EXTRAJUDICIAL SEGREGATION: CHALLENGING SOLITARY CONFINEMENT IN IMMIGRATION PRISONS

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Stepping into that cell, it felt like I lost all hope. You could smell the concrete, the isolation, the loneliness. And I knew in my heart that I would die here.

— Five Mualimm-ak[1]

After that first or second week, I lost my mind. . . . Sometimes I feel like someone is choking me. I have flashbacks, like I'm still confined in that little room.

— Ayo Oyakhire[2]

INTRODUCTION

Pitch black darkness. Screams of neighbors in pain. Excluded from everything: your family, neighbors, and vital medical help. Thrown in the hole because you spoke Spanish, left "juice" in your cell, a guard was upset at you, you are gay or transgender,[3] you have a preexisting medical or mental health condition, you do not want to work for $1 a day, you

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[1] THE BOX: MINDS LOST IN SOLITARY CONFINEMENT (New Yorker 2022), at 0:00–0:26, https://www.newyorker.com/culture/the-new-yorker-documentary/survivors-of-solitary-confinement-tell-their-stories-in-the-box [https://perma.cc/ZMX7-NVK5].

[2] Hannah Rappleye et al., *Thousands of Immigrants Suffer in Solitary Confinement in U.S. Detention Centers*, NBC NEWS (May 21, 2019, 12:01 AM), https://www.nbcnews.com/politics/immigration/thousands-immigrants-suffer-solitary-confinement-u-s-detention-centers-n1007881 [https://perma.cc/8E6J-737M] (reporting that Ayo Oyakhire, a 52-year-old immigrant from Nigeria, was held in solitary confinement in a U.S. Immigration and Customs Enforcement (ICE) jail in Atlanta for nearly seven weeks).

[3] *See generally* Laura P. Minero et al., *Latinx Trans Immigrants' Survival of Torture in U.S. Detention: A Qualitative Investigation of the Psychological Impact of Abuse and Mistreatment*, 23 INT'L J. TRANSGENDER HEALTH 36 (2022).

are fasting during Ramadan, you are on a hunger strike to protest prison conditions, or you ask for help with a medical or legal issue.[4] Days feel like months, months feel like years, and years feel like an eternity when you are in an elevator-sized cell[5] fully enclosed by cold concrete walls.

In 2015, the United Nations recognized that solitary confinement — the caging of people in isolation for twenty-two to twenty-four hours a day in a cell — beyond fifteen consecutive days is cruel, inhumane, and degrading treatment amounting to torture.[6] During prolonged periods in isolation, people may be subjected to horrors such as sensory and sleep deprivation,[7] physical restraints,[8] restrictions on religious practice,[9] chemical attacks,[10] and sexual assault.[11] Voluminous research

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[4] *See* ALEXIS PERLMUTTER & MIKE CORRADINI, NAT'L IMMIGRANT JUST. CTR. & PHYSICIANS FOR HUM. RTS., INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION 17–20 (2012) (describing the various reasons why immigrants are thrown into solitary confinement); OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OG-22-01, ICE NEEDS TO IMPROVE ITS OVERSIGHT OF SEGREGATION USE IN DETENTION FACILITIES 19–20 (2021) [hereinafter OIG REPORT] (reporting that immigrants are thrown into solitary confinement for being gay, lesbian, bisexual, transgender, or intersex in an unsafe facility; for having preexisting medical and mental health issues; or for going on a hunger strike); Rappleye et al., *supra* note 2 (documenting the experiences of several people in solitary confinement in immigration prisons and describing the various trivial reasons they were placed in solitary and the severe physical and psychological impact it had); Sarah Gonzalez, *Alone and Isolated, The Punishment Piles on for Immigrant Detainees*, WNYC NEWS (Nov. 9, 2015), https://www.wnyc.org/story/solitary-confinement-immigrant-detention [https://perma.cc/KR62-QD4U] (describing how trivial infractions accumulate and lead to days in solitary confinement).

[5] Julia Vitale, *Despite Limits, Solitary Confinement Remains a Fixture in U.S. Prisons*, INTERROGATING JUST. (July 8, 2021), https://interrogatingjustice.org/prisons/despite-limits-solitary-confinement-remains-a-fixture-in-u-s-prisons [https://perma.cc/VMQ7-Q27G].

[6] Press Release, Off. of the United Nations High Comm'r for Hum. Rts., United States: Prolonged Solitary Confinement Amounts to Psychological Torture, Says UN Expert (Feb. 28, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25633 [https://perma.cc/5WYN-A5SG].

[7] Justin D. Strong et al., *The Body in Isolation: The Physical Health Impacts of Incarceration in Solitary Confinement*, PLOS ONE, Oct. 9, 2020, at 1, 8–12 (describing the physical impacts of solitary confinement as a result of sensory, social, and sleep deprivation).

[8] *Solitary Confinement Facts*, AM. FRIENDS SERV. COMM., https://afsc.org/solitary-confinement-facts [https://perma.cc/PR87-ZQRR].

[9] Press Release, ACLU of Va., Settlement Agreement Reached in Religious Freedom, Solitary Confinement Lawsuit Against Virginia Department of Corrections (Jan. 10, 2022), https://www.acluva.org/en/press-releases/settlement-agreement-reached-religious-freedom-solitary-confinement-lawsuit-against [https://perma.cc/7PBE-9DBL] (describing a settlement in a lawsuit where an individual was denied his religious practice while placed in solitary confinement).

[10] ANGELINA SNODGRASS GODOY, UNIV. OF WASH. CTR. FOR HUM. RTS., CONDITIONS AT THE NWDC: USES OF FORCE AND CHEMICAL AGENTS (Aug. 14, 2023), https://jsis.washington.edu/humanrights/2023/08/14/conditions-at-the-nwdc-uses-of-force-and-chemical-agents [https://perma.cc/SJ4C-C6BY] (describing the use of chemical agents against hunger strikers who were placed in solitary confinement at an immigration detention center).

[11] Victoria Law, *For People Behind Bars, Reporting Sexual Assault Leads to More Punishment*, TRUTHOUT (Sept. 30, 2018), https://truthout.org/articles/for-people-behind-bars-reporting-sexual-assault-leads-to-more-punishment [https://perma.cc/VT3W-9QDT] (describing cases where individuals were placed in solitary confinement for reporting sexual assaults by corrections officers). *See*

studies consistently show that solitary permanently harms a person's psychological and physical health.[12] Compared to the general nonincarcerated population, rates of self-harm and suicide are seven and five times higher, respectively, among those in solitary.[13]

The United States leads the world in the use of long-term solitary confinement[14] — disproportionately impacting LGBTQ individuals,

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generally HARVARD IMMIGR. & REFUGEE CLINICAL PROGRAM ET AL., "ENDLESS NIGHTMARE": TORTURE AND INHUMAN TREATMENT IN SOLITARY CONFINEMENT IN U.S. IMMIGRATION DETENTION (2024), https://phr.org/wp-content/uploads/2024/02/PHR-REPORT-ICE-Solitary-Confinement-2024.pdf [https://perma.cc/GN7Z-B9KW].

[12] Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 298–99 (2018) (synthesizing the scientific research finding that solitary confinement causes serious lifetime psychological harms); Brie A. Williams et al., *The Cardiovascular Health Burdens of Solitary Confinement*, 34 J. GEN. INTERNAL MED. 1977, 1977 (2019) ("[I]ndividuals in solitary confinement experienced an absolute 31% higher hypertension prevalence than those in maximum security units . . . ."); *see also* sources cited *supra* notes 7–11.

[13] UNLOCK THE BOX, SOLITARY CONFINEMENT IS NEVER THE ANSWER 2 (2020), https://unlocktheboxcampaign.org/wp-content/uploads/2021/02/UTB-Covid-19-June2020Report.pdf [https://perma.cc/Q7LQ-2FY2] ("Various studies have shown suicide rates to be at least five times higher in solitary than in the general prison population, and rates of self-harm to be seven times higher."); Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 445 (2014) ("Inmates punished by solitary confinement were approximately 6.9 times as likely to commit acts of self-harm . . . ."); *see also* Lauren Brinkley-Rubinstein et al., *Association of Restrictive Housing During Incarceration with Mortality After Release*, JAMA NETWORK OPEN, Oct. 4, 2019, at 1, 6 ("[T]hose who spent more than 14 consecutive days in restrictive housing had a greater risk of all-cause mortality, homicide, suicide and reincarceration within 1 year after release . . . ."); BRAD BENNETT ET AL., S. POVERTY L. CTR., SOLITARY CONFINEMENT: INHUMANE, INEFFECTIVE, AND WASTEFUL 13–14 (2019), https://www.splcenter.org/sites/default/files/com_solitary_confinement_0.pdf [https://perma.cc/M5N5-QY62] (synthesizing research and reports showing that solitary confinement does not make prisons or communities safer, but rather is linked to increased violent recidivism, increased public spending, and negative impacts on mental health); Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 372 (2018).

[14] *See* Jeremy Young, *Solitary Confinement Is Still Widespread in US Prisons and Jails*, AL JAZEERA (June 27, 2023), https://www.aljazeera.com/news/2023/6/27/solitary-confinement-is-still-widespread-in-us-prisons-and-jails [https://perma.cc/Y9P8-CEFX] (reporting that there are an average of 120,000 people in solitary confinement in the United States "on any given night"); Patrice Taddonio, *WATCH: How the U.S. Became the World Leader in Solitary Confinement*, PBS FRONTLINE (Apr. 17, 2017), https://www.pbs.org/wgbh/frontline/article/watch-how-the-u-s-became-the-world-leader-in-solitary-confinement [https://perma.cc/ATK5-PK38] ("[T]he U.S. remains the world leader in the use of long-term solitary confinement . . . ."); Valerie Kiebala et al., *Solitary Confinement in the United States: The Facts*, SOLITARY WATCH (June 2023), https://solitarywatch.org/facts/faq [https://perma.cc/TZ53-YFPK] ("Among Western industrialized nations, the United States is the only country to make extensive use of long-term solitary confinement.").

I use the term "solitary confinement" to describe what United States and immigration prison officials characterize as "administrative segregation" or "disciplinary segregation." Solitary confinement captures the true experience of survivors as being isolated, confined, and traumatized whereas labeling this experience as "administrative" or "disciplinary" erases the true experience and legitimizes the use of solitary as procedural or places responsibility solely on the incarcerated person. *See* ANDREEA MATEI, URB. INST., SOLITARY CONFINEMENT IN US PRISONS, 4 (2022), https://www.urban.org/sites/default/files/2022-08/Solitary%20Confinement%20in%20the%20US.pdf [https://perma.cc/P5FX-AL2S] (explaining administrative and disciplinary segregation); U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105366, IMMIGRATION DETENTION: ACTIONS NEEDED

women, immigrants, people of color, and people with disabilities and mental illnesses.[15] Prior to the COVID-19 pandemic, there were approximately 60,000 people nationally in solitary confinement.[16] However, after March 2020, there was a 400% increase to more than 300,000 people in solitary.[17] One study estimated that, in 2021, over 60% of men and over 40% of women in solitary confinement were nonwhite.[18] Though designed to sanction the most violent behavior, solitary is a common punishment for trivial infractions.[19] At the whim of prison staff, incarcerated persons are denied human contact, educational and legal resources, and medical treatment.

Solitary confinement has increasingly been used on immigrants in immigration prisons[20] during admission and removal proceedings.[21]

TO COLLECT CONSISTENT INFORMATION FOR SEGREGATED HOUSING OVERSIGHT 13–14 (2022), https://www.gao.gov/assets/gao-23-105366.pdf [https://perma.cc/WUF8-P5VK] [hereinafter GAO REPORT] (explaining the use of disciplinary and administrative segregation in ICE prisons).

15 Brandy F. Henry, *Disparities in Use of Disciplinary Solitary Confinement by Mental Health Diagnosis, Race, Sexual Orientation and Sex: Results from a National Survey in the United States of America*, 32 CRIM. BEHAV. MENTAL HEALTH 114, 120–21 (2022) (conducting a national survey and finding that solitary confinement is used at higher rates for people who are multiracial, male, or bisexual, or who have had multiple mental disorders); CORR. LEADERS ASS'N & ARTHUR LIMAN CTR. FOR PUB. INT. L. AT YALE L. SCH., TIME-IN-CELL: A 2021 SNAPSHOT OF RESTRICTIVE HOUSING 28, 36, 53–54 (2022), https://law.yale.edu/sites/default/files/area/center/liman/document/time_in_cell_2021.pdf [https://perma.cc/D7FD-3PL3] (reporting that Black and Hispanic/Latinx men and women, especially those with mental health illnesses, make up the majority of people in solitary confinement).

16 UNLOCK THE BOX, *supra* note 13, at 4.

17 *Id.* The 400% increase figure was calculated in the following manner: (300,000 – 60,000) / 60,000 = 400%.

18 CORR. LEADERS ASS'N & ARTHUR LIMAN CTR. FOR PUB. INT. L. AT YALE L. SCH., *supra* note 15, at 27–28, 35–36.

19 *See* Stephanie Wykstra, *The Case Against Solitary Confinement*, VOX (Apr. 17, 2019, 4:30 PM), https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice-reform [https://perma.cc/DG52-VSQG] (noting that "it's very common for corrections to put people in solitary for trivial reasons" including for disruptive behavior such as talking back or failing to obey an order (citing ALISON SHAMES ET AL., VERA INST. OF JUST., SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 14 (2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/solitary-confinement-common-misconceptions-and-emerging-safe-alternatives/legacy_downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf [https://perma.cc/7V5A-425S])).

20 I use the term "immigration prisons" rather than immigration detention deliberately because these are sites that are constructed, operated as, and managed like prisons — sites of state violence. The immigration prison described as civil detention represents another level of extrajudiciality that obscures and minimizes the trauma that noncitizens experience and has legal implications that limit the legal remedies that noncitizens have for challenging their confinement. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 88 (2019) (arguing that labels matter, and no "meaningful difference [exists] between an ICE lockup and the typical county jail or state prison").

