

**JOINT SUBMISSION TO THE U.N. HUMAN RIGHTS COMMITTEE**

**CONCERNING THE USE OF SOLITARY CONFINEMENT IN IMMIGRANT  
DETENTION FACILITIES IN THE UNITED STATES OF AMERICA**

**IN RELATION TO THE UNITED STATES' 4<sup>TH</sup> PERIODIC REPORT**

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**This report is jointly submitted by the following organizations:**

**The John Marshall Law School Human Rights Project**

The John Marshall Law School Human Rights Project is a nonprofit, nonpartisan law school legal clinic dedicated to promoting and protecting human rights in the United States and around the world. The Human Rights Project offers students a background in human rights advocacy through the practical experience of working in international human rights cases and projects. The Project is currently working to bring light to problems related to the use of solitary confinement in immigration detention in the United States.

**National Immigrant Justice Center, Heartland Alliance**

NIJC is a non-governmental organization dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers through a combination of direct services, policy advocacy, impact litigation, and public education. For more than a third of its 30-year history, NIJC has provided Know Your Rights presentations, direct representation, and individual advocacy for thousands of adults and children in more than 45 detention facilities across the country.

**National Lawyers Guild International Committee**

The NLG International Committee (IC) supports legal work around the world "to the end that human rights shall be regarded as more sacred than property interests." As lawyers, law students, and legal activists, the IC seeks to change U.S. foreign policy that threatens, rather than engages, or is based on a model of domination rather than respect. The Guild provides assistance and solidarity to movements in the United States and abroad that work for social justice in this increasingly interconnected world.

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## I. Introduction and Summary

This report relates to the situation of immigrant detainees who are held in solitary confinement in detention facilities in the United States. This report is submitted in response to the United States' fourth periodic report and specifically addresses the widespread use of solitary confinement in immigrant detention as it violates immigrant detainees' rights to due process and judicial remedies, violations of minimum standards of the right to humane treatment, and the right to personal liberty. This report discusses the policies and practices of the U.S. Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) that support the use of solitary confinement as "disciplinary" and "administrative" tools.

Solitary confinement is a form of segregation in which individuals are held in total or near-total isolation. Individuals in solitary confinement are generally held in small cells for 23 hours a day and rarely have contact with other people. In all cases, they are subject to stringent restrictions on recreation, visitation, and other privileges available to the facility's general population. Solitary confinement is sometimes referred to as "isolation," "the hole," "Supermax," "Secure Housing Unit (SHU)," or other terms.<sup>1</sup>

As discussed in the report, the current 2011 Performance-Based National Detention Standards (PBNDS), which set the national standards for ICE operated facilities, newly adopted ICE Policy 11065.1, commonly referred to as the Segregation Directive, and current practices fail to protect the general detainee population and vulnerable populations from abuse. Indeed, the PBNDS have not even been fully implemented in all ICE detention facilities. The current reality of immigrant detainees (ICE detainees) being housed in county jails or other detention facilities housing criminally convicted persons, lends to the lack of differentiation in treatment between civil and criminally convicted detainees, therefore allowing the use of solitary confinement in immigrant detention as a common practice.

The Committee has expressed concern regarding the treatment, conditions and abuses of detainees in the United States in prisons and jails.<sup>2</sup> Additionally, the Committee requested information specifically about the United States' use of "prolonged cellular isolation," including people with mental disabilities, as well as information on "steps taken to ensure that persons deprived of their liberty have the ability to maintain contact with their family."<sup>3</sup> The Committee also requested information related to the detention of immigrants.<sup>4</sup> This report seeks to provide information regarding these concerns of the Committee.

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<sup>1</sup> INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION 2 [hereinafter INVISIBLE IN ISOLATION].

<sup>2</sup> Human Rights Committee, List of issues to be taken up in connection with the consideration of the fourth periodic report of the United States of America [Advance unedited version], para. 4, 16.

<sup>3</sup> *Id.* at para. 16.

<sup>4</sup> *Id.* at para. 19.

Although the United States Supreme Court has held that 30-day period of segregation does not give rise to a liberty interest<sup>5</sup> that would require a full due process hearing, it is clear from the recent adoption of the ICE Policy 11065.1 that the United States government has started to recognize the harmful effects of the use of solitary confinement in detainees subjected to such practices.<sup>6</sup> This new ICE Policy (11065.1) represents a step in the right direction, but does not sufficiently ensure that there is proper implementation of the already recognized protection standards or provide sufficient protections for vulnerable persons in compliance with international law and domestic law.

