permanent infertility only in the facts but not as part of the harm caused to him, which was limited to physical pain and emotional distress).

134. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

135. V.C. v. Slovk., App. No. 18968/07 (Aug. 2, 2012), http://hudoc.echr.coe.int/eng?i=001-107364; N.B. v. Slovk., App. No. 29518/10 (Dec. 9, 2012), http://hudoc.echr.coe.int/eng?i=001-111427; I.G. and Others v. Slovk., App. No. 15966/04 (Apr. 29, 2013), http://hudoc.echr.coe.int/eng?i=001-114514.

136. V.C. v. Slovk., App. No. 18968/07, ¶ 120 (Aug. 2, 2012), http://hudoc.echr.coe.int/eng?i=001-107364; N.B. v. Slovk., App. No. 29518/10, ¶ 81 (Dec. 9, 2012), http://hudoc.echr.coe.int/eng?i=001-111427; I.G. and Others v. Slovk., App. No. 15966/04, ¶ 124 (Apr. 29, 2013), http://hudoc.echr.coe.int/eng?i=001-114514.

137. *See* I.G. and Others v. Slovk., App. No. 15966/04, ¶¶ 120–24 (Apr. 29, 2013), http://hudoc.echr.coe.int/eng?i=001-114514. The three applicants in this case were sterilised, without consent, during Caesarean section procedures. *Id.* at ¶¶ 9, 18, 23. The first applicant in *IG* was unaware of the sterilisation procedure having taken place. *Id.* at ¶ 14. A few days after, she underwent a hysterectomy required due to post-surgery complications following the Caesarean section. *Id.* at ¶ 13. When the applicant sought to bring a civil claim in the domestic courts, it was dismissed due to the lack of a causal

level of pain and suffering required for a finding of violation of Article 3 ECHR. This aligns with a broader trend in the Court's jurisprudence towards recognition of harm "concerned with what the meaning of [inhuman or degrading treatment] expresses in regards to the value of the human person."[138] By lowering the threshold of suffering that was satisfied to find a violation of Article 3 ECHR, the Court has recognised denial of reproductive autonomy through non-consensual sterilization as a harm which is "grossly disrespectful of [the victim's] human dignity."[139]

Secondly, if *Oldaker v. Giles* reaches the U.S. Supreme Court, the Court is presented with an opportunity to overrule *Buck v. Bell*. The Court should take that opportunity to make amends for the legacy of injustice and anguish caused by U.S. courts' failure to prevent the forced sterilization of minority women. When denial of reproductive autonomy is recognized as its own distinct harm, forced sterilization regimes can be confronted as uniquely horrifying expressions of dehumanization. Courts must build up their arsenal of precedent against oppressive regimes now, erasing the support for eugenics which is found in *Buck v. Bell* and *Madrigal v. Quilligan* for fear that those existing cases may be called upon in the future by those who would reinstate "better breeding" on U.S. soil.

VI. CONCLUSION

This note aimed to draw attention to the legal situation faced by the alleged victims of unnecessary and non-consensual gynecological surgery while in detention at Irwin County Detention Center. As explored by this note, the plaintiffs in *Oldaker v. Giles* face serious, but not insurmountable barriers to the vindication of their Fifth Amendment Due Process Rights. The argument for their success proposed by this note is an ambitious one, but if accepted, the suggested adjustment of the standard of fault required in cases involving allegations of Fifth Amendment rights violations by civil and pre-trial detainees would make a significant difference to the experiences of individuals held in privately run detention facilities such as ICDC. Further, the dignitary value of extending *Bivens* and affording protection to the constitutional rights of *all* federal detainees is enormous. Finally, judicial recognition of the unique and egregious harm caused by denial of reproductive autonomy could have a major impact in removing the legacy of precedent condoning eugenics in U.S. courts, creating legal protections for generations of women to come.

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link between the sterilisation and justiciable damage. *Id.* at 52. "In their view, during the short period between the sterilisation and the hysterectomy the first applicant had suffered no damage which required compensation under the relevant law." *Id.* at ¶ 120. However, the Court still found that the Article 3 rights of the applicant had been violated within this short period because she felt debased due to the violation of her bodily integrity, rather than the harm caused by permanent loss of reproductive capacity. *Id.* at ¶¶ 121–24.

138. Daniel Bedford, *Key Cases on Human Dignity Under Article 3 of the ECHR*, 2 EUR. HUM. RTS. L. REV. 185, 188 (2019).

139. N.B. v. Slovk., App. No. 29518/10, ¶ 77 (June 12, 2012), http://hudoc.echr.coe.int/eng?i=001-111427.