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Delegating Care, Evading Review: The Federal Tort Claims Act andAccess to Medical Care in Federal Private Prisons

Danielle C. Jefferis

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Danielle C. Jefferis[*]

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INTRODUCTION

Accounts of the troubling conditions[1] inside America's prisons, jails, and detention centers and the government's inhumane, at times cruel, treatment of people who are incarcerated[2] often never escape institutions' walls. Prison systems are largely opaque[3] and have few incentives for

1. *See, e.g.*, Second Amended Complaint, Cunningham v. Fed. Bureau of Prisons, No. 1:12-cv-1570 (D. Colo., June 18, 2015) (Doc. 274) (alleging egregious violations of law with respect to the Federal Bureau of Prison's treatment of people with serious and acute mental illnesses confined in the federal supermax prison known as "ADX"); Annie Correal, *Frantic Inmates in Brooklyn Jail Complain of No Heat for Days in Deep Freeze*, N.Y. TIMES (Feb. 1, 2019), at A19 (reporting that a federal jail had gone without heat and power for at least a week while temperatures fell to two degrees and incarcerated people were without hot water, extra blankets, and light in their cells); Katherine Hawkins, *Medical Neglect at a Denver Immigration Jail*, PROJECT ON GOV'T OVERSIGHT (May 21, 2019), https:// www.pogo.org/investigation/2019/05/medical-neglect-at-a-denver-immigration-jail/ [https://perma.cc/EYN2-LJX2] (recounting deficiencies in medical care and other conditions at immigration detention center).

2. *See, e.g.*, Alene Tchekmedyian, *Women in Jail Endured Group Strip Searches. L.A. County to Pay $53 Million to Settle Suit*, L.A. TIMES (July 16, 2019), https://www.latimes.com/local/lanow/la-me-ln-lasd-womens-jail-settlement-20190716-story.html [https://perma.cc/SN3F-7W6U] (reporting case in which prison officials intentionally ignored safety risks to prisoner–plaintiff, resulting in physical assault and rape of plaintiff over two days); Katie Benner & Shaila Dewan, *"Common, Cruel" Violence Met by Indifference*, N.Y. TIMES (April 3, 2019), at A1 (reporting on Department of Justice findings after investigation into Alabama's prison system, summarizing "[p]risoners in the Alabama system endured some of the highest rates of homicide and rape in the country . . . and officials showed a 'flagrant disregard' for their right to be free from excessive and cruel punishment"); Jessica Pishko, *At Angola Prison, "People Are Suffering. People Are Dying*," APPEAL (Oct. 12, 2018), https://theappeal.org/at-angola-prison-people-are-suffering-people-are-dying/ [https://perma.cc/82FB-3F66] (reporting on class-action lawsuit in which correctional medicine expert opined Louisiana State Penitentiary "had long neglected its duty to keep prisoners safe").

3. *See, e.g.*, Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 472 (2018) ("But accessing the sources necessary to learn about ADX can be exceedingly difficult. For example, in its 2014 report examining the use of solitary confinement in the federal prison system, Amnesty International condemned both the conditions in ADX and 'the lack of detailed publicly available information on the facility.' . . . Journalists similarly have been prevented from accessing ADX."); Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. &

transparency.[4] Yet courts provide one mechanism by which first-hand accounts of prison and jail conditions may make their way into the public record by enabling people seeking redress for harms they have endured to tell their accounts through pleadings and testimony. Seminal lawsuits, from *Farmer v. Brennan*[5] to *Brown v. Plata*[6] to *Estelle v. Gamble*,[7] have helped record the history of America's treatment of incarcerated people and have shaped, in varying degrees, the way incarcerated and formerly incarcerated people, prisoners' rights advocates, and prison systems view and approach confinement.

Much of the meaningful impact of prisoners' suits, however, extends only as far as the law provides redress for the people who allege violations of their rights. Complaint screening mechanisms nearly guarantee that an incarcerated plaintiff's lawsuit that asserts a violation of the law for which no remedy exists will be dismissed as frivolous, often before the case is even docketed.[8] Rigorous pleading requirements and procedural hurdles unique to litigation regarding prison conditions often result in the dismissal of lawsuits at early stages before the judicial system has even afforded the plaintiffs the opportunity to present evidence in their favor.[9]

POL'Y REV. 435, 436 (2014) ("The public has little idea what happens behind prison walls. Prisons and jails are essentially 'closed institutions holding an ever-growing disempowered population.'"); Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 469–70 (2012) ("For much of American history, federal courts considered prisons' internal operations off limits."); David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1453 (2010) ("Prisons are closed environments, largely hidden from public view.").

4. *See, e.g.*, Kathleen M. Dennehy & Kelly A. Nantel, *Improving Prison Safety: Breaking the Code of Silence*, 22 WASH. U. J.L. & POL'Y 175, 176–78 (2006) (discussing "code of silence" among prison staff, wherein some staff members "believe that what goes on behind the prison walls should remain hidden from public knowledge," resulting in increased violence and dangerousness of prisons).

5. 511 U.S. 825 (1994).

6. 563 U.S. 493 (2011).

7. 429 U.S. 97 (1976).

8. Pursuant to the Prison Litigation Reform Act, the federal district court must review all complaints filed by incarcerated people "before docketing, if feasible," to ensure that the filing is not "frivolous, malicious, or fails to state a claim upon which relief can be granted." 28 U.S.C. § 1915(a) (2019).

9. *See generally* Maureen Brocco, *Facing the Facts: The Guarantee Against Cruel and Unusual Punishment in Light of PLRA,* Iqbal*, and PREA*, 16 J. GENDER RACE & JUST. 917 (2013).

The law treats incarcerated and non-incarcerated people differently. It also affords disparate rights and remedies for people incarcerated in the custody of state and local entities, as compared to people incarcerated in federal custody. People who are incarcerated in state and local prisons and jails have the robust 42 U.S.C. § 1983, among other tools, at their disposal to seek damages and injunctive relief against state and local government entities and prison officials. This federal statute provides a cause of action against state and local officials and municipalities acting under color of law for constitutional violations. Although the Prison Litigation Reform Act and other common law doctrines, including qualified immunity, impose a number of requirements and limitations—often significant—on prisoners' rights to recovery, § 1983 provides the vehicle for which people in the custody of state and local prison systems may seek a judgment in their favor for harms they have suffered.

