

# SLAMMING THE COURTHOUSE DOORS

Denial of Access to Justice and Remedy in America

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## I. EXECUTIVE SUMMARY

Actions of the executive, federal legislative, and judicial branches of the United States have seriously restricted access to justice for victims of civil liberties and human rights violations, and have limited the availability of effective (or, in some cases, any) remedies for these violations. Weakened judicial oversight and recent attempts to limit access to justice by attacking plaintiffs' and defendants' standing, discovery rights and the courts' jurisdiction, are denying victims of human rights violations their day in court and protecting responsible officials and corporations from litigation.

Over the last decade, there has been a serious erosion in the ability of, among others, immigrants, prisoners, and detainees in the “war on terror” to use the writ of habeas corpus in U.S. courts to challenge the constitutionality of their ongoing detention, significantly circumscribing the availability of a most potentially significant remedy. For example, federal legislation, most prominently the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and Supreme Court decisions, have greatly limited access to federal review of state court death penalty convictions.

Indigent capital defendants are systematically denied access to justice, as they are often appointed attorneys who are overworked, underpaid, lacking critical resources, incompetent, or inexperienced in trying death penalty cases. Further, the lack of a right to counsel in post-conviction proceedings and procedural and substantive hurdles in raising a claim of ineffective assistance of counsel leave capital defendants with little recourse when they have been denied adequate legal representation or have endured other constitutional violations. Prisoners seeking a remedy for injuries inflicted by prison staff and others, or seeking the protection of the courts against dangerous or unhealthy conditions of confinement, also have been denied any remedy and have had their cases thrown out of court. The Prison Litigation Reform Act of 1995 (PLRA) created numerous burdens and restrictions on lawsuits brought by prisoners in the federal courts.

Victims of torture and “extraordinary rendition” have been denied their day in court. The Obama Administration has sought to extinguish lawsuits brought by torture survivors—denying them recognition as victims, compensation for their injuries, and even the opportunity to present their cases. The federal government has used judicially-created doctrines such as the so-called “state secrets” privilege and qualified immunity to dismiss civil suits alleging torture; cruel, inhuman, or degrading treatment; forced disappearance; and arbitrary detention, without consideration on the merits. For instance, by invoking the “state secrets” privilege, the Obama Administration can not only restrict discovery but can quash an entire lawsuit—without demonstrating the validity of their claim to a judge.

Immigrants also are systematically denied access to justice, as they face monumental obstacles to obtaining review of removal orders. The U.S. government has claimed that there is no right to judicial review of diplomatic assurances when it has sought to transfer individuals to countries known to employ torture. Federal immigration officials also have used a procedure known as

stipulated removal to deport non-U.S. citizens without a hearing before an immigration judge. Immigrants who sign stipulated orders of removal waive their rights to hearings and agree to have a removal order entered against them in order to avoid the prospect of prolonged immigration detention. By stipulating to removal, individuals who may have legitimate claims to remain in the United States unknowingly waive their opportunity to pursue these claims. There is a lack of meaningful safeguards to ensure people with mental disabilities facing possible deportation from the United States are afforded fair hearings. As a result, legal permanent residents and asylum seekers with a lawful basis for remaining in the United States may have been unfairly deported from the country because their mental disabilities made it impossible for them to effectively present their claims in court.

Recent U.S. Supreme Court cases have also sharply limited the ability of individuals to bring legal action for rights violations. Rights available to women victims of domestic violence have been curtailed, with the Court striking down a civil remedy under the Violence Against Women Act and finding no constitutional violation for police failure to enforce a mandatory judicial protective order. Courts also have barred women domestic workers from obtaining any remedy for abuses by their diplomat employers who claim diplomatic immunity from suit. For people of color, the Supreme Court has created often insurmountable procedural obstacles for victims of racial or ethnic discrimination seeking judicial relief under Title VI of the historic Civil Rights Act. The Supreme Court also has ruled that claims of racial or national origin discrimination must be accompanied by proof of intentional discrimination; showing disparate impact, however egregious, is insufficient. Concerning undocumented migrant worker's rights, courts have severely circumscribed available remedies including back pay, state tort remedies and workers' compensation, and have also made immigration status relevant in such litigation.

The ACLU calls on the Obama Administration and Congress to take measures to ensure all victims of human rights and civil rights violations in the United States are afforded meaningful access to justice and effective remedy. A list of recommendations follows at the conclusion of this report, outlining concrete measures needed to guarantee access to justice and remedy for capital defendants, prisoners seeking protection of their rights in federal courts, victims of torture, women victims of domestic violence or abuse, immigrants facing deportation, people of color seeking judicial relief from instances of racial or ethnic discrimination, and undocumented workers seeking remedy for employment rights violations.

### a. About the ACLU

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States.<sup>1</sup> The ACLU is the largest civil liberties organization in the country, with affiliate offices in 50 states and over 500,000 members. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America’s entry into World War I, including the persecution of political dissidents and the denial of due process rights for non-citizens. In the intervening decades, the ACLU has advocated to hold the U.S. government accountable to the rights protected under the U.S. Constitution and other civil and human rights laws. In 2004, the ACLU created a Human Rights Program dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution. The ACLU Human Rights Program incorporates international human rights strategies into ACLU advocacy on issues relating to racial justice, national security, immigrants’ rights, and women’s rights.

## **II. HUMAN RIGHTS FRAMEWORK: ACCESS TO JUSTICE AND RIGHT TO EFFECTIVE REMEDY**

Access to justice is an essential right for victims of all human rights violations.<sup>2</sup> Under international law, access to justice must be fair, effective, and prompt. Access to justice encompasses both procedural and substantive justice. A victim's right of access to justice includes access to all available judicial, administrative, or other mechanisms available under existing domestic and international law. A cornerstone of the right to access to justice is access to courts, including fair and impartial judicial proceedings, when a person faces criminal charges or has been deprived of liberty, or when a person wishes to commence litigation concerning civil rights or human rights violations.<sup>3</sup> Under international law states must take steps to ensure access to justice is effective, such as by providing adequate legal counsel, diplomatic and consular assistance to victims seeking justice for violations, in both criminal and civil cases.<sup>4</sup> To ensure effective access to justice, states must ensure access to justice without discrimination, and must adopt measures to ensure access to justice for all on an equal basis, such as through special accommodations.<sup>5</sup>

A foundational principle of human rights law is the right to an effective remedy for victims of human rights violations. The right to effective remedy for human rights violations is enshrined in Article 8 of the Universal Declaration of Human Rights,<sup>6</sup> Article 2(3) of the International Covenant on Civil and Political Rights,<sup>7</sup> Article 14 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,<sup>8</sup> Article 6 of the Convention for the Elimination of All Forms of Racial Discrimination,<sup>9</sup> Article 25 of the American Convention on Human Rights,<sup>10</sup> and Article 13 of the European Convention on Human Rights.<sup>11</sup> The right to effective remedy is non-derogable, and may not be limited even during times of national emergency.<sup>12</sup> Under international law, states have a duty to provide judicial, civil, and administrative remedies.<sup>13</sup> States' duty to provide effective remedy for human rights violations includes an obligation to investigate alleged human rights violations.<sup>14</sup> The Human Rights Committee,<sup>15</sup> Inter-American Court,<sup>16</sup> and European Court of Human Rights<sup>17</sup> recognize that the state is required to investigate human rights violations, even when the perpetrator is a private actor. In addition, states' duty to provide effective remedy also encompasses an obligation to punish those responsible for human rights violations,<sup>18</sup> as well as an obligation to provide compensation to victims of human rights violations.<sup>19</sup>

Under U.S. law, the Constitution provides for the separation of powers between the executive, legislative, and judiciary branches. The judiciary has both the authority and the duty to review the actions of the other branches of government.<sup>20</sup> Historically, U.S. courts have enjoyed independence, and in the past the judiciary has been fundamental to the protection of civil rights, civil liberties, and human rights.

### III. CAPITAL PUNISHMENT

The U.S.'s administration of the death penalty in 35 states, the federal system and the military violates the right to life. As of November 30, 2010, 1,233 people—including men, women, children (at the time of the crime), the mentally retarded, and the mentally ill—have been executed in the United States since the death penalty was reinstated by the Supreme Court in 1976.<sup>21</sup> As of January 2010, 3,261 people were awaiting execution across the country.<sup>22</sup> In recent years, the U.S. has taken some important steps in protecting the right to life by barring the execution of juveniles, the mentally retarded, and those who have committed non-homicide offenses. Yet the death penalty system continues to be flawed and unsalvageable. Since 1978, 138 innocent people have been released from death rows across the country.<sup>23</sup> The U.S. death penalty continues to discriminate on the basis of socioeconomic status, race, and geography. It is still applied against the mentally ill, the mentally retarded (despite the prohibition), those who did not kill, and those who did not intend to kill. Capital defendants and death row prisoners are not provided adequate counsel or adequate resources. Many of these flaws are discussed below.

#### **a. Failures of Indigent Defense Systems: Denial of Access to Justice Due to Inadequate Counsel**

With rare exceptions, defendants facing capital charges cannot afford a lawyer, and therefore rely on the state to appoint an attorney to provide an adequate defense. While capital cases are among the most complex, time-intensive and financially draining cases to try, indigent capital defendants often are appointed attorneys who are overworked, underpaid, lacking critical resources, incompetent, or inexperienced in trying death penalty cases.<sup>24</sup> Incompetent defense attorneys fail to investigate cases thoroughly, fail to present compelling mitigating evidence, and fail to call witnesses that would aid in the defense. In addition, enormous caseloads, caps on defender fees, and a critical lack of resources for investigation and expert assistance are barriers to the presentation of an adequate and effective defense.

The problem of inadequate counsel is not isolated to a few bad attorneys; it is a widespread and systematic failure to ensure access to justice for defendants facing capital charges and those convicted of capital crimes.<sup>25</sup> Few states provide adequate funds to compensate lawyers for their work or to investigate cases properly. In addition to inadequate funding, the majority of death-penalty states lack adequate competency standards. Many states require only minimal training and experience for attorneys handling death penalty cases, and in some cases capital defense attorneys fail to meet the minimum guidelines for capital defense set by the American Bar Association (ABA). A 2002 report on indigent defense by the Texas Defender Service found that death row prisoners “face a one-in-three chance of being executed without having the case properly investigated by a competent attorney or without having any claims of innocence or unfairness heard.”<sup>26</sup> Among other reasons, many death sentences are set aside because a federal court finds the lawyer who represented the accused at his first trial in state court was so incompetent that the accused’s constitutional right to effective counsel was violated.<sup>27</sup>

The absence of a right to counsel in post-conviction proceedings,<sup>28</sup> in addition to the myriad procedural and substantive hurdles in raising a claim of ineffective assistance of counsel,<sup>29</sup> leaves capital defendants with little recourse when they have been denied adequate legal representation or have endured other constitutional violations. Inadequate counsel not only adversely affects the client at trial and sentencing, but substandard attorneys fail to preserve objections, resulting in an inadequate trial record. These failures vastly reduce the scope of appellate review, decreasing the possibility that errors will be corrected later. Success in challenging a death sentence on the ground that the accused's constitutional rights were violated also depends on the death-sentenced inmate having quality representation in their habeas corpus appeal to the federal courts, which assesses the case for violations of the U.S. Constitution. Yet beyond the first appeal, people fighting their death sentences have no constitutional right to a lawyer, and the quality of available counsel can be as abysmal in these appeals as at the trial level.<sup>30</sup>

The state of Alabama, for instance, has no statewide public defender system, though Alabama's death row occupants are overwhelmingly poor; 95 percent are indigent.<sup>31</sup> Alabama provides only minimal compensation for court-appointed defense attorneys in death penalty cases.<sup>32</sup> Alabama's funding rates and caps are grossly inadequate for the amount of work required to properly represent an inmate's rights. Moreover, judges routinely do not pay lawyers the entire bill for work done in the case.<sup>33</sup> Unlike every other state in the country that uses the death penalty, Alabama has no mechanism or state-funded agency to provide post-conviction counsel for persons sentenced to death. As a result, death row inmates in Alabama are not guaranteed the right to legal assistance to challenge the inadequate representation they received at trial or other aspects of their conviction or sentence in post-conviction proceedings. State law in Alabama does permit a judge to appoint a lawyer for post-conviction proceedings, but the law does not authorize any appointment of counsel until a prisoner has filed a petition with the court.<sup>34</sup>

Last year, the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions conducted an official visit to the United States to examine the administration of the death penalty in Alabama and Texas. He chose to examine the death penalty in Alabama and Texas because Alabama has the highest per capita rate of executions in the United States, while Texas has the largest total number of executions and one of the largest death row populations. The Special Rapporteur expressed concern about deficiencies in the administration of the death penalty in Alabama and Texas, including "the lack of adequate counsel for indigent defendants." He called for the two states "to establish well-funded, state-wide public defender services" and recommended that "[o]versight of these should be independent of the executive and judicial branches."<sup>35</sup>



## **b. Denial of Habeas Review under the Antiterrorism and Effective Death Penalty Act (AEDPA)**

Federal legislation, most prominently the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>36</sup> and the USA PATRIOT Improvement and Reauthorization Act of 2005, as well as numerous Supreme Court decisions on federal habeas corpus, have greatly limited access to federal review of state court death penalty convictions. These laws drastically limit the availability of federal habeas corpus relief for defendants sentenced to death. As a result, defendants who are later able to present evidence establishing their innocence that may not have been available at the time of trial, and could have led to a different result if it had been presented, are left with no recourse. In addition to the denial of relief to defendants who have powerful evidence of their innocence, many defendants who have suffered serious constitutional violations, such as inadequate defense counsel, racially discriminatory jury selection, and suppression of exculpatory evidence have been left without federal judicial recourse.

The U.S. Congress began scaling back federal court power to grant habeas review with the AEDPA, which limits the ability of state detainees to bring habeas corpus claims in federal court and drastically curtails the ability of federal courts to adjudicate meritorious claims and review state court decisions for constitutional error. Before the AEDPA's passage, between 1976 and 1991, death row inmates were granted relief in 47 % of all federal habeas cases, underscoring the need for appellate review beyond the direct appellate process.<sup>37</sup> Additionally, "there have been no systematic trial-level improvements that have coincided with the AEDPA's adoption and implementation."<sup>38</sup>

Since AEDPA's enactment in 1996, state and federal prisoners have been forced to navigate a labyrinth of complex procedural rules and stringent deadlines in order to assert claims of serious constitutional violations in post-conviction proceedings. State prisoners particularly have been burdened by AEDPA, which requires greater deference to state court decisions and, thus, constrains federal review of federal constitutional violations. Indeed, federal courts may only grant habeas relief to state prisoners where the state court's decision was "contrary to, or involved an unreasonable application of clearly established Federal law" as determined by the U.S. Supreme Court, or based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."<sup>39</sup> It is not enough for the state court decision to be wrong as a matter of constitutional law, it must have been unreasonably wrong. Interpretations of these limitations by the U.S. Supreme Court and lower federal courts have made it even more burdensome for petitioners to obtain federal habeas relief. Moreover, a one-year statute of limitations and prohibitions against successive habeas petitions serve as bars to federal habeas review. As a result, federal courts are unable to reach the merits of substantive claims, which include, among others, claims of racial bias in jury selection, ineffective assistance of counsel, prosecutorial misconduct, and even innocence, due to substantial deference to state court proceedings or mere technical reasons.

AEDPA further added a state-friendly statutory scheme—commonly referred to as Chapter 154—for states willing to "opt in" by providing competent counsel and reasonable litigation resources to indigent death-sentenced prisoners. In exchange for providing these benefits, states would be able to subject prisoners to additional restrictions such as a 180-day limitations period for filing

in federal court, and more demanding criteria for securing merits review of their federal habeas claims.

When no state succeeded in opting into Chapter 154 during its first decade, Congress enacted an amendment to Chapter 154 in the USA PATRIOT Improvement And Reauthorization Act of 2005 (PIRA). These amendments made it much easier for states to obtain “opt-in” status. PIRA substantially reduces the state’s burden and changes the decision maker from the federal courts to the U.S. Attorney General. As those amendments are implemented, it is expected that at least some states will renew their efforts to secure opt-in status.

Barring access to the federal courts undermines confidence in criminal convictions as thousands of prisoners are left with no recourse for constitutional violations that deprived them of a fair trial. This is especially alarming for prisoners facing execution, where there should be no margin of error. With the knowledge that prejudicial error will occur in an unacceptable number of criminal proceedings, including capital cases, it is imperative to ensure access to federal post-conviction proceedings. The constraints on the federal courts to serve as a final check on state capital convictions are particularly damning for prisoners asserting claims of actual innocence when we know with certainty that defendants have been, and will be, wrongfully convicted of capital crimes. As noted above, 138 death-row inmates from 26 states have been exonerated upon proof of innocence and released from custody after serving years (often decades) on death row.<sup>40</sup>

The case of Troy Davis, a Georgia death row inmate who is almost certainly innocent of the murder of an off-duty police officer, vividly illustrates these high bars to relief in federal court, even in the face of compelling evidence of innocence. No physical or forensic evidence tied Davis to the murder; he was convicted based only on eyewitness testimony. Seven of the nine non-police witnesses against him have recanted or contradicted their trial testimony. Davis came close to execution three times without a court ever hearing the new evidence of the recantations. Finally, last year in a historical move, the U.S. Supreme Court granted Davis’s original habeas petition—the court had not done so in 50 years—and ordered a federal district court in Georgia to hold a hearing to hear evidence on Davis’s innocence. The court held a hearing in June 2010, but severely restricted the kind of evidence Mr. Davis’s attorneys could present. The court also chose to apply an impossibly high standard of proof of innocence: Davis had to prove by “clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence.” Using this high standard, the court denied Davis’s petition to overturn his conviction. Mr. Davis must now appeal this ruling.

### c. Gaps in Legal Protection for Mentally Ill Defendants Charged with or Convicted of a Capital Crime

International law prohibits the execution of the mentally ill. Yet in the United States, significant gaps remain in the legal protection accorded severely mentally ill defendants charged with or convicted of a capital crime. Most notably, this country still permits the execution of the severely mentally ill. The problem is not a small one. A leading mental health group, Mental Health America, estimates that five to ten percent of all death row inmates suffer from a severe mental illness.<sup>41</sup> A 2006 report by Amnesty International identified 100 individuals with severe mental illnesses who had been executed in the United States in the prior three decades, a roughly one in ten ratio.<sup>42</sup>

Seeking death sentences against the mentally ill presents serious concerns at all stages of criminal justice system. Prior to arrest, mentally ill defendants are more vulnerable to police pressure and thus more likely to confess.<sup>43</sup> Once charged with a capital crime, courts or juries routinely find that severely mentally ill defendants, including capital defendants, meet the basic test of competency.<sup>44</sup> Delusional mentally ill defendants are more likely to insist on representing themselves at trial, literally daring juries to sentence them to death. Many mentally ill defendants are prone to outbursts in front of their juries and some are so heavily medicated that they appear to their juries devoid of any remorse. Juries frequently reject insanity defenses in capital cases despite strong evidence that the defendants were suffering from serious mental illnesses at the time of the crime. As the United States Supreme Court observed of those with mental retardation, mentally ill defendants are “less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”<sup>45</sup> For these reasons, juries are often scared into recommending a sentence of death for mentally ill persons and fail to treat their mental illness as the mitigating circumstance that it is.<sup>46</sup> Mentally ill defendants who have been sentenced to death often waive their appeals and seek to volunteer for execution.

Although constitutional law prohibits the execution of the mentally incompetent,<sup>47</sup> the death sentences imposed on and executions of numerous mentally ill people demonstrate that these laws are insufficient safeguards for capital defendants with severe mental impairments.

## IV. PRISONERS' RIGHTS

### a. Denial of Access to Justice under the Prison Litigation Reform Act (PLRA)

In 1996, Congress passed the Prison Litigation Reform Act (PLRA) with the stated purpose of curbing allegedly frivolous litigation by prisoners.<sup>48</sup> However, since its enactment, the Act has had a disastrous effect on the ability of prisoners to seek protection of their rights in the U.S. federal courts. The PLRA created numerous burdens and restrictions on lawsuits brought by prisoners in the federal courts.<sup>49</sup> As a result of these restrictions, prisoners seeking a remedy for injuries inflicted by prison staff and others, or seeking the protection of the courts against dangerous or unhealthy conditions of confinement, have had their cases dismissed. Three provisions in particular affect the ability of individual prisoners, most of whom have no access to legal counsel, to bring their claims before the federal courts.

#### i. Physical Injury Requirement

The PLRA provisions often referred to as the “physical injury” requirement prevent prisoners, including juvenile and pre-trial detainees, from obtaining money damages in federal court for violations of their civil and human rights that can amount to torture or cruel and demeaning treatment.<sup>50</sup> These provisions require that, in order to sue for compensatory damages in federal court, a prisoner must demonstrate a “prior showing of physical injury” before he or she can win damages for mental or emotional injuries. Most federal courts have applied this provision to bar damages claims involving all constitutional violations that intrinsically do not involve a physical injury.

The following are a few examples of cases in which prisoners were denied relief because they have no “physical injury”:

- Actions challenging the violation of prisoners’ religious rights guaranteed by the Constitution and protected by Congress in the Religious Land Use and Institutionalized Persons Act;<sup>51</sup>
- An action challenging sexual assault, including forcible sodomy in the absence of other physical injury;<sup>52</sup>
- Cases challenging a prisoner’s false arrest and illegal detention;<sup>53</sup>
- A case challenging prison officials’ failure to protect a prisoner from repeated beatings that resulted in cuts and bruises;<sup>54</sup>
- An action challenging placement in filthy cells and exposure to the deranged behavior of psychiatric patients;<sup>55</sup> and
- A challenge to a prison official’s denial of a prisoner’s psychiatric medications to deliberately cause the prisoner to experience pain and depression.<sup>56</sup>

These cases represent serious and in some cases intentional rights violations, but the PLRA leaves prisoners without a remedy.

The Convention against Torture defines torture as either “physical” or “mental.” The Committee against Torture has called for repeal of the PLRA’s “physical injury” provision, citing article 14 of the Convention, which requires that “[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.”<sup>57</sup>

## ii. Exhaustion Requirement

The PLRA provision referred to as the “exhaustion requirement” requires courts to dismiss a prisoner’s case if she has not completed all internal complaint procedures at her prison or jail facility prior to filing suit.<sup>58</sup> Before a prisoner may file a lawsuit in court, a prisoner must first comply with all deadlines and other procedural rules of his prison or jail’s grievance system, and if he fails to comply with all technical requirements or misses a filing deadline, he may not sue. In practice, this provision has sharply limited the ability of prisoners to seek protection and judicial remedies for serious violations of their civil and other human rights for several reasons.<sup>59</sup>

First, the PLRA’s exhaustion requirement has proven to be a trap for the unschooled and the disabled. In general, prisoners have very low rates of literacy and education.<sup>60</sup> In addition, the number of severely mentally ill and cognitively impaired persons in prison is high. According to a 2006 U.S. Department of Justice report, 56% of State prisoners, 45% of Federal prisoners, and 64% of jail prisoners in the United States suffer from mental illness,<sup>61</sup> and experts estimate that people with mental retardation may constitute as much as 10 percent of the prison population.<sup>62</sup>

Second, internal complaint procedures or grievance systems create numerous stumbling blocks for prisoners seeking a remedy. Deadlines are very short in many grievance systems—almost always a month or less, and sometimes five days or less—and these deadlines operate as statutes of limitations for federal civil rights claims.<sup>63</sup> In addition, a typical system may have three or more deadlines that could lead to forfeiture of a claim, as prisoners must appeal to all levels of a grievance system. For illiterate, mentally ill, or cognitively challenged prisoners, these administrative systems are virtually impossible to navigate. As a result, constitutional claims for many of the most vulnerable are lost irrevocably under PLRA because of technical misunderstandings rather than lack of legal merit.

Third, there is a well-established practice of threatening and retaliating against prisoners who file grievances. Under some grievance regimes, prisoners are even required to obtain grievance forms from or file their grievances with the very same individuals who have abused them or violated their rights. Many prisoners are simply too afraid to file grievances for fear of the consequences.<sup>64</sup> All these factors bar prisoners’ access to the courts and deny them remedies for serious violations of their rights.

### iii. Application of the PLRA to Children

The provisions of the PLRA also apply to children confined in prisons, jails, and juvenile detention facilities.<sup>65</sup> Application of the PLRA to children is especially problematic because youth are exceptionally vulnerable to abuse in institutions, such that court oversight is particularly important. For example, the Federal Bureau of Justice Statistics recently found widespread sexual abuse of incarcerated juveniles across the nation, with 12% of all youth in state juvenile facilities reporting one or more incidents of sexual victimization within the past year.<sup>66</sup> Staff sexual and physical abuse and harassment of youth in custody has been an issue in states from New York to Hawaii.<sup>67</sup> In the Texas juvenile system, for example, boys and girls were sexually and physically abused by prison staff, and faced retaliation, including being thrown into an isolation cell in shackles if they complained.<sup>68</sup>

In addition, the PLRA's exhaustion requirement has been an especially problematic obstacle to justice for incarcerated children, particularly because some courts have ruled that efforts to pursue grievance procedures by children's parents or other adults do not satisfy the PLRA.<sup>69</sup> The PLRA has created a lack of oversight and accountability for abuse of children, and increases their vulnerability to physical and sexual abuse and other rights violations.

## V. NATIONAL SECURITY

The last decade has seen systematic efforts to limit access to justice by the executive, Congress, and the courts themselves in the name of national security in the U.S.-led “war on terror.” Under the Bush Administration, the Executive Branch diminished access to the courts, in order to shift the power of justice into its own hands. For eight years the Bush Administration sought to act unsupervised by the judiciary, invoking “national security” and the discredited unitary executive theory as reasons why the courts’ reach did not extend to the Oval Office or to undisclosed locations. The Obama Administration has adopted a similar position to deny plaintiffs their day in court, and to protect senior officials from litigation, regardless of their actions and roles. The Obama Administration has embraced the Bush Administration’s claim that, by invoking “state secrets,” the government can not only restrict discovery but can quash an entire lawsuit—without demonstrating the validity of their claim to a judge. The federal government has also used the judicially-created doctrine of qualified immunity to dismiss civil suits alleging torture; cruel, inhuman, or degrading treatment; forced disappearance; and arbitrary detention without consideration on the merits.<sup>70</sup> In addition, civil cases alleging torture, cruel, inhuman or degrading treatment, and extra-judicial killings by private military contractors face procedural hurdles and defenses, resulting in dismissal.<sup>71</sup>

### a. Government Invocation of the State Secrets Privilege as a Bar to Justice and Remedy for Torture Victims

The United States government has intervened in cases alleging forced disappearance and torture by U.S. officials and U.S.-based corporations to assert the “state secrets” privilege—a common law evidentiary privilege—and to have these cases dismissed without any consideration of unclassified, publicly available information substantiating victims’ allegations. Courts by and large have accepted the government’s assertions.<sup>72</sup> The U.S. government’s “state secrets” tactic to dispose of lawsuits in which it says that any discussion of a lawsuit’s accusations would endanger national security has short-circuited judicial scrutiny.<sup>73</sup> As a result, victims of torture and secret detention have been denied their day in court. To date, not a single torture victim of the Bush administration’s torture program has had his day in a U.S. court.