Additionally, the United States is failing to separate immigrants from the criminally detained, places unwarranted restrictions on contact with visiting family members, and violates the rights of LGBT and disabled persons by imposing solitary confinement on them purportedly for their own protection.

Included in this report are examples of the current practices gathered from detention facilities around the United States housing ICE immigrant detainees. The report will limit its examples to practices in detention facilities where the violations are most egregious.

The United States' failure to protect the rights of immigrant detainees represents a violation of the ICCPR Articles 2(3), 7, 9, 10, and 26 as well as the United States' obligations under the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and domestic law.<sup>7</sup> We respectfully request that the Committee urge the United States to: strictly enforce the 14-day limit in a 30-day period; prohibit the use of solitary confinement based on age, gender identity, sexual orientation, mental health, pregnancy, or disability unless the detainee request such placement; ensure that if the detainee requests placement there is a review process to ensure that the detainee is not kept in solitary confinement against his or her

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<sup>5</sup> Sandin v. Conner, 515 U.S. 472 (1995); Fourth Periodic Report, at para. 234, referencing paragraph 139 of the Second and Third Periodic Report.

<sup>6</sup> ICE Policy 11065.1, Review of the Use of Segregation for ICE, U.S., Immigration and Customs Enforcement, available at: [http://www.ice.gov/doclib/detention-reform/pdf/segregation\\_directive.pdf](http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf).

<sup>7</sup> Other relevant international instruments and laws include but are not limited to: the ICCPR optional protocols of 1966 and 1989; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and optional protocol (2002); the International Convention on Economic, Social, and Cultural Rights (1966) and optional protocol (2008); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); Convention relating to the Status of Refugees (1951) and protocol (1967); the Geneva Conventions of 1949 and their protocols (1977); Standard Minimum Rules for the Treatment of Prisoners (1977); Basic Principles for the Treatment of Prisoners (1990); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (1990); the ILO Migration for Employment Convention (1949); the ILO Migrant Workers Convention (1975); the American Convention on Human Rights (1969); the Cartagena Declaration on Refugees (1984); the San Jose Declaration on Refugees and Internally Displaced Persons (1994). Detention and /or the use of solitary confinement may also have racial, ethnic, or religious discrimination, free speech suppression, or political oppression components and motivation that implicate the protections of these detainees under these and many other human rights instruments, including but not limited to: the International Convention on the Elimination of all Forms of Racial Discrimination (1965); Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1963). It is understood that many of these human rights instruments have not been adopted or ratified by the United States or may lack provisions for specific implementation or enforcement but still may reflect widely held norms within the international community and may be resorted to in interpreting terms and provisions within the ICCPR and other human rights documents that the United States has ratified.

wishes; and report all uses of solitary confinement by DHS/ICE to Congress and to make all reports publically available.

## **II. The United States' International Obligations**

### **A. Right to Due Process and Judicial Remedies**

#### **1. Violations of Immigrant Detainee's Due Process Right of Access to Courts**

It is clear that the right to due process has been recognized through international and domestic standards. Article 2(3)(a) of the ICCPR requires that States provide an “effective remedy.” Further, Article 2(3)(b) provides that: “To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.”

In deportation proceedings, immigrant detainees have a right to retain counsel of their choice; however, they do not have the right to appointed counsel. ICCPR Article 14(3)(b) states that each person shall be entitled to “minimum guarantees,” including the right “[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.” In the domestic realm, an immigrant detainee’s right to retain counsel is recognized under domestic constitutional and statutory law.<sup>8</sup> In fact, domestic courts have found that the Fifth Amendment to the United States Constitution affords immigrant detainees the same rights of access to retained counsel as criminal prisoners who are American citizens.<sup>9</sup>

However, the United States Immigration Detention Centers are relentlessly violating immigrant detainees’ right to judicial protection and judicial guarantees. This is apparent by the lack of availability and affordability of legal aid services, which prevents detainees from asserting their right to due process.<sup>10</sup>

#### **2. ICE Delays and Lack of Reporting of Confinement and Confinement Practices**

The U.S. government’s internal systems of oversight are (1) annual inspection for all ICE detention facilities, contract, and intergovernmental service agreement jails, and (2) the Office of Inspector General’s occasional site or issue-specific investigations.<sup>11</sup>

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<sup>8</sup> See, e.g., 8 U.S.C. §§ 1252(b)(2), 1362; *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300-02 (7th Cir. 1975); *Nunez v. Boldin*, 537 F. Supp. 578, 582 (S.D. Tex. 1982).

