

Fall 2020

## **Thirteenth Amendment Litigation in the Immigration Detention Context**

Jennifer Safstrom

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Jennifer Safstrom, Thirteenth Amendment Litigation in the Immigration Detention Context, 26 MICH. J. RACE & L. 205 (2020).

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Jennifer Safstrom, Thirteenth Amendment Litigation in the Immigration Detention Context, 26 Mich. J. Race & L. 205 (2020).

APA 7th ed.

Safstrom, J. (2020). Thirteenth amendment litigation in the immigration detention context. Michigan Journal of Race & Law, 26(1), 205-240.

Chicago 17th ed.

Jennifer Safstrom, "Thirteenth Amendment Litigation in the Immigration Detention Context," Michigan Journal of Race & Law 26, no. 1 (Fall 2020): 205-240

McGill Guide 9th ed.

Jennifer Safstrom, "Thirteenth Amendment Litigation in the Immigration Detention Context" (2020) 26:1 Mich J Race & L 205.

AGLC 4th ed.

Jennifer Safstrom, 'Thirteenth Amendment Litigation in the Immigration Detention Context' (2020) 26(1) Michigan Journal of Race & Law 205

MLA 9th ed.

Safstrom, Jennifer. "Thirteenth Amendment Litigation in the Immigration Detention Context." Michigan Journal of Race & Law, vol. 26, no. 1, Fall 2020, pp. 205-240. HeinOnline.

OSCOLA 4th ed.

Jennifer Safstrom, 'Thirteenth Amendment Litigation in the Immigration Detention Context' (2020) 26 Mich J Race & L 205

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# THIRTEENTH AMENDMENT LITIGATION IN THE IMMIGRATION DETENTION CONTEXT

Jennifer Safstrom\*

## ABSTRACT

*This Article analyzes how the Thirteenth Amendment has been used to prevent forced labor practices in immigration detention. The Article assesses the effectiveness of Thirteenth Amendment litigation by dissecting cases where detainees have challenged the legality of labor requirements under the Trafficking Victims Protection Act. Given the expansion in immigration detention, the increasing privatization of detention, and the significant human rights implications of this issue, the arguments advanced in this Article are not only currently relevant but have the potential to shape ongoing dialogue on this subject.*

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\* Counsel, Institute for Constitutional Advocacy & Protection, Georgetown University Law Center (L' 18). I extend my sincere appreciation to the attendees of the Law & Society Association's 2020 Annual Meeting, American Constitution Society's Fifth Annual Constitutional Law Scholars Forum and the Illinois Institute of Technology Chicago-Kent College of Law's Thirteenth Amendment & Racial Justice Conference for their feedback and insight. I am deeply grateful to the staff of the *Michigan Journal of Race & Law* for their diligence and zeal. With special thanks to my family for their love and support. All views expressed are my own and do not reflect those of any current or previous employer, client, or other entity.

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### INTRODUCTION

Across the country, detainees in the custody of the United States Department of Homeland Security’s Immigration and Customs Enforcement (“ICE”) allege they are being coerced into performing work without proper compensation, often under the threat of punishment or under other forcible conditions.<sup>1</sup> The immigrant plaintiffs in one such case—*Menocal v. GEO Group, Inc.*—filed a lawsuit alleging violations of federal law prohibiting forced labor by the for-profit company managing and operating the facility.<sup>2</sup> The complaint asserts that detainees were forced by GEO Group (“GEO”) to work for either token pay (\$1/day) or no pay to perform the following range of tasks:

Plaintiffs scrubbed bathrooms, showers, toilets, and windows throughout GEO’s Aurora facility. They cleaned and maintained GEO’s on-site medical facility, cleaned the medical facility’s toilets, floors and windows, cleaned patient rooms and medical staff offices, swept, mopped, stripped, and waxed the floors of the medical facility, did medical facility laundry, swept, mopped, stripped, and waxed floors throughout the facility, did detainee laundry, prepared and served detainee meals, assisted in preparing catered meals for law enforcement events sponsored by GEO, performed clerical work for GEO, prepared clothing for newly arriving detainees, provided barber services to detainees, ran the facility’s law library, cleaned the facility’s intake area and solitary confinement unit, deep cleaned and prepared vacant portions of the facility for newly

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1. See Michelle Chen, *ICE’s Captive Immigrant Labor Force*, NATION (Oct. 11, 2017), <https://www.thenation.com/article/ices-captive-immigrant-labor-force> [<https://perma.cc/5BBU-5PCR>].

2. See *Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258, 261 (D. Colo. 2017), *aff’d*, 882 F.3d 905 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 143, 202 L. Ed. 2d 34 (2018).

arriving detainees, cleaned the facility's warehouse, and maintained the exterior and landscaping of the GEO building, *inter alia*.<sup>3</sup>

The detainees in these facilities allege that they were forced to do various types of labor, including administrative, janitorial, housekeeping, landscaping, and maintenance work. The complaint also alleges that individuals who refused to work were subject to threats of discipline including punishment in solitary confinement if they failed to comply.<sup>4</sup> This scheme of underpayment or nonpayment “unjustly enriched [the company] when it paid its employees \$1 per day, or nothing at all, for their labor.”<sup>5</sup>

This Article seeks to analyze how legislation developed pursuant to the Thirteenth Amendment can be used to prevent forced labor in immigrant detention settings. In addition to analyzing the effectiveness of these legal challenges brought under the Trafficking Victims Protection Act (“TVPA”), the Article assesses how these arguments can impact current litigation, legislation, and public action across the country.

Given the expansion in immigration detention, the increasing privatization of detention, and the significant human rights implications of this issue, this Article is critical in the current moment and can be used to shape ongoing dialogue on this subject. This Article assesses the role that Thirteenth Amendment litigation in the immigration detention context can play in rectifying inequities at the intersection of race, immigration, and labor.

## I. CONTEXTUALIZING THE THIRTEENTH AMENDMENT IN THE IMMIGRATION DETENTION SETTING

### A. *The Immigration Detention Context*

In assessing whether the Thirteenth Amendment should be used in the immigration detention context, it is key to understand the circumstances in which it would be applied and who would be impacted. The immigrant detainee population is primarily comprised of people of color, more of whom are being held in detention and are being detained for longer periods of time than ever before.

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3. Complaint at 2-3, *Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258, 261 (D. Colo. filed Oct. 22, 2014) (No. 14-cv-02887).

4. *See id.* at 3.

5. *Id.* at 2.

Immigrants are mostly people of color: the percent of white, non-Hispanic immigrants has dropped from nearly fifty percent in 1980 to under twenty percent in 2018.<sup>6</sup> According to Pew Research Center data, the top five countries of origin for immigrants to the United States in 2018 were Mexico, China, India, Philippines, and El Salvador.<sup>7</sup> Moreover, per data collected by Freedom for Immigrants, the top countries of birth for immigrants in detention are Mexico, El Salvador, Honduras, and Guatemala.<sup>8</sup> This data reflects the changing demographics of the immigrant population.<sup>9</sup>

The length of immigration detention is also increasing. In some cases, ICE detains immigrants while pursuing deportation.<sup>10</sup> Reports from the TRAC Immigration Project, which systematically reviews federal government data, indicate highly variable lengths of detention among detainees. In 2012, of 1,500 individuals detained, 40 percent had their case “dispositions occur[] very quickly, within three days,” and 70 percent had their “ICE custody ended during the first month.”<sup>11</sup> Short detention durations can be attributed to the number of individuals who “did not

6. Abby Budiman, Christine Tamir, Lauren Mora & Luis Noe-Bustamante, *Facts on U.S. Immigrants, 2018*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/hispanic/2019/06/03/facts-on-u-s-immigrants-trend-data/> [https://perma.cc/2YHH-HNTS].

7. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2019/06/03/key-findings-about-u-s-immigrants/> [https://perma.cc/D658-2RTT].

8. *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-statistics> [https://perma.cc/VK9B-NHH6] (last visited Sept. 27, 2020).

9. See *id.* Data compiled by Freedom for Immigrants, based on “thousands of intakes with people in immigration detention,” illustrates that individuals aged 26 to 35 years old are the largest age group being detained, followed by 36 to 45 years olds and subsequently by individuals under the age of 25.

10. Section 1226(a) of the INA provides that, “pending a decision on whether the alien is to be removed from the” country, “the Attorney General (1) may continue to detain the arrested alien; and (2) may release the alien on (A) bond of at least \$1,500 . . . or (B) conditional parole[.]” 8 U.S.C.A. § 1226 (West 2020). The inability to pay is but one factor that might cause an individual to be detained. See Brianna Hill, *Issues with Interpretation, Video-Teleconferencing, and More in Chicago’s Immigration Bond Court*, CHI. APPLESEED FUND FOR JUSTICE (Feb. 18, 2020), <http://www.chicagoappleseed.org/our-blog/preliminary-findings-immigration-observations/> [https://perma.cc/UA85-BEDX] (reporting that although “about 30% of detained immigrants were able to secure an immigration custody decision that allowed them to be released upon paying bond” in 2018, about one-fifth of detainees granted bond “remain in custody until the end of their case, most likely because of their inability to pay their bond”).

11. *Legal Noncitizens Receive Longest ICE Detention*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGRATION (June 3, 2013), <https://trac.syr.edu/immigration/reports/321/> [https://perma.cc/8N4Y-SR3D].

contest their deportation”<sup>12</sup> and may “indicat[e] that ICE did not need to obtain court approval to deport these individuals.”<sup>13</sup> Even in the midst of increasingly lengthy detention periods, the American Immigration Council found “the average detention length was consistently and substantially longer in privately operated facilities” than at those that were publicly-operated.<sup>14</sup>

Differences in detention duration are especially evident when making state-by-state comparisons. In California, 50 percent of individuals “spent less than a day in ICE custody and nearly three quarters spent three days or less in lockup.”<sup>15</sup> In South Carolina and Alabama, however, only three percent of immigrants “were detained for three days or less.”<sup>16</sup> In states that detain individuals for longer periods of time, each day presents a new opportunity for unpaid labor to be requested. The population of detained immigrants has also increased steadily over the years from approximately 6,800 in 1994 to 49,500 in early 2019, rising about 625 percent over the last two and a half decades.<sup>17</sup> Yet, it seems that even this may be a conservative estimate, as other reports suggest the immigration population in detention exceeds 55,000, which would be over a 700 percent increase since 1994.<sup>18</sup>

Reports from within these detention centers often reveal shockingly atrocious conditions. The management of these facilities often reflects an extreme lack of care,<sup>19</sup> resulting in detainees’ inadequate access to medical

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12. *Id.*

13. *Detention by the Numbers*, *supra* note 8; *November 2017 ICE Detention Facility Lists*, NAT’L IMMIGRANT JUSTICE CTR. (Nov. 6, 2017), <https://www.scribd.com/document/373733514/November-2017-ICE-Detention-Facility-Lists#fromembed> [<https://perma.cc/5AZE-NFPH>].

14. EMILY RYO & IAN PEACOCK, AM. IMMIGRATION COUNCIL, *THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES* 23 (Dec. 2018), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_landscape\\_of\\_immigration\\_detention\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf) [<https://perma.cc/V3RY-WY2B>].

15. *Legal Noncitizens Receive Longest ICE Detention*, *supra* note 11.

16. *Id.*

17. Katie Sullivan & Jeff Mason, *Immigration Detention in the United States: A Primer*, BIPARTISAN POLICY CTR. (Apr. 24, 2019), <https://bipartisanpolicy.org/blog/immigration-detention-in-the-united-states-a-primer/> [<https://perma.cc/5MFB-3TMV>].