A similar tool does not exist, however, at the federal level.[10] The remedies available to federal prisoners seeking to litigate violations of their constitutional rights are quite narrow, while the federal government has myriad tools at its disposal to attempt to evade judicial review of claims brought by federally incarcerated people. People incarcerated in federal prisons may seek monetary damages from the federal government for certain injuries[11] through the Federal Tort Claims Act (FTCA)[12] or from individual government actors through the implied *Bivens* remedy for certain constitutional torts.[13] As current precedent stands, however, the

10. *See, e.g.*, Allison L. Waks, *Federal Incarceration by Contract in a Post-*Minneci *World: Legislation to Equalize the Constitutional Rights of Prisoners*, 46 U. MICH. J.L. REFORM 1065, 1066–67 (2013) ("At the state level, by contrast [to federal prisoners], public and private prisoners have superior federal rights through remedies afforded by § 1983 of the Civil Rights Act of 1971, which provides a private right of action for constitutional violations committed by state actors.").

11. Legislative Reorganization Act of 1946 ("FTCA"), Pub. L. No. 79-601, tit. IV, 60 Stat. 812 (1946) (codified at 28 U.S.C. § 1346(b)) (providing remedy against United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred").

12. *Id*.

13. The United States Supreme Court has recognized an implied constitutional tort remedy against federal actors in just three cases: *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980).

availability of those claims is exceedingly narrow.[14] Federal prisoners may also seek forward-looking or injunctive relief for ongoing violations of their rights, but the nature of federal incarceration leaves the government with several procedural means to attempt to evade review of prospective-relief claims.[15]

People confined in private, for-profit prisons at the federal level are in some ways at a greater disadvantage than their federal, public-prison counterparts.[16] The United States Supreme Court has held that federally incarcerated people cannot sue private prison corporations or their employees for constitutional torts. Rather, if a federal prisoner–plaintiff is seeking damages for a past injury, the plaintiff is restricted to state tort law for claims against the private prison and its nongovernmental staff and to the FTCA for claims against the United States for the wrongful conduct of its employees. For federal prisoners, these restrictions may mean that certain injuries they suffer while incarcerated never reach a federal court because there is no recognized remedy. These barriers restrict the ability of incarcerated people to address past violations and mitigate the often harsh conditions in which the federal government incarcerates people. The restrictions also hamper the means by which many accounts of the conditions of American incarceration are disseminated to the public, leaving much of what happens behind prisons' walls locked inside with the people being confined.[17] If public court filings and litigation are mechanisms by which accounts of U.S. incarceration make their way into the public record, and courts do not recognize a vehicle through which to

14. *See generally* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

15. The Federal Bureau of Prisons, for example, may transfer a prisoner to prisons across state lines and then seek to dismiss his lawsuit on venue or jurisdictional grounds. *See, e.g.*, Nicole B. Godfrey & Danielle C. Jefferis, Chapman v. Bureau of Prisons: *Stopping the Venue Merry-Go-Round*, 96 DENV. L. REV. ONLINE 9 (2018).

16. The fastest growing category of federally incarcerated people is those in the so-called "civil" custody of federal immigration enforcement agencies, such as United States Immigration and Customs Enforcement. *See* Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 INDIANA L.J. (forthcoming 2020).

17. Increasingly, media outlets are recognizing the value in publishing first-hand accounts of prison conditions. The Marshall Project's *Life Inside* series is an example. *See generally Life Inside*, MARSHALL PROJECT, https://www.themarshallproject.org/tag/life-inside [https://perma.cc/T9GB-Z3Y2] (last visited Sept. 6, 2019). But journalists and incarcerated and formerly incarcerated people still face significant obstacles in investigating and reporting on conditions inside America's prisons. *See generally supra* sources cited note 3.

hear federal prisoners' accounts, those accounts may never be heard in any meaningful way.

This Article highlights and focuses on one discrete—but critical—way in which the federal government attempts to evade judicial review of its conduct with respect to the people it incarcerates: its invocation of the FTCA's independent-contractor exception[18] when faced with federal prisoners' claims of inadequate medical care in private, for-profit prisons. Private prisons are not unique to the federal prison system. Indeed, states, counties, and municipalities rely on the contract services of corporations to operate prisons and jails.[19] Many states, however, also recognize the common law principle that ensuring the provision of adequate medical care to incarcerated people is a nondelegable duty of state and municipal governments.[20] Under this principle, the governmental entity contracting to operate the prison or to provide medical care within the facility cannot evade liability for harms relating to the provision of medical care by simply asserting that the agreement delegated that responsibility to the contractor. These entities' (and courts') recognition of this duty ensures governmental accountability for certain harms to incarcerated people, despite the governmental entities delegating a traditional state function—incarceration—to private businesses designed to generate and maximize profit.

Increasingly, however, the federal government attempts to evade its own duty of care owed to people in its custody by invoking the FTCA's independent-contractor exception. When people confined in federal private prisons try to hold the federal government liable for inadequate care they have received in those prisons, the government invokes the exception and asserts that it cannot be liable for the conduct of a third-party contractor. To date, some courts have adopted this view of the

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18. There is some ambiguity surrounding the source of the "independent-contractor" exception: sometimes, it is invoked via the FTCA's definition provisions; other times, it is raised through the substantive discretionary-function exception. *See infra* Section II.B.

19. Recently, California and Illinois have enacted legislation to ban for-profit prison companies from operating in the state. *See* A.B. 32, 2019 Assemb., Reg. Sess. (Cal. 2019), *available at* http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB32&search_keywords=prison+private [https://perma.cc/LG7H-MEZ9]; H.B. 2040, 101st Gen. Assemb., Reg. Sess. (Ill. 2019), *available at* http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2040&GAID=15&DocTypeID=HB&SessionID=108&GA=101 [https://perma.cc/TZX4-GHCW].

20. West v. Atkins, 487 U.S. 42, 56 (1988) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights.").

government's role when relying on the services of private prisons.[21] This Article asserts that the lack of parity between the remedies that courts have recognized as available to state prisoners and federal prisoners in private prisons undermines the rights of people in federal custody and is contrary to public policy: it incentivizes the federal government to contract away the quintessential government function of incarcerating its citizens.

