

DANGEROUS DETENTION:

HUMAN RIGHTS STANDARDS AND ENFORCEMENT IN IMMIGRATION DETENTION

JACK ROCKERS AND ELIZABETH TROUTMAN
UNC-CH LAW STUDENTS



THE UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW:
IMMIGRATION AND HUMAN RIGHTS POLICY CLINIC
IN ASSOCIATION WITH
AMERICAN CIVIL LIBERTIES UNION IN NORTH CAROLINA LEGAL FOUNDATION

MAY 2009





Immigration & Human Rights Policy Clinic
University of North Carolina at Chapel Hill
Document Design: Rebecca Rodriguez

**DANGEROUS DETENTION:
HUMAN RIGHTS STANDARDS AND ENFORCEMENT IN IMMIGRATION
DETENTION**

MAY 2009

THE UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW:
IMMIGRATION AND HUMAN RIGHTS POLICY CLINIC
IN ASSOCIATION WITH
AMERICAN CIVIL LIBERTIES UNION IN NORTH CAROLINA LEGAL FOUNDATION

JACK ROCKERS
ELIZABETH TROUTMAN
UNC-CH LAW STUDENTS

DEBORAH M. WEISSMAN
REEF C. IVEY II DISTINGUISHED PROFESSOR OF LAW
DIRECTOR OF CLINICAL PROGRAMS

WWW.LAW.UNC.EDU/DOCUMENTS/CLINICALPROGRAMS/DANGEROUSDETENTION.PDF

TABLE OF CONTENTS

INTRODUCTION	6
PART 1: Human Rights Standards and Rights Applicable to Detainees	9
A. INTERNATIONAL HUMAN RIGHTS STANDARDS	9
1. <i>Sources of International Human Rights Standards</i>	10
B. DOMESTIC STANDARDS	11
1. <i>Sources of Human Rights Standards</i>	11
a. The United States Constitution	12
b. Domestic Case Law	13
c. DHS/ICE Guidelines	15
d. Other Statutes and Regulations	16
C. A HIERARCHY OF STANDARDS	17
PART 2: Specific Rights Covered by Domestic and International Human Rights Standards	19
A. THE BROAD PROTECTIONS OF HUMAN DIGNITY	19
1. <i>The Right to Equal Protection Under the Law</i>	20
2. <i>Freedom from Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment</i>	21
3. <i>Freedom from Arbitrary Arrest and Detention</i>	22
4. <i>Freedom from Arbitrary or Unlawful Interference with Privacy, Family, and Correspondence</i>	23
5. <i>The Right to Freedom of Thought, Expression, Conscience, and Religion</i>	25
B. THE RIGHT TO DUE PROCESS OF LAW	26
1. <i>The Right to be Informed of the Reason for Arrest and Charges in a Language that the Detainee Speaks</i>	27
2. <i>The Right to Prompt Explanation of One’s Rights and How to Avail One’s Self to Those Rights</i>	27
3. <i>The Right to Prompt Opportunity for Judicial Hearing on the Reason of Detention/The Right to Habeas Corpus</i>	29
4. <i>The Right to Legal Counsel and Prompt Notification of that Right, Assistance in Finding Counsel, and Adequate Time for Facilities for Confidential Consultation with Counsel</i>	29
5. <i>The Right to Interpretation at No Expense in All Proceedings</i>	32
6. <i>The Right to Prompt Notification that Consul of Home Country Can Be Contacted and Information on how to do so</i>	33
7. <i>Freedom from Coerced Confessions, Testimony, and Voluntary Departures</i>	34
8. <i>The Right to Petition for Grievances and to a Judicial Remedy for Human Rights Violations While Detained</i>	35
9. <i>The Right to Due Process Before Disciplinary Action is Taken</i>	37
C. THE RIGHT TO ADMINISTRATIVE OVERSIGHT OF DETENTION CONDITIONS.....	39
D. THE RIGHT TO HEALTH CARE (INCLUDING MENTAL HEALTH CARE)	40
E. THE RIGHT TO FAMILY UNITY/FAMILY RELATED RIGHTS	42
F. RIGHTS PERTAINING TO GENERAL CONDITIONS OF DETENTION	44
PART 3: MARIA’S STORY	47
PART 4: ENFORCEMENT	51
A. IACHR.....	51

1. <i>Overview of Petitions and Generalized Grievances</i>	52
2. <i>Using the IACHR to Enforce the Rights of Immigrant Detainees</i>	54
a. <i>Arbitrary Transfer</i>	54
b. <i>Inhumane Conditions</i>	55
c. <i>Violation of Family Rights</i>	55
B. SHADOW REPORTING	56
1. <i>Overview of Shadow Reporting Process</i>	56
2. <i>Using Shadow Reports to Hold the United States Accountable for Immigration Detention Practices</i>	59
a. <i>Right to Human Dignity</i>	59
b. <i>Right to Freedom of Thought, Expression, Conscience, and Religion</i>	59
c. <i>Right to Interpreter</i>	60
C. LITIGATION IN U.S. COURTS	60
1. <i>Overview of Types of Claims That Can Be Brought Pursuant to Violations of Immigrant Detainee Rights</i>	61
a. <i>Claims Against Federal Authorities</i>	61
b. <i>Claims Against State Authorities</i>	63
c. <i>Claims Pursuant to Settlements</i>	63
2. <i>U.S. Litigation Challenging the Conditions of Immigration Detention</i>	64
a. <i>Inadequate Provision of Medical Care</i>	64
b. <i>Right to Counsel</i>	65
c. <i>Right to Freedom from Overcrowding</i>	65
D. POLICY AND REGULATORY REFORM	66
1. <i>Codify ICE's Performance Based National Detention Standards or Enact Similar Legislation</i>	66
2. <i>Comprehensive Immigration Reform</i>	67
CONCLUSION	68

APPENDIX A: HUMAN RIGHTS SOURCES AND STANDARDS

APPENDIX B: LINKS FOR

SOURCES DESCRIBING HOW TO USE THE IACHR, MODEL PETITIONS, AND FORM PETITIONS

SHADOW REPORTING MANUAL

COMPLAINTS FILED IN U.S. FEDERAL COURT PERTAINING TO DETENTION

Introduction

Across North Carolina, increasing numbers of immigrants are being apprehended and locked up in county jails for months or even years pending the final outcome of their immigration cases. Although local media and advocacy groups have focused considerable attention on immigration enforcement activities such as raids conducted by Immigration and Customs Enforcement (ICE) and local immigration enforcement efforts under the 287(g) program, only recently have detention conditions received public scrutiny. In North Carolina, the increasing attention to detention of immigrants mirrors trends throughout the United States. Well-documented detainee abuses, some of which have led to avoidable deaths, have generated widespread denunciations of federal, state, and local treatment of immigrant detainees. In an effort to channel growing public awareness into effective advocacy, this report documents violations of immigrant detainee rights taking place in North Carolina jails and offers suggestions as to effective legal mechanisms that can be used to remedy past injustices and ensure future compliance with existing laws and norms that protect this population.

The topic of immigration detention is especially salient in North Carolina right now because an unprecedented number of immigrants are being detained in the state. For example, in 2008, more than 3,100 immigrants were detained and deported from the state, a marked jump from previous years.¹ The increase in detention can be traced to many key factors.

First, North Carolina has the 7th fastest growing foreign-born population in the United States during this decade.² This surge in immigration includes persons that have legal authorization to be in the country, as well as those who do not. Second, concomitant with the rise in the undocumented population in North Carolina has been a drastic escalation of immigration enforcement activities in the state. Enforcement activities include worksite and home raids by ICE and programs such as 287(g)

¹ *Five Counties Push Jail Deportations, The News and Observer, Kristin Collins, Feb. 5, 2009.*

² *Pew Hispanic Center, Statistical Portrait of the Foreign-born Population in the United States, 2007*

and Secure Communities that are part of a burgeoning federal-state cooperation to deport the undocumented.

North Carolina is one of the most active states in programs that rely on the use of local law enforcement agencies to enforce federal immigration laws. Currently, seven county sheriffs offices and one city police department have signed 287(g) agreements with ICE.³ Under 287(g), ICE authorizes state and local law enforcement to identify, process, and when appropriate, detain immigration offenders they encounter during their regular, daily law-enforcement activity. Additionally, twelve North Carolina counties are now participating in the Secure Communities program, which, similar to 287(g), enables ICE to partner with county jails to detain and deport immigrants.⁴

Finally, immigration detention is rising in North Carolina because recent amendments to the Immigration and Nationality Act (INA) prioritize detention. In 1996, The Antiterrorism and Effective Death Penalty Act and the Illegal Immigrant Reform and Immigrant Responsibility Act expanded mandatory detention without bond to large categories of non-citizens. Even when mandatory detention does not apply, it is very difficult for immigrant detainees to prove that they are not a danger to society or a flight risk, which is required for bond to be set. Furthermore, because detainees can be readily transferred, they have a more difficult time securing counsel who might assist them with bond hearings.

In response to increased detention, this report aims to provide advocates with the knowledge and tools to hold government authorities accountable for violations of immigrant detainee rights. The first step in this process is to develop a framework for understanding the patchwork of legal regimes under which immigrant detainees derive rights. To this end, Part I of the paper identifies and analyzes

³ Alamance County, Cabarrus County, Cumberland County, Gaston County, Henderson County, Mecklenburg County, Wake County, and Durham City Police Department.

⁴ ICE Rolling Out Secure Communities, *Charlotte Observer*, Franco Ordonez, Apr. 26, 2009, available at <http://www.charlotteobserver.com/local/story/687573.html>

the legal sources of immigrant detainee rights, which includes both international human rights instruments and norms and domestic sources such as the U.S. Constitution and case law. Part II then catalogs in detail the scores of immigrant detainee rights that are put into force by the international and domestic sources provided in Part I, including, among others, the right to human dignity, due process of law, and adequate medical care. These first two sections lay the groundwork for a future systematic survey of immigration detention conditions in North Carolina jails, which was initially going to be the central focal point of this project for the authors. However, due to time constraints and having been denied access to the Alamance County jail where interviews of detainees were to take place, the authors were only able to interview one former immigrant detainee in North Carolina. Thus, rather than present a picture of immigrant detention in North Carolina drawn from dozens of interviews of detainees in the state, Part III offers the story of Maria, an immigrant mother of two who was detained for over three months in five different jails and endured countless violations of her rights. Finally, recognizing that violations of the rights immigrant detainees must not only be documented but also acted upon, Part IV describes legal forums in which attorneys and advocates can work to enforce the rights of immigrant detainees.

Part I: Human Rights Standards and Rights Applicable to Detainees

In recent years, the United States has been detaining immigrants at an increasingly higher rate. Each year, the government detains over 300,000 people, more than triple the amount detained just a decade ago.⁵ Because of the large and increasing number of persons whose rights are affected by detention, it is more important than ever to hold detention facilities accountable to the standards that are found in the U.S. Constitution and other sources of domestic law, as well as international human rights treaties and norms and customary international law.

A. International Human Rights Standards

Immigration detainees are protected under international human rights treaties and norms, not because of their status as immigrants, but because of the inherent dignity and rights they possess simply by virtue of being human. The Universal Declaration of Human Rights (UDHR), the first global expression of rights to which all human beings are inherently entitled, declares that “[t]he peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”⁶

Human rights treaties and norms provide protection for citizens of all countries regardless of whether they are living in or outside of the country of birth. Furthermore, for the purposes of human rights standards that govern detention which is the subject matter of this report, the type of facility where an immigrant is detained is immaterial. Immigration detainees may be held in government (ICE-run) detention facilities, which are privately owned and operated facilities, as well as local jails and prisons.⁷ All facilities must be held to the same standards.

⁵ Detention Watch Network, *About the U.S. Detention and Deportation System*, <http://www.detentionwatchnetwork.org/aboutdetention>.

⁶ *Universal Declaration of Human Rights* [hereinafter “UDHR”], adopted Dec. 10, 1948, G.A. res. 217A (III).

⁷ U.S. Immigration and Customs Enforcement, *Protecting the Homeland; Semiannual Report on Compliance with ICE National Detention Standards (Jan.-June 2007)*, http://www.ice.gov/doclib/pi/news/newsreleases/articles/semi_annual_dmd.pdf.

1. Sources of International Human Rights Standards

The sheer volume of human rights treaties and international instruments is indicative of the importance that the international community places on maintaining the inherent dignity accorded to all humans. Although the United States is a party to only some of the instruments that address human rights, treaties are not the only source of international human rights standards to which the United States must adhere in its detention of immigrants.⁸ The United States must also comply with *jus cogens* norms (often called peremptory norms). *Jus cogens* are defined as those norms that are “accepted and recognized by the international community of states as a whole...from which no derogation is permitted.”⁹ Furthermore, the United States is obligated to comply with customary international law that emerges “from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁰ The U.S. government may argue that because it has not signed a particular treaty, it is not bound by its terms.¹¹ But the fact that most other states have signed and ratified these human rights treaties suggests that there is a general and consistent practice of valuing the human rights contained within them.

The treaties that have been ratified by the United States provide clear standards to which detention facilities must adhere in their treatment of immigration detainees.¹² There is considerable overlap among these treaties. For example, with regards to human rights generally, most treaties begin with a preamble that stresses the recognition of the inherent dignity and equal and inalienable rights of

⁸ The U.S. is a party to the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment (CAT), the U.N. Charter and the Vienna Convention on Consular Relations. The U.S. has signed, but not ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The U.S. is not a party to the International Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (MWC).

⁹ Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679, 698-99 (1969).

¹⁰ Restatement of the Law (Third) of Foreign Relations Law of the United States § 102(2) (1987).

¹¹ Sometimes parties to a treaty take reservations, understandings, or declarations that attempt to limit the terms of how a particular treaty applies to that state. Of the treaties that the United States has signed, the ICCPR has a reservation to it that claims that the United States is only bound to the treaty to the extent that cruel, inhuman, or degrading treatment is the same prohibition that exists in the Eighth Amendment of the Constitution.¹¹ However, reservations cannot be read contrary to the principle rights in a treaty because to do so would render the treaty meaningless.

