

# ENDING FORCED LABOR IN ICE DETENTION CENTERS: A NEW APPROACH

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## INTRODUCTION

Privately managed detention centers hold the majority of detained immigrants in Immigration and Customs Enforcement (“ICE”) custody.<sup>1</sup> Coerced detainee labor in these for-profit facilities is commonplace. The practice contributes significantly to the financial viability of CoreCivic and GEO Group, the two corporations which manage most ICE detention centers, but it violates the prohibition on forced labor contained in the 2000 Trafficking Victims Protection Act (“TVPA”).<sup>2</sup>

Despite a growing field of scholarship on “cimmigration” and proposals to abolish immigration detention,<sup>3</sup> few scholars have examined the centrality of forced labor to immigration detention.<sup>4</sup> Instead, most scholarly analyses of the TVPA have focused on its impact on labor trafficking,<sup>5</sup> sex trafficking,<sup>6</sup>

1. See *infra* Section I.C.

2. 18 U.S.C. § 1589 (2018).

3. Sean McElwee, *The Power of ‘Abolish ICE’*, N.Y. TIMES (Aug. 4, 2018), <https://www.nytimes.com/2018/08/04/opinion/sunday/abolish-ice-ocasio-cortez-democrats.html>; Antonio Iglesias, *Abolishing the Private Prison Industry’s Evolving Influence on Immigrant Oppression*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 293 (2019); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017); Allison Crennen-Dunlap, *Abolishing the Iceberg*, 96 DENV. L. REV. ONLINE 148 (2019); Robert Koulish, *Immigration Detention in the Risk Classification Assessment Era*, 16 CONN. PUB. INT. L.J. 1 (2017); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010).

4. But see Jacqueline Stevens, *One Dollar Per Day: A Note on Recent Forced Labor and Dollar-Per-Day Wages in Private Prisons Holding People Under Immigration Law*, 52 VAL. U. L. REV. 343 (2018).

5. Maria L. Ontiveros, “Liquidated Damages” in Guest Worker Contracts: Involuntary Servitude, Debt Peonage or Valid Contract Clause?, 19 NEV. L.J. 413 (2018); Karin Dryhurst, *Liability Up the Supply Chain: Corporate Accountability for Labor Trafficking*, 45 N.Y.U. J. INT’L L. & POL. 641 (2013).

6. Anna Belle Hoots, *Severing the Connection Between Sex Trafficking and U.S. Military Bases Overseas*, 88 FORDHAM L. REV. 733 (2019); Christian Lee González Rivera, *The Plight of “Unreasonable” Trafficking Victims: Replacing the Trafficking Victims Protection Act’s Reasonable Person Standard for Coercion with A Genuine Belief Standard*, 40 WOMEN’S RTS. L. REP. 272 (2019); Allison J. Luzwick, *Human Trafficking and Pornography: Using the Trafficking Victims Protection Act to Prosecute Trafficking for the Production of Internet Pornography*, 111 NW. U.L. REV. ONLINE 137 (2017); Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1247 (2011); April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J. L. & GENDER 231 (2007).

or on its extraterritorial application.<sup>7</sup> Because practitioners, rather than scholars, were the first to recognize that the TVPA's prohibition of forced labor applies to private detention centers, there has been little scholarly analysis of the application of the TVPA to forced labor within detention facilities.

This Article provides the first scholarly assessment of a wave of pending class action lawsuits challenging forced labor in privately managed ICE facilities under the TVPA. It concludes that such lawsuits are likely to succeed, given the facts known about conditions in for-profit immigrant detention facilities and the broad text and favorable legislative history of the TVPA. If the plaintiffs win a favorable jury verdict or a far-reaching settlement, the cases may cause fundamental changes to the current system of mass immigration detention.

Part I of this Article examines the rise of for-profit detention in the United States and shows that detaining immigrants is now a central business of for-profit detention corporations. Next, Part II describes the labor policies within ICE detention that plaintiffs in these lawsuits allege amount to forced labor and thus violate the TVPA. Part III turns to the TVPA itself and analyzes its text, legislative history, and applicability to class actions. Part IV argues that its text and legislative history demonstrate that the TVPA covers forced labor claims within for-profit immigrant detention facilities and that such claims, if successful, could transform the business of detaining immigrants. Finally, Part V argues that publicly available information, including that revealed through discovery in these lawsuits, makes it likely that plaintiffs will prevail at trial.

## I. THE RISE OF FOR-PROFIT DETENTION

Moneymaking has long been central to American incarceration, but the ways state and private actors have profited from incarceration has changed greatly over the past two centuries. This Part first explores the long history of profitable prisoner labor—both for private corporations and for the state. It then discusses the re-birth of private, for-profit prison management in the 1980s. Finally, it examines the central importance of detaining immigrants to for-profit prison corporations, the vast political influence of the industry, and activist resistance to the privatized detention boom, including the series of TVPA lawsuits.

### A. *Private Prisons Before the 1980s*

American prisons have long profited from prisoners' labor.<sup>8</sup> In the antebellum period, most prisoners in the North, and some in the South, worked for private interests within the prison walls to defray the cost of their

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7. Jonathan Brown, *The Modern Foreign Commerce Clause: U.S. v. Baston and Extraterritorial Sex Trafficking Statutes*, 87 UMKC L. REV. 191 (2018); Caroline A. Fish, *Extraterritorial Human Trafficking Prosecutions: Eliminating Zones of Impunity Within the Limits of International Law and Due Process*, 91 ST. JOHN'S L. REV. 529 (2017).

8. SHANE BAUER, AMERICAN PRISON: A REPORTER'S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT 58–61, 79 (2018).

imprisonment.<sup>9</sup> Historian Rebecca McLennan has demonstrated that “forced, hard, productive labor was of foundational importance to the penal order.”<sup>10</sup> Before the Civil War, most Southern states imprisoned few people and resisted constructing penitentiaries for their white populations. Enslaved people were rarely imprisoned.<sup>11</sup> When the enslaved population won freedom and equal citizenship, Southern states transformed their criminal punishment systems, moving from labor within penitentiary walls to a system where incarcerated people were farmed out to private corporations around the state.<sup>12</sup>

This shift occurred because the Civil War had bankrupted the states of the former Confederacy and destroyed many of their penitentiaries.<sup>13</sup> With hundreds of thousands of black people in each state now subject to criminal punishment, it was impossible to construct enough penitentiary space to house them, especially since police and sheriffs arrested them at much higher rates than whites.<sup>14</sup> As a result, and as a way to jumpstart economic development, most Southern states began to lease state convicts to the highest bidder.<sup>15</sup>

Black convict labor was important to southern industrial development after the Civil War. Leased convicts built railroads, mined coal, baked bricks, harvested turpentine, and consequently died in massive numbers.<sup>16</sup> Both the states that leased them and the corporations that employed them profited greatly. Tennessee Coal and Iron, one corporation of the many that made extensive use of convict labor, eventually became a subsidiary of the

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9. *Id.* at 58–61, 79.

10. REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE* 53 (2008).

11. EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19<sup>TH</sup> CENTURY AMERICAN SOUTH* 34–72 (1984).

12. *Id.* at 141–84.

13. *Id.* at 186–90.

14. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 199–201*, 208–09, 225, 244 (1988); NEIL R. McMILLEN, *DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 197–223* (1989); WILLIAM COHEN, *AT FREEDOM’S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL* 238–44 (1991); AYERS, *supra* note 11, at 180; TALITHA LEFLOURIA, *CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH* 11, 177 (2015) (explaining that although the “Black Codes” passed in the immediate aftermath of emancipation in many Southern states were openly discriminatory, they were quickly annulled by the federal law. Federal civil rights legislation and the Fourteenth Amendment forbade states from enforcing criminal laws that required different punishments for whites and blacks or that criminalized behavior for blacks but not whites. Despite this formally race-neutral system, the discretion given to both law enforcement officers and judges led to drastically higher arrest and incarceration rates for black compared to white Southerners. In practice, some laws, such as vagrancy laws, were enforced almost exclusively against black Southerners. At every level of the criminal justice system, black Southerners were drastically over-represented, at times amounting to more than 90% of those incarcerated at certain levels of the punishment system, such as county chain gangs.).

15. AYERS, *supra* note 11, at 185–222; MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928* (1996) (demonstrating that Georgia, Alabama, Arkansas, Mississippi, Louisiana, Tennessee, Texas, Florida, North Carolina, and South Carolina—but not Virginia—instituted convict leasing); ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* (1996); LEFLOURIA, *supra* note 14; BAUER, *supra* note 8, at 121–25.

16. BAUER, *supra* note 8, at 130.

industrial giant U.S. Steel.<sup>17</sup> In addition to convicts that states leased to industry, many towns, cities, and counties made agreements of varying legality to force those convicted of minor crimes to labor on roads, in sawmills, or for local plantation owners.<sup>18</sup>

Convicts who were leased to corporations such as Tennessee Coal and Iron were not held in traditional jails, but in work camps where they were usually chained day and night and monitored by armed guards, who were often other prisoners.<sup>19</sup> As tragedies in the convict camps proliferated in the last years of the nineteenth century and were widely reported on in newspapers, the convict leasing system began to face strong resistance from black Southerners, progressive reformers, and organized labor. As a result, the system was largely abolished by 1910.<sup>20</sup> Though the convicts no longer labored for private companies, they still worked, quite literally, as slaves of the state.<sup>21</sup>

In the early twentieth century, many Southern states set up a system that combined chain gangs and prison farms. On chain gangs, black prisoners worked to maintain and improve roads, which was of vital importance due to the spread of the automobile. On prison farms, other prisoners grew crops, usually cotton, to be sold for the state's profit.<sup>22</sup> The most famous of these prison farms, including Angola in Louisiana and Parchman in Mississippi, were built on the sites of former slave plantations and are still working prisons today.<sup>23</sup> Although chain gangs were largely phased out after the Second World War, several Southern states maintained the profitable prison farm system well into the 1970s.<sup>24</sup>

The legality of forced prison labor is secured by the Thirteenth Amendment, which contains an exception to its general prohibition against involuntary servitude when states employ it "as a punishment for crime whereof the party shall have been duly convicted."<sup>25</sup> By including that

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17. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 335 (2008).

18. DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* (1978); BLACKMON, *supra* note 17, at 117–54; LEFLOURIA, *supra* note 14, at 177–78.

19. AYERS, *supra* note 11, at 200–05; LICHTENSTEIN, *supra* note 15, at 126–51.

20. KAREN A. SHAPIRO, *A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COALFIELDS, 1871–1896* (1998); Matthew J. Mancini, *Race, Economics, and the Abandonment of Convict Leasing*, 63 J. NEGRO HIST. 339 (1978); Jane Zimmerman, *The Penal Reform Movement in the South during the Progressive Era*, 17 J. SOUTHERN HIST. 462 (1951); BAUER, *supra* note 8, at 169–73.

21. DENNIS CHILDS, *SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY* (2016); *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871); BAUER, *supra* note 8, at 196–99, 219–26.

22. DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996); LICHTENSTEIN, *supra* note 15; TAMMY INGRAM, *DIXIE HIGHWAY: ROADBUILDING AND THE MAKING OF THE MODERN SOUTH* 129–62 (2014).

23. See ALBERT WOODFOX, *SOLITARY* (2019) (describing Angola); see also OSHINSKY, *supra* note 22, at 109–248 (describing Parchman).

24. BAUER, *supra* note 8, at 242–47. But see William Booth, *The Return of the Chain Gang*, WASH. POST (May 4, 1995), <https://www.washingtonpost.com/archive/politics/1995/05/04/the-return-of-the-chain-gangs/fd5ca8eb-3b43-4740-be59-f9888dbb1f88/>.

25. U.S. CONST. amend. XIII, § 1.

exception, the drafters of the Amendment wanted to ensure that abolishing the institution of slavery did not also ban the nationwide practice of sentencing prisoners to “hard labor.”<sup>26</sup>

Lawsuits claiming that prison labor violates the Thirteenth Amendment have almost universally failed.<sup>27</sup> Even lawsuits that appeared promising, such as those asserting that prisoners sentenced to incarceration rather than “hard labor” could not be forced to work while incarcerated, have been beaten back by the courts.<sup>28</sup> In addition, courts have consistently denied incarcerated laborers the protection of state and federal employment laws.<sup>29</sup>

### B. *Today’s System of For-Profit Incarceration*

From the turn of the twentieth century until 1980, prisoners were forced to labor largely under the direct supervision of county, state, or federal governments. With the memory of the horrors of the convict leasing system close in mind, governments were unwilling to entrust the supervision of incarcerated people to private corporations with strong profit motives.<sup>30</sup>

This began to change in 1983 when Robert Crants and Thomas Beasley saw a business opportunity at the intersection of the rapid growth of incarceration and the Reagan Administration’s push for privatization. They decided to start a private prison company called the Corrections Corporation of America (“CCA”).<sup>31</sup> Neither Crants nor Beasley had any experience with managing prisons, so they reached out to T. Don Hutto, the Director of

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26. See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 925–28 (2019).

27. See, e.g., *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) (“There is no federally protected right of a state prisoner not to work while imprisoned after conviction, even though that conviction is being appealed. . . . Where a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises.”); *Williams v. Henagan*, 595 F.3d 610, 622 (5th Cir. 2010) (holding that a prisoner “being forced to work on private property” does not “render his labor involuntary servitude”); *Omasta v. Wainwright*, 696 F.2d 1304, 1305 (11th Cir. 1983) (holding that “where a prisoner is incarcerated pursuant to a presumptively valid judgment . . . and is forced to work . . . the thirteenth amendment’s prohibition against involuntary servitude is not implicated” even if the conviction is subsequently reversed).

28. *Ali v. Johnson*, 259 F.3d 317, 317–18 (5th Cir. 2001) (holding that even a prisoner “not sentenced to ‘hard labor’ . . . cannot state a viable Thirteenth Amendment claim if the prison system requires [him] to work”); *Shakouri v. Davis*, 923 F.3d 407, 411 (5th Cir. 2019) (quoting *Ali v. Johnson*); *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999). See also Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395 (2009).

29. See, e.g., *Tourscher v. McCullough*, 184 F.3d 236, 243 (3d Cir. 1999) (collecting cases and holding that “prisoners producing goods and services used by the prison should not be considered employees under the FLSA”); *Harker v. State Use Indus.*, 990 F.2d 131, 136 (4th Cir. 1993) (“For more than fifty years, Congress has operated on the assumption that the FLSA does not apply to inmate labor.”); *Menocal v. GEO Group, Inc.*, 113 F. Supp. 3d 1125, 1129–31 (D. Colo. 2015) (holding that detained immigrants were not employees under Colorado employment law). *But see* *Watson v. Graves*, 909 F.2d 1549, 1556 (5th Cir. 1990) (holding that prisoners, not sentenced to hard labor, who worked outside the prison for a private firm were employees of that firm under FLSA).

30. See, e.g., LICHTENSTEIN, *supra* note 15, at 152–95 (describing the transition to the chain gang system); MANCINI, *supra* note 15, at 215–32 (describing the abolition of the convict labor system).

