

# Defining Forced Labor: The Legal Battle to Protect Detained Immigrants from Private Exploitation

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*Privately run immigration detention facilities allegedly profit from a nationwide system of forced labor. People detained in these for-profit facilities allege that they are compelled to work—often without pay—under threats of solitary confinement, deprivation of basic necessities, and other serious harms. Advocates have challenged these human rights abuses through a series of class action lawsuits under the Trafficking Victims Protection Act (TVPA). The TVPA’s forced labor provision, codified at 18 U.S.C. § 1589, prohibits the use of “labor or services” obtained by force or coercion. If successful, these lawsuits would not only help vindicate the rights of the hundreds of thousands of people detained in these prisonlike facilities each year but would also call into question the viability of the entire private immigration detention industry.*

*This Comment examines one critical legal question raised by the pending litigation: How should courts define what activities are “labor or services” under § 1589? Private detention corporations argue that the activities that plaintiffs allege they were forced to perform, such as cleaning bathrooms and common areas, are merely housekeeping tasks that do not qualify as “labor or services” under the TVPA. This Comment argues that this defense is inconsistent with the TVPA’s text, its legislative history, and existing case law. Drawing from the Second Circuit’s decision in McGarry v. Pallito, this Comment proposes a new standard for courts to apply in determining whether a certain task qualifies as “labor or services” in the detention context. First, courts should consider whether the task is truly personal. Second, courts should assess whether the purpose of the task is to defray institutional costs. This standard will help ensure that people held in for-profit immigration detention centers receive the full federal protection from forced labor to which they are entitled.*

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## INTRODUCTION

Over the past seven years, a bitterly fought legal battle over one key question has slowly advanced through the courts: Can private immigration detention corporations require detained people to work under threat of solitary confinement, deprivation of basic essentials, and other serious harms? Despite the United States’ constitutional and statutory prohibitions on forced labor, people detained in privately operated immigration detention centers allege that these corporations profit from an illegal system of forced labor. Recent litigation seeks to end these practices by bringing class action suits against detention corporations under the Trafficking Victims Protection Act (TVPA).<sup>1</sup> This far-reaching Act prohibits conduct related to human trafficking, sexual exploitation, and forced labor.

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<sup>1</sup> Pub. L. No. 106–386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

CoreCivic and GEO Group, the two largest private-prison corporations in the United States,<sup>2</sup> currently face five federal class action lawsuits for allegedly violating the TVPA's forced labor provision, codified at 18 U.S.C. § 1589. This provision creates civil and criminal liability for "[w]hoever knowingly provides or obtains the labor or services of a person" by "threat" or use of "force," "physical restraint," "serious harm," "abuse of law or legal process," or "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>3</sup>

Thus far, courts have certified classes comprised of thousands of currently and formerly detained people in three of the five ongoing cases. The outcome of this litigation, however, is far from certain. At stake are the human rights of hundreds of thousands of people who are detained each year in for-profit detention facilities. People detained in these facilities have reported harrowing stories of abusive forced labor practices that not only violate fundamental principles of human dignity but also pose serious dangers to their mental and physical health and well-being.

Recent events have magnified the stakes of these suits. In the midst of the COVID-19 pandemic, reports emerged of private detention facilities forcing detained people to work without proper protection from the highly contagious virus.<sup>4</sup> People confined in a COVID-infected facility operated by CoreCivic released a letter reporting that CoreCivic used "verbal threats" and "indefinite lock ins" to force them to work in the kitchen and other areas without proper protective gear despite the high COVID-19 risk.<sup>5</sup>

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<sup>2</sup> ALEXANDRA LEVY, HUM. TRAFFICKING LEGAL CTR., FACT SHEET: HUMAN TRAFFICKING & FORCED LABOR IN FOR-PROFIT DETENTION FACILITIES 6 (2018).

<sup>3</sup> 18 U.S.C. § 1589(a)–(c). The pending federal suits include: *Owino v. CoreCivic, Inc.*, No. 17-CV-01112 (S.D. Cal. filed May 31, 2017); *Barrientos v. CoreCivic, Inc.*, No. 18-CV-00070 (M.D. Ga. filed Apr. 17, 2018); *Novoa v. GEO Group, Inc.*, No. 17-CV-02514 (C.D. Cal. filed Dec. 19, 2017); *Menocal v. GEO Group, Inc.*, No. 14-CV-02887 (D. Colo. filed Oct. 22, 2014); *Gonzalez v. CoreCivic, Inc. (M. Gonzalez)*, No. 18-CV-00169 (W.D. Tex. filed Feb. 22, 2018). Another suit, *Gonzalez v. CoreCivic, Inc. (C. Gonzalez)*, No. 17-CV-02573 (S.D. Cal. filed Dec. 27, 2017), was filed but stayed pending the resolution of *Owino* because the putative class was duplicative of the class defined in *Owino*. See *C. Gonzalez* 2018 WL 1621543, at \*6.

<sup>4</sup> See Jacob Soboroff & Julia Ainsley, *Detained Migrants Say They Were Forced to Clean COVID-Infected ICE Facility*, NBC NEWS (June 10, 2020), <https://perma.cc/A6QM-TF6G>.

<sup>5</sup> Letter from Detainees, La Palma Corr. Ctr., to the Florence Immigrants & Refugees Rts. Project (May 18, 2020), <https://perma.cc/JG7Y-S47G>.

“Were [sic] begging you for help because this is a life or death situation,” the letter concludes.<sup>6</sup> Yet for-profit detention corporations claim not only that “claims of ‘forced’ work are false”<sup>7</sup> but also that these claims should not give rise to criminal or civil liability regardless of their veracity.

This Comment examines one legal question raised by the pending litigation: the scope of § 1589’s “labor or services” language. Because § 1589 does not define “labor or services,” interpreting this language has become a recurring flashpoint in TVPA cases since its enactment in 2000. Prosecutors and plaintiffs argue that courts should interpret “labor or services” broadly because Congress intended the statute to provide robust protection to victims regardless of the class of labor or service they were forced to perform. In contrast, defendants argue for narrow interpretations of “labor or services,” especially interpretations that exclude domestic labor and housekeeping tasks, such as cleaning. Private detention corporations facing TVPA suits similarly argue that detained plaintiffs’ allegations amount to little more than “general housekeeping responsibilities.”<sup>8</sup> They argue that Congress could not have intended the TVPA, enacted with “the sole purpose . . . to target, deter, and prosecute international human trafficking, and protect trafficking victims,” to apply to such conduct.<sup>9</sup>

Analyzing the history and purpose of § 1589 and two decades of TVPA case law, this Comment argues that cleaning and otherwise maintaining private detention facilities qualify as “labor or services” under § 1589. First, although combatting transnational human trafficking was one of the purposes of the TVPA, Congress also intended the TVPA’s broad provisions to address domestic concerns. Second, courts have consistently held that “labor or services” can encompass housekeeping tasks. This analysis demonstrates that the tasks plaintiffs allege that they were forced to perform while detained should not be categorically excluded from the scope of “labor or services.”

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<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Soboroff & Ainsley, *supra* note 4 (quoting a statement from a CoreCivic spokesperson).

<sup>8</sup> Replacement Opening Brief for Appellant at 27–28, *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269 (11th Cir. 2020) (No. 18-15081), 2019 WL 1417078, at \*27–28 [hereinafter CoreCivic *Barrientos* Brief] (quoting *Bijeol v. Nelson*, 579 F.2d 423, 424–25 (7th Cir. 1978)).

<sup>9</sup> *Id.* at 21.

Private detention corporations contest this conclusion as absurd and as endangering their ability to enforce basic rules necessary for safety and order in a communal facility. Courts have demonstrated some receptiveness to defendants' arguments that basic housekeeping chores should, at a minimum, be excluded from the definition of "labor or services." This Comment argues that a wholesale exception for the vague category of housekeeping activities is misguided. Instead, courts should consider two factors when drawing a line in the detention context between basic tasks necessary for order and tasks that constitute actionable forced labor under the TVPA. First, courts should consider whether the task is truly personal. Second, courts should assess whether the purpose of the task is to defray institutional costs.

Part I of this Comment provides an overview of immigration detention and discusses the various forms of voluntary and allegedly involuntary labor within detention facilities. Part II examines the central constitutional and statutory prohibitions on forced labor in the United States. Part III summarizes some important features of the ongoing § 1589 suits. Part IV analyzes the purpose, legislative history, and case law of the TVPA in order to understand the meaning of "labor or services" in § 1589. Part V applies this analysis to the current § 1589 lawsuits and proposes a new test to determine whether the activities plaintiffs allege give rise to a § 1589 claim.

## I. IMMIGRATION DETENTION, PRIVATE CORPORATIONS, AND LABOR

### A. Immigration Detention

Courts have long held that immigration detention is civil—not criminal—detention. The federal immigration detention system was established in 1891, and the first Supreme Court decisions distinguishing immigration detention from criminal incarceration followed shortly thereafter.<sup>10</sup> People are not sent to immigration detention facilities as punishment for a crime. Rather, immigration detention serves the "preventive" purpose of ensuring that people appear at hearings or comply with removal orders.<sup>11</sup> Similarly, the

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<sup>10</sup> See Anita Sinha, *Slavery by Another Name: "Voluntary" Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. C.R. & C.L. 1, 8–10 (2015).

<sup>11</sup> See *id.* at 10–11; see also U.S. IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at i (2016) [hereinafter PBNDS] ("ICE detains

Court has resisted characterizing deportation and removal as criminal punishments and emphasized the civil enforcement nature of these processes.<sup>12</sup> Because of this distinction, the Supreme Court has denied to people who are detained for suspected civil immigration violations many of the constitutional rights that they would be guaranteed if facing incarceration through the criminal justice system.

Most people whom Immigration and Customs Enforcement (ICE) detains in immigration facilities are awaiting immigration court hearings and decisions on whether they may legally remain in the country. They include asylum seekers, torture and human trafficking survivors, people who have overstayed legally granted visas, people who have lived in the United States for decades, legal permanent residents, U.S. military veterans, and even U.S. citizens.<sup>13</sup> While immigration detention was once reserved only for rare cases in which a person suspected of an immigration violation was determined to be a particular risk, that is far from the case today. ICE's own data suggest that the overwhelming majority of people it currently detains pose no danger to the public.<sup>14</sup>

Regardless of its formal legal classification as a civil system, immigration detention is a significant deprivation of liberty and shares many similarities with incarceration in terms of everyday life inside detention centers. In fact, many facilities that house people awaiting immigration hearings or removal proceedings were originally designed as prisons.<sup>15</sup> Living conditions commonly

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people for no purpose other than to secure their presence both for immigration proceedings and their removal.”).

<sup>12</sup> See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime. . . . It is but a method of enforcing the return [of an immigrant] to his own country.”).

<sup>13</sup> See *Immigration Detention 101*, DET. WATCH NETWORK (2019), <https://perma.cc/VD4C-Q37X>; Maria Ines Zamudio, *Deported U.S. Veterans Feel Abandoned by the Country They Defended*, NPR (June 21, 2019), <https://perma.cc/88XH-5VRP>; DAVID J. BIER, CATO INST., U.S. CITIZENS TARGETED BY ICE 3 (2018).

<sup>14</sup> See Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming*, NAT'L IMMIGRANT JUST. CTR. (Mar. 13, 2018), <https://perma.cc/NC2V-58UQ>; see also *Decline in ICE Detainees with Criminal Records Could Shape Agency's Response to COVID-19 Pandemic*, TRAC IMMIGR. (Apr. 3, 2020), <https://perma.cc/3TB6-GBPY> (reporting that only approximately 10.7% of people in ICE detention have a serious criminal conviction). This Comment's discussion of the differences between civil detention and criminal incarceration should not be read to imply an acceptance of forced labor in the criminal incarceration context.

<sup>15</sup> See CTR. FOR IMMIGRANTS' RTS. CLINIC, PENN STATE L., *IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS* 31 (2017) [hereinafter *IMPRISONED JUSTICE*]; see also Jacqueline Stevens, *One Dollar per Day: The Slaving Wages of Immigration Jail, from 1943 to Present*, 29 GEO. IMMIGR. L.J. 391, 410, 413 (2015) (discussing

associated with prisons, such as bathrooms shared among large numbers of people without privacy, are the norm.<sup>16</sup> Detention facilities also regularly employ prisonlike disciplinary practices, such as “segregation,” which can involve isolating and locking people in cells for up to twenty-three hours per day.<sup>17</sup>

ICE operates only a fraction of all immigration detention facilities. Instead, the vast majority of people detained for suspected immigration violations are sent to facilities operated by private companies. These for-profit companies secure lucrative contracts with ICE or with state and local governments and are compensated for each person booked into the facility.<sup>18</sup> In total, over 80% of people in the immigration detention system are detained in privately operated facilities.<sup>19</sup>

By numerous accounts, conditions in for-profit immigration detention facilities are deplorable. Advocacy groups, congressional representatives, journalists, and scholars have documented the inhumane conditions of these facilities, including dangerously subpar medical practices, rampant sexual abuse, and lack of access to legal assistance.<sup>20</sup> Internal inspections of the Department of Homeland Security (DHS), which oversees ICE, corroborate these reports. For example, DHS’s 2018 inspection of one GEO-operated facility uncovered “significant health and safety risks, including nooses in detainee cells, improper and overly restrictive segregation, and inadequate detainee medical care.”<sup>21</sup> Some facilities do not adequately provide basic necessities. Water, for example, “has been described as green, non-potable, smelling of feces, or completely shut off,” and food as “spoiled or expired. . . . undercooked, burnt, or rancid.”<sup>22</sup>

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Performance-Based National Detention Standards in “non-dedicated” facilities, which are “typically county jails with a wing rented out to ICE”).

