

Report to the United Nations
Special Rapporteur on the
Human Rights of Migrants:

Detention of Migrants in the United States

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Submitted by



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 Detention of Asylum Seekers and Immigrants in the United States

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Executive Summary

1. International law recognizes that while the United States has the power to control immigration that authority is limited by its obligations to respect the fundamental human rights of all persons. In designing and in enforcing its immigration laws, the rights to due process and fair deportation procedures, seek and enjoy asylum from persecution, freedom from discrimination based on race, religion, or national origin, freedom from arbitrary detention, freedom from inhumane conditions of detention, and other fundamental human rights must be protected.
2. The United States' immigration detention system is riddled with systemic failures to protect human rights. The system has evolved with no regard to international human rights standards and is based on a penal model of corrections which fails to address the needs of a population detained for civil status violations. The reliance on detention reflects broader trends in the United States relating to racial discrimination, mass incarceration, and the criminalization of migration.
3. We welcome the recent efforts of the United States to begin to acknowledge some of the concerns with human rights violations resulting from the immigration detention system. Nonetheless, serious human rights violations continue and progress toward reform has been slow, still failing to address the need to diminish the numbers of detained migrants, reduce the government's reliance on detention, and halt the dramatic expansion of detention facilities around the country.
4. **Key concerns** on the human rights of migrants in detention in the U.S. include:
 - The right to due process and access to legal counsel
 - Verbal and physical abuse, including sexual assault and violence, against migrants in detention particularly women, transgender, and LGBT migrants.
 - Lack of access or inadequate medical care, including medication and treatment especially for migrants with chronic illnesses such as diabetes and heart conditions.
 - Cruel and excessive use of solitary confinement against detained migrants, often for speaking out against unjust practices and conditions.
 - Prolonged detention of migrants awaiting to resolve their immigration status, and who are subject to mandatory detention
 - Frequent transfer of detained migrants to facilities in isolated areas far away from their families and community support networks.
5. **Overall trends** in U.S. domestic policies and practices that impact the human rights of immigrants subject to detention include:
 - Expansion of immigration enforcement programs that encourage and mandate the collaboration by local law enforcement and other agencies in identifying and reporting anyone suspected of being a non-citizen eligible for removal incentivizes racial profiling and other forms of discrimination.
 - Over-reliance on detention, albeit "civil" in nature, to address the government's stated need for compliance of court-issued Notice to Appear.

- Increased reliance on private prison corporations for the management and operation of immigrant detention centers, which have played a significant role in advocating for punitive policies that criminalize migration and increase the numbers of people subject to detention and deportation.

I. Recommendations on national policy

6. The U.S. government should diminish the number of overall detention beds and significantly reduce reliance on detention to ensure compliance with government-issued Notice to Appear. We urge a serious consideration and commitment to the expansion of community-based alternatives to detention.
7. The Department of Justice should revise its June 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies to apply the guidance to state and local law enforcement agencies, to eliminate the loopholes created for national security and border searches, to include religion and national origin as protected classes, to cover surveillance activities and to make it enforceable in a court of law.
8. The Department of Homeland Security should terminate the 287(g) program and all other federal immigration enforcement programs that rely on state and local criminal justice systems, including the Secure Communities Initiative and the Criminal Alien Program.
9. Further investigation is needed to determine the scope and scale of verbal and physical abuse, including sexual abuse and violence, in detention centers across the U.S., particularly its impacts on women, transgender and LGBT migrants.
10. The Obama Administration must take concrete steps to bring the U.S. into compliance with its obligations under international human rights law, which prohibits arbitrary detention.
11. The Obama Administration should put an end to all laws mandating the detention of non-citizens, including asylum-seekers and long-term residents with strong community ties in the U.S.
12. The U.S. government must allow for independent oversight and institute enforceable mechanisms for accountability.

II. Background and Framework

A. Scope of International Obligations

13. Pursuant to the International Covenant on Civil and Political Rights (ICCPR), non-citizens in the U.S. have a right to **due process and fair deportation procedures**,¹ including international standards on proportionality.²

14. Non-citizens also enjoy the right to **freedom from discrimination** under article 2 of the ICCPR and the obligations imposed by the Convention on the Elimination of all forms of Racial Discrimination (ICERD).³
15. Both the Universal Declaration of Human Rights and the ICCPR guarantee the right to **liberty and security of person**,⁴ freedom from **arbitrary arrest or detention**,⁵ and are entitled to **prompt review of their detention by an independent court**.⁶
16. Non-citizens who are detained have a right to **humane conditions of detention**.⁷
17. **Detention of refugees and asylum seekers** should be avoided when possible; if refugees and asylum seekers must be detained, adequate safeguards should be in place to avoid arbitrary detention.⁸ The United Nations High Commissioner for Refugees has made clear that asylum seekers should be detained only as a last resort and with guarantees against arbitrary detention.⁹
18. Regardless of immigration status, individuals in the U.S. have a right to **family unity**.¹⁰ In interpreting the obligations of the ICCPR, the Human Rights Committee has explicitly stated that family unity imposes limits on the power of States to deport.¹¹

B. Legislative and Policy Framework

19. In the United States, Congress holds the authority to make the laws that govern admission, protection, and removal of non-citizens. Federal immigration law, however, must be understood in its context within the U.S. tripartite system of government. The Executive branch agencies, including the Department of Homeland Security, the Department of Justice, and the Department of State, promulgate regulations that directly govern the application of U.S. immigration law. Myriad public and internal policy guidance spells out how the U.S. immigration system operates in practice. Federal courts also play a role in providing a final review of individual decisions made in removal proceedings in administrative courts.
20. Federal immigration law in the U.S. continues to be based on the Immigration and Nationality Act of 1952 (INA)¹². Reforms to the INA were made in 1965, which amended the INA to set a permanent annual worldwide level of immigration divided into categories for family-related immigrants, employment-based immigrants, and diversity immigrants. Refugees were excluded from these numerical limits; the Refugee Act of 1980 defines the U.S. laws relating to refugees.¹³
21. In 1986, Congress enacted the Immigration Reform and Control Act (IRCA) to toughen sanctions against employers who hired undocumented persons and limit access to federally funded welfare benefits.
22. The Immigration Act of 1990 substantially expanded the “aggravated felony” category of deportable crimes, first added to the INA in 1988.¹⁴

23. In 1996, the Antiterrorism and Effective Death Penalty Act¹⁵ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)¹⁶ added additional crimes to the aggravated felony ground for deportation and reduced the term of imprisonment threshold requirement to one year,¹⁷ **drastically increasing the number of people subject to prolonged and indefinite detention.**
24. The IIRIRA also created a new “expedited removal” system for arriving aliens without proper documentation for admission¹⁸ which has resulted in the routine detention of arriving asylum seekers and the summary expulsion of 111,000 people in 2010 alone.¹⁹
25. The USA PATRIOT Act of 2001,²⁰ passed just weeks after the 9/11 terrorist attacks, and the REAL ID Act of 2005²¹ expanded the class of individuals who are inadmissible to the U.S. for having provided “material support” to terrorism.
26. The Department of Homeland Security (DHS) was created in 2003 as part of federal agency reform following the 9/11 terrorist attacks, shifting immigration enforcement into the arena of anti-terrorism policy. The Immigration and Naturalization Service (INS) was replaced with three different agencies within DHS: U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE).
27. Federal law gives the Department of Homeland Security, including both ICE and CBP, the authority to apprehend and detain aliens under the Immigration and Nationality Act (INA) §232 (Detention of Aliens for Physical and Mental Examination), §235 (Inspection by Immigration Officers; Expedited Removal of Inadmissible Arriving Aliens; Referral for Hearing); §236 (Apprehension and Detention of Aliens; §236A (Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial Review), and §241 (Detention of Aliens Ordered Removed) and by corresponding federal regulations.
28. Because immigration is a matter of federal law, state and local governments in the U.S. have historically played a very limited role in immigration enforcement. Recent policies, however, have attempted to expand responsibility for enforcing civil immigration laws to state and local police through formal DHS programs, such as the 287(g) program, the Criminal Alien Program (CAP), and Secure Communities,²² and informal cooperation between immigration authorities and public safety officials.
29. During the booking process, Secure Communities, an immigration enforcement initiative launched by ICE in March 2008, allows the fingerprints of arrestees to be automatically checked against DHS’ civil immigration databases in addition to the Federal Bureau of Investigation’s (FBI’s) criminal databases. Secure Communities and related programs incentivize racial profiling and pre-textual arrests by state and local police—agents know that when they arrest individuals, those individuals’ immigration status will be checked when they are fingerprinted.²³ This is supported by data analyses done by researchers at the University of California, Berkeley which demonstrate that Latinos are disproportionately targeted by the program and that approximately 3,600 U.S. citizens have been arrested by ICE through Secure Communities.²⁴ ICE’s own data demonstrate that, for example between

the program's inception and June 2010, 79% of the people deported due to Secure Communities are non-criminals or were picked up for lower level offenses, such as traffic violations.²⁵ Recently, through FOIA litigation, it has been uncovered that DHS acted improperly in presenting the Secure Communities program to local communities, Congress, and the public—particularly those communities that expressed a desire to opt out of the program.²⁶ This has resulted in reviews of Secure Communities by the DHS Office of the Inspector General as well as the Government Accountability Office.²⁷

