IMPROVING THE CARCERAL CONDITIONS OF FEDERAL IMMIGRANT DETAINEES

Over the last three decades, the U.S. government has increased the strictness and enforcement of federal immigration law.[1] As a result, federal agencies have detained a growing number of immigrants, usually in state, local, or private prisons.[2] The government requires these facilities to provide a certain level of care to all immigrant detainees. However, this duty has been repeatedly violated. For example, guards at one facility "used pliers to pull out one [detainee]'s pubic hair and forced a line of men to kneel naked on the jail floor and chant, 'America is No. 1.'"[3] Female detainees in a different prison "complained that they had been issued male underwear on which large question marks had been made in the area of the crotch."[4] And at yet another facility, a male detainee's fractured spine and widespread cancer went undiagnosed and untreated for several months, despite his complaints of pain and eventual inability to stand or walk.[5]

This Note explores the causes of this lamentable treatment and argues that these nonfederal facilities should be categorized as government agents for the purposes of liability under the Federal Tort Claims Act[6] (FTCA). Part I examines how recent federal immigration policy has led to widespread maltreatment of federal immigrant detainees. Part II argues that the public's negative impressions of undocumented immigrants, coupled with these immigrants' inability to participate in the political process, make political intervention on behalf of the detainees unlikely. Part III analyzes the FTCA, which permits individuals to sue the federal government for certain torts committed by government agents but not by government contractors. Part III then argues that classifying nonfederal prison facilities as agents of the federal government is the most viable approach to ameliorating the carceral conditions of federal immigrant detainees.

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[1] *See, e.g.*, Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 629–30 (2003); Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 578–79 (1998).

[2] *See* Simon, *supra* note 1, at 579.

[3] John Sullivan, *6 Guards in New Jersey Charged with Beating Jailed Immigrants*, N.Y. TIMES, Oct. 13, 1995, at A1.

[4] Michael Welch, *The Role of the Immigration and Naturalization Service in the Prison-Industrial Complex*, SOC. JUST., Fall 2000, at 73, 77.

[5] Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. TIMES, Aug. 13, 2008, at A1.

[6] 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

I. RECENT TRENDS IN FEDERAL IMMIGRANT DETENTION

A. Immigrant Detention in Nonfederal Prison Facilities

Before the 1980s, the Immigration and Naturalization Service (INS) — whose investigative and interior enforcement responsibilities currently reside within Immigration and Customs Enforcement[7] (ICE) — "enforced a policy of detaining only those individuals deemed likely to abscond or who posed a security risk."[8] In 1982, the Reagan Administration responded to a sharp rise in the illegal immigration of Cuban and Haitian citizens by instituting a policy that "mandat[ed] imprisonment for all refugees that the INS inspectors did not deem clearly authorized to enter."[9] In the dozen or so years subsequent, Congress passed a series of laws that introduced penalties for employers who hired undocumented workers[10] and that increased the number of crimes for which immigrants could be deported.[11]

At the same time, Congress sought to expedite removal proceedings by enacting laws that reduced administrative procedures, limited ways for immigrant detainees to delay or preclude removal, and restricted judicial review.[12] However, insufficient federal funding and the challenge of coordinating among the various administrative, prosecutorial, and correctional actors have undermined the efficacy of these statutory provisions.[13] The number of immigrants detained by INS on any given day rose from an average of 4062 in 1980[14] to approximately 30,000 in 2008,[15] while the number of immigrants detained annually increased

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[7] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2135, 2192 (codified at 6 U.S.C. §§ 101–557 (2006)).

[8] MICHAEL WELCH, DETAINED 107 (2002).

[9] Simon, *supra* note 1, at 583. This policy formalized "the de facto strategy [that the Administration] had been implementing since the spring of 1981." *Id.*

[10] *See* Michael D. Hoefer, *Background of U.S. Immigration Policy Reform*, *in* U.S. IMMIGRATION POLICY REFORM IN THE 1980S 17, 20–21 (Francisco L. Rivera-Batiz et al. eds., 1991) (referencing the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.)).

[11] *See, e.g.*, Miller, *supra* note 1, at 634 (discussing, inter alia, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code)); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 387–88 (1999) (discussing a 1988 statute that created a category of "aggravated felon[ies]" for which an immigrant could be removed at any point after entering the United States); Christopher Drew & Adam Liptak, *Immigration Groups Fault Rule on Automatic Detention of Some Asylum Seekers*, N.Y. TIMES, Mar. 31, 2003, at B15 (discussing policies promulgated in the early 2000s).

[12] *See* Schuck & Williams, *supra* note 11, at 389–94.

[13] *See id.* at 420–22.

[14] MARK DOW, AMERICAN GULAG 8 (2004).

[15] ACLU OF MASS., DETENTION AND DEPORTATION IN THE AGE OF ICE: IMMIGRANTS AND HUMAN RIGHTS IN MASSACHUSETTS 2 (2008), *available at* http://aclum.org/sites/all/files/education/aclu_ice_detention_report.pdf.

from 280,000 in 2005 to nearly 400,000 in 2010.[16] Meanwhile, the average length of INS detention skyrocketed from less than four days in 1981[17] to sixty-four days in 2003.[18]

During this period, Congress increased funding for INS, allowing the Service to increase the number of beds and staff in federal and nonfederal detention facilities.[19] Despite these new resources, INS lacked the infrastructure and personnel necessary to house its entire detainee population on its own[20] and turned to state, local, and private prison facilities for assistance. By 2011, these nonfederal facilities housed eighty-four percent of all INS detainees.[21] Importantly, nonfederal detention benefited both the federal government and the nonfederal facilities: the facilities had beds to spare and a desire for additional revenue, while INS met its demand for beds at a relatively low cost.[22]

INS is obligated to exercise a measure of control over the carceral conditions at these local facilities through Intergovernmental Service Agreements (IGSAs). These IGSAs, signed by INS and state and local prison facilities, require the facilities to provide federal immigrant detainees with "safekeeping, housing, subsistence, medical and other services."[23] ICE can inspect a facility without prior notice "to ensure an acceptable level of services and acceptable conditions of confinement as determined by ICE."[24] ICE can also request access to any federal

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[16] Nina Bernstein, *Getting Tough on Immigrants to Turn a Profit*, N.Y. TIMES, Sept. 29, 2011, at A1.

[17] ACLU IMMIGRANTS' RIGHTS PROJECT, JUSTICE DETAINED 1 (1993).

[18] DET. & DEPORTATION WORKING GRP., ACLU, BRIEFING MATERIALS SUBMITTED TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS 4 (2007) [hereinafter ACLU, BRIEFING MATERIALS], *available at* http://www.aclu.org/pdfs/humanrights/detention_deportation_briefing.pdf.

[19] *See* Miller, *supra* note 1, at 647–48.

[20] *See* Mirta Ojito, *Change in Laws Sets Off Big Wave of Deportations*, N.Y. TIMES, Dec. 15, 1998, at A1 (referencing statements of INS spokesperson Russell A. Bergeron Jr.).

[21] *See Fact Sheet: Detention Management*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Nov. 10, 2011), http://www.ice.gov/news/library/factsheets/detention-mgmt.htm.

[22] *See* WELCH, *supra* note 8, at 161. While INS saved money compared to the cost of housing inmates itself, it commonly paid the facilities "twice the cost of housing inmates charged with criminal offenses," *id.* at 151, thus enabling governments to pay down their debt, cut property taxes, and pay for various governmental services, such as judicial administration and elder care, *see id.* at 160–61. Private sector prison facilities have fared equally well. *See, e.g.*, *id.* at 162–66; Bernstein, *supra* note 16.

