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Glykeria Teji, Esq.
Seton Hall Law School

Shira Wisotsky, Esq.
Benjamin N. Cardozo School of Law

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Dignity in Detention: Addressing Gynecological Healthcare Needs of People Detained by U.S. Immigration Authorities

Glykeria Teji [*] *and Shira Wisotsky* [+]

ABSTRACT

People who require gynecological and obstetric care and who are detained by U.S. federal immigration authorities face unique challenges. This article examines how the current legal and administrative landscape fails to hold those responsible for providing healthcare accountable, effectively blocking access to gynecological care, and, assuming no immediate abolition of immigrant detention facilities, how international human law principles can and should guide a reimagining of the system. We also propose interim steps that U.S. authorities can take to protect access to basic and needed gynecological care for the people that they detain.

Beginning with an overview of immigration detention as a civil detention practice, we delve into the international and national oversight bodies and mechanisms and how each was designed without any enforcement mechanisms. Highlighting the expansion of detention across the country, we underscore the critical need for comprehensive healthcare services within detention facilities, and how the current systems fail to meet those needs, highlighting privacy and confidentiality concerns, inadequate routine screenings, lack of access to menstrual hygiene products, and language barriers. Drawing on principles of dignity and

[*] Dr. Glykeria Teji, Esq., is an Associate Clinical Professor at Seton Hall Law School's Center for Social Justice in Newark, New Jersey. She co-teaches the Immigrants' Rights/International Human Rights Clinic seminar, supervises clinical students, and oversees the Center's collaborations with forensic psychiatry and social work programs. Her litigation practice focuses on detained cases at the intersection of criminal and immigration law, with a particular emphasis on matters involving competency issues and mental health diagnoses. She was awarded the title of Doctor of Juridical Science (S.J.D.) from Widener University, Delaware School of Law.

[+] Shira Wisotsky, Esq., is Assistant Chief Counsel for the Special Projects Team within the Legal Services of New Jersey's Immigration Representation Project. She is the inaugural Special Projects attorney, innovating a collaborative civil rights litigation and policy practice embedded within a traditional legal services model, aimed at securing and strengthening the rights of noncitizens in detention and facing deportation, frequently with concurrent state criminal charges. In addition to her litigation and administrative agency advocacy practice, Shira co-coordinates a legal advocates' working group on detention conditions in New Jersey, New York, and Pennsylvania. Shira received her bachelor's degree from Barnard College, Columbia University, and her law degree, with honors, from the Benjamin N. Cardozo School of Law. The views in this article are the author's alone and do not represent Shira's workplace.

dignity law, we argue for a reimagining of access to healthcare, both within and beyond immigration detention settings.

Ultimately, in the absence of abolition of immigration detention facilities, our article calls for a comprehensive reevaluation of the legal and policy frameworks governing access to healthcare in immigration detention. By prioritizing dignity and human rights, we aim to chart a course toward a healthcare system that affords all individuals dignity under the law, including access to fundamental rights, such as medical care, regardless of their immigration or detention status.

I. INTRODUCTION

People detained by federal immigration authorities in the United States—whether at the border or internal detention facilities—are systematically denied gynecological and obstetric care on a routine basis and at the times they most desperately need it. The first half of this Article introduces immigration detention in the United States and details the stories of people in custody and denied care and the administrative and judicial systems that permit these denials.

A. Immigration detention in the U.S.

Immigration detention in the United States developed in direct response to fears over female migrants. In 1875, Congress enacted the Page Act to regulate "the importation into the United States of women for the purposes of prostitution," specifically focusing on women from China, Japan, and other Asian countries.[1] Detention practices expanded in 1882 with the Chinese Exclusion Act,[2] and the Immigration Acts of 1903 and 1917.[3] The modern immigration detention system began in 1996 when Congress passed the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration and Immigrant Responsibility Act, establishing minimum daily detention numbers and subjecting both undocumented individuals and legal permanent residents to detention.[4] Today, the United States operates the largest immigration detention system in the world, detaining migrants, asylum-seekers, new arrivals, and people who have been in the

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[1] Aaron Korthuis, *Detention and Deterrence: Insights from the Early Years of Immigration Detention at the Border*, 129 YALE L.J. F. 238, 246 (Nov. 25, 2019).
[2] *Id.*
[3] *Id.* at 248.
[4] Robert M. Morgenthau, *The US Keeps 34,000 Immigrants in Detention Each Day Simply to Meet a Quota*, THE NATION (Aug. 13, 2014), http://www.thenation.com/article/archive/us-keeps-34000-immigrants-detention-each-day-simply-meet-quota/.

country for decades.[5] Meanwhile, in 2016 women and girls made up 14.5% of the population detained by ICE, a 60% increase from 2009,.[6] And, 46% of immigrant women in the United States are of reproductive age.[7]

The expansion of detention has happened concurrently with significant changes to the national immigration enforcement apparatus. Following the 2001 terrorist attacks, Congress linked the immigration detention system to national security and passed the Homeland Security Act in November 2022, establishing the Department of Homeland Security ("DHS") as a Cabinet Department responsible for preventing and responding to terrorist attacks within the United States,[8] and combining all or part of twenty-two different federal agencies under one heading.[9] As part of that reorganization, President George W. Bush reconfigured border security apparatuses into two separate agencies—Customs and Border Patrol ("CBP") and Immigration and Customs Enforcement ("ICE").[10] Those are the two primary agencies responsible for the apprehension and detention of noncitizens in the United States.[11]

CBP detains all people—adults and children—whom it apprehends between ports of entry or that it deems inadmissible at a port of entry.[12] CBP can encounter over 300,000 people per month, or well over 3 million

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[5] *Overview*, GLOB. DET. PROJECT, https://www.globaldetentionproject.org/countries/americas/united-states (last visited (Mar. 2, 2025). For a longer recitation of the history of U.S. immigration policy, *see* Walter A. Ewing, *Opportunity and Exclusion: A Brief History of U.S. Immigration Policy*, IMMIGR. POL'Y CTR. (Jan. 2012), https://exchange.americanimmigrationcouncil.org/sites/default/files/research/opportunity_exclusion_011312.pdf.

[6] Nora Ellmann, *Women's Health and Rights in Immigration Detention,* CTR. FOR AM. PROGRESS (Oct. 2019), https://www.americanprogress.org/article/womens-health-rights-immigration-detention.

[7] Am. Coll. Obstetricians & Gynecologists Comm. on Health Care for Underserved Women, *Health Care for Immigrants*, 141 OBSTETRICS & GYNECOLOGY 427, 428 (2023).

[8] 6 U.S.C. § 111 (2022).

[9] *Creation of the Department of Homeland Security*, DEP'T. HOMELAND SEC. (May 8, 2023), https://www.dhs.gov/creation-department-homeland-security/.

[10] HAROLD C. RELYEA & HENRY B. HOGUE, CONG. RSCH. SERV., RL33042, DEPARTMENT OF HOMELAND SECURITY REORGANIZATION: THE 2SR INITIATIVE 2 (2005).

[11] *Immigration Enforcement*, U.S. DEP'T OF HOMELAND SEC., https://ohss.dhs.gov/topics/immigration/immigration-enforcement (last updated Feb. 11, 2025) (noting that U.S. Citizenship and Immigration Services (USCIS) participates through adjudication rather than enforcement); *see also Career Frequently Asked Questions (FAQs),* U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/careers/faqs (last updated Mar. 10, 2025) ("ICE and CBP are both components of the Department of Homeland Security," sharing responsibility for enforcing the nation's immigration laws).

[12] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-658, LAND PORTS OF ENTRY: CBP SHOULD UPDATE POLICIES AND ENHANCE ANALYSIS OF INSPECTIONS 8-18 (2019).

people per year.[13] CBP does not detain people for long periods of time, but operates "short-term holding during processing," for a maximum of seventy-two hours.[14] Published in 2015, the National Standards on Transport, Escort, Detention, and Search ("TEDS") are the guidelines governing CBP facilities, although the guidelines are limited by what is "operationally feasible."[15]

ICE's policing arm, Enforcement and Removal Operations ("ERO"), "oversees civil immigration detention in facilities nationwide that house [noncitizens] to secure their presence for immigration proceedings or removal from the U.S."[16] ICE houses the adults that they detain in six kinds of facilities: service processing centers, facilities owned by ICE and operated by contract detention staff; contract detention facilities ("CDF"), facilities owned and operated by a private entity and with which ICE contracts directly for immigration detention services; U.S. Marshals Service inter-governmental agreements, facilities owned by a state or political subdivision of a state and contracted with the U.S. Marshals Service to house people, which ICE uses as a rider on that agreement; Inter-Governmental Service Agreements ("IGSA"), facilities owned by a state or political subdivision of a state where ICE uses beds pursuant to an IGSA; dedicated Intergovernmental Services Agreements ("DIGSA"), IGSA facilities of which ICE has exclusive use; and the Bureau of Prisons ("BOP"), facilities fully operated under the management of the Bureau of Prisons.[17] ICE and DHS primarily contract with other entities to detain people—therefore, to "provide oversight," [i]nspections and audits are conducted by the DHS Office of the Inspector General, the DHS Office of the Immigration Detention Ombudsman, and the ICE Office of Detention Oversight within ICE's Office of Professional Responsibility," in addition

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[13] *Nationwide Encounters*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/stats/nationwide-encounters (last modified Mar. 13, 2025).

[14] Unknown Parties v. Nielsen, 611 F. Supp. 3d 786, 801-02 (D. Az. 2020); U.S. Customs & Border Prot., *National Standards on Transport, Escort, Detention, and Search* § 4.1 at 14 (Oct. 2015), https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf.

[15] U.S. CUSTOMS & BORDER PROT., NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH, 4 (Oct. 2015) https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf ("Every effort must be made to promptly transfer, transport, process, release, or repatriate detainees as appropriate according to each operational office's policies and procedures, and as operationally feasible.").

[16] *ICE Detention Facilities*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detention-facilities/ (last visited Feb. 10, 2025).

[17] *Over 72-hour ICE Detention Facilities*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/doclib/detention/Over72HourFacilities.xlsx.

to the on-site investigations done by DHS's Office of Civil Rights and Civil Liberties ("CRCL"), further discussed below.[18]

Altogether, today, ICE detains people in more than 190 different facilities across the United States, with more than 90% of people held in detention centers that are operated by private and for-profit companies.[19] On average ICE detains 37,000 individuals daily in facilities across the country.[20] In fact, ERO is the only law enforcement agency in the country that is "subject to a national quota system for incarceration," and is required, by law, to fill its beds.[21] In Fiscal Year 2024 alone, ICE held 277,913 people in immigration detention.[22] The detention budget for Fiscal Year 2024 was $3.4 billion.[23] The ICE Health Service Corps ("IHSC") is housed within ERO, and is tasked with oversight and administration of healthcare to people detained within ICE facilities.[24]

The people who are detained by federal immigration authorities and facing the conditions within those facilities concurrently face removal proceedings.[25] Removal (deportation) carries profound and irreversible consequences. In fact, deportation may result in loss of both property and life; or of "all that makes life worth living."[26] Noncitizens may face

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[18] *Facility Inspections*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/facility-inspections (last updated Jan. 22, 2025).

[19] *Snapshot of ICE Detention: Inhumane Conditions and Alarming Expansion,* NAT'L IMMIGR. JUST. CTR. (Sept. 2024), https://immigrantjustice.org/research-items/policy-brief-snapshot-ice-detention-inhumane-conditions-and-alarming-expansion/; *see also* Livia Luann, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), https://www.migrationpolicy.org/article/profiting-enforcement-role-private-prisons-us-immigration-detention.

[20] *See Snapshot of ICE Detention*, *supra* note at 19.

[21] *Banking on Detention: Local Lockup Quotas & the Immigrant Dragnet,* DET. WATCH NETWORK & CTR. CONST. RTS. (2015), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf.

[22] *U.S. Immigration and Customs Enforcement Detention Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/spotlight/statistics (sorted by fiscal year).

[23] *Detention 101*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 (last visited Apr. 7, 2025).

[24] *Healthcare Costs for Noncitizens in Detention: Fiscal Year 2022 Report to Congress,* U.S. DEP'T OF HOMELAND SEC. (July 12, 2023), https://www.dhs.gov/sites/default/files/2023-08/23_0712_ice_healthcare_costs_for_noncitizens_in_detention.pdf.

[25] In principle, immigration removal proceedings are considered "purely a civil action to determine eligibility to remain in [the] country," rather than a criminal proceeding intended to penalize prior conduct. Vides-Vides v. Immigr. & Naturalization Serv., 783 F.2d 1463, 1469 (9th Cir. 1986) (citing INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)). Courts have further held that "a deportation proceeding is a purely civil action . . . [and is not intended] to punish. Lopez-Mendoza, 468 U.S. at 1038. That said, deportation has long-term and often irreversible consequences.

[26] Bridges v. Wixon, 326 U.S. 135, 147 (1945).

lifelong exile from their homes, families, and livelihoods in the United States, often being forced to return to countries they have not seen since childhood.[27] Despite the significant deprivation of liberty at stake in removal proceedings, the Department of Homeland Security generally wields broad authority over the detention of noncitizens.[28] The statute grants the Attorney General the authority to release noncitizens on bond "with security approved by, and containing conditions prescribed by, the Attorney General."[29] The Attorney General has delegated this authority to the Immigration Judges.[30] These profound consequences of deportation are compounded by the significant role detention plays in the removal process.[31] Detention not only underscores the deprivation of liberty inherent in removal proceedings but also reflects the tension between the government's broad authority to detain and the statutory safeguards meant to ensure fair treatment of noncitizen detainees.

The detention framework established under the Immigration and Nationality Act ("INA") is intricate and multifaceted, with its application varying based on several critical factors: whether the noncitizen is seeking initial admission to the United States or was previously lawfully admitted; whether the noncitizen has committed particular criminal offenses or engaged in conduct posing a security risk; and whether the detention occurs during removal proceedings or under a final order of removal.[32] In numerous instances, detention is discretionary, permitting the Department

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[27] *See* Claire Galofaro & Kim Tong-Hyung, *Thousands Were Adopted to the US but Not Made Citizens. Decades Later, They Risk Being Deported*, AP NEWS (Oct. 24, 2024), https://apnews.com/article/a1ec84a94f2442e3dc4b7a31cad27d21; *see also*, Joanna Dreby, *The Ones They Leave Behind: Deportation of Lawful Permanent Residents Harms U.S. Citizen Children*, AM. IMMIGR. COUNCIL (Apr. 26, 2010), https://www.americanimmigrationcouncil.org/research/ones-they-leave-behind-deportation-lawful-permanent-residents-harm-us-citizen-children.

[28] *See* INA § 236(a), 8 U.S.C. § 1226(a) (2018) (providing that the Attorney General may arrest and detain a noncitizen pending a decision on whether the noncitizen is to be removed from the United States. This section grants DHS the discretion to detain or release noncitizens on bond or conditional parole while removal proceedings are pending).

[29] INA § 236(a)(2)(A), 8 U.S.C. § 1226(a)(2)(A) (2018).

[30] INA § 236, 8 U.S.C. § 1226 (2018); 8 C.F.R. §§ 1003.19, 1236.1 (2006).

[31] *See Policy Brief: 5 Reasons to End Immigrant Detention,* NAT'L IMMIGR. JUST. CTR. (Sept. 14, 2020), https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrant-detention (noting the psychological and procedural harms of detention, including that the U.S. immigrant detention system undermines community safety, contributes to human suffering, and costs billions of dollars.).

[32] 8 INA § 235(b)(1) (detention of arriving aliens and aliens who recently entered the United States without inspection, and who are subject to expedited removal), § 235(b)(2) (detention of "other aliens" seeking admission who are subject to removal), § 235(a) (general detention authority over aliens subject to removal), § 235(c) (detention of aliens who have committed certain criminal offenses or engaged in other proscribed conduct), 8 U.S.C. § 1225(a)–(c) (2018).

of Homeland Security to release a noncitizen on bondor conditional parole, while removal proceedings are pending.[33] However, for certain categories of noncitizens—particularly those who have committed or have been convicted of specified criminal offenses—release from custody is permitted only under narrowly defined circumstances.[34] In *Matter of Patel*, the Board of Immigration Appeals ("BIA") held that a noncitizen "[g]enerally…is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk."[35] Despite DHS's statutory discretion to detain or release noncitizens, in practice, this discretion is frequently exercised in favor of detention.[36]

This discretionary authority, while structured by statutory provisions and judicial precedent, highlights a critical tension within the immigration detention framework: the balance between safeguarding public safety and protecting individual liberty. In theory, this framework aims to achieve that balance, but in practice, it often skews toward over-detention, leading to significant questions about its proportionality and fairness.[37]

II. THE PROBLEM: PEOPLE IN IMMIGRATION DETENTION DO NOT RECEIVE THE MOST BASIC AND ROUTINE GYNECOLOGICAL AND OBSTETRICAL CARE

Public reporting, court records, and other documentation demonstrate that people in immigration detention do not receive the most basic and routine gynecological and obstetric care.

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[33] INA § 236 (a)(2)(A), 8 U.S.C. § 1226(a)(2)(A) (2018); INA § 236 (a)(2)(B), 8 U.S.C. § 236.1 (c)(8) (2024).
[34] *See* INA § 236(c), 8 U.S.C. § 1226(c) (2018).
[35] *Matter of Patel*, No. 2491 at 666 (B.I.A. May 7, 1976) (order sustaining appeal and releasing respondent from custody on his own recognizance).
[36] *See* Declaration of Professor Maureen A. Sweeney, Esq., ECF No. 31-15, ¶¶ 13-19, *Doe v. DHS*, No. 24-1905 (W.D.P.A.); Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65, 72 (2011) (reporting that government attorneys rarely stipulate to release and that most custody redeterminations result in continued detention); *see also generally* Shoba Sivasprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367 (2020) (discussing discretion in relief decisions); Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2024) (mandating federal detention of noncitizens charged with certain crimes and restricting release discretion, with emphasis on immigration enforcement).
[37] *See e.g.*, *Ensuring Fairness and Due Process in Immigration Proceedings,* AM. BAR ASS'N. (Mar. 2024), https://civilrighttocounsel.org/wp-content/uploads/2024/03/ABA-report-on-ensuring-fairness-in-immigration-proceedings.pdf (emphasizing the necessity of restoring discretion to immigration judges to ensure fairness and proportionality in detention decisions).

> Teresa was four months pregnant when she arrived at the San Ysidro Port of Entry on the U.S.-Mexico border in 2017 seeking asylum from El Salvador. She was placed in a holding cell for 24 hours, where she experienced pain and heavy bleeding. She told immigration officials multiple times that she was pregnant and bleeding, and her repeated requests for medical help were ignored. Next, she was transferred to Otay Mesa Detention Center, where she met with medical staff, but she was not transferred to a hospital for treatment. Only days later did detention staff confirm that Teresa had miscarried. Following her miscarriage, Teresa had serious complications, including heavy bleeding, weight loss, and headaches. Despite being told she would be given an appointment with a provider outside the detention center, Teresa was not, and she had to pay for medications from the facility's commissary, which were later confiscated. Multiple requests to be released from detention for humanitarian reasons were denied, and four months after her miscarriage, Teresa was still in detention, still in pain, and still neglected by medical staff.[38]

Although recommended by medical experts, and required by administrative guidelines,[39] people detained by federal immigration authorities lack access to healthcare and, specifically, access to gynecological care while in custody.[40]

In contrast to the appropriate and needed attention paid to deaths in custody,[41] there are few systematic studies of the medical impact of people

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[38] Nora Ellmann, *Immigration Detention is Dangerous for Women's Health and Rights*, CTR. FOR AM. PROGRESS (Oct. 2019), https://www.americanprogress.org/wp-content/uploads/sites/2/2019/10/WommenImmigrationHealth-report.pdf.

[39] *See* discussion *infra* Section III(b)(B).

[40] Ellmann, *supra* note 38, at 2.