31. LAUREN-BROOKE EISEN, *INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION* 57–61 (2017); BAUER, *supra* note 8 at 37–39.



Corrections for the State of Virginia.<sup>32</sup> Hutto had a long track record of running prisons at a profit in Texas and Arkansas, and Crants and Beasley believed he could help their new venture thrive.<sup>33</sup> The fact that Hutto was the defendant in several horrific prison conditions lawsuits, two of which reached the Supreme Court, did not stop Crants and Beasley from partnering with him.<sup>34</sup>

The initial CCA investors came largely from Beasley's connections from his time as the head of the Tennessee Republican Party, including then-Governor Lamar Alexander's wife, Honey.<sup>35</sup> The company received its first contract to run an Immigration and Naturalization Service detention facility in 1984 and went public in 1986.<sup>36</sup>

The founding of CCA marked the beginning of a new era of American incarceration, which nevertheless included some features of the old convict lease system. Just one year later, in 1984, the Wackenhut Corrections Corporation was formed.<sup>37</sup> Through acquisitions these two corporations, now known as CoreCivic<sup>38</sup> and GEO Group, respectively, have developed into essentially a duopoly.<sup>39</sup> In 2019, GEO Group had \$2.48 billion in revenue<sup>40</sup> while CoreCivic had \$1.98 billion.<sup>41</sup> GEO Group manages 124 detention facilities of various types in the United States<sup>42</sup> and CoreCivic manages 108.<sup>43</sup> In addition to "secure services" contracts to manage detention facilities with states, cities, ICE, the U.S. Marshals, and the U.S. Bureau of Prisons,

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32. BAUER, *supra* note 8, at 37.

33. *Id.* at 21–22, 243–47.

34. *See* Hutto v. Finney, 437 U.S. 678 (1978); Hutto v. Davis, 454 U.S. 370 (1982).

35. EISEN, *supra* note 31, at 57, 61.

36. *Id.* at 59; BAUER, *supra* note 8, at 37–39. In 2003, the Immigration and Naturalization Service was brought under the umbrella of the Department of Homeland Security. Its functions were distributed among three entities: U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement ("ICE"), and U.S. Customs and Border Protection. ICE has assumed the detention and enforcement functions. *See* The Homeland Security Act of 2002, PUB. L. NO. 107–296, 116 STAT. 2135 (2002); *Our History*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/about-us/our-history>.

37. *GEO Group History Timeline*, GEO GROUP, [https://www.geogroup.com/history\\_timeline](https://www.geogroup.com/history_timeline) (last visited June 28, 2020).

38. *See* Shane Bauer, *A Stray Email Exposes a Prison Company's Rebranding Efforts*, MOTHER JONES (Jan. 19, 2017), <https://www.motherjones.com/politics/2017/01/corecivic-cca-private-prison-pr-firm-hillenby/> (describing CCA's decision to rebrand as CoreCivic in 2016, shortly after Mother Jones published a major investigation on the company).

39. EISEN, *supra* note 31, at 151–53, 203–07 (noting that next largest private prison corporations are the Management and Training Corporation and Lasalle Southwest Corrections, which are much smaller); Avlana Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 84 (2016); Kalena Thomhave, *Banning Private Prisons—and Prisoner Exploitation*, AM. PROSPECT (June 25, 2019), <https://prospect.org/health/banning-private-prisons-and-prisoner-exploitation/>.

40. GEO Group, Inc., Annual Report 90 (Form 10-K) (Feb. 26, 2020), <http://investors.geogroup.com/Cache/IRCache/cdf2d868-2ef2-d95f-6096-954030483167.pdf> [hereinafter GEO Group Annual Report].

41. CoreCivic, Inc., Annual Report 61 (Form 10-K) (Feb. 20, 2020), <http://ir.corecivic.com/static-files/acc01462-f138-4e80-a699-10db834fec73> [hereinafter CoreCivic Annual Report].

42. GEO Group Annual Report, *supra* note 40, at 10–19 (explaining, in addition, that it manages four facilities in Australia and one each in the United Kingdom, South Africa, and Canada).

43. CoreCivic Annual Report, *supra* note 41, at 17–26.

the companies also maintain “community based services,” such as halfway houses, youth services, and day reporting centers.<sup>44</sup>

Private prison corporations have followed the general playbook of privatization: they convince governments to privatize incarceration by promising to provide the same service that the public sector currently provides at a lower price.<sup>45</sup> Unlike other products and services, however, there is little room to improve the efficiency of incarceration through innovation or technology because the most important costs of running prisons are guard labor, food, and medical care—areas in which it is difficult to improve efficiency.<sup>46</sup> Moreover, research generally shows that private prisons do not save money for state governments.<sup>47</sup>

Instead, private prisons profit by cutting costs. Once prisons, public or private, are constructed, the two largest expenses are labor and medical costs.<sup>48</sup> For example, labor and benefits costs make up 59% of CoreCivic’s operating expenses, even though its nonunionized correctional officers are paid as little as nine dollars per hour, much less than most unionized state prisoner guards are paid.<sup>49</sup> Consequently, private prisons attempt to run their facilities on a skeleton staff. Shane Bauer, who spent four months working as a guard in a Louisiana prison run by CoreCivic, reports that the facility where he worked was frequently understaffed.<sup>50</sup> Bauer describes dangerous conditions caused by understaffing, such as keeping prisoners on lockdown solely because there was not enough staff to supervise them.<sup>51</sup> In addition, Bauer reports that it was common for security checks to be logged but not performed.<sup>52</sup> Bauer’s firsthand observations have been corroborated by journalists and government investigators.<sup>53</sup>

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44. GEO Group Annual Report, *supra* note 40, at 10–19; CoreCivic Annual Report, *supra* note 41, at 17–26.

45. EISEN, *supra* note 31, at 36–46.

46. *Id.* at 174.

47. *Id.* at 176; ALEXANDRA (SACHI) COLE, PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA 19–20 (2012).

48. Eisenberg, *supra* note 39, at 98.

49. BAUER, *supra* note 8, at 39.

50. *Id.* at 44, 144.

51. *Id.* at 64, 113, 140–43, 228, 250–51.

52. *Id.* at 144.

53. Samantha Michaels, *The Feds Just Slammed One of the Country's Biggest Private Prison Companies—Once Again*, MOTHER JONES (Apr. 26, 2017), <https://www.motherjones.com/politics/2017/04/justice-department-audit-corecivic-marshall-service-leavenworth/3/>; Daniel Arkin, *Tennessee Audit Finds Rampant Understaffing, Other Issues at Prisons*, NBC NEWS (Nov. 15, 2017, 4:40 PM), <https://www.nbcnews.com/news/all/tennessee-audit-finds-rampant-understaffing-other-issues-prisons-n820746>; Joe Watson and Mark Wilson, *Idaho: FBI Declines to Press Criminal Charges against CCA for Falsified Staffing Records*, PRISON LEGAL NEWS (Dec. 2, 2015), <https://www.prisonlegalnews.org/news/2015/dec/2/idaho-fbi-declines-press-criminal-charges-against-cca-falsified-staffing-records/>; Associated Press, *Tennessee Plaintiff Says Prison Operator is Withholding Info*, WREG NEWS (July 17, 2019, 9:00 AM), <https://wreg.com/2019/07/17/tennessee-plaintiff-says-prison-operator-is-withholding-info/>; Marcia Heroux Pounds, *It's One of the Worst Jobs in America. Would You Do it for \$13 an Hour?*, SOUTH FLA. SUN SENTINEL (May 13, 2019, 4:31 PM), <https://www.sun-sentinel.com/business/fl-bz-geo-minimum-wage-20190513-osqdzabo5bi3nbtg35aejrrzm-story.html>.



The second major operating cost is healthcare, which leads private prison operators to discourage inmates from seeking medical care, though reliable statistics are difficult to find.<sup>54</sup> At one point, Bauer met a man who sued CCA because he lost his legs and most of his fingers to gangrene while incarcerated.<sup>55</sup> The man claimed that medical staff ignored his complaints of pain and numbness in his extremities, refused to send him to a hospital for a second opinion, and threatened him with punishment if he continued making complaints.<sup>56</sup> Bauer's account is anecdotal, but it has been supported by numerous investigations into healthcare provision in private prisons.<sup>57</sup>

For-profit prison corporations are also immune from many, but not all, lawsuits. In 1997, the Supreme Court held in a 5-4 decision that employees of privately managed state facilities could be sued under 42 U.S.C. § 1983, the constitutional tort statute, if they violated the constitutional rights of inmates under color of state law, and that such employees were not entitled to qualified immunity.<sup>58</sup> In privately managed federal facilities, however, § 1983 is not available. And in 2001, with a different set of Justices in the majority, the Court held that a prisoner could not bring a *Bivens*<sup>59</sup> action against the private operator of a federal halfway house for violating the constitutional rights of the plaintiff under color of federal law.<sup>60</sup> In 2012, the Court further limited prisoners' options for suit in privately managed federal facilities, holding that prisoners cannot maintain *Bivens* claims against the employees of a privately operated federal prison.<sup>61</sup> In denying *Bivens* remedies, these cases note that prisoners still have access to state tort remedies.<sup>62</sup> As Danielle Jefferis has noted, however, it can be extremely difficult, if not impossible, for prisoners in privately managed federal facilities to bring state tort claims due to the

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54. BAUER, *supra* note 8, at 204–6; Alex Friedman, *Apples-to-Fish: Public and Private Prison Cost Comparisons*, 42 FORDHAM URB. L.J. 503, 523–31 (2014).

55. BAUER, *supra* note 8, at 49–50.

56. *Id.* at 49–50, 204; Scott v. Corr. Corp. of Am., No. 1:14-CV-00956, 2015 WL 5771916 (W.D. La. Aug. 18, 2015), <https://casetext.com/case/scott-v-corr-corp>. CCA eventually settled the case.

57. Seth Freed Wessler, 'This Man Will Almost Certainly Die', NATION (Jan. 28, 2016), <https://www.thenation.com/article/archive/privatized-immigrant-prison-deaths/>; Seth Freed Wessler, *Federal Officials Ignored Years of Internal Warnings About Deaths at Private Prisons*, NATION (June 15, 2016), <https://www.thenation.com/article/archive/federal-officials-ignored-years-of-internal-warnings-about-deaths-at-private-prisons/>; ACLU OF COLO., CASHING IN ON CRUELTY: STORIES OF DEATH, ABUSE AND NEGLECT AT THE GEO IMMIGRATION DETENTION FACILITY IN AURORA (2019), [https://aclu-co.org/wp-content/uploads/2019/09/ACLU\\_CO\\_Cashing\\_In\\_On\\_Cruelty\\_09-17-19.pdf](https://aclu-co.org/wp-content/uploads/2019/09/ACLU_CO_Cashing_In_On_Cruelty_09-17-19.pdf); Human Rights Watch, *US: Poor Medical Care, Deaths, in Immigrant Detention* (June 20, 2018), <https://www.hrw.org/news/2018/06/20/us-poor-medical-care-deaths-immigrant-detention>; Chris Conte, *Scathing state audit slams Tennessee prisons, CoreCivic for staffing, sexual assaults, and deaths in jails*, NEWSCHANNEL5 NASHVILLE (Jan. 10, 2020), <https://www.newschannel5.com/news/scathing-state-audit-slams-tennessee-prisons-corecivic-for-staffing-sexual-assaults-and-deaths-in-jails>.

58. Richardson v. McKnight, 521 U.S. 399 (1997).

59. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that *Bivens* had an implied right under the Fourth Amendment to sue the federal agents who had violated his constitutional rights by undertaking an unconstitutional search and seizure under color of federal law).

60. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

61. *Minnecci v. Pollard*, 565 U.S. 118 (2012).

62. *Id.* at 122–26.

independent contractor exception to the Federal Tort Claims Act.<sup>63</sup> Taken together, these protections allow private facility operators such as GEO Group and CoreCivic to save money by cutting corners and violating prisoners' rights with little fear of liability.

In recent years, GEO Group and CoreCivic have begun to diversify their business away from detention and into other areas such as prisoner transport, technology, drug rehabilitation, and parole.<sup>64</sup> In 2016, for example, CCA purchased Correctional Management, Inc., which ran seven drug rehabilitation facilities in Colorado.<sup>65</sup> Similarly, in 2011, GEO Group purchased Behavioral Interventions, a provider of electronic monitoring equipment.<sup>66</sup> Although it can be seen as a positive development that these companies are becoming less reliant on expanding the number of people incarcerated, the potential for negative consequences, such as pressure to punish minor offenders with electronic monitoring instead of simply dropping charges, is enormous.<sup>67</sup>

### C. *For-Profit Detention Corporations in Immigration Detention*

Private prison companies have garnered an outsized share of criticism given their relatively minor role in American mass incarceration.<sup>68</sup> One scholar has described them as “a camera, not an engine” of mass incarceration.<sup>69</sup> In 2017, 121,420, or about 8%, of state and federal inmates were housed in private prisons.<sup>70</sup> About 94,000 of those, or 7% of the total number of incarcerated people, were held in private state prisons.<sup>71</sup> In the federal system, for-profit prisons are more important: about 27,500 people, 15% of federal inmates, were held in private facilities.<sup>72</sup> The state with the highest proportion of prisoners in for-profit facilities is New Mexico, which holds about 42% of its incarcerated population in private prisons.<sup>73</sup>

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63. Danielle C. Jefferis, *Delegating Care, Evading Review: The Federal Tort Claims Act and Access to Medical Care in Federal Private Prisons*, 80 LA. L. REV. 37, 43 (2019). See also Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145 (2020).

64. EISEN, *supra* note 31, at 72.

65. *Id.* at 5.

66. *Id.* at 34; Eisenberg, *supra* note 39, at 119–21.

67. EISEN, *supra* note 31, at 215–218. See also Joshua Sharpe, *Critics rip Ga. bill aimed at private probation firms' profitability*, ATLANTA J.-CONST. (Mar. 11, 2020), <https://www.ajc.com/news/crime-law/critics-rip-bill-aimed-private-probation-firms-profitability/OoXduEzxxCKM32m0jtxI6M/> (describing a new bill expanding “pay-only probation” as part of Georgia’s privatized probation system); Komala Ramachandra, *Tennessee has a problem with private probation companies. It hurts poor people*, HUM. RTS. WATCH, (Feb. 19, 2019), <https://www.hrw.org/news/2019/02/19/tennessee-has-problem-private-probation-companies-it-hurts-poor-people>.

68. See JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION – AND HOW TO ACHIEVE REAL REFORM 79–104 (2017).

69. David Stein, *Still Bringing the State Back In: Private Prisons and Mass Incarceration*, PROCESS HIST., Jul. 18, 2017, <http://www.processhistory.org/stein-private-prisons/>.

70. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017 27 (2019) <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

71. *Id.* State prisons incarcerate far more Americans than federal prisons.