<sup>9</sup> *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

In addition, in order for ICE to stay in compliance with the confinement procedures under the ICCPR, ICE is required to give immigrant detainees “prompt” notice, also known as a “notice to appear,” and give immigrants the opportunity to exercise their right to dispute the validity of the detention “without delay.”<sup>12</sup> However, although immigrant detainees have a right to a notice to appear, there is no time frame as to which ICE must serve a notice to appear on the immigrant detainee or the immigration court.<sup>13</sup>

The recently adopted ICE Policy 11065.1 provides for increased oversight on the use of solitary confinement in immigrant detention. The directive requires all detention facilities that contract with ICE to report cases in which individuals are held in solitary confinement within a certain time period. The directive explicitly states that solitary confinement should be used only as a last resort, and that release from detention should be considered for individuals who are not subject to mandatory custody laws. In addition, the directive includes special reporting requirements for vulnerable populations, including people with mental illness; severe medical illnesses or disabilities; pregnant or nursing women; elderly individuals; and those susceptible to harm due to their sexual orientation, gender identity, or because they have been victims of sexual assault. As mentioned previously, this directive is a step in the right direction, but does not by itself represent greater protections. While the reporting requirements provide important steps to review ICE’s segregation policy, it does not prevent individuals from languishing in solitary confinement for stretches of time extending beyond 15 days while their cases are being reviewed. Strict implementation of the policy will be required in order to avoid lengthy processes of solitary confinement while evaluations and processes take place.

### **3. ICE Guards’ Intimidation Methods Keep Immigrant Detainees from Filing Complaints.**

Intimidation has been used by some ICE personnel to purposely deny immigrant detainees their right to lodge petitions for judicial remedies and complaints to the administration. As part of this practice, some detention centers are using inhumane intimidation methods to keep immigrant detainees from filing complaints.

For instance, on June 8<sup>th</sup>, 2009, in Washoe County, Nevada, seven detainees filed an Inmate Grievance Form against a prison officer.<sup>14</sup> After learning about the complaint, the sergeant attempted to identify the drafter of the complaint and subjected each immigrant detainee to questioning.<sup>15</sup> Four signatories refused to name the drafter.<sup>16</sup> Consequently, as punishment for

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<sup>12</sup> See International Covenant on Civil and Political Rights art. 9(4), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (1966) [hereinafter ICCPR] (giving an immigrant detainee the right to “take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”).

<sup>13</sup> See General Assembly, Hum. Rts. Comm., Report of the Human Rights Committee, ¶ 79(12), U.N. Doc. A/56/40 (2001) (holding that three days and fifteen hours before any sort of judicial review occurs violates the “prompt” requirement of the ICCPR); General Assembly, Hum. Rts. Comm., Report of the Human Rights Committee, ¶¶ 100-11, U.N. Doc. A/52/40 (1997) (waiting ninety-six hours before judicial review occurs is violative of due process).

<sup>14</sup> See FOIA Response Washoe County Jail NV 4 April 2012 (Part 1).pdf, P. 79; see also, Christopher Cardona, John Marshall Human Rights Clinic Fact Finding, *Petitioner Memo*, 6 (2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

filing a group complaint, the sergeant transferred the four immigrant detainees out of their housing block.<sup>17</sup> The sergeant claimed that he instructed the detainees that they were allowed to file individual complaints, however, the sergeant also emphasized the importance for the detainees to “clearly understand the point being made.”<sup>18</sup> This situation illustrates the use of threats of solitary confinement as a form of coercion to keep immigrant detainees from filing complaints, thereby demonstrating a violation of due process within the context of Article 2 of the ICCPR.<sup>19</sup>

## **B. Right to Humane Treatment**

Article 10(1) of the ICCPR provides that: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” To complement the right to be treated humanely, is the treatment to protect the dignity, mental, and physical integrity of the individual. Article 7 states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” In addition, it is recognized that the standards of humane treatment of immigrant detainees and respect for human dignity necessitate “minimum and non-derogable requirements dealing with the humane treatment of all persons held under the authority and control of the state.”<sup>20</sup>

### **1. The Use of Solitary Confinement as Physical and Mental Punishment**

The Human Rights Committee stated in General Comment 20 that “[t]he prohibition in [ICCPR] article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee’s view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.”<sup>21</sup>

Solitary confinement or “prolonged incommunicado detention,” as a detention measure qualifies as inhuman treatment.<sup>22</sup> Solitary confinement is a form of segregation in which individuals are held in total or near-total isolation. Individuals in solitary confinement are generally held in small cells for 23 hours a day and rarely have contact with other people. These cells can be located in dedicated segregation units, within either administrative or disciplinary segregation, but individuals may also be locked in their cells in their assigned housing unit. In all cases, they are subject to stringent restrictions on recreation, visitation, and other privileges available to the facility’s general population. Solitary confinement is sometimes referred to as “isolation,” “the hole,” “Supermax,” “Secure Housing Unit (SHU),” or other terms.<sup>23</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), available at: <http://www1.umn.edu/humanrts/iachr/terrorism-ch3C.html>.