30. Individual states, notably Arizona and Alabama, have enacted immigrant enforcement laws that impact the human rights of non-citizens in the United States. In some cases, other states have laws which, while facially neutral, primarily target undocumented migrants. These laws that lead to more arrests and detentions of people suspected of civil immigration status violations, including U.S. citizens who are suspected of such violations based primarily on race or national origin. The Arizona immigration law will be before the United States Supreme Court this term.²⁸ The Court's decision will have a tremendous impact on current and future state immigration laws.

III. Promotion and Protection of Human Rights on the Ground

A. Scope of Migrant Detention in the United States

31. The U.S. immigration detention system is an enormous and growing operation which has become a cornerstone of immigration enforcement in the United States. The Department of Homeland Security reports that in 2010 517,000 foreign nationals were apprehended; approximately 363,000 foreign nationals were detained by ICE; 387,000 foreign nationals were removed from the United States; and 476,000 foreign nationals were returned to their home countries without a removal order.²⁹
32. Detention is widely used by Immigration and Customs Enforcement (ICE) for people apprehended on suspicion of civil immigration status violations in the U.S. interior³⁰ and by Customs and Border Protection (CBP) for people apprehended at or within 100 miles of the United States' borders with Mexico or Canada or at ports of entry.³¹
33. While both ICE and CBP operate within the Department of Homeland Security, they have separate command structures. CBP has remained largely impervious to the limited progress made toward securing oversight of conditions for people in ICE custody and understanding of the numbers of people detained under CBP authority and the conditions under which they are detained is limited.
34. CBP is a large and growing security apparatus. The Department notes that: “[o]ver the past two years, CBP has dedicated unprecedented manpower, technology and infrastructure to the Southwest border. The Border Patrol is better staffed now than at any time in its 86-year history having doubled the number of agents from 10,000 in FY 2004 to more than 20,500 in FY 2010. In addition to the Border Patrol, CBP's workforce of more than 58,000 employees also includes more than 2,300 agriculture specialists and 20,600 CBP officers at ports of

entry.”³² CBP has requested over \$11.8 billion for the upcoming fiscal year, an increase of over \$300 million from the previous year.³³

35. Customs and Border Protection (CBP) reports that on a typical day, 1,903 people were apprehended at and in between the ports of entry for illegal entry.³⁴ CBP coordinates border security operations closely with the U.S. Department of Defense and other federal agencies, using myriad defense technologies and strategies that have resulted in a militarized U.S.-Mexico border.³⁵ According to the Department of Homeland Security, “[t]he number of Border Patrol apprehensions declined 61 percent from 1,189,000 in 2005 to 463,000 in 2010. The decrease in apprehensions between 2005 and 2010 may be due to a number of factors including changes in U.S. economic conditions and border enforcement efforts. Border apprehensions in 2010 were at their lowest level since 1972.”³⁶
36. U.S. National Guard troops have been deployed to the Southwest border during much of 2010 and 2011.³⁷ Their mission clearly focuses on monitoring the border for illegal crossings.³⁸
37. The number of beds available for detention in Immigration and Customs Enforcement (ICE) custody has nearly doubled in the past seven years, from 18,000 beds in 2004 to 33,400 in 2011.³⁹ The number of people who pass through the ICE detention system nearly has doubled from 209,000 in 2001 to 392,000 in 2010.⁴⁰ Approximately 2,700 new beds have been added to the system since July 2009.⁴¹
38. At the same time, the United States has failed to adequately fund or use alternatives to detention, despite findings that alternatives to detention cost significantly less⁴² and “yield 93 percent to 99 percent appearance rates before the immigration courts.”⁴³
39. Federal expenditures on ICE detention have grown 134% in the past seven years, from \$864 million to \$2.02 billion.⁴⁴ The Obama Administration’s FY2012 request would amount to expenditure of \$5.5 million per day on ICE detention.⁴⁵
40. The private prison industry has played a significant role in the growth of these budgets by advocating for the expansion of immigration detention and enforcement policies at the federal and state levels. A 2011 report by Detention Watch Network notes that “[a]lthough private corporations have long exercised influence over detention policy in a variety of contexts, a recent accumulation of evidence indicates that the main contractors involved in the explosive growth of the immigration detention system have been involved in heavy lobbying at the federal level.” The report finds that [i]n 2009 ICE had an adult average daily population (ADP) of 32,606 in a total of 178 facilities. Of these, 15,942 detainees – or 49% – were housed in 30 privately-operated detention centers.”⁴⁶
41. Mandatory detention laws enacted in 1996 have contributed to the skyrocketing growth of detention as an immigration enforcement tool. Sixty-six percent of the 31,075 people detained on September 1, 2009, were subject to mandatory detention.⁴⁷

42. At the same time, ICE fails to exercise discretion to release those people not subject to mandatory detention laws.⁴⁸ Indeed, ICE increasingly relies on detention as the only way to guarantee appearance for hearings despite the availability of alternatives to detention.
43. In addition to people detained by immigration authorities, state and local law enforcement agencies detain thousands of individuals each year under ICE “detainers.” Detainers are requests by ICE to a law enforcement agency to detain the named individual for up to 48 hours (excluding Saturdays, Sundays, and holidays) in order to provide ICE an opportunity to determine the person’s immigration status. While law enforcement agencies are under no obligation to honor these requests, detainers routinely result in extended detention of people suspected of being noncitizens in the United States.⁴⁹
44. Finally, increasing numbers of people are imprisoned following convictions for criminal charges relating to immigration. Federal prosecution of immigration-related crimes, including illegal reentry into the United States following deportation, has skyrocketed in recent years. Border enforcement programs such as *Operation Streamline* deepen the crisis of criminalization by subjecting migrants apprehended at the U.S.-Mexico border to criminal prosecution and sentencing *en masse* through a fast-track process, which undermines due process rights at every step.⁵⁰ Under this program, migrants who have been deported and get caught re-entering the country are prosecuted with felony charges with a maximum sentence of 20 years. According to the Transactional Records Access Clearinghouse, “the data show that prosecutions of this type are up 135 percent from levels reported in 2006,” and “reentry of deported alien” (Title 8 U.S.C. §1326), was the lead charge recorded in the prosecutions of 1,844 immigration matters filed in U.S. District Court during September 2011 alone.⁵¹ A report by the U.S. Sentencing Commission revealed that over half of all people sent to federal prison for committing felony crimes in 2011 were Hispanic.⁵² The report attributed the increase of Hispanics in prison to an increase in prosecution for immigration-related crimes.⁵³
45. Similar trends can be observed at the state level, where immigration-related crimes such as identity theft or failure to carry immigration documents are frequently prosecuted. While the migrants in custody following these criminal convictions are not in ICE or CBP custody, the increase in prosecutions reflect a growing trend toward the criminalization of migration itself by the United States.⁵⁴
46. Detention of families in the United States continues to be of concern.⁵⁵ In August 2009, the U.S. government announced it would cease to detain immigrant families at the T. Don Hutto facility in Taylor, Texas, and continue to detain families only in small numbers at the Berks Family Residential Shelter in Berks, Pennsylvania. Although a detention center, Women’s Refugee Commission visits found that conditions at the Berks facility greatly differed from other detention facilities and was, as a whole, much more of a shelter-like facility than the penal, punitive nature of other immigration detention centers. According to the Women’s Refugee Commission, in Fall, 2011, the Department of Homeland Security announced that the Berks facility would close due to technical reasons and issued a request for proposals for a new facility to be located closer to the border. Advocates understand that this new facility, like Berks, would be used primarily for families who are unwilling or unable to provide any

connections in the community and would otherwise be homeless. We believe the needs of these families would best be met through the use of community support programs that would provide social and legal services, provide access to medical services, and provide shelter to these families. Community support programs or community sponsored release from ICE custody remains the most humane and cost-effective means for immigrants who do not have their own ties and support in the community but who should also not be detained in ICE facilities.