21 PERLMUTTER & CORRADINI, *supra* note 4, at 9–11 (describing the use of solitary confinement in removal proceedings). *See generally* Konrad Franco et al., *Punishing Status and the Punishment Status Quo: Solitary Confinement in U.S. Immigration Prisons, 2013–2017*, 24 PUNISHMENT & SOC'Y 170 (2022) (finding that vulnerable populations with underlying mental

According to data from U.S. Immigration and Customs Enforcement (ICE), in fiscal year 2023, people spent an average of twenty consecutive days and over thirty-eight cumulative days in solitary confinement (both administrative and disciplinary).[22] Recall that, according to the U.N., placing a person in solitary for more than fifteen consecutive days amounts to torture.[23] According to the Department of Homeland Security's Office of Inspector General (OIG), between fiscal years 2015 and 2019, there were a total of 13,784 immigrants placed in segregation, the term ICE uses for solitary confinement.[24] The report determined that for 72% of segregation placements, ICE did not "maintain evidence showing it considered alternatives to segregation."[25] The report also highlighted how solitary confinement worsened mental and physical health conditions, causing depression, post-traumatic stress disorder, and increased risk of self-harm and suicide.[26] In a subsequent report, the U.S. Government Accountability Office (GAO) reported that, from fiscal years 2017 to 2021, there were 14,581 segregated housing placements in immigration prisons.[27] While 41% of these placements were for disciplinary reasons, about 60% were for administrative reasons for individuals with special vulnerabilities.[28] During the COVID-19 pandemic, and between March 2020 to January 2022, the rate of immigrants placed in solitary confinement skyrocketed with the majority being for administrative and medical reasons.[29]

This problem is only bound to get worse. In 2022, global human displacement reached an all-time high of 108.4 million people as a result of famine, war and violence, poverty, and climate change.[30] That year, 2.76 million people arrived at the U.S. borders, mostly from Latin

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illness and immigrants from majority-Black countries are at greater risk for experiencing solitary confinement); Rappleye et al., *supra* note 2 (documenting the experiences of immigrants who survived solitary confinement); Spencer Woodman et al., *Solitary Voices: Thousands of Immigrants Suffer in Solitary Confinement in ICE Detention*, THE INTERCEPT (May 21, 2019, 12:01 AM), https://theintercept.com/2019/05/21/ice-solitary-confinement-immigration-detention [https://perma.cc/UW4N-FBQJ] (describing the stories of immigrants who survived solitary confinement in immigration prison). *See generally* HARVARD IMMIGR. & REFUGEE CLINICAL PROGRAM ET AL., *supra* note 11.

[22] *See ICE Detention Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T (Jan. 18, 2024), https://www.ice.gov/doclib/detention/FY24_detentionStats01182024.xlsx [https://perma.cc/A6F6-7Y87] ("Vulnerable & Special Population" tab) (reporting the average number of consecutive and cumulative days "vulnerable and special populations" spent in segregation in fiscal years 2022 and 2023).

[23] *See* Press Release, Off. of the United Nations High Comm'r for Hum. Rts., *supra* note 6.

[24] OIG REPORT, *supra* note 4, at 3.

[25] *Id.* at 1.

[26] *Id.* at 11. *See generally* HARVARD IMMIGR. & REFUGEE CLINICAL PROGRAM ET AL., *supra* note 11.

[27] GAO REPORT, *supra* note 14, at 29.

[28] *Id.* at 29–30.

[29] Joseph Nwadiuko et al., *Solitary Confinement Use in Immigration Detention Before and After the Beginning of the SARS-CoV-2 Pandemic*, 38 J. GEN. INTERNAL MED. 1789, 1790 (2023).

[30] UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2022, at 4 (2023), https://www.unhcr.org/sites/default/files/2023-06/global-trends-report-2022.pdf [https://perma.cc/H32G-N7FG].

American countries.[31] While news media often portrays immigrants as "illegal[s]" threatening society, the reality is that displaced people seek a better life from the ravages of colonialism, racial capitalism, military imperialism, climate change, and poverty.[32] And as more people are displaced, more will seek refuge in the United States (as an expression of self-determination and decolonization[33]), and more will likely be incarcerated and confined in solitary. Therefore, it is critical that we, lawyers and scholars, join with organizers[34] and people who are grappling with the implications of solitary confinement in immigration prisons.

This Essay first traces the evolution of immigration prisons leading to the contemporary use of solitary confinement. Second, the Essay examines how solitary confinement in immigration prisons is an extrajudicial segregation condoned and designed by courts and congressional plenary power.[35] Third, the Essay examines the limited pathways that the U.S. government offers to advocates and lawyers to curtail the use of solitary confinement in immigration prisons.[36] The Essay concludes

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[31] Julia Ainsley, *Migrant Border Crossings in Fiscal Year 2022 Topped 2.76 Million, Breaking Previous Record*, NBC NEWS (Oct. 22, 2022, 11:26 AM), https://www.nbcnews.com/politics/immigration/migrant-border-crossings-fiscal-year-2022-topped-276-million-breaking-rcna53517 [https://perma.cc/C37B-BZ22].

[32] Hana E. Brown & Michelle S. Dromgold-Sermen, *Borders, Politics, and Bounded Sympathy: How U.S. Television News Constructs Refugees, 1980–2016*, SOC. PROBS., June 25, 2022, at 2.

[33] E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1552–58 (2019) (arguing that migration today is "decolonial" as a necessary expression of self-determination and a right that Third World persons have as a just response to the centuries of colonialism and neocolonial imperialism that they endured at the hands of the global north).

[34] For example, over 150 legal and nonlegal organizations support the End Solitary Confinement Act. *See Organizations Endorsing the End Solitary Confinement Act*, U.S. CONGRESSWOMAN CORI BUSH, https://bush.house.gov/imo/media/doc/organizations_endorsing_end_solitary_confinement_act.pdf [https://perma.cc/VT97-MUTV].

[35] I use the term "extrajudicial segregation" to describe how the use of solitary confinement in immigration prisons is a legal and intentional deprivation of life and liberty with limited to no judicial or legal oversight and which exists *outside* of the realm of legal relief that is afforded to citizens who are also in solitary confinement. That is, and as explained below in Parts II and III, because Congress and the judiciary have intentionally denied noncitizens in solitary relief via the traditional legal pathways offered to citizens who are incarcerated; solitary confinement in immigration prisons is intentionally and legally outside the bounds of law and judicial proceedings. The term "segregation" is used to describe how solitary confinement functions to *physically* segregate and exclude people from the general prison population (and society as a whole) and also how our legal system has *legally* segregated, excluded, or denied, people on the basis of citizenship from obtaining the same legal remedies available to incarcerated citizens to challenge solitary confinement in immigration detention. *See Extrajudicial*, BLACK'S LAW DICTIONARY (2d ed. 1910) (defining extrajudicial as "[t]hat which is done, given, or effected outside the course of regular judicial proceedings; not founded upon, or unconnected with, the action of a court of law"); William J. Aceves, *When Death Becomes Murder: A Primer on Extrajudicial Killing*, 50 COLUM. HUM. RTS. L. REV. 116, 127 (2018) (describing the prohibition of extrajudicial killing used in international law as "an extension of the right to life norm and represent[ing] a manifestation of the right to be free from the arbitrary deprivation of life").

[36] *See* Azadeh Shahshahani & Ayah Natasha El-Sergany, *Challenging the Practice of Solitary Confinement in Immigration Detention in Georgia and Beyond*, 16 CUNY L. REV. 243, 253–62

by exploring harm-reduction legislative options and by advocating for abolishing solitary confinement entirely.

I. THE EVOLUTION OF SOLITARY CONFINEMENT IN IMMIGRATION PRISONS

A. Immigration Prisons

Immigration prisons, described as "civil detention," are structures of confinement designed to segregate and isolate noncitizens during the admission and removal process.[37] The use of immigration prisons as a tool of settler-colonial segregation[38] began with the 1891 Immigration

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(2013) (describing pathways and legal limitations of challenging solitary confinement in immigration prisons); Savannah Kumar, *Compelling Labor and Chilling Dissent: Creative Resistance to Coercive Uses of Solitary Confinement in Prisons and Immigration Detention Centers*, 36 HARV. BLACKLETTER L.J. 93, 110–16 (2020) (examining the use of social movement and arts-based interventions to challenge solitary confinement).

[37] Carrie L. Rosenbaum, *Crimmigration — Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9, 46 (2018) (discussing the expanded use of immigration detention as a way to racialize migrant "[o]thers" and subordinate peoples of color through criminalization); Liat Ben-Moshe et al., *Critical Theory, Queer Resistance, and the Ends of Capture, in* DEATH AND OTHER PENALTIES: PHILOSOPHY IN A TIME OF MASS INCARCERATION 266, 272 (Geoffrey Adelsberg et al. eds., 2015) ("[C]arceral forces both target particular populations as disposable and amenable to incarceration . . . and they also construct and reproduce members of these populations as nonnormative subjects while doing so."); LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW 22 (2010) (describing the process of constructing the "other" in the settler-colonial project).

For books describing the history of immigration incarceration and prisons, see generally KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES 1771–1965 (2017); GARCÍA HERNÁNDEZ, *supra* note 20.

[38] Prisons are used to create, govern, punish, eliminate, and exclude those who are deemed politically to not belong — the "other," an oppositional identity to white or settler citizenship, which relies on intersecting markers of difference to create a tiered system of segregated exclusion across society. *See* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 403–04 (2006) (arguing that the legal system and prisons evolved to become "eliminatory options," *id.* at 403, to criminalize, control, punish, and expel nonwhite populations and those deemed a threat to the expanding empire); Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 777, 777 (2010) ("[S]tate and local anti-immigrant laws lead to the segregation, exclusion, and degradation of Latinos from American society in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and relegated them to second-class citizenship.").

Other settler-colonial states, like Israel, use large-scale segregation, incarceration, solitary confinement, and isolation practices to punish and confine people, including children and entire communities, who live in occupied territories and are resisting the ongoing forced displacement and oppression. *See* Press Release, Human Rights Council, Off. of the United Nations High Comm'r for Hum. Rts., Special Rapporteur Says Israel's Unlawful Carceral Practices in the Occupied Palestinian Territory Are Tantamount to International Crimes and Have Turned It into an Open-Air Prison (July 10, 2023), https://www.ohchr.org/en/news/2023/07/special-rapporteur-says-israels-unlawful-carceral-practices-occupied-palestinian [https://perma.cc/4SZ4-SRFB] ("[T]he occupied Palestinian territory had been transformed as a whole into a constantly surveilled open-air prison."); Samer Badawi, *Youth Conviction: Palestinian Children Describe Solitary Confinement in Israeli Military Prisons*, DEF. FOR CHILD. INT'L PALESTINE (Dec. 20, 2014), https://www.

Act,[39] which authorized, for the first time, the detention of immigrants at Ellis Island.[40] The law also created the first immigration department, criminalized the first classes of excludable immigrants, and created new border enforcement procedures.[41] The following year, the Supreme Court upheld Congress's power to arrest immigrants and hold them in "civil detention."[42] Over time, that power was justified as part of Congress's plenary power to exclude anyone whom they deemed undesirable and to detain and deport them in whichever manner Congress elected.[43]

At the turn of the nineteenth century, Congress expanded immigration incarceration. In 1910, for example, Angel Island in San Francisco was an immigration prison where thousands of mostly Asian immigrants were detained for days or months to enforce the Chinese Exclusion Act of 1882.[44] In 1924, Congress instituted racial quotas limiting who could

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dci-palestine.org/youth_conviction_palestinian_children_describe_solitary_confinement_in_israeli_military_prisons [https://perma.cc/ACG6-53AA] (describing personal stories of children who survived solitary confinement, and were tortured and interrogated, in Israeli prisons for alleged acts like throwing stones); FRANCESCA ALBANESE, HUM. RTS. COUNCIL, OFF. OF THE UNITED NATIONS HIGH COMM'R FOR HUM. RTS., REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES OCCUPIED SINCE 1967, at 1 (2023), https://www.ohchr.org/sites/default/files/2023-12/A_HRC_53_59_AUV.pdf [https://perma.cc/9WBU-JXJF] (advance unedited version) ("[A]rbitrary and deliberate ill-treatment is inflicted upon the Palestinians not only through unlawful practices in detention but also as a carceral continuum comprised of techniques of large-scale confinement — physical, bureaucratic, digital — beyond detention. . . . Israel's occupation has been a tool of settler colonial conquest also through intensifying methods of confinement . . . .").

[39] Ch. 551, 26 Stat. 1084.

[40] *Id.* § 8.

[41] *See id.* §§ 1, 6, 8; *see also* Immigration Act of 1893, ch. 206, § 5, 27 Stat. 569, 570 (empowering immigration inspectors to "detain for special inquiry . . . every person who may not appear to him to be clearly and beyond doubt entitled to admission"); César Cuauhtémoc García Hernández, Opinion, *Ellis Island Welcomed Thousands to America — But It Was Also a Detention Center*, TIME (Jan. 1, 2020, 11:00 AM), https://time.com/5752116/ellis-island-immigration-detention-center [https://perma.cc/TWR3-BJGT] (describing the history of Ellis Island as America's first immigration prison).

[42] Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("[D]etention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid.").

[43] Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889) (holding that the political branches can exclude "foreigners of a different race . . . [deemed] to be dangerous to its peace and security"); Fong Yue Ting v. United States, 149 U.S. 698, 707, 714 (1893) (holding that the executive branch may expel noncitizens "as it may see fit," *id.* at 714); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."). Those detained by the government were not legally in the United States. Rather, they were in a "limbo — with the detention centre constituting . . . an extra-legal space." DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 13 (2012).

[44] *History of Angel Island Immigration Station*, ANGEL ISLAND IMMIGR. STATION FOUND., https://www.aiisf.org/history [https://perma.cc/2VXT-5Y3F]; Gary Mukai, *Angel Island Immigration*

enter the country and created the U.S. Border Patrol.[45] The majority of the newly formed border patrol was composed of a majority of working-class landless white men who toiled in agriculture, staunchly opposed unrestricted migration from Mexico, and violently policed the borderlands, with militia groups, to maintain strict racial divides, protect their socioeconomic status, and climb the social ladder.[46] As such, anti-immigrant violence is embedded at the core of the Border Patrol. For example, the early Border Patrol agents witnessed Texas Rangers or local police (often the same recruits) inflict brutal violence on Mexicans along the borderlands with impunity.[47] Such violence often included lynchings.[48] With the Undesirable Aliens Act of 1929,[49] Congress criminalized U.S.-Mexico border crossings, leading to over 44,000 prosecutions and convictions by the close of the 1930s,[50] surpassing all other federal crimes.[51] Throughout the 1940s, Congress further criminalized, incarcerated (most notably in internment camps), and deported immigrants, all while authorizing exploitative labor practices for immigrants.[52]

Station: The Hidden History, STAN. PROGRAM ON INT'L & CROSS-CULTURAL EDUC. (Oct. 13, 2020), https://spice.fsi.stanford.edu/news/angel-island-immigration-station-hidden-history [https://perma.cc/752X-N2KQ]; *see also* Geary Act, ch. 60, §§ 2, 4, 27 Stat. 25, 25 (1892) (repealed 1943) (requiring that Chinese immigrants deemed removable be subject to up to one year of imprisonment of "hard labor" and then deported).

[45] *See* Emergency Immigration Act, ch. 8, § 2(a), 42 Stat. 5, 5 (1921) (repealed 1952) (creating immigration quotas set at 3% of the total population of foreign-born for each nationality group based on the 1910 census, which explicitly barred people from the "Asiatic Barred Zone," and virtually excluded migrants from the Middle East, Latin America, Africa, and Eastern and Southern Europe, but not people from Western Europe); Labor Appropriation Act, ch. 204, 43 Stat. 205, 240 (1924) (creating a border patrol).

[46] KELLY LYTLE HERNÁNDEZ, MIGRA! A HISTORY OF THE U.S. BORDER PATROL 36–44 (2010) (describing the history of the early members of the U.S. Border Patrol); Ryan Devereaux, *The Bloody History of Border Militias Runs Deep — And Law Enforcement Is Part of It*, THE INTERCEPT (Apr. 23, 2019, 1:24 PM), https://theintercept.com/2019/04/23/border-militia-migrants [https://perma.cc/Q5WW-AGKD] (describing the history of white militia men who often served as Border Patrol agents or worked closely with the agency to police the border).