72. *Id.*

73. EISEN, *supra* note 31, at 10.

Despite the relatively small quantitative presence of private prisons in the context of mass incarceration, scholars and activists have engaged in a spirited empirical, moral, and policy debate about their use.<sup>74</sup> This debate, however, has largely ignored the central role of private prison operators in immigrant detention.<sup>75</sup>

Today, over 70% of detained immigrants—who, unlike federal and state inmates, are in civil rather than criminal detention—are housed in privately run facilities.<sup>76</sup> What is more, private facilities make up nine of the ten largest detention centers.<sup>77</sup> Private interests have long played an important role in the mechanics of detention and deportation of immigrants.<sup>78</sup> As mentioned above, the first CCA facility was an immigrant detention center. Over the past two decades, immigration detention has become a large part of both CoreCivic and GEO Group's business. In 2002, GEO Group's Annual Report accurately predicted that post-September 11 security measures would lead to the arrest of a large number of undocumented immigrants and thus require a vast expansion of private detention.<sup>79</sup> The subsequent formation of ICE and the increase in deportations that began under the George W. Bush Administration and continued under the Obama Administration helped buoy the industry. As the number of detained immigrants held on an average day

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74. See, e.g., EISEN, *supra* note 31, at 182–229 (reviewing the literature on private prisons and concluding that there is no evidence they are superior to public prisons and arguing that private prisons could be improved through better contracts); Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133 (2012) (arguing that private versus public provision is irrelevant in and of itself and that all privatization efforts must be evaluated empirically); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L. J. 437 (2005) (arguing that using comparative efficiency to evaluate private prisons is not value neutral and that, rather, it is a rhetorical strategy used to constrain debate on private prisons); Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401 (2014) (arguing that the state monopoly justification of banning private prisons used by the Israeli High Court is fundamentally flawed); Eisenberg, *supra* note 39 (arguing that both private prisons and public sector prison guard unions incentivize increased incarceration); Brett C. Burkhardt, *Private Prisons in Public Discourse: Measuring Moral Legitimacy*, 47 SOC. FOCUS 279 (2014) (arguing that the perceived level of moral legitimacy of private prisons differs from state to state and helps determine where private prisons will be built); Brett C. Burkhardt, *The politics of correctional privatization in the United States*, 18 CRIMINOLOGY & PUB. POL'Y 401 (2019) (arguing that private prison corporations work to create favorable conditions for their business but are also constrained by political and reputational forces).

75. But see Felipe Hernandez, *Not A Matter of If, but "When": Expanding the Immigration Caging Machine Regardless of Nielsen*, 22 HARV. LATINX L. REV. 87, 113–17 (2019); Jennifer M. Chacon, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1 (2017), EISEN, *supra* note 31, at 137–68; MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 215–40 (2014).

76. NAT'L IMMIGRANT JUSTICE CTR., *ICE RELEASED ITS MOST COMPREHENSIVE IMMIGRATION DETENTION DATA YET. IT'S ALARMING* (2018), <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet>. The remaining detained immigrants are held in local jails in which ICE rents space, see Emily Ryo & Ian Peacock, *Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983–2013*, 54 L. & SOC'Y REV. 66 (2020).

77. NAT'L IMMIGRANT JUSTICE CTR., *supra* note 76.

78. See Adam Goodman, *Bananas North, Deportees South: Punishment, Profits, and the Human Costs of the Business of Deportation*, 106 J. AM. HIST. 949 (2020).

79. EISEN, *supra* note 31, at 137.

increased from about 2,000 in 1980 to over 50,000 in 2019,<sup>80</sup> for-profit detention has assumed greater significance. Without for-profit facility operators, the system would not be able to function at current levels.<sup>81</sup>

Immigration detention figures prominently in GEO Group and CoreCivic's business model. In 2019, almost 30% of both companies' revenue came from detaining immigrants.<sup>82</sup> From 2008 to 2016, CoreCivic earned \$689 million from ICE contracts and GEO Group earned \$1.18 billion.<sup>83</sup> ICE contracts are both companies' single largest source of revenue.<sup>84</sup> Most detained immigrants have not committed violent crimes, so the facility managers can lower security costs even further by cutting staffing to levels below those in privately managed state and federal prisons.<sup>85</sup> Additionally, immigration detention centers have lower costs and higher profits because there is no requirement to provide detained immigrants with any kind of rehabilitative services.<sup>86</sup> As we will see below, GEO Group and CoreCivic are able to boost profits further by forcing detained immigrants to perform labor that would otherwise be done by hired employees.<sup>87</sup>

Incarcerating immigrants awaiting deportation hearings is an essential profit center for the private prison duopoly, and a large proportion of the profits are essentially guaranteed by government policy. In 2010, Congress passed a law requiring ICE to maintain "not less than 33,400 detention beds."<sup>88</sup> The majority of those beds are managed by private corporations—primarily by GEO Group and CoreCivic—and ICE has every incentive to fill them since they are already paid for. In the government shutdown and border wall fight of early 2019, Democrats beat back the Trump Administration's attempt to require ICE to maintain 52,000 beds. But the average daily population of detained immigrants remained above 50,000 for fiscal year 2019,<sup>89</sup>

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80. Carl Takei et al., *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons*, AM. C.L. UNION 7 (Sept. 2016), [https://www.aclu.org/sites/default/files/field\\_document/white\\_paper\\_09-30-16\\_released\\_for\\_web-v1-opt.pdf](https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf); ICE, U.S. IMMIGRATION AND CUSTOMS ENF'T FISCAL YEAR 2019 ENF'T AND REMOVAL OPERATIONS REPORT 5 (2019), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>.

81. Chico Harlan, *In Policy Review, Homeland Security Panel Sends Mixed Message about Future of Private Immigrant Detention*, WASH. POST (Dec. 1, 2016), <https://www.washingtonpost.com/news/work/wp/2016/12/01/after-review-of-policy-homeland-security-panel-says-private-immigrant-detention-will-continue/>.

82. See GEO Group Annual Report, *supra* note 40, at 34 (stating that ICE contracts accounted for 28.6% of revenue in 2019, up from 23.9% in 2018); CoreCivic Annual Report, *supra* note 41, at 41 (stating that ICE contracts accounted for 29% of revenue in 2019, up from 25% in 2018).

83. EISEN, *supra* note 31, at 139.

84. GEO Group Annual Report, *supra* note 40, at 34; CoreCivic Annual Report, *supra* note 41, at 41.

85. EISEN, *supra* note 31, at 148.

86. *Id.* at 149; Eisenberg, *supra* note 39, at 110.

87. See *infra* Part II.

88. EISEN, *supra* note 31, at 53.

89. ICE, *supra* note 80.

and the Trump Administration asked for a 54,000-bed requirement in its 2019 budget.<sup>90</sup>

As a result of cost cutting, conditions in private immigration detention facilities are often deplorable, which has led to numerous journalistic exposés of and lawsuits against GEO Group and CoreCivic.<sup>91</sup> For example, a *USA Today* investigation found “more than 400 allegations of sexual assault or abuse, inadequate medical care, regular hunger strikes, frequent use of solitary confinement, more than 800 instances of physical force against detainees, nearly 20,000 grievances filed by detainees and at least 29 fatalities, including seven suicides” since Trump’s inauguration in 2017.<sup>92</sup>

### 1. *Political Influence of the Industry*

Because the industry profits almost exclusively from government contracts, it is vulnerable to political changes. Several companies almost went bankrupt after building too many prisons on speculation in the 1990s, but the industry was saved when both the Clinton and George W. Bush Administrations increased the number of incarcerated people, especially immigrants.<sup>93</sup> It also faced a crisis at the end of the Obama Administration when it appeared that the federal government was going to phase out its use of private prisons.<sup>94</sup>

Consequently, the industry spends a great deal of money and effort lobbying the state and federal governments to continue contracting with private prison corporations. For instance, CoreCivic spent more than \$21 million on federal lobbying efforts between 1998 and 2014.<sup>95</sup> That amount does not include the millions more the industry has spent opposing the anti-private prison legislation put forward by Representative Sheila Jackson Lee and Senator Bernie Sanders in 2015.<sup>96</sup>

The industry has also supported a variety of laws and policies that function to grow the incarcerated population, hopefully forcing states to increase private prison contracts. Until 2010, both GEO Group and CCA were members of the American Legislative Exchange Council (“ALEC”) while it wrote and promoted “three strikes laws” that increased the prison population across the country.<sup>97</sup> One other notable moment of cooperation between the private

90. U.S. GOV’T, A BUDGET FOR A BETTER AMERICA: FISCAL YEAR 2020 BUDGET OF THE U.S. GOVERNMENT 50 (2019) <https://www.whitehouse.gov/wp-content/uploads/2019/03/budget-fy2020.pdf>.

91. Astrid Galvan, *2,200 Quarantined over Mumps Outbreak at Immigration Centers*, ASSOCIATED PRESS (Mar. 12, 2019), <https://apnews.com/37fea883624e4b20af6fa86352f35050>; Press Release, ACLU, ACLU of Colorado Sues GEO for the Wrongful Death of Kamyar Samimi (Nov. 12, 2019), <https://aclu-co.org/aclu-of-colorado-sues-geo-for-the-wrongful-death-of-kamyar-samimi/>.

92. Monsy Alvarado et al., *‘These People are Profitable’: Under Trump, Private Prisons are Cashing in on ICE Detainees*, USA TODAY (Dec. 20, 2019), <https://amp.usatoday.com/amp/4393366002>.

93. EISEN, *supra* note 31, at 147–50.

94. *Id.* at 160–65.

95. *Id.* at 188.

96. *Id.* at 130, 188.

97. *Id.* at 195–96; Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, NATION (Aug. 1, 2011), <https://www.thenation.com/article/hidden-history-alec-and-prison-labor/>;

prison companies and ALEC was the passage of Arizona's controversial and largely unconstitutional SB 1070, which promised to vastly increase the number of immigrants arrested and deported.<sup>98</sup> Private prison industry representatives met with many state legislators, and thirty of the thirty-six cosponsors of the bill in the Arizona Senate received campaign contributions from lobbyists for CCA and GEO Group.<sup>99</sup>

GEO Group has been particularly active in courting politicians both at the national level and in its home state of Florida. For example, before his election to the Senate Rick Scott headlined a fundraiser held at the home of GEO Group's CEO, George Zoley.<sup>100</sup> In addition, GEO recently hired the outgoing president of the Florida Senate as head counsel<sup>101</sup> and former Florida Attorney General Pam Bondi as a lobbyist.<sup>102</sup>

The Trump Administration has provided the industry with more opportunities for lobbying. Both GEO Group and CoreCivic donated heavily to pro-Trump political action committees.<sup>103</sup> GEO Group also donated \$50,000 to conservative activist group Turning Point USA, which has strong connections to the Trump White House.<sup>104</sup> In 2017, GEO Group moved its annual conference from its headquarters to the Trump National Doral Miami golf

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ACLU, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 15 (2011), <https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration>.

ALEC is an extremely influential organization funded by conservative donors, including the Koch Brothers. ALEC exerts the most influence at the state level, where it takes advantage of expertise-starved state legislators by drafting legislation that benefits its funders and provides "fill-in-the-blank" legislation to lawmakers across the country. See JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 424–28 (2017); Yvonne Wingett Sanchez and Rob O'Dell, *What is ALEC? 'The most effective organization' for conservatives, says Newt Gingrich*, USA TODAY (Apr. 5, 2019, 4:15 PM), <https://www.usatoday.com/story/news/investigations/2019/04/03/alec-american-legislative-exchange-council-model-bills-republican-conservative-devos-gingrich/3162357002/>; Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS INSTITUTION (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/>.

98. EISEN, *supra* note 31, at 158–59; Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010), <https://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>; Beau Hodai, *Ties That Bind: Arizona Politicians and the Private Prison Industry*, IN THESE TIMES (June 12, 2010), [http://inthesetimes.com/article/6085/ties\\_that\\_bind\\_arizona\\_politicians\\_and\\_the\\_private\\_prison\\_industry](http://inthesetimes.com/article/6085/ties_that_bind_arizona_politicians_and_the_private_prison_industry).

99. EISEN, *supra* note 31, at 159. In an intriguing coincidence, CoreCivic is represented in a variety of important litigation not by a major national law firm, but by Struck Love Bojanowski & Acedo, PLC, a small Arizona law firm that also represented the state of Arizona in the SB 1070 litigation and defended sheriff Joe Arpaio.

100. Eisenberg, *supra* note 39, at 108–09.

101. Jerry Iannelli, *ICE is Getting Legal Advice from South Florida's Private-prison Giant, Emails Show*, MIAMI NEW TIMES (Dec. 10, 2018, 8:30 AM), <https://www.miaminewtimes.com/news/geo-group-coordinated-on-ices-california-lawsuit-emails-show-10945740>.

102. Lawrence Mower, *Florida's Pam Bondi Defends Trump in a New – yet Familiar – Gig*, TAMPA BAY TIMES (Nov. 12, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/11/12/floridas-pam-bondi-defends-trump-in-a-new-but-familiar-gig/>.

103. EISEN, *supra* note 31, at 128.

104. Alex Kotch, *GEO Group Donated to the Trump-Tied Turning Point USA, Then Got Rave Review*, SLUDGE (June 24, 2019, 6:40 PM), <https://readsludge.com/2019/06/24/geo-group-donated-to-the-trump-tied-turning-point-usa-then-got-rave-review/>; Wakisha Bailey, *President Trump headlines Turning Point USA convention*, WPBF NEWS (Dec. 21, 2019, 11:58 PM), <https://www.wpbf.com/article/president-trump-headlines-turning-point-usa-convention/30305724#>.



resort.<sup>105</sup> In addition, both companies, whose stocks soared immediately after President Trump's election, donated \$250,000 each to Trump's inauguration festivities.<sup>106</sup>

As mentioned above, the Trump Administration's immigration policies have benefitted the private prison industry by increasing the number of detained immigrants. On a 2017 shareholder call, CoreCivic's CEO expressed enthusiasm at the increase of ICE arrests after Trump's inauguration.<sup>107</sup> Recently, however, activist pressure has resulted in a steep drop in the stock prices of both corporations.<sup>108</sup>

## 2. Activist Pressure

Anti-private prison activism and legislation is on the rise across the United States. Many college students are pressuring their universities to divest their endowments from corporations associated with the prison-industrial complex, including for-profit prison corporations.<sup>109</sup> At Harvard University, for example, a student organization investigated the university's ties with the industry and pressured it to divest its millions of dollars in holdings connected to the prison industry.<sup>110</sup> Outside of universities, activists have successfully pressured public pension funds to divest from prison-related industries, including for-profit prisons.<sup>111</sup>

Perhaps most significantly, activists have also succeeded in forcing major banks to stop lending to GEO Group and CoreCivic.<sup>112</sup> Both corporations

105. Alvarado, *supra* note 92.

106. EISEN, *supra* note 31, at 212.

107. Stein, *supra* note 69.

108. See The GEO Group, Inc. (GEO), YAHOO! FINANCE, <https://finance.yahoo.com/quote/GEO/> (showing GEO Group's share price at \$31.74 on Feb. 1, 2017 and at \$14.64 on Feb. 1, 2020); CoreCivic, Inc. (CXW), YAHOO! FINANCE, <https://finance.yahoo.com/quote/CXW/> (showing CoreCivic's share price at \$33.70 on Feb. 1, 2017 and at \$14.81 on Feb. 1, 2020).