For example, the U.S. government invoked the common-law “state secrets” privilege to squelch a lawsuit brought by the ACLU in April 2006. The lawsuit concerned the secret detention of German citizen Khaled El-Masri, and it sought compensation for his unlawful detention and torture.<sup>74</sup> Mr. El-Masri was abducted while on holiday and detained from December 31, 2003 through May 28, 2004 in Macedonia and Afghanistan where he was subjected to torture and abuse.<sup>75</sup> In 2006, a judge dismissed the case, accepting the CIA’s claim that simply holding proceedings would jeopardize state secrets, and denying Mr. El-Masri’s only real chance for justice before domestic courts.<sup>76</sup> The ACLU appealed the dismissal, and the U.S. Court of Appeals for the Fourth Circuit upheld the lower court decision that denied Mr. El-Masri a hearing in the United States.<sup>77</sup> In October 2007, the U.S. Supreme Court refused to review Mr. El-Masri’s case.<sup>78</sup>

However, the rendition of Mr. El-Masri to detention and interrogation in Afghanistan by agents of the U.S. represents the most widely known example of a publicly acknowledged program. High-level government officials have publicly discussed the rendition program, and Mr. El-Masri's allegations have been the subject of widespread media reports in the world's leading newspapers and news programs, many of them based on the accounts of government officials. Having exhausted domestic remedies, on April 9, 2008, the ACLU filed a petition with the Inter-American Commission on Human Rights (IACHR) on behalf of Mr. El-Masri, arguing, *inter alia*, that due to the application of the state secrets doctrine, Mr. El-Masri was deprived of the right of effective access to a court and that his right to a remedy for the human rights violations he suffered had been violated.<sup>79</sup> To date, the U.S. government not responded to the petition.

The U.S. government invoked the "state secrets" privilege in another lawsuit brought by the ACLU in 2007. The ACLU filed a federal lawsuit against Jeppesen DataPlan, Inc., a subsidiary of Boeing Company, on behalf of five survivors of the extraordinary rendition program. The suit charges that Jeppesen knowingly participated in these renditions by providing critical flight planning and logistical support services to aircraft and crews used by the CIA to forcibly disappear these five men to torture, detention and interrogation. According to published reports, Jeppesen had actual knowledge of the consequences of its activities. A former Jeppesen employee informed *The New Yorker* magazine that, at an internal corporate meeting, a senior Jeppesen official stated, "We do all of the extraordinary rendition flights—you know, the torture flights. Let's face it, some of these flights end up that way."<sup>80</sup> Shortly after the suit was filed, the government intervened and asserted the "state secrets" privilege, claiming further litigation would undermine national security interests, even though much of the evidence needed to try the case was already available to the public. Two years ago, the trial court accepted Bush Administration claims that the "state secrets" privilege allowed them to put an end to the entire proceedings. In April 2009, however, three judges from the 9<sup>th</sup> Circuit federal appeals court reversed that ruling, over Obama Administration objections. The administration subsequently asked for a hearing before the full court, asserting again the right to crush a lawsuit against a company that was a knowing accomplice to torture. In September 2010, the full bench of the Ninth Circuit federal appeals court reversed the April 2009 decision and dismissed the lawsuit, accepting the Obama Administration's argument that the case could not be litigated without disclosing state secrets. On December 7, 2010 the ACLU filed a petition for certiorari with the Supreme Court, asking the Court to review the lower court's decision dismissing the lawsuit against Jeppesen.<sup>81</sup> The Supreme Court has not reviewed the government's use of the state secrets privilege in more than half a century.<sup>82</sup>

The state secrets doctrine is not the only mechanism the Obama Administration has invoked to extinguish civil suits by torture survivors. In *Rasul v. Rumsfeld*, a suit brought by former Guantánamo detainees seeking redress for torture, abuse, and religious discrimination, the Obama Administration argued, remarkably, that the government defendants were immune from suit because, at the time that the abuse occurred, established law did not clearly prohibit torture and religious discrimination at Guantánamo. In *Arar v. Ashcroft*, the administration argued that the Constitution provided no cause of action to an innocent man who had been identified by the United States as a terrorist, rendered to Syria for torture, and not released until ten months later when it was determined that he was not a terrorist after all. In that case, the administration also argued to



the courts that affording Arar a judicial remedy “would offend the separation of powers and inhibit this country’s foreign policy,” and impermissibly involve the courts in assessing “the motives and sincerity” of the officials who authorized Arar’s rendition.<sup>83</sup>

The Obama Administration has sometimes suggested that civil suits are unnecessary because the Justice Department has the authority to investigate allegations that government agents violated the law.<sup>84</sup> But civil suits, of course, serve purposes that criminal investigations do not: they allow victims their day in court, and they provide an avenue through which victims can seek compensation from perpetrators.

## VI. WOMEN'S RIGHTS

### a. Lack of Remedies for Female Domestic Violence Victims

Victims of domestic violence face court-created obstacles to obtaining federal civil rights and state law remedies for violations of their fundamental human rights. Two Supreme Court cases in particular, *United States v. Morrison* and *Castle Rock v. Gonzales*, erode federal civil rights remedies for female victims of domestic violence.<sup>85</sup> In *Morrison*, the Court held that Congress did not have the power to create a private cause of action under the Violence Against Women Act, and in *Gonzales*, the Court found no constitutional violation for police failure to enforce a prior mandatory judicial protective order.<sup>86</sup>

*Morrison* arose out of an alleged sexual assault perpetrated against a college student. After the school's disciplinary procedures failed to punish the alleged perpetrators, the student filed suit under a provision providing a federal civil remedy for victims of gender-motivated violence. In 2000, the U.S. Supreme Court held that this provision exceeded Congress's powers despite voluminous congressional findings justifying congressional power based on both Congress's reasoning that gender-motivated violence in the aggregate negatively impacts interstate commerce and the need to avoid gender bias in the state systems.<sup>87</sup> The Court noted that the fact that the law applied uniformly nationwide bound even those municipalities without any history of discrimination or bias against victims of gender-motivated violence, and that violence against women is a local not national issue and a matter therefore for state law. Accordingly, there is now no federal statutory basis for women seeking a remedy to compensate for violence by private actors.

The possibility of a federal remedy against local officials who fail to protect women from privately inflicted violence under constitutional protections was also shut out in the *Gonzales* case. Mr. Gonzales violated a restraining order against him and abducted his daughters from his ex-wife's home. Ms. Gonzales reported the abduction to the police and informed them that her husband had a history of mental instability and erratic behavior. She phoned repeatedly and pleaded with the police to search for her children. The police repeatedly refused to enforce the restraining order. Ten hours after the abduction, Mr. Gonzales opened fire outside of the police station and was immediately shot and killed. The police discovered the bodies of the three murdered Gonzales children in his truck. Ms. Gonzales filed suit alleging that the police failure to enforce the restraining order deprived her of due process. The U.S. Supreme Court refused to recognize her right to relief, holding that the government had no affirmative duty to protect its citizens from privately inflicted violence despite the existence of a valid protective order, a state law requiring arrest for any violations of a protective order, knowledge of imminent harm and opportunity to act to prevent the harm.<sup>88</sup> As a result, the only recourse for such violations is in state courts, which tend to discriminate against victims of gender violence, and also generally provide state officials immunity for such conduct.<sup>89</sup> Accordingly, there is also now no federal remedy to compensate for the failure of state actors to protect women from and/or prevent domestic violence. In an effort to seek redress for this systemic failure of the police and other governmental actors to respond to domestic

violence victims, the ACLU filed a petition with the Inter-American Commission on Human Rights in December 2005.<sup>90</sup>

In some states, there are avenues for holding law enforcement officials accountable when police officers fail to provide the protection mandated by state law. But in others, including Colorado where the *Gonzales* suit arose, no such remedies exist. There, the doctrine of sovereign immunity sharply limits the utility of any such tort remedy shielding government officials from liability with certain stated exceptions. The sovereign immunity obstacles vary from state to state. Few states have general, explicit anti-discrimination provisions protecting domestic violence victims that are enforceable through a private right of action. Instead, there are piecemeal protections in a handful of states for individuals in certain situations, often without a private enforcement option. Thus, without uniform federal legislation, many victims remain unprotected and without effective remedy.

## **b. Diplomatic Immunity for Abuse of Domestic Workers**

Domestic workers abused by foreign diplomats in the U.S. face barriers to obtaining any remedy for exploitation and other workplace abuses. Unlike other employers, diplomats are generally immune from civil, criminal and administrative processes in the U.S. unless the sending countries waive their immunity. Aggravating the problem, U.S. courts have interpreted the commercial activity exception contained in Article 31(c) of the Vienna Convention on Diplomatic Relations to exclude the hiring and employment of domestic workers.<sup>91</sup> Diplomatic immunity bars domestic workers from claiming their legal rights in court and, as a result, gives diplomats a free pass to mistreat domestic workers deliberately and with impunity.

The United States government has failed to ensure women domestic workers abused by their diplomat employers any form of redress on account of diplomatic immunity. The U.S. government has submitted “Statements of Interest” in lawsuits brought by abused workers, in support of diplomats’ positions, arguing that the U.S. has entered into a number of treaties that establish its obligation to accord diplomatic immunity from prosecution.<sup>92</sup> Pursuant to these treaties, diplomats are entitled to the same privileges and immunities in the U.S. as the U.S. accords to diplomatic envoys, immunities defined by the Vienna Convention, including immunity from the civil jurisdiction of the courts in this country.<sup>93</sup> In *Tabion v. Mufti*, the federal court of appeals relied on what it called the State Department’s “narrow interpretation” of commercial activity and held that employment of a domestic servant did not constitute commercial activity.<sup>94</sup> As a result, certain diplomats are sheltered from the legal repercussions of exploiting employees including domestic workers. Yet domestic workers, including workers employed by diplomats, too often face a range of civil and human rights violations including forced labor and trafficking rising to the level of slavery.

For example, in *Sabbithi, et al. v. Al Saleh, et al.*, the ACLU represents Kumari Sabbithi, Joaquina Quadros, and Tina Fernandes, three Indian women who were employed as domestic workers by a Military Attaché to the Embassy of Kuwait and his wife, to work in their home in Virginia.<sup>95</sup> In

the summer of 2005, the three women were brought to the United States under false pretenses, where they were subjected to physical and psychological abuse by their employers and forced to work against their will. In the winter of that year, fearing for their lives, each of the women individually fled the household. In January 2007, the three workers brought a lawsuit against the diplomat, his wife, and the State of Kuwait for trafficking and forced labor. In March 2009, the court granted the Motion to Dismiss by the diplomat and his wife, on the grounds of diplomatic immunity. In November 2009, the court also granted the Motion to Dismiss by the State of Kuwait, on grounds related to service. The ACLU filed and was granted a Motion for Reconsideration. A hearing is scheduled for May 2010 in federal district court in Washington, D.C.

In another case, *Vishranthamma v. Al-Awadi*, the ACLU serves as amicus in support of Swarna Vishranthamma, a domestic worker who was exploited and abused by her employer, the First Secretary to the Kuwaiti mission to the U.N. For four years, she was forced to work seven days a week, 18 hours a day, paid far below minimum wage, and given no overtime compensation. She was also physically and sexually abused, repeatedly threatened, and verbally assaulted. Her employers confiscated her passport, threatened her with arrest should she try to leave, and severely restricted her contact with family and friends. Despite her fears of retaliation, she ultimately escaped from her employer's home. Ms. Vishranthamma filed a civil action against her employer seeking redress and compensation for the exploitation she endured, but the case was dismissed by the Southern District of New York, after the court concluded her employer was entitled to diplomatic immunity. On February 16, 2010, the ACLU and 12 other organizations submitted an amicus brief to the U.S. Court of Appeals for the Second Circuit in support of Ms. Vishranthamma's claims against her former employers, arguing that human trafficking and exploitation of domestic workers are commercial activities outside the scope of the Vienna Convention's immunity for diplomats. The case is currently pending.

In 2007, the ACLU petitioned the Inter-American Commission on Human Rights (IACHR) on behalf of five domestic workers, asking the IACHR to hold the United States responsible for its neglect and failure to protect domestic workers employed by diplomats from human rights abuses and to ensure that these workers can seek meaningful redress for their rights.<sup>96</sup> The petition is still pending.

## VII. IMMIGRANTS' RIGHTS

### a. Stipulated Removal and Denial of any Hearing before Deportation

Over the last five years, federal immigration officials have expanded implementation of a program called stipulated removal that allows for deportation of non-U.S. citizens without a hearing before an immigration judge. This procedure is used to swiftly deport detained noncitizens under circumstances in which these detainees are unaware of the rights they are giving up or the potential consequences that may result. Immigrants who sign stipulated orders of removal waive their rights to a hearing before an immigration judge and agree to have a removal order entered against them, regardless of whether they are actually eligible to remain in the United States. The use of stipulated removal orders increased 535% between 2004 and 2008.<sup>97</sup> According to data obtained through a Freedom of Information Act (FOIA) request, federal immigration officials entered 31,554 stipulated removal orders in 2007 alone.<sup>98</sup>

In practice, many immigrants who have signed stipulated removal orders do not understand that they have done so, much less the impact these orders have on their right to remain in or reenter the United States lawfully in the future. Worse, immigrants have reported being coerced to sign stipulated orders of removal. According to press reports, federal agents have pressured detained immigrants to sign stipulated orders as a way of avoiding prolonged immigration detention.<sup>99</sup> Immigrants who sign stipulated removal orders may have colorable claims for immigration relief based on a variety of factors, including the length of their presence, their family ties to the country, their status as crime victims, or their fear of being persecuted or tortured if they are returned to their home country. By agreeing to stipulated removal orders, they unknowingly waive the opportunity to pursue these claims.

The overwhelming majority of noncitizens who sign stipulated orders of removal do so without the benefit of legal representation. As of 2008, nearly 95% of those who signed stipulated orders since 1999 were not represented by an attorney in their deportation proceedings.<sup>100</sup> The lack of representation is particularly problematic because individuals who sign stipulated orders do so without ever seeing an immigration judge. Immigration judges normally inform immigrants about their eligibility for relief from removal. Without either hearings or lawyers, immigrants may never discover that they have legal claims against deportation.

The use of stipulated removal orders on a large scale in the context of workplace raids also raises very serious concerns. On May 12, 2008, U.S. Immigration and Customs Enforcement (ICE) conducted the largest single-site immigration raid in U.S. history at Agriprocessors, Inc., a kosher meatpacking plant in Postville, Iowa.<sup>101</sup> After the raid, 306 immigrant workers were criminally prosecuted for allegedly using false documents to work.<sup>102</sup> The U.S. Attorney's Office offered seven-day "exploding" plea agreements to all defendants. Under this practice, each defendant was compelled to decide whether to accept the offer within seven days. Within seven days, 300 of the workers had pled guilty, principally to knowingly using false Social Security numbers or other false employment documents.<sup>103</sup>

As a result, the Postville defendants waived all of their rights—including their right to indictment, to court reporters, to review the pre-sentence investigation report, and to appeal their convictions and sentences. Formulaic guilty pleas demanded by prosecutors also almost universally required defendants to accept mandatory stipulated judicial orders of deportation. These orders barred any further consideration of defendants' immigration status or claims, though many defendants may have had valid claims for immigration relief or ineffective assistance of counsel. The circumstances—with an average of 17 defendants represented by a single lawyer; complex immigration issues; significant language, educational and cultural barriers; and the extreme time limit prosecutors set for the plea offers—made adequate legal defense investigation and counseling almost impossible.<sup>104</sup>

## **b. Lack of Judicial Review for Diplomatic Assurances**

The U.S. has circumvented its treaty obligations by transferring individuals to foreign countries that provide “diplomatic assurances” that they will not torture such individuals. Diplomatic assurances are assurances from countries—including those with a known record of torture or ill-treatment—that they will treat prisoners humanely. Such “assurances” are inherently unreliable, not legally binding, and provide no recourse for the transferred individual. To the extent that U.S. officials even try to monitor whether these assurances are honored, such monitoring is ineffective.<sup>105</sup> For example, U.S. officials reportedly suggest questions to foreign intelligence interrogators and then turn a blind eye to the methods employed to extract the information.<sup>106</sup>

The U.S. government has claimed that there is no right to judicial review of diplomatic assurances when it has sought to transfer individuals to countries known to employ torture. The U.S. executive branch has claimed *carte blanche* authority to remove individuals on the basis of diplomatic assurances—in some cases even terminating protection granted under the Convention Against Torture (CAT)—without any judicial review.

International law dictates that states must not expel, return, or extradite any person to a country where they risk torture. The CAT, ratified by the U.S. in 1994 and implemented by domestic legislation, prohibits the U.S. from transferring a person “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The U.S. government has sought to use diplomatic assurances to circumvent its treaty obligations under the CAT, and has argued that individuals the government seeks to remove by means of diplomatic assurances are precluded from any review of claims arising under the CAT and that the CAT does not apply as a matter of law to individuals transferred from U.S. custody abroad to a third country.<sup>107</sup>

With regard to individuals present in the United States, to whom CAT indisputably applies, the U.S. government has also sought to use diplomatic assurances. For example, Sameh Khouzam, an Egyptian Coptic Christian who came to the United States in 1998 fleeing religious persecution in Egypt, was granted protection from deportation under the CAT in 2004 after a federal appeals court found that he would likely be tortured if sent back to Egypt. Despite this finding, as well as

State Department reports showing that Egypt routinely engages in torture, the U.S. government tried to summarily deport Khouzam to Egypt based on diplomatic assurances the U.S. claims to have received from the Egyptian government that it asserts are “sufficiently reliable” to protect him from torture.

The government provided no prior notice to Mr. Khouzam regarding the diplomatic assurances, and neither he nor his lawyers were permitted to see the Egyptian assurances that are the basis for terminating his CAT protection. Nor had the U.S. government offered any explanation for why these assurances would be deemed sufficiently reliable to protect Mr. Khouzam from torture. The government argued that Mr. Khouzam was entitled to no more process than a three-sentence letter summarily informing him that he would be removed after 72 hours on the basis of Egyptian assurances not to torture him which had been deemed “sufficiently reliable.” The government also denied Mr. Khouzam any opportunity to review the assurances, or to present evidence or arguments challenging the assurances before an immigration judge, the Board of Immigration Appeals, or any other body.<sup>108</sup>

Ultimately, as a result of the ACLU’s litigation, a federal court held that removing Mr. Khouzam to Egypt based on unreviewable diplomatic assurances would violate his right to due process.<sup>109</sup> The U.S. Court of Appeals for the Third Circuit agreed, remanding Mr. Khouzam’s case to the Board of Immigration Appeals to review the adequacy of the assurances. The Obama Administration declined to appeal the ruling.<sup>110</sup>

In August 2009, the Obama Administration announced that it will continue the extraordinary rendition program.<sup>111</sup> The Obama Administration also announced that it will continue to rely on diplomatic assurances, including where there is no judicial review, to reduce the likelihood that transferred detainees will face torture—the same procedure used by the Bush Administration that failed to protect suspects from torture.<sup>112</sup> In addition, the Obama Administration announced the U.S. would establish a system for monitoring their post-rendition treatment, in an attempt to ensure that individuals will not be tortured once they are transferred to other countries.

### **c. Denial of the Right to a Fair Hearing for Mentally Ill Immigrants**

The U.S. immigration court system can be particularly confusing for people with mental disabilities, who may find it hard to follow proceedings, or provide credible evidence to lawyers and judges, especially without legal representation and adequate support. And yet there is a lack of meaningful safeguards for people with mental disabilities facing possible deportation from the United States.<sup>113</sup> Deficiencies exist throughout the arrest, detention, removal, and deportation process, violating the human rights of affected individuals and offending both American and international standards of justice. The shortcomings include no right to appointed counsel; inflexible detention policies; lack of substantive or operative guidance for attorneys and judges as to how courts should achieve fair hearings for people with mental disabilities; and inadequately coordinated care and social services to aid detainees while in custody and upon release. As a result, even U.S. citizens with mental disabilities have ended up in Immigration and Customs

Enforcement (ICE) custody, and an unknown number of legal permanent residents and asylum seekers with a lawful basis for remaining in the United States may have been unfairly deported from the country because their mental disabilities made it impossible for them to effectively present their claims in court.

Immigration courts have no substantive or operative guidance for how they should achieve fair hearings for people with mental disabilities, aside from a general statement in the statutes that the U.S. attorney general must provide “safeguards” for individuals who cannot participate in proceedings by reason of their “mental incompetency.”<sup>114</sup> However, neither this statute nor any federal regulation governing immigration proceedings provides definition or standards for competency to self-represent or proceed in immigration court, and does not spell out what a “reasonable opportunity” means for a non-citizen with a mental disability who may not even recognize that he or she is facing deportation.<sup>115</sup> Judges are not required to appoint lawyers or alter procedures to accommodate a person’s limited comprehension; nor does any law or regulation instruct immigration judges to question whether a person facing deportation understands the charges against him or her, or even understands what deportation means.

International human rights standards require that non-citizens, including those with mental disabilities, are genuinely able to present their cases in immigration court, and receive fair treatment throughout proceedings. To meet this standard it would be appear vital that this includes having a court-appointed attorney represent individuals who either cannot represent themselves, or express their interests without support; and giving judges tools to adapt procedures and custody decisions to the needs of a particular individual with disabilities.



## VIII. RACIAL JUSTICE

### a. Erosion of Rights and Remedies for Victims of Racial Discrimination under Title VI of the Civil Rights Act

Some of the greatest obstacles to access to courts for plaintiffs seeking judicial relief from instances of racial or ethnic injustice arise from court decisions which affect procedural requirements for bringing cases. Although these decisions do not deal specifically with the substantive coverage of individual laws, they, in effect, erect barriers to access to courts which are just as effective at denying justice to plaintiffs as would the repeal of substantive civil rights statutes. The two most striking examples of changes in procedural requirements which have had negative effects on the enforcement of civil rights and civil liberties are the U.S. Supreme Court's decisions in *Alexander v. Sandoval*,<sup>116</sup> which eliminated private causes of action to enforce disparate impact regulations under Title VI of the Civil Rights Act of 1964, and the heightened pleading requirements for bringing a viable case imposed by *Bell Atlantic Corp. v. Twombly*<sup>117</sup> and *Ashcroft v. Iqbal*.<sup>118</sup> In each case, the impact on plaintiffs seeking relief from discrimination was severe and immediate.

Title VI prohibits discrimination on the basis of race and national origin in any program receiving federal funding.<sup>119</sup> Under regulations promulgated under the law, plaintiffs were originally permitted to challenge programs that had a discriminatory impact on legally protected classes. The use of this standard allowed plaintiffs to act as "private attorneys general" who could bring cases to achieve the broad goals of non-discrimination which informed the nation's civil rights laws. As a result of the *Sandoval* decision, however, that option was no longer available and private plaintiffs are now required to meet the far more onerous requirement of proving intentional discrimination in federally funded program. Given the fact that much present-day discrimination is subtle or even frequently unintentional, the decision swiftly removed the most powerful weapon in confronting the most prevalent forms of discrimination today.

Even if a plaintiff were able to get into court to assert a claim, *Twombly* and *Iqbal* made it far more difficult for civil rights cases to survive motions to dismiss. For decades, the Supreme Court used a standard under which plaintiffs were only required to state a short and plain statement of the claim which would provide fair notice to the defendants of the nature of the claim against them.<sup>120</sup> *Twombly* and *Iqbal* substantially raised the pleadings requirements so that plaintiffs must now plead at the outset specific facts sufficient to show that the defendant is liable for the misconduct alleged. In effect, plaintiffs are required to prove their case at the time the case is filed, even before discovery is held or face dismissal before there is any adjudication on the merits of the case.

Although the two rulings are neutral on their face, in practice they disproportionately disadvantage plaintiffs in civil rights actions.<sup>121</sup> Operating under these vague and subjective new legal standards, defendants are increasingly urging federal judges to dismiss federal lawsuits, before the claimants have any opportunity to develop facts in support of their claims through discovery,

on the basis that the factual allegations do not establish a “plausible” claim for relief.<sup>122</sup> In most civil rights actions, the evidence needed to prove the case is usually within the exclusive possession of the defendant or its agents or employees. To obtain that information has usually required that defendants avail themselves of all opportunities for discovery permitted under the Federal Rules of Civil Procedure. After *Iqbal* and *Twombly*, plaintiffs find themselves facing dismissal prior to discovery for failure to plead the facts which they could only have gained access to in the discovery process.<sup>123</sup>

The combined effects of the limitations on bringing private causes of action under Title VI regulations and those imposing stricter pleading requirements are ones which may escape public discussion because they involve relatively arcane details of legal procedure. But taken together, they substantially undercut equal access to the courts and therefore erode a fundamental principle: the ability to seek relief from unlawful discrimination in the courts. Until federal legislation is passed reversing these decisions, or the Judicial Conference adopts changes to the rule governing motions to dismiss, plaintiffs with potentially meritorious claims will be denied the opportunity to assert the rights to which they are entitled.<sup>124</sup>

#### **b. Barriers to Justice and Remedy for Victims of Racial Profiling**

Despite the efforts of some law enforcement agencies to address racial profiling within their departments, the practice of racial profiling is pervasive in the U.S. Racial profiling occurs when law enforcement rely on race, ethnicity, national origin, or religion in selecting which individuals to subject to investigations. Although there is considerable evidence that racial profiling is widespread throughout the U.S., there is no comprehensive federal law that prohibits any local, state or federal law enforcement agency or officer from engaging in racial profiling and includes a strong enforcement and oversight mechanism. At the state level, only half of U.S. states have enacted legislation addressing the practice.<sup>125</sup> Fewer states have enacted procedures for actually enforcing the statutory and constitutional prohibition of racial profiling. Five states mandate discipline for officers found to be engaging in racial profiling<sup>126</sup> but only two (New Jersey<sup>127</sup> and Oklahoma<sup>128</sup>) have created criminal penalties. Ten states have established processes for people to register complaints of racial profiling<sup>129</sup> but only two<sup>130</sup> back up this process with a private right of action.

There is a critical need for federal legislation that bans racial profiling and provides for government monitoring and documentation of racial profiling, including the collection of comprehensive data on stops, searches, arrests, and law enforcement officers’ explanations for these encounters. The End Racial Profiling Act (ERPA), which has languished in Congress since its introduction in 1997,<sup>131</sup> would compel all law enforcement agencies to ban racial profiling; create and apply profiling procedures; and document data on stop/search/arrest activities by race and gender.<sup>132</sup> ERPA would also provide victims of racial profiling with the legal tools to hold law enforcement agencies accountable, by creating a private right of action for victims of profiling.

Because of the narrow definition of racial profiling under existing law, many victims of racial profiling are denied any remedy. The primary statutory vehicle for bringing criminal charges against law enforcement officers, 18 U.S.C. § 242, requires proof that a law enforcement agent specifically intended to violate an individual's constitutional rights, rather than merely intend to commit the act(s) which results in rights violations.<sup>133</sup> Moreover, an officer's belief that his or her conduct is reasonable under the circumstances is a sufficient defense to a charge under § 242.<sup>134</sup> The standard of proof of intentional racial discrimination under the statute is particularly high, in contravention of the Convention on the Elimination of All Forms of Racial Discrimination's definition of racial discrimination, which includes acts which have racially discriminatory effects.<sup>135</sup> As a result, few prosecutions for racially discriminatory law enforcement conduct are successfully brought under this statutory provision.<sup>136</sup> Moreover, because any legal remedy for racial discrimination by law enforcement currently requires specific proof of intent to discriminate, it is extremely difficult, if not impossible, for individual victims to challenge violations of their rights and broader law enforcement practices without comprehensive data that can measure the larger impact on minority communities. In addition, the Criminal Section of the U.S. Department of Justice Civil Rights Division is insufficiently resourced and therefore unable, as a practical matter, to prosecute the number of cases of racial profiling which take place each year.

In the few states that have enacted legislation addressing racial profiling, state statutes are also limited by their narrow definitions of racial profiling. Many statutes are limited to profiling based on perceived race, ethnicity, and national origin and thus permit law enforcement officers to profile based on other categories, such as age, religion, gender, or sexual orientation. Also, a number of states prohibit profiling only when a prohibited factor is the *sole* reason for the stop. This, in effect, permits officers to discriminate based on race so long as they can point to any other reasonably legitimate reason for making the stop.

### **c. Denial of Undocumented Workers' Access to Effective Remedy for Employment Rights Violations**

Because of recent jurisprudential decisions beginning with the *Hoffman Plastic Compounds, Inc. v. NLRB* Supreme Court case in 2002, undocumented workers are denied access to effective remedy for employment rights violations under U.S. labor and employment laws, on the basis of workers' immigration status.<sup>137</sup> In *Hoffman*, the U.S. Supreme Court held that the National Labor Relations Board (NLRB) lacked the authority to order an award of back pay—compensation for wages an individual would have received had he not been unlawfully terminated before finding new employment—to an undocumented worker who had been the victim of an unfair labor practice by his employer.<sup>138</sup> Since then, employer defendants have invoked *Hoffman* to argue that undocumented workers are not entitled to backpay or other remedies under labor or employment-related statutes, including Title VII (employment discrimination), the Americans with Disabilities Act (disability discrimination), the Age Discrimination in Employment Act, the Fair Labor Standards Act (setting forth right to federal minimum wage and overtime), state workers' compensations schemes, and state law counterparts to the federal anti-discrimination and wage and hour laws.