This Article has three parts. Part I provides necessary background information, discussing the FTCA, its early application to prisoners' claims, and the growth of the private prison industry. Part II describes the applications of the independent-contractor exception to prisoners' claims arising out of federal for-profit prisons and contrasts the exclusion of a remedy for those claims with similar claims brought by people incarcerated in state and local prisons and jails. Part III concludes by examining the nondelegable duty of care many states have recognized with respect to the government and the people whom it incarcerates and then asserts that Congress must enact legislation to counteract the FTCA's independent-contractor exception and to, therefore, bring the remedial structures between the states and federal government in comity with one another.

I. BACKGROUND

The federal government and its employees enjoy immunity from tort claims arising from conduct performed while acting within the scope of their government employment unless Congress has expressly waived that immunity.[22] To date, the nation's most expansive waiver of that sovereign

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21. *See, e.g.*, Harvey v. United States, No. 14 Civ. 1787 (PAC), 2017 WL 2954399, at *3 (S.D.N.Y., July 10, 2017) ("The United States is not liable for injuries caused by private jail staff because under [the independent-contractor] exception the penal staff is not considered to be Federal employees."). *But see* Rodriguez v. United States, No. 1:13 CV 01559, 2015 WL 3645716, at *9–10 (N.D. Ohio, June 10, 2015) (citing Brown v. United States, 486 F.2d 284, 288–89 (8th Cir. 1973) ("On remand, the district court in *Brown* found that, although the Bureau of Prisons had statutory authority to contract for the confinement of federal prisoners in non-federal facilities, the BOP nonetheless had a *positive duty to exercise due care* for the safety of all federal prisoners . . . 'regardless of whether they are confined in federal institutions or whether they are confined in State or local jails or penal institutions.'" (emphasis added)).

22. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679).

immunity is the Federal Tort Claims Act passed in 1946.[23] Before the FTCA's enactment, the only means of monetary recovery from the government for an injury in tort was through the passage of a private bill—a burdensome and rigorous process.[24] The FTCA streamlined the recovery process and moved it from the legislature to the executive and judiciary.

Since its enactment, the FTCA has permitted recovery for claimants suffering a variety of injuries caused by employees across the federal government, including claims brought by people incarcerated in federal prisons. This Part provides an overview of the scope of injuries the FTCA covers and discusses the FTCA's application to prisoners' claims.

A. The Federal Tort Claims Act

The FTCA imposes liability on the United States for certain tort claims in the same manner tort law provides for recovery for private litigants.[25] The law does not create any new causes of action; rather, it provides a statutory waiver of the federal government's sovereign immunity so that litigants may assert the equivalence of state tort claims for injuries caused by federal employees and actors.[26] Discussing the FTCA's passage, the Supreme Court explained:

> [The FTCA] was the offspring of a feeling that the Government should assume the obligation to pay for damages for the misfeasance of employees in carrying out its work. And the

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23. Legislative Reorganization Act of 1946 ("FTCA"), Pub. L. No. 79-601, tit. IV, 60 Stat. 812 (1946) (codified at 28 U.S.C. § 1346(b)).

24. Gregory C. Sisk, *Official Wrongdoing and the Civil Liability of the Federal Government and Officers*, 8 U. ST. THOMAS L.J. 295, 295 (2011).

25. 28 U.S.C. § 2674 (2019) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .").

26. Sisk, *supra* note 24, at 300:

> The FTCA does not create any new causes of action nor does it formulate federal rules of substantive tort law. Instead, as the Supreme Court explained in *Richards v. United States*, Congress chose "to build upon the legal relationships formulated and characterized by the States' with respect to principles of tort law. Accordingly, under § 1346(b)(1), the United States is liable under the FTCA when 'a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The fundamental principle, then, is that the tort claim alleged must be one that the law of the pertinent state recognizes.

> private bill device was notoriously clumsy. Some simplified recovery procedure for the mass of claims was imperative. This Act was Congress' solution, affording easy and simple access to the federal courts for torts within its scope.[27]

The United States is the proper and sole defendant in an FTCA action; the federal district courts retain exclusive jurisdiction; and the bench is the factfinder and adjudicator—jury trials are not permitted.[28]

Although the oft-cited example of the liability Congress anticipated when enacting the FTCA was motor vehicle accidents, FTCA lawsuits have alleged torts committed by a range of federal agencies and employees, including harms resulting from the allegedly wrongful arrest and malicious prosecution of a former police officer and FBI informant,[29] the reported slander of a former National Aeronautics and Space Administration (NASA) employee,[30] and the United States Customs Service's seizure of an aircraft and arrest of its owners.[31] Incarcerated people have also turned to the FTCA to attempt to obtain relief for harms they claimed to have suffered while in the custody of the United States.

B. The FTCA's Application to Prisoners' Claims

Henry Winston was incarcerated in the United States Penitentiary in Terre Haute, Indiana, in 1959 when he began experiencing dizziness, instability, and difficulty with his vision.[32] He requested a medical examination by prison doctors.[33] The prison doctors diagnosed him with

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27. Dalehite v. United States, 346 U.S. 15, 25 (1953).

28. 28 U.S.C. § 1346(b)(1).

29. Manning v. United States, 546 F.3d 430 (7th Cir. 2008).

30. Henson v. Nat'l Aeronautics and Space Admin., 14 F.3d 1143 (6th Cir. 1994).

31. Gasho v. United States, 39 F.3d 1420 (9th Cir. 1994); *see also* Sisk, *supra* note 24, at 298:

> Lawsuits under the FTCA have challenged the regulatory approval of the polio vaccine by the Food and Drug Administration, the alleged negligence of federal mine inspectors in failing to discover non-compliance with regulatory safety requirements before a mine accident, and a multi-billion-dollar lawsuit alleging that the negligence of the Army Corps of Engineers in failing to seek congressional appropriations to upgrade a navigation channel adjacent to New Orleans was responsible for exacerbating the damages caused by Hurricane Katrina.

32. Winston v. United States, 305 F.2d 253, 254–55 (2d Cir. 1962).

33. *Id.* at 255.

