

**DECONSTRUCTING DETENTION: STRUCTURAL IMPUNITY AND  
THE NEED FOR AN INTERVENTION**

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**ABSTRACT**

*This Article argues that the U.S. immigration detention system, the largest law enforcement operation in the country, operates with structural impunity resulting in the perpetual abuse of the detained population. There are no enforceable regulations and no accountability mechanisms to protect the nearly thirty thousand individuals held in the Department of Homeland Security’s (“DHS”) custody every day. A culture of abuse and “othering” of immigrant detainees has resulted in numerous reports of dehumanizing physical, sexual, and medical abuse. This structural impunity is exacerbated by the near total privatization of the detention system and corresponding restrictive Supreme Court decisions absolving private-prison companies of liability. This Article argues that the reform of the New Orleans Police Department in the aftermath of Hurricane Katrina can be used as a model to transform the immigration detention system by providing accountability for abuse and oversight for civil rights violations.*

INTRODUCTION ..... 448  
I.OVERVIEW OF IMMIGRATION DETENTION ..... 452  
    A. The Driving Force Behind Immigration Detention ..... 452  
    B. The Structure of Immigration Detention ..... 456  
    C. The Culture of Abuse in Immigration Detention ..... 460  
II.THE LACK OF ACCOUNTABILITY IN IMMIGRATION DETENTION ..... 463

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A. Administrative Remedies in Detention .....	463
B. Civil Remedies for Immigrant Detainees .....	468
C. The Experiences of John, Francisco, and Mary .....	474
1. John's Experience with Physical Abuse .....	474
2. Francisco's Experience with Medical Abuse .....	481
3. Mary's Experience with Sexual Abuse .....	486
III. TWO PRONGED APPROACH: ESTABLISHING STRONG	
ACCOUNTABILITY AND OVERSIGHT .....	490
A. The Civil Rights Reform of the NOPD .....	490
B. Accountability for Civil Rights Violations Using 18	
U.S.C. § 242 .....	494
C. Oversight Mechanisms in Immigration Detention .....	497
D. Community Collaboration on Immigration Detention	
Reform .....	500
IV. CHALLENGES OF CRIMINAL SANCTIONS IN IMMIGRATION	
DETENTION .....	501
CONCLUSION .....	503

## INTRODUCTION

No checks and balances currently exist within [Immigration and Customs Enforcement,] ICE. ICE investigates itself. Because ICE investigates itself there is no transparency and there is no reform or improvement. . . .

. . . .

Oversight must be removed from ICE, otherwise ICE managers and senior leadership will continue to have complete control over the investigative process and the outcome.

Christopher L. Crane

Vice President of Detention and Removal Operations ("DRO"), ICE<sup>1</sup>

The largest law enforcement agency in the country, the Department of Homeland Security ("DHS"), has exponentially increased the numbers of immigrant detainees held in custody awaiting court proceedings and/or removal.<sup>2</sup> Unfortunately, DHS has

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1. *Moving Toward More Effective Immigration Detention Management: Hearing Before the Subcomm. on Border, Mar., and Global Counterterrorism of the Comm. on Homeland Sec. H.R.*, 111th Cong. 15-16 (2009) (statement of Christopher L. Crane, Vice President, Det. and Removal Operations, Am. Fed'n of Gov't Emps. Nat'l ICE Council). Christopher Crane is a somewhat controversial figure in the immigrants rights community because he holds views that some would consider to be immigration restrictionist. In other parts of his prepared statement, he laments that immigrant detainees are treated well, etc. However, the author's cite is limited to his statement regarding lack of oversight within DHS, which is factually accurate. Furthermore, his statement reflects a disconnect between policies of DHS headquarters and detention officers in actual facilities.

2. See DORA SCHRIO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS

failed to maintain safe and humane conditions for individuals in detention and many have been victims of medical,<sup>3</sup> physical,<sup>4</sup> and sexual abuse.<sup>5</sup> In the words of one formerly detained immigrant, “It’s very clear that [the] whole system is designed for intimidation.”<sup>6</sup>

The fact that immigrants in detention are abused in custody is quite likely not a surprise to those remotely familiar with prison conditions. However, what is not commonly understood is the manner in which widespread abuse occurs in immigrant detention with impunity, and without recourse.<sup>7</sup> DHS-ICE has created and perpetuated a “culture of abuse” in the immigrant detention system.<sup>8</sup> The “othering” of immigrant detainees has made it acceptable to abuse detainees,<sup>9</sup> and those who are kind to immigrant detainees are chided and ridiculed.<sup>10</sup>

The vulnerability of immigrant detainees is compounded by the fact that the majority of them do not have legal representation,<sup>11</sup>

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ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009).

3. See, e.g., FLA. IMMIGRANT ADVOCACY CTR., DYING FOR DECENT CARE: BAD MEDICINE IN IMMIGRATION CUSTODY 39 (2009).

4. See, e.g., AM. CIVIL LIBERTIES UNION OF GA., PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA 19 (2012).

5. See, e.g., HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION 8-14 (2010).

6. MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 140 (2004) (internal quotation marks omitted).

7. *Id.* at 68-88 (documenting detailed examples of abuse in the immigration detention system); see, e.g., HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 25 (2011); see also AMNESTY INT’L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 42 (2009) (describing abuse recalled by a formerly detained immigrant).

8. DOW, *supra* note 6, at 87. When referring to an abusive former INS officer, a supervisory asylum officer stated, “He thought he was doing the right thing . . . . He was a traditional INS person. They don’t do things by the law, they do things by force. Enforcement means you’re brutal.” *Id.* (internal quotation marks omitted).

9. See, e.g., Hannah Rappleye & Lisa Riordan Seville, *How One Georgia Town Gambled Its Future on Immigration Detention*, THE NATION (Apr. 10, 2012), <http://www.thenation.com/article/167312/how-one-georgia-town-gambled-its-future-immigration-detention>. A detainee in Georgia, Florent Firmin Kalonji Kalala, stated, “We’re fed like dogs. . . . I just feel humiliated—that’s the feeling I have everyday.” Kalala was held in solitary confinement for twenty-seven days for yelling “I’m just tired of his [sic] place,” in front of an officer. *Id.*; see also DOW, *supra* note 6, at 69 (referring to the former Immigration and Nationality Act, Judith Marty, a supervisory asylum officer, said, “The mentality is that they’re, quote, *aliens*. Which means they’re subhuman. Then you can do anything to them” (internal quotation marks omitted)).

10. DOW, *supra* note 6, at 68-69. A supervising asylum officer complained to her director that a colleague had intentionally abused a Somali asylum applicant by handcuffing him and forcing him to sit for a half hour in a hot car with the windows rolled up in the mid-day heat. She voiced discomfort over this incident and other incidents that she called the “intentional abuse of applicants.” As a result she was labeled a “nigger-lover or alien-lover” and suffered bureaucratic retribution. *Id.*

11. See Peter L. Markowitz et al., *Assessing Justice: The Availability and Adequacy*

many do not speak English,<sup>12</sup> and still others struggle to understand the American legal system.<sup>13</sup> Many immigrant detainees have never been incarcerated,<sup>14</sup> and others are victims of abuse and persecution in their home countries and are afraid to speak out against officials in positions of power.<sup>15</sup> Immigrants in detention are easy prey, and those who abuse them are aware of this fact.<sup>16</sup>

The current structure of immigration detention does little to deter detainee abuse. Detention standards provide guidelines for detainee care; however, the standards are unenforceable. The standards provide for medical care and forbid physical and sexual abuse;<sup>17</sup> however, the standards do not create a remedy whereby a detainee can challenge the facility's adherence to the standard. Detention abuse is compounded by the near total privatization of immigration detention.<sup>18</sup> Private-prison companies oversee almost every aspect of detainee life, and recent Supreme Court decisions limiting the liability of private-prison companies have virtually foreclosed an immigrant detainee's cause of action in federal court.<sup>19</sup>

The increase in immigration detention and corresponding

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*of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 365 (2011) (discussing the number of unrepresented detainees in New York, specifically); APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 3 (2009).

12. See, e.g., Markowitz, *supra* note 11, at 399; NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 177 (2009) (discussing the difficulties experienced by immigrant detainees who do not speak English).

13. See Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 551 (2009) (noting that immigrants are particularly likely to "fall prey to the disreputable sector of the immigration bar" and "less likely to be familiar with local methods to redress exploitation at the hands of their attorneys"); APPLESEED, *supra* note 11, at 29; NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 12, at 183-84 (recognizing that once detained, immigrants are often isolated and have very few, if any, opportunities to ask questions about the unfamiliar court system).

14. See HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN'S STRUGGLES TO OBTAIN HEALTH CARE IN UNITES STATES IMMIGRATION DETENTION 27 (2009) (noting that women who have never been detained before are unaware of services that they are entitled to).

15. See NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 12, at 176-78; see also HUMAN RIGHTS WATCH, *supra* note 5, at 3-4.

16. See HUMAN RIGHTS WATCH, *supra* note 5, at 10. A detainee who was raped by an ICE agent explained, "I was scared for my life. . . . He had a gun. He's a big man, and I was in his custody. I expected him to protect me, not to take advantage of me." *Id.* (quoting Alfonso Chardy & Jay Weaver, *Agent Charged with Raping Woman*, MIAMI HERALD, Nov. 17, 2007, at A1).

17. See *infra* notes 93-100 and accompanying text.

18. See, e.g., AM. CIVIL LIBERTIES UNION OF GA., *supra* note 4, at 12.

19. See, e.g., *Minneeci v. Pollard*, 132 S. Ct. 617, 626 (2012); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001).

decrease in accountability has created a system whereby detainee abuse goes unpunished and unnoticed. In 2009, the Obama administration proposed a series of detention reform proposals<sup>20</sup> that focused on improving the outward appearance of detention, but did little to provide a strong accountability mechanism for detainee abuse.<sup>21</sup> The current models for Comprehensive Immigration Reform proposed by both President Obama and the Senate do not adequately address detention reform.<sup>22</sup>

This Article argues that the immigration detention system has reached a crisis point whereby it operates with entrenched structural impunity and offers no accountability for misconduct. The New Orleans Police Department (“NOPD”) reached a similar tipping point in the aftermath of Hurricane Katrina when police officers engaged in acts of brutal violence on New Orleans residents.<sup>23</sup> Several police officers were convicted of violating federal criminal civil rights statutes, and subsequently, Mayor Mitch Landrieu entered into a consent decree with the Department of Justice in an effort to reform the NOPD.<sup>24</sup>

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20. *Fact Sheet: 2009 Immigration Detention Reforms*, ICE, <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm> (last visited Mar. 8, 2013) [hereinafter *ICE 2009 Fact Sheet*]. For a criticism of the implementation of detention reforms, see NAT’L IMMIGRANT JUSTICE CTR. ET AL., YEAR ONE REPORT CARD: HUMAN RIGHTS & THE OBAMA ADMINISTRATION’S IMMIGRATION DETENTION REFORM 2 (2010) [hereinafter YEAR ONE REPORT CARD] (“[H]ighlight[ing] where ICE must concentrate its efforts as it moves from the design and development phase of the reform process toward implementation, and where ICE must work to bring its proposed changes into compliance with international human rights standards.”); NAT’L IMMIGRANT JUSTICE CTR. ET AL., NOT TOO LATE FOR REFORM: A CALL FOR PRESIDENT OBAMA TO CLOSE FAILED IMMIGRATION DETENTION FACILITIES, HALT COSTLY PRIVATIZATION & RESTORE BASIC HUMAN RIGHTS 2 (2011) [hereinafter NOT TOO LATE] (reporting on what it considers the Obama administration’s failures in addressing immigrant rights in DHS custody); Sarah Gryll, Comment, *Immigration Detention Reform: No Band-Aid Desired*, 60 EMORY L.J. 1211, 1216 (2011) (“While [the Obama administration’s] reforms are promising and long overdue, they do not address the fundamental problem: the growing number of detainees and the failure of the . . . system to handle them.”).

21. See generally Mark Noferi, *Making Civil Immigration Detention “Civil”: Preventative Detention’s Guilty Conscience*, 27 J. C.R. & ECON. DEV. (forthcoming 2013) (outlining the problems with the immigrant detention system and arguing that ending or reducing the amount of immigrant detentions would be more beneficial).

22. Press Release, White House, Office of the Press Sec’y, Fact Sheet: Fixing Our Broken Immigration System So Everyone Plays by the Rules (Jan. 29, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-by-the-rules>; CHUCK SCHUMER ET AL., BIPARTISAN FRAMEWORK FOR COMPREHENSIVE IMMIGRATION REFORM (undated), available at <http://www.c-span.org/uploadedFiles/Content/Documents/Bipartisan-Framework-For-Immigration-Reform.pdf>.

23. Trymaine Lee, *Inquiries Give Credence to Reports of Racial Violence After Katrina*, N.Y. TIMES, Aug. 27, 2010, at A9.

24. Press Release, Dep’t of Justice, Justice Department Announces Consent Decree

This Article argues that the NOPD reform model can be instructive in the immigration detention context because it is a proactive solution that injects accountability and oversight into a system plagued with civil rights abuses. The immigrant detention system is at a similar crisis point and any reform efforts must contain both a strong accountability mechanism for those who engage in acts of detainee abuse, while also providing oversight to prevent abuse.

This Article is divided into four major parts. Part I provides an overview of the immigration detention system and explains the culture of abuse in detention. Part II describes the lack of accountability in the current detention system, as well as the limited availability of civil remedies. In addition to explaining the structure of the detention system, Part II uses the stories of three immigrant detainees to demonstrate the limited availability of relief in the current system. Part III argues that the intervention of criminal investigative agencies, the Department of Justice and the Federal Bureau of Investigation, can provide accountability for abuse. Part IV explains that there is an existing statute that authorizes this intervention and is a recent model of success. Lastly, the Article evaluates the proposal and explains some practical challenges to criminal sanctions and investigations.

## I. OVERVIEW OF IMMIGRATION DETENTION

### A. *The Driving Force Behind Immigration Detention*

The immigration detention system has experienced rapid growth in the past fifteen years. DHS currently detains over thirty thousand individuals each day, while in 1995, the Immigration and Naturalization Service (“INS”) (the predecessor to DHS) detained approximately seventy-five hundred immigrants per day.<sup>25</sup> The expansion of immigrant detention is due in part to the passage of restrictive immigration laws that authorize the mandatory detention of individuals convicted of certain criminal convictions and individuals who are apprehended near the border or point of entry.<sup>26</sup>

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with City of New Orleans to Resolve Allegations of Unlawful Misconduct by New Orleans Police Department (July 24, 2012), *available at* <http://www.justice.gov/opa/pr/2012/July/12-ag-917.html>.

25. SCHIRO, *supra* note 2, at 2; *see also* NAT’L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 3 (2012) (explaining that the number of immigrant detainees has doubled in the past eight years).

26. 8 U.S.C. § 1226 (2006); *see also* Markowitz, *supra* note 13, at 564-66. *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-39 (2000) (discussing the increase in numbers of immigrant detainees as a result of mandatory detention provisions); Geoffery Heeren, *Pulling Teeth: The State of Mandatory*

The passage of mandatory detention laws alone do not account for the increase in immigrant detention.<sup>27</sup> Since 2001, Congress has consistently increased funding for immigration detention and enforcement.<sup>28</sup> The initial increase in funding occurred shortly after September 11, 2001, when Congress was concerned about its ability to locate and detain terrorists.<sup>29</sup> As the years passed, Congress stopped using terrorism as a justification for large-scale immigration detention and focused on the need for public safety, as well as the outright desire to rid the country of undocumented immigrants.<sup>30</sup> In 2003, Congress approved and funded a strategy to deport all undocumented immigrants by 2012.<sup>31</sup> This strategy, known as “Operation Endgame,” expanded DHS enforcement objectives and contributed to the increase in immigrant detention.<sup>32</sup> As part of this strategy, a DHS administrative policy known as “Secure Communities” was created to share information between local law enforcement agents and immigration officials.<sup>33</sup> Congress supported

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*Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 604 (2010) (describing the challenges faced by detainees subject to mandatory detention); Whitney Chelgren, Note, *Preventive Detention Distorted: Why it is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1481 (2011) (noting that immigration detention can be longer than time served for the underlying offense).

27. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 45-46 (2010), [http://www.columbialawreview.org/wp-content/uploads/2010/07/42\\_Anil\\_Kalhan.pdf](http://www.columbialawreview.org/wp-content/uploads/2010/07/42_Anil_Kalhan.pdf) (discussing reasons why immigration detention has increased).

28. See HUMAN RIGHTS FIRST, *supra* note 7, at 13 (“In its budget request for fiscal year 2012, DHS asked Congress for \$2.02 billion to cover the costs of maintaining bed space and other needs associated with detaining immigrants. In FY 2005, the same budget line was \$864 million. Over seven years, then, the U.S. government has increased its spending on detention bed space by 134 percent.”).

29. AM. CIVIL LIBERTIES UNION OF GA., *supra* note 4, at 20.

30. See Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1349 (2011). It is also true that tough immigration enforcement policies and anti-immigrant rhetoric can be politically advantageous. See Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants’ Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO. L. REV. 1, 3-8 (2011) (discussing voter support for anti-immigrant ballot initiatives in Arizona).

31. U.S. DEP’T OF HOMELAND SEC., BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, *ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012: DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND (2003)* (“As the title implies, DRO provides the endgame to immigration enforcement and that is the removal of all removable aliens. This is also the essence of our mission statement and the ‘golden measure’ of our success. We must endeavor to maintain the integrity of the immigration process and protect our homeland by ensuring that every alien who is ordered removed, and can be, departs the United States as quickly as possible and as effectively as practicable. We must strive for [a] 100% removal rate.”).

32. See *id.*

33. U.S. DEP’T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, OFFICE OF PUB. AFFAIRS, *FACT SHEET 1* (2008). Secure Communities requires local law enforcement agencies to share fingerprints of all arrestees with DHS. The prints are

the stated goal of Secure Communities, to remove the “worst” of immigrant society, despite the reality that it has resulted in the increased detention of low-level offenders, such as immigrants with traffic offenses and nonviolent drug possessions.<sup>34</sup>

Congressional policy on immigration reform and detention appropriations has been influenced, in part, by the lobbying efforts of the private-prison industry.<sup>35</sup> Private-prison corporations have lobbied for strict immigration laws “that detain immigrants more frequently and for longer periods of time.”<sup>36</sup> After the attacks of September 11, 2001, the chairman of Cornell Companies, a private-prison company, told stock analysts, “It is clear that since September 11 there’s a heightened focus on detention. More people are gonna get caught. So I would say that’s positive. The federal business is the best business for us, and September 11 is increasing that business.”<sup>37</sup> From 1999 to 2009, the top three prison companies with the most ICE detention contracts spent over \$45 million in lobbying

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sent to the FBI and DHS. DHS then reviews the fingerprints, ascertains whether there are any immigration violators, and then apprehends them at the local law enforcement facility. *Id.* In their fact sheet, ICE explains that Secure Communities improves “community safety by transforming the way the federal government cooperates with state and local law enforcement agencies to identify, detain, and remove all criminal aliens held in custody.” *Id.* The program has been criticized for deporting individuals with minor criminal history; however, ICE explains that the purpose of Secure Communities is to use “technology to share information between law enforcement agencies and [to] apply[] risk-based methodologies to focus resources on assisting all local communities [in] remov[ing] high-risk criminal aliens.” *Id.*; *see also* AM. CIVIL LIBERTIES UNION OF GA., *supra* note 4, at 22.

34. *See* EDGAR AGUILASOCHO ET AL., IMMIGRANT RIGHTS CLINIC, UNIV. OF CAL., MISPLACED PRIORITIES: THE FAILURE OF SECURE COMMUNITIES IN LOS ANGELES COUNTY 9-10 (2012) (analyzing the effect of Secure Communities in Los Angeles, concluding that the majority of people identified through the program were not convicted of serious crimes, and recommending that Los Angeles issue an ordinance to limit the county’s participation in the program); AARTI KOHLI ET AL., SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 3 (2011) (stating that nationwide data on Secure Communities finds that the program “has led to the mass deportation of low-level offenders, such as people who violate traffic laws and people without criminal histories at all”). *See generally* NYU SCH. OF LAW IMMIGRANT RIGHTS CLINIC ET AL., INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRANT DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 13 (2012).