[47] MONICA MUÑOZ MARTINEZ, THE INJUSTICE NEVER LEAVES YOU: ANTI-MEXICAN VIOLENCE IN TEXAS 225–26, 296–98 (2018) (describing the history of the early Border Patrol agents who had connections to the Texas Rangers and local police who inflicted violent acts on Mexicans along the borderlands).

[48] *See id.*

[49] Ch. 690, 45 Stat. 1551 (repealed 1952).

[50] *Undesirable Aliens Act of 1929 (Blease's Law)*, IMMIGR. HIST., https://immigrationhistory.org/item/undesirable-aliens-act-of-1929-bleases-law [https://perma.cc/Q7UC-BCF6]; *see also* LYTLE HERNÁNDEZ, *supra* note 46, at 91–93 (describing how Congress criminalized those crossing the Mexico-U.S. border, who were mostly laborers and who were previously permitted to enter lawfully, by imposing, for the first time, "lengthy jail terms and costly fines," which resulted in filling up jails at the border "beyond capacity" prior to deportation).

[51] *A Short History of Immigration Detention*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/detention-timeline [https://perma.cc/X5S6-SAXK].

[52] In 1942, Franklin D. Roosevelt signed Executive Order 9,066, providing for the internment of 120,000 Japanese-Americans over the course of the war, as well as German-Americans and Italian-Americans suspected of being spies. *Executive Order 9066: Resulting in Japanese-American*

In the 1980s and 1990s, Congress adopted a tough-on-crime regime and augmented its efforts to criminalize, detain, incarcerate, and deport more immigrants.[53] For example, the Immigration Reform and Control Act of 1986[54] (IRCA), the Anti-Drug Abuse Act of 1988,[55] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[56] all expanded the list of crimes under which noncitizens could be charged, incarcerated, and deported. As Congress expanded the list of removable offenses, more immigrants were incarcerated and immigration prisons burgeoned alongside the prison industrial complex.[57] Congress again expanded its authority to criminalize and detain immigrants by empowering local and state law enforcement to detain immigrants.[58] In the post-9/11 era, Congress drastically enhanced surveillance, detention, and deportation measures via the USA PATRIOT Act,[59] specifically targeting Middle Eastern, Arab, and North African communities, and created the Department of Homeland Security (DHS), which included Customs and Border Protection (CBP) and ICE.[60] Subsequently,

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Incarceration (1942), NAT'L ARCHIVES (Jan. 24, 2022), https://www.archives.gov/milestone-documents/executive-order-9066 [https://perma.cc/S9MS-9VSQ]. As the United States required more manual labor, the United States created the 1942 Bracero Program to bring in thousands of Mexican laborers, over one million of whom were later deported under Operation "Wetback" beginning in 1954. Brent Funderburk, *Operation Wetback*, BRITANNICA, https://www.britannica.com/topic/Operation-Wetback [https://perma.cc/MZ56-EJ7P].

53 Felipe Hernández, Note, *Not a Matter of If, But "When": Expanding the Immigration Caging Machine Regardless of* Nielsen, 22 HARV. LATINX L. REV. 87, 102–04 (2019) (explaining how Congress enacted these laws to create more criminal offenses, resulting in higher incarceration and deportation rates of immigrants).

54 Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

55 Pub. L. No. 100-690, §§ 7341–7349, 102 Stat. 4181, 4469–73 (codified as amended in scattered sections of 8 U.S.C.).

56 Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

57 Private capital met the demand to construct more prisons, which led to higher incarceration rates, longer sentences, and skyrocketing profit. *See* Gregmar I. Galinato & Ryne Rohla, *Do Privately-Owned Prisons Increase Incarceration Rates?*, LAB. ECON., Sept. 2020, at 10; WALTER A. EWING ET AL., AM. IMMIGR. COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 11–12 (2015) (explaining the increase in incarceration rates for removal proceedings as more prisons were built and Congress expanded the list of crimes leading to removal). Corrections Corporation of America (CCA, now CoreCivic), founded as the world's first private prison company, entered into a contract with the federal government to create the first private immigration detention facility. *See* Galinato & Rohla, *supra*, at 1. In 1986, GEO Group obtained its first federal contract for the Aurora Detention Facility in Colorado. *See Aurora ICE Processing Center*, GEO GRP., https://www.geogroup.com/FacilityDetail/FacilityID/31 [https://perma.cc/U6E2-RPMB].

58 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 439, 110 Stat. 1214, 1276 (2005) (codified at 8 U.S.C. § 1252c); Donald Kerwin & Kristen McCabe, *Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes*, MIGRATION POL'Y INST. (Apr. 29, 2010), https://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes [https://perma.cc/5RBG-M2JQ].

59 Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of the U.S. Code).

60 *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of the U.S. Code).

Congress passed the first immigration detention bed quota — requiring that a minimum of 33,400 prison beds be maintained nationally.[61] Throughout the steady expansion of the immigration incarceration and deportation regime, the Supreme Court has steadily upheld Congress's growing use of prolonged detention during removal proceedings.[62]

The U.S. immigration system is now a well-oiled incarceration and deportation machine with over 200 prisons[63] that, in fiscal year 2024, collectively house an average daily population of over 38,000 people[64] — about 91% of whom are held in privately operated prisons.[65] When people seeking asylum arrive at the border, the majority are deemed to be a "security risk" and are held in immigration detention for an average of 36 days before they are either released on parole or bond to continue their asylum case or deported.[66] Moreover, the average length of detention of people already in the country facing removal for criminal or immigration violations is 48.8 days, and 52% of detainees remain in

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[61] *See* Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, 2149 (2010). This bed quota arbitrarily fluctuates depending on the administration. *See generally* Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77 (2017) (describing fluctuations during the Obama Administration). The Obama Administration had deported over three million people by the end of President Obama's presidency. This amounted to more removals than that which occurred under any other president before President Obama. *See* Alex Nowrasteh, *Deportation Rates in Historical Perspective*, CATO INST. (Sept. 16, 2019, 3:43 PM), https://www.cato.org/blog/deportation-rates-historical-perspective [https://perma.cc/B79N-AURV].

[62] *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid."); Carlson v. Landon, 342 U.S. 524, 537–38 (1952) (holding that "[d]eportation is not a criminal proceeding," *id.* at 537, and that "[d]etention is necessarily a part of this deportation procedure," *id.* at 538); Zadvydas v. Davis, 533 U.S. 678, 682, 699–701 (2001) (holding that detention for six months for immigrants in removal proceedings is appropriate and that detention beyond six months is permitted if it is reasonably necessary to secure removal); Demore v. Kim, 538 U.S. 510, 531 (2003) (upholding detention of six months prior to removal as "constitutionally permissible"); Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) (holding that Congress did not "limit detention to six months" for immigrants seeking entry to United States via asylum); Nielsen v. Preap, 139 S. Ct. 954, 965 (2019) (holding that immigrants who are jailed and deemed to be deportable can be taken into removal proceedings and held in mandatory detention at any time, even years, after they are released from jail).

[63] *Immigration Detention & Enforcement*, NAT'L IMMIGRANT JUST. CTR., https://immigrantjustice.org/issues/immigration-detention-enforcement [https://perma.cc/X6VY-4L8A].

[64] *See ICE Detention Statistics*, *supra* note 22 ("Detention FY24" tab) (reporting that from October 2023 to mid-January 2024, there was a daily average of 38,137 people in ICE and CBP detention); *see also Immigration Detention Quick Facts*, TRAC IMMIGR. (2023), https://trac.syr.edu/immigration/quickfacts [https://perma.cc/DYR7-L2Y3].

[65] Eunice Hyunhye Cho, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years into the Biden Administration*, ACLU (Aug. 7, 2023), https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration [https://perma.cc/8C66-AHSV].

[66] *ICE Detention Statistics*, *supra* note 22 ("Detention FY24" tab) (reporting that for those seeking asylum the "Average Time from USCIS Fear Decision Service Date to ICE release" is 35.9 days in detention).

detention and are denied parole or bond.[67] About 67% do not have any criminal record.[68] According to ICE, in fiscal year 2024 so far, there are over 192,000 people being monitored and tracked by GPS, SmartLink, VoiceID, and Veriwatch technology as part of Alternatives to Detention (ATD) programs.[69] In all, the immigration incarceration and deportation regime is a formidable and sophisticated machine that continues to grow and is rooted in the settler-colonial logics of the eighteenth century: criminalization, forced displacement, segregation and isolation, and removal of those designated as the "other" — noncitizens.

B. Solitary Confinement in Immigration Prisons

In 2021, an estimated 1,193,934 people were held in state and federal prisons across the United States.[70] In 2019, an estimated 5.6% of the prison population was held in solitary confinement.[71] Solitary in immigration prisons follows the use of solitary on the general prison population starting in the 1980s,[72] and is used to segregate, isolate, and punish

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[67] *See id.* (reporting that, as of January 26, 2024, in fiscal year 2024, the average length of stay in detention in both CBP and ICE custody was 48.8 days). The 52% figure is calculated by taking the figure of those who are bonded out, paroled, or released on supervision (20,878 in fiscal year 2024) and dividing *that* number by the number of ICE's total initial book-ins (42,879), which means that 48% of people are released and 52% are held in detention and both groups are held for over 48.8 days in detention. *See id.*

[68] *Immigration Detention Quick Facts*, *supra* note 64.

[69] *See ICE Detention Statistics*, *supra* note 22 ("ATD FY24 YTD" tab) (reporting that in fiscal year 2024 thus far there have been 192,490 people monitored by GPS, SmartLink, VoiceID, Veriwatch, no technology, and dual technology as an alternative to detention); *see id.* ("ATD EOFY23" tab) (reporting that at the end of fiscal year 2023, there were a total of 194,427 people actively in the Alternatives to Detention program).

Surveillance tools are modern prison technologies. Though alternatives to detention may seem more humane, they are not. Rather, they represent the state's constant surveillance of illegalized people and its ability to monitor and limit their movements (i.e., curtailing freedom of movement) and, at any moment, physically detain and remove people from society and force them outside of the physical border walls. *Alternatives to Detention*, U.S. IMMIGR. & CUSTOMS ENF'T (July 6, 2023), https://www.ice.gov/features/atd [https://perma.cc/8KXX-PE5K] (explaining that this program has been in place since 2004 and more than 350,000 people have been monitored via the ATD program).

[70] JACOB KANG-BROWN ET AL., VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN SPRING 2021, at 11 (2021), https://vera.org/downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf [https://perma.cc/6X6C-YZHE].

[71] CORR. LEADERS ASS'N & ARTHUR LIMAN CTR. FOR PUB. INT. L. AT YALE L. SCH., *supra* note 15, at 4.

[72] *See* David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 574 (2019) (tracing the early use of solitary confinement); TERRY ALLEN KUPERS, SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION & HOW WE CAN ABOLISH IT 25 (2017) (noting how solitary confinement was resurrected in the 1990s along with the prison boom); Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 LAW & SOC. INQUIRY 1604, 1623–25 (2018).

adults and families facing long-term detention across over 200 immigration prisons in the country.[73]

Immigration prisons use two forms of solitary: disciplinary and administrative segregation.[74] Though disciplinary segregation can be used only against serious violence, detainees have been sent to disciplinary segregation for trivial reasons, including "for requesting to watch Spanish language television, for submitting complaints to the facility administration for intimidation and wrongful placement in segregation, or for having medically necessary pills on [their] person that had been previously approved by another facility."[75] Prison guards also use administrative segregation for detainees designated as "vulnerable" — which can include LGBTQ persons, persons with disabilities or physical and mental health conditions, and people who need protective custody.[76] According to ICE's data, in fiscal year 2023, people spent an average of approximately twenty consecutive days and thirty-eight cumulative days in solitary confinement (both administrative and disciplinary).[77] Moreover, the average number of consecutive and cumulative days immigrants spent in solitary confinement increased from 2022 to 2023.[78]

In 2013, ICE issued Directive 11065.1, providing increased oversight and reporting mechanisms to "ensure the safety, health and welfare of detainees" when solitary confinement is used.[79] After this directive, detainees may be confined to solitary only if they have a special vulnerability, such as a known mental illness or serious medical illness.[80] The ICE Directive requires a review if the detainee is in solitary for longer than fourteen days, but there is no right of action for wrongful placement.[81] Recently, the OIG found that immigration prisons do not

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[73] OIG REPORT, *supra* note 4, at 2; Patrick Taurel, *Internal Watchdog Finds ICE Violations of Solitary Confinement Policy*, ACLU (Oct. 21, 2021), https://www.aclu.org/news/immigrants-rights/internal-watchdog-finds-ice-violations-of-solitary-confinement-policy [https://perma.cc/22KY-PYE9].

[74] OIG REPORT, *supra* note 4, at 2.

[75] Sarah Dávila-Ruhaak, *ICE's New Policy on Segregation and the Continuing Use of Solitary Confinement Within the Context of International Human Rights*, 47 J. MARSHALL L. REV. 1433, 1448 (2014) (footnote omitted).

[76] OIG REPORT, *supra* note 4, at 19–20.

[77] *See ICE Detention Statistics*, *supra* note 22 ("Vulnerable & Special Population" tab) (reporting the average number of consecutive and cumulative days in segregation in fiscal years 2022, 2023, and 2024).

[78] *See id.* ("Vulnerable & Special Population" tab) (reporting that in fiscal year 2022, the average number of consecutive and cumulative days in segregation across three quarters was 13.9 days and 21 days, respectively).

[79] U.S. IMMIGR. & CUSTOMS ENF'T, DIRECTIVE 11065.1, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES § 2 (2013) [hereinafter ICE DIRECTIVE 11065.1], https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf [https://perma.cc/K6EX-7C8U].

[80] *Id.* § 3.3. Other listed vulnerabilities include being elderly, disabled, or pregnant or nursing; needing protection because of sexual orientation or gender identity; or being a victim of sexual assault, torture, trafficking, or abuse. *Id.*

[81] *See id.* § 5.3(3).

uniformly comply with ICE's standards or implementation practices governing solitary.[82]

Immigrants in solitary experience the same psychological, physical, and physiological impacts as the general prison population in solitary.[83] Both groups are confined in cells that are smaller than the size of an elevator,[84] some detainees for twenty-two to twenty-three hours a day,[85] with limited out-of-cell recreation, medical care, and mental health services. As a result, and as the OIG recognized, survivors of solitary commonly experience debilitating physical and psychological ailments[86]: panic attacks, depression, paranoia, intrusive obsessive thinking, suicidal ideation and self-harm, severe weight loss, chronic physical ailments, and other severe mental health conditions.[87] Additionally, because some immigrants, such as asylum seekers, are more likely to experience premigration post-traumatic stress disorder and trauma, they are more likely to enter detention and solitary confinement with underlying psychological and physical ailments[88] — conditions exacerbated by solitary.[89]

The use of solitary confinement against immigrants is a torturous practice[90] and a revealing microcosm of the larger structural segregation, state violence, and organized abandonment that the *migra state*[91]

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82 *See* OIG REPORT, *supra* note 4, at 4.