"borderline hypertension" and recommended he lose weight.[34] Mr. Winston's symptoms worsened, however: he experienced severe headaches and suffered from daily attacks involving the inability to walk and vision loss.[35] Mr. Winston pleaded with prison officials for medical attention.[36] They refused to schedule another examination and, instead, prescribed Dramamine.[37]

In 1960, Mr. Winston's attorney visited him and, troubled by his client's apparent condition, scheduled him an examination with a consulting physician.[38] A month later, Mr. Winston underwent surgery to remove a brain tumor.[39] The delay in treatment left Mr. Winston permanently blind.[40]

Mr. Winston sought to hold the government responsible pursuant to the FTCA for the prison officials' negligence in treating his medical condition.[41] The district court dismissed Mr. Winston's complaint on the basis that the FTCA "does not permit suits by federal prisoners against the United States."[42] On appeal, the Second Circuit assessed whether the FTCA excepted prisoners from the statute's clear intent to waive the sovereign immunity of the United States with respect to certain claims.[43] The court, sitting *en banc*, observed, "With the passage of the [Federal] Tort Claims Act, which by its terms does not except prisoners, it would seem that the sole barrier to federal prisoners' suits against the United States had been removed."[44] But despite the statute's clear language, the government argued that the court should not permit prisoners' suits against the United States to proceed because doing so would interfere with prison security and result in such deleterious consequences for the prison's operation and administration that Congress could not possibly have intended to permit prisoners to assert claims under the law.[45] The government urged the court to conclude that the FTCA contains an *implied* bar to claims brought against the United States by people who are incarcerated.[46]

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 254–55.
42. *Id.* at 255.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

The court rejected the government's argument for two reasons.[47] First, in a rare showing of skepticism to the government's argument that prisoners' suits threaten prison security,[48] the court found "the assertions of dire consequences" to be "overdrawn."[49] Recognizing that the law already permitted prisoners to sue individual prison officials, the court reasoned that there could be no worse consequences from an FTCA suit against the United States than from a suit against an individual.[50] To claim that more serious consequences would result from a claim asserted directly against the government was, for the court, "at best dubious."[51]

Second, the court rejected the government's argument that a prior decision precluding FTCA claims brought by members of the Armed Forces should be extended to prisoners' claims. Keeping with its position that Congress, though silent on the matter, must have intended an implied bar to FTCA claims brought by incarcerated people, the government argued that *Feres v. United States* stood for the proposition that courts may—or must—

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47. In addition to the reasoning discussed, the court swiftly rejected the government's argument that Congress implicitly intended to except prisoners from the FTCA's reach *because of* the purported security risk to prisoner suits against the United States, calling the argument "circular":

> The question for decision is what Congress thought and intended. Whether discipline would be impaired is a legislative judgment. To assert that because discipline would suffer Congress could not have intended the result is only to say that Congress thought one thing rather than another—which is the very question we seek to answer.

Id.

48. Federal courts are notoriously deferential to prison administrators' positions regarding prison security. This is most visible in First-Amendment claims arising in prisons, where the Supreme Court set forth a test that mandates such deference. *See, e.g.*, Evan Bianchi & David Shapiro, *Locked Up, Shut Up: Why Speech in Prison Matters*, 92 ST. JOHN'S L. REV. 1, 6 (2018) ("When it comes to judicial review of prison censorship, deference to prison officials is the order of the day."). But it pervades much of prison-conditions litigation. *See, e.g.*, Michael Keegan, *The Supreme Court's "Prisoner Dilemma:" How* Johnson, *RLUIPA, and* Cutter *Re-Defined Inmate Constitutional Claims*, 86 NEB. L. REV. 279, 280 (2007) ("Prison rights litigation is a relatively recent phenomenon, taking root only in the latter half of the twentieth century. Since its inception, the Supreme Court consistently held firm on two propositions. First, prison inmates retain the protections of the Constitution, even though they are incarcerated. Second, corrections officials should be granted deference when dealing with the difficult task of running a prison.").

49. *Winston*, 305 F.2d at 255.

50. *Id.*

51. *Id.*

read implied exceptions into the FTCA.[52] The court was not persuaded: in contrast with servicemembers' claims, which would require courts to create new remedies, prisoners' claims would likely fall under already recognized state tort theories.[53] Although the need for remedial uniformity was strong due to the "distinctively federal relationship between soldiers and the government," the court was unconvinced that the same was true for prisoners: "[S]uch considerations are irrelevant to the government-prisoner relationship."[54]

Moreover, the court recognized that servicemembers benefited from a Congressionally enacted system of compensation for those injured in work activity that paralleled the remedies available under the FTCA. Prisoners, on the other hand, did not.[55] For these reasons, the court concluded that "little remains to support an exception to the [FTCA] which Congress wholly failed to articulate."[56] Every other federal court that asked the same question prior to Mr. Winston's case had relied on *Feres* to reach the opposite conclusion.[57] Mr. Winston became the first prisoner allowed to

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52. *Id.* at 256.

53. *Id.*

> The first premise of *Feres* was that the [Federal] Tort Claims Act, while terminating government immunity, created no new liabilities, and that no American law had ever permitted a soldier to recover for negligence, against *either* his superior officers or the Government he is serving. Suits by prisoners against jailers and local governments, however, had been authorized prior to the passage of the [FTCA].)

Id. (internal citations and quotation marks omitted).

54. *Id.* (internal quotation marks omitted). The court here dispensed with this remedial uniformity premise quickly and with no analysis; however, the absence of uniformity among the remedies available for federal prisoners is a compelling reason for recognizing *Bivens* constitutional remedies.

55. *Id.*

> But the prisoners' compensation system extends only to prisoners actually engaged in work in prison industry and maintenance. Many prisoners are not so engaged at any time. And those so employed actually work at such tasks for only a portion of the day . . . . In comparison with the military compensation program, which affords relief for virtually all service-incurred injuries, the prison work-compensation plan is vastly less comprehensive and is in no real sense a substitute for tort liability.

Id. (internal citations omitted).

56. *Id.* at 257.

57. Recent Cases, *Federal Tort Claims Act—in General—Federal Prisoner May Sue United States for Injuries Resulting from Negligence of Prison Physician*, 76 HARV. L. REV. 413, 413–14 (1962).

> Yet, irrespective of state law, every federal court to consider the question has refused to apply the [FTCA] to federal prisoners, relying on the

sue the United States for the negligence of federal prison employees.[58] The Supreme Court thereafter affirmed the availability of the FTCA to federal prisoners' claims.[59] Just over a decade later, the Court would consider whether the applicability of the FTCA to prisons included contracting entities. The significance of the Court's answer to that question has grown in tandem with the expansion of the for-profit prison industry.