35. Rappleye & Seville, *supra* note 9, at 1 (reporting that private prison companies “spend millions on federal lobbying to ensure that the” immigration detention market remains a strong investment); NAT’L IMMIGRATION FORUM, *supra* note 25, at 6.

36. NAT’L IMMIGRATION FORUM, *supra* note 25, at 6; Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NAT’L PUB. RADIO (Oct. 28, 2010, 11:01 AM), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>.

37. Judy Greene & Sunita Patel, *The Immigrant Gold Rush: The Profit Motive Behind Immigrant Detention*, DET. WATCH NETWORK, 2, [http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/unsr\\_profitmotives.pdf](http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/unsr_profitmotives.pdf).

expenditures.<sup>38</sup>

Private prison companies have made significant profits in the immigrant detention business. The largest company in the private prison industry, the Corrections Corporation of America (“CCA”), had \$1.6 billion in revenues for fiscal year (“FY”) 2008.<sup>39</sup> During that same year, for two detention centers that ICE runs, it paid CCA a per diem of \$64.47 and \$54.25 to house each detainee; however, CCA only spent \$33.25 in detainee services.<sup>40</sup>

The appropriation of detention funds, currently estimated at \$2.6 billion, serves as a congressional mandate for large-scale immigration detention.<sup>41</sup> At a recent community meeting, the Executive Associate Director of the DRO, Gary Mead, explained that Congress has allocated funds to detain and deport 400,000 immigrants each year.<sup>42</sup> He explained that as long as DRO kept receiving that congressional allocation, they would continue to detain and deport 400,000 immigrants each year.<sup>43</sup> The idea that the

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38. NAT’L IMMIGRATION FORUM, *supra* note 25, at 6; *see also* Laura Wides-Munoz & Garance Burke, *Immigrants Prove Big Business for Prison Companies*, ASSOC. PRESS, (Aug. 2, 2012, 12:39 PM), <http://apnews.myway.com/article/20120802/DA0DAQA81.html>.

39. As a company, CCA owns both criminal prisons and immigrant detention centers. The \$1.6 billion in revenues is not exclusively from immigration detention. *See* CORR. CORP. OF AM., 2008 ANNUAL REPORT ON FORM 10-K (2009).

40. INTER-AM. COMM’N ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 94 (2010), *available at* <http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf>.

41. During a House Subcommittee on Homeland Security meeting in March 2011, Representative Robert Aderholt told ICE Assistant Secretary John Morton,

“Dollars are scarce in Washington these days,” . . . “[b]ut I’m proud to say that this budget request does not cut funds for illegal immigration detention space. As chairman of this subcommittee, I pledge to you that we will fund every dollar needed to house and detain illegal immigrants in order to keep them off the streets.”

Rappleye & Seville, *supra* note 9, at 4; *see also* *Detention of Criminal Aliens: What Has Congress Bought?*, TRAC IMMIGR. (Feb. 11, 2010), <http://trac.syr.edu/immigration/reports/224/>; NAT’L IMMIGRATION FORUM, *supra* note 25, at 1.

42. Personal observations of author from a Community Roundtable on U.S. Immigration and Customs Enforcement and Enforcement and Removal Operations with Executive Associate Director, Gary Mead on Apr. 27, 2012 [hereinafter Community Roundtable]; *see also* Andrew Becker & Spencer S. Hsu, *ICE Officials Set Quotas to Deport More Illegal Immigrants*, WASH. POST, Mar. 27, 2010, at A4; Jenna Greene, *ICE Warms Up to Detainees*, NAT’L L.J., Feb. 8, 2010 (ICE Assistant Secretary John Morton explained, “This isn’t a question of whether or not we will detain people. We will detain people, and we will detain them on a grand scale.”).

43. Community Roundtable, *supra* note 42. The congressional influence on detention space allocation was emphasized in an e-mail exchange between ICE officials. In those e-mails, Gary Mead alluded to the fact that the head of the Congressional Appropriations Committee wanted detention space for a facility in his state, and Mead explained that ICE would be unable to disagree “without serious

congressional allocation of funds dictates government action is a basic reality; however, it also provides insight into how and why the immigration detention system is structured in such a way.

*B. The Structure of Immigration Detention*

The immigration detention system largely follows a criminal incarceration model.<sup>44</sup> Although immigrant detainees are technically in “civil custody,” many are held in criminal jails or detention facilities that resemble criminal jails.<sup>45</sup> Detainees in jails reside with criminal inmates, and with the exception of a jumpsuit with the letters “INS” written in large letters on the back, there is little to distinguish an immigrant detainee from a criminal inmate. Detainees at immigrant only facilities do not fare better as many of these facilities were originally built as prisons and detainees do not have freedom of movement.<sup>46</sup>

Although the immigration detention system appears to be similar to the criminal incarceration system in outward appearance, one unique difference is the incredibly minor role DHS plays in the actual custody and care of detainees. DHS has almost exclusively privatized care of the detained population to private-prison companies and state and local jails.<sup>47</sup> While this is not entirely unlike the criminal system, where privatization has a strong foothold, the immigrant detention system is served almost entirely by non-DHS entities.<sup>48</sup> The immigrant detention system processes almost 400,000 individuals each year, but retains almost no control over their daily

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repercussions against our budget.” Rappleye & Seville, *supra* note 9, at 4 (internal quotation marks omitted).

44. See SCHRIRO, *supra* note 2, at 4; see also Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1445 (2010).

45. See DOW, *supra* note 6, at 259 (Although immigration detention centers are not jails, attorney Carol Lehman observed, “It looks like a prison, it smells like a prison, everybody in it acts like it’s a prison.”); see also SCHRIRO, *supra* note 2, at 4; Schriro, *supra* note 44, at 1445.

46. SCHRIRO, *supra* note 2, at 4; see also Schriro, *supra* note 44, at 1445. In response to criticism of the criminal model of immigration detention, DHS recently constructed a model “civil detention center” in Karnes County, Texas. News Release, ICE, ICE Opens Its First-Ever Designed-and-Built Civil Detention Center (Mar. 13, 2012), available at <http://www.ice.gov/news/releases/1203/120313karnescity.htm>. At this facility, immigrant detainees have freedom of movement as well as other amenities. *Id.*

47. CODY MASON, THE SENTENCING PROJECT, DOLLARS AND DETAINEES: THE GROWTH OF FOR-PROFIT DETENTION 4-7 (2012); JAMES AUSTIN & GARRY COVENTRY, U.S. DEPT OF JUSTICE, EMERGING ISSUES ON PRIVATIZED PRISONS 12 (2001), available at <https://www.ncjrs.gov/pdffiles1/bja/181249.pdf>; Greene & Patel, *supra* note 37, at 1.

48. Michael Flynn & Cecilia Cannon, *The Privatization of Immigration Detention: Towards a Global View* 3-4 (unpublished manuscript) (September 2009).

care or well being.<sup>49</sup>

There are three types of immigrant detention facilities: facilities subject to an Intergovernmental Service Agreement (“IGSA”), Contract Detention Facilities (“CDF”), and Service Processing Centers (“SPC”).<sup>50</sup> An overwhelming majority of immigrant detainees (sixty-seven percent) are housed in facilities known as IGSA facilities.<sup>51</sup> The IGSA’s are state and local jails that contract with DHS to house immigrant detainees.<sup>52</sup> Not unlike a hotel room, state and local jails are paid per person, per night to house immigrant detainees.<sup>53</sup> There are hundreds of IGSA’s across the country and they house as many as fourteen hundred detainees or as little as one detainee.<sup>54</sup> Some of the larger IGSA’s are dedicated immigration detention facilities.<sup>55</sup> Many of the IGSA’s have complex contracting and subcontracting structures.<sup>56</sup> For example, the largest detention center in the Mid-Atlantic region, the Farmville Detention Center, can hold up to one thousand detainees.<sup>57</sup> Farmville is owned by the town of Farmville, Virginia, but it is operated by the Immigration Centers of America, a company based in Richmond, Virginia.<sup>58</sup>

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49. [W]here there is no accountability, the arbitrary use of authority governs the trivial as well as the substantial. One insidious aspect of the private contractor’s relationship with the INS is that it pairs bureaucracies that are hostile to public scrutiny. The buck stops nowhere. While the INS pretends to be open to scrutiny, the corporate offices of CCA make no secret of their antipathy to oversight . . . .

DOW, *supra* note 6, at 90.

50. KAREN TUMLIN ET AL., NAT’L IMMIGRATION LAW CTR., A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 4 (2009).

51. *Id.*

52. Greene & Patel, *supra* note 37, at 3-5.

53. In an attempt to solicit an ICE contract for a detention center in Georgia, Representative Jack Kingston wrote, “ICE currently houses detainees with private providers at a price of \$69.00 to \$90.00 per day in Georgia. . . . [The detention center] is prepared to charge significantly less than the current rate, only \$45.00 per detainee per day. This cost reduction will result in annual savings of over \$10 million to the Department and the taxpayer.” Rappleye & Seville, *supra* note 9; *see also* Jack Cloherty, *Overpaying for Prison*, ABCNEWS.COM (Mar. 21, 2011), <http://abcnews.go.com/Politics/overpaying-prison/story?id=13185798> (citing audit of prisons by DOJ Inspector General that found room rates higher than those of hotels).

54. DRO Det. Mgmt. Div., *IGSA Facilities Used by ICE in FY2010*, ICE (Mar. 8, 2010), <http://www.ice.gov/doclib/foia/isa/igsafacilitylistasof03012010.pdf>.

55. *Id.*

56. INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 40, at 92-93.

57. Kevin Sieff, *Immigrant Detainees Bound for Va. Center Surge of Criminal Charges Since ’09 Large Facility the Result of Federal Screening Program*, WASH. POST, July 18, 2010, at C01.

58. Intergovernmental Service Agreement Between the United States Department of Homeland Security, United States Immigration and Customs Enforcement, and Town of Farmville (Sept. 15, 2008) [hereinafter Intergovernmental Service

Smaller IGSA's are state and local jails that rent bed space to DHS.<sup>59</sup> Immigrant detainees in smaller IGSA's are housed alongside criminal inmates.<sup>60</sup> The smaller IGSA's often directly solicit DHS as a way to offset local revenue needs.<sup>61</sup> In response to the detention of immigrants in a Mississippi jail, one sheriff commented, "We don't always agree with the INS holding them . . . . But we like the money."<sup>62</sup> Some counties have actively sought out immigrant detention in order to rejuvenate local economies.<sup>63</sup>

The second form of detention facility is known as a CDF.<sup>64</sup> CDFs

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Agreement], available at <http://www.ice.gov/doclib/foia/media-requests/09foia338washingtonpostfarmvilleigsal.pdf>; Sieff, *supra* note 57.

59. In one case, state prisoners in Oklahoma were relocated in order to make room for federal immigration detainees. The Oklahoma corrections director explained that ICE offered a better rate than the state. Greene & Patel, *supra* note 37, at 3; see, e.g., NINA RABIN, UNIV. OF ARIZ., UNSEEN PRISONERS: A REPORT ON WOMEN IN IMMIGRATION DETENTION FACILITIES IN ARIZONA 6 (2009), available at [http://www.law.arizona.edu/depts/bacon\\_program/pdf/unseen\\_prisoners.pdf](http://www.law.arizona.edu/depts/bacon_program/pdf/unseen_prisoners.pdf).

60. HUMAN RIGHTS FIRST, *supra* note 7, at 7; Greene, *supra* note 42, at 5.

61. In their expose of the immigration detention system in Georgia and Alabama, reporters found that "politicians from both states were lobbying hard to bring immigrant detainees in. ICE succumbed to the pressure, sending hundreds of detainees to the financially unstable facility in Georgia that promised to detain immigrants cheaply." Rappleye & Seville, *supra* note 9. Similarly in New Jersey, the Passaic County Jail received \$17.7 million from ICE in 2004, which represented *seventy-four percent* of the County Sheriff's budget. In 2005, immigrant detainees were withdrawn from Passaic County amidst scandals that detention center guards abused detainees after September 11th. See Greene & Patel, *supra* note 37, at 5. When a Pennsylvania county made \$1.5 million dollars in profit detaining Chinese immigrants, a county commissioner commented, "We tried like the dickens to get some of the Chinese . . . but it didn't pan out . . . . If no immigrants are secured, some layoffs may be inevitable." DOW, *supra* note 6, at 10.

62. *Id.*

63. "They have to send these people somewhere," said Farmville Mayor Sydnor C. Newman Jr. "Thank God they chose Farmville." The town, which has lost manufacturing jobs in recent years, stands to receive \$213,000 a year in revenue from a \$1-per-detainee daily fee the company will pay." Sieff, *supra* note 57. For an insightful examination of the politics of immigration detention and local economics, see Rappleye & Seville, *supra* note 9. Not all local communities are welcoming immigration detention. Daniel Chang & Michael Vasquez, *ICE Pulls Plug on Immigration Detention Center in Southwest Ranches*, MIAMI HERALD (June 15, 2012), <http://www.miamiherald.com/2012/06/15/2851928/ice-pulls-plug-on-immigration.html>. ICE recently withdrew plans to build an immigrant detention center in Southwest Ranches, Florida. *Id.* The local commissioner of neighboring Pembroke Pines, Florida explained, "We don't want that stuff in Pembroke Pines." *Id.* Another said, "It was not a very popular idea here." . . . "In fact, that's understating it. It was a dreaded idea." *Id.* The commissioner explained that the local protests against the detention center were what led to ICE's withdrawal. *Id.* Immigration advocates applauded the decision. Fla. Immigrant Coal., *CCA Se Fue!*, CCA GO AWAY! BLOG (June 16, 2012), <http://ccagoaway.org/2012/06/16/cca-se-fue/>.

64. OFFICE OF INSPECTOR GEN., DEPT OF HOMELAND SEC., OIG-09-52, IMMIGRATION AND CUSTOM ENFORCEMENT DETENTION BEDSPACE MANAGEMENT 2 (2009), available at [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_09-52\\_Apr09.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_09-52_Apr09.pdf).

are facilities that are entirely owned and operated by private-prison companies.<sup>65</sup> There are seven CDFs, and they comprise approximately sixteen percent of the detained population.<sup>66</sup> Like an IGSA, these facilities are paid per detainee; however, unlike the IGSA, the complex contracting and subcontracting structure does not exist.<sup>67</sup>

The third form of immigration detention is known as a SPC.<sup>68</sup> The SPCs are physically owned by DHS; however, the daily care and custody of detainees is provided by private-prison companies.<sup>69</sup> Therefore while DHS remains onsite at an SPC, they do not provide the daily care of detainees and their function remains limited to enforcement objectives.<sup>70</sup> There are six processing centers, and they house twelve percent of immigrant detainees.<sup>71</sup>

In all of the various structures of immigration detention—IGSAs, CDFs, and SPCs—DHS has minimized its role and relied on private-prison companies to provide detainee care.<sup>72</sup> While DHS retains the most control in the SPC, simply by virtue of owning the facility, DHS has not constructed a new SPC in several years.<sup>73</sup> The

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65. *Id.*; see also Stephanie Lan Chin, Library Services in U.S. Immigration Detention Facilities 17 (May 2010) (unpublished Masters thesis, San Jose State University), available at [http://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=4751&context=etd\\_theses](http://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=4751&context=etd_theses); SCHRIRO, *supra* note 2, at 10.

66. The seven contract detention facilities are Pearsall South Texas Detention complex (Pearsall, TX), Northwest CDF (Tacoma, WA), Houston CDF (Houston, TX), Otay-Mesa CDF (San Diego, CA), and Broward Transitional Companies such as CCA, Geo Group, and MTC. SCHRIRO, *supra* note 2, at 10 n.6, 15; see also TUMLIN ET AL., *supra* note 50, at 4 (stating that CDFs house as many as seventeen percent of detainees).

67. See SCHRIRO, *supra* note 2, at 10; TUMLIN ET AL., *supra* note 50, at vi; U.S. DEPT OF HOMELAND SEC., ANNUAL PERFORMANCE REPORT FISCAL YEARS 2011-2013, at 1067-68 (2012), available at <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf>.

68. TUMLIN ET AL., *supra* note 50, at 4; U.S. DEPT OF HOMELAND SEC., *supra* note 67, at 1067-68.

69. For example, the Port Isabel Service Processing Center in Los Fresnos, Texas, is owned by DHS; however, the private security company Asset Protection and Security Services (“ASSET”) provides daily care to the detained population. See COMM’N ON ACCREDITATION FOR CORRECTIONS, U.S. DEPT OF HOMELAND SEC., STANDARDS COMPLIANCE TECHNICAL ASSISTANCE VISIT AUDIT 5 (2007) (regarding Port Isabel Detention Center); see also INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 40, at 87 n.409.

70. See INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 40, at 87 n.409 (citing SCHRIRO, *supra* note 2, at 10).

71. The six SPCs are located in “Batavia, [NY]; El Centro, [CA]; El Paso, [TX]; Florence, [AZ]; Miami, [FL]; and Los Fresnos, [TX].” NAT’L IMMIGRATION FORUM, *supra* note 25, at 4 n.14 (citing U.S. DEPT OF HOMELAND SEC., *supra* note 67, at 1067-68).

72. Greene & Patel, *supra* note 37, at 2.

73. In fact, ICE has explained that it might consider closing the SPC facilities in order to save costs. See NAT’L IMMIGRATION FORUM, *supra* note 25, at 4.

same is true of CDFs.<sup>74</sup> DHS has focused its immigration detention expansion efforts solely on IGSAAs,<sup>75</sup> despite the fact that IGSAAs have received the most criticism for detainee abuse and DHS has little oversight of the IGSAAs.<sup>76</sup> DHS has not publicly addressed the reasons why it has chosen the IGSA model and has not indicated any intention of veering away from the IGSA model.<sup>77</sup>

### C. *The Culture of Abuse in Immigration Detention*

Since its inception, immigration detention has been steeped in a culture of abuse.<sup>78</sup> The initial mass immigration detention centers encouraged abuse as a method of deterring asylum seekers from seeking refuge in the United States.<sup>79</sup> Central American asylum seekers, unaware of the abusive detention practices, overflowed immigration detention centers, and the former INS resorted to privatization of detention as a way of increasing the numbers of detainees.<sup>80</sup> The increase in privatization and corresponding decrease in effective oversight contributed to abuse because it reduced

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74. Human Rights First analyzed the increase in detention bed space from 2009 to 2011 and found that 6360 new beds were added during this time frame. HUMAN RIGHTS FIRST, *supra* note 7, at 11. Of this number, only ninety-seven beds were expanded at a CDF; no new beds were expanded at a SPC. *Id.* Its report concluded that the majority of growth in the detention system has been at IGSA facilities. *See id.* (providing a list that includes the IGSA facilities that have grown between 2009-2011).

75. *Id.* DHS has not constructed a SPC or CDF in several years despite the congressional appropriations budgetary increase for detention construction; instead, most of the recent detention facilities have been IGSAAs. *See* HUMAN RIGHTS FIRST, *supra*, note 7, at iii, 11; *see also* Intergovernmental Service Agreement, *supra* note 58, at 2 (outlining the agreement by the Town of Farmville to act as Service Provider to hold detainees pending their detention hearing in exchange for federal funds); Kalhan, *supra* note 27, at 47 (attributing the worsening detainee conditions, in part, to “ICE’s expanded use of county jails”).

76. *See* Michael Barajas, *Prisons for Profit: Deaths, Lawsuits Don’t Stop Expansion of GEO Immigration Prisons*, SAN ANTONIO CURRENT (Feb. 16, 2011), <http://www2.sacurrent.com/news/story.asp?id=72044>.

