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Immigration Detention & Human Rights in the Lone Star State

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# Immigration Detention & Human Rights in the Lone Star State

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I. Introduction

Every year, almost 400,000 individuals are held in immigration detention in the United States. These individuals—men, women, and even children—are held in a patchwork of federal, local, and private contract facilities. Surprisingly, one-third of all U.S. immigration detention beds are located in the state of Texas. Given the concentration of detention space in Texas and thus the unique issues facing that state, this report seeks to elucidate the key human rights issues surrounding immigration detention with a focus on the situation in Texas.

The information contained in this report was gathered using a variety of research methods, including: (1) review of relevant scholarly articles, human rights reports, government reports, international materials, and news articles, (2) in-person and telephone interviews with fifteen legal and policy advocates working with clinics and non-profit organizations focused on immigration detention issues, (3) observations at immigration court proceedings, (4) visits to six immigration detention facilities in Texas, (5) interviews with employees of Immigration and Customs Enforcement as well as employees of private prison corporations, and (6) interviews with eight individuals being held in immigration detention in Texas.

The Background section of this paper provides a snapshot of immigration detention in Texas, explains the legal framework under which the United States detains immigrants and briefly describes the relevance of international human rights law in the discussion to immigration detention. The body of the paper is then split into six main sections, which discuss: (1) conditions faced by immigrant detainees in Texas and the international human rights obligations implicated by those conditions, (2) immigration detention standards and oversight, (3) access to counsel and adjudication in Texas, (4) the causes and consequences of over-detention, (5) the policy choice to detain immigrants and alternatives to detention, and (6) recommendations to bring U.S. immigration detention practices into compliance with international human rights law. While the report focuses on how federal immigration detention practices play out in Texas, many of the findings and recommendations are applicable throughout the United States.

II. Background

A. Immigration Detention Basics

Immigration detention is the practice of detaining individuals who the U.S. Government suspects have violated immigration laws. Roughly 30,000 individuals are held in immigration detention in the United States on any given day, and immigration detention has grown dramatically in recent years. In fiscal year 2009, 383,524 immigrants were detained. This marked a 64 percent increase over 2005. Among the individuals in ICE detention are “survivors of torture, asylum seekers, victims of trafficking, families with small children, the elderly, individuals with serious medical and mental health conditions, and lawful permanent residents with longstanding family and community ties who are facing deportation because of previous criminal convictions, some of which are for petty offenses such as shoplifting and low-level drug crimes.” The Immigration and Nationality Act (INA) authorizes Immigration and Customs Enforcement (ICE) to detain certain immigrants. ICE is an investigative arm of the U.S. Department of Homeland Security (DHS) created in 2003, and the Office of Detention and Removal Operations is the largest program within ICE.

There are over 300 facilities across the nation in which ICE incarcerates immigrants; these facilities include Service Processing Centers (SPC) owned by ICE and operated by the
private sector, Contract Detention Facilities (CDF) owned and operated by the private sector, and county jails with which ICE maintains intergovernmental agency services agreements (IGSA). Many IGSA county jails further sub-contract out the operation of the facilities to the private sector. Some IGSA jails are dedicated to ICE, meaning that the entire population in the jails is comprised of ICE immigrant detainees. Some IGSA jails, on the other hand, are shared-use, meaning that both ICE immigrants and county criminal defendants are housed in the same facility. A small percentage of immigrants are housed in facilities that are actually owned and operated by ICE or in Bureau of Prison facilities. There is also one facility, the Berks Family Residential Center in Pennsylvania, in which families with minor children are incarcerated.

The issue of immigration detention is particularly relevant to policy-makers, lawyers, and other advocates in Texas because, as stated, approximately one-third of all individuals in ICE detention are incarcerated in Texas. The following graphic, reproduced from a 2009 report by then Director of the ICE Office of Detention Policy and Planning, Dr. Dora Schriro (the “Schriro Report”), shows a spatial density analysis of the average daily population by detention facility locations, revealing the heavy concentration of ICE detainees in Texas:

The following chart, provided upon request by the ICE Public Engagement Office, lists the authorized immigration detention locations in Texas and their Average Daily Populations (ADPs) for fiscal years 2010 and 2011.

<table>
<thead>
<tr>
<th>NAME</th>
<th>CITY</th>
<th>FY11 ADP</th>
<th>FY10 ADP</th>
</tr>
</thead>
<tbody>
<tr>
<td>SOUTH TEXAS DETENTION COMPLEX</td>
<td>PEARSALL</td>
<td>1,454</td>
<td>1,527</td>
</tr>
<tr>
<td>WILLACY DETENTION CENTER</td>
<td>RAYMONDVILLE</td>
<td>1,194</td>
<td>1,212</td>
</tr>
<tr>
<td>HOUSTON CDF</td>
<td>HOUSTON</td>
<td>906</td>
<td>866</td>
</tr>
<tr>
<td>EL PASO SPC</td>
<td>EL PASO</td>
<td>773</td>
<td>794</td>
</tr>
</tbody>
</table>
B.  The Legal Framework: A Civil System?

It is critically important for policy-makers, advocates, and the public at large to recognize that the laws under which ICE places individuals in immigration detention are civil, not criminal. Though some individuals in ICE detention have indeed had criminal convictions in the past, they are placed in ICE detention under suspicion of violating civil laws. Thus, the goals of criminal incarceration do not, or at least should not, come into play in the immigration detention context.

There are several paths—paved by a variety of complex federal statutes and regulations—that can lead an individual to civil immigration detention. For non-citizens seeking admission into the United States, Section 235(b)(2)(A) of the Immigration and Nationality Act (INA), provides that: “in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained.” Notably, Section 235(b)(2)(A) does not require officials to obtain a warrant in order to detain an alien who is unable to establish his or her admissibility.

When a person who is already in the United States is suspected of violating immigration laws, ICE may place that individual in removal proceedings—immigration proceedings to
determine whether the individual will be deported. An immigrant in removal proceedings may consent to removal, voluntarily depart, or try to remain in the United States by challenging the grounds for removal, seeking asylum or relief under the Convention Against Torture, or several other avenues for relief. ICE may subject an individual in removal proceedings to discretionary detention pursuant to Section 236(a) of the INA, which states that: “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”

Most immigrants in ICE custody, however, are there as a result of federal mandatory detention provisions. Pursuant to INA Section 236(c), which was added by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), “criminal aliens,” or non-citizens who have been convicted of certain crimes are subject to mandatory detention. INA 236(c) requires mandatory detention for non-citizens, including legal permanent residents, who have committed crimes of moral turpitude and aggravated felonies, as well as most controlled substance offenses and firearms offenses. The definitions of “moral turpitude” and “aggravated felonies” are “broad and confusing and subject to constant interpretation by the immigration courts, the Board of Immigration Appeals, and federal courts.” Before IIRIRA, the U.S. government detained non-citizens only after establishing that the individual was a flight risk or a threat to public safety. IIRIRA removed that initial burden and requires detention for these “criminal aliens” even though they have already served their criminal sentences. In 2009, 66% of all immigrants incarcerated by ICE were mandatorily detained.

Mandatory detention, by definition, omits individualized assessment of the unique circumstances of a certain subset of immigrants. The law ignores whether a person is actually a flight or security risk and it ignores a person’s status as a lawful permanent resident. The mandatory detention provisions do not allow for any consideration of the length of time a non-citizen has remained in the country as a lawful permanent resident. In order to defeat mandatory detention, the immigrant respondent has the burden to prove that the government is ”substantially unlikely to establish, at the merits hearing, the charge or charges that subject the alien to mandatory detention.”

Although immigration detention was intended to be a civil method of immigration enforcement, DHS acknowledges that immigrants in detention are often perceived by the public as comparable to individuals in criminal incarceration and are “ordinarily detained in secure facilities with hardened perimeters in remote locations” similar to prisoners convicted of crimes. DHS also acknowledges that many of the “facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons” and that “[t]heir design, construction, staffing plans, and population management strategies are based largely upon the principles of command and control.” Advocates and other commentators agree that immigration detention has “embraced the ‘aesthetic’ and ‘technique’ of incarceration, evolving for many detainees into a quasi-punitive regime far out of alignment with immigration custody’s permissible purposes.”

Although civil immigration detention has “embraced the ‘aesthetic’ and ‘technique’” of criminal incarceration, civil immigration law does not afford the same rights to immigrant detainees as those given to criminal detainees. For instance, immigrants in detention have no constitutional right to appointed counsel. U.S. law provides that “[i]n any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of
being represented” but “at no expense to the Government.”xiii Furthermore, in the context of mandatory detention, the burden is placed on the detainee to prove that the government cannot establish that the individual is subject to mandatory detention—an inversion of the burden in the criminal context, which is placed on the government. Thus, immigrant detainees suffer many of the same restrictions of personal liberty as criminal detainees without the same safeguards or rights.

There are several alternatives to detention available, including community-based programs as well as more restrictive programs such as the Intensive Supervision Appearance Program (ISAP II), Enhanced Supervision Reporting, and electronic monitoring. Although ICE has the discretion to utilize these alternatives under current law, it has chosen to under-utilize alternatives and has admitted to over-reliance on incarceration.xxiv

C. The Role of International Human Rights Law

This paper seeks to review the status of immigration detention in Texas through an international human rights lens. With the exception of cases involving unaccompanied minors, international human rights law is not generally relied upon during immigration proceedings or other immigration detention-related litigation in Texas. International human rights law is significant, however, in achieving broader policy changes for three key reasons.

First, and most importantly, some international human rights law is binding on the United States, and the United States is therefore required to promulgate laws that comply with certain human rights obligations.xxx As explained in a 2008 report by the U.N. Special Rapporteur on the human rights of migrants to the U.S., "while international law recognizes every State’s right to set immigration criteria and procedures, it does not allow unfettered discretion to set policies for detention or deportation of non-citizens without regard to human rights standards.xxxi Similarly, in a 2002 report, the U.N. Special Rapporteur explained that “[d]eprivation of liberty of migrants must comply not only with national law, but also with international legislation.xxxii

Second, international human rights law, including those provisions that are not binding, serves as an important tool against which to measure our domestic practices. It helps to put our policies and practices into context with the rest of the world.

Finally, the United States’ compliance with international human rights obligations contributes to our nation’s goal of promoting human rights around the world. The U.S. State Department has said that: “[t]he protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights. . . “xxviii In order to promote respect for human rights around the globe, the United States must lead by example by scrutinizing its own practices through a human rights lens. The State Department has further said that: “[t]he United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.xxxix This notion is also true within our own borders. Promotion of human rights within the United States helps promote the rule of law, combats crime and corruption, and prevents humanitarian crises.
For these reasons, this paper considers how immigration detention in Texas implicates various treaties, conventions, U.N. resolutions, reports of Special Rapporteurs, international case law, and advisory comments and opinions.

III. Detention Conditions in Texas

While this report will later consider and challenge the policy choice to detain immigrants at all, this section of the report focuses on the issues faced by immigrants who are currently in ICE detention in Texas. This includes an explanation of the general conditions of confinement such as prison-like living conditions, personal safety issues, inadequate provision of medical and mental health care, unique issues faced by vulnerable populations in detention, the length of detention, and the human rights implications of these conditions.

The majority of the information contained in this section was obtained during visits to six different immigration detention facilities in Texas during the Fall and Winter of 2010. The immigration detention facilities visited were:

<table>
<thead>
<tr>
<th>NAME</th>
<th>CITY</th>
<th>BASIC DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 JOHNSON COUNTY DETENTION CENTER</td>
<td>CLEBURNE</td>
<td>Located approximately 55 miles southwest of Dallas. Shared-use IGSA with an Averaged Daily Population (ADP) of 167, operated by the private corporation, LaSalle Corrections.</td>
</tr>
<tr>
<td>2 T. DON HUTTO RESIDENTIAL CENTER *</td>
<td>TAYLOR</td>
<td>Located approximately 35 miles northeast of Austin. Dedicated all-female IGSA with an ADP of 500, operated by the private corporation, Corrections Corporation of America.</td>
</tr>
<tr>
<td>3 SOUTH TEXAS DETENTION FACILITY * +</td>
<td>PEARSALL</td>
<td>Located approximately 55 miles southwest of San Antonio. Dedicated CDF with an ADP of 1,454, operated by the private corporation, GEO Group, Inc.</td>
</tr>
<tr>
<td>4 LAREDO PROCESSING CENTER *</td>
<td>LAREDO</td>
<td>Located approximately 160 miles southwest of San Antonio on the U.S.-Mexico border. Dedicated CDF with an ADP of 128, operated by the private corporation, Corrections</td>
</tr>
</tbody>
</table>
5  POLK COUNTY ADULT DETENTION CENTER  LIVINGSTON  Located approximately 85 miles northeast of Houston. Shared-use IGSA with an ADP of 796, operated by the private corporation, Community Education Centers.

6  HOUSTON CONTRACT DETENTION FACILITY  HOUSTON  Located in Houston, minutes away from the George Bush Intercontinental Airport. Dedicated CDF with an ADP of 906, operated by the private corporation, Corrections Corporation of America.

* Detainee interviews were permitted at these locations.  
+ The author visited but did not tour the South Texas Detention Facility.

A.  **Prison-Like Conditions of Confinement**

While visiting the Johnson County Detention Center, T. Don Hutto Detention Residential Center, South Texas Detention Facility, Laredo Processing Center, Polk County Adult Detention Center, and Houston Contract Detention Facility, the author focused observations on the following factors: (a) architecture and layout of the detention facilities, (b) living quarters, (c) restriction of movement, use of uniforms, and body counts, (d) food, (e) recreation, (f) visitation, and (g) communication. An overarching theme arising from these observations was the prevalence of prison-like conditions and the criminal aesthetic of these supposedly civil detention facilities.

1. **Architecture and Layout of Detention Facilities**

All facilities visited for this report maintained an exterior appearance very similar to that of a jail, and indeed many were former jails or continue to operate, in part, as county jails. High fences surrounded all the facilities visited, and five out of the six facilities had some form of barbed or razor wiring at the top of the fence. On the interior, all facilities had the look and feel of a criminal detention institution, with long sparse hallways and automatically locking doors operated from a control room.

