



NEW YORK  
CITY BAR

February 23, 2021

Via Mail/Email

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**Re: Call for Measures to Ensure Health, Human Rights and Public Health Protections  
for Detained Immigrant Women**

Dear Secretary Mayorkas, Mr. Giles, Mr. Johnson, Mr. Wilkinson, Mr. Cuffari, Ms. Culliton-González, Mr. Trasviña and Mr. Paulk:

The New York City Bar Association writes with deep concern about a whistleblower complaint and documented reports of medical abuses of detained immigrant women in the Irwin County Detention Center (Irwin), and broader patterns of medical neglect and failures to protect

the health of detained immigrant women in the United States, especially in view of the significant threat to the public's health posed by the COVID-19 pandemic. These troubling practices occurred in a detention system characterized by weak and uneven oversight, and raise serious concerns about violations of human rights and basic human dignity, as well as related constitutional concerns, as discussed more fully below.

The Department of Homeland Security (DHS) has launched an internal investigation, which must be bolstered by independent medical evaluations and continued scrutiny by Members of Congress and advocates. Several members of Congress wrote to the UN High Commissioner for Human Rights to request an independent investigation, alleging a pattern of abuse and neglect in ICE detention centers that calls for an international response.<sup>1</sup> While such investigations take place, the rights of the affected women must be protected. We call for their deportations to be halted. It must be emphasized that this medical abuse, which is alleged to have affected at least 43 women, is merely a particularly egregious example of the dehumanizing effects of the current immigration detention system. It is imperative that overall accountability for abuses and neglect not be limited to investigation into these discrete events. As an interim measure, DHS must take appropriate actions to ensure the provision of adequate medical and mental health services, as well as public health protections, to all women held in immigration detention by the U.S. government.

As the City Bar noted in its December 2015 letter to the Obama Administration, “[D]etention raises particularly severe concerns for vulnerable individuals,” and “is neither effective nor justified as a deterrent to the migration of families and individuals into the United States.”<sup>2</sup> We recently called upon the Biden Administration to take all steps to ensure that the detention of immigrants returns to be the exception, and not the rule, and to ban entirely the use of detention for immigrant children and families.<sup>3</sup> Here we address, in particular, the needs and rights of immigrant women who have experienced reproductive violence while in detention.<sup>4</sup> In addition,

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<sup>1</sup> Letter from Reps. Rashida Tlaib, Ayanna Pressley, Ilhan Omar, Alexandria Ocasio-Cortez, Veronica Escobar, Mark Pocan, Alan Lowenthal, and Mary Gay Scanlon to UN High Comm’r for Hum. Rts. (Oct. 23, 2020), <https://tlaib.house.gov/sites/tlaib.house.gov/files/Final%20Final%20%20-%20Letter%20to%20OCHR%20on%20DHS%20Human%20Rights%20Abuses.pdf>. (All sites last visited Feb. 16, 2021).

<sup>2</sup> Letter from New York City Bar Ass’n to President Barack Obama Re: End Detention of Mothers and Children Seeking Protection as Refugees (May 26, 2015), <https://www2.nycbar.org/pdf/report/uploads/20072910-LettertoPresidentObamareLarge-ScaleDetentionofImmigrantMothersandChildren.pdf>; *see also* Letter from New York City Bar Ass’n to President Barack Obama, Re: Denial of Access to Counsel and Fair Hearings for Immigrant Mothers and Children Detained in Artesia, New Mexico (Aug. 20, 2014), [http://www2.nycbar.org/pdf/report/uploads/1\\_20072779-LetteronDenialofCounselandFairHearingsforDetainedImmigrantMothersChildren.pdf](http://www2.nycbar.org/pdf/report/uploads/1_20072779-LetteronDenialofCounselandFairHearingsforDetainedImmigrantMothersChildren.pdf).

<sup>3</sup> New York City Bar Ass’n, Recommendations Respectfully Submitted to the Biden Administration Regarding Principal Actions After Inauguration Related to the Rule of Law (Jan. 13, 2021), [https://s3.amazonaws.com/documents.nycbar.org/files/2020830-RuleOfLaw\\_BidenTransition.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2020830-RuleOfLaw_BidenTransition.pdf).

<sup>4</sup> “Reproductive violence” refers to, *inter alia*, “nonconsensual, medically unnecessary gynecological procedures.” American Public Health Association, *A Call to Investigate and Prevent Further Violations of Sexual and Reproductive Health and Rights in Immigration Detention Centers*. Policy Number: LB20-01 (October 24, 2020) (citing to the Irwin whistleblower complaint), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2021/01/13/a-call-to-investigate-immigration-detention-centers>. As explained by the American Public Health Association, “The systematic reproductive violence committed against people of color and immigrants reflects a society in which the lives of certain communities are deemed less worthy of reproduction,

in accordance with the City Bar's view that due process and international human rights standards require a "strong presumption against the detention of asylum-seekers and immigrants,"<sup>5</sup> we call for an end to the wholesale civil detention of asylum-seekers and immigrants in the United States. We also call for significant enhancement of the safeguards and oversight protections necessary to ensure the health and safety of detainees, including the reproductive rights of immigrant women, as underscored by the disturbing events laid bare in the whistleblower's complaint.

## I. BACKGROUND INFORMATION

A whistleblower complaint dated September 14, 2020, alleged that, over a period of time while awaiting immigration hearings or deportation, detained immigrant women at Irwin were subjected to nonconsensual and medically aggressive and unnecessary gynecological procedures.<sup>6</sup> According to the findings of an independent review team, the women were subjected to unnecessary surgery without adequate disclosure of risks and alternatives to procedures, and were pressured to undergo procedures inconsistent with the standard of care. The procedures allegedly took place without informed consent. The independent medical review team confirmed the abuse by analyzing records of 19 women.<sup>7</sup> The team plans to review additional medical records as they become available. Some of the women underwent gynecological surgeries that were coerced, nonconsensual, and unnecessary. At least 43 women have alleged nonconsensual or unnecessary gynecological procedures, and some sources assert that the number is at least 57.<sup>8</sup>

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autonomy, family formation, and respect. . . . In immigration detention, intersecting systems of oppression (e.g., the carceral system, misogyny, racism, and xenophobia) produce an inadequate and abusive system that fails to deliver quality reproductive health care and undermines bodily autonomy." *Id.*

<sup>5</sup> Letter from New York City Bar Ass'n to Jefferson Sessions, U.S. Att'y Gen., and Kirstjen Nielsen, Sec'y, Dep't Homeland Sec. 7 (July 6, 2018), [http://documents.nycbar.org/files/2018407-FamilySeparation\\_CityCouncilTestimony\\_7.12.18.pdf](http://documents.nycbar.org/files/2018407-FamilySeparation_CityCouncilTestimony_7.12.18.pdf); *see also* letter from New York City Bar Ass'n to President Obama, Re: End Detention of Mothers and Children Seeking Protection as Refugees (May 26, 2015), <https://www2.nycbar.org/pdf/report/uploads/20072910-LettertoPresidentObamareLarge-ScaleDetentionofImmigrantMothersandChildren.pdf> ("Due process requires a strong presumption against civil detention, and detention raises particularly severe concerns for vulnerable individuals such as asylum-seekers...").