II. FOR-PROFIT PRISONS AND THE FTCA'S INDEPENDENT-CONTRACTOR EXCEPTION

The FTCA waives the sovereign immunity of the United States for torts committed by employees of any federal agency.[60] In defining the term "federal agency," the FTCA explicitly exempts "any contractor with the

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> Supreme Court's decision in *Feres v. United States*, which held that actions by servicemen for the negligence of other military personnel, including a claim for the malpractice of an army doctor, were not covered by the [FTCA].

Id. (internal footnotes omitted).

58. *Id.* ("The Federal Tort Claims Act allows actions against the United States in those situations in which parallel private claims would be cognizable under state law; the present case sufficiently demonstrates the existence of such parallel private liability.").

59. United States v. Muniz, 374 U.S. 150 (1963).

> The Federal Tort Claims Act provides much-needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. . . . "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

Id. at 165–66 (internal citations and quotation marks omitted). Although the Court has affirmed the availability of the FTCA to prisoners' claims, courts have systematically declined to adjudicate the merits of prisoners' claims on the basis of any number of exceptions or jurisdictional bars, including and in addition to those discussed herein. *See, e.g.*, Hatten v. White, 275 F.3d 1208, 1210 (10th Cir. 2002) (holding the FTCA inapplicable to prisoners' loss of property claim); Cohen v. United States, 151 F.3d 1338 (11th Cir. 1998) (finding the FTCA's discretionary-function exception barred a prisoner's claim that prison officials negligently assigned him to live with another prisoner who attacked him); Thompson v. United States, 495 F.2d 192, 193 (5th Cir. 1974) (barring prisoners' workplace injuries under the FTCA).

60. 28 U.S.C. § 2671 (2019).

United States."[61] This Part provides an overview of the for-profit prison industry in the United States, specifically on the federal level, and then describes how some courts have applied the FTCA's independent-contractor exception generally and to for-profit federal prisons.

A. The Rise of For-Profit Federal Prisons

For-profit incarceration is a booming business in the United States. The industry's profit leaders, the GEO Group, Inc. ("GEO") and CoreCivic (known formerly as the Corrections Corporation of America or CCA), have reported substantial income over the last five years. In 2017, the GEO Group reported nearly $2.3 billion in revenue compared to $2.2 billion in 2016 and $1.8 billion in 2015.[62] CoreCivic reported $1.7 billion in revenue for 2017, with similar numbers reported in 2016 and 2015.[63] The Trump administration's immigration-enforcement policies account for much of the companies' recent growth because detention space continues to rise exponentially.[64] Since the 2016 presidential election, these companies' shareholders have seen a rapid spike in stock value with each announcement of a new tough-on-immigration policy.[65]

The rise of the for-profit prison industry is inextricably linked to the shift in law enforcement priorities, beginning with the Nixon era's wars on drugs and crime in the 1970s[66] and the influx of migrants and refugees in the early 1980s.[67] As American society gradually took a harsher stance

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61. *Id.* ("[T]he term 'Federal agency' . . . does not include any contractor with the United States.").

62. THE GEO GROUP, INC., 2017 ANNUAL REPORT 1 (2017).

63. CORECIVIC, 2017 ANNUAL REPORT 2 (2017).

64. *See, e.g.*, Jefferis, *supra* note 16.

65. *See, e.g.*, John Washington, *Trump's Immigration Policy 'Fever Dream,'* NATION (Oct. 5, 2018), https://www.thenation.com/article/trumps-immigration-policy-fever-dream/ [https://perma.cc/WT7Q-K2TU] (last visited March 2, 2019) ("[B]etween the announcement of the 'zero tolerance' policy and DHS's June 22 request for information about the possibility of detaining an additional 15,000 people in family jails, the stocks of Geo Group and CoreCivic, the two largest for-profit immigration-detention corporations, increased 5.9 percent and 8.3 percent, respectively."). *But see* Danielle C. Jefferis, *Private Prisons, Private Governance: Essay on Developments in Private-Sector Resistance to Privatized Immigration Detention*, 15 NW J.L. & SOC. POL'Y (forthcoming 2019).

66. *See* Waks, *supra* note 10, at 1065. ("Beginning in the 1970s, the government's 'war on drugs' and war on crime have resulted in thousands of additional federal convictions and imprisonments.").

67. *See, e.g.*, Jefferis, *supra* note 16; Fiona O'Carroll, *Inherently Governmental: A Legal Argument for Ending Private Federal Prisons and*

on crime and immigration, state and local governments could not keep up with a rapidly expanding prison population.[68] States quickly turned to private prison companies;[69] soon thereafter, Congress authorized the Federal Bureau of Prisons to contract with for-profit companies to operate prisons and detention centers.[70]

Allison L. Waks describes the modern scope of for-profit federal confinement:

> The modern system of incarceration in the United States has created a massive prison population that has fueled a $3 billion private sector prison industry. According to the Department of Justice (DOJ), between 2000 and 2009, the number of federal prisoners in private prisons more than doubled from 15,524 to 34,087. In 2009, 16.4 percent of federal Bureau of Prisons (BOP) prisoners were housed in private facilities. This was ten times higher than the number in 1990. Further, the number of ICE detainees held in private prison facilities increased by 263 percent from 1995 to 2005.[71]

Immigration detention has continued to balloon in recent years, with an average of more than 50,000 people in immigration confinement each day, and nearly 70% of those people finding themselves at one time or another in a for-profit prison.[72] The Trump administration's reliance on immigration detention, along with its reversal of the Obama

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Detention Centers, 67 EMORY L.J. 293, 300 (2017) ("Privatization has also played an increasingly important role in immigration detention as the population of detainees has swelled.").

68. *See, e.g.*, O'Carroll, *supra* note 67, at 299 ("Struggling to provide adequate facilities for a growing population of inmates, state and local governments turned to private corrections companies in the 1980s.").

69. *Id.*:

> Struggling to provide adequate facilities for a growing population of inmates, state and local governments turned to private corrections companies in the 1980s. This response accorded with the political values that defined the Reagan era, such as limited government and faith in the private sector. Free market advocates promoted prison privatization as a means of achieving greater efficiency and reducing government bureaucracy.