¹² However, whether a treaty is self-executing or not affects its implementation and enforceability. If a treaty is self-executing, then individual countries do not need to pass domestic legislation that implements the treaty's provisions. If the treaty is non-self-executing, governments must pass legislation to implement the provisions. Thus, it is possible for states to have ratified a treaty, but may seek to avoid adhering to its terms by refusing to pass the necessary domestic legislation. If a treaty is self-executing, then under Article IV of the U.S. Constitution, it is the “supreme law of the land” and stands on equal footing with our own domestic laws. Furthermore, U.S. case law reaffirms that international law is a part of U.S. federal law. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) and *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

all.¹³ The prevalence of these standards provides considerable evidence of a customary international law demonstrating that the fundamental right to dignity does not depend on immigration status or citizenship.

The mere fact that an immigrant is detained is not *prima facie* evidence of a human rights violation, but when that immigrant is being held without just cause or held with cause, but treated inhumanely; her inherent human rights are violated.

B. Domestic Standards

Human rights norms are not only found in international human rights treaties. Domestic standards found in U.S. laws—whether through the Constitution, federal statutes and regulations, or ICE guidelines—also set forth requirements that are compatible with human rights norms. While they are not necessarily called “human rights” standards, domestic standards reflect a basic respect for dignity that is inherent in being human and overlap with many of the international standards in both language and substance and provide protection for the very same rights found in international law. For example, the right to be free from torture and cruel, inhuman or degrading treatment or punishment is found in international law. Similarly, the Eighth Amendment of the Constitution, which prohibits “cruel and unusual punishment,” establishes comparable protections.¹⁴

1. Sources of Human Rights Standards

With regards to the U.S. Constitution, all immigration detainees, including about half of them who are being held pursuant to civil immigration law and who have no prior criminal history are entitled to rely on the protections of the due process clauses in the Fifth and Fourteenth Amendments as well as the right to bring a writ of habeas corpus.¹⁵ Those detainees that are held pursuant to criminal charges have the additional protections of the Sixth and Eighth Amendments with regard to those charges.

¹³ See *Human Rights Sources and Standards in Appendix A*.

¹⁴ CAT art. I, 16 article 16, entered into force June 26, 1987, 1465 U.N.T.S. 85 and U.S. Const. amend VIII.

¹⁵ About the U.S. Detention and Deportation System, Detention Watch Network, available at <http://www.detentionwatchnetwork.org/aboutdetention>.

a. The United States Constitution

- **Fifth Amendment**

The Fifth Amendment of the Constitution provides protections to all immigration detainees regardless of whether or not they have been charged with a crime. This amendment provides that “[n]o person shall be...compelled in any criminal case to be a witness against himself, which pertains to the right to be free from coercion and confession.”¹⁶ This clause should be read in tandem with the Eighth Amendment which bars cruel and unusual punishments.¹⁷

- **Fourteenth Amendment**

Similarly, the Fourteenth Amendment, through its Due Process Clause also provides protections to immigrant detainees regardless of whether they are being held on criminal or civil grounds with regard to conditions that constitute “punishment.”¹⁸ This amendment provides that “[n]o State shall...deprive any person of life, liberty, or property, without due process of law.”¹⁹ All immigrant detainees, whether they are civil detainees or criminal detainees, are entitled to equal protection under the Fourteenth Amendment.²⁰ There is some debate as to the meaning of the term “within its jurisdiction”, but it is clear that immigrants who have already entered this country, regardless of the legality of such entry, and who are detained by the U.S. government, are within the jurisdiction of the United States.

- **Eighth Amendment**

Like any other person who faces criminal charges or who is convicted of a crime, immigration detainees who are detained pursuant to criminal grounds are entitled to the protections of the Eighth Amendments. This amendment provides “[e]xcessive bail shall not be required, nor excessive fines

¹⁶ *U.S. Const. amend. V.*

¹⁷ *U.S. Const. amend. VIII.*

¹⁸ *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

¹⁹ *U.S. Const. amend. XIV.*

²⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Here, the Supreme Court held that, “[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.” *Id.* *Emphasis added.*

imposed, nor cruel and unusual punishments inflicted.²¹ While this amendment is not directly applicable to immigration detainees held for purely civil violations, these detainees should be treated in a manner that would not violate the Eighth Amendment.

- **Sixth Amendment**

The Sixth Amendment only applies to those detainees who are held on criminal grounds and provides that,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.²²

- **Habeas Corpus**

The Constitution provides that “[t]he privilege of the writ of habeas corpus shall not be suspended unless when in case of rebellion or invasion the public safety may require it.”²³ While the REAL ID Act eliminated habeas corpus for those detainees who wished to challenge a final removal order, those immigrants in government custody continue to have the right to challenge some aspects of their detention.²⁴ For example, if someone is convicted of a crime and the immigration court issues a final removal order based on that conviction, then habeas would not be available. However, a habeas petition claiming a person was unconstitutionally apprehended could still be brought in district court.

b. Domestic Case Law

Case law and judicial precedent—particularly established by the Supreme Court—also set standards for immigration detention. Through case law, courts interpret and apply the Constitution, laws, and rules. Immigration detainees can also challenge the validity and/or interpretation of current statutes or rules. Domestic case law has implemented the Constitution in such a way that reflects

²¹ *U.S. Const. amend. VI.*

²² *Id.*

²³ *U.S. Const. art. I, § 9, cl. 2.*

²⁴ *American Immigration Law Foundation, Judicial Review Provisions of the REAL ID Act, June 7, 2005, available at <http://www.aifl.org/lac/pa/realid6705.pdf>.*

human rights standards. While court opinions may not specifically mention that a right it is upholding is a “human rights standard,” the substance of many of these rights is consistent with those rights found in international human rights law.

- **Right to Due Process**

Under *Wong Wing v. U.S.*, all immigration detainees, civil and criminal, are entitled to the due process protections of the Fifth and Fourteenth Amendments.²⁵ The Supreme Court in *Zadvydas v. Davis* reaffirmed the principle that regardless of legal status, all persons within the United States are entitled to the due process protections of the Fifth Amendment.²⁶ The Supreme Court’s ruling also made clear that arbitrary and indefinite detention is unconstitutional.²⁷ While the circuit courts may differ on the exact nature of the protections provided by the Fifth Amendment, federal courts have made clear that detainees are entitled to some protections under the Constitution.²⁸

In *Youngberg v. Romeo*, the Supreme Court ruled that civil detainees are also guaranteed Fourteenth Amendment due process protections, which include certain liberty interests such as reasonably safe conditions of confinement, freedom from unreasonably bodily restraint, and the right to food, clothing, medical care, and shelter.²⁹

- **Right of civil detainees to greater protections than those of criminal detainees**

Detainees who have not been convicted of a crime but are in detention pending the resolution of either their civil or criminal case are entitled to greater protections than those afforded criminally convicted detainees.³⁰ As the Ninth Circuit held, in *Jones v. Blanas*, conditions are unconstitutional if

²⁵ *Wong Wing v. U.S.*, U.S. 163 U.S. 228, 237-238 (1896).

²⁶ *Zadvydas v. Davis*, 533 U.S. 678, 678-80 (2001).

²⁷ *Id.* at 691.

²⁸ Compare *Dalhan v. Dep’t. of Homeland Sec.*, 215 Fed.Appx. 97, 100 (3d Cir. 2007) (holding immigration detainees are entitled to the same level of protections as pre-trial criminal detainees) and *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) (holding immigration detainees are entitled to the same due process protections as pre-trial criminal detainees) with *Arar v. Ashcroft*, 532 F.3d 157, 189-90 (2d Cir. 2008) (holding that it depends on an individual’s immigration status as to whether “unadmitted aliens” are entitled to the same level of protection as pre-trial criminal detainees or whether some other level of protection applies) and *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004) (holding that the level of protection for civil immigration detainees should be higher than both convicted prisoners and also pre-trial criminal detainees and that when civil detainees are confined in conditions that are either identical, similar to, or more restrictive than those under which convicted prisoners or pre-trial criminal detainees, then such conditions are presumptively punitive and unconstitutional).

²⁹ *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982).

³⁰ *Jones v. Blanas*, 393 F.3d 918 (933-94) (9th Cir. 2004), cert. denied, 546 U.S. 820 (2005).

a civil detainee is held in the same, similar, or more restrictive conditions than detainees who are awaiting a criminal trial or who have been convicted of a crime.³¹

Furthermore, the Court in *Bell v. Wolfish* made clear that the Due Process Clause of the Fourteenth Amendment protects those who have not been charged with a crime from conditions that are tantamount to punishment.³²

- **Right to be free from self-incrimination and right to counsel**

Under *Miranda v. Arizona*, all persons, even outside of the criminal context have a constitutional right not to be compelled to make incriminating statements, a right to remain silent, a right to counsel, and a right to be provided with counsel if she cannot afford it.³³ Furthermore, the Supreme Court held that the police must state these rights “in clear and unequivocal terms.”³⁴

- **Freedom from cruel and unusual punishment**

For those immigrant detainees that have been convicted of a crime, the Eighth Amendment also clearly applies.³⁵ Tom Jawetz of the ACLU’s National Prison Project has stated:

To establish a violation of the Eighth Amendment, a prisoner must show both (1) a deprivation of a basic human need, *Helling v. McKinney*, 509 U.S. 25, 31-32 (1993), and (2) deliberate indifference, *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). In the context of medical or mental health care, a prisoner must demonstrate “deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Eighth Amendment is also violated when prison officials “maliciously and sadistically use force to cause harm,” even where no serious injury results. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).³⁶

c. DHS/ICE Guidelines

The Department of Homeland Security (DHS) has promulgated its own non-binding standards that serve as “guidelines” applicable to the treatment of immigrant detainees while they are in government custody.³⁷ They do not create the basis for an independent legal claim, but may be

³¹ *Id.* at 934.

³² *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

³³ *Miranda v. Arizona*, 384 U.S. 436, 467(1966).

³⁴ *Id.*

³⁵ Tom, Jawetz, *Litigating Immigration Detention Conditions*, (2008).

³⁶ *Id.*

³⁷ *Operations Manual ICE Performance Based National Detention Standards (PBNDS)*, <http://www.ice.gov/partners/dro/PBNDS/index.htm>, (2008).

evidentiary guidance to a court as to minimal standards of detention. Irrespective of their direct enforceability, these standards must meet U.S. Constitutional and international detention standards or applicable human rights standards generally.

These forty-one standards were released on September 12, 2008 and are found in ICE's Detentions Operations Manual and are called National Performance Based Detention Standards.³⁸ The guidelines cover day-to-day living conditions within detention facilities as well as procedures for transfer and the administration of medical care. On their face, if actually faithfully and fully implemented, many of the standards may provide acceptable guidance as to how detainees should be treated. They generally include the due process guarantees and protections against discrimination as required by the Constitution and international law.³⁹

The standards apply to three types of detention facilities where detainees are housed: ICE Service Processing Facilities, Contract Detention Facilities, and state and local government facilities which house detainees pursuant to an Intergovernmental Service Agreement *for more than 72 hours*.⁴⁰ While the vast majority of facilities that house detainees are covered, the DHS/ICE standards do not apply to detainees who are temporarily housed for less than 72 hours, for example, when they are transferred from one facility to another.

d. Other Statutes and Regulations

Under 28 U.S.C. § 2241, anyone—including undocumented immigrant detainees—can challenge the legality of their detention by seeking a writ of habeas corpus. This statute codifies the same right given in the Constitution.⁴¹ The statute guarantees protection by providing the right to

³⁸ U.S. Immigration and Customs Enforcement, *Ice Announces New Performance-Based National Detention Standards for all ICE Detention Facilities* (Sept. 12, 2008), <http://www.ice.gov/pi/nr/0809/080912washington.htm>.

³⁹ Not all standards comply with legal and human rights norms. Of particular concern is the *Transfer of Detainees* which on its face violates a number of detainee rights. This standard provides that after a detainee is notified that he is to be transferred, he is not allowed to contact his family and the only requirement is that officials at the facility notify the detainee's attorney on record, who is then responsible for contacting the detainee's family. This standard violates the right to be free from arbitrary or unlawful interference with family and is further complicated when a person has no attorney and is not allowed to contact his family until sometime after he has reached the new facility. See Immigration and Customs Enforcement, *Operations Manual ICE Performance Based National Detention Standards, Transfer of Detainees*, available at http://www.ice.gov/doclib/PBNDs/pdf/transfer_of_detainees.pdf.

⁴⁰ *Operations Manual ICE Performance Based National Detention Standards (PBNDs)*, <http://www.ice.gov/partners/dro/PBNDs/index.htm>, (2008).

⁴¹ U.S. Const. art. I, § 9, cl. 2 (However, as mentioned above, immigrants do not have the right to challenge final removal orders).

detainees to seek remedy in federal court when they believe the government has infringed on their right to be free from arbitrary, prolonged, or indefinite detention.

There are additional federal regulations that govern those facilities that are not run by ICE, that is, those that are privately owned and managed: (1) 24-hour supervision, (2) conformance with safety and emergency codes, (3) food service, and (4) availability of medical care.⁴²

C. A Hierarchy of Standards

Arguably, all of these standards are binding on U.S. immigration detention facilities; however, some of these standards are more readily accepted in domestic courts than others. Furthermore, the use of human rights norms is constantly evolving. Notwithstanding the applicability of international legal norms in domestic law as binding law or as guidance to courts, such norms have been invoked infrequently in the litigation of human rights standards. Courts tend to give greater deference to domestic law arguments than those based on international treaty law. Currently, however, there have been a number of cases where advocates have successfully invoked international law as a basis for supporting human rights-related claims.⁴³ In the event that courts accept that international law informs domestic law, the human rights laws, particularly those treaties that the United States has ratified may become an important tool in protecting people from human rights abuses, including those that take place in immigration detention facilities.

It is clear that detention facilities must abide by the guarantees provided in the U.S. Constitution and federal statutes. Article IV of the U.S. Constitution declares that the treaties which the United States has ratified are the “supreme law of land.” If the United States has ratified a self-executing treaty, its terms and provisions are thus on par with all other federal statutes and the Constitution.⁴⁴ The United States also has an obligation to abide by treaties that are non-self-executing

⁴² 8 C.F.R. § 235.3(e) (2009).

⁴³ See *Zi Zhi Tang v. Gonzales* 489 F.3d 987 (2007), *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322 (2002), *Xuncaz and Ortiz v. Gramajo*, 886 F.Supp. 162 (1995), *Ma v. Ashcroft*, 257 F.3d 1095(2001), *Sterling v. Cupp*, 290 Ore. 611 (1981), *Tun v. Gonzales*, 485 F.3d 1014 (2007), *Zubedar v. Ashcroft*, 333 F.3d 463 (2003).