77. In an effort to reform the immigration detention system, ICE Assistant Secretary John Morton called for movement of detainees from a penal environment to facilities that were more “civil” in nature; however, detention expansion has focused on the increased use of prison beds for immigrant detainees. *See* HUMAN RIGHTS FIRST, *supra* note 7, at 7.

78. For examples of such abuses, see ROBERT KAHN, *OTHER PEOPLE’S BLOOD: U.S. IMMIGRATION PRISONS IN THE REAGAN DECADE 58* (1996) (“In the three months I worked in the [Port Isabel Detention Center] I saw prison guards, immigration judges, and court workers break so many laws that recording these abuses became as big a project as the bare-bones legal work and refugee interviews I continued to do. Among the most egregious abuses to which the INS subjected refugees were beatings, sexual assault, theft of mail, theft of property, theft of bond money, denial of access to counsel, . . . woefully inadequate medical care, and unconstitutional interference with the right to counsel.”).

79. *See* DOW, *supra* note 6, at 68-69.

80. *Id.* at 8-10.

accountability for acts of abuse.<sup>81</sup> An experienced immigration detention legal worker, Robert Kahn, explains: “Privatization of the immigration prison did not create the abuse—privatization made responsibility for the abuse indeterminate. Nobody had to answer for it.”<sup>82</sup>

Robert Kahn was referring to the pervasiveness of abuse in the large immigration detention centers of the 1980s; however, as privatized immigration detention has expanded, so has the abuse.<sup>83</sup> Every year, human rights report groups, nonprofit organizations, media sources, and even congressional leaders detail extensive reports of abuse in detention.<sup>84</sup> However, it is not only the numerousness and veracity of abuse reports that is disturbing; the nature of immigrant detainee abuse is particularly troubling because it is cruel and dehumanizing.<sup>85</sup>

The dehumanization and humiliation occurs in part because immigrant detainees are a vulnerable population.<sup>86</sup> Over ninety

81. KAHN, *supra* note 78, at 120.

82. *Id.*

83. The IACHR observed that because the daily per diem rate awarded to IGSAAs “is not in any way contingent upon” the private prison company’s compliance with detention standards, there is no incentive “to perform above the minimum required” to retain the award. INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 40, at 93. The IACHR explained that “[t]he profits are the principal motive for local governments and private security firms to enter into contracts with ICE.” *Id.*

84. REG’L CTR. FOR BORDER RIGHTS, AM. CIVIL LIBERTIES UNION OF N.M., OUTSOURCING RESPONSIBILITY: THE HUMAN COST OF PRIVATIZED IMMIGRATION DETENTION IN OTERO COUNTY 27-41 (2011); HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 2 (2010); NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 12, at v, 175-88.

85. *See, e.g.*, FLA. IMMIGRANT ADVOCACY CTR., *supra* note 3.

I have to pee on myself putting a towel on my laps to prevent the urine run all over myself. When I have to do the other necessity is very uncomfortable [and] unsanitary. This is a pitiful and inhumane situation but it is the truth. I’ve been mistreated; this is a violation of my rights. I think that animals got more rights than a person. I made my mistakes in the past but believe me sir, I learned a valuable lesson. Don’t you think I’m still a human being? [sic]

*Id.* at 38 (alteration in original) (quoting Felipe Perez-Leon, paraplegic detainee in the Atlantic City Detention Center). In one case, INS agents paralyzed an immigrant detainee during the course of an arrest and did not administer medical care until over six hours later. *United States v. Gonzales*, 436 F.3d 560, 567-68 (5th Cir. 2006). In the interim, the INS agents taunted the new quadriplegic detainee, invited other agents to wipe their feet on him, manhandled his limp body, locked him in an empty bus with pepper spray, and left him foaming at the mouth on a bus for some period of time. *Id.* The detainee died eleven months after the incident. *Id.* at 568.

86. “A large and growing number of detained immigrants are at risk of sexual abuse. Their heightened vulnerability and unusual circumstances require special interventions.” NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 12, at 21; *see also* TEX. APPLESEED, JUSTICE FOR IMMIGRATION’S HIDDEN POPULATION: PROTECTING THE

percent of immigrants who enter DHS custody are eventually removed from the United States,<sup>87</sup> some through an “expedited removal” process, and many do not formally report their abusive experiences prior to removal.<sup>88</sup> At times, removal to a foreign country is used as retribution for those detainees who report abuse, or removal is used as a fail-safe measure to prevent a detainee from reporting abuse.<sup>89</sup> At the Willacy Detention Center in Raymondville, Texas, a female detainee who claimed she had been raped was immediately taken to the airport before she could report the sexual abuse.<sup>90</sup> A transportation guard was ordered by a supervisor “to find the next flight out for the detainee” and was told to “[m]ake sure nobody talks to her. . . . Don’t say nothing to her. Just get her in the van and meet up with the U.S. Marshals up at the airport.”<sup>91</sup>

In 2009, the Obama administration proposed a series of detention reforms that purport to reform the abusive detention system.<sup>92</sup> However, the proposed plans do not include an effective solution for curbing detention abuse.<sup>93</sup> Instead, the detention reform

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RIGHTS OF PERSONS WITH MENTAL DISABILITIES IN THE IMMIGRATION COURT AND DETENTION SYSTEM 1 (2010); HUMAN RIGHTS WATCH, *supra* note 14, at 32; HUMAN RIGHTS FIRST, *supra* note 7, at 29; Michelle Roberts, *Immigrants Face Long Detention, Few Rights*, DESERET MORNING NEWS, Mar. 16, 2009, at A01.

87. DEPT’ OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS 1 (2010), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>. This data was calculated by dividing the number of immigrants detained by ICE in 2010 by the number of immigrants removed from the United States in that same year. Of all immigrants apprehended and not necessarily detained, approximately seventy-five percent were removed. *Id.*

88. See NAT’L IMMIGRANT JUSTICE CTR., SNAPSHOT OF IMMIGRATION DETENTION (2011) (noting law enforcement’s concern that crime victims and witnesses will be reluctant to report crimes out of fear of detention); DEPT’ OF HOMELAND SEC., *supra* note 87, at 3-4. Of the total removals, twenty-nine percent were expedited, meaning the detainees could be “removed without a hearing before an immigration court.” *Id.* at 2, 4.

89. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 12, at 22. (“We are afraid . . . each time one of us is interviewed by investigating officers. . . . [S]ome of the women who have given statements have either been transferred or deported to their countries.” (alterations in original)).

90. Catherine Rentz, *How Much Sexual Abuse Gets “Lost in Detention”?*, PBS (Oct. 19, 2011, 2:03 PM), <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/how-much-sexual-abuse-gets-lost-in-detention/>.

91. *Id.* Deportation is a powerful tool that can be used to make detainees (and their problems) disappear. In one case in New Jersey, a detainee “slipped on a puddle of water” and hit his head and started bleeding. SEMUTEH FREEMAN & LAUREN MAJOR, N.Y. UNIV. SCH. OF LAW IMMIGRANT RIGHTS CLINIC, IMMIGRATION INCARCERATION: THE EXPANSION AND FAILED REFORM OF IMMIGRATION DETENTION IN ESSEX COUNTY, NJ 21 (2012). The detainee “was taken to the hospital and upon return was offered quick deportation as long as he kept quiet about the incident and didn’t sue.” *Id.*

92. Kalhan, *supra* note 27, at 50-56.

93. *Id.* at 51-56; Susan Carroll, *ICE Paints Bleak Picture of Detention System*, HOUS. CHRON. (Oct. 10, 2011, 12:02 AM), <http://www.chron.com/news/houston->

policies focus on creating benign facilities that appear (at least outwardly) to be less prison-like.<sup>94</sup> At the new Karnes County Civil Detention Center, detention guards have been replaced with “resident advisers” and detainees have limited freedom of movement.<sup>95</sup> However, the use of less restrictive detention does not translate into less detention abuse.<sup>96</sup> Effective detention reform must have strong accountability and deterrence mechanisms for individuals who engage in acts of abuse.<sup>97</sup>

## II. THE LACK OF ACCOUNTABILITY IN IMMIGRATION DETENTION

### A. Administrative Remedies in Detention

The Immigration and Nationality Act (“INA”) authorizes the detention of immigrants pending their removal hearings.<sup>98</sup> The INA

texas/article/ICE-paints-bleak-picture-of-its-detention-system-2209428.php; NOT TOO LATE, *supra* note 20, at 9-11; YEAR ONE REPORT CARD, *supra* note 20, at 12; Nina Bernstein, *U.S. to Overhaul Detention Policy for Immigrants*, N.Y. TIMES, Aug. 6, 2009, at A1 [hereinafter Bernstein, *U.S. to Overhaul*] (ICE director announced plan for a “truly civil detention system”); Nina Bernstein, *Ideas For Immigrant Detention Include Converting Hotels and Building Models*, N.Y. TIMES, Oct. 6, 2009, at A14.

94. “They will be able to keep their athletic shoes with laces,” said Joe Longoria, a supervisory detention and deportation officer for ICE. “That’s another dynamic not seen at other facilities.” Guillermo Contreras, *A New Kind of Detention Center for Immigrants*, SAN ANTONIO EXPRESS NEWS, Mar. 14, 2012, [http://www.my.sanantonio.com/news/local\\_news/article/A-new-kind-of-detention-center-for-immigrants-3404501.php](http://www.my.sanantonio.com/news/local_news/article/A-new-kind-of-detention-center-for-immigrants-3404501.php); see also Bernstein, *U.S. to Overhaul*, *supra* note 93; Ruthie Epstein, *ICE’s Detention Reform Promises—A Second Look*, HUFFINGTON POST (Mar. 28, 2012, 12:39 AM), [http://www.huffingtonpost.com/human-rights-first/ices-detention-reform-pro\\_b\\_1385513.html](http://www.huffingtonpost.com/human-rights-first/ices-detention-reform-pro_b_1385513.html). For a detailed analysis of the ICE “civil detention system,” see Noferi, *supra* note 21.

95. Kirk Semple & Tim Eaton, *Detention for Immigrants that Looks Less Like Prison*, N.Y. TIMES, Mar. 14, 2012, A17.

96. The Hutto detention center was previously labeled as a model facility, and several women subsequently reported acts of sexual abuse by detention guards. HUMAN RIGHTS WATCH, *supra* note 5, at 1-2 (“[I]n August 2009, the Obama administration announced plans to overhaul the immigration detention system. Hutto was a model for the detention reform plan that followed. Previously a family detention facility, Hutto was to become an all-female detention center. It was to be an example of the enhanced oversight ICE planned, and the ‘softer’ form of detention that was to reflect the non-criminal nature of immigration custody.”); Renee Feltz, *Guard’s Arrest Highlights Sexual Assault of Immigrant Detainees*, PBS (Aug. 27, 2010, 5:22 PM), <http://www.pbs.org/wnet/need-to-know/security/lax-regulations-lead-to-sexual-assault-of-immigrant-detainees/3149/>; Michelle Chen, *Women Detainees Sexually Abused as ICE Polices Itself*, COLORLINES (Aug. 25, 2010, 10:28 AM), [http://colorlines.com/archives/2010/08/women\\_detainees\\_sexually\\_abused\\_as\\_ice\\_polices\\_itself.html](http://colorlines.com/archives/2010/08/women_detainees_sexually_abused_as_ice_polices_itself.html).

97. DOW, *supra* note 6, at 138. INS officials have exploited the buffer of private-prison companies to shield themselves from accountability. For instance, former INS chief of detention George Taylor explained, “There’s no real governing body to drop the hammer when the hammer needs to be dropped.” *Id.*

98. 8 U.S.C. § 1226 (2006). DHS officials have repeatedly stated that the purpose of detention is to ensure that immigrants will not abscond and will appear for their

does not define the type of detention required, though it does authorize mandatory detention for immigrants with certain criminal convictions.<sup>99</sup> In response to complaints of detention conditions, the former Immigration and Naturalization Service and U.S. Attorney General drafted a set of “National Detention Standards.”<sup>100</sup> These standards were modeled off of the American Correctional Association Standards.<sup>101</sup> The National Detention Standards included guidelines in a variety of areas including medical care, hygiene, attorney access, mail, and telephone access.<sup>102</sup> The National Detention Standards are not binding regulations, and, therefore, a violation of a detention standard has little effect on the detention center and offers little relief to the individual detainee.<sup>103</sup>

In response to the criticism of the nonbinding standards, DHS drafted the Performance Based National Detention Standards.<sup>104</sup> These standards are also nonbinding; however, DHS created a list of “expected practices” that ICE facilities were required to maintain and “expected outcomes” that DHS could use to measure facilities’ adherence to the standards.<sup>105</sup> The expected outcomes and practices attempt to provide some accountability for deficient detention conditions; however, the standards remain nonbinding, nonregulatory, and unenforceable.<sup>106</sup> The Performance Based

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removal hearing. *See* Intergovernmental Service Agreement, *supra* note 58, at 2. Some scholars disagree and have found that detention exists to motivate the self-deportation of detainees. *See, e.g.,* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, N.C. L. REV. (forthcoming 2013).

99. 8 U.S.C. § 1226. DHS has stated that mandatory detention serves to protect the public from additional criminal activity, although the majority of mandatory detainees are low-level and nonviolent offenders such as individuals with simple drug possession offenses. Kalhan, *supra* note 27, at 48-56.

100. *2000 Detention Operations Manual*, ICE, <http://www.ice.gov/detention-standards/2000/> (last visited Mar. 9, 2013).

101. *See* HUMAN RIGHTS FIRST, *supra* note 7, at 15 (“The problem with the existing [detention] standards that we have is that they are based on the American Correctional Association standards. They are largely coming out of the penal world, and that’s not where I want to be. I want us to be in an immigration detention world.” - ICE Assistant Secretary John Morton, January 2010); *INS Hopes to Bring Uniformity to Detention Facilities’ Processes with Release of Comprehensive Standards*, 77 INTERPRETER RELEASES 1637, 1637 (2000).

102. *2000 Detention Operations Manual*, *supra* note 100.

103. *See* Steven Neeley, *Immigration Detention: The Inaction of the Bureau of Immigration and Customs Enforcement*, 60 ADMIN. L. REV. 729, 731 (2008).

104. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARD 2011 (2011), *available at* <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf> ; INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 40, at 87-88.

105. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 104, at 1.

106. INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 40, at 87-88 (stating that ICE’s performance-based standards “are not legally enforceable by detainees in court

National Detention Standards serve as internal benchmarks for DHS and do not provide detainees with an actionable claim. The standards are used primarily in ICE's annual review of each detention facility; however, the annual review process has not been effective as several facilities fail inspection and continue to house detainees.<sup>107</sup>

The Inter-American Commission on Human Rights ("IACHR") conducted a detailed investigation of ICE detention and deportation policies and found that the privatization of immigration detention hindered adherence to detention standards.<sup>108</sup> The IACHR report explained that the private contracts (and subcontracts) between ICE and private-prison companies "are the only legally binding instruments that dictate detention conditions."<sup>109</sup> Detention conditions themselves are unenforceable and, therefore, the only "force of law" given to detention conditions is in the contract where the private-prison company promises to adhere to the standards.<sup>110</sup> The IACHR report explains: "[T]here are no legal mechanisms, short of termination of the contract, whereby ICE can ensure compliance with detention standards. As a result, only those detention centers that have committed the most egregious violations of those standards, to the point of requiring termination of the contract, might face any consequences."<sup>111</sup> The report explained that as of 2009, only three contracts had been terminated.<sup>112</sup>

Detention standards also fail to provide accountability because

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or any other administrative judicial process").

107. The IACHR found that

ICE monitoring practices are not up to identifying violations of detention standards; do not provide detailed descriptions of the violations so that they can be brought to the attention of authorities; make no recommendations to find a solution; and that no follow-up is done to determine whether violations have decreased.

*Id.* at 88-91; *see also* TUMLIN, ET AL., *supra* note 50, at vi; OFFICE OF INSPECTOR GEN., DEPT OF HOMELAND SEC., ICE POLICIES RELATED TO DETAINEE DEATHS AND THE OVERSIGHT OF IMMIGRATION DETENTION FACILITIES 23 (2008), *available at* [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_08-52\\_Jun08.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_08-52_Jun08.pdf). A 2012 study of two detention centers in New Jersey revealed numerous detention standard violations. *See* FREEMAN & MAJOR, *supra* note 91, at 4, 18. Not only do these New Jersey facilities remain operational, but they are also expanding. *Id.* at 8-9. For more examples of detention centers that continue to house detainees despite flagrant violations of performance standards, *see* Nina Bernstein, *Ill and In Pain, Detainee Dies in U.S. Hands*, N.Y. TIMES, Aug. 13, 2008, at A1; Lynn Brezosky, *South Texas Detention Center to See a New Type of Resident*, SAN ANTONIO EXPRESS-NEWS, June 10, 2011, at 01B; *see also* Lin Li Qu v. Cent. Falls Det. Facility Corp., 717 F. Supp. 2d 233, 236 (D.R.I. 2010) (finding plaintiff's deceased husband was not provided medical care, but was pressured to withdraw his appeals and accept deportation).

108. INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 40, at 87-97.

109. *Id.* at 91 (citation omitted).

110. *Id.* at 91-92.

111. *Id.* at 92.

112. *Id.* (citation omitted).

they do not govern the care of all immigrant detainees.<sup>113</sup> The 2000 version of the National Detention Standards only applied to INS detainees housed at government owned SPCs.<sup>114</sup> This meant that the standards only covered approximately sixteen percent of the detained population.<sup>115</sup> The most recent version of the standards state that they apply to detainees at CDFs and that nondedicated IGSA facilities must have their own standards that “meet or exceed” the detention standards.<sup>116</sup> However, the applicability of the standards is unclear, as evidenced by ICE spokesperson Gillian Christensen’s recent remark that the standards do not apply to IGSA facilities.<sup>117</sup>

Regardless of its applicability, the detention standards have failed to include an enforcement mechanism whereby an immigrant detainee, or her representative, can obtain any redress for a detention standard violation.<sup>118</sup> There is no actionable claim, or even an administrative remedy.<sup>119</sup> The Performance Based National Detention Standards (“PBNDs”) created a grievance system that “protects a detainee’s rights and ensures that all detainees are treated fairly by providing a procedure for them to file both informal and formal grievances, which shall receive timely responses relating to any aspect of their detention.”<sup>120</sup> However, many detainees fail to file grievances because they are afraid of retribution by detention guards.<sup>121</sup> Those who do file grievances are not successful in resolving

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113. The 2011 revised standards state that an IGSA must have similar or equivalent standards; however, it is unclear how standards will be judged. The IACHR found that “the standards establish a certain margin of flexibility where some sections are concerned.” *Id.* at 88, 91-93; NAT’L IMMIGRATION FORUM, *supra* note 25, at 6.

114. *2000 Detention Operations Manual*, *supra* note 100.

115. Schiro, *supra* note 44, at 1450-51.

116. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 104, at 1.

117. *See* Rentz, *supra* note 90 (“ICE spokeswoman Gillian Christensen told FRONTLINE that the current ICE Performance Based National Detention Standards, which cover 50 percent of its detainee population, mirror many of the ‘most critical’ [Prison Rape Elimination Act (PREA)] provisions. She added that ICE is working on new standards that would contain even stronger PREA-related provisions. ‘ICE has zero tolerance for sexual abuse,’ she wrote in an e-mail.”).

118. Kalhan, *supra* note 27, at 51-52.

119. *See* Neeley, *supra* note 103, at 732-33, 740 (advocating for a claim under the Administrative Procedure Act in the absence of an alternative cause of action).

120. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 104, at 333.