18. Isabela Dias, *ICE is Detaining More People Than Ever—and for Longer*, PACIFIC STANDARD (Aug. 1, 2019), <https://psmag.com/news/ice-is-detaining-more-people-than-ever-and-for-longer> [<https://perma.cc/X7FM-G8UB>] (reporting that there were “55,185 people in ICE’s custody, which represents a jump of almost 3,000 in comparison to just last week (which was already a record)”).

19. *See, e.g.*, Monsy Alvarado, Ashley Balcerzak, Stacey Barchenger, Jon Campbell, Rafael Carranza, Maria Clark, Alan Gomez, Daniel Gonzalez, Trevor Hughes, Rick Jervis, Dan Keemahill, Rebecca Plevin, Jeremy Schwartz, Sarah Taddeo, Lauren Villagran, Dennis Wagner, Elizabeth Weise & Alissa Zhu, *‘These People Are Profitable’: Under Trump*,

care,<sup>20</sup> sexual abuse,<sup>21</sup> and inhumane conditions of detention.<sup>22</sup> Yet, the government's lack of basic data tracking,<sup>23</sup> penchant for destroying records,<sup>24</sup> and decreased oversight<sup>25</sup> all allow these conditions to persist.

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*Private Prisons Are Cashing in on ICE Detainees*, USA TODAY (Dec. 20, 2019), <https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-detention-private-prisons-expands-under-trump-administration/4393366002/> [<https://perma.cc/7XWF-8C53>] (reporting “400 allegations of sexual assault or abuse, inadequate medical care, regular hunger strikes, frequent use of solitary confinement, more than 800 instances of physical force against detainees, nearly 20,000 grievances filed by detainees and at least 29 fatalities, including seven suicides, since Trump took office in January 2017”); BBC, *Trump Migrant Separation Policy: Children ‘In Cages’ in Texas* (June 18, 2018), <https://www.bbc.com/news/world-us-canada-44518942> [<https://perma.cc/X5TV-28EK>]; Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html>; Rachel Treisman, *Whistleblower Alleges ‘Medical Neglect,’ Questionable Hysterectomies Of ICE Detainees*, NPR (Sept. 16, 2020 4:43 AM), <https://www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detainee> [<https://perma.cc/BX79-3G78>] (complaint allegations included: performing sterilizations without consent or medical necessity, “refusing to test detainees for COVID-19, shredding medical requests submitted by detained immigrants, fabricating medical records, allowing employees to work while symptomatic and awaiting COVID-19 test results, withholding information from detainees and employees about who has tested positive, underreporting COVID-19 cases, and allowing the transfer of detained immigrants, including those who have tested positive for the virus”).

20. See, e.g., Hamed Aleaziz, *Another Immigrant Has Died in ICE Custody. She’s The Eighth Since October.*, BUZZFEED NEWS (Mar. 9, 2020, 7:13 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-died-ice-custody-healthcare-hospital-asylum> [<https://perma.cc/T679-BCLZ>] (reporting death of 22-year-old Guatemalan woman as “the eighth [fatality] in ICE custody in the 2020 fiscal year, which began Oct. 1, and equals the number of deaths for the entire 2019 fiscal year”); *US: Poor Medical Care, Deaths, in Immigrant Detention*, HUMAN RTS. WATCH (June 20, 2018), <https://www.hrw.org/news/2018/06/20/us-poor-medical-care-deaths-immigrant-detention#> [<https://perma.cc/DHW4-9JW4>].

21. See, e.g., Alice Speri, *Detained, Then Violated: 1,224 Complaints Reveal a Staggering Pattern of Sexual Abuse in Immigration Detention. Half of Those Accused Worked for ICE.*, INTERCEPT (Apr. 11, 2018, 12:11 PM), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/> [<https://perma.cc/57M2-HTEK>] (noting 1,224 complaints from January 2010 to September 2017, but only 43 investigations during the same time period; also observing that in nearly 60 percent of cases “an officer or private detention contractor [w]as the perpetrator of the alleged abuse” and that one-third of complaints assert “an officer either directly witnessed the alleged abuse or was made aware of it”).

22. See, e.g., Ellen Gallagher, *The Other Problem with ICE Detention: Solitary Confinement*, WASH. POST (Aug. 28, 2019), <https://www.washingtonpost.com/outlook/2019/08/28/other-problem-with-ice-detention-solitary-confinement/>; John Washington, *The Epidemic of Hunger Strikes in Immigrant Detention Centers*, NATION (Feb. 13, 2020), <https://www.thenation.com/article/society/immigrant-detention-hunger-strike/> [<https://perma.cc/HN22-8J4R>].



Yet, the expansion of the mass detention system likely comes as welcome news to the many American companies that profit from it. The chief executives of the private companies running these immigration facilities “speak of ‘improved occupancy rates’ as a perverse benefit of [ICE’s] practices, which heavily sweep in undocumented immigrants as ‘detainees.’”<sup>26</sup> DHS Homeland Security Advisory Council reported in 2016 that 65 percent of the detainee population resides in private facilities, while 25 percent are detained in public facilities like county jails, and only 10 percent of detainees reside in federally owned and directed facilities.<sup>27</sup> According to data compiled by the Urban Justice Center’s Correc-

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23. Associated Press, *More than 5,400 Children Split at Border, According to New Count*, NBC NEWS (Oct. 25, 2019, 4:58 AM), <https://www.nbcnews.com/news/us-news/more-5-400-children-split-border-according-new-count-n1071791> [<https://perma.cc/X3H8-Z4VW>] (reporting that 5,400 children separated from their parents at the border, especially the 1,500 admitted between July 2017 to June 2018, were “difficult to find because the government had inadequate tracking systems”); Jacob Soboroff, *Emails Show Trump Admin Had ‘No Way to Link’ Separated Migrant Children to Parents*, NBC NEWS (May 1, 2019, 7:29 PM), <https://www.nbcnews.com/politics/immigration/emails-show-trump-admin-had-no-way-link-separated-migrant-n1000746> [<https://perma.cc/5A64-PJGG>] (citing delays in family reunifications because government’s allegedly centralized database system “did not contain enough information to successfully reunite parents and kids”).

24. *Immigration and Customs Enforcement Scheduled Approved*, U.S. NAT’L ARCHIVES: RECORDS EXPRESS (Dec. 17, 2019), <https://records-express.blogs.archives.gov/2019/12/17/immigration-and-customs-enforcement-scheduled-approved/> [<https://perma.cc/95RU-JCPK>] (noting the cache of documents scheduled for destruction included “covers records related to deaths of detainees and allegations of sexual assault and abuse of detainees”).

25. Eunice Cho, *The Trump Administration Weakens Standards for ICE Detention Facilities*, ACLU (Jan. 14, 2020), <https://www.aclu.org/news/immigrants-rights/the-trump-administration-weakens-standards-for-ice-detention-facilities/> [<https://perma.cc/E2YV-M3LM>] (explaining how new standards weaken protections for immigrants by removing critical requirements governing health accreditation, health assessments, and physician supervision; eliminating protections against the use of force and solitary confinement; eradicating standards governing basic needs and human dignity, such that “ICE no longer requires that hold rooms have toilets with modesty panels, and removes the ratios for the number of toilets per detainee”; and modifying the requirements for new facilities to no longer require outdoor recreation space).

26. Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 970 (2019).

27. HOMELAND SECURITY ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES (Dec. 1, 2016), [https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2016-12/DHS\\_HSAC\\_PIDF\\_Report-FINAL\\_DRAFT.pdf](https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2016-12/DHS_HSAC_PIDF_Report-FINAL_DRAFT.pdf) [<https://perma.cc/5FBC-W5FF>]; see also Mike Ludwig, *Big Banks Are Divesting From Private Prisons, Thanks to Anti-ICE Activism*, SLUDGE (July 24, 2019, 11:44 AM), <https://readsludge.com/2019/07/24/big-banks-are-divesting-from-private-prisons-thanks-to-anti-ice-activism/> [<https://perma.cc/N8L3-RWGN>] (reporting that the National Immigrant Justice Center estimates that “71 percent

tions Accountability Project in 2019, as many as 72 percent of immigrant detainees are held in privately owned facilities.<sup>28</sup> As a result, “ICE spends more than \$2 billion a year on immigrant detention through private jails.”<sup>29</sup> The two largest detention companies—GEO Group and Core-Civic, formerly Corrections Corporation of America—earned a combined \$985 million from contracts with ICE in 2017.<sup>30</sup>

This business is only expanding, as are the earnings. The staggering increase in immigration detention, both in terms of total numbers and length of confinement, perpetuates the “profit-driven incentivization for mass incarceration of immigrants.”<sup>31</sup> These companies are planning and constructing additional detention facilities<sup>32</sup> while detained individuals and advocacy groups continue to make allegations regarding the poor quality of care in these facilities.<sup>33</sup>

Privatization also shields operators from scrutiny because “detention contractors are not subject to federal open records laws, civil service requirements, administrative law, constitutional requirements, and other legal checks that would otherwise apply to federal officials doing the same work.”<sup>34</sup> ICE is responsible for monitoring private facilities to ensure that they meet detention standards. The Inspector General of the Department

of people in ICE custody were held at private facilities in 2017” as opposed to “only 8.5 percent of state and federal prisoners are held in private jails and prisons”).

28. *Immigration Detention: An American Business*, WORTH RISES, [hereinafter Worth Rises] <https://worthrises.org/immigration> [<https://perma.cc/GP8A-L9AY>] (last visited Sept. 26, 2020).

29. John Burnett, *Big Money as Private Immigrant Jails Boom*, NPR (Nov. 21, 2017, 5:00 AM), <https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom> [<https://perma.cc/TX5A-7UHK>].

30. Worth Rises, *supra* note 28.

31. Tanvi Misra, *Emails Show How Private Firms Profit from ICE Detention Centers*, ROLL CALL (Sept. 26, 2019, 10:09 AM), <https://www.rollcall.com/news/policy/emails-show-how-private-firms-profit-from-ice-detention-centers> [<https://perma.cc/G36U-FCPH>] (reporting that Immigration Centers of America was awaiting payment “for at least \$1.8 million in February for running operations at the Farmville facility, which has around 700 beds” and “that ICE pays \$120 per day for each person held at Farmville, and an additional \$28 per person when the total number of detainees exceeds 500”).

32. Nuria Marquez Martinez, *ICE Is Rushing to Open For-Profit Detention Centers—Right Before California’s Ban Goes Into Effect*, Mother Jones (Oct. 29, 2019), <https://www.motherjones.com/politics/2019/10/ice-california-new-detention-facilities-private-profit/> [<https://perma.cc/U4DT-48RA>].

33. See Gaby Del Valle, *ICE Has Been Ramping Up Its Work with a Private Prison Company Connected to Horrific Allegations*, VICE (Oct. 29, 2019, 11:31 AM), [https://www.vice.com/en\\_us/article/ywa4v5/ice-has-been-ramping-up-its-work-with-a-private-prison-company-connected-to-horrific-allegations](https://www.vice.com/en_us/article/ywa4v5/ice-has-been-ramping-up-its-work-with-a-private-prison-company-connected-to-horrific-allegations) [<https://perma.cc/6ZUD-DWVU>].

34. David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. Online 224, 226 (2019).

of Homeland Security (“DHS”) reported that ICE has failed to “ensure adequate oversight” for these facilities, leaving some issues “unaddressed for years.”<sup>35</sup> When coupled with destructive public commentary that dehumanizes the individuals who are detained, these circumstances are likely to worsen detention conditions and result in further constitutional violations.<sup>36</sup>

### B. *The Civil-Criminal Distinction*

There are many similarities between the immigration and criminal detention settings, including poor conditions, gross lack of oversight, and systemic underfunding of detainee services.<sup>37</sup> However, the most salient parallels are the staggering racial disparities within these systems and the

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35. DEP’T OF HOMELAND SEC., OFF. OF INSPECTOR GEN., ICE’S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMIC IMPROVEMENTS (June 26, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf> [<https://perma.cc/ET5L-5PPF>].