⁴⁴ A self-executing treaty is one that does not require the ratifying party to pass domestic legislation that codifies the terms of the treaty. Once ratified, it goes into effect and the party is bound to its terms.

(that is, they require implementing legislation) under the Vienna Convention on the Law of Treaties, which obligates states to not act in a way that would “defeat the object and purpose of the treaty.”⁴⁵ Similarly, if the United States has signed but not ratified a treaty, it is forbidden from taking action inconsistent with the object and purpose of the treaty.

Even those treaties that the United States has not ratified are useful because they provide evidence of customary international law and accepted standards of conduct and serve as an important guidepost in identifying human rights abuses.

Although not judicially enforceable in and of themselves, the ICE Standards can be used as evidence of what the minimum standards and as a guide for interpreting detention rights. Furthermore, detention facilities are “contractually required to be in compliance with ICE’s detention standards” which could create a cause of action based on the contract theory of third party beneficiaries.

Finally, if advocates have difficulty proving the binding nature of these standards in domestic courts, it is possible that they will have greater success in regional courts. For example, the Inter-American Commission on Human Rights has established a court where the provisions of the American Declaration on the Rights and Duties of Man are binding law.⁴⁶

It must be stressed that domestic courts may be more likely to accept some of these standards, but the use of international human rights law in domestic courts is increasing and constantly evolving. Any lack of acceptance in the past is not indicative of the usefulness of using these standards to address human rights abuses as this field of law grows and gains recognition.

⁴⁵ Vienna Convention on the Law of Treaties art. 18, entered into force Jan 27, 1980, 1155 U.N.T.S. 331. (Article 18 provides that “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.”)

⁴⁶ See below for a more in-depth discussion on how advocates can make use of this avenue.

Part II: Specific Rights Covered by Domestic and International Human Rights Standards

General human rights provisions and basic constitutional principles are broad and include numerous concepts that bear on basic principles of the rule of law. They cover a vast range of specific human rights. Here, we seek to identify those specific rights that are most relevant to the well-being and dignity of immigration detainees. The sources of these rights are often varied and overlap in their coverage. These redundancies reinforce the importance of the specific rights addressed here. Additional rights not specifically addressed below are nonetheless meaningful for the protection of immigrant detainees and can be found in “Human Rights Sources and Standards” attached in this report’s Appendix A.

A. The Broad Protections of Human Dignity

As previously discussed, one of the fundamental concepts in international law is the right to human dignity. This concept is the foundational principle by which a detainee’s circumstances need to be evaluated and the context within which we should measure her conditions in detention. Arguably, nearly all of the rights discussed in this report are protected under this category and while this right as related to immigration detention may be understood as broad in scope, there are specific rights that fall within the realm of the right to human dignity.

The right to human dignity itself is found in the preambles of most international human rights instruments. The preamble in the Convention on the Rights of the Child declares that, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁴⁷ This is reaffirmed in the ICERD, ICESCR, ICCPR, CEDAW, CAT, MWC, UDHR, the Body of Principles, and the American Declaration on the Rights and Duties of Man.⁴⁸ Although the U.S. Constitution does not explicitly recognize the right to

⁴⁷ *Convention on the Rights of the Child [hereinafter “CRC”] preamble, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 1456.*

⁴⁸ *See Human Rights Sources and Standards in Appendix A.*

human dignity, the Bill of Rights together with the Fourteenth Amendment encompass a general respect for human dignity and bestow rights upon people that are consistent with the rights inherent in being human.⁴⁹

States may not restrict human rights even if a particular right is not explicitly set forth in the instrument. Article 5(2) of the ICCPR sets forth such a catch-all provision:

There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.⁵⁰

Similar provisions are found in the UDHR, ICESCR, MWC and the Body of Principles.⁵¹ In detention facilities, human rights abuses that are not explicitly prohibited by domestic or international law are still prohibited because of such provisions. The rights below are more specific examples of the broad protections of human dignity.

1. The Right to Equal Protection under the Law

The right to equal protection under the law is explicitly embodied in some of the treaties as well as the Constitution. Article 2(1) of the ICCPR declares that all state parties “undertake to respect and ensure that all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵² The CRC in its Article 2(1) and the American Declaration on the Rights and Duties of Man in its Article 2 have nearly the exact same language. A violation of equal protection is also a violation of CAT, UDHR, the Body of Principles, SMRTP, ICESCR, MWC, and CEDAW. It is also generally a violation of CERD as a whole, and specifically violates Articles 2 and 5.⁵³

⁴⁹ *U.S. Const. amend I-X, XIV.*

⁵⁰ *International Covenant on Civil and Political Rights [hereinafter “ICCPR”] art. 5(2), entered into force Mar. 23, 1976, 999 U.N.T.S. 171.*

⁵¹ *See Human Rights Sources and Standards in Appendix A.*

⁵² *ICCPR, art. 2(1), entered into force Mar. 23, 1976, 999 U.N.T.S. 171.*

⁵³ *Convention on the Elimination of All Forms of Racial Discrimination, entered into force Jan. 4, 1969, 660 U.N.T.S. 195.*

This right is also found explicitly in the Fourteenth Amendment of the U.S. Constitution, which declares “[n]o state shall...deny to any person within its jurisdiction the equal protection of the law.”⁵⁴

Immigrants held in detention, regardless of their nationality or any other factor, have the right to equal protection under the law. The following are examples of violations of the right to equal protection under the law:

- Application of detention policies in a discriminatory manner, whether based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.
- Detention of refugees in worse conditions than other immigration detainees.
- Harassment or abuse of female detainees.
- Interference with a detainee’s religious beliefs and worship absent a demonstrated threat to herself or others.
- Failure to provide an interpreter at no cost for detainees who are not proficient in English.
- Differentiating between detainees based on country of origin for the purpose of discrimination.

2. Freedom from Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment

The right to be free from torture and other cruel, inhuman, or degrading treatment or punishment, found in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is directly applicable to circumstances of immigration detention. Article 1 sets forth the prohibition and definition of torture, while Article 16 prohibits any *other* acts that do not amount to torture per se, but are nonetheless cruel, inhuman or degrading treatment or punishment.⁵⁵

In addition to CAT, other treaty provisions also include this prohibition. The ICERD, ICCPR, CRC, MWC, UDHR, SMRTP, Body of Principles, and the American Declaration of the Duties and Rights of Man all include the same prohibition.⁵⁶

⁵⁴ *U.S. Const. amend. XIV, § 1, cl.*

⁵⁵ *CAT art 1, 16, entered into force June 26, 1987, 1465 U.N.T.S. 85.*

⁵⁶ *See Human Rights Sources and Standards in Appendix A.*

The Eighth Amendment of the Constitution, which prohibits cruel and unusual punishment, also applies to those detainees that are held on criminal charges.⁵⁷

The following are examples of violations of the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment:

- Poor sanitary conditions.
- Lack of drinking water that is available at all times.
- Locking detainees in solitary confinement in response to their filing of grievances.
- Refusing to administer necessary medical care.
- Overcrowding.
- Abusive conduct by guards.
- Holding primary care givers in detention away from the children that rely on them.
- Failure to provide detainees with restroom visits.
- Holding mentally ill detainees in solitary confinement.
- Failure to provide health care to detainees who are sick or injured.
- Shackling non-criminal detainees during transfer.

3. Freedom from Arbitrary Arrest and Detention

The right to be free from arbitrary arrest and detention is found in several sources. It is inherent in the human dignity of a person and is encompassed in the right to due process of law. This right is found in Article 9(1) of the ICCPR which declares that, “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁵⁸ Similarly, this right is covered the American Declaration of the Rights and Duties of Man,

⁵⁷ U.S. Const. amend VIII.

⁵⁸ ICCPR, art. 9(1), entered into force Mar. 23, 1976, 999 U.N.T.S. 171.

UDHR, the Body of Principles, CRC, and implied in Article 16 of CAT.⁵⁹ The right to be free from arbitrary arrest and detention is also found in the Fifth Amendment of the Constitution that guarantees “no person shall...be deprived of life, liberty, or property, without due process of law.”⁶⁰ A deprivation of liberty, i.e., arrest or detention, must be done in accordance with the law. Thus, any arbitrary deprivation of either of these is violation of the Fifth Amendment.

This right, applicable to immigration detainees, is violated when they are arrested despite having committed no crime. While entrance into the United States and entrance after removal are crimes, simply overstaying one’s visa is not a crime. Immigrants who have not committed any crimes and who are detained may claim a number of rights violations.

The following are examples of violations of the right to be free from arbitrary arrest and detention:

- Arresting an immigrant without a valid arrest warrant.
- Arresting an immigrant through traffic stops even when she has committed no crime.
- Arresting an immigrant in work and home raids when she has committed no crime.
- Detaining an immigrant who has not committed a crime.
- Detaining an immigrant without charging him with a crime or a violation of immigration law.
- Detaining an immigrant without allowing her to challenge her detention.

4. Freedom from Arbitrary or Unlawful Interference with Privacy, Family, and Correspondence

The right to be free from arbitrary or unlawful interference with privacy, family, and correspondence is found in a variety of sources. These rights are mentioned together in the international instruments while the ICE standards address them separately. The ICCPR, CRC, UDHR, MWC, and American Declaration of the Rights and Duties of Man and CAT (implied in Article 16)

⁵⁹ See *Human Rights Sources and Standards in Appendix A*.

⁶⁰ *U.S. Const. amend. V*.

bear on the integrity of the family while an individual is in detention.⁶¹ The ICCPR provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence...” and that “[e]veryone has the right to the protection of the law against such interference or attacks.”⁶²

ICE Standard 26, Correspondence and Other Mail, allows detainees to communicate with their families, communities, lawyers, the news media, government officers, and consular officials, as long as it does not interfere with the safety and order of the facility.⁶³ In the case of legal correspondence, if mail is clearly marked as such, it can only be opened in the presence of the detainee. ICE standards also ensure that mail and packages are not delivered to detainees without undue delay.⁶⁴ Also, according to ICE standards, detainees are entitled to contact with family and legal counsel. They have the right to family visits, telephone access, and may be entitled to access to family members in the event of health or other emergency.⁶⁵

The right to be free from arbitrary or unlawful interference with privacy, family, and correspondence is an important guarantee for individuals held in immigration detention. It goes without saying that the very nature of detention interferes with privacy, family, and correspondence. But these protections require that such interference is neither unlawful nor arbitrary. Interference with privacy and correspondence is especially important when considering the relationship between a detainee and his or her attorney.

The following are examples of violations of the right to be free from arbitrary or unlawful interference with privacy, family, and correspondence:

⁶¹ See *Human Rights Sources and Standards in Appendix A*.

⁶² ICCPR art. 17(1)-(2), entered into force Mar. 23, 1976, 999 U.N.T.S. 171.

⁶³ Immigration and Customs Enforcement, *Operations Manual ICE Performance Based National Detention Standards, Correspondence and Other Mail*, available at http://www.ice.gov/doclib/PBNS/pdf/correspondence_and_other_mail.pdf.

⁶⁴ *Id.*

⁶⁵ Immigration and Customs Enforcement, *Operations Manual ICE Performance Based National Detention Standards, Escorted Trips for Non-Medical Emergencies*, available at http://www.ice.gov/doclib/PBNS/pdf/escorted_trips_for_nonmedical_emergencies.pdf; Immigration and Customs Enforcement, *Operations Manual ICE Performance Based National Detention Standards, Telephone Access*, available at http://www.ice.gov/doclib/PBNS/pdf/telephone_access.pdf; Immigration and Customs Enforcement, *Operations Manual ICE Performance Based National Detention Standards, Visitation*, available at <http://www.ice.gov/doclib/PBNS/pdf/visitation.pdf>.

- Depriving visits with relatives absent some demonstrated threat to the security of the facility.
- Holding primary care givers in detention and away from their children who rely on their support to live.
- Transfer to facilities that are far away from an individual's family.
- Denial of contact their families to notify them of transfer.
- Interference with legal correspondence.
- Interference with family correspondence absent some demonstrated threat to the security of the facility.

5. The Right to Freedom of Thought, Expression, Conscience, and Religion

The right to freedom of thought, expression, conscience, and religion is found in the ICCPR, CRC, ICERD, UDHR, MWC, and the American Declaration on the Rights and Duties of Man.⁶⁶ These rights are also among the most basic freedoms in U.S. domestic law and international law. They are embodied in the Constitution's First Amendment that provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press or the right of the people to peaceably assemble, and to petition the government for a redress of grievances."⁶⁷

ICE's standards protect the right to freedom of religion. The standard on religious practices provides that detainees, even those in disciplinary or administrative confinement, are entitled to have reasonable and equitable opportunities to practice any religion of their choice and participate in their faiths unless there is a showing of a threat to safety of persons involved in the activity.⁶⁸ The standards also requires facilities to provide adequate space, facilities, and clergy to detainees and religious providers must be allowed to meet with detainees individually or in groups for services and

⁶⁶ See *Human Rights Sources and Standards in Appendix A*.

⁶⁷ *U.S. Const. amend I*.

⁶⁸ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Religious Practices*, available at http://www.ice.gov/doclib/PBNS/pdf/religious_practices.pdf.

counseling.⁶⁹ The standard also prohibits a facility's staff from coercing or harassing detainees on the basis of their religious beliefs.⁷⁰ Detention facilities must make appropriate accommodations when an individual's religion or religious practice prohibits the eating of certain foods or calls for fasting or the observation of holy days.⁷¹ ICE standards allow detainees to keep small religious items in their possession.⁷²

The following are examples of violations of a detainee's right to freedom of thought, expression, conscience, and religion:

- Infringement upon or punishing a detainee's speech.
- Harassment of an individual based on a grievance that individual has filed.
- Forcing a detainee to practice a particular religion.
- Forbidding a detainee to practice a particular religion.
- Forcing a detainee to eat foods that are against her religion.
- Forcing a detainee to eat during religious holidays where fasting is required.
- Infringement upon a detainee's religious worship absent a demonstrated threat to the security of the facility.
- Coercion or harassment of a detainee based on her religious beliefs.
- Denial of the right to possess small religious items.