[41] In 2017, the nongovernmental organization ("NGO") Human Rights Watch asked medical experts to review available documentation of deaths in immigration custody, and highlighted that "the experts identified repeated, clear-cut instances of subpar medical care, including inadequate care that contributed to seven deaths in detention. They also found numerous examples of systemic substandard and dangerous medical practices in other cases—such as overreliance on unqualified medical staff, delays in emergency responses, and requests for care unreasonably delayed." Mitch Blunt, *Systemic Indifference: Dangerous & Substandard Medical Care in U.S. Immigration Detention* 3 HUM. RTS. WATCH (May 8, 2017), https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention. Physicians for Human Rights, the American Civil Liberties Union ("ACLU"), and American Oversight followed this report in 2024, with an examination of the public records pertaining to fifty-two of the seventy people who died in ICE custody between 2017 and 2021. Eunice Hyunhye Cho & Tessa Wilson, *Deadly Failures: Preventable Deaths in U.S. Immigration Detention*, ACLU, AM. OVERSIGHT, & PHYSICIANS FOR HUM. RTS. (2024), https://assets.aclu.org/live/uploads/2024/06/2024-07-01-ICE-Detainee-Deaths.pdf. Also utilizing medical experts, the NGOs found, *inter alia*, that "systemic failures in medical and mental health care . . . caused preventable deaths in ICE detention"; "ICE detention medical staff made incorrect or incomplete diagnoses in the

held in detention.[42] However, "case studies and reports[43] from multiple government agencies have identified high rates of suicidality and depression and documented serious deficiencies in medical evaluation and treatment within detention centers."[44] Customs and Border Patrol, for instance, has been significantly criticized for its failure to provide people in its custody with access to healthcare,[45] including its reliance on its

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overwhelming majority of cases of death"; "ICE detention medical staff provided incomplete, inappropriate, or delayed treatment and medication"; "ICE detention facilities have failed to provide necessary interpretation and translation to detained people who do not speak English"; and "ICE detention facilities have consistently failed to provide adequate medical and mental health staff who are trained and licensed to ensure patient health and safety." Cho & Wilson, *supra* note 41. In response to that report, members of the U.S. Senate Judiciary Committee called for answers regarding the "systemic failures in medical and mental health care that have caused preventable deaths in [ICE] detention facilities nationwide, underscoring an urgent need for comprehensive reforms." Letter from Hon. Richard J. Durbin, Chair, S. Comm. on the Judiciary, to ICE (July 16, 2024), https://www.judiciary.senate.gov/imo/media/doc/DHS%20ICE%20Detainee%20Deaths%20in%20Detention%20Letter.pdf.

[42] *See, e.g.,* Krista M. Perreira & Juan M. Pedroza, *Policies of Exclusion: Implications for Health of Immigrants and Their Children*, 40 ANN. REV. PUB. HEALTH 147, 147-55 (2019); *see also* Caitlin Patler et al., *Release from US immigration Detention May Improve Physical and Psychological Stress and Health: Results from a Two-Wave Panel Study in California*, 1 SSM - MENTAL HEALTH 100035, 100035-36 (2021) ("There is . . . a dearth of research on how immigrants' health may change once they are released from detention, and the potential mechanisms that could influence those changes."); Chanelle Diaz et al., *Harmful by Design—A Qualitative Study of the Health Impacts of Immigration Detention*, 38 J. GEN. INTERNAL MED. 2030, 2034 (2022).

[43] *See, e.g.*, *Concerns about ICE Detainee Treatment and Care at Four Detention Facilities,* OFF. INSPECTOR GEN. (June 3, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf; Letter from the American Immigration Council and the American Immigration Lawyers Association to Stewart D. Smith et al., *Failure to Provide Adequate Medical and Mental Health Care to Individuals Detained in the Denver Contract Detention Facility*, AM. IMMIGR. COUNCIL & AILA (June 4, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_supplement_failure_to_provide_adequate_medical_and_mental_health_care.pdf; Letter from Lindsay M. Harris, American Immigration Council, et al., to Megan Mack & Jonathan Roth, *ICE's Continued Failure to Provide Adequate Medical Care to Mothers and Children Detained at the South Texas Family Residential Center*, AILA, (Oct. 6, 2015), https://www.aila.org/library/cara-jointly-filed-a-complaint; Michael Grabell, *Pediatrician Who Treated Immigrant Children Describes Pattern of Lapses in Medical Care in Shelters*, PROPUBLICA (May 3, 2019), https://www.propublica.org/article/pediatrician-who-treated-immigrant-children-describes-pattern-of-lapses-in-medical-care-in-shelters.

[44] Perreira & Pedroza *supra* note 42, at 154.

[45] For a general overview, *see* Daniel E. Martinez et al., *Border Enforcement Developments Since 1993 and How to Change CBP*, CTR. MIGRATION STUD. (Aug. 2020), https://www.cmsny.org/wp-content/uploads/2020/08/Border-Enforcement-Developments.pdf (summarizing border patrol developments and different ways as to how CBP can prevent further deaths); *see also* Letter from the American Immigration Council et al., to Cameron Quinn et al., *Deprivation of Medical Care to Children in CBP Custody* 1, 6-

agents to conduct medical screenings, rather than utilizing medical personnel.[46]

In describing oversight inspections of ICE detention facilities, Eunice Cho, a senior staff attorney at the American Civil Liberties Union's National Prison Project, explained in an interview with The New Yorker:

> [W]hat these oversight inspections have revealed is that medical care provided to detainees is substandard, and that people can go for weeks, if not months, with life-threatening conditions, without getting the proper medical care. People are typically told to take a Tylenol, or aspirin, or drink more water as the standard recommendation or response for any illness. It is very challenging to have a specialist's care approved. And, in general, many detainees have reported that they are actually unaware of what is happening to them in detention because of poor translation in these medical appointments.[47] We've had detainees tell us that they have no idea what's happening. We've had many people who were detained say that they have been pulled in to come translate for other detained people in their medical care provided by ICE facilities, because the medical staff could not speak the person's language, which obviously raises many issues regarding patient confidentiality. Even where there's no bilingual staff, detention staff is supposed to be able to use telephone language lines, but that's either not used or not actually very effective in terms of providing care sufficient for informed consent.[48]

These concerns are particularly evident and pronounced for people requiring both routine and emergent gynecological and obstetric care in custody. Women in detention often face compounded challenges that stem from systemic gender biases in healthcare. The phenomenon of "medical gaslighting,"[49] where valid concerns are dismissed, reflects broader

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12 (complaining to the government's border patrol agency on failures to provide children with adequate health care while in custody).

[46] Doe v. Kelly, 878 F.3d 710, 722-24 (9th Cir. 2017).

[47] For a fulsome discussion of the lack of language access for people in immigration detention and its ramifications on access to healthcare, *see* Marc Cardona et al., *Held Incommunicado: The Failed Promise of Language Access in Immigration Detention*, KATHRYN O. GREENBERG IMMIGR. JUST. CLINIC, CARDOZO SCH. L. (2024), https://cardozo.yu.edu/sites/default/files/2024-08/YU-101%20Held%20Incommunicado.pdf (filling the LEP gap between the government and those who have struggled to find adequate medical care due to not knowing English).

[48] Isaac Chotiner, *Q&A: The Troubling State of Medical Care in ICE Detention*, THE NEW YORKER (Sept. 25, 2020), https://www.newyorker.com/news/q-and-a/the-troubling-state-of-medical-care-in-ice-detention.

[49] *See, e.g*, *Women's Inequitable Healthcare Experiences Reflect Implicit Bias, Discrimination and Disempowerment*, NEWS MED. LIFE SCI. (Dec. 20, 2022), https://www.news-medical.net/news/20221220/Womene28099s-inequitable-healthcare-experiences-reflect-implicit-bias-discrimination-and-disempowerment.aspx (documenting

societal trends that disproportionately affect women, particularly those from marginalized communities. This issue becomes even more acute in the carceral system, where power dynamics, resource limitations, and institutional neglect exacerbate disparities.[50] In the context of immigration detention, dismissal of medical concerns is further exacerbated by the precarious legal and social status of detainees, language barriers, cultural insensitivity, and the lack of independent oversight. Pregnant women and those with chronic health conditions are particularly at risk, as facilities often lack the expertise, resources, and accountability mechanisms necessary to provide adequate care.

These acute issues are reflected in first-hand accounts of women in immigration detention. As a woman in detention describes through her written testimony to a District Court,

> I was . . . receiving medical treatment for fibromas in my uterus from my gynecologist before coming here. It feels like the front part of my body near my pelvis is heavy and pressing on my bladder, and there is so much pain in my right side. It took more than two weeks after I told the doctor for me to get any testing done, and because there are no gynecological services at [this immigration detention facility], I had to wait for them to take me offsite for help. I am still waiting for the test results, and I do not know how long it will take. When I need medical help at home, I am able to access answers much faster.[51]

Similarly, a recent group CRCL complaint filed by the Legal Services of New Jersey,[52] the American Civil Liberties Union of Pennsylvania, and the Transnational Law Clinic at the University of Pennsylvania Carey Law School on behalf of people detained at the Moshannon Valley Processing Center in Clearfield County, Pennsylvania, detailed that

> [i]n stark contrast to other forms of medical care that are provided by medical staff on-site, the lack of gynecological care in-house at Moshannon means that women must be approved for treatment and, only

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the struggles women in general face in healthcare); *see also How Discrimination Can Harm Black Women's Health*, HARVARD T.H. CHAN SCH. PUB. HEALTH (Oct. 31, 2018), https://www.hsph.harvard.edu/news/hsph-in-the-news/discrimination-black-womens-health/ (showcasing a research article that found that black women in Jim Crow states face health troubles due to environmental factors and lack of access to healthcare) .

[50] *See, e.g.*, Mori v. Allegheny Cty., 51 F. Supp. 3d 558, 566 (W.D. Pa. 2014) (quoting Estelle v. Gamble, 429 U.S. 97, 105 (1976)) (describing institutional indifference to detainee medical needs as a potential constitutional violation under the Eighth Amendment).

[51] Declaration of Josefina Doe, ECF No. 72, ¶ 38. Doe v. Dep't of Homeland Security, No. 3:24-cv-00259-SLH-PLD (W.D. Pa.).

[52] Article author Shira Wisotsky is co-counsel on this Complaint.

> if permitted, go through the humiliating process of being shackled, transferred, and taken off-site to be seen at an outside provider, deterring people from seeking care.[53]

In the words of Complainant Jane:

> Before I was placed in ICE detention, I got my period every month to the exact date. Around about April 2023 is the last time I had a regular period. I know of many other women who have told me their periods have stopped being regular.
>
> I think it is related to stress, but we do not have access to gynecological care here, they have to take you to an outside hospital for that. So while we are detained here, we are not sure if . . . these symptoms are something that will have effects that are more lasting. My diet is also so terrible here, so it could be that as well.
>
> I have never sought out gynecological care at the facility, but back in July 2023, they told me because of my age, I would need a mammogram soon. However, it was never scheduled.
>
> Gynecological care is not sufficient here which is why I never bring up problems with my menstrual cycle or anything else because I hear from other women that they cannot get access to it either or its really difficult. Knowing that you have to be taken to an outside hospital in order to get care makes people less interested because they shackle you when they take you off site. Why would anyone want to go through that humiliation? It deters us from seeking preventative or even emergency care. They will only take you to the hospital, or to see a proper doctor, when they determine that it is an emergency so most women, including myself, do not bother seeking care or complaining about it.[54]

Comparably, another complainant, Catherine, described that,

> About one month after her arrival at Moshannon, she began experiencing serious pain. After a pap smear identified abnormal cells, Catherine was sent for further testing with medical professionals outside of the facility, Catherine was diagnosed with ovarian growths. Those painful growths required surgery to remove. Staff at Moshannon told Catherine that they

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[53] CRCL Complaint, *Re: Egregious and Unconstitutional Conditions of Confinement at the Moshannon Valley Processing Center*, AM. C.L. UNION PA. (July 10, 2024), https://www.aclupa.org/en/cases/re-egregious-and-unconstitutional-conditions-confinement-moshannon-valley-processing-center.

[54] *Id.* at 48-49.

> would schedule the surgery, but never said when it would be scheduled. Staff then failed to respond to any of Catherine's subsequent questions about when the procedure would take place. Not only did Catherine not receive the surgery she needed, no other medical treatment was provided for her gynecological conditions. She lived in pain for months at Moshannon until she was deported.[55]

Courts only step in when the lack of care is particularly egregious (and when the detained individual has access to the court system). In *Rosemarie M. v. Morton*, the Middle District of Florida actually granted a preliminary injunction to a woman in ICE detention suffering from gynecological complications.[56] Rosemarie had been diagnosed and treated while in state custody, but treatment ceased when she was transferred to ICE, and although she was "seen by a number of physicians and provided with numerous forms of diagnostic testing, she ha[d] not received any of the procedures that [were] recommended by the physicians as treatment for her condition."[57] When ordering ICE to provide the necessary treatment, the Court highlighted both the severe nature of Rosemarie's condition, and that "[w]hile Defendants maintain[ed] that [the] Plaintiff . . . refused to consent to the recommended procedures, at worst, the record reflects that [she] was confused as to the content of the various forms she was being asked to sign due to language barriers."[58]

The lack of access to healthcare for gynecological needs dovetails with a chronic lack of access to menstrual products for people in immigration detention facilities. Detained women face distinct challenges related to sanitation, particularly as most are of reproductive age. Access to adequate undergarments and menstrual products is vital for preserving bodily integrity and dignity, enabling them to manage their menstrual cycles with cleanliness and hygiene while avoiding unnecessary humiliation.[59] However, such products are often unavailable or priced beyond reach at prison commissaries, leaving women with limited options.[60] Many are forced to rely on unsafe and ineffective alternatives, as demonstrated by

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[55] *Id.* at 49.
[56] Rosemarie M. v. Morton, 671 F. Supp. 2d 1311, 1313 (M.D. Fla. 2009).
[57] *Id.*
[58] *Id.*
[59] *The Unequal Price of Periods*, AM. C.L. UNION, https://www.aclu.org/report/unequal-price-periods (last visited Dec. 19, 2024).
[60] *Id.*; *see also* Kimberly Haven, *Why I'm Fighting for Menstrual Equity in Prison*, AM. C.L. UNION (Nov. 8, 2019), https://www.aclu.org/news/prisoners-rights/why-im-fighting-for-menstrual-equity-in-prison/.

Kimberly Haven, a former inmate and activist.[61] Due to the lack of proper menstrual products, Haven resorted to using improvised tampons made from toilet paper, which led to severe health complications, including the need for a hysterectomy.[62] Haven's story is not an isolated incident; numerous women have suffered significant health issues from makeshift solutions, underscoring the urgent need for all carceral institutions, including immigration detention facilities, to provide accessible and appropriate menstrual products.[63] For instance,

> [CBP] detained sixteen-year-old "Maria" for four hours in a room with 100 people. Guards told her to "do it on" herself when she asked for the restroom; they also threw away her extra clothing. CBP transported her to another facility, to a 10x14 foot room containing a sink and toilet "bathroom area" with only three five-foot-high walls. Children held up blankets for privacy. Toilet paper was replenished only once a day. Maria and another girl had their periods and were each provided one menstrual pad daily. Guards failed to provide soap, more than one shower, a change of clothes, or "extra" pads, even when a girl visibly bled through her pants. Without an alternative, stained clothes and soiled underwear were worn throughout detention.[64]

It is not just the people detained who have raised the lack of access to menstrual products as a significant concern.[65] In a whistleblower complaint, Nurse Practitioner Vera Goodwin explained that at the Baker facility in Florida, an ICE detention facility,

> Baker rationed toilet paper at two thin, single-ply rolls per person each week, such that individuals in custody would run out within a few days. Provider Goodwin observed that in the women's housing unit, women used pairs of socks for toilet paper — one sock for urine and one for feces.

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[61] Haven, *supra* note 60.

[62] Haven, *supra* note 60; *see also* Jean Lee, *5 Pads for 2 Cellmates: Period Inequity Remains a Problem in Prisons*, USA TODAY (July 18, 2021), https://www.usatoday.com/story/news/nation/2021/07/13/lack-access-period-products-prisons-widespread-us/7932448002/.

[63] Haven, *supra* note 60.

[64] Valeria Gomez & Marcy L. Karin, *Menstrual Justice in Immigration Detention*, 41 CARDOZO J. OF GENDER & L. 123, 123–24 (2021).

[65] *Protected whistleblower disclosure of gross mismanagement of a federal contract, gross waste of federal funds, abuse of authority relating to a federal contract, substantial and specific danger to public health or safety, and violation of law, rules, and regulations related to a federal contract by the Baker County Detention Center in Florida,* GOV'T ACCOUNTABILITY PROJECT (Nov. 14, 2024), https://whistleblower.org/wp-content/uploads/2024/11/Nov-2024-Whistleblower-Disclosure-of-Nurse-Practitioner-Vera-Goodwin-re-Baker.pdf.

> Women would hand wash the socks to try to clean them and leave them out to dry. Many went without wearing socks so they could use them for hygiene needs.
>
> The women also did not receive adequate menstrual products. They received about 30 pads or tampons a month, but they were too thin to handle normal menstrual bleeding. The pads were more akin to panty liners, with women needing to use three or four pads at a time. Provider Goodwin personally saw that multiple women's bedsheets and clothing were often covered in blood. Provider Goodwin raised her concerns about the inadequate hygiene supplies. . . . She first tried requesting additional toilet paper and other hygiene supplies on behalf of the individuals in custody, but the supply room clerk denied her requests. She reported her concerns to superiors at the weekly administrative meetings, but no remedial action was taken while she was at Baker.[66]

Nurse Goodwin's account was consistent with a Civil Rights Complaint filed by people detained at Baker.[67] As detailed in that Complaint:

> Raquel Cuevas, for example, is a Nicaraguan woman who has bled for months on end while detained at Baker. Ms. Cuevas' bleeding is caused by a preexisting medical condition for which she has repeatedly asked for medical attention but received little care. She continues to bleed constantly and heavily. When she informed Baker staff about her condition, she was forced to strip off her clothes to prove she was bleeding and still was not given any medication or additional supplies. Instead, officers advised her to use socks instead of sanitary napkins—despite the fact that the socks issued by Baker are often extremely dirty. With no other choice, Ms. Cuevas used the socks but bled through them onto her bedding. Baker staff refused to provide clean bedding, forcing her to sleep on blood-soaked sheets for several days.
>
> Samantha Lindsay, a Jamaican woman, similarly had to sleep in blood-soaked sheets because of the arbitrary sanitary napkin cap. She went three full days without sanitary napkins. When she informed Baker staff of the menstrual blood running down her legs and her desperate need for sanitary napkins, she too was told to use socks.[68]

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[66] *Id*.

[67] CRCL Complaint, *RE: Multi-Individual Complaint Regarding Inhumane Conditions and Unlawful Treatment at Baker County Detention Center, Including Retaliation, Physical Assault, Medical Neglect, and Unsanitary Conditions*, AM. C.L. UNION - FL. (Sept. 13, 2022), https://www.aclufl.org/sites/default/files/crcl_complaint_-_baker_county_detention_center_-_final.pdf.

[68] *Id*.