<sup>6</sup> Letter from Project South, Georgia Detention Watch, Georgia Latino All. for Hum. Rts., & S. Georgia Immigr. Support Network, Re: Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center (Sept. 14, 2020), <https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf>; letter from Project South and Government Accountability Project, Re: Whistleblower's Disclosures on Medical Care in ICE Detention at Irwin County Detention Center: Private Contractors' Mismanagement is Endangering Immigrant, Worker and Public Health and Safety (Sept. 17, 2020), <https://projectsouth.org/wp-content/uploads/2020/09/ICE-ICDC-Whistleblower-Disclosure-to-Congress-091720.pdf>; *see also* Consolidated Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Declaratory and Injunctive Relief and for Damages, *Oldaker v. Giles*, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. Dec. 21, 2020), [https://www.nipnlg.org/PDFs/practitioners/our\\_lit/impact\\_litigation/2020\\_21Dec\\_oldaker-v-giles-complaint.pdf](https://www.nipnlg.org/PDFs/practitioners/our_lit/impact_litigation/2020_21Dec_oldaker-v-giles-complaint.pdf).

<sup>7</sup> TED ANDERSON ET AL., EXECUTIVE SUMMARY OF FINDINGS BY THE INDEPENDENT MEDICAL REVIEW TEAM REGARDING MEDICAL ABUSE ALLEGATIONS AT THE IRWIN COUNTY DETENTION CENTER (Oct. 21, 2020), <https://www.scribd.com/document/481646674/Executive-Summary-of-Medical-Abuse-Findings-About-Irwin-Detention-Center#download>.

<sup>8</sup>John Washington & José Olivares, *Number of Women Alleging Misconduct by ICE Gynecologist Nearly Triples*, INTERCEPT (Oct. 27, 2020), <https://theintercept.com/2020/10/27/ice-irwin-women-hysterectomies-senate/>.

Some of the women have been deported, making it more difficult to collect testimonies and evidence. Since investigations began, others have been slated for deportation. The deportations of potential witnesses by DHS may constitute interference with the investigation, possible obstruction of justice, and destruction of evidence, all of which are criminal acts. Members of Congress have called on Immigration and Customs Enforcement (ICE) to halt the deportations, which are in violation of long-standing ICE policy not to deport witnesses of open investigations, and condemned ICE's continuing efforts to "stonewall" Congressional inquiries.<sup>9</sup> Under the circumstances presented here, it further appears likely that the women are eligible to receive U visas,<sup>10</sup> a protected humanitarian status for cooperating victims of qualifying criminal acts, which would provide them with status to remain in the United States and eventually adjust to lawful permanent residents. While the new Administration has announced a temporary moratorium on removals and a change in enforcement priorities, the moratorium has already been challenged in federal court.<sup>11</sup> In addition, ICE's previous actions, already contrary to their own guidance, raise serious concerns regarding compliance with such executive actions.

The abuses suffered by the women at Irwin, while outrageous, are not aberrations. They must be contextualized within long-standing abuses against detained immigrants and the history of gynecological abuse, sterilization, and anti-immigrant practices.<sup>12</sup> Given the nature of the violations, it is critical that they be immediately and thoroughly investigated, that the victims be afforded opportunities for redress, and that the responsible parties engage in a plan to rectify and guarantee non-repetition.

## II. DETENTION FACILITY STANDARDS AND OVERSIGHT

Although the previous administration introduced harsh new anti-immigrant policies, structural issues in immigration detention have also contributed to the current crisis. A significant challenge in holding ICE accountable for quality of care within its detention centers is the diverse types of facilities and the contracts and standards governing the facilities. Immigrants are detained

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<sup>9</sup> Letter from U.S. House of Reps. Comm. on Oversight & Reform & Comm. on Homeland Sec. to Tony Pham, Senior Off. Performing the Duties of the Director, U.S. Immigration and Customs Enforcement (Nov. 12, 2020), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-11-12.Thompson%20CBM%20Rice%20JR%20Cooper%20to%20Pham-ICE%20re%20Agency%20Policy.pdf>.

<sup>10</sup> A person is eligible to a U visa if they (1) suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity; (2) possess information about that qualifying criminal activity; (3) receive a certification attesting to their helpfulness from a Federal, State or local government official investigating or prosecuting that qualifying criminal activity; and (4) the criminal activity of which he is a victim violated the laws of the United States or occurred in the United States. *See* INA § 101(a)(15)(U); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (2000); *see also* DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, [https://www.dhs.gov/sites/default/files/publications/19\\_0731\\_uscis\\_u-visa-law-enforcement-resource-guide.pdf](https://www.dhs.gov/sites/default/files/publications/19_0731_uscis_u-visa-law-enforcement-resource-guide.pdf).

<sup>11</sup> *Texas v. United States*, No. 6:21-cv-00003, (S.D. Tex., Victoria Div. Jan. 26, 2021) (order granting plaintiff's emergency application for temporary restraining order), [https://www.courtlistener.com/recap/gov.uscourts.txsd.1811836/gov.uscourts.txsd.1811836.16.0\\_1.pdf](https://www.courtlistener.com/recap/gov.uscourts.txsd.1811836/gov.uscourts.txsd.1811836.16.0_1.pdf).

<sup>12</sup> Justine Lei, *History of Sterilization and Eugenics in the United States* (Nov. 2020) (unpublished manuscript) (on file with the New York City Bar Association Immigration and Nationality Law Committee); Andrea DenHoed, *The Forgotten Lessons of the American Eugenics Movement*, *NEW YORKER* (Apr. 27, 2016), <https://www.newyorker.com/books/page-turner/the-forgotten-lessons-of-the-american-eugenics-movement>.

in many different facilities, including various Service Processing Centers (SPCs) owned by ICE and typically operated by contract detention staff, Contract Detention Facilities (CDFs) owned and operated by private prison companies, local and county jails under Non-Dedicated Intergovernmental Service Agreements (IGSAs) with ICE, local facilities that only house ICE detainees under Dedicated Intergovernmental Service Agreements (DIGSAs), and facilities operated by the United States Marshals Service under Marshals Service Intergovernmental Agreement (IGAs).<sup>13</sup> There are no statutes or regulations that set binding standards for the operation of these facilities.<sup>14</sup> Since ICE was established in 2000, ICE facilities have operated under a set of National Detention Standards (NDS). New outcomes-based sets of standards, the Performance-Based National Detention Standards (PBNDS) 2008 and PBNDS 2011, were subsequently established (and revisions were made to the 2011 standards in 2016).<sup>15</sup> However, these standards are not consistently applied across facilities, resulting in a system where some facilities are governed by older versions of the standards, others are not covered at all,<sup>16</sup> or in some cases, it is unclear from a contract which standards apply.<sup>17</sup>

Adding to this complex web of regulations are the separate sets of standards applicable to ICE Family Residential Centers,<sup>18</sup> to Customs and Border Protection detention (which, given that CBP is not supposed to hold individuals for longer than 72 hours, has much less comprehensive medical care standards)<sup>19</sup> and to the supervision of unaccompanied children under the Office of Refugee Resettlement, which is under the Department of Health and Human Services rather than DHS.<sup>20</sup>

Irwin is failing to meet the standards under which it is currently governed. It is a facility owned and operated by LaSalle Correctional Corporation, under an IGSA contract and governed

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<sup>13</sup> See NAT'L IMMIGR. JUST. CTR., IMMIGRATION DETENTION OVERSIGHT AND ACCOUNTABILITY TOOLKIT: A GUIDE FOR MEMBERS OF CONGRESS VISITING ICE JAILS 3-4 (May 2019).