109. See EISEN, *supra* note 31, at 110–19.

110. Haimy Assefa & Erik Ortiz, 'An Uphill Battle': Harvard Students Urge School to Pull Investments that Support Prisons, NBC NEWS (Sept. 3, 2019), <https://www.nbcnews.com/news/us-news/uphill-battle-harvard-students-urge-school-pull-investments-support-prisons-n1038686>; Alexandra A. Chaidez, *Harvard Prison Divestment Campaign Delivers Report to Mass. Hall*, HARV. CRIMSON (Oct. 22, 2019), <https://www.thecrimson.com/article/2019/10/22/prison-divestment-petition/>.

111. Lucinda Chen, *Why America's Largest Pension Fund Is Cutting Ties with Private Prisons*, FORTUNE (Oct. 22, 2019, 6:14 AM), <https://fortune.com/2019/10/22/why-americas-largest-pension-fund-cutting-private-prisons-ties/>; Associated Press, *Rhode Island to divest from private prisons, gun makers*, ABC NEWS (Jan. 22, 2020, 4:15 PM), <https://abcnews.go.com/US/wireStory/rhode-island-divest-private-prisons-gun-makers-68452646>; Kenneth Lovett, *DiNapoli divests N.Y. pension funds from private prison companies*, N.Y. DAILY NEWS (July 13, 2018, 12:30 PM), <https://www.nydailynews.com/news/politics/ny-pol-dinapoli-private-prisons-pension-divest-20180713-story.html>; *National Prison Divestment Campaign*, NAT'L NETWORK FOR IMMIGRANT & REFUGEE RTS., <https://www.nnirr.org/drupal/prisondivestment> (last visited May 23, 2020).

112. EISEN, *supra* note 31, at 119–25; Morgan Simon, *GEO Group Running Out of Banks as 100% of Known Banking Partners Say 'No' to the Private Prison Sector*, FORBES (Sept. 30, 2019, 7:33 PM), <https://www.forbes.com/sites/morgansimon/2019/09/30/geo-group-runs-out-of-banks-as-100-of-banking-partners-say-no-to-the-private-prison-sector/>; Morgan Simon, *Shareholders Take A Stand Against Private Prisons*, FORBES (Mar. 11, 2019, 5:13 PM), <https://www.forbes.com/sites/morgansimon/2019/03/11/shareholders-take-a-stand-against-private-prisons/#7827731b41e6>; David Henry & Imani Moise, *JPMorgan backs away from private prison finance*, REUTERS (Mar. 5, 2019, 8:42 AM), <https://www.reuters.com/article/us-jp-morgan-prisons-idUSKCN1QM1LE>.

have acknowledged in Securities and Exchange Commission filings that “[i]ncreasing activist resistance” could “result in our inability to obtain new contracts or the loss of existing contracts” or could “impact our ability to obtain or refinance debt financing or enter into commercial arrangements.”<sup>113</sup>

Legislation has been introduced at the federal level to ban the use of private prisons by both the federal government and states.<sup>114</sup> In addition, several states already prohibit state use of private prisons.<sup>115</sup> Most recently, California and Illinois passed bills to remove them entirely from the state, including immigration detention facilities that contract with the federal government.<sup>116</sup> This step has led both the Trump Administration and GEO Group to sue California, saying this law discriminates against the federal government.<sup>117</sup> Despite these developments, it is likely that many states will continue to allow for-profit prisons. And if for-profit prison corporations remain profitable, they will be able to find investors.

### 3. *TVPA Lawsuits*

A new set of lawsuits argue that labor practices in for-profit ICE detention centers violate the forced labor section of the Trafficking Victims Protection Act (“TVPA”)<sup>118</sup> and threaten the profitability of for-profit immigration detention. While some scholars have argued that private prison contracts themselves violate the Thirteenth Amendment,<sup>119</sup> such arguments are unlikely to succeed given the weight of the relevant precedent. A statutory strategy, however, is more promising.

CoreCivic and GEO Group are currently facing six class action lawsuits alleging that forced labor in the immigration detention facilities they manage violates the TVPA.<sup>120</sup> Several courts have denied CoreCivic and GEO

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113. CoreCivic Annual Report, *supra* note 41, at 51; GEO Group Annual Report, *supra* note 40, at 34.

114. *E.g.*, German Lopez, *Bernie Sanders’s plan to abolish private prisons, explained*, VOX (Sept. 18, 2015), <https://www.vox.com/2015/9/10/9299851/bernie-sanders-private-prisons>.

115. Morgan Simon, *New York Could Become First State To Be Completely Done With Private Prisons*, FORBES (June 18, 2019, 2:50 PM), <https://www.forbes.com/sites/morgansimon/2019/06/18/new-york-to-become-first-state-to-be-completely-done-with-private-prisons/#71c57740725b>.

116. Veronica Stracqualursi, *California to shut down private prisons and immigrant detention centers*, CNN (Oct. 12, 2019, 12:46 PM), <https://www.cnn.com/2019/10/12/politics/california-law-ban-private-for-profit-prisons/index.html>; Jamie Ehrlich, *Illinois bans private immigration detention centers*, CNN (June 21, 2019, 11:09 PM), <https://www.cnn.com/2019/06/21/politics/illinois-private-detention-centers-immigration-ice-raids/index.html>.

117. Liam Dillon, *Trump administration sues California over private prison ban*, L.A. TIMES (Jan. 25, 2020, 11:05 AM), <https://www.latimes.com/california/story/2020-01-25/trump-administration-sues-california-over-private-prison-ban>; Andrea Castillo, *Firm sues California over law banning private prisons and immigration detention centers*, L.A. TIMES (Dec. 31, 2019, 5:13 PM), <https://www.latimes.com/california/story/2019-12-31/prison-company-sues-california-over-law-banning-private-immigration-detention-centers>.

118. 18 U.S.C. § 1589 (2018).

119. *E.g.*, Ryan S. Marion, *Prisoners for Sale Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213 (2009).

120. See discussion *infra* Part IV.

Group's motions to dismiss<sup>121</sup> and one of those denials was upheld in an interlocutory appeal that held that the TVPA applies to private immigration detention facilities.<sup>122</sup> In three cases, a class of formerly detained immigrants has been certified under the TVPA.<sup>123</sup> The U.S. Court of Appeals for the Tenth Circuit upheld one of the certifications.<sup>124</sup> In another case, the Ninth Circuit exercised its discretion to deny GEO Group's appeal of the certification decision under Rule 23(f).<sup>125</sup>

These lawsuits pose a significant risk for GEO Group and CoreCivic. One academic has estimated that the use of detainee labor instead of hiring employees increases their profits by approximately 25% each year.<sup>126</sup> A jury decision invalidating the program and ordering the companies to pay damages would have a material impact on both companies' profitability.<sup>127</sup> To demonstrate what is at stake in these lawsuits, it is first necessary to understand the state of forced labor in immigration detention.

## II. ICE WORK POLICIES

The lawsuits focus on two related labor policies: the "Voluntary Work Program," which pays detained immigrants as little as one dollar per day for their labor, and the mandatory and uncompensated cleaning of the detention facilities. The lawsuits allege that both policies, as currently implemented, violate the TVPA by coercing detained immigrants by means of serious harm and threats of serious harm.

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121. *Menocal v. GEO Group, Inc.*, 113 F. Supp. 3d 1125, 1135 (D. Colo. 2015); *Novoa v. GEO Group, Inc.*, No. EDCV 17-2514 JGB (SHKx), 2018 WL 3343494, at \*6-15 (C.D. Cal. June 21, 2018); *Barrientos v. CoreCivic, Inc.*, 332 F. Supp. 3d 1305, 1313 (M.D. Ga. 2018); *Nwauzor v. GEO Group, Inc.*, No. 3:17-cv-05769-RJB, 2018 U.S. Dist. LEXIS 131684, at \*2-3 (W.D. Wash. Aug. 6, 2018); *Gonzalez v. CoreCivic, Inc.*, No. 1:18-CV-169-LY, 2019 WL 2572540, at \*2-3 (W.D. Tex. Mar. 1, 2019).

122. *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1277-80 (11th Cir. 2020).

123. *Novoa v. GEO Group*, No. EDCV 17-2514 JGB (SHKx), 2019 WL 7195331, at \*16-20 (C.D. Cal. Nov. 26, 2019) (certifying a nationwide class of detained immigrants held for more than 72 hours in GEO Group facilities); *Menocal v. GEO Group, Inc.*, 320 F.R.D. 258, 266-69 (D. Colo. 2017), *aff'd*, 882 F.3d 905 (10th Cir. 2018); *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2020 WL 1550218 (S.D. Cal. Apr. 1, 2020) (certifying, among other classes, a national forced labor class under the TVPA). *See also* Order On Plaintiffs' Motion For Class Certification And Defendant's Motion To Deny Class Certification, *Nwauzor v. GEO Group, Inc.*, No. 3:17-cv-05769-RJB (W. D. Wash. Aug. 6, 2018) (certifying class under Rule 23(b)(3) for a class of detained immigrants under state minimum wage law, not the TVPA).

124. *Menocal v. GEO Group, Inc.*, 882 F.3d 905, 926-27 (10th Cir. 2018).

125. *Novoa v. GEO Group, Inc.*, No. 19-80169, 2020 U.S. App. LEXIS 2045 (9th Cir. Jan. 22, 2020).

126. Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, 1943-Present*, 29 GEO. IMMIGR. L.J. 391, 402 (2015).

127. Betsy Swan, *Private Prison Bosses Beg Taxpayers to Pay Human-Trafficking Lawsuit Bills*, DAILY BEAST (July 17, 2019, 9:51 AM) <https://www.thedailybeast.com/private-prison-bosses-beg-taxpayers-to-pay-human-trafficking-lawsuit-bills> ("We are deeply alarmed at the rapidly increasing costs in defending these lawsuits without reimbursement from ICE, or assistance in their defense by the Department of Justice . . . Continued defense against the litigation would be 'likely to cost \$15-\$20 million,' with tens of millions more if they lost and a court awarded damages to the plaintiffs.").

### A. *Voluntary Work Program*

Scholars Jacqueline Stevens and Anita Sinha have documented the history and present reality of ICE's Voluntary Work Program ("VWP"), which permits detained immigrants to work while incarcerated. Both trace the origins of the VWP to 8 U.S.C. § 1555(d), first passed in 1950,<sup>128</sup> which states that appropriations provided for the Immigration and Naturalization Service shall be available for payment "of allowances . . . to aliens, while held in custody under the immigration laws, for work performed."<sup>129</sup> Congress set the rate at a minimum of one dollar per day in a 1979 appropriations act.<sup>130</sup> Courts have recently held that the rate expired at the end of that fiscal year and, because Congress has not set a new rate since 1979, it has not acted to preempt state minimum wage laws.<sup>131</sup> At the time Congress set the rate, for-profit detention centers did not exist, and there were fewer than 2,000 detained immigrants.<sup>132</sup> Importantly, nothing forbids GEO Group or CoreCivic from voluntarily paying the state or federal minimum wage—or more—for detainees' labor.<sup>133</sup>

Today, all detained immigrants are eligible to work and approximately 50% of those who are detained for more than a few days end up laboring as part of the VWP.<sup>134</sup> Detained immigrants perform a wide variety of jobs, from washing dishes to cutting hair to performing clerical work for the private facility manager.<sup>135</sup> Any job performed by a prisoner for a sub-minimum wage makes it unnecessary to hire an employee to perform the same task.

The VWP is governed by a five-page section of ICE's Performance Based National Detention Standards ("PNDBS").<sup>136</sup> These guidelines, which are incorporated into the contracts of for-profit prison contractors, state that

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128. Stevens, *supra* note 126, at 460–65; Anita Sinha, *Slavery by Another Name*, "Voluntary Detainee Labor and the Thirteenth Amendment, 11 STAN. J. C.R. & C.L. 1, 25–30 (2015). See also Seth H. Garfinkel, *The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers*, 67 CASE W. RES. L. REV. 1287, 1289–94 (2017).

129. 8 U.S.C. § 1555(d) (2018).

130. Sinha, *supra* note 128, at 30; Stevens, *supra* note 126, at 465–67.

131. *Washington v. GEO Group, Inc.*, 283 F. Supp. 3d 967, 977 (W.D. Wash. 2017) ("At least since fiscal year 1979, Congress has abandoned direct appropriations for payment of allowances, despite its awareness of how to do so. . . . The Voluntary Work Program is an ICE policy with no preemptive force at law."); *Chen v. GEO Group, Inc.*, 287 F. Supp. 3d 1158, 1165–66 (W.D. Wash. 2017) ("[I]t cannot be said, with any degree of clarity, that Congress intends to occupy the field of detainee wages."); *Novoa v. GEO Group, Inc.*, No. EDCV 17-2514 JGB (SHKx), 2018 U.S. Dist. LEXIS 117129, at \*12 (C.D. Cal. Jun. 21, 2018) ("Congress . . . has not directly appropriated such funds since 1979. This subsection speaks to Congressional intent to authorize appropriations for detainee labor, but Congress' abandonment of such appropriations refutes any reasonable inference that Congress left no room for states to supplement the field.").

132. Stevens, *supra* note 126, at 469.

133. See *Washington*, 283 F. Supp. 3d at 977; *Chen*, 287 F. Supp. 3d at 1165–66; *Novoa*, 2018 U.S. Dist. LEXIS 117129 at \*12.

134. Stevens, *supra* note 126, at 416.

135. For examples of jobs included in the VWP see: Complaint at 9, *Barrientos v. CoreCivic, Inc.*, 332 F. Supp. 3d 1305 (M.D. Ga. 2018) (No. 4:18-cv-00070-CDL) [hereinafter *Barrientos* Complaint]; Complaint at 5–6, *Gonzalez v. CoreCivic, Inc.*, 2019 WL 2572540 (W.D. Tex. Mar. 1, 2019) (No. 1:18-CV-169-LY) [hereinafter *Gonzalez* Complaint].

136. ICE, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 405–08 (2011, rev. 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>, [hereinafter PNDBS].