36. See John Fritze, *Trump Used Words Like ‘Invasion’ and ‘Killer’ to Discuss Immigrants at Rallies 500 Times*, USA TODAY (Aug. 8, 2019, 4:46 PM), <https://www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/> [<https://perma.cc/5MFJ-YVPE>] (documenting that an “analysis of the 64 rallies Trump has held since 2017 found that, when discussing immigration, the president has said ‘invasion’ at least 19 times. He has used the word ‘animal’ 34 times and the word ‘killer’ nearly three dozen times”); see also Tess Bonn, *Trump’s Immigration Rhetoric Has ‘Chilling Effect’ on Families, Says Children’s Advocacy Group Director*, HILL (Dec. 20, 2018), <https://thehill.com/hilltv/rising/422371-childrens-advocacy-group-director-says-trumps-immigration-rhetoric-has-chilling> [<https://perma.cc/D9WA-UVDP>]; see also Philip Rucker, *‘How Do You Stop These People?’: Trump’s Anti-immigrant Rhetoric Looms over El Paso Massacre*, WASH. POST (Aug. 4, 2019), [https://www.washingtonpost.com/politics/how-do-you-stop-these-people-trumps-anti-immigrant-rhetoric-looms-over-el-paso-massacre/2019/08/04/62d0435a-b6ce-11e9-a091-6a96e67d9cce\\_story.html](https://www.washingtonpost.com/politics/how-do-you-stop-these-people-trumps-anti-immigrant-rhetoric-looms-over-el-paso-massacre/2019/08/04/62d0435a-b6ce-11e9-a091-6a96e67d9cce_story.html).

37. See, e.g., Muzaffar Chishti & Jessica Bolter, *As #DefundThePolice Movement Gains Steam, Immigration Enforcement Spending and Practices Attract Scrutiny*, MIGRATION POL’Y INST. (June 25, 2020), <https://www.migrationpolicy.org/article/defundthepolice-movement-gains-steam-immigration-enforcement-spending-and-practices-attract> [<https://perma.cc/46NB-XVRE>]; Stacy Brustin, *I Toured an Immigration Detention Center. The Prison-like Atmosphere Was Mind-numbing.*, USA TODAY (May 16, 2019, 4:00 AM), <https://www.usatoday.com/story/opinion/voices/2019/05/16/ice-immigration-detention-center-like-prison-otero-column/1190633001/> [<https://perma.cc/NMB2-SYLW>]; Claire Brown, *ICE Detainees Are Supposed to Get Three Square Meals a Day—But They Don’t*, FOOD JUSTICE (Aug. 24, 2018), <https://civileats.com/2018/08/24/ice-detainees-are-supposed-to-get-three-square-meals-a-day-but-they-dont/> [<https://perma.cc/6FZR-LEMS>]; John W. Schoen & Chloe Aiello, *ICE Overspends Tax Dollars on a Detention Policy Many Americans Find Abhorrent*, CNBC (June 22, 2018, 12:04 PM), <https://www.cnbc.com/2018/06/22/ice-overspends-tax-dollars-on-a-detention-policy-many-americans-find-abhorrent.html> [<https://perma.cc/P9A8-MWUL>].

increasing trend toward privatization. Despite the many commonalities, the applicability of the Thirteenth Amendment is determined by one vital difference between these detention contexts.

Like the immigrant detention system, the prison population is “disproportionately men and women of color.”<sup>38</sup> People of color are overrepresented in detention<sup>39</sup> for several reasons, including the criminalization of poverty,<sup>40</sup> the over-policing of communities of color,<sup>41</sup> and the historical vestiges of discrimination that have become institutionalized in our criminal legal system.<sup>42</sup> This has given rise to “a prison system that incarcerates black people at more than five times the rate of white people.”<sup>43</sup>

38. Goodwin, *supra* note 26, at 971.

39. *Compare Inmate Race*, U.S. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp) [https://perma.cc/PK59-3MBZ] (last visited Apr. 5, 2020) (providing statistics on incarceration rates), *with Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> [https://perma.cc/3ZJ3-AEXW] (last visited Apr. 5, 2020) (despite comprising only 13.4 percent of the population, Black people represent 37.5 percent of those detained in federal prisons; Native Americans are also overrepresented, constituting 2.3 percent of detained individuals but only 1.3 percent of the general population; data on Hispanic/Latinos not provided).

40. Jeff Yungman, *The Criminalization of Poverty*, AM. BAR ASS'N (2019), [https://www.americanbar.org/groups/gpsolo/publications/gp\\_solo/2019/january-february/criminalization-poverty/](https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2019/january-february/criminalization-poverty/) [https://perma.cc/Y9NB-C92D] (finding that “[p]oor people, especially people of color, face a greater risk of being fined, arrested, and even incarcerated for minor offenses . . . [such as] [a] broken taillight, an unpaid parking ticket, a minor drug offense, sitting on a sidewalk, or sleeping in a park”) (referencing KAREN DOLAN, INST. FOR POL'Y STUD., *THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY*).

41. See, e.g., Alexi Jones, *Police Stops Are Still Marred by Racial Discrimination, New Data Shows*, PRISON POL'Y INITIATIVE (Oct. 12, 2018), <https://www.prisonpolicy.org/blog/2018/10/12/policing/> [https://perma.cc/VHJ7-SBS3] (noting “Black residents were more likely to be stopped by police than white or Hispanic residents, both in traffic stops and street stops” and that “[p]olice are twice as likely to use force against people of color”); Danyelle Solomon, *The Intersection of Policing and Race*, CTR. FOR AM. PROGRESS (Sept. 1, 2016, 5:00 AM), <https://www.americanprogress.org/issues/race/reports/2016/09/01/143357/the-intersection-of-policing-and-race/> [https://perma.cc/229T-UMFZ]; Shaun King, *Communities of Color are Massively Over-policed — Effectively Criminalizing Color Itself*, N.Y. DAILY NEWS (Aug. 7, 2016, 4:37 PM), <https://www.nydailynews.com/news/national/communities-color-massively-over-policed-article-1.2741945> [https://perma.cc/5NW5-98WF].

42. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2011).

43. Becky Little, *Does an Exception Clause in the 13th Amendment Still Permit Slavery?*, HISTORY.COM (Oct. 2, 2018), <https://www.history.com/news/13th-amendment-slavery-loop-hole-jim-crow-prisons> [https://perma.cc/CC8V-S2AY]; see also *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> [https://perma.cc/3ALC-LESZ] (last visited Sept. 22, 2020).

The second notable similarity to the immigration detention context is the rapid increase of the privatization of prisons, especially since the start of “the Trump Administration, [when] private prison companies have expanded their reach and consolidated their market share.”<sup>44</sup> The U.S. Department of Justice has acknowledged that “between 1980 and 2013, the federal prison population increased by almost 800 percent,” such that private prisons have profited from this expansion.<sup>45</sup>

As a result of these trends, laborers in prison are predominantly people of color and are increasingly under the control of private companies that run these detention facilities. However, the Thirteenth Amendment exempts “punishment for crime whereof the party shall have been duly convicted” from its scope of protection.<sup>46</sup> Accordingly, “prison labor practices, from chain gangs to prison laundries, do not run afoul of the Thirteenth Amendment.”<sup>47</sup> Those confined within the jail or prison system pursuant to a criminal conviction are part of the Thirteenth Amendment’s loophole.<sup>48</sup> These individuals’ labor is either unpaid or underpaid.<sup>49</sup> This has been permitted for years, despite arguments advocat-

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44. Goodwin, *supra* note 26, at 970 (citing Ciara O’Neill, *Private Prisons: Principally Profit-Oriented and Politically Pliable*, FOLLOW THE MONEY (June 7, 2018), <https://www.followthemoney.org/research/institute-reports/private-prisons-principally-profit-oriented-and-politically-pliable> [<https://perma.cc/B9MW-3QM3>]).

45. *Id.* at 971 (citing Memorandum from Sally Yates, Deputy Attorney General, on Reducing Our Use of Private Prisons (Aug. 18, 2016), <https://www.justice.gov/archives/opa/file/886311/download> [<https://perma.cc/NTQ9-AZF4>]).

46. U.S. CONST. amend. XIII; *but see* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist View*, 94 N.Y.U. L. REV. 1465 (July 23, 2019) (Although beyond the scope of this Article, at least one scholar contends that— notwithstanding the Punishment Clause—convicted persons retain Thirteenth Amendment protection against any slavery or involuntary servitude that has not been inflicted “as punishment” for the particular crime of which they “have been duly convicted.” If that argument holds true, then the Amendment shields persons who are incarcerated not only against compulsory labor, but also against any badge or incident of slavery that has not been imposed as part of the individual’s sentence.).

47. Jamal Greene & Jennifer Mason McAward, *Common Interpretation: The Thirteenth Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiii/interps/137> [<https://perma.cc/SN24-KK58>] (last visited Sept. 22, 2020).

48. Little, *supra* note 43.

49. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/V7AS-EMGU>] (noting several states where “regular prison jobs are still unpaid in Alabama, Arkansas, Florida, Georgia, and Texas”; reviewing wages for regular, non-industry jobs: where lowest pay is \$0 and highest pay is \$2.00, and jobs in state-owned businesses or “correctional industries,” where lowest pay is \$0 and highest pay is \$5.15).

ing for improving the pay of incarcerated laborers.<sup>50</sup> Ultimately, those who are criminally detained are exempt from the Thirteenth Amendment and subject to a form of modern-day slavery.<sup>51</sup>

By contrast, immigration detention is civil in nature.<sup>52</sup> Although some immigration offenses such as unlawful re-entry are criminal offenses with criminal penalties, many immigration violations are civil in nature.<sup>53</sup> Federal law recognizes this civil-criminal distinction in the immigration context. For instance, physical presence in the United States without proper authorization, such as overstaying a visa, is a civil—but not criminal—offense.<sup>54</sup> As such, the civil nature of immigration detention is important to note given the Thirteenth Amendment’s criminal detention exemption.

Thus, despite the many similarities between the individuals detained by the criminal legal and the immigration detention systems—including being subject to complete control in a confined setting within a system that has a disparate impact on communities of color—the fundamental distinction between the criminal versus civil nature of the detention impacts the applicability of the Thirteenth Amendment’s protections. As a

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50. U.S. GOV. ACCOUNTABILITY OFF., PRISONER LABOR: PERSPECTIVES ON PAYING THE FEDERAL MINIMUM WAGE (May 20, 1993), <https://www.gao.gov/assets/220/217999.pdf> [<https://perma.cc/JRC6-97W7>]. The Government Accountability Office (GAO) report found in 1993 that “inmates are not paid or are paid at rates that are substantially less than the federal minimum wage,” “prison systems would have a substantial increase in costs if they were required to pay inmate workers the minimum wage,” and that “some organizations generally favored improving inmate work programs and inmate pay through greater use of prison industry programs, and believed that prison industries gain an unfair competitive advantage by not paying inmates minimum wages.” *Id.* at 4, 6, 10.