<sup>16</sup> IMPRISONED JUSTICE, *supra* note 15, at 30.

<sup>17</sup> *Id.* at 36–39.

<sup>18</sup> See Sharita Gruberg, *How For-Profit Companies Are Driving Immigration Detention Policies*, CTR. FOR AM. PROGRESS (Dec. 18, 2015), <https://perma.cc/T743-FA4C>.

<sup>19</sup> ACLU, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 17 (2020).

<sup>20</sup> See NAT’L IMMIGRANT JUST. CTR. & DET. WATCH NETWORK, IMMIGRATION DETENTION OVERSIGHT AND ACCOUNTABILITY TOOLKIT: A GUIDE FOR MEMBERS OF CONGRESS VISITING ICE JAILS 6–7 (2019).

<sup>21</sup> OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-19-47, CONCERNS ABOUT DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 3 (2019).

<sup>22</sup> IMPRISONED JUSTICE, *supra* note 15, at 31–32.

Despite the flood of reports documenting the inhumane conditions of many privately operated facilities, immigration detention remains a booming business. ICE paid out over \$1.2 billion in detention contracts to GEO and CoreCivic in 2019 alone.<sup>23</sup> Both companies rely on immigration detention for a significant portion of their profits.<sup>24</sup> Under the Trump administration, the immigration detention system grew at an unprecedented rate, with detention rates skyrocketing and billions of dollars in contracts awarded to private detention companies.<sup>25</sup>

### B. Labor Programs in Detention Centers

To fully understand plaintiffs' forced labor claims, it is important to first discuss the structure of formal work programs in detention centers. ICE requires all detention centers to operate a Voluntary Work Program (VWP), which allows people "to work and earn money while confined."<sup>26</sup> Through this program, people can volunteer for various job assignments, such as food service, laundry, barber service, medical detail, and paint detail.<sup>27</sup> In exchange, detention facilities are only required to provide workers a minimum wage of \$1 per eight-hour workday.<sup>28</sup> Workers can use this stipend to purchase food, personal hygiene products, payphone credit, and other items at the detention center's commissary.

Surprisingly, there is virtually no legislation concerning the VWP. A one-sentence statute from 1950 serves as the legal basis for the operation of work programs in immigration detention facilities. This statute authorizes the appropriation of funds to the Immigration and Naturalization Service (ICE's predecessor) for "payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed."<sup>29</sup> The compensation rate contemplated when Congress

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<sup>23</sup> See ACLU, *supra* note 19, at 17.

<sup>24</sup> *Id.*

<sup>25</sup> See *id.* at 14–15.

<sup>26</sup> PBNDS, *supra* note 11, at 405.

<sup>27</sup> See, e.g., *Novoa v. GEO Grp., Inc.*, No. 17-CV-02514, 2019 WL 7195331, at \*3 (C.D. Cal. Nov. 26, 2019).

<sup>28</sup> The dollar-per-day rate is a legal minimum. Statistics on the actual stipend that private detention facilities pay to VWP workers are difficult to find due to a lack of transparency. Stipend rates also vary among job assignments and facilities. Professor Jacqueline Stevens, through extensive research and Freedom of Information Act litigation, has concluded that detention centers pay VWP workers \$1–\$3 per day. See Stevens, *supra* note 15, at 415–17.

<sup>29</sup> 8 U.S.C. § 1555.



passed this provision in 1950 was \$1 per day. Adjusted for inflation, the dollar-per-day wage would equal approximately \$10.63 in 2019.<sup>30</sup> But in the seventy years since the passage of this provision, Congress has never set a rate higher than \$1 per day.<sup>31</sup> In 2017, the U.S. Commission on Civil Rights called on Congress to address these “abusive labor practices” and “require fair wages for all detainees.”<sup>32</sup> Congress, however, has yet to act. Indeed, a group of eighteen Republican representatives recently issued a letter in support of the dollar-per-day rate.<sup>33</sup>

Numerous lawsuits have targeted the VWP’s low pay rate, questioning its legality in light of minimum wage laws and other labor regulations such as the Fair Labor Standards Act.<sup>34</sup> While these claims are outside the scope of this Comment, it is important to note that the legality of the VWP itself is controversial, even when people participate willingly.

Aside from the one-sentence provision mentioning an allowance for work performed by people in immigration custody, now codified at 8 U.S.C. § 1555, no other federal legislation directly refers to work programs in immigration detention centers. Instead, the rules governing the VWP are provided by ICE’s Performance-Based National Detention Standards (PBNDS), a set of guidelines

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<sup>30</sup> See *Inflation Calculator*, FED. RESERVE BANK MINNEAPOLIS, <https://perma.cc/LY4Z-K68Y>.

<sup>31</sup> See Stevens, *supra* note 15, at 461–65. In fact, the last time that Congress specified the compensation rate was in the Appropriations Act of 1978, after which Congress ceased to include an express compensation rate in its appropriation acts. Department of Justice Appropriation Act of 1978, Pub L. No. 95-86, 91 Stat. 424, 426. Stevens argues that this congressional neglect has potential consequences for the legality of the dollar-per-day payment in light of other labor and wage laws. See Stevens, *supra* note 15, at 439–48.

<sup>32</sup> U.S. COMM’N ON C.R., U.S. COMMISSION ON CIVIL RIGHTS CONCERNED WITH ALLEGED ABUSIVE LABOR PRACTICES AT IMMIGRATION DETENTION CENTERS 1 (2017).

<sup>33</sup> See Letter from Steve King, Representative, U.S. Cong., et al., to Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Just., Alexander Acosta, Sec’y, U.S. Dep’t of Lab. & Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enft (Mar. 7, 2018), <https://perma.cc/T8RS-J97N>.

<sup>34</sup> See, e.g., *Alvarado Guevara v. INS*, 902 F.2d 394, 396 (5th Cir. 1990) (per curiam) (challenging dollar-per-day wages in a government detention facility as a violation of the Fair Labor Standards Act); *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1128 (D. Colo. 2015) (challenging dollar-per-day wages in a GEO detention facility as a violation of Colorado’s minimum wage laws); *Washington v. GEO Grp., Inc.*, 283 F. Supp. 3d 967 (W.D. Wash. 2017) (challenging dollar-per-day wages in a GEO detention facility as a violation of Washington’s minimum wage laws). For more analysis of these cases, see Jacqueline Stevens, *One Dollar per Day: A Note on Recent Forced Labor and Dollar-per-Day Wages in Private Prisons Holding People Under Immigration Law*, 52 VAL. U. L. REV. 343, 346–64, 366–67 (2018); Stevens, *supra* note 15, at 400–03; Seth H. Garfinkel, *The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers*, 67 CASE W. RES. L. REV. 1287, 1310–17 (2017).

for administering immigration detention centers. The PBNDS are ICE-drafted guidelines that are not legally binding.<sup>35</sup> They have no basis in statute nor were they promulgated in accordance with administrative rulemaking processes. ICE is not legally obligated to follow these guidelines in the operation of detention centers and can alter the guidelines at any time. ICE does, however, incorporate the PBNDS into its contracts with private detention corporations. This means that private detention corporations are required to abide by the PBNDS by the terms of their government contracts.<sup>36</sup>

Section 5.8 of the PBNDS addresses the purpose and scope of the VWP but provides only a skeletal outline of the program.<sup>37</sup> Most details are left to the discretion of detention center administrators. The PBNDS do specify, however, that “[d]etainees shall be able to volunteer for work assignments *but otherwise shall not be required to work*, except to do personal housekeeping.”<sup>38</sup> The PBNDS define the “personal housekeeping” duties of detained people as: “1. making their bunk beds daily; 2. stacking loose papers; 3. keeping the floor free of debris and dividers free of clutter; and 4. refraining from hanging/draping clothing, pictures, keepsakes, or other objects from beds, overhead lighting fixtures or other furniture.”<sup>39</sup>

It is important to note that—despite the extremely low wages and the alleged use of coercion to be explored more in depth in the next Section—some detained people report a positive experience with the VWP.<sup>40</sup> One man formerly detained by ICE, for example, noted that working through the VWP “broke up the tedium of being locked up and the stress of dealing with his constantly delayed appeals.”<sup>41</sup> This is consistent with the experience of many immigration attorneys, who have noted that, although detained clients may have complaints about the VWP, many do not want to see it

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<sup>35</sup> See ALISON SISKIN, CONG. RSCH. SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 11 (2012).

<sup>36</sup> See *Novoa*, 2019 WL 7195331, at \*2.

<sup>37</sup> See PBNDS, *supra* note 11, at 405–09.

<sup>38</sup> *Id.* at 405 (emphasis added).

<sup>39</sup> *Id.* at 406.

<sup>40</sup> See Sinha, *supra* note 10, at 33 (“[M]any detainees . . . welcome the opportunity to work as a way to endure the stress and boredom of incarceration.”).

<sup>41</sup> Yana Kunichoff, “Voluntary” Work Program in Private Detention Centers Pays Detained Immigrants \$1 a Day, PRISON LEGAL NEWS (Aug. 15, 2012), <https://perma.cc/J29A-JF93>.

disappear.<sup>42</sup> The subminimum wages and potential labor law violations endemic to the VWP, however, should not be ignored simply because the program also provides some benefits.

Despite the potential benefits of a voluntary work program, the current § 1589 suits hinge on allegations that much of the work in detention centers is not voluntary. Eduardo Zuñiga's account of his experience at a CoreCivic detention center in Georgia is illustrative.<sup>43</sup> While working in the facility's kitchen, Zuñiga suffered painful on-the-job injuries that resulted in a shattered, infected toenail and a torn ligament in his knee. Medical staff eventually ordered Zuñiga to rest his injured leg.<sup>44</sup> Nevertheless, Zuñiga reported that CoreCivic guards "threatened him with 'the hole' [i.e., solitary confinement]" if he did not report for his work shift.<sup>45</sup> CoreCivic denied any evidence of the incident,<sup>46</sup> but stories like Zuñiga's are common. The next Section discusses the allegations of forced labor in for-profit detention centers that underpin the current § 1589 suits against CoreCivic and GEO.

### C. Forced Labor Allegations

Plaintiffs allege that private detention corporations systematically force detained people to work both within and outside of the VWP. The conduct underlying these claims can be sorted into four main categories: (1) mandatory unpaid cleaning assignments, (2) forced participation in the VWP, (3) coerced participation in the VWP through deprivation of basic essentials, and (4) coerced unpaid labor through a shadow unpaid work program. This Section provides an overview of the practices that plaintiffs argue constitute illegal forced labor under § 1589. Understanding these different types of forced labor practices is critical because, depending on the manner in which courts interpret and apply the TVPA, some of these practices may or may not be sufficient to state a § 1589 claim. Note that CoreCivic and GEO contest many of the factual allegations underlying these claims.

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<sup>42</sup> See Mia Steinle, *Slave Labor Widespread at ICE Detention Centers*, *Lawyers Say*, PROJECT ON GOV'T OVERSIGHT (Sept. 7, 2017), <https://perma.cc/8X57-WGNJ>.

<sup>43</sup> See ACLU OF GA., PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA 57–58, 61 (2012); Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24, 2014), <https://perma.cc/Z3GS-K4WD>.

<sup>44</sup> ACLU OF GA., *supra* note 43, at 61.

<sup>45</sup> *Id.* at 58. For a discussion of CoreCivic and GEO's objections to the term "solitary confinement" to describe their practices, see *infra* note 53.

<sup>46</sup> See ACLU OF GA., *supra* note 43, at 58 n.568.