Poor menstrual hygiene is directly linked to risk of medical complications. Using items other than menstrual pads to "absorb or collect blood . . . can increase the risk of urogenital infections," while poor menstrual hygiene overall is lined to physical health problems including reproductive infections, and to issues relating to mental health.[69]

People who are pregnant also face significant obstacles to obtaining medical care while detained by federal immigration authorities. Inadequate prenatal care in prisons has been linked to disproportionately high rates of complications during pregnancy, highlighting systemic neglect of women's health needs in detention settings. [70] A systematic review and meta-analysis found that 34% of incarcerated pregnant individuals in the U.S. received inadequate prenatal care, defined as fewer than the clinically recommended number of prenatal visits.[71] Additionally, a study reported that 52.3% of pregnant inmates received inadequate care during pregnancy, with 4.4% receiving no prenatal care at all.[72]

These deficiencies in prenatal care contribute to adverse pregnancy outcomes among incarcerated people. Research indicates that pregnancies among incarcerated people are often high risk due to factors such as poor nutrition, limited access to prenatal care, and substance use disorders.[73] The lack of standardized policies and the variability in the quality of prenatal care across correctional facilities exacerbate these issues, leading to higher rates of complications during pregnancy and childbirth.[74] Psychosocial stress experienced during pregnancy has been linked to an elevated likelihood of preterm births and pregnancies resulting in small-for-gestational-age infants.[75] Even after accounting for sociodemographic, medical, and behavioral risk factors, high levels of stress during pregnancy

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[69] Lancet Regional Health – Americas, *Menstrual Health: a Neglected Public Health Problem*, 15 LANCET REG. HEALTH AM. 1, 1 (2022).

[70] Melissa J. Zielinski et al., *Custodial and Perinatal Care Patterns of Women Who Received Prenatal Care While Incarcerated in the Arkansas State Prison System, 2014–2019*, 12 HEALTH & JUST. 16 (2024).

[71] *Id.*

[72] Catherine Ingram Fogel, *Pregnant Inmates: Risk Factors and Pregnancy Outcomes*, 22 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 33, 36 (1993).

[73] Carolyn Sufrin, *Pregnancy and Postpartum Care in Correctional Settings*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS CLINICAL GUIDANCE (Mar. 2018), https://www.ncchc.org/wp-content/uploads/Pregnancy-and-Postpartum-Care-2018.pdf.

[74] Susan Hatters Friedman, et. al, *The Realities of Pregnancy and Mothering While Incarcerated*, 48 J. AM. ACAD. PSYCHIATRY & L. 365, 366 (2020).

[75] Caroline Lilliecreutz et al., *Effect of Maternal Stress During Pregnancy on the Risk for Preterm Birth*, 16 BMC PREGNANCY & CHILDBIRTH 2, 2 (2016).

remain significantly associated with preterm births.[76] Moreover, the psychological strain faced by expectant individuals may have long-term, transgenerational consequences, potentially affecting emotional and cognitive development in offspring and heightening their vulnerability to anxiety disorders in later stages of life.[77]

People detained in immigration facilities are not immune to these high risks. An analysis of emergency medical responses at ICE facilities in California highlighted that pregnancy-related emergencies accounted for 12.4% (42 of 338) of emergencies in females.[78] The lack of care occurs despite the assessment by medical professionals that pregnant people in detention—and particularly people who journey to the border while pregnant—are more likely to arrive with high-risk pregnancies.[79] As described by Virginia Sushila Schwerin, a midwife and nurse who volunteered by the border for two years:

> They've been traveling for at least two and a half weeks, often without sufficient food, experiencing unimaginable stress, they haven't been able to urinate when they need to or drink the amount they need to while pregnant. . . . [W]omen often experience emotionally traumatic incidents on the trip, like sexual assault or separation from their partners, which can also threaten their pregnancies.
>
> They're coming in at risk from that, and then a lot of them develop illnesses in detention because they are coming from a very warm climate into an extremely cold place filled with people and circulated air. . . Pregnant women have highly specialized needs and this is a high-risk group. [80]

Nurse Schwerin's description is consistent with IHSC's own analysis that

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[76] Aleksandra Staneva et al., *The Effects of Maternal Depression, Anxiety, and Perceived Stress During Pregnancy on Preterm Birth: A Systematic Review*, 28 WOMEN & BIRTH 179, 179 (2015).

[77] Florian Rakers, et al., *Transfer of Maternal Psychosocial Stress to the Fetus*, 117 NEUROSCI. BIOBEHAV. REV. 185, 185 (2020); *see also* Patrícia M. Miguel, et. al, *Early Environmental Influences on the Development of Children's Brain Structure and Function*, 61 DEV. MED. & CHILD NEUROLOGY 1127, 1127 (2019).

[78] Annette M. Dekker et al., *Emergency Medical Responses at US Immigration and Customs Enforcement Detention Centers in California*, 6 JAMA NETWORK OPEN 1, 1, 4 (2023).

[79] Zielinski et al., *supra* note 70.

[80] Ema O'Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn't Get the Care They Needed*, BUZZFEED NEWS (July 9, 2018), https://www.buzzfeednews.com/article/emaoconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump#.bjAVK6Pj0.

> ICE's detained noncitizen population presents unique health care challenges. Some noncitizens come into the United States under dangerous conditions and may suffer from dehydration, injuries, misdiagnoses, or previously existing medical conditions. In many instances, the care noncitizens receive while in ICE custody is the first professional medical care they have received. Health screenings often identify chronic and previously undiagnosed health conditions.[81]

And yet, although the Obama administration enacted a policy that pregnant people will generally not be detained by ICE "absent extraordinary circumstances" or mandatory detention,[82] the first Trump Administration rescinded that policy, ending the presumption of release.[83] Pregnant people began reporting denials of adequate medical care relatively quickly following the change in policy. For instance, in July of 2018, Buzzfeed News reported that "[p]regnant women in immigration detention under the Trump administration say that they have been denied medical care, shackled around the stomach and abused."[84] The article highlighted the story of E, a 23-year-old who,

> found herself in a detention cell in San Luis, Arizona, bleeding profusely and begging for help from staff at the facility. She was four months pregnant and felt like she was losing her baby. She had come to the US from El Salvador after finding out she was pregnant, in the hopes of raising her son in a safer home.[85]

She described, "I realized I was losing my son. It was his life that I was bleeding out. I was staining everything. I spent about eight days just lying down. I couldn't eat, I couldn't do anything. I started crying and crying

[81] ICE Health Service Corps, *Focused on Best Patient Outcomes*, U.S. IMMIGR. & CUSTOMS ENF'T (Feb. 14, 2025), https://www.ice.gov/detain/ice-health-service-corps.
[82] *Directive No. 11032.3: Identification and Monitoring of Pregnant Detainees*, U.S. IMMIGR. & CUSTOMS ENF'T (Dec. 14, 2017), https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentificationMonitoringPregnantDetainees.pdf.
[83] *FAQs: Identification and Monitoring of Pregnant, Postpartum or Nursing Individuals*, U.S. IMMIGR. & CUSTOMS ENF'T (July 7, 2021), https://www.ice.gov/directive-identification-and-monitoring-pregnant-postpartum-or-nursing-individuals; *see also*, *ICE ends presumption of release for pregnant detainees*, IMMIGR. POL'Y TRACKING PROJECT, https://immpolicytracking.org/policies/ice-ends-presumption-of-release-for-pregnant-detainees/.
[84] O'Connor, *supra* note 80.
[85] *Id.*

and crying."[86] She rescinded her request for asylum and was deported back to El Salvador.[87]

A 2017 CRCL Complaint filed by the Women's Refugee Commission, the Refugee and Immigrant Center for Education and Legal Services ("RAICES"), the Northwest Immigrant Rights Project, the Center for Gender and Refugee Studies, the American Immigration Lawyers Association, and the ACLU highlighted additional stories by pregnant women in immigration detention denied care.[88]

Ana, a 28-year-old woman from Honduras detained with her child, described

> It is very difficult for me to be detained here with my son while I am pregnant. It is hard for me to get around because I am not feeling well and my son is too heavy for me to carry. I feel that I need to be living where my family can assist me. I am very concerned about the health of my baby because there are a lot of people here and many viruses, including the flu and diarrhea.
>
> Being detained and preparing for a credible fear [interview] has also been very stressful for me, which I feel is dangerous for my baby. In order to prepare for my credible fear interview with a CARA [the pro bono legal service organization at STRFC] legal assistant, I have had to discuss my history of sexual abuse and domestic violence in detail.

Laura, a 24-year-old-woman from Honduras, detailed,

> After two weeks in the safe house [in Honduras], when I was seven months pregnant, I had a miscarriage. I was taken to a doctor, who told me that I seemed depressed and had probably miscarried because of this. Before he told me this, I knew I was very sad, but I hadn't known what to do about it or that I had depression.
>
> I have vomited four times here at [the detention facility]. I also get headaches and feel dizzy sometimes, probably in part because the food here makes me lose my appetite and it is hard for me to eat when I am depressed. I have not told the doctor about most of this because he has not asked how I am feeling in the three times I have visited him. Yesterday, we were called to the Medical Unit for my vaccinations, but they

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[86] *Id.*
[87] *Id.*
[88] E-mail from ACLU et al., *Re: U.S. Immigration and Customs Enforcement's Detention and Treatment of Pregnant Women*, AM. IMMIGR. COUNCIL (Nov. 13, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_increasing_numbers_of_pregnant_women_facing_harm_in_detention.pdf.

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> accidently gave them to my daughter instead, even though she had already received hers. For this reason, they called us back later and had to give me mine.[89]

Similarly, Emma recounted that

> I wanted to explain to the immigration officer who processed me about my rape and show him that my fingernails were missing [as part of the torture inflicted on her] but he said, "No, don't tell me anything. You all say the same thing." I told the immigration officials at the border that I might be pregnant but that I was bleeding. They took me in a car to a hospital. I was given two ultrasounds: one of my stomach and one of my vagina. The doctor told me that I was pregnant and that my pregnancy was high risk. He told me that I have an infection, and gave me pills.
>
> I was taken back to the border, where we slept in the cold on very thin mattresses. Most people were given only aluminum blankets but I was given a real one. I still could not sleep, however, because there were so many children crying. I could not eat because the smell of food makes me want to vomit.[90]

The CRCL complaint also highlighted the ordeal that Rosa experienced. She reported that during her months-long ICE detention "she experienced nausea and vomiting, weakness, headaches, abdominal pain, and vomited blood."[91] She was also "denied requests for a vegetarian diet, did not receive sufficient prenatal vitamins or adequate medical attention. She was assigned to a dormitory area on the second floor and requests to be moved to a first floor dormitory area so that she would not have to climb stairs were denied."[92]

The lack of gynecological, menstrual, and obstetric care to people detained in immigration custody has occurred alongside abuses and catastrophic outcomes for people who did seek treatment. The most notable violations were reported by Nurse Dawn Wooten, a nurse at the Irwin County Detention Center in Oscilla, Georgia.[93] A letter to Congress from her attorneys, the Government Accountability Project and Project South, described:

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[89] *Id.* at 6.
[90] *Id.* at 8.
[91] *Id.* at 12.
[92] *Id.*
[93] *Letter to Congress Regarding Whistleblower Disclosures on Medical Care in ICE Detention*, GOV'T ACCOUNTABILITY PROJECT & PROJECT S. (Sept. 17, 2020), https://whistleblower.org/wp-content/uploads/2020/09/ICE-ICDC-Whistleblower-Disclosure-to-Congress-091720-1.pdf.

https://lawecommons.luc.edu/annals/vol34/iss2/5

Several detained immigrants reported that many immigrant women have received hysterectomies while detained at ICDC by ICE without their fully informed consent. Upon our information and belief, one woman reported last year that ICDC routinely sends many women to see a particular gynecologist outside the facility and that some women find him untrustworthy. More recently, a detained immigrant told Project South that she talked to five different women detained at ICDC during just the last three months of 2019. When she talked to them about the surgeries they had received, the women "reacted confused when explaining why they had one done." This detained immigrant said: "When I met all these women who had had surgeries, I thought this was like an experimental concentration camp … they're experimenting with our bodies."

Ms. Wooten similarly expressed concern regarding the high numbers and percentages of detained immigrant women at ICDC receiving hysterectomies. She stated that although some women have heavy menstruation or other severe issues that might would require a hysterectomy, "everybody's uterus cannot be that bad." Ms. Wooten explained: "Everybody he sees has a hysterectomy—just about everybody. He's even taken out the wrong ovary on a young lady [detained immigrant woman]. She was supposed to get her left ovary removed because it had a cyst on the left ovary; he took out the right one. She was upset. She had to go back to take out the left and she wound up with a total hysterectomy. She still wanted children—so she has to go back home now and tell her husband that she can't bear kids… she said she was not all the way out under anesthesia and heard him [doctor] tell the nurse that he took the wrong ovary."

The rate at which the hysterectomies have occurred have been a red flag for Ms. Wooten and other nurses at ICDC. As Ms. Wooten has explained: "Everybody he sees, he's taking all their uteruses out or he's taken their tubes out."

Intertwined with the issue of the reported high rates of hysterectomies is widespread lack of proper, informed consent. Regarding the hysterectomies, Ms. Wooten explained: "These immigrant women, I don't think they really, totally, all the way understand this is what's going to happen depending on who explains it to them."

Ms. Wooten observed that the sick call nurse tried to communicate with the detained immigrants in Spanish by simply googling translations or by asking another detained immigrant to help interpret rather than using "the language line" as medical staff are instructed to use. Ms. Wooten recalled that detained women expressed to her that they didn't fully understand why

> they had to get a hysterectomy. She said: "I've had several inmates tell me that they've been to see the doctor and they've had hysterectomies and they don't know why they went or why they're going." And if the immigrants do understand what they're getting done, "some of them a lot of times won't even go, they say they'll wait to get back to their country to go to the doctor."[94]

Most recently, the USA Today reported on the experiences of women detained at the Krome North Service Processing Center in Miami, Florida, a privately-owned male-only facility.[95] The article described:

> The women spent three or four days at Krome in what they described as cramped holding cells, with concrete benches and two toilets with no stall. They saw a camera pointed at the cell, with no privacy. . . . They experienced or observed women being denied timely medical and sanitary care. One witnessed a cellmate wait 12 hours to receive two sanitary napkins while on her period. In the audio recording, the woman describes how she developed a 'very bad' rash after not bathing for days. When she asked for Benadryl, guards told her to fake a serious illness.
>
> 'I was told by guards that if I wanted anything I needed to pretend I had a seizure and fall down,' she said in the audio recording. The treatment made her feel like 'nobody cares,' she said. "Everyone acts like we're animals or something.' She said she witnessed another woman suffer a seizure, a real one, that left her collapsed on the floor, foaming at the mouth and nose. That time, the guards came.

This lack of access to safe and effective healthcare pervades the treatment of people who require gynecologic, obstetric, and menstrual care while in immigration detention.

A. There are no detention oversight mechanisms that have any power to enforce existing rules and norms, or to ensure access to gynecologic and obstetric care

1. International Legal Principles and Tribunals

The lack of gynecological preventive care for people in U.S. immigration detention highlights a systemic failure to address their unique

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[94] *Id.*

[95] Lauren Villagran, *Immigrant Women Describe 'Hell on Earth' in ICE Detention*, USA TODAY (Mar. 24, 2025), https://www.usatoday.com/story/news/nation/2025/03/23/immigrant-women-hell-on-earth-trump-ice-detention/82029368007/.

healthcare needs. While this neglect persists within the domestic legal framework, international norms and principles provide compelling guidance on how detained individuals should be treated. Decisions from international courts and foreign jurisdictions, though not binding on U.S. courts, serve as persuasive authority, especially when arguing for evolving standards of decency under the Bill of Rights.[96] These norms underscore the global consensus that the dignity and health of detainees must be preserved, including access to adequate medical care.[97]

The World Health Organization, in its Prisons and Health guide, emphasizes that "[r]egardless of the circumstances, the ultimate goal of healthcare staff must remain the welfare and dignity of the patients."[98] It further underscores that prison healthcare staff must prioritize the health of prisoners above all else, adhering to strict medical and ethical principles, including independence, equivalence of care, and confidentiality.[99] Additionally, international courts have consistently emphasized the duty of states to provide conditions of detention that respect human dignity, including adequate healthcare. The European Court of Human Rights has been particularly instrumental in developing this principle in *Kudla v. Poland*, where the Court held that states have a positive obligation under Article 3 of the European Convention on Human Rights to ensure that detention conditions are compatible with human dignity.[100] This obligation explicitly includes access to adequate medical care, and the absence of such care, especially preventive healthcare, may constitute inhuman or degrading treatment.[101]

Further reinforcing this obligation, albeit relating to a male detainee, the European Court of Human Rights ("ECtHR") decision in *Dougoz v. Greece* addressed systemic healthcare failures that disproportionately harm vulnerable populations.[102] There, the European Court of Human

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[96] See e.g., *Roper v. Simmons*, 543 U.S. 551, 575 (2005), (where the U.S. Supreme Court considered international practices when determining the constitutionality of executing individuals who committed criminal offenses as juveniles. Justice Kennedy, writing for the majority, noted that while international opinions are not controlling, they provide "respected and significant confirmation" for the Court's interpretation of the Eighth Amendment.); *id.* at 578.

[97] Taylor Koehler, *Arbitrary & Cruel: How U.S. Immigration Detention Violates the Convention against Torture and Other International Obligations,* CTR. FOR VICTIMS OF TORTURE (2021), https://www.cvt.org/wp-content/uploads/2023/06/Arbitrary_and_Cruel_d5_FINAL.pdf.

[98] Regional Office for Europe [WHO], *Prisons and Health,* WORLD HEALTH ORG. (June 23, 2014), https://iris.who.int/bitstream/handle/10665/128603/9789289050593-eng.pdf.

[99] *Id*.

[100] Kudla v. Pol., App. No. 30210/96 (Oct. 26, 2000).

[101] *Id*. at 13.

[102] Dougoz v. Greece, App. No. 40907/98, ¶¶ 46–48 (Eur. Ct. H.R. Mar. 6, 2001).

Rights examined the conditions of detention experienced by Mohamed Dougoz, a Syrian national, in various Greek detention facilities.[103] Mr. Dougoz was held in several detention centers, including the Alexandras police headquarters and the Drapetsona detention center, from July 1997 to April 1998, pending extradition.[104] He contended that the overcrowded and unsanitary conditions, combined with the extended duration of his detention, violated his rights under Article 3 of the European Convention on Human Rights.[105] In the judgment, the Court noted that the conditions of Mr. Dougoz's detention, including overcrowding, lack of sleeping arrangements, poor sanitation, and the prolonged duration of his detention, degraded his dignity as a human being.[106] This type of treatment created feelings of inferiority, humiliation, and distress, which are incompatible with respect for human dignity.