51. See Lindsey Bever & Cleve R. Wootson Jr., *Inmates Across the U.S. Are Staging a Prison Strike over ‘Modern-day Slavery’*, WASH. POST (Aug. 21, 2018, 5:53 PM), <https://www.washingtonpost.com/nation/2018/08/21/inmates-across-us-are-staging-prison-strike-over-modern-day-slavery/> [<https://perma.cc/FDW9-6R5P>]; see also Jennifer Safstrom & Claire G. Gastañaga, *Virginia Must Stop Exploiting People in Prison*, WASH. POST (Apr. 24, 2020), [https://www.washingtonpost.com/opinions/local-opinions/virginia-must-stop-exploiting-people-in-prison/2020/04/23/e6516ff8-790e-11ea-b6ff-597f170df8f8\\_story.html](https://www.washingtonpost.com/opinions/local-opinions/virginia-must-stop-exploiting-people-in-prison/2020/04/23/e6516ff8-790e-11ea-b6ff-597f170df8f8_story.html).

52. Sullivan & Mason, *supra* note 17 (“Immigration detention is the practice of holding individuals in government custody for immigration violations, such as illegal entry or visa overstay, during their removal proceedings. Notably, to remain in the United States without authorization is an administrative violation of the law. For this reason, immigration detention is civil in nature and therefore distinct from criminal incarceration.”).

53. See, e.g., 8 U.S.C. § 1326(a).

54. See, e.g., 8 U.S.C. § 1227; see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (Kagan, J., plurality opinion) (holding, in the context of 8 U.S.C. § 1227, that “[t]he removal of an alien is a civil matter”); *Id.* at 1231 (Gorsuch, J., concurring) (agreeing about the civil context).

result, though in many ways similarly situated in terms of confinement and vulnerability, those in the immigration detention are entitled to protections against forced labor that individuals who are incarcerated do not receive.<sup>55</sup>

*C. History and Legal Context of the Thirteenth Amendment and  
Trafficking Victims Protection Act*

While the Thirteenth Amendment abolished slavery upon its ratification in 1865, the Amendment continues to serve an important function in preventing labor abuses.<sup>56</sup> The Amendment declares that “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction,”<sup>57</sup> and “is enforceable against private parties in the absence of state action.”<sup>58</sup> Its expansiveness is neither limited in its geographic reach nor in who is required to comply with the prohibition; it is an unqualified denunciation of the conditions of forced labor “and not a declaration in favor of a particular people” such that the Amendment “reaches every race and every individual.”<sup>59</sup> The Thirteenth Amendment, like most provisions of the Constitution, applies to non-citizens, who are guaranteed “many of the basic rights, such as the freedom of religion and speech, the right to due process and equal protection under the law” by virtue of their personhood and presence in the United States, not their citizenship status.<sup>60</sup>

Moreover, under Section 2, Congress has the “power to enforce this article by appropriate legislation.”<sup>61</sup> This provision permits Congress to legislate against the “badges and incidents of slavery” that violate the Amendment.<sup>62</sup> The expansive nature of the Thirteenth Amendment and

55. U.S. CONST. amend. XIII.

56. 45 AM. JUR. 2D *Involuntary Servitude* § 12 (2020).

57. U.S. CONST. amend. XIII.

58. 45 AM. JUR. 2D *Involuntary Servitude* § 12 (2020).

59. *Id.*

60. Gretchen Frazee, *What Constitutional Rights Do Undocumented Immigrants Have?*, PBS (June 25, 2018, 5:08 PM), <https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have> [<https://perma.cc/DC64-H8WV>].

61. U.S. CONST. amend. XIII.

62. Greene & McAward, *supra* note 47 (providing examples of congressional legislation: “the Anti-Peonage Act of 1867 prohibits peonage, and another federal law, 18 U.S.C. § 1592, makes it a crime to take somebody’s passport or other official documents for the purpose of holding her as a slave”; “Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (which criminalizes race-based hate crimes) and the Trafficking Victims Protection Act (which penalizes human trafficking and protects its survivors).”).

the laws pursuant to Section 2 “are grounded in the view that slavery was not just the holding of black Americans to unpaid service, but an entire system of social relations designed to enforce a racial hierarchy . . . [and that] [t]hese practices denied the equal citizenship status, and implicitly the humanity, of African Americans.”<sup>63</sup> Thus, it is no surprise that the Thirteenth Amendment ban on slavery and involuntary servitude encompasses “a broad[] range of labor arrangements where a person is forced to work by the use or threatened use of physical or legal coercion.”<sup>64</sup> This includes not only situations in which a “servant believes that he or she has no viable alternative but to perform service for the master because of the master’s use or threatened use of physical force, such as where there is repeated use and threats to use physical force,” but also those means where “the law, legal process, or legal institutions [are used] to compel service.”<sup>65</sup>

## II. LITIGATION IN THE IMMIGRATION DETENTION CONTEXT

The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution—the Reconstruction Amendments—are animated by twin purposes: inclusion and equality. These amendments—banning slavery, extending citizenship, and safeguarding voting—were ratified in the wake of the Civil War in an effort to establish equality for Black Americans with the goal of ensuring full societal participation and political representation. “The Reconstruction Amendments were the first to include separate, express authorization for Congress to enforce their substantive commands” and “were the first amendments to the U.S. Constitution to enlarge federal power.”<sup>66</sup>

The Thirteenth Amendment has been applied in the modern context against forced labor practices. Pursuant to its authority under Section 2 of the Thirteenth Amendment, Congress passed 18 U.S.C. § 1589 as part of the Trafficking Victims Protection Act to broaden the definition of the types of coercion that could intimidate or pressure an individual

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63. Jamal Greene, *Matters of Debate: The Thirteenth Amendment and the Constitutional Imagination*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiii/interps/137#the-thirteenth-amendment-today-jamal-greene> [<https://perma.cc/TB62-25HA>] (last visited Sept. 23, 2020).

64. Greene & McAward, *supra* note 47 (noting that “the Thirteenth Amendment bans peonage, which occurs when a person is compelled to work to pay off a debt” and that would trap individuals “in a cycle of work-without-pay” that the Supreme Court held unconstitutional in *Bailey v. Alabama*, 219 U.S. 219 (1911)).

65. 45 AM. JUR. 2D *Involuntary Servitude* § 6 (citing *U.S. v. King*, 840 F.2d 1276 (6th Cir. 1988); *U.S. v. Alzanki*, 54 F.3d 994 (1st Cir. 1995)).

66. Christopher Bryant, *The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments*, 47 HOUS. L. REV. 579, 596 (2010).



into forced labor. This expanded definition developed “in response to the Supreme Court’s decision in *United States v. Kozminski*, 487 U.S. 931 (1988), which interpreted § 1584 to require the use or threatened use of physical or legal coercion,” encompasses types of conduct that might result in forced labor.<sup>67</sup> Section 1589 prohibits:

[O]btain[ing] labor or services . . .

- (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
- (2) by means of serious harm or threats of serious harm to that person or another person;
- (3) by means of the abuse or threatened abuse of law or legal process; or
- (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.<sup>68</sup>

Those who violate the § 1589 forced labor provision “shall be fined under this title, imprisoned not more than 20 years, or both.”<sup>69</sup>

Code provision 18 U.S.C.A. § 1595 provides a civil cause of action for enforcement of any violation of this chapter, including § 1589. This subjects any individual who perpetrates a violation or who “knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter” to liability “in an appropriate district court of the United States” for “damages and reasonable attorneys fees.”<sup>70</sup>

Advocates have filed lawsuits to remedy forced labor violations occurring in the immigration detention context pursuant to this provision.<sup>71</sup>

67. *Involuntary Servitude, Forced Labor, and Sex Trafficking Statutes Enforced*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/involuntary-servitude-forced-labor-and-sex-trafficking-statutes-enforced> [<https://perma.cc/5BGS-RWGG>] (last updated Aug. 6, 2015).

68. 18 U.S.C. § 1589.

69. *Id.*

70. 18 U.S.C.A. § 1595.

71. See, e.g., Laura D. Francis, *\$1-a-Day Work Program for Immigrant Detainees Heads to Trial*, BLOOMBERG LAW: DAILY LABOR REPORT (Aug. 7, 2019, 5:12 PM), <https://news.bloomberglaw.com/daily-labor-report/geo-group-must-face-lawsuit-over-1-a-day-immigrant-detainee-pay> [<https://perma.cc/7DG5-AYWA>]; Tess Owen, *Detained Immigrants Suing a Private Prison Company over Forced Labor Move Forward with Groundbreaking Class Action*, VICE (Feb. 28, 2017, 9:18 AM), [https://www.vice.com/en\\_us/article/paz5qb/detained-immigrants-suing-a-private-prison-company-over-forced-labor-move-forward-with-groundbreaking-class-action](https://www.vice.com/en_us/article/paz5qb/detained-immigrants-suing-a-private-prison-company-over-forced-labor-move-forward-with-groundbreaking-class-action) [<https://perma.cc/JK2C-3G7M>].

Some courts have found § 1589 to be a constitutional exercise of congressional authority under the Thirteenth Amendment's broad enforcement power and command to enact "appropriate legislation," while others have held this implicitly in applying the statute.<sup>72</sup> This section compares the analysis and reasoning relied upon by various courts in assessing arguments pursuant to § 1589 as a mechanism for implementing the Thirteenth Amendment's promise against slavery and indentured servitude, including its modern manifestation in the immigration context.<sup>73</sup>

### A. Textual Analysis

In *Menocal v. GEO Group*, plaintiffs Alejandro Menocal, Marcos Brambila, Grisel Xahuentitla, Hugo Hernandez, Lourdes Argueta, Jesus Gaytan, Olga Alexaklina, Dagoberto Vizguerra, and Demetrio Valerga filed a class claim on behalf of current and former detainees of the Aurora Detention Facility, a private immigration detention center owned and operated by the GEO Group, Inc.<sup>74</sup> In this suit, detainees challenged both GEO's "Housing Unit Sanitation Policy, which required all detainees to clean their common living areas[,] and the Voluntary Work Program, which compensated detainees \$1 a day for performing various jobs."<sup>75</sup> Under the sanitation policy's "disciplinary system, detainees who refused to perform their cleaning assignments faced a range of possible sanctions, including: (1) the initiation of criminal proceedings, (2) disciplinary segregation—or solitary confinement—up to 72 hours, (3) loss of commissary, (4) loss of job, (5) restriction to housing unit, (6) reprimand, or (7) warning."<sup>76</sup>

Complainants asserted they were "forced . . . to clean the [housing units] for no pay and under threat of solitary confinement as punishment for any refusal to work."<sup>77</sup> Those participating in the Voluntary Work Program allege they worked up to eight hours a day "serving food, cleaning the facilities, doing laundry, and stripping and waxing floors" for only \$1 in compensation.<sup>78</sup>

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72. *United States v. Garcia*, No. 02-CR-110S-01, 2003 WL 22938040, at \*3 (W.D.N.Y. Dec. 2, 2003); *see also* *United States v. Marcus*, 560 U.S. 258 (2010) (finding error in the applied standard of review, but raising no issues regarding 1589's underlying legitimacy or Congress' authority to enact such a provision).

73. This Article does not address the retroactivity of TVPA's provisions.

74. *Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258, 261 (D. Colo. 2017).

75. *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 910-11 (10th Cir. 2018).

76. *Id.* at 911.