1. Mandatory unpaid cleaning assignments.

Claims falling in the first category allege that CoreCivic and GEO employ standard policies across their facilities requiring detained people to complete “cleaning assignment[s]” on a regular basis under threat of punishment.<sup>47</sup> This work is not part of the VWP and is not compensated. GEO and CoreCivic assert that these cleaning assignments are nothing more than “personal housekeeping.”<sup>48</sup> But the tasks required by the policies are more extensive than the image that the personal housekeeping label evokes. For example:

[GEO’s] Adelanto policy makes detainees responsible for the cleanliness of walls, floors, sinks, toilets, windows within the “cell, room, or living area.” At 6 a.m. each Detainee is issued mops, buckets, brooms, scrub brushes, cleaning rags, and chemicals, and officers supervise the mandatory cleaning. Another section of the GEO policy expands the area of responsibility to “all commonly accessible areas of the unit” including “microwaves, tables, and chairs,” and notes “each and every detainee must participate.” A third plan provides that on a weekly basis or as needed each unit as a whole is subject to a “total sanitation mission.”<sup>49</sup>

CoreCivic allegedly maintains a similar sanitation policy which states that:

“[a]ll floors will be swept and mopped on a daily basis,” “[t]oilet bowls and sinks will be cleaned daily,” “[t]he showers and floors will be mopped and scrubbed daily,” “[a]ll furniture will be dusted on a daily basis and cleaned when necessary,” “[a]ll trash will be emptied daily,” “[w]indows will be washed weekly or more often when erquired [sic],” “[w]alls and doors will be wiped daily,” and “[a]ll equipment will be dusted or cleaned on a daily basis.”<sup>50</sup>

Again, these cleaning assignments involve more extensive work than what might typically be characterized as personal housekeeping. In addition, these tasks go beyond the four low-effort

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<sup>47</sup> *Owino v. CoreCivic, Inc.*, No. 17-CV-01112, 2020 WL 1550218, at \*21 (S.D. Cal. Apr. 1, 2020) *appeal docketed*, No. 21-55221 (9th Cir. Mar. 10, 2021).

<sup>48</sup> *See, e.g.*, CoreCivic *Barrientos* Brief, *supra* note 8, at 18.

<sup>49</sup> *Novoa*, 2019 WL 7195331, at \*4 (citations omitted) (quoting a written declaration submitted by GEO’s counsel).

<sup>50</sup> *Owino*, 2020 WL 1550218, at \*21 (alterations in original) (quoting a written declaration submitted by plaintiffs’ counsel citing CoreCivic’s written policies).

tasks designated as “personal housekeeping” by the PBNDS—namely, making the bed and keeping personal clutter off the floor, furniture, and lighting fixtures.<sup>51</sup> In fact, plaintiffs claim that CoreCivic and GEO rely on detained labor to keep facilities clean; nondetained janitorial staff are allegedly only hired to clean areas that detained people are prohibited from accessing.<sup>52</sup>

Plaintiffs allege that the consequences for not completing the cleaning assignments include solitary confinement,<sup>53</sup> housing transfers, and other sanctions.<sup>54</sup> For example, one plaintiff alleges that, after he declined to clean areas of the detention facility for free, GEO officials threw all of his belongings on the floor, threatened him with solitary confinement, and threatened to negatively influence his ongoing asylum case.<sup>55</sup> According to another plaintiff, “officials threaten[ed] to lock detainees in their cells, suspend their attorney and personal visits, and prohibit them from interacting with other detained immigrants if they refused to clean areas of the Adelanto Facility for free.”<sup>56</sup>

## 2. Forced VWP participation.

Claims falling in the second category allege that detained people were forced to participate in the VWP—often obligated to work while sick, to work extra hours or shifts, or to otherwise participate against their wishes. Detention center authorities allegedly threatened detained people with solitary confinement and other harms if they refused to work. One plaintiff recounted that “CoreCivic threatened to transfer him to the Chicken Coop [a housing unit with subpar conditions], revoke his access to the commissary, and put him in solitary confinement if he stopped

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<sup>51</sup> PBNDS, *supra* note 11, at 405–06.

<sup>52</sup> See *infra* Part V.B.2.

<sup>53</sup> CoreCivic and GEO have objected to the use of the term “solitary confinement” to describe their isolation practices, which they refer to as “segregation.” See, e.g., *Novoa*, 2019 WL 7195331, at \*5. But reports suggest that, in practice, segregation frequently operates in the same general manner as solitary confinement. See ACLU, *supra* note 19, at 38–41; IMPRISONED JUSTICE, *supra* note 16, at 36–37. DHS’s internal investigations of detention centers have “identified serious issues with administrative and disciplinary segregation of detainees.” ACLU, *supra* note 19, at 38 (quoting OFF. OF INSPECTOR GEN., *supra* note 21, at 5). As a result, this Comment will continue to use the term “solitary confinement” to refer to instances where detained people are purposely isolated from others.

<sup>54</sup> See, e.g., *Novoa*, 2019 WL 7195331, at \*4 (summarizing GEO’s alleged disciplinary policy).

<sup>55</sup> Third Amended Complaint at 30, *Novoa v. GEO Grp., Inc.*, No. 17-02514 (C.D. Cal. Nov. 26, 2019), 2019 WL 8329599 ¶ 147 [hereinafter *Novoa* Complaint].

<sup>56</sup> *Id.* at 26.

working, called in sick, refused to change shifts, or encouraged others to stop working.”<sup>57</sup> In short, these claims assert that forced labor practices are prevalent even within nominally voluntary work programs in detention centers.

3. Coerced VWP participation through deprivation.

Claims falling in the third category challenge the VWP itself in light of the grim reality of modern detention conditions. Although private detention corporations are obligated to provide detained people with basic necessities, plaintiffs allege that facilities regularly deprive them of essentials. Plaintiffs in one facility, for example, reported that CoreCivic did not adequately provide “basic necessities, like food, toothpaste, toilet paper, and soap.”<sup>58</sup> Instead, they had no choice but to purchase these necessities from the commissary. For people who do not have family members to fund their commissary accounts, working in the VWP is the only means of earning commissary credit. In sum, detention corporations allegedly operate a “deprivation scheme” in which they withhold basic necessities in order to coerce people into working in the VWP and making commissary purchases.<sup>59</sup>

4. Coerced participation in an unpaid shadow work program.

Finally, some plaintiffs allege that detention centers exploited their desire or need to participate in the paid VWP by requiring them to first participate in a de facto shadow work program. In this unpaid work arrangement, “applicants for the [paid VWP] must work for an arbitrary period of time for no compensation whatsoever, in the hopes that they will eventually be hired into the [paid VWP].”<sup>60</sup> In these instances, plaintiffs allegedly worked alongside paid VWP participants completing the same tasks but were not paid the dollar-per-day minimum allowance.<sup>61</sup> For example, an asylum seeker detained in GEO’s Adelanto Detention Center alleges that GEO required him to work without pay in the kitchen from 2 to 8 a.m. for approximately one month before GEO

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<sup>57</sup> *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1274 (11th Cir. 2020).

<sup>58</sup> *Id.* at 1273.

<sup>59</sup> *Id.*

<sup>60</sup> *Novoa*, 2019 WL 7195331, at \*3.

<sup>61</sup> *See id.* at \*4.

officials permitted him to receive the dollar-per-day payment for the same tasks through the VWP.<sup>62</sup>

Each category of alleged forced labor reviewed above represents a different combination of facts regarding two factors: (1) the methods that detention facilities use to coerce detained individuals and (2) the types of activities that detention facilities coerce detained individuals to perform. As this Comment will discuss further, both factors are critical to determine whether conduct amounts to illegal forced labor. Thus, depending on how courts interpret and apply the TVPA, it is possible that all, some, or none of these four categories of allegations will result in liability for private detention corporations. This Comment focuses on the TVPA's relationship to the latter factor—the types of activities that are coerced—and argues that the TVPA covers all the activities alleged in each of the four categories. To lay the foundation for this argument, the next Part summarizes the legal status of forced labor in the United States.

## II. PROHIBITIONS ON FORCED LABOR IN THE UNITED STATES

### A. The Thirteenth Amendment

Forced labor is illegal in the United States. The Constitution may seem the most obvious protection against systematic forced labor. Section 1 of the Thirteenth Amendment prohibits “slavery” and “involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted.”<sup>63</sup> This constitutional protection is not limited to the context of African American slavery and extends to both citizens and noncitizens.<sup>64</sup>

Because immigration detention is civil rather than criminal detention, people detained awaiting immigration proceedings do not fall within the Amendment's criminal punishment exception clause. Hence, some scholars argue that forced labor in immigration detention centers violates the Thirteenth Amendment.<sup>65</sup> But Thirteenth Amendment claims are difficult to win.

One obstacle is that existing case law provides no clear definition of “slavery” or “involuntary servitude.” The Supreme Court

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<sup>62</sup> Novoa Complaint, *supra* note 55, at 28–29.

<sup>63</sup> U.S. CONST. amend. XIII, § 1.

<sup>64</sup> See Sinha, *supra* note 10, at 41–42.

<sup>65</sup> See generally *id.*; Jamila S. Cambridge, Note, *Land of the Free? An Examination of the Constitutionality of Forced Labor in U.S. Immigrant Detention Centers*, 63 HOW. L.J. 405 (2020).

has, thus far, only found Thirteenth Amendment violations in cases where the victim was subject to “the use or threatened use of physical or legal coercion.”<sup>66</sup> Physical coercion involves the threat or use of physical force to compel labor, such as physically injuring a person who fails to complete a task or physically restraining a person from leaving the workplace.<sup>67</sup> Legal coercion occurs when the victim has no choice but to work or be subject to a legal sanction, such as a criminal charge. For example, states cannot pass laws that criminalize the nonperformance of labor contracts.<sup>68</sup> Whether the Thirteenth Amendment extends to forced labor obtained by other means, such as psychological coercion, is unclear. The Supreme Court has not ruled directly on this question, but it has suggested that applying the Thirteenth Amendment to situations where means other than physical or legal coercion are employed would be a significant departure from its past Thirteenth Amendment jurisprudence.<sup>69</sup>

Additionally, the Supreme Court has recognized an unwritten but far-reaching civic duty exception to the Thirteenth Amendment. Under this exception, the Amendment does not prohibit “State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties.”<sup>70</sup> Applying this civic duty exception, the Court has rejected challenges to practices such as jury duty and the military draft.<sup>71</sup>

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<sup>66</sup> *United States v. Kozminski*, 487 U.S. 931, 944 (1988).

<sup>67</sup> *See United States v. Alzanki*, 54 F.3d 994, 1001 (1st Cir. 1995) (affirming the district court’s jury instructions defining involuntary servitude through physical coercion as including “restraint, physical restraint, locking somebody up, or in some other way restraining the person . . . [and] physically injuring the person”).

<sup>68</sup> *See, e.g., United States v. Reynolds*, 235 U.S. 133, 146–47 (1914) (striking down a law authorizing the “arrest of [a] convict for violation of his labor contract” with a surety who had paid fines or fees to the state related to the person’s criminal conviction); *Bailey v. Alabama*, 219 U.S. 219, 243–45 (1911) (striking down a law permitting criminal fraud convictions to be based solely on failure of defendants to perform labor contracts for which they had accepted advance payment).

<sup>69</sup> *See Kozminski*, 487 U.S. at 944:

[O]ur precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion. The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion. We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*



Whether the civic duty exception extends to government-compelled forced labor performed by detained people is unresolved.<sup>72</sup> The U.S. government has sometimes attempted to use the civic duty exception to justify forced labor performed by people detained while awaiting criminal trials and people detained while awaiting immigration proceedings given that this labor cannot be justified under the criminal exception clause because neither group has been convicted of a crime. In *Channer v. Hall*,<sup>73</sup> the Fifth Circuit held that a government-run detention facility did not violate the Thirteenth Amendment when it compelled a detained immigrant to work in the food services department of the facility because such conduct fell under the civic duty exception: “[T]he federal government is entitled to require a communal contribution by an [Immigration and Naturalization Service] detainee.”<sup>74</sup>

In *McGarry v. Pallito*,<sup>75</sup> however, the Second Circuit reached a different conclusion in the pretrial detention context. The plaintiff claimed that the prison had violated the Thirteenth Amendment by compelling him to work in the prison laundry before he had been convicted of a crime. The Second Circuit first assumed without deciding that the government could compel someone detained awaiting a criminal trial to perform “personally related housekeeping chores” without violating the Thirteenth Amendment.<sup>76</sup> However, the court ruled out the possibility of an exception where the housekeeping chores were not truly “personal” but instead were well within the Thirteenth Amendment’s scope of “compulsory service of *one to another*.”<sup>77</sup> The Supreme Court has not weighed in on this issue.

Importantly, each case in which the Supreme Court has recognized a civic duty exception has involved service to the government—not to private entities, such as for-profit corporations. Courts have thus far rejected the argument that the civic duty exception extends to GEO and CoreCivic as for-profit government contractors.<sup>78</sup>

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<sup>72</sup> For an analysis of whether the civic duty exception applies to forced labor in immigration detention centers, see Cambridge, *supra* note 65, at 411–19.

<sup>73</sup> 112 F.3d 214 (5th Cir. 1997).

<sup>74</sup> *Id.* at 219.

<sup>75</sup> 687 F.3d 505 (2d Cir. 2012).

<sup>76</sup> *Id.* at 514.