The T. Don Hutto facility in Taylor (the “Hutto Facility” or “Hutto”) was one exception to this observation. That facility had adopted a more residential feel, with painted murals, comfortable furniture, and a friendlier décor. An ICE Assistant Field Director interviewed for this report explained that the Hutto facility was “softer” because, as of September of 2009, Hutto became an all-female facility and residents there do not have criminal histories. In order to be admitted to Hutto, female detainees must have no convictions or arrests for drug, assault, or crimes against people. As an important side note, the Hutto facility is the exception to many, but not all, of the observations outlined below. This is due in large part to a 2007 settlement agreement between ICE and the American Civil Liberties Union (ACLU) and ICE under which ICE agreed to significantly improve conditions in the detention facility. At the time ACLU filed the lawsuit, ICE used the Hutto facility to detain both women and children in prison-like conditions. Since the settlement, Hutto has ceased detaining children and has improved conditions.

Although the author did not visit the Willacy Detention Center in Raymondville, several advocates reported that the facility utilizes tents to house many ICE detainees. In a December
2009 human rights report, the ACLU of Texas provided a first-hand account of the architecture and layout of the Willacy Facility: “Surrounded by acres of utter desolation, the . . . Willacy Detention Center . . . looms ominously with high barbed wire fencing, sentries, ‘no trespassing’ signs, patrol cars and long rows of tents that hold 2,000 detainees. Nearby is a newly opened brick structure housing another 1,000.” xxxi The ACLU report goes on to explain that “these ten low slung dome-shaped structures, about the length of a football field . . . have [windows . . . placed too high to see out.” xxxii

2. Living Quarters

Most facilities visited for this report utilized dormitory living with bunk beds. For instance, in the Houston Contract Detention Facility (the “Houston Facility”), male detainees are housed in 40-man dormitories with assigned bunk beds. The dormitories also include a microwave, sink, television, and communal bathrooms. There is an officer present in each dorm for 24 hours a day as well as the periodic presence of case management and correctional counselors. Larger dorms are used at the Johnson County Facility, which houses detainees in “tanks” containing 64 bunk beds each.

Smaller dormitories are used at the Polk Facility, where men are housed in 8-person or 24-person dorms with similar communal amenities. Like many immigration detention facilities, the Polk Facility also incarcerates non-ICE criminal defendants. When asked about the difference in conditions for the ICE detainees and criminal county detainees, the warden at the Polk County Adult Detention Center in Livingston, Texas said there was no difference in the conditions for the two populations. ICE has admitted that immigrant detainees with no criminal history are frequently housed with detainees with criminal histories, and detainees with non-violent criminal histories are often housed with detainees with violent criminal histories. xxxiii

The Hutto facility contains 11 pods of dormitories. The facility used to be a jail, so the women sleep in shared jail cells, although the doors are kept open and none of the doors are secured. There are toilets in each cell, but the women must use communal showers in the pods. The pods contain microwaves, televisions, couches, and telephones. Though the Hutto facility is managed by the private Corrections Corporation of America (CCA), ICE has a daily presence in the pods.

Several facilities visited, including the Houston Facility, Johnson County Facility, Laredo Facility, and Polk Facility, utilize segregation or solitary confinement for disciplinary purposes. Several ICE representatives interviewed for this report explained that segregation was used as punishment for infractions of the detention facility rules, such as fighting among detainees. Segregation units in the facilities were generally small and sparse. For instance, segregation at the Polk Facility consisted of a small cell with a toilet, bed, and table. Several ICE officials interviewed explained that segregation was sometimes used, not for disciplinary purposes, but for the protection of vulnerable populations, such as transgender individuals.

In 2009, the Inter-American Commission on Human Rights (IACHR) Rapporteurship on the Rights of Migrant Workers and their Families released a press release regarding their observations of U.S. immigration detention. Their observations were based on a week of visits of various detention facilities in Texas and Arizona. xxxiv The IACHR Rapporteurship stated that it was “alarmed at the prevalence of a prison-based system for ensuring migrants’ appearance at
immigration proceedings for alleged civil immigration violations.” It noted that in many instances, "detention conditions for immigrant detainees were no different than those for the criminal convicts, as reflected among other aspects in their cells, their living space, the intake area, and the solitary confinement cells.”

3. Uniforms, Restriction on Movement, & Body Counts

In addition to the exterior architecture, interior layout, and living quarters at the detention facilities visited for this report, the author observed that other, less obvious, factors contributed to the criminal aesthetic of the facilities. These factors include the use of uniforms, restrictions on detainee movement, and frequent body counts.

a) Uniforms

Detainees wore prison-like uniforms in five out of the six detention facilities visited for this report. Upon arriving at an immigration detention facility, detainees are given an ICE security classification—low, moderate, or high—based primarily on criminal history. The majority of detainees are classified as low. In most facilities visited, these classifications affected the color of the detainee’s jumpsuit uniforms. For example, in the Houston Facility, detainees wearing blue were classified at the lowest level, detainees wearing orange were classified as moderate, and detainees wearing red were classified as high. A similar uniform assignment system based on classification was used at the Polk Facility in Livingston.

The Hutto facility was the exception to these observations. Because none of the residents at Hutto have criminal histories, they are not given uniforms based on classifications. In fact, residents there are not required to wear uniforms, although many of them were wearing facility-issued clothing.

A Texas Advocate’s Perspective

“The very awkward thing is that in a system that is . . . civil, what we are doing, to a very great extent, is just housing people in jail. There are uniforms, colored overalls, heavy steel gates and locks. Some facilities are harsher than others, and some you might perceive as being more tolerable, but still you are dealing with significant restraints on individuals—their ability to move around, to stand out in the sun.”

b) Restriction on Movement

Restriction of movement varies among facilities. Movement in the Houston Facility, for instance, is quite restricted. When leaving the dormitories, detainees there are required to carry a slip stating their purpose, and there are several metal detectors located throughout the facility through which detainees must pass periodically. Similarly, according to an ICE Assistant Field Office Director interviewed, all detainee movement at the Polk Facility is escorted. A staff person at the Johnson County Facility described the restrictions on movement as follows: “This is a county jail, so movement is of course controlled—for instance, everyone leaves from their dormitories to recreation in one group.”

In contrast, the Hutto facility was described as an “open-movement” facility, meaning that the women are permitted to move from the dorms to the library to different programming at
will. For instance, while walking through the facility, the author observed a large group of unattended women freely moving from inside the facility to an outside portable building in which a crochet class was taking place.

c) Body Counts

In order to keep track of the number of detainees being held at any given time, immigration detention facilities often perform “counts.” The number of counts varies from facility to facility. At the Houston Contract Detention Facility, there are 10 counts for each 24-hour period. The private prison corporation representative interviewed there explained that during counts, “everyone stops and we count all the dorms.” The private prison staff at the Polk County Adult Detention Center explained that body counts occur six or seven times every day. The Johnson County Detention Facility has three counts a day.

4. Food

Some advocates interviewed for this report stated that their detained clients complain about the food quality and selection in detention facilities. The ACLU of Texas reported in 2009 that at the Willacy Facility in Raymondville, Port Isabel Service Processing Center in Los Fresnos, and South Texas Detention Complex in Pearsall, “detainees expressed serious concerns with the quantity of food provided, the nutritional content, and the sanitation of trays and eating utensils . . . [and] stated that the food was often cold, greasy and lacking any fruit or vegetables.” When asked, most detainees interviewed for this report did not have serious complaints about the food other than lack of variety. An ICE Assistant Field Director interviewed for this report explained that the Hutto facility conducts surveys of the detainees once a month about the quality of food, and the kitchen staff tries to respond to complaints or preferences. A Hutto detainee interviewed for this report, however, reported that the kitchen staff repeats some dishes over and over again and “the thing about surveys is not true. They ask us what we want but in my opinion the food has gotten worse.”

In terms of food service, most facilities visited use a “satellite feeding” method to provide food to detainees. Under this method, food is prepared in the kitchen and then brought to the dormitories and eaten there. Several facilities also have commissaries from which detainees could purchase additional snacks and drinks at specified times. The Hutto facility has a cafeteria that looks similar to a cafeteria in a public school. There is a salad bar, soda machine, and open seating, meaning that residents may sit wherever they want in the cafeteria. Residents who work in the kitchen on a voluntary basis serve the meals.

5. Recreation

The author also observed varying amounts and types of recreational activities afforded to ICE detainees in the different facilities. Detainees at the Laredo Facility, Johnson County Facility and Houston Facility receive one hour of outdoor recreation a day, while detainees at the Polk Facility receive up to four hours of outdoor recreation a day. Despite the greater length of recreation time, the “outdoor” recreation yard at Polk was actually a partially covered courtyard, more akin to an indoor room with a partial sunroof than to an actual outdoor space. Detainees interviewed at the South Texas Detention Complex in Pearsall reported that they received open recreation for most of the day, but that the outdoor recreation yard was also more similar to an indoor room with a sunroof than an actual outdoor space.
The gym at the Hutto facility contained treadmills, bikes, basketballs, volleyballs, and table tennis equipment. There is a recreation office, which also offers Zumba classes and movie nights on weekends. Residents there are permitted to go to recreation at will within the allotted schedule under the open movement system.

6. Visitation

Visitation with friends and family is critical for immigrants in ICE detention. A recent study showed that visitation boosts immigrant detainees’ morale and assists detainees in pursuing their immigration cases.\textsuperscript{xxxviii} The study showed that visitors also help mitigate deficient medical care in detention facilities and can help pressure facilities to improve conditions.\textsuperscript{xxxix} Indeed, two detainees interviewed at the South Texas Detention Center explained that visitation with their families helped alleviate the depression that they were experiencing in detention and also helped them organize paperwork and other materials for their immigration cases. However, they also expressed frustration or disappointment over the restrictions on visitation.

\begin{quote}
\textbf{SNAPSHOT FROM DETENTION: SOUTH TEXAS DETENTION CENTER, PEARSALL}

“Alejandro,” a male detainee from Mexico:

“I want to have visitors, but I can’t. My wife doesn’t have papers, so she can’t come here. And my daughter, I don’t want my daughter to see me in here like this.”
\end{quote}

Visitation rules and visitation rooms vary from facility to facility. At the Houston Facility, visitation is permitted seven days a week, but visits are non-contact, meaning that visitors must talk to their relatives or friends through a glass panel using a telephone. Visitation at the Polk Facility is also non-contact but is only permitted for 30 minutes a week. Visitation at the Johnson County Facility is non-contact and occurs on weekends.

The visitation room at the Hutto facility was large, carpeted, contained comfortable seating and toys and activities for children. All visits there are contact visits, meaning that residents did not have to speak through glass or a telephone during visits. Family and friends are permitted to visit any day a week and visits generally last an hour. The Laredo Facility also permitted contact visits.

7. Communication

All facilities visited for this report featured telephones in the dormitory area from which detainees can make but not receive calls. The facilities utilized a variety of payment methods for telephone calls including pin numbers and calling cards. Calls are generally free to consular offices and pro bono services. A female detainee interviewed at the Hutto facility reported that: “[t]here are a lot of problems with the phone. When you want to make a call, you have to dial 20 times, and have to buy a card and we waste the card just trying and trying to make the call.”

The Hutto facility features a computer lab and with 20 computers that have internet access and residents can access e-mail. There are also instructions posted in the lab showing how to send text messages from the computers. The residents can use the lab once a day for 20-
30 minutes a day. The ICE Assistant Field Office Director described the computer lab as one of the highlights of the facility because it opened up communication.

8. Human Rights Obligations Implicated by General Conditions of Confinement

As explained by the U.N. Special Rapporteur in a report to the U.N. Sub-Commission on the Promotion and Protection of Minorities, “conditions of detention faced by undocumented migrants and asylum-seekers should meet international standards.” The conditions of confinement described above implicate international human rights law related to (a) prohibitions against arbitrary detention, (b) prohibitions against cruel, inhuman, or degrading treatment or punishment, and torture, and (c) requirements that detainees be treated with respect for their humanity and their inherent.

a) Arbitrary Detention

As explained in a 2002 report by the U.N. Special Rapporteur, “it is a fundamental principle of international law that no one should be subjected to arbitrary detention.” This fundamental principle is codified in Article 9 of the Universal Declaration of Human Rights, which was adopted by the U.N. General Assembly, and in Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which the United States has signed and ratified. The Human Rights Committee, which is the body that monitors implementation of the ICCPR, has stated that the arbitrary arrest provisions of the ICCPR are applicable to all deprivations of liberty by arrest or detention, including civil immigration detention. This means that detention, even when done in accordance with domestic law, must be necessary, reasonable, predictable and proportional. The conditions of confinement described above certainly lack proportionality—the harshness of conditions are incongruous with the stated civil, non-punitive goals of immigration enforcement. Take, for instance, all of the immigrant detainees in Texas with low-level, non-violent criminal backgrounds who, despite their desire to return to their home countries, are held in ICE custody and must endure 10 body counts a day, escorted movement—sometimes through metal detectors, and chains and shackles during transportation. These individuals, and many more in ICE custody in Texas, are being subjected to arbitrary detention lacking proportionality in violation of the ICCPR.

The arbitrariness analysis under the ICCPR was best illustrated in the Human Rights Committee case of A. v. Australia. In that case, a Cambodian asylum-seeker’s application was refused and, after appealing, he was detained for more than four years while the Australian government determined his refugee status. The Human Rights Committee considered whether A’s” detention was arbitrary in violation of ICCPR Article 9(1). It explained that:

‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.

Based on the analysis in A. v. Australia, detainees in Texas have a strong argument that their detention is arbitrary because it is inappropriate and unnecessary. The conditions of
detention are inappropriate in that ICE has adopted detention practices from the criminal context and utilized them in the civil context. The conditions of detention are unnecessary because most detainees do not need to endure such harsh treatment in order for ICE to achieve its deportation goals—softer techniques could be implemented, and viable and cost-effective alternatives to detention exist. ICE has simply under-utilized these alternatives and has even admitted to over-reliance on incarceration.\textsuperscript{xliv}

\begin{itemize}
  \item[b)] Cruel, Inhuman, or Degrading Treatment or Punishment & Torture

  The above-described conditions of confinement for detainees in Texas also violates international law prohibiting cruel, inhuman, or degrading treatment or punishment. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which has been signed and ratified by the United States, requires that parties “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”\textsuperscript{xlv} Similarly, the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that “[n]o person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”\textsuperscript{xlvii} Importantly, Article 7 of the ICCPR, which the United States has signed and ratified, prohibits cruel, inhuman, or degrading treatment or punishment.