77. *Id.* (internal quotation marks omitted)

78. *Id.*

The *Menocal* plaintiffs' argument rests on the plain text of the TVPA, which prohibits "knowingly provid[ing] or obtain[ing] the labor or services of a person by . . . means of force, threats of force, physical restraint, or threats of physical restraint."<sup>79</sup> The threat or means of force "reaches any type of forced labor."<sup>80</sup> In response, GEO cited *U.S. v. Kozminski*, a 1988 Supreme Court case that held "§ 1584 reaches only compulsion of services by use of physical or legal, as opposed to psychological, coercion."<sup>81</sup> GEO also relied on *Channer v. Hall*, a case from the Fifth Circuit, which "held that an immigration detainee forced to work in the kitchen under threat of solitary confinement was not subjected to involuntary servitude in violation of the Thirteenth Amendment."<sup>82</sup> Although the language at issue in *Kozminski* and *Channer* appear in the same title, the court held the "language at issue here [in § 1589] is thus broader . . . and intentionally so."<sup>83</sup> The text of § 1589 of the TVPA, passed in its current iteration in 2008, was not constrained by the text or prior interpretations of different language reflected in § 1584, as the defendant detention center suggested. Moreover, the court determined that the legislative history of the provisions required a reading consistent with those put forth by *Menocal* and the other then-putative class representatives.<sup>84</sup> Thus, the court refused to dismiss the claim.<sup>85</sup>

The plaintiffs and the court in *Owino v. CoreCivic, Inc.* relied on the same textual argument in *Menocal*. Plaintiffs Sylvester Owino and Jonathan Gomez were incarcerated at the Otay Mesa Detention Center facility where "they and other detainees performed a variety of tasks for Defendant ranging from scrubb[ing] bathrooms, showers, toilets, and windows to provid[ing] barber services to detainees to perform[ing] clerical work for CoreCivic" for \$1 a day.<sup>86</sup> In *Owino*, "Plaintiffs respond[ed] that the plain text of the TVPA, including section 1589, proscribes any kind of forced labor even if that labor does not rise to the level of involuntary servitude as defined prior to enactment of the TVPA . . . [because] the plain meaning of the TVPA is broad enough to encompass their claims."<sup>87</sup> The court in *Owino* found that the statutory language is unam-

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79. *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1132 (D. Colo. 2015).

80. *Id.* (citing *Nunag-Tanedo v. East Baton Rouge Parish School Bd.*, 790 F.Supp.2d 1134 (C.D. Cal. 2011) and *U.S. v. Kaufman*, 546 F.3d 1242, 1263 (10th Cir. 2008)).

81. *Id.* (citing *U.S. v. Kozminski*, 487 U.S. 93 (1988)).

82. *Id.* (citing *Channer v. Hall*, 112 F.3d 214, 219 (5th Cir.1997)).

83. *Id.* at 1133.

84. See *infra* Part III.B.

85. *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1133 (D. Colo. 2015).

86. *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at \*1 (S.D. Cal. May 14, 2018) (internal quotation marks omitted).

87. *Id.* at \*4.

biguous because “[t]he statute’s express terms do not limit who constitutes a victim of forced labor” and the provision “applies to any ‘person’—there is no limitation on the type or status of said person.”<sup>88</sup> However, the defendant asserted that they were not subject to the forced labor provision because there were no “trafficking” violations under the TVPA. The court dismissed this argument, finding that “the statute [does not] contain any language limiting application to those who traffic in persons or transport persons across national borders.”<sup>89</sup> The *Owino* court also acknowledged that the term “labor or services” was left undefined by the statute and, relying on Webster’s Third New International Dictionary, found the term’s ordinary meaning to include any “expenditure of physical or mental effort esp[ecially] when fatiguing, difficult, or compulsory” or “the performance of work commanded or paid for by another.”<sup>90</sup> As such, the allegations that “detainees cleaned, maintained, scrubbed, swept, and mopped floors, bathrooms, showers, toilets, and windows . . . are clearly within the definition of labor or service.”<sup>91</sup> The court also acknowledged that threats of solitary confinement, the harm alleged by plaintiffs, was sufficient because “solitary confinement bears ‘a further terror and peculiar mark of infamy’” that even “the threat of solitary confinement, sufficiently alleges the means to achieve forced labor.”<sup>92</sup>

The *Owino* case guided the development of *Gonzalez v. CoreCivic, Inc.*, a related matter in which plaintiffs Carlos Gonzalez, Juan Jose Merino-Rodas, Maribel Gutierrez-Canchola, Gladys Carrera-Duarte, and Jennye Pagoada-Lopez (“Gonzalez Plaintiffs”) sought to consolidate their case with *Owino*’s.<sup>93</sup> These plaintiffs, like the complainants in *Owino*, “are former civil immigration detainees housed at Defendant’s Otay Mesa facility . . . [who] allege[d] that they received \$1 or \$1.50 a day for their labor at the detention facility” under threat of solitary confinement or loss of privileges.<sup>94</sup> The court denied the motion to consolidate and stayed the *Gonzalez* case “until it rules on class certification (or other dispositive motions, such as a motion to dismiss with prejudice) in *Owino*.”<sup>95</sup>

In another case, plaintiffs Wilhen Barrientos, Margarito Velazquez-Galicia, and Shoab Ahmed sued CoreCivic for “forc[ing] detainees to work through threats of physical violence, solitary confinement, and dep-

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88. *Id.*

89. *Id.*

90. *Id.* at \*10.

91. *Id.*

92. *Id.* at \*11.

93. *Gonzalez v. CoreCivic, Inc.*, No. 17-CV-2573 JLS (NLS), 2018 WL 1621543, at \*1 (S.D. Cal. Apr. 4, 2018).

94. *Id.* at \*1, \*3.

95. *Id.* at \*6.

privation of basic necessities” at the Stewart Detention Center in Georgia.<sup>96</sup> In August 2018, Barrientos and the other class members survived a motion to dismiss.<sup>97</sup> The district court in Georgia was not swayed by CoreCivic’s argument that the “TVPA is intended to apply narrowly to forced labor in the human trafficking context” and that applying the TVPA “to detainee work programs is ‘absurd’ and contrary to the intentions of Congress.”<sup>98</sup> The court found such an interpretation “ignores the plain language of the statute” and “misunderstands ‘the absurdity doctrine,’ which is a narrow exception to the fundamental principle that statutory interpretation must be anchored to the plain language of the statute.”<sup>99</sup> Consistent with the reasoning of other courts, the *Barrientos* court held that the plain reading of § 1589 indicates that “Congress placed no such restriction in the statute but chose instead to broadly prohibit ‘whoever’ from ‘obtain[ing] labor’ by any of the proscribed means.”<sup>100</sup> Thus, while the “lawful force necessary to detain the detainees cannot be the source for the TVPA claims,” individuals “cannot be forced into labor in violation of the TVPA.”<sup>101</sup> The defendant sought to persevere under the absurdity doctrine, contending that deviation from the ordinary sense of the words is appropriate because otherwise the purported interpretation “would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument.”<sup>102</sup> The court here readily dismissed the applicability of the absurdity doctrine, noting that this canon does not provide license for “judicial revision of public and private texts to make them (in the judge’s view) more reasonable.”<sup>103</sup> Because “CoreCivic points to no particular word or phrase in the TVPA that it claims must be corrected” and “relies upon no language in the statute for this broad assertion,” the court declined to “re-draft” the statute to align with CoreCivic’s reading simply because the company “may find it absurd that Congress drafted the TVPA in such a way that it theoretically reaches the conduct alleged here.”<sup>104</sup>

The lower court’s denial of defendant CoreCivic’s motion to dismiss was affirmed by the Eleventh Circuit, allowing the plaintiffs’ case to proceed, by finding that “the TVPA applies to private for-profit contrac-

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96. *Barrientos v. CoreCivic, Inc.*, 332 F. Supp. 3d 1305, 1307 (M.D. Ga. 2018).

97. *Id.*

98. *Id.* at 1310.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1310-11 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 237 (2012)).

104. *Id.* at 1311.

tors operating federal immigration detention facilities.”<sup>105</sup> The panel’s holding, like the district court, found the TVPA’s “clear and unambiguous language . . . limits liability only by reference to the actions taken by a would-be violator” and “applies to anyone who knowingly obtains the labor or services of a person through one of the four illegal coercive means explicitly listed in the statute,” with “[n]o other limiting principle” in the plain text of the statute.<sup>106</sup>

The federal district court in Texas rejected CoreCivic’s motion to dismiss a TVPA claim pursuant to § 1589 in *Gonzalez v. CoreCivic, Inc.*, arising out of complaints levied by Martha Gonzalez and those similarly situated at the Laredo Detention Center.<sup>107</sup> During her confinement, “Gonzalez contends that . . . she was paid only \$1 or \$1.50 per day to clean pods, work in the kitchen, sort laundry, and perform other duties under threat of punishment, including but not limited to lockdown and solitary confinement.”<sup>108</sup> Similar to the claims of other immigrant detainees, Gonzalez alleges that those who refused to work were threatened by CoreCivic “with confinement, physical restraint, substantial and sustained restrictions, deprivation, violation of their liberty, and solitary confinement, including the denial or delay of hygiene products.”<sup>109</sup> As a result, immigrants at the facility “performed labor for no pay or at a rate of compensation of \$1.00 to \$2.00 per day for work performed.”<sup>110</sup> Here, too, the court found that “CoreCivic’s argument fails to identify any ambiguity in the language or exceptional circumstances to depart from the plain language of the statute” and, given that “[t]here is no ambiguity in section 1589,” refused to “read congressional findings into the statute.”<sup>111</sup> As in *Owino*, the court here also found “that solitary confinement, or the threat of solitary confinement, sufficiently alleges the means to achieve forced labor, and the court therefore concludes that Gonzalez has sufficiently stated a claim for a TVPA violation sufficient to overcome the motion to dismiss.”<sup>112</sup>

Although the Central District of California agreed in *Novoa v. GEO Group* that § 1589 applies to immigrant detainees, the court found the allegations lacked specificity to state a plausible pattern/practice claim. The

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105. *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1280 (11th Cir. 2020).

106. *Id.* at 1276–77.

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

108. *Id.*; see also *supra*, note 4 (referencing Complaint at 2–3, *Menocal v. GEO Grp., Inc.*).

109. *Id.*

110. *Id.*

111. *Id.* at \*2.

112. *Id.*

court recognized that the text and scope of the TVPA applied to the defendants, holding that “[t]he plain language of § 1589 holds no limitation on who it applies to; indeed, subdivision (a) begins ‘whoever.’”<sup>113</sup> The court heard the case of Raul Novoa, who filed a putative class action on behalf of himself and other similarly situated detainees. Novoa worked as a janitor and barber through the Voluntary Work Program over the course of the three years he was detained at the Adelanto facility.<sup>114</sup> In his complaint, Novoa alleges that as a janitor he “worked four-hour shifts, up to seven days per week” and as a barber for “up to ten hours per day, seven days a week.”<sup>115</sup> Novoa asserted that he spent his earnings on “food, bottled water, and hygiene products . . . among other necessities” and was threatened with “solitary confinement if he stopped working or encouraged other detainees to stop working.”<sup>116</sup>

Despite these assertions, the court ultimately concluded that “Plaintiff fails to provide more than conclusory assertions in support of his TVPA claim.”<sup>117</sup> Though Novoa “alleged a scheme involving GEO withholding necessities for detainees and officer threats of solitary confinement or criminal prosecution for refusing to work, Plaintiff does not sufficiently substantiate these allegations” because he failed to “describe[] when he was threatened or who threatened him” or “allege any additional information about the withheld necessities to make his allegations more than conclusory assertions.”<sup>118</sup> The court acknowledged that a forced labor claim could be alleged against GEO but held that the facts as pleaded in the complaint were insufficient to state a plausible claim that a “policy and uniform practice” of withholding necessities was occurring, instead granting Novoa leave to amend the complaint.<sup>119</sup> This deviated from the holding in *Owino* and other cases, where plaintiffs’ allegations of “a specific punishment (solitary confinement) carried out or threatened to be carried out as a direct consequence for refusing to perform labor . . . while Plaintiffs were under the exclusive control of Defendant” were sufficient to state a claim.<sup>120</sup>

In each of these cases, the court of record was able to articulate how the conduct alleged by immigrant detainees was violative of the plain

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113. *Novoa v. GEO Grp., Inc.*, No. EDCV 17-2514 JGB (SHKx), 2018 WL 3343494, at \*12 (C.D. Cal. June 21, 2018) (citing 18 U.S.C. § 1589).