Focusing more specifically on preventative gynecological healthcare, in *Manuela v. El Salvador* a Salvadoran woman was convicted of aggravated homicide after suffering an obstetric emergency.[107] She was denied adequate medical care during her detention, which contributed to her deteriorating health and eventual death from Hodgkin's lymphoma.[108] In its 2021 judgment, the Inter-American Court of Human Rights ("IACHR") held El Salvador responsible for multiple human rights violations, including the right to life, personal integrity, health, and fair trial guarantees.[109] The Court criticized the state's failure to provide timely and appropriate medical care, including preventive healthcare, during Manuela's detention.[110] In its decision, the Court found that the state violated Manuela's right to humane treatment (Article 5 of the American Convention on Human Rights) by subjecting her to inhumane detention conditions and denying her adequate healthcare.[111] It noted that this treatment was incompatible with respect for her dignity as a human being.[112] It further recognized that the lack of appropriate medical care for her obstetric emergency and subsequent criminalization of her actions violated her reproductive rights; that she was denied timely and adequate medical care for her Hodgkin's lymphoma while detained, thereby failing

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[103] *Id*.
[104] *Id*.
[105] *Id*. at 7.
[106] *Id*.
[107] Manuela v. El Salvador, Preliminary objections, merits, reparations, and costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 411 (Nov. 30, 2021).
[108] *Id*. at 29, ¶ 89.
[109] *Id*. at 2, ¶ 7.
[110] *Id*. at 54, ¶ 185.
[111] *Id*. at 57-58, ¶ 198.
[112] *Id*.

to uphold her dignity and rights as a detainee, particularly given her vulnerable health status, and that the state's actions subjected Manuela to stigmatization and discriminatory treatment as a woman seeking reproductive healthcare.[113]

Similarly, in 2000, I.V., a Peruvian national residing in Bolivia, underwent a cesarean section during which she was subjected to a non-consensual tubal ligation, effectively sterilizing her without her informed consent.[114] This procedure was performed in a public hospital while she was detained for immigration-related reasons.[115] In its 2016 judgment,[116] the IACHR found Bolivia responsible for violating several rights under the American Convention on Human Rights, including the right to personal integrity (Article 5), personal liberty (Article 7), right to dignity (Article 11) because the forced sterilization infringed upon her personal dignity and autonomy, and right to private and family life (Article 17).[117]

While most international court cases in this area address either general access to medical care for detainees of all genders or the practice of forced sterilization of female detainees, these decisions establish a legal framework grounded in United Nations norms and principles that explicitly acknowledge the unique healthcare needs of people with gynecological needs in detention.[118] The United Nations Rules for the Treatment of Women Prisoners, commonly known as the "Bangkok Rules," provide clear guidance on gender-specific healthcare.[119] Rule 6[120] emphasizes the importance of sexual and reproductive healthcare, while Rule 5[121] mandates access to pre-and postnatal care for detained pregnant people. These rules emphasize that access to preventive healthcare is essential for upholding the dignity and well-being of people in custody,

[113] *Id*. at 69, ¶ 245.
[114] I.V. v. Bolivia*,* Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 329, ¶ 1 (Nov. 30, 2016).
[115] *Id*.
[116] *Id*.
[117] *See* American Convention on Human Rights, arts. 5, 7, 11, 17, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36.
[118] G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), U.N. Doc. A/RES/65/229 (Dec. 21, 2010) [hereinafter The Bangkok Rules]. *See also*, Meredith McCain, *Robbing Reproductive Autonomy: Forced Sterilizations in the Americas and the Inter-American Human Rights System*, PRINCETON J. OF PUB. & INT'L AFFS. (Apr. 7, 2023), https://jpia.princeton.edu/news/robbing-reproductive-autonomy-forced-sterilizations-americas-and-inter-american-human-rights.
[119] The Bangkok Rules, *supra* note 118, at 2.
[120] *Id.* at 9.
[121] *Id.*

establishing a framework for domestic and international courts to implement and follow.

The International Covenant on Civil and Political Rights ("ICCPR") reinforces the standard of dignity in detention.[122] Article 10(1) requires that all detainees be treated with respect for their inherent dignity, which includes access to healthcare equivalent to that available to the general population.[123] The Human Rights Committee, in its General Comment 35, has further clarified that adequate healthcare is a critical component of humane treatment in detention[124] while the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") addresses the state's responsibility to provide comprehensive healthcare services to women.[125] General Recommendation No. 24 can be interpreted to extend this obligation to women in detention – especially when read in conjunction with General Recommendation No. 33[126] and the U.N. Bangkok Rules[127] - underscoring the importance of preventive and reproductive healthcare as essential elements of gender equity.[128]

While decisions from international courts and foreign jurisdictions are not binding in the United States, they hold persuasive value in shaping domestic legal arguments.[129] International principles reflecting the global consensus on dignity can bolster constitutional claims, which prohibit cruel and unusual punishment. For example, the concept of evolving standards of decency can be informed by international norms,

[122] International Covenant on Civil and Political Rights art. 10(1), Dec. 16, 1966, 999 U.N.T.S. 171.

[123] *Id*.

[124] Human Rights Committee, General Comment No. 35, Article 9 (Liberty and Security of Person), U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

[125] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

[126] U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 33 on Women's Access to Justice, ¶¶ 51–52, U.N. Doc. CEDAW/C/GC/33 (2015) (noting barriers to justice faced by incarcerated women and the need for gender-sensitive services).

[127] U.N. Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), G.A. Res. 65/229, U.N. Doc. A/RES/65/229, rules 5–18 (Mar. 16, 2011) (affirming the right of women in detention to adequate, gender-specific healthcare, including prenatal and reproductive care).

[128] The Convention on the Elimination of Discrimination Against Women General Recommendation No. 24, Article 12 of the Convention (Women and Health), U.N. Doc. A/54/38/Rev.1, chap. I (1999), (while establishing critical standards for gender equity and healthcare access, it has not been ratified by the U.S. Senate, further limiting its applicability within the domestic legal framework).

[129] Ruth Bader Ginsburg, *A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication*, 99 PROC. OF THE ANN. MEETING (AM. SOC'Y OF INT'L L.) 351, 351-59.

strengthening the argument that preventive gynecological care is essential to the humane treatment of detainees. Foreign court rulings also provide valuable insights. The Supreme Court of Malawi, for instance, has interpreted dignity to include access to adequate medical care and nutrition.[130] In a landmark decision, the Court ruled that subsisting on nutritionally sufficient but monotonous food, such as a diet of only beans, was undignified.[131] While not binding on U.S. courts, such rulings highlight a global understanding that the conditions of detention must meet basic standards of humanity.

The systemic neglect of gynecological preventive care in U.S. immigration detention starkly contrasts with international norms and court decisions, which address such issues through the lens of dignity—a perspective notably absent in the U.S. approach. These norms offer a powerful framework for rethinking U.S. detention practices and addressing the disparities that disproportionately harm people in detention. Although not directly enforceable in U.S. courts, the principles established by international human rights bodies, United Nations guidelines, and foreign jurisdictions provide persuasive authority that can inform legal strategies and drive policy reform. For instance, they can shape constitutional arguments by informing the "evolving standards of decency" test used by U.S. courts to determine what constitutes cruel and unusual punishment.[132] Advocates can also use these norms to push for legislative or regulatory reforms, highlighting the disparity between U.S. practices and globally recognized standards.

Moreover, international norms can bolster advocacy efforts, providing a moral and ethical foundation for demanding systemic change. Nongovernmental organizations and human rights groups often leverage these norms to build public awareness and pressure policymakers to address gaps in healthcare access and other detention-related issues.[133] Aligning domestic practices with globally recognized standards presents an opportunity for U.S. courts to uphold the dignity and health of women in detention, while also meeting their ethical and legal obligations.

International norms, such as those outlined in the United Nations Standard Minimum Rules for the Treatment of Prisoners (the "Nelson

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[130] Gable Masangano v. Attorney General and Others, Constitutional Case No. 15 of 2007, High Court of Malawi (2009).
[131] *Id.* at 47.
[132] Trop v. Dulles, 356 U.S. 86, 101 (1958).
[133] *See, e.g.*, *NYLPI's Health in Detention Program Included in Human Rights Watch Report as an Example of Creative Medical Advocacy*, N.Y. LAWS. FOR THE PUB. INT. (May 12, 2007), https://www.nylpi.org/nylpis-health-in-detention-program-included-in-human-rights-watch-report-as-an-example-of-creative-medical-advocacy; *see also*, *About Us,* PHYSICIANS FOR HUM. RTS., https://phr.org (last visited Apr. 6, 2025).

Mandela Rules")[134] and the United Nations Rules for the Treatment of Women Prisoners (the "Bangkok Rules"),[135] provide a comprehensive framework for ensuring humane, dignity-centered treatment of detainees, including access to healthcare tailored to their specific needs. These frameworks emphasize access to essential sanitation products, reproductive healthcare, and prenatal care, underscoring the importance of addressing gender-specific needs as integral to human dignity and equity.[136] The central issue, however, lies in the lack of enforceability of these international principles within the U.S. legal framework. International human rights treaties and guidelines lack binding authority unless expressly incorporated into domestic law.[137] The United States has ratified few human rights treaties, and even those, like the International Covenant on Civil and Political Rights, are often considered non-self-executing, meaning they require additional domestic legislation for enforcement.[138] Furthermore, the absence of international enforcement mechanisms capable of compelling compliance exacerbates the challenge.[139] While the principles articulated in instruments like the Bangkok Rules and the Nelson Mandela Rules reflect a global consensus on dignity and humane treatment, they remain aspirational in jurisdictions like the United States, where domestic legal frameworks often fall short of these global benchmarks.

This disconnect between international principles and U.S. practices is evident in multiple documented cases. For instance, between August 19 and 23, 2019, the Inter-American Commission on Human Rights visited detention centers at the southern U.S. border, including the Otay Mesa detention center, managed by the private firm Core Civic, which provides services to ICE and the United States Marshals Service

[134] United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), G.A. Res. 70/175, U.N. Doc. A/RES/70/175 (Dec. 17, 2015).
[135] The Bangkok Rules, *supra* note 118.
[136] *Id.* at 9-10.
[137] U.S. CONST. art. VI.
[138] Timothy E. Lynch, *The ICCPR, Non-Self-Execution, and DACA Recipients' Right to Remain in the United States*, 34 GEO. IMMIGR. L.J. 323 (2020); *see also, FAQ: The Covenant on Civil & Political Rights (ICCPR*), ACLU (July 11, 2013), https://www.aclu.org/documents/faq-covenant-civil-political-rights-iccpr ("Though the government retains the obligation to comply with the ICCPR, one of the RUDs attached by the U.S. Senate is a "not self-executing" Declaration, intended to limit the ability of litigants to sue in a court of direct enforcement of the treaty").
[139] Richard A. Martin, *Problems in International Law Enforcement*, 14 FORDHAM INT'L L.J. 519, 519 (1990).

("USMS").[140] At the time, Otay Mesa held 981 detained noncitizens, including 804 men and 177 women, yet both populations were subjected to the same detention regime.[141] During its visit, the IACHR received numerous complaints of discriminatory and abusive treatment, physical and psychological violence, and inadequate food and hygiene.[142] Detainees reported being provided only juices and frozen burritos, denied basic supplies such as toothbrushes and toothpaste, and forced to use open toilets located within their sleeping quarters.[143] Detention in Customs and Border Protection facilities often exceeded the mandatory 72-hour maximum, with severe consequences for the mental and physical health of detainees.[144]

Subsequently, in a press release,[145] the IACHR strongly condemned the sterilization of migrant women without the provision of adequate information and prior consent at a different detention center, the Irwin County Detention Center, and initiated specific monitoring of this situation.[146] The IACHR noted that these non-consensual surgical procedures represented a violation of the rights to personal security and freedom from arbitrary or unlawful interference with privacy.[147] The Commission further considered that these violations compromised and profoundly affected the right to family and the preservation of noncitizen female detainees' health.[148] In its 2021 Annual Report,[149] the IACHR stated that it had monitored the effect of policies, actions, and discourse that violated noncitizen detainee rights - especially amidst the COVID-19 pandemic. In its 2021 Annual Report, the IACHR reiterated its concern regarding the conditions in immigration detention centers, particularly amid the COVID-19 pandemic, and the lasting impact on detained

[140] Press Release No. 228/19: *IACHR Conducted Visit to the United States' Southern Border of the United States*, INTER-AM. COMM'N HUM. RTS. (Sept. 16, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/228.asp.
[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] Press Release No. 262/20: *IACHR Expresses Its Concerns Over Reports of Sterilizations and Surgical Interventions Without Consent in Migrant Detention Centers in the United States,* INTER-AM. COMM'N HUM. RTS. (Oct. 30, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/262.asp.
[146] *Id*.
[147] *Id*.
[148] *Id*.
[149] *Human Rights Development in the Region: Annual Report 2020, Chapter IV.A*, INTER-AM. COMM'N HUM. RTS., (2020), https://www.oas.org/en/iachr/docs/annual/2021/Chapters/IA2021cap4A-en.pdf.

individuals.[150] Despite these well-documented violations, the IACHR's efforts have not led to meaningful sanctions or rectification of the situation, with its role largely limited to monitoring, issuing recommendations, and advocating for policy reform.

III. LEGAL PRINCIPLES AND TRIBUNALS IN THE UNITED STATES

Although not unique to the United States, this country has a long history of regulating and devaluing the reproductive health experiences of specific ethnic and racial groups, including immigrant communities.[151] In fact, the idea that "some women's reproduction is worthy of celebration and care while others is deemed problematic or undeserving" is part of "a long-standing global phenomenon called 'stratified reproduction' which disproportionately affects indigenous, poor, immigrant, undocumented, and incarcerated women."[152] Modern gynecology developed directly from an American slave-owner who experimented on Black women held against their will.[153] The laws of immigration and detention are intertwined with this history.

> Immigration law was first conceived within a racialized and gendered framework with the goal of excluding specific groups from the national body. These laws were racialized because immigrants, many of whom were not White, were deemed inferior and therefore unworthy of political influence. These laws were gendered because immigrant women carried an immense power in their ability to bear a future generation of U.S. citizens. From the very inception of federal immigration law, with the passage of the Page Act in 1875, Congress banned the entry of Chinese women who had a history of sex work or polygamy. Although Chinese

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[150] *Id.*

[151] Cristina A. Quinonez, *Exposing the American History of Applying Racial Anxieties to Regulate and Devalue Latinx Immigrant Reproductive Rights*, 54 UNIV. OF SAN FRANCISCO L. REV. 557, 563-69 (2020); *see also,* Julianna G. Alson et al., *Incorporating Measures of Structural Racism into Population Studies of Reproductive Health in the United States: A Narrative Review*, 5 HEALTH EQUITY 49, 50-54 (2021); *see also,* Alexandra Minna Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, 95 AM. J. OF PUB. HEALTH 1128, 1131-35 (2005).

[152] Margaret M. Sullivan et al., *Reproductive Healthcare in Immigration Detention: The Imperative of Informed Consent*, 2022 LANCET REG. HEALTH AM. (Feb. 2022) (citing Knight K.R. et al., *Reproductive (In)justice – Two Patients with Avoidable Poor Reproductive Outcomes*, 281 NEW ENG. J. MED. (2019) 593, 593–596); *see also* Gwyneth Lonergan, *Pregnant Racialised Migrants and the Ubiquitous Border: The Hostile Environment as a Technology of Stratified Reproduction*, 44 J. OF CRITICAL SOC. POL'Y 222 (2024).

[153] Kirsten Butler, *Life-Saving Tool or Torture Device? The Answer, Once You Learn the History of the Speculum, is a Little of Both*, PBS (Mar. 15, 2024), https://www.pbs.org/wgbh/americanexperience/features/cancer-detectives-brief-history-speculum/.

> immigrants were unable to naturalize during this period of time, the newly ratified Fourteenth Amendment established birthright citizenship regardless of parental origin. The reproductive power of Chinese women was perceived as the ultimate threat to the cultural and ethnic purity of the nation-state. By banning the entry of Chinese women, the first federal immigration laws were formed to reflect the nation's interest in controlling the entry of people with reproductive capacity in an attempt to maintain its cultural and political hegemony.[154]

Although the Bill of Rights and Fourteenth Amendment *should* provide for mechanisms and systems that allow all people in the United States to protect their reproductive health and access to healthcare,[155] even when detained by federal immigration authorities, every available system fails on that promise.

A. The U.S. Court System

In any circumstance in which the government detains a person, the U.S. Constitution provides an "obligation to provide medical care."[156] After all, a person in detention

> must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical torture or a lingering death . . . [and] [i]n less serious cases, denial of medical care may result in pain and suffering.[157]

This principle reflects the critical role of healthcare in preserving human dignity, a value that remains central to ethical treatment, even in incarceration settings. Despite this mandate, dignity is often compromised when institutions fail to provide essential care, particularly for women.[158]

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[154] Claudia Pepe et. al*, Reproductive Justice in the U.S. Immigration Detention System*, 142 J. OF OBSTETRICS & GYNECOLOGY 804, 805 (2023).
[155] *See generally The Constitutional Right to Reproductive Autonomy: Realizing the Promise of the 14th Amendment,* CTR. FOR REPRODUCTIVE RTS. (2022), https://reproductiverights.org/wp-content/uploads/2022/07/Final-14th-Amendment-Report-7.26.22.pdf.
[156] Estelle v. Gamble, 429 U.S. 97, 103 (1976). Decided in the more restrictive context of deliberate indifference to a medical need by a person incarcerated following a criminal conviction.
[157] *Id.*
[158] Anna Roh, *Forced to Give Birth Alone: How Prisons and Jails Neglect Pregnant People Who are Incarcerated*, COLUMBIA MAILMAN SCH. OF PUB. HEALTH (Feb. 28, 2022), https://www.publichealth.columbia.edu/public-health-now/news/forced-give-birth-alone-how-prisons-and-jails-neglect-pregnant-people-who-are-incarcerated.

In constitutional terms, the government, including federal immigration agencies, has an affirmative duty to provide conditions of reasonable health and safety for the people it holds in its custody. As previously explicated, people in immigration detention, even those with prior criminal convictions or against whom government entities have brought criminal charges, are *civil* detainees and as such, are entitled to the same Fifth and Fourteenth Amendment due process protections as any other pretrial detainee.[159] A person in *criminal* detention is protected from excessive punishment by the Eighth Amendment.[160] In practice, many circuits evaluate medical claims using the same standards for all three amendments, finding that a person may bring a constitutional claim for failure to access medical care only when they can meet the requirements for deliberate indifference to their serious medical needs.[161] Put another way, courts consider "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."[162] The difference in standards between prisoners and people in civil detention is grounded in the degree of intent that must be shown to establish deliberate indifference.[163] This standard does not encompass neglect or medical malpractice or even claims that do not include a *substantial* risk of serious harm.[164] An example in which a claim by a pregnant person succeeded using these standards is *Villegas v. Metropolitan Govt. Nashville*, where the Sixth Circuit considered a deliberate indifference claim by a pregnant woman in immigration detention who was shackled during labor and postpartum recovery due to her flight risk as an undocumented individual who was previously deported and reentered.[165] That court found summary judgment inappropriate because the risks associated with shackling a pregnant person during labor were obvious and, "without any extenuating

[159] *See* E. D. v. Sharkey, 928 F.3d 299, 306–07 (3d Cir. 2019) ("This Circuit has longed [sic] viewed the legal rights of an immigration detainee to be analogous to those of a pretrial detainee."). People in ICE detention may not be subject to punishment at all; *see also* Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial detainee not be punished.").
[160] U.S. Const. amend. VIII.
[161] For instance, the Third Circuit "has found no reason to apply a different standard than that set forth in Estelle [and applicable to people with convictions] when evaluating whether a claim for inadequate medical care by a pre-trial detainee is sufficient." Natale v. Camden Cnty. Corr. Facility, 318 F.3d 575, 581 (3d Cir. 2003) (citing, *inter alia*, Estelle v. Gamble, 429 U.S. 91, 103-04 (1997)).
[162] *Id.* at 104-05 (footnotes omitted).
[163] Farmer v. Brennan, 511 U.S. 825, 836-37 (1994).
[164] *See*, *e.g.*, Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996).
[165] Villegas v. Metro. Gov't Nashville, 709 F.3d 563, 563 (6th Cir. 2013).

circumstances, shackling women during labor runs afoul of the protections of the Eighth Amendment."[166]

To bring a lawsuit one must have a viable mechanism for a cause of action.[167] However, courts have found that the private detention officials responsible for the care of the vast majority of people in immigration custody are not subject to the Federal Tort Claims Act ("FTCA"), a widely used mechanism to secure relief, and that claims against ICE officials cannot arise under *Bivens*, one of the only mechanisms by which a cause of action arises against a federal official.[168] One is also barred from suing federal actors under Section 1983, which allows constitutional lawsuits against *state* officials.[169]

Under the FTCA, individuals pursue monetary damages against the federal government for acts that were "caused by the negligent or wrongful act or omission" of federal employees."[170] The FTCA does not impose liability on individual federal officials, only on the federal government itself.[171] Under the statute, the government is held liable "under circumstances where the United States, if a private person, would be liable to the claimant."[172] The viability of a FTCA claim depends on whether the state where the alleged misconduct occurred would permit such a cause of action under state tort law.[173] Consequently, state law governs the application of the FTCA.[174] Thus, the FTCA does not permit claims based on constitutional violations, as constitutional torts arise from federal rather than state law.[175] For noncitizen detainees, this limitation bars claims of deliberate indifference, such as those alleging inadequate medical care. Even if a detainee reframes the claim as a common law tort, its success depends on specific state laws. For example, states like Texas, Louisiana, and Arizona, which hold significant numbers of immigrant detainees, have

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[166] *Id.* at 574.
[167] See Ziglar v. Abbasi, 582 U.S. 120, 133-34 (2017) (discussing approach to recognizing different forms of causes of action).
[168] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 388 (1971); Minneci v. Pollard, 565 U.S. 118, 131 (2012); *see also* Ruiz v. Fed. Bureau of Prisons, 481 F. App'x 738, 740-41 (3d Cir. 2012) (holding that plaintiff, detained at a private prison facility contracting with the BOP, could not bring an Eighth Amendment *Bivens* claim for inadequate medical treatment against either the BOP or the private corporation, facility, or its employees).
[169] 42 U.S.C. § 1983.
[170] 28 U.S.C. § 2672.
[171] 28 U.S.C. § 2674.
[172] *Id.*
[173] 28 U.S.C. § 2672.
[174] *Id.*
[175] Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 699-702 (1997).

implemented tort reform measures that make it difficult to recover damages under the FTCA.[176] Additional procedural hurdles include compliance with a strict statute of limitations and exhaustion of administrative remedies before filing suit.[177] The FTCA also excludes claims against nongovernment contractors, barring recovery for detainees in privately run facilities.[178] Even for detainees in federal facilities, their claims must navigate state laws that vary significantly, often posing substantial barriers to recovery. These limitations make the FTCA a challenging avenue for immigrant detainees seeking redress for alleged harms.