Some courts have applied the *Hoffman* rationale in other contexts, curtailing both undocumented workers' access to courts and entitlement to various rights and remedies. For example, a New Jersey state court interpreted *Hoffman* to preclude the ability of undocumented migrants terminated for discriminatory reasons to avail themselves of the protection afforded by New Jersey's anti-discrimination law.<sup>139</sup> Because most federal discrimination statutes only apply to private employers with a minimum of 15 employees, the practical effect of such a ruling is that any undocumented migrant who works for an employer with fewer than 15 employees in the State of New Jersey has no enforceable right to be free from discriminatory termination in the work place.

In addition, other states including Kansas, New York, California, Pennsylvania, Michigan, Illinois, and Florida have similarly restricted the rights of undocumented workers since *Hoffman*. As a result, undocumented workers have lost protections in the areas of available remedies when injured or killed on the job, overtime pay, workers' compensation (a state-based system that provides remuneration for employees who have been injured while working on the job), family and medical leave and other areas.<sup>140</sup> Since *Hoffman*, a number of state courts have held that undocumented immigrants' access to certain workers' compensation benefits are limited by their immigration status, and in states where an individual may sue in tort for injury or wrongful death, those benefits have also been limited. Moreover, in some states, procedural and other barriers have blocked unauthorized workers' access to workers' compensation. For example, in Pennsylvania, undocumented immigrant workers' access to compensation for disability payments, based on the workers' wages at the time of the accident, have been limited by a decision of that state's highest court.<sup>141</sup> In Michigan, injured workers' access to workers' compensation benefits has been similarly limited by the highest state court.<sup>142</sup>

In addition to excluding undocumented migrants from protection of state anti-discrimination laws, tort remedies or workers' compensation protection in some states, one collateral effect of the post-*Hoffman* litigation has been to make immigration status a focal point in all employment-related litigation. Because of immigrant workers' fear of drawing attention to their immigration status or the status of their family members, *Hoffman* has had a chilling effect that undermines the ability of migrant workers to enforce their right to be free from discrimination, their right to a fair wage and overtime, their right to be compensated for work-related injuries, and other workplace rights.

## IX. RECOMMENDATIONS

In order to comply with international human rights obligations and commitments to guarantee access to justice and effective remedy, the United States should take the following measures:

**Habeas review in death penalty cases:** Congress should amend the habeas-related provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) so that federal courts are more accessible to prisoners asserting claims of constitutional violations.

**Indigent defense for capital cases:** Create and adequately fund state defender organizations that are independent of the judiciary and that have sufficient resources to provide quality representation to indigent capital defendants at the trial, appeal and post-conviction levels. Require states to ensure that capital defense lawyers have adequate time, compensation and resources for their work.

**Prisoners' right to remedy:** Congress should act immediately to ensure the *Prison Abuse Remedies Act of 2009*, H.R. 4335 (PARA) becomes law, and the Obama Administration should support its passage. PARA reinstates the ability of prisoners to challenge conditions of confinement that violate their rights by repealing the "physical injury" requirement of the Prison Litigation Reform Act (PLRA); exempting juveniles under age eighteen (18) from the burdens created by the PLRA; and amending the "exhaustion requirement" to allow prison officials to deal administratively with problems in the first instance, but without the ability to block legitimate claims from reaching the federal courts.

**State secrets:** Congress should pass legislation that creates procedures to prevent the abuse of the state secrets privilege and protect the rights of those seeking redress through our court system.

**Remedies for domestic violence victims:** Congress should amend the Violence Against Women Act to ensure better oversight and training of police and provide effective remedies for victims of violence.

**Diplomatic immunity for abuse of domestic workers:** The Obama Administration should fully implement the Trafficking Victims Protection Act to ensure that diplomat employers are held accountable for abuse of domestic workers, including establishing a standard contract for domestic workers and a mechanism for providing adequate compensation for domestic workers who are subject to abuse and exploitation by diplomat employers.

**Stipulated removal orders:** The Department of Homeland Security should not issue stipulated removal orders without an in-person hearing before an immigration judge to determine that the noncitizen's waiver of the right to a removal hearing was knowing and voluntary.

**Diplomatic assurances:** The Obama Administration should prohibit the reliance on “diplomatic assurances” to deport (pursuant to 8 C.F.R. § 208.18(c)) or otherwise transfer persons from the United States. At a minimum, ensure that no such assurances are used without an opportunity for meaningful judicial review of whether they are sufficient to comply with U.S. obligations under the UN Convention Against Torture.

**Access to immigration counsel for people facing removal:** Congress should provide appointed counsel for people with mental disabilities and other immigrants in removal proceedings. The Department of Justice and the Executive Office for Immigration Review should develop regulations that protect the rights of non-citizens with mental disabilities in immigration court proceedings, including directing immigration judges in appropriate cases to appoint counsel and terminate proceedings.

**Erosion of remedies for victims of racial discrimination:** Congress should introduce and pass legislation addressing the *Sandoval* decision by providing a private right of action against entities receiving federal funding based on evidence of disparate impact under Title VI. In addition, Congress should pass legislation<sup>143</sup> to restore the historic construction of the rule governing motions to dismiss and the Judicial Conference should adopt changes to the rule itself to help make that change permanent and protect it from further judicial interference.

**Racial profiling:** Congress should enact the End Racial Profiling Act, which would ban racial profiling and provide for government monitoring and documentation of racial profiling, including the collection of comprehensive data on stops, searches, arrests, and law enforcement officers’ explanations for these encounters. Such legislation should compel all law enforcement agencies to ban racial profiling; create and apply profiling procedures; document data on stop/search/arrest activities by race and gender; and create a private cause of action for victims of profiling.

**Violations of undocumented workers’ employment rights:** Congress should reintroduce, update, and pass the Civil Rights Act of 2008, which would address the *Hoffman Plastics* decision and ensure employment protections for non-citizens regardless of their immigration status. State legislatures should strengthen protections in state anti-discrimination and workers’ compensation laws for undocumented persons.

## ENDNOTES

- 1 An earlier, 10-page version of this report was submitted on April 19, 2010 to the historic Universal Periodic Review of the United States.
- 2 See, e.g., Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005); Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, E.CN.4/2000/62, §§ 2(b), 2(c), 3(d). See also Francesco Francioni, ed., *ACCESS TO JUSTICE AS A HUMAN RIGHT* (Oxford: Oxford University Press, 2007).
- 3 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 9; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, opened for signature Nov. 4, 1950, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11, entered into force 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, arts. 5, 6.
- 4 Inter-Am. Comm'n on Human Rights, *Access to Justice as a Guaranty of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights* 47 (2007) para. 182, OEA/Ser.L.V/II.129 doc. 4. The Commission also noted the importance of access to counsel in its recent report entitled "Access to Justice for Women Victims of Violence in the Americas."
- 5 International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, art. 13 ("States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.").
- 6 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").
- 7 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 2(3) ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.").
- 8 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the United States on October 21, 1994, art. 14, sec. 1 (requiring countries to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.").
- 9 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, ratified by the United States on October 21, 1994, art. 6 (granting victims of racial discrimination "the right to seek ... just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.").
- 10 American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), art. 25 ("Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.").
- 11 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, opened for signature Nov. 4, 1950, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11, entered into force 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, art. 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.").
- 12 Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 of the American Convention on Human Rights), Advisory



- Opinion OC-9/87, Inter-Am. C.H.R., OAS/Ser.C/V/111.19, doc. 13, para 41, at 23 (1987) [holding that “the ‘essential’ judicial guarantees which are not subject to derogation, according to...the Convention, include habeas corpus...amparo, and any other effective remedy before judges or competent tribunals...which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention”].
- 13 See, e.g., Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); Committee on Economic, Social and Cultural Rights, General Comment 9, The Domestic Application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003).
  - 14 Case No. 6586 Inter-Am. C.H.R. 91, OEA/ser.L./V/II/61, doc. 22 rev. 1 (1983), at paras. 166, 176; see also *Gary Hermosilla et. al.*, Case No. 10.843, Inter-Am C.H.R. (1988).
  - 15 See, e.g., *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, Communication No. 30/1978, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 109, para. 13.3 (1985); see also *Alberto Grille Motta v. Uruguay*, Communication No. 11/1977, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 54, para. 14 (1984); *William Torres Ramirez v. Uruguay*, Communication No. 4/1977 (26 January 1978), Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 4, para. 16 (1984); *Edgardo Dante Santullo Valcada v. Uruguay*, Communication No. 9/1977, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 43, para. 11 (1984); *Anthony McLeod v. Jamaica*, Communication No. 734/1997, U.N. Doc. CCPR/C/59/D/734/1997 (3 June 1998).
  - 16 Thomas M. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, *Michigan Journal of International Law*, 23 MICH. J. INT’L L. 977, 986 (2002).
  - 17 See, e.g., *McCann and others v. United Kingdom*, 324 Eur. Ct. H.R. 31 (ser. A) (1995); *Avsar v. Turkey*, App. No. 25657/94, Eur. Ct. H.R., at para. 393 (2001).
  - 18 See Naomi Roht-Arriaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, 78 Cal. L. Rev. 451, 482 (1990); Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, at 207, U.N. Doc. A/47/49 (1992), adopted Dec. 18, 1992 (stating that individuals responsible for forced disappearances are liable under civil law).
  - 19 See, e.g., Convention against Torture, *supra* note 8, art. 14; ICCPR, *supra* note 7, art. 9(5); American Convention on Human Rights, *supra* note 10, art. 63(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, art 5(5); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 2, arts. 8-21; Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Preliminary Report Submitted by Mr. Theo van Boven, Special Rapporteur, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 42d Sess., at 1, U.N. Doc. E/CN.4/Sub.2/1990/10 (1990) [quoting Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Resolution 1988/11 (Sept. 1, 1988)].
  - 20 See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *United States v. Nixon*, 418 U.S. 683, 707 (1974).
  - 21 Death Penalty Information Center, *Executions in 2010*, available at <http://deathpenaltyinfo.org/executions-2010>; Death Penalty Information Center, *The Death Penalty in 2009: Year End Report*, Dec. 2009, available at <http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf>.
  - 22 Death Penalty Information Center, *The Death Penalty in 2009: Year End Report*, Dec. 2009, available at <http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf>.
  - 23 Death Penalty Information Center, The Innocence List, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Dec. 6, 2010).
  - 24 See ACLU, *Broken Justice: The Death Penalty in Alabama* (Oct. 2005), available at [http://www.aclualabama.org/WhatWeDo/BrokenJustice\\_report.pdf](http://www.aclualabama.org/WhatWeDo/BrokenJustice_report.pdf); The Southern Center for Human Rights, “If You Cannot Afford a Lawyer...”: A Report on Georgia’s Failed Indigent Defense System (Jan. 2003).
  - 25 *Id.*
  - 26 Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts*, Dec. 2002, available at <http://02f2fd4.netsohost.com/tds/images/publications/chapters.pdf>.
  - 27 James S. Liebman et al., *A Broken System: Error Rates in Capital Cases: 1973-1995* (June 2000), available at [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf).
  - 28 While the U.S. Supreme Court has recognized a defendant’s Sixth Amendment right to counsel in criminal cases, see *Gideon v. Wainwright*, 372 U.S. 355 (1963), it has not recognized that right in post-conviction proceedings, see *Murray v. Giarratano*, 492 U.S. 1 (1989).
  - 29 Claims of ineffective assistance of counsel in violation of the Sixth Amendment are subject to a two-prong standard, set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that counsel performed deficiently and that the deficient performance prejudiced the defendant’s case.



30 See *Murray v. Giarratano*, 492 U.S. 1 (1989).

31 Leonard Post, *On Their Own*, Nat'l L.J., Dec. 1, 2003.

32 American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report 99* (June 2006) at 126; *Barbour v. Haley*, Brief of Amici Curiae, Alabama Appellate Court Justices and Bar Presidents in Support of Petition for a Writ of Certiorari, No. 06-10920 (11th Cir. Dec. 8, 2006).

33 ACLU, *Broken Justice: The Death Penalty in Alabama* (Oct. 2005) at 2, available at [http://www.aclualabama.org/WhatWeDo/BrokenJustice\\_report.pdf](http://www.aclualabama.org/WhatWeDo/BrokenJustice_report.pdf).

34 Ala. R. Crim. P. 32.7(c).

35 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, *Addendum, Mission to the United States of America*, UN Doc. A/HRC/11/2/Add.5, May 28, 2009, available at [http://www.extrajudicialexecutions.org/application/media/United%20States%202009%20%28A\\_HRC\\_11\\_2\\_Add.5%29.pdf](http://www.extrajudicialexecutions.org/application/media/United%20States%202009%20%28A_HRC_11_2_Add.5%29.pdf).

36 Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104 – 132, § 101 – 08, 110 Stat 1214 (1996).

37 Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?* 27 LOY. U. CHI. L.J. 523, 526 (1996).

38 James S. Liebman, *An "Effective Death Penalty"?* *AEDPA and Error Detection in Capital Cases*, 67 Brooklyn L. Rev. 411, 425 (2001).

39 28 U.S.C. § 2254(d).

40 Death Penalty Information Center, *Innocence and the Death Penalty*, available at <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>; Death Penalty Information Center, *The Innocence List*, available at <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

41 Mental Health America, *Death Penalty and People with Mental Illness* (June 11, 2006), available at <http://www.nmha.org/go/position-statements/54> (formerly known as National Mental Health Association).

42 Amnesty International, *United States of America: the Execution of Mentally Ill Offenders* (2006), available at <http://www.amnesty.org/en/library/asset/AMR51/003/2006/en/73c0b3fe-d46f-11dd-8743-d305bea2b2c7/amr510032006en.pdf>.

43 See W. Follette, D. Davis & R. Leo, *Mental Health Status and Vulnerability to Police Interrogation Tactics* 42, 46-49, *Criminal Justice*, (Fall 2007).

44 See generally, Michelle C. Goldbach, *Like Oil and Water: Medical and Legal Competency in Capital Appeal Waivers*, 1 Cal. Crim. L. Rev. 2 (2000).

45 *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002)

46 See *id.* at 321.

47 *Ford v. Wainwright*, 477 U.S. 399 (1986)

48 Pub. L. 104-134 (Apr. 26, 1996).

49 See Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the United States* (June 2009) available at <http://www.hrw.org/en/reports/2009/06/15/no-equal-justice>.

50 The provision reads as follows: "No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). See also 28 U.S.C. § 1346(b)(2) (applying "physical injury requirement" to suits where the United States is a defendant).

51 *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001) (no damages for violation of religious rights); *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) (same).

52 See *Hancock v. Payne*, 2006 WL 21751 at \*1, 3 (S.D. Miss. Jan. 4, 2006) (complaints that officers forcibly sodomized prisoners barred by provision); *Smith v. Shady*, 2006 WL 314514 at \*2 (M.D. Pa. Feb. 3, 2006) (complaint that correctional officer grabbed prisoner's penis barred by provision).

53 *Young v. Knight*, 113 F.3d 1248, 1997 WL 297692 (10th Cir. June 5, 1997); see also *Colby v. Sarpy Co.*, 2006 WL 519396 (D. Neb. Mar. 1, 2006) (dismissal of a claim of wrongful confinement for four months).

54 *Luong v. Hatt*, 979 F. Supp. 481 (N.D. Tex. 1997).

55 *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999).

56 *Weatherspoon v. Valdez*, 2005 WL 1201118 (N.D. Tex. May 17, 2005).

57 Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America, CAT/C/USA/CO/2*, paras. 29-30 (Concluding Observations/Comments), July 25, 2006; Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America, 15/05/2000.A/55/44*, paras. 179-80 (Concluding Observations/Comments), May 15, 2000.

58 42 U.S.C. § 1997e(a).

59 See Giovanna E. Shay & Joanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation*

- Reform Act (PLRA)*, 29 *Cardozo Law Review* 291, 321 (2007) (reporting that in cases in which an exhaustion issue was raised after the Supreme Court decision in *Woodford v. Ngo*, 548 U.S. 81, 126 S. Ct. 2378 (2006), all of the prisoner's claims survived in fewer than 15% of reported cases).
- 60 The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17-19 (1994), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102>.
- 61 James, Doris J. & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates, Bureau of Justice Statistics Special Report 1*, Department of Justice, Bureau of Justice Statistics, December 14, 2006.
- 62 Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, available at [www.thearc.org/faqs/crimqa.html](http://www.thearc.org/faqs/crimqa.html).
- 63 See *Woodford v. Ngo*, *supra* note 59 at 2402 (Stevens, J., dissenting) (noting that most grievance systems have deadlines of 15 days or less, and that the grievance systems of nine states have deadlines of between two and five days).
- 64 See, e.g., *Pearson v. Welborn*, 471 F.3d 732, 745 (7th Cir. 2006) (affirming jury verdict that prisoner was sent to a "supermax" facility for a year in retaliation for First Amendment-protected complaints about conditions); *Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances).
- 65 See 18 U.S.C. § 3626(g)(3), (5); 42 U.S.C. § 1997e(h); 28 U.S.C. § 1915(h); and 28 U.S.C. § 1915A(c).
- 66 Allen J. Beck, Ph.D, Paige M. Harrison, and Paul Guerino, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09 1*, Department of Justice, Bureau of Justice Statistics, January 2010.
- 67 See, e.g., Stop Prisoner Rape, *The Sexual Abuse of Female Inmates in Ohio* (Dec. 2003), available at <http://www.spr.org/pdf/sexabuseohio.pdf> (including discussion of sexual assaults by staff in juvenile wing of facility); American Civil Liberties Union of Hawaii, "Hawaii's Youth Correctional Facility to Pay Over Half a Million Dollars for 'Relentless Campaign of Harassment' of Gay and Transgender Youth" (June 15, 2006) (threats of violence and physical and sexual assault), available at <http://www.acluhawaii.org/news.php?id=24>; Letter from Deval Patrick, Civil Rights Division of U.S. Department of Justice to Louisiana Governor Mike Foster, July 15, 1996, available at <http://www.usdoj.gov/crt/split/documents/lajuvfind3.htm> (describing physical and sexual assaults on youth held in secure juvenile facilities in Louisiana); American Civil Liberties Union & Human Rights Watch, *Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls* at 44-56, 63-71 (2006).
- 68 See Gregg Jones, et al., *TYC Facilities Ruled by Fear*, *Dallas Morning News*, March 18, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/031807dnprotycretaliat.3e701e5.html>.
- 69 See, e.g., *M.C. ex rel. Crider v. Whitcomb*, 2007 WL 854019, at \*3 (S.D. Ind. 2007); *Harris v. Le Roy Baca*, 2003 WL 21384306, at \*3 (C.D. Cal. 2003) (rejecting the contention that a grievance filed by counsel on prisoner's behalf satisfies the exhaustion requirement); *El'Shabazz v. City of Philadelphia*, 2007 WL 2155676, at \*3 (E.D. Pa. 2007) (grievances filed by prisoner's father on his behalf did not satisfy PLRA); *Minix v. Pazera*, 2005 WL 1799538, at \*7 (N.D. Ind. 2005) (efforts of detained juvenile's mother to stop ongoing abuse of her son did not satisfy PLRA); *Brock v. Kenton County, KY*, 93 Fed. Appx. 793, 795, 799 (6th Cir. 2004).
- 70 See, e.g. *Rasul v. Myers*, 563 F.3d 527, 528 (D.C. Cir. 2009) (no reasonable government official would know that Guantanamo detainees had due process rights or a right to be free from "cruel and unusual punishment" as provided by the Fifth and Eighth Amendments to the U.S. Constitution); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. N.Y. 2009) (government argued qualified immunity, but court did not rule on it); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007).
- 71 See, e.g., *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (Alien Tort Statute claim dismissed on ground that non-state actors cannot be liable. This decision grants unwarranted immunity for private contractors through an erroneous conclusion equating them with armed forces—a perversion of International Humanitarian Law rules and principles of distinction between combatants and civilians).
- 72 See, e.g., *Mohamed v. Jeppesen Dataplan*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd*, 563 F.3d 992 (9th Cir. Cal. 2009), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. Cal. 2009); *El-Masri v. Tenet*, 479 F.3d 296 (4th Cir. Va. [2007].; *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. N.Y. 2009) (government asserted state secret privilege, but court did not rule on it).
- 73 Scott Shane, "Invoking Secrets Privileges Becomes a More Popular Legal Tactic by U.S.," *New York Times* (Jun. 4, 2006).
- 74 See, e.g. Complaint, *Khaled El-Masri v. George J. Tenet*, No. 05-cv-1417 (E.D. Va., filed Dec. 6, 2005), available at [http://www.aclu.org/images/extraordinaryrendition/asset\\_upload\\_file829\\_22211.pdf](http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf).
- 75 Brief for Plaintiff, Statement of Khaled El-Masri, *Khaled El-Masri v. George J. Tenet*, No. 05-cv-1417 (E.D. Va., filed Dec. 6, 2005), available at <http://www.aclu.org/safefree/extraordinaryrendition/22201res20051206.html>.
- 76 *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).
- 77 *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007).
- 78 *El-Masri v. U.S.*, 128 S.Ct. 373 (2007).
- 79 Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request

for an Investigation and Hearing on the Merits at 77-85, April 9, 2008, available at <http://www.aclu.org/safefree/torture/34837lg120080409.html>.

80 Jane Mayer, *Outsourcing: The C.I.A.'s Travel Agent*, THE NEW YORKER, Oct. 30, 2006.

81 Petition for Writ of Certiorari, *Mohamed et al. v. Jeppesen DataPlan, Inc.* (U.S. filed Dec. 7, 2010), available at <http://www.aclu.org/files/assets/2010-12-7-JeppesenCertPetition.pdf>.

82 On September 27, 2010, the Supreme Court announced that it will be revisiting the state secrets privilege for the first time since 1953 in two consolidated cases, *General Dynamics Corp. v. United States* (09-1298) and *Boeing Co. v. United States* (09-1302). In both cases, the government terminated a substantial military contract based on a claim of default, but then asserted the state secrets privilege to prevent the contractors from defending themselves against the government's default charge.

83 Brief in Opposition to Petition for Certiorari, *Arar v. Ashcroft*, No. 09-923 (May 12, 2010).

84 See, e.g., Brief of the United States, *Padilla v. Yoo*, No. 09-16478 (9th Cir. Dec. 3, 2009).

85 *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Castle Rock*, 125 S. Ct. 2796 (2005).

86 *Id.*

87 *Morrison*, 529 U.S. at 618-20.

88 *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

89 In this case, the Court's decision also distorts state legislatures' intent in requiring enforcement of protective orders and ignores the dynamics of police non-responsiveness to domestic violence that led to these laws. It displays blindness to the realities of domestic violence and the legal structures created to respond to it.

90 *Gonzales v. United States*, Petition, Inter-American Commission on Human Rights (2005), available at <http://www.aclu.org/files/pdfs/petitionallegingviolationsofthehumanrightsofjessicagonzales.pdf>.

91 Vienna Convention on Diplomatic Relations, done Apr. 18, 1961, *United States accession*, April 29, 1970, 23 U.S.T. 3227, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf).

92 See, e.g., U.S. Dep't of State, Statement of Interest in *Gonzalez Paredes v. Vila*, No. 06-0059-cv (D.D.C.), docket no. 23; Statement of Interest of the United States, *Begum v. Saleh*, No. 1:99-cv-11834-RMB (S.D.N.Y. filed Dec. 7, 1999), available at [www.state.gov/documents/organization/6655.doc](http://www.state.gov/documents/organization/6655.doc). See also Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26-Nov. 21, 1947, 61 Stat. 3416; Convention on Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, *United States accession*, April 29, 1970, 21 U.S.T. 1418.

93 See, e.g., *Begum v. Saleh*, where the complaint sought damages for defendants' allegedly holding plaintiff in involuntary servitude prohibited by the Thirteenth Amendment, failure to pay minimum wage under federal and state laws, assault and battery, false imprisonment, conversion, and trespass to chattels.

94 *Tabion v. Mufti*, 73 F.3d 535, 537-540 (4th Cir. 1996).

95 *Sabbithi v. Al Saleh*, No. 07-cv-00115 (D.D.C. January 18, 2007).

96 Petition Alleging Violations of the Human Rights of Domestic Workers Employed by Diplomats by the United States of America, Inter-American Commission on Human Rights (2007), available at <http://www.aclu.org/womens-rights/petition-un-domestic-workers-iachr>.

97 Jayashri Srikantiah, Stanford School of Law Immigrants' Rights Clinic, and Karen Tumlin, National Immigration Law Center, *Backgrounder: Stipulated Removal*, November 2008, available at [http://www.law.stanford.edu/program/clinics/immigrantsrights/pressrelease/Stipulated\\_removal\\_backgroundunder.pdf](http://www.law.stanford.edu/program/clinics/immigrantsrights/pressrelease/Stipulated_removal_backgroundunder.pdf).

98 *Id.*

99 See, e.g., Anna Gorman, *Concerns Arise Over Fast-Track Deportation Program*, L.A. TIMES, March 2, 2009. As of 2008, nearly half of all stipulated orders entered since 1999 were signed at just three large immigration detention facilities in Eloy, Arizona; Lancaster, California; and Los Fresnos, Texas. Srikantiah and Tumlin, *Backgrounder: Stipulated Removal*, *supra* note 97.

100 Srikantiah and Tumlin, *Backgrounder: Stipulated Removal*, *supra* note 97.

101 Department of Justice and ICE Joint Press Release, "ICE and DOJ Joint Enforcement Action at Iowa Meatpacking Plant," May 12, 2008, available at <http://www.ice.gov/pi/news/newsreleases/articles/080512cedarrapids.html>.

102 DOJ Press Release, "Over 300 Criminal Arrests In Postville ICE Operation," May 15, 2008, available at [http://www.usdoj.gov/usao/ian/press/May\\_08/5\\_15?08\\_Agriprocessors.html](http://www.usdoj.gov/usao/ian/press/May_08/5_15?08_Agriprocessors.html).

103 U.S. Attorney's Office Northern District of Iowa Press Release, "300 Now Convicted and Sentenced Following May Arrests in Postville," June 10, 2008, available at [http://www.usdoj.gov/usao/ian/press/June\\_08/6\\_10?08\\_Postville.html](http://www.usdoj.gov/usao/ian/press/June_08/6_10?08_Postville.html).