<sup>21</sup> Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 5.

<sup>22</sup> *Report on Terrorism and Human Rights*, *supra* note 20.

<sup>23</sup> *INVISIBLE IN ISOLATION*, *supra* note 1, at 2.

Prolonged incommunicado detention is commonly known as a severe form of custody where persons are disallowed access to their families, lawyers, or independent physicians, and in some extreme instances, prevented from informing anyone about their arrest.<sup>24</sup> In a similar sense, solitary confinement in the context of immigration detention centers is a type of segregation where detainees are in total or near-total isolation with very limited, if any, contact with others.<sup>25</sup> Further, immigrant detainees in some locations are prevented from contacting their lawyers for at least 30 days or are denied access to a phone altogether.<sup>26</sup>

Detainees may be placed in two different types of solitary confinement:

### **Administrative Segregation**

Administrative segregation is a non-punitive status in which the individual is confined only to ensure the safety of residents or others, the protection of property, or the security or good order of the facility. Administrative segregation may be used for medical reasons or in cases where a detainee requires protection. When used for protection purposes, segregation may be initiated at the detainee's request or by staff in order to protect the resident from harm. In these cases, detainees should still be granted access to privileges, such as recreation, visitation, etc. In addition, detainees who request to be placed in segregation must be able to be placed back in the general population should they request to do so.

### **Disciplinary Segregation**

Disciplinary segregation is used to separate individuals who have violated a facility rule. ICE standards state that individuals are only to be placed in disciplinary segregation after a hearing has been conducted and the detainee is determined to have committed a violation.

Even though the reasons for individual placement in solitary confinement may vary, the conditions tend to be the same. In most immigration facilities, there is no meaningful difference in the conditions used to house individuals in "protective" administrative solitary and those used for disciplinary segregation.

It is estimated that 300 immigrant detainees are held in solitary confinement at any given time within the 50 largest ICE detention facilities.<sup>27</sup> Of those 300 immigrant detainees, nearly fifty percent are kept in solitary confinement for 15 days or more.<sup>28</sup> A lesser but nonetheless significant percentage of those, about 35 immigrant detainees, are isolated for more than 75 days.<sup>29</sup> Given these federal statistics, on any given day: hundreds of immigrant detainees are subjected to cruel and inhuman treatment; hundreds of immigrant detainees are put at risk of

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<sup>24</sup> Judith Sunderland, *Setting an Example? Counter Terrorism Measures in Spain: The Use of Incommunicado Detention*, 17 Human Rights Watch 1. 23 (2005), available at: <http://www.hrw.org/reports/2005/spain0105/spain0105.pdf>.

<sup>25</sup> INVISIBLE IN ISOLATION, *supra* note 1, at 2.

<sup>26</sup> *Id.* at 10, 11.

<sup>27</sup> Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. Times, Mar. 24, 2013, p.1, available at: [http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?\\_r=2&](http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?_r=2&) (hereinafter "*Immigrants Held Often for Weeks*").

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

suffering psychological, physical, and moral harm; and hundreds of immigrant detainees' are denied day after day their inherent right to human dignity.

The U.N. Special Rapporteur on torture and other forms of cruel, inhuman or degrading punishment found that the limit of "prolonged" solitary confinement "is 15 days, at which point some of the harmful psychological effects of solitary confinement may become irreversible."<sup>30</sup> In addition, recent medical studies have shown that solitary confinement can cause hallucinations, paranoia, memory loss, and random violence and self-harm, and creates severe, harmful psychological and physiological effects in persons detained.<sup>31</sup> Even a "short, defined period of solitary confinement" can be "disastrous."<sup>32</sup>

Yet many immigrants have been put into solitary confinement for prolonged or indefinite periods.<sup>33</sup> The 2011 PBNDS require detention facilities to notify ICE when they place a detainee in segregation for over 30 days.<sup>34</sup> However, many facilities avoid this requirement by releasing the individual into the general population after 29 days of segregation, only to return them to segregation the next day.<sup>35</sup> Moreover, investigators have found instances where immigrants have been held in solitary confinement for much longer periods.<sup>36</sup> For example:

- At a jail in Nevada, there were at least ten separate instances where immigration detainees were placed in solitary confinement for more than 15 days. One detainee was placed in solitary confinement for 54 and then again for 23 days.<sup>37</sup>
- At a jail in Ohio, there were at least twelve separate instances where immigration detainees were placed in solitary confinement for more than 30 days.<sup>38</sup>

There may be instances when detained individuals need to be separated for a brief period for their own safety; however, solitary confinement should not be used for this kind of administrative separation. DHS/ICE should consider placing vulnerable populations into alternatives to detention (ATD) programs if they cannot be held safely in the general population,

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<sup>30</sup> *Id.* at 13; see also Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 24, 2013, § 1, at 1-18.