[23] *E.g.*, Inter-Governmental Service Agreement Between the United States Department of Homeland Security, U.S. Immigration & Customs Enforcement Office of Detention and Removal and Gaston County art. III, para. B, at 2 (2007) [hereinafter Gaston County IGSA], *available at* http://www.ice.gov/doclib/foia/isa/igsagastoncounty.pdf. Additionally, both parties retain the right to terminate the IGSA at any time prior to the expiration of the Agreement. *Id.* art. VIII, para. A, at 6–7.

[24] *E.g.*, *id.* art. IX, para. A, at 7. However, ICE rarely reviews prison facilities without providing advance notice of at least thirty days. NAT'L IMMIGRATION LAW CTR. ET AL., A

detainee's records — which must include, at the very least, incident reports, suicide attempts, and behavior assessments[25] — and to any pertinent financial documents pertaining to the facility itself.[26]

IGSAs signed in the 1990s and early 2000s further specify, with regard to the quality of medical services, the level of professionalism, access to health care, on-site health care, arrival screening, and emergency medical care.[27] More recent IGSAs state that facilities must generally "house detainees . . . in accordance with the most current edition of *ICE National Detention Standards*."[28] The current edition provides that physical force "is restricted to instances of justifiable self-defense, protection of others, protection of property, and prevention of escapes," and is not permitted as a form of punishment.[29] Additionally, detainees must have access to health care services pertaining to "prevention, health education, diagnosis, and treatment."[30]

B. Widespread Maltreatment of Federal Immigrant Detainees

The rapid increase in immigrant detention, coupled with the delegation of detention duties to nonfederal facilities, has resulted in widespread abuse and neglect of federal immigrant detainees. Notably, between 2003 and 2011, 127 detainees died in ICE custody; seventy-one percent of those deaths occurred in nonfederal facilities.[31] However,

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BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 6 (2009), *available at* www.nilc.org/document.html?id=9.

[25] *See* Gaston County IGSA, *supra* note 23, art. IX, para. D, at 7.

[26] *See, e.g.*, *id.* art. XV, para. B, at 11.

[27] *See, e.g.*, Intergovernmental Service Agreement Between U.S. Department of Justice, Immigration & Naturalization Service and Iberia Parish Detention Center art. V (1998) [hereinafter Iberia Parish IGSA].

[28] *E.g.*, Gaston County IGSA, *supra* note 23, art. V, at 4. IGSAs may "adopt, adapt or establish alternatives, provided they meet or exceed the intent represented by these procedures." U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS: USE OF FORCE AND RESTRAINTS 1 (2008) [hereinafter ICE, USE OF FORCE], *available at* http://www.ice.gov/doclib/dro/detention-standards/pdf/use_of_force_and_restraints.pdf.

[29] ICE, USE OF FORCE, *supra* note 28, at 1.

[30] U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS: MEDICAL CARE 1 (2008), *available at* http://www.ice.gov/doclib/dro/detention-standards/pdf/medical_care.pdf. Should any dispute arise between ICE and the facility, IGSAs from the 1990s and 2000s typically provide that the ICE Contracting Officer may make the final decision. *See, e.g.*, Gaston County IGSA, *supra* note 23, art. X, para. B, at 8. *But see* Hoyte v. Wagner, No. 05-4437, 2007 WL 2768862, at *6 (E.D. Pa. Sept. 14, 2007) (noting that one IGSA empowered the warden and guards to make decisions); Iberia Parish IGSA, *supra* note 27, art. X, para. 2 (not specifying which party is empowered to make a final decision).

[31] U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DETAINEE DEATHS — OCTOBER 2003–DECEMBER 19, 2011 (2011), *available at* http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf. However, this number may be low. *See* Nina Bernstein, *Officials Say Fatalities of Detainees Were Missed*, N.Y. TIMES, Aug. 18, 2009, at A10; Nina Bern-

the nonfatal maltreatment of federal immigrant detainees is equally concerning. It is difficult to determine precisely the degree to which the abuse and neglect of federal immigrant detainees have increased over the past three decades.[32] Nevertheless, there are alleged or proven instances of maltreatment in most of the states in which a nonfederal prison facility houses federal immigrant detainees.[33]

Three different explanations address the potentially causal relationship between the increase in immigration detention and the maltreatment of immigrant detainees. While they bear similarities to one another, each explanation relies on a distinct view of the relevant actors and their incentives. One explanation posits that prison overcrowding prevents even the most assiduous federal and nonfederal officials from effectively overseeing and administering immigrant detention facilities.[34]

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stein, *Immigrant Detainee Dies, and a Life Is Buried, Too*, N.Y. TIMES, Apr. 3, 2009, at A1. In 2005, the number of federal immigrant detainee deaths per 100,000 detainees was approximately seven. *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* (twenty deaths); Bernstein, *supra* note 16 (280,000 detainees). This rate is quite low relative to deaths of prisoners under federal jurisdiction and of people in the United States generally. *See Federal Prisons*, BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=194 (last visited Feb. 25, 2012); Jiaquan Xu et al., *Deaths: Final Data for 2007*, NAT'L VITAL STAT. REP. (Nat'l Ctr. for Health Statistics, Hyattsville, Md.), May 20, 2010, at 1. However, the magnitude of this discrepancy diminishes when one considers that a federal immigrant detainee's average length of imprisonment is less than seventy days. *See supra* p. 1478.

[32] *See* ACLU OF MASS., *supra* note 15, at 3 (suggesting explanations for this difficulty); *see also* ACLU, BRIEFING MATERIALS, *supra* note 18, at 62; *cf.* ACLU OF MASS., *supra* note 15 (documenting the confinement conditions of federal immigrant detainees in Massachusetts facilities over a twenty-two-month period); HUMAN RIGHTS WATCH, LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES (1998), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=printdoc&docid=3ae6a8400 (detailing the results of interviews conducted with INS detainees over an eighteen-month period in seven states: Florida, Illinois, Louisiana, Maryland, Pennsylvania, Texas, and Virginia).

[33] *See, e.g.*, WELCH, *supra* note 8, at 119–20, 123–25, 150–51 (discussing Florida, Illinois, and Maryland); ACLU, BRIEFING MATERIALS, *supra* note 18, at 65 (discussing New Mexico and Virginia); GA. DETENTION WATCH, REPORT ON THE DECEMBER 2008 HUMANITARIAN VISIT TO THE STEWART DETENTION CENTER (2009), *available at* http://www.acluga.org/Georgia_Detention_Watch_Report_on_Stewart.pdf (discussing Georgia); SUNITA PATEL & TOM JAWETZ, ACLU NAT'L PRISON PROJECT, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES 4–5, 8 (2007), *available at* http://www.aclu.org/pdfs/prison/unsr_briefing_materials.pdf (discussing Alabama, California, and Pennsylvania); Bernstein, *supra* note 5 (discussing Rhode Island); Natasha Dato, *Michigan Immigrant Community Testifies on ICE Abuse*, SAN DIEGO IMMIGRANT RTS. CONSORTIUM (May 2, 2011), http://immigrantsandiego.org/2011/05/02/michigan-immigrant-community-testifies-on-ice-abuse (discussing Michigan); Jackie Vega, *Eight Victims ID'd in Hutto Guard Case*, KXAN.COM (Aug. 20, 2010, 5:22 PM), http://www.kxan.com/dpp/news/crime/deputies-to-discuss-arrested-guard (discussing Texas).

[34] Although private contractors currently perform the majority of the on-site monitoring and annual evaluations of prison facilities, DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 14 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf, ICE personnel review these initial findings and assign the final ratings for each facility, NAT'L IMMIGRATION LAW CTR. ET AL., *supra* note 24, at 6.