B. The Right to Due Process of Law

Every person in the United States has the right to due process of law. This guarantee is found in the Fifth Amendment which states that, "[n]o person shall...be deprived of life, liberty, or property,

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Immigration and Customs Enforcement, *Operations Manual ICE Performance Based National Detention Standards, Funds and Personal Property*, available at http://www.ice.gov/doclib/PBND/standard/pdf/funds_and_personal_property.pdf.

without due process of law;”⁷³ This right encompasses many other rights including, for example, the right to be free from arbitrary arrest and detention as discussed above.⁷⁴

1. The Right to be Informed of the Reason for Arrest and Charges in a Language that the Detainee Speaks

Both international and domestic law provide for the right to be informed of the reason or arrest and charges in a language that the detainee understands. The ICCPR sets forth this right in Article 9, Section 2 and 3 and Article 14(3)(a).⁷⁵ The CRC, MWC, Body of Principles and the American Declaration on the Rights and Duties of Man also establish this right.⁷⁶ Further, a violation of this right is a violation of the due process clause found in the Fifth Amendment.⁷⁷

The right to be informed of arrest and charges in a language that a detainee speaks is particularly relevant to the circumstances of immigrants, many of whom do not understand English.

The following are examples of violations of the right to be informed of the reason for arrest and charges in a language that the detainee speaks:

- Failure to inform a detainee who has been arrested the reasons for her arrest at all.
- Failure to inform a detainee who has been arrested the reasons for her arrest in a language in which she understands.
- Failure to inform a detainee who has been arrested the charges against her.
- Failure to inform a detainee of the charges against her in a language in which she understands.

2. The Right to Prompt Explanation of One’s Rights and How to Avail One’s Self to Those Rights

Related to the right to be informed of the reason for arrest and charges is the right to prompt explanation of rights and how to avail one’s self of those rights. The United Nations Body of Principles explains in Principle 13 that, “[a]ny person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority

⁷³ U.S. Const. amend. V.

⁷⁴ See Human Rights Sources and Standards in Appendix A.

⁷⁵ ICCPR, entered into force Mar. 23, 1976, 999 U.N.T.S. 171.

⁷⁶ See Human Rights Sources and Standards in Appendix A.

⁷⁷ U.S. Const. amend V.

responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.”⁷⁸ This principle is also echoed in the American Declaration on the Rights and Duties of Man, SMRTP, CRC, and the MWC.⁷⁹

The right to be informed of one’s rights is found in Fifth Amendment’s due process clause and in the case of criminal arrests, the Sixth Amendment.⁸⁰ The applicable ICE standards are Legal Rights Group Presentations and Detainee Handbook. These standards allow legal rights advocacy groups access to detainees in facilities to presentations about immigration law.⁸¹ In addition, ICE standards require that once a detainee is admitted to a facility, the facility must provide a comprehensive manual (the Detainee Handbook) explaining the rules, sanctions, disciplinary system, mail and visitation procedures, grievance system, access to the law library, telephone access, prohibited acts, services, programs, and medical care.⁸² This manual must be in a language in which the detainee understands.⁸³

The following are examples of violations of the right to prompt explanation of one’s rights and how to avail one’s self to those rights:

- Failure to inform detainees what their legal rights are upon arrival to the detention facility.
- Failure to permit legal rights groups to make presentations to detainees.
- Failure to inform detainees how they may avail themselves to their legal rights.
- Failure to disseminate the Detainee Handbook.
- Failure to include in the Detainee Handbook an explanation of a detainee’s rights.

⁷⁸ United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment [hereinafter “Body of Principles”] principle 13, Dec. 9, 1988, 43 U.N. GAOR Supp. (No. 49) at 298.

⁷⁹ See Human Rights Sources and Standards in Appendix A.

⁸⁰ U.S. Const. amend V, VI.

⁸¹ Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Legal Rights Group Presentations, available at http://www.ice.gov/doclib/PBND/ pdf/legal_rights_group_presentations.pdf, (However, all of this material must be pre-approved and presentations are typically only allowed to last one hour. Detention facilities are under no obligation to arrange presentations. That burden rests entirely on the legal rights group to take the initiative to make such presentations.)

⁸² Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Detainee Handbook, available at http://www.ice.gov/doclib/PBND/ pdf/detainee_handbook.pdf.

⁸³ *Id.*

3. The Right to Prompt Opportunity for Judicial Hearing on the Reason for Detention/The Right to Habeas Corpus

The right to prompt opportunity for judicial hearing to challenge detention and the right to habeas corpus are found in international instruments, the U.S. Constitution, and U.S. federal domestic law. The Universal Declaration of Human Rights states that, “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”⁸⁴ The ICCPR, MWC, the Body of Principles, and the American Declaration of the Rights and Duties of Man all include similar provisions.⁸⁵ The general right of anyone to challenge his detention is found in the Constitution’s habeas corpus clause.⁸⁶ Furthermore, this right is codified in U.S. law and people under the jurisdiction of the United States are given a statutory right to habeas corpus.⁸⁷ This right is also covered by the due process clause in the Fifth Amendment of the Constitution as well as the Sixth Amendment when considering detainees who have been charged with a crime.⁸⁸

Without an opportunity to challenge one’s detention and ask for an explanation as to why one is being detained, the right to arbitrary and unlawful detention is also implicated.

The following are examples of the right to right to prompt opportunity for judicial hearing on the reason for detention/the right to habeas corpus:

- Denial of a judicial hearing on the reason for detention.
- Denial of the right to apply for a writ of habeas corpus.

4. The Right to Legal Counsel and Prompt Notification of that Right, Assistance in Finding Counsel, and Adequate Time and Facilities for Confidential Consultation with Counsel

The rights regarding counsel are found in international law, the Constitution, and the ICE Standards. The right to legal counsel and prompt notification of that right and assistance in finding

⁸⁴ UDHR, adopted Dec. 10, 1948, G.A. res. 217A (III).

⁸⁵ See *Human Rights Sources and Standards in Appendix A*.

⁸⁶ U.S. Const. art. I, § 9, cl. 2.

⁸⁷ 28 U.S.C. § 2241 (2007).

⁸⁸ U.S. Const. amend V, VI.

counsel is found in the Body of Principles. It declares that “[a] detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.”⁸⁹ It goes on to say that

If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.⁹⁰

The American Declaration of the Rights and Duties of Man does not explicitly provide for counsel but it does call for courts to protect people from acts that would “violate any fundamental constitutional rights.”⁹¹ Similarly, the ICCPR and MWC provide access to free legal counsel, if necessary.⁹²

The right to adequate time and facilities for confidential communication is found in the ICCPR, which provides that criminal detainees are entitled, at a minimum, “to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.”⁹³ The CRC provides merely for confidential communications with counsel, while the Body of Principles and the MWC provide for adequate time and facilities for such confidential consultations.⁹⁴ The American Declaration of the Rights and Duties of Man implies such a right through its due process provisions in Articles 18, 25, and 26.⁹⁵

While the international instruments are broader in scope, the U.S. Constitution provides the right to legal counsel, prompt notification of that right, and assistance in finding counsel.⁹⁶ This amendment also covers the right to adequate time and facilities for confidential communication with counsel.

⁸⁹ *Body of Principles principle 17(1)*, Nov. 9, 1988, 43 U.N. GAOR Supp. (No. 49) at 298.

⁹⁰ *Body of Principles principle 17(2)*, Nov. 9, 1988, 43 U.N. GAOR Supp. (No. 49) at 298.

⁹¹ *American Declaration on the Rights and Duties of Man art. 18*, adopted Apr. 30, 1948, OAS Res. XXX.

⁹² See *Human Rights Sources and Standards in Appendix A*.

⁹³ *ICCPR art. 14(3)(b)*, entered into force Mar. 23, 1976, 999 U.N.T.S. 171.

⁹⁴ See *Human Rights Sources and Standards in Appendix A*.

⁹⁵ *American Declaration on the Rights and Duties of Man art. 18, 25, 26* adopted Apr. 30, 1948, OAS Res. XXX.

⁹⁶ *U.S. Const. amend VI*.

The ICE standards require facilities to keep an up-to-date list of free legal service providers for the purpose of getting an attorney or contacting a government agency or court.⁹⁷ They also require facilities to give detainees access to courts, counsel, and comprehensive legal materials.⁹⁸ Facilities are required to have law libraries and grant detainees access to these libraries for at least five hours a week.⁹⁹ Additionally, ICE standards require that legal representatives be permitted to visit their clients seven days a week and meet with them privately.¹⁰⁰ Detainees are permitted to make free telephone calls to a legal service provider from an ICE/DRO-provided list.¹⁰¹ Any calls made to a legal representative may not be monitored and the detainee must be provided with privacy.¹⁰²

The right to legal counsel is crucial. Most detainees are unfamiliar with the U.S. legal system. Detainees who are without legal representation are left to navigate the highly complex immigration system alone. Immigration matters are considered civil in nature; thus, the guarantees in the Sixth Amendment to free counsel at government expense are unavailable to those who are detained on immigration charges. If a detainee is being held on criminal charges, an attorney will be appointed; however, such representation is limited to the criminal charge. Thus, detainees are left to find counsel on their own and pay for it if they can afford it.

Furthermore, detainees are frequently transferred to other facilities after their initial apprehension due to lack of bed space or a variety of other reasons. They are often transferred to locations that are hundreds or even thousands of miles away from their families and counsel. The right to be detained near counsel is critical if detainees are to be able to make effective use of their legal representative

⁹⁷ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Telephone Access*, available at http://www.ice.gov/doclib/PBND/dfs/telephone_access.pdf.

⁹⁸ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Law Libraries and Legal Materials*, available at http://www.ice.gov/doclib/PBND/dfs/law_libraries_and_legal_material.pdf.

⁹⁹ *Id.*

¹⁰⁰ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Visitation*, available at <http://www.ice.gov/doclib/PBND/dfs/visitation.pdf>.

¹⁰¹ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Telephone Access*, available at http://www.ice.gov/doclib/PBND/dfs/telephone_access.pdf.

¹⁰² *Id.*

The following are examples of violations of the rights to legal counsel and prompt notification of that right, assistance in finding counsel, and adequate time and facilities for confidential communication with counsel:

- Denial of contact or communication between a detainee and her legal counsel.
- Failure to notify detainees that they are entitled to counsel.
- Failure to provide legal counsel at no cost to a detainee who cannot afford it.
- Absent or inadequate lists of free legal service providers, government agencies, and courts.
- Transfer of a detainee to a facility that is away distant from her legal representative.
- Failure to provide facilities for confidential communication with counsel.
- Failure to provide adequate time for confidential communication with counsel.
- Denial of confidential written correspondence with counsel.
- Monitoring a detainee’s phone calls with counsel absent the detainee’s permission.
- Inhibiting counsel from visiting a client during business hours.

5. The Right to Interpretation at No Expense in All Proceedings

The right to interpretation at no expense in all proceedings is found in international law and the U.S. Constitution. Article 14(3)(f) of the ICCPR provides “everyone shall be entitled to...the free assistance of an interpreter if he cannot understand or speak the language used in court.”¹⁰³ This right is also provided in the MWC, CRC, SMRTP, Body of Principles and implied in Article 18 of the American Declaration on the Rights and Duties of Man.¹⁰⁴ The Sixth Amendment and Fifth Amendment due process clause also incorporate this right.¹⁰⁵

Detainees with limited English proficiency who are not provided with an interpreter will not be able to effectively understand and participate in their legal proceedings. It is crucial that detainees understand the proceeding so that they may effectively communicate with the court and their counsel.

¹⁰³ ICCPR, art. 14(3)(f), entered into force Mar. 23, 1976, 999 U.N.T.S. 171.

¹⁰⁴ See *Human Rights Sources and Standards* in Appendix A.

¹⁰⁵ U.S. Const. amend V, VI.

This right is even more important if an individual cannot afford legal representation and is representing herself.

The following are examples of violations of the right to interpretation at no expense in all proceedings:

- Failure to allow interpretation at a proceeding.
- Failure to provide free interpretation at a proceeding.

6. The Right to Prompt Notification that Consul of Home Country Can Be Contacted and Information on how to do so.

Several international instruments have provisions that establish the right to prompt notification that consul of a detainee's home country can be contacted and the right to information on how to contact the consular office. The Vienna Convention on Consular Relations provides that,

[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;¹⁰⁶

The Body of Principles, SMRTP and MWC also have provisions providing notification to consul and access to consular representatives.¹⁰⁷

The ICE standards require facilities to advise detainees of their right to consular access and assist detainees in accessing the appropriate consular officer.¹⁰⁸ They also require facilities to make telephone number to consulate offices available.¹⁰⁹

When immigrants are apprehended and detained, they have the right to be notified of their right to contact their home country's consular office and how to do so in order for them to obtain any and all

¹⁰⁶ Vienna Convention on Consular Relations article 36(1)(b), entered into force Mar. 19, 1967, 596 U.N.T.S. 261.

¹⁰⁷ See Human Rights Sources and Standards in Appendix A.

¹⁰⁸ Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Visitation, available at <http://www.ice.gov/doclib/PBND/dfs/visitation.pdf>.

¹⁰⁹ Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Telephone Access, available at http://www.ice.gov/doclib/PBND/dfs/telephone_access.pdf. But see *Medellin v. Texas*, 522 U.S. ____ (2008) (holding that the signed Protocol to the Vienna Convention on Consular Relations is not self-executing and thus the it is not binding on state courts).

possible assistance that the consular office can provide. Consulates from other countries are located across the United States and their purpose is to protect their citizens. If detainees are denied access or not informed of their right to contact their consular office, this is a deprivation of an important source of assistance.

The following are examples of violations of the right to prompt notification that consul of a detainee's home country can be contacted and the right to information on how to contact the consular office:

- Failure to promptly notify a detainee of her right to notify the consul of her home country.
- Interference with access to consul.
- Failure to provide an explanation of how a detainee can contact the consul of her home country.

7. Freedom from Coerced Confessions, Testimony, and Voluntary Departures

The right to be free from coerced confessions, testimony, and voluntary departure is found in international law, constitutional law, and the ICE standards. Under CAT, torture or other cruel, inhumane, or degrading treatment is a violation of international law.¹¹⁰ The ICCPR provides that one of the minimum guarantees is that criminal detainees, “[n]ot...be compelled to testify against himself or to confess guilt.”¹¹¹ The American Declaration on the Rights and Duties of Man, MWC, CRC, and the Body of Principles also prohibit coerced testimony and confessions.¹¹²

The Fifth Amendment due process clause and Eighth Amendment also prohibit coerced confessions, testimony, and voluntary departures. The ICE standard, Use of Force and Restraints, prohibits using physical force and restraint devices as punishment or using restraints to cause physical pain or extreme discomfort.¹¹³

¹¹⁰ CAT articles 1, 16, entered into force June 26, 1987, 1465 U.N.T.S. 85.