<sup>31</sup> INVISIBLE IN ISOLATION, *supra* note 1, at 12; see also Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J.L. & PSYCHIATRY 49, 53-55 (1986); Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT'L L. REV. 1, 3, 11 (2006); Nan D. Miller, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139, 160-161 (1995).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 23.

<sup>35</sup> *Id.*

<sup>36</sup> In addition to the information uncovered by the National Immigrant Justice Center and Physicians for Human Rights, law student investigators from The John Marshall Law School Human Rights Project in Chicago have discovered additional instances of persons being held for periods exceeding 30 days and even 60 days.

<sup>37</sup> Letter from Diane Nutter, *Jail Clerk at Seneca County Jail, in response to a Freedom of Information Request* (Mar. 12, 2012) (on file with The John Marshall Law School Human Rights Project).

<sup>38</sup> *Id.*

releasing individuals on humanitarian parole or immigration bond, and housing immigrants based upon their status.<sup>39</sup>

## 2. Special Considerations for Vulnerable Persons

Vulnerable persons are recognized under international human rights and international humanitarian law as requiring special protections. States must “afford specific guarantees for the care, aid and protection.”<sup>40</sup> These special protections can be said to compliment Articles 7 and 10 of the ICCPR, and alternatively Article 26, which states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>41</sup> Specifically, discrimination based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” is prohibited.<sup>42</sup>

Large and vulnerable portions of the immigrant population are still subjected to segregation, often arbitrarily and with little justification or review. The current standards do not specifically address the disparate impact that the use of solitary confinement can have on some vulnerable populations, such as people who identify as lesbian, gay, bisexual, or transgender (LGBT), people with mental disabilities, and other vulnerable populations based on age and gender, as well as pregnant women.<sup>43</sup>

“[S]olitary confinement frequently is used as a control mechanism. Researchers met individuals who were held in solitary confinement after they helped other detainees file complaints about detention conditions. People who are mentally ill and people who identify as lesbian, gay, bisexual, or transgender (LGBT) often are assigned to solitary confinement because jail staff is unwilling to deal with their unique circumstances and/or because staff thinks of solitary confinement as a ‘protective’ status for vulnerable populations.”<sup>44</sup>

### a. LGBT Individuals

People who identify as LGBT are often placed in solitary confinement for their own “protection.”<sup>45</sup> However, such placement requires little justification and many times is used against the express wishes of the detainee.<sup>46</sup> Specific examples of abuse and harassment of LGBT persons have been documented:<sup>47</sup>

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<sup>39</sup> INVISIBLE IN ISOLATION, *supra* note 1, at 26.

<sup>40</sup> Report on Terrorism and Human Rights, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, Doc.5.1.corr.(2002), at para. 194.

<sup>41</sup> Article 26, ICCPR.

<sup>42</sup> Article 26, ICCPR.

<sup>43</sup> *Id.* at 43.

<sup>44</sup> INVISIBLE IN ISOLATION, *supra* note 1, at 9.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *Id.* at 18.

<sup>47</sup> INVISIBLE IN ISOLATION, *supra* note 1, at 9.

A detainee at a facility in California had asked a corrections officer why he had reduced the recreation time for the LGBT detainees from two hours to only 45 minutes.<sup>48</sup> The officer said: “Because you need to learn not to be faggots.”<sup>49</sup>

A transgender detainee at a facility in Georgia reported that a guard grabbed her while she was in the bathroom.<sup>50</sup> “The guard attempted to handcuff her while her pants were still around her ankles, and the detainee urinated on herself and the floor.”<sup>51</sup> The detainee “asked to clean herself up but the guard refused and told her to keep quiet about what happened.”<sup>52</sup>

### **b. People with Mental Disabilities**

People with mental disabilities are often put in solitary confinement “because jail staff is unwilling to deal with their unique circumstances.”<sup>53</sup> According to the ACLU incarcerated persons who are classified as having a disability under the Americans with Disabilities Act (ADA) are entitled to all of the protections of the ADA and The Rehabilitation Act.<sup>54</sup> Several courts have recognized such ADA protections to include equal access to facilities, programs, and services, including medical care.<sup>55</sup>

### **c. Other Vulnerable Populations**

Other vulnerable populations in detention include women, pregnant women, and other minorities. Women, in particular, are more vulnerable to sexual harassment and abuse in detention. Also, pregnant women, nursing or post-partum mothers, and women in labor or delivery may be placed in segregation—and in some cases restraints are used—due to their status. In addition, it is important to ensure that religious minorities are protected from discrimination without resorting to the use of solitary confinement.