<sup>77</sup> *Id.* at 513–14 (emphasis in original) (quotation marks omitted) (quoting *Hodges v. United States*, 203 U.S. 1, 16 (1906)).

<sup>78</sup> See *Novoa v. GEO Grp., Inc.*, No. 17-CV-02514, 2018 WL 3343494, at \*13 (C.D. Cal. June 21, 2018) (order granting in part and denying in part defendant’s motion to

Despite the Supreme Court's tendency to narrowly interpret the meaning of "slavery" and "involuntary servitude" under Section 1 of the Thirteenth Amendment, the Court has recognized broad congressional authority to enact legislation under the power granted to it by Section 2 of the Thirteenth Amendment. Section 2 states that "Congress shall have power to enforce this article by appropriate legislation."<sup>79</sup> The Court has long held that this clause endowed Congress with the power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."<sup>80</sup>

The exact scope of this power remains largely undefined. For example, some have questioned whether Congress's enactment of federal hate crimes legislation was a proper exercise of Thirteenth Amendment power.<sup>81</sup> It is well-settled, however, that Congress's power to legislate under Section 2 is not coterminous with the definitions of "slavery" and "involuntary servitude" directly prohibited by Section 1. Rather, the types of "conduct that [Congress] may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude."<sup>82</sup> Pursuant to this authority as well as its power to regulate interstate commerce, Congress enacted the Trafficking Victims Protection Act, discussed next.

## B. The Trafficking Victims Protection Act

Enacted in 2000, the TVPA addressed a broad range of activities related to sex trafficking, involuntary servitude, peonage, debt bondage, slavery, and forced labor.<sup>83</sup> Although the term "human trafficking" evokes ideas of smuggling women across international borders for purposes of forced prostitution, the TVPA extends far

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dismiss) (holding that "the rationale underlying the civic duty exception and its historical usage" rendered it "inapplicable to a claim against a private corporation contracting with the federal government to run an immigration detention facility"); *Owino v. CoreCivic, Inc.*, No. 17-CV-1112, 2018 WL 2193644, at \*10 (S.D. Cal. May 14, 2018) (order granting in part and denying in part defendant's motion to dismiss) (holding that the civic duty exception could not shield CoreCivic from forced labor allegations because it "is a private entity, not a government"); *Menocal v. GEO Grp., Inc.* 113 F. Supp. 3d 1125, 1133 (D. Colo. 2015) (order granting in part and denying in part defendant's motion to dismiss) (same).

<sup>79</sup> U.S. CONST. amend. XIII, § 2.

<sup>80</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (emphasis omitted) (quotation marks omitted) (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

<sup>81</sup> See Jennifer Mason McAward, *The Thirteenth Amendment, Human Trafficking, and Hate Crimes*, 39 SEATTLE U. L. REV. 829, 834–45 (2016).

<sup>82</sup> *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

<sup>83</sup> 22 U.S.C. § 7102.

beyond this conventional conception of trafficking. During the congressional debates preceding the enactment of the TVPA, representatives clashed over how the proposed legislation would define “trafficking.”<sup>84</sup> Members of Congress disagreed, for example, over the extent to which sex work, such as prostitution, should or would be swept into a single, catchall definition of “trafficking.”<sup>85</sup> Inability to reach a compromise ultimately led Congress to leave the term without a single clear definition. Rather, Congress chose to dodge this question by defining “severe forms of trafficking” rather than “trafficking” more broadly.<sup>86</sup>

The practical implication of this history is that the operative definition of “trafficking” under federal law today is generally considered to be the TVPA definition of “severe forms of trafficking.”<sup>87</sup> This definition includes certain types of sex trafficking as well as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>88</sup> This definition of “human trafficking” is considerably more expansive than the stereotype of a foreign woman forced into prostitution.

Critically, the TVPA also created several offenses without reference to the term “trafficking.” Perhaps the most important among these provisions was a sweeping new prohibition on forced labor. Before the TVPA, federal statutory protection from forced labor was largely limited to a prohibition on involuntary servitude enacted in 1948 (18 U.S.C. § 1584), which criminalized “knowingly and willfully hold[ing] to involuntary servitude or sell[ing] into any condition of involuntary servitude, any other person for any term.”<sup>89</sup> But the statute did not define “involuntary servitude.” In *United States v. Kozminski*,<sup>90</sup> the Supreme Court held that, absent a definition from Congress, the term “involuntary servitude” should only include conduct that was understood

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<sup>84</sup> For a thorough discussion of the contentious debates and diversity of interests involved in the passage of the TVPA, see ALICIA W. PETERS, RESPONDING TO HUMAN TRAFFICKING: SEX, GENDER, AND CULTURE IN THE LAW 43–70 (2015).

<sup>85</sup> See *id.* at 61 (explaining that “[o]ne of the main controversies during [TVPA] negotiations” was “the relationship between prostitution and trafficking and whether individuals participating in a criminalized act could be considered victims”).

<sup>86</sup> See 22 U.S.C. § 7102(11).

<sup>87</sup> See PETERS, *supra* note 84, at 63, 75–77.

<sup>88</sup> 22 U.S.C. § 7102(11)(B).

<sup>89</sup> 18 U.S.C. § 1584(a) (originally enacted as Act of June 25, 1948, ch. 645, 62 Stat. 683, 773).

<sup>90</sup> 487 U.S. 931 (1988).

to be prohibited by the Thirteenth Amendment at the time of the statute's enactment.<sup>91</sup> This limited the § 1584 prohibition on involuntary servitude to cases where victims were compelled by physical or legal coercion.<sup>92</sup>

This holding led to a rather unsympathetic result in *Kozminski*. The *Kozminski* defendants had appealed their convictions under § 1584 for coercing two men with disabilities into laboring seventeen hours per day without pay or adequate living conditions.<sup>93</sup> The Court reversed their convictions, however, because the district court's jury instructions permitted the jury to consider methods of coercion (such as psychological coercion) other than "physical or legal coercion."<sup>94</sup>

In designing the TVPA, Congress expressly sought to expand federal prohibitions on forced labor to cover "severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*."<sup>95</sup> To fill this gap, Congress created a provision entitled "Forced Labor," codified at 18 U.S.C. § 1589, which complemented but did not replace the existing § 1584 prohibition on involuntary servitude. The original version of § 1589 enacted in 2000 prohibited:

knowingly provid[ing] or obtain[ing] the labor or services of a person—

- (1) by threats of serious harm to, or physical restraint against, that person or another person;
- (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
- (3) by means of the abuse or threatened abuse of law or the legal process.<sup>96</sup>

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<sup>91</sup> See *id.* at 944–45:

The pivotal phrase, "involuntary servitude," clearly was borrowed from the Thirteenth Amendment. . . . In the absence of any contrary indications, we therefore give effect to congressional intent by construing "involuntary servitude" in a way consistent with the understanding of the Thirteenth Amendment that prevailed at the time of § 1584's enactment.

<sup>92</sup> See *supra* Part II.A.

<sup>93</sup> See *Kozminski*, 487 U.S. at 934–35.

<sup>94</sup> See *id.* at 949, 953.

<sup>95</sup> H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.) reprinted in 2000 U.S.C.C.A.N. 1380, 1393.

<sup>96</sup> 18 U.S.C. § 1589.

Two aspects of this statute are notable. First, Congress avoided the Thirteenth Amendment's language of "slavery" or "involuntary servitude," thus decoupling the statute from the Supreme Court's existing interpretations of those terms. Second, Congress included the broad term "threats of serious harm" in an attempt to include nonviolent coercion and thus supersede *Kozminski*.<sup>97</sup> Taken together, these characteristics make § 1589 a significant expansion of federal forced labor protections.

In addition to its criminal provisions, the TVPA contains numerous other provisions, such as grants for victims' services organizations. As a result, every few years, Congress has passed a reauthorization act to continue certain TVPA programs and reauthorize the appropriation of funds.<sup>98</sup> These reauthorization acts have often included amendments to the TVPA's criminal and civil prohibitions. The 2003 and 2008 reauthorizations contain the two most important amendments related to § 1589.

The 2003 reauthorization of the TVPA, known as the Trafficking Victims Protection Reauthorization Act (TVPRA),<sup>99</sup> provided victims with a powerful new tool: a private civil cause of action.<sup>100</sup> This provision came in response to critiques from advocacy groups that the TVPA's emphasis on criminal prosecution was inconsistent with the needs of victims.<sup>101</sup> The private cause of action enables victims to sue defendants for violating the TVPA, regardless of whether a federal prosecutor decides to pursue a criminal charge. According to a database maintained by the Human Trafficking Legal Center, "[i]n the 15 years since Congress created the civil provision under the [TVPRA], trafficking survivors have brought more than 270 cases alleging forced labor and involuntary servitude in a wide array of contexts, ranging from slaughterhouses to construction sites, from nursing homes to mansions."<sup>102</sup>

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<sup>97</sup> H.R. REP. NO. 106-939, at 100–01.

<sup>98</sup> Reauthorizations of the TVPA of 2000 have been passed in 2003, 2006, 2008, 2013, 2018, and 2019. See OFF. TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEPT OF STATE, INTERNATIONAL AND DOMESTIC LAW, <https://perma.cc/XJ52-6FAQ>.

<sup>99</sup> Pub. L. No. 108-193, 117 Stat. 2875 (2003).

<sup>100</sup> TVPRA § 4, 117 Stat. at 2878–79.

<sup>101</sup> See Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1661–63 (2007) (discussing Congress's motivations for including a private right of action in the 2003 reauthorization).

<sup>102</sup> LEVY, *supra* note 2, at 3.

With the 2008 reauthorization, Congress clarified the types of coercion prohibited by the Act. This was likely in response to defendants' arguments that courts had improperly instructed juries on the meaning of "serious harm," a term that the original text of § 1589 left undefined.<sup>103</sup> The new, expansive definition of "serious harm" includes

any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.<sup>104</sup>

Thus, § 1589 provides a robust prohibition on forced labor that is significantly more expansive than its statutory predecessors as well as the protection offered by Section 1 of the Thirteenth Amendment.<sup>105</sup>

### III. CURRENT IMMIGRATION DETENTION TVPA CASES

Beginning in 2014, a small coalition of immigrants' rights advocates set its sights on using the TVPA's broad forced labor prohibition and powerful civil suit provision to demand justice for people in immigration detention centers. Because advocates view forced labor in private detention facilities not as occasional misconduct but as systematic operating policy, they have pursued these claims as class actions rather than as individual suits.

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<sup>103</sup> See, e.g., *United States v. Bradley*, 390 F.3d 145, 150–51 (1st Cir. 2004) (rejecting defendants' argument that district court's jury instruction defined "serious harm" too broadly but noting that the phrase "creates a potential for jury misunderstanding as to the nature of the pressure that is proscribed" (emphasis in original)), *vacated on other grounds*, 545 U.S. 1101 (2005).

<sup>104</sup> 18 U.S.C. § 1589(c)(2).

<sup>105</sup> The current text of 18 U.S.C. § 1589, in relevant part, creates civil and criminal liability for:

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

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

Given the ten-year statute of limitations on § 1589 claims and the vast number of people detained in these facilities each year, classes in these cases have the potential to include hundreds of thousands of members.

Currently, there are five TVPA class action suits pending against GEO and CoreCivic in federal court. A sixth suit was filed, but has been stayed as duplicative of another proceeding.<sup>106</sup> Thus far, these suits have overcome some major hurdles. Classes have been certified in three of these cases: *Menocal v. GEO Group*,<sup>107</sup> *Owino v. CoreCivic*,<sup>108</sup> and *Novoa v. GEO Group*.<sup>109</sup> Three cases have already survived one round of interlocutory appellate review on important questions of law before the Tenth, Eleventh, and Fifth Circuits: *Menocal v. GEO Group*,<sup>110</sup> *Barrientos v. CoreCivic*,<sup>111</sup> and *Gonzalez v. CoreCivic*.<sup>112</sup> It remains uncertain whether plaintiffs will succeed on the merits or win a favorable settlement. Nevertheless, these suits represent cause for optimism for immigrants' rights advocates, who are accustomed to an immigration detention system that seems to routinely violate detained individuals' rights with impunity.

If these lawsuits succeed, the immediate and long-term financial ramifications for the private prison industry are dramatic. Scholar Jonathon Booth estimates that a nationwide settlement of these TVPA claims "could easily cost hundreds of millions of dollars, not counting reputational harm."<sup>113</sup> Perhaps most importantly, if these claims succeed, private detention operators will be forced to radically alter the way they run their facilities. For example, without a guaranteed supply of forced labor, detention corporations may need to hire nondetained employees who must receive minimum wage.<sup>114</sup> Professor Jacqueline Stevens, who has conducted groundbreaking research on labor in immigration detention centers, estimates that labor performed by detained

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<sup>106</sup> See *Gonzalez v. CoreCivic, Inc.*, No. 17-CV-2573, 2018 WL 1621543, at \*6 (S.D. Cal. Apr. 4, 2018).