¹¹¹ ICCPR, art. 14(3)(g), entered into force Mar. 23, 1976, 999 U.N.T.S. 171.

¹¹² See *Human Rights Sources and Standards in Appendix A*.

¹¹³ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Use of Force and Restraints*, available at http://www.ice.gov/doclib/PBND/ice/pdf/use_of_force_and_restraints.pdf.

Detention facilities must avoid conditions that are tantamount to coercing detainees to confessing or admitting to a charge to which they may not be guilty. In some circumstances in which confessions or testimony are coerced, they can be tantamount to torture and is, at the least, cruel and inhuman treatment. Detainees are sometimes given the option to depart the country of their own free will rather than go through proceedings to determine if they must leave the country. When these so-called “voluntary departures” are not actually voluntary and amount to coercion, there is a violation of this right.

The following are examples of the violation of the right to be free from coerced confessions, testimony, and voluntary departure:

- Forcing a detainee to sign an agreement to voluntarily depart when the detainee does not know what she is signing.
- Coercion of a detainee into confessing.
- Coercion of a detainee into testifying against herself or others.
- Retaliation against a detainee who refuses to testify or confess.
- Using physical force or restraint devices to coerce a detainee into confessing, testifying, or accepting voluntary departure.
- Using restraints to cause physical pain for the purpose of coercing a detainee into confessing, testifying, or accepting voluntary departure.

8. The Right to Petition for Grievances and to a Judicial Remedy for Human Rights Violations While Detained

The right to petition for grievances and the right to a judicial remedy for human rights violations during detention is found in international law, the Constitution, and the ICE standards. The SMRTP provides that, “[e]very prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.”¹¹⁴ It further provides for the opportunity to discuss conditions with inspectors and submit grievances or requests to

¹¹⁴ *Standard Minimum Rules for the Treatment of Prisoners [hereinafter “SMRTP”] article 36(1), adopted Aug. 30, 1955, 24 U.N. ESCOR Supp. (No. 1) at 11.*

judicial authorities and central prison administrations. The Body of Principles and American Declaration of the Rights and Duties of Man supply a similar right.¹¹⁵ The ICCPR provides that anyone whose rights or freedoms under that instrument “shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity” and may seek such a remedy through judicial or legislative authorities.¹¹⁶ CAT provides a judicial remedy to those who have been tortured or subjected to cruel, inhumane, or degrading treatment or punishment.¹¹⁷ The MWC and the American Declaration of the Rights and Duties of Man include similar provisions relating to violations of human rights in general.¹¹⁸

The First Amendment of the Constitution provides that the government not restrict the right “to petition the government for the redress of grievances.”¹¹⁹ The ICE standard entitled Grievance System provides the procedure for detainee to file grievances. The facility must inform them as to what the grievance procedure is for both formal and informal complaints.¹²⁰ Facilities must deal with grievances with within five business days of receipt and must provide an appeals process.¹²¹

When a detainee suffers rights violations during her detention, she must be given the opportunity to seek an administrative and a judicial remedy. If conditions in facilities are not adequate, or detainees suffer from any other violation of protected rights, they have the right to petition regarding their complaints. A system should be in place that allows detainees to file grievances and receive feedback or an improvement in conditions. Allowing a violation of any right or entitlement to go unpunished is a violation of fundamental principles of fairness and justice and otherwise bad public policy. If facilities do not remedy conditions that violate a detainee’s rights, detainees must be permitted to make use of the legal system in order to obtain legal or equitable remedy against the

¹¹⁵ See *Human Rights Sources and Standards in Appendix A*.

¹¹⁶ ICCPR art. 2, entered into force Mar. 23, 1976, 999 U.N.T.S. 171.

¹¹⁷ CAT art. 14, entered into force June 26, 1987, 1465 U.N.T.S. 85.

¹¹⁸ See *Human Rights Sources and Standards in Appendix A*.

¹¹⁹ U.S. Const. amend I.

¹²⁰ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Grievance System*, available at http://www.ice.gov/doclib/PBND/dfs/grievance_system.pdf.

¹²¹ *Id.*

government, individual, or facility in order to right the wrong and deter future violations of derogations from human rights laws and norms.

The following are examples of violations of the right to petition to grievances and the right to a judicial remedy for human rights violations while detained:

- Retaliation against a detainee for filing a grievance.
- Failing to promptly deliver a grievance that a detainee is filing to the appropriate authority.
- Prohibiting a detainee from filing a grievance.
- Failing to deal with a detainee's reasonable grievance in a timely manner.
- Impeding a detainee from discussing conditions with inspectors.
- Denial of an impartial investigation regarding complaints.
- Restrictions on a detainee of making a statement to her trial judge.
- Denial of a judicial remedy for human rights violations while detained.
- Depriving a detainee the opportunity to seek a judicial remedy for human rights violations in detention.
- Retaliating against a detainee for seeking a judicial remedy for human rights violations.
- Interfering with a detainee's efforts to seek a judicial remedy for human rights violations in detention.

9. The Right to Due Process Before Disciplinary Action is Taken

The right to due process before disciplinary action may be had is found in international law, constitutional law, and the ICE standards. The Body of Principles provides that facilities publish and inform detainees of the type of conduct that constitutes a disciplinary offence as well as what punishments may be inflicted.¹²² Detainees also have the right to be heard before any disciplinary action is taken and the right to appeal.¹²³ The SMRTP provides that “[t]he following shall always be determined by the law or by the regulation of the competent administrative authority: (a) Conduct

¹²² *Body of Principles principle 30(1), Nov. 9, 1988, 43 U.N. GAOR Supp. (No. 49) at 298.*

¹²³ *Body of Principles principle 30(2), Nov. 9, 1988, 43 U.N. GAOR Supp. (No. 49) at 298.*

constituting a disciplinary offence; (b) The types and duration of punishment which may be inflicted; (c) The authority competent to impose such punishment.”¹²⁴ It also provides general due process rights. Article 30 provides that,

No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence...[nor]...punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defense. The competent authority shall conduct a thorough examination of the case... [and]... [w]here necessary and practicable the prisoner shall be allowed to make his defense through an interpreter.¹²⁵

The American Declaration on the Rights and Duties of Man provides general guarantees of due process which can be applied to disciplinary action.¹²⁶ The Fifth Amendment due process clause also gives rise to these rights in general. The ICE standard entitled Disciplinary System requires facilities to inform detainees of the rules and regulations, prohibited acts, disciplinary sanctions that may be imposed, the rights in the disciplinary system, and the procedure for appealing disciplinary findings.¹²⁷ Facilities must also advise the detainee of her rights in a language she understands at every stage of the disciplinary and appeals process as well as provide interpretation services.¹²⁸ Another standard, Special Management Units, provides that facilities only place detainees in disciplinary segregation after a finding by a Disciplinary Hearing Panel that the detainee is guilty of a prohibited act.¹²⁹

This right is broad and encompasses many different facets of the disciplinary process. Facilities, of course, are authorized to discipline detainees who endanger the lives or health of other detainees and the facility. But the fact that detention facilities have so much power over detainees makes it all the more important to adhere to disciplinary rights.

The following are examples of violations of the right to due process before disciplinary action is taken:

¹²⁴ SMRTP art. 29, adopted Aug. 30, 1955, 24 U.N. ESCOR Supp. (No. 1) at 11.

¹²⁵ SMRTP art. 30, adopted Aug. 30, 1955, 24 U.N. ESCOR Supp. (No. 1) at 11.

¹²⁶ American Declaration on the Rights and Duties of Man art. 18, 25, 26, adopted Apr. 30, 1948, OAS Res. XXX.

¹²⁷ Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Disciplinary System, available at http://www.ice.gov/doclib/PBND/dfs/disciplinary_system.pdf.

¹²⁸ *Id.*

¹²⁹ Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Special management Units, available at http://www.ice.gov/doclib/PBND/dfs/special_management_units.pdf.

- Failure to publish punishable offenses and the nature and duration of punishments in a language the detainee understands.
- Failure to provide a hearing before any disciplinary action is taken.
- Failure to provide administrative and judicial review of the hearing.

C. The Right to Administrative Oversight of Detention Conditions

The right to administrative oversight of detention conditions is found in international law and the ICE standards. The right to regular visits to detention facilities by independent authorities is found in the Body of Principles, CAT, and SMRTP.¹³⁰ The ICE standard entitled Staff-Detainee Communication does not provide for visits by independent authorities, but it does provide for regular as well as unannounced visits by ICE personnel.¹³¹ The right to free and fully confidential communication with independent authorities is found in the Body of Principles and CAT.¹³² The ICE standard regarding correspondence provides that all correspondence between detainees and judicial officials or government offices be confidential.¹³³ Similarly, facilities must allow detainees to make free phone calls to government agencies.¹³⁴

It is essential that independent authorities be allowed access to detention facilities. Without administrative oversight of detention conditions, there is no way to hold facilities accountable for detention conditions and procedures. Access must also be provided on a regular basis. There should be no obstacles to unannounced visits so that detention facilities do not have time to correct conditions that would otherwise be unsatisfactory to independent authorities.

¹³⁰ See *Human Rights Sources and Standards in Appendix A*.

¹³¹ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Staff-Detainee Communication*, available at http://www.ice.gov/doclib/PBND/Staff-Detainee_Communication.pdf.

¹³² See *Human Rights Sources and Standards in Appendix A*.

¹³³ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Correspondence and Other Mail*, available at http://www.ice.gov/doclib/PBND/Correspondence_and_Other_Mail.pdf.

¹³⁴ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Telephone Access*, available at http://www.ice.gov/doclib/PBND/Telephone_Access.pdf. (However, there is no requirement that facilities provide the detainee with privacy).

The following are examples of violations of the right to administrative oversight of detention conditions:

- Prohibiting independent authorities to visit detention facilities.
- Interfering with independent authorities' access to detention facilities.
- Interfering with communication between detainees and independent authorities.
- Failure to provide detainees with a free way to contact independent authorities.
- Failure to provide detainees with a confidential way in which to contact independent authorities.

D. The Right to Health Care (including mental health care)

The right to health care is found in international law and the ICE standards and can be implied in the Constitution. The prohibition of cruel, inhuman, and degrading treatment found in Article 16 of CAT establishes this right.¹³⁵ The American Declaration on the Rights and Duties of Man generally provides “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”¹³⁶ More specific rights to healthcare also established in the CRC, UDHR, MWC, Body of Principles, ICERD, ICESCR, CEDAW, and SMRTP.¹³⁷

The Constitution does not explicitly confer a right to health care, but it does prohibit the infliction of cruel and unusual punishments.¹³⁸ If facilities were to deny a detainee healthcare as a form of punishment, this provision would be implicated.

The ICE standards require facilities to give detainees timely access to medical care with regard to medical, dental, and mental health care.¹³⁹ They must also have access to emergency health care and hospitalization if necessary.¹⁴⁰ This includes maintaining relationships with local medical

¹³⁵ CAT art. 16, entered into force June 26, 1987, 1465 U.N.T.S. 85.

¹³⁶ American Declaration on the Rights and Duties of Man art. 11, adopted Apr. 30, 1948, OAS Res. XXX.

¹³⁷ See Human Rights Sources and Standards in Appendix A.

¹³⁸ U.S. Const. amend. VIII.

¹³⁹ Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Medical Care, available at http://www.ice.gov/doclib/PBND/medical_care.pdf.

¹⁴⁰ *Id.*

facilities that can provide health care services that are not available within the facility.¹⁴¹ Detainees should be allowed to make daily health care requests and are entitled to timely follow-ups to those requests.¹⁴² The standard that deals with admission and release requires a medical screening upon a detainee's admission.¹⁴³ Detainees with terminal illnesses are required to be transferred to an off-site facility.¹⁴⁴ In the event of the death of a detainee in a detention facility, her family and consulate must be notified and facility officials must report the death to the ICE Reporting and Operations Center, the DIHS Medical Director, and the Office of Inspector General for DHS.¹⁴⁵

About one in four immigrant detainees has a chronic health condition.¹⁴⁶ Detainees in detention cannot provide for themselves when they are sick or injured. At the very least, they cannot drive to a pharmacy to buy a bottle of aspirin or bandages. The right to health care is all the more important for those detainees who have serious medical or mental health conditions. They must constantly rely on detention facility personnel to administer medical care and relay their medical concerns to medical care providers. Such reliance makes it absolutely necessary that all requests for medical care are dealt with in a timely manner and that medical care, including mental health care is provided free of charge and in a competent manner.

The following are examples of violations of the right to health care, including mental health care:

- Denial of health care while detained.
- Failure to conduct a prompt medical exam after taken into detention.
- Denial of a reasonable health care request.
- Failure to respond to a request for health care in a timely manner.

¹⁴¹ *Id.*

¹⁴² *Id.* (However, the standard goes on to say that unless it is an emergency, requests should be processed within 48 hours of receipt).

¹⁴³ Immigration and Customs Enforcement, *Operations Manual ICE Performance Based National Detention Standards, Admission and Release*, available at http://www.ice.gov/doclib/PBNS/pdf/admission_and_release.pdf.

¹⁴⁴ Immigration and Customs Enforcement, *Operations Manual ICE Performance Based National Detention Standards, Terminal Illness, Advance Directives, and Death*, available at http://www.ice.gov/doclib/PBNS/pdf/terminal_illness_advance_directives_and_death.pdf.

¹⁴⁵ *Id.*

¹⁴⁶ Dana Priest and Amy Goldstein, *System of Neglect*, *The Washington Post*, May 11, 2008, at A1.

- Failure to provide emergency health care.
- Failure to transfer a detainee’s medical records at the time of her transfer.
- Failure to promptly notify a detainee’s family in the event of her death.
- Failure to conduct an administrative inquiry into the cause of death.
- Detention of a detainee who is critically ill.
- Detention of a detainee who is mentally ill.
- Failure to record medical exam data.
- Failure to permit a detainee to access her medical record.
- Failure to provide adequate pre- and post- natal health care.
- Failure to provide access to necessary medications upon detention and during transfer.
- Detention of those who are pregnant.