70. *Id.* at 299–300 ("But it was not until 1996—shortly after President Clinton declared, 'The era of big Government is over'—that Congress expressly authorized the BOP to contract with the private sector for the operation of prisons.").

71. Waks, *supra* note 10, at 1069–70.

72. Jefferis, *supra* note 16.

administration's policy of eliminating the use of private prisons, suggests that for-profit confinement on the federal level will continue to grow.[73]

B. The Independent-Contractor Exception as Applied, Generally

As a threshold matter, there is some confusion around the source of the independent-contractor exception. Some litigants and courts point to the definitional provision 28 U.S.C. § 2671 when invoking the exception, which for purposes of the FTCA defines "employee of the government" as "officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States . . . ."[74] The definition expressly excludes "any contractor with the United States."[75] Others point to the FTCA's discretionary-function exception[76] to assert that the United States cannot be liable for the conduct of independent contractors because the government's decision to contract with third parties is inherently discretionary.[77] Despite this confusion, the origin of the independent-contractor exception lies with the definitional statute, § 2671.[78]

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73. Memorandum from Attorney General Jefferson B. Sessions III, *Rescission of Memorandum on Use of Private Prisons* (Feb. 21, 2017), *available at* https://www.bop.gov/resources/news/pdfs/20170224_doj_memo.pdf [https://perma.cc/ P3UR-DKMF].

74. *See, e.g.*, Rodriguez v. United States, No. 1:13 CV 01559, 2015 WL 3645716, at *5 (N.D. Ohio, June 10, 2015) ("The [FTCA] defines 'government employees' as 'officers and employees of any federal agency.' The definition does not include independent contractors, nor the employees of independent contractors." (quoting 28 U.S.C § 2671)); United States Tobacco Coop. Inc. v. Big South Wholesale of Virginia, LLC, 899 F.3d 236, 248 (4th Cir. 2018).

75. 28 U.S.C. § 2671 (2019).

76. 28 U.S.C. § 2680(a) (exempting from the FTCA "[a]ny claim based upon an act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . .").

77. *See, e.g.*, Memorandum in Support of the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction, Keyes v. United States, No. 1:18-cv-1469, (D. Co. 2018) (Doc. 19). In a case considering a federal pretrial detainee's allegations under the FTCA of medical negligence he suffered while confined in a for-profit prison contracting with the U.S. Marshals Service, the United States argued that its "decision to contract with [a private prison company] is quintessentially a discretionary decision, for which liability is barred by the discretionary function exception." *Id.* at 14.

78. *See* United States v. Orleans, 425 U.S. 807, 813–14 (1976) (citing Dalehite v. United States, 346 U.S. 15, 30–31 (1953); Logue v. United States, 412 U.S. 521, 528 (1973)).

Courts' application of the FTCA's independent-contractor exception generally tracks common law principles of principal–agent relationships.[79] In *United States v. Orleans*, for example, the Supreme Court analyzed the application of the exception to a claim brought against a community action agency operating pursuant to a congressional act and with federal government funding.[80] In evaluating the relationship between the non-profit agency and the federal government, the Court recognized the substantial amount of money the federal government spends on contracted projects each year, noting the contractors are paid by the United States but are largely free to implement their contracts as they choose.[81] This degree of freedom to act on the part of the contractor was key for the Court: "The Federal Government in no sense controls 'the detailed physical performance' of all the programs and projects it finances by gifts, grants, contracts, or loans."[82] When the contracting agency has complete control over its activities, the FTCA's independent-contractor exception must apply.[83]

Soon after the *Winston* decision, which recognized a cause of action against the United States under the FTCA for people confined in federal prisons, the question of the independent-contractor's application to the conduct of private prisons and their employees came before the Court.

C. The Exception as Applied to For-Profit Prisons

In 1973, the Supreme Court considered the application of the FTCA's independent-contractor exception to a prisoner's claim for the first time in *Logue v. United States*.[84] The case did not concern a federal prisoner housed in a for-profit prison but, rather, a federal prisoner held in a county jail pursuant to a contract between the county and the Bureau of Prisons.[85]

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79. *See, e.g.*, *Orleans*, 425 U.S. 807.

80. *Id.* at 809.

81. *Id.* at 815.

82. *Id.* at 816 (quoting *Logue*, 412 U.S. at 528).

83. *Id.* at 818 ("Nothing could be plainer than the congressional intent that the local entities here in question have complete control over operations of their own programs with the Federal Government supplying financial aid, advice, and oversight only to assure that federal funds not be diverted to unauthorized purposes.").

84. 412 U.S. 521 (1973).

85. *Id.* at 523:

> After a hearing, [Mr. Logue] was taken to the Nueces County jail in Corpus Christi, Texas, to await trial. This jail is one of some 800 institutions operated by state and local governments that contract with

On the second day of his incarceration in the county jail, Mr. Logue attempted to commit suicide.[86] After receiving treatment in a non-prison hospital emergency room, he was admitted to the hospital's psychiatric floor. Mr. Logue's treating physician recommended to federal officials that he be incarcerated in a medical facility for rehabilitation.[87] The next day, the district court ordered federal officials to comply with the doctor's recommendation and transfer Mr. Logue to a medical facility.[88]

Federal officials, however, moved Mr. Logue back to the county jail to await the processing of his transfer paperwork.[89] These officials notified the administration of the contracting jail of Mr. Logue's condition and requested that the administration assign Mr. Logue to a cell removed of all items that may pose a risk.[90] The federal officials made no arrangements with the jail administration to observe Mr. Logue, and jail staff checked on Mr. Logue only periodically "when they were on that floor for some other reasons."[91] The next day, Mr. Logue killed himself.[92]

Mr. Logue's parents sued the United States under the FTCA for damages relating to their son's death, claiming that the federal officials' negligence was the proximate cause of Mr. Logue's death.[93] To account for the contractor relationship of the jail, they presented alternate theories: either the jail was a federal agency within the FTCA's meaning, or the jail employees were "acting on behalf of" the federal government when performing services for federal prisoners.[94]

Turning to common law principles, the Court rejected both arguments. As the Court had recognized in previous cases, the difference between a principal–agent relationship and an independent contractor "turn[s] on the absence of authority in the principal to control the physical conduct of the contractor in performance of the contract."[95] There was no evidence that the federal officials had any power or authority to control the operations

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the Federal Bureau of Prisons to provide for the safekeeping, care, and subsistence of federal prisoners.