<sup>107</sup> 320 F.R.D. 258 (D. Colo. 2017), *aff'd*, 882 F.3d 905 (10th Cir. 2018).

<sup>108</sup> No. 17-CV-01112, 2020 WL 1550218 (S.D. Cal. Apr. 1, 2020).

<sup>109</sup> No. 17-CV-02514, 2019 WL 7195331 (C.D. Cal. Nov. 26, 2019).

<sup>110</sup> 882 F.3d 905 (10th Cir. 2018).

<sup>111</sup> 951 F.3d 1269 (11th Cir. 2020).

<sup>112</sup> 986 F.3d 536 (5th Cir. 2021).

<sup>113</sup> Jonathon Booth, *Ending Forced Labor in ICE Detention Centers: A New Approach*, 34 GEO. IMMIGR. L.J. 573, 606 (2020).

<sup>114</sup> See *id.* at 606–08 (discussing the potential effects of these TVPA class action suits on the private prison industry).

people saves GEO Group between \$33 and \$72 million and CoreCivic an estimated \$30 to \$77 million annually.<sup>115</sup>

In statements to the public and to shareholders, the private detention industry has projected confidence about the outcome of the suits. GEO told shareholders in February 2019 that a victory for plaintiffs in these suits was neither “probable nor reasonably estimable.”<sup>116</sup> Further, GEO assured shareholders that it did “not expect the outcome of any pending claims or legal proceedings to have a material adverse effect on its financial condition, results of operations or cash flows.”<sup>117</sup> But GEO’s communications with ICE—obtained by Stevens via Freedom of Information Act requests—have painted a different picture. GEO stressed that the legal costs in just one of these suits had already topped \$1.6 million, with millions more expected in discovery costs and “potential damages . . . in the tens of millions.”<sup>118</sup>

Given these high stakes, it is no surprise that CoreCivic and GEO have mounted formidable legal defenses to these suits. This Comment focuses on one of these defenses, namely, that the types of tasks detained people claim they are forced to perform do not qualify as “labor or services” under § 1589. Before analyzing this particular legal argument, however, it is helpful to understand the broad strokes of this pending litigation. Because these lawsuits are ongoing, this Part does not attempt to provide a comprehensive summary of these suits, but rather to spotlight some of the most important legal developments.<sup>119</sup>

#### A. Classes and Claims

The first of this cluster of TVPA suits, *Menocal v. GEO Group*, was filed in the U.S. District Court for Colorado in 2014 by individuals detained at the Aurora Detention Facility in Colorado. The *Menocal* plaintiffs’ complaint alleged that the GEO-operated facility enforced a “Housing Unit Sanitation Policy” that required them to complete unpaid cleaning assignments—janitorial

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<sup>115</sup> Stevens, *supra* note 15, at 402.

<sup>116</sup> Betsy Swan, *Private Prison Bosses Beg Taxpayers to Pay Human-Trafficking Lawsuit Bills*, DAILY BEAST (July 17, 2019), <https://perma.cc/QAB4-692Q>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*; see Stevens, *supra* note 34, at 369–71.

<sup>119</sup> This Comment focuses only on the plaintiffs’ TVPA claims, but plaintiffs in these suits have also stated claims based on allegations of unjust enrichment and violations of minimum wage laws. For additional commentary on this litigation, see generally Stevens, *supra* note 34; see also Booth, *supra* note 113, at 601–03.



maintenance of the facility—under threat of punishment, as discussed in Part I.C.<sup>120</sup> Because plaintiffs claimed that the Housing Unit Sanitation Policy was a facility-wide policy that required all detained individuals to participate, the *Menocal* plaintiffs brought their TVPA claims on behalf of everyone detained at Aurora in the ten years prior to the filing of the suit.<sup>121</sup> Despite GEO's vigorous opposition to class certification, the district court certified the Aurora TVPA class.<sup>122</sup> The Tenth Circuit affirmed on interlocutory appeal.<sup>123</sup>

Evidence uncovered during discovery thus far appears to support some of the plaintiffs' factual allegations that GEO employed a uniform policy of mandatory unpaid janitorial work. For example, detained people received a handbook upon arrival stating that "detainees in a housing unit [or dorm] are required to keep clean and sanitary all commonly accessible areas of the housing unit [or dorm], including walls, floors, windows, window ledges, showers, sinks, toilets, tables, and chairs."<sup>124</sup> As discussed in Part I.C, CoreCivic is alleged to operate a similar uniform policy in its detention facilities.

Some of these TVPA suits have seized upon this uniformity of policy to go a step further than the *Menocal* plaintiffs. If GEO and CoreCivic employ the same policies in all their facilities across the country, then why limit a putative class to people detained in a single facility? *Owino v. CoreCivic*, the next federal TVPA suit, which was filed in 2017 by individuals detained at Otay Mesa Detention Center in California, pursued this strategy. Like the *Menocal* plaintiffs, the *Owino* plaintiffs allege that CoreCivic maintains a policy of mandatory unpaid janitorial assignments.<sup>125</sup> Unlike *Menocal*, however, the *Owino* plaintiffs represent not only people in a single detention facility, but people detained by CoreCivic nationwide.<sup>126</sup> Despite CoreCivic's vigorous opposition, the district court certified the *Owino* plaintiffs' proposed nationwide TVPA class comprised of everyone who was "detained at a CoreCivic facility" within the ten-year statute of

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<sup>120</sup> *Menocal*, 320 F.R.D. at 261.

<sup>121</sup> *Id.* at 262.

<sup>122</sup> *Id.* at 261.

<sup>123</sup> *See Menocal*, 882 F.3d at 910.

<sup>124</sup> Plaintiffs' Response in Opposition to Defendant's Motion for Decertification at 3, *Menocal v. GEO Grp., Inc.*, No. 14-CV-02887 (D. Colo. Oct. 26, 2020) (alterations in original).

<sup>125</sup> *Owino*, 2020 WL 1550218, at \*1.

<sup>126</sup> *Id.*

limitations who had “cleaned areas of the facilities above and beyond the personal housekeeping tasks enumerated in [the ICE PBNDS] . . . under threat of discipline.”<sup>127</sup>

Though pursuing claims through the kind of large, nationwide class certified in *Owino* has significant advantages in terms of its potential to affect systemic change and provide relief to victims across the country, this strategy also has its drawbacks. It opens plaintiffs up to attacks over whether the circumstances and conduct in so many different detention centers are similar enough to be resolved in a single action.<sup>128</sup> Perhaps recognizing these pros and cons, the next case in which class certification was granted has taken a hybrid approach.

In *Novoa v. GEO Group*, people detained in the Adelanto Detention Center in California filed suit in 2017 alleging numerous theories of TVPA liability.<sup>129</sup> Plaintiffs requested both a nationwide TVPA class and an Adelanto-specific TVPA class.<sup>130</sup> The district court certified both classes.<sup>131</sup>

The nationwide class is comprised of all people detained in GEO immigration facilities in the United States within the statute of limitations (excluding class members in the *Menocal* suit due to their separate ongoing litigation) and is based on GEO’s allegedly uniform Housing Unit Sanitation Policy of mandatory unpaid cleaning assignments.<sup>132</sup> GEO, however, continues to deny the existence of any uniform national Housing Unit Sanitation Policy and contends that the cleaning policies of each of its facilities are different.

The claims of the Adelanto-specific class focus on the remaining three theories of forced labor liability discussed in Part I.C: forced participation in Adelanto’s official VWP, coerced participation in Adelanto’s unofficial shadow unpaid work program, and the deprivation-scheme theory of TVPA liability.<sup>133</sup> Plaintiffs argue, for example, that they “often lack sufficient food, clothing, or personal hygiene items, and work without pay only to receive

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<sup>127</sup> *Id.* at \*7, \*31.

<sup>128</sup> *See, e.g.*, *Owino v. CoreCivic*, No. 17-CV-1112, at \*7–11 (S.D. Cal. Jan. 13, 2021) (order denying defendant’s motion for reconsideration).

<sup>129</sup> *Novoa*, 2019 WL 7195331, at \*1.

<sup>130</sup> *Id.* at \*10.

<sup>131</sup> *Id.* at \*20.

<sup>132</sup> *Id.* at \*10.

<sup>133</sup> *Id.* at \*5, \*10.

such necessities as gifts from officers, or to increase their commissary balance and purchase those necessities.”<sup>134</sup>

Although winning class certification was an important initial victory for plaintiffs in these cases, significant obstacles remain. CoreCivic and GEO continue to argue for decertification, both on motions to the district courts as well as on appeal.<sup>135</sup> Thus, class certification is still uncertain, and plaintiffs’ victories may be tenuous.

### B. Foundational Appellate Victories

CoreCivic and GEO have vigorously defended against these suits, attacking both the factual accuracy of plaintiffs’ claims and their legal sufficiency. One critical pillar of their defense strategy is the assertion that, regardless of the truth of the forced labor allegations, plaintiffs’ § 1589 claims must fail because this statute does not apply in the immigration detention context. Thus far, however, both the Eleventh Circuit and the Fifth Circuit have rejected this claim. These rulings represent major victories for the plaintiffs in the instant cases, but also for immigrants’ rights litigation more broadly. They represent judicial rejection of the argument that immigration detention is a unique context where legal protections do not apply in equal force.

The Eleventh Circuit, in *Barrientos v. CoreCivic*, was the first circuit court to rule on the question of the TVPA’s applicability to private detention facilities. The *Barrientos* plaintiffs are people who are currently or formerly detained at Stewart Detention Center in Georgia.<sup>136</sup> In contrast to the TVPA cases discussed previously, the *Barrientos* plaintiffs’ § 1589 claims focus solely on forced labor through the VWP.<sup>137</sup> The plaintiffs advance a deprivation theory of TVPA liability and also allege that they were threatened and retaliated against if they refused to work in the VWP or desired to change shifts, take a day off, or otherwise did not submit to CoreCivic’s VWP-related demands.<sup>138</sup>

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<sup>134</sup> *Novoa*, 2019 WL 7195331, at \*5.

<sup>135</sup> See Notice of Motion to Decertify the Class, *Novoa v. GEO Group, Inc.*, No. 17-CV-02514 (C.D. Cal. Dec. 22, 2020). The Ninth Circuit recently agreed to hear CoreCivic’s interlocutory appeal of the district court’s order granting class certification in *Owino v. CoreCivic*. See Order for Permission to Appeal, *Owino v. CoreCivic*, No. 21-80003 (9th Cir. Mar. 10, 2021).

<sup>136</sup> Amended Complaint at 1, *Barrientos v. CoreCivic, Inc.*, No. 18-CV-00070 (M.D. Ga. Oct. 16, 2020), 2020 WL 7021904 [hereinafter *Barrientos* Complaint].

<sup>137</sup> *Id.* at 10–13.

<sup>138</sup> See *id.* at 14–19.

CoreCivic argued before the Eleventh Circuit that Congress did not intend for the TVPA to extend to immigrants who are lawfully detained under government orders in detention centers. CoreCivic thus asserted “that the TVPA (specifically § 1589) can never apply in the specific context of a ‘federally mandated voluntary work program in a detention setting,’ even where the work performed through that program is obtained through, for example, force, physical restraint, or threats of serious harm.”<sup>139</sup> Notably, the Department of Justice submitted an amicus brief in support of neither party but firmly *against* CoreCivic’s stance of complete immunity from the TVPA. The brief argued that “the TVPA does not contain an implicit exception for private providers of immigration detention services” and that, in fact, “Congress has repeatedly emphasized that it seeks to stamp out any use of forced labor by federal contractors.”<sup>140</sup> The Eleventh Circuit held that there was no exception to TVPA liability for private contractors operating federal immigration facilities.<sup>141</sup>

CoreCivic, however, did not abandon this strategy following its Eleventh Circuit loss. Instead, it advanced the same argument before the Fifth Circuit in *Gonzalez v. CoreCivic*.<sup>142</sup> Martha Gonzalez was held at two different CoreCivic-owned facilities and filed suit seeking to represent a nationwide TVPA class of “[a]ll civil immigration detainees who performed labor for no pay or at a rate of compensation of \$1.00 to \$2.00 per day for work performed for CoreCivic at any detention facility owned or operated by it from February 20, 2007 to the applicable opt-out date, inclusive.”<sup>143</sup>

In response, CoreCivic again argued that conduct within immigration detention facilities should be exempt from TVPA protection, but lost on this argument at the district court.<sup>144</sup> The Fifth Circuit accepted the case on interlocutory appeal to decide “[w]hether the TVPA applies to work programs in federal immigration detention facilities.”<sup>145</sup> The grant of interlocutory review sparked hope for the private detention industry that the Fifth

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<sup>139</sup> *Barrientos*, 951 F.3d at 1275–76.

<sup>140</sup> Brief for the United States as Amicus Curiae in Support of Neither Party at 7–8, *Barrientos v. CoreCivic*, 951 F.3d 1269 (11th Cir. 2020) (No. 18-15081), 2019 WL 1468236, at \*7–8.