“[d]etainees shall be able to volunteer for work assignments but otherwise shall not be required to work.”<sup>137</sup> The standards allow for the removal of detained immigrants from work assignments for several reasons but do not allow for other punishment.<sup>138</sup>

These regulations, however, do not reflect the reality of labor in detention. As the American Civil Liberties Union found, “[e]ven though the program is supposed to be voluntary, detainees’ experiences are illustrative of its coercive nature.”<sup>139</sup> Detained immigrants have alleged that the program is coercive for two main reasons. First, participating is the only way to buy necessities such as toothpaste and feminine hygiene products, which are not otherwise provided to detained immigrants.<sup>140</sup> Second, detainees allege that they are retaliated against with solitary confinement or housing transfers for refusing to work double shifts, refusing to work while sick, and for protesting unsafe conditions.<sup>141</sup> These allegations have been supported by documents turned over during discovery.<sup>142</sup> CoreCivic and GEO Group claim that they only use solitary confinement to prevent organized work stoppages,<sup>143</sup> which the PNDBS permits companies to do.<sup>144</sup> However, detainees claim that they are punished with inferior housing assignments and even solitary confinement for a much wider variety of behavior, including merely wanting to withdraw from the VWP.<sup>145</sup>

The Justice Department has stated in an amicus brief that, if operated in accordance with the PNDBS, the VWP should be truly voluntary. But the brief leaves open the possibility that contractors may violate the PNDBS, for example by punishing detainees who quit their positions, and that such violations could run afoul of the TVPA.<sup>146</sup>

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137. *Id.* at 405.

138. *Id.* at 407–08.

139. ACLU, PRISONERS OF PROFIT, *supra* note 47, at 57.

140. *Barrientos* Complaint, *supra* note 135, at 12–14; *Gonzalez* Complaint, *supra* note 135, at 16; OFFICE OF THE INSPECTOR GENERAL, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES 7 (2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>. The PNDBS state that facilities should provide hygiene products and that distribution of products “shall not be used as reward or punishment.” PNDBS, *supra* note 136, at 328.

141. *Barrientos* Complaint, *supra* note 135, at 15–19; Stevens, *supra* note 126, at 396, 420; Sinha, *supra* note 128, at 34; ACLU, PRISONERS OF PROFIT, *supra* note 47, at 57–58; Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24, 2014), <https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html>.

142. Jerry Iannelli, *Emails Show GEO Employee Threatening ICE Detainees Who Didn’t Clean Their Jails*, MIAMI NEW TIMES (Oct. 31, 2019, 9:00 AM), <https://www.miaminewtimes.com/news/emails-in-lawsuit-suggest-geo-group-forces-ice-detainees-to-work-11310005>.

143. Replacement Opening Brief of Defendant-Appellant at 6–7, *Ahmed v. CoreCivic, Inc.*, 951 F.3d 1269 (11th Cir. 2020) (No. 18-15081).

144. PNDBS, *supra* note 136, at 226.

145. *Barrientos* Complaint, *supra* note 135, at 15–17.

146. Brief for the United States as Amicus Curiae in Support of Neither Party at 8–10, *Ahmed v. CoreCivic, Inc.*, 951 F.3d 1269 (11th Cir. 2020) (No. 18-15081). To take one example, the PNDBS states explicitly that that solitary confinement may not be used “for purposes of punishment.” PNDBS, *supra* note 136, at 180.

### B. *Mandatory Housekeeping Labor*

Second, some suits allege that the mandatory and uncompensated cleaning of living areas is coercive because those who refused to perform uncompensated work were subjected to “serious harm” when they were “subjected to discipline . . . including solitary confinement.”<sup>147</sup> The PNDBS require detained immigrants to “maintain their immediate living areas in a neat and orderly manner,”<sup>148</sup> but do not address punishment for those detained immigrants who do not comply. Additionally, some detainees allege that the mandatory housekeeping duties imposed by GEO Group and CoreCivic extend far beyond maintaining their immediate living areas to general uncompensated janitorial work.<sup>149</sup>

CoreCivic has argued that, even if the TVPA does apply to for-profit immigration detention centers, the “civic duty exception,”<sup>150</sup> discussed below, protects it from liability. In its motion to dismiss in one case, for example, CoreCivic cited a number of cases—none from the context of for-profit immigration detention—that approved of requirements that detained people perform housekeeping tasks.<sup>151</sup> CoreCivic, however, ignored the fact that the PNDBS only requires detainees to perform four minimal housekeeping duties: “1. making their bunk beds daily; 2. stacking loose papers; 3. keeping the floor free of debris and dividers free of clutter; and 4. refraining from hanging/draping clothing, pictures, keepsakes, or other objects from beds, overhead lighting fixtures or other furniture.”<sup>152</sup> Nothing in the PNDBS requires cleaning common areas or bathrooms, and there is no indication that ICE expects or desires detained immigrants to be required to perform any housekeeping labor beyond what is included in the PNDBS.

## III. TRAFFICKING VICTIMS PROTECTION ACT

The lawsuits against GEO Group and CoreCivic make claims under the forced labor provision of the Trafficking Victims Protection Act.<sup>153</sup> When the TVPA was enacted in 2000, the average daily population of detained immigrants was less than half what it is today.<sup>154</sup> Congress amended the TVPA

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147. Complaint at 13–14, *Menocal v. GEO Group, Inc.*, 113 F. Supp. 3d 1125 (D. Colo. 2015) (No. 14-cv-02887-JLK).

148. PNDBS, *supra* note 136, at 406.

149. Complaint at 5, *Owino v. CoreCivic, Inc.*, 2018 WL 2193644 (S.D. Cal. May 14, 2018) (No. 17-CV-1112 JLS (NLS)).

150. *See Channer v. Hall*, 112 F.3d 214, 219 (5th Cir. 1997).

151. Memorandum of Points and Authorities in Support of Defendant’s Motion to Dismiss Complaint at 8–9, *Owino v. CoreCivic, Inc.*, 2018 WL 2193644 (S.D. Cal. May 14, 2018). *See also* Defendant’s Motion to Dismiss at 10–12, *Gonzalez v. CoreCivic, Inc.*, 2019 WL 2572540 (W.D. Tex. Mar. 1, 2019).

152. PBNDS, *supra* note 136, at 406.

153. Trafficking Victims Protection Act of 2000, Div. A, 114 Stat. 1464 (2000) [hereinafter TVPA].

154. ACLU, *supra* note 80, at 7.



significantly in 2008.<sup>155</sup> It is an omnibus statute that covers a wide area and includes, among other provisions, the reenactment of the Violence Against Women Act.<sup>156</sup>

To end forced labor in privately managed immigration detention facilities, the relevant portion of the TVPA is the forced labor statute, codified as 18 U.S.C. § 1589, which prohibits supplying or obtaining labor through coercion.<sup>157</sup> In addition, 18 U.S.C. § 1593 creates a private right of action against the “perpetrator (or whoever knowingly benefits)” of any violation of § 1589.<sup>158</sup> The statute contains no exemption for coerced labor obtained by government contractors or in prisons. The TVPA’s text and legislative history support the conclusion that the statute reaches all forms of coerced labor for profit, including in immigration detention centers.

#### A. Text

The TVPA distinguishes between “involuntary servitude” and “forced labor.” It increased the maximum punishment for the longstanding offense of “involuntary servitude” (without changing the elements for that offense),<sup>159</sup> but also created a new prohibition on “forced labor” in a stand-alone section with a much broader sweep.<sup>160</sup>

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155. See William Wilberforce Trafficking Victims Protection Reauthorization Act Of 2008, 122 Stat. 5044 (2008). The most important change Congress made in the 2008 Amendments was the addition of 18 U.S.C. § 1589(b), which allows “whoever knowingly benefits” financially from forced labor to be punished. Courts have held that the change did not apply retroactively, and thus financial benefit claims could not be made for conduct occurring before 2008. *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at \*13 (S.D. Cal. May 14, 2018); *Gonzalez v. CoreCivic, Inc.*, No. 1:18-CV-169-LY, 2019 WL 2572540, at \*3 (W.D. Tex. Mar. 1, 2019).

156. TVPA, *supra* note 153, at Div. B.

157. *Id.* at § 112.

158. 18 U.S.C. § 1593 (2018).

159. TVPA, *supra* note 153, at § 112(a)(1).

160. 18 U.S.C. § 1589 (2018):

- (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—
  - (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
  - (2) by means of serious harm or threats of serious harm to that person or another person;
  - (3) by means of the abuse or threatened abuse of law or legal process; or
  - (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).
- (b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).
- (c) In this section:
  - (1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

The forced labor statute, 18 U.S.C. § 1589, provides for criminal punishment for “whoever” obtains labor by any one—or a combination—of four means.<sup>161</sup> First, “by means of force, threats of force, physical restraint, or threats of physical restraint.”<sup>162</sup> Second, “by means of serious harm or threats of serious harm.”<sup>163</sup> Third, “by means of the abuse or threatened abuse of law or legal process.”<sup>164</sup> And fourth, “by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.”<sup>165</sup>

“Serious harm” is defined broadly by the 2008 amendment to the act. It “means any harm, whether physical or nonphysical, including psychological . . . harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.”<sup>166</sup>

The language of § 1589 bars all forms of coerced labor, even when the coercion employed is subtle. The definition of “serious harm” covers a variety of possible forms of coercion beyond physical violence; it forces courts and prosecutors to take account of the circumstances of each offense and the characteristics of each victim.<sup>167</sup> The inclusion of “any scheme, plan, or pattern” allows enforcement without requiring victims to provide evidence of a single specific act of coercion.<sup>168</sup> Finally, there is no requirement in the text for the victims to be immigrants or be trafficked across any border. Rather, the statute protects everyone in the United States.

(2) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

161. *Id.* § 1589(a). The Dictionary Act defines “whoever” to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” 1 U.S.C. § 1 (2018). The statute explicitly includes government contractors and forbids them from using forced labor. *See infra* Section IV.B.1; 22 U.S.C. § 7104(g)(3) (2018).

162. 18 U.S.C. § 1589(a)(1).

163. *Id.* § 1589(a)(2).

164. *Id.* § 1589(a)(3).

165. *Id.* § 1589(a)(4). The definition of “labor and services” applies to coerced acts beyond simply “work in the economic sense.” *United States v. Kaufman*, 546 F.3d 1242, 1263 (10th Cir. 2008).

166. 18 U.S.C. § 1589(c)(2).

167. *Id.*

168. 18 U.S.C. § 1589(a)(4).

## B. Legislative History

The legislative history of the TVPA and its 2008 amendments demonstrates the explicit intent of Congress to expand the scope of the federal ban on forced labor beyond the involuntary servitude forbidden by 18 U.S.C. § 1584, which the Supreme Court interpreted narrowly in 1988 in *United States v. Kozminski*.<sup>169</sup>

In that case, Ike Kozminski was charged with coercing two mentally disabled men to labor on his farm.<sup>170</sup> At trial, the government argued that the men were “psychological hostages,”<sup>171</sup> and the trial judge instructed the jury that under 18 U.S.C. § 1584, involuntary servitude “may also include situations involving either physical and other coercion, or a combination thereof, used to detain persons in employment.”<sup>172</sup> The jury convicted, and Kozminski appealed. The Sixth Circuit Court of Appeals, sitting en banc, held that the trial court’s definition of involuntary servitude was too broad and vacated the verdict.<sup>173</sup> The Supreme Court granted certiorari and affirmed.<sup>174</sup>

The Court held that the meaning of “involuntary servitude” in § 1584 is identical to its meaning in the Thirteenth Amendment and thus requires physical or legal, not psychological, coercion.<sup>175</sup> Justice O’Connor, writing for the majority, reasoned that by borrowing the term “involuntary servitude” from the Thirteenth Amendment, Congress evidenced an aim to forbid the same type of activity as was banned under the Amendment, as interpreted at the time of § 1584’s codification in 1948.<sup>176</sup> Thus, the Court held that “‘involuntary servitude’ necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.”<sup>177</sup>

Many scholars and activists felt that the Court had defined involuntary servitude too narrowly and therefore risked making it much more difficult to prosecute cases of forced labor.<sup>178</sup> In response, Congress created the “forced

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169. *United States v. Kozminski*, 487 U.S. 931 (1988). Several courts have recognized this fact. *See United States v. Callahan*, 801 F.3d 606, 618 (6th Cir. 2015) (citing *United States v. Kaufman*, 546 F.3d 1242, 1261 (10th Cir. 2008)); *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004), (judgment vacated on other grounds, 545 U.S. 1101 (2005)).

170. *Kozminski*, 487 U.S. at 934.

171. *Id.* at 936.

172. *Id.* at 937.

173. *Id.* at 937–38.

174. *Id.* at 939.

175. *Id.* at 945.

176. *Id.*

177. *Id.* at 952.

178. *See, e.g.,* Kenneth T. Koonce Jr., *United States v. Kozminski: On the Threshold of Involuntary Servitude*, 16 PEPP. L. REV. 689 (1989); Ann Penners Wrosch, *Undue Influence, Involuntary Servitude and Brainwashing: A More Consistent, Interests-Based Approach*, 25 LOY. L.A. L. REV. 499 (1992).

labor” section of the TVPA.<sup>179</sup> The findings section of the statute refers to *Kozminski* and states that the law aims to expand the definition of involuntary servitude.<sup>180</sup>

The TVPA Conference Report also states that § 1589 was created to “address issues raised by . . . *Kozminski*.”<sup>181</sup> If he had been charged under § 1589, *Kozminski*’s conviction would have likely been upheld. The conferees wrote that § 1589 is directed at the “subtle methods” used to coerce labor and that it “will provide . . . tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*.”<sup>182</sup> Moreover, although “serious harm” would not be defined in the statutory text until the Act was amended in 2008, the Conference Report stated:

serious harm . . . refers to a broad array of harms, including both physical and nonphysical, and [the statute is] intended to be construed with respect to the individual circumstances of victims that are relevant in determining whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain a victim’s labor or services.<sup>183</sup>

The legislative history of the 2008 amendments is scant.<sup>184</sup> A few weeks before the bill was passed, two Congressmen noted on the House floor that the purpose of the amendments was to make explicit that the definition of “serious harm” in the TVPA “allowed conviction in servitude cases involving psychological coercion as well as overt violence.”<sup>185</sup> The Congressmen also noted that the modifications to § 1589 were meant to ban “various and subtle forms of coercion.”<sup>186</sup> In addition, they explained that the “scheme, plan, or pattern” contemplated by the law is any one “intended to inculcate a belief of serious harm [and] may refer to nonviolent and psychological coercion, including but not limited to isolation, denial of sleep and punishments, or preying on mental illness, infirmity, drug use or addictions.”<sup>187</sup>

Two important conclusions can be drawn from the law’s text and legislative history. First, Congress intended § 1589 to criminalize behavior that was

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179. See, e.g., Taylor King, *On This Day in History: United States v. Kozminski*, TRAFFICKING MATTERS, <https://www.traffickingmatters.com/on-this-day-in-history-united-states-v-kozminski/>.

180. 22 U.S.C. § 7101(b)(13) (2018).

181. H.R. REP. NO. 106-939, at 100 (2000) (Conf. Rep.).

182. *Id.* at 101.

183. *Id.*

184. *But see* H.R. REP. NO. 110-430 (2007). There was no conference report on the amendments and no floor debate in either chamber.

185. 154 CONG. REC. 10888, 10904 (2008) (Statements of Reps. Berman and Conyers).