  The use of segregation for disciplinary and other purposes may in some instances violate these prohibitions against cruel, inhuman, or degrading treatment and torture. The Human Rights Committee has interpreted Article 7 of the ICCPR to prohibit the prolonged solitary confinement of a detained person.\textsuperscript{xlviii} During tours of facilities in Texas, the IACHR Rapporteurship was distressed at the use of solitary confinement to ostensibly provide personal protection for vulnerable immigrant detainees.\textsuperscript{xlix} It urged the U.S. Government to establish alternatives to protect vulnerable populations in detention and to provide the mentally ill with appropriate treatment in a proper environment.\textsuperscript{l}

  In addition, the restrictive visitation policies at some of the Texas facilities visited for this report likely violate Article 7 of the ICCPR. The Human Rights Committee, in interpreting Article 7, has stated that “[t]he protection of the detainee . . . requires that prompt and regular access be given to . . . family members.”\textsuperscript{li} Article 17(5) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family states that: “[d]uring detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.”\textsuperscript{lii} Although this standard is merely persuasive because the United States has neither ratified nor signed the Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, it directly addresses the concern of a detainee interviewed who stated he wished his wife could come visit him, but since she “doesn’t have papers,” she cannot come to the facility for visitation.

  \item[c)] Lack of Respect for Inherent Dignity of the Human Person

  Treatment of ICE detainees in Texas and the broader United States also constitutes a violation of the requirement, codified in various international instruments, that detained individuals be treated with humanity and respect for their inherent dignity. Article 17(1) of the International Convention on the Protection of Human Rights of All Migrants and Their Families requires that “[m]igrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and
for their cultural identity. Principle 1 of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, states that “[a]ll persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.”

Similarly, Article 10(1) of the ICCPR, which the United States has signed and ratified, states “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” The U.N. Special Rapporteur has explained that Article 10 “implies . . . that migrants deprived of their liberty should be subjected to conditions of detention that take into account their status and needs,” stating also that “[a]dministrative detention should never be of a punitive nature.” Many of the conditions of detention described above do not “take into account [the] status and needs” of the detainees and are indeed punitive in nature. Proportionality is thus a key factor in determining violations of the ICCPR Article 10, as it is in determining violations of ICCPR Article 9. Because immigration detention conditions—including the use of uniforms, restriction of movement, and overly restrictive visitation and recreation—is not proportional and ignores the “status and needs” of detainees, it is in violation of ICCPR Article 10.

B. Personal Safety

1. Reports of Abuse

In addition to the prison-like conditions of confinement, immigrants in detention face threats to their personal safety. Although none of the eight detainees interviewed for this report indicated that they had personally experienced any abuse while in detention, there have been notable instances of abuse in Texas immigration detention facilities.

Reports of sexual abuse at the T. Don Hutto Residential Center surfaced as recently as May 2010. A female detainee there complained to an airport official that a Hutto resident supervisor had touched her inappropriately during her transport to the airport. Authorities investigated the complaint—interviewing 19 women, eight of whom said they had also been touched inappropriately by the same resident supervisor, who was an employee of the Corrections Corporation of America. That resident supervisor, Donald Charles Dunn, was responsible for driving women who were out on bail from the detention center to the Austin-Bergstrom International Airport. The investigation showed that “[s]everal times while driving women to the airport, Dunn stopped at a gas station on FM 973 in Coupland and asked the women to get out of the van. . . . He then frisked them while they stood outside the van, touching the women on their breasts and genitals.” Dunn later told investigators "he would frisk the females for his own self-gratification and not for a safety concern." The IGSA between CCA and Williamson County prohibits female immigration detainees from being alone with male staff members, but CCA failed to comply with that policy. This failure to comply created the opportunity for abuse. In November 2010, Dunn was sentenced to a year in jail and two years of probation. Ironically, the Hutto facility is known as the “model facility” because of its “softer” approach to immigration detention.

A report by Human Rights Watch, entitled “Detained and at Risk: Sexual Abuse and Harassment in United States Immigration,” provides details on other instances of abuse in Texas immigration detention facilities. For example, the report describes five women detained at the Port Isabel Service Processing Center in Texas who were assaulted by a guard in 2008. On
several occasions between March and April of 2008, the guard, Robert Luis Loya, entered the women’s rooms in the detention center’s infirmary, where they were patients. Loya lied to the women, telling them that he was operating under physician instructions, ordered them to remove their clothing, and then touched the intimate parts of their bodies in a sexual manner. Loya later admitted that he “frequently volunteered for infirmary duty so that he would be alone with the victims and his victims were usually asleep when he entered the room.” The guard was sentenced to three years in prison. Abuse has also been reported in The South Texas Detention Complex in Pearsall, Texas.

2. Human Rights Obligations Implicated by Reports of Abuse

Abuse of detainees in ICE custody implicates several international human rights obligations, such as the ICCPR requirement that individuals in detention be treated with humanity and with respect for the inherent dignity of the human person.” The abuse of immigration detainees also implicates the Convention against Torture, which, like the ICCPR, was signed and ratified by the United States. The Committee against Torture has specifically expressed concern about “reliable reports of sexual assault of . . . persons in . . . immigration detention” in the United States.

Abuse of detainee, especially the repeated sexual abuse by the male resident supervisor at the Hutto facility, also implicates international norms relating to the issue of body searches and the supervision of female detainees. The Human Rights Committee has stated that body searches by government authorities or medical personnel should only be conducted by persons of the same sex. Furthermore, under the UN Standard Minimum Rules for the Treatment of Prisoners, women prisoners are to “be attended and supervised only by women officers.” The abuses that have occurred to ICE detainees in Texas were due largely in part to ICE’s failure to comply with these international standards.

C. Medical and Mental Health Care

1. Medical Services

ICE’s Office of Detention and Removal Operations is obligated to provide adequate health care to immigrant detainees. Detainee health care is provided either by the Division of Immigration Health Services (DIHS), sheriff departments, or private medical providers, depending on the detention facility. For instance, the Hutto Facility utilizes a combination of DIHS and contract providers, while DIHS has no presence at the Laredo Facility.

There are many documented problems plaguing the provision of medical care in ICE detention facilities, including delayed or denied healthcare, shortages of qualified staff, mistaken or insufficient prescription medication, and insufficient medical record-keeping, among other things. There have been documented cases of detainees dying in U.S. immigration detention after expressing a need for medical care and being denied or provided inadequate care.

In general, ICE detainees have poor health status and many have not have had access to regular medical care for years. According to an ICE Assistant Field Office Director interviewed for this report, many detainees arrive in poor health—especially those detained as a result of border apprehensions after long, arduous journeys with little food or water. In an effort to address the low health status of many entering detainees and prevent future illness or injury, medical staff at detention facilities are required by the National Detention Standard for Medical
Care to conduct physical examinations within 14 days of a detainee’s entry into the facility. However, a 2009 audit by the Department of Homeland Security Office of Inspector General revealed that detainees received timely physical examinations in only 80% of the data set.\textsuperscript{lxxi} The audit report explained that “[n]oncompliance can result in a higher incidence of untreated or undiagnosed illnesses and promote the spread of infectious diseases.”\textsuperscript{lxxi}

In addition to the initial physical, ICE facilities are also required to provide detainees with the opportunity to freely request health services, which is achieved through a process called “sick call.” Though sick call can operate in slightly different ways depending on the facility, most facilities visited for this report allowed detainees to submit paper medical requests to a designated sick call drop box. These boxes are usually checked every night, the paper requests are triaged by level of need, and then addressed accordingly. Alternatively, in the Houston Facility, the staff nurse goes to each dormitory and the detainees make their sick call requests directly to the nurse who triages them and responds within 72 hours of the request. A staff person interviewed there explained that the Houston Facility plans to move to the paper request method. If a detainee requests health services that the on-site health provider cannot provide, the facility submits a request to authorize payment for off-site medical care.\textsuperscript{lxixii} Though most detainees interviewed expressed satisfaction with the medical services they receive, one detainee had a serious complaint about the sick call process.

**SNAPSHOT FROM DETENTION: T. DON HUTTO FACILITY, TAYLOR**

“Norma,” a female detainee from Honduras reported:

“Ever since I got here [9 months ago], I had a pain in the back of my head. So I asked to see the doctor to check my head. I put in some requests, and it still hurt, so I put in more. My immigration officer told me that if I put in more requests, she will transfer me to Willacy [considered by many to be one of the worst detention facilities in Texas]. . . . I still have a bruise and pain on the back of my neck and head, but now I don’t put any more requests in.”

2. **Mental Health and Mental Disability Services**

In addition to basic living needs, safety concerns, and medical needs, immigrants in ICE detention also require mental health services. Though the exact number of immigrants in detention with mental health needs is not known, the non-profit organization Texas Appleseed recently reported that: “. . . demands on DIHS to provide mental health care services for detainees continue to grow with the size of the detainee population”\textsuperscript{lxxiv} and that “[i]n FY 2008, ICE recorded a total of 29,423 mental health interventions for detainees in DIHS care, 13 percent of the total number of DIHS intake screenings for the same year.”\textsuperscript{lxivv} In its report entitled “Justice for Immigration’s Hidden Population,” Texas Appleseed found that “[t]he aggressive move to detain immigrants, hostile detention environments, lack of proper diagnosis and treatment protocols, and understaffing or staffing with inadequately trained or unqualified facility staff — combined with ineffective enforcement of existing standards — all contribute to insufficient care for immigrants with mental disabilities.”\textsuperscript{lxvvi}

Many immigrants enter the detention context with pre-existing mental health needs, but many develop mental health needs while in detention. For instance, one detainee from the South
Texas Detention Complex in Pearsall explained, “Sometimes I get really bad depression. Eight months without seeing the free world is really hard. I know others get depressed.” Nevertheless, none of the eight detainees interviewed for this paper expressed dissatisfaction with the provision of mental health services at the detention facilities. In fact, one female detainee at the Hutto Facility stated: “[t]he psychologist is the only one who helps me here.” Another detainee at the South Texas Detention Complex in Pearsall, who is only 19 years old, expressed satisfaction with the mental health services he had received.

**SNAPSHOT FROM DETENTION: SOUTH TEXAS DETENTION COMPLEX, PEARSSALL**

“Angel,” a 19-year-old male detainee born in Mexico:

“I have been in the U.S. since I was 4 years old. I am a Texas State University freshman. I was about to start my second semester, but now they tell me I’m going to be deported to Mexico. I only know my grandma there. I was very depressed when I got here and learned about what was going to happen to me—I kept to myself most of the time and didn’t do any of the rec. I felt so bad that finally I had to talk to the doctors here about depression. They diagnosed me with anxiety too. At first it was hard because I felt weird talking to the doctors about that, but I think it really helped.”

Despite these positive reports, several advocates interviewed told stories of clients in ICE detention with untreated or inadequately treated mental health needs.

**A TEXAS ADVOCATE’S ACCOUNT:**

“I have a client who I have been representing for many years who struggled with severe depression and psychosis. Over the last seven years, he has been detained and released several times. When he is not in detention, he is clean, bathed, and wears nice clothes. But recently, while he’s been in detention, I’ve noticed a big change in his physical condition. He is being severely over-medicated and as a result, he’s started to bloat up. When I saw him last, he was very frothy at the mouth and his eyes were glazed over. They are keeping him super medicated just to keep him from having episodes of psychosis but it has made him practically unable to function.”

3. **Human Rights Obligations Implicated by Inadequate Medical and Mental Health Care**

The failure to provide adequate medical care, sometimes resulting in deaths of detainees, violates the prohibition in the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention against torture or cruel, inhuman or degrading treatment or punishment and violates ICCPR Article 7’s prohibition against cruel, inhuman, or degrading treatment or punishment. The Human Rights Committee has interpreted Article 7 to “require that prompt and regular access be given to doctors” for individuals in detention.
ICCPR Article 7 also applies to the provision of mental health care to detainees. In the
Human Rights Committee case of C. v. Australia illustrates this point. In C. v. Australia, an
Iranian asylum-seeker was detained in Australia in such a way that caused him to develop severe
mental illness. That the development of the mental illness was a result of the detention was well-
supported by medical evidence. The Committee found that the continued detention of “C” even
though Australia “was aware of [his] mental condition and failed to take steps necessary to
ameliorate [his] mental deterioration constituted a violation of his rights under article 7 of the
Covenant.” The inadequate mental health treatment of the detainee described by the Texas
advocate above, whose mental and physical demeanor deteriorated to the point of frothing at the
mouth and glazed over eyes might very well be an example of a violation of ICCPR Article 7. Other
similar violations likely exist in Texas.

In addition to these instruments and case law, the International Covenant on Economic,
Social and Cultural Rights, which the United States has signed but not ratified, recognizes “the
right of everyone to the enjoyment of the highest attainable standard of physical and mental
health” and encourages governments to take steps “to achieve the full realization of this
right.” The Committee on Economic, Social and Cultural Rights has said that States must
respect the right to health by “refraining from denying or limiting equal access for all persons,
including . . . detainees, . . . asylum seekers and illegal immigrants, to preventive, curative and
palliative health services.” The documented instances of inadequate medical and mental
health care to immigrant detainees do not comport with these standards.

D. Vulnerable Populations

The conditions described above and their human rights implications are exacerbated for
certain vulnerable populations held in ICE detention, including asylum seekers, women, and
children.

1. Human Rights Obligations Implicated by Detention of Asylum
Seekers

Immigrants may pursue asylum and related forms of protection from removal if they
successfully demonstrate that they have a credible fear of persecution or torture if returned
to their home country. Article 14 of the Universal Declaration of Human Rights recognizes the
right to seek and enjoy asylum as a basic human right. However, in exercising this right,
asylum-seekers are often not in a position to comply with the legal requirements for entry and
may be forced by their circumstances to arrive at, or enter the United States illegally.

According to INA Section 235(b)(1)(B)(ii), arriving immigrants who establish a credible
fear of persecution or torture are to be detained for further consideration of their application for
asylum, but they may be paroled on a case-by-case basis for "urgent humanitarian reasons" or
"significant public benefit." Scant records exist on the detention of asylum seekers, but
according to Human Rights First, approximately 48,000 asylum seekers were held in U.S.
immigration detention between 2003 and 2009. More than 2,700 asylum seekers were
detained in the South Texas Detention Center in Pearsall in 2007 alone. In addition, an ICE
Assistant Field Office Director at the Hutto Facility interviewed for this report explained that the
majority of the women detained there are seeking asylum. Only a small percentage of the
population at the Polk Facility is comprised of asylum seekers because, according to an ICE
Assistant Field Office Director interviewed there, most of the population there is from Central
America, and “asylum is more common with ‘exotics’ [immigrants from countries other than Mexico and Central American].”