83 *See id.* at 11.

84 Vitale, *supra* note 5.

85 OIG REPORT, *supra* note 4, at 11 ("During one inspection in particular, inspectors determined detainees were held in administrative segregation for prolonged periods of 22 to 23 hours a day . . . .").

86 *Id.* ("Numerous studies have found that any time spent in segregation can be detrimental to a person's health and that individuals in solitary confinement may experience negative psychological and physical effects even after being released." (footnote omitted)).

87 *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 328, 335–36, 343, 367, 378, 382–83 (2006); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 474, 477 (2006); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 523, 525 (1997).

88 *See* PHYSICIANS FOR HUM. RTS. & BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS 56–57 (2003).

89 *See id.* at 75; *see also* sources cited *supra* note 87.

90 *See* Daniella Silva, *Detainees and Advocates Decry "Horrific" Conditions at Louisiana ICE Detention Center*, NBC NEWS (July 17, 2023, 5:00 AM), https://www.nbcnews.com/news/detainees-advocates-decry-horrific-conditions-louisiana-ice-detention-rcna92339 [https://perma.cc/5DF8-D835] (describing the conditions at a Louisiana immigration detention center that uses solitary as "horrific"); PENNSTATE L. CTR. FOR IMMIGRANTS' RTS. CLINIC, IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS 36, 38, 44, 50 (2017) (detailing how immigrants in detention centers that use solitary describe the conditions of these centers as "horrible," *id.* at 36, and "horrendous," *id.* at 44); Taurel, *supra* note 73 (characterizing the use of prolonged solitary in immigration prisons as torture); Minero et al., *supra* note 3, at 49 (collecting interviews of survivors of solitary confinement in immigration prisons who describe the experience as torture).

91 Here the *migra state* is the politics, logics, structures, and organizations that the U.S. government, states, and private actors use to surveil, criminalize, detain, segregate, punish, incarcerate,

inflicts on immigrants at home, abroad, and at the borders.[92] Recently, several states have adopted punitive anti-immigrant enforcement measures.[93] The rationale for exercising such violence on immigrants is justified by a bipartisan tough-on-immigration paradigm whereby both parties pass punitive laws — condoning the use of solitary — that criminalize and dehumanize immigrants and that bolster the immigration detention machine.[94] As I argue below, solitary in immigration prisons is another layer of this violence: extrajudicial segregation.[95]

II. EXTRAJUDICIAL SEGREGATION: CONGRESSIONAL PLENARY POWER

The Supreme Court has cast immigrants as pretrial civil detainees and defined their incarceration and removal as "a purely civil action"

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oppress, expel, and exploit noncitizens. *See* JUSTIN AKERS CHACÓN, THE BORDER CROSSED US: THE CASE FOR OPENING THE US-MEXICO BORDER 149 (2021) (explaining that the *migra state* is "international criminalization of migration — at its most defined and systematic form in the United States — [that] results in the superexploitation of transborder people through legally sanctioned repression, detention, and terrorization by an expanding wing of the repressive state apparatus").

92 The connection between solitary confinement as a "microcosm" of the overall oppressive structure in society has been articulated by many scholars. *E.g.*, Angela Davis, Amy Goodman & Juan González, *Part 2: Angela Davis on Solitary Confinement, Immigration Detention and "12 Years a Slave,"* DEMOCRACY NOW (Mar. 6, 2014), www.democracynow.org/2014/3/6/part_2_angela_davis_on_solitary [https://perma.cc/RW98-MASW] ("[I]n a sense, one can look at solitary confinement as a microcosm of the whole system . . . . And how can one expect to create any kind of rehabilitation, which unfortunately prisons still claim that they rehabilitate, in the context of the kind of isolation that happens in these institutions? So, solitary confinement needs to be abolished, yes, but I think that is a strong argument for the abolition of imprisonment as the dominant mode of punishment." (quoting Angela Davis)).

93 *See, e.g.*, Julian Aguilar, *Texas' Illegal Entry Law Will Test States' Powers on Immigration, Border Enforcement*, NPR (Dec. 6, 2023, 1:28 PM), https://www.npr.org/2023/12/06/1216140529/texas-immigration-border-illegal-entry-law [https://perma.cc/43HY-J2QQ] (describing Texas Senate Bill 4, which created a state misdemeanor for undocumented people who enter Texas from Mexico outside a lawful port of entry and authorized state courts and police to deport immigrants; and also describing how Texas has installed "razor wire" as a "floating barrier" in the Rio Grande and added "thousands of Texas State troopers and National Guards" on the border); Gloria Rebecca Gomez, *Aiming to Copy Texas, AZ Republicans Want to Wrest Immigration Enforcement Away from the Feds*, AZ MIRROR (Jan. 26, 2024, 10:39 AM), https://www.azmirror.com/2024/01/26/aiming-to-copy-texas-az-republicans-want-to-wrest-immigration-enforcement-away-from-the-feds [https://perma.cc/8GJP-JWST] (describing Arizona Senate Bill 1231 which would make it a misdemeanor for undocumented people to enter Arizona from Mexico outside a port of entry and would authorize state courts and police to deport immigrants).

94 *See* Felipe Hernández, *Abolishing the Toxic "Tough-On-Immigration" Paradigm*, 31 HARV. KENNEDY SCH. J. HISP. POL'Y 45, 46 (2019) ("The tough-on-immigration toxic cycle, a global phenomenon, begins with the false — but powerfully persuasive — dehumanizing narrative that 'illegal (criminal) aliens,' particularly from non-European 'shithole' countries, are invaders threatening the economic, social, moral, and political interests of the country's citizens. Once designated as threats and undesired populations, immigrants are systematically linked to criminality to facilitate their permanent exploitation and marginalization.").

95 *See supra* note 35.

that is not punishment.[96] The Court has reasoned that, under the plenary power doctrine, Congress, as a matter of nation-state sovereignty, has the ultimate decision over whether, and under what conditions, it designs these proceedings.[97] Namely, the Supreme Court affirmed that Congress has the unfettered power to designate immigrants as a "menace" to the nation and can determine how to deal with this "menace."[98]

According to the Supreme Court, people in immigration detention do not have Eighth Amendment protections to challenge the conditions of their confinement because they have not been formally adjudicated guilty of a crime, so incarceration to facilitate their deportation is *not* a punishment.[99] The Supreme Court later held that people may be incarcerated for a period "reasonably necessary" to deport them, which can be up to ninety days or for months and years under the rationale of national security.[100] At best, the Court has commented that "deportation is a particularly severe 'penalty'" and recognized that "deportation is . . . intimately related to the criminal process."[101] But ultimately, Congress has carved out an extrajudicial realm of law — a second system of "justice" — whereby noncitizens can be incarcerated for long periods of time with relatively few rights and remedies.[102]

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[96] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that "the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application" to immigration control); Wong Wing v. United States, 163 U.S. 228, 236 (1896) (holding that where detention is incident to removal, the detention is not punishment); *cf.* Kingsley v. Hendrickson, 576 U.S. 389, 400 (2015) ("[P]retrial detainees (unlike convicted prisoners) cannot be punished at all.").

[97] *See* Carlson v. Landon, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of . . . deportation procedure . . . . Otherwise [the noncitizen could] hurt the United States . . . ."); *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 44–49 (1996) (explaining how debates over federalism in the immigration context eventually gave way to federal authority).

[98] *See Carlson*, 342 U.S. at 541 (holding that noncitizen detainees have the burden of proving that they are *not* a flight or security risk in order to avoid being held in custody without bail).

[99] *See* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

[100] *See* Zadvydas v. Davis, 533 U.S. 678, 682, 701 (2001) ("[W]e doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. . . . After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701.); Demore v. Kim, 538 U.S. 510, 523, 531 (2003) (holding that mandatory detention of deportable aliens under Immigration and Nationality Act provision (8 U.S.C. § 1226(c)) pending removal proceedings, without determination of danger to society or flight risk, is consistent with Fifth Amendment's Due Process Clause); Jennings v. Rodriguez, 138 S. Ct. 830, 836, 851 (2018) (holding that ICE can hold immigrants in indefinite detention without periodic bond hearings).

[101] Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (quoting *Fong Yue Ting*, 149 U.S. at 740).

[102] *See* AM. IMMIGR. COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE 2 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf [https://perma.cc/3GE8-V29Y] (describing the immigration system as a separate system of justice, with

Many scholars agree that the plenary power is extraconstitutional — resulting in extrajudicial proceedings and confinement.[103] As a result, plenary power is used to justify immigration incarceration as a form of state-sponsored action not bound by constitutional protections.[104] By existing outside of the constitutional protections required for other forms of state-sponsored confinement, solitary in immigration prisons is extrajudicial.

The lack of congressional and judicial oversight also exemplifies how solitary in immigration prisons is extrajudicial.[105] Congressional lack of oversight is intentional inaction because Congress can design the immigration prison system any way it wants.[106] Indeed, Congress can remove solitary or immigration incarceration altogether and design a more humane process. Yet, it has not. Rather, and as demonstrated in Part I, a bipartisan Congress has, for decades, consistently strengthened and expanded the immigration detention machine to be more punitive,

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respect to incarceration and deportation proceedings, because the Supreme Court and Congress have designated it as a "civil" proceeding even though the penalty of incarceration, and associated harms, are the same).

103 *See, e.g.*, Carrie L. Rosenbaum, *Anti-democratic Immigration Law*, 97 DENV. L. REV. 797, 823 (2020) (describing the plenary power as "a made-up authority not found in the Constitution but in imagined principles"); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550 (1990) (discussing "the plenary power doctrine as the dominant principle of constitutional and *subconstitutional* immigration law" (emphasis added)); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 854–63 (1987) (discussing the unenumerated federal power over immigration).

104 Rosenbaum, *supra* note 103, at 827 (noting how the immigration plenary power doctrine has been used "to justify extended civil detention of noncitizens without the due process protections that would apply to citizens convicted or accused of crimes").

105 *See generally* Gabriel J. Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7, 7–29 (David A. Martin & Peter H. Schuck eds., 2005); Henkin, *supra* note 103, at 859 (1987) (explaining the nearly unfettered power of Congress to regulate immigration following the *Chinese Exclusion Case*); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1229 (1996) (arguing that detaining immigrants in isolation in Guantanamo Bay is an anomalous zone of law that is a "rights-free regime" outside constitutional protections). For a discussion of the history of the use of solitary in prisons (rather than in immigration detention), see Shapiro, *supra* note 72, at 593–94; Shahshahani & El-Sergany, *supra* note 36, at 257–60 (describing the lack of federal regulations and vagueness of DHS guidelines around the conditions of solitary confinement in immigration detention).

106 Several scholars have argued that congressional inaction can be interpreted as an intentional decision. *See, e.g.*, 2A C. DALLAS SANDS, STATUTES AND STATUTORY CONSTRUCTION § 49.10 (rev. 3d ed. 1973); Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 529 (1982) ("What Congress has legislated necessarily takes its meaning in part from the context in which Congress chose the words it did, and Congress' silence or inaction may — and sometimes must — be treated as *part* of that context for purposes of faithfully construing contemporaneous and subsequent enactments."); Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 254 n.24 (1947) ("'Inaction' continues the rule of law as originally interpreted.").

harsh, and far-reaching.[107] So, the use of solitary against immigrants is intentional.

There is also a lack of oversight within the executive branch because there is a systemic absence of robust internal grievance procedures within prisons and a lack of resources and assistance to challenge solitary.[108] Recently, an OIG Report found that immigration prisons vary significantly in their administration of solitary confinement, with each prison providing different documentation to justify solitary confinement, conditions of confinement, length of placement, and reporting requirements.[109] Notably, across all prisons, ICE did not record thirteen percent of the instances when people were placed in solitary; improperly destroyed records; and did not address complaints of people in solitary who were denied medical attention, refused adequate food and showers, were not informed why they were placed in solitary, or were threatened with solitary for not working or following prison rules.[110]

In all, bipartisan congressional inaction and lack of executive oversight represent two intentionally designed systemic ways in which solitary in immigration prisons is extrajudicial segregation. As explained below, the legal system's lack of relief is another layer — thus showing that solitary in immigration prisons is tolerated across all branches of government.

III. THE LIMITED PATHWAYS FOR CHALLENGING EXTRAJUDICIAL SEGREGATION

Congress and the Supreme Court have limited the legal vehicles that immigrant detainees may use to challenge solitary confinement in immigration prisons. Though immigrants are confined in the same prisons and experience nearly identical traumatic prison conditions as the

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[107] For more information on the bipartisan efforts to expand the immigration detention regime, see HARSHA WALIA, BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 45–60 (2021) (explaining the bipartisan efforts used to expand the immigration detention and deportation regime from the 1960s to 2020); Anthony W. Fontes, *The Long, Bipartisan History of Dealing with Immigrants Harshly*, THE WORLD: THE CONVERSATION (July 9, 2019, 11:30 AM), https://theworld.org/stories/2019-07-09/long-bipartisan-history-dealing-immigrants-harshly [https://perma.cc/9PK3-SSP8] (explaining how presidents from both parties expanded the immigration detention and deportation regime throughout the twentieth century); Cho, *supra* note 65 (explaining how "[t]hree years into the Biden administration, the number of people held in ICE detention continues to grow").

[108] Shahshahani & El-Sergany, *supra* note 36, at 258–59 (describing how immigrants can file grievances and appeal initial decisions, but if an ICE administrator believes that an immigrant has established a pattern of filing nuisance complaints, the administrator can determine that the immigrant is one for whom not all subsequent complaints must be fully processed).

[109] *See* OIG REPORT, *supra* note 4, at 7–8 (detailing substantial inconsistencies in recording, documentation, and reporting practices across ICE facilities, preventing effective oversight).

[110] *Id.* (finding that ICE failed to provide basic oversight measures of its use of solitary confinement and may have unlawfully destroyed records).

general prison population,[111] they are denied the protections offered to the general prison population.[112] So, immigrants must rely on convoluted pathways to challenge solitary in immigration prisons. Accordingly, it is unsurprising that no federal court has ruled on the constitutionality of solitary in immigration prisons.[113]

As an initial hurdle, because about ninety-one percent of people are held in privately run immigration prisons, and the remaining nine percent are held in state and federal prisons,[114] the greatest initial challenge for immigrant detainees in solitary is knowing whom they can sue, which claims they can bring, and how to do so. Additionally, immigrant detainees face other structural challenges such as difficulty securing counsel; lack of access to legal resources; language, knowledge, and financial barriers; retaliation by prison officials; and the threat of removal[115] — systemic barriers reinforcing their extrajudicial segregation.