Yaruro v. United States demonstrates the practical ramifications of these doctrines.[179] In that case, the plaintiff alleged that during her detention at Irwin County Detention Center in Georgia, she was subjected to inadequate medical care, including lack of access to necessary gynecological services, and other inhumane treatment.[180] These claims were brought under the Federal Tort Claims Act and *Bivens,* asserting violations of her constitutional rights.[181] The court dismissed the Plaintiff's claims under the FTCA, finding a failure to state a claim, and the applicability of the discretionary function exception to the FTCA, which preserves the government's sovereign immunity for acts involving judgment or choice related to public policy considerations.[182] This court's decision illustrates the challenges involved in bringing such claims under the FTCA.

A *Bivens* claim differs in that it allows individuals to seek damages against individual federal officials who have violated their constitutional rights – unlike FTCA claims that impose liability against the United

[176] *See* Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (2022) (permitting limited tort suits against the United States based on state substantive law); TEX. CIV. PRAC. & REM. CODE ANN. § 101.023 (West 2023) (capping damages at $250,000 per person and $500,000 per occurrence for bodily injury or death); LA. STAT. ANN. § 13:5106(B)(1) (2023) (limiting general damages against public entities to $500,000); ARIZ. REV. STAT. ANN. § 12-820.04 (2023) (providing qualified immunity for public entities and employees); *see also* David M. Shapiro & Emily Zacharias, *Tort Remedies for ICE Abuses*, 95 N.Y.U. L. REV. 123, 129 (2020).

[177] 28 U.S.C. § 2675.

[178] 28 U.S.C. § 2671 (barring recovery under the FTCA from contractor-defendants); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72-73 (2001) (discussing avenues to relief for federal prisoners housed in private facilities).

[179] Yaruro v. United States, No. 7:22-cv-00039, 2023 WL 2614593 (M.D. Ga. Mar. 23, 2023).

[180] *Id.* at 2–3.

[181] *Id.*; *See also* Bivens, 403 U.S. at 388; 28 U.S.C. § 2672.

[182] Yaruro, *supra* note 179, at 4–5.

States.[183] In *Bivens*, the plaintiff successfully pursued damages for a Fourth Amendment violation stemming from an unreasonable search and seizure by federal agents.[184] The Supreme Court in *Bivens* recognized an implied private right of action for such claims and subsequently extended the doctrine to include Eighth Amendment violations related to prison conditions[185] and Fifth Amendment equal protection violations.[186] However, the Supreme Court has since significantly limited the expansion of *Bivens* claims beyond these three contexts. In *Ziglar v. Abbasi*, the Supreme Court emphasized that *Bivens* actions should only proceed in rare and extraordinary circumstances, particularly when a claim arises in a new context or involves "special factors counseling hesitation," such as concerns over national security or the prerogative of Congress to provide remedies.[187] The Court's decision in *Abbasi* has made the extension of *Bivens* to new claims, such as those involving pregnant detainees, exceedingly difficult. For a pregnant detainee to succeed in a Bivens claim, the Court would have to recognize the claim as distinct from previously accepted *Bivens* contexts, implicating a new constitutional right, unique factual circumstances, or a different rank of federal officer.[188]

Moreover, courts have further restricted *Bivens* claims by pointing to alternative remedies. In *Minneci v. Pollard*, the Court denied a *Bivens* remedy to prisoners held in private detention facilities, reasoning that state tort law provided an adequate alternative.[189] This rationale has encouraged the federal government's increased reliance on private prison companies, effectively shielding them and their employees from liability under *Bivens*. For noncitizens detained in such facilities, as well as in federally operated ones, the availability of state tort claims and the restrictive interpretation

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[183] Bivens, 403 U.S. at 388; *cf.* U.S. House of Representatives, *Federal Tort Claims Act*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/doing-business-with-the-house/leases/federal-tort-claims-act (last visited Feb. 16, 2025) (sovereign immunity under the FTCA).

[184] Bivens, 403 U.S. at 388.

[185] Carlson v. Green, 446 U.S. 14, 19–20 (1980) (recognizing a Bivens remedy under the Eighth Amendment where federal prison officials were alleged to have shown deliberate indifference to a prisoner's serious medical needs, resulting in his death).

[186] Davis v. Passman, 442 U.S. 228, 234–35, 244 (1979) (concluding the Plaintiff, who brought forth a gender discrimination claim against a Congressman, has a cause of action under the equal protection component of the Due Process Clause of the Fifth Amendment).

[187] Ziglar v. Abbasi, 582 U.S. 120, 136 (2017).

[188] N.A. Barnaby, *Pregnant and Detained: Constitutional Rights and Remedies for Pregnant Immigrant Detainees*, 111 J. CRIM. L. & CRIMINOLOGY 345, 383–84 (2021), (arguing that pregnant detainees seeking relief under *Bivens* would face substantial barriers due to the new context test, which requires courts to reject extensions of *Bivens* unless closely aligned with previously recognized constitutional claims and fact patterns).

[189] Minneci v. Pollard, 565 U.S. 118, 120 (2012).

of *Bivens* severely limit their ability to seek damages for constitutional violations.

In addition to the extraordinarily high constitutional burden set by the Supreme Court, with few available causes of action, even in extraordinary cases with extraordinary allegations, other jurisdictional doctrines can stand in the way of judicial relief. For example, in *Oldaker v. Giles*, sixteen women impacted by the Irwin allegations previously discussed, filed a class action complaint against a hospital, physician, detention center officials, and federal immigration authorities, alleging that while detained by ICE they were subjected to medical abuse, including unnecessary gynecological procedures performed without their consent, causing "significant pain" and rendering some of the plaintiffs infertile.[190] Plaintiffs endured unnecessary transvaginal ultrasounds, speculums inserted without lubrication, and gynecological surgeries performed without consent and for no medical reason.[191] One woman alleged that her uterus was "cut or burned."[192] And yet, their claims failed as to the federal defendants in the case because the women were no longer in custody.[193] The Court thus found that neither a declaration nor an injunction would provide meaningful relief.[194]

Likewise, there are significant difficulties presented by claims under the Administrative Procedures Act ("APA") and habeas statutes. Many courts decline to hear conditions of confinement claims brought via habeas petition because of the availability of other avenues for civil rights relief.[195] Challenging conditions of confinement through an APA claim can also be difficult. Only final, official agency action is subject to review under the APA.[196] These requirements present a challenge in conditions cases, which often arise from a lack of consistent or enforceable standards as opposed to final agency policy.[197]

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[190] Oldaker v. Giles, 724 F. Supp. 3d 1315, 1327 (M.D. Ga. 2024).
[191] *Id.* at 1327-29.
[192] *Id.* at 1329.
[193] *Id.* at 1337.
[194] *Id.*
[195] *See e.g.*, Nettles v. Grounds, 830 F.3d 922, 931-34 (9th Cir. 2016) (holding that unless a conditions-of-confinement claim lies at the core of a federal habeas corpus petition, it must be brought via a civil rights claim); Cardona v. Bledsoe, 681 F.3d 533, 537 (3d Cir. 2012) (holding plaintiff's claims challenging solitary confinement were not properly brought in a habeas petition because they would not necessarily result in a change to the duration or execution of his sentence).
[196] 5 U.S.C. § 704.
[197] 5 U.S.C. § 702; Bennet v. Spear, 520 U.S. 154, 177-78 (1997) (holding there was final agency action based on defined legal consequences that would have affected the parties in question).

The cumulative effect of these decisions is a near-complete foreclosure of the abilities of people in immigration detention to seek redress for ongoing violations of their constitutional rights.[198] There are few mechanisms by which a person in detention can use the courts to ensure healthcare access.[199]

B. Administrative Oversight and Regulation

Immigration detention facilities are contracted and overseen by federal administrative agencies and are thus subject to the regulation and oversight of those administrative bodies, as delegated by Congress.[200] The inability of ICE to police its own detention facilities, and ensure the adequacy of medical care, is well documented. In 2018, DHS's own Office of the Inspector General issued a report entitled "ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements."[201] It found that,

> ICE uses two inspection types to examine detention conditions in more than 200 detention facilities. ICE contracts with a private company and also relies on its Office of Detention Oversight for inspections. ICE also uses an onsite monitoring program. Yet, neither the inspections nor the onsite monitoring ensure consistent compliance with detention standards, nor do they promote comprehensive deficiency corrections. Specifically, the scope of ICE's contracted inspections is too broad; ICE's guidance on procedures is unclear; and the contractor's inspection practices are not consistently thorough. As a result, the inspections do not fully examine actual conditions or identify all deficiencies. In contrast, ICE's Office of

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[198] Barnaby, *supra* note 188, at 536-37.

[199] State legislation and state courts similarly fail to provide healthcare access. Oversight of the immigration system is specifically delegated to the federal government, and generally, the Supremacy Clause mandates that "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." Kurns v. A.W. Chesterton Inc., 620 F.3d 392, 395 (3d Cir. 2010) (quoting Free v. Bland, 369 U.S. 663, 666 (1962)). Therefore, state legislative changes to regulate federal immigration facilities largely fail because of the Supremacy Clause and intergovernmental immunity doctrine; *See*, *e.g.*, Geo Group, Inc. v. Newsom, 50 F.4th 745, 751 (9th Cir. 2022); McHenry County v. Raoul, 44 F.4th 581, 92-93 (7th Cir. 2022); United States v. California, 921 F.3d 865, 882-83 (9th Cir. 2019); Geo Group, Inc. v. Inslee, 720 F. Supp. 3d 1029, 1052-54 (W.D. Wa. Mar. 2024); CoreCivic, Inc. v. Murphy, 690 F. Supp. 3d 467 (D.N.J. 2023).

[200] David S. Rubenstein & Pratheepan Gulsekram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. 224, 225-27 (2019).

[201] Off. of the Inspector Gen., *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, DEP'T OF HOMELAND SEC. (June 26, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf.

> Detention Oversight uses effective practices to thoroughly inspect facilities and identify deficiencies, but these inspections are too infrequent to ensure the facilities implement all deficiency corrections. Moreover, ICE does not adequately follow up on identified deficiencies or consistently hold facilities accountable for correcting them, which further diminishes the usefulness of inspections. Although ICE's inspections, follow-up processes, and onsite monitoring of facilities help correct some deficiencies, they do not ensure adequate oversight or systemic improvements in detention conditions, with some deficiencies remaining unaddressed for years.[202]

ICE concurred with the conclusions of this report.[203]

Congress imbued DHS with oversight responsibilities.[204] From its inception, DHS was tasked by Congress to "ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland,"[205] and to that end, required that the President appoint "[a]n Officer for Civil Rights and Civil Liberties,"[206] reporting directly to the Secretary of DHS.[207] Congress went so far as to specify the role of the Officer, which includes, *inter alia*, "review[ing] and assess[ing] information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by employees and officials of the Department"; "assist[ing] . . . [with] develop[ing], implement[ing], and periodically review[ing] Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities"; "oversee[ing] compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department"; and "investigat[ing] complaints and information indicating possible abuses of civil rights or civil liberties."[208] This work is led by the Officer, and supported by CRCL.[209]

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[202] *Id.*
[203] *Id.*
[204] *See* 6 U.S.C. § 111(b) (outlining DHS' mission, including ensuring security while preserving civil liberties).
[205] *Id.*
[206] 6 U.S.C. § 113(d)(3).
[207] 6 U.S.C. § 345(a).
[208] *Id.*
[209] HOMELAND SEC., *Office for Civil Rights and Civil Liberties*, https://www.dhs.gov/office-civil-rights-and-civil-liberties (last updated Jan. 28, 2025).

What Congress did *not* do, however, was imbue the Civil Rights and Civil Liberties Officer, and the CRCL, with any enforcement power, allowing them to make binding recommendations on the Department. While they can advise, they cannot direct change.

The Office of the Immigration Detention Ombudsman ("OIDO") was established by Congress as part of the Department of Homeland Security, through the Consolidated Appropriations Act.[210] Its creation was driven by growing concerns about the lack of independent oversight of immigration detention facilities and the systemic issues affecting individuals detained by Immigration and Customs Enforcement and Customs and Border Protection.[211] OIDO's primary mandate includes investigating complaints of abuse, medical neglect, and mistreatment in detention facilities; monitoring compliance with federal laws, policies, and detention standards; and recommending improvements to detention practices.[212] Congress envisioned OIDO as a critical mechanism for addressing the systemic failures that have plagued immigration detention for years, providing a means for detainees, their families, advocates, and even ICE officials to raise concerns and seek resolution.[213]

Despite its broad investigative and oversight responsibilities, OIDO's effectiveness is hampered by its lack of enforcement authority. As is the case with the DHS Office for Civil Rights and Civil Liberties, OIDO's role is advisory, with no power to compel ICE or CBP to implement its findings or recommendations.[214] While it may conduct investigations, issue reports, and propose systemic changes, ultimate authority rests with ICE and DHS leadership, leaving OIDO's impact contingent upon the receptiveness and responsiveness of these agencies.[215] This limitation,

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[210] Department of Homeland Security Appropriations Act, Pub. L. No. 116-93, 133 Stat. 2504 (2020).

[211] Hamed Aleaziz, *The Ex-Leader of an Anti-Immigration Group is Creating the Office in Charge of Fielding Civil Rights Complaints from Detainees,* BUZZFEED NEWS (Jan. 30, 2020, 12:45 PM), https://www.buzzfeednews.com/article/hamedaleaziz/immigration-hardliner-detention-ombudsman.

[212] 6 U.S.C. § 205(b) (2020) (outlining the responsibilities of the Office of the Immigration Detention Ombudsman, including investigating complaints and recommending improvements to detention practices); *See also* U.S. DEP'T OF HOMELAND SEC., OFF. OF THE IMMGR. DET. OMBUDSMAN, *Annual Report to Congress* 1–2 (2021), https://www.dhs.gov/sites/default/files/2022-07/OIDO_2021AnnualReport_5-10-22_508compliant%20%283%29_0.pdf.

[213] H.R. Rep. No. 116–180, at 18–19 (2019) (describing the intent behind establishing the Office of the Immigration Detention Ombudsman to provide independent oversight of immigration detention and address systemic issues).

[214] *See* 6 U.S.C. § 205(b).

[215] *See* 6 U.S.C. § 205(d).

combined with resource constraints, raises questions about whether OIDO can fulfill its oversight mandate in a meaningful way.

Notwithstanding Congressional mandates, in March of 2025, President Trump's administration "dismantle[ed] the office that investigations civil rights violation in immigration enforcement and other departmental work," including the Office of Civil Rights and Civil Liberties and the Office of the Immigration Detention Ombudsman, "which looks specifically at detention conditions."[216]

Additionally, over time, ICE has adopted and revised a series of detention standards to govern the provision of medical care to the people they detain.[217] When the agency was first formed, in September 2000, ICE adopted a set of National Detention Standards to govern conditions of confinement.[218] Those standards were reviewed in 2008, when ICE "undertook a revision of the National Detention Standards to more clearly delineate the results or outcomes to be accomplished by adherence to their requirements," and adopted the Performance-Based National Detention Standards ("PBNDS").[219] Those standards were revised again in 2011, to "improve medical and mental health services, increase access to legal services and religious opportunities, improve communication with detainees with limited English proficiency, improve the process for reporting and responding to complaints, and increase recreation and visitation."[220] The 2011 PBNDS, revised in 2016, is the operative set of rules governing the vast majority of people in detention. Also, in 2019, ICE issued updated National Detention Standards for Non-Dedicated Facilities to apply to a much smaller subset of people in detention—the about 45 facilities currently operating under the NDS, approximately 35 United States Marshals Service ("USMS") facilities used by ICE and which ICE inspects, and approximately 60 facilities (both IGSA and

[216] Ellen M. Gilber, *Trump Aides Shutter Homeland Security Civil Rights Office*, BLOOMBERG NEWS, https://news.bgov.com/bloomberg-government-news/civil-rights-advocates-brace-for-cuts-in-homeland-security-unit (last updated Mar. 21, 2025); *See also* Rebecca Beitsch, *Trump Topples Civil Rights Offices at DHS*, THE HILL (Mar. 21, 2025), https://thehill.com/homenews/administration/5208342-dhs-eliminates-civil-rights-office/ (describing dismantling of CRCL, and the ombuds offices).

[217] Gilber, *supra* note 216.

[218] *2000 National Detention Standards for Non-Dedicated Facilities*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management/2000 (last updated Feb. 18, 2022).

[219] *2008 Operations Manual ICE Performance-Based National Detention Standards*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management/2008 (last updated Dec. 11, 2024).

[220] *2011 Operations Manual ICE Performance-Based National Detention Standards*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management/2011 (last updated Feb. 18, 2022).

USMS) which do not reach the threshold for ICE annual inspections because they have an Average Daily Population of less than 10.[221]

The National Detention Standards and PBNDS lack enforceability due to their nature as internal agency guidelines rather than formal regulations. While these standards delineate operational expectations for detention facilities, they do not carry the binding force of law. Their status as non-regulatory frameworks preclude detainees from invoking them as a basis for legal claims, as courts have consistently held that such internal policies do not create enforceable rights unless explicitly authorized by statute.[222] This lack of enforceability underscores the precarious position of detainees, who are left without legal recourse to challenge substandard conditions or systemic failures.

Because ICE detention standards are inherently advisory, serving to guide agency operations rather than establishing legally cognizable enforceable rights for detainees, individuals lack a private right of action to challenge violations of these standards. The absence of such a right is compounded by the judiciary's deference to agency discretion, particularly in the realm of immigration enforcement.[223] Courts have underscored the executive branch's latitude in implementing internal policies.[224] As a result, efforts to compel ICE's adherence to these standards are often dismissed on the basis that they are aspirational, not obligatory.[225]

The applicability of the *Accardi* doctrine, a subset of APA claims which requires agencies to follow their own rules when they implicate individual rights, provides no recourse in this context.[226] The doctrine, as articulated in *United States ex rel. Accardi v. Shaughnessy*,[227] applies only to rules or regulations with the force of law. Because the NDS and PBNDS lack regulatory status, they are viewed as insufficient to trigger the protections afforded by *Accardi*. Furthermore, for the doctrine to apply, a deviation from agency policy must directly affect an individual's legal rights.[228]

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[221] *2019 National Detention Standards for Non-Dedicated Facilities*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management/2019 (last updated Feb. 18, 2022).
[222] *See e.g.*, Doe v. Kelly, 878 F.3d 710, 717 (9th Cir. 2017).
[223] *See, e.g.*, Torres v. U.S. Dep't of Homeland Sec., 2018 WL 1757668, at *8 (S.D. Ca. Apr. 12, 2018) ("Judicial deference to the Executive Branch is especially appropriate in the immigration context" (citing I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999))); Szentkiralyi v. Ahrendt, No. 17-CV-1889 (SDW), 2017 WL 34477739, at *3 (D.N.J. Aug. 14, 2017) (collecting cases in *Chevron* context).
[224] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).
[225] United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266–68 (1954).
[226] *Id.*
[227] *Id.*
[228] *See* Jefferson v. Harris, 285 F. Supp. 3d 173, 184–85 (D.D.C. 2018).