114. *Id.* at \*2.

115. *Id.*

116. *Id.*

117. *Id.* at \*14.

118. *Id.*

119. *Id.* at \*14-15.

120. *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at \*11 (S.D. Cal. May 14, 2018).

language of § 1589 of the TVPA. Although the *Novoa* court did not allow the plaintiff to proceed, it acknowledged the underlying conduct, if sufficiently pleaded, would have likely given rise to a TVPA violation under the court's analysis. In sum, the text of § 1589 has been sufficient for courts to allow claims to proceed and find that immigrant detainees' claims satisfy the threshold requirements of this provision.

### B. Legislative History

The defendants in these cases put forth three distinct arguments to assert that TVPA's legislative history does not support its applicability in the immigration detention context. These arguments related to: (1) the appropriate scope of § 1589 in the context of appellate court precedent interpreting § 1584, (2) the need for trafficking or transnational conduct pursuant to § 1589, and (3) the applicability of § 1589 outside of the trafficking context. These arguments failed to exonerate private detention companies from compliance with § 1589 of the TVPA; rather, the legislative history indicated that forced labor in the immigration detention setting is within the reach of § 1589's forced labor prohibition.

As referenced above, the defendants in these cases attempted to undermine the expansive reading of § 1589 by relying on *U.S. v. Kozminski* and *Channer v. Hall* as precedent that would cabin the reading of this TVPA provision. This is because *Kozminski* and *Channer* interpreted § 1584 to encompass "only compulsion of services by use of physical or legal, as opposed to psychological, coercion."<sup>121</sup> As the *Menocal* court noted, the Tenth Circuit's analysis in *U.S. v. Kaufman* is persuasive.<sup>122</sup> "The legislative history reveals that, in enacting § 1589, Congress sought to expand *Kozminski*'s limited definition of coercion under § 1584, stating that '[s]ection 1589 will provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*.'"<sup>123</sup> Thus the plaintiffs here properly "argue[d] that § 1589 should not be interpreted similarly to § 1584 because Congress enacted § 1589 in order to broaden the narrow definition of coercion adopted by the Supreme Court in *Kozminski*."<sup>124</sup>

The Southern District of California came to the same conclusion, holding that "[h]ad Congress intended to limit § 1589 to trafficking or transnational crime it could have done so; indeed, other sections of the

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121. *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1132 (D. Colo. 2015) (citing *Kozminski*, 487 U.S. 931 (1988)).

122. *Id.*

123. *U.S. v. Kaufman*, 546 F.3d 1242, 1261 (10th Cir 2008).

124. *Menocal*, 113 F. Supp. 3d at 1132.



TVPA contain the limiting language Defendant urges the Court read into § 1589.”<sup>125</sup> In support of this assertion, the *Owino* court referenced § 1591’s prohibition against “[s]ex trafficking of children or by force, fraud, or coercion,” which has “an explicit interstate or foreign commerce requirement.”<sup>126</sup> The court also distinguished § 1584’s restriction against “[w]hoever knowingly and willfully holds to involuntary servitude . . . any other person for any term, or brings within the United States any person so held.”<sup>127</sup> Accordingly, the court held that “[t]he lack of similar language in section 1589 reinforces the conclusion that there is no limitation on who constitutes a ‘person’ for purposes of section 1589” and its applicability under the following circumstances.

Finally, the defendants argued that “the TVPA is inapplicable because its purpose was to prevent human trafficking, and cases exclusively apply the TVPA to trafficking persons for labor and/or sex.”<sup>128</sup> In quarreling over § 1589, private detention companies argue that “applying the TVPA here would go beyond the intent and purpose of the statute, which was to prosecute and deter the trafficking of persons over geographic spaces.”<sup>129</sup> The court in *Owino* responded by analogizing to *United States v. Callahan*, a case where “defendants argued that the TVPA’s legislative history was passed to combat international trafficking in human beings and Congress did not intend to criminalize their conduct.”<sup>130</sup> In *Callahan*, the court found that the plain language was not limited to victims who were immigrants or sex workers, and the court could not read in such a limitation when “the language of the statu[t]e did not include such a restriction.”<sup>131</sup> Similarly, the Eleventh Circuit in *Barrientos* “d[id] not find a private government contractor’s obtaining forced labor through actual or threatened force, restraint, or serious harm to be so far removed from the purpose Congress identified as to cause us to look beyond the plain statutory language” and did not “justify a departure from the principle that [the court] should give general terms their general meaning.”<sup>132</sup> Thus, despite the fact the congressional findings all focused on the evils of trafficking in persons, because the “statute merely proscribes knowingly providing or obtaining labor through defined

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125. *Owino*, 2018 WL 2193644 at \*4.

126. *Id.*

127. *Id.* (citing 18 U.S.C. § 1584(a)(2012)).

128. *Menocal*, 113 F. Supp. 3d at 1132.

129. *Novoa v. GEO Grp., Inc.*, No. EDCV 17-2514 JGB (SHKx), 2018 WL 3343494, at \*12 (C.D. Cal. June 21, 2018).

130. *Owino*, 2018 WL 2193644 at \*4.

131. *Id.* (quoting *United States v. Callahan*, 801 F.3d 606, 618 (6th Cir. 2015)).

132. *Barrientos v. CoreCivic, Inc.*, No. 18-15081, 2020 WL 964358, at \*8 (11th Cir. Feb. 28, 2020).

means . . . [t]here is no basis for Defendant's proposition that a federal detention center run by a private entity is excluded from the reach of the TVPA."<sup>133</sup>

The defendants' attempted reliance on the TVPA's legislative history failed them in these cases. The arguments attempted to elevate congressional intent over the plain language, but even so, failed to account for the interpretations of these legislative findings that support the plaintiffs' arguments regarding the applicability of § 1589 to the civil immigration detention setting.

### C. Inapplicability of the Civic Duty Exception

The defendants in these cases also argued that the civic exception to the Thirteenth Amendment supported their claims and permitted immigrant detainees' labor. This exception, as articulated in *Butler v. Perry*, states:

[T]he 13th Amendment declares that neither slavery nor involuntary servitude shall exist . . . It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc.<sup>134</sup>

Defendants relied on the judicially-created exception to the Thirteenth Amendment to hold that "the federal government is entitled to require a communal contribution by an [immigration] detainee in the form of housekeeping tasks."<sup>135</sup> GEO cited to Fifth Circuit precedent in *Channer* to argue not only that § 1589 should be interpreted narrowly by drawing upon § 1584, but that the civic duty exception applied to § 1589 as it did to the other provision within the chapter.<sup>136</sup> However, as the court in *Menocal* found, "Defendants have cited no authority for reading a civic duty exception into § 1589, or for applying such an exception to a private, for-profit corporation under contract with the government."<sup>137</sup> In

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133. *Nova*, 2018 WL 3343494 at \*12.

134. *Butler v. Perry*, 240 U.S. 328, 332-33 (1916).

135. *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 912 (10th Cir. 2018) (brackets in original).

136. *Id.*

137. *Menocal*, 113 F. Supp. 3d at 1133.

*Menocal* the Tenth Circuit affirmed the district court's denial of the defendants' motion to dismiss.<sup>138</sup>

It is antithetical to apply the civic duty exception to non-citizens. Requiring individuals who are being detained in preparation for possible removal "from the country precisely because they are not citizens . . . to perform the duties of citizenship without reaping its most fundamental benefits" is inapposite.<sup>139</sup> The courts' analysis of the applicability of the civic duty exception was correct for two main reasons.

First, the private corporate defendants impermissibly argued for the civic duty to apply, as it is a defense that only the government can invoke and does "not apply to a contractor such as CoreCivic" or GEO.<sup>140</sup> This reasoning was acknowledged by the *Novoa* court, which held that cases where the civic duty exception was recognized "had a direct government nexus—government service or work at government-run facilities."<sup>141</sup> Because CoreCivic was unable to cite "any authority that the civic duty exception can apply to a privately run facility or an instance where a court did so," and given that "a private entity contracting with the federal government is not necessarily a federal agent," the court held the civic duty exception was inapplicable.<sup>142</sup> The *Owino* court came to the same conclusion in deciding that the defendant could not avail itself of the "civic duty exception to the Thirteenth Amendment's prohibition on involuntary servitude whereby state or federal governments could compel their citizens, by threat of criminal sanction, to perform certain civic duties."<sup>143</sup> Citing *Menocal*, the court reiterated that defendants failed to put forth any authority that would allow the court to "read a civic duty exception into § 1589, or . . . apply[] such an exception to a private, for-profit corporation under contract with the government."<sup>144</sup>

Second, even if these corporate entities qualified as government agents such that they would qualify for the civic duty exception, the exception would not apply in these circumstances. The allegations of forced

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138. Ruben J. Garcia, *The Thirteenth Amendment and Minimum Wage Laws*, 19 NEV. L.J. 479, 499 (2018).

139. Abigail Kerfoot, *Reproducing Immigration Detention* (2020) (unpublished comment) (on file with author).

140. Garcia, *supra* note 138 at 498.

141. *Novoa v. GEO Grp., Inc.*, No. EDCV 17-2514 JGB (SHKx), 2018 WL 3343494, at \*13 (C.D. Cal. June 21, 2018).

142. *Id.* (citing *Minnecci v. Pollard*, 565 U.S. 118, 126 (2012) as "specifically reject[ing] the proposition that a private prison-management firm is a federal agent like a federal employee").

143. *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at \*6-10 (S.D. Cal. May 14, 2018).

144. *Id.* at \*8 (citing *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1133 (D. Colo. 2015)).

labor in these cases extend far beyond the situations where a civic duty has been recognized, such as jury duty and military conscription.<sup>145</sup> Labor in the immigration detention context is not insulated by the civic duty exception, which distinguishes those “duties which individuals owe to the state from the Thirteenth Amendment’s prohibitions.”<sup>146</sup> Applying this exception would also ignore the facial claims asserted by the complainants. As the *Novoa* court reasoned:

“[e]ven assuming the civic duty exception applies, Plaintiff has alleged he was a barber, which appears to exceed the house-keeping responsibilities a detainee may be required to perform. Moreover, what duties and tasks the detainees were compelled to undertake and whether these assignments amounted to more than general housekeeping tasks are factual issues.”<sup>147</sup>

Accordingly, it would twist the civic duty exception past the point of recognition if this conduct, especially when undertaken by private actors, was found to be protected under this exception to the Thirteenth Amendment.

#### D. Appropriateness of Class Certification

The ability to file a TVPA claim as a class action suit could benefit the prospective plaintiffs, impact the scope of relief, and materially impact litigation. Federal Rule of Civil Procedure 23 sets forth the threshold requirements for a class action lawsuit and entails a showing that:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.<sup>148</sup>

These class certification requirements—referred to as the requirements for numerosity, commonality, typicality, and adequacy, respective-

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145. *Novoa*, 2018 WL 3343494 at \*13.

146. *Id.*

147. *Id.* at \*12-14.