A policy memorandum issued by ICE Director John Morton at the end of 2009 provided guidance on the parole of asylum seekers. Under the new policy, aliens who arrive in the United States at a port of entry and are found to have a credible fear of persecution or torture will automatically be considered by DRO for parole. Indeed, some advocates interviewed for this paper reported that they had already noticed an increase in the eventual parole of asylum seekers. Still, many asylum-seekers continue to be detained, and the negative impact of detention on asylum seekers is well-documented. According to Human Rights First, detention of asylum seekers causes additional harm to a population that is in many cases already suffering from anxiety, depression, and Post Traumatic Stress Disorder.

A TEXAS ADVOCATE’S ACCOUNT

“Honestly, the sad part is that many asylum seekers don’t think that it's that bad in detention because they came from such deplorable circumstances in their home countries.”

The United States’ practice of detaining asylum seekers implicates several international human rights standards. The United Nations High Commissioner for Refugees has stated in its Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers that “detention of asylum-seekers is . . . inherently undesirable” and “[t]he use of prisons should be avoided.” Furthermore, the 1967 Protocol Relating to the Status of Refugees, to which the United States acceded in 2008, provides that parties to the protocol undertake to apply articles 2 to 34 of the Convention Relating to the Status of Refugees of 1951. Article 2 of the 1951 Geneva Convention Relating to the Status of Refugees prohibits states from unnecessarily restricting the movement of asylum-seekers unlawfully in the country of refuge. The continued and unnecessary detention of asylum-seekers in Texas facilities and across the nation do not comport with these international standards.

In 2009, the Rapporteurship on the Rights of Migrant Workers and their Families of the Inter-American Commission on Human Rights (IACHR) expressed concern about the U.S. Government’s "broad use of detention for asylum seekers," which it stated is not in compliance with “the principles applicable to the detention of asylum seekers under international law.” The Rapporteurship found that the “the psychological impact of detention on the asylum seekers . . . is detrimental to their well being” and “observed an example of an alternative to detention in the Austin, Texas area that allows asylum seekers and their children to live in a home environment while their cases proceed.”

2. Human Rights Obligations Implicated by Detention of Women

Women make up about 9% of ICE’s daily detained population, and they constitute a population with distinctive characteristics and needs, such as high prevalence of survivors of physical or sexual abuse and a high prevalence of primary caregivers or dependent children. Women also have unique medical needs. While in detention, women must go to ICE in order to “to get a Pap smear to detect cervical cancer, undergo a mammogram, receive pregnancy care, access care and counseling after sexual violence, or simply obtain a sufficient supply of sanitary
In a 2009 Human Rights Watch study on the provision of medical care to women in detention, researchers encountered many female detainees who had been denied basic women’s health services while in detention. In addition to these special medical concerns, as explained above in the Personal Safety section, female detainees, many of whom have already been victims of violence in their home countries, continue to be victimized while in detention by guards and other detention facility personnel.

Of course, some women in immigration detention have had positive experiences.

### Snapshot from Detention: Laredo Detention Facility, Laredo

“Sofia,” a female detainee from Mexico reported:

“The trip coming to America was horrific; it was the worst experience of my life and I never thought it would be like that. But ever since coming to this facility, I finally feel as though I am being treated like a person.”

“Jade,” another female detainee interviewed concurred that she has felt “safe and comfortable,” and both women said that they have been able to ask questions about their situation and have those questions answered.

Still, the reports of inadequate medical treatment for females in ICE detention raise international human rights concerns. As stated in reference to medical care for the general detainee population, the failure to provide adequate care violates ICCPR Article 7’s prohibition against cruel, inhuman, or degrading treatment or punishment. The Human Rights Committee has interpreted Article 7 to “require that prompt and regular access be given to doctors” for individuals in detention. Thus, the denial of basic women’s health services to female detainees violates the ICCPR. The repeated reports of abuse of female detainees in Texas, such as the May 2010 reports of sexual abuse at the Hutto Facility, also reveal violations of the Article 7’s prohibition against cruel, inhuman, or degrading treatment.

### 3. Human Rights Obligations Implicated by Detention of Children

Although this report predominantly focuses on detention of immigrant adults, a discussion of vulnerable populations necessitates a discussion of the unique issues faced by unaccompanied minors in detention.

Many children are held in immigration detention alone, as unaccompanied minors. Unaccompanied minors are undocumented children under the age of 18 who enter the United States without parents. They are subject to deportation and are often detained while they await the outcome of their immigration cases. In 2003, responsibility for the custody of unaccompanied immigrant children was transferred from ICE’s predecessor, INS, to the Office of Refugee Resettlement, ORR, a division of the Department of Health and Human Services. ORR then created the Division of Unaccompanied Children’s Services, DUCS. In a 2009 study of unaccompanied children in immigration custody, the Women’s Refugee Commission found that treatment of unaccompanied children had significantly improved since custody was transferred to DUCS. Despite these improvements in conditions for children, ICE continued
to serve a “gatekeeping” role in determining when to release unaccompanied minors to DUCS and continued to detain children in inappropriate facilities.

One Texas attorney who represents unaccompanied minors explained that in Texas, children are detained in shelters that are licensed by the state of Texas to house children in the custody of Child Protective Services. This advocate explained that, like detention of adults, detention of minors has increased in recent years, noting that “bed space in San Antonio was at 28 beds in December of 2009 and we are now at 106. We are looking at another 100 beds by January.”

Other children are held in so-called “family detention.” Although family detention in Texas ended with the transformation of the Hutto facility into an all-women’s facility, family detention still exists in America. The Berks Family Residential Center in Pennsylvania holds roughly twenty-four families detained with children as young as one year.

Because detention facilities holding children were not visited by the author, it is beyond the scope of this report to enumerate specific human rights violations observed in Texas related to detention conditions for children. Speaking generally, however, the detention of children raises several international human rights law red flags. The U.N. Convention on the Rights of Child (CRC) provides some safe guards for children. CRC Article 3(1) provides that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” One advocate who represents detained children, not only in Texas, but across the nation explained that the United States does not have a best interest of the child standard. This raises concerns that the United States does not always prioritize the best interest of the child in making detention decisions. Article 37 of the CRC requires that states ensure that minors are detained as a measure of last resort and for the shortest possible period of time. Unfortunately, the United States has signed but not ratified the CRC. The only other country to take such a course of action with regard to the CRC is Somalia.

The IACHR Rapporteurship on the Rights of Migrant Workers and their Families recently found, after a tour of some child detention facilities in Texas, that since responsibility for of the custody of unaccompanied minors was transferred to ORR, "strides have been made in transforming the custody from a juvenile detention model to a more humane approach of shelters and foster care." The Rapporteurship found, however that there was lack of adequate access to counsel for unaccompanied minors. It also expressed concerns that some of the methods used by U.S. Border Patrol are not effective to protect victims of trafficking and investigate claims of asylum among the arriving unaccompanied minors.

4. **Other Populations**

There are many other populations who are particularly vulnerable when placed in the immigration detention context. For instance, authors have commented on the unique challenges faced by transgender individuals in immigration detention. Transgender individuals have experienced physical and sexual abuses, and in response to reports of those abuses ICE has often placed in the victims in administrative segregation. ICE also detains individuals with physical and mental disabilities and the elderly, who also face unique challenges in the detention context.
The U.N. Special Rapporteur on the Human Rights of Migrants has stated that “[a]dministrative detention should never be punitive in nature and special arrangements should be sought to protect vulnerable groups. In these cases the harm inflicted seems to the Special Rapporteur to be wholly disproportionate to the policy aim of immigration control.”

The IACHR Rapporteurship has expressed serious concern regarding the use of solitary confinement to ostensibly provide personal protection for vulnerable immigrant detainees. It urged the U.S. Government to establish alternatives to protect vulnerable populations in detention and to provide the mentally ill with appropriate treatment in a proper environment.

E. Length of Detention

Exacerbating the issues outlined above is the length of time that many immigrants are held in detention. Although immigrants remain in detention for an average 30 days, many are detained for several months, and about 2,100 immigrants are detained for a year or more. The U.N. Special Rapporteur on the Human Rights of Migrants has explained that detention length is affected by the various, and sometimes complicated steps involved in deportation procedure—consulates must process travel documents, travel arrangements must be made, and asylum claims and appeals against deportation must be reviewed. Lengthy detention is also prevalent among detainees who have already received removal orders but whose home countries do not have repatriation agreements with the United States or for whom the government is unable to retrieve proper travel documents.

Lengthy detention was addressed in the 2001 United States Supreme Court case of Zadvydas v. Davis. In that case, “the court held that indefinite detention must be a practice limited to cases with no significant likelihood of removal and subject to stringent procedural safeguards, and that six months will be a presumptively reasonable period of time for DHS to execute a removal order, after which due process rights attach.” In practice, various administrative loopholes can lead to detention beyond the Zadvydas standard.

1. The Square Peg in a Round Hole: Lengthy detention in the Short-Term Detention Context

There is a fundamental problem with holding individuals in long-term detention in conditions designed for the short term. For instance, an individual’s short-term medical and mental health care needs may vary from their long-term needs. The problem also arises in the context of educational, social, and cultural programs and other social services in detention. When asked what types of programs were available in detention, almost every ICE official or private prison corporation representative interviewed for this report explained that such programs were not available because “there is so little time” or because “they are here for such a short amount of time, that it is not worth it.” In other words, ICE and the various entities they contract with base their management practices on the assumption that detainees will only be at the facility for a short time. For those who remain in detention for months and sometimes years, this assumption can have serious consequences on their medical and mental health and general well-being. Detainees can remain in ICE custody for months or years with little or no social services or other programming.

The length of detention also has an effect on the individual’s ability, and sometimes their desire, to pursue meritorious forms of relief. Several advocates interviewed for this project
provided examples of detainees who, because of the unreasonable length of time they were detained, opted to accept deportation rather than stay in detention to fight their claims.

A Texas Advocate’s Account

“The docket in San Antonio is so overloaded. I have an individual set for a hearing in December. He has been detained since May, and this is just a regular cancellation of removal case. It is not complicated, but it’s taking a really long time. If my clients decide to exercise their statutory right to stay in this country, they have to be prepared for 6-8 months in detention. We often see people just give up their right to fight for asylum or cancellation in exchange for getting out of detention.”

2. Human Rights Obligations Implicated

In some cases, lengthy detention could be deemed an arbitrary detention in violation ICCPR Article 9(1). An otherwise lawful and non-arbitrary detention may become arbitrary with the passage of time.\textsuperscript{cxvii} The Human Rights Committee has found that “detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.\textsuperscript{cxviii} In the case of \textit{C v. Australia}, the Human Rights Committee considered whether an Iranian asylum-seeker who had been detained for over two years had been arbitrarily detained. It concluded that because, among other things, the government had held “C” beyond the point of “individual justification,” the detention was arbitrary in violation of ICCPR 9(1).\textsuperscript{cxix}

The lack of social services or educational programming for some long-term ICE detainees in Texas may also have international human rights implications. The U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that “detained . . . person shall have the right to obtain within the limits of available resources, . . . reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.”\textsuperscript{cxxx}

IV. Detention Standards & Oversight

Conditions for immigrants in ICE custody in Texas and the United States continue to violate the various international human rights standards outlined above as a result of three related factors: (1) the lack of enforceable detention standards and failure to adhere to detention standards, (2) delegation of immigration detention to state, local, and private entities, and (3) the lack of meaningful and systematic oversight.

A. Lack of Enforceable Detention Standards

The descriptions of detention conditions at immigration facilities in Texas reveal the variation that exists between facilities. Indeed, an ICE detainee’s daily life and well-being is heavily dependent on the facility in which he or she is housed. In an effort to create consistency
among immigration detention facilities, ICE and the Immigration and Naturalization Service (INS), the predecessor to ICE, have drafted various detention guidelines.

The most recently promulgated standards, released in 2008, are the “Performance Based National Detention Standards” (PBNDS). These standards address most features of immigration detention, including population counts, medical care, recreation, food, and more. The 2008 PBNDS brought welcome reforms. Compared with earlier iterations of immigration detention standards, the 2008 PBNDS set clearer goals and methods of measurement. However, several key weaknesses remain. Most importantly, the 2008 PBNDS are not legally binding, and thus they impose no real consequences for failure to comply. In other words, they are wholly unenforceable. Furthermore, the 2008 PBNDS are based on the American Correctional Association standards for pre-trial felons in jail—thus “carrying criminal incarceration policies and practices into the arena of immigration detention.” This is yet another example of the inappropriate application of criminal standards to what is supposed to be a civil context.

In September of 2010, a draft copy of the 2010 PBNDS was leaked to the Houston Chronicle. The draft showed improvements to many of the problematic conditions observed in the previous section. For instance, the draft standards expanded medical and mental health care and improved outdoor recreation. Despite these improvements, the 2010 draft standards remain unenforceable, with no enforcement mechanism or consequences for failure to comply. Even if they were enforceable, the 2010 standards have yet to be promulgated. ICE union officials oppose many of the changes, arguing they pose “serious safety concerns for officers, contractors and detainees.”

A NATIONAL ADVOCATE’S ACCOUNT

“The only standards that govern ICE standards are the PBNDS, which are not enforceable, totally internal, and totally inadequate. The 2010 standards were leaked, but they haven’t come into effect yet because there is an ongoing battle between ICE and the union, which . . . says that the reforms amount to change in their job description. So, internal politics affect standards.”

B. Delegation to State and Local Authorities and Subcontracting to Private For-Profit Prison Corporations

Further weakening the enforceability of detention standards is the contracting and subcontracting of immigration detention to private for-profit prison corporations. ICE does not itself maintain enough detention space to accommodate the number of immigrants it seeks to detain. Therefore, as described in the introduction to this report, ICE utilizes a patchwork of various facilities to house detainees, including Service Processing Centers (SPC) owned by ICE and operated by the private sector, Contract Detention Facilities (CDF) owned and operated by the private sector, and county jails with which ICE maintains intergovernmental agency services agreements (IGSA). Many IGSA county jails further sub-contract out the operation of the facilities to the private sector. IGSA facilities house about 67% of the immigrant detainee population.

The immigration detention facilities in Texas utilize a variety of contracting schemes and a variety of private prison corporations for the management of the facilities. For instance, at the
T. Don Hutto Facility. ICE contracts with Williamson County, which further sub-contracts to the Corrections Corporation of America. At the Houston Facility, ICE contracts directly with the Corrections Corporation of America. At the Johnson County Detention Facility, ICE contracts with Johnson County, which further sub-contracts out to a corporation called LaSalle Corrections. At the Polk Facility, ICE contracts with Polk County, which sub-contracts with a corporation called Community Education Centers. Other private companies used in Texas are Emerald Companies, the GEO Group, and Management & Training Corporation.