121. The ACLU of Arizona reviewed five hundred grievances filed at two detention centers between 2005 and 2009 and found that only forty-six were approved. AM. CIVIL LIBERTIES UNION OF ARIZ., IN THEIR OWN WORDS 2, 21 (2011), available at <http://acluaz.org/sites/default/files/documents/detention%20report%202011.pdf>; *see also* TUMLIN ET AL., *supra* note 50, at 61-64; HUMAN RIGHTS WATCH, *supra* note 5, at 18-19. In 2009, ICE established the Office of Detention Oversight within its Office of Professional Responsibility to independently investigate detainee grievances. *ICE 2009 Fact Sheet*, *supra* note 20. Recent study of immigration detention centers in New Jersey revealed that many detainees were afraid to speak about detention center conditions because of “fear of targeting by guards.” FREEMAN & MAJOR, *supra* note 91,

their problem.<sup>122</sup>

Detainees who have suffered an act of physical and/or sexual abuse are instructed to file a complaint with the DHS Office of Civil Rights and Civil Liberties (“CRCL”).<sup>123</sup> CRCL is supposed to conduct investigations of abuse; however, in reality the office is not able to effectively investigate claims.<sup>124</sup> The primary purpose of CRCL is to propose big picture policy changes within DHS, and the office is not able to provide an effective accountability mechanism for individual cases of detainee abuse.<sup>125</sup>

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at 17. The study also explained that many detainees fail to submit written grievances because of their “lack of literacy or fluency in English.” *Id.*

122. One detainee explained, “[O]ur grievance system is a hoax . . . it’s [sic] 100% doesn’t work, it doesn’t get heard as if you never had wrote it. We wrote over 40 grievances and a whole year later we still haven’t received responses to any of them.” FREEMAN & MAJOR, *supra* note 91, at 20; *see also* AM. CIVIL LIBERTIES UNION OF GA., *supra* note 4, at 19 (noting that only six grievances out of the one hundred and sixty that were filed in a report of four facilities were “closed without any action” (citation omitted)); INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 40, at 119-20 (recognizing that “ICE’s grievance procedure has been systematically mismanaged”).

123. DHS Office for Civil Rights and Civil Liberties explains that its objective is to support the DHS “mission to secure the nation while preserving individual liberty, fairness, and equality under the law.” *About the Office for Civil Rights and Civil Liberties*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/about-office-civil-rights-and-civil-liberties> (last visited Mar. 9, 2013). “Under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, the Office for Civil Rights and Civil Liberties (CRCL) reviews and assesses information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by employees and officials of the Department of Homeland Security.” *File a Civil Rights Complaint*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/file-civil-rights-complaint> (last visited Mar. 9, 2013). The same process is used for human rights complaints under Executive Order 13107. OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, DEP’T OF HOMELAND SEC., HOW TO FILE A COMPLAINT WITH THE DEPARTMENT OF HOMELAND SECURITY 2 (2012), *available at* [http://www.dhs.gov/sites/default/files/publications/dhs-complaint-avenues-guide\\_10-03-12\\_0.pdf](http://www.dhs.gov/sites/default/files/publications/dhs-complaint-avenues-guide_10-03-12_0.pdf); OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, DEP’T OF HOMELAND SEC., FISCAL YEAR 2010 ANNUAL AND CONSOLIDATED QUARTERLY REPORTS TO CONGRESS 25, 29 (2011) [hereinafter 2010 REPORTS], *available at* <http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2010.pdf>.

124. DHS-CRCL’s statistics demonstrate their ineffectiveness. In FY 2010, ICE detained 360,000 individuals and only 195 individuals filed complaints with CRCL. 2010 REPORTS, *supra* note 123, at 49. This means that 0.3% of immigrant detainees filed complaints with CRCL. *See id.* The number of human rights reports detailing the abuse endured by immigrant detainees is staggering, and, therefore, it is apparent that the detainee population is simply not relying on CRCL to protect their rights.

125. *See generally* OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, DEP’T OF HOMELAND SEC., FISCAL YEAR 2011 ANNUAL AND 4TH QUARTER REPORT TO CONGRESS (2012), *available at* <http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2011-final.pdf> (describing its role as “support[ing] the Department of Homeland Security” and “[p]romoting respect for civil rights and civil liberties in policy creation and implementation by advising Department leadership”); personal observation by author of remarks by Kareem Shora at the Emerging Immigration Scholars and Teachers Conference held at American University Washington College of Law on May 20, 2011.

*B. Civil Remedies for Immigrant Detainees*

Although immigrant detainees are often held in criminal custody, or detention centers that replicate criminal conditions, immigrant detainees are technically detained in *civil*, not criminal, custody. Immigrant detainees share the same constitutional rights as pretrial detainees who are in criminal custody but are not serving a criminal sentence as punishment for a crime.<sup>126</sup> Immigrant detainees can “challenge the conditions of their confinement” pursuant to the Fifth Amendment Due Process clause.<sup>127</sup> Detainees who wish to challenge detention conditions, or pursue a cause of action based on an abusive experience, can file a claim pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>128</sup>

The *Bivens* ruling provides a private right of action for individuals whose constitutionally protected rights have been violated by federal officials.<sup>129</sup> The Court explained that “[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.”<sup>130</sup> In subsequent decisions, the Court clarified that the purpose of *Bivens* was to deter federal agents from acting in a manner that violated the Constitution.<sup>131</sup> However, the *Bivens* ruling has been widely criticized by conservative judges and legal scholars as an exercise of judicial activism.<sup>132</sup>

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126. See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (indicating that the Court will evaluate the constitutionality of civil pretrial detention under the Due Process Clause); see also Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1090 (1995); DOW, *supra* note 6, at 260 (explaining how immigration law is “subconstitutional” in nature); *American Gulag: Inside U.S. Immigration Prisons*, C-SPAN (July 9, 2004), <http://www.c-spanvideo.org/program/gulag>.

127. Taylor, *supra* note 126, at 1090.

128. 403 U.S. 388, 395-97 (1971) (holding that the violation of a person's Fourth Amendment rights by federal officers, acting under color of federal law, gives rise to a federal cause of action for damages for the unconstitutional conduct).

129. *Id.*; see also Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293-94 (1995) (arguing that the Constitution should be a self-executing document and the *Bivens* Court should not have deferred to Congress or state law).

130. *Bivens*, 403 U.S. at 392.

131. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (“The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.”); see also *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 485 (1994) (explaining that “the purpose of *Bivens* is to deter *the officer*” (citations omitted)).

132. In the *Malesko* dissent, Justices Stevens, Souter, Ginsburg, and Breyer accused the majority of reaching their decision based upon their disagreement with *Bivens*. “It is apparent . . . that the driving force behind the Court's decision is a disagreement with the holding in *Bivens* itself.” *Malesko*, 534 U.S. at 82 (Stevens, J., dissenting). Justices Scalia and Thomas did not hide their disdain of the *Bivens* ruling.

Perhaps in response to both the criticism of the *Bivens* ruling<sup>133</sup> and a politically conservative shift in the Court, the *Bivens* doctrine has been whittled away in recent years.<sup>134</sup> The Court has narrowed the scope of the *Bivens* doctrine<sup>135</sup> as well as expanded the grant of immunity.<sup>136</sup> The Court has particularly narrowed the *Bivens* doctrine in the context of private prisons by finding that private-prison companies (and their agents) are not governmental actors for purposes of a *Bivens* action.<sup>137</sup> As a result, the *Bivens* doctrine has been severely limited, if not entirely foreclosed, in the detention abuse context.

In *Correction Services Corporation v. Malesko*, the Supreme Court refused to extend *Bivens* liability to a private corporation operating a halfway house through a contract with the Bureau of Prisons (“BOP”).<sup>138</sup> The plaintiff argued that because the private corporation performed the services of the government, which was housing prisoners pursuant to a governmental criminal punishment, the private corporation should be liable in the same manner as a governmental entity.<sup>139</sup> The Court disagreed and held that there was no right of action against a private entity.<sup>140</sup> The Court also found

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*See id.* at 75 (Scalia, J., concurring). In their concurrence, they argued that “*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.” *Id.*

133. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 51-53 (1985) (stating that courts must “determine whether Congress or the framers specifically intended to create a federal right enforceable by judicial action” before recognizing a *Bivens* remedy.).

134. *See generally* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L. J. 65, 66 (1999) (arguing that holding federal officials personally liable is a legal fiction that contributed to “the low rate of recovery under *Bivens*”); Alexander A. Reinert, *Measuring Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010) (examining the successes of *Bivens* suits in relation to other constitutional torts); James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L. J. 117, 121 (2009) (arguing that in light of post-*Bivens* legislation, courts should expand availability of recovery from case-by-case evaluation to “presumptive rights to sue”).

135. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 389-90 (1983) (holding the *Bivens* remedy unavailable to a federal employee of NASA who was demoted following unfavorable comments critical of NASA policies); *Wilkie v. Robbins*, 551 U.S. 537, 554-55 (2007) (holding the *Bivens* remedy unavailable to owner of commercial guest ranch who was extorted by federal employees of the Bureau of Land Management).

136. *See, e.g.*, *Hui v. Castaneda*, 130 S. Ct. 1845, 1848 (2010) (holding that Public Health Service “officers and employees are not personally subject to *Bivens* actions for harms arising out of [actions within the scope of their employment]”).

137. *Malesko*, 534 U.S. at 70-74; *Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012).

138. *Malesko*, 534 U.S. at 63.

139. *Id.* at 66.

140. *Id.* at 74. The court was persuaded that the administrative remedies within the

that the deterrence function of *Bivens* was not relevant to a private corporation because the purpose of *Bivens* was to deter the bad behavior of an individual governmental actor.<sup>141</sup> The Court reasoned that it would be contrary to the intent of *Bivens* to focus deterrent efforts on a corporation, and not the individual tortfeasor.<sup>142</sup> The Court left open the question of whether or not an individual prisoner could file a *Bivens* action against a private-prison employee.

In *Minneeci v. Pollard*,<sup>143</sup> the Court answered the question left open by the *Malesko* ruling. The Court held that a prisoner at a private-prison company could not assert a *Bivens* claim against private-prison employees.<sup>144</sup> The plaintiff, Richard Lee Pollard, argued that the prison guards, employed by the Wackenhut Corrections Corporation, violated his Eighth Amendment right to be free from cruel and unusual punishment.<sup>145</sup> Pollard argued that he had sustained an injury after he “slipped on a cart left in the doorway of the prison’s butcher shop”.<sup>146</sup> The prison arranged for Pollard to have surgery; however, after his surgery, Pollard claimed the guards acted in a manner that caused him “the most excruciating pain” and “humiliat[ion].”<sup>147</sup>

The Court reasoned that the type of claim alleged by Pollard was one that was well covered by “traditional state tort law”.<sup>148</sup> The Court found that private-prison employees were not unlike employees of a “private firm” who could be sued by an individual for a tortious act.<sup>149</sup> The Court explained that a *Bivens* action was not necessary because *Bivens* was limited to cases where the plaintiff could not recover against the federal government because of sovereign immunity.<sup>150</sup> In

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BOP system were expansive and therefore a *Bivens* action was not necessary. *Id.*

141. *Id.* at 70, 74.

142. *Id.* at 70. (“The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations. . . . *Meyer* . . . made clear that the threat of suit against an individual’s employer was not the kind of deterrence contemplated by *Bivens*.”); see also *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 485 (1994) (“If we were to imply a damages action directly against federal agencies . . . there would be no reason for aggrieved parties to bring damages actions against individual officers. . . . [T]he deterrent effects of the *Bivens* remedy would be lost.”); *Malesko*, 534 U.S. at 71 (“This case is, in every meaningful sense, the same [as *Meyer*]. For if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury.”).

143. 132 S. Ct. 617 (2012).

144. *Id.* at 620.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 623.

149. *Id.* at 623-35.

150. *Id.* at 623. A prior case granting *Bivens* action to a prisoner could be distinguished because that case involved a federal employee that had immunity from state tort. In *Minneeci*, the prison guards were employees of a private-prison company

the case of private-prison companies, there is no sovereign immunity and therefore state courts offer an adequate remedy.<sup>151</sup>

In *Minnecci* and *Malesko*, the Court failed to adequately address the reality that private-prison companies perform a substitute government function.<sup>152</sup> Private-prison companies house immigrant detainees (and prisoners) under the auspices of the federal government and perform functions that federal agents used to perform.<sup>153</sup> By placing private-prison companies (and their employees) in a category separate and apart from those liable under *Bivens*, the Court is creating a fiction that a private-prison company is somehow distinct from a federal company.<sup>154</sup> Given the Court's decisions in *Minnecci* and *Malesko*, it is not surprising that the DHS is expanding its use of IGSA's and private-prison companies.<sup>155</sup> DHS and its contractors will be shielded from liability as long as private-prison companies continue to provide the majority of detainee services.

However, not all aspects of immigrant detention are privatized. In some detention centers, health care is directly administered by Public Health Service ("PHS") officers through the ICE Health Corps (formerly the Division of Immigration Health Services).<sup>156</sup> In a recent case involving horrific medical abuse of a detainee, the Court found

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and therefore the prisoner could bring state tort claims. *Id.*

151. *Id.*

152. In *Minnecci*, the Court rejected the argument that a private-prison company should be subject to *Bivens* liability because it functions as a "federal agent." *Id.* at 623-24. The Court failed to adequately explain *why* private-prison companies should not be viewed as government agents, and instead simply stated that there is a distinction between a corporation and a federal officer and, therefore, *Bivens* is inapplicable. *Id.* The Court's rationale is wholly unsatisfying.

153. See Intergovernmental Service Agreement, *supra* note 58, at 1 (illustrating the passing of custodial authority from the federal government to the Town of Farmville, contractually known as the "Service Provider.>").

154. In the *Bivens* decision, the Court rejected the idea that a state tort between two private individuals is akin to the tortious acts of a governmental agent. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391-92 (1971). The Court emphasized the element of power that comes from governmental employment and noted that this power status is not altered by the use of a private-prison company. *Id.* ("Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." (citations omitted)).

155. See, e.g., HUMAN RIGHTS FIRST, *supra* note 7, at 11 (listing new ICE beds opened—predominantly in ISGA facilities—since 2009).

156. See Intergovernmental Service Agreement, *supra* note 58, at 5 ("When communicable or debilitating physical problems are suspected, the detainee shall be separated from the detainee population, and immediately notify USPHS staff.>").

that PHS officers have absolute immunity from all liability, including acts that may violate a detainee's constitutional rights.<sup>157</sup> In that case, an immigrant detainee, Francisco Castaneda, argued that his constitutional rights had been violated when he was given ibuprofen, antibiotics, and a change of clothes as treatment for his advanced penile cancer.<sup>158</sup> Castaneda filed a *Bivens* action against the doctors who treated him while in detention; however, a unanimous Court found that the doctors had absolute immunity pursuant to 42 U.S.C. 233(a).<sup>159</sup> In its decision, the Court explained that it was not making a policy ruling; however, it did limit its decision to the plain language of the statute.<sup>160</sup>

The result of the Court's rulings in *Malesko*, *Minneci*, and *Hui* is that a majority of immigrant detainees are unable to pursue a *Bivens* action because the majority of detainee care is undertaken by private-prison companies and their employees. Immigrant detainees at some detention centers are treated by federal doctors in detention; however, the *Hui* case has effectively foreclosed the *Bivens* remedy for even these cases.<sup>161</sup>

Immigrant detainees can pursue claims under the Federal Tort Claims Act ("FTCA") for acts that were "caused by the negligent or wrongful act or omission" of federal employees.<sup>162</sup> The FTCA makes the government liable "under circumstances where the United States, if a private person, would be liable to the claimant."<sup>163</sup>

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157. *Hui v. Castaneda*, 130 S. Ct. 1845, 1851-54 (2010).

158. *Id.* at 1849.

159. *Id.* at 1854; see also Matthew Allen Woodward, *License to Violate the Constitution: How the Supreme Court's Decision in Hui v. Castaneda Exposes the Dangers of Constitutional Immunity and Revives the Debate over Widespread Constitutional Abuses in Our Immigration Detention Facilities*, 32 *HAMLIN J. PUB. L. & POL'Y* 449, 452-53 (2011).

160. *Hui*, 130 S. Ct. at 1854-55 ("In construing § 233(a) in petitioner's favor, we are mindful of the confines of our judicial role. Respondents' *amici* caution that providing special immunity for PHS personnel is contrary to the public interest. Respondents likewise contend that allowing *Bivens* claims against PHS personnel is necessary to ensure an adequate standard of care in federal detention facilities, and they further urge that permitting such actions would not endanger PHS' institutional interests as it would simply place PHS personnel in the same position as other federal employees who perform similar functions. We are required, however, to read the statute according to its text. Because § 233(a) plainly precludes a *Bivens* action against petitioners for the harms alleged in this case, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion." (internal citations omitted)).

161. *Id.*; see also Edwidge Danticat, *Detention Is No Holiday*, *N.Y. TIMES*, March 28, 2012, at A27 (explaining that *Hui v. Castaneda* further reduced accountability for detention mistreatment).

162. 28 U.S.C. § 2672 (2006).

163. *Id.* A FTCA claim does not impose individual liability on the government official because the claim is absorbed by the United States government. See *id.* at § 2674. A FTCA claim therefore becomes a claim against the United States government

However, FTCA claims are limited to the acts of federal government employees and cannot be filed against nongovernment independent contractors.<sup>164</sup> An overwhelming majority of immigrant detainees are served by private-prison companies who cannot be sued pursuant to the FTCA.<sup>165</sup>

Immigrant detainees retain the right to file claims in state courts; however, detainees are subject to the individual restrictions of state tort law, many of which may not be as generous as federal law.<sup>166</sup> In fact, the three states that hold a majority of the immigrant detainee population—Texas, Louisiana, and Arizona—have overly restrictive tort reform policies.<sup>167</sup> The issue then becomes whether a state court tort claim can adequately deter detention officials from acting in an abusive manner towards detainees.<sup>168</sup>

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as a whole, and not against the individual. *Id.* By contrast, a claim pursuant to *Bivens* is brought against the individual government officer directly, although the government will represent the individual and indemnify any losses. *See* Pillard, *supra* note 134, at 79 (noting that federal officials do not pay defense or compensation costs). The FTCA waives sovereign immunity in limited circumstances and allows individuals to file tort claims against the United States. 28 U.S.C. § 2672 (2006). Upon passage of the FTCA in 1946, Congress explained that the purpose of the FTCA was “to provide for increased efficiency in the legislative branch of the Government.” S. REP. NO. 1400, at 1 (1946). In examining the efficacy of the FTCA, the Supreme Court explained that an action exists only if the state where the misconduct took place would allow the action to proceed. *Carlson v. Green*, 446 U.S. 14, 23 (1980).

164. Note, *Improving the Carceral Conditions of Federal Immigrant Detainees*, 125 HARV. L. REV. 1476, 1491 (2012).

165. Furthermore the FTCA is not as an effective of a deterrent as a *Bivens* action. In *Carlson*, the Supreme Court explained that “[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy.” *Carlson*, 446 U.S. at 21. *But see* Pillard, *supra* note 134, at 65 (describing individual liability in *Bivens* actions as “fictional”).

166. *Improving the Carceral Conditions of Federal Immigrant Detainees*, *supra* note 164, at 1489.

167. *See, e.g.*, Frank L. Maraist & Thomas C. Galligan, Jr., *Buying Caesar: Civil Justice Reform and the Charging Face of Tort Law*, 71 TUL. L. REV. 339 (1996) (describing various tort reforms passed in Louisiana); David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 4 (2007) (describing tort reform in Texas and noting that “Texas is one of the states—perhaps *the* state—in which tort reformers have had the most success”).

168. In *Bivens*, the Court rejected the idea that state court remedies would be sufficient to address a violation of the Fourth Amendment. The Court explained that state laws regarding privacy and trespass (the issue in *Bivens*) may be “inconsistent or even hostile” thus resulting in the lack of protection of the Fourth Amendment. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971). The same is true in immigration detention. State tort laws often do not protect the rights of immigrant detainees to the same extent that constitutional protections could. For example, a *Bivens* action based on the claim that detention conditions rise to the level of punishment impermissible by the due process clause of the Fifth Amendment is not one that is generally covered by state law. *Id.* at 395 (“The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an independent claim both

*C. The Experiences of John, Francisco, and Mary*

The lack of accountability for acts of abuse in the current administrative and civil structures can best be understood through the real life experiences of immigrant detainees. The following stories exemplify the abusive and dehumanizing experiences of the detained population as well as the lack of accountability for acts of abuse. The three stories provide examples of physical, medical, and sexual abuse as well as explain challenges faced through the privatization of immigration detention in a SPC, CDF, and IGSA.