<sup>14</sup> *Id.*

<sup>15</sup> See U.S. IMMIGR. & CUSTOMS ENF'T, ICE DETENTION STANDARDS (Feb. 24, 2012), <https://www.ice.gov/factsheets/facilities-pbnnds>; U.S. IMMIGR. & CUSTOMS ENF'T, 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, <https://www.ice.gov/detention-standards/2011>.

<sup>16</sup> See NAT'L IMMIGR. JUST. CTR., IMMIGRATION DETENTION OVERSIGHT AND ACCOUNTABILITY TOOLKIT: A GUIDE FOR MEMBERS OF CONGRESS VISITING ICE JAILS 4 (May 2019).

<sup>17</sup> See NAT'L IMMIGR. JUST. CTR., THE IMMIGRATION DETENTION TRANSPARENCY & HUMAN RIGHTS PROJECT 6-7 (Aug. 2015), <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2017-03/NIJC%20Transparency%20and%20Human%20Rights%20Project%20August%202015%20Report%20FINAL3.pdf>.

<sup>18</sup> See U.S. IMMIGR. & CUSTOMS ENF'T, FAMILY RESIDENTIAL STANDARDS 2020, §§ 4.3, 4.4., <https://www.ice.gov/detention-standards/family-residential>.

<sup>19</sup> See U.S. CUSTOMS & BORDER PROT., NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH §§ 4.1, 4.10 (Oct. 2015), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf>.

<sup>20</sup> See OFF. OF REFUGEE RESETTLEMENT, ORR GUIDE: CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED § 3.4 (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied>.

by the 2016 PBNDS.<sup>21</sup> The 2016 PBNDS state that facilities must provide (either directly or through contracted services) “medically necessary and appropriate” medical care, including “specialty health care.”<sup>22</sup> Medical services must be provided by “appropriately trained and qualified personnel, whose duties are governed by thorough and detailed job descriptions and who are licensed, certified, credentialed and/or registered in compliance with applicable state and federal requirements.”<sup>23</sup>

The PBNDS standards on language interpretation, consent, and women’s health care are particularly relevant to the detained immigrant women at Irwin. In order to provide “meaningful access” for those with limited English proficiency (LEP), facilities must provide interpretation and translation through either bilingual staff or professional services.<sup>24</sup> The PBNDS’ detailed guidance on communicating with LEP detainees requires that all written materials detainees receive be translated into Spanish, and, to the extent practicable, into other languages spoken by significant numbers of detainees. If written materials are not available in the detainee’s language or for illiterate detainees, oral interpretation or assistance must be provided.<sup>25</sup> Additionally, new detainees “shall be informed orally or in a manner in which the detainee understands about how to access, appeal or communicate concerns about health services.”<sup>26</sup> Previous internal investigations of detention facilities have revealed failures to provide interpretation services during medical examinations and to provide medical consent forms in Spanish or explain English-language forms.<sup>27</sup>

The 2016 PBNDS required that staff make “reasonable efforts to ensure that detainees understand their medical condition and care.”<sup>28</sup> Additionally, the healthcare provider must “obtain informed consent in advance of any non-emergency examination or treatment.”<sup>29</sup> In addition to standard consent practices, “separate documented informed consent is required for invasive procedures” such as surgeries.<sup>30</sup>

The standards also specifically address women’s health care, requiring that “[f]emale detainees shall receive routine, age appropriate gynecological and obstetrical health care,

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<sup>21</sup> See S. POVERTY L. CTR., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 21 (2016), [https://www.splcenter.org/sites/default/files/ijp\\_shadow\\_prisons\\_immigrant\\_detention\\_report.pdf](https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf).

<sup>22</sup> U.S. IMMIGR. & CUSTOMS ENF’T, ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, Part 4.3 § V(A) *Medical Care* (Dec. 2016), <https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf>.

<sup>23</sup> *Id.* at § II(21).

<sup>24</sup> *Id.* at § II(3).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> DEP’T OF HOMELAND SEC., OFF. INSPECTOR GEN., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES (Dec. 11, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>.

<sup>28</sup> *Id.* at § II(24).

<sup>29</sup> *Id.* at § V(D).

<sup>30</sup> *Id.* at § V(AA).

consistent with recognized community and clinical guidelines for women’s health services.”<sup>31</sup> To meet optimum levels of compliance with the PBNDS, a facility’s “provision of gynecological and obstetrical health care shall be in compliance with standards set by the National Commission on Correctional Health Care (NCCHC).”<sup>32</sup>

The sparse policies put in place to protect migrants’ basic health and safety human rights are insufficient, and compounding that is a lack of policy implementation that makes violation of detained immigrant women’s healthcare rights almost inevitable. As localized failures like the current Irwin crisis demonstrate, detained immigrant women are particularly vulnerable to medical abuses that have enduring physical as well as psychological impact.<sup>33</sup> ICE does not have adequate procedures to ensure their policies are implemented in the over two hundred facilities where immigrants are detained. Of these facilities, ICE owns only five, contracting for the use of approximately two hundred.<sup>34</sup> This makes enforcement difficult, if not impossible. Additionally, many ICE contracts with private contractors do not have expiration dates, resulting in the absence of opportunities to make renewal contingent upon improvements.<sup>35</sup>

Finally, ICE’s inspection procedures are failing to resolve problems in facilities. While executive department agency policy requires that “Government retains inherently governmental decision-making authority” in service contracts,<sup>36</sup> ICE does not retain governmental decision-making control of the health and medical policies and practices of the facilities where it contracts for immigrant detention. The oversight systems they have in place do not create sustained compliance.<sup>37</sup> Inspections of ICE facilities are conducted by offices within ICE, including the Enforcement and Removal Operations (ERO) division, the Office of Detention Oversight, and

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<sup>31</sup> U.S. IMMIGR. & CUSTOMS ENF’T, ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, Part 4.4 § II(1) (Dec. 2016), <https://www.ice.gov/doclib/detention-standards/2011/4-4.pdf>.

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

<sup>33</sup> See, e.g., HUM. RTS. WATCH, SYSTEMIC INDIFFERENCE: DANGEROUS & SUBSTANDARD MEDICAL CARE IN US IMMIGRATION DETENTION (May 8, 2017), <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention> (claiming lack of health care in detention facilities has led to severe suffering, and sometimes even preventable or premature death); letter from American Immigration Council to Dep’t Homeland Sec., RE: Failure to provide adequate medical and mental health care to individuals detained in the Denver Contract Detention Facility at 3-4 (June 4, 2018), [https://www.americanimmigrationcouncil.org/sites/default/files/general\\_litigation/complaint\\_demands\\_investigation\\_into\\_inadequate\\_medical\\_and\\_mental\\_health\\_care\\_condition\\_in\\_immigration\\_detention\\_center.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_demands_investigation_into_inadequate_medical_and_mental_health_care_condition_in_immigration_detention_center.pdf).