104 Erik Camayd-Freixas, "Interpreting after the Largest ICE Raid in US History: A Personal Account," June 13, 2008, available at <http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf>; Muzaffar Chishti, Iowa Raid Raises Questions about Stepped-Up Immigration Enforcement, Migration Policy Institute, June 16, 2008, available at <http://www.migrationinformation.org/USFocus/display.cfm?ID=686>. Attorneys who represented the arrested workers were provided a pre-packaged

- "manual" at a meeting at the federal courthouse in Cedar Rapids in anticipation of the mass criminal prosecutions following the raid. It contained scripts for plea and sentencing hearings as well as documents providing for guilty pleas and waivers of rights. See July 24, 2008 Letter of Rockne Cole to Representative Zoe Lofgren. According to the Federal Courts' June 2008 Newsletter, *Third Branch*, the district court assembled checklists and forms related to initial appearances, status conferences, pleas and sentences prior to the raid. Largest Ever Criminal Worksite Enforcement Operation Stretches Court, *THE THIRD BRANCH*, Vol. 40 No. 6, June 2008, available at <http://www.uscourts.gov/ttb/2008-06/article01.cfm>.
- 105 Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (Apr. 2005)
- 106 Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, *WASH. POST*, Dec. 26, 2002, at A01 (quoting senior United States official as stating that after an individual is rendered, the CIA are "still very much in control" and that they will often "feed questions to their investigators"). See also Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, *WASH. POST*, Mar. 11, 2002; David E. Kaplan, et al., *Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After Al Qaeda*, *U.S. NEWS & WORLD REPORT*, June 2, 2003 (describing rendition of individuals to Jordan, Egypt, Morocco and Syria). For a comprehensive news report on the practice of rendition see Jane Mayer, *Outsourcing Torture*, *NEW YORKER*, Feb. 14, 2005.
- 107 Second Periodic Report of the United States of America to the Committee Against Torture, UN Doc. CAT/C/48/Add.3/Rev.1, January 13, 2006.
- 108 *Khouzam v. Chertoff*, 549 F.3d 235 (3d Cir. 2008).
- 109 *Khouzam v. Hogan, et al.*, 529 F. Supp. 2d 543 (M.D. Pa. 2008).
- 110 *Khouzam v. Chertoff*, 549 F.3d 235 (3d Cir. 2008).
- 111 Department of Justice, Office of Public Affairs, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President*, Aug. 24, 2009; see also David Johnston, *U.S. Says Rendition to Continue, but With More Oversight*, *N.Y. TIMES*, Aug. 24, 2009.
- 112 *Id.*
- 113 Human Rights Watch and ACLU, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System* (July 2010), available at [http://www.aclu.org/files/assets/usdeportation0710\\_0.pdf](http://www.aclu.org/files/assets/usdeportation0710_0.pdf).
- 114 8 U.S.C. Section 1229a(b)(3).
- 115 Here, "competency" refers to the legal term of art in the United States which sets a standard for a person's ability to participate in and understand the court process; 8 U.S.C. Section 1229a(b)(3).
- 116 *Alexander v. Sandoval*, 532 U.S. 275 (2001).
- 117 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (creating a new requirement that, to overcome motions to dismiss, federal complaints must state enough facts to persuade the presiding court that the claim is "plausible"; this replaced a standard set out in 1957 in *Conley v. Gibson*, 355 U.S. 41 (1957), which said that civil cases should not be dismissed "unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief").
- 118 *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (ruling that civil claimants must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and that in making that determination a court is to "draw on its judicial experience and common sense").
- 119 42 U.S.C. § 2000d et seq.
- 120 See *Conley v. Gibson*, 355 U.S. 41 (1957) (holding that civil cases should not be dismissed "unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief"). The Supreme Court has cited the language of *Conley* in at least a dozen decisions in the half-century since the case was decided.
- 121 See Editorial, *Restoring Access to the Courts*, *N.Y. TIMES*, Dec. 22, 2009; Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 *LEWIS & CLARK L. REV.* 157 (2010).
- 122 See, e.g., Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 *LEWIS & CLARK L. REV.* 15 (2010); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 *LEWIS & CLARK L. REV.* 185 (2010).
- 123 For examples of cases dismissed under the revised pleading standard, see, e.g., *Francis v. Giacomelli*, 588 F.3d. 186, 193 (4th Cir. 2009) (in a case brought by a police commissioner and his deputies following termination of their employment, in which plaintiffs argued *inter alia* that the defendants discriminated against them on account of their race, dismissal of the action is affirmed without leave to amend because, based on the facts alleged in the complaint, the complaint fails to articulate any claim for relief that is plausible on its face as required under *Iqbal* and *Twombly*, finding in part that because one of the fired employees is white, it was implausible that the African-American plaintiffs were fired as a result of animus); *Oinonen v. TRX, Inc.*, 2010 WL 396112 (N.D.Tex. 2010) (dismissing, with leave to amend, an age discrimination disparate impact class action involving a mass layoff of workers over 40 years of age, on the basis of plaintiffs' failure to meet heightened pleading standards under *Iqbal* and *Twombly*, finding that "Plaintiffs point to the layoff itself as the practice that disparately impacted older workers. However, they do not identify any specific test, requirement, or practice in the layoff selection process that is allegedly responsible for the purported statistical disparities. Identifying a specific practice is not a trivial burden, and is necessary to

- protect employers from potential liability when the statistical imbalances are the result of legitimate and non-discriminatory employment actions.”).
- 124 See, e.g., H.R. 4115 Open Access to the Courts Act of 2009; S. 1504 Notice Pleading Restoration Act of 2009. Both were introduced in the 111<sup>th</sup> Congress and attempt to achieve the result of restoring the *Conley* standard as it had been construed prior to the *Iqbal* and *Twombly* decisions.
- 125 States with racial profiling-related legislation include Arkansas, California, Colorado, Connecticut, Florida, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Washington and West Virginia.
- 126 Arkansas (Ark. Code. Ann § 12-12-1403), Kansas (Kan. Stat. Ann. § 22-4610), New Mexico (recently enacted HB 428 has not been codified yet), Oklahoma (22 Okl. St. Ann. § 34.3) and West Virginia (W. Va. Code, § 30-29-10).
- 127 N.J. Stat. Ann. § 2C:30-6.
- 128 Okl. St. Ann. tit. 22 § 34.3.
- 129 Colorado (Colo. Rev. Stat. § 24-31-309), Kansas (Kan. Stat. Ann. § 22-4610), Minnesota (Minn. Stat. Ann. § 626.9514), Missouri (Mo. Rev. Stat. § 590.653), Nebraska (Neb. Rev. Stat. § 20-504), New Mexico (recently enacted HB 428 has not been codified yet), Oklahoma (22 Okl. St. Ann. § 34.3), Rhode Island (Gen. Laws 1956, § 31-21.2-8), Washington (Rev. Code Wash. Ann. 43.101.410), and West Virginia (W. Va. Code, § 30-29-10).
- 130 Kansas (Kan. Stat. Ann. § 22-4611), and Rhode Island (Gen. Laws 1956, § 31-21.2-4).
- 131 The Traffic Stops Statistics Act, legislation to address racial profiling, was first introduced in 1997. Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997). Subsequently, similar legislation was introduced as the ERPA in 2001. End Racial Profiling Act of 2001, H.R. 2074, 107th Cong. (2001).
- 132 *Id.* §§ 101, 201, 304, 102(a).
- 133 *Screws v. U.S.*, 325 U.S. 91, 101 (1945); see also Michael J. Pastor, *A Tragedy and a Crime?: Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y.U. J. Legis. & Pub. Pol’y 171 (2002/2003). See also *United States v. Shafer*, 384 F. Supp. 496, 503 (N.D. Oh. 1974) (internal quotations omitted) (stating “Even the specific intent to injure, or the reckless use of excessive force, without more, does not satisfy the requirements of § 242 . . . There must exist an intention to punish or to prevent the exercise of constitutionally guaranteed rights, such as the right to vote, or to obtain equal protection of the law.”).
- 134 See *id.* at 502-03.
- 135 See Human Rights Council, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, para 138, U.N. Doc. A/HRC/11/2/Add.S (May 26, 2009) (characterizing the standard for criminal liability for police as “very high”).
- 136 See U.S. COMMISSION ON CIVIL RIGHTS, REVISITING WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES AND CIVIL RIGHTS IN AMERICA (2000), available at <http://www.usccr.gov/pubs/guard/main.htm>.
- 137 In September 2003, the Inter-American Court of Human Rights issued an advisory opinion on the rights of undocumented migrants, in which it held that international principles of human rights prohibit discrimination on the basis of immigration status. In particular, the Court examined the consequences of the *Hoffman* decision on the rights of undocumented workers. The Court held that states must ensure the right to access to justice, the right to effective jurisdictional protection, and the right to remedy irrespective of migratory status, stating that “States must ensure that all persons have access, without any restriction, to a simple and effective recourse that protects them in determining their rights, irrespective of their migratory status.” See Inter-American Court of Human Rights, Advisory Opinion OC-18/03 Requested by the United Mexican States, *Juridical Condition and Rights of the Undocumented Migrants*, paras. 107-110, Sept. 17, 2003, available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf).
- 138 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).
- 139 *Crespo v. Evergo*, 366 N.J.Super. 391 (N.J.Super.A.D., 2004).
- 140 Recognizing that, in some states, employment and labor protections under state law have been either eliminated or severely limited for undocumented workers (including basic workplace protections such as freedom from workplace discrimination and entitlement to hold an employer responsible for a workplace injury), the ACLU, along with the National Employment Law Project and the Transnational Legal Clinic at the University of Pennsylvania School of Law, filed a petition urging the Inter-American Commission on Human Rights to find the United States in violation of its universal human rights obligations by failing to protect millions of undocumented workers from exploitation and discrimination in the workplace. The petition argues that the U.S. is not in compliance with international human rights law, which requires all nations to apply their workplace protections equally and without discrimination based on immigration status. The petition was submitted to the commission on behalf of the United Mine Workers of America, AFL-CIO, Interfaith Justice Network, and six immigrant workers who are representative of the millions of undocumented workers in the U.S. labor force. The petition is currently pending. See Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America, Inter-American Commission on Human Rights, Nov. 1, 2006, available at [http://www.aclu.org/files/images/asset\\_upload\\_file946\\_27232.pdf](http://www.aclu.org/files/images/asset_upload_file946_27232.pdf).

- 141 *Reinforced Earth C. v. Workers' Compensation Appeal Bd. (Astudillo)* 570 Pa. 464.
- 142 *Sanchez v. Eagle Alloy Inc.*, 254 Mich. App. 651 (Mich. Ct. App. 2003) *cert. denied Sanchez v. Eagle Alloy, Inc.*, 471 Mich. 851 (Mich. 2004).
- 143 H.R. 4115 Open Access to the Courts Act of 2009 and S. 1504 Notice Pleading Restoration Act of 2009 have been introduced in the 111<sup>th</sup> Congress. Both attempt to achieve the result of restoring the *Conley* standard as it had been construed prior to the *Iqbal* and *Twombly* decisions.

## ANNEX:

### ACCESS TO JUSTICE AND EFFECTIVE REMEDY STATE-BY-STATE

*The following section outlines instances of denial of access to justice and effective remedy in various states. This section is based on information provided by ACLU affiliates in states across the country.*

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## **ALABAMA**

### **I. Prisoners' Rights**

#### **a. Denial of Access to Justice in Litigating Jail Conditions**

The ACLU of Alabama receives hundreds of requests for help every year from people in county and city jails. These prisoners tell stories of appalling violations of their human rights.<sup>1</sup> Overcrowding—with all of its consequences—is nearly universal. Prisoners in Alabama's county and city jails suffer from horrific medical neglect, including denial of medical care for acute mental health needs. A Calhoun County prisoner noted that he was denied medical care for a staph infection until his mother became involved. Despite eventually receiving some care, he stated, "I never visited a doctor no (sic) did one come to the jail to treat me, leg swollen, could barely walk, painful."<sup>2</sup> In Lamar County, a prisoner with Tuberculosis noted that he had, "been diagnosed with hepatitis C and am not being treated for the hepatitis."<sup>3</sup>

Prisoners in many facilities suffer from malnutrition. A Cleburne County prisoner wrote to the ACLU of Alabama, "The bread they are serving now is in a molded state. There is very little protein in the diet here. Not enough calories... and not close to the minimum amount of daily nutrition. People that I seen were eating toothpaste because of being hungry."<sup>4</sup> In Fayette County, a prisoner noted that, "The meals are cold. We are served one peanut butter sandwich for lunch everyday. Bologna for dinner each day."<sup>5</sup>

Filthy conditions are the norm in Alabama's county and city jails. A prisoner in Baldwin County stated that he had to sleep in human feces and was denied drinking water. In Coffee County, another prisoner reiterated these unacceptable conditions, stating, "There is stuff all over the walls, human feces spatter, it's just filthy. The lining at the bottom of the toilet is missing. It's leaking. Insects is crawling and flying out of it, also sewage is leaking out of it. I sleep and eat in this room 23 hours out of 24 hours a day."<sup>6</sup>

Inmates suffering these prison conditions are currently unable to receive adequate remedies and access to justice due to the substantial obstacles created by the Prison Litigation Reform Act (PLRA). The PLRA, enacted by Congress in 1996, is applicable to conditions suits pertaining to both prisons and jails.<sup>7</sup>

The PLRA contains numerous troubling provisions. First, the PLRA provides that no prisoner may bring an action for "mental or emotional injury suffered while in custody without a prior showing of physical injury."<sup>8</sup> This requirement may bar recovery of monetary damages for numerous violations, including the "denial of mental health care, racial discrimination, denial of religious freedoms, psychological torture, and retaliation for filing grievances."<sup>9</sup> Second, the PLRA places a two-year limit on prospective relief.<sup>10</sup> In practice, this provision allows prison conditions to easily revert back to their deteriorated state without more judicial oversight. Finally, the PLRA imposes significant restrictions on attorney fee awards to prevailing plaintiffs. Under the statute, attorney's fees must be proportionate to amount of relief ordered by the court regardless of the

fact that an actual money judgment might be quite small.<sup>11</sup> Additionally, the PLRA imposes a cap on attorney's fees.<sup>12</sup> These attorney's fees provisions are a disincentive to attorney participation in prisoner civil suits. As a result of the PLRA, prisoners with meritorious claims may have substantial difficulty litigating them in the court system. Consequently, prisoners are denied access to justice and an effective remedy for a variety of human rights abuses occurring in local jails.

## **b. Treatment of HIV+ Prisoners**

Alabama has a long and unfortunate history of discriminating against people living with HIV or AIDS in the prison system. HIV+ prisoners are segregated from the mainstream prison population. Due to discriminatory practices by the Alabama Department of Corrections (ADOC), HIV+ prisoners do not have access to important prison programs that may contribute to their rehabilitation and early release. Consequently, these prisoners have long been denied access to justice available to other similarly situated prisoners.

Through collaborative efforts with the ACLU of Alabama, ADOC has made progress in ending HIV discrimination in access to in-prison programs; however, significant problems remain. HIV+ men are barred from prison jobs outside the HIV unit at Limestone Correctional Facility, including supervised work crews. HIV+ men are also excluded from the Faith-based and Honor dorms. At Tutwiler Correctional Facility, HIV+ women are, likewise, excluded from supervised work crews and the Faith-based dorm. HIV+ men continue to be excluded from the eight-week substance abuse programs. This arbitrary exclusion of HIV+ men from the shorter program results in them serving longer sentences than their HIV-negative peers. Perhaps most egregious is the arbitrary medical eligibility requirements for HIV+ prisoners to qualify for work release.<sup>13</sup> These criteria bear no relation to an individual's capacity for employment.

## **II. Capital Punishment**

While Alabama's criminal justice is rife with problems, the state's administration of the death penalty exemplifies the over-arching issues of access to justice and denial of effective remedy symptomatic of the entire system. Alabama has over 200 people on death row.<sup>14</sup> According to the Death Penalty Information Center, Alabama has the highest death sentencing rate per capita and the eighth highest execution rate in the country per capita.<sup>15</sup>

### **a. Lack of an Indigent Defense System: Denial of Access to Justice Due to Inadequate Counsel**

In capital cases, a competent attorney can mean the difference between life and death. A defendant tried without adequate counsel is far more likely to be charged with and convicted of a capital crime and to receive a death sentence.<sup>16</sup> Alabama is the only state in the country with no state-funded program to provide legal assistance in state post-conviction proceedings to death row prisoners. Alabama has no statewide public defender system, though Alabama's death row occupants are overwhelmingly poor.<sup>17</sup>

Alabama's 67 counties are divided into 41 judicial circuits.<sup>18</sup> Each judicial circuit independently determines how to manage indigent defense.<sup>19</sup> In practice, only a few circuits have full or part-time public defenders' offices. The majority of circuits use private, court-appointed counsel for indigent representation.

Alabama provides only minimal compensation for court-appointed defense attorneys in death penalty cases: <sup>20</sup> \$60 an hour for in-court work and \$40 an hour for out-of-court work and no compensation for expenses, significantly below the market rate for lawyers in private practice. Over half of the 200 people on Alabama's death row were represented at trial by appointed lawyers whose compensation for out-of-court preparation was capped at \$1,000.<sup>21</sup> Historically, until 1999, Alabama capped the total defense costs for both trial and post-conviction work at a maximum of \$2,000. The cap has been lifted for trial work, but it still exists for appeal and post-conviction work. These funding rates and caps are grossly inadequate for the amount of work required to properly represent an inmate's rights. Moreover, judges routinely do not pay lawyers the entire bill for work done in the case. For example, one lawyer reported the court paid him the equivalent of \$4.98 per hour to defend his client's life.<sup>22</sup> Lawyers must receive adequate compensation in order to defend the rights of their clients most effectively. Financial resources can buy time, experts, investigators, DNA and other forensic testing—all important aspects of the legal process required to explore an inmate's legal history and options.

Studies by legal experts have documented severe shortcomings among these poorly paid lawyers, including lawyers who fail to investigate the crime or their clients' background or to prepare cross-examination or argument for trial.<sup>23</sup> Alabama's required qualifications for capital defense counsel fall far below the American Bar Association's guidelines for the appointment of defense counsel for death penalty cases.<sup>24</sup> Alabama merely requires five years' prior experience in the active practice of criminal law—with no distinction as to kinds of cases litigated or kinds of criminal law practiced. This is far from adequate preparation for the intricacies of a capital case. In some counties, defendants have been sentenced to death after trials where they were represented by a lawyer who did not meet even the minimum requirement of five years of criminal defense experience.

For wrongful convictions and sentences to be challenged effectively, death row inmates need lawyers at the post-conviction stage. Unlike every other state in the country that uses the death penalty, Alabama has no mechanism or state-funded agency to provide post-conviction counsel for persons sentenced to death. As a result, death row inmates do not receive state-provided legal assistance to challenge the inadequate representation they received at trial or other aspects of their conviction or sentence in post-conviction proceedings. State law in Alabama does permit a judge to appoint lawyers for post-conviction proceedings, but the law does not authorize any appointment of counsel until prisoners, all of whom are incarcerated on death row and many of whom are severely cognitively impaired, have filed their own petitions with the court.<sup>25</sup> This situation is an obvious roadblock that prevents courts from hearing legitimate claims of prosecutorial misconduct, failure to provide exculpatory evidence, and inadequate assistance of counsel.

## **b. Judicial Overrides in Death Sentencing**

Alabama is one of only three states in which the trial judge is empowered with the legal authority to disregard a jury's recommended sentence and impose his own sentence.<sup>26</sup> Alabama is the only state, however, with no meaningful standards governing this practice, called judicial override.<sup>27</sup> Judges use overrides in Alabama almost exclusively to override a jury's – often unanimous – life recommendation to a death sentence rather than override a death verdict to life. As a result, more than a fifth of the state's death row prisoners would never have been sent to death row had the judge followed the jury's verdict. The practice of judicial override is a significant factor in Alabama leading the country in death sentencing per capita.

Alabama's partisan judicial elections exacerbate the override problem. Because trial court judges in Alabama are elected, their sentences are likely to reflect a desire to appear "tough on crime" by imposing the death penalty.<sup>28</sup> Indeed, studies have shown that the use of judicial overrides of life verdicts to death sentences tend to increase in election years.<sup>29</sup> Particularly in high-profile capital cases, an elected judge's incentive to appease a constituency threatens the independence of the judiciary and the fairness of the death sentence.

## **c. Race and the Death Penalty**

As of 2010, 41 out of the 49 people (84 percent) executed by the State of Alabama during the modern era were convicted of killing white people.<sup>30</sup> While only six percent of all murders in Alabama involve black defendants and white victims, over 68 percent of black death row prisoners have been sentenced for killing a white victim.<sup>31</sup>

In the last ten years, 23 capital cases in Alabama were reversed upon proof that prosecutors illegally excluded black people from jury service.<sup>32</sup> From 2005 to 2009 in Houston County, Alabama, prosecutors removed 80% of qualified black jurors from service in capital cases. As a result, capital defendants there were tried by all-white juries or juries with only a single black juror, though African-Americans make up 27% of the county's population.<sup>33</sup> The practice of excluding black jurors during the selection process is particularly noticeable when the defendants are black and the victims are white.<sup>34</sup> The systematic exclusion of black jurors in such cases raises serious concerns about the fairness of these trials and the criminal justice system in general.

### **III. Women's Rights**

#### **a. Alabama Courts' Unwillingness to Review Applications for a Waiver of the Parental Consent Requirement for Abortion**

Under Alabama law, an unemancipated minor in Alabama must obtain the written consent of either parent or her legal guardian before obtaining an abortion. Without such consent, she must petition the juvenile court in the county in which she resides or in the county in which the abortion is to be performed for a waiver of the consent

requirement. To obtain an abortion, the court must find either: (1) that the minor is mature and well-informed enough to make the abortion decision on her own; or (2) that performance of the abortion would be in the best interest of the minor.<sup>35</sup> In actuality, the overwhelming majority of family and district courts are unwelcoming places to seek a judicial bypass. Testing has revealed that when asked about the judicial bypass provision, circuit clerks repeatedly tell young women that “We don’t do that here.” Often they are also advised to consult with an anti-choice counseling center. To the ACLU of Alabama’s knowledge, only the courts in Tuscaloosa and Montgomery fairly evaluate requests for waiver of the parental consent.

The Alabama court system’s unwillingness to review applications for a waiver of the parental consent requirement has serious consequences for young women’s access to abortion and their overall health. Most young women tell their parent or guardian about their decision to have an abortion. The young women who do not tell their parents often do so for compelling reasons such as emotional or physical abuse or incest. Rather than tell their parents, some teenagers resort to unsafe, illegal abortions, or try to perform the abortion themselves. In doing so, they risk serious injury and death.

#### **IV. Immigrants’ Rights**

##### **a. Access to Legal Representation**

Etowah County Detention Center, located in the community of Gadsden, Alabama, two hours from Atlanta, Georgia, and one hour from Birmingham, Alabama, is used by Immigration and Customs Enforcement (ICE) to detain long-term immigrant detainees who are either awaiting return to their country of origin or are awaiting the outcome of appellate rulings. Over 2,900 detainees were detained in the facility in 2008.<sup>36</sup>

Many of the immigration detainees warehoused in Etowah County Detention Center and other facilities in Alabama have agreed that they overstayed their visa and are willing to return to their country of origin, but are being detained as they wait for this to happen. This process can take months or years because of government difficulty obtaining the necessary travel documents from foreign embassies.

Still others are in removal proceedings and fighting for their right to remain in the U.S., including potentially meritorious claims such as claims for asylum because they fear persecution in their home country, or cancellation of removal based on their long history and strong family ties to the U.S. However, it is nearly impossible for these individuals to obtain legal assistance in removal proceedings or challenge their detention. The government is not required to provide them with a lawyer, although many of the detainees cannot afford an attorney.

## **ARIZONA**

### **I. Immigrants' Rights**

Arizona serves as a stark example of civil and human rights violations that result from unchecked enforcement authority in the area of immigration. Immigrant and ethnic communities throughout the state have paid an extremely high price for the actions of federal, state and local government officials. The combination of hostile state and federal immigration enforcement laws, far-reaching and draconian enforcement policies, and racist and anti-immigrant rhetoric have institutionalized discriminatory and abusive practices against citizens and non-citizens alike in Arizona. Together, these factors have created a climate of fear and distrust of law enforcement in our communities such that affected persons are often afraid and intimidated from coming forward to denounce violations. Without adequate protections and procedures to allow individuals to speak openly about these experiences, the possibilities for both individual redress and broader advocacy efforts are severely limited. Furthermore, without decisive intervention from the federal government, and in light of the existing hurdles to proving discrimination in the United States court system, the vast majority of persons are denied effective and meaningful access to justice.

The implementation of immigration enforcement and detention policies in Arizona raises serious human rights violations in the context of administration of justice and the rule of law; equality and non-discrimination; right to life, liberty and security of the person; and the rights of migrants, refugees, and asylum seekers.

#### **a. Arizona's Extreme Immigration Enforcement Law: SB 1070**

In April 2010, the Arizona House of Representatives passed SB 1070, a bill to dramatically expand police powers to stop, question and detain individuals for not having proper identification. Signed into law by Arizona Governor Jan Brewer on April 23, 2010, the law unconstitutionally allows the state of Arizona to regulate immigration by establishing a separate state offense for any person to violate provisions of the federal immigration law regarding registration and carrying registration documents. It gives local police officers authority to investigate, detain and arrest people for perceived immigration violations without the benefit of proper training, exacerbating the problem of racial profiling and raising concerns about the prolonged detention of citizens and legal residents. The extreme law requires police to demand "papers" from people they stop who they suspect are "unlawfully present" in the U.S. and would subject massive numbers of people to racial profiling, improper investigations and detention.

In May 2010, the ACLU and a coalition of civil rights groups filed a class action lawsuit in the U.S. District Court for the District of Arizona challenging SB 1070.<sup>37</sup> The lawsuit charges that the Arizona law unlawfully interferes with federal power and authority over immigration matters in violation of the Supremacy Clause of the U.S. Constitution; invites racial profiling against people of color by law enforcement in violation of the

equal protection guarantee and prohibition on unreasonable seizures under the Fourteenth and Fourth Amendments; and infringes on the free speech rights of day laborers and others in Arizona.<sup>38</sup>

One of the individuals the coalition is representing in the case, Jim Shee, is a U.S.-born 70-year-old American citizen of Spanish and Chinese descent. Shee asserts that he will be vulnerable to racial profiling under the law, and that, although the law has not yet gone into effect, he has already been stopped twice by local law enforcement officers in Arizona and asked to produce his “papers.”

Another plaintiff, Jesus Cuauhtémoc Villa, is a resident of the state of New Mexico who is currently attending Arizona State University. The state of New Mexico does not require proof of U.S. citizenship or immigration status to obtain a driver's license. Villa does not have a U.S. passport and does not want to risk losing his birth certificate by carrying it with him. He worries about traveling in Arizona without a valid form of identification that would prove his citizenship to police if he is pulled over. If he cannot supply proof upon demand, Arizona law enforcement is required to arrest and detain him.

In an important first step in challenging this unconstitutional law, in October 2010 the plaintiffs in *Friendly House et. al. v. Whiting et al.* won an important legal victory in their constitutional challenge to SB 1070.<sup>39</sup> Among other things, the court found that the plaintiffs' claim that “Racial discrimination was a motivating factor for [S.B.] 1070's enactment” establishes a valid constitutional challenge to the law. The decision was filed in response to the defendants' motions to dismiss the case and the plaintiffs' motion for a preliminary injunction.

During the November 2010 Universal Periodic Review of the United States by the Human Rights Council, country delegates questioned the U.S. delegation about S.B. 1070, and the Working Group on the Universal Periodic Review issued a recommendation that the U.S. government should repeal S.B. 1070 and refrain from enforcing such discriminatory and racial laws.<sup>40</sup>

#### **b. Access to Counsel for Detained Immigrants**

Immigration detainees in ICE custody and placed in removal proceedings do not have the right to appointed counsel. The majority of detained immigrants represent themselves in complex legal proceedings where often life or death is at stake. The right to counsel is a due process right that is fundamental to ensuring fairness and justice in proceedings, guaranteed by the U.S. Constitution for any individual regardless of immigration status.

Detainees at the Pinal County Jail in Arizona also face serious problems related to access to counsel and family visitation. At that jail, detainees are not allowed to have contact visits with family members who may have traveled long distances to see their loved one and who may not be able to afford multiple trips to the jail. Attorney visitation is limited to tele-video communication or contact visits in booths where only one attorney may visit at a time and will often wait anywhere from 15 to 30 minutes until their client is escorted to the visitation room by a detention officer. Discussions between

a detainee and his/her attorney in the contact booths are conducted over a telephone, which raises concerns about privileged information being overheard or monitored by detention personnel.

### **c. Diminished Due Process in Detention Policy: Mandatory Detention**

Longtime legal residents of the United States are most often subject to the mandatory detention provisions under 8 U.S.C. § 1226(c) because they are allegedly removable on certain criminal grounds. Some of the convictions in these cases are very minor, such as shoplifting, and may be several years old. Nonetheless, ICE has adopted overly broad constructions of the statute, thereby dramatically expanding the reach of mandatory detention beyond what Congress intended. Because of their elevated immigration status and their long-standing ties to the community, lawful permanent residents of the U.S. should receive the highest levels of legal and humanitarian protections against mandatory detention.