47. While some improvement to the treatment of unaccompanied children detained in the United States has been seen, continued concern exists. The Women's Refugee Commission's 2009 report on the screening and detention conditions of unaccompanied children who enter the U.S. found numerous problems on both fronts. Despite the passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) as well as provisions in the Flores Settlement, advocates continue to be concerned about the conditions of Office of Refugee Resettlement (ORR, within the Department of Health and Human Services, DHHS) facilities as well as the conditions of holding rooms and cells in Customs and Border Protection (CBP, within DHS). Implementation of TVPRA-mandated training and screening has been slow and the Women's Refugee Commission has been unable to gain meaningful access to CBP Border Patrol stations.⁵⁶

B. Right to Freedom from Discrimination based on Race, Religion, or National Origin

48. **Racial discrimination** in law enforcement and the administration of justice continues to be a significant problem in the United States. As the Committee on the Elimination of all forms of Racial Discrimination stated in its concluding observations to the United States' most recent report on compliance with the Convention: "[t]he Committee reiterates its concern with regard to the persistent racial disparities in the criminal justice system of the [United States], including the disproportionate number of persons belonging to racial, ethnic and national minorities in the prison population, allegedly due to the harsher treatment that defendants belonging to these minorities, especially African American persons, receive at various stages of criminal proceedings (art.5 (a))."⁵⁷ As the U.S. government continues to expand the role of local law enforcement agencies in the enforcement of immigration laws and policies, these formal and informal partnerships incentivize racial profiling by using the state criminal justice system to target perceived foreigners and to channel them into the immigration enforcement system.⁵⁸
49. U.S. detention law patently discriminates against immigrants and undermines fundamental prohibitions on discrimination as well as well-founded due process principles under the Constitution and the U.S. international legal obligations.⁵⁹ In 2003 the court heard *Demore v. Kim*, which challenged the constitutionality of the INA provision that permits the mandatory detention of certain ex-offenders. The majority of the justices ignored jurisprudence related to freedom from bodily restraint and instead focused on prior immigration-related precedent and said, "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." This discriminates

against all non-citizens in the U.S. and is thus prohibited discrimination based on national origin.

50. Immigration enforcement programs known collectively as ICE ACCESS provide an “umbrella of services” for state and local law enforcement agencies to cooperate with federal immigration authorities.⁶⁰ These programs, including the 287(g) program, the Criminal Alien Program, and the Secure Communities program, all have drawn substantial criticism for engendering racial profiling practices.⁶¹
51. In some cases state and local authorities enforce immigration law without any formal training or agreement, relying on informal processes for reporting anyone suspected of being non-citizens over to the Department of Homeland Security. For example, some local law enforcement agencies are reported to call ICE or CBP officers to interpret in routine traffic stops.⁶²
52. The United States does attempt to investigate allegations of local law enforcement practices targeting migrants,⁶³ including an investigation by the U.S. Department of Justice Civil Rights Division into allegations of racial discrimination by the Maricopa County, Arizona, Sheriff’s Office.⁶⁴ Such oversight should be encouraged and expanded.
53. An October 2010 report documented a lack of access to religious services in two adult immigration detention facilities in Arizona.⁶⁵ Although ICE officials at both facilities contended that religious services were available for different faiths, including Islam, Muslim detainees in both facilities reported that they had never been told about such services. One woman had asked a chaplain whether Muslim services existed, and he told her he knew of none.⁶⁶

C. Right to Due Process and Fair Deportation Procedures

54. While U.S. law provides that aliens in removal proceedings have “the privilege of being represented,” legal representation must be “at no expense to the Government.”⁶⁷ The United States’ failure to ensure that all non-citizens have access to legal representation during their expulsion hearings, and by extension, to fair proceedings, violates ICCPR article 13.
55. Nationwide, Approximately 84% of detained cases were unrepresented.⁶⁸ According to a report of the American Bar Association, there is “strong evidence that representation affects the *outcome* of immigration proceedings.”⁶⁹ The findings of the New York Immigrant Representation Study echo the ABA’s observation:
 - Represented and released or never detained: 74% have successful outcomes.
 - Represented but detained: 18% have successful outcomes.
 - Unrepresented but released or never detained: 13% have successful outcomes.
 - Unrepresented and detained: 3% have successful outcomes.⁷⁰
56. The New York Immigrant Representation Study made the following finding: “By every measure, the number of deportations and removal proceedings has skyrocketed over the last

decade. Between 2000 and 2010, the number of removal proceedings initiated per year in our nation's immigration courts increased nearly fifty percent, totally over 300,000 last year. During that period, the representation rate of respondents in removal proceedings has remained relatively constant and abysmally low. Correspondingly, the actual number of unrepresented respondents has virtually doubled."⁷¹ The study notes that lack of representation is particularly acute for detained people: "A striking percentage of detained and nondetained immigrants appearing before the New York Immigration Courts do not have representation. The greatest area of need for indigent removal defense is, however, for detained individuals. In New York City: Sixty percent of detained immigrants do not have counsel by the time their cases are completed."⁷²

57. Geographic isolation compounds the inability of people in detention to access legal assistance. Human Rights First has noted that "as DHS and ICE expanded immigration detention, they repeatedly chose to detain asylum seekers and other immigrants in areas that are not near pro bono legal resources, the immigration courts, or U.S. asylum offices."⁷³
58. Approximately 28 percent of detainees are held at facilities where there is no free legal service provider.⁷⁴ Even the provision of information about legal rights is limited; nearly 25 percent of all detainees are held at facilities where they receive no information about their legal rights from attorneys or legal services providers.⁷⁵ The staff time and travel costs for legal service providers provide a significant barrier to reaching and representing individuals held in geographically remote areas.⁷⁶ Further compounding these issues is limited access to phone calls to attorneys. Seventy-eight percent of the facilities holding immigrants prohibit private calls between attorneys and clients.⁷⁷ Many facilities require legal aid organizations to register in order to receive calls from detainees, as well as maintaining an account with funds to cover the cost of the calls.⁷⁸ When individuals are transferred between facilities, they may end up at a facility where the legal aid organization they worked with is not listed to receive calls and the individual may not have funds to pay for a call.⁷⁹
59. Frequent transfers between detention centers further undermine access to counsel and to fair deportation proceedings. According to the New York Immigrant Representation Study, "ICE transfers almost two-thirds (64%) of those detained in New York to far-off detention centers (most frequently to Louisiana, Pennsylvania, and Texas), where they face the greatest obstacles to obtaining counsel. Individuals who are transferred elsewhere and who remain detained outside of New York are unrepresented 79% of the time."⁸⁰
60. The immigration justice system lacks procedural safeguards for detained people with mental disabilities who face the possibility of deportation.⁸¹ Approximately fifteen percent of the total immigrant population in detention is comprised of individuals with mental disabilities.⁸² "[I]mmigration courts have no substantive or operative guidance for how they should achieve fair hearings for people with mental disabilities."⁸³ "[I]n many cases the ICE attorney prosecuting the case did not inform the judge when a non-citizen facing deportation had a diagnosed or suspected mental disability—even when one had been previously adjudged by a criminal court—which clearly compromised the non-citizen's ability to understand proceedings."⁸⁴ "In other cases, ICE attorneys refused or neglected to perform competency evaluations and to supply information from evaluations to the court—even when the court

ordered them to do so.”⁸⁵ As a result, “legal permanent residents (LPRs) and asylum seekers with a lawful basis for remaining in the United States may have been unfairly deported from the country because their mental disabilities made it impossible for them to effectively present their claims in court. Some US citizens with mental disabilities may have been deported to countries they do not know, and some of these people have not been or cannot be found.”⁸⁶