<sup>34</sup> *Oversight of ICE Detention Facilities: Is DHS Doing Enough*, Subcommittee on Oversight, Management, and Accountability 2 (testimony of Diana R. Shaw, Assistant Inspector Gen. for Special Reviews and Evaluations, Off. of the Inspector Gen., U.S. Dep’t of Homeland Sec.) (Sept. 26, 2019), <https://www.congress.gov/116/meeting/house/110022/witnesses/HHRG-116-HM09-Wstate-ShawD-20190926.pdf>.

<sup>35</sup> See DETENTION WATCH NETWORK, ICE LIES: PUBLIC DECEPTION, PRIVATE PROFIT 7 (Jan. 2018), [https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-02/IceLies\\_DWN\\_NIJC\\_Feb2018.pdf](https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-02/IceLies_DWN_NIJC_Feb2018.pdf).

<sup>36</sup> OFF. MGMT. & BUDGET, EXEC. OFF. PRESIDENT, POLICY LETTER 93-1, MANAGEMENT OVERSIGHT OF SERVICE CONTRACTING (1994), [https://obamawhitehouse.archives.gov/omb/procurement\\_policy\\_letter\\_93-1](https://obamawhitehouse.archives.gov/omb/procurement_policy_letter_93-1)

<sup>37</sup> See *Oversight of ICE Detention Facilities: Is DHS Doing Enough*, Subcommittee on Oversight, Management, and Accountability 4 (testimony of Diana R. Shaw, Assistant Inspector Gen.) (Sept. 26, 2019).

those offices' contractors, rather than by independent investigators.<sup>38</sup> The Office of the Inspector General, in its review of the inspections process (including of the Irwin facility specifically) has found that these inspections are not governed by clear procedures, are too infrequent, lack follow-up, and therefore are not successful in ensuring compliance with standards or improvements in conditions.<sup>39</sup> Within facilities where ICE has contracted to use beds for detention, ICE does not use contractual tools available to enforce its policies with subcontractors, leading to a further dilution of the protection for detainees.<sup>40</sup> In all, there is a lack of accountability which jeopardizes the health and safety of ICE-detained immigrant women.

### III. INTERNATIONAL HUMAN RIGHTS STANDARDS

The United States has obligations under international law to respect human rights, and those obligations are implicated by the allegations of the whistleblower's complaint. Indeed, the United States played an essential role in the drafting of the Universal Declaration of Human Rights (UDHR)<sup>41</sup>, in which Member States pledged to achieve "the promotion of universal respect for and observance of human rights and fundamental freedoms."<sup>42</sup> Ensuring respect for these basic principles is essential to maintaining the United States's stature and influence in promoting human rights around the world.<sup>43</sup> Particularly relevant are the United States' commitments as a party to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Protocol Relating to the Status of Refugees.

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<sup>38</sup> See DEP'T OF HOMELAND SEC., OFF. INSPECTOR GEN., ICE'S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMIC IMPROVEMENTS 2-3 (June 26, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

<sup>39</sup> See *id.*

<sup>40</sup> *Id.* at 5; see also DEP'T OF HOMELAND SEC., OFF. INSPECTOR GEN., ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS (Jan. 29, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>.

<sup>41</sup> The UDHR, adopted by the United Nations General Assembly in 1948, is the foundation of the United Nations' human rights framework. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), <https://www.un.org/en/universal-declaration-human-rights/>. See also JOHN F. SEARS, FRANKLIN & ELEANOR ROOSEVELT INST., ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2008), <http://goodofall.org/site/wp-content/uploads/2008/06/sears.pdf>.

<sup>42</sup> *Id.* Among the Declaration's relevant articles are Article 5, which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," Article 7, which states that "all are equal before the law and are entitled without any discrimination to equal protection of the law," Article 14, which establishes that "Everyone has the right to seek and to enjoy in other countries asylum from persecution," and Article 25, which provides for everyone's "right to a standard of living adequate for the health and well-being of himself and of his family," including medical care.

<sup>43</sup> Additionally, although the U.S. legal system is generally less reliant on international standards than those of some countries, U.S. courts and legislatures do use the Declaration to inform or interpret laws concerned with human rights. See Gordon Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, CIN. L. REV. 52 (1983); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, GA. J. INT'L & COMP. L., Vol 25:287, p. 304.



The ICCPR, signed and ratified by the United States, recognizes “the inherent dignity and of the equal and inalienable rights of all members of the human family.”<sup>44</sup> The United States has also ratified the CAT, which bans the intentional infliction of severe physical or mental pain or suffering, either by state actors or with the acquiescence of state actors.<sup>45</sup> The reported abuses outlined in the whistleblower complaint likely fall under the CAT’s definition of torture<sup>46</sup> and can lead to long term psychological sequelae and disorders.<sup>47</sup> The United States did not ratify the 1951 Refugee Convention, but has ratified the subsequent 1967 Refugee Protocol, which incorporates the rights of the Convention and establishes standards for the humane and dignified treatment of refugees, but removes the geographical and time-based restrictions on the Convention.<sup>48</sup>

While the United States has not ratified all the key human rights treaties, the failure to do so does not mean that the United States is free to ignore or violate those treaties. Pursuant to the

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<sup>44</sup> International Covenant on Civil and Political Rights, Preamble, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>45</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85. In asking States to pay special attention to contexts where women and girls are particularly at risk, the Committee highlighted situations involving “deprivation of liberty, medical treatment, particularly involving reproductive decisions.” Comm. against Torture, General Comment 2, CAT/C/GC/2 (Jan. 24, 2008). Forced sterilization, particularly when it is aimed at particular marginalized groups, has specifically been found by CAT and by the UN Special Rapporteur on Torture to constitute torture or ill-treatment. *See, e.g.*, Comm. Against Torture, Concluding Observations: Slovakia ¶ 14, U.N. Doc. CAT/C/SVK/CO/2 (Dec. 17, 2009); Comm. Against Torture, Concluding Observations: Canada ¶¶ 150-51, U.N. Doc. CAT/C/CAN/CO/7 (Dec. 21, 2018); U.N. Human Rights Council, Report of the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, U.N. Doc A/HRC/22/53 (Feb. 1, 2013).