Ameliorating this problem might necessitate allocating additional funds for contracting with new nonfederal facilities. However, it is unclear precisely how much more oversight would be required and, more importantly, to what extent more robust oversight would even prove effective. Indeed, supervision by ICE's compliance unit has "varied in many ways from the procedures spelled out" in the unit's manual, suggesting that the manual has, "in many respects, [been] an aspirational document rather than a definitive representation of ICE's monitoring structure."[35] Federal overseers often "cover up evidence of mistreatment, deflect scrutiny by the news media or prepare exculpatory public statements after gathering facts that pointed to substandard care or abuse."[36] Notably, ICE has terminated its contract with only three facilities as a result of noncompliance with ICE's standards.[37]

A second explanation suggests that maltreatment is rooted in the dehumanization of immigrant detainees in the minds of officials at all levels.[38] However, potential remedies for this problem are far from obvious, and the most effective approach might involve a prohibitively costly mix of prison guard training, lengthy public relations initiatives designed to alter the public's perception of prison, and significant improvements to the layouts and amenities of almost every prison facility.

The third explanation focuses on the sometimes-conflicting motivations of federal and state actors: while federal actors are often preoccupied with enforcing immigration policy pursuant to various legal and political parameters, nonfederal officials are often driven primarily by cost considerations.[39] An appropriate remedy might entail reducing federal delegation to nonfederal facilities, enhancing federal oversight, constructing more federal detention centers, and reducing the number of detainees in ICE custody. Parts II and III of this Note largely embrace this third explanation to the exclusion of the prior two.

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[35] NAT'L IMMIGRATION LAW CTR. ET AL., *supra* note 24, at 5.

[36] Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 10, 2010, at A1.

[37] *See* NAT'L IMMIGRATION LAW CTR. ET AL., *supra* note 24, at 12–13. ICE's inability to enforce successfully the contractually mandated standards of care, while troubling, does not appear to create an administrative law problem that justifies judicial intervention. ICE's National Detention Standards likely represent "statements of policy" that do not have binding effect on the agency. *See, e.g.*, Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 93–94 (D.C. Cir. 1997); Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987). And while immigrant detainees may be able to bring third-party beneficiary suits against nonfederal prison facilities and their officials to enforce the contractually mandated standards, the efficacy of such suits is unclear. *See infra* pp. 1488–89.

[38] *See, e.g.*, Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 932–35 (2009).

[39] *See* Schuck & Williams, *supra* note 11, at 375–76.

II. LEGISLATIVE AND EXECUTIVE INTERVENTION

The political branches are well equipped to intervene on behalf of federal immigrant detainees. Congress could expand liability by explicitly permitting detainees to sue the federal government or by classifying such facilities and their employees as federal government employees. Congress could also allocate greater funds for outfitting and staffing existing federal facilities and building new ones. Either Congress or the executive branch could promulgate stricter detainee care standards, which the latter could enforce by reprimanding or severing ties with facilities that fail to comply.[40] Despite these options, two considerations counsel that efficacious legislative and executive intervention is unlikely: (1) motivated attributional biases about certain immigrant groups dampen the public's desire to support reform, and (2) these immigrant groups lack the ability to attract the attention of political leaders through votes and campaign contributions.

A. Motivated Attributional Biases

Recent social psychology scholarship provides valuable insight into the formation of motivated attributional biases concerning unpopular social groups. One powerful force behind these biases is the tendency to devalue a person's worth "in order to bring about a more appropriate fit between [a victim's] fate and [his or her] character."[41] A second and related force is the desire to adjust perceptions of fairness and justice in order to "justify and rationalise the way things are, so that existing social arrangements are perceived as fair and legitimate, perhaps even natural and inevitable."[42] This tendency to employ "just world" reasoning occurs "particularly when that system is under threat," even if doing so requires actors "to hold more positive attitudes towards high-status individuals than they hold of themselves or members of their own group."[43] These victim-blame and system-justification tendencies produce an "ultimate attribution error": When something bad happens to an actor or her group, she often blames situations beyond her control.[44] However, when bad things happen to other indi-

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[40] *Cf.* SCHRIRO, *supra* note 34, at 10 (noting that in 2009, Congress required "ICE to discontinue use of any facility with less than satisfactory ratings for two consecutive years").

[41] Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1032 (1978).

[42] John T. Jost & Orsolya Hunyady, *The Psychology of System Justification and the Palliative Function of Ideology*, 13 EUR. REV. SOC. PSYCHOL. 111, 119 (2002); *see also, e.g.*, Elaine Walster, *"Second Guessing" Important Events*, 20 HUM. REL. 239, 239 (1967).

[43] Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 103 (2004).

[44] *See, e.g.*, Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 423–24 (2006); Janice Nadler & Mary-Hunter Morris

viduals, that actor often employs "blame frames" through which she views the negative outcomes as byproducts of the blameworthy choices that are rooted in the victims' personal preferences.[45]

These human tendencies help explain the shift from tolerance to criminalization that federal immigration policy has undergone over the past three decades.[46] Beginning in the mid-1970s, the American public became increasingly aware of and opinionated about immigration policy, due in large part to media coverage of emigration from Southeast Asia and Latin America, and of drug-related crimes in Florida and the U.S. Southwest.[47] At the same time, a growing number of middle-class Americans were becoming frustrated by the disintegration of shared moral values caused by immigration, technological innovation, and their increasingly limited prospects of economic success.[48] Furthermore, expert opinion was in the process of "vanish[ing] from the field of penal legislation in favor of direct appeals to voters in the form of 'sound bite' politics."[49]

These events activated significant victim-blame and system-justification inclinations, which in turn produced the immigration policies and laws noted above. Americans of all stripes forewent questioning the increasingly stiff sanctions imposed on immigrants.[50] In particular, struggling middle-class Americans set aside (if only temporarily) feelings of anger and resentment about their financial health in order to take comfort in knowing that the government, by taking steps to punish immigrant criminals,[51] was maintaining a system of shared social values, common practices, and resource allocation to members of the "in-group."[52] Seeking to take advantage of these shifting social

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McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. (forthcoming 2012) (manuscript at 11) (on file with the Harvard Law School Library).

[45] Hanson & Hanson, *supra* note 44, at 426–27; *see also, e.g.*, Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556, 568 (2000). Policies that negatively affect one or more of these external groups are often justified as "situationally excused omissions," so long as the policies pursue some ostensibly reasonable end. Hanson & Hanson, *supra* note 44, at 422.

[46] *See* Miller, *supra* note 1, at 625; Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217, 220 (2001).

[47] Miller, *supra* note 1, at 626.

[48] *See* Simon, *supra* note 46, at 232–33.

[49] *Id.* at 237.

[50] *See* Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 81–91 (1998) (discussing the prejudicial treatment of, inter alia, Filipino and Mexican immigrants in the mid- and late twentieth century); Welch, *supra* note 4, at 79 (describing the stigma Cuban immigrants faced in the United States during the 1970s and '80s).

[51] *See* Simon, *supra* note 46, at 227–29.