A. State Claims Against Private Officials

Because immigrant detainees are overwhelmingly held in private prisons, the most viable claims are state tort claims for wrongful death, negligence, and violations of state statutes and constitutions.[116] Plaintiffs, or their estates, may, for example, bring a wrongful death claim if their loved one died as a result of their solitary confinement either by suicide,

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[111] Malik Ndaula with Debbie Satyal, *Rafiu's Story: An American Immigrant Nightmare, in* KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY 241, 250 (David C. Brotherton & Philip Kretsedemas eds., 2008) ("They call immigration detention civil confinement, but prison is prison no matter what label you use, and prison breaks people's souls, hearts, and even minds."); *see* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1380–81 (2014) (arguing that immigration detention constitutes punishment given its similarities with traditional prisons).

[112] *See* Nechelle Nicholas, Note, *Cruel and Unusual Punishment: The Eighth Amendment and ICE Detainees in the COVID-19 Crisis*, 42 PACE L. REV. 223, 240 (2021) ("Immigrant detainees are legally able to make an Eighth Amendment claim regarding the conditions of their confinement through civil rights claims, but courts have struck down attempts by immigrant detainees to make habeas corpus claims under the Eighth Amendment."); Brandon Galli-Graves, *Rights Without a Remedy: Detained Immigrants and Unlawful Conditions of Confinement*, 48 BYU L. REV. 1015, 1042–48 (2022) (explaining that noncitizens in immigration detention do not have a "clear vehicle," *id.* at 1042, for challenging the unlawful conditions of their confinement or basis for their detention).

[113] Shahshahani & El-Sergany, *supra* note 36, at 255.

[114] Cho, *supra* note 65. As of July 2023, about ninety-one percent of people were held in private immigration prisons with the majority of people held in Texas, Louisiana, California, Georgia, and Arizona. *Id.*; *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/detention-statistics [https://perma.cc/9SG8-B79Y] (relying on ICE data).

[115] *See* Altaf Saadi et al., *Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health*, 22 HEALTH & HUM. RTS. J. 187, 190–93 (2020); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 30–43 (2015).

[116] *See* Alison Gordon, *Challenging Solitary Confinement Through State Constitutions*, 90 U. CIN. L. REV. 454, 482–85 (examining how various state constitutions are broader and can be used to challenge solitary confinement in ways that would be otherwise limited by the Federal Constitution).

denial of medical care, excessive force, or some alleged negligent act or acts by the prison officials.

In a current federal case in California,[117] Mr. Choung Woong Ahn, a seventy-four-year-old man with a history of mental illness who had reported suicidal ideation, was placed in solitary without medical care, evaluation, or monitoring at Mesa Verde, a private immigration prison.[118] Shortly thereafter, he died by suicide.[119] Mr. Ahn's daughter filed a suit alleging several state claims for wrongful death, negligence, negligent training and supervision, and disability discrimination against GEO Group.[120] She alleged, inter alia, that GEO Group failed to identify Mr. Ahn as disabled or at risk for suicide or self-harm, failed to provide Mr. Ahn with the requisite medical treatment and evaluation, and neglected him by placing him in solitary despite knowing about his mental illness and ignoring his pleas for help.[121] The case, which is still pending unfortunately, represents the horrific and deadly consequences of solitary. It also showcases the kind of lawsuits that plaintiffs may bring to remedy the harms they experienced while in solitary confinement.

B. Bivens *Claims*

In addition to state law claims against the private prison guards, plaintiffs may attempt to sue individual federal officers for constitutional and federal law violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[122] But, for plaintiffs in private prisons, a successful *Bivens* claim is essentially foreclosed. And, for those in federally run detention centers, success is unlikely.

In *Bivens*, the Supreme Court recognized an implied right of action to compensate a plaintiff whose constitutional rights were violated by a federal agent.[123] There are three legal hurdles to bringing a *Bivens* claim. First, the Supreme Court has declined to extend *Bivens* to a federal agency due to qualified immunity protection, so the doctrine only applies to federal officers.[124] Thus, a plaintiff can only sue the particular federal officer involved in placing them in solitary. Because about ninety-one percent of immigrant detainees are held in private prisons, there will usually not be an individual federal officer to sue (except for the nine percent of detainees held in federally run detention centers).

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[117] I am currently serving as co-counsel on this case along with Rights Behind Bars, Asian Americans Advancing Justice — Asian Law Caucus, and the California Collaborative for Immigrant Justice.

[118] Complaint at 3–6, Ahn v. Geo Grp., Inc., No. 22-cv-00586 (E.D. Cal. Apr. 17, 2023).

[119] *Id.* at 15.

[120] *Id.* at 11.

[121] *Id.*

[122] 403 U.S. 388 (1971).

[123] *Id.* at 389.

[124] Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 485 (1994).

Second, the Supreme Court has declined to extend *Bivens* to private facilities and their employees who have a contract with the Bureau of Prisons[125] — though it is unclear if this would also apply to private prison contracts with ICE. Relatedly, the Supreme Court has held that incarcerated persons cannot bring constitutional claims against officials in privately run prisons where there are state tort claims available.[126] As noted above, because most states allow the relevant tort claims, a federal court may decline to hear a *Bivens* claim on this ground. Third, *Bivens*'s applications have been limited to a few contexts involving a Fourth Amendment unreasonable search and seizure claim,[127] a Fifth Amendment equal protection claim based on gender employment discrimination,[128] and an Eighth Amendment claim based on failure to provide adequate medical care.[129]

Assuming that an immigrant-detainee plaintiff is suing a federal officer, a federal court would have to determine whether the plaintiff can bring a *Bivens* claim challenging solitary confinement in the immigration-conditions context. To extend *Bivens* to a new context, a federal court would have to, first, examine whether the plaintiff's claim arises in a new context (or implicates a new constitutional right) and, second, whether there are any alternative remedies or "special factors" counseling hesitation in extending *Bivens* to the new context.[130]

Several circuit courts have held that challenging conditions of confinement in immigration facilities against prison officials presents a new *Bivens* context.[131] As to the second factor, several courts have recognized that the special factors governing immigration law — national security, federal separation of powers, and congressional plenary powers — preclude extending *Bivens* to the immigration-conditions context.[132] But because the Supreme Court has not settled this question,

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[125] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71–74 (2001) (declining to extend *Bivens* to a private company that had a contract with the federal Bureau of Prisons to operate a halfway house for federal prisoners); Minneci v. Pollard, 565 U.S. 118, 131 (2012) (declining to extend *Bivens* to the employees of a private correctional company).

[126] *Minneci*, 565 U.S. at 124–25 (2012) (holding that an incarcerated person could not assert an Eighth Amendment *Bivens* claim for damages against private prison employees where there are "other alternative forms of judicial relief" (quoting Davis v. Passman, 442 U.S. 228, 245 (1979))).

[127] *Bivens*, 403 U.S. at 389–92.

[128] *Passman*, 442 U.S. at 234–35.

[129] Carlson v. Green, 446 U.S. 14, 19–20 (1980).

[130] *The Supreme Court, 2016 Term — Leading Cases*, 131 HARV. L. REV. 223, 315–18 (2017) (citing Ziglar v. Abbasi, 137 S. Ct. 1843 (2017)) (explaining that the *Bivens* inquiry for new contexts is demanding and difficult).

[131] *See, e.g.*, Tun-Cos v. Perrotte, 922 F.3d 514, 525–28 (4th Cir. 2019); Rroku v. Cole, 726 F. App'x 201, 206 (5th Cir. 2018) (per curiam); Alvarez v. U.S. Immigr. & Customs Enf't, 818 F.3d 1194, 1206 (11th Cir. 2016); Mirmehdi v. United States, 689 F.3d 975, 981 (9th Cir. 2012).

[132] Hernandez v. Mesa, 140 S. Ct. 735, 750 (2020) (declining to extend *Bivens* claim to Mexican parents of a child who was killed by a U.S. Border Patrol agent who fired shots at the child across the United States-Mexico border); *Abbasi*, 137 S. Ct. at 1860; *Mirmehdi*, 689 F.3d at 983 (declining

there may be an opportunity in circuits that have not yet had occasion to examine the question to extend *Bivens* claims to persons held in solitary confinement in federal immigration detention centers. In all, the nearly impossible challenge in bringing a successful *Bivens* claim (and its limited scope) represents a key example of how our legal system has constructed an extrajudicial realm of law for immigrants in detention, generally, and in solitary confinement, specifically.

C. Section 1983 Claims for Violations of Fifth, Eighth, and Fourteenth Amendment Rights

For the subset of immigrant detainees who are held in local or state jails, even those in privately operated ones, they can attempt to bring a § 1983 claim alleging that a state prison or jail official (for example, a guard, physician, or employee) violated their Fourteenth, Eighth, and Fifth Amendment rights by placing them in solitary confinement.[133] A § 1983 civil rights action can provide injunctive and declaratory relief, as well as damages, for the deprivation of a constitutional or statutory right by persons acting under the color of state law.[134] Prison officials are liable under § 1983 if they act under the "authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[135]

Immigrant plaintiffs can bring due process claims under the Fourteenth and Fifth Amendments. The Supreme Court has held that, under the Fourteenth Amendment, the confinement of immigrant detainees must "bear some reasonable relation to the purpose for which

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"to extend *Bivens* to allow [plaintiff] to sue federal agents for wrongful detention pending deportation"); *Alvarez*, 818 F.3d at 1210 ("Numerous special factors counsel hesitation in this context. For starters, the breadth and detail of the Immigration and Nationality Act itself counsels in favor of hesitation."); *Tun-Cos*, 922 F.3d at 526 ("[I]mmigration enforcement . . . has 'the natural tendency to affect diplomacy, foreign policy, and the security of the nation, which . . . counsel[s] hesitation in extending *Bivens*.'" (quoting *Mirmehdi*, 689 F.3d at 983)); Maria S. *ex rel.* E.H.F. v. Garza, 912 F.3d 778, 784–85 (5th Cir. 2019) (declining to extend *Bivens* in immigration context because "judicial meddling in immigration matters is particularly violative of separation-of-powers principles," *id.* at 784). *But cf.* Lanuza v. Love, 899 F.3d 1019, 1027, 1032 (9th Cir. 2018) (holding that special factors did not preclude a *Bivens* remedy for "an individual attorney's violation of [plaintiff's] due process rights in a routine immigration proceeding," *id.* at 1027, by submitting false evidence because "[j]udges are particularly well-equipped to weigh the costs of constitutional violations that threaten the credibility of our judicial system," *id.* at 1032).

133 Bell v. Wolfish, 441 U.S. 520, 535 (1979) (holding that pretrial detainees who are not convicted for a crime "may not be punished prior to an adjudication of guilt in accordance with due process of law"); Demery v. Arpaio, 378 F.3d 1020, 1029 (9th Cir. 2004) ("[T]he Fourteenth Amendment prohibits all punishment of pretrial detainees . . . .").

134 42 U.S.C. § 1983.

135 Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (quoting Monroe v. Pape, 365 U.S. 167, 172 (1961)). *But see* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978) (barring § 1983 claims against municipalities under the theory of respondeat superior, but permitting such claims when "action pursuant to municipal policy of some nature caused a constitutional tort," *id.* at 691).

the individual is committed,"[136] and prison officials cannot subject detainees to conditions that "amount to punishment."[137] Conditions of confinement for pretrial detainees are punitive where the restriction is expressly intended to punish or serves an alternative (nonpunitive) purpose but is nonetheless excessive, or is used to achieve objectives that could be accomplished with nonpunitive methods.[138] The Fifth Amendment also applies to immigrant detainees in the United States[139] and prohibits the government from imposing conditions of confinement that amount to punishment without an adjudication of guilt.[140]

Meanwhile, the Eighth Amendment's prohibition against cruel and unusual punishment requires the government to provide immigrant detainees the "minimal civilized measure of life's necessities."[141] Plaintiffs may challenge their conditions in solitary confinement by bringing claims regarding inadequate medical care, food, clothing, or shelter, as well as excessive force, or failure to protect.[142]

These claims, however, face three significant hurdles: proving state action, navigating a circuit split on the deliberate indifference standard, and bypassing qualified immunity.

1. State Action. — Typically, state prisoners bring § 1983 claims to challenge the conditions of their confinement against state or local officials. But immigrant detainees held either in ICE custody or in privately run prisons (holding ninety-one percent of detainees) who have contracts with the federal government are barred from such claims.[143] Still, these claims may be viable in cases where a plaintiff is held at a state or local jail. In these cases, the federal court must first determine whether the jail official acted under color of state law — which is complex in the immigration context.

First, in cases where a state officer or employee strictly applies federal rules, courts have held that federal involvement "is so pervasive

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136 Jackson v. Indiana, 406 U.S. 715, 738 (1972).

137 *Wolfish*, 441 U.S. at 535.

138 *Id.* at 538–39.

139 Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

140 *Wolfish*, 441 U.S. at 535 ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt.").

141 Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

142 *Id.* at 348 (discussing rights to "essential food, medical care, or sanitation"); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (recognizing a pretrial detainee's constitutional right, under the Eighth Amendment, to receive adequate medical care); Wilson v. Seiter, 501 U.S. 294, 303 (1991) ("We see no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.' Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as . . . the protection he is afforded against other inmates.").

143 Martin A. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 86 n.4 (1987) ("Federal prisoners in federal custody may not seek relief against federal prison officials under section 1983 because these officials do not act under color of state law within the meaning of section 1983." (citing MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATIONS: CLAIMS, DEFENSES AND FEES § 5.6 (1986))).

that the actions are taken under color of federal and not state law."[144] In immigration prisons, a court could find federal involvement in a case where, for example, the state jail guard is following ICE's rules and regulations governing solitary confinement.[145] In most cases, however, immigration prisons do not follow ICE's segregation directions and guidelines.[146] And most, if not all, state, county, and local jails and prisons have their own solitary confinement rules and procedures — which may overlap with ICE's policies. Thus, a court may have to carefully examine the prison guards' reasons for placing an immigrant detainee in solitary. Unfortunately for plaintiffs, and as the recent OIG report highlighted,[147] immigration prisons vary significantly in reporting or documenting the reasons for placing a detainee in solitary confinement.[148] For example, from a "sample of 147 segregated housing placements in fiscal years 2019 and 2021," the GAO found that "documentations for 61 of those placements (about 41 percent) did not provide a detailed explanation of the incidents or circumstances leading to the segregated housing placements."[149] Some of these cursory justifications included, for example, "conduct that disrupts or interferes with the security or orderly operation of the facility" or statements that a person was a security risk to themselves or the facility.[150] Accordingly, a court may find no state action where state jail officials applied ICE's Segregation Standards.[151] On the other hand, if the state or local jail also has an overlapping policy regarding placing a detainee in protective custody in solitary confinement, this might be a factual question for the jury.

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144 Rosas v. Brock, 826 F.2d 1004, 1007 (11th Cir. 1987) (citing Martin v. Heckler, 773 F.2d 1145, 1154 (11th Cir. 1985) (en banc); Ellis v. Blum, 643 F.2d 68, 83 n.17 (2d Cir. 1981); Askew v. Bloemker, 548 F.2d 673, 677–78 (7th Cir. 1976)).

145 ICE developed the Performance-Based National Detention Standards (PBNDS) and the National Detention Standards (NDS) to govern the use of solitary confinement. ICE also issued Directive 11065.1 to complement the segregation requirements outlined in the PBNDS and NDS. *See* ICE DIRECTIVE 11065.1, *supra* note 79.