186. *Id.* In fact, the law has been very effective. In 2017, the Justice Department obtained 15 convictions under 18 U.S.C. § 1589 but none under § 1584. U.S. DEP’T OF JUSTICE, ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 18 (2017), <https://www.justice.gov/humantrafficking/page/file/1103081/download>.

187. 154 CONG. REC. at 10904 (2008).

not covered by § 1584. Thus, cases interpreting § 1584 are not relevant to interpreting the TVPA in forced labor cases. Second, the law defines “serious harm” broadly to include nonphysical coercion and coercion by a mixture of means.

### C. *Class Actions under TVPA*

The TVPA is well suited to class action litigation. Its broad language makes class certification relatively easy because plaintiffs can show that the common issues exist and predominate over individual concerns.<sup>188</sup> Plaintiffs who wish to certify a class under Rule 23 of the Federal Rules of Civil Procedure must meet all of the prerequisite requirements of Rule 23(a)<sup>189</sup> and must fit into one of the three categories set forth in Rule 23(b).<sup>190</sup> The TVPA class actions at issue in this Article are mostly for damages, so they fall under the more stringent requirements of Rule 23(b)(3).<sup>191</sup> Class actions under the TVPA for forced labor in privately managed immigration detention facilities easily meet the requirements of Rule 23(a) and the language of § 1589 makes it relatively easy for plaintiffs to show that common issues predominate and thus meet the requirements of Rule 23(b)(3).

#### 1. *Rule 23(a)*

The current litigation easily meets the prerequisites of Rule 23(a). Rule 23(a)(1) requires that the plaintiffs be so numerous that joinder is impracticable.<sup>192</sup> A leading treatise and numerous cases state that classes with more than forty members presumptively meet this requirement.<sup>193</sup> Most ICE forced-labor classes have far more than forty purported class members.<sup>194</sup> Even a smaller class, however, is likely to meet this requirement because joinder of formerly detained immigrants scattered throughout the world is impracticable.<sup>195</sup> But in practice, given the large numbers of detainees who cycle through these facilities and are subject to forced labor policies, a typical class will have at least several thousand putative members.<sup>196</sup>

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188. See *Menocal v. GEO Group, Inc.*, 320 F.R.D. 258 (D. Colo. 2017), *aff'd*, 882 F.3d 905 (10th Cir. 2018); see also Renee M. Knudsen, *From Second Class to Certified Class: Using Class-Action Lawsuits to Combat Human Trafficking*, 28 REGENT U. L. REV. 137 (2016).

189. FED. R. CIV. P. 23(a).

190. FED. R. CIV. P. 23(b).

191. In *Novoa*, the court certified some subclasses under Rule 23(b)(2) and others under Rule 23(b)(3). *Novoa v. GEO Group, Inc.*, No. EDCV 17-2514 JGB (SHKx), 2019 WL 7195331, at \*19 (C.D. Cal. Nov. 26, 2019).

192. FED. R. CIV. P. 23(a)(1).

193. 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:12 (5th ed.).

194. See *Novoa*, 2019 WL 7195331, at \*11–12 (C.D. Cal. 2019).

195. RUBENSTEIN, *supra* note 193, at § 3:14.

196. See, e.g., Motion for Class Certification Under Rule 23(b)(3), at 10, *Menocal v. GEO Group, Inc.*, 320 F.R.D. 258 (D. Colo. 2017) (claiming that the proposed class contains 50,000 to 60,000 members).

Rule 23(a)(2) requires that the class have common questions of law or fact.<sup>197</sup> Only a single common issue is required.<sup>198</sup> Forced-labor lawsuits against ICE raise many common issues of law and fact, such as the applicability of the TVPA to immigration detention and whether specific ICE policies constitute forced labor.<sup>199</sup>

Rules 23(a)(3) and 23(a)(4) both focus on the class representative. Rule 23(a)(3) requires that the class representative's claims and defenses be "typical" of the class.<sup>200</sup> A representative's claim is typical "if it arises from the same event, practice, or course of conduct that gives rise to the claims of other class members and if his or her claims are based on the same legal theory."<sup>201</sup> This requirement is easily met because all class representatives allege that they were subject to the same illegal and coercive labor policy and allege that it violates the TVPA.<sup>202</sup> Rule 23(a)(4) requires that the class representative be an adequate representative of the class.<sup>203</sup> This standard generally requires that the representative have no conflicts of interest and has a basic knowledge of the case.<sup>204</sup> Again, it is easy to find a former detainee who was allegedly coerced into laboring and thus satisfies this minimal requirement.<sup>205</sup>

## 2. Rule 23(b)(3)

Class actions must also meet the requirements of one of the three categories of Rule 23(b). The lawsuits that have been filed against GEO Group and CoreCivic have mostly sought class certification under Rule 23(b)(3), which allows for damages.<sup>206</sup> Rule 23(b)(3) requires that common issues "predominate over any questions affecting only individual members" ("predominance") and that a class action be "superior to other available methods of adjudicating the controversy" ("superiority").<sup>207</sup>

Predominance is the most difficult step on the path to class certification, and meeting the requirement is "far more demanding" than meeting the Rule 23(a) factors.<sup>208</sup> Rule 23(b)(3) does not require that each and every issue be

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197. FED. R. CIV. P. 23(a)(2).

198. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) ("for purposes of Rule 23(a)(2) [e]ven a single [common] question will do") (internal quotation marks omitted).

199. *See, e.g., Menocal*, 320 F.R.D. at 264 ("Representatives submit that the common questions putative class members share are: (1) whether GEO obtains the labor of class members; (2) whether GEO threatens class members with physical restraint, serious harm, or abuse of the legal process; and (3) whether GEO knowingly obtains class members' labor by . . . means of these threats.") (internal quotation marks omitted).

200. FED. R. CIV. P. 23(a)(3).

201. RUBENSTEIN, *supra* note 193, at § 3:29.

202. *Novoa v. GEO Group, Inc.*, No. EDCV 17-2514 JGB (SHKx), 2019 WL 7195331, at \*13–15 (C.D. Cal. 2019).

203. FED. R. CIV. P. 23(a)(4) (2009).

204. RUBENSTEIN, *supra* note 193, at § 3:54.

205. *Novoa*, 2019 WL 7195331, at \*18.

206. *Menocal v. GEO Group, Inc.*, 320 F.R.D. 258 (D. Colo. 2017), *aff'd*, 882 F.3d 905 (10th Cir. 2018). *But see Novoa*, 2019 WL 7195331, at \*10 (summarizing proposed subclasses under Rule 23(b)(2) and 23(b)(3)).

207. FED. R. CIV. P. 23(b)(3) (2009).

208. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997).



common to the class, but rather that common issues of law and fact outweigh individual issues.<sup>209</sup> The predominance requirement assesses whether the interests of the class are “sufficiently cohesive to warrant adjudication by representation”<sup>210</sup> and asks whether the issues are susceptible to class-wide proof.<sup>211</sup> “Put differently, the predominance prong asks whether the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.”<sup>212</sup> In assessing predominance, courts are required to look at the specific elements of the underlying claim, including the statute under which the claim is made.<sup>213</sup>

Certain individual issues recur commonly in 23(b)(3) class actions, but rarely defeat a motion for class certification. Such issues include the presence of individual damage calculations, individual counterclaims, and individual affirmative defenses.<sup>214</sup> It is in meeting the predominance requirement that the text of 18 U.S.C. § 1589 is most helpful to plaintiffs.

In defining forced labor, the TVPA contains both an objective and a subjective element. The person who obtains labor must objectively do so “by means of” one of the elements of the statute: force or threats of force, serious harm or threats of serious harm, abuse or threatened abuse of legal process, or a scheme, plan, or pattern intended to cause the victim to believe they would suffer serious harm.<sup>215</sup> This element is susceptible to class-wide proof in ICE forced labor cases because plaintiffs argue that the formal and informal policies of GEO Group and CoreCivic amount to forced labor. It then becomes a question of fact for a jury whether or not these policies and practices meet the definition of forced labor under 18 U.S.C. § 1589.

The more difficult question is whether the class members were subjectively coerced by the policies. In other words, did GEO Group and CoreCivic’s policies cause them to labor?<sup>216</sup> In attempting to defeat class certification, GEO Group has argued that causation is fundamentally an individual issue that is not susceptible to class-wide proof and, moreover, it is so central to the case that it should defeat class certification.<sup>217</sup> In *Menocal*, the first ICE forced-labor case in which a class was certified, the Tenth Circuit avoided deciding whether or not a reasonable person standard should determine causation by holding that, regardless, causation was susceptible to

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209. 2 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 4:51 (5th ed. 2011).

210. *Amchem*, 521 U.S. at 623.

211. *See, e.g.*, *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006).

212. *Menocal v. GEO Group, Inc.*, 882 F.3d 905, 914–15 (10th Cir. 2018), cert. denied, 139 S. Ct. 143, 202 L.Ed.2d 34 (2018) (quoting *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014)).

213. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

214. RUBENSTEIN, *supra* note 209, at §§ 4:53–61. *See also* *Novoa v. GEO Group, Inc.*, No. EDCV 17-2514 JGB (SHKx), 2019 WL 7195331, at \*14–15 (C.D. Cal. 2019).

215. 18 U.S.C. § 1589(a) (2018).

216. *See Menocal*, 882 F.3d at 918 (“[P]laintiffs must prove that an unlawful means of coercion caused them to render labor.” (citing *United States v. Kalu*, 791 F.3d 1194, 1211–12 (10th Cir. 2015))).

217. *See* Defendant’s Opposition to Motion for Class Certification at 32–40, *Menocal v. GEO Group*, 320 F.R.D. 258 (D. Colo. 2017) (No. 14-CV-02887-JLK).

class-wide proof by inference from common circumstantial evidence.<sup>218</sup> Moreover, it held that neither GEO Group's "hypothetical alternative explanations for the class members' labor" nor the presence of individualized damages calculations defeated predominance.<sup>219</sup>

The Tenth Circuit reasoned that class-wide circumstantial evidence was appropriate because an individual class member could prove causation under the TVPA through circumstantial evidence and because "the TVPA class members share the relevant evidence in common because their claims are based on allegations of a single, common scheme."<sup>220</sup> The plaintiffs alleged that GEO Group had a uniform "sanitation policy" that all detained immigrants were aware of and that required coercive discipline, including solitary confinement, for those who refused to work.<sup>221</sup> Thus, they argued, the entire class was forced to labor by means of GEO Group's "scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm."<sup>222</sup> Therefore, common issues predominated over individual issues.

Finally, the TVPA lawsuits easily meet the superiority prong. Superiority is a less onerous requirement than predominance and requires a comparison between the representative litigation of a class action and other alternatives, such as individual lawsuits.<sup>223</sup> Class actions are most clearly superior to individual litigation in cases where there are small but widespread monetary damages<sup>224</sup> or vulnerable or dispersed class members who are unlikely to bring their own lawsuits.<sup>225</sup> In short, as the Supreme Court wrote, the class action mechanism is meant to protect the "rights of groups of people who individually would be without effective strength to bring their opponents into court at all."<sup>226</sup> In these cases, where the class members have largely been deported to countries around the world and have relatively small damages claims, a class action is the superior method of adjudication.<sup>227</sup>

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218. *Menocal*, 882 F.3d at 922 (citing *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014)). See also *Nova*, 2019 WL 7195331, at \*16 (following the reasoning of *Menocal* and certifying class under TVPA); *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2020 WL 1550218, at \*28 (S.D. Cal. Apr. 1, 2020) ("[A]n inference of class-wide causation may be permissible where, as here, the putative class members share a large number of common attributes such that they are similarly situated.").

219. *Menocal*, 882 F.3d at 921–22.

220. *Id.* at 919.

221. *Id.* at 920.

222. 18 U.S.C. § 1589(a)(4) (2018).

223. RUBENSTEIN, *supra* note 209, at § 4:64.

224. The Supreme Court has called this "[t]he policy at the very core of the class action mechanism. . . ." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

225. RUBENSTEIN, *supra* note 209, at § 4:65.

226. *Amchem*, 521 U.S. at 617.

227. *Nova v. GEO Group, Inc.*, No. EDCV 17-2514 JGB (SHKx), 2019 WL 7195331, at \*19 (C.D. Cal. 2019). ("[T]he fact class members may otherwise be unable to bring their claims due to their tenuous situations only militates in favor of certification."); *Menocal v. GEO Group, Inc.*, 320 F.R.D. 258, 268 (D. Colo. 2017) ("In this case, the putative class members reside in countries around the world, lack English

#### IV. TVPA LITIGATION AND POTENTIAL MAJOR CHANGES TO IMMIGRATION DETENTION

Because of its text and legislative history, the TVPA applies within for-profit immigration detention facilities and has already shown promise as a vehicle for challenging abuse in for-profit immigration detention facilities. Similar suits are likely to continue to find success and may disrupt the system of immigration detention by significantly reducing the profitability of private facility operators.<sup>228</sup>

##### A. Overview of Lawsuits

There are ongoing class-action lawsuits challenging forced labor in ICE detention centers run by GEO Group and CoreCivic in California, Texas, Georgia, and Colorado.<sup>229</sup> The suits all claim that the VWP, mandatory housekeeping, or both, violate the TVPA. Most have also pleaded derivative common law claims, such as unjust enrichment, which have survived dismissal along with the TVPA claims.<sup>230</sup> In addition, some cases have pleaded claims under state employment law, and these claims have risen or fallen based on the content of the state statutes.<sup>231</sup>

The most advanced lawsuit is *Menocal v. GEO Group*.<sup>232</sup> The District Court for the District of Colorado denied a motion to dismiss and certified a class both under the TVPA (for mandatory housekeeping duties) and under state unjust enrichment law (for the VWP).<sup>233</sup> GEO Group filed an interlocutory appeal of the class certification decision, but the Tenth Circuit upheld the certification and the Supreme Court denied certiorari.<sup>234</sup> In addition, in late 2019, the District Court for the Central District of California certified a class in *Novoa v. GEO Group*<sup>235</sup> and in April 2020, the District Court for the Southern District of California certified several classes in *Owino v. CoreCivic*.<sup>236</sup>

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proficiency, and have little knowledge of the legal system in the United States. It is unlikely that they would individually bring these innovative claims against GEO.”)

228. In addition to other already-existing securities cases against the corporations, such as *Grae v. Corrections Corporation of America*, 330 F.R.D. 481 (M.D. Tenn. 2019), both corporations risk securities liability if they make or have made material misstatements downplaying the threat of the lawsuits.

229. See Table 1, *infra*.

230. Most have also pleaded various state law claims, which usually, but not always, have been dismissed.

231. See *Chen v. GEO Group, Inc.*, 287 F. Supp. 3d 1158, 1168 (W.D. Wash. 2017) (denying a motion to dismiss a case under Washington minimum wage law because “it is plausible that Plaintiff is an ‘employee’ under Washington law”).

232. *Menocal v. GEO Group, Inc.*, 882 F.3d 905, 905 (10th Cir. 2018).

233. *Id.* at 1135; *Menocal v. GEO Group, Inc.*, 320 F.R.D. 258, 271 (D. Colo. 2017).