<sup>141</sup> *Barrientos*, 951 F.3d at 1280.

<sup>142</sup> See *Gonzalez v. CoreCivic, Inc.*, 986 F.3d 536, 537 (5th Cir. 2021).

<sup>143</sup> Complaint at 19, *Gonzalez v. CoreCivic, Inc.*, No. 18-CV-169 (W.D. Tex. Feb. 22, 2018).

<sup>144</sup> *Gonzalez v. CoreCivic, Inc.*, No. 18-CV-169, 2019 WL 2572540, at \*2–3 (W.D. Tex. Mar. 1, 2019).

<sup>145</sup> *Gonzalez*, 986 F.3d at 538.

Circuit would split with the Eleventh Circuit, thus increasing the chances that the Supreme Court might intervene with a favorable ruling. But in another major victory for plaintiffs and immigrants' rights supporters, the court held that "§ 1589(a) does not contain a categorical exemption—not even an ambiguous one—for work programs in detention facilities."<sup>146</sup> Thus, both circuits that have ruled on this issue have rejected CoreCivic's theory of categorical exemption.

In a recent analysis of these suits, Booth concluded that the "TVPA cases against GEO Group and CoreCivic continue to move inexorably toward class certification and trial" and that these claims are likely to be successful.<sup>147</sup> Similarly, Jennifer Safstrom of the Institute for Constitutional Advocacy and Protection recently called these lawsuits "key drivers of reform" that have "established new precedent and expanded the context in which the Thirteenth Amendment is applicable" via the TVPA.<sup>148</sup> Private detention corporations appear to have lost their initial bids to claim a complete exemption from the TVPA as private government contractors operating detention centers. But significant obstacles still remain. Defendants have doubled down on the argument that the activities alleged by the plaintiffs do not rise to the level of "labor or services" actionable under the TVPA. This Comment now turns to examine the merits of this argument.

#### IV. INTERPRETING "LABOR OR SERVICES" IN 18 U.S.C. § 1589

Because § 1589 does not define "labor or services," parties often argue for differing interpretations of this term. Defendants frequently attempt to escape liability by arguing that the activities performed by victims do not amount to "labor or services" actionable under the TVPA, and thus are not covered by the statute, regardless of whether the defendants used force or coercion. In the current immigration detention cases, courts once again face the challenge of defining the boundaries of "labor or services" under § 1589.

Private detention defendants advance a two-tiered argument. First, they argue that, although the plain language of

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<sup>146</sup> *Id.* at 539.

<sup>147</sup> Booth, *supra* note 113, at 610.

<sup>148</sup> Jennifer Safstrom, *Thirteenth Amendment Litigation in the Immigration Detention Context*, 26 MICH. J. RACE & L. 205, 232 (2020).

§ 1589 refers broadly to any labor or services, Congress was narrowly focused on transnational human trafficking activities. Defendants assert that their alleged conduct is far outside the realm of paradigmatic human trafficking schemes that Congress intended to target with the TVPA. Second, they argue for a limited interpretation of “labor or services” that would—at a minimum—exclude requiring detained people to complete housekeeping tasks under threat of punishment. They assert that § 1589 was not intended to encompass mere housekeeping tasks. This reading would permit § 1589 claims premised on forced participation in the VWP or the shadow unpaid work program, but would bar claims premised solely on tasks defined as housekeeping.

Legislative history and twenty years of precedent interpreting the TVPA, however, provide little support for either of the defendants’ interpretations. This Part first examines the merits of the congressional intent argument and then looks to TVPA case law. Both analyses support the conclusion that the activities plaintiffs allege they were compelled to perform—including housekeeping tasks—constitute labor actionable under the TVPA.

#### A. Examining the Context and Legislative History of § 1589

Both GEO and CoreCivic have asked courts to dismiss the TVPA claims against them by arguing that the conduct Congress intended the TVPA to target is wholly distinct from the conduct plaintiffs allege. CoreCivic, for example, has argued that “the sole purpose of the TVPA was to target, deter, and prosecute international human trafficking, and protect trafficking victims (particularly women and children).”<sup>149</sup> But this emphasis on the TVPA’s focus on trafficking as a transnational crime affecting women and children is misplaced, especially with respect to its forced labor provision.

Notably, § 1589 contains no references to human trafficking or any qualifying language referring to an international or gendered element. Rather, this provision is entitled “Forced labor” and contains broad language.<sup>150</sup> In contrast, the subsequent section, 18 U.S.C. § 1590—also enacted as part of the original TVPA—is entitled “Trafficking with respect to peonage, slavery,

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<sup>149</sup> CoreCivic *Barrientos* Brief, *supra* note 8, at 21. For an example of GEO advancing this argument, see Motion to Dismiss at 12–13, *Menocal v. GEO Grp., Inc.*, No. 14-CV-02887, 2014 WL 6697253 (D. Colo. 2014).

<sup>150</sup> See 18 U.S.C. § 1589.

involuntary servitude, or forced labor.”<sup>151</sup> Interpreting “forced labor” to require an implicit trafficking element would render the subsequent offense of “trafficking with respect to . . . forced labor” redundant. This strongly suggests that Congress did not conceive of § 1589 as a trafficking offense at all.

This reading is consistent with the context and legislative history of § 1589. Specifically, the TVPA’s express references to *Kozminski* support the view of § 1589 as a forced labor prohibition rather than a transnational human trafficking prohibition. As discussed in Part II.B, *Kozminski* had significant influence on the design of § 1589.<sup>152</sup> The case involved two adult male U.S. citizens who were forced to work without adequate pay or living conditions on a family farm in Michigan.<sup>153</sup> There was no transnational crime ring, no trafficking across international (or even interstate) borders, no women or children, no immigrants, nor any of the other elements that would mark the case as one that detention corporations argue the TVPA was intended to target. Even so, there is clear evidence that Congress intended the facts of *Kozminski* to be well within the reach of § 1589’s prohibition on forced labor. The Conference Report, for example, discussed the proposed § 1589 in the following way:

In order to address issues raised by the decision of the United States Supreme Court in *United States v. Kozminski*, the agreement creates a new section 1589 on forced labor. . . . Section 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>154</sup>

Thus, reading § 1589 as only applicable to trafficking with a transnational element would paradoxically rule out liability on facts identical to those in *Kozminski*.

Although it is conceivable that Congress could have intended to eliminate the restrictive *Kozminski* coercion standard only for international human trafficking cases and not for purely domestic cases like *Kozminski* itself, this would be a strained reading of the legislative history. The Conference Report refers to § 1589 as a tool to combat “severe forms of worker exploitation” in a general

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<sup>151</sup> 18 U.S.C. § 1590. This provision creates liability for “[w]hoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services.” 18 U.S.C. § 1590(a).

<sup>152</sup> See *supra* Part II.B.

<sup>153</sup> *Kozminski*, 487 U.S. at 934–35.

<sup>154</sup> H.R. REP. NO. 106-939, at 5, 100–01 (citations omitted).

sense without any modifiers indicating that Congress was only concerned with exploitation involving some sort of transnational element.<sup>155</sup> Again—unlike other TVPA-created provisions—§ 1589 contains no indication that trafficking is an element of the offense.

Even assuming *arguendo* that § 1589 applies only to trafficking cases, other provisions of the TVPA belie the contention that trafficking necessarily contains a transnational element. For example, the TVPA called for the establishment of a “Task Force to Monitor and Combat Trafficking” with responsibilities including “significant research and resource information on domestic and international trafficking.”<sup>156</sup> Furthermore, this interpretation is consistent with the long-held position of the U.S. government. The first Trafficking in Persons Report issued by the U.S. State Department in 2001 in order to fulfill its obligations under the TVPA noted that “[t]rafficking occurs across borders *and within countries*.”<sup>157</sup> Thus, the context and legislative history of the TVPA support what the plain language of § 1589 suggests: that the statute applies to a broad range of cases regardless of any transnational trafficking element.

Private detention corporations also argue that Congress “could not have intended the TVPA to prohibit immigration officials or their private partners from requiring immigration detainees to participate in routine housekeeping tasks in and around the facilities they are lawfully detained in.”<sup>158</sup> These chores, defendants argue, are far outside the TVPA’s target of “modern-day slavery.”<sup>159</sup> Yet routine housekeeping—in other words, domestic labor—is one of the most persistent forms of forced labor.

The TVPA’s legislative history shows that Congress was well aware of the issue of forced domestic labor and intended § 1589 to reach this conduct. First, before the passage of the TVPA, § 1584 (the involuntary servitude statute) was regularly used to prosecute cases in which defendants forced victims to complete domestic

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<sup>155</sup> *Id.*

<sup>156</sup> 22 U.S.C. § 7103(d)(3).

<sup>157</sup> U.S. DEPT OF STATE, 2001 TRAFFICKING IN PERSONS REPORT 1 (2001) (emphasis added).

<sup>158</sup> Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss Complaint at 7, *Owino v. CoreCivic, Inc.*, No. 17-CV-01112, 2017 WL 8948699 (S.D. Cal. 2017).

<sup>159</sup> *CoreCivic Barrientos Brief*, *supra* note 8, at 9–10.



housekeeping.<sup>160</sup> Excluding housekeeping labor from § 1589 would thus be inconsistent with Congress's express desire to *expand* the protections of § 1584. Second, the Conference Report explained that, under the provisions of § 1589, "it is intended that prosecutors will be able to bring more cases in which individuals have been trafficked into domestic service, an increasingly common occurrence."<sup>161</sup> To hold that housekeeping falls outside the scope of "labor or services" protected by the TVPA would thus directly contradict Congress's well-documented intention to protect victims forced to carry out this category of work.

Finally, it bears mentioning that the attempt to cast housekeeping tasks as separate from the modern slavery that the TVPA was arguably enacted to halt is historically unfounded, ignoring the well-documented history of "house slaves" in the United States and the continued problem of domestic servitude. In the pre-Civil War United States, enslaved people were not only forced to work in the fields; many were charged with exclusively domestic duties, such as cooking, cleaning, and caring for children.<sup>162</sup> Moreover, forced domestic labor continues to be a major issue today. The U.S. State Department defines "involuntary domestic servitude" as a prevalent form of "modern slavery."<sup>163</sup> Housekeeping chores have always been, and continue to be, at the center of slavery and servitude. Attempts to exclude these activities from the definition of "labor or services" under § 1589 on the basis that they are not akin to modern slavery are therefore groundless.

#### B. Examining § 1589 Case Law

Private detention corporations' argument that courts should adopt a limiting interpretation of "labor or services" that would not include chores or domestic labor is not unique. Defendants facing § 1589 liability for offenses involving domestic labor have regularly advanced this argument over the statute's two-decade history. Courts, however, have consistently rejected the argument

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<sup>160</sup> See, e.g., *United States v. Alzanki*, 54 F.3d 994, 1000–01 (1st Cir. 1995) (affirming defendant's conviction under § 1584 for holding a household servant in involuntary servitude); *Kimes v. United States*, 939 F.2d 776, 777 (9th Cir. 1991) (affirming defendant's conviction under § 1584 for forcing young women to work as "maids").

<sup>161</sup> H.R. REP. NO. 106-939, at 101.

<sup>162</sup> See PAUL E. TEED & MELISSA LADD TEED, *DAILY LIFE OF AFRICAN AMERICAN SLAVES IN THE ANTEBELLUM SOUTH* 27–29 (2020).

<sup>163</sup> OFF. TO MONITOR & COMBAT TRAFFICKING IN PERSONS, *What is Modern Slavery?*, <https://perma.cc/V68E-8PQ6>.

that the statute covers only the “paradigmatic forced labor situation” of “onerous, required, and taxing” labor—and other suggested limiting interpretations—in favor of adopting the plain meaning of “labor or services.”<sup>164</sup> As a result, courts have interpreted “labor or services” to include housekeeping and domestic tasks. In addition, these cases show a substantial history of application to purely domestic cases with no transnational element.

GEO and CoreCivic have cited the Sixth Circuit’s decision in *United States v. Toviave*<sup>165</sup> for the proposition that courts should exercise “interpretive restraint” rather than applying § 1589 in accordance with its plain meaning.<sup>166</sup> In *Toviave*, the defendant served as the guardian for four children and was criminally prosecuted under § 1589 for requiring the children to do household chores and physically abusing them.<sup>167</sup> The court held that the defendant’s behavior was not prohibited by § 1589, and that he should instead be prosecuted under state law child abuse statutes rather than the federal forced labor statute.<sup>168</sup> CoreCivic has argued that, in *Toviave*, “[a]lthough chores such as taking out the garbage and mowing the lawn [were] ‘labor’ in the economic sense,” the court refused to read § 1589’s reference to ‘labor’ to reach that circumstance.”<sup>169</sup>

The Sixth Circuit, however, rejected this characterization of its *Toviave* decision in a subsequent case, *United States v. Callahan*.<sup>170</sup> The victims in this case—a woman with severe developmental disabilities and her minor daughter—originally lived with the defendants as roommates.<sup>171</sup> Over time, the defendants began to severely abuse the victims and “forced [the adult victim] to clean the apartment, do yardwork, care for their dogs, and run various errands for them.”<sup>172</sup> The defendants argued that the TVPA “was

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<sup>164</sup> *United States v. Raniere*, 384 F. Supp. 3d 282, 312–13 (E.D.N.Y. 2019) (quotation marks omitted) (quoting Mack Mem. in Support of Mot. to Dismiss First Superseding Indictment at 14).