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

ly—ensure that the class claims can move forward.<sup>149</sup> Additionally, under Rule 23(b)(3) a class action must satisfy two additional requirements: “questions of law or fact common to class members [must] predominate over any questions affecting only individual members” and a class action must be “superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>150</sup> Referred to as the predominance and superiority requirements, these additional criteria provide the final hurdle for claimants seeking class certification.<sup>151</sup>

The Tenth Circuit, in affirming the holding of the district court in *Menocal*, conducted a thorough analysis of class certification pursuant to Rule 23.<sup>152</sup> Although GEO only challenged the commonality and typicality requirements, the court did not limit its analysis to those contested grounds.<sup>153</sup> The court found the commonality requirement was satisfied because there were common questions of law and fact, including “(1) whether the Sanitation Policy constitutes improper means of coercion under § 1589, (2) whether GEO knowingly obtain[s] detainees’ labor using [the Sanitation Policy], and (3) whether a civic duty exception exempts the Sanitation Policy from § 1589.”<sup>154</sup> As such, the class “[r]epresentatives have demonstrated the existence of common questions that can resolve issues central to the validity of its TVPA claim in one stroke.”<sup>155</sup> The typicality requirement was satisfied because the class asserted “that GEO knowingly obtained class members’ labor by means of the Sanitation Policy, which threatened—or was intended to cause them to believe they would suffer—serious harm or physical restraint if they did not fulfill their cleaning assignments.”<sup>156</sup> The class met the superiority requirement because individual “class members would have to overcome significant hurdles to adjudicate their individual claims,” would “have little interest[ ] in individually controlling the prosecution or defense of separate actions,” and “the putative class members reside in countries

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149. *Id.*

150. FED. R. CIV. P. 23(b)(3).

151. *Id.*

152. *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 914 (10th Cir. 2018) (analyzing FED. R. CIV. P. 23).

153. *Id.*

154. *Id.* at 916 (internal quotations omitted).

155. *Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258, 265 (D. Colo. 2017) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

156. *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 917 (10th Cir. 2018); *see also Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258, 264 (D. Colo. 2017) (distinguishing *Wal-Mart v. Dukes* because “GEO has a specific, uniformly applicable Sanitation Policy that is the subject of Representatives’ TVPA claim” and that “[t]his Policy is the glue that holds the allegations of the Representatives and putative class members together, creating a number of crucial questions with common answers”).

around the world, lack English proficiency, and have little knowledge of the legal system in the United States.”<sup>157</sup> Finally, the class also survived Rule 23’s predominance requirement because “(i) the causation element is susceptible to generalized proof and thus cannot defeat class certification, and (ii) individual damages assessments would not predominate over the class’s common issues.”<sup>158</sup>

Under this analysis, class certification was appropriate in these circumstances as the best means to vindicate the rights of the complainants and ensure judicial economy. This strategy also allowed the litigants to benefit from collective action, including the synergy of resources, to achieve success on the merits while promoting judicial efficiency.<sup>159</sup>

### III. IMPACT OF THIRTEENTH AMENDMENT FORCED LABOR LITIGATION OUTSIDE OF COURT

These litigation efforts across the country have established new precedent and expanded the context in which the Thirteenth Amendment is applicable. With the unparalleled expansion of immigration detention, these lawsuits are key drivers of reform and should be used to inform and propel other advocacy efforts.

#### A. Legislative

There are legislative efforts on both the state and national levels that can complement advocacy in the courts. Currently, twenty-two states do not house individuals in for-profit prisons. These states, under both Democratic and Republican control, prohibit private, for-profit facilities. Additionally, three states—Nevada, Illinois, and California—passed legislation in 2019 to ban for-profit facilities.<sup>160</sup> In California alone, this legislation will ultimately close three private prisons and four private detention centers, impacting over 5,400 people currently confined in those

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157. *Menocal*, 882 F.3d at 917 (“GEO also suggests that the class should instead seek to have the ICE standards relating to the Sanitation Policy ‘changed by the agency, declared invalid, or enjoined’ . . . But such actions, even if feasible, would not provide damages relief and thus are not ‘superior . . . available methods for fairly and efficiently adjudicating the controversy,’ especially for *former* detainees in the TVPA class.”).

158. *Id.* at 918.

159. Monique I. Madan, *ICE Opposes Class-Action Suit, Says It Would Rather Litigate 1,200 Lawsuits Instead*, MIA. HERALD (May 15, 2020, 10:29 AM), <https://www.miamiherald.com/news/local/immigration/article242739646.html>.

160. Catherine Kim, *Private Prisons Face an Uncertain Future as States Turn Their Backs on the Industry*, VOX (Dec. 1, 2019, 3:53 PM), <https://www.vox.com/policy-and-politics/2019/12/1/20989336/private-prisons-states-bans-california-nevada-colorado>.

facilities.<sup>161</sup> Some of these laws have faced significant public criticism and legal challenges. Recent legislation has faced opposition from some advocates for not being sufficiently progressive and robust, while simultaneously facing resistance from prison companies for being overly stringent.

For example, California's law has been criticized as insufficiently robust. Advocates fear that loopholes in the California law will allow private facilities to continue operating under the legislation's broad carve-outs.<sup>162</sup> Specifically, AB 32 does not apply to: (1) "any facility providing educational, vocational, medical, or other ancillary services to an inmate," (2) facilities that "provide housing for state prison inmates in order to comply with the requirements of any court-ordered population cap," or (3) "any privately owned property or facility that is leased and operated" by a law enforcement agency.<sup>163</sup> The danger of these caveats is evident when compared with Nevada's law, which prohibits "contracts with any private facilities that provide services like housing and custody after July 1, 2022, with no exemptions."<sup>164</sup>

In addition to the shortcomings identified by advocates, California's law is also being challenged in court by private prison companies who find the law overly restrictive. GEO Group filed suit in the U.S. Southern District of California alleging AB 32 would unlawfully undermine enforcement of criminal and immigration law.<sup>165</sup> According to the lawsuit, "GEO has invested more than \$300 million in acquiring, constructing and outfitting the facilities it operates" and would stand to "lose more than \$4 billion in capital investment and future revenue over the next 15 years."<sup>166</sup> Moreover, AB 32 has been challenged by the Trump Admin-

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161. *Id.* (citing Steve Gorman, *California Bans Private Prisons and Immigration Detention Centers*, REUTERS (Oct. 11, 2019, 5:40 PM), <https://www.reuters.com/article/us-california-prisons/california-bans-private-prisons-and-immigration-detention-centers-idUSKBN1WQ2Q9> [<https://perma.cc/RS7Q-QLT4>]).

162. *Id.*

163. 2019 Cal. Legis. Serv. ch. 739 (WEST).

164. Kim, *supra* note 160.

165. Complaint at 1, *GEO Grp., Inc. v. Newsom*, 2019 WL 7373612 (S.D. Cal. 2019) (No. 19CV2491); Order, *GEO Grp. v. Newsom*, Case No.: 19-CV-2491 JLS (WVG), (S.D. Cal. Oct. 8, 2020) (granting in part and denying in part plaintiffs' motions for a preliminary injunction, defendants' motions to dismiss, and defendants' motion for judgment on the pleadings); Associated Press, *Geo Group Sues California over AB 32, Which Bans Private Prisons*, DESERT SUN (Dec. 31, 2019, 11:06 AM), <https://www.desertsun.com/story/news/2019/12/31/geo-group-sues-california-over-ab-32-ban-private-prisons/2784752001/> [<https://perma.cc/2LBT-EC8U>].

166. Rebecca Plevin, *4 Things We Learned from GEO Group's Lawsuit over Immigration Detention in California*, PALM SPRINGS DESERT SUN (Jan. 2, 2020, 5:49 PM), <https://www.desertsun.com/story/news/2020/01/02/4-things-we-learned-geo-groups-lawsuit-over-immigration-detention-california/2798568001/> [<https://perma.cc/Z5PW-DRCF>].

istration in separate litigation filed by the Department of Justice, U.S. Attorney for the Southern District of California, and other federal officials. This lawsuit claims “that AB 32 violates the supremacy clause of the U.S. Constitution if applied against the federal government, contending that federal agencies have the power to decide how they [wi]ll house prisoners and detainees without interference from state governments.”<sup>167</sup> Although the outcome of this litigation is uncertain, efforts to curtail millions of dollars in contracts to these facilities pose a threat to the operations and financing of these companies.

Legislative changes adopted by states, if implemented at the federal level, would also be significant in curtailing incentives for private prison facilities in the immigration context. Yet, part of the challenge of passing legislative reform on either the federal or state level is the strong foothold that private detention companies already have in the lobbying sphere. It is estimated that “GEO Group and CoreCivic have spent \$25M[illion] on lobbying over the past three decades” to increase the number of people incarcerated within their facilities.<sup>168</sup> They have also spent “\$10 million in support of their preferred candidates.”<sup>169</sup> Both entities have partnered with coalitions like the conservative American Legislative Exchange Council (“ALEC”), well known for writing and promoting model legislation focused on mandatory minimum sentences, three-strikes laws, and ‘truth in sentencing’ legislation,” all of which have the effect of keeping more individuals in detention for longer periods of time.<sup>170</sup> These companies have also joined to form The Day 1 Alliance, “to rebut a growing backlash from Democratic presidential candidates and other industry critics.”<sup>171</sup> The Center for American Progress reported that “[i]n memos to their shareholders, both companies [—GEO Group

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167. Liam Dillon, *Trump Administration Sues California over Private Prison Ban*, L.A. TIMES (Jan. 25, 2020), <https://www.latimes.com/california/story/2020-01-25/trump-administration-sues-california-over-private-prison-ban> [<https://perma.cc/7R73-859P>].

168. Morgan Simon, *GEO Group Running Out of Banks as 100% of Known Banking Partners Say ‘No’ to the Private Prison Sector*, FORBES (Sept. 30, 2019, 7:33 PM), <https://www.forbes.com/sites/morgansimon/2019/09/30/geo-group-runs-out-of-banks-as-100-of-banking-partners-say-no-to-the-private-prison-sector/#5275f3b83298> [<https://perma.cc/5WBL-KQ89>].

169. *How to Divest from Immigrant Detention: A Philanthropic Primer*, GRANTMAKERS CONCERNED WITH IMMIGRANTS AND REFUGEES (Aug. 2019), <https://www.gcir.org/resources/how-divest-immigrant-detention-philanthropic-primer> [<https://perma.cc/6ZK7-XKY8>].

170. Simon, *supra* note 168.

171. *Private Prison Firms Form Advocacy Group to Rebut Scrutiny*, ASSOCIATED PRESS (Oct. 25, 2019), <https://apnews.com/042884c81ec94faeb344a0b4a2fced7> [<https://perma.cc/Q69W-8W26>] (“Tennessee-based CoreCivic will provide the group’s initial funding” and “Florida-based The GEO Group and Utah-based Management & Training Corporation will join in leadership roles”).



and CoreCivic—] acknowledge that policies with the potential to reduce the U.S. detainee population constitute potential risk factors to their business model.”<sup>172</sup> This lobbying saturation is mirrored on the state level.<sup>173</sup> Thus, while legislative reform would provide an important vehicle for reform, the extensive lobbying apparatus of the immigration detention industrial complex advocates against the interests of those in their care and custody, much like the private prison industry.<sup>174</sup>

### B. Business Community

The private sector can also play a role in curtailing for-profit detention. First, as with many successful reform initiatives, a strong corporate consciousness can help increase public awareness and have a strong positive impact, even in the absence of formal government regulation. Second, consumer activism and responsiveness can help propel businesses to engage in better corporate conduct by demanding transparency and action through their spending and investments. Both of these are uniquely important. Because of the specific corporate and funding structure of most private facilities, for-profit detention companies are dependent on private-sector financing. Accordingly, divestment from these institutions can help reinforce or supplement litigation efforts to combat forced labor practices.