Some provisions of the PBNDS do not apply to IGSAs, and “while the standards state that CDFs and SPCs are required to follow all standards’ provisions, IGSAs are permitted to adopt alternative procedures for implementing portions of the standards that are designated by italicized language.”\textsuperscript{cxxvii} According to the Schriro Report, “[t]he majority of agreements with IGSA facilities do not contain the national detention standards.”\textsuperscript{cxxviii} And one commentator argues that it is an abuse of ICE's discretion not to enforce its standards simultaneously relying predominantly on those facilities to house the majority of immigration detainees.\textsuperscript{cxxxix}

C. Lack of Meaningful Oversight

ICE does maintain a presence at every facility through Deportation Officers who meet with each detainee on a weekly basis to discuss the detainee’s case status. Though Deportation Officers are present in the facilities, their primary duty is not oversight. ICE’s main form of internal oversight comes from Contract Officer Technical Representatives (COTR) and Assistant Field Office Directors (AFOD). However, ICE’s Office of Detention and Removal Operations does not require COTRs or AFODs to take regular tours of detention facilities or to document those tours.\textsuperscript{cxxx}

On-site monitoring and annual evaluations are performed primarily by the private sector.\textsuperscript{cxxxii} Little information is publically available about the results of these evaluations. In one report entitled, “A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers,” researchers were able to obtain, by way of court order, certain portions of detention facility review reports from 2001 to 2005. These reports, which reviewed CDF’s, IGSA’s, and SPC’s, revealed serious and widespread violations of the government’s own detention standards relating to visitation, recreation, telephone access, access to legal material, and much more.\textsuperscript{cxxxii} The lack of oversight is also evident from the repeated reports of sexual abuse and inadequate medical care, which could have been easily prevented with proper oversight of PBNDS in detention facilities.

The consequences of weak controls over IGSAs affect not only conditions of confinement for detainees, but also detention costs for taxpayers. A 2009 audit of ICE bedspace management by the DHS Office of Inspector General revealed that while

[i]ntergovernmental service agreements provide a comparatively quick means of adding bedspace compared to contracting with commercial detention facilities or constructing new government-owned ones . . . without standards and controls for intergovernmental service agreement use, ICE may be spending more than it should for intergovernmental service agreement detention bedspace and related services.\textsuperscript{cxxxiii}
This overspending was a consequence of lack of oversight of IGSAs which permitted budgetary excesses like unauthorized charges, duplicate costs and excess overtime charges. The Rolling Plains Detention Facility in Haskell, Texas was used as an example of an IGSA at which lack of oversight had led to over-spending.\textsuperscript{cxxxiv}

Of course, there are some examples of quality oversight. For example, at the Laredo facility, an ICE Assistant Field Director reported that: “there is daily oversight of care [and ICE maintains] constant communication with medical. We set up a system where ICE receives immediate notification of any health issues.”

\textbf{D. Impact of Enforceability and Oversight on Human Rights Compliance}

Thorough and systematic oversight of detention facilities in Texas and across the United States paired with greater adherence to the detention standards can help the U.S. government address and even prevent some of the human rights violates outlined above. Various international bodies have recognized the direct link between oversight and human rights. For instance, the U.N. Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment acknowledged the effectiveness of inspections of detention facilities in human rights obligation compliance, stating that “regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture.”\textsuperscript{cxxxv}

Just as greater oversight can lead to fewer human rights violations, less oversight can lead to more violations. The IACHR Rapporteurship has addressed this trend in the context of subcontracting of detention facility operations to state, local, and private entities. In a recent press release put out shortly after a comprehensive tour of Texas facilities, the IACHR Rapporteurship stated:

The Rapporteurship noticed significant disparities in detention conditions between the different adult immigration detention facilities it observed. The subcontracting to state and local prisons and the frequent sub-subcontracting of the staffing for the facilities to private correctional service companies create significant obstacles to providing immigrant detainees care that comports with their basic human rights. Moreover, as a structural matter, this does not provide accountability for human rights violations.\textsuperscript{cxxxvi}

The lack of enforceable standards and failure to adhere to detention standards, delegation of immigration detention to state, local, and private entities, and the lack of meaningful and systematic oversight are all related factors that contribute to continued human rights violations in Texas and the United States.

\textbf{V. Due Process Concerns: Representation and Adjudication}

Immigration detention also creates due process problems related to legal representation by counsel and adjudication of immigration cases. These problems implicate international human rights law.
A. **Representation**

The due process concerns related to representation of immigrant detainees are (1) lack of legal representation and (2) barriers to effective representation of detainees.

1. **Lack of Legal Representation**

   a) **High Rates of Unrepresented Immigration Detainees**

   Some advocates interviewed for this report maintained that lack of legal representation was a more significant and widespread problem for immigrants in detention than the actual detention conditions. A substantial majority of immigrants facing or in detention are without representation. According to a 2010 report by the non-profit organization Texas Appleseed, “[a]cross all immigration courts in Texas, 86 percent of detained immigrants are unrepresented by legal counsel.”\[^{cxxxvii}\] In 2009, 90% of detained immigrants appearing in the Dallas Immigration Court were unrepresented, followed by 88% in Houston, 86% in Harlingen, 84% in San Antonio, and 83% in El Paso.\[^{cxxxviii}\] The Texas Appleseed report revealed that certain immigration detention facilities in Texas have higher numbers of unrepresented detainees.

   The main reason that the number of detained individuals without representation remains shockingly high is that, because immigration detention is deemed civil, there is no constitutional right to appointed counsel.\[^{cxxxix}\] U.S. law provides that “[i]n any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented” but “at no expense to the Government.”\[^{cxli}\] Thus, immigrant detainees are forced to rely on their own, often limited, personal funds to retain representation. Because detention impedes a detainee’s ability to earn an income, paying for legal representation can be difficult or impossible, and many detainees must seek out non-profit legal services organizations or pro bono attorneys for assistance. These organizations do not have nearly enough resources to provide free representation to the thousands of detainees housed in Texas every year.

   Access to counsel can have a profound effect on the outcome of a detainee’s immigration case. According to a Migration Policy Institute study from 2005, among ICE detainees applying to become lawful permanent residents, 41% of those with counsel won their cases, compared to 21% of those without counsel.\[^{cxlii}\] Furthermore, among ICE detainees in the study seeking asylum, 18% of detainees with counsel were granted asylum, compared to only 3% of those without counsel.\[^{cxliii}\]

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**SNAPSHOT FROM DETENTION: JOHNSON COUNTY DETENTION FACILITY, CLEBURNE**

A private prison corporation representative reported:

“The number of attorney visits have declined. Detainees say that attorneys are using their money and then vanish, so a lot of them are saying it’s cheaper to just get deported and then sneak back in than to try to hire an attorney and fight the case legally.”
b) **Strengths and Weaknesses of Legal Orientation Programs**

Detainees, even if unrepresented, may still receive legal resources through Legal Orientation Programs and “Know Your Rights” presentations. During these programs, which are not offered at all facilities, attorneys present information to detainees about the detention process, immigration court and the various forms of relief that may be available. While these programs provide invaluable initial information to detainees, they are not a sufficient replacement for legal representation.

**A Texas Advocate’s Account**

“Over 80% of our funding is restricted to providing legal rights orientations and pro se workshops. Even after these orientations, many of these immigrants cannot represent themselves in complicated cases. Some are children and they obviously cannot represent themselves. Pro bono volunteers are a great complement to our program but we can’t rely on them completely. A lot of pro bono attorneys travel from out of the state or out of the city and incur a lot of costs. They aren’t able to be in constant communication with clients. We need funding to provide more direct service. The detainees need more direct staff time.”

c) **The Inefficiency of Unrepresented Detainee Cases**

The problems with access to counsel not only affect the individual immigrant detainees, they also impede efficiency in immigration courts. Immigration courts must spend more time managing pro se cases. Furthermore, as one author explained, pro se immigrant detainees cause backlogs with ICE because “[t]here are a significant percentage of cases in the immigration courts where the outcome is certain from the outset and respondents have no avenue to escape deportation. With competent counsel, such cases are often resolved at an initial master calendar appearance with a grant of voluntary departure. However, pro se litigants . . . often make the unwise choice to fight their deportation.”

On the other hand, some pro se litigants do not have a claim and do not wish to fight their deportation. They stay in detention, however because they lack sufficient information about their rights and options. In those cases, lack of legal representation leads to inefficient use of government resources for detaining individuals who are ready for deportation.

**A Texas Advocate’s Account**

“For people that don’t have a claim to stay here . . . and may even want to be removed—they just need the information and just need to get out. As taxpayers we are paying for . . . [immigrants] to stay in detention for several months. There is a group of people who just want to get out and go back, and we need to get them out. . . . [B]ecause there are few attorneys and not enough judges, a person might stay in detention for several months just to attend a 20 minute proceeding. . . . If everyone had an attorney, the wasted time would be cut down dramatically.”

**Another Texas Advocate’s Account**
“Many of the people that come through the Houston detention facility just admittedly are individuals without documentation and a large percentage of them have been here a relatively short period of time, and for them there may not be any relief. In situations like that then there is frankly not much that’s available for them. Many in that category are just ready to get out of detention and ready to just go home, and the best that we are able to do for people like that is just to describe what the process is going to be and what things will look like when they appear before the judge.”

2. Barriers to Effective Representation of Immigrants in Detention

Advocates interviewed for this report indicated that, even if detainees are fortunate enough to be represented by counsel, there are many obstacles impeding effective representation. Such obstacles include: (a) geographic isolation of detention facilities, (b) frequent transfer of detainees, (c) difficulty in developing an evidentiary record, and (d) issues with attorney visitation at the facilities.

a) Geographic Isolation of Facilities

One of the main barriers cited by advocates interviewed for this report was the geographic isolation of most detention facilities in Texas. Though isolation is not unique to Texas, almost every advocate interviewed stated that geographic isolation of detention facilities is a serious issue that is more extreme in Texas than in other regions of the country. Indeed, several facilities with substantial detainee populations are located hours away from major cities with legal resources. For instance, the Willacy Detention Center in Raymondville, which has an average daily population of 1,194 immigrant detainees, is approximately 230 miles away from San Antonio and 306 miles from Houston. The Port Isabel Detention Center in Los Fresnos, which has an average daily population of 718, is approximately 270 miles away from San Antonio and 346 miles from Houston. The distance of these and other facilities in Texas not only makes representation difficult; it also prevents representation in some instances.

**A Texas Advocate’s Account**

“The detention facilities are placed very far away. The closest one to our organization is the Rolling Plains Facility in Haskell, which is about a 4-hour drive away. We have had a few staff members go there, but we don’t have the resources to make the trip often. We get a lot of calls from the detention facility, and it’s very upsetting and difficult when it sounds like someone might have a claim that we could help with, but we simply aren’t able to represent them because of the distance.”
Some of the problems caused by isolated geographic location are alleviated by the use of telephones, but as described in the section above on detention conditions, communication via telephone can be difficult due to cost or malfunctioning phone cards. Furthermore, detainees can make but cannot receive phone calls.

b) Transfer of Detainees to Texas and Within Texas

The transfer of detainees to and from different facilities around the country also poses a serious obstacle to effective representation. A 2009 study by Human Rights Watch showed that between 1999 and 2008, 1.4 million detainee transfers occurred. In 2008, 24% of detainees experienced multiple transfers. The Human Rights Watch study revealed that the state most likely to receive transfers is Texas. Though little is known about the decision-making behind these transfers, the most probable reason is government convenience; bed space is less expensive and more plentiful in Texas. Indeed, ICE has publicly opposed limits on its transfer power, arguing that such limits would impede their ability to make cost-effective use of the detention beds it already has. Statements made by one ICE official interviewed for this report reveal that detainee nationality might also be a basis for transfer:

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<th>SNAPSHOT FROM DETENTION: POLK COUNTY ADULT DETENTION CENTER, LIVINGSTON</th>
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<tr>
<td>An ICE official interviewed during the visit to the Polk Facility explained that:</td>
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<td>“All ‘bodies’ come through Houston and are broken by nationality. Here, we have mostly Central Americans from Guatemala and Belize. ‘Exotic nationalities’ usually stay in Houston. Central Americans and Mexicans are not as litigious as ‘exotics,’ so the average length of stay here is 60 days.”</td>
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Almost every attorney interviewed identified the transfer of detainees as a significant impediment to the provision of legal services. Some did note that the recent creation of the online detainee locator database had improved the situation by providing attorneys and families a way of finding a detainee who had been transferred by searching their immigration number.

Transfers can have a disastrous effect on an immigrant detainee’s ability to pursue his or her immigration case. Transfer pulls detainees away from attorneys they may have retained in their original location and pulls detainees away from families, which increases isolation and depression in detention. The high volume of transfers to Texas also puts a greater strain on the already overtaxed immigration legal advocacy community here. These transfers could also amount to forum shopping on the part of the government because transfers to Texas subject detainees to Fifth Circuit, which is known for “decisions that are hostile to the rights of non-citizens.” States in the Fifth Circuit, including Texas, are also known for having among the lowest ratio of immigration attorneys to immigration detainees in the country.

c) Difficulty in Developing an Evidentiary Record

Detention also makes it extremely difficult for immigrants to develop an evidentiary record. Immigration proceedings sometimes require documentation including medical, employment, and criminal records, as well as evidence of family ties or good moral character. Without the help of friends or family members, it is extremely difficult for immigrants in
detention to procure these documents from employers, schools, hospitals, and other entities. This problem is exacerbated by geographic isolation and transfer of detainees to locations that are far from their homes where these documents may be kept.

**A NATIONAL ADVOCATE’S ACCOUNT**

“It is difficult to meet with an individual face to face in detention, especially when the detention facility is in an isolated location. Because they are detained, they aren’t able to do the factual information gathering, and so that either falls to family or it doesn’t get done. I have to constantly badger one of my client’s families to get after certain documents. If the actual individual were out, that individual would be far more cognizant and prompt in getting the documents, because it’s their life that is literally at stake.”