<sup>46</sup> CAT Article 1 defines “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

<sup>47</sup> *See* Metin Basoglu et al., *Torture vs Other Cruel, Inhuman, and Degrading Treatment*, ARCHIVES OF GEN. PSYCH., Volume 64, March 2007, <http://archpsyc.ama-assn.org/cgi/reprint/64/3/277>; THE MENTAL HEALTH CONSEQUENCES OF TORTURE (Ellen Gerrity et al. eds., 2001); BROKEN SPIRITS: THE TREATMENT OF TRAUMATIZED ASYLUM SEEKERS, REFUGEES, WAR AND TORTURE VICTIMS (John Wilson & Boris Drozdek eds., 2004); Amanda C de C Williams & Jannie van der Merwe, *The Psychological Impact of Torture*, BRITISH J. PAIN, 7(2), 101-106 (May 2013), <https://doi.org/10.1177/2049463713483596>; CTR. FOR VICTIMS TORTURE, EFFECTS OF TORTURE (April 2015), <https://www.cvt.org/sites/default/files/downloads/CVT%20Effects%20Torture%20April%202015.pdf>; Emilie Lerner et al., *Predictors of Suicidal Ideation in Treatment-Seeking Survivors of Torture*, PSYCH. TRAUMA: THEORY, RSCH, PRAC., & POL’Y (2016).

<sup>48</sup> Under the Protocol, parties agree to “undertake to cooperate with the Office of the United Nations High Commissioner for Refugees” (UNHCR). In a 2012 UNHCR report, the agency established formal standards for detention of refugees seeking asylum. Asylum seekers are entitled to minimum conditions that are both humane and dignified. Per Guideline 8, subsection (vi) “Appropriate medical treatment must be provided where needed, including psychological counselling.” This surely includes access to appropriate gynecological care. Similarly, subsection (xvi) recommends that “All staff working with detainees should receive proper training, including in relation to asylum, sexual and gender-based violence, the identification of the symptoms of trauma and/or stress, and refugee and human rights standards relating to detention.” UNITED NATIONS HIGH COMM’R FOR REFUGEES, DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION (2012), <https://www.refworld.org/docid/503489533b8.html>.

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,<sup>49</sup> a state “is obliged to refrain from acts which would defeat the object and purpose of a treaty” when it has signed but not yet ratified a treaty.<sup>50</sup> Its “object and purpose is understood to mean the ‘essential goals’ of a treaty... a signatory state need not comply with every part of a treaty, but it must comply with the most important parts.”<sup>51</sup> The conduct at Irwin violates the object and purpose of several treaties that the United States has signed but not ratified, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).<sup>52</sup> Under the ICESCR,<sup>53</sup> states must ensure “the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups” and “equitable distribution of all health facilities, goods and services.”<sup>54</sup> The Committee on Economic, Social and Cultural Rights asserted that states must ensure that migrants have equal access to “preventive, curative, and palliative health services, regardless of their legal status and

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<sup>49</sup> The Vienna Convention, to which the United States is a party, outlines the rules, procedures, and guidelines for how treaties are defined and interpreted and how they operate. *See* Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Preamble, May 21, 1986, 25 I.L.M. 543.

<sup>50</sup> *Id.* at art. 18.

<sup>51</sup> David S. Jonas & Thomas N. Saunders, *The Object and Purpose of A Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565, 596 (2010).

<sup>52</sup> The United States signed CEDAW in 1980 and ICESCR in 1977, but to date neither treaty has been ratified. *See Status of Ratification: United States*, OFF. HIGH COMM'R HUM. RTS., <https://indicators.ohchr.org/>.

<sup>53</sup> The ICESCR protects various economic, social and cultural rights, including the right to the highest attainable standards of physical and mental health. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. Although the United States has not ratified ICESCR, as a signatory to that treaty, it still has an obligation not to violate the object and purpose of the treaty. The Committee on Economic, Social and Cultural Rights has elaborated on the right in General Comment 14, which states that “[e]very human being is entitled to the enjoyment of the highest attainable standard of health conducive to living life in dignity” and that the right includes the ability to “control one’s health and body, including sexual and reproductive freedom.” ESCR Comm., General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), ¶¶ 1, 8 U.N. Doc. E/C.12/2000/4, (Aug. 11, 2000).

<sup>54</sup> *See* ESCR Comm., General Comment 14; UN Human Rights Council, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (2017), <https://reliefweb.int/sites/reliefweb.int/files/resources/G1707604.pdf>; Lisa Cosgrove et al., *Global Mental Health*, LANCET 117–118 (2019), [https://doi.org/10.1016/S0140-6736\(19\)30945-6](https://doi.org/10.1016/S0140-6736(19)30945-6); Dainius Pūras, *Human Rights and the Practice of Medicine*, PUB. HEALTH REVS., 38,9 (2017), <https://doi.org/10.1186/s40985-017-0054-7>; Dainius Pūras et al., *The Right to Health Must Guide Responses to COVID-19*, LANCET 395(10241), 1883, 1888–1890 (2020), [https://doi.org/10.1016/S0140-6736\(20\)31255-1](https://doi.org/10.1016/S0140-6736(20)31255-1) (“As recognised in the International Covenant on Economic, Social and Cultural Rights, the right to health requires that states take steps for the “prevention, treatment and control of epidemic, endemic, occupational, and other diseases” and to assure “medical service and medical attention in the event of sickness. The right to health requires that health goods, services, and facilities are available in adequate numbers; accessible on a financial, geographical, and non-discriminatory basis; acceptable, including culturally appropriate and respectful of gender and medical ethics; and of good quality.”)

documentation.”<sup>55</sup> And, the objective of CEDAW is “the elimination of all forms of discrimination against women on the basis of sex.”<sup>56</sup>

These international treaties and guidelines should not be disregarded and must inform U.S. laws and regulations governing ICE detention centers and the treatment of immigrants and refugees. The reported abuses of immigrant women in ICE detention centers reflect a larger pattern of degrading treatment of migrants in the United States – in violation of international standards – and of policies designed to disincentivize and punish migration.<sup>57</sup>

#### IV. CONSTITUTIONAL PROTECTIONS: THROUGH A HEALTH AND PUBLIC HEALTH LENS

The U.S. Constitution protects citizens and noncitizens alike from violations of rights fundamental to our nation’s concepts of liberty. The Fourteenth Amendment has been invoked to protect bodily autonomy and safeguards against state-compelled medical invasions absent compelling reasons.<sup>58</sup> Gynecological procedures performed for no medical purpose, as reported at

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<sup>55</sup> See Statement by the Committee on Economic, Social and Cultural Rights, The Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights, ¶ 12, U.N. Doc. E/C.12/2017/1 (Mar. 13, 2017), <https://undocs.org/E/C.12/2017/1>.

<sup>56</sup> Comm. Elimination Discrimination Against Women, General Recommendation 28 (2010) ¶ 4, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010). CEDAW defines discrimination as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” Convention on the Elimination of All Forms of Discrimination against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13. Under CEDAW, states have three central obligations in their efforts to eliminate discrimination against women: (1) to ensure that “there is no direct or indirect discrimination against women *in their laws* and that women are protected against discrimination;” (2) to improve the “de facto position of women through concrete and effective policies and programmes;” and (3) to address “prevailing gender relations and the persistence of gender-based stereotypes.” To actively contradict any of these three obligations is to act contrary to the object and purpose of CEDAW. The policies enacted by the U.S. toward women in ICE/DHS detention conflict with the United States’ obligations under CEDAW.