It is estimated that “3,100 companies have a financial stake in mass incarceration, from private healthcare providers and food service operators to well-known names like Amazon and General Electric.”<sup>175</sup> However, limiting the financial resources of these for-profit detention companies is an important tool in curtailing their unchecked power. There is an important role for private businesses to play that may be informed by litigation, legislative work, and community engagement on this issue, and

172. Medha Chidambaram, *Big Banks to Stop Future Financing of Prisons & Immigrant Detention Centers*, GREEN AM. (Sept. 26, 2019), <https://www.greenamerica.org/blog/big-banks-stop-financing-prisons-immigrant-detention-centers> [<https://perma.cc/YCD7-MYAR>].

173. See Darwin BondGraham, *California Bans Private Prisons—Including Ice Detention Centers*, GUARDIAN (Sept. 12, 2019, 1:58 PM), <https://www.theguardian.com/us-news/2019/sep/12/california-private-prison-ban-immigration-ice> [<https://perma.cc/35RV-XY96>] (“CoreCivic and Geo Group spent \$130,000 during the first six months of this year lobbying the legislature and governor against AB32” in California).

174. See Cynthia Yue, *The Private Prison Industrial Complex*, EQUAL JUST. UNDER L. (Jan. 18, 2019), <https://equaljusticeunderlaw.org/thejusticereport/privateprisonindustrialcomplex> [<https://perma.cc/6M6H-965M>]; Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC (Dec. 1998), <https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/> [<https://perma.cc/8TPN-KSYK>].

175. *How to Divest from Immigrant Detention: A Philanthropic Primer*, *supra* note 169.

that may, in turn, influence these efforts. As GEO Group has acknowledged, “losing the backing of its banking partners ‘could have a material adverse effect on our business, financial condition, and results of operations’ if other investors decide to ditch the industry as well.”<sup>176</sup>

Financial divestment from these for-profit detention centers must be part of the strategy to impact GEO and CoreCivic’s corporate structure. Both GEO and CoreCivic are established as Real Estate Investment Trusts (“REITs”) exempt from corporate income taxes.<sup>177</sup> This business organization permitted GEO Group “to save an estimated \$44 million in 2017 alone.”<sup>178</sup> However, because “REITs are required by law to pass large portions of their incomes back to investors, limiting the amount of cash they have on hand[,] . . . [the companies] must rely on short-term loans and lines of credit, making Wall Street financing for private prison firms a crucial chokepoint of activists.”<sup>179</sup>

Banks including JPMorgan Chase, Wells Fargo, Bank of America, BNP Paribas, SunTrust, Barclays, Fifth Third Bank, and PNC have publicly committed to ending ties with the private prison and immigrant detention industry, which impacts “an estimated \$2.4 [billion] in credit lines and term loans to industry giants GEO Group and CoreCivic.”<sup>180</sup> Despite the leadership from some industry leaders, several banks—for example, Regions, Citizens, Pinnacle Bank, First Tennessee, and Synovus—continue to support the industry.<sup>181</sup> However, it is not just the banking industry that can exercise this influence. For instance, the California Public Employees Retirement System (“CalPERS”), the state’s largest pension fund, divested \$13.7 million from GEO Group and CoreCivic in October 2019 after “public employees took a stand and made their voices heard after learning that their retirement savings were propping up the very companies that have played a critical role in the migrant abuse crisis, as well as mass incarceration, and the school-to-prison pipeline.”<sup>182</sup>

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176. Kim, *supra* note 60.

177. Mike Ludwig, *Big Banks Are Divesting From Private Prisons, Thanks to Anti-ICE Activism*, SLUDGE (July 24, 2019, 11:44 AM), <https://readsludge.com/2019/07/24/big-banks-are-divesting-from-private-prisons-thanks-to-anti-ice-activism/> [<https://perma.cc/6YNV-XG9K>].

178. *How to Divest from Immigrant Detention: A Philanthropic Primer*, *supra* note 169.

179. Ludwig, *supra* note 177.

180. Simon, *supra* note 168.

181. *Id.*

182. Julia Ainsley, *Biggest Public Pension Fund in U.S. Dumps Private Prison Firms That Run ICE Migrant Detention Centers*, NBC NEWS (Oct. 21, 2019, 4:08 PM), <https://www.nbcnews.com/politics/immigration/biggest-public-pension-fund-u-s-dumps-private-prison-firms-n1063231> [<https://perma.cc/9AMK-RFNU>].

This is a message that investors, advocacy organizations, and other partners have been able to successfully champion,<sup>183</sup> with “over 100 grassroots groups . . . pressur[ing] . . . banks with petitions, protests and sit-ins, building on years of organizing by prison divestment activists.”<sup>184</sup> If the current trend continues, “CoreCivic and GEO Group stand to lose 72 percent—about \$1.9 billion—of their private financing as major banks commit to divesting from the private prison industry under pressure from activists.”<sup>185</sup> Direct divestment is only the first step, as these companies “are heavily invested in ‘alternatives’ to incarceration like ankle monitors and facial recognition technology that can extend the system of control and incarceration beyond the walls of a jail or detention center.”<sup>186</sup>

### C. Public Education & Support

As a prerequisite to achieving changes in fiscal or immigration policy, it is necessary to inform and influence public opinion on this issue. Public opinion translates to community pressure, to build power within the electorate and influence key actors, whether they be legislators, businesses, or other partners. As discussed above, many public interest organizations, including coalitions of advocacy groups, such as Families Belong Together, provide resources and help organize community-based campaigns to create this shift.<sup>187</sup>

Recognizing recent changes in electoral power and public opinion is a helpful first step. For instance, acknowledging that “[t]he number of immigrants eligible to vote has risen 93 percent—from 12 million in 2000 to 23.2 million in 2020,” represents a dramatic increase in ballot ac-

183. *Bank of America & SunTrust - Stop Financing Pain For Corporate Gain!*, MOMS RISING, [https://action.momsrising.org/survey/BankOfAmerica\\_SunTrust\\_Petition/](https://action.momsrising.org/survey/BankOfAmerica_SunTrust_Petition/) [<https://perma.cc/N6Q9-FYC6>] (last visited Sept. 19, 2020).

184. Ludwig, *supra* note 177.

185. *Id.* (citing GIN ARMSTRONG, SHAHRZAD HABIBI & MAGGIE CORSER, 2019 IMPACT BRIEF: AS WALL STREET BANKS SEVER TIES, PRIVATE PRISON COMPANIES STAND TO LOSE OVER \$1.9B IN FUTURE FINANCING, PUBLIC ACCOUNTABILITY INITIATIVE, IN THE PUBLIC INTEREST & CTR. FOR POPULAR DEMOCRACY (July 2019), <https://populardemocracy.org/sites/default/files/2019%20Impact%20Brief%20-%20Wall%20Street%20Banks%20Sever%20Ties%20with%20Private%20Prisons%20ITPI%20PAI%20CPD%20July%202019%20FINAL.pdf> [<https://perma.cc/B73L-4U55>]).

186. *Id.*

187. *About Us*, FAMILIES BELONG TOGETHER, <https://www.familiesbelongtogether.org/about/> [<https://perma.cc/C99C-3M2V>] (last visited Sept. 19, 2020) (listing nearly 200 supporting organizations, including ACLU, Southern Poverty Law Center, National Women’s Law Center, Congressional Hispanic Caucus Institute, and SEIU, among others).

cess.<sup>188</sup> This means that in the next election, one in ten eligible American voters are immigrants, which is a record high.<sup>189</sup> This power is concentrated—in California (5.5 million), New York (2.5 million), Florida (2.5 million), Texas (1.8 million), and New Jersey (1.2 million)—as approximately six in ten of these 23 million naturalized citizens live in just five states.<sup>190</sup> But this growth has the power to make a significant difference in key swing states, like Florida, where 54 percent of the immigrant eligible voters are Latinx.<sup>191</sup>

In addition to a changing electorate, public opinion research indicates an increase in support for immigrant communities. One Pew study found that nearly 60 percent of Americans thought that immigrants make our country stronger, compared to 34 percent who believe that immigrants are a burden.<sup>192</sup> However, the ability to shift opinion may exist, even amongst those who oppose immigration, by highlighting the bloated funding to private detention facilities, lack of government transparency, and other problematic aspects of this issue. Thus, framing and messaging is important in helping to galvanize the community's call for change.

#### CONCLUSION

This Article critically assesses the role that litigation under the Thirteenth Amendment can play in rectifying inequities that exist at the intersection of immigration, race, and labor analyzed in the immigration detention context. For immigrants in detention settings, advancing Thirteenth Amendment litigation, pursuing legislation, and shifting public opinion may provide a remedy.<sup>193</sup> Ultimately, the immigration detention context represents a unique opportunity to reconcile Thirteenth Amendment litigation with existing case law.

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188. Suzanne Gamboa, *A Record High: 1 in 10 Eligible American Voters are Immigrants*, NBC NEWS (Feb. 26, 2020, 2:06 PM), <https://www.nbcnews.com/news/latino/record-high-1-10-eligible-american-voters-are-immigrants-n1142261> [https://perma.cc/MA4D-SGHB].

189. Luis Noe-Bustamante & Abby Budiman, *Most of the 23 Million Immigrants Eligible to Vote in 2020 Election Live in Just Five States*, PEW RSCH. CTR. (Mar. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/03/03/most-of-the-23-million-immigrants-eligible-to-vote-in-2020-election-live-in-just-five-states/> [https://perma.cc/PVD4-WWVC].

190. *Id.*

191. *Id.*

192. Ana Gonzalez-Barrera & Phillip Connor, *Around the World, More Say Immigrants Are a Strength Than a Burden*, PEW RSCH. CTR. (Mar. 14, 2019), <https://www.pewresearch.org/global/2019/03/14/around-the-world-more-say-immigrants-are-a-strength-than-a-burden/> [https://perma.cc/FWV3-YGKY].

193. Kerfoot, *supra* note 139.

This litigation also forces us to analyze the true costs of immigration detention and the widespread lack of transparency and accountability that allows for the perpetuation of inhumane conditions that dehumanize and enslave vulnerable individuals in coercive settings. These are people in the custody of our government. If we as a society are to confine people, we must ensure it at least is in full compliance with the Constitution. Detention should not be a subsidized venture or lucrative business opportunity, especially not when it is at the expense of those whose forced labor is used to pad profit margins and fund lobbying efforts to maintain the subjugation of their captive, low-cost workforce.

Trafficking Victims Protection Act litigation provides the mechanism and framework for achieving the Thirteenth Amendment's promise that "[n]either slavery nor involuntary servitude . . . shall exist within the United States."<sup>194</sup> It also provides a broad, unambiguous basis upon which to promulgate legislation. The TVPA, passed by Congress in an effort to eliminate "all badges and incidents of slavery," can be used to secure the basic rights and dignity of those incarcerated within our immigration system. Section 1589's text is as unambiguous as its purpose: to end all involuntary labor obtained "by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person."<sup>195</sup> This litigation is not only an end unto itself, but can also help propel legislation, civic activism, business consciousness, and concrete change.

Our laws do not permit a shroud of secrecy and financial exploitation to shield the abuses of the immigration detention system. Thirteenth Amendment litigation is the necessary first step in dismantling that structure. If the detention system was forced to bear its own costs, it would crumble under its own weight. In the wake of both expansion and privatization of immigration detention, the Thirteenth Amendment provides the tools to prevent the ongoing use of forced labor in these facilities, giving full force to the Amendment's promise to abolish "all badges and incidents of slavery," including current manifestations within the immigration detention system.

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194. U.S. CONST. amend. XIII, § 1.

195. 18 U.S.C. § 1589 (2008).