ICE's detention standards, however, are framed not as guarantees of individual rights but as *operational benchmarks* and not representative of final agency action, rendering *Accardi* inapplicable.[229] This interpretation is bolstered by judicial reluctance to intervene in matters involving immigration detention,[230] reflecting deference to the executive branch's discretion in enforcement and detention operations.

The absence of enforceability leaves people in detention with limited avenues for redress, particularly when they are confined to privately run detention facilities.[231] While constitutional claims under the Fourth or Fourteenth Amendments may provide a theoretical pathway, such claims face significant procedural hurdles, particularly under the constraints of the *Bivens* framework and the Federal Tort Claims Act. Administrative oversight mechanisms, such as the DHS Office for Civil Rights and Civil Liberties and the Office of the Immigration Detention Ombudsman, offered investigatory and advisory functions, but these bodies lacked enforcement authority to compel compliance with the standards.[232]

IV. GYNECOLOGICAL AND OBSTETRIC CARE

A. Receipt of gynecological care is an aspect of human dignity required by international law

1. Definitions of Dignity & Introduction to Dignity Law

Human dignity affirms every individual's equal value and worth, transcending distinctions of gender, race, socioeconomic status, political affiliation, or other socially constructed categories.[233] This principle is

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[229] *See e.g.*, S.P.L.C. v. U.S. Dep't Homeland Sec., No. 18-0760 (CKK), 2023 WL 256411, at *6 (D.D.C. Mar. 15, 2023).
[230] *2019 National Detention Standards, supra* note 221.
[231] Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 INDIANA L.J. 145, 164–74 (2020).
[232] See *Oversight of Immigration Detention: An Overview of Key Entities and Their Authorities* 5, AM. IMMIGR. COUNCIL (Aug. 2022), https://www.americanimmigrationcouncil.org/research/oversight-immigration-detention-overview (explaining that "CRCL has significant limitations in its oversight abilities. Other than in cases of discrimination on account of disability, the office does not have enforcement authority for its recommendations"); Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 106, 133 Stat. 2317, 2503 (2019) (establishing the Office of the Immigration Detention Ombudsman within DHS to investigate complaints and provide oversight of immigration detention facilities, but without authority to compel agency compliance).
[233] ("In the system of nature, a human being is a being of slight importance and shares with the rest of the animals … an ordinary value … But a human being regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price; for as a person he is not to be valued merely as a means to the ends of others or even to his own ends, but as an

deeply embedded in many of the world's religious traditions, including Islam,[234] Christianity,[235] Judaism,[236] and Hinduism.[237] Secular philosophers have also characterized human dignity as an "absolute inner worth" that demands respect irrespective of utility or social standing.[238] In ancient Greece, dignity was closely tied to autonomy and self-governance. According to Greek thought, a truly human life required both personal and political self-rule, which they believed could only be achieved within the 'polis,' the autonomous, self-governing city-state composed of legally equal citizens. As Aristotle famously stated, "one who exists outside the polis is either a God or a beast."[239]

In the legal realm, dignity law has emerged as a framework for understanding how courts interpret and enforce the principle of dignity as a fundamental legal right.[240] Professors Erin Daly and James R. May

end in itself, that is, he possesses a dignity [an absolute inner worth] by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and can value himself on a footing of equality with them).

[234] The Quran declares: "We have bestowed dignity on the children of Adam … and conferred upon them special favors above the greater part of our creation." The Holy Quran, Surah Al-Isrā, 17:70. Quran Commentator, Shihab al-Din al-Alusi, instructed that "everyone and all members of the human race, including the pious and the sinner, are endowed with dignity, nobility and honor, which cannot be made exclusive to any particular group or class of people." *See* al-Alusī, Ruh al-ma 'ānī fī tafsīr al- Qur'ān al-'Aẓīm (Cairo: Dār al-Turāth, n.d.).

[235] Joseph Tham, *Human Dignity in Dignitas Personae: Philosophical and Theological Reflections*, 2 Studia Bioethica 12, 12-13 (2009), https://riviste.upra.org/index.php/bioethica/article/download/3478/2611. ("The theological foundations of human dignity are manifold. Similar to the above-mentioned philosophical tradition, the biblical notion that man is created in the image and likeness of God forms a theological basis of our dignity.")

[236] In Judaism, human dignity, or kavod ha-briyot (literally, "the honor of those that have been created"), is a fundamental principle that recognizes the intrinsic worth of every person as created in the image of God (b'tzelem Elokim). Genesis 1:26–27.

[237] For instance, the *Śrīmad-Bhāgavatam*, a revered Vedic text, delves into ideals of beauty, fame, and other virtues that inspire love and admiration. It underscores humanity's pursuit of higher values, fostering meaningful relationships and recognizing the divine in all beings, thus affirming the universal worth and dignity of every individual. In fact, the *Śrīmad-Bhāgavatam* equates dignity and deism: "The state assembly house is constructed according to the dignity of the particular state. In the heavenly planets, the state assembly house called Sudharmā was deserving of the dignity of the best of the demigods." Prabhupada, A.C.B.S, Bhaktivedanta Vedabase (The Book Bhaktivedanta Trust International, CA) (2023).

[238] *See e.g.*, IMMANUEL KANT, THE METAPHYSICS OF MORALS 434(Mary J. Gregor trans. & ed., Allen W. Wood gen. ed., Cambridge Univ. Press 1996) (explaining that a human being, regarded as a person, "possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world").

[239] ARISTOTLE, *Politics* Bk. I, Ch. 2, at 1253a, in 27 THE WORKS OF ARISTOTLE 8 (J.A. Smith & W.D. Ross eds., Benjamin Jowett trans., 1908).

[240] James R. May & Erin Daly, *Dignity Under Law: A Global Handbook for Civil Society*, DIGNITY RTS. INT'L 55 (2021).

describe dignity jurisprudence as a global movement redefining the relationship between individuals and the state.[241] They note that there is a strong overlapping consensus surrounding the meaning of human dignity as a legal right and a fundamental value of nations large and small,[242] underscoring its universality in contemporary legal systems.[243]

The recognition of human dignity finds its roots in international law, notably through the 1948 Universal Declaration of Human Rights ("UDHR").[244] The UDHR enshrines the principle of inherent dignity as the cornerstone of all human rights, declaring that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world."[245] It further asserts that "all human beings are born free and equal in dignity and rights."[246] The UDHR, consisting of 30 articles, establishes a universal framework, affirming that every individual is entitled to a life of dignity, irrespective of distinctions based on sex, race, color, national or social origin, religion, political opinion, or other statuses.[247]

Building on the UDHR, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") recognize that the inalienable rights of all human beings are derived from the inherent dignity of the human person.[248] These foundational documents anchor a spectrum of rights fundamental to human existence, including the right to life, liberty, and

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[241] *Id*.
[242] *Id*. at 22.
[243] That principle applies broadly, but is inclusive of the right to healthcare access and, as argued by Professors Winkler and Roaf, the specific right to access menstrual hygiene products. *See* Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 CARDOZO J. L. & GENDER 1, 14–15 (2014). In fact, The Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in Europe found inadequate provisions for menstrual hygiene in detention facilities to likely amount to "degrading treatment." Council of Europe, Rep. to the Bulgarian Government on the Visit to Bulgaria Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 September 2006, ¶¶ 51, 85, Doc. CPT/Inf, (2008) 11 (Feb. 28, 2008), *available at* http://www.cpt.coe.int/documents/bgr/2008-11-inf-eng.pdf.
[244] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).
[245] *Id.* at pmbl.
[246] *Id*.
[247] *Id*. at Article 2.
[248] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, https://www.refworld.org/docid/3ae6b3aa0.html [hereinafter ICCPR] (last visited Dec. 1, 2024); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, https://www.refworld.org/legal/agreements/unga/1966/en/33423 [hereinafter ICESCR] (last visited Dec. 1, 2024).

security;[249] freedom from slavery and torture;[250] the right to work and education;[251] and the right to physical and mental health,[252] among others. Dignity is not merely a theoretical concept but the bedrock upon which these rights are constructed.

Domestically, dignity is preserved in more than 160 constitutions worldwide, often as a core value,[253] a standalone right,[254] or both.[255] Through judicial interpretation and application, dignity becomes a living principle, central to the protection of individual rights. In some jurisdictions, dignity is recognized as an independent substantive right, guiding legal protections and judicial reasoning.[256] The U.S. Constitution, in contrast to many constitutions worldwide,[257] omits explicit provisions for socioeconomic rights—those essential to living a dignified life, such as access to healthcare, education, housing, adequate food, and clean water.[258] It does not recognize positive rights or entitlements to government support, such as income guarantees, nor does it impose affirmative obligations on the state to ensure a dignified existence.[259] Consequently, the Constitution does not explicitly require the government to protect the dignity of all individuals or address the needs of marginalized and vulnerable populations, including those struggling with health issues, poverty, or in detention. Moreover, unlike many other constitutions,[260] it refrains from codifying principles such as democracy,

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[249] *See* ICCPR, *supra* note 248, at art.9.
[250] G.A. Res. 217A (III), art.4 (1948); ICCPR, *supra* note 248, at art.8.
[251] G.A. Res. 217A (III), art.23 (1948); ICESCR, *supra* note 248, at arts.6-8.
[252] ICESCR, *supra* note 248, at art. 12.
[253] CONSTITUCIÓN POLITICA DEL PERU [CONSTITUTION], Dec. 29, 1993, art. 1 (Peru) ("The defense of the human person and respect for his dignity are the supreme purpose of the society and the State.").
[254] GRUNDGESETZ [GG] [Basic Law] May 23, 1949, art. I, sec. I (Ger.) ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.").
[255] S*ee e.g.,* S. AFR. CONST., 1996, (sec. 7, "This Bill of Rights is a cornerstone of democracy in South Africa. It
enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.") (sec. 10 "Everyone has inherent dignity and the right to have their dignity respected and protected.").
[256] *Id*.
[257] *See, e.g*., CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 2014, art. 78: "The state guarantees citizens the right to decent, safe and healthy housing, in a way that preserves human dignity and achieves social justice."
[258] *Id*.
[259] *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (*citing* Harris v. MacRae, 448 U.S. 297 (1980)), *cert. denied*, 465 U.S. 1049 (1983), for the proposition that the Constitution is a "charter of negative liberties.").
[260] *See e.g*., S. Afr. Const., 1996, ch. 1, § 1 ("The Republic of South Africa is one, sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms."). *See also*, Grundgesetz [GG]

equality, or human dignity as foundational values, leaving their realization largely to judicial interpretation and legislative processes. For example, the executive branch has a history of shaping and implementing international human rights norms domestically, often through the use of executive orders.[261] A notable example is Executive Order 13107,[262] issued by President Bill Clinton on December 10, 1998, to commemorate the 50th anniversary of the Universal Declaration of Human Rights. The order, entitled "Implementation of Human Rights Treaties," established a framework for coordinating compliance with international human rights treaties to which the United States is a party, including the International Covenant on Civil and Political Rights, the Convention Against Torture ("CAT"),[263] and the Convention on the Elimination of All Forms of Racial Discrimination ("CERD").[264] Through this order, the executive branch thus sought to reaffirm the United States' commitment to the UDHR and other human rights treaties, inferring – though not explicitly stating – the foundational significance of dignity as a cornerstone of human rights.

Dignity, both as a core value and as a legal right, is particularly salient when addressing the rights of detainees, including their access to adequate physical and mental healthcare. Upholding the dignity of noncitizen detainees is not only a legal obligation but a moral imperative, ensuring that no individual is subjected to avoidable suffering or indignity regardless of their immigration status. International human rights instruments, including the UDHR and ICESCR, affirm the right to health and well-being, emphasizing access to healthcare as essential for preserving human dignity.[265]

The denial of access to preventive medical care in immigration detention carries profound consequences.[266] Many noncitizen detainees, who often enter detention with preexisting trauma or a history of neglect,

[Basic Law], art. 1(1) (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/index.html ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.").

[261] *See e.g.*, Exec. Order No. 13107, 3 C.F.R. 262 (1998), reprinted in 5 U.S.C. § 601 note (1998), https://www.govinfo.gov/link/cpd/executiveorder/13107 (last visited Feb. 16, 2025) This order aimed to ensure that federal agencies took necessary actions to comply with international human rights treaties to which the U.S. is a party.

[262] *Id.*

[263] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art. 16, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

[264] *International Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195.

[265] G.A. Res. 217A (III), *supra* note 250, at 7; ICESCR, *supra* note 248248, at art.12.

[266] M. von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC PSYCHIATRY (Dec. 6, 2018), at 2, https://bmcpsychiatry.biomedcentral.com/articles/10.1186/s12888-018-1945-y.

face exacerbation of their physical and mental health conditions due to inadequate healthcare.[267] This not only undermines their capacity to participate meaningfully in their legal proceedings but also erodes their agency and self-worth,[268] compounding violations of their dignity. This treatment may rise to the level of cruel, inhuman, or degrading treatment, which is prohibited under the United Nations Convention Against Torture.[269] The following section will explore the specific challenges faced in immigration detention and how these conditions can infringe upon dignity rights.

2. Living with Dignity: The Challenges of Immigration Detention

Living in a dignified manner inherently requires access to socio-economic rights such as housing, healthcare, education, and a healthy environment.[270] An individual in detention may lose their liberty, but they do not forfeit their humanity or their inherent and equal worth as a person. Upholding dignity in such circumstances demands that even those deprived of liberty retain access to the basic resources and conditions necessary for a life consistent with human decency.[271] Courts worldwide have recognized this principle, linking the material conditions of individuals' lives directly to the realization of their inherent dignity.[272]

A landmark example of judicial recognition of dignity can be found in the Indian Supreme Court's determination that the right to life "includes the right to live with human dignity and all that goes along with it."[273] In *Francis Coralie Mullin v. The Administrator*, the Supreme Court of India was among the first courts globally to explore the value of living with dignity by examining the material conditions under which individuals

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[267] *Id*.

[268] Alice Gerlach, *Women's Experiences of Indignity in Immigration Detention and Beyond*, 3 INCARCERATION 1, 12 (2022). ("Women's sense of self-worth and self-esteem had plummeted since detention, as ongoing involvement with the Home Office compounded the indignity of detention.")

[269] 1465 U.N.T.S. 85, *supra* note 263, at art.16.

[270] Erin Daly & James R. May, *A Dignity Rights Synopsis*, WIDENER UNIV. DEL. L. SCH. (2017), https://delawarelaw.widener.edu/files/resources/adignityrightssynopsisdalymay.pdf. *See also* Sentencia T-088/08, § 3.5.5, CORTE CONSTITUCIONAL [C.C.], 2008 (Colom.), https://www.corteconstitucional.gov.co (last visited Feb. 16, 2025) (holding that the Colombian state has an obligation to ensure the dignity and fundamental rights such as housing, employment, education and healthcare, among others of internally displaced persons).

[271] Nelson Mandela Rules, *supra* note 134, at rules 1, 13.

[272] CORTE CONSTITUCIONAL, *supra* note 270, at § 3.5.5.

[273] Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 1 SCC 608 (India) (referencing Munn v. Illinois, 94 U.S. 113, 142 (1876)).

live.[274] The petitioner, a British national detained at Central Jail Tihar, sought a writ of habeas corpus to challenge her detention.[275] She raised issues regarding her inability to contact her lawyer and family members, including her young daughter, whom she was permitted to meet only once a month.[276] The petitioner contested provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("COFEPOSA"), arguing that these restrictions violated Article 14 (equality before the law and equal protection of the laws) and Article 21 (protection of life and personal liberty) of the Indian Constitution due to their arbitrariness and unreasonableness.[277]

The Court held that the provisions of COFEPOSA restricting the petitioner's regular access to her attorney and family members were inconsistent with Articles 14 and 21 of the Indian Constitution.[278] The Court conducted a detailed analysis of the concept of life, emphasizing that the fundamental right to life is the most precious human right and must be interpreted expansively.[279] It determined that "life" extends beyond mere physical survival or animal existence, to encompass a broader scope of human experience.[280] Life includes: all "faculties" and limbs that enable individuals to enjoy life, and even partial deprivation—whether permanent, temporary, or ongoing—constitutes a violation of this right.[281] The right to life, the Supreme Court of India noted, includes the right to live with human dignity, encompassing access to the necessities of life.[282] This interpretation strengthened the constitutional guarantee of personal liberty and enhanced the dignity and worth of individuals.

The Court's expansive interpretation of the right to life, including its connection to human dignity, laid the foundation for understanding the essential elements that make life meaningful.[283] Building on this analysis,

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[274] *Id*.
[275] *Id.* at 520.
[276] *Id.*
[277] *Id.* at 522.
[278] *Id.*
[279] *Id*. at 528.
[280] *Id*.
[281] *Id*.; *see also* Kharak Singh v. State of Uttar Pradesh, 1963 AIR 1295 (India) (referencing *Munn*, 94 U.S. 113, 142 (1876)).
[282] Mullin, *supra* note 273, at 529.
[283] *Id*., at 529 B-F ("The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as

the fundamental necessities of life were defined not only as the means for physical survival but also as the resources and opportunities that allow individuals to express their humanity and individuality. These necessities encompass, but are not limited to, sufficient nutrition, appropriate clothing, shelter, and resources for literacy, self-expression in various forms, freedom of movement, and social interaction with others.[284] The entitlement to these essential aspects of life includes the ability to engage in activities that embody one's personal expression and human identity.[285] Conversely, any action that obstructs or diminishes access to these necessities or impairs one's ability to engage in such self-expression constitutes an infringement upon the right to life and human dignity.[286]

Indeed, the Israeli Supreme Court has stated "that the human dignity of a prisoner is like the dignity of every person. Imprisonment violates a prisoner's liberty, but it must not be allowed to violate his human dignity."[287] Immigration detention, by its very nature, creates conditions that are often at odds with human dignity.[288] Detainees are entirely dependent on the state for access to basic necessities such as food, shelter, medical care, and personal safety.[289] Reports from U.S. detention facilities

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constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Therefore, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruelty, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Article 14 and 21.")

[284] Daly & May, *supra* note 270241, at 39.

[285] *Id.* at 52.

[286] *Id*.

[287] PPA 4463/94 Golan v. Prisons Service, [1995–6] Isr. L. Rep. 1, 17 (Isr.), https://versa.cardozo.yu.edu/opinions/golan-v-prisons-service.

[288] ACLU OF N. CAL., RESISTANCE, RETALIATION, REPRESSION: TWO YEARS IN CALIFORNIA IMMIGRATION DETENTION (2024), https://www.aclunc.org/sites/default/files/Resistance%20Retaliation%20Repression%20-%20Two%20Years%20in%20California%20Immigration%20Detention.pdf (documenting multiple hunger and labor strikes by detainees protesting inhumane conditions and asserting their right to dignity within California immigration detention centers).

[289] *See e.g*., Peter Groenewegen et al., *The Health of Detainees and the Role of Primary Care: Position Paper of the European Forum for Primary Care*, PRIM. HEALTH CARE RES. & DEV. 2 (2022), https://doi.org/10.1017/S1463423622000184. ("Incarcerated people cannot choose their own doctor or health care provider and have to rely on the authorities to ensure their health.").

reveal systemic deficiencies that exacerbate these challenges.[290] For instance, investigations into U.S. Immigration and Customs Enforcement detention centers have documented overcrowded facilities, unsanitary living conditions, and inadequate medical care.[291] In some cases, detainees have died from preventable illnesses due to delays in receiving proper treatment, underscoring the life-threatening consequences of neglect within the detention system.[292]

The psychological impact of detention is equally significant.[293] Prolonged confinement, often in prison-like settings, isolates individuals from their families and communities, leading to mental health crises.[294] Women and other vulnerable groups, including children and asylum seekers, are particularly at risk, as detention conditions often fail to account for their specific needs.[295] Reports have highlighted the lack of

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[290] *See e.g.*, U.S. Dep't of Homeland Sec., Office of Inspector Gen., *Summary of Unannounced Inspections of ICE Facilities Conducted in Fiscal Years 2020–2023*, OIG-24-59 (Sept. 24, 2024), https://www.oig.dhs.gov/sites/default/files/assets/2024-09/OIG-24-59-Sep24.pdf (summarizing widespread noncompliance with ICE detention standards across multiple facilities, including deficiencies in medical care, safety, and oversight mechanisms.).