<sup>165</sup> 761 F.3d 623 (6th Cir. 2014).

<sup>166</sup> See, e.g., Letter Brief for Appellant at 2, *Gonzalez v. CoreCivic, Inc.*, 986 F.3d 537 (5th Cir. 2021) (No. 19-50691), 2020 WL 1666977, at \*2; Petition for a Writ of Certiorari at 9 n.5, *GEO Grp., Inc. v. Menocal*, 139 S. Ct. 143 (2018) (No. 17-1648), 2018 WL 2809390, at \*9 n.5.

<sup>167</sup> *Toviave*, 761 F.3d at 623–24.

<sup>168</sup> *Id.*

<sup>169</sup> Reply Brief for Appellant at 8–9, *Barrientos v. CoreCivic*, 951 F.3d 1269 (11th Cir. 2020) (No. 18-15081), 2019 WL 2417131, at \*8–9.

<sup>170</sup> 801 F.3d 606 (6th Cir. 2015).

<sup>171</sup> *Id.* at 614.

<sup>172</sup> *Id.*

passed to combat international trafficking in human beings and that Congress did not intend to criminalize the type of conduct charged in this case,” citing *Toviave* as support for excluding household chores from the meaning of “labor or services” in § 1589.<sup>173</sup> The Sixth Circuit rejected this argument, stating that “labor or services” must be interpreted according to its plain meaning:

There was voluminous testimony that [the adult victim] was constantly cleaning the apartment, running errands for Defendants, doing yardwork, and otherwise performing domestic tasks from morning until night. These tasks certainly constitute labor or service under the ordinary meaning of those words, and Defendants cite no authority for the proposition that household chores do not constitute labor or service under the statute.<sup>174</sup>

The court clarified that its holding in *Toviave* was premised on the unique facts of that particular guardian-child relationship and “did *not* hold that household chores do not constitute labor or services.”<sup>175</sup> Because the special circumstances of *Toviave* were not implicated in *Callahan*, the court affirmed the defendants’ convictions under § 1589.<sup>176</sup>

Other circuits have similarly taken a plain-meaning approach. In *United States v. Kaufman*,<sup>177</sup> the Tenth Circuit rejected the defendants’ arguments that § 1589 only applied to “work in an economic sense.”<sup>178</sup> The defendants had regularly forced victims to engage in masturbatory and other sexual acts while the defendants recorded these acts. They argued that this could not be considered “labor or services” under § 1589 because the acts did not produce an “economic benefit” and the tapes had “no general economic value,” and thus were not “work in its regular, economic sense.”<sup>179</sup> The Tenth Circuit rejected this argument and held that the district court did not err by using the following jury instructions: “‘Labor’ means the expenditure of physical or mental effort.

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<sup>173</sup> *Id.* at 617–18.

<sup>174</sup> *Id.* at 620.

<sup>175</sup> *Callahan*, 801 F.3d at 620 (emphasis in original).

<sup>176</sup> *Id.* at 621.

<sup>177</sup> 546 F.3d 1242 (10th Cir. 2008).

<sup>178</sup> *Id.* at 1263 (quotation marks omitted) (quoting Appellant’s Brief at 60, *United States v. Kaufman*, 546 F.3d 1242 (10th Cir. 2008)).

<sup>179</sup> See Reply Brief of Appellant at 23, 40–41, *United States v. Kaufman*, 546 F.3d 1242 (10th Cir. 2008) (No. 04-CR-40141), 2008 WL 1964584, at \*23, \*40–41.

‘Services’ means conduct or performance that assists or benefits someone or something.”<sup>180</sup>

The Second Circuit has also held that “labor or services” should be interpreted using its plain meaning. In *United States v. Marcus*,<sup>181</sup> the defendant argued that “the usual presence of compensation for the labor or services at issue should be a requirement for a conviction under [§ 1589]” and that the statute “was only meant to proscribe conduct that compels the victim to provide labor or services ‘for a business purpose.’”<sup>182</sup> The defendant argued that household chores in the context of an “intimate living arrangement” should be excluded from the statute’s reach.<sup>183</sup> The district court, however, rejected the defendant’s suggested tests in favor of adopting the ordinary meaning of the statutory language.<sup>184</sup> The court considered that “[t]he ordinary meaning of the term ‘labor’ is an ‘expenditure of physical or mental effort especially when fatiguing, difficult, or compulsory’” and that “the term ‘services’ is defined as ‘useful labor that does not produce a tangible commodity.’”<sup>185</sup> The Second Circuit affirmed this interpretation.<sup>186</sup>

Taken together, these cases illustrate that courts have consistently adopted the plain meaning of “labor or services” and rejected the idea that § 1589 applies only to so-called paradigmatic forced labor cases. This is true even in situations where the activities giving rise to TVPA liability consist of housekeeping chores. Moreover, these cases show a history of uncontroversial application of § 1589 to cases with no international component.

## V. INTERPRETING “LABOR OR SERVICES” IN THE IMMIGRATION DETENTION CONTEXT

### A. The Line-Drawing Dilemma: Permissible Housekeeping or Illegal Forced Labor?

As discussed previously, private detention corporations have argued for a limited interpretation of “labor or services” that

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<sup>180</sup> *Kaufman*, 546 F.3d at 1260, 1263.

<sup>181</sup> 487 F. Supp. 2d 289 (E.D.N.Y. 2007), *aff’d in part and vacated in part on other grounds*, 628 F.3d 36 (2d Cir. 2010).

<sup>182</sup> *Id.* at 300–01 (quoting Defendant’s Reply Brief at 3, *United States v. Marcus*, 487 F. Supp. 2d 289 (E.D.N.Y. 2007)).

<sup>183</sup> *Id.* at 300.

<sup>184</sup> *See id.* at 300, 304.

<sup>185</sup> *Id.* at 300 (quoting *Labor and Services*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2002)).

<sup>186</sup> *United States v. Marcus*, 628 F.3d 36, 44–45 (2d Cir. 2010).

would, at a minimum, exclude requiring detained people to complete housekeeping tasks under threat of punishment. This reading of the TVPA would permit § 1589 claims premised on forced participation in the VWP or the unpaid shadow work program, but it would bar suits premised solely on tasks defined as personal housekeeping.

Thus far, courts have suggested some receptiveness to this narrow interpretation of § 1589. In *Owino*, for example, the district court denied CoreCivic's motion to dismiss the plaintiffs' § 1589 claims, but stated:

[CoreCivic] might argue that the “labor or services” it requires of detainees is miniscule—detainees are only required to clean up their personal and communal areas. Logically, this is a question of degree. If detainees are only forced to make their beds then such conduct likely does not rise to criminal forced labor. . . . Conversely, one could imagine forced labor to such an extent and degree as to go well beyond cleaning personal and communal areas.<sup>187</sup>

The Eleventh Circuit expressed a similar sentiment in *Barrientos*, clarifying that its holding that private detention facilities are not exempt from TVPA liability “should not be read . . . to call into question longstanding requirements that detainees or inmates be required to perform basic housekeeping tasks.”<sup>188</sup> And in *Novoa*, the district court bypassed the issue of whether housekeeping tasks could qualify as forced labor under § 1589. The court denied in part GEO's motion to dismiss because the plaintiff “alleged he was a barber, which appears to exceed the housekeeping responsibilities a detainee may be required to perform.”<sup>189</sup> However, the court's language did not foreclose the possibility that housekeeping tasks may not be covered by § 1589.<sup>190</sup>

This suggests that, despite the ample precedent establishing that housekeeping labor is, in fact, included within the plain meaning of § 1589, courts may nonetheless be willing to set a different standard for people in immigration detention facilities than for people in nondetention settings. In other words, courts

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<sup>187</sup> *Owino*, 2018 WL 2193644, at \*6.

<sup>188</sup> *Barrientos*, 951 F.3d at 1277–78.

<sup>189</sup> *Novoa v. GEO Grp., Inc.*, No. 17-CV-02514, 2018 WL 3343494, at \*14 (C.D. Cal. June 21, 2018).

<sup>190</sup> *See id.* (“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.”).

might accept that the detention context necessitates that some line be drawn between the proper exercise of coercive power to ensure the maintenance of order and the improper use of coercive power to advance a scheme of forced labor. This may be due to the assumption, as described by the Department of Justice's amicus brief in *Barrientos*, that there is "no basis for concluding that Congress [in enacting the TVPA] intended to prevent detention facilities from taking basic steps to ensure order and discipline."<sup>191</sup>

Because the scope of the mandatory cleaning assignments is factually contested, courts have not yet squarely addressed where the line is between permissible obligatory cleaning assignments and TVPA-protected labor. Courts have not shed any light on what metric, standard, or test might be used to draw this line. Nor have the plaintiffs or defendants in these cases suggested a workable limiting principle.

To the extent that courts and advocates have intimated an answer to this dilemma, they have tended to rely, at least implicitly, on ICE's PBNDS to draw these boundaries.<sup>192</sup> This is because the PBNDS clearly state that detained people "shall not be required to work, except to do personal housekeeping" and narrowly define personal housekeeping as: "1. making their bunk beds daily; 2. stacking loose papers; 3. keeping the floor free of debris and dividers free of clutter; and 4. refraining from hanging/draping clothing, pictures, keepsakes, or other objects from beds, overhead lighting fixtures or other furniture."<sup>193</sup> These guidelines tend to work in the plaintiffs' favor because they enumerate only four minor exceptions to the general rule that detained people are not required to work. The PBNDS suggest a clear answer to the perceived need to limit the scope of § 1589 liability: tasks the PBNDS define as required personal housekeeping cannot give rise to § 1589 liability, while tasks not defined as required personal housekeeping can give rise to § 1589 liability. This rule would decidedly favor the plaintiffs in the currently pending cases given

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<sup>191</sup> Brief for the United States as Amicus Curiae in Support of Neither Party at 9, *Barrientos v. CoreCivic*, 951 F.3d 1269 (11th Cir. 2020) (No. 18-15081), 2019 WL 1468236, at \*9.

<sup>192</sup> See, e.g., *Owino*, 2020 WL 1550218, at \*21 ("The Court concludes that Plaintiffs sufficiently have demonstrated for purposes of class certification that Defendant . . . may have coerced detainees to clean areas of Defendant's facilities beyond the personal housekeeping tasks enumerated in the ICE PBNDS."); see also *Gonzalez*, 986 F.3d at 545 (Oldham, J., dissenting) ("[T]o state a claim [under § 1589], [the plaintiff] first must allege that CoreCivic violated the PBNDS.").

<sup>193</sup> PBNDS, *supra* note 11, at 405–06.

the evidence that the unpaid obligatory tasks required under GEO's and CoreCivic's sanitation policies extend beyond the PBNDS definition of personal housekeeping to include cleaning floors, windows, common spaces, bathrooms, and other areas.<sup>194</sup>

Although this strategy provides a convenient answer to the line-drawing problem, unquestioningly relying on the PBNDS as a yardstick for TVPA liability is fundamentally flawed and possibly adverse to detained people's long-term interests. This is because ICE could unilaterally change the PBNDS at any time. The agency could alter the guidelines to include a more expansive definition of required personal housekeeping that mirrors CoreCivic's and GEO's current policies. ICE could, for example, include cleaning bathrooms and housing units to its list of personal housekeeping tasks. Because the PBNDS permit punishment for failing to complete personal housekeeping tasks—including solitary confinement—detained people would be back to square one with conduct that was once defined as a violation of § 1589 now arguably legitimized by its inclusion in the PBNDS.

This scenario illustrates why it is important to recognize that the PBNDS could potentially conflict with § 1589 and thus are an insufficient basis for determining which required tasks rise to the level of "labor or services" protected by § 1589. How, then, should courts draw a line between permissible chores in a detention setting and forced labor that gives rise to § 1589 liability? This question can be resolved by applying a simple standard to judge the conduct at issue that looks to the nature and purpose of the required activity.