61. Detention undermines individuals’ ability to raise defenses to deportation that may be available. Detention also undermines individuals’ will and ability to pursue appeal.⁸⁷ Faced with the prospect of indefinite detention pending the outcome of removal hearings, detainees often agree to “stipulated removal orders” in which they accept an order of deportation without access to an attorney or an appearance before an immigration judge.
62. A September 2011 report found that over 160,000 people have been deported under these stipulated removal orders over the past decade.⁸⁸ The interplay between detention, stipulated removal, and the deliberate attempt to forestall applications for relief from removal is illustrated by the following e-mail from an ICE official obtained through the researchers’ Freedom of Information Act request:

“Please, please, please . . . encourage the agents to work harder on the stipulated orders of removal. . . . It is really important for the agents to push for stipulated orders of removal. . . . Most of the [lawful permanent residents] who get out of jail are willing to take an order just to get out of jail sooner (that is until the judge encourages them to get a lawyer).” —Email message from M. Meymariam to various recipients.⁸⁹

63. Unrepresented people in detention face serious barriers to presenting a defense to their removal. Law library access often is minimal or restricted.⁹⁰

D. Right to Liberty and Security of the Person and Freedom from Arbitrary Detention

64. The United States’ detention system lacks three critical elements which are necessary to meeting its obligations under international human rights law: an individualized assessment and process to challenge all custody decisions, robust case management tailored to individual needs, and access to legal and support services. This failure has resulted in the arbitrary detention of thousands of migrants in violation of ICCPR articles 9(1) and 9(4).
65. U.S. law imposes mandatory detention without an individualized custody determination by a court in a broad category of cases, including arriving asylum seekers⁹¹ and non-citizens convicted of certain crimes,⁹² and certain refugees awaiting adjudication of their applications

for permanent residence.⁹³ These categorical detention determinations violate norms of proportionality and non-discrimination.⁹⁴

66. Individuals subject to mandatory detention in the United States are not entitled to a bond hearing before an immigration judge⁹⁵ or to independent review of their custody determination by a court.
67. All migrants in detention in the U.S. are detained without an individualized assessment as to need to detain. The U.S. lacks a process or tool that standardizes decision making as to restriction of liberty, leaving individual officers to make decisions informed by their own intuition. Rather than making informed decisions for each and every individual the government intends to restrict liberty, the burden usually falls to the individual migrant to make the case as to why he is eligible for release.
68. The U.S. is bound by human rights law to demonstrate by clearly articulable facts why it is necessary to restrict any person's liberty. In making these individualized determinations, the U.S. is bound by the principles of necessity and proportionality and must show why any less restrictive means of control migration will not suffice in the particular individual's situation before it can resort to detention. The guarantee of this fundamental process before a person is denied liberty does not exist in the U.S. rendering all detention, including mandatory detention, arbitrary.
69. Arriving asylum seekers in expedited removal proceedings are subject to mandatory detention and may not be released while awaiting their initial "credible fear" review to determine whether they may apply for asylum before an immigration judge.⁹⁶ Following determination of credible fear, asylum seekers may be released on parole pending their asylum hearings before an immigration judge or while on appeal, but if the detaining authority (ICE) denies parole, the asylum seeker is prevented under regulations from having an immigration court assess the need for his continued custody.⁹⁷ ICE revised its parole guidelines effective January 2010.⁹⁸
70. In terms of less restrictive measures to control migration, the U.S. lacks robust alternatives to detention. As found in a recent report by Lutheran Immigration and Refugee Service, the U.S. government's approach has focused on security at the expense of other goals, casting shadows on the program's operations.⁹⁹
71. *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, reviews the U.S. government's attempts to implement alternatives to detention programs and reveals five overarching structural challenges that must be overcome:
 - an overreliance on detention as an approach to immigration enforcement,
 - the lack of individualized risk assessments to determine who needs to be detained or otherwise supervised to ensure appearance and removal,
 - absence of necessary data indicators and the mechanisms to collect and report those indicators to evaluate the use of detention and alternatives,

- absence of a robust case management system with referrals to appropriate social services, and
- insufficient access to legal and social services.¹⁰⁰

E. Right to Humane Conditions of Detention

72. People detained on civil immigration status violations are held in over 250 jails, prisons, and secure detention centers around the United States,¹⁰¹ operated variously by ICE, state and local governments, and private prison corporations.¹⁰² People apprehended by CBP often are detained in short-term custody facilities which hold people for less than 72 hours.

1. Detention by Immigration and Customs Enforcement (ICE)

a. Reliance on a Penal Model of Detention

73. Reliance by ICE on a penal model of detention is inappropriate for people detained on allegations of civil status violations and must be ended. Virtually all people detained by ICE are held in correctional facilities or prison- or jail-like settings,¹⁰³ which fail to adhere to guarantees in ICCPR articles 10(1) and 10(2)(a).¹⁰⁴

74. As Dr. Dora Schriro explained in her 2009 report: “With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on corrections incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.”

b. Lack of Appropriate and Enforceable Standards for Detention Facilities

75. Although the United States has adopted detention standards, the standards are not legally enforceable. In addition, they are based on a penal correctional model inappropriate for civil detention and have significant deficiencies in monitoring and oversight, little transparency, and no consequences for non-compliance with standards.¹⁰⁵ Contracted facilities are rated on the standards, but failure to meet standards carries no penalty.

76. People detained by ICE wear prison uniforms, are regularly shackled during transport and in their hearings,¹⁰⁶ are held behind barbed wire,¹⁰⁷ and may be locked in their cells up to 18 hours each day.¹⁰⁸

77. Because of the penal nature of the facilities, detained people routinely are subject to degrading conditions¹⁰⁹ The most basic needs of transgender detainees are rarely met. Transgender detainees are routinely denied gender-appropriate undergarments and are often denied any privacy in communal showers and toilet facilities.¹¹⁰ Low-cost solutions like

shower curtains are rarely implemented. Medically-necessary hormone therapy is dramatically reduced or eliminated, resulting in rapid body changes.

78. People in detention often face barriers to communicating with their family, counsel, or other support systems.¹¹¹ Depending upon where they are detained, they may not be permitted contact visits with family.¹¹²
79. Immigrants in detention may be held for prolonged periods of time without access to the outdoors.¹¹³
80. Appropriate psychological and medical services for torture survivors are universally unavailable.¹¹⁴
81. People detained on allegations of civil immigration status violations routinely are commingled with individuals convicted in the general criminal justice system.¹¹⁵
82. Reports of poor food quality and limited amount of food are common.¹¹⁶ Both state-run and private detention centers often rely on income from commissary charges including additional food, additional clothing, stationery, toiletries, and telephone cards.¹¹⁷
83. The Women's Refugee Commission conducted site visits of Arizona detention facilities in 2010 and concluded that "[c]onditions and amenities described by ICE and facility staff during our tours were refuted by the women we spoke to—most specifically, access to medical care and religious services, recreation and the legal library were either impossible, or not nearly as frequent as we had been told. Detainees also reported difficulties in filing grievances. Our findings indicate that the facilities are in violation of both the 2000 National Detention Standards and the 2008 Performance-Based National Detention Standards (PBNDS) in several critical areas."¹¹⁸
84. Use of solitary confinement is, sometimes for prolonged periods of time, is permitted and routine. Of particular concern is the practice of placing transgender people in solitary confinement, known as "administrative segregation," citing safety concerns.¹¹⁹ Transgender people may be placed into "administrative segregation" without any individualized assessment¹²⁰ or may face administrative segregation after being attacked or expressing fear for personal safety.¹²¹ One transgender woman, Ana Luisa,¹²² was placed in administrative segregation after being assaulted by a male detainee in a bias attack. Ana Luisa, rather than her assailant, was placed in solitary confinement after this attack, further victimizing her.
85. Administrative and disciplinary segregation, both used in ICE detention facilities, mirror punitive forms of solitary confinement imposed in the penal context.¹²³ Detained people are confined alone in tiny cells for up to twenty-three hours a day.¹²⁴ Phone privileges, access to legal counsel, and recreational time are often restricted or completely denied.¹²⁵ Freedom of movement can be so severely limited that even trips to the bathroom may require shackles and a staff escort. Making matters worse, when such detainees express depression or hopelessness from this extreme isolation, they are often placed on suicide watch, which can

mean further limitations on their privacy and freedom of movement.¹²⁶ Once in administrative segregation, it becomes extremely difficult to get out.¹²⁷