# **CALIFORNIA**

## **I. Capital Punishment**

### **a. Denial of Access to Counsel**

California's death penalty is plagued with systemic problems that deny access to justice for capital defendants and those convicted of capital crimes. Most disturbing, the state is unable to provide attorneys in a timely fashion to people sentenced to death. Of the 698 inmates on California's death row at the end of 2009, 208 (29.8%) had no counsel for habeas corpus proceedings. An additional 83 (11.89%) have no appellate or habeas counsel at all. In total, more than 40 percent of death row inmates in California are without legal representation in one of these legal proceedings. Individuals sentenced to death must wait four or five years for appellate counsel to be appointed, and some have waited more than a decade for habeas counsel to be appointed. In 2009, 21 appellate counsel appointments were made, while 29 individuals were sentenced to death. The backlog thus continues to grow. Meanwhile, records are lost, memories fade and key witnesses die or disappear.

In addition to this systemic lack of access to justice in the post-conviction setting, the economic crisis has led to more and more restrictions on the resources provided to defense counsel in death penalty cases at the trial level. In Los Angeles County, the county that sends the most people to death row in California, court-appointed attorneys in death penalty cases are paid under a flat fee contract system. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases prohibits the use of such flat fee contracts because they create a conflict of interest between the attorney and the client.<sup>41</sup> Trial courts across the state are routinely denying necessary resources for investigators and experts, all in an effort to save money. As a result, defendants facing the death penalty are increasingly denied access to justice in California trial courts. Finally, California's enormously expensive death penalty system diverts resources needed to solve murders and promote public safety. In fact, almost half of all murders in California remain unsolved, totaling 1,000 murders each year. This effectively denies murder victims' family members access to justice in these cases.

## **II. Racial Justice**

### **a. Mass and Disproportionate Incarceration**

California's criminal justice system is highly dysfunctional and fails to provide access to justice for all of its citizens. California passes laws and enforces them in a manner that leads to mass incarceration and to the disproportionate incarceration of people of color, particularly African American men. Over the past 30 years, California has enacted scores of new felony crimes and increased sentences, which has led to mass incarceration in the state. Two criminal justice policies, in particular, have helped fuel this prison growth and the resulting disparities: the "War on Drugs" and "Three Strikes

You're Out." African Americans have borne the brunt of these laws and are severely overrepresented among the prison population in California.

California has the largest prison system in the nation—second only to the Federal Bureau of Prisons. Since the 1980s, the number of people incarcerated in California has increased from 22,000 to an all-time high of 168,350 in 2006, with projections suggesting that it will reach 180,000 by the end of 2010. As of 2006, one of every nine individuals incarcerated in state prisons nationwide were housed in California. Many of these individuals are incarcerated for nonviolent offenses. In California, African Americans represent less than seven percent of the general population, but are more than a quarter of the state's prison population. The California drug offender prison population as of 1996 was greater than the entire number of prisoners incarcerated in 1982. In 2003, the rate of white male prison admissions for drug offenses in California was about 44 per 100,000, while the rate for African-American males was 515 per 100,000. Today, one in four prisoners is serving a doubled or 25-years-to-life sentence under California's Three Strikes law—the majority are there for nonviolent offenses. African Americans are incarcerated for third-strike life sentences at a rate 12 times more than whites. Taking second and third strike sentences together, the African-American incarceration rate is over 10 times that of whites.

The expansion of California's felony laws and increased length of sentences and parole has not only led to mass and disproportionate incarceration, but has led to a shocking degree of African-American voter disenfranchisement. While racially neutral on their face, felony disenfranchisement laws have had a severe, racially-disparate impact. At the current rate and pattern of incarceration, it has been forecast that three in ten of the next generation of African American men nationwide will be disenfranchised at some point in their lifetime. Yet African Americans are less than seven percent of California's total population and, as of 2000, were eight percent of the adult citizen population. African Americans are disenfranchised at almost 10 times the rate of whites in this state.

### **III. Immigrants' Rights**

#### **a. Detainees with Mental Disabilities: Lost in the System**

The ACLU of Southern California—in partnership with the ACLU's Immigrants' Rights Project, the ACLU of San Diego and Imperial County, several other nonprofit organizations, and Sullivan & Cromwell LLP—recently filed the nation's first class action lawsuit on behalf of immigrant detainees with severe mental disabilities, detainees who are left defenseless in a system that they cannot comprehend.

The lawsuit, *Franco v. Holder*, asks a federal district court in Los Angeles to order the U.S. government to create a system for determining which non-citizens lack the mental competence to represent themselves and to appoint legal representation for those who are unable to defend themselves. Unlike the criminal court system—where appointed counsel is part of due process—immigration courts and detention facilities have no safeguards for ensuring that the rights of people with serious mental disabilities are

protected. Two plaintiffs in the suit were the subject of habeas petitions before federal courts in California last March.

The six immigrants represented are from California and Washington, and all have been diagnosed with severe mental disabilities. Several have been found incompetent to stand trial in other court proceedings. One of them, Jose Antonio Franco-Gonzalez, was lost in detention facilities in California for nearly five years because of the government's failure to account for his cognitive disability. Another detainee named in the lawsuit, Aleksandr Khukhryanskiy, is a 45-year-old refugee from the Ukraine who has been diagnosed with paranoid schizophrenia, post traumatic stress disorder, and major depression. Despite being unrepresented and telling an immigration judge that he did not understand what was happening during his immigration hearing, Mr. Khukhryanskiy was ordered removed and denied any opportunity to apply for immigration relief. A recent report published by the ACLU and Human Rights Watch indicates that countless other detained non-citizens with mental disabilities are also being forced to defend themselves from deportation, even if they cannot understand the proceedings to which they are subjected.

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Despite the extreme vulnerabilities of unrepresented individuals with serious mental disabilities, the Department of Justice and the Department of Homeland Security has failed to adopt any clear policies or procedures to protect their fundamental rights in immigration proceedings. This callous neglect continues to put detained non-citizens with mental disabilities, such as Mr. Franco and Mr. Khukhryanskiy, at risk of being "lost" in the immigration detention system for years at a time or deported by default.

### **b. Prolonged Immigration Detention**

*Rodriguez v. Hayes* is a class action lawsuit challenging the Department of Homeland Security's policy of imprisoning non-citizens without providing them with detention hearings for lengthy periods of time. Because incarceration in an immigration detention facility is considered "civil detention" rather than imprisonment under domestic U.S. Constitutional law, the government takes the position that it need not provide hearings to detainees to determine if their detention is warranted while their immigration cases remain pending. For the same reason, the government declines to appoint attorneys for detainees who cannot afford to hire one for themselves. As a result, approximately 80% of non-citizens detained in the immigration prison system have no attorney to represent them.

For those detainees who choose to contest their deportation, that process can often take years, due to case backlogs in the immigration courts and in the federal courts. Although many of those detainees have meritorious claims, they often must remain in detention while they pursue them. As a result, on any given day thousands of detainees throughout the country—including several hundred in the Southern California area—remain imprisoned in immigration detention centers without having had a hearing before a judge concerning whether or not they should remain detained.

In addition, this detention system operates against all classes of non-citizens seeking to remain here under the immigration laws. As a result, it applies not only to those who face deportation because of a prior criminal conviction, but also to asylum seekers and people who committed only technical violations of their visas.

The ACLU has won important victories to establish limits on the detention of such individuals in certain individual cases, but has yet to effect a system-wide change to this massive system of imprisonment without trial in the United States. Given this widespread denial of access to justice and due process in our immigration system, the ACLU of Southern California is asking the court in its lawsuit, *Rodriguez v. Hayes*, to adopt a rule that people held for longer than six months without a hearing on whether their detention is warranted must either be given a hearing or released.

## **FLORIDA**

### **I. Capital Punishment**

#### **a. Denial of Federal Habeas Review Due to Florida's Post-Conviction Counsel Registry System**

Inadequate legal assistance provided by Florida's post-conviction counsel registry system has resulted in many inmates missing filing deadlines mandated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and thus waiving federal habeas review. This situation has disastrously limited the availability of federal habeas corpus relief for defendants in Florida seeking to challenge their convictions and death sentences in federal court.

In addition to institutional defenders, Florida employs a "registry" of private attorneys to provide legal representation for death-row inmates in state post-conviction proceedings.<sup>43</sup> "Registry" attorneys are required by statute to continue representing their clients through federal habeas review.<sup>44</sup> Numerous federal courts have held that habeas petitioners are entitled to equitable tolling of the statute of limitations for state post-conviction motions when their filings are late due to reliance on inaccurate representations or unfair actions by the courts or a state. However, Florida has repeatedly and often successfully moved to dismiss federal habeas petitions filed on behalf of death-row inmates based on a failure by state-selected and state-monitored registry counsel to meet AEDPA deadlines. In these cases, death-row inmates are then foreclosed from ever seeking federal habeas review, and as a result many petitioners in Florida may be executed without a federal court ever reviewing their habeas claims.

For example, from 2004-2006, eight men sentenced to death in Florida, six represented by registry counsel, had their federal habeas petitions rejected as untimely (appeals, petitions for *certiorari*, and/or requests for certificates of appealability ("COA") are pending in six of these cases).<sup>45</sup> In addition, during that same period, eight other inmates on Florida's death row—all represented by registry counsel—had federal habeas petitions pending which the state is arguing should be barred as untimely.<sup>46</sup> The legal representation provided by the state and purportedly monitored by its courts has led directly to an intolerably long list of capitally-sentenced defendants who may never have an opportunity to pursue federal habeas review.

Florida's registry system has repeatedly resulted in missed habeas deadlines since its creation in 1998. Florida and its courts have long known about the severe deficiencies of the registry counsel system. Charged with overseeing "registry" counsel,<sup>47</sup> the Florida courts became aware as early as 1998 that the transition from capital-collateral relief counsel to registry counsel had created a backlog of people on death row who had no lawyers, even while AEDPA's one-year clock was running.<sup>48</sup> According to Florida Bar and media reports, Florida legislators and Florida Supreme Court justices have repeatedly

complained publicly, including in Florida's legislative record, about the poor quality of representation from registry attorneys.<sup>49</sup>

The severe deficiencies in the registry counsel system were well known in 2003, when Florida expanded the registry system to cover the northern region of the state.<sup>50</sup> In fact, Florida was on notice of the registry system's deficiencies as early as 2000, two years after its creation, when reports emerged that registry attorneys were failing to provide quality representation and that their failures included missing deadlines for filing federal habeas corpus petitions.<sup>51</sup>

## **GEORGIA**

### **I. Racial Justice**

#### **a. Racial Profiling in Gwinnett County**

Georgia is among those states that have no laws to prohibit racial profiling, as the Georgia General Assembly has rejected repeated attempts to pass such a law. Accordingly, law enforcement personnel throughout Georgia may continue to stop individuals based solely on their race or ethnicity, often without any measure of accountability. This is of particular concern in Gwinnett County, where testimonies affirm that officers disproportionately target people of color for pretextual stops, investigations, and enforcement.<sup>52</sup>

The incidents of racial profiling in Gwinnett County have been particularly exacerbated after the implementation of the 287(g) program, which allows local law enforcement to participate in enforcement of federal immigration laws.<sup>53</sup> Both before and after the implementation of this program, the ACLU of Georgia received complaints from drivers, pedestrians, and Gwinnett community members showing that police officers are targeting immigrants and people of color for stops, searches, and interrogations.

The program gives 287(g)-trained officers wide discretion to question and detain all detainees who enter the jail, even for traffic and non-immigration related infractions. Pursuant to official Gwinnett County's Sheriff's Office (GCSO) policy, 287(g) trained officers must conduct an interview of every detainee who enters the Gwinnett County Jail to determine a detainee's legal status.<sup>54</sup> Similarly, 287(g) trained GCSO officers have the discretion to interview all foreign-born detainees to determine if they are illegally residing in this country.<sup>55</sup> Therefore, even if a detainee is arrested for a basic traffic violation, such as failing to have the car lights on, that detainee may be interrogated about his or her immigration status and ultimately transferred to ICE custody. Although the officers are supposed to conduct these interviews "without prejudice or racial discrimination,"<sup>56</sup> it is difficult to determine how the officers choose which detainees to interview, and also, how they decide which detainees are foreign born. The discretion these rules give to the officers, coupled with the program's lack of oversight, easily allow for racial profiling.

After implementation of 287(g) in Gwinnett, the ACLU of Georgia has received numerous complaints from Latino drivers and other immigrants who have been stopped or arrested by officers on improper grounds. Additionally, in some instances, a basic traffic stop or minor traffic violation has led to detention and removal. As such, many immigrants are scared to contact or interact with the police, as they fear that they will be deported or punished if they do so.

There is a lack of adequate policies mandating collection of stop and search data from traffic stops, and without such data, it is difficult to determine whether officers are making stops and arrests based on a proper basis of reasonable suspicion or probable cause, or on the improper basis of race and ethnicity. Without proper documentation of the stops, detentions, and arrests conducted through use of 287(g), there is no way to ensure that GCSO officers are not engaging in discriminatory practices in violation of federal civil rights law. Without proper documentation of investigatory stops, there are no meaningful checks in place to ensure that the GCSO officers do not abuse the 287(g) program by intimidating and racially profiling immigrant communities in Gwinnett County in order to identify and deport undocumented immigrants. There are no checks in place to ensure that Gwinnett officers are making stops based on a proper legal basis. This concern is especially prevalent in Gwinnett, as the county has a very large population of Latino immigrants as well as immigrants from other backgrounds who are susceptible to such profiling.



## IOWA

### I. Immigrants' Rights

#### a. Stipulated Removal and Denial of any Hearing before Deportation

On May 12, 2008, U.S. Immigration and Customs Enforcement (ICE) conducted the largest single-site immigration raid in U.S. history at Agriprocessors, Inc., a kosher meatpacking plant in Postville, Iowa, and the largest employer in northeast Iowa.<sup>57</sup> A significant aspect of the raid was the accompanying massive *criminal* prosecution of immigrant workers for allegedly using false documents to work and accompanying stipulated orders of removal.

Federal immigration officials used stipulated removal orders to deport non-U.S. citizens following the workplace raid. Stipulated orders of removal are plea agreements that allow the deportation of a noncitizen without a hearing before an immigration judge. Immigrants who sign stipulated orders of removal waive their rights to hearings and agree to have a removal order entered against them, regardless of whether they are eligible to remain in the United States.

In Postville, ICE initially arrested 389 workers for “administrative immigration violations”—that is, for using Social Security or alien registration numbers that did not belong to them.<sup>58</sup> The majority of the workers were indigenous Mayans recruited and brought to the U.S. from Guatemala by a U.S. company; for many of the workers even Spanish was a second language.

Three days after the raid, on May 15, 2008, the U.S. Attorney’s Office in the Northern District of Iowa charged 306 of the arrested workers criminally for allegedly using false documents in relation to their employment.<sup>59</sup> The principal charge brought against 270 of the arrested workers was not just ordinary document fraud, but rather a newly minted interpretation of the extraordinary charge of aggravated identity *theft*.<sup>60</sup> In March 2008, in *United States v. Mendoza-Gonzalez*, the Eighth Circuit had decided that a defendant need not know that the identification he was using belonged to another person to be convicted of the crime of aggravated identity theft.<sup>61</sup>

Many of Agriprocessors’ immigrant workers purchased false documents to obtain employment, often at the suggestion of Agriprocessors management.<sup>62</sup> In many cases, the immigrant workers who were using false documents did not even know the significance of a Social Security or alien registration number, or that the number they had been assigned and submitted to their employer belonged to another person.<sup>63</sup>

Within seven days, 300 of the workers had pled guilty, principally to knowingly using false Social Security numbers in violation of 42 U.S.C. § 408(a)(7)(B) or other false employment documents in violation of 18 U.S.C. § 1546(a).<sup>64</sup> The U.S. Attorney's Office offered uniform, non-negotiable, seven-day "exploding" plea agreements to all defendants. Under this practice, each defendant was compelled to decide whether to accept in full or reject the offer within seven days. The standard plea arrangement offered those charged with aggravated identity theft consisted of a five-month sentence pursuant to a guilty plea to fraud in violation of 18 U.S.C. § 1546(a), three years of supervised release, and a stipulated judicial removal order that waived all rights to individualized immigration proceedings and consideration of forms of relief.<sup>65</sup> In exchange, the U.S. would drop the sentence-enhancing charge of aggravated identity theft, which carries a two-year mandatory sentence on top of punishment for underlying crimes.

Few if any of the workers received individualized court proceedings. Arraignments and pleas were completed en masse. Court-appointed attorneys had little time to meet with their clients, and each of the 18 court-appointed attorneys represented 17 defendants on average.<sup>66</sup> After their initial appearance, many of the workers were scattered to state and county prisons throughout eastern Iowa, making it difficult for their attorneys and interpreters to find an interview them. The circumstances, with multiple defendants represented by a single lawyer; complex immigration issues; significant language, educational and cultural barriers; and the extreme time limit, made adequate legal defense, investigation and counseling almost impossible.<sup>67</sup>

Within days, the Postville defendants routinely waived all of their rights—including their right to indictment, to court reporters, to review the pre-sentence investigation report, and to appeal their convictions and sentences—and pled guilty, the vast majority with a judicial order of deportation, pursuant to Section 238(c)(5) of the Immigration and Nationality Act (INA), that makes *any* further immigration relief impossible. The formulaic guilty pleas demanded by prosecutors almost universally required defendants to accept mandatory stipulated judicial orders of deportation under Section 238(c)(5) of the INA, codified at 8 U.S.C. § 1228(c)(5). These orders barred any further consideration of defendants' immigration status or claims, though the defendants may have had valid claims for immigration relief or ineffective assistance of counsel claims.

Under the circumstances, the workers who were denied assistance from immigration attorneys, could barely understand the proceedings, were separated from their counsel by distance and language barriers, and faced overwhelming legal coercion in the form of exploding plea deals, were railroaded into pleas that separated them from their families and resulted in permanent exclusion from the U.S.

## **MARYLAND**

### **I. LGBT Rights**

#### **a. Excluding Same-sex Couples from Marriage Protections**

In lawsuits brought to the highest courts in several states of the United States,<sup>68</sup> as well as in lawsuits brought in federal courts,<sup>69</sup> arguments that excluding same-sex couples from the protections of marriage violate state and federal constitutions have been dismissed as without foundation. The American legal system has thereby denied lesbian, gay, and bisexual people access to justice with regard to significant protections at the core of family life for most people. The governments of various states, as well as the United States government itself, have urged the courts to close their doors to same-sex couples seeking to enforce their rights to equality and liberty under the state and federal constitutions.

In August 2005, the ACLU filed a lawsuit in Baltimore with the cooperation of Equality Maryland, charging that a state law denying same-sex couples the right to marry violates the Maryland Constitution.<sup>70</sup> The lawsuit was filed on behalf of nine same-sex couples and a man whose partner recently passed away and would like to be able to marry a same-sex partner one day. The couples came from all walks of life—a former civil rights worker, a bus driver, a paramedic, a teacher, a dentist and a former police officer. Some of the couples have been together for decades, and some are raising children.

The plaintiffs in the case include:

- Alvin Williams and Nigel Simon, who described their meeting eight years earlier at a discussion group for black gay men as “love at first sight.” Both active Baptists, the couple exchanged vows at a holy union ceremony in July 2000. The adoptive parents of three former foster children (two boys and a girl), the couple would like to be able to marry in order to give their children the comfort and security that come only with marriage.
- Takia Foskey and Jo Rabb, who had been together for over three years. Rabb is a bus driver for the state. Their romance began after Rabb showed kindness to Foskey’s children when Foskey was struggling to get them on the bus. Although they are now raising the children as a family, Rabb cannot enroll Foskey or the children in the state health plan. For a while, Foskey and her children were forced to go without insurance. Although her new employer provides insurance for her and her children, the coverage is inferior to the coverage Rabb receives from the state. In 2003, Rabb had an emergency gallbladder operation at a Baltimore hospital, and Foskey was barred from seeing Rabb or receiving any information about Rabb’s condition.

- Charles Blackburn and Glen Dehn of Baltimore, who are senior citizens who had been together for more than 28 years. Ordained a Unitarian minister in 1962, Blackburn was heavily involved in the civil rights movement in Alabama in the mid-1960s. Dehn worked for 31 years as a legislative planner and analyst for the U.S. Social Security Administration. As a retired federal employee, Dehn has excellent health benefits and coverage that he cannot share with Blackburn. Now that Blackburn is in his 70's, he wonders what will happen if he becomes ill and the protections of marriage are not available to him and Dehn.

The Maryland Court of Appeals ruled against the ACLU's plaintiffs in September 2007, upholding the state law that bars same-sex couples from marrying and accessing the hundreds of family protections provided to married couples and their children under state law.<sup>71</sup> The vote in the case was 4 to 3. One of the dissenting judges said the legislature should either be required to adopt civil unions or marriage. The other two said that the case should be sent back to the lower court for a trial to see if government has a good enough reason to bar same-sex couples from marriage.

The majority opinion rejects the ACLU's arguments that barring same-sex couples from marriage is sex discrimination. While the court agreed that marriage is a fundamental right, it ruled there is no fundamental right to marry someone of the same sex. The court also ruled that laws discriminating against gay people are not subject to stringent judicial review. The court applied the least demanding form of constitutional analysis to determine if the ban violates the state's equal protection guarantees and concluded that excluding same-sex couples from marriage might rationally be related to inducing heterosexuals to have children, so the state can continue to deny same-sex couples the ability to marry and family protections.

## **MICHIGAN**

### **I. Racial Justice**

#### **a. Denial of Undocumented Workers' Access to Effective Remedy for Employment Rights Violations**

In Michigan, undocumented immigrant workers' access to workers' compensation benefits for injuries caused by workplace accidents has been limited by the state's highest court. In one case, an employer fired two workers who were seriously injured in separate workplace accidents, and the employer defended against having to pay the workers' compensation claims on the basis that the workers were undocumented immigrants from Mexico.<sup>72</sup> Based on *Hoffman*, and under a state law that disallows time loss benefits (time loss benefits are benefits that are paid to compensate an individual for time lost from work due to a work-related injury) to those workers who are unable to "obtain or perform work" because of commission of a crime, the court suspended wage loss benefits because the workers had used false documents in order to get a job. Benefits were suspended from the time that the workers' status was discovered, which was after their workplace accidents. As a result, the approximately 150,000 undocumented immigrants working in agriculture, construction, and similarly dangerous jobs in Michigan are left without compensation for the time they are unable to work due to their injury.<sup>73</sup>

### **II. Indigent Defense**

#### **a. Inadequacies of Michigan's Indigent Defense System**

The state of Michigan fails to adequately fund and administer its indigent defense system. Researchers estimate that between 80 and 90% of all those accused of criminal wrongdoing by state prosecutors must rely upon state indigent defense programs for representation. As a result, the state of Michigan's failure to adequately fund and administer its indigent defense system infects the entire criminal justice system and seriously limits criminal defendants' access to justice.

Michigan has delegated to each of its 83 counties the responsibility for funding and administering trial-level indigent defense services. It provides no fiscal or administrative oversight. Michigan does not ensure that the counties allocate the funding and promulgate the policies, programs and guidelines needed to enable their public defenders to provide constitutionally adequate legal representation. As a result, most Michigan county public defense programs are seriously under-funded and poorly administered. For example:

- In 2007, the budgets of the prosecutors in Michigan's Berrien and Genesee counties were nearly three and one-half times greater than the counties'

indigent defense budgets. In Muskegon County, the prosecuting attorney's budget was nearly double the county's indigent defense budget.

- A 1999 survey by the U.S. Department of Justice of 100 largest counties in the country found that those counties spent an average of \$287 per case to provide representation to indigent persons accused of criminal wrongdoing.<sup>74</sup> In 2006, the Muskegon County finance director issued a letter to the county commissioners stating that the average cost per case should be kept to \$130 to \$140.

Without adequate funding, Michigan's indigent defense program cannot hire a sufficient number of attorneys and support staff to meet the demand. Insufficient numbers of attorneys and essential support staff, in turn, lead to excessive workloads and no time or money for training or supervision.

Overwhelming caseloads prevent attorneys for poor criminal defendants from meeting with their clients with sufficient frequency, interviewing defense and prosecution witnesses, obtaining and analyzing evidence, visiting the scenes of alleged crimes, consulting with experts, researching case law, filing motions and preparing for trial.<sup>75</sup> A report released in 2000 by the Bureau of Justice Statistics of the United States Department of Justice confirmed that, nationwide, public defenders meet and confer with their clients almost 50% less than do privately retained counsel.<sup>76</sup> As a result, the poor are frequently provided with counsel in name only. The representation they receive is far from that contemplated by the Supreme Court's definition of "effective assistance of competent counsel."<sup>77</sup>

When public defenders do not have the tools to engage in adversarial advocacy, their clients are wrongfully convicted; are incarcerated prior to trial for unnecessarily long periods of time; plead guilty to inappropriate charges and receive harsher sentences than the facts of their cases warrant. For example:

- Michigan resident Allen Fox received a 12-month sentence after pleading guilty to attempting to steal two cans of corned beef from a convenience store. Although the cans in question never left the store, Mr. Fox was arrested after he and the store clerk got into a scuffle. Charged with a felony, Mr. Fox sat in jail for six months before ever meeting an attorney.
- Michigan resident Darryl Lynn Blakely paid his court appointed attorney \$7500 to ensure that he received a fair plea agreement. Charged with unlawful driving of an automobile, Mr. Blakely was informed by his attorney at their first meeting that for \$7500, the attorney would ensure that Mr. Blakely received a sentence of two years in prison. If Mr. Blakely did not pay, he would spend five years in prison. The judge knew of the payment agreement but did nothing about it.

### III. Prisoners' Rights / Children's Rights

#### a. Juvenile Life Without Parole

The U.S. is the only country in the world that sentences youth to spend the rest of their lives in prison without any opportunity for release, and Michigan incarcerates the second highest number of people serving life sentences without parole for crimes committed when they were 17 years old or younger.<sup>78</sup> Currently, there are 350 individuals serving such mandatory life sentences in Michigan. This includes more than 100 individuals who were sentenced to life without parole who were present or committed a felony when a homicide was committed by someone else.

Nationally, 2,574 prisoners who were children at the time of their crimes are currently serving sentences of life without parole in the United States. In a landmark decision, the U.S. Supreme Court in *Graham v. Florida* ruled that sentences of life without parole for juveniles who did not commit homicide are unconstitutional.<sup>79</sup> However, of the over 2,500 juvenile life-without-parole cases in the U.S., only about 129 involve juveniles who did not commit homicide.

In November 2010, the ACLU and the ACLU of Michigan filed a lawsuit on behalf of nine Michigan citizens who were sentenced to life in prison without the possibility of parole for crimes committed when they were minors. The lawsuit charges that a Michigan sentencing scheme that denies the now-adult plaintiffs an opportunity for parole and a fair hearing to demonstrate their growth, maturity, and rehabilitation constitutes cruel and unusual punishment and violates their constitutional rights.<sup>80</sup>

The ACLU's clients in the lawsuit include:

- **Henry Hill**, who was 16 when he was charged for his involvement in a shooting that took place at a park. In 1980, Henry and a few friends went to a park to confront three other boys they had been feuding with previously. Henry fired several shots in the air with a handgun to scare off other people in the park, but never fired his gun at the victim. Despite the fact that all four bullets found in the victim's body were characteristic of the weapon used by one of Henry's co-defendants, Henry was still charged with 1<sup>st</sup> degree murder for aiding and abetting. After his arrest, Henry was evaluated and found to have the academic ability of a third grader, and the mental maturity of a 9-year-old. The doctor who did his evaluation recommended that Henry remain under the jurisdiction of the Juvenile Court. Based on the charge against him, Henry stood trial as an adult. The trial court had no discretion to consider Henry's juvenile status, mental age or maturity. Michigan law required that the trial court charge and punish Henry as if he were an adult and sentence him as such to the mandatory adult sentence of life imprisonment. Because of the nature of the offense, the Michigan Parole Board has no jurisdiction to consider Henry for parole. Henry is now 45 years old and has spent nearly 30 years—nearly two-thirds of his life—behind bars. He has exhausted all prison educational programs and resources available to him.