E. The Right to Family Unity/Family Related Rights

The right to family unity and other family related rights are found in international law and the ICE standards. Generally, Article 16 of CAT, which prohibits inhuman or degrading treatment, applies.¹⁴⁷ The CRC recognizes the family as the natural and fundamental group and gives the right to family visits and communication with family.¹⁴⁸ The ICCPR, the American Declaration on the Rights and Duties of Man, UDHR, and the ICESCR all establish the family as the fundamental group.¹⁴⁹

The right to be released from detention if pregnant, a primary caregiver, or severely ill is found in ICESCR, CEDAW, MWC, UDHR, Body of Principles, and the American Declaration of the Rights and Duties of Man.¹⁵⁰

¹⁴⁷ CAT art. 16, entered into force June 26, 1987, 1465 U.N.T.S. 85.

¹⁴⁸ CRC preamble, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 1456.

¹⁴⁹ See Human Rights Sources and Standards in Appendix A.

¹⁵⁰ *Id.*

The right to protection of minors and special help in notifying their family and counsel of detention is found in ICESCR, ICCPR, CRC, MWC, UDHR, Body of Principles, and the American Declaration of the Rights and Duties of Man.¹⁵¹

The right of protection of refugee minors is found in the CRC and the American Declaration on the Rights and Duties of Man.¹⁵² The right to family visits and the opportunity to communicate with the outside world is found in ICESCR, SMRTP, CRC, MWC, Body of Principles, and the American Declaration of the Rights and Duties of Man.¹⁵³

By its very nature, immigration detention separates families. However, when possible, family unity must be protected and maintained. This includes releasing those who are especially vulnerable or whose presence is necessary in the home. It also includes making sure that those detainees who are held in detention are allowed to visit and communicate with their family as much as is reasonable. If a detainee is transferred away from her family it can be emotionally devastating to both her and her family.

The following are examples of violations of the right to family unity and other family related rights:

- Detention of those who are pregnant.
- Detention of those who are primary caregivers of children.
- Detention of those who are severely ill.
- Deprivation of state protection of the family as the natural and fundamental group.
- Failure to protect minors.
- Failure to provide special help to minor detainees in notifying family and counsel of detention.
- Failure to detain minors in the least restrictive setting possible.
- Failure to protect and assist refugee minors.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

- Failure to provide to minors basic educational, health, and social benefits.
- Arbitrary transfer of a detainee away from her family.
- Arbitrary interference with a detainee’s communication with her family.
- Arbitrary interference with family visits.
- Prohibition of physical contact during family visits.

F. Rights Pertaining to General Conditions of Detention

Rights pertaining to general conditions of detention are derived from international law, domestic law, and the ICE standards. The right to be held separate from those held on more severe, or criminal, charges is found in the ICCPR, MWC, SMRTP, the Body of Principles, the American Declaration of the Rights and Duties of Man and implied in Article 16 of CAT.¹⁵⁴ It is also found in the ICE standards which provide a formal classification system for managing and separating detainees based on whether they are criminal or non-criminal detainees and an appeals process for such classifications.¹⁵⁵

The right to be detained near family when possible is found in the Body of Principles and implied in provisions in the CRC and the American Declaration of the Rights and Duties of Man that protect the family.¹⁵⁶

The right to access to educational, cultural, and legal materials is found in ICERD, ICECSR, CRC, MWC, UDHR, SMRTP, the Body of Principles, and the American Declaration on the Rights and Duties of Man.¹⁵⁷ The ICE Standards provide for access to legal materials.¹⁵⁸

The right to healthy diet and drinking water is found in the SMRTP, UDHR, American Declaration of the Rights and Duties of Man, and ICE standards.¹⁵⁹ This right is also implied in the “adequate standard of living” provision in of ICESCR and CAT.¹⁶⁰

¹⁵⁴ *Id.*

¹⁵⁵ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Classification System, available at http://www.ice.gov/doclib/PBND/standard/pdf/classification_system.pdf.*

¹⁵⁶ *See Human Rights Sources and Standards in Appendix A.*

¹⁵⁷ *Id.*

¹⁵⁸ *Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, Law Libraries and Legal Materials, available at http://www.ice.gov/doclib/PBND/standard/pdf/law_libraries_and_legal_material.pdf.*

The right to sanitary conditions and facilities for remaining clean is implied in ICESCR, UDHR, and CAT and expressly provided for in SMRTP and the American Declaration of the Rights and Duties of Man.¹⁶¹

The right to deprivation of the opportunity to exercise for at least one hour each day is found in SMRTP, ICE standards, and the American Declaration on the Rights and Duties of Man.¹⁶² It is also implied in Article 16 of CAT.¹⁶³ Similarly, the right to be free from overcrowding is found in Article 16 of CAT.¹⁶⁴

Rights pertaining to general conditions of detention are also found in the constitution. The constitution's equal protection clause in the Fourteenth Amendment protects immigrants in detention by requiring that the facilities do not discriminate against detainees.¹⁶⁵

The only federal regulations that provide rights for detainees in detention provide for 24-hour supervision, conformance with safety and emergency codes, food service, and the availability of medical care.¹⁶⁶

The rights pertaining to general conditions of detention are important because of the implications they have for the quality of life for a detainee. At a minimum, detainees must be provided with an adequate standard of living and not subjected to unsanitary living quarters.

The following are examples of violations of general rights pertaining to detention:

- Failure to hold a detainee separate from those held on more severe charges.
- Failure to hold a detainee separate from criminal detainees.
- Arbitrary transfer away from family.
- Failure to provide educational, cultural, and legal materials.

¹⁵⁹ See *Human Rights Sources and Standards in Appendix A*.

¹⁶⁰ *International Covenant on Economic, Social, and Cultural Rights art. 11, entered into force Jan. 3, 1976, 993 U.N.T.S. 3*

¹⁶¹ See *Human Rights Sources and Standards in Appendix A*.

¹⁶² *Id.*

¹⁶³ *CAT art. 16, entered into force June 26, 1987, 1465 U.N.T.S. 85.*

¹⁶⁴ *Id.*

¹⁶⁵ *U.S. Const. amend XIV.*

¹⁶⁶ *8 CFR 235.3(e) (2009). Even this regulation is extremely sparse and does not give any more details than what is stated above.*

- Deprivation of a healthy diet and drinking water at all times.
- Failure to maintain sanitary conditions and supplying facilities for remaining clean.
- Deprivation of the opportunity to exercise for at least one hour each day.
- Overcrowding.

Part III: Maria's Story

In April 2006, Maria, an immigrant from Honduras, was in an abusive marriage to a U.S. citizen who refused to file her paperwork so that she could get legal status in the United States. With her two boys, aged six and three at that time, she left her abusive husband to live with a friend, even at the risk of her husband calling immigration, which he said he would if she ever left him. A few months later, in the middle of the night, ICE agents entered the apartment where Maria and her children were living at the time and took her into custody. Thus began over three months of hell for Maria, during which time she was taken away from her children and detained in five different jails across the southeastern United States.

1. Raleigh, North Carolina

Maria was immediately taken to jail in Raleigh, where she spent the next twelve days. She was locked up in a small transitional cell with other recent detainees for three days, and then placed in a large holding area where the detainees were held for longer periods of time. Although she was in jail for a civil violation of immigration laws, Maria was placed in the same living area as detainees charged with violent crimes. The area was badly overcrowded and Maria had to sleep on a mattress on the floor, in the same place where detainees ate and congregated during the day. There were no individual cells for the detainees – rather they all slept in one giant common area. The food at the jail was not nutritious and barely edible. Even so, prisoners stole food from one another. There was always fights breaking out between detainees and Maria was in constant fear of being physically assaulted. At night it was very cold in the prison and Maria had only thin sheets to stay warm. During the day, the detainees were never allowed to leave the building to exercise. Maria considered complaining about the conditions but she did not know how to – she was never informed of how to file a grievance. “The guards treated us like animals,” was Maria’s constant refrain. After twelve days in these horrendous

conditions, Maria was transferred to Johnston County Jail. She was not notified of the transfer before it occurred, nor was her attorney

2. Johnston County, North Carolina

Maria was not in Johnston County Jail for very long – only five days. There, the food was decent and she shared a cell with another detainee. Like Raleigh, Maria was mixed in with detainees who were charged with violent crimes. She slept on a mattress on the floor of her cell. By now she was very worried about the how her children were holding up. Their father was taking care of them and Maria was worried that she would be deported and never see her kids again. To shield them from reality, Maria told her boys on the phone that she was off working and was earning enough money to buy them a house or get them a dog. Her sons replied that they did not want those things; they just wanted her to come home. Maria often cried when thinking about her boys because she missed them and was scared that their father would never let her see her kids again if she was deported. In fact, he told her while she was in jail that she would never see her kids again. At this point, after three weeks of detention, Maria did her best to remain positive, but it was not easy. Then, without notifying her she would be transferred once again, this time far away from her children, jail personnel shackled her hands and her feet and put her on a bus to Charlotte.

3. Charlotte, North Carolina

Maria was detained in Charlotte for a month and a half. There, the conditions were similar to those in Raleigh. It was wintertime and the jail was very cold. Maria was detained in a small cell with a cellmate and she had to sleep on a mattress on the floor. She was provided with thin sheets that didn't cover her whole body. As a result of these conditions, Maria developed a nasty cold that would plague her until her eventual release months later. She felt terribly sick and asked for a warmer blanket but the guards denied her request. The guards did not allow the detainees outside for recreation and Maria suffered from a lack of fresh air. She was forced to spend all day in the stagnant air that was full of the germs of other detainees. During the day, although it remained cold in the jail

the guards did not allow the detainees to use their sleeping sheet for warmth; they were only allowed to use a towel to stay warm.

Compounding Maria's poor health was the quality of the food. Most meals the detainees were only given bread, a slice of baloney, condiments, and a bag of chips. Lacking proper nutrients and suffering from the constant chill of the prison, Maria experienced flu-like symptoms throughout her body. However, there was no opportunity to complain to the prison administration about these conditions because the grievance procedure was not explained to the detainees. It was also difficult for Maria to tell her attorney about the conditions because she had been transferred hundreds of miles away from the attorney when she was sent to Charlotte. Lastly, making a phone call was difficult as well because the detainees were given only one hour to make phone calls. Thus, for one hour each day forty detainees would vie for the three available telephones to make calls. Maria saw a nurse about her health condition but this was not helpful because all the nurse did was to give her aspirin for the symptoms.

Like in the previous jails, Maria was mixed in with persons charged with violent crimes. Fights were frequently occurring and Maria did not feel safe in the jail.

4. Alabama

Maria was transferred, without notice, to Alabama after Charlotte and she spent three weeks there. The jail in Alabama consisted of large holding rooms; the detainees did not have separate rooms, as it was in Raleigh. There were one hundred beds in each room and the detainee population was all immigrants, although some of the immigrant detainees had served sentences for violent crimes. While in Alabama, Maria witnessed a woman who was very sick pass out. Although Maria told the guards about the woman, the guards ignored her and the woman remained passed out on the floor for some time. Finally, the guards came to take the woman away. As they were taking her to the hospital, they put the unconscious woman in shackles that were so tight, they cut her hands and legs.

While in Alabama, the guards tried to convince Maria to sign away her rights to pursue her immigration case and take voluntary departure back to Honduras. She refused to do so. At that time, Maria suffered from excruciating pain in her mouth. She went to the nurse about the pain and she was forced to buy pain medicine because the nurse would not give her any free of charge. Then, when Maria returned to the nurse because the pain persisted, without getting Maria's consent, the prison got a dentist to remove a molar from Maria's mouth that was causing the pain. Maria did not want them to take the tooth.

5. Georgia

Maria's last stop was in a prison in Georgia, where she was transferred after Alabama, again without notice, and remained for one month before she was ultimately released and could return to her family. In Georgia, like in the four other detention centers, the food was bad, the prison was overcrowded, violent criminals were mixed in with civil detainees, and no outside recreation was allowed. Because of the filthy conditions of the shower and bathroom in Georgia, Maria developed fungus on her feet from bathing. She showed the health staff her condition but they did not give her anything to treat the fungus.

Maria was released from the jail in Georgia after she won her immigration case. She was released a week after the case was decided and no one, not even her lawyer, was notified when exactly Maria was going to be released. The prison put her out on the street without allowing her to make a phone call and set up a ride with anyone.

Part IV. Enforcement

Previous reports on the conditions of immigrant detention in the United States have done an exemplary job of (1) identifying applicable international and domestic legal standards regarding immigration detention, (2) describing violations of these rights in local detention facilities, and (3) recommending reforms to the detention system that will remedy such violations.¹⁶⁷ This report contributes to these efforts and expands the analysis by identifying practical steps that U.S. lawyers and non-governmental organizations (NGOs) can pursue to enforce the international and domestic human rights of immigrant detainees. The enforcement methods that lawyers and activists have at their disposal include: petitioning the Inter-American Commission on Human Rights (IACHR), drafting Shadow Reports, litigating in U.S. courts, and advocating for policy and regulatory reforms.

A. IACHR¹⁶⁸

In light of the significant limitations that affect efforts to raise international human rights claims in U.S. courts¹⁶⁹, advocates are looking to the Inter-American Commission on Human Rights (IACHR) to hold the U.S. government accountable for violations of immigrant detainees' human rights.¹⁷⁰ The IACHR is an autonomous organ of the Organization of American States (OAS) and is based in Washington, D.C. It was created in 1959 to “promote the observance and defense of human rights” in OAS member states.¹⁷¹ To this end, the IACHR acts as an arbiter and adjudicator of petitions that allege discrete human rights violations against individuals or groups, and as a forum to consider and investigate generalized grievances or issues that are not appropriate or ripe for adjudication.¹⁷²

¹⁶⁷ *Seattle Report, MA ACLU Report, NJ ACLU Report, Unseen Prisoners Report, Locking Up Family Values Report.*

¹⁶⁸ *See Appendix B for sources that describe how to use the IACHR and model petitions*

¹⁶⁹ *As mentioned earlier in this report, the United States has refused to ratify most international human rights treaties and has attempted to water down the few treaties it has ratified by attaching broad reservations, understandings, and declarations (RUDs).*

¹⁷⁰ *Caroline Bettinger-López, The Inter-American Human Rights System: A Primer, Human Rights Institute, 42 Clearinghouse Rev. 581 (2009).*

¹⁷¹ *Statute of the Inter-Am. C.H.R., O.A.S. Res. 447 (IX-0/79), art. 1(1), 9th Sess., O.A.S. Official Rec.,*

OEA/Ser.P/IX.0.2/80, vol. 1 at 88 (1979); OAS Charter, Art. 106.