[52] *See id.* at 233; *cf.* Ulrich Wagner et al., *Anti-Immigration Bias*, *in* THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 361, 363–68 (John F. Dovidio et al. eds., 2010) (noting that ethnocentrism, nationalism, and group competition over resources help explain prejudice and discrimination against immigrants); Nadler & McDonnell, *supra* note 44, at

currents, many politicians advocated policies that delegitimized assistance for criminals and the poor.[53] However, the strict immigration laws that they helped pass required an increase in penal resources and supervision that the U.S. government was politically incapable of providing on its own. Into this void stepped private corporations and state and local governments, whose financial success soon turned not just on the maintenance of immigrant detention, but also on its continued proliferation.[54]

Recent events suggest that these negative attributional assumptions continue to pose significant hurdles to ameliorating the conditions of federal immigrant detention. Much of the United States is experiencing social and economic anxiety that political strategists and politicians are keen to take advantage of by further marginalizing certain unpopular groups. Notably, states such as Alabama and Arizona have introduced or passed legislation that restricts and punishes activities relating to undocumented immigration.[55] Supporters of these and similar endeavors frequently justify the measures by linking immigration, particularly undocumented immigration, with crime, joblessness, and excessive government spending — justifications that have likely received more media coverage than have the deplorable conditions pervasive in the prisons that house federal immigrant detainees. As a result, the public is more likely to view undocumented immigrants as perpetrators of crime and job theft than as victims of harsh penal conditions who deserve assistance.[56] Because these individuals *chose* of their

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2 ("Blaming in ordinary social life primarily serves as an expressive social tool to sort the 'bad' members of society from the 'good' members of society and, thereby, to foster solidarity and cohesion among those who are appropriately abiding social expectations.").

53 *See* Simon, *supra* note 46, at 238.

54 *See, e.g.*, Welch, *supra* note 4, at 73, 78; Bernstein, *supra* note 16.

55 *See* Elizabeth Summers, *New Alabama Immigration Law Tougher than Arizona's SB-1070 Measure*, PBS NEWSHOUR (June 10, 2011, 12:33 PM), http://www.pbs.org/newshour/updates/law/jan-june11/alabama_06-10.html.

56 The fact that a particular group is marginalized does not mean that such marginalization will continue indefinitely and without abatement. Notably, gay, lesbian, and bisexual Americans have enjoyed a significant improvement in their social standing over the last three decades, despite the prevalence of motivated attributional biases. One can attribute this success, inter alia, to municipal and statewide political organizations that organize fundraisers, grassroots mobilizations, and voter registrations, particularly when threatened by antigay legislation, *see* Donald P. Haider-Markel, *Lesbian and Gay Politics in the States: Interest Groups, Electoral Politics, and Policy*, *in* THE POLITICS OF GAY RIGHTS 290, 291–95 (Craig A. Rimmerman et al. eds., 2000); to the election of gay political representatives, *see id.* at 295–97; to rising numbers of individuals who claim to know one or more gay people, *see* Patrick J. Egan et al., *Gay Rights*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 234, 237 (Nathaniel Persily et al. eds., 2008); and to media coverage of antigay hate crimes — notably, the murder of Matthew Shepard, *see* JENNIFER PETERSEN, MURDER, THE MEDIA, AND THE POLITICS OF PUBLIC FEELINGS 23–60 (2011). In contrast, federal immigrant detainees may currently face more significant barriers due to their classification as criminals, their status as current or former inmates, and their in-

own volition to immigrate to the United States illegally, they must accept the consequences of their choice; therefore, they deserve whatever punishment the U.S. justice system imposes.

B. Political Power

The relative political powerlessness of poor and undocumented immigrants also makes it unlikely that executive and legislative actors will endeavor to improve the carceral conditions of detainees. Because they lack U.S. citizenship, undocumented immigrants do not possess the ability to voice their political opinions by voting.[57] Moreover, federal election law prohibits undocumented immigrants from donating or spending funds in connection with any federal, state, or local election in the United States.[58] Because undocumented immigrants are unable to affect political outcomes with their money and votes, they are not a constituency with which politicians and their supporters must cultivate relationships in order to win elections.

On the other hand, immigrants who have become naturalized citizens, as well as individuals and groups that are sympathetic to undocumented immigrant issues, may lobby on behalf of detainees.[59] In cities that are "heavily dependent on immigrants[,] . . . members of the city council pay attention to the economic and social concerns of immigrants, despite the fact that few are voters."[60] Similarly, in 2006, millions of Americans protested a proposed change in federal immigration policy that would have increased penalties for illegal immigration and would have classified undocumented immigrants — and anyone who helped them immigrate to or remain in the United States — as felons.[61] However, it is unlikely that these political activists will spend

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ability to affect public opinion once released from prison because of their deportation and their inability to spend funds in connection with elections, *see infra* note 58 and accompanying text.

[57] *See* United States v. Classic, 313 U.S. 299, 314 (1941) (noting that Article 1, Section 2 of the U.S. Constitution gives states the ability to set conditions on an individual's right to vote in federal elections); *see also State by State Info: State by State Voter Laws and Registration Deadlines*, DECLARE YOURSELF, http://www.declareyourself.com/voting_faq/state_by_state_info_2.html (last visited Feb. 25, 2012) (noting that all fifty states and the District of Columbia require that an individual be a citizen of the United States in order to vote).

[58] *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of the U.S. Code). Even if undocumented immigrants were permitted to contribute, the little money they earn from their often low-wage jobs prevents them from making the kinds of large and frequent contributions that attract policymakers' attention.

[59] *Cf.* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 157 (2008) (explaining that numerous groups advocated for congressional action after the U.S. Supreme Court held that a state could deny unemployment benefits to Native Americans who violated the state's prohibition of the use of peyote).

[60] Cristina M. Rodríguez, *The Significance of the Local in Immigrant Regulation*, 106 MICH. L. REV. 567, 609 n.180 (2008).

[61] *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

large amounts of their political capital on lobbying members of Congress to address the *specific issue* of the carceral conditions of federal immigrant detainees. Indeed, they could instead direct their efforts toward issues such as guest worker programs and permanent residency for immigrants who arrived in the United States as minors. These programs not only affect larger groups of immigrants, but also do not carry the stigma of crime and prison upon which opponents of carceral reforms may seize.

Additionally, the motivated attributional biases noted above render it less likely that politically powerful actors would have an incentive to assist in the first place. As with felon parole and disenfranchisement,[62] a political actor may himself hold such biases against detainees; if he does not and expresses or acts on a desire to assist detainees, he runs the risk of losing support from current or potential constituents — many of whom do possess these biases — and of being attacked by political opponents. To be sure, political actors are not completely incapable of intervening.[63] However, such responses invariably pale in comparison to competing calls for punitive measures, as well as to the daunting problems that the responses are designed to address. In 2009, the Obama Administration introduced a large package of immigration detention reforms; however, due process and human rights violations persist, and improvements to ICE's oversight practices have been modest at best.[64] Between 2007 and 2011, the House Judiciary Subcommittee on Immigration Policy and Enforcement held numerous hearings on immigration enforcement. However, only five of the hearings concerned immigrant detention, and all of them took place before 2009.[65] Moreover, only one piece of legislation pertaining to immi-

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[62] *See generally* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT (2006); Mandeep K. Dhami, *Prisoner Disenfranchisement Policy: A Threat to Democracy?*, 5 ANALYSES OF SOC. ISSUES & PUB. POL'Y 235 (2005).

[63] *See* Kirk Semple, *Plan to Upgrade New Jersey Jail into Model for Immigrant Detention Centers*, N.Y. TIMES, Jan. 28, 2011, at A26; Bernstein, *supra* note 16.

[64] NAT'L IMMIGRANT JUSTICE CTR., YEAR ONE REPORT CARD: HUMAN RIGHTS & THE OBAMA ADMINISTRATION'S IMMIGRATION DETENTION REFORMS (2010), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/ICE%20report%20card%20FULL%20FINAL%202010%2010%2006.pdf.