234. *Menocal*, 882 F.3d at 916.

235. *Novoa v. GEO Group, Inc.*, No. EDCV 17-2514 JGB (SHKx) 2019 WL 7195331, at \*20 (C.D. Cal. 2019).

236. *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2020 WL 1550218 (S.D. Cal. Apr. 1, 2020).

TABLE 1: ONGOING TVPA CASES AGAINST CORECIVIC AND GEO GROUP

Case Name	Court	Docket	Year Filed	TVPA Claims - VPW	TVPA Claims - Housekeeping	State Statutory Claims	Derivative Common Law Claims	Survived Dismissal?	Class certified?
<i>Menocal v. GEO Group</i>	D. Colo.	14-CV-02887-JLK	2014	No	Yes	Yes	Yes	Yes	Yes
<i>Barrientos v. GEO Group</i>	M. D. Ga.	4:18-cv-00070-CDL	2018	Yes	No	No	Yes	Yes (upheld on appeal)	No Decision
<i>Martha Gonzales v. CoreCivic</i>	W. D. Tex.	1:18-cv-00169-LY	2018	Yes	Yes	No	Yes	Yes (interlocutory appeal)	No Decision
<i>Carlos Gonzales v. CoreCivic</i>	S. D. Cal.	3:17-cv-02573-AJB-NLS	2017	Yes	Yes	Yes	No	No Decision	No Decision
<i>Novoa v. GEO Group</i>	C. D. Cal.	5:17-cv-02514-IJB-SHK	2017	Yes	No	Yes	Yes	Yes	Yes
<i>Owino v. CoreCivic</i>	S. D. Cal.	3:17-cv-01112-JLS-NLS	2017	Yes	Yes	Yes	Yes	Yes	Yes

The other most significant case is *Barrientos v. CoreCivic*.<sup>237</sup> In *Barrientos*, the District Court for the Middle District of Georgia denied the motion to dismiss, but immediately certified the case for interlocutory appeal for the Eleventh Circuit to rule on the core question of whether the TVPA applies to for-profit detention centers.<sup>238</sup> In February 2020, the Eleventh Circuit held that the TVPA covers work programs in for-profit immigration detention facilities.<sup>239</sup>

## B. *The TVPA's Application to For-Profit Immigration Detention Facilities*

As the Eleventh Circuit recently held, the text and legislative history of the TVPA demonstrates that it applies to for-profit immigration detention facilities.<sup>240</sup> What is more, the defenses that CoreCivic and GEO Group attempted to raise have repeatedly and rightly failed.

### 1. *Text*

As courts have repeatedly noted, when interpreting a statute, courts must “presume that a legislature says in a statute what it means and means in a statute what it says.”<sup>241</sup> Courts have found that the text of the TVPA unambiguously covers the forced labor allegedly utilized by the GEO Group and CoreCivic in their immigration detention facilities<sup>242</sup> for four reasons.

First, the statute applies to “whoever” obtains forced labor.<sup>243</sup> Congress could have limited the reach of this section of the Act: for example, by applying it only to individuals. Instead, Congress wrote this section to prohibit anyone from obtaining forced labor, including corporations and, as discussed below, government contractors.<sup>244</sup>

Second, as noted above, Congress chose to define “serious harm” broadly to include harm “sufficiently serious, under all the surrounding circumstances, to compel a *reasonable person of the same background and in the same circumstances*” to labor or continue laboring.<sup>245</sup> Congress drafted this text to prevent acquittals in cases such as *Kozminski* where vulnerable victims were not subjected to physical harm.<sup>246</sup> Detained immigrants are a particularly vulnerable group, which has contributed to endemic forced labor in detention facilities.

237. *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269 (11th Cir. 2020).

238. *Barrientos v. CoreCivic, Inc.*, 332 F. Supp. 3d 1305, 1313 (M.D. Ga. 2018).

239. *Barrientos*, 951 F.3d at 1271. The appellate documents in *Barrientos* are drafted under the caption *Ahmed v. CoreCivic, Inc.* Another case has been certified to the Fifth Circuit for similar reasons. *Gonzalez v. CoreCivic, Inc.*, No. 1:18-cv-00169-LY, 2019 WL 2572540 (W.D. Tex., Mar. 1, 2019).

240. *Barrientos*, 951 F.3d at 1278.

241. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

242. *Barrientos*, 951 F.3d at 1276–78.

243. 18 U.S.C. § 1589(a) (2018).

244. *Barrientos*, 951 F.3d at 1277; *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at \*4, \*6 (S.D. Cal. May 14, 2018).

245. 18 U.S.C. § 1589(c)(2) (emphasis added).

246. *See supra* Section III.B.

Third, Congress allowed those who obtained forced labor through a “combination of” means to be prosecuted, even if no single coercive act alone reached the necessary severity.<sup>247</sup> Congress also decided to include in the Act coercion by means of a “scheme, plan, or pattern” that caused a victim to believe they would be subject to serious harm if they did not labor or continue to labor.<sup>248</sup> One court has held “solitary confinement alone constitutes serious harm.”<sup>249</sup> But even if solitary confinement was not used, the broad language of the TVPA allows courts to take multiple types of coercion into account and make sure no instances of forced labor fall through the cracks.

Finally, rather than exempt government contractors, the TVPA explicitly includes them. For example, the law requires that the government terminate its relationship with any contractor that “engages in, or uses labor recruiters, brokers, or other agents who engage in . . . the use of forced labor.”<sup>250</sup> In addition to this explicit inclusion of government contractors, the Eleventh Circuit has held that “nothing in the text of the statute excludes federal contractors providing immigration detention services from liability under the TVPA,”<sup>251</sup> and has noted that the Department of Justice supports interpreting the TVPA to cover government contractors.<sup>252</sup>

In conclusion, it is not an absurd or “boundless reading”<sup>253</sup> of the TVPA to apply it to for-profit immigration detention, as the for-profit prison corporations have claimed.<sup>254</sup> Rather, it is what the law requires.

## 2. Legislative History

In their briefs and motions to dismiss in these cases, GEO Group and CoreCivic have generally ignored the text of the TVPA and argued instead that the purpose of the TVPA was solely to combat international human trafficking, and thus the law must reach no further.<sup>255</sup> Courts have rejected this argument, and for good reason.<sup>256</sup> All courts that have ruled on the application of § 1589 agree that, as discussed above, preventing international labor

247. 18 U.S.C. § 1589(a).

248. *Id.* § 1589(a)(4).

249. *Gonzalez v. CoreCivic, Inc.*, No. 1:18-CV-169-LY, 2019 WL 2572540, at \*2 (W.D. Tex. Mar. 1, 2019).

250. 22 U.S.C. § 7104(g)(3) (2018).

251. *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1277 (11th Cir. 2020).

252. *Id.* at \*8 n.7. *See also* Brief for the United States as Amicus Curiae in Support of Neither Party at 8, *Ahmed v. CoreCivic, Inc.*, No. 18-15081 (11th Cir. Apr. 1, 2019).

253. *Bond v. United States*, 572 U.S. 844, 860 (2014).

254. *See, e.g.*, Defendant CoreCivic’s Motion to Dismiss at 7, *Gonzalez v. CoreCivic, Inc.*, 2019 WL 2572540 (W.D. Tex. Mar. 1, 2019) (No. 1:18-CV-169-LY); Replacement Opening Brief of Defendant-Appellant at 11, 15, *Ahmed v. CoreCivic, Inc.*, No. 18-15081 (11th Cir. Mar. 25, 2019); Motion for Reconsideration of Order Denying GEO Group, Inc.’s Motion to Dismiss, at 10, *Menocal v. GEO Group, Inc.*, 113 F. Supp. 3d 1125 (D. Colo. 2015) (No. 14-cv-02887-JLK).

255. *See, e.g.*, Replacement Opening Brief of Defendant-Appellant at 19, *Ahmed v. CoreCivic, Inc.*, No. 18-15081 (11th Cir. Mar. 25, 2019); Motion to Dismiss, *Menocal v. GEO Group, Inc.*, 113 F. Supp. 3d 1125 (D. Colo. 2015) (No. 14-cv-02887-JLK).

256. *Barrientos*, 951 F.3d at 1278–80; *United States v. Callahan*, 801 F.3d 606, 617 (6th Cir. 2015) (finding unpersuasive the defendants’ contention that 18 U.S.C. § 1589 applied only to foreign-born victims and thus upholding conviction); *United States v. Kaufman*, 546 F.3d 1242, 1259–63 (10th Cir. 2008)



trafficking and sex trafficking was one of the goals of the TVPA, but the explicit purpose of § 1589 was to create a new cause of action to supersede the Supreme Court's narrow definition of "involuntary servitude" in *Kozminski*.<sup>257</sup>

### 3. Defenses

GEO Group and CoreCivic have attempted to raise two primary defenses, but both have failed.

First, in *Menocal*, GEO Group argued for dismissal on the grounds of contractor immunity.<sup>258</sup> GEO Group argued that under *Boyle*<sup>259</sup> and *Malesko*,<sup>260</sup> it should be immune from suit because the government ordered it to perform the very actions that were the basis of the plaintiffs' claims.<sup>261</sup> But coercion is not required by the PNDBS and the Government has disavowed any suggestion that coerced labor has any place in the VWP.<sup>262</sup> Thus, the contractor preemption defense is unlikely to lead to the dismissal of TVPA cases.

Second, also in *Menocal*, GEO Group also argued that any forced labor in its facilities was permitted by the so-called "civic duty exception" to the Thirteenth Amendment.<sup>263</sup> In 1997, the Fifth Circuit held that under the Thirteenth Amendment (not the TVPA), forcing an immigrant detainee in a government-run facility to labor under threat of solitary confinement did not constitute involuntary servitude, as it was the detainee's "civic duty."<sup>264</sup> The court in *Menocal* distinguished the Fifth Circuit case because the defendants "cited no authority for reading a civic duty exception into § 1589, or for applying such an exception to a private, for-profit corporation."<sup>265</sup> In short, the Thirteenth Amendment is not relevant to these cases, and there is no civic duty to increase the profits of the shareholders of private prison corporations.

By its text and legislative history, § 1589 criminalizes all forced labor, including in privately managed immigration detention centers.

### C. Potential Effects of TVPA Lawsuits on Immigration Detention

Many developments in the last year have begun to render mass immigration untenable. The COVID-19 pandemic has spurred hunger strikes from

(adopting a broad definition of "labor and services" and stating that Congress, in 18 U.S.C. § 1589, intended for the definition of "forced labor" to be broader than that of "involuntary servitude").

257. See 22 U.S.C. § 7101(b)(13) (2018); H.R. REP. NO. 106-939, at 100 (2000) (Conf. Rep.).

258. See *Menocal v. GEO Group, Inc.*, 113 F. Supp. 3d 1125, 1134–35 (D. Colo. 2015).

259. *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988).

260. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

261. See *id.* at 74 n.6.

262. See Brief for the United States as Amicus Curiae in Support of Neither Party at 8–11, *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269 (11th Cir. 2020) (No. 18-15081).

263. See *Menocal*, 113 F. Supp. 3d at 1132.

264. *Id.* at 1132 (citing *Channer v. Hall*, 112 F.3d 214 (5th Cir. 1997)).

265. See *Menocal*, 113 F. Supp. 3d at 1133. See also *Novoa v. GEO Group, Inc.*, No. EDCV 17-2514 JGB (SHKx), 2018 WL 3343494, at \*13–14 (C.D. Cal. June 21, 2018); *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at \*6–10 (S.D. Cal. May 14, 2018).

detained immigrants<sup>266</sup> and even forced ICE to release some at-risk detainees.<sup>267</sup> The TVPA lawsuits will likely continue this trend, potentially driving for-profit detention corporations out of the industry and drastically increasing the costs and logistical challenges of mass immigrant detention. These costs and potential changes are necessarily speculative, but this Section attempts to think through the potential impact of a material change in the profitability of immigration detention to GEO Group and CoreCivic on the system as a whole. The most straightforward solution to both the current health crisis and the coming cost crisis is to detain fewer immigrants.

The direct and indirect costs of defending against these lawsuits, and the cost of a potential verdict or settlement, are quite high. A nationwide settlement covering a class of all detained immigrants held by GEO Group and CoreCivic could easily cost hundreds of millions of dollars, not counting reputational harm.<sup>268</sup> The ongoing costs of ceasing to coerce detained immigrants to labor could be even higher in the long run. Most significantly, the corporations would have to hire more non-detained employees who would be paid at least the state minimum wage to replace many functions currently performed by detained immigrants. These additional costs are likely to have a large impact on GEO Group and CoreCivic because they are organized as Real Estate Investment Trusts (“REITs”). If for-profit detention facilities are pushed out of the business of detaining immigrants, the bed space they provide will be difficult to replace and could cause major changes in the United States’ system of immigration detention.

Although the costs of legal representation and monetary damages to plaintiffs have the potential to be quite large, they are essentially one-time costs.<sup>269</sup> It is likely, however, that any verdict or settlement would include injunctive relief: GEO Group and CoreCivic will be required to cease labor practices that violate the TVPA.<sup>270</sup> The costs that would accrue from a change to labor practices in detention will last as long as GEO Group and CoreCivic continue

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266. Dara Lind, *ICE Detainee Says Migrants Are Going on a Hunger Strike for Soap*, PROPUBLICA (Mar. 23, 2020, 5:57 PM), <https://www.propublica.org/article/ice-detainee-says-migrants-are-going-on-a-hunger-strike-for-soap>; Alejandro Lazo, *Protests, Hunger Strikes Erupt Over Coronavirus in Immigration Detention*, WALL ST. J. (Mar. 27, 2020, 1:25 PM), <https://www.wsj.com/articles/protests-hunger-strikes-erupt-over-coronavirus-in-immigration-detention-11585320903>; Chase Hutchinson, *Scores of Tacoma ICE Detainees Refusing Food to Try to Force Coronavirus Changes, Advocates Say*, TACOMA NEWS TRIB. (Mar. 30, 2020, 3:27 PM), <https://www.thenewstribune.com/news/coronavirus/article241632656.html>.

267. Noah Lanard, *Civil Rights Groups Sue ICE to Force Release of Detainees Vulnerable to COVID-19*, MOTHER JONES (Mar. 31, 2020), <https://www.motherjones.com/politics/2020/03/civil-rights-groups-sue-ice-to-force-release-of-detainees-vulnerable-to-covid-19/>; Scott Neuman, *Judge Orders 10 ICE Detainees Released from N.J. Jails over COVID-19 Concerns*, NPR (Mar. 27, 2020, 1:34 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/27/822348039/federal-judge-orders-10-ice-detainees-released-from-n-j-jails-over-covid-19-conc>. See also *United States v. Nkanga*, No. 18-CR-713 (JMF) 2020 WL 1529535 (S.D.N.Y. Mar. 31, 2020) (calling for Congressional action to release vulnerable incarcerated people from prison).