86. *Id.* at 524.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 524–25.
92. *Id.* at 525.
93. *Id.* at 522.
94. *Id.* at 526.
95. *Id.* at 526–27 (citations omitted).

of the jail where Mr. Logue died, so the United States could not be liable for the conduct of the independent contractor.[96]

As the federal government relies more and more on for-profit prison operators, this exception to the FTCA has resulted increasingly in the government's evasion of liability for harms suffered by people in its custody. This reality is distinct from the liability of state and local governments who delegate the function of incarceration to third parties, particularly in states that have recognized an express non-delegable duty of care to those people whom they incarcerate.

III. INCARCERATION AS A GOVERNMENT FUNCTION, MEDICAL CARE AS A NONDELEGABLE DUTY

A. States' Non-Delegable Duty to Provide Medical Care to Prisoners

Several states, including North Carolina, Washington, and Arizona, have recognized a non-delegable duty of the government to provide adequate medical care to the people whom it incarcerates.[97] Courts in other states have similarly recognized a duty of care with respect to incarceration and private contractors, including for-profit prison medical providers.[98]

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96. *Id.* at 530.

> But we are not persuaded that employees of a contractor with the Government, whose physical performance is not subject to governmental supervision, are to be treated as 'acting on behalf of' a federal agency simply because they are performing tasks that would otherwise be performed by salaried employees of the Government. If this were to be the law, the exclusion of contractors from the definition of 'Federal agency' in § 2671 would be virtually meaningless, since it would be a rare situation indeed in which an independent contractor with the Government would be performing tasks that would not otherwise be performed by salaried Government employees.

Id. at 531–32.

97. Medley v. North Carolina Dep't of Correction, 412 S.E. 2d 654, 659 (N.C. 1992); Harrelson v. Dupnik, 970 F. Supp. 2d 953 (D. Ariz. 2013) (applying DeMontiney v. Desert Manor Convalescent Center, Inc., 695 P.2d 255 (1985) to the incarceration setting); Shea v. City of Spokane, 562 P.2d 264 (Wash Ct. App. 1977), *aff'd*, 578 P.2d 42 (Wash. 1978).

98. *See, e.g.*, Estate of Lovern v. Correct Care Solutions, LLC, No. 18-cv-02573-KLM, 2019 WL 2903589 (D. Colo., July 3, 2019).

> The Tenth Circuit Court of Appeals has not yet formally adopted the non-delegable duty doctrine. Nonetheless, to the extent that the County Defendants claim the doctrine is not well-established and should not be applied here, the Court disagrees. The non-delegable duty doctrine has

The Supreme Court of North Carolina, for example, held in 1992 that the state's duty to provide adequate medical care to prisoners in its custody is non-delegable and the state cannot avoid liability by contracting with private companies to provide such services, including incarceration as a whole.[99] In *Medley v. North Carolina Department of Correction*, the plaintiff, Mr. Medley, filed a medical negligence claim against the Department of Corrections (DOC) under the North Carolina Tort Claims Act, a statutory scheme roughly parallel to the FTCA.[100] Mr. Medley alleged that he developed a foot infection, which the prison doctor failed to adequately treat, leading to the development of "diabetic gangrene" and the amputation of Mr. Medley's leg below the knee.[101] The prison doctor was a contract physician paid by the state to provide medical services for prisoners in one prison.[102]

Similar to the FTCA, the North Carolina Tort Claims Act encompasses claims arising from the negligence of any state officer, employee, or agent.[103] The court noted that the state legislature had not defined "agent"[104] and then went on to analyze Mr. Medley's tort claim against the DOC on the theory that the contracted prison doctor was an "agent" of the state "as a matter of law" due to the state's "nondelegable duty to provide adequate medical care for persons it incarcerates."[105] This sort of nondelegable duty, the court explained, arises out of situations in which "a person's duty [is] so important and so preemptory" that its obligations cannot be transferred to another.[106] The situations involve "responsibility [that] is so important to the community" and obligations that "are of such importance" that entities "should not be able to escape liability merely by hiring others to perform them."[107] The court compared the level of care a government owes to those whom it incarcerates to the

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> been applied several times in this District very recently, with the court in each case finding that the doctrine provides a viable theory of indirect liability against a municipality in circumstances similar to those found here.

Id. at *4.

99. Medley v. North Carolina Dep't of Correction, 412 S.E. 2d 654, 659 (N.C. 1992).

100. *Id.* at 655.

101. *Id.* at 656.

102. *Id.*

103. *Id.* at 657.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

level of care a parent owes to his children: "Just as a minor child is, relative to his adult parents, less able to care for himself, so is a prison inmate who is prevented from seeking medical care outside the prison less able to care for himself than are his custodians."[108] The court concluded: "We hold that the duty to provide adequate medical care to inmates, imposed by the state and federal Constitutions, and recognized in state statute and caselaw, is such a fundamental and paramount obligation of the state that the state cannot absolve itself of responsibility by delegating to another."[109]

The Washington Court of Appeals reached a similar conclusion in *Shea v. City of Spokane*, which the Washington Supreme Court affirmed.[110] Mr. Shea was incarcerated in the Spokane City jail when he started to feel nauseous.[111] He asked for help but was told there was nothing that could be done.[112] He began to feel worse, but jail staff still denied him any assessment or treatment.[113] At one point, he apparently lost consciousness and was taken to a hospital where he began complaining of back pain.[114] The back pain continued when he was returned to the jail.[115] His condition worsened, and when staff returned him to the hospital, doctors discovered he had suffered various permanent injuries, including paralysis.[116] Mr. Shea sued the City of Spokane, alleging that city employees and jail staff, including the jail physician, negligently caused his injuries, and he won a jury verdict in his favor.[117]

The City of Spokane appealed the verdict.[118] Among the questions presented on appeal, the city asserted it could not be held liable for the actions of the jail physician because he was an independent contractor who was also engaged in private practice.[119] The court disagreed, concluding that the city, "in operating and maintaining a jail, has a twofold duty: one to the public to keep and produce the prisoner when required, and the other to the prisoner to keep him in health and safety."[120] This second duty—the one of the government to keep those who are in its custody healthy and