[65] *See Problems with Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (2008); *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (2008); *Save America Comprehensive Immigration Act of 2007: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (2007); *Hearing on H.R. 750, the "Save America Comprehensive Immigration Act of 2007,"* U.S. HOUSE OF REPRESENTATIVES COMM. ON THE JUDICIARY, http://judiciary.house.gov/hearings/hear_101107.html (last visited Feb. 25, 2012); *Detention and Removal: Immigration Detainee Medical Care: Hearing Before the*

grant detention was proposed during this period,[66] and it did not receive a subcommittee vote.[67]

III. JUDICIAL REMEDIES

Because the political branches are unlikely to intervene on behalf of federal immigrant detainees, federal courts should step in to assist. Suits against nonfederal facilities and their officials are unlikely to improve sufficiently the detainees' conditions; the detainees must be able to sue the federal government directly. The FTCA permits detainees to sue the federal government for money damages "caused by the negligent or wrongful act or omission" of federal employees but not of contractors.[68] Accordingly, federal courts should revise their application of the FTCA to detainee suits by classifying nonfederal prison facilities as agents — and not as contractors — of the federal government.

A. Suing Nonfederal Prisons

Federal immigrant detainees who receive negligent treatment have at least three non-FTCA remedies available to them. However, regardless of whether they are taken together or individually, the remedies cannot adequately improve the carceral conditions of detainees.

First, an immigrant detainee may bring suit under § 1983[69] against a state or local government official in his personal capacity if the official acted in a way that "violate[d] clearly established [federal] statutory or constitutional rights of which a reasonable person would have known."[70] It is clearly established law that prison officials may not be

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Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary, 110th Cong. (2007).

66 *See* Detainee Basic Medical Care Act of 2008, H.R. 5950, 110th Cong. (2008).

67 *See Bill Summary & Status, 110th Congress (2007–2008), H.R. 5950 All Information*, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR05950:@@@L&summ2=m& (last visited Feb. 25, 2012). *But cf.* NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION 3 (2011), *available at* http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf (showing that federal spending on immigration detention increased significantly between 2005 and 2010).

68 28 U.S.C. § 1346(b) (2006).

69 42 U.S.C. § 1983 (2006).

70 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Prison officials at public facilities receive qualified immunity under § 1983. Procunier v. Navarette, 434 U.S. 555, 561 (1978). However, officials at nonpublic facilities do not. Richardson v. McKnight, 521 U.S. 399, 412 (1997). Although states cannot be sued under § 1983, *see* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989), a municipality can be held liable, but only "when execution of a government's policy or custom . . . inflicts the injury," Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). Consequently, an immigrant is unlikely to be successful with such a claim. *See* Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 760 (1992) ("[I]n practice, the difficulty of demonstrating 'policy' or 'custom' provides the entity an expansive exemption from liability.").

deliberately indifferent to a prisoner's Eighth Amendment–protected medical needs by, inter alia, "refus[ing] to treat him, ignor[ing] his complaints, [or] intentionally treat[ing] him incorrectly."[71] Nor may officials maliciously use excessive physical force against a prisoner, even if the prisoner does not suffer serious injury as a result.[72] However, negligence and gross negligence are not actionable under § 1983 in the prison context.[73] Additionally restrictive is the fact that, because private prison facilities do not act under color of state or local law when they house federal immigrant detainees, they escape any liability under § 1983.[74]

Second, an immigrant may file a third-party beneficiary suit against a nonfederal facility and its officials to enforce the standards of care described in IGSAs and comparable contracts.[75] Such suits can "supplement . . . the government's own efforts at contractor oversight"[76] and can provide additional deterrence by way of punitive damages.[77] However, these benefits pale in comparison to the shortcomings of third-party beneficiary suits: competing legal principles such as consequential damages can preclude or significantly limit the scope of damages;[78] nonfederal facilities could negotiate contracts that in essence exempt them from third-party liability;[79] and a sizable portion of the suits that have been litigated to date have not moved be-

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[71] Domino v. Tex. Dep't of Criminal Justice, 239 F.3d 752, 756 (5th Cir. 2001) (quoting Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985)).

[72] *See* Hudson v. McMillian, 503 U.S. 1, 6–7 (1992).

[73] *See* Farmer v. Brennan, 511 U.S. 825, 835–36 & n.4 (1994). To be sure, prison officials at public facilities may also be subject to liability under § 1983 for violating federal statutes. *See* Maine v. Thiboutot, 448 U.S. 1, 4–6 (1980). However, the relative dearth of § 1983 cases involving such laws suggests that there are few (if any) federal statutes under which detainees may sue.

[74] *See, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 424 (1973). It is also unlikely that a federal immigrant detainee could successfully bring suit under the Alien Tort Statute (ATS), 28 U.S.C. § 1350 (2006). *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (reasoning that a claim under the ATS must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized"); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (holding that nontorture claims of "cruel, inhuman, degrading treatment or punishment" are not actionable under the ATS); Flores v. S. Peru Copper Corp., 414 F.3d 233, 254 (2d Cir. 2003) (holding that a "right to health [is] insufficiently definite to constitute [a] rule[] of customary international law").

[75] *See generally* Spencer Bruck, Note, *The Impact of Constitutional Liability and Private Contracting on Health Care Services for Immigrants in Civil Detention*, 25 GEO. IMMIGR. L.J. 487, 511–14 (2011).

[76] Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 226 (1997).

[77] *See* Bruck, *supra* note 75, at 511.

[78] *See* Sabatino, *supra* note 76, at 225 n.144.

[79] *See* Alfred C. Aman, Jr., *An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City*, 14 IND. J. GLOBAL LEGAL STUD. 301, 325 & n.102 (2007).

yond the preliminary stages, thus rendering it "unclear what a successful award brought by inmates would look like in this context."[80]

Third, detainees may bring suit under state tort law;[81] however, state law defines the scope of official immunity in such suits.[82] Because some states have declined to waive sovereign immunity to the same extent as the federal government in the FTCA, claims that may be meritorious if brought under federal law may instead be dismissed when brought under state law.[83] In addition, considerations rooted in fairness suggest that state law tort suits may be an insufficient remedy for federal immigrant detainees. When agents perform work from which their principal benefits, this work sometimes causes harm that, when tortiously caused by the agent, is proper for the principal to pay.[84] In other words, because the principal is the party who usually benefits most directly from the agent's activities, the principal should bear the burden of ensuring that the benefits of these activities outweigh the costs. With regard to federal immigrant detainees, it is the federal government that is principally tasked with and principally benefits from immigration enforcement. As a result, it is the federal government that should bear the costs of a detention system that has grown so rapidly that it necessitates assistance from state, local, and private prison facilities. Moreover, in the event that a judicial outcome shifts the disadvantages of this system away from immigrant detainees, nonfederal prisons should not be the only entities to bear this burden. Otherwise, the federal government might be incentivized to contract out all of its detention responsibilities to nonfederal facilities, thereby shielding itself from the liability that may be inevitable with this detention scheme.

Relatedly, considerations rooted in efficiency point away from all three remedies noted above. Holding the government liable can "foster greater attention to safety" by incentivizing the government to "exercise reasonable care in selecting and supervising employees."[85] In-

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[80] *Id.* at 325 (discussing the experience in New York state courts).

[81] *See, e.g.*, Di Donato v. State, 807 N.Y.S.2d 456, 457 (App. Div. 2006); Miracle v. Ohio Dep't of Rehab. & Corr., 649 N.E.2d 927, 929 (Ohio Ct. Cl. 1995); Simmons v. State, 44 Ill. Ct. Cl. 304, 305–07 (1991).

[82] *See* Martinez v. California, 444 U.S. 277, 280–83 (1980) (upholding a California statute granting absolute immunity to public employees making parole release decisions).

[83] *See, e.g.*, McCool v. Dep't of Corr., 984 A.2d 565, 570 (Pa. Commw. Ct. 2009); Fabrey v. McDonald Vill. Police Dep't, 639 N.E.2d 31, 33–34 (Ohio 1994); Sheffield v. Turner, 445 P.2d 367, 368–69 (Utah 1968).