146 OIG REPORT, *supra* note 4, at 4–5.

147 *Id.* at 4 (discussing people being held for long periods of time without proper documentation).

148 ICE has been sued for its lack of transparency and inadequate reporting with respect to its use of solitary confinement. *See* Harvard Immigr. & Refugee Clinical Program v. United States Dep't of Homeland Sec., No. 21-CV-12030, 2023 WL 4685961, at *1 (D. Mass. July 21, 2023) (bringing a suit against DHS and ICE for allegedly violating the Freedom of Information Act in connection with the Clinic's requests for records concerning ICE's use of solitary confinement in immigration detention centers).

149 GAO REPORT, *supra* note 14, at 22.

150 *Id.*

151 While no federal court has held that there is no state action where a jail official places immigrants in solitary confinement following ICE's segregation policies, some federal courts have held that there is no state action when a state official merely applies federal rules. *See* Rosas v. Brock, 826 F.2d 1004, 1007 (11th Cir. 1987) (holding that there is no state action where the state employee was merely "appl[ying] . . . federal rules"); Askew v. Bloemker, 548 F.2d 673, 677–78 (7th Cir. 1976) (holding that state drug enforcement officers were acting under federal law as part of a federal investigation); Lloyd v. Corr. Corp. of Am., 855 F. Supp. 221, 222 (W.D. Tenn. 1994) (holding that a private prison official did "not act under color of state law").

Second, in cases where federal involvement is not so clear, courts examine "whether day-to-day operations are supervised by the Federal [or state] government."[152] For example, a federal court found state action in a case involving the death of an ICE detainee in a state prison because of inadequate medical care, reasoning that that the jail authority had "substantial control over its own operations."[153] In another case, a federal court found state action where an ICE detainee alleged excessive force by jail guards. The court reasoned that ICE rules and regulations did not specify how the jail should supervise its guards and that immigration detainees were confined alongside the jail's general population.[154] In solitary confinement cases, a federal court could find state action on grounds that the state jail guard has substantial control over the day-to-day operations (in other words, the decision to use solitary confinement). Alternatively, a court could find state action in cases where state jail guards do not follow ICE's rules governing solitary confinement.

Additionally, in cases where the state jail guard is employed by a private prison company, courts have held that the private prison official may be acting under color of state law because the official is contracted with the state to perform a traditional public function.[155] This is particularly evident where the private facility houses both state prisoners and ICE detainees.[156] Some courts, however, have held that private immigration facilities were performing a federal function, not a state function, despite having a contract with the local municipality.[157] In these cases, the private state prison official would be shielded from § 1983 liability.

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[152] Johnson v. Orr, 780 F.2d 386, 390 (3d Cir. 1986).

[153] Newbrough v. Piedmont Reg'l Jail Auth., 822 F. Supp. 2d 558, 573 (E.D. Va. 2011), *vacated in part*, No. 10CV867, 2012 WL 12931710 (E.D. Va. Jan. 12, 2012).

[154] Jarno v. Lewis, 256 F. Supp. 2d 499, 503 (E.D. Va. 2003).

[155] West v. Atkins, 487 U.S. 42, 50–51 (1988) (holding that private actors, like private prison guards, act like the government by performing a public function).

[156] Alvarez v. Geo Grp., Inc., No. SA-09-CV-0299, 2010 WL 743752, at *2 (W.D. Tex. Mar. 1, 2010) (finding that a private prison company housing state prisoners and ICE detainees can be liable under § 1983 when its contractual relationship with a county authorizes it to operate the jail).

[157] *See, e.g.*, Doe v. United States, 831 F.3d 309, 316 (5th Cir. 2016) (dismissing a § 1983 suit in a case involving ICE detainees who were sexually assaulted while being transported, reasoning that the private prison was performing a federal function in "detaining aliens pending a determination of their immigration status pursuant to ICE specifications" and that the county had almost no involvement in the detention center's day-to-day operations); Doe v. Neveleff, No. A-11-CV-907, 2013 WL 489442, at *13 (W.D. Tex. Feb. 8, 2013) (holding that there is "no dispute that CCA [Correctional Corporation of America, a private prison company] carried out purely federal functions," and noting that the "sole purpose" of that facility was to "detain aliens pending a determination of their immigration status"); Guzman-Martinez v. Corr. Corp. of Am., No. CV-11-02390, 2012 WL 5907081, at *11 (D. Ariz. Nov. 26, 2012) (holding that, "[e]ven if the contract between the City and CCA imposed extensive regulation and provided governmental funding, it would be insufficient to establish joint action," since "[t]he contract merely acted as a conduit for transferring regulation and funding from ICE to CCA").

In all, the thorny question of who acted represents a key example of how solitary confinement in immigration prisons is extrajudicial segregation because the answer to this question is convoluted by design to make it difficult to sue immigration prison officials, and, critically, determines whether a detainee may bring a § 1983 claim.

2. Objective Unreasonableness or Deliberate Indifference: A Circuit Split. — Assuming that there is state action, the second hurdle is to show that the state official acted with either objective unreasonableness or deliberate indifference.

In *Kingsley v. Hendrickson*,[158] the Supreme Court held that claims brought by a pretrial detainee for excessive force under the Fourteenth Amendment did not need to show subjective deliberate indifference and need only demonstrate "that the force purposely or knowingly used against him was objectively unreasonable."[159] Following *Kingsley*, courts have split on whether immigrant plaintiffs must also satisfy the subjective element of the deliberate indifference standard when challenging the conditions in immigration prisons.

On one side, the Second, Sixth, Seventh, and Ninth Circuits apply *Kingsley* to immigration detention.[160] To establish objective unreasonableness, these circuits require that the plaintiff "prove more than negligence but less than subjective intent — something akin to reckless disregard."[161] To meet this standard the plaintiff must show that:

(1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;

(2) Those conditions put the plaintiff at substantial risk of suffering serious harm;

(3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved — making the consequences of the defendant's conduct obvious; and

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158 576 U.S. 389 (2015).

159 *Id.* at 397; *see also id.* at 396.

160 *See, e.g.*, Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017) ("[T]he 'subjective prong' . . . of a deliberate indifference claim is defined objectively."); Westmoreland v. Butler County, 29 F.4th 721, 728 (6th Cir. 2022) (adopting *Kingsley*'s standard to a pretrial detainee's failure-to-protect claim and holding that such a claim "requires only an objective showing that an individual defendant acted (or failed to act) deliberately and recklessly" (citing Brawner v. Scott County, 14 F.4th 585, 596 (6th Cir. 2021))); Gordon v. County of Orange, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018) (applying *Kingsley* to inadequate medical care claim); Miranda v. County of Lake, 900 F.3d 335, 352 (7th Cir. 2018) (holding that for inadequate medical-care claims, pretrial detainees must only meet *Kingsley*'s objective unreasonableness inquiry); Castro v. County of Los Angeles, 833 F.3d 1060, 1070–71 (9th Cir. 2016) (en banc) (adopting *Kingsley*'s standard to a pretrial detainee's failure-to-protect claim); *see also* C.G.B. v. Wolf, 464 F. Supp. 3d 174, 211 n.31 (D.D.C. 2020) (noting that the D.C. Circuit has not addressed the issue, but following other circuit courts in determining that *Kingsley* applies to a conditions-of-confinement claim).

161 *Gordon*, 888 F.3d at 1125 (quoting *Castro*, 833 F.3d at 1071).

(4) By not taking such measures, the defendant caused the plaintiff's injuries.[162]

The reckless disregard standard is a "high standard"[163] that requires showing more than an inadvertent failure to remedy the prison condition or lack of medical care. It is unclear what evidence courts require to establish that prison officials acted with reckless disregard. Recently, for example, the Ninth Circuit considered a case where five immigrant-detainee plaintiffs with serious underlying health conditions alleged that ICE acted with deliberate indifference to their medical needs and recklessly disregarded their known health risks despite the ongoing COVID-19 pandemic.[164] On appeal, the Ninth Circuit held that the plaintiffs failed to bring forth affirmative evidence showing that prison officials acted with reckless disregard.[165] The court reasoned, rather, that "the slew of national guidance, directives, and mandatory requirements that [ICE] issued and then frequently updated in the spring of 2020 belie[d]" plaintiffs' contention.[166] In solitary confinement cases, a defendant could argue that immigration prison officials did not act with reckless disregard to the plaintiff's health but rather, per the ICE Segregation Standards,[167] used solitary confinement to protect their health and well-being. Nevertheless, a plaintiff could readily counter by pointing to the mounds of scientific literature showing that solitary confinement does not improve mental, physical, and emotional health, but rather worsens outcomes.[168] And a plaintiff may show that prison guards recklessly disregarded the impact of solitary confinement on their health. Ultimately, no court has yet faced this question.

On the other hand, the Fifth, Eighth, Tenth, and Eleventh Circuits have not squarely decided whether *Kingsley* applies to the immigration prison context. These circuits require showing the prison officials' subjective knowledge, intent, or culpability in disregarding the risk of the prison condition.[169] In these circuits, a plaintiff must establish that

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[162] *Westmoreland*, 29 F.4th at 729 (quoting *Castro*, 833 F.3d at 1071).

[163] Roman v. Wolf, 977 F.3d 935, 947 (9th Cir. 2020) (Miller, J., concurring in part and concurring in the judgment).

[164] Fraihat v. U.S. Immigr. & Customs Enf't, 16 F.4th 613, 618 (9th Cir. 2021).

[165] *See id.* at 618–19.

[166] *Id.* at 619.

[167] ICE DIRECTIVE 11065.1, *supra* note 79.

[168] *Cf. supra* note 13 (scientific literature showing the harmful impacts of solitary confinement); *infra* note 180 (same).

[169] *See, e.g.*, Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 419–20, 419 n.4 (5th Cir. 2017) (citing Domino v. Tex. Dep't of Crim. Just., 239 F.3d 752, 755 (5th Cir. 2001)) (declining to extend *Kingsley* beyond excessive force claims by pretrial detainees and stating that "plaintiff must show that the official knew of and disregarded a substantial risk of serious harm," *id.* at 419–20); Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (noting that *Kingsley* is limited to excessive force claims and does not apply to deliberate indifference claims); Perry v. Durborow, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018) (declining to address *Kingsley*'s impact on a pretrial

prison officials acted with deliberate indifference to serious harm by placing them in solitary confinement.[170] Litigating a solitary confinement case in these circuits with this higher standard will be tough but necessary because over sixty percent of immigrant detainees are held in these circuits.[171]

Under this standard, plaintiffs could first rely on the many conditions-of-confinement cases involving pretrial detainees to demonstrate deliberate indifference.[172] Also, several courts have found that long-term solitary confinement creates due process concerns.[173] In line with these cases, a plaintiff could argue, for example, that solitary confinement is "an additional punishment of the most important and painful character."[174] Plaintiffs could point to other circuit courts that have held that prison officials act with deliberate indifference when they deny vital

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detainee's claim of supervisory liability based on deliberate indifference); Grochowski v. Clayton County, 961 F.3d 1311, 1318 n.4 (11th Cir. 2020) (declining to apply *Kingsley* as it was decided before the events of this case occurred); *see also* Coreas v. Bounds, 451 F. Supp. 3d 407, 422 (D. Md. 2020) (holding that, although the Fourth Circuit has not ruled on the question, "the Court concludes that the deliberate indifference standard applies to the Fourteenth Amendment health and safety and inadequate medical care claims").

170 Farmer v. Brennan, 511 U.S. 825, 842 (1994); Villegas v. Metro. Gov't, 709 F.3d 563, 568 (6th Cir. 2013) (citing Harrison v. Ash, 539 F.3d 510, 518 (6th Cir. 2008); Estelle v. Gamble, 429 U.S. 97 (1976)).

171 *See Mapping U.S. Immigration Detention*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/map [https://perma.cc/4TEK-G7GK].

172 *See, e.g.*, McElligott v. Foley, 182 F.3d 1248, 1256 (11th Cir. 1999) (holding extreme weight loss permitted a jury to infer knowledge of a substantial risk of serious harm); Palakovic v. Wetzel, 854 F.3d 209, 226 (3d Cir. 2017) (holding it was "quite reasonable to infer that prison officials had (or should have had) knowledge of" plaintiff's mental health where "prison diagnosed [plaintiff] with an array of serious mental health issues"); Clark v. Coupe, 55 F.4th 167, 180 (3d Cir. 2022) ("[D]efendants were 'well aware' that [the plaintiff] was seriously mentally ill, given that he had been treated for schizophrenia and bipolar disorder at the prison for over ten years.").

173 Wilkinson v. Austin, 545 U.S. 209, 223–24 (2005) (holding that indefinite placement in solitary confinement created a liberty interest, focusing on the duration of the placement and explaining that the conditions "impose[d] an atypical and significant hardship under any plausible baseline"); Colon v. Howard, 215 F.3d 227, 231–32 (2d Cir. 2000) (holding that 305 days in solitary confinement likely created a due process violation); Brown v. Or. Dep't of Corr., 751 F.3d 983, 988 (9th Cir. 2014) (holding twenty-seven months in solitary confinement created a liberty interest).

174 *In re* Medley, 134 U.S. 160, 171 (1890); *see* Melendez v. Sec'y, Fla. Dep't of Corr., No. 21-13455, 2022 WL 1124753, at *12 (11th Cir. Apr. 15, 2022) (recognizing that "self-injurious acts" as a result of solitary confinement constitute serious harm under the Eighth Amendment); *Clark*, 55 F.4th at 180–81 (recognizing that plaintiff's allegations of "increased hallucinations, panic attacks, paranoia, nightmares and self-mutilation" were "sufficient to raise a viable Eighth Amendment claim," *id.* at 181); Porter v. Pa. Dep't of Corr., 974 F.3d 431, 441 (3d Cir. 2020) (recognizing the vast evidence showing that prolonged solitary confinement itself is objectively harmful because it worsens the physical and psychological health of incarcerated people); Porter v. Clarke, 923 F.3d 348, 357 (4th Cir. 2019) (citing *Palakovic*, 854 F.3d at 225–26; Ashker v. Brown, No. C 09-5796, 2013 WL 1435148, at *4–5 (N.D. Cal. Apr. 9, 2013); Wilkerson v. Stalder, 639 F. Supp. 2d 654, 678–79 (M.D. La. 2007); McClary v. Kelly, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998)) ("[S]olitary confinement poses an objective risk of serious psychological and emotional harm to inmates, and therefore can violate the Eighth Amendment."); Hutto v. Finney, 437 U.S. 678, 685 (1978) ("Confinement . . . is a form of punishment subject to scrutiny under Eighth Amendment standards.").

medical care to an incarcerated person in solitary, after being informed about the person's serious physical and psychological injuries.[175]

Ultimately, under either standard, knowledge about the subjective harm of solitary confinement is apparent as the government recognizes that placing immigrants in solitary confinement causes serious physical and psychological harm.[176] Recently, the OIG "identified violations of ICE detention standards for segregation" as facilities placed detainees in segregation for "extended periods without proper documentation or reviews" or in "disciplinary segregation prematurely or inappropriately."[177] Moreover, there is robust scientific consensus that solitary confinement worsens physical and psychological health outcomes, leads to premature death, and exacerbates debilitating illnesses.[178] The same is true for immigrant detainees.[179] Solitary confinement also does not serve any penological interest and, in fact, worsens recidivism rates.[180] Though federal courts have yet to consider a Fourteenth Amendment

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[175] *See, e.g.*, Comstock v. McCrary, 273 F.3d 693, 702 (6th Cir. 2001) ("[W]e have long held that prison officials who have been alerted to a prisoner's serious medical needs are under an obligation to offer medical care to such a prisoner.").