**A TEXAS ADVOCATE’S ACCOUNT**

“It’s really hard to represent detained immigrants because you need so many documents to support their claim including medical records, criminal records, tax records. Unless you have a family member outside who is willing to run around getting records, [then it’s very difficult]. A lot of times I think I have a good case [but] when I talk to the client, I realize it’s not as good as it could be if I could get all the evidence.”

d) **Difficulty of Attorney Visitation at Facilities**

Attorney visitation varies between facilities in Texas. For instance, attorney visitation is permitted at the El Paso Facility on Mondays through Fridays from 8 a.m. – 5 p.m. and on Saturdays and Sundays from 8 a.m. – 11 a.m., but is permitted 24 hours a day every day of the week at the Joe Corely Detention Facility. Visitation rooms vary as well. At Hutto, the attorney visitation rooms are small cubicles with doors and plexi-glass siding. There are noise cancellation devices on the outside of the cubicles, though some advocates interviewed reported that those devices do not work and privacy is lacking during attorney visits. Other facilities provide more private attorney visitation rooms. For example, the 3 attorney visitation rooms at the Houston Facility are closed off with a window. The Polk County Adult Detention has 2 attorney visitation rooms.

**A TEXAS ADVOCATE’S ACCOUNT**

“When you build a detention center in South Texas far away from a population of immigration attorneys, and there are over a 1,000 people in the center but only 3 spaces for attorney visits, then you are saying we don’t care about access to counsel.”

3. **International Human Rights Implications of Representation Issues**

The lack of representation and barriers to effective representation raise international human rights compliance concerns. With regard to lack of representation, several international instruments and reports call for the provision of government-funded legal representation for
immigrant detainees who cannot afford representation or cannot obtain pro bono representation. For instance, the International Convention on the Protection of Human Rights’ of All Migrant Workers and Members of their Families Article 18(3)(d) states that “[m]igrant workers and members of their families shall have the right] . . . to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay.” Similarly, the U.N. Special Rapporteur on the Human Rights of Migrants wrote that governments “should take measures to ensure respect for the human rights of migrants” by ensuring that “[m]igrants in detention shall be assisted, free of charge, by legal counsel” The U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Principle 17 also states that “[i]f 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.”

Representation is particularly important for asylum-seekers. According to a Report of the Working Group on Arbitrary Detention, “[a]liens seeking immigration or asylum are ill equipped to pursue effectively their legal rights or remedies that they might have under the applicable legislation. They would invariably suffer from material constraints or constraints of language disabling them from representing their cause effectively. Many might not be informed of the legal remedies available.” For these individuals, access to legal counsel “is of exceptional importance.” The UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers states that detained asylum-seekers should be “informed of the right to legal counsel. Where possible, they should receive free legal assistance.” The denial government-funded appointed counsel for immigrant detainees runs contrary to all of these international instruments.

Some international standards discuss the barriers to effective counsel. For instance, Principle 18 of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides, “[i]nterviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.” The Hutto Facility, where attorney visitation rooms consist of open-top cubicles with reportedly malfunctioning noise cancellation devices, would not likely satisfy this standard.

B. **Adjudication of Immigration Cases**

There are also issues with the fairness of immigration proceedings, which are adjudicated before the Executive Office of Immigration Review (EOIR), an agency within the U.S. Department of Justice.

1. **Use of Televideo**

Many immigration court proceedings for detained immigrants are conducted via tele-video, presumably to save the cost of transporting detainees from the facilities, which can be hundreds of miles away from immigration courts. All of the court proceedings for ICE detainees observed at the San Antonio Immigration Court for this report were conducted via tele-video.

The use of tele-video raises some concerns about the fairness of adjudication for detained immigrants. Immigration proceedings via tele-video can have a serious negative impact on a
detainee’s case. The use of tele-video depersonalizes the process, making it easier for immigration judges and DHS attorneys to ignore the human nuances of each individualized case. Furthermore, credibility, an important factor in any case during which a party is testifying, is difficult to establish from a television screen. This is a particularly true for asylum cases. One study showed that asylum seekers appearing in immigration court for their asylum hearings via tele-video are half as likely to be granted asylum as those appearing in person.

Three attorneys interviewed for this report also expressed concern about a recent move by the EOIR to relocate immigration courts to the detention facilities themselves. This has already been done in some locations. As one advocate put it, “tele-video is something that people complained about for a long time, but we are going to be missing the days of tele-video when the attorney must go all the way to the detention facility to represent and even to file papers.”

2. Translation

Furthermore, many individuals in immigration proceedings require translation services. The translation technology used in the proceedings observed at the San Antonio Immigration Court functioned properly, but translators there only translated words that were spoken directly to the immigrant respondent. Neither the dialogue between the judge and attorneys nor the dialogue between the two attorneys was translated to the respondent. Thus, many detainees simply missed important portions of their proceedings.

3. Case Backlog Leading to Lengthier Detention

Advocates interviewed for this report also explained that many of their clients are subjected to lengthy detention as a result of the incredible backlog of cases in immigration courts in Texas. Two detainees interviewed at the South Texas Detention Complex in Pearsall confirmed that the backlog of cases affected their detention length. These individuals expressed frustration over many months they had spent waiting to see the immigration judge while wanting only to accept deportation and return their home countries.

SNAPSHOT FROM SAN ANTONIO IMMIGRATION COURT

“Juan” was appearing in court via tele-video from the South Texas Detention Facility in Pearsall. An English-Spanish translator was present, translating only the words spoken by the judge directly to the respondent. Juan was represented by an immigration attorney, and a criminal attorney was also present. The criminal attorney explained that Juan was seeking habeas relief in state court. The case was reset for a later date, and the court gave the immigration lawyer some information regarding respondent’s Petition for Alien Relative. Juan’s hearing lasted approximately 10-15 minutes. At the very end of the hearing, the Juan stated into the video monitor, “I’m sorry, I couldn’t understand a word you were saying your honor.” He spoke English with a southern accent. Not only was he unable to hear his entire proceeding, the translator had translated unnecessarily.

A TEXAS ADVOCATE’S ACCOUNT

“Hearing by tele-video is a serious challenge—my clients only get translated what is being directly said to them. I have to pick whether I want to be present with the client in the detention facility or not.”
center or appear in court. So we try to coordinate so that someone is with the client and one in the court so that someone can hand documents to the judge or the government attorney. I’ve seen attorneys have confidential conversations with their clients via tele-video out of necessity.”

4. International Human Rights Implications of Adjudication Issues

The adjudication problems described above implicate various international human rights obligations. Specifically, the lengthy detention caused by the backlog of cases in Texas implicates international human rights law. Article 9(4) of the ICCPR provides that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” The Human Rights Committee considered this issue in the case of Torres v. Finland. There, a Spanish citizen was detained in Finland while his asylum claim was being considered and subsequently rejected. The Human Rights Committee wrote that because Torres “could not have the lawfulness of his detention reviewed by a court [and r]eview before a court of law was possible only . . . after seven days,” his detention violated Article 9(4) of the ICCPR.

VI. Over-Detention

Many of the human rights issues related to conditions, adjudication, and representation are severely exacerbated in Texas as a result of the extreme numbers of individuals in detention here. Over-detention in Texas was a reoccurring theme that arose among many advocates interviewed for this report. Two major factors contribute to over-detention in Texas: mandatory detention and the use of state and local law enforcement for immigration enforcement. These practices also raise international human rights concerns themselves.

A. Mandatory Detention Revisited

In 2010, the United States spent approximately $1.77 billion to detain close to 400,000 immigrants. As explained above, approximately 66% of all immigrants incarcerated by ICE are there as a result of mandatory detention. Mandatory detention, which by definition omits individual evaluation of a person’s flight risk, leads to inefficient and absurd results, placing a large number of individuals unnecessarily into a detention system that is already overburdened.

A Texas Advocate’s Account

“[I] have visited with a detainee from the island of Antigua. He has been in the United States since he was 8. At one point, he pled guilty to possession with intent to distribute marijuana in Philadelphia to get 5 years probation. Ten years later, he was going to his uncle’s funeral in Antigua and had a run in with the police. He has spent the last the 2 ½ years in various detention facilities. He has been moved all around from Port Isabel to New Mexico then to Willacy, and back to Port Isabel. He is still in detention; he has had a final order of removal for about six months. His is a good example of prolonged detention and of the ridiculous nature of mandatory detention. This is a guy who hasn’t had any criminal offenses for 10 years, runs his dads auto shop and has a U.S. citizen wife and 2 kids.”

Another Texas Advocate’s Account
We’ve had clients who have been living in Texas for a very long time. They were brought over to the United States at the age of six months or a year old and had legal resident status but no citizenship. Many of the individuals have children. These clients commit some criminal violation, perhaps minor or non-violent, and what may be merely regrettable as a citizen, becomes a removable offense and a life-altering event for a permanent resident. This person, with children and deep roots in the community and state, has no form of relief. They are mandatorily detained and removed.”

**ANOTHER TEXAS ADVOCATE’S ACCOUNT**

“Mandatory detention under INA 236(c) casts too wide of a net. So many people end up in detention, and it hinders people’s willingness to seek the immigration relief they’re entitled to. We actually have to convince people to fight their case because they just don’t want to stay in detention anymore. I believe there is a direct correlation between length of detention and willingness to fight their cases.”

According to a 2008 report by the U.N. Special Rapporteur on the human rights of migrants in the United States, the lack of individualized assessment of mandatory deportation violates several international human rights obligations. The U.N. Rapporteur explained that: “international conventions require that the decision to detain someone should be made on a case by case basis after an assessment of the functional need to detain a particular individual.” It did not specify which standards are implicated by mandatory detention. The Special Rapporteur found the individual case assessment in the U.S. insufficient, stating that “detention policies in the United States constitute serious violations of international due process standards.” As explained by the U.N. Special Rapporteur, while human rights law recognizes that the privilege of living in any country as a non-citizen may be conditioned upon obeying that country’s laws, human rights law “requires a fair hearing in which family ties and other connections to an immigrant’s host country are weighed against that country’s interest in deporting him or her.”

**B. Racial Profiling through Enforcement: 287(g), CAP, & Secure Communities**

In addition, “[f]ederal immigration officials and the federal government generally have started applying pressure and giving incentives to local law enforcement to get involved in immigration enforcement.” Several advocates consulted for this report explained that three policies in particular—the 287(g) Program, the Criminal Alien Program (CAP) and Secure Communities—have affected the immigration detention system significantly. In 2009, it was reported that 12% of ICE detainees were encountered through the 287(g) Program and 48% were encountered through the Criminal Alien Program.

The 287(g) Program, described by ICE as “one of ICE’s top partnership initiatives,” is a program under Section 287(g) of the INA, which allows the federal government to enter into agreements with state and local law enforcement agencies under which those agencies are given delegated authority for immigration enforcement within their jurisdictions. In Texas, ICE currently has 287(g) agreements with the Carrollton Police Department, Farmers Branch Police Department, and Harris County Sheriff’s Office. ICE’s Criminal Alien Program (CAP) is “responsible for identifying, processing and removing criminal aliens incarcerated in federal, state and local prisons and jails” with the goal of “prevent[ing] the release of these criminal aliens into the general public by securing a final order of removal prior to the
termination of their sentences, whenever possible." Secure Communities is yet another method that ICE uses to “quickly and accurately identify aliens who are arrested for a crime and booked into local law enforcement custody.” Under the program, the fingerprints of anyone arrested and booked are not only checked against FBI criminal history records, but also against DHS immigration records. The Secure Communities federal biometric information sharing capability was first activated in Texas in 2008. From October 27, 2008, through November 30, 2010, ICE reports that 21,880 “[c]onvicted criminal aliens [were] administratively arrested or booked into ICE custody.”

There are several key problems raised by the use of these programs. These programs contribute to over-detention because they subject more individuals to mandatory detention who do not necessarily pose a flight risk. Furthermore, these programs encourage racial profiling. In a September 2009, researchers at the Warren Institute at Berkeley Law considered whether CAP affected arrest rates of certain minority groups in Irving, Texas. The study revealed that “immediately after Irving, Texas law enforcement had 24-hour access (via telephone and video teleconference) to ICE in the local jail, discretionary arrests of Hispanics for petty offenses—particularly minor traffic offenses—rose dramatically.” The researchers found “strong evidence to support claims that Irving police engaged in racial profiling of Hispanics in order to filter them through the CAP screening system.”

After the IACHR Rapporteurship’s review of the U.S. immigration detention and visits to detention facilities in Texas, it expressed “fears [that] . . . local law enforcement programs divert scarce resources away from protecting the community and invite racial-profiling.” The IACHR Rapporteurship, also found “the federal oversight of local law enforcement’s practices in enforcing federal civil immigration laws . . . insufficient.” This lack of oversight raises concerns that the federal government might be unable to hold local law enforcement “properly accountable for enforcing immigration laws with respect for basic human rights.”

The deputizing of local officials can have international human rights implications. For instance, the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Principle 2 states that “[a]rrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.” Without proper oversight of the execution of the 287(g) Program, the Criminal Alien Program (CAP) and Secure Communities, it is not clear that state and local law enforcement qualify as “competent officials” to enforce immigration laws.

VII. The Policy Choice to Detain

As shown, the choice to detain immigrants implicates several international human rights obligations and standards. This section considers why the United States has, despite the large number apparent human rights violations, relied so heavily on detention to enforce immigration laws and what alternatives to detention exist.

A. Why We Detain

Thus far, this report has considered the human rights issues plaguing the U.S. immigration detention system. What it has not done is ask – why do we detain? This is a question that is often overlooked when immigration detention is discussed. An evaluation of the theories that underpin our detention policies reveals that many of the assumptions made about the necessity of detention as an immigration enforcement tool are false.
In defending the policy of detention, ICE Director John Morton has stated the detainees are behind bars because they would "either run away and wouldn't show up for their detention hearing, or because they're a danger to the community." The following sections will address these rationales, as well as two others often cited to defend detention.

1. False Perceptions of Criminality

American citizens and policy-makers alike have drawn a misplaced correlation between individuals suspected of violating immigration law and individuals suspected of violating criminal law. As described in the background section of this report, there exists a fundamental and systemic failure to maintain truly civil enforcement of immigration laws. Americans perceive immigrants as criminal, resulting in a perception of the necessity to impose quasi-criminal punishment. For most individuals incarcerated by ICE, physical custody in secure facilities surrounded by barbed wire fencing, full-time supervision by facility guards, and ten body-counts a day is entirely disproportionate.