[84] William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1164 (1996); *cf.* Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2014–15 (1998) ("[H]olding the government accountable for the injuries caused by its agents while acting within the scope of their employment engenders respect for the rule of law.").

[85] Kratzke, *supra* note 84, at 1163.

deed, doctrines such as respondeat superior can effectively "facilitat[e] the imposition of liability upon the person or entity best situated by reason of size, insurability, control, or otherwise to minimize the total costs attributable to a harm."[86] Unlike ICE, nonfederal facilities are unable to survey the entire immigrant detention system and "shape a relatively comprehensive array of social costs and benefits" by "deploy[ing] organizational resources and incentives from a broad perspective."[87] Moreover, private facilities themselves — and certainly the employees at both private and government facilities — may not possess the funds necessary to compensate successful plaintiffs.[88]

Additionally, non-FTCA suits may not promote efficiency insofar as they may do little to deter facility administrators who believe that the occasional unfavorable judgment pales in comparison to the profits derived from detention.[89] These administrators may also assume that certain tortious actions are simply the product of a few bad apples rather than the inevitable result of a flawed system — an assumption sometimes validated by federal auditors who conclude that the facilities are in compliance with federal standards despite evidence to the contrary.[90] State courts may be a less hospitable forum for detainees, as state judges may be less likely to reach impartial decisions. The fact that many of the judges are either elected or appointed to definite terms may make them more sensitive to public opinion and the accompanying motivated attributional biases than their federal counterparts.[91] In addition, adverse judgments in state court may not always call attention to how nonfederal facilities operate, as many state and local newspapers have had to scale back reporting or shut down completely.[92]

In contrast, liability for the U.S. government may provide the political branches with an incentive to recalibrate public spending. In light

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[86] Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 288; *see also, e.g.*, Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 1003 (1989).

[87] *See* PETER H. SCHUCK, SUING GOVERNMENT 105 (1983).

[88] *See* Oren, *supra* note 86, at 1003. To be sure, many believe that public employers frequently indemnify their employees; however, the scope of this indemnification is unclear and may not extend to acts that unequivocally display bad faith. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 n.16 (1998).

[89] *See* WELCH, *supra* note 8, at 162–63 (explaining that large adverse judgments against private prison facilities may merely prompt these facilities to reorganize and rename themselves in order to remain in business); Bernstein, *supra* note 16 (explaining that, despite the incentivizing effect that losing a contract may have on motivating private contractors to ensure adequate care of federal immigrant detainees in their custody, "lost detention contracts are rare and easily replaced" by revenues from other businesses within the private companies' portfolios).

[90] *See supra* notes 34–37 and accompanying text.

[91] *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127–28 (1977).

[92] *See, e.g.*, NEWSPAPER DEATH WATCH, http://newspaperdeathwatch.com (last visited Feb. 25, 2012).

of the growing resources that immigration enforcement agencies receive[93] and the recent concerns about the federal deficit,[94] liability may prompt various federal officials to revisit the price and policy of detaining immigrants.[95] Congress could respond by passing laws that flatly deny federal funds to nonfederal facilities that violate ICE detention standards, or by enacting comprehensive immigration reform that includes policies that would decrease the frequency and length of immigrant detention.[96] Similarly, the executive branch might respond by revising the existing federal oversight apparatus;[97] identifying alternatives to detention for groups such as asylum seekers, victims of torture and trafficking, and caretakers of minor children; and extending more robust oversight to nonfederal facilities to ensure compliance with ICE regulations.

B. Suing the Federal Government Under the FTCA

1. The FTCA & Logue. — In order to improve the carceral conditions of federal immigrant detainees, courts should classify nonfederal facilities as agents of the U.S. government. As noted above, the FTCA provides that the government may be liable for money damages "caused by the negligent or wrongful act or omission of any employee of the Government."[98] The term "employee" covers "officers or employees of any federal agency," as well as "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."[99] However, the Act explicitly excludes "contractor[s]" from its definition of "[f]ederal agency."[100]

In *Maryland v. United States*,[101] the Supreme Court indicated that the degree of supervision and control that the government exercises

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93 *See* Schuck & Williams, *supra* note 11, at 422.

94 *See, e.g.*, Clifford Marks, *In Media Coverage, Deficit Eclipses Unemployment*, NAT'L J. (May 16, 2011, 6:05 PM), http://www.nationaljournal.com/economy/in-media-coverage-deficit-eclipses-unemployment-20110516.

95 *See* Kratzke, *supra* note 84, at 1167.

96 *Cf. id.* (analogizing the federal government to a corporation that can order a department to take actions that "reduce the expected costs of accidents incurred by the corporation, because that department is the one whose activity caused the injury").

97 A natural starting place might be the electronic database on which ICE relies to track detainees: as of 2007, ICE had no "modern nationwide system to track its facilities' populations" and relied on "an antiquated computer system created in 1984." Spencer S. Hsu & Sylvia Moreno, *Border Policy's Success Strains Resources: Tent City in Texas Among Immigrant Holding Sites Drawing Criticism*, WASH. POST, Feb. 2, 2007, at A1.

98 28 U.S.C. § 1346(b) (2006).

99 *Id.* § 2671.

100 *Id.* A second exception to the waiver of immunity relates to "the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* § 2680(a).

101 381 U.S. 41 (1965).

over an alleged agent could help determine whether that agent is the employee of a government.[102] In *Logue v. United States*,[103] the Court further reasoned that, in proscribing liability with regard to contractors, Congress "clearly contemplated that the day-to-day operations of the contractor's facilities were to be in the hands of the contractor."[104] The Court concluded that a prison was a contractor despite the government's ability to "specify standards of treatment for federal prisoners, including methods of discipline, rules for communicating with attorneys, visitation privileges, mail, medical services, and employment," as well as to "enter the institution . . . at reasonable hours for the purpose of inspecting the same and determining the conditions under which federal offenders are housed."[105] Given this common law definition, courts must find a way to reconsider *Logue* before they assess the government's liability in immigrant detainee mistreatment cases.

2. The Broad Approach for Reconsidering Logue. — Courts can take one of two approaches in revising their application of *Logue* to cases involving nonfederal facilities that have allegedly mistreated immigrant detainees. The "broad" approach calls for courts to look beyond *Logue*'s day-to-day inquiry and focus on *all* of the factors in the Restatement (Second) of Agency. Courts would acknowledge that "quite clearly the statutory language [of the FTCA] was drafted to have an expansive reach and should be applied with an eye to general agency law rather than to the formalities of employment contracts."[106]

Despite noting that the *Maryland* Court considered the "supervision exercised by the States over both military and civilian personnel" as *one* of many factors in its decisions,[107] the *Logue* Court focused almost exclusively on this factor.[108] Almost every court that has since applied the FTCA to nonfederal prison facilities has focused largely on whether the U.S. government supervised the day-to-day operations of

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[102] *Id.* at 53 (finding that the "supervision exercised by the States over both military and civilian personnel," along with other factors, meant that they "are to be treated for the purposes of the Tort Claims Act as employees of the States").

[103] 412 U.S. 521 (1973).

[104] *Id.* at 529.

[105] *Id.* at 530 (alteration in original).

[106] Witt v. United States, 462 F.2d 1261, 1263–64 (2d Cir. 1972) (citations omitted) (citing Martarano v. United States, 231 F. Supp. 805, 807–09 (D. Nev. 1964); Irvin M. Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 GEO. L.J. 1, 11–12 (1946)).

[107] *Logue*, 412 U.S. at 527 (quoting *Maryland*, 381 U.S. at 53) (internal quotation marks omitted).