¹⁷² *Bettinger-Lopez, supra note 170 at 584.*

1. Overview of Petitions and Generalized Grievances

The IACHR is an international forum in which petitioners can bring human rights complaints against the United States and have those complaints adjudicated by a decision-making body.¹⁷³ Any individual or group may petition the Commission for relief, claiming that a state or its agents are responsible for human rights violations.¹⁷⁴ The Commission considers human rights petitions against OAS member states in light of relevant human rights instruments, which include the OAS Charter, the American Declaration on the Rights and Duties of Man (Declaration), and the American Convention on Human Rights. Because the United States has not ratified the American Convention on Human Rights, only the OAS Charter and the Declaration bind it.¹⁷⁵

Petitions to the Commission can be submitted directly by aggrieved individuals and groups, or on behalf of a third party, with or without the victim's knowledge or authorization.¹⁷⁶ However, before appealing to the Inter-American Commission for relief in a particular case, Petitioners must exhaust domestic legal remedies or show why certain legal avenues, while technically available, would have been futile.¹⁷⁷

There are two phases in a petitioner's case before the IACHR: the admissibility phase and the merits phase.¹⁷⁸ During the admissibility phase, the Commission decides whether the petitioner has met the procedural requirements of bringing a petition and whether the Commission has jurisdiction to examine the human rights claim. If the Commission determines it has jurisdiction, it registers the petition, assigns it a number, and then transmits it to the state in question.¹⁷⁹ The state then has two months to respond. The merits phase commences next, during which the Commission considers

¹⁷³ The United States has not ratified the Optional Protocols to the three U.N. human rights treaties to which it is a party and thus is not subject to the individual petition process established pursuant to each treaty.

¹⁷⁴ IACHR R. Proc. art. 23.

¹⁷⁵ The OAS Charter is the constitutional text of the organization and it sets forth basic human rights principles. The Declaration focuses on more specific rights and the United States, as a signatory to the Charter, is legally bound by the Declaration's provisions.

¹⁷⁶ Bettinger-Lopez, *supra* note 170 at 586.

¹⁷⁷ *Id.* Petitions must be submitted within six months of notification of a final judgment, or, under certain circumstances, within a reasonable time thereafter.

¹⁷⁸ IACHR R. Proc. arts. 26-43.

¹⁷⁹ Bettinger-Lopez, *supra* note 170 at 586.

evidence presented before it and may hold hearings or even conduct investigatory field visits.¹⁸⁰

Throughout the merits phase, the Commission will encourage friendly settlement between the parties.¹⁸¹ When settlement is not possible and when the Commission determines there is a violation, it will send the State a preliminary report with the proposals and recommendations it deems pertinent.¹⁸² States have three months to comply with the recommendations.¹⁸³

Usually, the Commission will publish a merits report on state culpability if it deems the state responsible for a human rights violation.¹⁸⁴ The Commission will also publicly issue the recommendations for the state to prevent future repetition of the harm.¹⁸⁵ Then, each year, the Commission will supervise state compliance with its recommendations and publish statistics on compliance in its Annual Report.¹⁸⁶

In addition to considering individual petitions, the Commission presides over general (or thematic) hearings that allow it to consider and investigate generalized grievances that would not necessarily be cognizable through the individual petition process, due to jurisdictional or substantive limitations.¹⁸⁷ An example of a generalized grievance is collective petitions indicating numerous victims of a specific incident or practice that sets forth generalized harms.¹⁸⁸ At a general hearing, NGOs may present information on the particular human rights issue to the Commission. The state at issue may or may not be present, but if it is then it has the opportunity to rebut the NGO information.

¹⁸⁰ *Id.* Petitioners have the opportunity to develop the factual record, clarify legal arguments, offer victim statements and/or expert testimony, and have face-to-face time with the Commission at case-based hearings and working meetings, which are held during the Commission's semi-annual sessions, usually in Washington, D.C. Hearing and meeting requests must be submitted to the Secretariat at least 50 days in advance of a hearing session. *Id.* at 587.

¹⁸¹ *Id.* at 587.

¹⁸² *Id.* The Commission's suggested remedies may include the payment of damages, a public apology, an investigation into the source of a violation, and changes in law, action, or policy.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 589.

¹⁸⁸ *Id.* at 586.

In addition to holding general hearings, the Commission also publishes thematic or country-specific human rights reports and conducts on-site visits to regions with problematic human rights situations.¹⁸⁹

2. Using the IACHR to Enforce the Rights of Immigrant Detainees

In light of the numerous and well-documented human rights violations inflicted upon immigrant detainees in the United States, lawyers and activists can turn to the IACHR to seek redress for clients under the Declaration. Claims under the Declaration could invoke the rights to life, liberty, family life, special protections for women and children, health and well-being, due process, fair trial, humane treatment while in the custody of the state, and freedom from cruel or unusual punishment. The following reviews common and egregious detention violations and demonstrates how legal principles of interest to the IACHR might apply:

a. Arbitrary Transfers

The use of arbitrary transfers of immigrant detainees violates several of the human rights standards codified in the Declaration. Arbitrary transfers interfere with detainees' access to legal counsel and ability to receive visits from family, impinging on articles XVIII (right to a fair trial¹⁹⁰) and VI (right to a family and protection thereof) of the Declaration. Transfers that are in response to a detainee filing a grievance, demanding better health care, or pursuing relief from removal with an attorney violate articles I (right to life and liberty), XI (right to the preservation of health and well-being), XVIII (right to a fair trial), XXIV (right of petition), XXV (right of protection from arbitrary arrest), and XXVI (right of due process of law).¹⁹¹

¹⁸⁹ *Id.* at 586, 590. Specific Commissioners serve as a Country and/or Thematic Rapporteur and current Rapporteurships include migrant workers and families and persons deprived of liberty. Advocates can request that the Thematic Rapporteur conduct a visit to investigate allegations of human rights abuses.

¹⁹⁰ The entire article reads, "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

¹⁹¹ See Human Rights Sources and standards in Appendix A.

*b. Inhumane Conditions*¹⁹²

The Declaration may be invoked to protect immigrants from inhumane conditions of detention, which include overcrowding, an unhealthy diet, poor sanitation in living and eating areas, inadequate time and space for recreation, inadequate facilities for improving poor sanitation, and related conditions that expose detainees to an unsafe and unhealthy living situation. For example, article XI of the Declaration provides that “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care.” Article XV ensures that every person has the right to “recreation” and the opportunity to use his free time “to his spiritual, cultural, and physical benefit.”

c. Violation of Family Rights

While immigration detention rips families apart by its very nature, families still retain legal rights under the Declaration. Article VI holds that every person has the right to establish a family and receive protection for that family. Advocates should argue that this article protects the right to communicate with family in detention and have that communication be confidential. It protects the right to visit detained family members often and have physical contact with them while visiting. Under Article V, the state may not abusively attack a person’s family life – here, it can be argued that transferring a detainee hundreds or thousands of miles away from their family is an abusive attack. Finally, Article VII provides that pregnant women and all children have the right to special protection, care, and aid.

This is but a small sampling of the legal claims relevant to a petition to the IACHR regarding human rights abuses of immigrant detainees in the United States. By using the IACHR to hold the United States accountable for its treatment of immigrants in detention, lawyers and NGOs are creating international human rights norms that can be persuasive authority for domestic litigation and

¹⁹² See following complaints: *Caranza-Reyes, Kiniti, Appendix B.*

legislative advocacy.¹⁹³ The actions of the Commission carry significant moral and political weight that can be used to influence federal, state, and local policymakers to enact policies and/or regulations that ensure immigration detention standards are not in violation of international law.¹⁹⁴ Additionally, bringing the issue of immigrant detention to the IACHR is a way to publicize a human rights issue and create a forum whereby new coalitions can be built and the movement for immigrant detainee rights can be further energized.

*B. Shadow Reporting*¹⁹⁵

Human rights treaties require ratifying countries (State Parties) to submit formal, written reports to the bodies that monitor implementation of the treaty obligations.¹⁹⁶ These reports are intended to detail the steps that State Parties have taken, and plan to take, to implement and safeguard the rights contained in the treaties.¹⁹⁷ Unfortunately, State Parties are not always forthcoming about possible or alleged violations of treaty obligations.¹⁹⁸ The drafting of “shadow reports” by NGOs thus evolved to counteract such shortcomings in State Party reports. Accordingly, shadow reports can be an effective means of holding the United States accountable to international human rights law commitments that protect immigrant detainees.

1. Overview of Shadow Reporting Process

The term “shadow report” refers to reports created by NGOs that supplement the report created by the government by providing the treaty monitoring bodies with accurate and appropriate information documenting a government’s human rights record from a civil society perspective.¹⁹⁹ Simply put, shadow reports offer an alternative viewpoint on whether a State Party is in compliance with a treaty’s human rights protections.

¹⁹³ *Bettinger-Lopez, supra note 170 at 592.*

¹⁹⁴ *Id.* at 587. *The amount of resources and energy the U.S. State Department dedicates to opposing petitions in the IACHR evinces the truth of this claim. Also note that although the offending actor might be a state or municipality that arbitrarily transfers immigrant detainees to another facility, the United States must ultimately answer to the Commission as to why its subnational entity are not complying with the Declaration.*

¹⁹⁵ *See Appendix B for sources that describe the shadow reporting process and model shadow reports.*

¹⁹⁶ *NGO Shadow Reports Under the U.N. Convention on the Elimination of All Forms of Racial Discrimination, Global Rights, pg. 1, September 2005.*

¹⁹⁷ *Id.* *If a State Party has not signed the Optional Protocols to the treaties that subject it to the individual petition process, then the reporting process is the most formal enforcement mechanism available under the treaty to judge the State Party’s compliance with the treaty provisions.*

¹⁹⁸ *NGO Shadow Reports, supra note 196 at 1.*

¹⁹⁹ *Id.*

Shadow reports play a critical role in monitoring the implementation of human rights treaties and ensuring the full protection of all peoples' rights under those treaties.²⁰⁰ An underlying purpose of preparing a shadow report is to build political pressure through publicity and education and to strengthen coalition-building efforts around a human rights issue.²⁰¹ Additionally, the shadow report process provides an opportunity to compile detailed documentation of human rights violations that can be used in litigation in U.S. courts.²⁰²

Preparing a shadow report is not an easy process – it requires an in-depth monitoring and investigation of a state's compliance with its treaty obligations, collaboration and coordination with diverse groups of allies, and a time-consuming drafting phase. There is much to be gained from the work though. First, the process offers an opportunity for advocates to become familiar with treaties that the United States has ratified and use that knowledge in other advocacy work, especially in the domestic legal setting as international human rights norms increasingly gain acceptance in U.S. courts.²⁰³ Second, the process brings advocates together to confer and identify common issues across regions, both geographical and issue-oriented. Collaboration of this sort can enable interested parties to clarify priorities for the enforcement of specific human rights moving forward. Third, the drafting of a shadow report forces advocates to offer concrete and time-specific recommendations for how a state can remedy violations of human rights – these recommendations can serve as policy recommendations for domestic legislative advocacy work.²⁰⁴

Once the drafting commences, the first step is to describe the human rights situation.²⁰⁵ Statistical data and case studies help the treating monitoring body assess the human rights situation on the ground, but is also important present an emotionally compelling narrative to place such data and

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

studies in a broader framework.²⁰⁶ Additionally, the presented information must be accessible, objective, and as comprehensive as possible. The second step is to link the human rights issue to specific treaty articles.²⁰⁷ Here, the report would emphasize the relevant provision of the treaty and describe the rights being violated as a consequence of government action or inaction. The third step in the process is to identify the state's laws and regulations that apply to the human rights situation described in the report and the state's implementation record of those domestic protections.²⁰⁸ The fourth step is to identify obstacles to achieving full implementation of the treaty provisions.²⁰⁹ These obstacles should include both private and public factors. Finally, the fifth step in drafting a shadow report is to identify concrete steps linked to a timeline that should be taken by the state to address the obstacles and shortcomings that have led to noncompliance with the treaty provisions.²¹⁰ This should include not only legislative action, but also education and public awareness campaigns, funding of programs, and other creative affirmative steps.²¹¹ It is also recommended to identify key indicators for the state accountable and explain how the treaty bodies should measure the state's progress over time.²¹²

Timing is important in the shadow reporting process – advocates should submit the shadow report after the State Party has submitted its report but before the treaty body holds an official hearing on the report. The shadow report should include analysis of the State Party's report and sample questions that the treaty body might ask during the hearing. The treaty body will hold a formal hearing reviewing the State Party report where it will ask questions to State Party representatives and make comments on the sufficiency of the steps the State Party has taken to implement the treaty.²¹³ At the end of the process, the treaty body will make recommendations regarding the areas of treaty

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

compliance that the State Party should focus on and how to make improvements. A summary of the hearing between the treaty body and the State Party is published by the U.N.²¹⁴

2. Using Shadow Reports to Hold the United States Accountable for Immigration Detention Practices

The treaties that the United States has ratified contain many provisions that specifically address human rights protections that are being violated at immigrant detention facilities in the United States. The following identifies three areas of concern regarding the rights of immigrant detainees and links these areas to specific treaty provisions for purposes of shadow report writing.

a. Right to Human Dignity

A detention facility that treats detainees in an inhumane manner, which includes both physical and mental abuse, violates the following: article 16 of CAT, which states “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture;” article 5 of ICERD, which states “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of ...[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;” article 7 of ICCPR, which states “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;” and, article 10 of ICCPR, which states “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

²¹⁴ *Id.*

b. Right to freedom of thought, expression, conscience, and religion

Immigrant detainees have a right to freedom of thought, expression, conscience, and religion. Article 18 of ICCPR explicitly states that, “[e]veryone shall have the right to freedom of thought, conscience and religion” and “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” Furthermore, under article 19 of ICCPR, “[e]veryone shall have the right to ... seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Similarly, article 5 of ICERD protects the right of freedom of thought, conscience, and religion.

c. Right to Interpreter

When English is not spoken or understood by an immigrant detainee, she has the right to be provided with an interpreter at no expense for all proceedings. This right is not explicitly established in the treaties the United States is a party to, but it is a right whose realization is a necessary condition for the enumerated rights found in the treaties. For example, article 9 of ICCPR states that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” This right would be useless if the arrestee was not informed in a language he/she understood. Under article 14 of ICCPR, “[a]ll persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal.” This same right to equal treatment before judicial organs is found under article 5 of ICERD. The argument to be made here is that there cannot be equal treatment under the law, nor can a hearing be “fair,” when the accused does not understand the language of the judicial proceedings.