1. John's Experience with Physical Abuse

John is a former "lost boy" from the Darfur region of Sudan.<sup>169</sup> When he was fifteen years old, the Janjaweed rebel group raided his village, kidnapped several young boys, and forced them to join the Sudanese People's Liberation Army. John's mother was killed in the raid, and John was captured by the Janjaweed rebels. John was tortured, but he managed to escape to a refugee camp in the Democratic Republic of the Congo ("DRC"). John entered the United States in 1998. He lived with an African family in Atlanta, Georgia, and attempted to make a life for himself in the United States.<sup>170</sup> John is a shy, soft-spoken young man who, in his struggle to find an identity for himself, adopted some of the characteristics of the hip-hop inspired African American culture. He braided his hair, and like many young African American men, he had a metal dental grill in his mouth.<sup>171</sup> Although he appeared to be just like other African American men, John was an undocumented immigrant from Sudan and was in danger of deportation.

In August 2006, ICE officers came to John's home and took him into immigration custody.<sup>172</sup> He was detained at a facility in Alabama for two weeks and then transferred to the Port Isabel Detention

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necessary and sufficient to make out the plaintiff's cause of action."); *see also* Davis v. Passman, 442 U.S. 228, 245 (1979) (applying *Bivens* action because plaintiff lacked any other remedy for constitutional violation). In the case of immigration detention, the Court has failed to analyze whether immigrant detainees lack any other remedy for the constitutional violation. They retain the right to file a claim in state court for a simple tort, but their right to claim a remedy for the *constitutional* violation goes unfulfilled. *Improving the Carceral Conditions of Federal Immigrant Detainees*, *supra* note 164, at 1486-89. Detention officials are therefore free to abuse immigrant detainees without punishment or consequence.

169. John Doe Affidavit (2009) (on file with author) (John is a pseudonym for a detainee the author interviewed in 2009). The following narrative consists of the author's recollections from the interview and details from John's Affidavit.

170. John Doe Affidavit, *supra* note 169, at ¶¶ 1-8.

171. See Vanessa E. Jones, *Put Your Money Where Your Mouth Is*, BOS. GLOBE, Jan. 31, 2006, at C1.

172. John Doe Affidavit, *supra* note 169, at ¶ 10.

Center<sup>173</sup> in Los Fresnos, Texas. While in detention, John applied for political asylum, withholding of removal, and relief under the Convention Against Torture.<sup>174</sup> John did not have the funds to hire an immigration attorney, and he represented himself in his removal proceedings.<sup>175</sup>

In May 2007, after being detained for close to a year, John was assaulted by several detention guards. The altercation arose out of a dispute over the television set in the detention facility. In order to accommodate both Spanish- and English-language detainees, the facility sets time blocks where either Spanish television programming or English programming is shown. John was watching an English television program when one of the guards switched the channel to a Spanish program during the time allotted for English programming. John asked the guard to change the channel back, and in response, the guard called a supervising lieutenant. The Lieutenant would not hear John's explanation. He and several additional guards escorted John to a small room outside the dormitory.<sup>176</sup>

Once in that room, the Lieutenant pushed John to the ground and ordered the guards to handcuff John and take him to the processing area.<sup>177</sup> The guards forced John's hands behind him, handcuffed him, and then carried him horizontally outside the dormitory structure. Along the way, John asked that his handcuffs be loosened. In response, the detention guards dropped John on the concrete floor and started kicking him. They kicked John in his face, legs, and mouth. They called him a "nigger," "moreno,"<sup>178</sup> and said that he was "black and stupid."<sup>179</sup> As they kicked him, they said that he "was pretending to be American, with his grill, but he was a stupid immigrant."<sup>180</sup>

After the assault, John laid on the ground for ten minutes while a DHS van was brought to collect him. Three guards picked John up off the ground and threw him into the back of the van. John landed

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173. See *Port Isabel Detention Center*, IMMIGR. DETENTION JUST. CENTER, <http://www.immigrationdetention.org/wiki/port-isabel-detention-center/> (last visited Mar. 9, 2013).

174. John Doe Affidavit, *supra* note 169, at ¶ 11.

175. See *id.*

176. *Id.* at ¶¶ 12-14.

177. The processing area is where detainees are taken for disciplinary violations.

178. Tomas Almaguer, *Race, Racialization and Latino Populations in the United States*, in RACIAL FORMATION IN THE TWENTY-FIRST CENTURY 143, 151 (Daniel Martinez HoSang et al. eds., 2012) (explaining that the Mexican American community uses the term "moreno" as a derogatory slur referring to the African American population).

179. John Doe Affidavit, *supra* note 169, at ¶ 16

180. *Id.*

on his left hip and left ring finger. John was taken to the processing area of the detention center by ICE officials. Two ICE officials carried John into the processing area because he could not walk. John was held in a solitary confinement unit reserved for detainees with disciplinary issues.<sup>181</sup>

John remained in solitary confinement for three days after the assault. ICE officers took a statement from John, but told him that because there was no proof of the attack, there was nothing they could do. They suggested that John file a grievance against the Lieutenant and the other guards. John continued to fight his immigration case, but his applications were denied and in November 2007 he was ordered removed.

John was in a lot of pain after the assault, and he was given pain medication by the medical staff. He could barely walk, and he repeatedly asked for an x-ray or to be taken to a clinic outside the facility, but his requests were denied. Instead, John was given daily anti-inflammatory medicines, ibuprofen, and muscle relaxants. He took these medications twice a day for over a year.<sup>182</sup>

Finally after two years in detention, John was released in May 2008 because DHS could not remove him to Sudan. After his release, John visited a local hospital where it was confirmed that he had in fact suffered a severe injury to his hip and jaw. John filed a pro se civil law suit in Cameron County, Texas, against the lieutenant who assaulted him; however, he did not receive a response.<sup>183</sup>

The Port Isabel Detention Center is a government owned service processing center.<sup>184</sup> Like many service processing centers, the security guards are employed by a private-prison company.<sup>185</sup> The security company at Port Isabel, Asset Protection and Security Services, maintains a contract with DHS.<sup>186</sup> Asset employed guards oversee every aspect of detainee life, including escorting them to various parts of the facility, overseeing their activity in the detainee pods, and communicating messages to ICE deportation officers.<sup>187</sup> Asset employed guards are the first line of communication between immigrant detainees and the rest of the world. The medical department at Port Isabel is comprised of military commissioned

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181. *Id.* at ¶¶ 17-20.

182. *Id.* at ¶¶ 27-28.

183. *Id.* at ¶¶ 29-31

184. COMM'N ON ACCREDITATION FOR CORRECTIONS, *supra* note 69, at 2-3.

185. *Id.* at 5; *see also* Flynn & Cannon, *supra* note 48, at 15.

186. *See* COMM'N ON ACCREDITATION FOR CORRECTIONS, *supra* note 69, at 5. ("The Port Isabel Detention Center has a contract with uniformed security services from Asset Protection and Security Services . . . since 2001.")

187. The author was a staff attorney with the ProBAR in Harlingen, Texas, from March 2007 to March 2009 and visited the Port Isabel Detention Center on a daily basis during that time.

officers of the United States Public Health Service and private contractors.<sup>188</sup> There are twenty-nine medical staff members at Port Isabel, eighteen of which are USPHS officers, and eleven are contract employees.<sup>189</sup>

John's experience at Port Isabel is not unique.<sup>190</sup> There have been several reports of abuse at the facility, including sexual abuse and harassment.<sup>191</sup> In March 2009, detainees at Port Isabel engaged in a hunger strike to protest conditions.<sup>192</sup> The Port Isabel Detention center is located in an isolated, rural area, far from any major U.S. metropolitan center.<sup>193</sup> It is located about 360 miles south of Houston, Texas, and about thirty miles north of the Mexican border.<sup>194</sup> Detainees are transferred to Port Isabel from major urban areas such as New York, New York, and Boston, Massachusetts.<sup>195</sup> The transfer of detainees from urban areas to isolated rural areas amplifies the confusion and vulnerability of immigrant detainees at Port Isabel.<sup>196</sup> Detainees are often separated far from family, attorneys, and other networks of support.<sup>197</sup>

In John's case, he was transferred from Atlanta, Georgia, and did not have legal representation. After the assault, John attempted to file a grievance for medical care and assault; however, he was not successful.<sup>198</sup> Unfortunately, John's experience with the grievance

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188. COMM'N ON ACCREDITATION FOR CORRECTIONS, *supra* note 69, at 6.

189. *Id.*

190. See TONY HEFNER, *BETWEEN THE FENCES: BEFORE GUANTANAMO, THERE WAS THE PORT ISABEL SERVICE PROCESSING CENTER* 17-18 (2010); KAHN, *supra* note 78, at 58.

191. See generally HEFNER, *supra* note 190; KAHN, *supra* note 78; HUMAN RIGHTS WATCH, *supra* note 5; see, e.g., *Former Immigration Detention Center Guard Sentenced*, VALLEY CENTRAL.COM (Apr. 8, 2010, 11:11 AM), <http://www.valleycentral.com/news/story.aspx?id=441070#>; Press Release, Dep't of Justice, Office of Pub. Affairs, *Detention Officer Sentenced for Repeated Sexual Abuse of Detainees* (Apr. 7, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crt-380.html>.

192. Melissa Del Bosque, *Point of No Return: With Thousands of Legal Residents Locked Up Indefinitely, Far from Home, Texas' Immigrant Detention Centers Are Boiling Over*, TEX. OBSERVER, Mar. 19, 2010, at 6.; Lynn Brezosky, *Detention Center on Cusp of Change*, SAN ANTONIO EXPRESS NEWS, Mar. 8, 2010, at 11A.

193. See *Port Isabel Service Processing Center*, ICE HEALTH SERVICES CORPS, <http://www.icehealth.org/facilities/portisabel.shtm> (last visited Mar. 9, 2013).

194. *Id.*

195. Del Bosque, *supra* note 192 (discussing the various prior locations of detainees and noting that "many detainees in Texas have been relocated from urban areas in the Northeast").

196. See HUMAN RIGHTS WATCH, *LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES* 1-5 (2009) (discussing the hardships detainees endure as a result of being transferred).

197. See HUMAN RIGHTS WATCH, *A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES* 1 (2011).

198. John Doe Affidavit, *supra* note 169, at ¶¶ 25-30.

process is not unique.<sup>199</sup> The ACLU of Arizona recently reported that immigrant detainees failed to file grievances because they feared retribution from guards.<sup>200</sup> Still others claimed that they would request grievance forms from guards and would not receive them for weeks. For detainees under threat of deportation, a few weeks could mean that they would no longer be detained at the facility. Furthermore, the grievance procedure itself is questionable because detainees are forced to file them through security guards that might themselves be the ones creating the abusive environment.<sup>201</sup>

In John's case, there was no effective administrative procedure that he could use to report the assault, and as a result, the guards continued to work at the facility and did not suffer any apparent consequence. The guards who assaulted John continued to work at Port Isabel, and John continued to see them in the facility.<sup>202</sup>

The most recent version of the Performance Based National Detention Standards contains a section on sexual and physical assault, with directives to the detention center and contract workers; however, there is no accountability mechanism. The detention standards state, "[I]f sexual abuse or assault of any detainee occurs, the medical, psychological, safety and legal needs of the detainee shall be promptly and effectively addressed."<sup>203</sup> However, the standards do not provide for any remedy if the detainee's assault is not promptly or effectively addressed.<sup>204</sup> A victim of physical assault cannot use the detention standards as an actionable claim if his or her needs are not addressed by the facility or by DHS.<sup>205</sup> The

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199. A detainee's case "ending in a mistrial is significant because it says a lot about holding detention officers accountable, which often does not happen within the detention system, said Harlingen immigration attorney Jodi Goodwin, who works with many clients held at the Port Isabel Detention Center. 'I have tons and tons of clients that file grievances and nothing ever comes from those grievances,' Goodwin said." Jazmine Ulloa, *One Man's Battle with Immigration Detention Echoes a Multitude of National Concerns*, BROWNSVILLE HERALD, Mar. 28, 2010.

200. The ACLU of Arizona reviewed five hundred grievances filed at two detention centers between 2005 and 2009 and found that only forty-four were approved. AM. CIVIL LIBERTIES UNION OF ARIZ., *supra* note 121, at 20-21.

201. *Id.* at 13, 20.

202. *See* John Doe Affidavit, *supra* note 169.

203. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 104, at 130.

204. The "Performance Based National Detention Standards" differ from the prior National Detention Standards because they have "expected outcomes" which the facility must comply with. However the standards fail to specify what would occur if a facility fails to meet the expected outcome. Moreover, it is unclear who determines whether or not the specific outcome has been met. In the past, detention standards were used primarily by ICE, the ABA, and correctional agencies in their inspection process. The inspection process has been criticized for announcing an inspection ahead of time and DHS has been criticized for continuing to allow a facility to operate despite the failure of an inspection. *See* HUMAN RIGHTS FIRST, *supra* note 7, at 15-17.

205. Unfortunately, physical abuse in immigration detention is not an uncommon

standards operate as general guidelines for a detention facility; however, because they do not provide an enforcement mechanism for the individual detainee, they act as a wish list of preferential standards and do not provide any accountability for abuse.

John filed repeated requests for medical assistance after the assault; however, he did not receive adequate medical care.<sup>206</sup> The applicable detention standards at the time stated that “[e]very facility will provide its detainee population with initial medical screening, cost-effective primary medical care, and emergency care. The [Officer in Charge] will also arrange for specialized health care, mental health care, and hospitalization within the local community.”<sup>207</sup> The most recent detention standards expanded the medical standard by including “[m]edically necessary and appropriate medical, dental and mental health care and pharmaceutical services,” “[s]pecialty health care,” and “[t]imely responses to medical complaints.”<sup>208</sup> However, the medical standards do not provide an enforcement mechanism whereby a detainee can obtain a remedy for a violation of a detention standard.<sup>209</sup>

John did not file a claim in federal court; however, he would have been unsuccessful if he had.<sup>210</sup> Although John was housed in a government owned Service Processing Center, he would be unsuccessful in a *Bivens* action because the guards who attacked him were employees of a private-prison company and cannot be found

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occurrence. As a detainee in New Jersey explained,

One person up to last week was in lock up with his face swollen, and scratches all over he was kicked repeatedly and drug to lock-up and given medication until his bruises and cut's healed. . . . We are crying out for help and concern for our health and well-being and life. Its like a third-world country in this facility and we lack proper judgment watching over us . . . . Physical and verbal threats on a daily basis by staff must be stop.

FREEMAN & MAJOR, *supra* note 91, at 19 (internal quotation marks and citation omitted).

206. John Doe Affidavit, *supra* note 169, at ¶¶ 24, 28.

207. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, INS DETENTION STANDARD (2000), available at <http://www.ice.gov/doclib/dro/detention-standards/pdf/medical.pdf>.

208. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 104, at 236. The standard does not define “medically necessary,” “appropriate,” “specialty health care,” or “timely responses.”

209. Although DHS has revised and expanded the most recent detention standards, they have repeatedly opposed calls for enforceable detention standards. Enforceable detention standards could create some accountability in the detention system; however, DHS prefers to maintain a system whereby they (not the detainee) retain oversight of the facility. See Neeley, *supra* note 103, at 740-41.

210. John attempted to file a state tort claim in the local Cameron County, Texas court; however, he never received a response from the court. John was unrepresented by legal counsel and as a pro se claimant, it is possible that his claim was rejected. It is also possible that John’s tort claim was never received by the court as outgoing mail is a constant problem in detention centers. See John Doe Affidavit, *supra* note 169, at ¶ 30; TUMLIN ET AL., *supra* note 50, at 40.

liable for a constitutional tort.<sup>211</sup> John would also be unsuccessful in pursuing a *Bivens* action against the private-prison company itself.<sup>212</sup> Furthermore, John would not be successful in a FTCA action against the prison guards because the FTCA does not authorize suits against independent contractors.<sup>213</sup>

John's federal suit against the medical staff at Port Isabel would similarly be foreclosed. The medical staff at Port Isabel is employed by either the Public Health Service or private contractors.<sup>214</sup> A *Bivens* action against the Public Health Service medical staff would be foreclosed because the Court has ruled that employees of the PHS have absolute immunity pursuant to 42 U.S.C. § 233(a).<sup>215</sup>

The only civil or administrative accountability mechanism in place for an act of physical abuse at the Port Isabel Detention Center is a state tort claim against the private guards or a FTCA claim against the federal officers (both medical staff and ICE agents). The contractors would escape liability. In a recent Harvard Law Review article, the editors argued that contractors should be held liable for the abuse of immigrant detainees; however, this would require congressional action, which is unlikely to occur anytime in the near future.<sup>216</sup> In the limited FTCA claim that is available, the government would be substituted for the tortfeasor, so the individual officer would not be held personally liable for an act of abuse.<sup>217</sup>

John's experience demonstrates that the deterrent effect that the Court envisioned in a *Bivens* action is lost in the immigration detention context.<sup>218</sup> There is no deterrence to dissuade officers from engaging in acts of physical violence against detainees, and there is no accountability for those who harm detainees. Physical abuse is a crime that goes unpunished in immigration detention.

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211. See *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012).

212. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001).

213. *Improving the Carceral Conditions of Federal Immigrant Detainees*, *supra* note 164, at 1492-93.

214. See *Port Isabel Service Processing Center*, *supra* note 193.

215. *Hui v. Castaneda*, 130 S. Ct. 1845, 1854 (2010). The Court's ruling narrowly applied to employees of the PHS; however, the primary doctor, Dr. Esther Hui, was a government contractor and not a commissioned officer in the PHS. Still, the Court found that she should have the benefit of absolute immunity. *Id.* It is unclear whether medical contractors working with PHS doctors would have the benefit of immunity as per the Court's ruling in *Hui*.

216. *Improving the Carceral Conditions of Federal Immigrant Detainees*, *supra* note 164, at 1487.

217. See *id.* at 1491.

218. *Corr. Servs. Corp. v. Malesko*, 535 U.S. 61, 70 (2001) (stating the "purpose of *Bivens* is to deter individual federal officers from committing constitutional violations").

## 2. Francisco's Experience with Medical Abuse

Francisco Castaneda entered the custody of the Department of Homeland Security ("DHS") at the San Diego Correctional Facility (also known as the Otay Mesa Contract Detention Center) in the beginning of March 2006.<sup>219</sup> Like the Port Isabel Detention Center, the San Diego facility is located in a rural part of the country. Detainees are often transferred from urban areas in California to San Diego, although the distance of transfer is not as drastic as the transfer to Texas. The majority of immigrant detainees are from California or the Southwest.<sup>220</sup> The San Diego facility is a Contract Detention Center that is owned and operated by the Correctional Corporation of America.<sup>221</sup>

Immediately upon his arrival, Francisco informed the ICE medical staff that a "lesion on his penis was becoming painful, growing in size, and exuding discharge."<sup>222</sup> The next day, an ICE physician's Assistant, Lieutenant Anthony Walker, examined him. Mr. Walker's initial treatment plan called for an outside urology consult and a request for a biopsy "ASAP."<sup>223</sup>

On April 11, 2006, "[a] Treatment Authorization Request ('TAR') was filed with the Division of Immigration Health Services ('DIHS'), requesting approval for a biopsy and circumcision."<sup>224</sup> "The TAR noted that Castaneda's penile lesion had grown, that he was experiencing pain at a level 8 on a scale of 10, and that the lesion had a 'foul odor.'<sup>225</sup> On May 31, 2006, "DIHS approved the TAR, authorizing the biopsy, urology consult, and [surgical follow-up]."<sup>226</sup>

On June 7, 2006, an outside specialist, oncologist John

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219. *Hui*, 130 S. Ct. at 1848.