<sup>57</sup> See Letter from New York City Bar Ass’n to President Barack Obama Re: End Detention of Mothers and Children Seeking Protection as Refugees (May 26, 2015), <https://www2.nycbar.org/pdf/report/uploads/20072910-LettertoPresidentObamareLarge-ScaleDetentionofImmigrantMothersandChildren.pdf>; Letter from New York City Bar Ass’n to President Barack Obama, Re: Denial of Access to Counsel and Fair Hearings for Immigrant Mothers and Children Detained in Artesia, New Mexico, August 20, 2014, [http://www2.nycbar.org/pdf/report/uploads/1\\_20072779-LetteronDenialofCounselandFairHearingsforDetainedImmigrantMothersChildren.pdf](http://www2.nycbar.org/pdf/report/uploads/1_20072779-LetteronDenialofCounselandFairHearingsforDetainedImmigrantMothersChildren.pdf); Letter from New York City Bar Ass’n to Jefferson Sessions, U.S. Att’y Gen., and Kirstjen Nielsen, Sec’y, Dep’t Homeland Sec. 7 (July 6, 2018), [http://documents.nycbar.org/files/2018407-FamilySeparation\\_CityCouncilTestimony\\_7.12.18.pdf](http://documents.nycbar.org/files/2018407-FamilySeparation_CityCouncilTestimony_7.12.18.pdf); SARAH PIERCE & JESSICA BOLTER, MIGRATION POL’Y INST, DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY (July 2020), [https://www.migrationpolicy.org/sites/default/files/publications/MPI\\_US-Immigration-Trump-Presidency-Final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf); CONG. RSCH. SERV., THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY (Feb. 26, 2019), <https://fas.org/sgp/crs/homsec/R45266.pdf>.

<sup>58</sup> *In re K.L.*, 1 N.Y.3d 362 (2004); *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 287-88 (1990) (O’Connor, J., concurring). (“Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.”)

Irwin, violate the constitutional rights of the detained women on whom the procedures were performed. There is no legitimate state purpose that would justify, or even provide a rational basis for, the actions alleged in the whistleblower complaint. Moreover, rather than isolated incidents, they are properly seen as indicative of a larger system of discrimination against immigrants, and more specifically immigrant women. The absence of sufficient policies to prevent medical abuse and neglect, as well as the lack of implementation procedures which may have allowed the abuse to be carried out, raise distinct constitutional issues.

### **A. Punitive Conditions and Harm**

Immigration detention is not the result of a criminal justice process although detention constitutes immigration enforcement.<sup>59</sup> The significant number of asylum seekers who are detained merely for their undocumented status (not for having committed a crime unrelated to entering the U.S.) undermines U.S. and international asylum policy, which is intended to permit people to seek asylum based on risk of persecution in their home country. While improper entry is a criminal violation (a federal misdemeanor) and a civil one, ICE's role is to oversee civil detentions of those awaiting immigration hearings or removal.

The prohibition against inflicting punishment in the civil detention context applies to everyone regardless of immigration status,<sup>60</sup> acts as a check on plenary power, and must apply to those detained as they are living an incarcerated life.<sup>61</sup> Ignoring the medical needs of detained immigrant women violates the prohibition on cruel and unusual punishment;<sup>62</sup> it follows that inflicting painful, unnecessary medical treatment also is cruel and unusual. Inflicting unwanted medical care on those incarcerated is impermissible without an overriding legitimate government purpose.<sup>63</sup>

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<sup>59</sup> Shoba Sivaprasad Wadhia, *BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 2* (2019) (In 2016, one arm of ICE detained 350,000 people.)

<sup>60</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001) (in evaluating a statute, the Court found no ability to detain immigrants indefinitely; there being nowhere for the immigrants to go does not equate to reason to deprive them of liberty other than necessary to aid the deportation; if an inability to remove them from the country allowed for incarceration to continue, then the incarceration would be punitive and not civil; permissible incarceration could essentially be incidental to deportation; court in dicta indicated detention for proceedings to do with deportation as "civil and non-punitive in purpose and effect" and applied equal right to liberty to those without documentation.) *See also* Daniel Wilsher, *MODERN IMMIGRATION DETENTION* 71-79 (2012).

<sup>61</sup> *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005) (confinement must not be punitive).

<sup>62</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (to ignore an incarcerated person's serious medical needs is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment).

<sup>63</sup> For discussion of incarcerated persons and unwanted care, *see* Frederick R. Parker, Jr. & Charles J. Paine, *Informed Consent and the Refusal of Medical Treatment in the Correctional Setting*, 27(3) *J. L. MED. & ETHICS* 240 (1999). *See also* *Washington v. Harper*, 494 U.S. 210 (1990) (holding that an incarcerated person's refusal of medical care can be overridden if the prison has a reason legitimately related to the imprisonment). *See also* *Riggins v. Nevada*, 504 U.S. 127 (1992) and *Thor v. Superior Court*, 5 Cal.4th 725 (1993). These cases hinge on the legitimate government interest and can be distinguished from the women in ICE detention whose medical abuses could not be deemed linked to a similar government interest.

In *Youngberg v. Romeo*, the Supreme Court held that substantive due process protects the rights of those in civil confinement, finding that mentally challenged individuals in state-run institutions must be free of unnecessary infringements on their liberty. In doing so, the Court's decision impacted the future of civil confinement, applying minimum standards and requiring that individuals in civil detention receive "more constitutional protection, more considerate treatment, and conditions of confinement..."<sup>64</sup> than those in criminal confinement. Specifically, the *Youngberg* court evaluated the infringement of constitutionally protected liberty after the plaintiff was unduly restrained.

In *Hamm v. DeKalb*, the Court held that the Eighth Amendment applies to confinement only in a criminal context and after a "formal adjudication of guilt" because the State would not have the power to punish in pretrial imprisonment. "This court holds that in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care the *minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons*. The Court recognizes that the limitations imposed by the eighth amendment and the due process clause arise in different contexts. Nonetheless, with respect to the provision of basic necessities to individuals in the state's custody, the two provisions necessarily yield the same result."<sup>65</sup> The Constitution requires minimum standards to be upheld and imposes on courts to protect the rights of prisoners.<sup>66</sup>

To determine whether there is a substantive due process violation in this context, courts apply the deliberative indifference standard.<sup>67</sup> In *Hamm*, the Court applied the standard to both the pretrial detention pursuant to the Fourteenth Amendment's protection of substantive due process and the imprisonment (post-conviction), pursuant to the Eighth Amendment.<sup>68</sup> The substantive due process violation arises from conditions that would violate the Eighth Amendment prohibition against cruel and unusual punishment.

In *Bell v. Wolfish*, the Court created a test to determine whether an action is "punishment" as the Constitution prohibits punishment of those not convicted. The Court held that when an act lacks legitimate government purpose, a court can infer the action is punishment and violates the Constitution.<sup>69</sup> Taken together, *Estelle v. Gamble*, *Hamm v. DeKalb*, *Youngberg v. Romeo*<sup>70</sup> and *Bell* establish that the failure to meet medical needs of a detained person violates substantive due process. In the case of the detained immigrant women at Irwin, there was more than medical neglect; the allegations demonstrate care that was medically unwarranted, non-consensual, abusive, and unsafe. The medical team analyzing the records concluded the procedures were not

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<sup>64</sup> *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982).