## **3. Immigrant Detainees are Virtually Indistinguishable from Criminally Convicted Persons when Housed in the Same Facilities.**

When interpreting the rights protected of immigrant detainees, the Human Rights Committee may refer to the United Nations Minimum Rules for the Treatment of Prisoners and to the Body of Principles for the Protection of All Persons under Any Form of Detention or

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> National Prison Project, *Know Your Rights, Legal Rights of Disabled Prisoners*, ACLU.COM, [http://www.aclu.org/images/asset\\_upload\\_file735\\_25737.pdf](http://www.aclu.org/images/asset_upload_file735_25737.pdf) (last visited June 6, 2013).

<sup>55</sup> *Kaufman v. Carter*, 952 F. Supp 520 (W.D. Mich. 1996), handicap detainee not given proper handicap accessible toilet and shower accommodations; *see also Carty v. Farrelly*, 957 F. Supp 727 (D.V.I. 1997), where the court held it was improper to house non-mentally ill inmate with the mentally ill because his cane was seen as a threat to other inmates; *see also Love v. Westville Correctional Center*, 103 F. 3d 558 (7<sup>th</sup> Cir. 1996), where the court held it was a violation of handicapped inmate’s rights under the ADA to be held in isolation; therefore, not being able to attend substance abuse programs and other facilities.

Imprisonment.<sup>56</sup> Principle I provides that “All 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.”<sup>57</sup>

Further, Article 5(4) of the American Convention on Human Rights provides that “[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.”<sup>58</sup> This provision of the American Convention is extremely relevant to humane treatment in the context of solitary confinement as it relates to the rights of immigrant detainees, especially considering the sharp distinction between “convicted persons” and “unconvicted persons.” Immigrant detainees generally do not have a criminal record.<sup>59</sup>

In some instances, often years prior to being detained by ICE, they may have committed a minor crime or a traffic violation.<sup>60</sup> Still, immigrant detainees are not persons facing criminal trials or serving prison sentences, but rather are persons in civil removal proceedings or in the process of waiting for their asylum claims to be adjudicated by an immigration judge.<sup>61</sup> Despite their status as such, immigrant detainees are placed in facilities that parallel the repugnant conditions of jails: where persons are imprisoned behind towering walls that are lined with razor wire and are further constrained from freely moving about or restricted in having contact with others, including their families.<sup>62</sup> At a minimum however, immigrant detainees as civil detainees are entitled to a higher standard of protection and better confinement conditions than either convicted prisoners or pre-trial criminal detainees.<sup>63</sup> If civil detainees face conditions that are

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<sup>56</sup> Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, Inter-American Commission on Human Rights, OEA/Ser L/V/II, Doc 78/10, para. 22 (30 December 2010). See General Assembly Resolution, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc A/RES/43/173 (1988).

<sup>57</sup> Principle I, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc A/RES/43/173 (1988).

<sup>58</sup> American Convention, *supra* note 7, Article 5(4). Although the United States is not a party to the American Convention, the IACHR has interpreted the principles of the American Declaration on the Rights and Duties of Man to be consistent with the American Convention. See *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860, at para. 97.

<sup>59</sup> INVISIBLE IN ISOLATION, *supra* note 1, at 8; see also *Why Detain Nonviolent Immigrants?*, L.A. Times, Mar. 24, 2013 (editorial), available at: <http://www.latimes.com/news/opinion/editorials/la-ed-detainees-20130324,0,6561747.story> (Recently, the DHS released 2,228 immigrant detainees from detention facilities around the nation. Federal officials noted that more than 70% of those released had no criminal history. The remaining immigrant detainees, with the exception of 10, had only misdemeanor convictions.).

<sup>60</sup> *Id.*

<sup>61</sup> ABA House of Delegates Report 102, at 1 (Fall 2012). See *Immigrants in Solitary*, N.Y. Times, Apr. 2, 2013, at A18 (editorial), available at: [http://www.nytimes.com/2013/04/02/opinion/immigrants-in-solitary.html?\\_r=0](http://www.nytimes.com/2013/04/02/opinion/immigrants-in-solitary.html?_r=0) (“Civil detention is imposed not as punishment, but simply to make sure somebody shows up for a hearing.”); *Why Detain Nonviolent Immigrants?*, *supra* note 59 (Human Rights First found that more than 95% of immigrants who were either given a supervised release or monitored electrically, or were in similar programs, showed up for their final court hearing.).