- **Bobby Hines**, who was 15 years old in 1989, when he and a few of his friends were involved in an argument with other teenagers that ultimately led to one of Bobby's co-defendants firing several shots and fatally wounding one and injuring another. Bobby was automatically charged as an adult without consideration of his juvenile status, mental maturity or relative culpability. Despite the fact that Bobby never touched the murder weapon used in the crime and has consistently claimed he ran away from the scene, Bobby was convicted of felony homicide. Michigan law required that the trial court either sentence him as a juvenile to be released at age 21 or sentence him as an adult to a mandatory sentence of life. Bobby was sentenced to serve "the rest of [his] natural life to hard labor and solitary confinement." Because of the nature of the offense, the Michigan Parole Board has no jurisdiction to consider Bobby for parole, and he has never been afforded a meaningful opportunity for release based on his juvenile status and his demonstrated maturity and rehabilitation. It was demonstrated at trial court that Bobby's 19-year-old co-defendant supplied the gun while his other co-defendant, a 16-year-old, committed the actual shooting. Both are serving parolable sentences. Bobby is now 35 years old and has been in prison for almost 20 years. He has earned his GED and vocational qualifications.
- **Jennifer Pruitt**, who was 16 when she became a runaway. An older neighbor who took her in planned to rob someone in the neighborhood. Jennifer told her that an elderly man she had known since she was six years old, had money and agreed to participate in a robbery. On the evening of August 30, 1992, the neighbor let them in. Jennifer asked to use the bathroom. When Jennifer came out she found the other woman stabbing the victim and did not intervene. Jennifer had no idea the murder was going to take place. Jennifer went into severe depression over her role in the crime. She was determined to be unfit to stand trial until she was 18. At her trial, a psychologist testified that Jennifer needed long-term mental health treatment. Jennifer was then sentenced to adult court because the judge believed there was more rehabilitative programming for Jennifer available in the adult system. However, her rehabilitation and eventual return to society was impossible because under Michigan law, the court had no discretion to give her any sentence other than life in prison. Given the nature of the offense for which Jennifer was convicted, the Michigan Parole Board does not have jurisdiction to consider her for parole, and she has never been afforded a meaningful opportunity for release. Jennifer is now 33 years old, and has spent more than half of her natural life behind bars.

Michigan law requires that children as young as 14 who are charged with certain felonies be tried as adults and, if convicted, sentenced without judicial discretion to life without parole.<sup>81</sup> Judges and juries are not allowed to take into account the fact that children bear less responsibility for their actions and have a greater capacity for change, growth and rehabilitation than adults. Michigan is one of only seven states that automatically subjects 17-year-olds to adult charges and punishment of a life sentence without parole for first degree murder.

The ACLU's complaint asks the court to declare that denying children a meaningful



opportunity for parole violates the U.S. Constitution's Eighth Amendment protection against cruel and unusual punishment and Fourteenth Amendment right to due process. It also alleges violations of the plaintiffs' rights under international law and treaties.<sup>82</sup>

Michigan's laws run afoul of the U.S. Supreme Court's admonitions that children must be treated differently in our criminal justice system. In May, the Court ruled in *Graham v. Florida* that it is cruel and unusual punishment to sentence juvenile offenders who did not commit homicide to life in prison without any chance of parole.<sup>83</sup> In 2005, the Court ruled similarly in *Roper v. Simmons* that executing juvenile offenders is unconstitutional.<sup>84</sup> Both decisions recognized that juveniles bear less responsibility for their actions than adults and have a greater capacity for change, growth and rehabilitation, and that children should not be punished with the harshest sentence that can be imposed on adults.

## **NEVADA**

### **I. Indigent Defense**

#### **a. Gaps in Nevada's Indigent Defense System**

After years of attempts to improve a decentralized, unregulated indigent defense system, the Supreme Court's Indigent Defense Commission declared in 2008 that Nevada's indigent defense provision is in "crisis," and recommended sweeping changes including a statewide oversight board, performance standards, and caseload assessment and limits.<sup>85</sup> However, these proposed changes have run directly into a massive budget crisis, a change of membership on the Supreme Court, and a problematic caseload assessment process. As a result, most of the anticipated changes have either not occurred, or have lost steam and momentum. However, none of the underlying constitutional issues have abated.

The administration and funding of Nevada's indigent defense system raise serious concerns about indigent defendants' ability to access justice. The average caseload for a public defender in Clark County is 364 felony and gross misdemeanor cases and 327 cases in Washoe County.<sup>86</sup> The standard recommended by the National Legal Aid and Defender Association is 150 cases, less than half of what defenders in both of Nevada's population centers currently carry.<sup>87</sup> Rural counties lack public defenders. Instead, they contract out their public defense work to the lowest private bidder. Although the state bears the burden of providing constitutionally adequate levels of defense work for poor defendants, there are no working statewide standards or oversight.

### **II. LGBT Rights**

#### **a. Prohibiting Discrimination in Places of Public Accommodation**

It was the fulfillment of a decade-long promise when the Nevada Legislature in 2009 finally took the step forward of adding sexual orientation to its statutory chapter on Equal Enjoyment of Places of Public Accommodation.<sup>88</sup> Since 1999, sexual orientation had been included in NRS 233.101, the Nevada Equal Rights Commission's declaration of public policy, but it had no legal teeth. It was not until last year that the state's biannual legislature finally put full legal force behind the public policy declaration. Nevadans and tourists now can be legally protected, and file claims of discrimination with Nevada's Equal Rights Commission, if they are treated unfairly in public places due to their sexual orientation.

However, there are gaps in implementation and enforcement of this newly-adopted policy. In March 2010, the ACLU of Nevada sent a letter to the board of the Nevada Taxicab Authority, urging that they take immediate steps to stop the circulation of an old policy that classifies lesbians and gay men in the same "high-risk" group for communicable disease as intravenous-drug users and prostitutes. The policy, according

to media reports, was amended in 2007, but had not changed in the materials circulated among employees under the supervision of the Taxicab Authority, a state governmental agency.<sup>89</sup> The situation has now been remedied.

With respect to gender, Nevada's laws still do not offer protection for gender identity or even sex. In Nevada it is legal to discriminate in a hotel, a casino, a restaurant, and other such places based on sex or transgender identity. For instance, if a lesbian couple were visiting Las Vegas and trying to get into a nightclub, they could not, under the new law, be turned away for being a same-sex couple, but they could be barred simply because they are female.

## **NEW JERSEY**

### **I. Women's Rights**

#### **a. Diplomatic Immunity for Abuse of Domestic Workers**

In *Chere v. Taye*, the ACLU represents Beletaschew Chere, an Ethiopian domestic worker trafficked by UNDP staff Alemtashai Girma and her husband Fesseha Taye to New Jersey and held in conditions of forced labor by them.<sup>90</sup> She was forced to work 75-80 hours per week, without payment or time off, verbally and sexually abused, denied needed medical care, prohibited from contacting her family or seeking help, made to sleep on the toddler's bedroom floor and eat the family's leftovers.<sup>91</sup> The ACLU filed suit against the employers for violations of several federal and state labor laws, federal statutes, the Thirteenth Amendment of the U.S. Constitution prohibiting involuntary servitude, and international law prohibiting forced labor and trafficking in persons under the Alien Tort Claims Statute and state tort laws. The Alien Tort Claims statute allows non-citizens to sue for damages in U.S. courts for injuries that violate international law. The case ultimately settled.

### **II. LGBT Rights**

#### **a. Excluding Same-sex Couples from Marriage Protections**

In lawsuits brought to the highest courts in several states of the United States, as well as in lawsuits brought in federal courts, arguments that excluding same-sex couples from the protections of marriage violate state and federal constitutions have been dismissed as without foundation. The American legal system has thereby denied lesbian, gay, and bisexual people access to justice with regard to significant protections at the core of family life for most people. The governments of various states, as well as the United States government itself, have urged the courts to close their doors to same-sex couples seeking to enforce their rights to equality and liberty under the state and federal constitutions.

In 2002, Lambda Legal filed a historic case on behalf of seven New Jersey same-sex couples seeking the freedom to marry. The case reached the New Jersey Supreme Court in 2006. The high court ruled unanimously that same-sex couples must be provided all the benefits and responsibilities of marriage, but it declined to mandate that marriage was specifically required, and gave the state legislature 180 days to choose either marriage or an alternate system that would provide equality.<sup>92</sup> The legislature hastily passed a civil union law in December 2006. In December 2008 the Civil Union Review Commission, appointed by the legislature, issued its report documenting how civil unions fall short of providing the court-mandated equality for same-sex couples. In January 2010, days before the legislative session ended, the New Jersey Senate voted on and failed to pass a marriage fairness law. On March 18, 2010, Lambda Legal filed a motion asking the New Jersey Supreme Court to intercede and order marriage to secure

compliance with its original mandate of equality for the *Lewis v. Harris* plaintiffs. In July 2010, the New Jersey Supreme Court refused to take up the case directly, instructing the plaintiffs to file a new action in the trial court.

## **NEW MEXICO AND BORDER REGION**

The United States' border communities have always been subjected to national security measures that unduly encroach upon their civil and human rights and force borderland inhabitants to live with daily indignities typically not faced by the interior residents of the nation. Following the events of September 11, 2001, policies related to both immigration and border security were expanded. The effect has been devastating on border communities' access to justice.

### **I. Women's Rights**

#### **a. Access to the Judicial System**

Immigrant victims of domestic violence in Southern New Mexico face a unique challenge to appearing before the court to seek justice against their abuser: the I-25 permanent Border Patrol checkpoint. This barrier disproportionately affects the rural communities of Hatch, Salem, Garfield, and other Dona Ana County communities that lie just north of the checkpoint. Women who experience violence must bring their cases to court in the city of Las Cruces, New Mexico, which lies south of the checkpoint. This means passing through the Border Patrol station on the return home, making the trip impossible for undocumented women, who then abandon their cases.

### **II. Immigrants' Rights**

#### **a. Diminished Due Process in Detention and Removal Policy**

##### **i. Operation Streamline**

"Operation Streamline" is a Southwest border initiative in which first-time border crossers are prosecuted with a criminal misdemeanor for Illegal Entry, punishable with a sentence of up to 6 months jail time. The penalty for illegal re-entry is up to 20 years jail time if an individual has a prior criminal record. Despite concerns from federal public defenders, the controversy surrounding due process for individuals when paraded in front of judges for mass pleadings, the stress on local court systems and jails, and the diversion of scarce resources from core law enforcement priorities, the operation has been touted a success and extended to other portions of the border. Often immigrants are processed through the system without knowledge of what is occurring to them, which can lead to the deportation of asylum seekers or victims of trafficking or of other crimes.

##### **ii. Transfer of Detainees**

Immigrants are frequently transferred from states such as Massachusetts, California, New York, and Florida, to privately contracted facilities in remote areas of the Southwest border region. For example, a large number of the detainees at the Otero County

Processing Center in Chaparral, New Mexico, had been transferred there from places such as Los Angeles and New York. Transfers are problematic for a number of reasons. Given the eradication of discretionary judgment with the 1996 immigration laws, the categorization of a particular crime is crucial in either opening or closing avenues for immigration relief, particularly for long-term legal permanent residents. Advocates report that often the immigration judges are unaware of the laws in the states from which detainees have been transferred and therefore unclear on how to properly analyze them.

In addition, concerns have been raised by advocates regarding due process violations related to the transferred detainees' distance from retained counsel, family and witnesses, evidence and documents relevant for the immigration case; longer detention due to hearing dates being pushed back and rescheduled, particularly for those who oppose the government's Motion to Change Venue; lack of notification to attorneys of record of the client transfer; and failure to produce new Notices to Appear, or constant reissuing of Notices to Appear, all of which negatively impact immigration detainees' access to justice. These circumstances often lead to delayed hearings, prolonged detention, and lengthy separation of families.

### **iii. Access to Counsel**

Immigration detainees in the custody of the Department of Homeland Security (DHS) and placed in removal proceedings still do not have the right to appointed counsel. Many must fend for themselves in a complicated legal system, sometimes without the benefit of a language interpreter. The right to counsel is a due process right that is fundamental to ensuring fairness and justice in proceedings, guaranteed by the U.S. Constitution for any individual regardless of immigration status. The prevalence of transfers to remote, rural locations with limited access to legal services further hampers detainees' access to counsel. There are no free or low cost non-profit legal service agencies in Southern New Mexico with the capacity to individually represent the detained immigrant population at the Otero County Processing Center.

### **b. Conditions of Confinement in Immigration Detention**

DHS issued new Performance Based National Detention Standards in 2008, but the U.S. government has yet to establish a mechanism for the enforcement of these standards. There remains a need to create enforceable standards governing the treatment of immigration detainees in all facilities, regardless of whether these standards are operated by the federal government, private companies, or local agencies. Among the issues registered by detainees at the Otero County Processing Center in Chaparral, New Mexico, are lack of appropriate medical or mental health services, no access to legal counsel or consular services, poor food services, poor environmental conditions, arbitrary use of the segregation unit as punishment, and racial and religious discrimination.

### **c. Prolonged Detention of Post Order Custody Cases**

ACLU of New Mexico Regional Center for Border Rights staff continue to meet with detainees who are unaware that DHS must comply with the Supreme Court's decision in *Zadvydas v. Davis*, which held that two immigrants, who had been ordered deported, retained a liberty interest strong enough to raise due process challenges concerning their indefinite—and possibly permanent—detention resulting from the government's inability to carry out the deportation. The *Zadvydas* ruling stated, "Once removal is no longer reasonably foreseeable, continued detention is no longer authorized."<sup>93</sup> The court determined that six months from the final order of removal was a presumptively reasonable period of detention, after which an immigrant may file a writ of habeas corpus in federal court seeking review of his/her detention. Since the fall of 2006, the ACLU of New Mexico has sought and obtained the release of detainees who had been held indefinitely in detention centers around the state. Despite the success of these habeas petitions, the ACLU continues to identify and meet with detainees who have been held far beyond 180 days past their order of removal.

### **III. Racial Justice / Immigrants' Rights**

#### **a. Local/Federal Law Enforcement Partnerships**

Under the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) program, local law enforcement agencies may participate in a number of formal partnerships with DHS. These programs include the 287(g) Memoranda of Agreement (MOA) program, which cross-designates local law enforcement officials to perform federal immigration enforcement duties, and the Criminal Alien and Secure Communities programs, in which ICE screens for foreign-born individuals in jail settings. These programs severely undermine community safety and open the path for racial profiling and other forms of abuse.

In New Mexico local law enforcement agencies routinely call the Border Patrol to assist with "translation" or for "back-up." People of color are frequently subject to pre-textual traffic stops and then subjected to an expanded scope of investigation on the suspicion that the individual may be undocumented; Border Patrol is then called. The ACLU of New Mexico Regional Center for Border Rights receives many cases of illegal and prolonged detention by local officers who hold individuals until Border Patrol agents arrive, or who stop vehicles without reasonable suspicion of criminal activity or enter homes in the absence of a warrant.

In September 2007, the Otero County Sheriff's Department conducted an immigration raid in the small rural colonia of Chaparral, New Mexico. Sheriff's deputies entered homes without permission or warrants, using false pretexts and, in one instance, even presenting themselves as a pizza delivery service in order to inquire into immigration status. In another case, an officer detained and handcuffed the father of five U.S. citizen children and drove him to three separate schools to retrieve them. Both parents were subsequently deported, and the eldest child is now caring for the four younger siblings. In all, 28 individuals were deported as a result of these raids.<sup>94</sup> Against the backdrop of such incidents, immigrant communities in Southern New Mexico have expressed



reluctance to report domestic violence, rapes or other violent crimes to local law enforcement because they fear deportation.

#### **b. Lack of Oversight and Accountability**

U.S.-Mexico border communities have experienced a significant increase in enforcement resources and operations in the absence of a proportional increase in resources for oversight and accountability for border enforcement activities. For example, border patrol has rapidly expanded its personnel capacity, while decreasing hiring and training requirements. Lack of oversight has led to border patrol agents patrolling outside of schools in Mesquite, New Mexico, and picking mothers up at bus stops after dropping off their children. Local law enforcement agencies engage in pretextual traffic stops based on race and perceived immigration status. Individuals are then subject to further investigation based on skin color, resulting ultimately in Border Patrol being called to the scene. In Roswell, New Mexico, individuals have been booked into the county jail without charges, simply for appearing “illegal.” Once in a jail facility, individuals are identified by ICE.

#### **c. Border Patrol Authority Within 100 Miles of the U.S./Mexico Border**

The United States Border Patrol Authority within 100 miles of the actual border (which includes both the borders with Mexico and Canada, as well as water ports) is vast, encroaching upon the civil and human rights of many individuals living within the boundary of the United States. In fact, in a recent investigation by the ACLU, it was discovered that nearly two-thirds of the U.S. population lives within 100 miles of the border, subjecting them to a significantly greater possibility of warrantless search and seizure, suspicion-less stops and interrogations, and the increased possibility of racial profiling.<sup>95</sup> In New Mexico, community well-being has been negatively affected by the expanded authority of federal law enforcement agencies in the region.

#### **d. Racial Profiling**

Due to the vast authority of border agents and case law that supports this authority, the potential for racial profiling has expanded. In *United States v. Brignoni-Ponce*, the U.S. Supreme Court held that “when an officer’s observations lead him to reasonably suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.”<sup>96</sup> In determining whether there is reasonable suspicion to stop a vehicle in the border area, “any number of factors may be taken into account,” including characteristics of the area in which the vehicle is found, proximity to the border, previous experience with alien traffic, traffic patterns; information regarding recent illegal entry in the area; driver’s behavior; aspects of the vehicle; and “mode of dress and haircut.” In *Brignoni-Ponce*, the officer relied on only one factor, apparent Mexican ancestry, to stop the vehicle. The court held that Mexican appearance is a “relevant factor...but standing alone it does not justify stopping all Mexican Americans to ask if they are aliens.”<sup>97</sup>

## **NEW YORK**

### **I. Indigent Defense**

#### **a. The Failure of Indigent Defense Services**

The federal Constitution and New York law require that the state must provide legal counsel to any individual who faces criminal charges and lacks the ability to pay for legal representation. The reality, however, is that in New York State indigent criminal defendants are routinely denied their constitutional and statutory right to meaningful and effective legal counsel. In 1965 the state authorized each of its 62 counties to establish, fund, and administer their own public defense programs, with little or no fiscal and administrative oversight by the state. The result is an indigent defense system that is dysfunctional.

Litigation brought by the New York Civil Liberties Union (NYCLU) in 2007 charged that indigent defendants frequently experience denial of representation; unnecessary or prolonged pre-trial detention; excessive or inappropriate bail determinations, which increase the likelihood of conviction; wrongful conviction; harsher sentences than warranted by the facts of the case; and waiver of the right to appeal and other post-conviction rights.<sup>98</sup> Moreover, without effective counsel, indigent defendants plead guilty to unwarranted charges, without understanding the collateral consequences of a conviction.

The NYCLU lawsuit was filed on behalf of indigent persons who have or will face criminal charges within five New York counties (Onondaga, Ontario, Schuyler, Suffolk, and Washington). However, the lawsuit makes clear that the failings of public defense services in those counties are also found statewide. A 2006 report by the New York State Commission on the Future of Indigent Defense Services, convened by then-Chief Judge Judith S. Kaye, concluded that the state is in critical need of an independent statewide defender system that is entirely, and adequately, funded by the state.<sup>99</sup>

In the absence of an independent statewide public defense system, New York will continue to deprive indigent criminal defendants of their constitutional right to counsel. The system will continue to lack clear standards regarding eligibility to receive counsel and the requirements for adequate defense. Indigent defendants will continue to be harmed by lack of access to, and little communication with, assigned counsel. Public defenders will continue to carry excessive caseloads, without the resources to mount an effective defense and without the training needed to be effective advocates on behalf of their clients. Funding and fees provided for public defense services will continue to vary from county to county, as will the scope and competence of representation provided.

#### **b. Denial of Access to Justice in Town and Village Courts**

The sole interaction most New Yorkers have with the criminal justice system is through the state’s town and village courts, a system with jurisdiction over nearly two million cases a year that hears complaints in cases involving felony crimes, misdemeanors, violations, and traffic infractions.<sup>100</sup> In the 21 counties that have no city court, town and village courts are the sole overseers of justice in the vast majority of criminal justice prosecutions.<sup>101</sup>

There are approximately 1,300 town and village courts across the state and approximately 2,200 town and village justices, the majority of whom are non-lawyers with minimal training.<sup>102</sup> Nearly 70 percent of town and village court justices are not trained legal professionals—the largest number of any state in the nation.

These justices have the power to imprison people for up to one year, evict people from their homes, and set bail that can result in lengthy pre-trial incarceration for people awaiting their day in court. Although they wield great power, many of these justices are not equipped to use it wisely. For example, one judge told a domestic abuse victim that “[e]very woman needs a good pounding every now and then.”<sup>103</sup> Another judge who was confronted by state disciplinary officials declared that he “follows [his] own common sense” and “the hell with the law.”<sup>104</sup> Many justices lack even a clear understanding about which cases trigger the right to counsel.<sup>105</sup> All too often, the result is no appointment of counsel at all, leaving unrepresented indigent defendants to negotiate pleas with the prosecution or face trial without any legal assistance.<sup>106</sup>

There is no state judicial body to set standards for the courts or oversee the administration of justice therein to ensure that town and village Courts meet basic standards of due process, or even that the justices follow the law of the state.<sup>107</sup>

Evidence of the constitutional inadequacies of town and village courts led the state Commission on the Future of Indigent Defense to issue recommendations in 2006 that have not been acted on to date. The result is a broken justice system that regularly results in violations of due process—violations that have a particularly severe effect on the poor. Indigent defendants are vulnerable to jail sentences and large fines handed down by judges with poor understanding of criminal procedure and substantive law, often with undue influence from the local District Attorney. Moreover, because of the failure of New York’s woefully-funded indigent defense system, in general there is no lawyer present to stand up for the rights of the accused.

## **II. Racial Justice**

### **a. Civilian Complaint Review Board Failure to Provide Justice and Redress for Police Misconduct**

In 1992 the New York City Council established an independent civilian oversight agency charged with investigating complaints of police misconduct. The City Charter mandates that the Civilian Complaint Review Board (CCRB) undertake “complete, thorough and impartial” investigations of police misconduct complaints filed by civilians, and that

these investigations are undertaken in a manner in which both the public and policymakers have confidence.<sup>108</sup>

In a 2007 report, the New York Civil Liberties Union (NYCLU) concluded that the CCRB had failed to fulfill its mission.<sup>109</sup> The report, which analyzed complaints filed with the CCRB from 1994 through 2006, concluded that police misconduct—including improper stop and frisk, excessive force, threat of arrest or force, unauthorized entry of premises—was systemic. The problem, which persists, bears the unmistakable signs of racial animus. Each year, eight of every ten individuals who file a complaint with the CCRB are African American or Latino; blacks represent 50 percent of all complainants—two times their representation in the general population.<sup>110</sup>

Even as complaints have increased sharply in the last eight years, the CCRB has consistently closed more than half of all complaints without an investigation, producing a finding on the merits in only three of ten complaints disposed of in any given year. Of the very few complaints that are substantiated (fewer than 5 percent) and referred for disciplinary action, the New York Police Department (NYPD) rejects the CCRB’s findings and disciplinary recommendations with great frequency. When discipline is imposed, it has been strikingly lenient in light of the severity of the misconduct documented by the CCRB.

Since the publication of the NYCLU’s 2007 report, the complaints filed with the CCRB are at the highest levels recorded by the agency—7,664 in 2009.<sup>111</sup> The CCRB closes more than 60 percent of complaints without an investigation. In 2007-2008 the NYPD declined to prosecute nearly 35 percent of substantiated complaints; 10 percent of those complaints involved an officer’s use of excessive force. The number of civil damage claims of police misconduct filed against the city is at a historically high level.

The NYCLU report finds that the CCRB’s failure is the result of an abdication of leadership—by the mayor, the police commissioner, the city council, and by the CCRB’s directors. The report concludes with 13 recommendations for establishing a civilian oversight system that fulfills the mandate given the CCRB in the City Charter.<sup>112</sup>

### **III. Immigrants’ Rights**

#### **a. New York’s Immigrants: Denied Equal Access to Justice**

Government authorities in New York all too often deprive immigrants of equal access to law enforcement assistance, counsel, and judicial review. Although these problems are not unique to New York, many of the examples from the state are pronounced and serve as vivid examples of justice denied.

In Suffolk County, Long Island, immigrants have been denied equal access to appropriate law enforcement assistance for years, resulting in an ongoing investigation by the U.S. Department of Justice into allegations of discriminatory policing by the Suffolk County Police Department.<sup>113</sup> For example, in 2003, Alejandro Castillo was repeatedly kicked in the head by youths demanding to see his green card. Although Mr.

Castillo reported the crime to the police, no one was ever charged.<sup>114</sup> In 2005, Luis Ochoa was run off the road, pulled out of his car, and beaten by a former firefighter who was shouting racist slurs. His case was dismissed.<sup>115</sup> In November 2008, a group of youth shouting racist remarks stabbed to death Marcelo Lucero.<sup>116</sup> Several of the accused had previously perpetrated acts of violence against Latinos, and yet the reported crimes were not adequately investigated.<sup>117</sup>

Detainees held by immigration authorities in New York also face significant hurdles in accessing justice. For several years, detainees housed at the Varick Federal Detention Facility in New York City have too often faced cruel conditions and limited access to counsel and other legal services, preventing them from pursuing valid legal avenues that would enable them to be released from detention.<sup>118</sup>

Moreover, Immigration and Customs Enforcement (ICE) agents have a permanent presence in New York City's largest jail—Rikers Island—and all too often place detainers on immigrant inmates by utilizing surreptitious means to gain access to those inmates and failing to inform inmates of their right to legal counsel and to remain silent. Immigration agents interview immigrant detainees without identifying themselves as ICE agents or providing information about an inmates' right to refuse the interview or to have an attorney or interpreter present during the interview. As a result, non-citizen inmates at Rikers frequently do not know that they are speaking with an ICE agent or understand that they could be placed into deportation proceedings as a result of the information they share with such agents.<sup>119</sup> Between 2004 and 2009, more than 13,000 inmates at Rikers Island have been placed into removal proceedings.<sup>120</sup>

Finally, as in other states, immigrants detained in New York are detained for prolonged periods before seeing a judge, amounting to a deprivation of justice. Although ICE reports that the average length of detention is 37 days,<sup>121</sup> the NYCLU has received intakes from immigrants who have been detained far longer. One individual, a legal permanent resident who has resided in the U.S. nearly his entire life, has been detained for more than two years and is, at the writing of this report, still challenging his deportation. Moreover, while some detained immigrants are eligible for a bond hearing, the average bond in New York is set much higher than in most states, making it exceedingly difficult, if not impossible, to pay. Bonds may be set at a minimum of \$1,500 and the national average is \$5,941.<sup>122</sup> Yet in New York, the average bond is set at \$9,831.<sup>123</sup> Furthermore, immigration courts in New York do not release individuals on their own recognizance (without paying bond).<sup>124</sup>

## OHIO

### I. Children's Rights

#### a. Failure to Ensure Juveniles' Right to Counsel

Based on analysis of juvenile court cases, a coalition comprised of the ACLU, the ACLU of Ohio, the Children's Law Center and the Office of the Ohio Public Defender estimates that in several Ohio counties, as many as 90 percent of children charged with criminal wrongdoing are not represented by counsel. Statewide, an estimated two-thirds of juveniles facing unruly or delinquency complaints proceed without an attorney. A growing number of cases show that young people who are not represented by an attorney are more likely to enter guilty pleas even when they may have viable defenses or may be innocent. Currently, Ohio law allows juveniles to waive their right to legal counsel before they have even met with an attorney to discuss the legal implications of their situation.<sup>125</sup>

Many children have barriers to understanding the serious charges that they may face. Almost 75 percent of incarcerated youth in Ohio need mental health services, and nearly half of those incarcerated at Ohio Department of Youth Services facilities need special educational instruction.<sup>126</sup>

In 2006, the Ohio coalition groups filed a petition with the Ohio Supreme Court asking that it promulgate a rule prohibiting juveniles in delinquency proceedings from waiving their right to counsel without first discussing the consequences of a waiver with an attorney. The state's high court agreed to consider this issue in the case of Corey Spears, who was 13 years old when he appeared in juvenile court. Corey waived his right to an attorney but the court failed to ensure that he understood what rights he was giving up.