<sup>65</sup> *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985) (emphasis added).

<sup>66</sup> *Jones v. Diamond*, 636 F.2d 1364, 1368 (5th Cir. 1981) (en banc), *cert. granted*, 452 U.S. 959 (1981), *cert. dismissed*, 453 U.S. 950 (1981).

<sup>67</sup> *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985).

<sup>68</sup> *Id.*

<sup>69</sup> *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

<sup>70</sup> *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982).

medically warranted or performed for the patients' own good.<sup>71</sup> Based on the above, the actions alleged in the whistleblower complaint amount to punishment and occurred with deliberate indifference and without a legitimate government purpose.

## **B. Reproductive Rights and Privacy**

Of particular relevance here, the Fourteenth Amendment's guarantee of substantive due process protects a range of intimate decisions people make, including decisions about what medical care they will accept or refuse, or decisions about procreation and pregnancy.<sup>72</sup> Due process underlies the right to privacy in reproductive decisions.<sup>73</sup> Even before *Griswold v. Connecticut*, which marks the start of the modern reproductive rights jurisprudence, "procreation" was considered a fundamental right.<sup>74</sup> Nonconsensual gynecological procedures inflicted on women held in the ICE detention center not only violated their right to be free from compelled medical procedures, but also, in some cases the procedures affected future fertility, thereby violating their right to make decisions about pregnancy and procreation in the future. There was no compelling government purpose for the procedures; in fact, an independent reviewer found that the procedures were not medically warranted.<sup>75</sup>

The alleged bodily intrusions against those held in ICE detention facilities were not for legitimate medical purposes, public health,<sup>76</sup> or the medical good of the patients. In fact, it appears that one purpose of the reported non-consensual gynecological procedures may have been a fraudulent money-making scheme, which calls for further investigation.<sup>77</sup>

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<sup>71</sup> TED ANDERSON ET AL., EXECUTIVE SUMMARY OF FINDINGS BY THE INDEPENDENT MEDICAL REVIEW TEAM REGARDING MEDICAL ABUSE ALLEGATIONS AT THE IRWIN COUNTY DETENTION CENTER (Oct. 21, 2020), <https://www.scribd.com/document/481646674/Executive-Summary-of-Medical-Abuse-Findings-About-Irwin-Detention-Center#download>.

<sup>72</sup> Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U. ILL. L. REV. 1059 (2014).

<sup>73</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>74</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

<sup>75</sup> TED ANDERSON ET AL., EXECUTIVE SUMMARY OF FINDINGS BY THE INDEPENDENT MEDICAL REVIEW TEAM REGARDING MEDICAL ABUSE ALLEGATIONS AT THE IRWIN COUNTY DETENTION CENTER (Oct. 21, 2020), <https://www.scribd.com/document/481646674/Executive-Summary-of-Medical-Abuse-Findings-About-Irwin-Detention-Center#download>.

<sup>76</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (establishing that the scope of police power includes reasonable measures to protect legitimate public health and safety).

<sup>77</sup> Dr. Mahendra Amin, one doctor accused of the allegations that are the subject of this comment letter, and several others were sued for defrauding Medicare and Medicaid and settled the claims for \$520,000 in 2015. Press Release, U.S. Atty's Off., M.D. Ga., Hospital Authority Of Irwin County Resolves False Claims Act Investigation For \$520,000 (Apr. 29, 2015), <https://www.justice.gov/usao-mdga/pr/hospital-authority-irwin-county-resolves-false-claims-act-investigation-520000>. The doctor then entered the contract with ICE to provide medical services to detainees. The unexplained, medically unnecessary procedures could be explained by an incentive to bill ICE. The New York Times reports that the gynecological procedures are billed at thousands of dollars. Independent doctors have concluded the procedures were unnecessary, and the New York Times independently interviewed 16 women who reported they were subjected to coercive practices. Caitlin Dickerson, Seth Freed Wessler & Miriam Jordan, *Immigrants Say They Were Pressured Into Unneeded Surgeries*, N.Y. TIMES, Sept. 29, 2020,

### C. Consent and Informed Refusal

The right of competent adults to refuse healthcare interventions even when they are life-sustaining is also well established.<sup>78</sup> Nonconsensual gynecological touching, intrusion, and assault or battery are each a fundamental abridgement of a person's rights – a threat to dignity and within the proper scope of substantive due process. *Jacobson*<sup>79</sup> and later *Cruzan*,<sup>80</sup> citing the *Jacobson* decision, established the “right to refuse” which governs refusal by informed adults of any and all medical procedures. Absent incapacity or incompetence, adults make their own medical decisions. As Justice Cardozo famously declared, “Every human being of adult years and sound mind has a right to determine what shall be done with his own body...”<sup>81</sup>

Informed consent has two distinct features: disclosure to the patient, and the patient's appreciation and acceptance of the intervention and its risks. The consent must be voluntary, free from coercion, and made after receipt and understanding of the relevant information.<sup>82</sup> Informing these requirements is a right to bodily integrity. As described by the Supreme Court nearly 130 years ago:

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<https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html>. The federal Centers for Medicare and Medicaid Services (CMS), within the U.S. Department of Health and Human Services, has recognized that furnishing surgical procedures that are medically unnecessary and without informed consent is a form of patient abuse and may be actionable as fraud and abuse if billed to the federal government. *See* CTR. FOR MEDICARE & MEDICAID SERVS., MEDICARE FRAUD & ABUSE: PREVENT, DETECT, REPORT (FEB. 2019), <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/Fraud-Abuse-MLN4649244.pdf>; CTR. FOR MEDICARE & MEDICAID SERVS., GUIDANCE FOR HOSPITALS, CRITICAL ACCESS HOSPITALS (CAHS) AND AMBULATORY SURGICAL CENTERS (ASCs) RELATED TO VARIOUS RULES REDUCING PROVIDER/SUPPLIER BURDEN (Mar. 15, 2013), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-13-20.pdf>. Courts have similarly recognized that performing such improper procedures on patients constitutes medical malpractice. *See* Isaac D. Buck, *Overtreatment and Informed Consent: A Fraud-Based Solution to Unwanted and Unnecessary Care*, 43 FLA. ST. U. L. REV. 901 (2017), <https://ir.law.fsu.edu/lr/vol43/iss3/3>.

<sup>78</sup> In the Matter of Karen Ann Quinlan, N.J. Sup. Ct., 355 A.2d 647 (1976). The right to privacy grows with the level of intrusion; the level of intrusion has an inverse relationship to the state's interest in interfering with medical decisions. *See also* *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (establishing a liberty interest in refusing medical care).

<sup>79</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>80</sup> *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

<sup>81</sup> *Schloendorff v. Society of New York Hospital*, 106 N.E.93, 129 (N.Y. 1914); *see also* *Lane v. Candura*, Mass. App. Ct., 376 N.E.2d 1232 (1978) (woman is competent to refuse amputation despite some unrelated confusion).