<sup>62</sup> INVISIBLE IN ISOLATION, *supra* note 1, at 3.

<sup>63</sup> See Special Rapporteur on the Human Rights of Migrants, August 2010 report A/65/222, ¶ 87 (“Migration-related detention should not bear similarities to prison-like conditions.”); *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), cert. denied, 126 S.Ct. 351 (2005)(Civil detainees must have superior conditions of confinement than both convicted prisoners and pre-trial criminal detainees.).

identical, similar, or inferior to those which convicted prisoners or pre-trial criminal detainees face, then those conditions are presumably punitive and unconstitutional in nature.<sup>64</sup>

The American Friends Service Committee (AFSC) has pointed out that these punitive and unconstitutional conditions are increasingly present in facilities housing immigrant detainees.<sup>65</sup> The newest trend observed is the increasing placement of younger and younger prisoners in isolation.<sup>66</sup> At the same time, segregation cells and sensory deprivation are beginning to spread to county jails, where people with shorter sentences, who would once have been held in minimum-security transitional sites, are increasingly being subjected to permanent lockdown and other maximum-security measures.<sup>67</sup>

Most immigration detention centers hold both immigrants and criminally sentenced persons, among other distinct vulnerable groups such as LGBT individuals and people with mental health conditions.<sup>68</sup> ICE-contracted detention facilities, which include over 250 state and local facilities as well as private prison corporations, regularly segregate particular persons or groups to manage the diverse populations.<sup>69</sup> ICE fails, however, to implement consistent segregation standards, and as a direct result, jails tend to use local correctional policies on both immigrant and non-immigrant detainees.<sup>70</sup> In fact, the 2011 Performance-Based National Detention Standards “are still based on American Correctional Association (ACA) pre-trial detention standards for jails and prisons, and fall short of truly civil and humane detention standards.”<sup>71</sup>

The European Commission on Human Rights has explained inhumane treatment to be conduct which “deliberately causes severe mental or psychological suffering, which, given the particular situation, is unjustifiable” and that “treatment or punishment of an individual may be degrading if he is severely humiliated in front of others or he is compelled to act against his wishes or conscience.”<sup>72</sup> The Inter-American Commission on Human Rights has also agreed with the opinion of the European Commission regarding the inclusion of “degrading treatment” within the meaning of inhumane treatment.<sup>73</sup>

The concept of human dignity is neither disposable nor dependent on a person’s status. Every individual is afforded the inherent and inalienable right to be valued and receive ethical treatment. An immigrant detainee is therefore automatically deprived of his human dignity when he is subjected to inhuman punishment or treatment. Thus, the global importance placed on human dignity should impose a higher burden of care on States to protect an immigrant

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<sup>64</sup> Jones v. Blanas, *supra* note 63, at 934.

<sup>65</sup> “The Prison Inside the Prison: Control Units, Supermax Prisons, and Devices of Torture, A Justice Briefing Paper, by Rachel Kamel and Bonnie Kerness, American Friends Service Committee, available at: <http://afsc.org/sites/afsc.civicactions.net/files/documents/PrisonInsideThePrison.pdf>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> INVISIBLE IN ISOLATION, *supra* note 1, at 3.

<sup>69</sup> *Id.*, at 3, 8.

<sup>70</sup> *Id.*, at 3.

<sup>71</sup> *Id.* at 11-12.

<sup>72</sup> Report on Terrorism and Human Rights, *supra* note 40.

<sup>73</sup> *Id.*

detainee's right to humane treatment, especially in situations where that right is vulnerable, to preserve their human dignity.

### III. Right to Personal Liberty

Article 9(1) of the ICCPR provides that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.” The Human Rights Committee has explained that Article 9(1) is applicable to all deprivations of liberty, including immigration control.<sup>74</sup>

ICE's reliance on correctional incarceration standards that impose unnecessary restrictions on immigrant detainees violates the fundamental right to personal liberty. Entering or remaining in the United States without authorization is a civil violation, not a crime. Therefore, “irregular migrants are not criminals *per se* and should not be treated as such.”<sup>75</sup> Because of the civil nature of immigration violations, the use of detention as a tool to combat unauthorized migration is inconsistent with international human rights law.