The *In Re: Spears* case was heard by the Supreme Court of Ohio in April of 2007 and decided in September of that year. The court held that Spears's waiver of counsel was invalid because his rights had not been adequately explained to him. The court affirmed that the appointment of counsel is mandatory in all cases where a juvenile does not have a parent or guardian available for advice, and allows juveniles to waive counsel only if the decision is made voluntarily, knowingly and intelligently. The court held that in determining whether a juvenile's waiver of counsel has met these standards, judges must engage the juvenile in a meaningful dialogue and consider the juvenile's unique circumstances, including age, intelligence, education level, life experience, and nature of complexity of the charges against the juvenile.<sup>127</sup>

In 2004, the ACLU and ACLU of Ohio filed *J.P. v. Taft*, a class action lawsuit on behalf of the nearly 2000 juveniles who are incarcerated in Ohio's eight juvenile correctional

facilities. The complaint alleged that the state failed to provide Ohio juveniles with constitutionally adequate access to the courts.

After lengthy pretrial proceedings, the state agreed to settle and the parties entered into a consent decree that the court approved in March of 2007. The settlement guarantees that:

- (1) all juveniles will be notified during their orientation about their right of access to the courts and how to request legal assistance;
- (2) all juveniles who request such assistance will be assigned an attorney; and
- (3) all juveniles who have non-frivolous cases will receive assistance in filing a civil rights lawsuit.

Under this settlement agreement, Ohio must send detailed compliance reports each month to the ACLU, which helps to ensure that the defendants are complying with the court order. Based on these reviews and other information, the ACLU filed a contempt action against the state in October 2007, alleging that numerous juveniles continue to be denied access to the courts, in violation of the consent decree. The contempt action was resolved in the ACLU's favor and imposed additional requirements upon the state. The ACLU continues to monitor the state's implementation of the settlement agreement and the resolution of the contempt proceedings.<sup>128</sup>

## **PENNSYLVANIA**

### **I. Racial Justice**

#### **b. Denial of Undocumented Workers' Access to Effective Remedy for Employment Rights Violations**

In Pennsylvania, undocumented immigrant workers' access to compensation for disability payments, based on the workers' wages at the time of the accident, have been limited by a decision of that state's highest court.<sup>129</sup> In one case, a worker who suffered a concussion, head injury and back strain and sprain on the job was initially awarded compensation for total disability, as well as medical expenses. On appeal, the Court ruled that the employer could apply for termination of permanent partial disability payments based on the worker's lack of immigration status. As a result, undocumented immigrants in Pennsylvania are forced to settle their claims for far less than they would have been entitled, and Pennsylvania's thousands of unauthorized immigrants now lack an effective safety net when they are injured on the job and left with a long-term or permanent partial disability.



## **TEXAS**

### **I. Immigrants' Rights**

#### **a. Lack of Legislative Oversight of Immigrant Detention Facilities**

Repeated rioting, reportedly over poor medical care, at a county-owned detention center in 2008 and early 2009 brought the issue of private operation of county-owned facilities to the attention of state lawmakers.<sup>130</sup> During the 2009 Texas legislative session, the ACLU of Texas, Grassroots Leadership, and other coalition partners championed increased state involvement in privately run jails and detention centers. Legislators filed three bills in an effort to increase state regulation of such facilities.

Two sought to place privately run facilities such as the Reeves County Detention Center under the purview of the Texas Commission on Jail Standards.<sup>131</sup> This change in law would have provided minimal standards and regular inspections. The third was less ambitious and sought only to apply public information law to companies contracting with a county to run a jail or detention center.<sup>132</sup> None of the bills gained traction, and facilities such as the Reeves County Detention Center remain unaccountable to state policymakers. Without such accountability, the continued lack of medical care and its corresponding rioting will continue.

#### **b. Lack of Access to Counsel for Immigrants in Detention**

Texas is home to a disproportionate number of immigration detention facilities, where detainees who have been apprehended across the country are sent to be adjudicated and await deportation or status adjustment.<sup>133</sup> A number of factors likely contributed to the development of detention capacity in Texas, including the state's proximity to Mexico, the relatively lower cost of real estate, and the state's deserved reputation for aggressive law enforcement and minimal oversight. Many of the detention facilities are located in remote parts of South and West Texas, where there are few attorneys in general, even fewer who specialize in immigration law, and nearly none who take immigration cases pro bono. As a result, immigrants who are apprehended on the East or West Coasts and then shipped to Texas are effectively denied access to attorneys, to non-profit assistance, and to family advocacy and support. Given the obstacles immigrants in detention already face in obtaining counsel, including language barriers and prohibitive costs, the removal of detainees from their home communities sharply exacerbates problems with individual access to counsel that confront all immigration detainees nationally. Moreover, the limited attorney access to facilities in more remote parts of Texas means that conditions at facilities are effectively unmonitored, and inmates denied adequate medical care, food, and shelter have no way of accessing assistance to remedy these problems.

### **c. Lack of Access to Administrative and Judicial Remedies for Non-Citizen Inmates in BOP Custody at Reeves County Detention Center**

Reeves County Detention Center (RCDC) is a federally contracted prison that houses over 3,000 inmates in the custody of the federal Bureau of Prisons (BOP), the vast majority of whom are immigrants convicted of nonviolent offenses.<sup>134</sup> The prison is located in Pecos, a remote town in West Texas hundreds of miles away from any major population center. It is run by the private prison contractor The GEO Group, Inc. Medical care is provided by Physicians Network Association, a private company specializing in “correctional health” with a documented history of providing inadequate care.<sup>135</sup> According to GEO, Reeves is “the largest detention/correctional facility under private management in the world.”<sup>136</sup> GEO reportedly has an extensive history of human and civil rights violations.<sup>137</sup>

Prisoners at RCDC rioted in December 2008 and again in February 2009, reportedly after inmates died due to denial of medical care.<sup>138</sup> The ACLU asked that the Department of Justice Office of Inspector General investigate; after receiving no response, we commenced our own investigation. During two trips to visit inmates in August 2009 and December 2009 and correspondence with more than 100 inmates, inmates reported repeated denial of adequate care for serious medical and mental health issues. Moreover, despite repeated requests to the facilities, to Geo and to BOP, the ACLU of Texas has been unable to ascertain the appropriate administrative grievance procedure for inmates to bring their concerns to the attention of prison officials and administrators. We have discovered that BOP procedure requires all grievances to be in English, a policy that effectively denies access to remedies to the vast majority of the population at Reeves, who are monolingual Spanish speakers.

### **d. Impact of Operation Streamline on Immigrants’ Access to Courts and Counsel**

“Operation Streamline” originated in Del Rio, Texas and was expanded under the Bush Administration throughout the southern border states. Streamline is a “zero tolerance” border enforcement program that targets even first-time undocumented border-crossers for federal criminal charges, meaning that they will be processed through the federal criminal justice. They are then incarcerated in the U.S. prison system as opposed to being processed through civil deportation proceedings and placed in detention pending deportation. Under this fast-track program, a federal criminal case with prison and deportation consequences is resolved in two days or less. Questions about the due process implications of defendants pleading en masse in cattle-call-like procedures have been raised by human and civil rights advocates, policy analysts, lawyers and judges.<sup>139</sup> One federal appeals court has declared Streamline proceedings violate the federal legal rights of defendants.<sup>140</sup> Nonetheless, Streamline proceedings continue to account for a vast majority of the criminal docket in the Western Division of Texas, and hundreds of immigrants are processed every day—leading one federal judge to publically challenge the United States Attorney’s Office to justify the proceedings.<sup>141</sup>

## II. Capital Punishment

Since the death penalty was reinstated in the United States in 1976,<sup>142</sup> Texas has overwhelmingly led the nation in the number of executions, with 464.<sup>143</sup> This number represents 38% of all executions in the United States since reinstatement, and is more than four times greater than the next highest state, Virginia.<sup>144</sup> Texas also has the third largest death row population in the United States,<sup>145</sup> with 317 people currently awaiting their executions.<sup>146</sup>

### a. Flawed Forensic Science Leading to Possible Wrongful Convictions and Executions

Twelve people have been exonerated from Texas' death row and yet the state of Texas has made few if any attempts to reform its death penalty system. Even more troubling, recent developments strongly suggest that Texas has allowed the execution of two men who were almost certainly innocent and whose convictions were largely based on unreliable scientific evidence. Cameron Todd Willingham was convicted for the arson-murder of his two young children.<sup>147</sup> Less than two months before Willingham's execution, his attorneys presented a report by a leading national expert in fire science that found that arson was not the cause of the fire.<sup>148</sup> Still, Governor Rick Perry denied clemency. The Texas Forensic Science Commission agreed to investigate Willingham's case in 2008. In 2010, days before the Commission's own expert was scheduled to testify that the arson investigators in Willingham's case should have known that their science was flawed, Governor Perry replaced key members of the Commission and appointed John Bradley, a District Attorney, as chair.<sup>149</sup> The reshuffling of the Commission delayed the investigation for months.<sup>150</sup> Meanwhile, at the request of Willingham's family members, a judge opened a court of inquiry in the case, to determine if Willingham was wrongfully executed. Attorneys for the state have attempted to stall or thwart these proceedings, rather than allow the court to consider the flawed forensic science and other new evidence that supports Willingham's innocence. These obstructionist moves by the Governor and prosecutors suggest that Texas is seeking to mask the very real possibility that it has executed an innocent man.

Claude Jones maintained his innocence until his execution in December 2000. Jones was convicted and sentenced to death on the basis of now-discredited hair analysis of a hair found at the crime scene—the only physical evidence that tied Jones to the murder. Counsel's repeated requests in post-conviction proceedings to test the DNA hair sample were denied. Finally, before his execution, attorneys for Jones asked then-Governor George W. Bush to grant Jones a 30-day stay in order to conduct the DNA testing. Bush's staff failed to mention to him that Jones wanted to test the hair for DNA. Bush denied the request, and Jones was executed. Texas prosecutors refused to turn over, and in fact, sought to destroy the evidence after Jones's execution, but his attorneys pressed for posthumous DNA testing. They were eventually successful. DNA results released in November 2010 revealed that the hair did not belong to Jones. His case, like Willingham's, spotlights the serious challenges in Texas to ensuring even basic justice for those sentenced to death.

## **b. Unreliable Evidence of Future Dangerousness**

Before it may impose a sentence of death, a Texas jury must decide that there is a probability that the defendant poses a threat of future danger. In many cases, prosecutors have employed the testimony of psychiatrists and other experts to make their case for a defendant's future dangerousness.

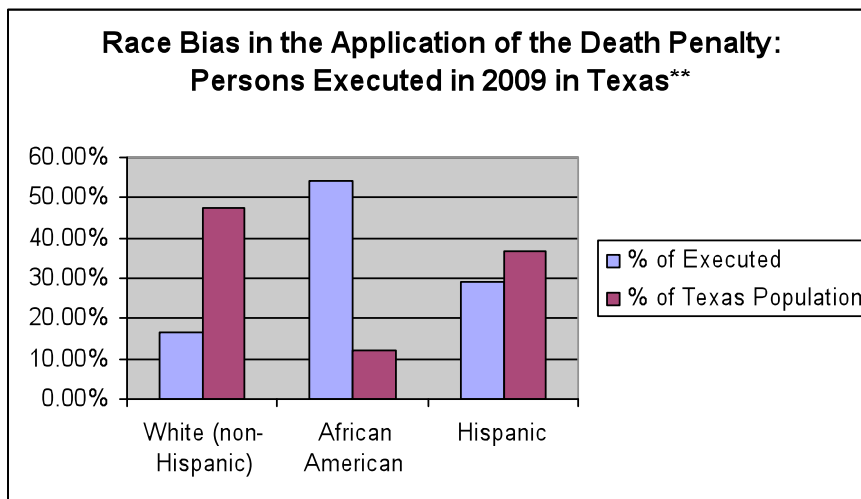
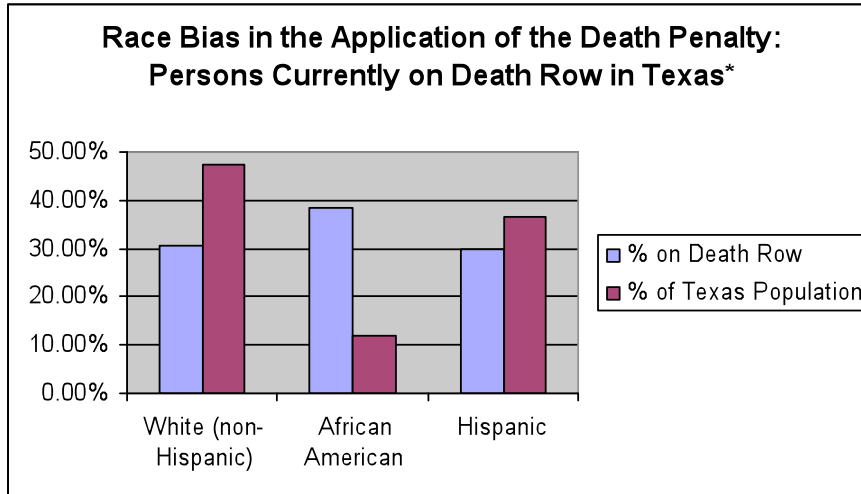
For instance, psychiatrist James Grigson, who earned the nickname "Dr. Death" for his role in aiding prosecutors obtain death sentences, testified in 136 capital cases before his death. He often guaranteed to juries that the defendants would commit future acts of violence. In the trial of Randall Dale Adams, Dr. Grigson testified that Adams was one of the most extreme cases he had ever seen, that "nothing we have in the world today" would change him. Years later, Adams was exonerated from death row. The American Psychiatric Association has long criticized these future danger predictions as having no basis in science. In fact, a comprehensive study by the Texas Defender Service showed that future dangerousness predictions were wrong over 95% of the time.<sup>151</sup> Recently the Texas Court of Criminal Appeals condemned this kind of prediction, finding that an expert's testimony was neither scientific nor reliable.<sup>152</sup> However, it upheld the death sentence against the defendant.<sup>153</sup>

Racial discrimination has also infected state experts' future dangerousness predictions. Victor Saldano was sentenced to death in 1996 after Dr. Walter Quijano, an expert for the prosecution, testified that Saldano was more likely to pose a threat of future danger because he was Hispanic.<sup>154</sup> Dr. Quijano gave similar testimony in at least six other capital cases against minority defendants.<sup>155</sup>

Texas is one of only two states that, in effect, requires the jury to predict a defendant's future behavior to sentence him to death. The use of state experts' unreliable predictions, sometimes tainted by racial bias, raises serious concern that Texas prisoners are condemned to death on the basis of speculative and unreliable evidence masking as expert medical testimony.

## **c. Statistics Show a Grossly Disproportionate Use of Capital Punishment Sentences on African-Americans**

Texas' high execution and death sentencing rates are even more disturbing in light of the discriminatory nature of Texas' death penalty. While African Americans make up just 12% of Texas' population, they account for nearly 38% of those on death row.<sup>156</sup> In addition to the sentencing disparity, Texas also maintains a massive racial disparity in actual executions. In 2009, African-Americans accounted for more than half of the 24 persons executed in Texas.<sup>157</sup> All but four of these men were people of color.<sup>158</sup>



**d. Lack of Access to Justice and Mental Health Care for Inmates on Texas' Death Row**

Mental health care for Texas death row prisoners, particularly given the inhumane conditions of confinement, is woefully inadequate. Since 1999, death row inmates in Texas have spent 23 hours per day in solitary lock-down, with one hour for solitary recreation. A number of inmates have committed suicide, often as a result of mental illness exacerbated by the isolation. For example, in 2008 death row inmate William Robinson, a paranoid schizophrenic who was convicted of murder by proxy for being present at the scene of a crime for just 11 minutes, committed suicide after a history of failed attempts.<sup>159</sup> Last year, another inmate with a history of mental health problems gouged out his eyeball and ate it.<sup>160</sup> Absent significant improvements in access to mental health care and reduced isolation, inmates on Texas' Death Row will remain at acute risk of diminishing mental capacity, rendering them unable to effectively participate in their own defense and thereby denying them access to justice.

### III. Indigent Defense

#### a. Lack of Access to Counsel for Indigent Defendants

In June 2001, the Texas Fair Defense Act was enacted to fix Texas' broken indigent defense system. The impetus behind the Act's passage was a December 2000 report released by Texas Appleseed.<sup>161</sup> The report documented numerous cases of unqualified counsel,<sup>162</sup> defendants kept in jail for months before being appointed counsel,<sup>163</sup> defendants denied counsel until after indictment,<sup>164</sup> and a general lack of accountability enjoyed by both the Texas judiciary and appointed counsel.<sup>165</sup>

To remedy these deficiencies, Texas Fair Defense Act created minimum statewide standards to ensure the right to counsel. In doing so, the Act created the statewide Task Force on Indigent Defense "to improve the delivery of indigent defense services through fiscal assistance, accountability and professional support to state, local judicial, county, and municipal officials."<sup>166</sup> Unfortunately, almost nine years after its passage, the Texas Fair Defense Act has failed to fix Texas' indigent defense system.

Harris County, Texas' most populous and of which Houston is the county seat, exhibits many of the problems that have plagued the post-Fair Defense Act indigent defense system in Texas. Under the Fair Defense Act, counties still maintain the right to determine the process for the appointment counsel to indigent defendants.<sup>167</sup> This decentralization has led to numerous problems for indigent defendants. For example, in juvenile courts the lack of enforced uniform standards has allowed judges to get away with appointing counsel with multiple State Bar suspensions.<sup>168</sup> At the same time, a judges' panel voted to remove "three respected, veteran, board-certified" attorneys from the list of attorneys eligible for court appointment.<sup>169</sup> These attorneys were removed without justification, although one of the removed attorneys believes that the reason was that his (or her) aggressive defense work clashed with the quick plea bargain approach preferred by the judges.<sup>170</sup> Harris County's adult judicial system has also failed to live up to the hopes enshrined in the Fair Defense Act. In hundreds of individual cases, defendants unable to post bail have spent more than a year in jail before their guilt or innocence was determined.<sup>171</sup> Harris County courts lack a centralized process to ensure proper access to counsel. In addition, they lack a review mechanism to ensure that appointed counsel are not overburdened with cases and/or are acting in the best interest of their clients.<sup>172</sup> In 2008, "[a]t least 54 court-appointed attorneys handled more than a nationally recommended limit of 150 felony cases ... [some] juggled more than 1,000."<sup>173</sup> Furthermore, appointed counsel are frequently paid a flat rate per case, which creates an added incentive for indigent defense attorneys to take as many cases as possible and spend as little time as possible on each.<sup>174</sup>

The case of Brisby Brown is just one of many examples of Texas' failed indigent defense system. Mr. Brown was arrested and charged with possession of cocaine, even though no drugs were found on him at the time of his arrest.<sup>175</sup> Instead, the arresting officer alleged that Mr. Brown threw away the drugs before being apprehended.<sup>176</sup> By the end of his ordeal, Mr. Brown had spent 17 months in jail for a drug possession charge that was later dropped. This treatment was, in part, the result of a system that granted Mr.

Brown two court-appointed attorneys who were each carrying more than 1000 cases annually, over 12 times the limit accepted by the National Legal Aid and Public Defender Association.<sup>177</sup> As stated in court documents and in a formal complaint, Mr. Brown's appointed attorneys, on numerous occasions, attempted to force Mr. Brown to plead guilty.<sup>178</sup>

To further stack the deck against indigent defendants in Harris County, the District Attorney's Office enjoys an annual budget twice the size of the annual indigent defense budget. Included in this massive disparity is the fact that indigent defense attorneys lack access to county staff investigators, while the District Attorney's Office enjoys the benefit of 30 staff investigators.<sup>179</sup>

#### **IV. Prisoners' Rights**

##### **a. Deplorable Conditions of Confinement in Harris and Dallas County Jails**

Like many states, a state agency runs Texas prisons but counties are left to operate jails. In Texas, jails are subject to jail standards and inspected for compliance by the Texas Commission on Jail Standards (TCJS). Just two of the 253 county jails house more inmates than the entire state systems in Arkansas, Nevada, or Connecticut.<sup>180</sup> This oversight structure has been in place since 1975 but in recent years has not been sufficient to ensure appropriate conditions at these large Texas jails.<sup>181</sup> Chronic conditions issues at these two facilities have prompted recent Department of Justice investigations.<sup>182</sup>

Despite TCJS and DOJ inspections, reports of deaths in custody, lack of appropriate mental health and medical care, and a variety of others issues continue to come from the Harris County and Dallas County jails. Current county resources are simply insufficient to provide for the large populations in these jails. Both counties are seeking solutions, for example reducing populations by diverting non-violent offenders from spending time in jail. However, with the large populations and the ongoing challenges in addressing conditions in these facilities, human rights violations will continue until a stronger commitment at the county, state, and federal level changes these facilities at a fundamental level.

## WASHINGTON

### I. LGBT Rights

#### a. Excluding Same-sex Couples from Marriage Protections

In lawsuits brought to the highest courts in several states of the United States, as well as in lawsuits brought in federal courts, arguments that excluding same-sex couples from the protections of marriage violate state and federal constitutions have been dismissed as without foundation. The American legal system has thereby denied lesbian, gay, and bisexual people access to justice with regard to significant protections at the core of family life for most people. The governments of various states, as well as the United States government itself, have urged the courts to close their doors to same-sex couples seeking to enforce their rights to equality and liberty under the state and federal constitutions.

The ACLU filed a lawsuit in 2004 against the state of Washington, challenging the denial of marriage rights to same-sex couples. The suit was filed in Thurston County Superior Court on behalf of 11 couples from across the state who wish to marry in Washington or to have their marriage recognized under Washington law. Plaintiffs include a police officer, a firefighter, a banker, a nurse, a retired judge, a college professor, a business executive, and others. They reside in communities from Seattle to Spokane and from Port Townsend to Hoquiam.

Reversing rulings in favor of marriage equality by two state trial courts, in July 2006 the Washington Supreme Court found that the state's ban on marriage by same-sex couples does not violate the state constitution.<sup>183</sup> In the appeal of two cases brought by 19 couples who wish to marry, *Castle v. State* and *Anderson v. King County*, the court upheld the state's Defense of Marriage Act of 1998 that defines marriage as between one man and one woman.

As a result, same-sex couples are treated unequally from different-sex couples, as they are barred from civil marriage under current Washington state law, despite state legislation providing the same benefits and responsibilities to same-sex couples who are registered as domestic partners as those enjoyed by married different-sex couples.

The decision came in the state's appeal of two lower-court rulings upholding marriage equality. In *Castle v. State*, Thurston County Superior Court Judge Richard Hicks in September 2004 found that legal barriers to marriage for same-sex couples violate the state constitution's guarantee of equal treatment for all citizens. In his ruling, Judge Hicks rebuffed arguments that marriage for same-sex couples destabilizes the family, noting that same-sex couples have already been found to serve as capable foster and adoptive parents. In *Anderson v. King County*, King County Superior Court Judge William Downing in April 2004 also ruled that Washington's law limiting marriage to opposite-sex couples violates the state constitution.



The court's ruling came by a 5-4 margin. In her dissent, Justice Bobbe Bridge wrote, "Rather than protecting children, the DOMA (Defense of Marriage Act) harms them." In another dissent, Justice Mary Fairhurst said that the plurality and concurring opinions "...condone blatant discrimination against Washington's gay and lesbian citizens in the name of encouraging procreation, marriage for individuals in relationships that result in children, and the raising of children in homes headed by opposite-sex parents, while ignoring the fact that denying same-sex couples the right to marry has no prospect of furthering any of those interests."<sup>184</sup>

## ENDNOTES

- <sup>1</sup> See e.g., Rebecca Walker, *BUSTED: Anniston in Desperate Need for New Jail, Police Facilities*, ANNISTON STAR, Feb. 5, 2010, available at [http://www.annistonstar.com/view/full\\_story/5785385/article-BUSTED--Anniston-in-desperate-need-for-new-jail--police-facilities](http://www.annistonstar.com/view/full_story/5785385/article-BUSTED--Anniston-in-desperate-need-for-new-jail--police-facilities).
- <sup>2</sup> Letter on file with the ACLU of Alabama.
- <sup>3</sup> Letter on file with the ACLU of Alabama.
- <sup>4</sup> Letter on file with the ACLU of Alabama.
- <sup>5</sup> Letter on file with the ACLU of Alabama.
- <sup>6</sup> Letter on file with the ACLU of Alabama.
- <sup>7</sup> See 18 U.S.C. § 3626(h)(5) (1997).
- <sup>8</sup> 42 U.S.C. § 1997e(e) (1996).
- <sup>9</sup> Barbara Belbot, *Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?*, 84 THE PRISON JOURNAL 290, 296 (2004).
- <sup>10</sup> 18 U.S.C. § 3626(b)(1) (1997).
- <sup>11</sup> See 452 U.S.C. § 1997e(d) (1996). See also Barbara Belbot, *Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?*, 84 THE PRISON JOURNAL 290, 304 (2004).
- <sup>12</sup> 42 U.S.C. § 1997e(d)(B)(3) (1996).
- <sup>13</sup> See Alabama Department of Corrections, Policy No. B-1(e), June 10, 2009.
- <sup>14</sup> Adam Litpak, *In Alabama, Execution without Representation*, NEW YORK TIMES, Mar. 26, 2007.
- <sup>15</sup> Death Penalty Information Center, Website, available at <http://deathpenaltyinfo.org/death-sentences-capita-state> and <http://deathpenaltyinfo.org/state-execution-rates>.
- <sup>16</sup> See Stephen B. Bright, *Turning Celebrated Principles Into Reality*, THE CHAMPION 6 (Dec./Jan. 2003); see also The Southern Center for Human Rights, *"If You Cannot Afford a Lawyer...": A Report on Georgia's Failed Indigent Defense System* (Jan. 2003), available at <http://www.deathpenaltyinfo.org/jan.%202003.%20report.pdf>.
- <sup>17</sup> Leonard Post, *On Their Own*, Nat'l L.J. (Dec. 1, 2003).
- <sup>18</sup> Alabama Judicial System, Website, available at <http://www.alacourt.gov/JudicialCircuits.aspx>.
- <sup>19</sup> See Ala. Code § 15-12-2 (1975).
- <sup>20</sup> American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 99 (June 2006) at 126, available at [http://www.nacdl.org/public.nsf/defenseupdates/deathpenalty\\_attachments/\\$FILE/ABA\\_AL.pdf](http://www.nacdl.org/public.nsf/defenseupdates/deathpenalty_attachments/$FILE/ABA_AL.pdf); *Barbour v. Haley*, Brief of Amici Curiae, Alabama Appellate Court Justices and Bar Presidents in Support of Petition for a Writ of Certiorari, No. 06-10920 (11th Cir. Dec. 8, 2006).
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- <sup>24</sup> ACLU, *Broken Justice*, *supra* note 22, at 5.
- <sup>25</sup> Ala. R. Crim. P. 32.7(c).
- <sup>26</sup> Ala. Code § 13A-5-46 (1975).
- <sup>27</sup> Ala. Code § 13A-5-46 (1975). See also *Harris v. Alabama*, 115 S.Ct. 1031 (1995).
- <sup>28</sup> Ken Silverstein, *The Judge as Lynch Mob*, 12 THE AMERICAN PROSPECT, May 7, 2001; see also Equal Justice Initiative, *Judicial Override in Alabama* (March 2008), available at [http://www.eji.org/eji/files/03.19.08%20Judicial%20Override%20Fact%20Sheet\\_0.pdf](http://www.eji.org/eji/files/03.19.08%20Judicial%20Override%20Fact%20Sheet_0.pdf).