86. In 2009, ICE announced plans to reform the immigrant detention system, but thus far there has been extremely limited progress toward a shift to non-penal facilities.¹²⁸ Human Rights First notes one challenge to reform: “[a]lthough U.S. immigration officials have repeatedly emphasized that facility safety and security are priorities of detention reform, and multiple studies demonstrate that the planned reforms can actually help improve facility safety, the ICE union has raised concerns about the reform’s impact on officer and detainee safety” [citations omitted].¹²⁹

c. Lack of Appropriate Access to Medical and Health Care

87. Highly publicized and tragic cases illustrate a systemic disregard for the rights to necessary medical care in detention, humane conditions of detention, and treatment respecting basic human dignity. Between 2003 and December 2011, ICE reported 127 deaths of non-citizens in their custody.¹³⁰ Shocking reports of the United States’ failure to screen for illness and failure to provide care to ill or injured persons in its custody abound.¹³¹

“One detainee, a legal permanent resident, had been diagnosed with bipolar disorder, post-traumatic stress disorder, and severe depression prior to her detention. Her mental health issues were not diagnosed when she was first detained by ICE in August, 2006, and during her 18-month detention her mental illness continued to go undiagnosed and untreated. Guards at the South Texas Detention Center ridiculed her by telling her she was not truly sick, she was faking her illness, that she had no rights in the United States, and that she would be deported to Mexico.”¹³²

“Even though I was showing many symptoms, no one offered me any medical attention. [...] I was so sick that I was delirious, vomiting, had no appetite, a strong head ache, fever, I was very cold, and I had a cold sweat. In my cell there are more than forty people who are sick. As far as I know, no one in my cell has had a blood test or any lab testing done.”¹³³

“When I came to this detention center, no one gave me a medical examination. I informed them that I had leukemia and diabetes, but up to this point, I have not received treatment for my cancer nor my diabetes. I have never had a blood test for my diabetes, and I’m only given a blood sugar test once a month.”¹³⁴

88. The Women’s Refugee Commission has documented many instances of delayed or denied medical care. Women in one Arizona facility reported “that medical treatment was often degrading: they are frequently told by medical staff that they are criminals who are not entitled to care; other detainees are used as interpreters, including during mental health consultations; medical staff deny their complaints of depression or anxiety and refuse them medication for these conditions, even when they had been receiving treatment at a previous facility.”¹³⁵

89. The Florida Immigrant Advocacy Center reported that, “Conditions of medical care have been deteriorating, funding is inadequate, detention is not cost effective, ICE oversight of detention facilities is lacking, detention facility staff often treats detainees cruelly, detainees are transferred in retaliation, and essential healthcare is often delayed or denied.”¹³⁶
90. A March 2011 report by the Department of Homeland Security’s Office of Inspector General reports that while the ICE Health Services Corps serves as medical authority for ICE, deficiencies call into question the effectiveness of care, particularly regarding provision of mental health care. The OIG reports that IHSC staffs only 18 of the approximately 250 facilities holding people in ICE custody, resulting in limited oversight and monitoring, and that even in those facilities which they staff, effectiveness is limited by persistent staff vacancy rates. The report finds that facilities were not always capable of providing adequate mental health care to ICE detainees.¹³⁷ Detention facilities lack the capacity to provide adequate care for the increasing number of people in detention and struggle to fill open medical positions.¹³⁸
91. Medical and mental health issues are exacerbated by the lengthy and indefinite periods of detention endemic in the immigration detention system. Many people in ICE custody are held in county jails or other facilities designed for short-term stays by people in pre-trial criminal custody. These facilities lack the screening, protocols, personnel, and facilities to deal with people detained by ICE whose average length of stay is over 30 days.¹³⁹

d. Sexual Abuse of Migrants in Detention¹⁴⁰

92. Sexual abuse of migrants in detention is a problem of serious concern. Over 200 reported complaints of sexual abuse have been filed by immigrant detainees in the past five years,¹⁴¹ which advocates believe reflect a fraction of the problem.¹⁴²
93. Women make up 9 percent of the immigration detention population.¹⁴³ Some of these women are “victims of trafficking, survivors of sexual assault and domestic violence, pregnant women, and nursing mothers.”¹⁴⁴ Human Rights Watch has identified “more than 15 separate documented incidents and allegations of sexual assault, abuse, or harassment from across the ICE detention system, involving more than 50 alleged detainee victims.”¹⁴⁵ These figures likely understate the extent of sexual harassment and abuse in ICE facilities, as people in detention “face a range of obstacles and disincentives to reporting, from a lack of information about rules governing staff conduct, to fear of speaking out against the same authority that is seeking their deportation, to trauma from the abuse in detention and possibly from violence and other abuse they have previously suffered in their countries of origin.”¹⁴⁶
94. The Bureau of Justice Statistics collects data on sexual abuse in custodial settings. But its data on ICE detainees are limited to facilities that are “run by or exclusively for” ICE, and therefore exclude “sexual violence, abuse, and harassment of immigration detainees in the hundreds of jails and contract facilities in which ICE rents a portion of the bed space. This is a notable omission, both because of the number of such facilities used by ICE and because the rates of substantiated sexual violence are four to five times higher in state prisons, local jails, and privately operated jails, than in federal prisons, according to the 2006 BJS

survey.”¹⁴⁷ “Department of Homeland Security, the agency in charge of immigration detention, is not mandated under law to publish data on sexual violence, and has not done so.”¹⁴⁸

95. The ACLU reports disturbing accounts of rape of women detained by ICE. An excerpt from one woman’s account states:

He hurriedly shoved anything that was on the floor of the front area of the van and motioned for me to lay down on my back. I refused. When he saw that I wasn’t going to cooperate, he went to the back of the van. He pushed my things off the seat in the cage inside the van and gestured for me to get back in. I complied. He followed me into the van. I told him I would report him if he continued to touch me and he pushed me into the van. I was crying and I thought it was the end of my life. I thought he was going to kill me. I thought I should have stayed in my home country if my life was going to end like this because at least I would have had more time with my children. He got in the cage with me and started unzipping his pants and pulling off my clothes. He exposed himself to me. He was angry that I would not take off my clothes. I kept yelling, saying that if he didn’t stop I would tell someone.¹⁴⁹

96. “Although federal law now criminalizes sexual contact between guards and detainees, the prohibition on such conduct is far from clear at the facility level. Advocates report that detainees sometimes deny knowledge of sexual misconduct at their facility, but will refer to ‘alliances’ between detainees and guards based on sexual relationships.”¹⁵⁰

97. While United States’ federal law, known as the Prison Rape Elimination Act (PREA), is in effect, recently proposed rules which would exempt immigration detention facilities from PREA have raised serious concerns. Despite Congressional intent of the 2003 Prison Rape Elimination Act to apply to all types of confinement, including confinement of immigrants in immigration detention, the rules proposed by Attorney General Eric Holder in June 2011 explicitly stated that they would not be applied to immigration detention. Justifications for this exclusion included that the U.S. Department of Justice cannot create rules for the U.S. Department of Homeland Security (the federal department with jurisdiction over immigration detention) and the Department of Health and Human Services (which has jurisdiction over the custody of unaccompanied alien children), as well as that the Department of Homeland Security already has its own policies to prevent sexual assault in detention. Ongoing advocacy around this issue has pushed for inclusion of all immigration detention in the Department of Justice’s final rules, which have been finalized but not yet released.¹⁵¹

98. “Sexual harassment receives sparse and inconsistent treatment in current ICE materials. In some instances, the definition of sexual harassment is limited to actions or communications ‘aimed at coercing or pressuring a detainee to engage in a sexual act.’ This fails to encompass egregious acts of harassment—humiliating comments of a sexual nature or unnecessary viewing of detainees while they undress—that are not directed towards instigating a sex act.”¹⁵²