C. Litigation in U.S. Courts²¹⁵

While international and regional human rights instruments provide novel ways to hold the United States accountable for violating the rights of immigrant detainees, litigation in U.S. courts, when successful, is a more effective legal mechanism for enforcing detainee rights.

1. Overview of Types of Claims That Can Be Brought Pursuant to Violations of Immigrant Detainee Rights

Attorneys in the United States have many legal means to enforce the rights of immigrants in detention, including bringing claims against federal authorities under the U.S. Constitution (Constitution) and the Federal Tort Claims Act (FTCA) and claims against state authorities under 42 U.S.C. § 1983 as well as state statutory and common law. Claims can also be brought pursuant to legally binding settlement agreements or private contracts. Depending on the claim, enforcement of rights can take the form of damages, injunctive relief, or a declaratory judgment.

a. Claims Against Federal Authorities

An aggrieved individual can seek a declaratory judgment and injunctive relief against the federal government for violations of any of her rights protected in the Constitution. While a declaratory judgment merely states the opinion of the court regarding the matter before it without requiring that either of the parties do anything, an injunction is an order of the court requiring a cessation of the unconstitutional behavior.

When seeking injunctive and declaratory relief under the Constitution, immigrant detainees are protected by the Fifth Amendment and the Fourteenth Amendment, which prohibit any person acting under color of federal law or state law from subjecting any person in the custody of the United States to punitive conditions of confinement without due process of law. Under this constitutional framework, immigration detainees (civil detainees), like pre-trial criminal detainees, are protected from conditions that amount to punishment.²¹⁶ More recently, the U.S. Court of Appeals for the Ninth

²¹⁵ See Appendix B for model complaints

²¹⁶ See *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

Circuit has held that conditions of confinement for civil detainees must be *superior* to those of pre-trial detainees, who, though not adjudged guilty of a crime, are held pursuant to criminal processes.²¹⁷ If a civil detainee is confined in conditions that are identical to, similar to, or more restrictive than those under which pre-trial detainees or convicted prisoners are held, then those conditions are presumptively punitive and unconstitutional.²¹⁸

Plaintiffs can also seek damages remedies for constitutional violations committed by federal agents under so-called *Bivens* actions.²¹⁹ *Bivens* was the first case that recognized a cause of action for monetary damages for a violation of the Constitution. However, when lawsuits are brought against federal officials in *Bivens* actions, they must be brought against them in their "individual" capacity, rather than their official capacity. The theory is that when federal officials perpetrate constitutional torts, they do so *ultra vires* and lose the shield of sovereign immunity that protects the federal government from claims for damages.

Finally, the FTCA permits plaintiffs to sue the federal government when its employees are negligent within the scope of their employment. The FTCA constitutes a limited waiver of the federal government's sovereign immunity. Liability under the FTCA is limited to "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."²²⁰ Thus, a federal district court must apply the law that state courts would apply in the analogous tort action. Accordingly, a plaintiff may bring an FTCA claim against the United States based on conduct that violates the Constitution only if such conduct also violates the tort law in the state where the violation occurred.

Also of note, since many immigrant detention centers are run by private companies, under the FTCA the United States is subject to liability for the negligence of an independent contractor only if it

²¹⁷ *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), cert. denied, 126 S.Ct. 351 (2005). However, the 5th circuit, along with other circuits, has held that immigration detainees should receive the same level of due process protection as pre-trial criminal detainees. A few courts have held that "an excludable alien is only entitled to be free from gross physical abuse" in detention.

²¹⁸ *Jones v. Blanas*, 393 F.3d at 934.

²¹⁹ *Bivens v. 6 Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

²²⁰ 28 U.S.C. § 1346(b).

can be shown that the government had authority to control the detailed physical performance of the contractor and exercised substantial supervision over its day-to-day activities.²²¹

b. Claims Against State Authorities

28 U.S.C. § 1983 (Section 1983) authorizes private parties to enforce their constitutional rights, and some federal statutory rights, against state and local government officials acting under color of state law.²²² Claimants may name as defendants state and municipal officials, municipal entities, and private parties, who act under color of state law.²²³

The three most recurring issues in Section 1983 cases are (1) whether a plaintiff has established the violation of a federal constitutional right; (2) whether qualified immunity protects an official from personal monetary liability; and (3) whether a plaintiff has established municipal liability through enforcement of a municipal policy, a municipal practice, or a decision of a municipal policy maker.²²⁴

Lastly, state statutory and common law provide grounds for holding state authorities accountable for violating immigrant detainees' rights. Depending on the state, there may be claims based on certain common law torts and wrongful death and medical negligence statutes.

c. Claims Pursuant to Settlements

When the parties to a dispute reach a settlement before trial, legal requirements are created that can be enforced if breached. For example, the 1997 *Flores v. Reno* settlement was reached after plaintiffs brought a class action lawsuit against the United States challenging the immigration service's practice of housing immigrant children in juvenile justice centers. The settlement agreement stipulated that detained children would be placed in the "least restrictive environment," such as a facility or home

²²¹ See *U.S. v. Orleans*, 425 U.S. 807, 814-15 (1976).

²²² 42 U.S.C. § 1983 reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

²²³ Section 1983 Litigation, 2nd ed., Martin Schwartz and Kathryn Urbonya, Federal Judicial Center Publication, pg. 4 (2008).

²²⁴ *Id.*

licensed for the care of dependent, non-delinquent minors. The settlement also guarantees basic educational, health, and social benefits and rights to minors in custody.

The *Flores v. Reno* settlement agreement was recently enforced when in April and May of 2007, ten immigrant children, ages 3 to 16, filed lawsuits challenging their detention at the T. Don Hutto detention facility in Taylor, Texas. The lawsuits charged that ICE's operation of the Hutto facility violated the settlement terms of *Flores v. Meese*. This litigation led to further settlement wherein ICE agreed to abide by the *Flores v. Meese* settlement and improve conditions for the plaintiffs and their families. These settlement agreements create enforceable rights for all detainees that fall within the class of persons whose rights were vindicated by the settlement, which may include future detainees who were not even in detention when the litigation that led to the settlement was commenced.

2. U.S. Litigation Challenging the Conditions of Immigrant Detention

This section reviews common and egregious detention violations and demonstrates how practitioners might bring claims against federal and state authorities to enforce the legal rights of immigrant detainees:

a. Inadequate Provision of Medical Care

In numerous instances, immigrants in detention have been denied adequate medical care, leading to illness, unnecessary suffering, grave bodily harm, and even death. Plaintiffs denied adequate medical care while in federal and/or state custody may seek compensatory damages under applicable state law, the FTCA, Section 1983, and *Bivens* claims. Applicable state law might include negligence torts, wrongful death statutes, and medical negligence statutes. Suing under these laws has the aim of holding state authorities liable for compensatory damages for denying adequate medical care to detainees. A plaintiff can get compensatory damages from federal authorities for violations of the same state laws through the FTCA. Section 1983 and *Bivens* claims enable plaintiffs to seek compensatory damages from state and/or federal officials, respectively, for violations of the

Constitution. Here, the argument would be that the Fifth, Eighth, and Fourteenth amendments of the Constitution were violated when state and/or federal officials acted with deliberate indifference to the reasonable medical care needs of the detainee. In addition to seeking compensatory damages under the Constitution, immigrant detainees may, as a class, file a class-action lawsuit for declaratory and injunctive relief.

b. Right to Counsel

Although immigrants in detention are not guaranteed access to free counsel under the Constitution's Sixth amendment because immigration is a civil, not criminal, proceeding, they cannot be denied counsel if they can afford to pay for it under the due process clause of the Fifth and Fourteenth Amendment. The following protections are included in the right to counsel: the right to be notified of a right to counsel and assistance in finding counsel; the right to confidential communication with counsel; the right to adequate time and facilities to meet with counsel; and, the right to not be arbitrarily transferred far away from counsel. If any of these rights are violated, claims for injunctive relief or damages can be pursued under the due process clause of the Fifth and Fourteenth Amendment.

c. Right to Freedom from Overcrowding

Immigrant detainees are threatened with chronic and dangerous overcrowding in the facilities in which they are housed for many reasons. Notably, the increase in immigration enforcement activities across the country has led to more immigrants being placed in detention. Furthermore, the potential money a private or state-run prison can earn for each immigrant it detains may provide an incentive to house as many inmates as possible. Overcrowding often leads to numerous unsafe and intolerable conditions in a facility. Such conditions deny basic human needs, inflict unnecessary pain and suffering, and constitute punitive conditions of confinement in violation of the due process clause of the Fifth and Fourteenth Amendment to the U.S. Constitution.

Recently, attorneys pursuing litigation regarding overcrowding in immigration detention facilities have argued that federal government and/or state government, policies, practices, acts, and

omissions in relation to prison overcrowding are not justified by a legitimate governmental purpose and constitute de facto punishment without due process of law. Conditions such as these are unlawful under the due process clause of the Fifth and Fourteenth Amendment. Furthermore, claims can be brought under state tort law and the FTCA if it can be shown that the dangerous conditions created by overcrowding were foreseeable causes of detainee injuries. As in similar cases mentioned above, all options should be pursued, including Section 1983 and *Bivens* claims if damages are sought.

*D. Policy and Regulatory Reform*²²⁵

The most effective way to enforce immigrant detainee rights found in international human rights instruments, the U.S. Constitution, and state common law is to codify those rights in federal and state legislation. The following are policy recommendations regarding immigration detention:

1. Codify ICE's Performance Based National Detention Standards or enact similar legislation

Making ICE's own Performance Based National Detention Standards (PBNDS) binding through legislation would be a significant step in the right direction for the protection of immigrant detainee rights. The PBNDS, if followed, provide necessary safeguards for immigrant detainee rights, ensuring that detainees are treated in a humane and dignified manner. However, the PBNDS do not go far enough.

Legislation that has been recently introduced in 2008 and 2009, if passed, would shore up some of the holes in the PBNDS, many of which hinge on the issues of detainee transfers to other detention facilities. For example, The Detainee Basic Medical Care Act of 2008, introduced in the House by Representative Lofgren (D-CA) and in the Senate by Senator Menendez (D-NJ), would improve on the PBNDS regarding provision of health care by ensuring a continuity of care for persons with serious health conditions who are transferred to another facility while detained. Another example, The Immigration Oversight and Fairness Act of 2008, introduced in the House by Representative Roybal-

²²⁵ See Appendix B for examples of legislation already introduced in Congress regarding immigration detention conditions.

Allard (D-CA), would require DHS to give detainees 72 hours notice before any transfer occurs. Also, the legislation makes it unlawful to transfer any detainee who has an existing attorney-client relationship if such transfer would impair the existing attorney client relationship or prejudice the rights of the detainee in any legal proceeding unless the transfer is necessitated by a highly unusual emergency (such as a natural disaster).

2. Comprehensive Immigration Reform

Equally as important as creating standards for the treatment of immigrant detainees is the passage of Comprehensive Immigration Reform that would diminish the need for detention in the first place. Comprehensive reform would include the following:

- A path to citizenship for undocumented persons currently residing in the United States.
- A cessation of home and worksite raids and the use of 287g programs to detain persons without a criminal record.
- An increase in number of work and family-based visas available to match current employment needs in the United States
- Statutory amendments regarding what persons are placed in mandatory detention and eligible for bail
- Requirement of secure alternatives to detention, such as electronic ankle monitoring, for detainees without a violent criminal history.

Conclusion

Conditions in immigration detention have deteriorated as the numbers of people being held by ICE has ballooned from 95,000 people in detention in 2001 to more than 300,000 last year, and the numbers continue to rise as ICE's detention budget grows. More than 90 people have died in immigration detention since 2003, some from treatable diseases and conditions that were not tended to. People are transferred to far away detention centers without notice to their families or their lawyers, and often are placed in facilities that do not have working phones. Such violations of detainee rights are happening on North Carolina soil. Although the Department of Homeland Security has issued Performance Based Detention Standards meant to address these issues, the standards are not enforceable. However, through the legal avenues discussed in this report, attorneys and advocates do have legal recourse for violations of immigrant detainee rights, and should utilize these tools to advance immigrants' rights.

Appendix A: Human Rights Sources & Standards

Human Rights Standard	U.S Constitution	ICE Standards	ICCPR	CAT	ICERD	Am. Dec. Rts.
The Broad Protections of Human Dignity						
Right to Humane Treatment	14th Am.		Preamble, 10(1)	Preamble	Preamble	Art. 25
Freedom from Restrictions/Derogations of Human Rights			Art. 4, 5(2)			
Right to Equal Protection Under the Law	14th Am.		Art. 2(1), 3, 14(1), 16, 26	Art. 16	Art. 2, Art. 5	Art. 2
Freedom from Torture and other Cruel, Inhumane or Degrading Treatment	8th Am.		Art. 7	Art. 1, Art. 16	Art. 5(b)	Art. 25, 26
Freedom from Arbitrary Ar	5th Am.		Art. 9(1)	Art. 16		Art. 25, 26

Double click on chart for full information

If you have trouble viewing this chart, please go to

www.law.unc.edu/documents/clinicalprograms/hrchart

Appendix B

1. Shadow Report Manual- available at www.law.unc.edu/documents/clinicalprograms/shadowreportmanual
2. Using the InterAmerican System for Human rights - available at <http://www.globalrights.org/site/DocServer/ENGLISH - REVISED 7-19.pdf?docID=423>
3. Woods et al v Myers et al Complaint for Relief – available at http://www.aclu.org/images/asset_upload_file510_30092.pdf
4. Kiniti et al v. Myers et al Second Amended Complaint - available at http://www.aclu.org/images/asset_upload_file904_28128.pdf



Immigration & Human Rights Policy Clinic

University of North Carolina at Chapel Hill

School of Law

Van Hecke-Wettach Hall

160 Ridge Road

CB# 3380

Chapel Hill, NC 27599

Phone: 919-962-5106

<http://www.law.unc.edu/centers/programs/clinic/ihrp>