B. The *McGarry v. Pallito* Approach: Examining the Nature and Purpose of the Labor

Following the Second Circuit's approach in *McGarry*, courts should examine whether (1) the task is truly personal, and (2) whether the task serves the purpose of defraying institutional costs. *McGarry* was about neither immigration detention nor the TVPA. Nevertheless, the Second Circuit faced a legal question that, in many ways, mirrors the question presented here. In *McGarry*, the plaintiff was required to work in the prison laundry while he was detained awaiting a criminal trial. Although the plaintiff objected to the work, prison officials threatened him with

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<sup>194</sup> See, e.g., *Owino*, 2020 WL 1550218, at \*21.

solitary confinement and disciplinary proceedings that could affect his release eligibility if he refused.<sup>195</sup> The plaintiff argued that this was a violation of his Thirteenth Amendment rights because he had not yet been tried and convicted of a crime, and therefore the criminal punishment exception to the Amendment did not apply.<sup>196</sup>

The Second Circuit considered, in the context of evaluating a qualified immunity claim, whether the civic duty exception to the Thirteenth Amendment permitted the government-run prison to force the plaintiff to work in the laundry during the pretrial detention period. The court “assume[d] that correctional institutions may require inmates to perform personally related housekeeping chores such as, for example, cleaning the areas in or around their cells, without violating the Thirteenth Amendment,” and then questioned whether the plaintiff’s compelled laundry service could “reasonably be construed as personally related housekeeping chores.”<sup>197</sup> The court held that it could not. To make this decision, the court noted the importance of both the nature and purpose of the work at issue. The court stated that the Thirteenth Amendment clearly bans “a condition of enforced compulsory service of *one to another*.”<sup>198</sup> Although prison authorities may be able to require a detained person to perform “personally-related chores” that are not “for another,” this exception is limited.<sup>199</sup> Critically, the court emphasized that the Thirteenth Amendment prohibits authorities from requiring “inmates to perform chores which . . . are not personally related, but are required to be performed solely in order to assist in the defraying of institutional costs.”<sup>200</sup>

Although the context of *McGarry* is different, the issue of what labor can be excepted from the Thirteenth Amendment in the pretrial detention context parallels the issue of what labor can be excepted from § 1589 in the immigration detention context. The two factors weighed in *McGarry*—whether the work is truly personal and whether its purpose is to defray institutional costs—make equal sense in the immigration detention context. In fact,

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<sup>195</sup> *McGarry*, 687 F.3d at 509.

<sup>196</sup> *Id.* at 509–10.

<sup>197</sup> *Id.* at 514.

<sup>198</sup> *Id.* at 513 (emphasis in original) (quoting *Hodges v. United States*, 203 U.S. 1, 16 (1906)).

<sup>199</sup> *See id.* at 514.

<sup>200</sup> *McGarry*, 687 F.3d at 514. (quotation marks omitted) (quoting *Jobson v. Henne*, 355 F.2d 129, 131–32 n.3 (2d Cir. 1966)).



because the vast majority of immigration detention centers are privately owned for profit, these considerations are perhaps even more salient. These considerations can help provide courts with clear and objective standards by which to separate permissible required chores from illegal forced labor.

Turning to the immigration detention TVPA cases, the compelled housekeeping labor that detention corporations are attempting to exclude from the scope of “labor or services” fails under the *McGarry* standard.

1. Whether the work is truly personal.

First, courts should consider whether the activities at issue are truly personal or whether they are more aptly described as “for another.”<sup>201</sup> The jobs assigned through the VWP as well as the shadow work program can easily be defined as “for another.” Someone who works as a barber or kitchen worker through the VWP is not merely cutting her own hair or preparing her own food. She is performing these tasks for the benefit of others.

Despite some instances where private detention centers have attempted to classify these tasks as “self-care,”<sup>202</sup> the defendants have generally refrained from arguing that these kinds of VWP tasks are personal in nature. Rather, the defendants advance this argument in full force with respect to the mandatory unpaid cleaning assignments, which they repeatedly and vigorously assert are “housekeeping tasks” that merely require detained people to “clean up after themselves.”<sup>203</sup> But while some of the required tasks may be construed as personal (such as cleaning a personal sleeping area), the bulk of the tasks that detained people are allegedly required to complete on a routine basis (scrubbing communal toilets, floors, showers, buffing floors, washing windows, among others) are not tasks that are personal to individual detained persons. This is especially true in light of the fact that detention facilities are often shared by large numbers of people. In the Stewart Detention Center, for example, one communal bathroom space is shared by approximately sixty men.<sup>204</sup>

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<sup>201</sup> *Id.*

<sup>202</sup> *Novoa*, 2019 WL 7195331, at \*3.

<sup>203</sup> Mem. of Points and Authorities in Support of Defendant’s Motion to Dismiss at 7, *Owino v. CoreCivic*, No. 17-CV-1112, 2018 WL 2193644 (S.D. Cal. Aug. 11, 2017), 2017 WL 8948699.

<sup>204</sup> IMPRISONED JUSTICE, *supra* note 15, at 31.

Some may argue that it is misguided to focus on the personal nature of a task in the context of a communal living arrangement like an immigration detention center. In communal living situations where many facilities are shared, one might argue, it is impractical and perhaps impossible to leave each individual to clean up after themselves. Instead, it is far more practicable and efficient to split up the labor evenly among residents and have everyone pitch in. Although residents may technically be required to perform a task for others rather than for themselves, they are not required to do anything beyond their fair share of the labor.

This argument falls short for several reasons. First, it presupposes that immigration detention centers must be communal living arrangements. But there is nothing inherent to the concept of immigration detention that necessitates that people detained pending immigration proceedings or removal be held in a communal living environment. People detained by ICE could be housed in private or semiprivate environments rather than in communal, prisonlike conditions. Indeed, the housing arrangements that ICE currently provides vary in the degree to which accommodations are shared. Some detained people, for example, share a cell and bathroom with only one roommate, while others are kept in communal dormitories with up to sixty-six people in thirty-three bunkbeds.<sup>205</sup>

The communal nature of immigration detention is not a required feature of the system but rather a business model selected by private detention corporations. This is unsurprising since there are commonsense cost savings to communal living arrangements. But private detention corporations cannot argue that they are justified in violating federal forced labor law because the law is incompatible or inefficient as applied to their own freely chosen business model. If corporations choose to house detained individuals in communal living arrangements, then they must ensure that the living conditions are safe and sanitary without forcing detained individuals to perform labor for others.

Second, even assuming that a communal living arrangement is unavoidably necessary, the efficiency-based justification for requiring nonpersonal labor from detained individuals is incompatible with the fundamental tenets underlying forced labor laws.

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<sup>205</sup> *Barrientos* Complaint, *supra* note 136, at 18–19.

Many defenders of pre–Civil War U.S. slavery, for example, argued that slavery was more efficient than a free labor system.<sup>206</sup> Economists continue to debate the economic efficiency of slavery today.<sup>207</sup> But the Thirteenth Amendment and the TVPA soundly reject forced labor in favor of a free labor market, regardless of the comparative efficiency of these alternatives. In other words, prohibitions on forced labor already consider and reject efficiency arguments by their very nature. Courts have no role in questioning that constitutionally and statutorily codified value judgment.

Finally, it is irrelevant that detention centers theoretically divide labor equally among detained individuals and only require them to do their so-called fair share. The question of whether forced labor is fairly divided among the coerced is of no consequence to its legality under § 1589.

In sum, assessing whether the activity in question is truly personal versus for another is a helpful inquiry for determining whether an activity qualifies as “labor or services” under § 1589 in the detention context.

## 2. Whether the purpose is to defray institutional costs.

Second, courts should consider whether the purpose and effect of these allegedly coerced activities are to defray the institutional costs of the detention center. Again, in terms of the coerced VWP and shadow work program assignments, this factor is clearly present. If the detention corporations could not rely on detained labor to staff the kitchens, paint the walls, or work medical detail for little to no compensation, they would need to pay the state minimum wage to nondetained employees to complete these tasks.

There is also significant evidence that many of the unpaid mandatory cleaning assignments serve to defray institutional costs. This is reflected most clearly in the minimal number of nondetained janitorial staff employed by private detention corporations. For example, plaintiffs alleged that GEO’s 2,000-bed Adelanto detention facility in California at one point employed

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<sup>206</sup> See, e.g., LARRY E. TISE, *PROSLAVERY: A HISTORY OF THE DEFENSE OF SLAVERY IN AMERICA, 1701–1840*, at 100 (1987) (noting that “many economists in the antebellum period [argued] that the plantation South . . . created the true basis of wealth for America” and that slavery was “a national benefit”).

<sup>207</sup> See generally, e.g., Peter A. Colcanis & Stanley L. Engerman, *Would Slavery Have Survived Without the Civil War?: Economic Factors in the American South During the Antebellum and Postbellum Eras*, 19 *S. CULTURES* 66 (2013) (debating the economics and profitability of pre–Civil War slavery).

only three nondetained janitors.<sup>208</sup> Moreover, these janitors were employed solely to clean areas that detained people were not permitted to enter for security reasons.<sup>209</sup> GEO's 525-bed Aurora detention facility reportedly employs only one nondetained janitor.<sup>210</sup> Because detained labor thus displaces paid, nondetained janitorial labor, it substantially defrays institutional costs. Indeed, according to Stevens's calculations, the use of detained labor saves GEO between \$33 and \$72 million and CoreCivic an estimated \$30 to \$77 million annually.<sup>211</sup>

In contrast, the minor tasks outlined in the PBNDS definition of personal housekeeping are examples of tasks that cannot be reasonably characterized as serving the purpose of defraying institutional costs, such as "stacking loose papers" and "refraining from hanging [items]" from light fixtures and furniture.<sup>212</sup> Instead, the primary purpose of these tasks seems more appropriately characterized as promoting safety and order in the facility.

In some instances, private detention corporations have argued that their use of detained labor has nothing to do with defraying institutional costs. GEO asserts that detained labor is used to "keep detainees busy and reduce disciplinary infractions" rather than defray costs.<sup>213</sup> But GEO has gone further than simply claiming that defraying costs is not the primary purpose of its labor policies. In fact, GEO claims that it would be more profitable—not less—if it did not use detained labor. Defending against an unjust enrichment claim targeting the VWP, GEO claimed that eliminating the dollar-per-day program and hiring "employees of its own choosing (and skill levels)" would result in "additional profit on that labor."<sup>214</sup>

However, these claims are inconsistent with the body of scholarship examining the private detention industry. Significant research by scholars and advocates supports the commonsense proposition that obtaining labor at no cost or at one dollar per day is vastly cheaper compared to compensating this labor according

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<sup>208</sup> See *Novoa*, 2019 WL 7195331, at \*6.

<sup>209</sup> See *id.*

<sup>210</sup> Brief of Plaintiffs-Appellees at 5, *Menocal v. GEO Grp.*, 882 F.3d 905 (10th Cir. 2018) (No. 17-1125), 2017 WL 3382827, at \*5.

<sup>211</sup> Stevens, *supra* note 15, at 402; see *supra* Part III.

<sup>212</sup> PBNDS, *supra* note 11, at 406; see *supra* Part V.A.

<sup>213</sup> Motion for Summary Judgment at 7–8, *Menocal v. GEO Grp., Inc.*, No. 14-CV-02887 (D. Colo. Aug. 18, 2020).

<sup>214</sup> *Id.* at 7 (emphasis in original).

to state and federal minimum wage and labor regulations.<sup>215</sup> In addition, these claims are at odds with GEO's own statements. For example, when discussing the *Menocal* case in a 2017 shareholder letter, GEO stated that "[i]f the Company had to change the level of compensation under the voluntary work program, or to substitute employee work for voluntary work, this could increase costs of operating these facilities."<sup>216</sup>

In sum, the *McGarry* standard provides a useful approach to drawing the line between permissible personal housekeeping requirements and activities that constitute "labor or services" under § 1589. It is important to emphasize that just because an activity is considered "labor or services" does not mean that it violates the TVPA or that detained people cannot carry out that activity in a detention center. Rather, it simply means that detained people must voluntarily choose to participate in the activity. Section 1589 is only violated if private detention corporations force or coerce people to perform the labor or service under threats of physical, legal, or other serious harm.

#### CONCLUSION

How courts ultimately define what constitutes TVPA-protected "labor or services" has significant potential consequences for people confined inside immigration detention facilities. Of course, plaintiffs base some of their claims on labor that is clearly beyond the scope of "housekeeping"—such as forced participation in the VWP and unpaid shadow work program—and thus their claims will not be gutted if courts develop a permissive housekeeping exception to the TVPA. But a definition that categorically exempts housekeeping labor without specifically applying narrowing factors such as those suggested in *McGarry* would leave the door open for detention corporations to continue to maintain their facilities through unpaid, involuntary labor and for ICE to legitimize this practice through its guidelines. As a result, any real change in conditions would be minimal. Courts should instead ensure that people detained in for-profit immigration detention centers receive the full federal protection from forced labor to which they are entitled.

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<sup>215</sup> See, e.g., Stevens, *supra* note 15, at 415–24; Booth, *supra* note 113, at 578–85.

<sup>216</sup> The GEO Grp., Inc., Quarterly Report at 26 (Form 10-Q) (Aug. 7, 2017).