2. False Perceptions of Efficient Enforcement

Even if advocates of immigration detention appreciate the distinction between immigration law and criminal law, many still maintain that detention is the most efficient means of immigration enforcement. The argument is that detention is the most efficient way to ensure immigrant appearance at immigration proceedings and thus the most efficient way to achieve removal. This has not always been the dominant mindset. If one analyzes U.S. immigration detention practices from an historical prospective, it becomes clear that where the government once “argued that detention was a necessary part of border inspection, . . . the concept [has] evolved to support detention as a necessary part of the hearing process, [and] . . . has also grown to be seen as a necessary deterrent to unlawful immigration . . . or as a part of large scale immigration law enforcement.” The government assumes that detention is necessary because without it, non-citizens would not appear at their removal proceedings. One advocate interviewed for this report, however, pointed out that there is a lack of evidence to support that assumption, explaining that: “Continued outside evaluation on the data of immigrants failing to appear is necessary. The perception of the population at large and of the government that people would just run away may not be accurate.”

English jurist William Blackstone famously wrote that it is “better that ten guilty persons escape than that one innocent suffer.” Indeed, this notion as well as the related notions of a presumption of innocence and a preference towards personal liberty have been a hallmark of American jurisprudence for centuries. Immigration detention inverts Blackstone’s principle, maintaining rather that it is better that ten immigrants with potentially viable forms of relief suffer in prison than that one immigrant abscond. The placement of immigrants in detention based on an automatic presumption that they are a flight risk, without extensive data to support that presumption, runs contrary to these basic principles of American law.

3. Xenophobia

Xenophobia, though difficult to prove, is likely a sentiment underpinning the nation’s detention policy. The U.N. Special Rapporteur on the human rights of migrants to the United States of America noted that “xenophobia and racism towards migrants in the United States has worsened since 9/11” and that the “xenophobic climate adversely affects many sections of the migrant population, and has a particularly discriminatory and devastating impact on many of the
most vulnerable groups in the migrant population, including children, unaccompanied minors, Haitian and other Afro-Caribbean migrants, and migrants who are, or are perceived to be, Muslim or of South Asian or Middle Eastern descent.*

4. **Profit**

The final motive to detain immigrants is for profit. Many IGSA jails sub-contract out the operation of the facilities to the private sector. The use of private prison corporations for the management of immigration detention facilities introduces an improper profit motive into the equation. Several advocates interviewed explained how the profit motive operates in Texas:

**A Texas Advocate’s Account**

“Texas offers a unique recipe for greater privatization of immigration detention: (1) a fondness for the private prison industry, (2) a lot of open space and cheap land where you can build these places far from advocates and the public, [and] (3) poor counties and rural counties who are eager to make a buck on the IGSA.”

**Another Texas Advocate’s Account**

“[Contracts between counties and private prison corporations] create . . . communities centered around maintaining high detention rates. Private prison corporations will go to communities and convince counties to build these facilities. Then, the counties create quasi-governmental organizations that issue revenue bonds to fund the building of the facilities. These bonds are [secured by] revenue of the detention facility—[the per diem amount paid by the federal government for the detention of immigrants]. Now you have a county who is absolutely committed to building a facility and filling it because they will lose their bonds. Willacy is a prime example of this model of speculative prison expansion. It is really bad for public policy because it allows the detention system to expand rapidly and at the same time creates interests that won’t allow it to constrict easily.”

Though the costs of detention vary from facility to facility, in some locations, ICE’s per diem cost is reduced when a certain occupancy level is achieved. This means that the more “bodies” (as some DHS officials interviewed for this report called the detainees) there are, the more money ICE saves. ICE’s interests are thus motivated by the obligations they themselves created by contracting with for-profit prison corporations.

**Snapshot from Detention: T. Don Hutto Facility, Taylor**

During the visit to the T. Don Hutto Residential Center, an ICE Assistant Field Office Director stated that the facility averaged around 500 residents daily and that they “tried to keep the center full” because it is the most “cost-effective” thing to do. He further explained that ICE did not “want to pay for empty beds.” When asked about the relationship between ICE and the Corrections Corporation of America, the Assistant Field Office Director stated simply: “We [ICE] just get them [CCA] the bodies and then we take them away.”
National Public Radio reported an example of how profit motive affected immigration detention in Arizona in late October of 2010. The report reveals the invidiousness of incentivizing increased immigrant detention. According to NPR, private prison corporations, who had unique access to state legislators through campaign donations and lobbying organizations, helped to draft and pass the strict Arizona Senate Bill 1070 immigration law in order to fill immigration detention facilities from which they hoped to profit. In other words, private profit motive directly impacted the government’s treatment of non-citizens. The private prison industry is not new; nor is the concept of profiting off of government contracts. But profiting off of privately created restrictions on personal liberty raises unique concerns—it does not correctly respect the inherent dignity of non-citizens and degrades their worth to mere coins on a scale.

B. Alternatives to Detention

As shown, many of the assumptions made about the necessity of detention as an immigration enforcement tool are questionable at best. Contrary to popular opinion, individuals in ICE custody are not serving criminal sentences—they are awaiting adjudication of their civil cases. Furthermore, the notion that immigration detention should be upheld for the convenience of the U.S. government runs contrary to basic principles of American liberty. And profit as a justification for denying the personal liberty of roughly 400,000 individuals a year is clearly unacceptable. Detention is neither the best nor the only method for ICE to attain its immigration enforcement goals. There are many alternatives to detention available, including community-based programs as well as more restrictive programs such as the Intensive Supervision Appearance Program (ISAP II), Enhanced Supervision Reporting, and electronic monitoring. Importantly, ICE already has the discretion to utilize these alternatives under the current law. ICE has simply chosen to under-utilize alternatives and has admitted to over-reliance on incarceration.

There are many advantages to alternatives to detention. The human rights issues relating to prison-like conditions of confinement, poor medical and mental healthcare, and reports of abuses would be dramatically mitigated by increased use of alternatives to detention. Alternatives to detention would also have an effect on the due process concerns delineated above. This is because alternatives to detention increase an individual’s ability to prepare his or her case, gather the necessary documents and evidence and, importantly, to retain and work with an attorney providing legal representation. They are also clearly more in line with the notion of a truly civil system. Alternatives to detention such as community-based programs, ISAP II, Enhanced Supervision Reporting, and electronic monitoring are not only more humane and civil than physical detention; they are also more cost-effective. In 2010, the United States spent approximately $1.77 billion to detain close to 400,000 immigrants. Alternatives to detention cost a fraction of that number. ICE Director John Morton estimated that ICE detention costs $122 per day per immigrant detainee, compared with the cost of community-based alternatives, which have been estimated to cost for $8.88 to $12.00 per person per day.

1. Community-Based Alternatives to Detention

Community-based alternatives to detention involve case management and supervision to ensure that individuals attend their immigration court proceedings, efficiently seek forms of relief if any apply, or, if they do not, comply with removal orders or voluntarily depart. The frequency of required reporting in community-based alternatives to detention depends on the
individualized assessed risk of each immigrant. For any community-based alternative to work, a comprehensive risk assessment tool is essential. ICE does have a pilot risk assessment tool in place, but it has not been rolled out nationwide.\textsuperscript{clxxxviii}

A great example of a successful community-based alternative to detention is the Appearance Assistance Project, a government-funded pilot project implemented by the Vera Institute from 1997-2000.\textsuperscript{clxxxix} The program involved a risk assessment tool to evaluate potential participants. The 500 immigrants selected for participate were provided reminders of court dates, referrals to pro bono attorneys, referrals to other social services, and information about relevant legal procedures.\textsuperscript{cx} In the end, more than 90% of the participants in Appearance Assistance Project had attended all of their required court appearances.

In 2006, the Australian government experimented with community-based alternatives through its Community Care Pilot program.\textsuperscript{cxci} The program used a comprehensive risk assessment tool.\textsuperscript{cxcii} For the first three years of the pilot program, 94% of participating immigrants complied with all of their reporting requirements, and the Australian government subsequently made the community-based program a permanent component of their immigration enforcement efforts.\textsuperscript{cxiii}

Another example of an alternative to detention is shelter release, implemented by Lutheran Immigration and Refugee Service. This program, which focused specifically on asylum-seekers, housed immigrants in community shelters and provided participants with reminders of hearings, scheduled check-ins with ICE, and organized transportation of participants to required meetings and hearings.\textsuperscript{cxiv} This shelter release program achieved a 96% appearance rate.\textsuperscript{cxv}

2. More Restrictive Alternatives: ISAP II, Enhanced Supervision Reporting, and Electronic Monitoring

ICE does not currently operate community-based alternatives like the one implemented by the Vera institute, and indeed such a program may not be appropriate for some detainees. ICE does operate three types of alternatives to detention--Intensive Supervision Appearance Program (ISAP II), Enhanced Supervision Reporting, and electronic monitoring. ISAP II, or Intensive Supervision Appearance Program is the most restrictive and expensive alternative to detention; it involves “telephonic reporting, radio frequency, and global positioning tracking in addition to unannounced home visits, curfew checks, and employment verification.”\textsuperscript{cxvi} Enhanced Supervision Reporting, which contains all the elements of ISAP II without the curfew checks and employment verification, is somewhat less restrictive. ICE contracts with private companies to run ISAP II and Enhanced Supervision Reporting.

Another alternative to detention is the use of electronic global positioning-enabled ankle bracelet monitoring. Some advocates, including some interviewed for this report, do not believe that ankle-bracelet monitoring is a true alternative to detention because it is so restrictive and intrusive.

VIII. Status of Reforms

In 2009, the Obama administration acknowledged the shortcomings of the immigration detention system when DHS released the Schriro Report, which assessed the status of the immigration detention system and called for reform. ICE Director John Morton has stated that
his goal is to "create a detention program managed directly by agency employees, not contracted out to public and private jails." Specifically, his “vision for the system is to reduce the number of facilities that we have, to have those facilities be designed and run solely from the immigration enforcement perspective, and to have strong, direct federal oversight;” he has plans for two new centers designed specifically for housing detainees--one in Texas--that Morton hopes will involve a combination of dormitories and cells, with good outdoor areas, good food, and access for lawyers. In response to questions regarding access to counsel, Morton has stated he is sympathetic and has mentioned the possibility of locating new ICE facilities "near major cities that have lawyers and pro bono counsel and charitable groups that can provide assistance." Despite these “grand plans,” as Morton himself calls them, few substantial reforms have been made.

An October 2010 report by Heartland Alliance’s National Immigrant Justice Center (NIJC), Detention Watch Network, and the Midwest Coalition for Human Rights entitled “Year One Report Card: Human Rights & the Obama Administration’s Immigration Detention Reforms” provides a comprehensive evaluation of the progress made in reforming the following areas: (1) expanding alternatives to detention; (2) creating a civil detention model; (3) providing sound medical care to ICE detainees; (4) developing oversight mechanisms to promote transparency and accountability within the agency; (5) and adopting fiscally prudent detention practices. The authors of the “Year One Report Card” found that, though some progress had been made, ICE needed to move faster to the implementation phase, as human rights violations persisted, including poor treatment, poor medical care, solitary confinement, and lack of access to legal services. The authors also found that there had been no meaningful improvement in oversight practices and that the size of the detention population impedes the reform process as consistent enforcement is incredibly difficult.

Several advocates interviewed for this report expressed frustration over the pace of reform and attributed the lack of progress to pushback from within ICE. One advocate explained that while the ICE Director Morton and DHS Secretary Janet Napolitano have expressed desire to reform, union members believe that ICE is going soft on immigration. Indeed, the Washington Post recently reported that the “American Federation of Government Employees Council 118, which represents about 7,000 ICE workers . . . recently cast a vote of no confidence in Morton's leadership [and] . . . accuse[d] Morton of abandoning ICE's ‘core mission’ of enforcing immigration laws and focusing on ‘policies related to amnesty.”

IX. Recommendations to Bring U.S. Detention Policy into Compliance with International Obligations

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- Involvement or Investment in “Know Your Rights” Programs
- Pro-Bono Representation of Individuals in Detention

**A. Recommendations for Congress**

1. **End Mandatory Detention**

   Congress should immediately pass legislation to end mandatory detention. Mandatory detention bloats the already overburdened immigration detention population unnecessarily and increases costs to the taxpayer significantly. An end to mandatory detention would bring the United States into compliance with international human rights standards that “require . . . a fair hearing in which family ties and other connections to an immigrant’s host country are weighed against that country’s interest in deporting him or her.”

   Though individual consideration of each immigrants’ unique circumstances will of course create additional costs, those costs will at least partially be offset by reduced spending on detention. Through individual assessment of each case, DHS will find that many, if not most, detainees currently in detention do not pose a significant flight or security risk and are better suited for alternatives to detention or release on bond.

   Mandatory detention leads to over-detention, creating a system in which ICE is forced to detain more immigrants than it has the resources or ability to care for in compliance with international human rights standards. By reducing the detainee population, ICE will have more resources to improve living conditions and provide adequate medical care, mental health care, and oversight. With these funds saved from a reduced detainee population, ICE will move closer to the international norms and standards regarding the treatment of non-citizens and closer to the truly civil form of immigration enforcement that it has repeatedly stated it desires.

2. **Create Safeguards Against the Profit Motive in Immigration Detention**

   Congress should immediately pass legislation that creates safeguards against the impact of private profit motive in immigration enforcement and detention. This should be done, not through greater regulation of the private prison industry, but through restrictions on state and local governments’ ability to profit off of immigration detention. One such safeguard should be the prohibition of the use of revenue bonds for the construction of detention facilities. As described earlier, revenue bonds are bonds secured by the revenue of the detention facility—which is the per diem amount paid by the federal government for the detention of immigrants. Such bonds motivate local governments to fill detention beds in order to make money. Reduction in profit
motive will lead to a reduction in detainee population, which, as described in the section above, would increase resources available for bringing U.S. detention practices into compliance with international human rights standards.

B. Recommendations for DHS & ICE

1. Drastically Increase the Use of Alternatives to Detention

Another method of bringing U.S. immigration detention practices into compliance with international human rights standards is an aggressive increase in the use of alternatives to detention. The U.N. Working Group on Arbitrary Detention has asked states to ensure that “alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.” The human rights issues relating to prison-like conditions of confinement, poor medical and mental healthcare, and reports of abuses would be dramatically mitigated by increased use of alternatives to detention because the U.S. government would not be responsible for all aspects of the immigrant’s life as it is when the immigrant is detained. Alternatives to detention would also improve the due process concerns delineated above. An immigrant that is living outside of a detention facility has a greater ability to prepare his or her case, gather the necessary documents and evidence and, importantly, to retain and work with an attorney providing legal representation.