[291] *See generally* U.S. DEP'T OF HOMELAND SEC., OFF. OF INSPECTOR GEN., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (June 2019) (detailing poor conditions varying among four ICE detention facilities).

[292] Eunice H. Cho, *95 Percent of Deaths in ICE Detention Could Likely Have Been Prevented with Adequate Medical Care: Report*, AM. C.L. UNION (June 25, 2024), https://www.aclu.org/press-releases/95-percent-of-deaths-in-ice-detention-could-likely-have-been-prevented-with-adequate-medical-care-report.

[293] *See* STEPHEN SHAW**,** REVIEW INTO THE WELFARE IN DETENTION OF VULNERABLE PERSONS 52-56 (2016) (finding that detention has a negative impact on detainees' mental health and that even individuals with no previous history of mental illness often develop symptoms during prolonged confinement).

[294] *See* Michelle Peterie, *Deprivation, Frustration, and Trauma: Immigration Detention Centres as Prisons*, 37 REFUGEE SURV. Q. 279, 281–83 (2018) (describing how remote, prison-like immigration detention facilities sever detainees from familial and community ties, exacerbating psychological distress and contributing to mental health crises).

[295] EMILY BUTERA & KATHARINA OBSER, PRISON FOR SURVIVORS: THE DETENTION OF WOMEN SEEKING ASYLUM IN THE UNITED STATES 2-3 (Women's Refugee Comm'n, 2017) ("Medical care and mental health care was repeatedly reported to be insufficient or denied, including in cases of serious medical conditions and pregnancy, in which mothers and babies were endangered […] Conditions of detention are inappropriate and uncomfortable for women seeking protection. WRC identified serious concerns over privacy—including showers and toilets with little to no privacy, insufficient access to basic needs such as sanitary products, and humiliation and physical discomfort at having to wear used underwear […] 'I don't have money to buy pads. I would rather use that money to call my kids,' Iliana* told the visiting WRC team. Women asylum seekers may be forced to buy their own feminine hygiene products, and cannot get the type or quantity that they need. Others said they were forced to wear underwear and bras that were visibly soiled from prior use."); *see generally* Press Release, Harv. FXB Ctr. For Health & Hum. Rts., New Report Documents the Mental and Physical Harm Experienced by Children in Immigration Detention (Jan. 11,

adequate prenatal care for pregnant detainees and the re-traumatization of individuals who have fled persecution or violence, further compounding the indignities they face.[296] A recent report underscores ongoing issues related to inadequate prenatal care for pregnant detainees, noting deficiencies in timely medical assessments and access to necessary obstetric-gynecological services.[297] Pregnant detainees reported numerous instances of medical neglect, for example, inadequate care during and after miscarriage, lack of prenatal care, and lack of attention from staff during health emergencies, including while they were experiencing severe bleeding and pain.[298]

The structural design of immigration detention systems often reflects a punitive approach rather than one focused on administrative necessity.[299]

2024), https://fxb.harvard.edu/2024/01/11/press-release-new-report-documents-the-mental-and-physical-harm-experienced-by-children-in-immigration-detention (detailing the report evidencing "mental and physical harm relating to inadequate and inappropriate medical care experienced by children during prolonged detention, including key screenings and management of acute medical and mental health issues.").

[296] *See* U.S. IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED NAT'L DET. STANDARDS 2011, 322–26 (2017), https://www.ice.gov/doclib/detention-standards/2011/4-4.pdf (requiring that pregnant detainees in custody have access to pregnancy services including routine or specialized prenatal care, pregnancy testing, comprehensive counseling and assistance, postpartum follow up, lactation services and abortion services); *see also* News Release, Hum. Rts. Watch, Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention, 3 (Mar. 17, 2009) (detailing the stories of detained and recently detained immigrant women where their health concerns went unaddressed by facility medical staff, or were addressed only after considerable delays).

[297] *See generally Preventing Violations of Sexual and Reproductive Health Rights in Immigration Detention*, AM. PUB. HEALTH ASS'N (Oct. 26, 2021), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2022/01/07/preventing-violations-of-sexual-and-reproductive-health-rights-in-immigration-detention.

[298] *Id.*; *see also* BUTERA & OBSER, *supra* note 295, at 29, 33 ("Breaches of the right to adequate healthcare and detention standard violations identified by WRC include: […] Inadequate and denied care, as in the case of a Karen at Joe Corley, who had a high fever for 15 days and was only given ibuprofen despite repeated requests for medical attention, and Melinda at Eloy who suffered from ovarian cysts, was experiencing vaginal bleeding, and received only Tylenol for two months. At Laredo, WRC spoke to a woman who had a cyst and explained that she simply gets a sedative. At Eloy, Joe Corley, and Mesa Verde, women told us that the only consistent medical care is acetaminophen and the instruction to 'drink more water.' One woman summed up the effects of this denied care, saying, 'Our medicine is water and to cry.' […] In multiple detention centers across the United States, WRC has heard of at least three confirmed reports of the detention of pregnant women or women who suffered excruciating miscarriages as a result of mistreatment and medical neglect.").

[299] Mizue Aizeki et al., *Cruel by Design: Voices of Resistance from Immigration Detention* 4,10 (Immigrant Def. Project & Ctr. for Const. Rts. 2022), https://www.immigrantdefenseproject.org/wp-content/uploads/Cruel-By-Design-IDP-CCR-Feb-2022.pdf (explaining that historically detention has been used as part of a strategy of

This approach undermines the principle that immigration detention should be a last resort, used sparingly and only when less restrictive alternatives are unavailable. Instead, detainees frequently experience conditions akin to criminal incarceration, with limited access to legal counsel, restricted visitation rights, and minimal opportunities for recreation or access to medical care.[300] These systemic failures create an environment where the very dignity of detainees is compromised, challenging international standards of humane treatment.

The European Court of Human Rights in *Kudla v. Poland*[301] addressed parallel systemic issues by emphasizing that states have a positive obligation to ensure detention conditions are compatible with human dignity. This includes access to adequate healthcare, hygiene, and engaging meaningfully with the outside world.[302] Yet, the gap between these legal obligations and the lived realities of noncitizen detainees remains stark. In *Kudla v. Poland*, the applicant, who was detained pending trial, argued that his prolonged detention conditions violated his human dignity and the right to adequate medical treatment under Article 3 of the European Convention on Human Rights ("ECHR"), which prohibits torture and inhuman or degrading treatment or punishment.[303] The applicant suffered from severe mental health issues, and despite repeated requests for medical attention, the detention facility failed to provide adequate care.[304] Although the European Court of Human Rights found that the conditions of the applicant's detention did not violate Article 3,[305] the Court emphasized that states have a positive obligation to ensure that detainees are held in conditions compatible with respect for human dignity, including providing necessary medical care.[306] Specifically, the Court reasoned that,

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deterrence, one that aims to discourage migration and to limit people's ability and will to fight deportation).

[300] *Id*. at 12 (documenting how ICE detention conditions mirror punitive incarceration through limited legal access, denials of release requests, medical neglect, and routine use of solitary confinement, particularly affecting those with mental illness).

[301] Kudla v. Poland, App. No. 30210/96, 2000-XI Eur. Ct. H.R. 198, ¶¶ 92–94 (holding that inadequate detention conditions can violate Article 3 of the European Convention and that states have a positive obligation to ensure those conditions respect human dignity and do not cause inhuman or degrading treatment).

[302] Nelson Mandela Rules, *supra* note 134, at 5–6 (listing requirements for accommodations for prisoners).

[303] Kudla, *supra* note 301, at ¶¶ 91–94 (holding that the state's failure to ensure adequate medical care during pre-trial detention may breach Article 3 and affirming a positive obligation to uphold detainees' dignity).

[304] *Id.* at ¶¶ 32-33.

[305] *Id.* at ¶ 99.

[306] *Id*. at ¶ 94.

> […]State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.[307]

Judicial interpretations across jurisdictions reinforce the universal importance of dignity in the context of detention. For example, the South African Constitutional Court linked the principle of dignity to the broader protection of fundamental rights, holding that even those deprived of their liberty retain their inherent human worth.[308] Similarly, Canadian courts have ruled that detention conditions must respect detainees' dignities, particularly for vulnerable populations, such as asylum seekers and children.[309] These comparative examples demonstrate that dignity in detention is not only a legal obligation but also a reflection of a society's commitment to fundamental human rights.

Incarceration inherently compromises a person's dignity by restricting their ability to make independent choices and diminishing their autonomy in shaping their lives and fully expressing their individuality.[310] It disrupts the sense of belonging by isolating individuals from their communities and compelling interaction in constrained environments.[311] Nevertheless, these impacts on dignity can be alleviated through policies that actively

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[307] *Id*.

[308] S v. Makwanyane 1995 (3) SA 391 (CC) at ¶ 144 (S. Afr.) (Justice Chaskalson wrote that "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights, we are required to value these two rights above all others.").

[309] *See e.g*., Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, 400 (Can.) (holding among others that the detention provisions, combined with indefinite detention without trial, were inconsistent with the principles of fundamental justice).

[310] *See* ACLU of N. Cal., *supra* note 288, at 14-16 (describing how detained immigrants were denied agency over basic aspects of their lives, subjected to dehumanizing conditions, and punished for asserting their dignity through peaceful strikes and complaints); *see also* Peter Groenewegen et al., *supra* note 289, at 2 (arguing that detention settings limit autonomy and control over daily life, contributing to psychological distress and undermining the dignity and personhood of detainees).

[311] Todd R. Clear & Dina R. Rose*, Incarceration, Reentry, and Social Capital: Social Networks in the Balance,* URB. INST. JUST. POL'Y CTR. (Jan. 30, 2002), https://www.urban.org/sites/default/files/publication/60671/410623-Incarceration-Reentry-and-Social-Capital.PDF (explaining that incarceration removes individuals from their communities, interrupts social relationships, and forces them into environments where interaction is highly constrained by institutional rules — significantly weakening the social capital they can access during and after release).

promote and uphold respect for human dignity.[312] Detention centers have the potential to safeguard against additional violations of dignity, such as threats to bodily integrity, by ensuring individuals maintain control over their bodies and are protected from harm.[313] Furthermore, detention centers can uphold dignity by providing conditions that reflect human decency, including standards of cleanliness, privacy, and basic comfort, ensuring that those in custody are treated with respect and humanity.[314]

The Grand Chamber of the European Court of Human Rights embodied this sentiment by declaring that the very essence of the Court is to recognize and safeguard human dignity.[315] As it pertains to prisoners sentenced to or serving life sentences, the advancement of human dignity implies a genuine possibility of one's release.[316] The European Prison Rules further underscore this principle by emphasizing the need for prison regimes to enable individuals in confinement to aspire to lead a responsible life.[317] This perspective aligns with the concept of therapeutic jurisprudence,[318] as articulated by Ochoa, Pleasants, Penn, and Stone, which stresses that the law should promote mental and physical well-being—suggesting that severely mentally ill individuals should not be detained at all.[319]

While international human rights law emphasizes dignity as a fundamental value, the U.S. legal framework addresses similar principles through constitutional safeguards. The Eighth Amendment's prohibition of cruel and unusual punishment[320] and the Fifth Amendment's guarantee of substantive due process[321] reflect this commitment. In *Brown v. Plata*, for instance, the Supreme Court acknowledged that humane treatment is fundamental to preserving dignity, even in the context of incarceration,

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312 *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System*, MIGRATION & REFUGEE SERV./U.S. CONF. CATH. BISHOPS & CTR. FOR MIGRATION STUD., at 29 (2015), https://www.usccb.org/resources/unlocking-human-dignity-report.

313 Dignity for Detained Immigrants Act of 2017, H.R. 3923, 115th Cong. (2017).

314 *Id*.

315 Bouyid v. Belgium, App. No. 23380/90, Eur. Ct. H.R., ¶ 89 (Sept. 28, 2015) (sitting as a Grand Chamber), http://hudoc.echr.coe.int/eng?i=001-157670.

316 Dirk van Zyl Smit et al., *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done*, 14 HUM. RTS. L. REV. 59, 59 (2014).

317 EUROPEAN PRISON RULES, COUNCIL OF EUR. PUBL'G, 13 (2006), https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae (last visited Mar. 21, 2025).

318 *Id.* at 34 (adopting the Committee of Ministers on 11 January 2006 at the 2nd meeting of the Ministers' Deputies).

319 Kristen C. Ochoa et al., *Disparities in Justice and Care: Persons with Severe Mental Illnesses in the U.S. Immigration Detention System*, 38 J. AM. ACAD. PSYCHIATRY L. 392, 396 (2010).

320 U.S. CONST. amend. VIII.

321 U.S. CONST. amend. V.

ruling that overcrowding in California prisons violated the Eighth Amendment by depriving inmates of adequate medical and mental health care.[322] Justice Kennedy, delivering the majority opinion, emphasized that: "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in a civilized society."[323]

The lessons from *Plata* and its recognition of dignity as a cornerstone of humane treatment resonate deeply in the context of immigration detention. While immigration law is often viewed as distinct from the criminal justice system, the realities of detention blur these lines, exposing noncitizens to punitive conditions that undermine their inherent human worth.[324] Comparative legal frameworks, from the European Court of Human Rights to the Indian and South African Supreme Courts, reinforce the universal principle that deprivation of liberty must not entail the denial of dignity.[325] These interpretations challenge detention systems to prioritize humane treatment and to align operational practices with broader constitutional and human rights obligations.

The current state of immigration detention in the United States contrasts with these legal and moral imperatives. Reports of systemic neglect—whether through inadequate medical care, unsanitary conditions, or prolonged isolation—illustrate a pattern of treatment that not only violates international standards but also falls short of constitutional guarantees.[326] Ultimately, the recognition and protection of dignity within detention settings serve as a litmus test for the broader values of society. Upholding this principle demands more than rhetorical acknowledgment; it requires actionable reform that ensures access to necessities, safeguards against inhumane conditions, and provides opportunities for meaningful engagement and rehabilitation. We attempt to proffer solutions and remedies to these chronic issues in the second part of the Article.

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[322] Brown v. Plata, 563 U.S. 493, 545 (2011).
[323] *Id*. at 510.
[324] Rudy Perez & John M. Eason, *ICE Says Immigrant Detention is "Non-Punitive." The Evidence Tells a Different Story*, URBAN WIRE (June 10, 2024), https://www.urban.org/urban-wire/ice-says-immigrant-detention-non-punitive-evidence-tells-different-story.
[325] *See, e.g.,* Bouyid v. Belgium, *supra* note 315, at 81-83; Mullin, *supra* note 273, at 608; S v. Makwanyane, *supra* note 308, at 391.
[326] ACLU of N. Cal., *supra* note 288, at 2-4, 10-12 (documenting widespread grievances involving medical neglect, hazardous conditions, retaliatory solitary confinement, and substandard treatment that violate both domestic constitutional norms and international human rights standards).

B. Medical authorities have developed clear guidelines for what types of preventative and routine gynecological care is required

Medical authorities have developed clear guidelines for the forms of preventative and routine gynecological care that is required.[327] The Health Resources and Services Administration, an agency of the U.S. Department of Health and Human Services, convened a five-year study in March 2016 for a coalition of clinicians, academics, and consumer-focused health professionals to conduct a scientifically rigorous review and develop recommendations for women's preventative service guidelines.[328] The agency awarded the cooperative agreement to the American College of Obstetricians and Gynecologists which formed an expert panel called the Women's Preventive Services Initiative.[329] The guidelines included the following:[330]

- Breast cancer screening for average-risk women to begin between the ages of 40 and 50 and for mammography screening to continue at least annually.[331]

- Comprehensive lactation support services during the antenatal, perinatal, and postpartum periods.

- Screening for cervical cancer, including using cervical cytology (pap tests) exams every three years for certain women.[332]

- Contraception access.

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[327] HEALTH RES. & SERVS. ADMIN., WOMEN'S PREVENTIVE SERVICES GUIDELINES, (Jan. 2022) https://www.hrsa.gov/womens-guidelines-2016 (discussing the purposes of guiding health insurance coverage under Section 2713 of the Public Health Services Act).
[328] *Id*.
[329] *Id*.
[330] *Id.*; *see also* JOHNS HOPKINS MED., *Women's Preventive Care Timeline: Infographic*, https://www.hopkinsmedicine.org/health/wellness-and-prevention/womens-preventive-care-infographic.
[331] *See also* U.S. PREVENTATIVE SERVS. TASK FORCE, *Final Recommendation Statement Breast Cancer: Screening*, (Apr. 30, 2024) https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/breast-cancer-screening#bcei-recommendation-title-area.
[332] S*ee generally id.*; Jane J. Kim et al., *Screening for Cervical Cancer in Primary Care: A Decision Analysis for the US Preventive Services Task Force*, 320 J. AM. MED. ASS'N ,706, 706-14 (2018).

- Screening for gestational diabetes mellitus and for diabetes mellitus postpartum, at least every three years for a minimum of ten years after a pregnancy.

- Screening for Human Immunodeficiency Virus ("HIV") infection.

- Screening for interpersonal and domestic violence.

- Behavioral counseling for sexually transmitted infections ("STI").

- Annual screening for urinary incontinence.

From a medical perspective, there is largely consensus about what gynecological healthcare should be provided on a routine basis.[333]

C. Administrative guidelines also require the provision of gynecological care to people in immigration detention

ICE's own detention guidelines do require the provision of gynecological and obstetric care. PBNDS Guideline 4.4 introduced detention guidelines for women's medical care.[334] It tied the guidelines to the standards set by the National Commission on Correctional Health Care and includes, *inter alia*, the following:

- "Female detainees shall receive routine, age appropriate gynecological and obstetrical health care, consistent with recognized community guidelines for women's health services."[335]

- "As part of every detainee's intake health assessment, female detainees shall also receive age-appropriate assessments and preventive women's health services, as medically appropriate."[336]

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[333] *See, e.g.*, Committee Statement, *Health Care for Immigrants*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (2023), https://www.acog.org/clinical/clinical-guidance/committee-statement/articles/2023/01/health-care-for-immigrants (recognizing "accepted clinical guidelines" should be used when treating people detained in immigration custody settings).
[334] *2011 Operations Manual*, *supra* note 220, at 322.
[335] *Id.*
[336] *Id.*

- "A pregnant detainee in custody shall have access to pregnancy services including routine or specialized prenatal care, pregnancy testing, comprehensive counseling and assistance, postpartum follow up, lactation services and abortion services."[337]

- With respect to abortion access: "In the event continued detention is necessary and appropriate, and consistent with the practice of our federal partners, if the life of the mother would be endangered by carrying a fetus to term, or in the case of rape or incest, ICE will assume the costs associated with a female detainee's decision to terminate a pregnancy."[338]

- "At no time shall a pregnant detainee be restrained, absent truly extraordinary circumstances that render restraints absolutely necessary."[339]

- "The facility shall provide communication assistance to detainees with disabilities and detainees who are limited in their English proficiency (LEP)."[340]

- "A pelvic and breast examination, pap test, baseline mammography and sexually transmitted disease (STD) testing shall be offered and provided as deemed appropriate or necessary by the medical provider."[341]

- "Preventative services specific to women shall be offered for routine age-appropriate screenings, to include breast examinations, pap smear, STD testing and mammograms. These services shall not interfere with detainee's deportation or release from custody date."[342]

The following guideline, PBNDS 4.5, further describes that "Female detainees shall be issued and may retain sufficient feminine hygiene items, including sanitary pads or tampons, for use during the menstrual cycle, and may be permitted unbreakable brushes with soft, synthetic bristles to replace combs."[343]

ICE explains those obligations to the people they detain in the National Detainee Handbook as follows:

[337] *Id.*
[338] *Id.* at 325.
[339] *Id.* at 322.
[340] *Id.* at 322.
[341] *Id.* at 324.
[342] *Id.*
[343] *Id.* at 329.