108. *Id.*
109. *Id.* at 659.
110. 562 P.2d 264, *aff'd*, 578 P.2d 42 (Wash. 1978).
111. 562 P.2d at 265.
112. *Id.*
113. *Id.*
114. *Id.* at 265–66.
115. *Id.* at 266.
116. *Id.* at 266–67.
117. *Id.*
118. *Id.* at 267.
119. *Id.*
120. *Id.* (quotations and citations omitted).

safe—arises out of the special relationship between the government and people who are incarcerated: when the state takes a person into its custody, it deprives that person "of his normal opportunities for protection."[121] The state exerts "complete control over a prisoner deprived of liberty"[122]:

> [T]he nature of the relationship is such as to render nondelegable the duty of providing for the health of a prisoner. Stated another way, the duty is so intertwined with the responsibility of the City as custodian that it cannot be relieved of liability for the negligent exercise of that duty by delegating it to an independent contractor physician.[123]

Arizona recognizes a similar nondelegable duty of care involving situations of confinement or commitment, finding it is "in the public interest that the [government] remain ultimately liable for any breach of that very important duty" to provide care to people in its custody.[124]

For these states, the act of incarceration—which renders a person in the near-complete control of the government and, therefore, virtually incapable of providing for her own health and safety—imposes a special duty on the government. That special duty is one that the government cannot evade simply by delegating it to another party. This nondelegable duty arises from the inherently governmental function of incarceration.

B. Incarceration as a Federal Government Function

In principle, incarceration is an inherently constitutional—or public—function.[125] That is, from a moral, philosophical, and legal view, depriving a person of his liberty is something only a government may rightfully do. Delegating that coercive power and the responsibilities that come with it "represents the government's abdication of one of its most basic responsibilities to its people."[126] Indeed, delegating this necessarily public function with few mechanisms in place to hold the private actors accountable eviscerates the oversight and accountability structure inherent

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121. *Id.*

122. *Id.* at 267–68.

123. *Id.* at 268.

124. Harrelson v. Dupnik, 970 F. Supp. 2d 953, 974 (2013) (quoting DeMontiney v. Desert Manor Convalescent Center, Inc., 695 P.2d 255 (1985)).

125. *See, e.g.*, Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 442–43 (2005) (compiling literature among private-prison critics relying on incarceration and punishment as inherently public function).

126. Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 668 (1987).

to the United States' system of government, with co-equal branches of government imposing checks and balances on each other in furtherance of adhering to constitutional standards and norms. By relying on the FTCA's independent-contractor exception and not recognizing a non-delegable duty of care, the government evades judicial review of, and responsibility for, one of its core functions.

C. A Federal Nondelegable Duty of Care

There is no meaningful difference between the power of state and local governments to incarcerate people within their jurisdictions and the power of the federal government to incarcerate people within its jurisdiction. People in the federal government's custody are in the government's near-complete control and depend in virtually every way on the government to provide for their health and safety—in the same ways as people in the custody of North Carolina, Washington, Arizona, and the other states that recognize a nondelegable duty of care. Yet, the FTCA's independent-contractor exception permits the federal government to delegate the duty it owes to the people whom it incarcerates.[127] This delegation of duty often means that claims against the government for inadequate medical care in private prisons or carried out by private parties evade review.

The obvious fix to this problem is one for Congress. Although the FTCA generally maps onto state tort law, its definition of the actors whose conduct subjects the federal government to liability contains no exceptions for non-governmental actors carrying out an otherwise nondelegable duty.[128] The Supreme Court has called this a "congressional choice":

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127. This is despite the existence of a federal statute obligating the federal government to "provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(2) (2019).

128. Logue v. United States, 412 U.S. 521, 528 (1973).

> Petitioners cite to the commentary to the Restatement (Second) of Torts § 409 (1965), to the effect that the common-law distinction that shields the employer from liability for injuries caused to another by the negligent act of a contractor or his servant is subject to so many exceptions that it is the general rule 'only in the sense that it is applied where no good reason is found for departing from it.' Congress, of course, could have left the determination as to whose negligence the Government should be liable for under the Federal Tort Claims Act to the law of the State involved, as it did with other aspects of liability under the Act. But it chose not to do this, and instead incorporated into the definitions of the

"While this congressional choice leaves the courts free to look to the law of torts and agency to define 'contractor,' it does not leave them free to abrogate the exemption [for independent contractors] that the Act provides."[129]

Accordingly, it is up to Congress to make another choice—to enact legislation to hold the federal government to the same nondelegable duty of care that states and local governments hold themselves to with respect to providing for the health and safety of incarcerated people. Revising the FTCA's definitional provision is the clearest place to begin and may require only striking from the definition of federal agency "any contractor with the United States."[130] Without the express independent-contractor exception, state tort and agency principles would apply and, in the many states that have a recognized nondelegable duty of care, the federal government may be liable for the wrongful actions of its contractors. Legislating an express nondelegable duty of care on the federal level would shore up any doubts as to the government's liability, particularly in the states that may not have as robust law on the subject as others.

CONCLUSION

The FTCA has been called the federal government's most expansive waiver of sovereign immunity to date. But it contains shortfalls. The law's independent-contractor exception leaves the people whom the federal government incarcerates in private prisons without a remedy against the government for harms they suffer within the private prison or at the hands of private-prison employees. This is in contrast to those people's counterparts in government-run prisons at the federal, state, and local levels. These disparities in available rights and remedies restrict the ability of many incarcerated people to address past violations of their rights and mitigate the often harsh conditions in which the federal government incarcerates people. The restrictions also hamper the means by which many accounts of the conditions of American incarceration are disseminated to the public, leaving much of what happens behind prisons' walls, locked inside with the people who are confined.

Congress must provide a legislative fix to its predecessor's legislative "choice" to exempt the federal government from liability for the wrongful acts of independent contractors that carry out its inherently governmental

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Act the exemption from liability for injury caused by employees of a contractor.

Id.

129. *Id.*

130. *See* 28 U.S.C. § 2671 (2019).

function of incarceration. As the privatization of incarceration proliferates on the federal level, the federal government seeks more often to evade courts' review of its, and its delegates', conduct and treatment of people in its care—people who are in the government's near-complete control and are unable to exercise virtually any choice over their medical care or provide for their own safety. The government is the only entity that may lawfully deprive a person of her liberty; the government must remain accountable to the people in its care.