2. Move Closer to Civil Detention Through Detention Standards

For those immigrants in removal proceedings who pose a flight or security risk and would not be eligible for alternatives to detention, detention standards can be improved for greater compliance with international standards. In the Schriro Report, ICE explained that the demeanor of immigrant detainees was markedly distinct from the demeanor of criminal detainees. Fights in detention facilities are infrequent, and “assaults on staff are even rarer.” Given that, the conditions of confinement should be softened, at the very least, to achieve greater proportionality, while still achieving the goals of immigration enforcement. One ICE official interviewed explained that he believes that the facilities in Texas “could move to a softer facility with more movement. [But ] it is not appropriate for the entire population. Detainee and officer safety is an issue. . . . There are only certain individuals where it would be appropriate. Ninety percent or more are straight from jail. The more you get to the interior [of the] US—away from the border, the less suitable the individuals are for less restrictive settings.”

Even taking officer and detainee safety into account, the current detention standards still leave significant room for improvements such as more recreation time, more visitation time, better communication resources, and educational or social service programming for long-term detainees. Some opponents of new civil detention standards argue that standards in immigration detention facilities no longer need to improve because the facilities are already “country club style” facilities. The observations for this report reveal that immigration detention facilities are far from “country club style.” Standards should be improved (1) because they can be, and (2) because the U.S. government has made the choice to detain these individuals and thus adopted the responsibility to provide resources and programming that comport with international human rights standards.
3. Create Enforcement Mechanisms for Detention Standards

The above-mentioned improvements in detention standards will be meaningless unless ICE promulgates standards with enforcement mechanisms and consequences for failures to comply. Without such enforcement mechanisms, we will continue to see reports of human rights violations in immigration detention facilities. Enforcement could be achieved through a variety of methods--assessment of fines to sub-contractors for failure to adhere to standards, licensing restrictions for failure to adhere, or the creation of private rights of action for detainees.

C. Recommendations for the Texas Bar

Reform of the system can also be achieved or at least complimented by investment and participation in legal services for individuals in detention at the micro-level. Lawyers across the nation, such as Patricia Hynes, President of the New York City Bar, recognize that there are injustices in our immigration system that lawyers simply cannot ignore. Hynes advocates the appointment of counsel for immigrants in detention, but even if that goal is not achieved, lawyers do not need to wait for Congress or ICE to change their practices. As shown, even with the best of intentions, these changes take time. Lawyers in Texas can improve the legal prospects of the thousands of immigrants detained across the state through participation or financial investment in (1) legal orientation programs; (2) know your rights programs; and (3) pro bono representation of immigrant detainees. These actions would bring the U.S. closer to compliance with the due process standards contained in various international human rights instruments.

1. Involvement or Investment in Legal Orientation Programs and “Know Your Rights” Programs

Legal orientation programs (LOPs) offer a way to provide invaluable information to immigrants in detention without engaging in full long-term representation of the individual. Statistics show that immigrant detainees who participate in LOPs “move an average of 13 days more quickly through the immigration courts than detainees who do not have access to the program.” Individual attorneys should consider joining already established LOPs, and pro bono coordinators in Texas law firms should consider creating independent LOPs to service the nearest immigration detention facility. The programs would not only assist the immigrant detainees served but would also provide valuable training in speaking and presentation skills for young attorneys.

Another opportunity for assisting immigrant detainees is Know Your Rights Programs. Know Your Rights Programs are more in-depth than legal orientation programs, but they operate under a brief services model where volunteers do not engage in full representation. Rather, the attorneys perform interviews of detainees and provide brief but customized advice and referrals. In one such program, conducted in New York City, weekly morning clinics were held on site at a detention facility. Various participating law firms and organizations send ten attorneys and one immigration law expert per week to the facility to conduct screening interviews with detainees. After the interviews, the volunteer attorneys consult the immigration law expert, and then counsel the detainee on their options and answers questions. The volunteer attorneys in the NYC Know Your Rights Program are not expected to take on long-term representation of the detainees they meet with, but they are permitted to if they choose.
Like the legal orientation programs, Know Your Rights programs would not only assist the immigrant detainees but would also provide valuable training in speaking and presentation skills for young attorneys.

2. **Pro-Bono Representation of Individuals in Detention**

Finally, Texas attorneys, especially bilingual attorneys, should consider providing pro bono representation of individuals in detention. As described above, many detainees in Texas face immigration proceedings without legal counsel. According to a 2010 report by the non-profit organization Texas Appleseed, “[a]cross all immigration courts in Texas, 86 percent of detained immigrants are unrepresented by legal counsel.” Though representation of detained immigrants can be difficult due to the geographic isolation and difficulty of communicating with detained individuals, representation can make a critical difference for this vulnerable and underserved segment of society and help to move the United States closer to human rights compliance.

X. **Conclusion**

In conclusion, the detention conditions and due process concerns faced by immigrant detainees in Texas contribute to a wide range of significant international human rights violations. By considering the causes and consequences of over-detention, challenging the policy choice to detain, and implementing the recommendations outlined above, Congress, ICE, and individual attorneys and firms can collectively bring United States immigration detention practices into compliance with international human rights law.
For more information about the organizations consulted for this report, or if you would like to support them financially or through volunteer work, please visit the following websites:

American Civil Liberties Union: http://www.aclu.org/

American Civil Liberties Union of Texas: http://www.aclutx.org/

American Gateways: http://www.americangateways.org/

Catholic Charities of Dallas, Inc.: http://www.catholiccharitiesdallas.org/

Detention Watch Network: http://www.detentionwatchnetwork.org/

Grassroots Leadership: http://www.grassrootsleadership.org/

Human Rights Initiative of North Texas: http://www.hrionline.org/


National Immigrant Justice Center: http://www.immigrantjustice.org/

Refugee and Immigrant Center for Education and Legal Services (RAICES): http://www.raicestexas.org/

South Texas Pro Bono Asylum Representation Project (ProBAR):
http://www.abanet.org/publicserv/immigration/probar.shtml

St. Mary’s School of Law Immigration and Refugee Rights Project: http://www.stmarytx.edu/lawTexas

Appleseed : http://www.texasappleseed.net/

University of Texas School of Law, Immigration Clinic: http://www.utexas.edu/law/clinics/immigration/

YMCA of Greater Houston - Immigration Legal Counseling Services:
http://www.ymcahouston.org/ymca-international/
AUTHORITIES CITED


iv 8 USC § 1226, 1227, 1229, and 1357.


vi Schriro, supra note 1 at 2.

vii Schriro, supra note 1 at 10.

viii Megan Bremer, Pa. Family Immigration Detention and New DHS Parole Guidelines, LEGAL INTELLIGENCER, June 28, 2010, at 7 (2010 WLNR 12992957). The Berks Family Residential Center, a former nursing home in Pennsylvania became the only family detention center after the Hutto facility in Taylor, Texas ceased housing families. There are 85 beds in the facility, and “[a]s of June 2010, there are 23 families detained at Berks with children as young as one year . . . [who are] predominantly from Latin America with an upsurge of families from Mexico.”


x Schriro, supra note 1.

xi The non-profit organization Detention Watch Network also lists Sierra Blanca Prison Facility in Blanca, the Reeves County Detention Complex in Pecos, the Webb County Detention Center in Laredo, the Jefferson County Downtown Jail in Beaumont, the Eden Detention Center in Eden, and the Big Springs Correctional Institution in Big Spring as immigration facilities in Texas. When asked for clarification, ICE explained that these facilities listed by Detention Watch Network are not currently authorized for use.


xiii INA 236 (c)


xvi Schriro, supra note 1, at 2.

Heeren, supra note 7.

Schriro, supra note 1.

Schriro, supra note 1, at 4.


8 U.S.C. 1362, INA Sec. 292.

Schriro, supra note 1.


State Dep’t Human Rights Website http://www.state.gov/g/drl/hr/

Id.


Id.

Schriro, supra note 1, at 17.


Id.

xxxix Id.


xiv Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary (Kehl/Strasbourg/Arlington: N.P.Engel, 2005), p.22


xlv Schriro, supra note 1.

xlii Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 Article 2 (1).


xliv General Comment No. 20 (1992) of the Human Rights Committee, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR)


1 Id.

li General Comment No. 20 (1992) of the Human Rights Committee, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR) Paragraph 11

lilli International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, 1990 Article 17(5)


See generally Dying for Decent Care: Bad Medicine in Immigration Custody from the Florida Immigrant Advocacy Center (March 17, 2009). www.fiacfla.org/reports/DyingForDecentCare.pdf.

Ana Maria Echiburu, "Healthcare Standards in Immigration Detention Centers," 14 PUB. INT. L. REP. 136 (2009). Echiburu tells the story of of Hiu Lui Ng, a computer engineer from Hong Kong, who moved to New York in 1992, married a U.S. citizen and fathered two U.S.-born children and was detained in 2007 by immigration officials. Mr. Ng complained of back pains but was repeatedly refused treatment. After a year in detention, Mr. Ng died with a fractured spine and untreated cancer in his lungs, liver, and bones. The author advocates the passage of a bill to reform healthcare for immigrants in detention. See also Janice G. Inman, "Immigration Medical Care: Detainees are Left in the Hands of Under-Supervised Contract Caretakers," 200 N.J.L.J. 759 (2010). Inman tells the story of Francisco Castaneda, a detainee who noticed a lesion on his penis and requested a biopsy from the medical providers in his detention facility. The civilian Public Health Service employee and the commissioned PHS officer refused to allow a biopsy, calling it an "elective procedure" despite the recommendations from a doctor, 3 physician assistants and a specialist. The procedure was finally authorized, but Castaneda was released. The next week, it was revealed that he had advanced penile cancer and had to have his penis removed immediately. He died the next year.
ld. (citing ICE testimony from Congressional hearing on “Medical Care and Treatment of Immigration Detainees and Deaths in DRO Custody,” March 3, 2009).


ld.


ld. at 15-16.


General Comment No. 20 (1992) of the Human Rights Committee, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR) Paragraph 11


the International Covenant on Economic, Social and Cultural Rights, 1966 Article 12 (1)

General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health, (Article 12 of the ICESCR) Paragraph 34


ld.


ld. See also Megan Bremer, Pa. Family Immigration Detention and New DHS Parole Guidelines, LEGAL INTELLIGENCER, June 28, 2010, at 7 (2010 WLNRR 12992957) (arguing that the new policy is a step in the right direction, but that more needs to be done to enable families to apply for asylum and find housing after release).

Human Rights First. at 7.

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999

1951 Geneva Convention Relating to the Status of Refugees, Article 31(2)

Id.


Rabin, supra note 91.


Id.


General Comment No. 20 (1992) of the Human Rights Committee, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR) Paragraph 11


Halfway Home: Unaccompanied Children in Immigration Custody from the Women’s Refugee Commission (February 2009) at 1, womensrefugeecommission.org/docs/halfway_home.pdf

Id.

UN Convention on the Rights of Child, 1990 Article 3(1)


Id.

Id.


Anderson, supra note cvi


The length of detention however, varies appreciably between those pursuing voluntary removals and those seeking relief. As much as 25 percent of the detained population is released within one day of admission, 38 percent within a week, 71 percent in less than a month, and 95 percent within four months.


UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988 Principle 28


Schriro, supra note 2 at 10.


Schriro, supra note 2 at 10.

Morehouse, supra note 46.

A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers supra note 64 at vi.

Schriro, supra note 2 at 16.


Schriro, supra note 2, at 15.
Schriro, supra note 2, at 15.

A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers supra note 64 at x-xii.


Id.

Report of Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, E/CN.4/2003/68, 2003

IACHR press release

Texas Appleseed at 13.

Id.

Markowitz, supra note Error! Bookmark not defined..

8 U.S.C. 1362, INA Sec. 292.


Id.

Markowitz, supra note Error! Bookmark not defined..

Maria Kantzavelos, Report finds detained immigrants allowed limited access to attorneys, CHI. DAILY L. BULL., September 15, 2010 (2010 WLNR 18368068). See also, National Immigrant Justice Center, “Isolated in Detention” (September 2010), available at http://www.immigrantjustice.org/download-document/793-isolated-in-detention-full-report.html. The National Immigrant Justice Center report surveyed 150 of the estimated 300 immigration detention facilities in operation between August and December 2009 and found that “[m]ost of the immigrants detained in the surveyed facilities have insufficient access to legal counsel because the facilities are isolated and legal aid organizations do not have the resources to serve them. More than a quarter of the surveyed facilities had no access to legal aid outreach from non-governmental organizations (NGOs), including direct representation and legal orientation programs.” The report further found that “[b]arriers to access to legal services for geographically isolated detainees is compounded by policies which block detainees’ ability to communicate with attorneys by phone. Of the 25,489 detainees in the 67 detention facilities surveyed regarding detainee phone access, 78 percent were in facilities where lawyers were prohibited from scheduling private calls with clients.”


Human Rights Watch Locked Up Far Away supra note 50 at 6.

Human Rights Watch Locked Up Far Away supra note 50 at 6.

Human Rights Watch Locked Up Far Away supra note 50 at 6.


Id.


Id.


Jenna Greene, ICE Warms up to Detainees: Immigration Chief Promises Overhaul of 'Haphazard' System, NAT'L L.J., February 8, 2010 (2/8/2010 Nat'l L.J. 1, (Col. 1)).

Schriro, supra note 2, at 4.


Schriro, supra note 2 at 11.


Schriro, supra note 1.


Id. at 6.
Id. at 10.

Id.


Schriro, supra note 2, at 20.

Greene, supra note clxxvii.


Schriro, supra note 1, at 21.

"Country Club" Detention Centers For Illegal Immigrants, KFOX14 News, November 16, 2010 http://www.kfox14.com/news/25811443/detail.html ("Illegal immigration costs taxpayers an estimated $100 billion a year. Texas picks up nearly $9 billion of that bill, New Mexico picks up about $608 million. And now the federal government is ordering changes on the taxpayers’ dime. E-mails obtained by the Houston Chronicle reveal that federal authorities have ordered the following changes at the holding centers for illegal immigrants: More variety in menus, fresh veggie bars, self-serve beverages, continental breakfast on weekends, movie nights, bingo, arts and crafts, dance and cooking classes, tutoring and computer training. The facilities are also to be made more welcoming with new paint, bedding and house plants. Human rights groups think the changes are overdue, claiming that illegal immigrants should not be treated as criminals.").


Schriro, supra note 1, at 13.
An Innovative Pro Bono Response to the Lack of Counsel for Indigent Immigrant Detainees from City Bar Justice Center NYC Know Your Rights Project (2009)

Id.

Texas Appleseed at 13.