99. “In spite of the non-criminal nature of immigration detention, ICE has adopted a policy that imposes few limitations on guards’ authority to search detainees and, consequently, opens up unnecessary opportunities for abuse of that authority. To conduct a pat-down search of a detainee, a guard need not meet any threshold of suspicion of contraband; it is contemplated that these searches will be conducted routinely. ICE insists this policy is necessary to give facilities flexibility in maintaining security. Currently, although crossgender strip searches are only permitted in emergency situations, no restriction is placed on cross-gender pat searches. However, ICE has said that the new detention standards will prohibit cross-gender pat searches and will allow trans-gender detainees to select the gender of the guard searching them.”[citations omitted]¹⁵³
100. Although there have been documented incidents of sexual assaults of people in detention during the course of transportation, ICE transportation policies are insufficient to protect against sexual assault. “Despite appeals from advocates that the transportation standard be amended to require that a female guard be present during transportation of female detainees, the existing standard has only required that transporting guards call in the time and mileage they spend transporting a female detainee. ICE has announced that the new standard will prohibit a single guard from transporting a single detainee of the opposite sex, but will not require the presence of a guard of the same-sex unless it is expected that a search of the detainee will be conducted during the transport.”¹⁵⁴
101. Frequent transfers of people between detention centers increase the likelihood that sexual abuse will remain unaddressed.¹⁵⁵ While ICE has announced its intent to implement a new transfer policy, that policy is not yet publicly available.
102. Lesbian, gay, bisexual, and transgender people face sexual and other abuse while in immigration custody. “Heartland Alliance’s National Immigrant Justice Center (NIJC) filed 13 complaints in April 2011 with the Department of Homeland Security’s (DHS’s) Office of Civil Rights and Civil Liberties and Office of Inspector General demanding that the Obama administration investigate abuse allegations and take action to protect lesbian, gay, bisexual, and transgender (LGBT) immigrants in DHS custody. The 13 complaints describe violations including sexual assault, denial of medical and mental health treatment, arbitrary long-term solitary confinement, and frequent harassment by officers and facility personnel... In October 2011, NIJC filed with the government four additional complaints of abuse against detained LGBT immigrants, bringing the total number of complaints to 17 since April 2011.”¹⁵⁶ Members of Congress recently called for an investigation into these allegations.¹⁵⁷
103. Transgender women in particular face an increased risk of rape and sexual violence when confined with male detainees. Because the immigration detention system often uses local jails to house detainees, immigrants with low-level or no convictions are often housed alongside violent and dangerous felons. One transgender woman, Josefina¹, was housed with convicted male sex offenders after she was detained following a minor shoplifting conviction. Sexual violence against transgender detainees is an even graver problem given

¹ For confidentiality reasons, individual names have been changed. Immigration Equality, a national organization that advocates for the rights of gay, lesbian, bisexual, transgender, and HIV positive immigrants, has either conducted an intake with these individuals or directly represented them in their immigration cases.

the Department of Justice's recent stance that the Prison Rape Elimination Act Of 2003 does not apply to immigration detention centers.¹⁵⁸ Transgender detainees who are suspected of civil immigration status violations therefore receive fewer procedural safeguards against rape than do convicted felons in federal prisons.

2. Detention by Customs and Border Protection

104. Conditions of detention of migrants by Customs and Border Protection, particularly near the U.S.-Mexico border, are of urgent concern. CBP apprehension and detention policies and practices lack transparency and accountability at both the local and federal levels.

105. Migrants, including minor children, apprehended by CBP often are detained in short-term custody facilities which hold people for less than 72 hours.¹⁵⁹ There is little access into these short-term detention facilities operated under Customs and Border Protection authority, and what insight we have into detention conditions comes largely from those formerly detained by Border Patrol. Between 2008 and 2011, the organization No More Deaths conducted interviews with nearly 13,000 people who had been in Border Patrol custody. Their findings reveal patterns of disregard for the most basic human rights of people in Border Patrol custody, including:

- Border Patrol agents denied food to 2,981 people and gave insufficient food to 11,384 people. Only 20 percent of people in custody for more than two days received a meal.
- Agents denied water to 863 people and gave insufficient access to water to 1,402 additional people. Children were more likely than adults to be denied water or given insufficient water. Many of those denied water by Border Patrol were already suffering from moderate to severe dehydration at the time they were apprehended.
- Physical abuse was reported by 10 percent of interviewees, including teens and children. The longer people were held in custody, the more likely they were to experience physical abuse.
- Of the 433 incidents in which emergency medical treatment or medications were needed, Border Patrol provided access to care in only 59 cases—86 percent were deported without necessary medical treatment.
- The most commonly reported forms of inhumane processing center conditions were overcrowding (5,763 reports), followed by unsanitary conditions (3,107), extreme cold (2,922), and extreme heat (2,349).¹⁶⁰

106. One person reported that she was not provided food for the first three days she was in Border Patrol custody and that she was told to drink water out of the toilet if she was thirsty.¹⁶¹

107. The GEO Group, and other privately contracted transportation buses are utilized as virtual detention centers where individuals are held until the bus departs.¹⁶²

F. Right to Seek Asylum from Persecution

108. Inconsistent with the United States' obligation under the Convention relating to the Status of Refugees, article 31, paragraph 1, detention of asylum seekers penalizes asylum seekers and deters them from seeking asylum in the United States.¹⁶³ Immigration regulations require that ICE detain individuals requesting asylum at a port of entry until an initial screening of their asylum claim, called a credible fear review, is conducted. While ICE claims these screenings are conducted within 2 weeks, some individuals have had to wait several weeks or even months for a screening.¹⁶⁴
109. Detention of asylum seekers "risks re-traumatizing those who are already in a psychologically frail state,"¹⁶⁵ creates barriers to establishing eligibility for asylum by limiting access to counsel and to evidence in support of their applications,¹⁶⁶ and can serve as a deterrent to pursuing a claim.

G. Right to Family Unity

110. In violation of ICCPR article 23 and article 17, the U.S. immigrant detention system contravenes the United States' obligations to protection family unity. Family unity cannot be considered in mandatory detention cases, and the United States routinely fails to consider family unity when making discretionary detention decisions. Transfer of people to facilities far from family members has increased sharply in the last decade.¹⁶⁷
111. According to the Applied Research Center's 2011 report *Shattered Families*: "In fiscal year 2011, the United States deported a record-breaking 397,000 people and detained nearly that many. According to federal data released to ARC through a Freedom of Information Act request, a growing number and proportion of deportees are parents. In the first six months of 2011, the federal government removed more than 46,000 mothers and fathers of U.S.-citizen children. These deportations shatter families and endanger the children left behind."¹⁶⁸
112. "ICE does not protect families at the time of apprehension. ICE and arresting police officers too often refuse to allow parents to make arrangements for their children. Existing ICE guidelines are largely outdated and insufficient for the current immigration enforcement context in which ICE has shifted from high-profile raids to more-hidden and devolved forms of enforcement that operate through local police and jails and smaller-scale ICE enforcement actions."¹⁶⁹
113. "ICE detention obstructs participation in CPS plans for family unity. ICE consistently detains parents when they could be released on their own recognizance or expand the use of community-based supervisory programs. Once detained, ICE denies parents access to programs required to complete CPS case plans. Due to the isolation of detention centers and ICE's refusal to transport detainees to hearings, parents can neither communicate with/visit their children nor participate in juvenile court proceedings. Child welfare caseworkers and attorneys struggle to locate and maintain contact with detained parents."¹⁷⁰

114. Parents detained in ICE facilities may sometimes be involved in complicated child custody disputes. These parents, however, are unable to participate—either telephonically, by video, or in person—in family court hearings and therefore are unable to fight for their parental rights.¹⁷¹ “In some cases this was because child welfare workers or their public defenders were not communicating information about custody proceedings to them in time for them to participate. In other cases, women knew about family court dates but did not know they could ask to participate from detention or had requested access by video or telephone but had been denied.”¹⁷²
115. In addition to obstructing participation in ongoing child protection or custody cases, the ICE detention itself too often forms the basis of child protection claims, resulting in placement of children in foster care and even termination of parental rights. “Whether children enter foster care as a direct result of their parents’ detention or deportation, or they were already in the child welfare system, immigration enforcement systems erect often-insurmountable barriers to family unity.”¹⁷³
116. The Applied Research Center found that: “[i]n practice, however, when mothers and fathers are detained and deported and their children are relegated to foster care, family separation can last for extended periods. Too often, these children lose the opportunity to ever see their parents again when a juvenile dependency court terminates parental rights.”¹⁷⁴