220. *See Transfers of ICE Detainees from the San Diego (Otay-Mesa) Contract Correctional Facility*, TRAC IMMIGR., <http://trac.syr.edu/immigration/detention/200803/CCASDCA/tran/> (last visited Mar. 11, 2013) (stating that the majority of detainees at the San Diego (Otay-Mesa) Contract Correctional Facility arrived the day they were detained by ICE).

221. *CCA Facility Locations*, CORR. CORP. OF AM., <http://www.cca.com/facilities> (last visited Mar. 11, 2013).

222. *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1281 (C.D. Cal. 2008).

223. Lieutenant Walker indicated that because of Mr. Castaneda's family history of cancer, penile cancer needed to be ruled out. *Id.*

224. *Id.* The "TAR" form is the health service authorization form that detention centers are required to send to ICE headquarters in Washington, DC to get approval for a medical treatment. ICE headquarters employs nurses who review TAR forms in Washington, D.C., and make decisions about whether or not the healthcare service will be authorized. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., AGE DETERMINATION PRACTICES FOR UNACCOMPANIED ALIEN CHILDREN 1 (2010). In Mr. Castaneda's case, the ICE nurses decided that the biopsy was an elective treatment. *Castaneda*, 538 F. Supp. 2d at 1282.

225. *Castaneda*, 538 F. Supp. 2d at 1281.

226. *Id.*

Wilkinson, stated that Mr. Castaneda needed an “urgent urologic[al] assessment of biopsy and definitive treatment.”<sup>227</sup> Dr. Wilkinson explained: “I have offered to admit patient for a urologic consultation and biopsy. Physicians [at the correctional facility] wish to pursue outpatient biopsy, which would be more cost effective. They understand the need for urgent diagnosis and treatment.”<sup>228</sup> Dr. Wilkinson spoke to Dr. Esther Hui at this time, and Dr. Hui was aware that Francisco had “a penile lesion that needs to be biopsied”; however, she stated that “DIHS would not admit him to a hospital because DIHS considered a biopsy to be an ‘elective outpatient procedure.’”<sup>229</sup>

On June 12, 2006, Francisco filed a grievance asking for the biopsy recommended by Dr. Wilkinson, but it was denied. DIHS records from June 23, 2006 state “that [Francisco’s] penis was ‘getting worse, more swelling to the area, foul odo[r], drainage, more difficult to urinate, bleeding from the foreskin.’”<sup>230</sup> One month later, DIHS records indicated that his penis was getting worse; however, the records “claimed to have no idea what could be causing Castaneda’s ailment.”<sup>231</sup> On the same day, Lieutenant Walker noted that there was no “emergent need” for any treatment.<sup>232</sup>

“[T]he next day[,] a TAR was submitted seeking Emergency Room (‘ER’) evaluation and in-patient treatment for [Francisco].”<sup>233</sup> The TAR noted: “There is now bleeding, drainage, malodorous smell and the lesion now appears to be ‘exploding’ for lack of better words, definitely macerated.”<sup>234</sup> Francisco’s TAR was granted, and he was taken to the Scripps Mercy Chula Vista Hospital. He was not taken to the prior oncologist, Dr. Wilkinson, who was familiar with his condition. A doctor at the hospital, Dr. Daniel Hunting, did not perform a biopsy and instead diagnosed Francisco with genital warts. Based on Dr. Hunting’s diagnosis (rather than Dr. Wilkinson’s), DIHS “declined to order a biopsy,” and on July 26, 2006, ICE instructed “that ‘while a surgical procedure might be recommended long-term, that does not imply that the Federal Government is obligated to provide that surgery if the condition is not threatening to life, limb or eyesight.’”<sup>235</sup>

On August 11, 2006, Lieutenant Walker again submitted a TAR requesting a biopsy and circumcision by another outside urologist,

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227. *Id.* at 1282 (emphasis omitted).

228. *Id.* (emphasis omitted).

229. *Id.* (emphasis omitted).

230. *Id.* (second alteration in original).

231. *Id.*

232. *Id.* (emphasis omitted).

233. *Id.*

234. *Id.* at 1283.

235. *Id.*

Dr. Masters.<sup>236</sup> The TAR was approved, and “Dr. Masters recommended circumcision, which would at once relieve the ‘ongoing medical side effects of the lesion including infection and bleeding’ and ‘provide a biopsy.’”<sup>237</sup> Lieutenant Walker mischaracterized Dr. Master’s treatment plan as “elective,” and on August 24, 2006, DIHS denied Francisco’s request for a circumcision.<sup>238</sup>

On August 26 and 28, Francisco received medical attention concerning stress and insomnia.<sup>239</sup> He “was prescribed an *antihistamine* as treatment.”<sup>240</sup> On August 30, 2006, Francisco received a letter explaining “any surgical intervention for the condition would be elective in nature” and therefore would not be approved by DIHS.<sup>241</sup>

On September 8, 2006, Francisco sent a letter to the detention center explaining that he had a lot of pain and was having discharge. ICE noted that his “treatment was ibuprofen” and it “was having ‘no effect’ on his pain.”<sup>242</sup> By October 17, 2006, DIHS knew Francisco “was bleeding from his penis.”<sup>243</sup> On October 23, 2006, Walker submitted a TAR for the circumcision surgery, but it was denied because “circumcisions are not a covered benefit.”<sup>244</sup> On November 9, 2006, DIHS noted that Francisco’s symptoms had worsened, and in a report they wrote that “he constantly ha[d] blood and discharge on his shorts” and “complain[ed] of a swollen rectum which he state[d] ma[de] bowel movements hard.”<sup>245</sup> From November 14 through 15, 2006, Francisco reported another penile lesion and explained “he cannot stand and urinate because the urine ‘sprays everywhere’ and he cannot direct the stream.”<sup>246</sup> For treatment, DIHS requested seven clean boxer shorts per week for Francisco.<sup>247</sup>

In December 2006, Francisco was moved to the San Pedro Service Processing Center, where “ACLU lawyers began to advocate on his behalf.”<sup>248</sup> Soon after, DIHS granted approval of Francisco’s TAR for an appointment with a Dr. Lawrence Greenberg who “also recommended a circumcision and biopsy.”<sup>249</sup> On January 24, 2007, a

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236. *Id.* at 1284.

237. *Id.*

238. *See id.*

239. *Id.*

240. *Id.* (emphasis added).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 1285.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

TAR for another urology consult was approved. On January 25, Dr. Asghar Askari stated that Francisco “most likely [had] penile cancer.”<sup>250</sup>

ICE finally approved Francisco’s biopsy for February 2007; however, he was released from custody a few days prior to the procedure. On February 8, 2007, Francisco went to the emergency room at Harbor-UCLA Hospital where he was diagnosed with squamous cell carcinoma and metastatic cancer. His penis was amputated on February 14, 2007, and he soon began undergoing chemotherapy. He passed away on February 16, 2008.<sup>251</sup>

Prior to his death, Francisco filed a *Bivens* action alleging that doctors and medical staff violated his Eighth Amendment right to be free from cruel and unusual punishment.<sup>252</sup> The doctors alleged that they were “absolutely immune from liability.”<sup>253</sup> A Federal District judge disagreed with the officials and found them liable. District Court Judge Pregerson stated that the abuse by the detention doctors “appears to be . . . one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered.”<sup>254</sup> In a footnote, Judge Pregerson wrote:

Plaintiff has submitted powerful evidence that Defendants knew Castaneda needed a biopsy to rule out cancer, falsely stated that his doctors called the biopsy “elective”, and let him suffer in extreme pain for almost one year while telling him to be “patient” and treating him with Ibuprofen, antihistamines, and extra pairs of boxer shorts. Everyone knows cancer is often deadly. Everyone knows that early diagnosis and treatment often saves lives. Everyone knows that if you deny someone the opportunity for an early diagnosis and treatment, you may be—literally—killing the person. Defendants’ own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker “cruel” is inadequate.<sup>255</sup>

The Ninth Circuit affirmed the District Court and the Supreme Court reversed.<sup>256</sup> The Supreme Court held that the Public Health officials were absolutely immune from all liability, including constitutional violations, pursuant to 42 U.S.C. § 233(a).<sup>257</sup> The immunity statute, 42 USC § 233(a), shields Public Health Service

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250. *Id.*

251. *Id.*

252. *Id.* at 1286.

253. *Id.*

254. *Id.* at 1295.

255. *Id.* at 1298 n.16.

256. *Castaneda v. United States*, 546 F.3d 682, 702 (9th Cir. 2008); *Hui v. Castaneda*, 130 S. Ct. 1845, 1855 (2010).

257. *Hui*, 130 S. Ct. at 1854-55.

officials from all liability for acts occurring within the scope of their employment.<sup>258</sup> The Supreme Court in *Hui* did not reach the issue of whether or not the doctors demonstrated a deliberate indifference to Mr. Castaneda's medical needs because they were foreclosed by a plain language interpretation of the immunity statute.<sup>259</sup>

Francisco retained the ability to pursue a claim pursuant to the FTCA. However, the FTCA substitutes the federal government as the defendant, and as a result, the individual tortfeasor is not held accountable for their actions.<sup>260</sup> In Francisco's case, the federal government settled his FTCA claim and awarded a \$1.95 million judgment to his estate.<sup>261</sup> While this is a substantial settlement amount, the doctors who engaged in the tortious act were not held accountable. The primary doctor in the case, Dr. Esther Hui, continues to practice medicine and her California medical licensing profile does not indicate any sanctions or reports of malpractice.<sup>262</sup>

The administrative remedies in immigration detention offered little relief to Francisco and did not create an effective deterrence for medical staff. The most recent detention standards have been revised to expand the level of medical care given to immigrant detainees; however, there is no enforcement mechanism if the standard is not followed.<sup>263</sup> The standard does provide for a grievance procedure for detainees; however, the facts of Francisco's case demonstrate the ineffectiveness of the grievance process.<sup>264</sup> Francisco submitted *numerous* grievance requests, some of which stated that he was

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258. 42 U.S.C. § 233(a) (2006).

259. *Hui*, 130 S. Ct. at 1848. Since San Diego is a Contract Detention Center, Francisco would be foreclosed from pursuing a *Bivens* actions against the guards or other staff of the facility pursuant to *Malesko* and *Minnecci*. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001); *Minnecci v. Pollard*, 132 S. Ct. 617, 626 (2012).

260. *Hui*, 130 S. Ct. at 1853.

261. *Government Settles with Family over Immigrant's Care*, EVANSVILLE COURIER & PRESS (Apr. 7, 2011, 7:43 PM), <http://www.courierpress.com/news/2011/apr/07/government-settles-family-over-immigrants-care/>.

262. Dr. Esther Hui was involved in other cases of medical abuse at the Otay Mesa Detention Center. In 2006, Dr. Hui admitted that an immigrant detainee did not receive adequate health care consistent with community standards. Dana Priest & Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, WASH. POST, May 11, 2008, at A1. The detainee, Yusif Osman, did not receive adequate medical attention and died in the detention center. *Id.* Dr. Hui acknowledged that she was committing medical abuse and was concerned about her liability. *Id.* In a memo sent to her medical director, Hui wrote that the DHS mission of "keeping the detainee medically ready for deportation" often conflicts with the standards of care in the wider medical community . . . 'I know in my gut that I am exposing myself to the US legal standard of care argument. . . . Do we need to get personal liability insurance?' *Id.*

263. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 104, at 330-39 (grievance system has a method of review, but no apparent method of enforcement).

264. *Id.* at 333.

bleeding and unable to urinate, and yet he received little response from the immigration detention center.<sup>265</sup> In their investigation of the case, the Washington Post obtained an email from a physician assistant at the facility.

We need to write something different, or make some amendment, on the Grievance for Francisco Castaneda. . . . Your response starts, "Grievance not resolved." Those words are going to attract all kinds of attention during an ICE Jail Standards audit . . . . Could you somehow "patch up" that Grievance with an amendment then put it in my box. I just want to avoid problems when the Auditors show up.<sup>266</sup>

### 3. Mary's Experience with Sexual Abuse

"Mary," a Canadian immigrant, was pulled over during a routine traffic stop in Florida in 2009.<sup>267</sup> During the traffic stop, the police officer found a ten-year-old warrant for a bounced check. She was taken into custody and transferred to the Willacy Detention Center in Raymondville, Texas.<sup>268</sup> The Willacy Detention Center detains immigrants subject to an IGSA.<sup>269</sup> The facility is owned by Raymondville County; however, the County contracts out with the Management and Training Corporation to operate the facility.<sup>270</sup> The Willacy Detention Center, often referred to as the "Tent City," was constructed in 2006 and intended to be the largest detention center

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265. See *Castaneda v. United States*, 538 F. Supp. 2d 1279 (C.D. Cal. 2008).

266. FLA. IMMIGRANT ADVOCACY CTR., *supra* note 3, at 17.

267. Rentz, *supra* note 90.

268. *Id.*

269. DRO Det. Mgmt. Div., *supra* note 54, at 1.

270. Rentz, *supra* note 90. The IACHR found that the complex relationship between contractor and subcontractors can result in ICE's inability to ensure compliance with detention centers. See INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 40, at 92. The IACHR also found that the Willacy Detention Center exemplified this tension and "observed that the multi-level contractual relationship prevented timely implementation of improvements in detention conditions." See *id.* The private prison contracting relationship is complex and can get muddied. Local counties often view the private prison as a way to increase local revenue and create jobs for the community; however, the cost of running the facility and payments to the private-prison company can often outweigh the financial benefit. See AUSTIN & COVENTRY, *supra* note 47, at 59. Some counties have gone into debt because the prison does not generate the amount of money promised and the expenses are more than anticipated. See John Burnett, *Private Prison Leaves Texas Towns in Trouble*, NPR.ORG (Mar. 28, 2011, 12:01 AM), <http://www.npr.org/2011/03/28/134855801/private-prison-promises-leave-texas-towns-in-trouble>. As a result, many counties push to keep costs as low as possible. In the case of the Willacy Detention Center, the desire to keep costs low resulted in severe human rights violations of immigrant detainees, including the feeding of rotten food. See INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 40, at 93, 107 ("A former nurse told the IACHR that while she worked at Willacy, prisoners were frequently given antacids to calm the hunger pains.").

in the country.<sup>271</sup>The detention center was able to keep costs low and profits high by holding detainees in tents in the middle of a flat Texas landscape.<sup>272</sup> The Willacy Detention Center has been rife with scandals since it first opened its doors, and the stories of sexual abuse garnered significant media and political attention.<sup>273</sup>

Mary was one of many women who claimed she was sexually abused by guards at the Willacy Detention Center.<sup>274</sup> When she arrived at the facility, Mary was told by a detainee that “another female detainee had been raped by a [detention] guard.”<sup>275</sup> Mary had never been held in custody before and did not know what to believe. She took trips to the law library to work on her immigration removal case. One day while she was in the library, a male guard approached her and told her she was beautiful. The guard made her uncomfortable but she was too afraid to say anything. One day, the guard came up to her and started holding her hands and kissed her. “[S]he pushed him away, and said that she was going to report him,” but he said “Who are you going to tell?”<sup>276</sup> Mary felt powerless expressing, “Who’s going to listen to you? . . . Who’s going to believe you? You’re criminals. You’re a detainee. Who are you going to complain to?”<sup>277</sup> Later the guard approached her and sexually assaulted her. “[H]e placed his hands in her pants [and] penetrated her with his fingers.”<sup>278</sup> He “told her, ‘If you tell anyone, you wouldn’t come out of here alive to see your family.’ Mary . . . confided in a female guard, who told her it was ‘useless’ to complain . . . [and it] would only make things worse.”<sup>279</sup> Mary was distraught by the incident and wanted to get out of the facility as fast as she could. She gave up her immigration case and consented to be removed to her home country as quickly as possible.<sup>280</sup>

Mary reported her assault to a female guard who explained that there was nothing that could be done, despite the fact that the detention standards were recently revised to include strong language regarding sexual assault. Like the physical assault standard, there is

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271. See SUNITA PATEL & TOM JAWETZ, AM. CIVIL LIBERTIES UNION, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES 12 (2012), available at [http://www.aclu.org/pdfs/prison/unsr\\_briefing\\_materials.pdf](http://www.aclu.org/pdfs/prison/unsr_briefing_materials.pdf).

272. *Id.*; see also CREATIVE CORRS., ICE DETENTION STANDARDS COMPLIANCE REVIEW: WILLACY DETENTION CENTER (2009), available at <http://www.ice.gov/doclib/foia/dfra-ice-dro/willacydetentioncenterraymondvilletxmar10122009.pdf>.

273. HUMAN RIGHTS WATCH, *supra* note 5, at 9-10.

274. Rentz, *supra* note 90.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

no enforcement mechanism for a sexual assault.<sup>281</sup> Mary could have filed a grievance; however, it is likely that she would have suffered from retribution as a result.<sup>282</sup> If Mary had attempted to pursue a *Bivens* action or FTCA claim in civil court, her claim would have been limited because the offending guard was employed by a private-prison company.<sup>283</sup> Instead, Mary handled the situation in the only way she could—she chose self-deportation in order to remove herself from the abusive environment of immigration detention.<sup>284</sup>

Unfortunately for Mary, there were several other reports of sexual abuse at Willacy. A FRONTLINE investigation of the facility found that the Willacy Detention Center had “more complaints of sexual abuse than any other facility.”<sup>285</sup> In early 2009, the DHS Special Advisor, Dr. Dora Schriro, personally investigated reports of sexual assaults at Willacy.<sup>286</sup> As a result, criminal investigations were initiated and criminal prosecution was pursued against at least one detention guard.<sup>287</sup> In that case, a contract detention guard approached a female detainee, pulled her into a bathroom, and engaged in sexual intercourse with her. The sexual assault occurred on or about October 26, 2008; however, he was not indicted until June 21, 2011.<sup>288</sup> The guard in that case was sentenced to fourteen months in prison and ten years of supervised release.<sup>289</sup>

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281. *Id.* Immigration detention centers are exempt from the Prison Rape Elimination Act (“PREA”), and therefore, immigrant detainees do not have the same protections as criminal inmates. *Id.*; see also NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 12, at 26, 43.

282. HRW reported that female detainees at Willacy were transferred to other detention centers when they reported an act of sexual abuse. HUMAN RIGHTS WATCH, *supra* note 5, at 9-10.

283. See *supra* notes 134-37 and accompanying text.

284. Rentz, *supra* note 90.

285. *Id.* Human Rights Watch reported an “alleged incident in which a guard locked a female detainee in a room with a male detainee to whom he ‘owed a favor,’ so that he could rape her.” HUMAN RIGHTS WATCH, *supra* note 5, at 10. HRW reported that they had various sources corroborate the story, “including former staff at the facility who wished to remain anonymous.” *Id.*

286. She reported that the female detainees appeared different than detainees at other facilities. “Their demeanor was very subdued, more than usual in my experience.” Rentz, *supra* note 90; see also SCHRIRO, *supra* note 2, at 21.

287. *Former Willacy Detention Center Contract Security Officer Pleads Guilty to Sexual Abuse of a Female Detainee in Texas*, DEP’T OF JUSTICE (Aug. 4, 2011), <http://www.justice.gov/opa/pr/2011/August/11-crt-1016.html> [hereinafter *Security Officer Pleads Guilty*]; Sergio Chapa, *Former Jailer Charged with Having Sex with Inmate in Willacy County*, VALLEYCENTRAL.COM (June 23, 2011, 3:50 PM), <http://www.valleycentral.com/news/story.aspx?id=633208#>.

288. *Security Officer Pleads Guilty*, *supra* note 287; Chapa, *supra* note 287.