[176] OIG REPORT, *supra* note 4, at 11.

[177] *Id.* at 4; *see id.* at 8–10 (identifying ICE's lack of oversight procedures and policies for the use of segregation).

[178] *See* Davis v. Ayala, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring) (citing Grassian, *supra* note 87) ("Years on end of near-total isolation exact a terrible price."); Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211, 219 (2020) (stating that it is "a largely settled scientific fact" that solitary confinement seriously damages an individual's well-being); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 130–31, 134–35 (2003) (collecting studies and finding that solitary confinement causes depression, anxiety, paranoia, memory loss, hallucinations, hypersensitivity to stimuli, panic attacks, and suicidal behavior); Mariposa McCall, *Health and Solitary Confinement: Issues and Impact*, PSYCHIATRIC TIMES (Mar. 16, 2022), https://www.psychiatrictimes.com/view/health-and-solitary-confinement-issues-and-impact [https://perma.cc/FF5P-CMPX] (describing how solitary confinement "is associated with a 26% increased risk of premature death"); Andrea Fenster, *New Data: Solitary Confinement Increases Risk of Premature Death After Release*, PRISON POL'Y INITIATIVE (Oct. 13, 2020), https://www.prisonpolicy.org/blog/2020/10/13/solitary_mortality_risk [https://perma.cc/38P5-33XJ] (finding that people who experienced solitary confinement have a much greater risk of death during their first year out of prison than others recently released); Jayne Leonard, *What Are the Effects of Solitary Confinement on Health?*, MED. NEWS TODAY (Nov. 16, 2023), https://www.medicalnewstoday.com/articles/solitary-confinement-effects [https://perma.cc/6YD5-V2G6] (discussing how solitary confinement may exacerbate life-threatening health conditions like diabetes, high blood pressure, and heart disease); Jules Lobel & Huda Akil, *Law & Neuroscience: The Case of Solitary Confinement*, DAEDALUS, Fall 2018, at 61, 69 (2018) (recognizing that severe isolation in solitary causes physical changes to the brain leading to a decline in neural activity).

[179] OIG REPORT, *supra* note 4, at 11.

[180] *See* Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1367 (2003) (noting that solitary confinement does not improve prison safety); Christopher Wildeman & Lars Højsgaard Andersen, *Long-Term Consequences of Being Placed in Disciplinary Segregation*, 58 CRIMINOLOGY 423, 448 (2020) (highlighting that even short-term placement in disciplinary segregation increases risk of recidivism); H. Daniel Butler et al., *An Examination of the Influence of Exposure to Disciplinary Segregation on Recidivism*, 66 CRIME & DELINQ. 485, 503 (2020) (finding increased recidivism among incarcerated people who were in solitary confinement).

conditions claim involving solitary confinement in immigration prisons, circuit courts have relied on this scientific consensus to hold that prison officials know about the harmful impacts of solitary confinement.[181]

3. Qualified Immunity. — Finally, a plaintiff must clear the hurdle of qualified immunity,[182] which precludes damages but is not a defense to injunctive relief.[183] A plaintiff may proceed with damages with a § 1983 claim against a state official in their personal capacity when the official's conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known."[184] A plaintiff must show that state officials had notice that their conduct violated established statutory or constitutional rights and the right itself was clearly established.[185] Unfortunately, there are no cases holding that solitary confinement in immigration prisons is unconstitutional and no state has established statutory limits on its use. Still, courts could rely on cases involving solitary confinement of the general prison population to find that state officials had notice. Also, though prison guards may be shielded from liability in early cases that establish the constitutional right, they will not in subsequent cases. Thus, plaintiffs may bring cases with a long-term strategy of paving the path for future litigants.

D. Federal Tort Claims

In addition to challenging the use of solitary confinement, people in immigration detention may challenge how solitary is used to coerce prison labor. For example, various coalition groups have brought constitutional challenges under the Thirteenth Amendment and the Trafficking Victims Protection Act of 2000[186] (TVPA), which prohibits obtaining "labor or services of a person . . . by means of," inter alia, "force, threats of force, physical restraint, or threats of physical

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181 *See, e.g.*, Porter v. Clarke, 923 F.3d 348, 361 (4th Cir. 2019).

182 *See, e.g.*, Procunier v. Navarette, 434 U.S. 555, 561 (1978) ("[State] prison officials and officers . . . were not absolutely immune from liability in this § 1983 damages suit and could rely only on the qualified immunity . . . ."). *But see* Richardson v. McKnight, 521 U.S. 399, 412 (1997) ("[P]rivate prison guards, unlike those who work directly for the government, do not enjoy [qualified] immunity from suit in a § 1983 case.").

183 *See* Hoohuli v. Ariyoshi, 741 F.2d 1169, 1175 (9th Cir. 1984), *abrogated on other grounds by* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006).

184 Wilson v. Layne, 526 U.S. 603, 609 (1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

185 Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."); Saucier v. Katz, 533 U.S. 194, 206 (2001) (holding that qualified immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful"); Hope v. Pelzer, 536 U.S. 730, 741 (2002) (citing United States v. Lanier, 520 U.S. 259, 271 (1997)) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

186 Pub. L. No. 106-386, div. A, 114 Stat. 1466 (codified as amended in scattered sections of 18 and 22 U.S.C.).

restraint."[187] In *Menocal v. GEO Group, Inc.*,[188] for example, a class of immigrants alleged that GEO Group violated the TVPA's prohibition against forced labor because, inter alia, the prison used solitary confinement as a tool to coerce people to work for as little as one dollar a day.[189] The complaint alleged that GEO Group placed people who refused to volunteer to clean into solitary confinement for up to seventy-two hours.[190] Though the case is still pending, the Tenth Circuit has held that the district court did not abuse its discretion in certifying the class of plaintiffs and allowing them to proceed with their TVPA and unjust enrichment claims.[191]

E. Habeas and International Law Claims

1. Habeas Petitions: Navigating More Splits. — The federal habeas corpus statute, 28 U.S.C. § 2241, allows incarcerated people to challenge their incarceration as violating the Constitution or laws of the United States.[192] The Supreme Court has held that a prisoner may challenge "the very fact or duration of [his] confinement" but has not definitively ruled on the use of the habeas corpus statute to combat conditions of incarceration.[193] Federal courts are "sharply divided as to whether conditions-of-confinement claims can be brought under the habeas statutes."[194] Moreover, courts are divided on whether immigrant detainees may use habeas petitions to challenge their confinement or prison conditions.

On one hand, one circuit court has ruled that habeas petitions are a proper remedy for challenging indefinite immigration detention.[195] At the same time, circuit courts are split over whether habeas petitions are

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187 18 U.S.C. § 1589(a).

188 882 F.3d 905 (10th Cir. 2018).

189 *Id.* at 911.

190 *Id.*

191 *Id.* at 923, 927. Recently, another coalition of immigrant rights groups brought a similar case under the TVPA. *See* Francis v. APEX USA, Inc., No. CIV-18-583, 2021 WL 4487985, at *1 (W.D. Okla. Sept. 30, 2021).

192 *See* 28 U.S.C. § 2241(c)(3).

193 Preiser v. Rodriguez, 411 U.S. 475, 499–500 (1973). Since *Preiser*, the Supreme Court has left open the question of whether habeas petitions may challenge conditions of confinement. *See* Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979) (deciding to "leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement"); Boumediene v. Bush, 553 U.S. 723, 792 (2008) (declining to "discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement").

194 Note, *A Textual Argument for Challenging Conditions of Confinement Under Habeas*, 135 HARV. L. REV. 1397, 1400 (2022); *see also* Fatma Marouf, *Immigration Detention and Illusory Alternatives to Habeas*, 12 U.C. IRVINE L. REV. 975, 983–84 (2022) (collecting and analyzing cases and explaining that the D.C., First, Second, and Third Circuits have allowed conditions claims to be brought via a habeas petition, while the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have not, and the Fourth, Ninth, and Eleventh Circuits have rejected doing so in unpublished decisions).

195 Hope v. Warden York Cnty. Prison, 972 F.3d 310, 325 (3d Cir. 2020) ("Petitioners' claim that unconstitutional conditions of [immigration] confinement at York and Pike require their release is cognizable in habeas.").

the appropriate vehicles for challenging solitary confinement among the general prison population.[196] During the COVID-19 pandemic, for example, the Third Circuit held that it had jurisdiction over habeas petitions brought by immigrant detainees challenging their conditions of confinement.[197] Several district courts also held that they have jurisdiction to hear habeas claims brought by immigrant detainees because they "have no vehicle by which to seek redress for . . . constitutional violation[s]."[198]

On the other hand, some courts have held that habeas petitions cannot be used to challenge an immigrant detainee's conditions of confinement,[199] reasoning that plaintiffs have other remedies available, such as a § 1983 or a *Bivens* claim.[200] A notable distinction is that these cases were brought during the COVID-19 pandemic when several ICE facilities used solitary as a means to isolate detainees for public health

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196 *See* McNair v. McCune, 527 F.2d 874, 875 (4th Cir. 1975) (per curiam) (allowing habeas for a challenge to segregated confinement); Krist v. Ricketts, 504 F.2d 887, 887 (5th Cir. 1974) (per curiam) ("[H]abeas corpus has been available to persons who seek release from solitary confinement within the context of general incarceration." (citing, inter alia, Bryant v. Harris, 465 F.2d 365 (7th Cir. 1972); Walters v. Henderson, 352 F. Supp. 556 (N.D. Ga. 1972)); McCollum v. Miller, 695 F.2d 1044, 1046 (7th Cir. 1982) (en banc) ("[H]abeas corpus is a proper remedy for someone unlawfully confined in a Control Unit [solitary confinement] or the equivalent . . . ." (citing Johnson v. Avery, 393 U.S. 483 (1969); Kyle v. Hanberry, 677 F.2d 1386 (11th Cir. 1982); *Krist*, 504 F.2d at 887)); Jackson v. Carlson, 707 F.2d 943, 946 (7th Cir. 1983) ("[H]abeas corpus is the proper remedy for getting from a more to a less restrictive custody . . . ." (citing *McCollum*, 695 F.2d at 1046)); *Kyle*, 677 F.2d at 1391–92 (assuming, without holding, that habeas petition is the proper vehicle to challenge disciplinary segregation after the incarcerated person exhausts his/her administrative remedies). *But see* Nettles v. Grounds, 830 F.3d 922, 927 (9th Cir. 2016) (en banc) (holding that "a § 1983 action is the exclusive vehicle for claims brought by state prisoners that are not within the core of habeas corpus," which includes immediate or early release from confinement).

197 *See Hope*, 972 F.3d at 325.

198 *See* Coreas v. Bounds, 451 F. Supp. 3d 407, 419 (D. Md. 2020) ("In the absence of binding Fourth Circuit authority, this Court concludes, consistent with the positions of several circuits, that a claim by an immigration detainee seeking release because of unconstitutional conditions or treatment is cognizable . . . ." (citing Aamer v. Obama, 742 F.3d 1023, 1038 (D.C. Cir. 2014); Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001); Miller v. United States, 564 F.2d 103, 106 (1st Cir. 1977))); *see also Walters*, 352 F. Supp. at 557; Basank v. Decker, 449 F. Supp. 3d 205, 214, 216 (S.D.N.Y. 2020) (holding that habeas petition is proper vehicle for plaintiffs to challenge the conditions of confinement under COVID-19 and releasing ten detainees who face a high risk of health complications).

199 *See, e.g.*, Beltran v. Wolf, 473 F. Supp. 3d 688, 692 (N.D. Tex. 2020) (dismissing a § 2241 petition for writ of habeas corpus for want of subject matter jurisdiction because the petition challenged conditions of confinement); Eyayu v. Wolf, 479 F. Supp. 3d 362, 365–66 (S.D. Tex. 2020) (dismissing ICE detainee's habeas claim challenging conditions under COVID-19).

200 *See* Acosta Ortega v. U.S. Immigr. & Customs Enf't, No. 20-cv-00522, 2020 WL 4816373, at *5 (D.N.M. Aug. 19, 2020) ("Petitioner has not shown cause why the Court could not order (in a § 1983 case) improvements to his conditions of confinement . . . ."); Toure v. Hott, 458 F. Supp. 3d 387, 400 (E.D. Va. 2020) (holding that habeas petition is unavailable because the ICE detainee could proceed under a *Bivens* claim); Umarbaev v. Moore, No. 20-CV-1279, 2020 WL 3051448, at *6 (N.D. Tex. June 6, 2020) (declining jurisdiction of ICE detainee's habeas claim and asserting that petitioner had other remedies for relief available through actions under the Administrative Procedure Act).

purposes.[201] So, their reasoning may not be applicable in the solitary context.

In all, habeas petitions may not offer a clear path to challenging solitary in immigration prisons but more research is needed in this area to explore this as an avenue for relief.

2. International Law Claims. — Immigrants may also bring claims under the Alien Tort Statute[202] (ATS) against the United States for violating international law.[203] As one scholar argues, "Civilly detained immigrants are uniquely positioned to use this statute to sue for violations."[204] Under the ATS, a noncitizen in solitary could bring a claim against the United States alleging cruel and inhuman treatment under international law. Namely, the Convention Against Torture (CAT),[205] the Universal Declaration of Human Rights,[206] the American Convention on Human Rights,[207] and the International Covenant on Civil and Political Rights[208] prohibit torture and cruel, inhuman, or degrading treatment. Indeed, the United Nations has recognized that

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[201] *See* Farida Jhabvala Romero, *ICE Misusing Solitary Confinement for COVID-19 Quarantine, Detainees Say*, KQED (Oct. 6, 2020), https://www.kqed.org/news/11841120/ice-misusing-solitary-confinement-for-covid-19-quarantine-detainees-say [https://perma.cc/PYV3-5SG5] (describing ICE's use of solitary confinement to quarantine and isolate detainees who contracted COVID-19 and those with high risk and describing the negative impacts on mental and physical health, including suicide). ICE still uses isolation as a means to quarantine detainees who contracted COVID-19. *See* U.S. IMMIGR. & CUSTOMS ENF'T, POST PANDEMIC EMERGENCY COVID-19 GUIDELINES AND PROTOCOLS VERSION 2.0 (2023), https://www.ice.gov/doclib/coronavirus/eroCOVID19PostPandemicEmergencyGuidelinesProtocol_07132023.pdf [https://perma.cc/8PSU-Q4GP].

[202] 28 U.S.C. § 1350.