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- <sup>32</sup> Equal Justice Initiative, *Racial Bias*, available at <http://www.eji.org/eji/deathpenalty/racialbias>.
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- <sup>35</sup> Ala. Code § 26-21-3 and § 26-21-4.
- <sup>36</sup> Trac Immigration, *Detainees Leaving ICE Detention from the Etowah County Jail*, available at <http://trac.syr.edu/immigration/detention/200803/ETOWAAL/exit/>.
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- <sup>44</sup> FLA. STAT. ANN. § 27.711 (1) (c).
- <sup>45</sup> See Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Florida in Support of Petitioner, *Lawrence v. Florida*, 549 U.S. 327 (2007) (No. 05-8820), available at [http://www.aclu.org/files/images/lawrencev.florida/asset\\_upload\\_file128\\_26049.pdf](http://www.aclu.org/files/images/lawrencev.florida/asset_upload_file128_26049.pdf).
- <sup>46</sup> *Id.*
- <sup>47</sup> FLA. STAT. ANN. § 27.711 (12).
- <sup>48</sup> See *In Re Rules of Criminal Procedure 3.851 & 3.850*, 719 So.2d 869 (Fla. 1998) (addressing practical implications of newly-enacted FLA. STAT. ANN. § 27.710 (5)).
- <sup>49</sup> See Carl Jones, *State Officials Appeal to Florida Supreme Court on Attorney Fee Caps*, DAILYBUSINESSREVIEW.COM, May 15, 2006; Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers*, FLORIDA BAR NEWS, Mar. 1, 2005, available at <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/Articles/6D34A7C218AE74C385256FB0004F3311>.
- <sup>50</sup> See *Death Appeals Not Quite Dead*, DAILYBUSINESSREVIEW.COM, Apr. 30, 2003.

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- <sup>51</sup> Jo Becker, System May Be Slowing Appeals: Introduced as a Way to Streamline the Death Penalty Process, a Registry System Using Private Defense Attorneys Has Led to Delays, Critics Say, ST. PETERSBURG TIMES, Jul. 17, 2000, at 1B.
- <sup>52</sup> See ACLU of Georgia, *The Persistence of Racial Profiling in Gwinnett: Time for Accountability, Transparency, and an End to 287(g)* (March 2010), available at <http://www.acluga.org/GwinnettRacialReportFinal1.pdf>.
- <sup>53</sup> U.S. Immigration and Customs Enforcement, Delegation of Immigration Authority Section 287(g), available at <http://www.ice.gov/287g/>.
- <sup>54</sup> Gwinnett County Sheriff's Department Jail Division, Policy Number 2.A., Chapter 2: Immigration (287(g) Program), § VI, para. C(c), on file with the ACLU of Georgia.
- <sup>55</sup> *Id.* at para. C(d).
- <sup>56</sup> *Id.*
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- <sup>59</sup> DOJ Press Release, *Over 300 Criminal Arrests In Postville ICE Operation*, May 15, 2008, available at [http://www.usdoj.gov/usao/ian/press/May\\_08/5\\_15?08\\_Agriprocessors.html](http://www.usdoj.gov/usao/ian/press/May_08/5_15?08_Agriprocessors.html).
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- <sup>61</sup> *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008) (holding that the aggravated-identity-theft charge "does not require the Government to prove that the defendant knew that the means of identity belonged to another actual person"), *abrogated by Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009).
- <sup>62</sup> Second Superseding Indictment at 1, *United States v. Agriprocessors, Inc.*, No. CR-08-1324 (N.D. Iowa Nov. 20, 2008); National Immigrant Justice Center, *U.S. Failed to Recognize Human Rights of Immigrants as it Aggressively Prosecuted Agriprocessors Workers 3* (2009), available at <http://www.immigrantjustice.org/resources/policy/nijcpolicybrief>.
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- <sup>65</sup> See, e.g., Plea Agreement for Thelma Zamol-Yool at 2-4, *United States v. Zamol-Yool*, No. 08-1306 (N.D. Iowa May 18, 2008).
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- <sup>67</sup> *Id.*
- <sup>68</sup> *Conaway v. Deane*, 401 Md. 219, 312, 932 A.2d 571, 627 (2007) (exclusion from marriage violates no provision of state constitution); *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196, 211 (2006) (state constitution required civil equality, but not marriage); *Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1, 9 (2006) (exclusion from marriage violates no provision of state constitution); *Andersen v. King County*, 158 Wash. 2d 1, 138 P.3d 963, 979 (2006) (exclusion from marriage violates no provision of state constitution); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005) (exclusion from marriage violates no provision of state constitution); *Baker v. State*,

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170 Vt. 194, 201, 744 A.2d 864, 869, 81 A.L.R.5th 627 (1999) (state constitution required civil equality, but not marriage); *Standhardt v. Superior Court ex rel. County of Maricopa*, 206 Ariz. 276, 77 P.3d 451 (Ct. App. Div. 1 2003) (exclusion from marriage violates no provision of state constitution); *Dean v. District of Columbia*, 653 A.2d 307, 310-331 (D.C. 1995) (exclusion from marriage violates no provision of district's laws); *Jones v. Hallahan*, 501 S.W.2d 588, 63 A.L.R.3d 1195 (Ky. Ct. App. 1973) (exclusion from marriage violates no provision of state constitution); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187, 1192 (Div. 1 1974) (exclusion from marriage violates no provision of state constitution).

<sup>69</sup> *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239 (N.D. Okla. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); but see *Perry v. Schwarzenegger*, \_\_\_ F.Supp.2d \_\_\_ (N.D.Cal.2010) (striking down state constitutional amendment excluding same-sex couples from marriage under federal constitution), *appeal pending*.

<sup>70</sup> *Deane & Polyak v. Conaway*, No.24-C-04-005390 (Md.Cir.Ct, Jan. 20, 2006) *overruled by Conaway v. Deane*, 401 Md. 219, 312, 932 A.2d 571, 627 (2007).

<sup>71</sup> *Conaway v. Deane*, 401 Md. 219, 312, 932 A.2d 571, 627 (2007).

<sup>72</sup> *Sanchez v. Eagle Alloy Inc.*, 254 Mich. App. 651 (Mich. Ct. App. 2003) *cert. denied Sanchez v. Eagle Alloy, Inc.*, 471 Mich. 851 (Mich. 2004).

<sup>73</sup> Ted Roelofs, *Undocumented Workers at Center of Growing Debate*, GRAND RAPIDS PRESS, Jan. 24, 2004, available at [http://www.farmworkerlaw.org/news\\_item.2005-06-01.8684853811](http://www.farmworkerlaw.org/news_item.2005-06-01.8684853811) (citing a study by the Urban Institute).

<sup>74</sup> Carol J. DeFrances, *State-Funded Indigent Defense Services 1999*, Bureau of Justice Statistics, U.S. Dep't of Justice (Wash., D.C.: September 2001/revised October 2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sfids99.pdf>.

<sup>75</sup> See, e.g., David Carroll, *Evaluation of Trial Level Indigent Defense Services in Michigan, A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis*, NLADA (Wash. D.C.: June 2008), available at [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf).

<sup>76</sup> Thirty-seven percent (37%) of state prisoners represented by public defenders reported meeting with counsel within a week of their arrest as compared to 60% of prisoners represented by private counsel. Twenty-seven percent (27%) of those represented by public defenders met with their attorneys at least four times before disposition as compared to 58% of prisoners with private counsel. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, Bureau of Justice Statistics, U.S. Dep't of Justice (Wash. D.C.: Nov. 2000), available at <http://www.ojp.gov/bjs/abstract/dccc.htm>.

<sup>77</sup> *United States v. Cronin*, 466 U.S. 648 at 656 (1984).

<sup>78</sup> See University of San Francisco School of Law, *Sentencing Our Children to Die in Prison: Global Law and Practice* (Nov. 2007), available at [http://www.usfca.edu/law/docs/sentencing\\_our\\_children/](http://www.usfca.edu/law/docs/sentencing_our_children/).

<sup>79</sup> *Graham v. Florida*, 560 U.S. \_\_\_ (2010).

<sup>80</sup> Complaint, *Hill et al. v. Granholm*, available at [http://www.aclu.org/files/assets/hillvgranholm\\_complaint\\_20101118.pdf](http://www.aclu.org/files/assets/hillvgranholm_complaint_20101118.pdf).

<sup>81</sup> See ACLU of Michigan, *Second Chances: Juveniles Serving Life without Parole in Michigan Prisons* (2006), available at <http://www.aclumich.org/sites/default/files/file/Publications/Juv%20Lifers%20V8.pdf>.

<sup>82</sup> Complaint, *Hill et al. v. Granholm*, available at [http://www.aclu.org/files/assets/hillvgranholm\\_complaint\\_20101118.pdf](http://www.aclu.org/files/assets/hillvgranholm_complaint_20101118.pdf).

<sup>83</sup> *Graham v. Florida*, 560 U.S. \_\_\_ (2010).

<sup>84</sup> *Roper v. Simmons*, 543 U.S. 5500 (2005).

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- <sup>86</sup> American Civil Liberties Union of Nevada, *New Report Says Public Defenders' Caseload is Too High* (July 9, 2009), available at <http://www.aclunv.org/new-report-says-public-defenders-caseload-too-high>.
- <sup>87</sup> *Id.*
- <sup>88</sup> See S.B. 207, 2009 Leg., 75<sup>th</sup> Sess. (Nv. 2009).
- <sup>89</sup> American Civil Liberties Union of Nevada, *UPDATE: Taxicab Authority Employees to Receive Diversity Training* (April 12, 2010), available at [http://www.aclunv.org/taxicab\\_authority](http://www.aclunv.org/taxicab_authority).
- <sup>90</sup> Complaint, *Chere v. Taye*, No. 2:04-cv-06264-FSH-PS (D.N.J. filed Dec. 21, 2004) at paras. 2, 5, available at <http://www.aclu.org/FilesPDFs/wrp%20chere%20complaint%20final%20filed.pdf>.
- <sup>91</sup> *Id.* at paras. 19, 21, 29, 35, 38 43-49, 57-58.
- <sup>92</sup> *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196, 211 (2006).
- <sup>93</sup> See *Zadvydas v. Davis*, 533 U.S. 678 (2001).
- <sup>94</sup> For more information on this case and to read the initial complaint and settlement agreement, see ACLU of New Mexico, Press Release, *MALDEF, ACLU and Otero County Sheriff's Department Resolve Civil Rights Suit*, May 11, 2010, available at [http://www.aclu-nm.org/News\\_Events/news\\_4\\_9\\_08.html](http://www.aclu-nm.org/News_Events/news_4_9_08.html).
- <sup>95</sup> For more information on the Technology and Liberty Project's study on the "Constitution Free Zone," see ACLU Technology and Liberty Project, Website, available at <http://www.aclu.org/privacy/spying/areyoulivinginaconstitutionfreezone.html>.
- <sup>96</sup> *United States v. Brignoni-Ponce*, 442 U.S. 873, 881 (1975).
- <sup>97</sup> *Id.* at 887.
- <sup>98</sup> Plaintiffs' Memorandum in Support of Motion for Preliminary Injunctive Relief, *Hurrell-Harring v. State of New York*, No. 8866-07 (N.Y. Sup. Ct. Mar. 27, 2008).
- <sup>99</sup> Commission on the Future of Indigent Services, *Final Report to the Chief Judge of the State of New York* (June 18, 2006).
- <sup>100</sup> State of New York Unified Court System, *Action Plan for the Justice Courts* 50 (Nov. 2006).
- <sup>101</sup> New York Civil Liberties Union, *Proposals for Reform of the New York State Justice Courts: Hearing Before the New York State Assembly Judiciary Committee*, Statement of Corey Stoughton, Staff Attorney (Dec. 14, 2006), available at <http://www.nyclu.org/content/proposals-reform-new-york-state-justice-courts>.
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- <sup>103</sup> *Id.*
- <sup>104</sup> *Id.*
- <sup>105</sup> Commission on the Future of Indigent Services, *supra* note 99; and New York Civil Liberties Union, *Proposals for Reform*, *supra* note 101.
- <sup>106</sup> Commission on the Future of Indigent Services, *supra* note 99.
- <sup>107</sup> See Glaberson, *supra* note 102; and *id.*
- <sup>108</sup> New York City Charter, Chapter 18-A, §440.
- <sup>109</sup> New York Civil Liberties Union, *Mission Failure: Civilian Review of Policing in New York City, 1994- 2006* (2007), available at [http://www.nyclu.org/files/publications/nyclu\\_pub\\_mission\\_failure.pdf](http://www.nyclu.org/files/publications/nyclu_pub_mission_failure.pdf).
- <sup>110</sup> *Id.*
- <sup>111</sup> New York City Civilian Complaint Review Board, *Status Report January - December 2009* (2010), available at <http://www.nyc.gov/html/ccrb/pdf/ccrbann2009.pdf>.
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<sup>113</sup> Southern Poverty Law Center, *DOJ Probes 'Discriminatory Policing' in NY*, Intelligence Report, Issue No. 136 (Winter 2009), available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2009/winter/hate-crimes#>.

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<sup>115</sup> Southern Poverty Law Center, *Climate of Fear: Latino Immigrants in Suffolk County, N.Y.*, Special Report (Sept. 2009), available at [http://www.splcenter.org/sites/default/files/downloads/publication/splc\\_suffolk\\_report.pdf](http://www.splcenter.org/sites/default/files/downloads/publication/splc_suffolk_report.pdf).

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<sup>117</sup> Latino Justice, Letter of Complaint to the United States Department of Justice and the United States Attorney for the Eastern District of New York (Nov. 25, 2008), available at [http://latinojustice.org/civil\\_rights/cases/DOJ\\_Suffolk\\_Letter.pdf](http://latinojustice.org/civil_rights/cases/DOJ_Suffolk_Letter.pdf).

<sup>118</sup> Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 Fordham L. Rev. 541, 552 (2009); New York Civil Liberties Union, *Voices from Varick: Detainee Grievances at New York City's Only Federal Immigration Detention Facility* (Feb. 2010), available at

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<sup>121</sup> Amnesty International, *Jailed without Justice: Immigration Detention in the USA* (Mar. 2009), available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>.

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<sup>126</sup> *Id.*

<sup>127</sup> *In re C.S.*, 115 Ohio St.3d 267 (Ohio 2007).

<sup>128</sup> See American Civil Liberties Union, *J.P. v. Taft* (March 9, 2006), available at [http://www.aclu.org/racial-justice\\_drug-law-reform\\_immigrants-rights\\_womens-rights/jp-v-taft](http://www.aclu.org/racial-justice_drug-law-reform_immigrants-rights_womens-rights/jp-v-taft).

<sup>129</sup> *Reinforced Earth Company v. Workers' Compensation Appeal Board (Astudillo)*, 570 Pa. 464, 810 A.2d 99 (2002).

<sup>130</sup> Janet DiGiacomo, *Texas Riot Quelled; Inmates Damage Building*, CNN.COM, Feb. 1, 2009, available at <http://www.cnn.com/2009/US/02/01/texas.prison.riot/index.html>; *New Details: Riot Appears to be Calming Down at Reeves County Detention Center*, NEWSWEST 9, Feb. 1, 2009, available at <http://www.kwes.com/global/story.asp?S=9766729>.

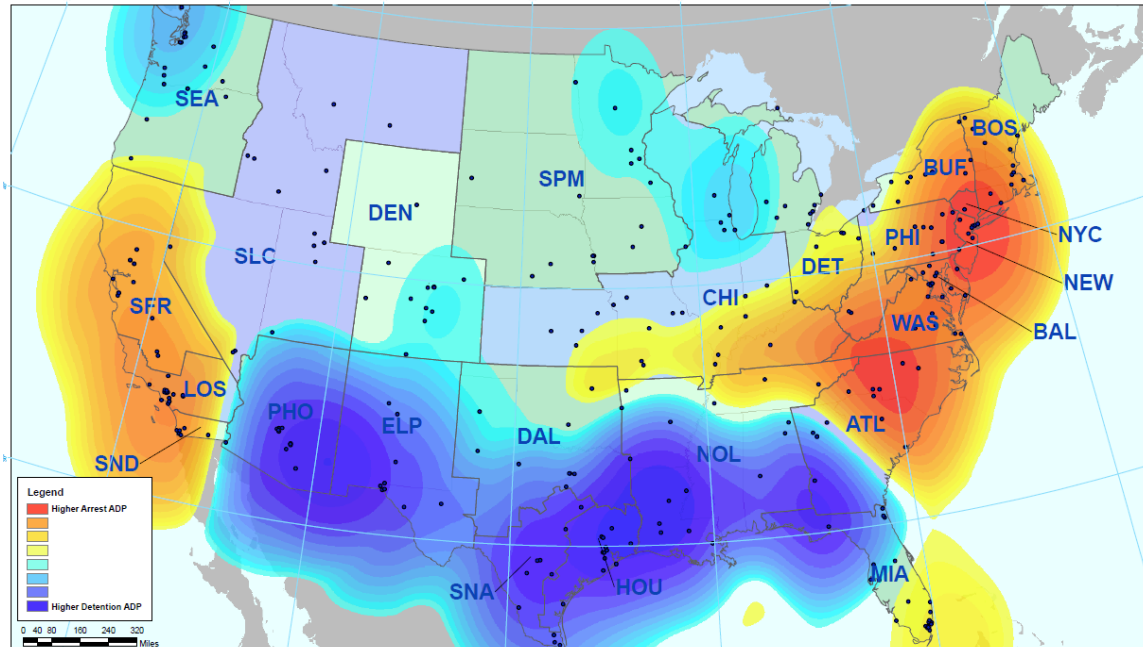
<sup>131</sup> H.B. 4606, 81<sup>st</sup> Leg., Reg. Sess. (Tx., unenacted), available at <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/HB046061.htm>; S.B. 1690, 81<sup>st</sup> Leg., Reg.



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<sup>132</sup> H.B. 3903, 80<sup>th</sup> Leg., Reg. Sess. (Tx., unenacted), available at <http://www.legis.state.tx.us/tlodocs/81R/analysis/html/HB03903H.htm>.

<sup>133</sup> See Dora Shriro, Immigration Detention Overview and Recommendations, Oct. 6, 2009, available at [http://www.ice.gov/doclib/091005\\_ice\\_detention\\_report-final.pdf](http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf) at p. 8. The chart below illustrates Detention Demand v. Capacity during FY 2009 through a special density analysis.



<sup>134</sup> See Reeves County Detention Center, Website, available at <http://www.reevescountydetectioncenter.com> (describing Reeves's structure of 3 separate facilities: Reeves I&II, which operate under a CAR-6 contract awarded in 2007, and Reeves III, which operates under a CAR-5 contract awarded in 2006); see also Federal Bureau of Prisons, *Solicitation for Criminal Alien Requirement 6*, Mar. 20, 2006 (announcing contract to "house a population of approximately 7000 low security, non-US citizens, primarily Mexican sentenced male inmates).

<sup>135</sup> See Department of Justice, *Findings Letter: Santa Fe County Adult Detention Center*, Mar. 6, 2003 (documenting serious lapses in medical treatment, including multiple cases of detected untreated tuberculosis, unmonitored and irregular access to anti-epileptic medications, and undiagnosed schizophrenia).

<sup>136</sup> The GEO Group, Inc., Website: Facts, available at <http://www.thegeogroupinc.com/facts.asp>.

<sup>137</sup> See, e.g., Peter Gorman, *Private Prisons, Public Pain*, FT. WORTH WEEKLY, Mar. 10, 2010, available at [http://www.fweek.com/index.php?option=com\\_content&view=article&id=2897:private-prisons-public-pain&catid=30:cover-story&Itemid=375](http://www.fweek.com/index.php?option=com_content&view=article&id=2897:private-prisons-public-pain&catid=30:cover-story&Itemid=375).

<sup>138</sup> See Forrest Wilder, *The Pecos Insurrection*, TEXAS OBSERVER, Oct. 2, 2009, available at <https://www.texasobserver.org/cover-story/the-pecos-insurrection>.

<sup>139</sup> See Joanna Lydgate, *Assembly Line Justice: A Review of Operation Streamline*, Warren Institute Policy Brief (January 2010), available at [http://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf).

<sup>140</sup> *United States v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009).



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<sup>141</sup> See Steven Kraytak, *Federal Judge Questions Immigration Prosecutions*, AUSTIN AMERICAN STATESMAN, Feb. 6, 2010, available at <http://www.statesman.com/news/local/federal-judge-questions-immigration-prosecutions-216667.html>.

<sup>142</sup> See *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>143</sup> Texas Department of Criminal Justice, *Death Row Facts*, available at <http://www.tdcj.state.tx.us/stat/drowfacts.htm>; Death Penalty Information Center, *Number of Executions by State and Region Since 1976*, available at <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>.

<sup>144</sup> Death Penalty Information Center, *Number of Executions by State and Region Since 1976*, available at <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>; see also Texas Department of Criminal Justice, *Executions*, available at <http://www.tdcj.state.tx.us/stat/annual.htm>.

<sup>145</sup> Death Penalty Information Center, *Death Row Inmates by State*, available at <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>; Death Penalty Information Center, *State by State*, available at [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state).

<sup>146</sup> Texas Department of Criminal Justice, *Gender and Racial Statistics of Death Row Offenders*, available at <http://www.tdcj.state.tx.us/stat/racial.htm>.

<sup>147</sup> For a comprehensive review of the Willingham case, see David Grann, *Trial by Fire*, NEW YORKER, Sept. 7, 2009, available at [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann?currentPage=all](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?currentPage=all).

<sup>148</sup> Dr. Craig L. Beyler, Chairman of the International Association for Fire Safety Science, reviewed the forensic evidence used to convict Mr. Willingham in 1992. Dr. Beyler concluded that: "The investigators had poor understandings of fire science and failed to acknowledge or apply the contemporaneous understanding of the limitations of fire indicators. Their methodologies did not comport with the scientific method or the process of elimination. A finding of arson could not be sustained based upon the standard of care expressed by NFPA 921, or the standard of care expressed by fire investigation texts and papers in the period 1980–1992." See Dr. Craig L. Beyler, *Analysis of the Fire Investigation Methods and Procedures Used in the Criminal Arson Cases Against Ernest Ray Willis and Cameron Todd Willingham* (Aug. 17, 2009).

<sup>149</sup> Matt Smith, *Texas Resists Family's Effort to Clear Executed Man's Name*, CNN, Nov. 9, 2009, available at <http://www.cnn.com/2009/CRIME/11/07/willingham.texas.execution.probe/>.

<sup>150</sup> *Id.*

<sup>151</sup> Texas Defender Service, *Deadly Speculation* 23 (2004), available at <http://02f2fd4.netsolhost.com/tds/images/publications/DEADLYSP.pdf>.

<sup>152</sup> *Coble v. State*, --- S.W.3d ----, 2010 WL 3984713, \*12 (Tex.Crim.App. Oct. 13, 2010).

<sup>153</sup> *Id.* at \*17.

<sup>154</sup> *Saldano v. State*, 70 S.W.3d 873, 884–85 (Tex.Crim.App.2002).

<sup>155</sup> Texas Defender Service, *Deadly Speculation* 41 (2004), available at <http://02f2fd4.netsolhost.com/tds/images/publications/DEADLYSP.pdf>.

<sup>156</sup> Texas Department of Criminal Justice, *Gender and Racial Statistics of Death Row Offenders*, available at <http://www.tdcj.state.tx.us/stat/racial.htm>.

<sup>157</sup> Texas Department of Criminal Justice, *Executions*, available at <http://www.tdcj.state.tx.us/stat/annual.htm>.

<sup>158</sup> *Id.*

\* For Texas death row statistics, see Texas Department of Criminal Justice, *Gender and Racial Statistics of Death Row Offenders*, available at <http://www.tdcj.state.tx.us/stat/racial.htm>; for Texas population statistics, see U.S. Census Bureau, *Texas*, available at <http://quickfacts.census.gov/qfd/states/48000.html>.

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\*\* For Texas 2009 execution statistics, see Texas Department of Criminal Justice, *Executions*, available at <http://www.tdcj.state.tx.us/stat/annual.htm>; for Texas population statistics, see U.S. Census Bureau, *Texas*, available at <http://quickfacts.census.gov/qfd/states/48000.html>.

<sup>159</sup> Allen Turner, *Mentally Ill Killer Found Hanging in his Cell*, HOUSTON CHRONICLE, Feb. 5, 2008, available at <http://www.chron.com/disp/story.mpl/metropolitan/5512123.html>.

<sup>160</sup> Associated Press, *Texas Death Row Inmate in Psychiatric Facility after Pulling Out Eye, Eating It*, DALLAS MORNING NEWS, Feb. 9, 2009, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/010909dntexinmateeye.17038ed.html>.

<sup>161</sup> Texas Appleseed, *The Fair Defense Report: Analysis of Indigent Defense Practices in Texas*, Dec. 2000, available at [http://www.texasappleseed.net/content/index.php?option=com\\_content&task=view&id=20&Itemid=119](http://www.texasappleseed.net/content/index.php?option=com_content&task=view&id=20&Itemid=119).

<sup>162</sup> *Id.* at 24-25.

<sup>163</sup> *Id.* at 29-30.

<sup>164</sup> *Id.* at 31.

<sup>165</sup> *Id.* at 43.

<sup>166</sup> Task Force on Indigent Defense, *Who We Are and What We Do*, available at <http://www.courts.state.tx.us/tfid/whoweare.asp>.

<sup>167</sup> Norman Lefstein and Robert L. Spangenberg, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, The Constitution Project, at 82, available at <http://www.constitutionproject.org/pdf/139.pdf>.

<sup>168</sup> Rick Casey, *County Hires Bad Lawyers, Bans Good*, HOUSTON CHRONICLE., Oct. 18, 2007, available at <http://www.chron.com/disp/story.mpl/metropolitan/casey/5226917.html>.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Lise Olson, *Hundreds Kept Jailed for Months Pretrial: Lawyers for the Poor have High Caseloads, but Little Oversight, Analysis Shows*, HOUSTON CHRONICLE., Oct. 4, 2009 available at <http://www.chron.com/disp/story.mpl/metropolitan/6650826.html>.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Norman Lefstein & Robert L. Spangenberg, *Justice Denied*, *supra* note 167 at 62.

<sup>180</sup> Harris County Jail (Houston) houses over 11,000 inmates and Dallas County Jail averages 8,400 inmates at any given time. See *Overcrowding Solutions Sought as Harris County Jail's Budget Tightens*, KHOU.COM, Mar. 9, 2010, available at <http://www.khou.com/news/local/-Overcrowding-solutions-sought-at-Harris-County-Jail-as-budget-tightens-87189187.html>; Dallas Country Sherriff's Department, Website, available at <http://www.dallas-sheriff.com/main.html>; *State-by-State Prison Population*, KTVU, Feb. 28, 2008, available at <http://www.ktvu.com/news/9254885/detail.html>.

<sup>181</sup> See Texas Commission on Jail Standards, available at <http://www.tcjs.state.tx.us/>; Kevin Krause and Jason Trahan, *Dallas County Faces Federal Lawsuit Over Jail Conditions*, DALLAS MORNING NEWS, Sept. 13, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/091407dnmetjailcomplaint.2cb3c3b.html>; Katie McCall, *New Information in Harris Co. Jail Probe*, ABC 13, Aug. 25, 2009 available at <http://abclocal.go.com/ktrk/story?section=news/local&id=6981785>.

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<sup>182</sup> Letter from Wan J. Kim, Assistant Attorney General, to Margaret Keliher, Dallas County Commissioners Court (Dec. 8, 2006), *available at* [http://www.justice.gov/crt/split/documents/dallas\\_county\\_findlet\\_12-8-06.pdf](http://www.justice.gov/crt/split/documents/dallas_county_findlet_12-8-06.pdf); Letter from Loretta King, Acting Assistant Attorney General, to Ed Emmett, County Judge (Jun. 4, 2009) *available at* [http://www.justice.gov/crt/split/documents/harris\\_county\\_jail\\_findlet\\_060409.pdf](http://www.justice.gov/crt/split/documents/harris_county_jail_findlet_060409.pdf).

<sup>183</sup> *Andersen v. King County*, 158 Wash. 2d 1, 138 P.3d 963, 979 (2006).

<sup>184</sup> *Andersen v. King County*, 158 Wash. 2d 1, 138 P.3d 963, 1012 (2006) (Fairhurst, J., dissenting).