289. Matt Clarke & Alex Friedmann, *State-by-State Prisoner Rape and Sexual Abuse Round-Up*, PRISON LEGAL NEWS, [https://www.prisonlegalnews.org/%28S%28gz3ueva2b1yvkkjuvgeutco%29%29/24298\\_displayArticle.aspx](https://www.prisonlegalnews.org/%28S%28gz3ueva2b1yvkkjuvgeutco%29%29/24298_displayArticle.aspx) (last visited Mar. 11, 2013).

Around the same time of the detention guard's prosecution, ICE withdrew from its contract with the Willacy Detention Center.<sup>290</sup> On or around June 2011, ICE transferred the immigrant detainee population to detention centers "elsewhere in the Rio Grande Valley."<sup>291</sup> Unfortunately the facility remains operational and houses individuals in the BOP's custody who are criminally charged with illegal entry and re-entry.<sup>292</sup>

Although Mary was not able to hold her abuser accountable for his actions, the subsequent prosecution of a detention guard had a significant impact on the detention center.<sup>293</sup> Despite a multitude of scandals,<sup>294</sup> and numerous human rights groups calling for its closure;<sup>295</sup> it was not until tough criminal sanctions were imposed for misconduct that DHS finally listened and withdrew its contract to house detainees pending an immigration charge.<sup>296</sup> The withdrawal of a DHS contract with an IGSA is a rare and unusual occurrence.<sup>297</sup> In the past, several facilities have remained open despite their failed compliance with detention standards.<sup>298</sup> The criminal prosecution of Willacy guards appears to have had an impact on the detention facility.

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290. However, the Bureau of Prisons ("BOP") entered into a contract with the facility and it has been housing individuals criminally charged with illegal re-entry. The BOP, in contrast with ICE, has stricter regulations. Lynn Brezoski, *ICE to Relocate Crowded Detention Center Site Contracted to House Alien Federal Prisoners*, HOUS. CHRON., June 10, 2011, at B3 (discussing the managerial benefits that will come from BOP taking over the facilities).

291. Brezoski, *supra* note 107.

292. Gretchen Gavett, *New Immigration Detention Center Aims for a Less Prison-like Feel*, PBS (Mar. 14, 2012, 3:39 PM), <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/new-immigration-detention-center-aims-for-a-less-prison-like-feel/>; *see also supra* note 290.

293. *See Sexual Assault Charges, Contract Changes Hit MTC's "Tent City"*, TEX. PRISON BID'NESS (June 27, 2011, 9:47 AM), <http://www.texasprisonbidness.org/moneyfinancial-interests/sexual-assault-charges-contract-changes-hit-mtcs-tent-city>.

294. *See* CREATIVE CORRS., *supra* note 272, at 1-3.

295. *See "Dignity Not Detention" Campaign Calls for Closure of South Texas Detention Centers - Houston Independent Media Center*, DET. WATCH NETWORK (Feb. 25, 2010), <http://detentionwatchnetwork.org/node/2522>.

296. *Id.* (giving examples of detention facilities that remain open despite documented violations). As noted *supra*, Willacy still remains operational. *See supra* notes 290, 292 and accompanying text; Douglas Keller, *Re-Thinking Illegal Entry and Re-Entry*, LOY. U. CHI. L.J. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1884354](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884354); Gavett, *supra* note 292.

297. *See* FREEMAN & MAJOR, *supra* note 91, at 3 ("[I]n recent years there has been an expansion of immigration detention even while detention facilities fail to meet the 2008 and 2011 Immigration and Customs Enforcement Performance-Based National Detention Standards (PBNDS).").

298. *Id.* at 3-4.

### III. TWO PRONGED APPROACH: ESTABLISHING STRONG ACCOUNTABILITY AND OVERSIGHT

This Article argues that the reform of the New Orleans Police Department (“NOPD”) should be used as an instructive model to reform the U.S. immigration detention system. Similar to the NOPD, the U.S. immigration detention system has reached a moment of crisis where abuse occurs with impunity, individual detainees have no recourse for abuse, and the DHS as an agency has failed to take effective actions towards internal reform.<sup>299</sup> The reform of the NOPD has created a strong accountability mechanism to deter abuses, and oversight to prevent them. The same two-pronged approach is necessary in the U.S. immigration detention system.

#### A. *The Civil Rights Reform of the NOPD*

The New Orleans Police Department has historically been plagued by accusations of official misconduct, violent police brutality, and extensive corruption.<sup>300</sup> Steeped in legacies of Jim Crow and one of the highest per capita incarceration rates in the world, the NOPD is a notorious civil rights abuser.<sup>301</sup> In August 2005, the destruction

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299. See *supra* Part II. A. In an attachment to its complaint against the NOPD, DOJ explains,

The deficiencies in the way NOPD polices the City are not simply individual, but structural as well. For too long, the Department has been largely indifferent to widespread violations of law and policy by its officers. NOPD does not have in place the basic systems known to improve public safety, ensure constitutional practices, and promote public confidence. We found that the deficiencies that lead to constitutional violations span the operation of the entire Department, from how officers are recruited, trained, supervised, and held accountable, to the operation of Paid Details.

U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, at v (2011), available at [http://www.justice.gov/crt/about/spl/nopd\\_report.pdf](http://www.justice.gov/crt/about/spl/nopd_report.pdf). In the complaint, the DOJ explains that while the NOPD facially has policies to prevent constitutional violations (e.g., use of force policies), the policies are “inconsistent, incomplete and routinely disregarded.” *Id.* at vii; see also Complaint, *United States v. City of New Orleans*, No. 12-1924 (E.D. La. July 24 2012), available at [http://media.nola.com/crime\\_impact/other/nopd-consent-decree.pdf](http://media.nola.com/crime_impact/other/nopd-consent-decree.pdf). Similarly, in the U.S. immigration detention system, detention standards provide a broad coverage of protections to immigrant detainees but these standards are not applicable to all detention centers and they are not enforceable at any facility. See *supra* Part II. B.

300. *Timeline: NOPD’s Long History of Scandal*, PBS (Aug. 25, 2010), <http://www.pbs.org/wgbh/pages/frontline/law-disorder/etc/cron.html>.

301. Cindy Chang, *Sheriffs and Politicians Have Financial Incentive to Keep People Locked Up*, TIMES-PICAYUNE, May 13, 2012, at A1; see also John Schwartz, *New Orleans Police, Mired in Scandal, Accept Plan for Overhaul*, N.Y. TIMES, July 25, 2012, at A1 (discussing how the problems within the police force during the 1990s faded for a short period, but ultimately persisted). See generally HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 250-67 (1998) (providing an overview of the scandals within the NOPD throughout the nineties).

of New Orleans in the aftermath of Hurricane Katrina thrust New Orleans (and its police department) into the national spotlight. Thousands of New Orleans residents were stranded in flooded homes without food or water and a sense of lawlessness overtook the city.<sup>302</sup> News media and local citizens reported killings of unarmed civilians by members of the NOPD.<sup>303</sup>

In one well-known incident, a NOPD officer, David Warren, shot an unarmed man, Henry Glover, in the chest for allegedly stealing goods from a local strip mall on September 4, 2005. Accompanying NOPD officers refused to transport Mr. Glover to a local hospital for medical assistance, and he died from the wound. NOPD officers burned Mr. Glover's body in an attempt to destroy the evidence. Supervising NOPD officers then drafted false police reports and lied to federal agents investigating the crime.<sup>304</sup> DOJ investigated and prosecuted the officers involved in the Glover incident and on December 9, 2010, three NOPD officers were found guilty.<sup>305</sup>

In another incident, several NOPD officers opened fire on unarmed civilians on Danziger Bridge, injuring several and killing two: James Brissette and Ronald Madison.<sup>306</sup> Ronald Madison, a forty-year-old mentally ill man, was shot several times in the back as he attempted to run away from the gunfire.<sup>307</sup> NOPD officers arrested Lance Madison, Ronald's brother, and accused him of firing at the police officers.<sup>308</sup> After a local investigation into the incident, the New Orleans district attorney declined to pursue criminal charges against the NOPD officers.<sup>309</sup> Shortly afterward, DOJ intervened and used federal civil rights statutes to launch investigations and prosecutions, and eventually obtained several convictions.<sup>310</sup>

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302. *Interview Sally Forman*, PBS (May 18, 2010), <http://www.pbs.org/wgbh/pages/frontline/law-disorder/interviews/forman.html>. "We need to declare martial law. This is not what we're dealing with right now. We are dealing with search and rescue. We're dealing with saving lives. If some thug or some thugs are going to go after our cops, then we're going after them." *Id.*

303. *Timeline: NOPD's Long History of Scandal*, *supra* note 300.

304. A.C. Thompson, *Body of Evidence*, *PROPUBLICA* (Dec. 19, 2008, 11:30 AM), <http://www.propublica.org/article/body-of-evidence>.

305. See A.C. Thompson, *Key Convictions Overturned in Killing by New Orleans Police*, *PROPUBLICA* (Dec. 17, 2002, 4:03 PM), <http://www.propublica.org/nola/story/key-convictions-overturned-in-killing-by-new-orleans-police>.

306. Campbell Robertson, *Officers Guilty of Shooting Six in New Orleans*, *N.Y. TIMES*, Aug. 5, 2011, at A1.

307. *Id.*

308. Campbell Robertson, *Five Ex-Officers Sentenced in Post-Katrina Shootings*, *N.Y. TIMES*, Apr. 5, 2012, at A1.

309. Robertson, *supra* note 306.

310. *Id.*; *5 NOPD Officers Guilty in Post-Katrina Danziger Bridge Shootings*, *Cover Up*, *TIMES-PICAYUNE* (Aug. 5, 2011, 6:35 PM), <http://www.nola.com/crime/index.ssf/>

Stories of horrific abuse by the NOPD in the aftermath of Katrina covered front pages of newspapers worldwide, and it became clear that these incidents were not isolated but rather were indicative of a systemic problem within the department.<sup>311</sup> In 2010, after several DOJ investigations and prosecutions, the newly elected mayor of New Orleans, Mitchell Landrieu, invited the Civil Rights Division of the DOJ to investigate abuses within the NOPD.<sup>312</sup> DOJ drafted an extensive report detailing the nature of abuses in the department.<sup>313</sup> The report found that the NOPD was engaging in patterns of using excessive force, unconstitutional stops, searches and arrests, biased policing, and other civil rights violations.<sup>314</sup> The report recommended an overhaul of the NOPD, and in July 2012, the city of New Orleans entered into a consent decree with DOJ to reform the NOPD.<sup>315</sup> The agreement is the United States' most expansive consent decree and consists of a 492 point court-enforced action plan to reform the NOPD.<sup>316</sup> The reform is currently overseen by an

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2011/08/danziger\_bridge\_verdict\_do\_not.html.

311. New Orleans civil rights lawyer Mary Howell explains that the incidents that occurred during the aftermath of Hurricane Katrina were not unique. "The things that happened with the police department during Katrina were shocking," she says. "They were disturbing. I wish I could say they were aberrant. But they were not. They are what happens when you have a department that is deeply troubled." Thompson, *supra* note 305; see also Schwartz, *supra* note 301 (discussing generally the process in which reform occurred); *Timeline: NOPD's Long History of Scandal*, *supra* note 300.

312. Schwartz, *supra* note 301 ("Days after taking office in 2010, Mayor Mitch Landrieu announced that he was inviting the Justice Department to help clean up a law enforcement agency that had grown increasingly lawless, saying, 'We have a systemic failure.'").

313. This report was conducted pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, Civil Rights Div., to Mitchell J. Landrieu, Mayor of New Orleans 1 (Mar. 16, 2011), available at [http://www.justice.gov/crt/about/spl/nopd\\_letter.pdf](http://www.justice.gov/crt/about/spl/nopd_letter.pdf). In his letter, Mr. Perez explains that the listed statutes

give the United States Department of Justice ("DOJ") authority to seek declaratory or equitable relief to remedy patterns or practices of conduct by law enforcement officers that deprive individuals of rights, privileges, or immunities secured by the Constitution or laws of the United States. These laws also give DOJ the authority to seek the withdrawal of federal funding from police departments that discriminate on the basis of race, color, religion, sex or national origin.

*Id.* It is unlikely that these statutes would give DOJ the authority to conduct a similar inquiry into the detention practices of DHS; however, it is unclear whether statutory authority would be necessary to conduct an inquiry into a sister federal agency.

314. U.S. DEP'T OF JUSTICE, *supra* note 299, at v.

315. Schwartz, *supra* note 301.

316. Joint Motion and Memorandum for Entry of Consent Decree, *United States v. New Orleans*, No. 12-01924 (E.D. La. July 24, 2012); Charles Maldonado, *Paying for the Consent Decree*, THE GAMBIT (Aug. 14, 2012), <http://www.bestofneworleans.com/>

appointed court monitor and a U.S. District Judge.<sup>317</sup>

The consent decree establishes a two-pronged approach of accountability and oversight.<sup>318</sup> First, the decree requires the NOPD to establish internal mechanisms such as use of force policies, investigations, and weapons usage. The 140-page consent decree outlines in explicit detail the specific reform efforts the NOPD must undertake in order to build accountability from within the department. If officers do not comply, the threat (or existence) of criminal prosecution for civil rights abuses remains a possibility.<sup>319</sup>

Second, the decree creates an oversight mechanism as it establishes clear timelines by which tasks must be undertaken and appoints a special monitor to oversee and ensure that the NOPD complies with the decree.<sup>320</sup> At all times, the NOPD is subject to oversight by DOJ, the monitor, and a federal judge—thus ensuring compliance with the decree.<sup>321</sup>

While the long-term success of the NOPD consent decree remains to be seen, in the short term, it creates mechanisms of oversight and accountability that were not in place prior to the consent decree.<sup>322</sup> This Article argues a similar model providing oversight and accountability should be used in the immigration detention context. The factual circumstances surrounding NOPD abuse and immigration detention abuse are not identical; however, the structural impunity embedded in both institutions have historically created an environment that shields (and sometimes promotes) abuse.

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[gambit/reform-at-a-cost/Content?oid=2057022](http://gambit/reform-at-a-cost/Content?oid=2057022).

317. Maldonado, *supra* note 316.

318. Brendan McCarthy & John Simerman, *Pact Makes NOPD More Transparent, Accountable: Use-of-Force Training, Oversight of Off-Duty Details Included in Decree*, TIMES-PICAYUNE, July 25, 2012, [http://www.nola.com/crime/index.ssf/2012/07/federal\\_consent\\_decree\\_outline.html](http://www.nola.com/crime/index.ssf/2012/07/federal_consent_decree_outline.html) (“The mission is to impart a fundamental culture change within the NOPD, according to the Justice Department. The goal is to spark reforms that will take hold and remain in place more than a decade from now.”).

319. Joint Motion and Memorandum for Entry of Consent Decree, *supra* note 316, at 104-05.

320. Ramon Antonio Vargas, *Mayor Mitch Landrieu Would Avoid Political Migraine by Withdrawing from Police Consent Decree*, TIMES-PICAYUNE, Feb. 4, 2013, [http://www.nola.com/crime/index.ssf/2013/02/mayor\\_mitch\\_landrieu\\_would\\_avo.html](http://www.nola.com/crime/index.ssf/2013/02/mayor_mitch_landrieu_would_avo.html).

321. McCarthy & Simerman, *supra* note 318.

322. A similar consent decree has proven successful in reforming the Los Angeles Police Department. See CHRISTOPHER STONE ET AL., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD (2009), available at [http://www.hks.harvard.edu/var/ezp\\_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/Harvard\\_LAPD\\_Report.pdf](http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/Harvard_LAPD_Report.pdf); Noah Kupferberg, *Transparency: A New Role for Police Consent Decrees*, 129 COLUMBIA J. OF LAW AND SOC. PROBLEMS 129, 133-37, 147-52 (2008).

*B. Accountability for Civil Rights Violations Using 18 U.S.C. § 242*

The federal government derives its authority to prosecute from the statute 18 U.S.C. § 242. This provision, titled “Deprivation of Rights Under Color of Law,” criminalizes conduct that violates the constitutional rights of persons in the United States.<sup>323</sup> The statute, 18 U.S.C. § 242, operates as the criminal counterpart to 42 U.S.C. § 1983 and *Bivens*. It gives the federal government the authority to prosecute violations of constitutional rights under color of law. The statute has historically been used to protect the rights of individuals whose rights have been violated by government officials, and it has also been used in the detention context.

18 U.S.C. § 242 and its sister statute, 42 U.S.C. § 1983, originated from the Civil Rights Act of 1866 (hereinafter “Act”).<sup>324</sup>

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323. 18 U.S.C. § 242 (2006) states:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

324. The Civil Rights Act was part of the Reconstruction era legislation that intended to reunite the country while also protecting the rights of newly freed slaves. Section 2 of the Act “made it a federal crime for ‘any person, who under color of any law’ deprives a person of ‘any right secured or protected by the Constitution or laws of the United States.’” Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2131 (1993) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 598 (1866)).

Section 20 originated in the Civil Rights Act of 1866, 14 Stat. 27, Section 19 in the Enforcement Act of 1870, 16 Stat. 141, § 6. Their great original purpose was to strike at discrimination, particularly against Negroes, the one securing civil, the other political rights. But they were not drawn so narrowly. From the beginning Section 19 protected all “citizens,” Section 20 “inhabitants.”

*Screws v. United States*, 325 U.S. 91, 120 (1945). The Act “established citizenship for ‘all persons born in the United States’ regardless of race or prior condition of servitude; required equal protection under state laws; and set up enforcement mechanisms” for violations of the Act. Lawrence, *supra*, at 2130 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1755 (1866)). The Civil Rights Act was passed during a time of great turmoil and

The reconstruction era statute was enacted in response to state governments' passage of "Black Codes."<sup>325</sup> The statute was enacted in order to protect the black population from violent reprisals and discrimination by white government officials.<sup>326</sup> The phrase "under color of law" was used in the statute to criminalize those who used their government status to persecute individuals.<sup>327</sup> In turn, the Court has distinguished between an act of violence between two free men and an act of violence carried out under the auspices of government authority.<sup>328</sup>

Immediately after the passage of 18 U.S.C. § 242, the DOJ targeted the Ku Klux Klan through criminal investigation and prosecution, and by 1872 the Klan had largely been abolished in many areas of the South.<sup>329</sup> However, the criminal prosecution of civil rights violations lost political support in the late nineteenth century, and for several years, the statute was rarely used.<sup>330</sup>

President Franklin Roosevelt resurrected the use of 18 U.S.C. § 242 after reports of mob killings and police brutality of African Americans.<sup>331</sup> After a constitutional challenge to the statute, in 1945 the Supreme Court decided the seminal case of *Screws v. United States*.<sup>332</sup> The defendants in *Screws* were law enforcement officers who were accused of severely beating and killing Robert Hall, a young African American man in Georgia.<sup>333</sup> The defendants were found guilty and they challenged the constitutionality of 18 U.S.C. §

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debate over the role of federalism and state authority. *Id.* at 2131. Many legislators believed the Act to be an overreaching use of federal authority. *Id.* President Johnson vetoed the Civil Rights Act; however, Congress overrode his veto and the Civil Rights Act was enacted in 1866. *See id.* at 2132-33.

325. *See* Lawrence, *supra* note 324, at 2127. In addition to the Black Codes, newly freed slaves were victims of violence, harassment, and intimidation. *Id.* at 2133. In particular, two large-scale massacres took place in New Orleans and Memphis. In Memphis, no less than forty-six black men and women were killed "by a mixed mob of local police and private" individuals. *Id.* In investigating the massacre, a congressional committee "explicitly considered the need for a federal role in prosecuting the perpetrators of the massacre." *Id.* at 2133.

326. *Id.* at 2135.

327. Senator Trumbull explained that "[t]he right to punish persons who violate the laws of the United States cannot be questioned, and the fact that in doing so they acted under color of law or usage in any locality affords no protection." Lawrence, *supra* note 324, at 2132.

328. *See* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (recognizing that an agent of the "United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own").

329. *See* Lawrence, *supra* note 324, at 2145 n.111.

330. *Id.* at 2146-47.

331. *Id.* at 2173-74.