268. See Buckhardt, *The Politics of Correctional Privatization*, *supra* note 74, at 411 (describing the potential reputational harm of participation in mass immigrant detention).

269. *But see* Swan, *supra* note 127.

270. Demands for injunctive relief are included in the complaints. See, e.g., Complaint for Declaratory and Injunctive Relief and Damages, *Barrientos v. CoreCivic, Inc.*, 332 F. Supp. 3d 1305

in the business of detaining immigrants. As detailed in the complaints and reporting, detained immigrants perform a wide variety of work in the detention facilities.<sup>271</sup> As mentioned above, janitorial and food service are the two largest categories, but detainees also perform all manner of work. Without coercion, this would change.<sup>272</sup>

Labor costs constitute a significant segment of GEO Group and CoreCivic's expenses, and the end of coerced labor in detention facilities would raise costs significantly. Some detainees would still work under a truly voluntary work program, out of boredom, if nothing else. But it is fair to assume that the labor supplied by detained immigrants would decrease without coercion. If solitary confinement is not the punishment for refusing to work a double shift, detainees will work fewer double shifts. If soap and toothpaste are provided for free instead of sold, there is less need to work for a dollar per day. Certainly, detainees are unlikely to do uncompensated janitorial work under the guise of mandatory housekeeping labor if that labor is no longer obtained through coercion.

All of these jobs, however, are necessary for the detention facilities to function. If detainees are not cleaning and cooking, someone else will have to do those jobs. Non-detained employees will have to be paid at least minimum wage, which is anywhere between ten and forty times the hourly wage of detained immigrant workers.<sup>273</sup> It is impossible to know in advance whether it would render immigration detention unprofitable, but it would certainly reduce profit margins.<sup>274</sup> If such changes make it difficult or impossible to profit from detaining immigrants, both corporations are likely to move away from the business, and their recent diversification into other areas of the carceral system may make this shift easier to accomplish.

What is more, two related complications make this reduction in the profitability potentially more significant for GEO Group and CoreCivic than it would be for most corporations. In 2013, both companies reorganized as REITs.<sup>275</sup> It is somewhat unexpected that corporations that primarily profit through government contracts would use the same corporate form as corporations that own a number of malls or apartment buildings, but the REIT form

(M.D. Ga 2018) (No. 4:18-CV-70 (CDL)); Original Complaint and Class Action, *Gonzalez v. CoreCivic, Inc.*, 2019 WL 2572540 (W.D. Tex. Mar. 1, 2019) (No. 1:18-CV-169-LY).

271. Urbina, *supra* note 141.

272. *See supra* note 135.

273. These calculations are necessarily inexact because detained immigrant workers are not paid hourly and because both their daily rate of pay and state minimum wages differ across the country. The minimum that a non-detained employee could be paid for an 8-hour shift is \$58 (at the federal minimum wage of \$7.25 per hour). Very few, if any, detained immigrant workers make more than \$5 per day.

274. *See Stevens, supra* note 126, at 402.

275. EISEN, *supra* note 31, at 130; Press Release, Corr. Corporation of Am., CCA Board of Directors Authorizes REIT Conversion (Feb. 7, 2013), <https://www.globenewswire.com/news-release/2013/02/07/1224227/0/en/CCA-Board-of-Directors-Authorizes-REIT-Conversion.html>; Matt Stroud, *Why Would A Prison Corporation Restructure As A Real Estate Company?*, FORBES (Jan. 31, 2013, 10:46 AM), <https://www.forbes.com/sites/mattstroud/2013/01/31/why-would-a-prison-corporation-restructure-as-a-real-estate-company/#4f9412716caa>.

has major tax advantages for shareholders.<sup>276</sup> REITs pay no corporate income tax but must distribute at least 90% of taxable income to shareholders.<sup>277</sup> With the obvious advantages of this corporate form<sup>278</sup> come significant risks. Because REITs must pay out so much of their income to shareholders, they often have little cash on hand and rely on revolving credit from banks.<sup>279</sup> As discussed above, due to activist pressure, many major banks have stopped lending to GEO Group and CoreCivic.<sup>280</sup> Thus, with little flexibility, the combination of a significant increase in labor costs caused by these lawsuits and the REIT structure could end up forcing GEO Group or CoreCivic to move away from immigrant detention contracts if they wish to retain their REIT status.

One potential solution for GEO Group and CoreCivic is to lobby Congress to supersede court decisions such as the Eleventh Circuit's recent decision in *Barrientos*, and declare that the TVPA does not apply to for-profit detention facilities. With Democrats in control of the House, however, such a change is hard to imagine. News coverage of such a bill would point out—accurately—that Congress was attempting to explicitly allow forced immigrant labor. It seems more likely that both companies will continue to litigate the cases in the courts, appealing them as many times as necessary. Both companies are hoping for a decision holding that the TVPA does not apply to immigration detention from the Fifth Circuit Court of Appeals panel in *Martha Gonzalez v. CoreCivic*.<sup>281</sup> Such a decision would create a circuit split on the question and thus increase the likelihood of the issue reaching the Supreme Court.

If GEO Group and CoreCivic become less involved in the business of detaining immigrants, by breaching or deciding not to renew detention contracts, ICE will be put in a difficult position. If it wants to continue detaining the same number of immigrants, ICE has two options. First, it could begin contracting more extensively with smaller for-profit prison corporations such as LaSalle Corrections and the Management and Training Corporation (“MTC”). Both LaSalle and MTC currently have contracts with ICE, but they manage far fewer facilities than GEO Group and CoreCivic do.<sup>282</sup> Even

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276. See Bryce Covert, *How Private Prison Companies Could Get Around a Federal Ban*, AM PROSPECT (June 28, 2019), <https://prospect.org/health/private-prison-companies-get-around-federal-ban/>.

277. 26 U.S.C. § 856 (2018). REITs also can own stock in “taxable REIT subsidiaries” (“TRS”) that do non-real estate business but are controlled by the larger REIT. For GEO Group and CoreCivic, the series of TRSs form the core of the business. See REIT Real Estate Investment Trust Modernization Act of 1999, PUB L. NO. 106-70, 113 STAT. 1860 (1999).

278. EISEN, *supra* note 31, at 123. In 2015, GEO Group paid only \$7.4 million in total taxes on \$1.84 billion in revenue. *Id.*

279. EISEN, *supra* note 31, at 123, 130–32.

280. See *supra* Section I.C.2.

281. Briefs have been filed in this case, but oral argument has not yet been scheduled. *Martha Gonzalez v. CoreCivic, Inc.*, 19-50691 (5th Cir.), COURTLISTENER, <https://www.courtlistener.com/docket/6499/marthagonzalez-v-corecivic-incorporated/>.

282. MTC claims to manage five immigrant detention facilities. *Detention Services: Where we help People*, MGMT. & TRAINING CORP. (2019), <https://www.mtctrains.com/detention/>. LaSalle manages 24 facilities, primarily in Texas and Louisiana, but it is not clear how many are used as ICE detention

if LaSalle and MTC could scale up their operations nationally, they may wish to avoid expanding their immigrant detention operations because they would face the same difficulties in turning a profit as GEO Group and CoreCivic due to the increase in labor costs. It is possible, however, that because they are not organized as REITs, LaSalle and MTC would be willing and able to accept smaller profits than GEO Group and CoreCivic might.<sup>283</sup>

Second, ICE could radically expand its practice of renting bed space from local jails. In a time when jail populations are dropping, it could be tempting for cities and counties to bring in revenue by renting out space to ICE. The recent trend, however, has gone in the other direction, with many localities refusing to allow ICE to detain immigrants in county jails.<sup>284</sup> For example, in 2018 ICE moved detained immigrants to a nearby GEO Group facility when the city of Atlanta canceled its contract to lease jail space to ICE.<sup>285</sup> While some municipalities would certainly be open to contracting with ICE, few jails have large numbers of open beds. Any system that kept the number of detained immigrants at current levels while shifting them to jails would require ICE to contract with dozens of jails, if not hundreds. Even if this were possible, it would be extremely costly. The increased use of teleconference immigration hearings would mitigate the need to transport detained immigrants long distances to court hearings.<sup>286</sup> But given how many people cycle through the detention system, a decentralized detention system where cities and counties detain a handful of immigrants would be a logistical nightmare.

The clearest moral, economic, and logistical solution to the problems posed by the TVPA's prohibition on forced labor in for-profit ICE detention centers is for GEO Group and CoreCivic to comply with the law and stop coercing labor. If the consequences of that decision make mass immigration detention much more expensive, the solution is to detain far fewer

centers, though some are. *Our Locations*, LASALLE CORRECTIONS (2020), <http://www.lasallecorrections.com/our-locations/> (last visited June 29, 2020). See also Nomaan Merchant, *Louisiana becomes new hub in immigrant detention under Trump*, ASSOCIATED PRESS (Oct. 9, 2019), <https://apnews.com/c72d49a100224cb5854ec8baea095044>.

283. Both LaSalle and MTC are privately held, which makes it much more difficult to access information about their financials compared to publicly held corporations such as GEO Group and CoreCivic. Alex Friedmann, *Who Owns Private Prison Stock?*, PRISON LEGAL NEWS (July 31, 2015), <https://www.prisonlegalnews.org/news/2015/jul/31/who-owns-private-prison-stock/>.

284. See Andrew Selsky, *Oregon lawmakers team up on bill to end jail's contract with ICE*, COLUMBIAN (Feb. 6, 2020, 7:24 PM), <https://www.columbian.com/news/2020/feb/06/oregon-lawmakers-team-up-on-bill-to-end-jails-contract-with-ice/>; David Bacon, *Counties Cancel ICE Detention Contracts*, AM. PROSPECT (July 18, 2018), <https://prospect.org/civil-rights/counties-cancel-ice-detention-contracts/>; Danny McDonald, *Suffolk sheriff's department ending contract with ICE*, BOS. GLOBE (Oct. 8, 2019, 7:09 PM), <https://www.bostonglobe.com/metro/2019/10/08/suffolk-sheriff-department-ending-contract-with-ice/XIWGpaT1gPgDsktDNSadVN/story.html>.

285. Elwyn Lopez, *ICE housing detainees in Clayton County jail after Atlanta ends relationship with federal agency*, 11 ALIVE (Oct. 31, 2018, 7:36 PM), <https://www.11alive.com/article/news/local/ice-housing-detainees-in-clayton-county-jail-after-atlanta-ends-relationship-with-federal-agency/85-610025662>.

286. See Lauren Markham, *How Trial by Skype Became the Norm in Immigration Court*, MOTHER JONES (May 2018), <https://www.motherjones.com/crime-justice/2018/05/how-trial-by-skype-became-the-norm-in-immigration-court/>; Christina Goldbaum, *Videoconferencing in Immigration Court: High-Tech Solution or Rights Violation?*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/nyregion/immigration-court-video-teleconferencing.html>.

immigrants. GEO Group and CoreCivic could continue to receive government contracts even in a system with greatly reduced detention rates. Both companies have expanded their businesses into so-called “community-based” or “non-residential” aspects of the justice system and have invested in new technology such as electronic monitoring, which, for better or worse, would likely replace detention.<sup>287</sup>

#### V. THE PLAINTIFFS’ LIKELIHOOD OF SUCCESS AT TRIAL

TVPA cases against GEO Group and CoreCivic continue to move inexorably toward class certification and trial. It is likely that additional classes will soon be certified. Plaintiffs are likely to force costly settlements or win at trial both because, as demonstrated above, the expansive language of the TVPA is firmly on their side. Additionally, the publicly available facts point to widespread coercion in for-profit detention facilities. Moreover, the information obtained through discovery, so far, has been revelatory. For example, an email sent by GEO Group detention facility administrator complained that on a site visit, he did not see detainees cleaning the facility and recommended that all recreation be canceled until the facility was “tour ready.”<sup>288</sup> In addition, in a deposition, one former detainee claimed that as part of the VWP “he was forced to clean maggots and worms out of shower drains” and was threatened with an inferior housing assignment if he refused. He also claims that he was never paid for that labor.<sup>289</sup>

In addition to allegations made in the complaints and documents obtained through discovery, journalistic accounts of immigration detention, as well as government and private investigations, suggest the cases have merit.<sup>290</sup> The various investigations are replete with evidence of the types of “serious harm” prohibited by the TVPA, including retaliation with solitary confinement. If plaintiffs are able to establish even a fraction of what is alleged in the complaints, they will prevail under the broad standards of the TVPA.

#### VI. CONCLUSION

These lawsuits, which will likely succeed unless Congress takes the unlikely step of amending the TVPA to exclude for-profit prison operators, pose a major risk to the profitability of GEO Group and CoreCivic and thus to the mass immigration detention system as a whole. First, decisions or settlements that force the corporations to stop coercing labor and to pay

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287. *Complete Electronic Monitoring Service Provider*, GEO GROUP (2018), [https://www.geogroup.com/electronic\\_monitoring](https://www.geogroup.com/electronic_monitoring); *Non-Residential Services*, CORECIVIC (2020), <https://www.corecivic.com/community/non-residential-services>. On the debate over electronic monitoring see Avlana Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123 (2017); Liliana Segura, *The First Step Act Could Be A Big Gift to CoreCivic and the Private Prison Industry*, INTERCEPT (Dec. 22, 2018), <https://theintercept.com/2018/12/22/first-step-act-corecivic-private-prisons/>.

288. Iannelli, *supra* note 142.

289. *Id.*

290. *See supra* Part II.



damages to those who were coerced into laboring will have a direct effect on the profitability of both corporations, both now and in the future. Second, the resulting negative press coverage about forced labor in immigration detention will embolden activists and increase the likelihood of governments canceling for-profit prison contracts and banks refusing to finance the corporations.<sup>291</sup>

The system of immigration detention cannot function at its current capacity without for-profit detention facilities. Private facilities incarcerate the vast majority of detained immigrants. As states, cities, and counties become less willing to lease space to ICE for detained immigrants in local jails, the reliance on private companies will only increase. The most reasonable course of action for the government if the costs of detaining immigrants rise significantly is simply to detain fewer immigrants. There are many additional reasons to detain fewer immigrants<sup>292</sup> and to eliminate private prisons,<sup>293</sup> but these are less likely to sway the policymakers in the Trump Administration. A return to the levels of immigration detention in the year 2000, however, would entirely obviate the need for private immigration detention facilities.

There are many effective activist and legislative strategies to restrict the use of for-profit prisons for immigration detention, but the TVPA provides the most powerful and underutilized litigation vehicle for challenging mass immigration detention.

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291. Rachel Layne, *Private prisons were supposed to thrive under Trump — then came a backlash*, CBS NEWS (July 29, 2019, 10:37 AM), <https://www.cbsnews.com/news/private-prison-companies-were-supposed-to-thrive-under-trump-instead-theyre-under-fire/>. See also Brett Buckhardt, *The Politics of Correctional Privatization*, *supra* note 74, at 411 (arguing that the reputational costs of participating in the system of mass immigration detention may outweigh the monetary gains).

292. See *supra* note 3.

293. See *supra* note 74.