I have a Mexican immigrant client detained by ICE for a year. She was a [domestic violence] victim and the police got involved and that’s when they found out that she was undocumented and so they had to go ahead and detain her. Eventually, they released her and permitted her to stay here in the U.S. based on a Violence Against Women Act visa. But the fact that she was detained by ICE was enough to push the kids into foster care.¹⁷⁵

117. ICE enforcement practices resulting in detention, particularly cooperation with local law enforcement, have undermined family unity:

A 34-year-old Ecuadoran woman named Maria who has lived in Minneapolis, Minnesota, for almost a decade was pulled over by a state police officer as she drove her daughter to school one morning. The Minnesota Department of Public Safety has signed a 287(g) agreement with ICE, and when Maria rolled down her window, the officer asked her for her papers. Because she is undocumented, she had no driver’s license, so the officer arrested her. Before taking her to the station, the police officer said that she could call someone to pick up the girl, but Maria told the officer that she had no family in the area. When the officer told her that the only other option was to call CPS, Maria called her elderly landlady who agreed to take the girl. Maria was soon detained by ICE and moved over 1000 miles away to the Hutto women’s detention center in Texas. A few days later, Maria’s former boyfriend, who was the girl’s father and who had abused Maria for years, arrived at the caregiver’s house and took his daughter away.¹⁷⁶

118. Mandatory detention laws have also been found to undermine family unity. Again, the Applied Research Center:

While our research did uncover instances in which ICE agents used their discretion to release parents with children in foster care, most were among the shockingly low 16% of detainees with legal representation or were among a very small number of parents whose caseworker actively contacted ICE to ask for their release.

Without a broader basis for relief, many families will continue to be separated by detention and deportation. For some parents, ICE discretion offers little hope because their detention and deportation is mandatory based on federal law. Mandatory detention and deportation means that even immigration judges are denied the prerogative to release detainees or cancel an order of removal. Immigrants convicted of a broad category of charges are subject to mandatory detention and deportation. Others are detained for extended periods because ICE officers believe that if they were released while waiting for the decision of an immigration judge, they would flee. However, immigration attorneys as well as parents interviewed for this report made it very clear that parents with children in foster care are categorically a low flight risk because their primary concern is almost always to regain custody of their children. Few parents would leave town without their sons and daughters.¹⁷⁷

119. Customs and Border Protection practices also violate obligations to ensure family unity. According to research conducted by the organization No More Deaths, which conducted interviews from Fall 2008 to Spring 2011 with 12,895 individuals who were in Border Patrol custody, “Border Patrol deported 869 family members separately, including 17 children and 41 teens.”¹⁷⁸
120. Visits by non-detained family members are limited by facility rules. In one survey of attorneys, 81% reported that clients expressed difficulty in calling or visiting with family. Facilities often restrict visits to video only and limit the time of visits to 10 minutes.¹⁷⁹

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² *Report of the Special Rapporteur on the Human Rights of Migrants*, *supra* note 1, ¶ 10.

³ ICERD, art. 1, ¶ 2 (providing for the possibility of differentiating between citizens and non-citizens); *but see* CERD, Gen. Rec. 11 (noting regarding the rights of non-citizens, art. 1, ¶ 2, must not detract from the rights and freedoms recognized and enunciated in other human rights instruments and “must be construed so as to avoid undermining the basic prohibition of discrimination”); Gen. Rec. 30, at ¶ 2 (noting that “Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”).

⁴ Universal Declaration of Human Rights (UDHR), art. 3, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); ICCPR, *supra* note 3, art. 9.

⁵ UDHR, *supra* note 4, art. 9; ICCPR, *supra* note 1, art. 9(1) (stating 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); *id.* art. 9(2) (guaranteeing that anyone 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); *id.* art. 9(4) (requiring that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful). *See also* UNHRC, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 67, U.N. Doc. A/HRC/10/21 (Feb. 16, 2009) (reminding states that the legality of detention must be open for challenge before a court and 2); UNHRC, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 52, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008) (reminding states of the right of the detained to a prompt review).

⁶ ICCPR, *supra* note 3, at art. 9(4).

⁷ ICCPR, *supra* note 1, art. 7 (stating that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment); ICCPR art. 10(1) (requiring that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person); *id.* art. 10(2) (requiring that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons).

⁸ UNHCR, Exec. Comm., *Detention of Refugees and Asylum Seekers, Conclusion No. 44 (XXXVII)* UN Doc. A/41/12/Add.1 (Oct. 13, 1986) (stating that “in view of the hardship which it involves, detention should normally be avoided” and sets out the limited accepted bases on which the detention of refugees or asylum-seekers may be justified, namely: to verify identity; to determine the elements of the claim; to deal with cases where refugees have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order. Those detained must have access to either an administrative or judicial review, an essential safeguard against arbitrary detention). *See also*, UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Feb. 26, 1999.

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¹⁰ UDHR, *supra* note 4, art.16 (3); ICCPR, *supra* note 1, art. 23 (1), (3) (stating that the right of men and women to marry and found a family shall be recognized and that this right includes the right to live together); *id.* art. 17(1)

(stating that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence . . .”).

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⁸⁷ See, e.g., Georgia Detention Watch, Report on the December 2008 Humanitarian Visit to the Stewart Detention Center, at 6 (reporting that in a visit on Feb. 21, 2009, “Julio” claimed that he had been detained for approximately three months and during that time had been unable to secure counsel for his deportation case. He told the volunteer that he had decided that it was “easier to give up” and had signed a stipulated order of removal). Available at http://www.acluga.org/Georgia_Detention_Watch_Report_on_Stewart.pdf.

⁸⁸ Jennifer Lee Koh, Jayashri Srikantiah, and Karen C. Tumlin, *Deportation Without Due Process*, Sept. 2011, available at http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf.

⁸⁹ Jennifer Lee Koh, Jayashri Srikantiah, and Karen C. Tumlin, *Deportation Without Due Process*, Sept. 2011, at p. 5. Available at http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf.

⁹⁰ See, e.g., E-mail from Ericka C. Curran to author describing the Baker County detention facility in McLenny, Florida and reporting that the law library is frequently inaccessible to detainees causing some to miss filing deadlines.

⁹¹ INA § 235(b)(1)(B)(iii)(IV).

⁹² Section 236(c) of the INA mandates detention of any alien who is inadmissible by reason of having committed any offense covered in § 212(a)(2); is deportable by reason of having committed any offense covered in INA § 273(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); is deportable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; or is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

⁹³ Human Rights Watch, *Costly and Unfair: Flaws in US Immigration Detention Policy*, May 2010, at 8-9.

⁹⁴ See, e.g., Barbara A. Frey and X. Kevin Zhao, “The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law,” *XXIX Law and Inequality: A Journal of Theory and Practice* 2, Summer 2011, at 310-11.

⁹⁵ See INA § 236(c).

⁹⁶ INA § 235(b)(1)(B)(iii)(IV).

⁹⁷ See HUMAN RIGHTS FIRST, RENEWING U.S. COMMITMENT TO REFUGEE PROTECTION: RECOMMENDATIONS FOR REFORM ON THE 30TH ANNIVERSARY OF THE REFUGEE ACT (Mar. 2010) at 10 (noting that while Immigration Judges can review ICE’s custody decisions for other immigrant detainees, they are precluded under regulatory language from reviewing the detention of “arriving aliens,” a group that includes asylum seekers who arrive at airports and other U.S. entry points under regulations located primarily at 8 C.F.R. § 1003.19 and § 212.5, as well as § 208.30 and § 235.3). See also U.S. Comm’n on Int’l Religious Freedom, ICE Parole Guideline is an Important First Step to Fix Flawed Treatment of Asylum Seekers in the United States (Dec. 23, 2009) (noting low rates of release on parole and citing that New Orleans released only 0.5 percent of asylum seekers, New Jersey less than four percent, and New York eight percent following a finding of credible fear), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=2891&Itemid=126.

⁹⁸ U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, News Release: ICE issues new procedures for asylum seekers as part of ongoing detention reform initiatives (Dec. 16, 2009), available at <http://www.ice.gov/pi/nr/0912/091216washington.htm>.