[203] The Alien Tort Statute was originally ratified by Congress in 1789. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

[204] Erika Voreh, *The United States' Convention Against Torture RUDs: Allowing the Use of Solitary Confinement in Lieu of Mental Health Treatment in U.S. Immigration Detention Centers*, 33 EMORY INT'L L. REV. 287, 309 (2019).

[205] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (entered into force for the United States Nov. 20, 1994) ("[T]he term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." *Id.* art. 1, ¶ 1.).

[206] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

[207] Organization of American States, American Convention on Human Rights, art. 5(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.").

[208] Art. 7, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171.

solitary confinement amounts to torture.[209] Unfortunately, federal courts may refuse to hear these claims on grounds that they pose a political question.[210]

Another challenge is that ATS claims can only be brought against federal officials. Given that over ninety percent of detainees are held in private prisons,[211] an ATS claim would likely be barred. The remaining plaintiffs could bring these claims, but they would still have to argue that their confinement in solitary violates the Fifth, Eighth, and Fourteenth Amendments because the United States ratified the CAT and defined "cruel, inhuman or degrading treatment or punishment" to cover conduct only if it was already prohibited by those Amendments.[212]

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Ultimately, and as demonstrated above, the difficulty in navigating the convoluted maze of legal remedies to challenge solitary in immigration prison is a prime example of the extrajudicial segregation, intentionally beyond the reaches of law, that noncitizens experience. To reiterate, per its plenary power doctrine, Congress intentionally designed this convoluted maze, and federal courts have condoned the maze. And so, without any changes, solitary confinement in immigration prisons remains a legalized form of segregation and violence.

IV. PATHWAYS FOR REFORM

Our political system can be used to reduce the impact and use of solitary confinement in all prisons. Congress can use its plenary power to enact legislation to prohibit the use of solitary confinement in immigration prisons, as well as across federal prisons. To this end, there has been some bipartisan critique of the use of solitary confinement on immigrant detainees.[213] Moreover, Congress has introduced various bills

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[209] Press Release, Off. of the United Nations High Comm'r for Hum. Rts., *supra* note 6; *see also* Anna Conley, *Torture in US Jails and Prisons: An Analysis of Solitary Confinement Under International Law*, 7 VIENNA J. ON INT'L CONST. L. 415, 429–37 (2013) (explaining the legal claims against solitary confinement arising out of the CAT and the International Covenant).

[210] *See* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 338–49 (2d ed. 2008) (analyzing past invocations of the political question doctrine regarding the ATS).

[211] *See* SOLITARY WATCH & UNLOCK THE BOX, CALCULATING TORTURE 9 (2023), https://solitarywatch.org/wp-content/uploads/2023/05/Calculating-Torture-Report-May-2023-R2.pdf [https://perma.cc/NB9M-MBMV].

[212] *See* 136 Cong. Rec. 36198 (1990) ("[T]he United States considers itself bound . . . to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments . . . .").

[213] *See, e.g.*, *Durbin, Colleagues Press ICE on "Excessive and Seemingly Indiscriminate" Use of Solitary Confinement*, U.S. SENATE COMM. ON JUDICIARY (Feb. 11, 2022), https://www.judiciary.

to curtail the use of solitary confinement in immigration prisons — though none has been signed into law. In 2019, for example, Senator Durbin introduced Senate Bill 2870, which would have limited the use of solitary to no more than twenty hours a day and for no more than fourteen consecutive days, with some additional oversight-review procedures and standards for confinement.[214] The same bill was reintroduced in 2022[215] and, in 2023, Representative Bush introduced the End of Solitary Confinement Act to curtail the use of solitary across all prisons,[216] which has broad support.[217]

Given that over ninety percent of people in solitary confinement are held in state prisons and local jails,[218] the most viable pathway to abolishing solitary confinement is via state and local legislation. According to Solitary Watch, some states and counties have limited the use of solitary confinement among youth, immigrants, and the general prison population.[219] Still, no state has outright banned the use of solitary confinement entirely.[220] In California, for example, the Governor recently vetoed a bill that would have vastly limited the use of solitary

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senate.gov/press/dem/releases/durbin-colleagues-press-ice-on-excessive-and-seemingly-indiscriminate-use-of-solitary-confinement [https://perma.cc/5MXH-2CB4]; Andrew W. Lehren, *GOP Senator Joins Democrats' Calls for Answers on ICE Solitary Confinement*, NBC NEWS (July 25, 2019, 5:20 PM), https://www.nbcnews.com/politics/immigration/republican-senator-joins-dem-calls-answers-ice-solitary-confinement-n1034621 [https://perma.cc/Q5C3-NV2R].

214 Restricting Solitary Confinement in Immigration Detention Act of 2019, S. 2870, 116th Cong. (2019).

215 *See* Solitary Confinement Reform Act, S. 5038, 117th Cong. (2022).

216 End Solitary Confinement Act, H.R. 4972, 118th Cong. (2023).

217 There are at least 156 organizations supporting the End Solitary Confinement Act. *See Organizations Endorsing the End Solitary Confinement Act*, *supra* note 34.

218 *See* SOLITARY WATCH & UNLOCK THE BOX, *supra* note 211, at 9 (reporting that 56.8% and 33.7% of people held in solitary confinement in 2019 were in state prisons and local jails, respectively).

219 UNLOCK THE BOX, *supra* note 13, at 13; MATEI, *supra* note 14, at 5 (explaining how various states, like Colorado, restricted the use of solitary, by, for example, ending "the use of solitary confinement for people who are seriously mentally ill, children, and pregnant women"); Patrick Riley, *Against Changing Tide, 11 States Haven't Limited Solitary Confinement of Juveniles*, YOUTH TODAY (Apr. 28, 2023), https://youthtoday.org/2023/04/against-changing-tide-11-states-havent-limited-solitary-confinement-of-juveniles [https://perma.cc/EM7R-C93Z] (explaining that only eleven states do not have some kind of limit or ban on the use of solitary confinement or shackles against juveniles); Jean Casella, *New Report and Public Database Track Legislation to Limit or End Solitary Confinement*, SOLITARY WATCH (Jan. 25, 2023), https://solitarywatch.org/2023/01/25/new-report-and-public-database-track-legislation-to-limit-or-end-solitary-confinement [https://perma.cc/EZA3-2SC9] ("Forty-five states have introduced bills to regulate, limit, or ban solitary confinement. Twenty states have introduced bills to limit solitary to fifteen days or less, three of which have passed.").

220 *See, e.g.*, Amy Fettig, *2019 Was a Watershed Year in the Movement to Stop Solitary Confinement*, ACLU (Dec. 16, 2019), https://www.aclu.org/news/prisoners-rights/2019-was-a-watershed-year-in-the-movement-to-stop-solitary-confinement [https://perma.cc/8VFV-5DCX]; MATEI, *supra* note 14, at 10–11 (explaining the various ways states have limited the use of solitary but none has entirely eliminated it).

confinement in private immigration prisons.[221] The bill has been reintroduced for the 2023 legislative session.[222] Other states have introduced legislation to move closer to banning solitary.[223] And, several counties have banned or severely restricted the use of solitary confinement.[224]

Lastly, advocates have coalesced around eradicating solitary confinement entirely. For example, in 2021, national, local, and state organizations convened the Federal Anti-Solitary Taskforce (FAST) to campaign to end the use of solitary confinement in state, federal, and immigration prisons.[225] In all, though political reforms may be the most impactful at reducing the use of solitary in immigration prisons, the political process itself represents another realm of extrajudicial segregation as noncitizens are barred from participation and legislative efforts have not yet been effective.

CONCLUSION: TOWARD ABOLITION

The United States has created an extrajudicial realm of law emblematic of the segregated and tiered citizen system that is rooted in the border logic of exclusion, separation, and domination of racialized and

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[221] *See* A.B. 2632, 2021–2022 Leg., Reg. Sess. (Cal. 2022); Letter from Gavin Newsom, Governor of California, to the Members of the California State Assembly (Sept. 29, 2022), https://www.gov.ca.gov/wp-content/uploads/2022/09/AB-2632-VETO.pdf [https://perma.cc/HY34-HFLJ].

[222] A.B. 280, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

[223] *See, e.g.*, David M. Shapiro, Opinion, *It's Time to Abolish Long-Term Solitary Confinement*, CHI. TRIB. (Feb. 15, 2023, 1:59 PM), https://www.chicagotribune.com/opinion/commentary/ct-opinion-solitary-confinement-reform-nelson-mandela-act-20230215-cwoz6un5mnhkrcodsaytxnnw7q-story.html [https://perma.cc/JMD2-C63A] (advocating for Illinois's Mandela Act, which would limit periods of solitary confinement); Chris Blackwell & Rachael Seevers, Opinion, *Abolish All Forms of Solitary Confinement in Washington State*, SEATTLE TIMES (Oct. 6, 2021, 2:07 PM), https://www.seattletimes.com/opinion/abolish-all-forms-of-solitary-confinement-in-washington-state [https://perma.cc/C855-NQFR] (advocating for an introduced bill in Washington State that would "ban long-term solitary and prohibit its use entirely against vulnerable populations"); N.Y. C.L. UNION, TRAPPED INSIDE: THE PAST, PRESENT, AND FUTURE OF SOLITARY CONFINEMENT IN NEW YORK 10 (2019), https://www.nyclu.org/sites/default/files/field_documents/201910_nyclu_solitary_web.pdf [https://perma.cc/NP7T-SHNC] (describing the Humane Alternatives to Long-Term Solitary Confinement Act's proposed fifteen-day cap on solitary confinement across all prisons and jails in the state).

[224] These counties include New York City, Allegheny County in Pennsylvania (restricting solitary confinement except in emergency and lockdown situations), and Cook County in Illinois. *See* Meg Anderson, *New York City Council Votes to Ban Most Instances of Solitary Confinement*, NPR (Dec. 20, 2023, 7:46 PM), https://www.npr.org/2023/12/20/1220789824/new-york-city-council-votes-to-ban-most-instances-of-solitary-confinement [https://perma.cc/4MBP-GLW5] (describing the list of cities that have banned or restricted solitary in local jails).

[225] Press Release, ACLU, Criminal Justice Task Force Releases First-Ever Federal Blueprint for Ending Solitary Confinement (June 7, 2021), https://www.aclu.org/press-releases/criminal-justice-task-force-releases-first-ever-federal-blueprint-ending-solitary [https://perma.cc/3VLH-QMWZ]. FAST is composed of various organizations including the "American Civil Liberties Union, Vera Institute of Justice, National Religious Campaign Against Torture, Unlock the Box Campaign, Center for Constitutional Rights, and the #HALTsolitary Campaign," as well as various "civil rights, human rights, faith, and health organizations and leaders, including people who have survived solitary confinement, people who have had family members in solitary confinement, and their allies." *Id.*

marginalized populations. This Essay has shown how solitary confinement in immigration prisons is an extrajudicial segregation that is tolerated and maintained by all three branches of government. As solitary confinement is increasingly being used on immigrants in civil detention, legal advocates are struggling to reduce the scope and impact of solitary on migrants because of the limited pathways that our legal and political systems offer. This Essay argues that the U.S. settler-colonial system has a vested interest in limiting the legal and political relief available to noncitizens because our nation's sovereignty is premised on violence and exclusion. To be sure, the legal system offers some material benefits to individuals, and in some cases, classes of incarcerated people, but the convoluted maze of law cannot dismantle institutions, practices, and social outcomes that are deeply rooted in this nation's settler-colonial foundation. Indeed, many scholars are recognizing how the Constitution and legal system maintain the permanence of settler colonialism.[226] The legal system conditions us to believe that "legal reform [is] the ultimate horizon of sociopolitical transformation," but this also "violently circumscrib[es] the scope, depth, and shape of transformation to which we might aspire."[227] Moreover, an international lens is critical as solitary confinement is also used by other state regimes globally.

Ultimately, and as social movements and survivors of solitary confinement have called for, the path forward is complete abolition of solitary confinement across all contexts because it serves no legitimate purpose and, rather, inflicts harm on incarcerated people and their loved ones. Abolition, as a praxis requiring action, focuses on reorganizing how we live our lives in the world by centering those whose lives are most marginalized and reducing the conditions that cause harm at all levels in society. Abolitionists, like myself, understand that a better world centered on values of liberation, justice, equity, compassion, and peace is achievable and begins by naming and undoing the logics (and beliefs), structures, and relations of domination, difference, suffering, and exploitation wherever they exist in our world — particularly in the U.S. carceral and immigration systems. But, because the powers that be are staunchly invested in maintaining and expanding an oppressive world order, our struggle continues. Abolition, thus, calls on us to dismantle the social, political, and economic relations and structures, rooted in logics of settler-colonial imperial domination, that create the conditions of oppression of minoritized groups — like globally displaced people.[228]

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[226] *See generally, e.g.*, Maggie Blackhawk, *The Supreme Court, 2022 Term — Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1 (2023).

[227] Ben-Moshe et al., *supra* note 37, at 275.

[228] *See* Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019) (describing "abolitionist measures" as those focused on large-scale transformation); Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114–18 (2019) (discussing "[n]onreformist [a]bolitionist [r]eforms," *id.* at 114 (emphases omitted)).

As demonstrated above, the use of solitary confinement in immigration prisons is an extension, and only one piece, of the violence that our nation inflicts on people seeking refuge and a better way of life. Though the use of solitary in immigration prisons will likely increase, leading to more needless harm, lawyers, scholars, and activists are continuing to fight for transformative justice for we know that another world is possible.[229] It is our responsibility to dismantle the interconnected web of oppression while fighting for liberation across society and organizing for what we need to have a better world in our lifetime.[230] This includes, for example, eliminating borders, immigration prisons and police, citizenship, and the global conditions causing forced displacement, while also organizing for a global freedom of movement and a large-scale redistribution of resources.[231] Thus, abolishing solitary in immigration prisons is a step toward abolishing the settler-colonial border logics of exclusion, domination, and premature death that create extrajudicial segregation.

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[229] DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 273–84 (2021) (stating that the "[t]he possibilities are endless with abolition" and describing how people are actively building a better world through an abolitionist praxis).

[230] *See generally* RUTH WILSON GILMORE, CHANGE EVERYTHING: RACIAL CAPITALISM AND THE CASE FOR ABOLITION (2024) (making the case that abolition is more than abolishing prisons, police, borders, and oppressive structures, and that it also requires changing "everything" in our world).

[231] Several scholars and organizers have advocated for the abolition of borders and for a global freedom of movement. *See, e.g.*, WALIA, *supra* note 107, at 213 ("[A]n open borders [politics] . . . calls on us to transform the underlying social, political, and economic conditions giving rise to what we know as 'the migration crises.' A meaningful no borders politics requires an end to forced displacement caused by the brutalities of conquest, the voraciousness of capital, and the wreckages of climate change."). *See generally* GRACIE MAE BRADLEY & LUKE DE NORONHA, AGAINST BORDERS: THE CASE FOR ABOLITION (2022); CHACÓN, *supra* note 91; REECE JONES, VIOLENT BORDERS: REFUGEES AND THE RIGHT TO MOVE (2016).