Additionally, the UN Working Group on Arbitrary Detention has stated: “As far as possible, the detention of foreigners who enter the country without the necessary visa or who remain in the country once their visa has expired should be avoided.”<sup>76</sup> In order to comply with international standards, alternative and non-custodial measures, such as telephonic and in-person reporting or home visits, should always be considered before resorting to detention.<sup>77</sup> The U.S. system, however, relies primarily on immigration detention and often applies correctional incarceration standards that impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.<sup>78</sup> Immigrant detention is not criminal detention, and therefore should not be punitive or prison-like.<sup>79</sup>

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<sup>74</sup> ICCPR, Human Rights Committee General Comment No. 8, *The Right to Liberty and Security of Persons*, para 1 (June 30, 1982).

<sup>75</sup> *Report of the UN Special Rapporteur on the Human Rights of Migrant Workers*, Gabriela Rodriguez Pizarro, E/CN.4/2003/85 (December 30, 2002).

<sup>76</sup> *Report of the Working Group on Arbitrary Detention, Addendum: Mission to Equatorial Guinea*, A/HRC/7/4/Add.3 para 100 (February 18, 2008).

<sup>77</sup> *Report of the Working Group on Arbitrary Detention*, E/CN.4/1999/63, para 69 (December 18, 1998).

<sup>78</sup> Between FY2007 and FY2009 two thirds of the immigration detainees had no criminal histories. Only a small percentage of the remaining third had been convicted of a felony or violent crime. DHS, Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*, p. 12 (October 6, 2009).

<sup>79</sup> Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, Inter-American Commission on Human Rights, OEA/Ser L/V/II, Doc 78/10, para. 64 (30 December 2010).

Detention centers also place unnecessary restrictions on visits by family and friends. “These unwarranted and disproportionate restrictions are unacceptable even for criminal detention, and are especially onerous in the case of immigration detention.”<sup>80</sup> The ability to maintain contact with the outside world is an important safeguard against arbitrary detention, and international standards stipulate that individuals should be “kept in a place of detention or imprisonment reasonably near his usual place of residence”.<sup>81</sup> However, detainees have no legal right to a visit from family or friends (although the government does allow limited visits) and many detainees have infrequent, if any, access to family members.<sup>82</sup>

#### IV. Conclusions and Recommendations

As has been evidenced by this report and all supporting documentation, the United States continues to breach its obligations to fully implement the ICCPR. The United States allows and facilitates the use of solitary confinement as an administrative tool to “protect” vulnerable populations and, more importantly and alarmingly, allows use of solitary confinement as a common punitive method for even minor violations. As Dr. Lisa Guenther of Vanderbilt University observes: “There are many ways to destroy a person, but the simplest and most devastating might be solitary confinement.”<sup>83</sup>

The United States’ failure to protect the rights of immigrant detainees represents a violation of the ICCPR Articles 2(3), 7, 9, 10 and 26. Because of the United States’ failure to protect the rights of immigrant detainees, we respectfully request that the Human Rights Committee urge the United States to:

- A. The use of solitary confinement should only be used as a last resort. In cases where it is employed, solitary confinement should be limited to 14 days within a 30-day period.
- B. Strictly enforce the monitoring provisions recently adopted by ICE in its policy 11065.1.
- C. Ensure an independent third party provides oversight and monitoring to ICE’s new Segregation Directive, 11065.1.
- D. Prohibit the use of solitary confinement based on age, gender identity, sexual orientation, mental health, pregnancy, or disability unless the detainee request such placement.
- E. If the detainee requests placement, there must be a review process to ensure that the detainee is not kept in solitary confinement against his or her wishes.

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<sup>80</sup> *Id.*

<sup>81</sup> UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, Principle 20.

<sup>82</sup> UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, Principle 20.

<sup>83</sup> LISA GUENTHER, SOCIAL DEATH AND ITS AFTERLIVES: A CRITICAL PHENOMENOLOGY OF SOLITARY CONFINEMENT,

[http://www.academia.edu/1883215/Social\\_Death\\_and\\_its\\_Afterlives\\_A\\_Critical\\_Phenomenology\\_of\\_Solitary\\_Confinement](http://www.academia.edu/1883215/Social_Death_and_its_Afterlives_A_Critical_Phenomenology_of_Solitary_Confinement) at 1 (last visited June 11, 2013); Lisa Guenther, *The Living Death of Solitary Confinement*, <http://opinionator.blogs.nytimes.com/2012/08/26/the-living-death-of-solitary-confinement> at 1 (last visited June 11, 2013).

- F. DHS/ICE and an independent third party should investigate the underlying reasons why individuals request to be put in segregation.
- G. All uses of solitary confinement must be reported by DHS/ICE to Congress and make all reports publically available.