> Females will receive routine, age appropriate gynecological and obstetrical health care. You may request pregnancy testing, a breast examination, Pap test, sexually transmitted infection (STI) screening, mammograms, birth control advice, and consultation about family planning as medically appropriate. If you are confirmed to be pregnant or have recently given birth, you will be provided with access to prenatal and specialized care.[344]

While not as comprehensive as the routine care recommended to people, and not as robust as this Article's authors would prefer, federal immigration authorities have done initial work to identify and define the healthcare that *should* be provided to the people in their custody.

V. INTERIM REMEDIES

In the absence of immigration detention abolition and large-scale restructuring of the entire immigration detention system, Congress and the Executive can take immediate action to ensure that the people their government detains has access to required healthcare.

A. Additional Public Reporting and Accountability

At the very least, Congressional and Executive oversight bodies can require ICE and CBP to collect and publish detailed data on how many people in their custody require gynecological and obstetric care; whether that care has been provided and by whom; and outcomes.[345]

Additionally, as recommended by Drs. Dekker, Farah, and Parmar, oversight entities can mandate medical reviews for outcomes other than death and require facilities to correct deficiencies identified by oversight bodies.[346]

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[344] U.S. IMMIGR. & CUSTOMS ENF'T, *Enforcement and Removal Operations, National Detainee Handbook*, 28 (2024) https://www.ice.gov/doclib/detention/ndHandbook/ndhEnglish.pdf

[345] *See* Katherine R. Peeler, Invited Commentary, *Research in US Immigration Detention—Transparency Through Policy*, J. AM. MED. ASS'N (Nov. 29, 2023), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2812365 ("Many researchers working in immigrant health know the long and often unfruitful process of submitting Freedom of Information Act requests in attempts to obtain more complete data about the health of individuals detained by ICE. By strategically placing immigration detention centers in remote areas and continually minimizing transparency about health protocols and detained persons' health, ICE successfully keeps the state of this population's health out of sight and thus out of the mind of the greater medical community and the US public.").

[346] Annette M. Dekker et al., *Emergency Medical Responses at U.S. Immigration and Customs Enforcement Detention Centers in California*, J. AM. MED. ASS'N (Nov. 29, 2023), at 9-10,

B. Alteration of NDS and PBNDS

The National Detention Standards and Performance-Based National Detention Standards serve as the regulatory backbone for U.S. Immigration and Customs Enforcement (ICE) detention operations.[347] However, these standards, while outlining baseline expectations for the treatment of detainees, fall critically short of ensuring enforceability, leaving detainees vulnerable to systemic neglect. Addressing these deficiencies requires a fundamental reimagining of the standards, transforming them into binding, enforceable frameworks that reflect contemporary legal and ethical principles, particularly for access to medical care and oversight mechanisms.

Central to this reformation is the integration of mandatory preventive healthcare as a cornerstone of the detention standards. The current iteration of the NDS and PBNDS provides limited guidance on the proactive identification and treatment of medical conditions. Future iterations must explicitly mandate access to annual physical examinations, age-appropriate screenings, and specialized care, including but not limited to gynecological services, mental health evaluations, and prenatal care. Such provisions are not merely aspirational; they are essential to ensuring detainees receive care equivalent to that provided to the general population, in alignment with international standards, such as those articulated in the Nelson Mandela Rules and Bangkok Rules.[348]

A significant failing of the current standards is the lack of robust accountability mechanisms. The NDS and PBNDS, as internal agency guidelines, are non-binding and lack the requisite enforcement teeth to compel compliance. Detention centers often operate with minimal oversight, and violations of these standards rarely result in meaningful consequences. A restructured framework must impose mandatory reporting requirements, requiring facilities to submit detailed data on healthcare outcomes, staff compliance, and grievance resolutions. These reports should be subject to independent review by a federally appointed oversight body with the authority to conduct unannounced inspections and impose penalties, including financial sanctions and contract termination for noncompliance.[349]

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https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2812358?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=112923.

[347] 8 USC §1226.

[348] Nelson Mandela Rules, *supra* note 134, at rules 1, 13; The Bangkok Rules, *supra* note 118.

[349] Annette M. Dekker et al., *A Call for Increased Transparency and Accountability of Health Care Outcomes in U.S. Immigration and Customs Enforcement Detention Centers*,

Furthermore, the standards must address the unique needs of vulnerable populations in detention, including pregnant individuals, children, and those with chronic illnesses or disabilities. Enhanced provisions should mandate access to prenatal and postpartum care, pediatric medical services, and tailored accommodations for elderly or chronically ill detainees. These requirements must be supplemented by mandatory staff training programs, ensuring detention personnel are equipped to identify and respond to the diverse healthcare needs of detainees in a manner consistent with trauma-informed and culturally competent practices.

The grievance process also warrants significant reform. Under the current standards,[350] detainees face insurmountable barriers when attempting to file complaints or seek redress for substandard care. The revised framework should establish an independent grievance mechanism, free from the influence of detention facility management, to ensure impartial review and resolution of complaints. Protections against retaliation must also be codified to encourage detainees to report abuses without fear of retribution.

The integration of these enhanced standards into binding federal regulations under the Administrative Procedure Act ("APA") can help overcome the enforceability concerns outlined in this article. The current advisory nature of the NDS and PBNDS undermines their efficacy, as courts have consistently held that non-regulatory guidelines do not create enforceable rights.[351] Codifying these standards into enforceable regulations, the federal government can ensure uniform compliance across all detention facilities, both public and privately operated. Moreover, contract renewals with private detention centers should be contingent upon adherence to these revised standards, with periodic audits conducted by third-party entities to verify compliance.

C. Incorporation into contracts, particularly of former male-only facilities

The voluntary and non-binding nature of the NDS and PBNDS has significantly undermined their effectiveness, particularly in facilities originally designed for male-only populations but subsequently modified

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36 LANCET REG'L HEALTH AM. 100825, 100825 (2024), https://doi.org/10.1016/j.lana.2024.100825.

[350] *2011 Operations Manual*, *supra* note 220; 2019 *National Detention Standards*, *supra* note 221.

[351] *See, e.g.,* U.S. v. Roman, 931 F. Supp. 960, 964 (D.R.I. 1996) (collecting cases for proposition that "[t]he internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party" (quotation marks and citations omitted)).

to accommodate female detainees.[352] This transition has exposed critical gaps in the provision of gender-specific healthcare, access to essential resources, and protections against abuse or neglect, thereby violating basic principles of dignity and equity enshrined in both domestic and international norms.

A meaningful solution to this pervasive issue lies in the mandatory incorporation of NDS and PBNDS provisions into detention facility contracts, with specific emphasis on ensuring that former male-only facilities adhere to updated requirements reflecting the needs of female detainees, and with provisions that allow the people detained in facilities to enforce the contracts vis a vis detention standards.[353] The contractual incorporation of these standards would effectively transform them from aspirational guidelines into enforceable obligations, holding facilities accountable for compliance through legal remedies and sanctions. Such a shift is particularly urgent in facilities where operational deficiencies have historically gone unaddressed due to the limited enforceability of these standards as mere agency policies.[354]

For facilities that were originally designed to house male detainees, the failure to account for the unique needs of women, particularly in areas such as reproductive healthcare, prenatal services, and protections against gender-specific forms of violence, highlights a systemic inadequacy. These deficiencies are exacerbated by the lack of tailored policies addressing gender disparities and the operational inertia stemming from outdated facility designs

Furthermore, contractual obligations should include specific provisions requiring facilities to undergo independent audits to verify compliance with the PBNDS. These audits should assess the adequacy of resources,

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[352] A number of immigration detention facilities have been modified from male-only facilities to ones where women are detained. *See*, *e.g.*, CRCL Complaint, *supra* note 53, at 48 (describing Moshannon as a "hastily converted former male-only prison facility that was neither designed nor modified to meet women's health care needs when ICE began to detain women there"); Lauren Villagran, *Immigrant Women Describe 'Hell on Earth" in ICE Detention*, USA TODAY, (Mar. 24, 2025), https://www.usatoday.com/story/news/nation/2025/03/23/immigrant-women-hell-on-earth-trump-ice-detention/82029368007/ (describing the detention of women at Krome, a male-only facility).

[353] ICE cannot be relied on to enforce its own contracts, as found by its own Inspector General. *See generally* U.S. DEP'T OF HOMELAND SEC., OFF. OF THE INSPECTOR GEN., ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS (Jan. 19, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf.

[354] *See, e.g.*, *Detention Oversight*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-oversight (last visited April 5, 2025) (explaining that detention oversight is ineffective and puts people's lives at risk).

including access to gynecological care, mental health services, and accommodations for pregnant detainees. Facilities that fail to meet these standards must face penalties, including potential termination of contracts, to incentivize compliance and prioritize the welfare of the people detained.

Incorporating these standards into contracts would also align with the evolving caselaw, which increasingly emphasizes the importance of dignity and humane treatment in detention contexts. Courts have recognized that conditions of confinement must be consistent with evolving standards of decency,[355] a principle that cannot be reconciled with the systemic neglect documented in many former male-only facilities. The legal enforceability of these standards would provide a critical mechanism for addressing these shortcomings, allowing detainees to seek redress for violations and compelling facilities to implement meaningful reforms.

D. Reinstating and then Strengthening the CRCL and OIDO process and enforcement

As previously described, this presidential administration has dismantled the civil rights and civil liberties oversight of ICE's detention system. Even with its weaknesses, no administrative oversight, at all, puts people detained at enormous risk of imminent harm. Congress must act to ensure that its legislative directions are enforced.

Kimberly Haven's advocacy for menstrual equity in Maryland is part of a growing national movement to address systemic inequities in prisons.[356] While progress has been made at the federal level and in a handful of states, enforcement remains inconsistent.[357] Expanding access to essential products requires not only legislation but also robust oversight to ensure compliance across all facilities. At present, only federal prisons, half of the States, and the District of Columbia ensure free access to sanitary products, leaving a substantial portion of the country without this critical support.[358] Providing adequate healthcare and essential sanitary products

[355] Rhodes v. Chapman, 452 U.S. 337, 346 (1981); *see also* Crawford v. Cuomo, 796 F.3d 252, 257 (2d Cir. 2015); Craig *v.* Eberly, 164 F.3d 490, 495 (10th Cir. 1998); Wells v. Franzen, 777 F.2d 1258, 1264 (7th Cir. 1985); Wright *v.* Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981); White v. Bergman, 770 F.2d 168 (6th Cir. 1985) (Table).
[356] Haven, *supra* note 60.
[357] *Id.*
[358] Tanesha Golding, *Supporting Rights of Incarcerated Women by Providing Free Period Products*, ROBERT F. KENNEDY HUM. RTS. (Apr. 8, 2024), https://rfkhumanrights.org/our-voices/supporting-rights-of-incarcerated-women-by-providing-free-period-products/; *see also State Laws Around Menstrual Projects in Prison*, THE PRISON FLOW PROJECT, https://theprisonflowproject.com/state-laws-around-access/ (last updated Mar. 29, 2025).

is not just a policy requirement but a crucial responsibility to safeguard human dignity.

Kimberly Haven's advocacy also highlights the need for robust oversight and accountability mechanisms to ensure compliance with these norms.[359] Enforcement must go beyond mere policy mandates; it requires independent oversight bodies with the authority to conduct investigations, issue *binding* directives, and hold facilities accountable for non-compliance. The establishment of a federal agency dedicated to the oversight of correctional facilities, modeled on the Office of the Immigration Detention Ombudsman, could provide the necessary infrastructure for monitoring and enforcement. Such an agency should have the power to conduct audits, investigate complaints, and mandate compliance with both domestic and international standards.

Furthermore, the lack of enforceability of existing detention standards, including the National Detention Standards and Performance-Based National Detention Standards, underscores the need for codified legal obligations. While these standards provide operational guidelines, they lack the force of law and cannot be directly enforced through litigation. Incorporating these standards into federal legislation and tying compliance to funding mechanisms would ensure uniformity and accountability across all facilities.

VI. RECOMMENDATION FOR A RESTRUCTURE OF THE SYSTEM TO INCLUDE THE ENFORCEMENT OF INTERNATIONAL NORMS

The systemic neglect of health needs of women detained by federal immigration authorities, ranging from inadequate access to menstrual products to insufficient prenatal care, underscores the broader failure of the U.S. correctional system to uphold human dignity and comply with international human rights norms. The absence of enforceable universal standards exacerbates systemic inequities and perpetuates conditions that fail to recognize the dignity and humanity of incarcerated female detainees.[360]

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[359] Haven, *supra* note 60.

[360] Ellmann, *supra* note 38, at 11 ("As outlined by the Office of the U.N. High Commissioner for Human Rights and the World Health Organization, the right to health includes, among other things, entitlements to prevention, treatment, and control of diseases; access to essential medicines; equal and timely access to basic health services; and maternal, child, and reproductive health. This report will demonstrate that the standards governing health care in immigration detention facilities are insufficient, inconsistent, and unevenly applied. Where standards do exist, they are regularly violated, amounting to egregious violations of the human right to health, particularly for women and other vulnerable groups.").

International norms, such as those outlined in the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)[361] and the United Nations Rules for the Treatment of Women Prisoners (Bangkok Rules),[362] offer a blueprint for ensuring humane and dignity-centered treatment of female detainees. These frameworks mandate access to adequate healthcare, including essential sanitation products,[363] reproductive healthcare and prenatal care,[364] and the need for appropriate screening upon entry.[365] Rule 5 of the Bangkok Rules explicitly requires the provision of sanitary products free of charge to women in custody, highlighting the importance of addressing gender-specific needs as a matter of dignity and equity.[366] However, despite these international norms, U.S. correctional facilities remain far from compliance, largely due to the lack of enforcement mechanisms at both the domestic and international levels.[367]

One effective mechanism for implementing and attempting to enforce international human rights standards within the domestic framework is the issuance of executive orders. Executive action provides a critical and immediate mechanism for addressing these deficiencies and incorporating dignity-centered practices within detention facilities.[368] The executive branch has historically played a role in shaping and implementing international human rights obligations domestically, as exemplified by Executive Order 13107.[369] The order created the Interagency Working Group on Human Rights Treaties, tasked with ensuring alignment between federal policies and the nation's treaty obligations.[370] This framework underscored the capacity of the executive branch to institutionalize international norms and promote systemic change in federal governance. Although the order did not confer enforceable rights or obligations directly upon individuals, it demonstrated the executive's ability to implement

[361] Nelson Mandela Rules, *supra* note 134, at 28 ("In women's prisons, there shall be special accommodation for all necessary prenatal and postnatal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the prison. If a child is born in prison, this fact shall not be mentioned in the birth certificate.").
[362] The Bangkok Rules, *supra* note 118.
[363] *Id.* at rule 5.
[364] *Id.* at rules 17,18.
[365] *Id.* at rule 6.
[366] *Id* at rule 5.
[367] Ellmann, *supra* note 38, at 23-25.
[368] Chevron U.S.A., Inc., *supra* note 224, at 844 (affirming the executive branch's authority to interpret and implement statutes where congressional intent is ambiguous, enabling timely policy responses).
[369] Exec. Order No. 13,107, *supra* note 261.
[370] *Id.*

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human rights principles through administrative and policy mechanisms, bypassing the often-protracted legislative process.[371]

Building on the precedent set by Executive Order 13107, a new executive order could address the pervasive lack of access to adequate healthcare and sanitation products in U.S. detention facilities. An order of this type could mandate the integration of international human rights standards, including the Nelson Mandela Rules and Bangkok Rules, into the operational policies of federal, state, and private detention facilities. It could require that all detention facilities provide essential medical services, including menstrual hygiene products, reproductive healthcare, and prenatal care, as a matter of dignity and equity. Moreover, the order could direct federal agencies, such as the Department of Justice and the Department of Homeland Security, to establish robust oversight mechanisms to ensure compliance with these standards.

The United States has thus an opportunity to take a significant step toward aligning its detention practices with international norms, addressing not only the immediate health and hygiene needs of detainees but also reinforcing human dignity as a guiding framework for correctional policies. However, implementing international standards must go beyond providing basic healthcare and sanitation; it necessitates a broader reimagining of detention practices that prioritize dignity and rehabilitation. Lessons from international models, particularly those that emphasize the reintegration of incarcerated individuals into society, offer insights for creating a system that not only meets physical needs but also fosters personal growth and respects the humanity of those in custody.[372] Detention centers and prisons that prioritize dignity are not just hypothetical—they exist in practice.[373] In recent years, some U.S. prison officials have turned to European models for guidance on implementing practices that respect individual dignity and focus on reintegrating individuals into society after incarceration.[374] A notable example is

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[371] *Id*.

[372] RUTH DELANEY ET. AL, REIMAGINING PRISON, VERA INST. OF JUST. (2018), https://www.vera.org/reimagining-prison-web-report/human-dignity-as-the-guiding-principle (last visited Feb. 16, 2025).

[373] *Id*.

[374] *European Prison Project*, PRISON LAW OFFICE, https://prisonlaw.com/european-prison-project (last visited Feb. 16, 2025). *See also*, Troy Aidan Sambajon, *Can U.S. Prisons Take a Page from Norway? Five Questions.*, CHRISTIAN SCI. MONITOR (Dec. 6, 2023, 3:26 PM. ET), https://www.csmonitor.com/USA/Justice/2023/1206/Can-US-prisons-take-a-page-from-Norway-Five-questions.

Germany's "normalization" model,[375] which aims to replicate life outside of prison as closely as possible. This approach emphasizes rehabilitation and the preservation of human dignity through various initiatives designed to support personal growth and successful reintegration.[376] Modern correctional systems increasingly prioritize rehabilitation over retribution or deterrence, aligning with the principles outlined in the International Covenant on Civil and Political Rights, which advocates for incarceration to serve the purposes of reformation and social reintegration.[377]

Addressing systemic neglect requires a fundamental rethinking of the purpose of detention and incarceration. The treatment of women in correctional spaces serves as a powerful reflection of societal values and priorities. Addressing systemic neglect—whether through providing adequate menstrual products, improving prenatal care, or adopting dignity-centered practices—requires a fundamental rethinking of the purpose of incarceration. By prioritizing health, dignity, and rehabilitation, correctional systems can not only meet their legal and ethical obligations but also create conditions that foster personal growth and successful reintegration into society. As one U.S. prison warden observed, "Their punishment is their incarceration. It's not our job as correctional professionals to punish somebody even more while they're incarcerated."[378] True justice lies not in perpetuating harm but in affirming the humanity and potential of every individual, even within the confines of a detention center or prison.

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[375] RAM SUBRAMANIAN & ALISON SHAMES, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES, VERA INST. OF JUST. (2013), https://www.vera.org/downloads/publications/european-american-prison-report-v3.pdf.
[376] *Id.*
[377] ICCPR, *supra* note 248, at Art.3.
[378] Bill Whitaker, *German-Style Program at a Connecticut Maximum Security Prison Emphasizes Rehab for Inmates*, CBS NEWS (Mar. 31, 2019, 7:18 PM EDT), https://www.cbsnews.com/news/german-style-true-program-at-cheshire-correctional-institution-emphasizes-rehab-for-inmates-60-minutes/.

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Beazley Institute for Health Law and Policy
Loyola University Chicago School of Law
25 East Pearson Street, Chicago, Illinois, 60611
Telephone: 312.915.7174 **Fax**: 312.915.6212
Email: health-law@luc.edu **On the web**: LUC.edu/healthlaw