332. 325 U.S. 91 (1945).

333. *Id.* at 92-93.

242.<sup>334</sup> The Supreme Court upheld the constitutionality of the statute and found that the provision “did not undertake to make all torts of state officials federal crimes . . . only specified acts done ‘under color’ of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.”<sup>335</sup>

In their decision, the Court found that Congress intended for an act of abuse by an official authority figure to be unique and distinct from a regular crime or violation of tort.<sup>336</sup> The Court found that a public official is entrusted with upholding the law, and therefore, any act by such an official that violates the law gives rise to a heightened level of criminality.<sup>337</sup> The Court reinvigorated 18 U.S.C. § 242 and emphasized that official abuse deserves additional scrutiny and punishment.

Since *Screws*, the Department of Justice has used criminal civil rights prosecutions in a variety of contexts. Notable cases include the Mississippi burning case,<sup>338</sup> the Rodney King case,<sup>339</sup> and the prosecutions of NOPD officers for violence in the aftermath of Hurricane Katrina.<sup>340</sup> The DOJ has pursued some criminal cases of detention abuse; however, the investigations and prosecutions have not been reflective of the mass abuse occurring within detention centers.<sup>341</sup> Further criminal investigation and prosecution of

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334. *See id.* at 94-96. Defendants argued that the allegations against them of committing criminal acts in violation of the Due Process Clause of the Fourteenth amendment lacked specificity. Additionally, defendants argued that because the Due Process Clause is constantly being interpreted by courts, they could not know what specific constitutional protection they were violating. *Id.*

335. *Id.* at 109.

It is said, however, that petitioners did not act “under color of any law” within the meaning of [18 U.S.C. § 242]. We disagree. We are of the view that petitioners acted under “color” of law in making the arrest of Robert Hall and in assaulting him. They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and keep their prisoner from escaping. It was their duty under Georgia law to make the arrest effective. Hence, their conduct comes within the statute.

*Id.* at 107-08.

336. *Id.* at 109.

337. *See id.* at 110.

338. *United States v. Price*, 383 U.S. 787 (1966).

339. *Koon v. United States*, 518 U.S. 81 (1996).

340. Robertson, *supra* note 306 (“The defendants were convicted on 25 counts, including federal civil rights violations in connection with the two deaths, for the violence and deception that began on the Danziger Bridge in eastern New Orleans on Sept[ember] 4, 2005, just days after Hurricane Katrina hit and the levees failed.”); *see also* John Burnett, *Verdict in Katrina Shooting Buys Police Reform*, NPR (Aug. 18, 2011), <http://www.npr.org/2011/08/18/139668648/verdict-in-katrina-shooting-buoys-police-reform>.

341. Press Release, Former Port Isabel Detention Officer Charged with Violating

detention abuses can provide a strong accountability mechanism in the detention system by diminishing the notion that abuse in detention goes unpunished and unnoticed.

*C. Oversight Mechanisms in Immigration Detention*

The key to establishing accountability and oversight of civil rights abuses is externalization. In the context of the NOPD reform, the externalization of investigation, prosecution, and ultimately the judicial consent decree were key factors leading to reform. Although the NOPD had a notorious reputation for abuse, local New Orleans officials had not demonstrated the political will to truly reform the system prior to Hurricane Katrina.<sup>342</sup> After the storm, the local New Orleans district attorney failed to prosecute officers for misconduct and the extent of officer malfeasance was only exposed after a federal investigation and prosecution.

The externalization of oversight is crucial because an agency is less likely to prosecute its own agents or give an unbiased opinion of a potential act of wrongdoing. This conflict of interest is a common occurrence in police brutality cases where local law enforcement agencies are unwilling to investigate abuse within their own agency (or in some cases engage in attempts to cover up allegations of abuse).<sup>343</sup> For example, the district attorney in *Screws* “blamed his inability to prosecute” the police officers “on the fact that he had no substantial independent investigative facilities, and had to rely upon local sheriffs and policemen to conduct investigations.”<sup>344</sup> He explained that the local sheriffs and policemen would not investigate abuse because they were either involved in the incident or

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Civil Rights of Detainee (July 8, 2011), available at <http://www.justice.gov/opa/pr/2011/July/11-crt-894.html>.

342. *Timeline: NOPD's Long History of Scandal*, *supra* note 300.

343. Robertson, *supra* note 308 (“A cover-up began immediately after the shooting, and eventually grew to include made-up witnesses and a planted handgun. A retired sergeant . . . was charged with administering . . . the cover-up . . .”). The New Orleans district attorney believed (or chose to believe) the cover up and dismissed state criminal charges. The assistant attorney general for the Civil Rights Division of the Justice Department explained, “I have in particular observed in the New Orleans Police Department that the code of silence was seemingly impenetrable.” *Id.*

344. Lawrence, *supra* note 324, at 2174.

The systemic explanation exists on a more general level as well. Even if the district attorney had not been placed in the impossible situation of relying upon Screws to investigate and bring charges against himself, he would have had to rely upon local police officers and deputy sheriffs in counties very much like Baker County. Such officers, although not facing a strict conflict of interest in the investigation, would likely conduct their investigation with an excessive willingness to view events from the officer’s perspective. The general “there but for luck go I” syndrome serves to minimize the effectiveness of local investigation of local law enforcement officers.

*Id.*

sympathized with the individuals accused of abuse. In the prosecutions of police officers in the aftermath of Hurricane Katrina, several supervising NOPD officers were convicted of covering up the abusive acts of other officers.<sup>345</sup> The culture of the NOPD in the aftermath of Katrina was one that celebrated abuse and the misuse of power. In 2007 when the NOPD officers involved in the shooting turned themselves in, they were patted on the back and called heroes by their fellow officers.<sup>346</sup>

A similar culture exists within DHS and immigration detention facilities. DHS cannot be relied upon to investigate and/or prosecute its own agency.<sup>347</sup> ICE officials have repeatedly engaged in attempts to cover up misconduct, and a culture of abuse within detention centers celebrates and even condones detainee abuse.<sup>348</sup> The structure of oversight and accountability within DHS only fosters the culture of abuse.

Presently, cases of detainee abuse are purportedly investigated by the DHS Office of Inspector General (“OIG”).<sup>349</sup> In the current scheme, a detainee with a civil rights complaint would be directed to an OIG agent who would investigate the matter and consider whether to refer it to DOJ for further investigation and/or prosecution.<sup>350</sup> Although this is a stated purpose of DHS-OIG, they have not been effective in their mission.<sup>351</sup> Few prosecutions for detainee abuse have been pursued, and it is unclear how DHS-OIG determines whether or not a case is suitable for referral. For example, in the case of sexual abuse allegations at the Willacy Detention Center, it took several years from the time of the

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345. Robertson, *supra* note 308.

346. “When the ‘Danziger Seven’ turned themselves in at Central Lockup in January 2007, fellow officers joined them in a show of solidarity, patting them on the back and calling them heroes.” 5 *NOPD Officers Guilty in Post-Katrina Danziger Bridge Shootings, Cover Up*, *supra* note 310.

347. *Moving Toward More Effective Immigration Detention Management: Hearing Before the Subcomm. on Border, Mar., and Global Counterterrorism of the Comm. on Homeland Sec. H.R.*, 111th Cong. 15-16 (2009) (statement of Chris Crane, Vice President, Detention and Removal Operations).

348. See Nina Bernstein, *Officials Obscured Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 10, 2010, at A1; Dana Priest & Amy Goldstein, *E-Mails Show Attempt to “Patch Up” a Case of Medical Negligence*, WASH. POST, May 11, 2008, at A9.

349. *What We Do*, OFFICE OF INSPECTOR GEN., [http://www.oig.dhs.gov/index.php?option=com\\_content&view=article&id=94:what-we-do&catid=2&Itemid=63](http://www.oig.dhs.gov/index.php?option=com_content&view=article&id=94:what-we-do&catid=2&Itemid=63) (last visited Feb. 26, 2013).

350. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-875, ALIEN DETENTION STANDARDS: TELEPHONE ACCESS PROBLEMS WERE PERVASIVE AT DETENTION FACILITIES; OTHER DEFICIENCIES DID NOT SHOW A PATTERN OF NONCOMPLIANCE 34 (2007).

351. A Government Accountability Office report concluded that of approximately seventeen hundred grievances reported, the OIG investigated only 173. *Id.*

allegation to the conviction of the guard.<sup>352</sup> In the interim, several cases of sexual abuse were reported at the Willacy Detention Center—more than any other detention center.<sup>353</sup> A former Customs and Border Protection (“CBP”) commissioner explained, “What happens is—and in my opinion it’s disgraceful—[the DHS-OIG] get around to investigate these things, and the witnesses are gone.”<sup>354</sup> This is particularly troubling in the context of immigrant detention where detainees are deported at a rapid pace.<sup>355</sup>

In addition, DHS-OIG is currently being investigated for alleged acts of internal corruption and misconduct. The McAllen, Texas office of DHS-OIG is currently the subject of a federal grand jury investigation to determine whether agents “fabricated ‘investigative activity’ to show progress on misconduct cases.”<sup>356</sup> As a result of the grand jury investigation, DHS-OIG transferred about half of its backlog cases to internal affairs agencies at ICE and CBP.<sup>357</sup> The investigation and backlog are additional indicators that DHS is unable to police its own agency, and as a result, the claims of abuse by immigrant detainees are not sufficiently investigated or referred for criminal prosecution and sanction.

In the case of NOPD reform, the externalization of oversight has arisen through a judicial consent decree.<sup>358</sup> It is highly unlikely that DHS would agree to a consent decree of oversight from the DOJ; however, alternative forms of oversight could potentially be pursued. DHS-OIG could be relocated out of DHS and either become a separate ombudsman-like agency or could be relocated to DOJ.<sup>359</sup> The role of DHS-CRCL could be changed to collaborate with DOJ to obtain prosecutorial power. Another option is that DOJ could unilaterally request to oversee and investigate DHS functions. While this oversight would likely be politically challenging, if DHS as an agency is harboring criminal actors and potentially condoning (or ignoring) criminal acts, there should be no legal barrier to a DOJ led investigation. It is admittedly perilous to rely on federal agencies to

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352. See *supra* notes 287-88 and accompanying text.

353. Rentz, *supra* note 93.

354. Andrew Becker, *Homeland Security Office to Unload Hundreds of Corruption Probes*, HUFFINGTON POST (May 7, 2012, 3:50 PM), [http://www.huffingtonpost.com/andrew-becker/homeland-security-office-\\_1\\_b\\_1497538.html](http://www.huffingtonpost.com/andrew-becker/homeland-security-office-_1_b_1497538.html).

355. See *supra* text accompanying note 43.

356. Andrew Becker, *Homeland Security Office Accused of Faking Reports on Internal Investigations*, HUFFINGTON POST (Apr. 6, 2012, 4:00 PM), [http://www.huffingtonpost.com/andrew-becker/homeland-security-office-\\_b\\_1408532.html](http://www.huffingtonpost.com/andrew-becker/homeland-security-office-_b_1408532.html).

357. *Id.*

358. See *supra* notes 316-22 and accompanying text.

359. The city of New Orleans has created an “Independent Police Monitor” where citizens can report abuse online. IMP, <http://www.nolaipm.org/main/index.php?page=home> (last visited Feb. 13, 2013).

act on their own volition, even when it is within the purview of their legislative mandate, and therefore, another option is for the immigrants' rights community to request oversight of DOJ through injunctive relief.<sup>360</sup> Prior consent decrees between police departments and municipalities have arisen through requests for injunctive relief and a similar path could be pursued in the context of immigration detention.<sup>361</sup>

#### *D. Community Collaboration on Immigration Detention Reform*

Although the DOJ investigation of the NOPD directly led to prosecutions and the consent decree, the federal government was not alone in their quest for reform. Community organizations organized for reform of the police department and local media exposed stories that the city of New Orleans had previously ignored.<sup>362</sup> Community organizations advocated for intervention into the NOPD and media outlets exposed stories of NOPD misconduct.<sup>363</sup> A similar community collaboration is necessary in order to bring about immigration detention reform.

The immigrants' rights community has not substantially collaborated with the federal government on detention reform primarily because the federal government is also involved in the detention and deportation of immigrants. There is an inherent (and justifiable) distrust of the federal government within the immigrants' rights community; however, it is possible to advocate within the government while continuing to disagree with them.<sup>364</sup>

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360. Although *Bivens* actions have largely been limited through broad interpretations of immunity power, injunctive relief remains a viable option. See *Ex Parte Young*, 209 U.S. 123 (1908) (holding that a private plaintiff may sue a state actor for injunctive relief).

361. See *Consent Decree Overview*, LAPD, [http://lapdonline.org/search\\_results/content\\_basic\\_view/928](http://lapdonline.org/search_results/content_basic_view/928) (last visited Feb. 26, 2013); CHRISTOPHER STONE ET AL., HARVARD UNIV., *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD* 4 (2009), available at [http://www.hks.harvard.edu/var/ezp\\_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/Harvard\\_LAPD\\_Report.pdf](http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/Harvard_LAPD_Report.pdf).

362. *Safe Streets/Strong Communities*, KATRINA READER, <http://katrinareader.org/safe-streetsstrong-communities> (last visited Feb. 13, 2013); *Some Grassroots Racial Justice Organizations*, KATRINA READER, <http://katrinareader.org/some-grassroots-racial-justice-organizations> (last visited Feb. 13, 2013); Julianne Hing, *New Orleans Activists Want Feds to Get Real About NOPD Misconduct*, COLORLINES, [http://colorlines.com/archives/2010/04/new\\_orleans\\_activists\\_want\\_feds\\_to\\_get\\_real\\_about\\_nopd\\_misconduct.html](http://colorlines.com/archives/2010/04/new_orleans_activists_want_feds_to_get_real_about_nopd_misconduct.html).

363. *Safe Streets/Strong Communities*, *supra* note 362; *Some Grassroots Racial Justice Organizations*, *supra* note 363; Hing, *supra* note 362.

364. For example, in the recent shooting death of Trayvon Martin, community leaders in Florida demanded an investigation into the incident. Daniel Trotta, *Trayvon Martin: Before the World Heard the Cries*, REUTERS (Apr. 3, 2012, 6:07 PM),

The concept of community involvement in prosecution is being implemented on the local level in cities across America. Community prosecution builds “upon popular theories of community-police partnership to build nimble, locally adaptable strategic organizations . . . [I]t endorses community outreach through public-private ventures between government and nongovernmental organizations and through need-specific local prosecutorial case and neighborhood assignments.”<sup>365</sup> Anthony V. Alfieri explains, “Like other crime-fighting initiatives, these pilot programs raise issues of priority and proportionality in prosecution. Priority concerns the ranking or ordering of anticrime initiatives. Proportionality refers to the correspondence between the charging and sentencing of the offender and the nature of his crime.”<sup>366</sup> Thus far, community prosecutions have primarily focused on integrating the role of the prosecutor within the community.<sup>367</sup>

This prosecutorial integration is less clear-cut when the “community” (in this case, the immigrant community) is scattered across the country. It is even more difficult considering the immigrant detainee community is in custody and many are transients who will be promptly deported to another country.<sup>368</sup> The integration of a prosecutorial role into an amorphous community presents many challenges. One possibility of countering this challenge is to empower immigrant detainees and their advocates to reach out to DOJ if they have experienced abuse. Detainees in some facilities are told to direct their complaints to the DHS Office of Civil Rights and Civil Liberties; however, that department does not have the ability to hold individual officers accountable.<sup>369</sup> In addition, given the ineffectiveness of DHS’s attempts to curb detainee abuse, the inclusion of an external agency, like DOJ, could provide effective oversight.

#### IV. CHALLENGES OF CRIMINAL SANCTIONS IN IMMIGRATION DETENTION

The primary challenge of the inclusion of civil rights prosecutions into immigration detention is political. The majority of

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<http://www.reuters.com/article/2012/04/03/us-usa-florida-shooting-trayvon-idUSBRE8320UK20120403>. Roland Martin, *Is Trayvon Martin’s Death the Catalyst of a New Movement?*, CNN (Apr. 14, 2012, 10:06 AM), <http://www.cnn.com/2012/04/14/opinion/roland-martin-florida-case>.

365. Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465, 1473-74 (2002).

366. *Id.* at 1474.

367. *Id.* at 1475-76.

368. *See supra* notes 13-16 and accompanying text.

369. *See About the Compliance Branch*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/about-compliance-branch> (last visited Feb. 26, 2013) (discussing procedure for forwarding civil rights and civil liberties complaints to a separate department).

DOJ investigations focus on state law enforcement activities,<sup>370</sup> and the investigation of a sister federal agency would likely present tough political challenges. DHS has historically been secretive about its operations and has resisted offers of assistance from other federal law enforcement agencies such as the FBI.<sup>371</sup> DHS has often invoked its role in national security as a reason for its independence;<sup>372</sup> however, the reality is that immigration detention has very little to do with national security.<sup>373</sup>

The inclusion of DOJ into the activities of DHS also presents a unique challenge because the two agencies are both involved in immigration enforcement. The Executive Office of Immigration Review, which consists of local immigration courts and its appellate body the Board of Immigration Appeals, is a subagency of the DOJ.<sup>374</sup> Assistant U.S. Attorneys, employees of DOJ, are involved in the criminal prosecution of immigrants charged with immigration crimes such as illegal re-entry and smuggling.<sup>375</sup> In fact, the two agencies have historically been so intertwined that the DOJ Civil Rights Division has itself been involved litigating immigration removal cases.<sup>376</sup> The question that remains is whether DOJ can serve as an independent agency for investigative purposes. The answer to that question is unclear; however, DOJ has the benefit of not being as entrenched in immigration enforcement as DHS and DHS-OIG.

In addition, the challenge of relying on DOJ as the watchdog agency of immigration detention abuse is that the leaders of the agency change with presidential administrations. Therefore, while the current DOJ leaders have prioritized civil rights prosecutions, it is unclear whether future leaders would continue to do so. The use of prosecutions then is not a long-term solution to the problem of

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370. See CMTY. RELATIONS SERV., U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS iii (2003) (discussing Community Relations Services' involvement in state and local police department practices).

371. Becker, *supra* 356 ("There is also a mutual sense of distrust that the [FBI and DHS-OIG] are not sharing information on new investigations, despite specific guidelines issued by the U.S. attorney general on how soon the inspector general and the FBI must notify each other when a case is initiated.").

372. See DOW, *supra* note 6, at 10-11.

373. See generally *id.*

374. *About the Office*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/orginfo.htm> (last visited Feb. 26, 2013).

375. See Douglas Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 126-27 (2012).

376. Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice*, WASH. POST, Nov. 13, 2005, at A1 ("The change in emphasis is perhaps most stark in the division's appellate section, which has historically played a prominent role intervening in key discrimination cases. The section filed only three friend-of-the-court briefs last year—compared with 22 in 1999—and now spends nearly half its time defending deportation orders rather than pursuing civil rights litigation. Last year, six of 10 briefs filed by the section were related to immigration cases.").

immigration detention abuse, but it does initiate entry into the world of detention abuse by exposing the problem, piercing the veil of secrecy around immigration detention, and, hopefully, drawing attention to the problem of detention abuse.

#### CONCLUSION

This Article calls for greater recognition of the manner in which U.S. immigration detention operates with structural impunity, thus contributing to the pervasive abuse of the detained population. The current structure of the immigration detention system does not contain any administrative recourse for victims of abuse, and the legal system has foreclosed all effective civil remedies. The monopoly of private-prison companies and deficient DHS oversight exacerbate the problem and, as a result, immigrant detainees are vulnerable to acts of abuse.

The criminal justice system provides a solution to the problem of detention abuse by externalizing the oversight of the detention system and providing a strong accountability mechanism for those who engage in acts of abuse. This model reinforces the concept of immorality of official abuse, overcomes the structural impunity of the U.S. immigration detention system, and protects immigrant detainees from future acts of abuse. The immigration detention system has reached a crisis tipping point and now is the time for accountability and reform.