[108] *See id.* at 527–32. Additional considerations suggest that *Maryland* was not as analogous or as helpful as the *Logue* Court indicated. For one, *Maryland* involved a relatively unique situation: Congress had explicitly rejected a proposal to extend federal government liability under the FTCA to include National Guard personnel. *Maryland*, 381 U.S. at 52. More importantly, the *Maryland* Court did not purport to supply a clear test that subsequent courts could apply in cases involving the proper scope of the FTCA's independent contractor exception. *See id.* at 52–53.

the facility.[109] However, a significant number of cases that have applied the independent contractor exception to other groups of workers — most notably private physicians — have explained that, although federal supervision may be the most important factor, it is not the sole factor. While some courts have simply applied a combination of different tests and factors,[110] many have explained that the Restatement factors should drive the inquiry.[111]

The Restatement lists eleven considerations for determining whether an individual is an agent or a contractor.[112] Several of these factors counsel in favor of the contractor label: the nonfederal prisons are employed both by ICE and by other public or private institutions,[113] supply many of the resources necessary for maintenance of the prisons themselves,[114] and may delegate work to subcontractors.[115] However, a larger number of considerations point toward the agent label. First, the work of the prisons "is part of the regular business" of ICE.[116] Second, the prisons are paid monthly, rather than in one lump sum.[117] Third, ICE employs the prisons "over a considerable period of time with regular hours."[118] Fourth, prison officials' work "does not require the services of one highly educated or skilled."[119] Fifth, ICE's em-

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[109] *See* Monroe v. U.S. Marshals, No. 95-35716, 1996 WL 665147, at *1 (9th Cir. Nov. 15, 1996); Baires v. United States, No. C 09-5171 CRB, 2010 WL 3515749, at *11 (N.D. Cal. Sept. 8, 2010); Lin Li Qu v. Cent. Falls Det. Facility Corp., 717 F. Supp. 2d 233, 239–40 (D.R.I. 2010); Esogbue v. Dep't of Homeland Sec., No. 07-6843, 2008 WL 754722, at *6 (E.D. La. Mar. 18, 2008); Bethae v. United States, 465 F. Supp. 2d 575, 580–81 (D.S.C. 2006); Johnson v. United States, No. Civ.A. 4:05CV40, 2006 WL 572312, at *4 (E.D. Va. Mar. 7, 2006); Jama v. U.S. INS, 343 F. Supp. 2d 338, 357 (D.N.J. 2004). *But see Baires*, 2010 WL 3515749, at *12 (arguing that the fact that the prison presumably housed nonfederal inmates also supported the application of the contractor label).

[110] *See, e.g.*, Leone v. United States, 910 F.2d 46, 49–51 (2d Cir. 1990); Lilly v. Fieldstone, 876 F.2d 857, 859 (10th Cir. 1989).

[111] *See, e.g.*, Linkous v. United States, 142 F.3d 271, 275–76 (5th Cir. 1998); Robb v. United States, 80 F.3d 884, 890–91 & n.5 (4th Cir. 1996).

[112] *See* RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h (1958).

[113] *Id.*; *see also, e.g.*, Recent Development, *Liability of the United States for the Torts of Its Contractors' Employees*, 53 COLUM. L. REV. 433, 433–34 (1953) (noting that one of the four most important features of an independent contractor is that "the contractor is an entrepreneur").

[114] *Compare* RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h, *with* Gaston County IGSA, *supra* note 23, art. III, at 2–3.

[115] *Compare* RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h, *with* Gaston County IGSA, *supra* note 23, art. II, para. B, at 2. It bears mention, however, that recent IGSAs provide that the nonfederal prisons must receive ICE approval in order to hire a proposed subcontractor. *See, e.g.*, Gaston County IGSA, *supra* note 23, art. II, para. B, at 2.

[116] RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h. *Compare* Recent Development, *supra* note 113, at 434 n.8 (collecting cases), *with supra* p. 1478.

[117] *Compare* RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h, *with* Gaston County IGSA, *supra* note 23, art. XII, para. C, at 10.

[118] RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h. *Compare id.*, *with* Gaston County IGSA, *supra* note 23, art. VIII, para. A, at 6–7.

[119] RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h.

ployment of the prisons is "in a specific area" of business.[120] Sixth and most importantly, ICE retains the ability to control and supervise closely the conditions under which the prisons perform their work.[121]

3. The Narrow Approach for Reconsidering Logue. — The "narrow" approach for revising the application of *Logue* posits that courts have applied an unnecessarily cramped reading of *Logue* in cases involving nonfederal prisons. Nearly every court confronted with this issue has focused largely on whether the U.S. government *in fact* supervised the day-to-day operations of the nonfederal facility. One such case involved two detainees who suffered serious complications from being denied access to HIV medications.[122] Although the government "imposed certain conditions in the Agreement,"[123] the court dismissed the case, in part, because there was no government overseer at the facility and no allegation that government employees directed the facility.[124] A similar case involved a detainee who died of asthma-related complications after being denied access to an inhaler.[125] Although the IGSA permitted the government to inspect the facility, the court dismissed the case because the government "did not have the authority to physically supervise the conduct of the [facility's] employees."[126] In another case, a court concluded that the prison was a contractor even though "INS owned and/or controlled the Facility" and "maintained several of its own personnel at the Facility on a daily basis."[127]

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120 *See id.*

121 *See id.*; Recent Development, *supra* note 113, at 434 & n.6 (collecting cases). In contrast, courts that balance the Restatement factors frequently conclude that independent doctors are contractors because the government exercises no control over the medical services they provide, these services constitute a distinct occupation that requires considerable skill, and the government compensates the doctors on a fee-for-service basis. *See, e.g.*, Linkous v. United States, 142 F.3d 271, 276–77 (5th Cir. 1998).

Importantly, judicial interpretation of sovereign immunity waivers provides a key counterargument to liability predicated on agent classification. Courts routinely assert that such waivers must be strictly construed, with all ambiguities being resolved in favor of the federal government. *See, e.g.*, Orff v. United States, 545 U.S. 596, 601–02 (2005). Though the Restatement factors do not unanimously counsel in favor of the agent label, taken together, they illustrate that nonfederal facilities are much closer to the "agent" end of the FTCA spectrum. Thus, the agent-contractor issue here is not so ambiguous as to trigger this sovereign immunity presumption.

122 Baires v. United States, No. C 09-5171 CRB, 2010 WL 3515749, at *2–4 (N.D. Cal. Sept. 8, 2010).

123 *Id.* at *11.

124 *Id.* at *11–12.

125 Bethae v. United States, 465 F. Supp. 2d 575, 577 (D.S.C. 2006).

126 *Id.* at 580; *see also* Lin Li Qu v. Cent. Falls Det. Facility Corp., 717 F. Supp. 2d 233, 239–40 (D.R.I. 2010); Esogbue v. Dep't of Homeland Sec., No. 07-6843, 2008 WL 754722, at *3–6 (E.D. La. Mar. 18, 2008); Johnson v. United States, No. Civ.A. 4:05CV40, 2006 WL 572312, at *4 (E.D. Va. Mar. 7, 2006); Monroe v. U.S. Marshals, No. 95-35716, 1996 WL 665147, at *1 (9th Cir. Nov. 15, 1996).