⁹⁹ See Lutheran Immigrant and Refugee Service, *Unlocking Liberty*, Oct. 2011. Available at <http://www.lirs.org/atf/cf/%7Ba9ddba5e-c6b5-4c63-89de-91d2f09a28ca%7D/RPTUNLOCKINGLIBERTY.PDF>.

¹⁰⁰ See Lutheran Immigrant and Refugee Service, *Unlocking Liberty*, Oct. 2011. Available at <http://www.lirs.org/atf/cf/%7Ba9ddba5e-c6b5-4c63-89de-91d2f09a28ca%7D/RPTUNLOCKINGLIBERTY.PDF>.

¹⁰¹ See NAT'L IMMIGR. L. CTR., ACLU OF S. CAL., AND HOLLAND & KNIGHT, A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 4 (2009) [*hereinafter* A BROKEN SYSTEM].

¹⁰² See *e.g.*, DETENTION WATCH NETWORK, ABOUT THE U.S. DETENTION AND DEPORTATION SYSTEM, available at www.detentionwatchnetwork.org/aboutdetention.

¹⁰³ SHRIRO, *supra* note 53 at 2.

¹⁰⁴ ICCPR, *supra* note 1, art. 10(1) (guaranteeing that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person); *id.* art. 10(2)(a) (providing that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons).

¹⁰⁵ Brittney Nystrom, Senior Legal Advisor, National Immigration Forum, Written Testimony before U.S. House of Representatives, House Homeland Security Committee, Border, Maritime, and Global Counterterrorism Subcommittee, "Moving Toward More Effective Immigration Detention Management," Dec. 10, 2009, available at <http://chsdemocrats.house.gov/SiteDocuments/20091210105703-50708.PDF>.

¹⁰⁶ The Advocates for Human Rights regularly represents people detained in Minnesota and has observed that people routinely remained shackled when appearing before the Immigration Judge.

¹⁰⁷ See Human Rights Advocates, Submission to the Human Rights Council, 11th Session, Agenda Item 3: Rights of Migrants.

¹⁰⁸ Visit by The Advocates for Human Rights to Ramsey County Adult Detention Center, 2011 (notes on file with author).

¹⁰⁹ See *e.g.*, American Civil Liberties Union of Georgia, Letter to the Inter-American Commission on Human Rights, "Submission re. Racial Profiling in Gwinnett and Cobb Counties, Georgia, and Conditions of Detention at Stewart and Irwin County Detention Center," Mar. 28, 2011, at 5 (reporting that detainees were given dirty underwear at the Irwin County Detention Center). Available at <http://www.acluga.org/ACLUofGeorgia-submissiontoIACHR.pdf>.

¹¹⁰ Immigration Equality, Conditions of Detention, <http://www.immigrationequality.org/issues/detention/conditions-of-detention/> (last visited Jan. 27, 2012).

¹¹¹ See, *e.g.*, KATHERINE FENNELLY AND KATHLEEN MOCCIO, U. OF MINN. HUBERT H. HUMPHREY INST. OF PUB. AFFAIRS, ATTORNEYS' PERSPECTIVES ON THE RIGHTS OF DETAINED IMMIGRANTS IN MINNESOTA (Nov. 2009).

¹¹² County jails holding immigrant detainees in Minnesota have "video visits" with family members, where detainees see and speak with their family members via closed circuit television.

¹¹³ County jails, designed for short periods of detention, do not necessarily have outdoor recreation facilities. The Ramsey County Adult Detention Center in St. Paul, Minnesota, for example, has no outdoor recreation access. People in detention have very limited access to a small room with window near the high ceilings which can be opened to let fresh air into the room.

¹¹⁴ See Dana Priest & Amy Goldstein, *Caught Without Care*, THE WASH. POST, May 13, 2008 (reporting that suicide is the most common cause of death among detained immigrants with 15 of 83 deaths since 2003 the result of suicide and stating, "No one in the Division of Immigration Health Services (DIHS), the agency responsible for detainee medical care, has a firm grip on the number of mentally ill among the 33,000 detainees held on any given day, records show. But in confidential memos, officials estimate that about 15 percent -- about 4,500 -- are mentally ill, a number that is much higher than the public ICE estimate. The numbers are rising fast, memos reveal, as state mental institutions and prisons transfer more people into immigration detention"). See also PHYSICIANS FOR HUMAN RIGHTS, BELLEVUE/NYU CENTER FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS (2003), available at <http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf>.

¹¹⁵ A client of The Advocates for Human Rights seeking asylum from Ethiopia and being treated for depression and Post-Traumatic Stress Disorder, was detained for over one year in the Ramsey County Adult Detention Center in St. Paul, Minnesota, following her asylum hearing in front of an immigration judge. While detained, she never saw the outdoors and was co-mingled with the general convicted population because the facility with which ICE contracts lacks the facilities.

¹¹⁶ See, *e.g.*, Georgia Detention Watch, Report on the December 2008 Humanitarian Visit to the Stewart Detention Center, at 5-6. Available at http://www.acluga.org/Georgia_Detention_Watch_Report_on_Stewart.pdf; letter from

IRATE & First Friends to the author summarizing key complaints received by volunteers during their visits with people detained in New Jersey, Jan. 26, 2012, on file with author.

¹¹⁷ See e.g., John E. Dannenberg, Prison Legal News, “Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks,” available at

[https://www.prisonlegalnews.org/\(S\(34xg4h553u305v453i4j5u45\)\)/23083_displayArticle.aspx](https://www.prisonlegalnews.org/(S(34xg4h553u305v453i4j5u45))/23083_displayArticle.aspx); Center for Constitutional Rights, <http://ccrjustice.org/learn-more/faqs/factsheet:-corporate-exploitation-and-prison-system>; letter from IRATE & First Friends to the author summarizing key complaints received by volunteers during their visits with people detained in New Jersey, Jan. 26, 2012, on file with author.

¹¹⁸ Women’s Refugee Commission, *Migrant Women and Children at Risk: In Custody in Arizona*, Oct. 2010, at 5.

¹¹⁹ *2008 Operations Manual ICE Performance Based National Detention Standards*, (PBNDS), available at http://www.ice.gov/doclib/dro/detention-standards/pdf/special_management_units.pdf. (last visited Jan. 27, 2012).

¹²⁰ IMMIGRATION LAW & THE TRANSGENDER CLIENT 90 (Victoria Neilson ed., 2008).

¹²¹ IMMIGRATION LAW & THE TRANSGENDER CLIENT 90 (Victoria Neilson ed., 2008).

¹²² Immigration Equality, a national organization that advocates for the rights of gay, lesbian, bisexual, transgender, and HIV positive immigrants, has either conducted an intake with these individuals or directly represented them in their immigration cases.

¹²³ See, e.g., Georgia Detention Watch, Report on the December 2008 Humanitarian Visit to the Stewart Detention Center, at 6. Available at http://www.acluga.org/Georgia_Detention_Watch_Report_on_Stewart.pdf.

¹²⁴ Immigration Equality, Conditions of Detention, <http://www.immigrationequality.org/issues/detention/conditions-of-detention/> (last visited Jan. 27, 2012).

¹²⁵ Clement Lee, Legal Fellow, Immigration Equality, Addresss at the New York City Council Hearing (Dec. 13, 2011) (transcript available at <http://www.scribd.com/doc/75669146/Testimony-on-LGBT-Detention-Issues>).

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¹²⁹ Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – A Two-Year Review*, 2001, at p. 22.

¹³⁰ Immigration and Customs Enforcement, List of Detainee Deaths Since October 2003, available at <http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf>

¹³¹ Nina Bernstein, *Hong Kong Emigrant’s Death Attracts Scrutiny of U.S. Detention System*, N.Y. TIMES, Aug. 13, 2008 (reporting that “[i]n April, [Hiu Lui] Ng began complaining of excruciating back pain. By mid-July, he could no longer walk or stand. And last Wednesday, two days after his 34th birthday, he died in the custody of Immigration and Customs Enforcement in a Rhode Island hospital, his spine fractured and his body riddled with cancer that had gone undiagnosed and untreated for months.”). See also Katherine Fennelly and Kathleen Moccio, U of Minn. Hubert H. Humphrey Inst. Of Pub. Affairs, “Attorneys’ Perspectives on the Rights of Detained Immigrants in Minnesota,” (Nov. 2009).

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