127 Jama v. U.S. INS, 343 F. Supp. 2d 338, 357 (D.N.J. 2004). The court emphasized that there was evidence from which one could infer that nonfederal officials "in fact ran the Facility"; how-

Yet even when one focuses exclusively on the day-to-day supervision factor, the IGSAs that ICE signs with nonfederal facilities authorize ICE to supervise and control numerous decisions that facility officials make.[128] As noted above, the IGSAs give ICE the authority to inspect the physical and financial conditions of the facility as often as ICE sees fit.[129] Nearly every recent IGSA requires the corresponding nonfederal facility to comply with detailed, ICE-promulgated detention standards[130] and to obtain ICE permission before providing immigrant detainees with access to specialized, non-emergency medical care for chronic conditions.[131] ICE also retains the right to resolve detainee medical care disputes between ICE and the facilities' officials[132] and to terminate the employment relationship without cause.[133] In short, ICE's power vis-à-vis the nonfederal facilities indicates that

ever, the court pointed only to a report that documented failures of the facility "to comply with the contract." *Id.* The court ultimately dismissed the claims against INS not because of the contractor exception, but rather because a settlement agreement barred all claims against the agency. *Id.* at 353.

128 Some courts have implicitly required the *actual* exercise of supervision, as opposed to the *potential* for such exercise. *See, e.g.*, Baires v. United States, No. C 09-5171 CRB, 2010 WL 3515749, at *11 (N.D. Cal. Sept. 8, 2010) ("There is no allegation of day-to-day supervision on [sic] detailed oversight of detention operations."). However, numerous courts have rejected such a reading, reasoning that "it is not necessary for the Government to continually control all aspects of the individual's activities, so long as it has the authority to do so given the nature of the task." Moreno v. United States, 387 F. App'x 159, 160–61 (3d Cir. 2010) (quoting Patterson & Wilder Constr. Co. v. United States, 226 F.3d 1269, 1274 (11th Cir. 2000)) (internal quotation marks omitted); *see also, e.g.*, B & A Marine Co. v. Am. Foreign Shipping Co., 23 F.3d 709, 713 (2d Cir. 1994).

129 *See supra* pp. 1478–79.

130 *See supra* p. 1479.

131 *See, e.g.*, *Baires*, 2010 WL 3515749, at *2.

132 *See supra* note 30.

133 *Compare* Gaston County IGSA, *supra* note 23, art. VIII, para. A, at 6–7, *with* Recent Development, *supra* note 113, at 434 & n.9 (collecting cases). Additionally instructive are several cases decided in the years immediately following the passage of the FTCA concluding that local private housing authorities were instrumentalities of the federal government. *See* Schetter v. Hous. Auth. of the City of Erie, 132 F. Supp. 149, 151–52 (W.D. Pa. 1955); Clark v. United States, 109 F. Supp. 213, 223 (D. Ore. 1952); Toth v. United States, 107 F. Supp. 37, 38 (N.D. Ohio 1952). Certainly, there are significant differences between these housing projects and nonfederal prison facilities. The housing authority leases reserved to the government all profits and required the government to approve the authorities' operating budgets. *See, e.g.*, *Schetter*, 132 F. Supp. at 151. One authority could not undertake "major repairs or improvements" without written approval from the U.S. government, *id.*, and that same authority had to surrender the premises to the government when the contractual relationship ended, *see id.* at 152.

These differences pale in comparison to the similarities. Although the "detailed supervision" that the government exercised over the housing authorities included approval of the authorities' operating budget, this supervision was also manifested through requirements that the authorities comply with federal stipulations regarding services, management, operations, and rental fees. *See, e.g.*, *id.* at 151. These authorities retained the ability to "engage personnel and provide equipment" in accordance with federally established parameters. *Toth*, 107 F. Supp. at 38. The federal government also reserved the right to inspect the housing authorities' management- and operations-related records. *Schetter*, 132 F. Supp. at 151.

ICE can supervise and control the day-to-day operations at these facilities.

4. Caveats. — The efficacy of the proposal that this Note advocates rests, in part, on detainees' access to attorneys who are willing and able to help them file suit. Detainees housed in federal facilities can sue the U.S. government by alleging that the government negligently approved medical treatment or a transfer between nonfederal detention facilities, based on the government's knowledge of that detainee's medical situation.[134] These suits might incentivize the federal government to take steps to improve conditions of confinement; however, the occurrence of detainee abuse in federal facilities[135] indicates that detainees may not have adequate access to legal representation.[136] Due to the motivated attributional biases noted above and the poor fiscal health of governments at all levels, it may be unreasonable to expect any government to appropriate the additional funds necessary to finance this representation. Accordingly, proponents of assisting detainees may do well to focus on corporate and individual giving, as well as on pro bono resources at mid- and large-sized law firms.

It is also conceivable that direct suits against the U.S. government could help improve the carceral conditions of immigrant detainees to the point that this Note's proposal would become less urgent. Indeed, given that ICE retains the power to approve a considerable number of detainee medical decisions,[137] such suits could potentially generate a nontrivial amount of litigation. However, the small number of direct negligence cases that have been litigated to date renders it difficult to determine to what degree courts might reject such suits pursuant to the discretionary function exception in the FTCA,[138] and thus, to what degree these suits would help large numbers of detainees.

In addition, it is conceivable that by treating nonfederal prisons as agents, the aggregate amount of anticipated or actual damages awards may fail to incentivize the U.S. government to take ameliorative action.[139] While this concern cannot be easily dismissed, the potential benefits of a more humane detention regime justify the risk. For one,

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134 *See* Lin Li Qu v. Cent. Falls Det. Facility Corp., 717 F. Supp. 2d 233, 240 (D.R.I. 2010).

135 *See, e.g.*, STOP PRISONER RAPE, NO REFUGE HERE: A FIRST LOOK AT SEXUAL ABUSE IN IMMIGRATION DETENTION 4–6 (2004), *available at* http://www.scribd.com/doc/35503775/No-Refuge-Here-A-First-Look-at-Sexual-Abuse-in-Immigration-Detention.

136 *See* WELCH, *supra* note 8, at 114–15.

137 *See, e.g.*, *supra* note 131 and accompanying text.

138 *Compare* Cesar v. Achim, No. 07C128, 2009 WL 2225414, at *2 (E.D. Wis. July 22, 2009) (refusing to dismiss a suit in which federal officials were aware that a detainee was not receiving his medication and failed to intervene), *with* Baires v. United States, No. C 09-5171 CRB, 2010 WL 3515749, at *13 (N.D. Cal. Sept. 8, 2010) (concluding that the federal government could not be held liable in a similar situation).

139 In light of the cognitive and political constraints noted above, it is unlikely that Congress would, inter alia, provide a schedule for liquidated damages for courts to assess automatically.

because it is difficult to estimate the number of cases that detainees will file under this proposed change,[140] the government may tread carefully in the interim. If such estimation subsequently becomes possible, the number may be high enough to prompt government action, rather than inaction. Moreover, the costs associated with funding government lawyers and with having ICE personnel rebut detainee allegations (instead of completing their ordinary work) may exceed what the government is willing to endure. And by continuing to highlight the shortcomings of ICE's detention regime, certain congressmen and journalists could establish a floor for detention standards, below which politicians and the public would not tolerate the standards' falling.

Lastly, holding the federal government liable under the FTCA risks attracting frivolous lawsuits and may result in large damages awards, thus consuming more government resources. However, courts and the political branches have ample tools at their disposal to repel baseless claims and excessive damages,[141] and it is unclear that increased government liability actually results in higher damages or more frivolous litigation.[142]

CONCLUSION

The abuse of federal immigrant detainees housed in nonfederal prison facilities is an important problem that demands immediate attention. Political and psychological realities render the legislative and executive branches inadequate to address this issue, making courts the most viable routes for offering relief. By viewing these facilities as federal government agents and imposing liability accordingly, the judiciary can help deter the abuses that immigrant detainees endure.

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[140] *See, e.g.*, *supra* p. 1496.

[141] *See* Note, *supra* note 84, at 2025–26 (noting that the FTCA only provides for bench trials and proscribes punitive damages, and that the legislative and executive branches could intervene by instituting ceilings for certain types of damages or discontinuing the official policy altogether).

[142] *See id.* at 2024.