<sup>82</sup> *See, e.g.*, 42 CFR § 482.13(b)(2) (the patient “has the right to make informed decisions regarding his or her care” and “to request or refuse treatment”); 42 CFR § 482.24(c)(2)(v) (requiring that a practitioner document all orders in the patient's medical record); 42 CFR § 482.51(b)(2) (mandating informed consent forms be executed before surgical services); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891) (holding that a trial court could not force a plaintiff in a civil action to submit to surgical examination to determine the extent of her injuries without her consent); Tom L. Beauchamp & James F. Childress, *PRINCIPLES OF BIOMEDICAL ETHICS* (1979).

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.<sup>83</sup>

For informed consent to be effective, a patient with capacity, or their surrogate decision maker if the patient lacks capacity, must receive information about the condition, the nature of the proposed treatment, potential benefits, potential risks, and available alternatives (including forgoing treatment).<sup>84</sup> The right to informed consent “can be effectively exercised only if the patient possesses enough information to enable an intelligent choice.”<sup>85</sup> Furthermore, the disclosure must be made in a manner that is accessible to the patient given their language needs and understanding. Safeguards include delivering information in the patient’s native language.<sup>86</sup> Practitioners must also receive training to meet the needs of the cultures they serve,<sup>87</sup> an essential element when dealing with vulnerable populations such as refugees.

The reportedly unwanted gynecological examinations, treatments, surgeries, and other medically aggressive and medically unnecessary procedures call for an analysis of both informed consent and informed refusal. Had the patients had the proper and correct information, and the entirety of the relevant information about the procedures, the risks, and the long-term consequences, it is reasonable to believe they would not have consented. According to the independent reviewer the women allegedly were not given the chance to hear or digest the complexity of the medical information.<sup>88</sup> For instance, had the women understood that some cysts are normal monthly occurrences, that some medicines (in some instances, apparently wrongfully given) caused abdominal pain, and that their conditions likely did not require any special medical

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<sup>83</sup> Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

<sup>84</sup> See, e.g., Nickell v Gonzalez, 17 Ohio St. 3d 136, 477 N.E.2d 1145 (1985); Dries v. Greacor, 424 N.Y.S. 2d 561, 72 A.2d 231 (1980); Holt v. Nelson, 11 Wash. App. 230, 523 P. 2d 211 (1974); David Louisell & Harold Williams, MEDICAL MALPRACTICE § 2201 (1974); Consent may be implied and not explicitly required in emergencies, when the information could be harmful (a limited exception), and when the patient waives consent. See, e.g., Leach v. Shapiro, 13 Ohio App. 3d 393, 469 N.E.2d 1047 (1984); Stover v. Assoc. of Cardiovascular Surgeons, 634 A. 2d 47 (Pa. Sup. 1993); N.Y. Pub. Health L. § 2805-d(4)(b).

<sup>85</sup> Canterbury v. Spence, 464 F.2d 772, 786 (1972); Adam S. Herbs, *Informed Consent in Medical Decision Making: A Historical Examination and Future Development*, NYSBA HEALTH L.J., WINTER 2018, at 72, 73.

<sup>86</sup> Gaurab Basu et al., *Clinicians’ Obligations to Use Qualified Medical Interpreters When Caring for Patients with Limited English Proficiency*, AM. MED. ASS’N J. ETHICS 245 (Mar. 2017).

<sup>87</sup> Fiona Meddings & Melanie Haith-Cooper, *Culture and Communication in Ethically Appropriate Care*, NURSING ETHICS 52 (2008); Rocio Garrido et al., *Moving towards Community Cultural Competence*, INT’L J INTERCULTURAL RELS. 89 (2019).

<sup>88</sup> TED ANDERSON, ET AL., EXECUTIVE SUMMARY OF FINDINGS BY THE INDEPENDENT MEDICAL REVIEW TEAM REGARDING MEDICAL ABUSE ALLEGATIONS AT THE IRWIN COUNTY DETENTION CENTER (Oct. 21, 2020), <https://www.scribd.com/document/481646674/Executive-Summary-of-Medical-Abuse-Findings-About-Irwin-Detention-Center#download>.



care and were not dire, one can reasonably assume that they would have refused the procedures.<sup>89</sup> And, the evidence suggests that they were not in need of drastic medical intervention.<sup>90</sup>

Informed refusal to undergo a recommended procedure tends to be challenged more than informed consent to undergo a recommended procedure because refusals challenge medical advice as opposed to agreeing with it. In fact, doctors occasionally seek out competency testing when recommended medical care is refused.<sup>91</sup> This leads to circular arguments in which the refusal of care by otherwise rational patients is itself interpreted as evidence of their lack of competence to make medical decisions, creating even further pressure on the patient to accept the treatment.<sup>92</sup> “Practitioners must be guarded against stigmatizing patients who decline their treatment recommendations by characterizing them as lacking intelligence or mental competency.”<sup>93</sup> Indeed, plaintiffs in the Irwin case alleged that the patients’ status as ICE detained immigrant women made them vulnerable, which increased the likelihood that the doctor’s power and professional decisions would carry more weight.<sup>94</sup> This may have led to the underlying presumption that had the women refused, their competence, intelligence, and ability to decide for themselves would be attacked. As demonstrated in the allegations at issue here, there is no evidence of voluntariness, a prerequisite to informed consent.<sup>95</sup>

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<sup>89</sup> *Id.* There are many allegations of the mistreatment and misdiagnosis of cysts, labeling normal follicles cysts, and the unnecessary removal of cysts. In one case, the complaint alleges surgery to remove a cyst was “not medically necessary, that the cyst would have resolved itself.” In another example, the doctor “did not explain what the cyst was, if it was dangerous, or give her any other details whatsoever.” Consolidated Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Declaratory and Injunctive Relief and for Damages at 64, 84, *Oldaker v. Giles*, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. Dec. 21, 2020), [https://www.nipnlg.org/PDFs/practitioners/our\\_lit/impact\\_litigation/2020\\_21Dec\\_oldaker-v-giles-complaint.pdf](https://www.nipnlg.org/PDFs/practitioners/our_lit/impact_litigation/2020_21Dec_oldaker-v-giles-complaint.pdf).

<sup>90</sup> *Id.*

<sup>91</sup> *See, e.g.,* *Dep’t of Human Servs. v. Mary Northern*, 563 S.W.2d 197 (Tenn. Ct. App. 1978).

<sup>92</sup> *See id.* at 204. Ms. Northern’s doctor, while finding her “generally lucid and sane,” states that she must be “functioning on a psychotic level” due to her refusal to accept her physicians’ diagnosis of her condition.

<sup>93</sup> Bernard M. Dickens & Rebecca Cook, *Patients’ Refusal of Recommended Treatment*, INT’L J. GYNECOLOGY & OBSTETRICS 105 (2015).

<sup>94</sup> Consolidated Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Declaratory and Injunctive Relief and for Damages, *Oldaker v. Giles*, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. Dec. 21, 2020), [https://www.nipnlg.org/PDFs/practitioners/our\\_lit/impact\\_litigation/2020\\_21Dec\\_oldaker-v-giles-complaint.pdf](https://www.nipnlg.org/PDFs/practitioners/our_lit/impact_litigation/2020_21Dec_oldaker-v-giles-complaint.pdf).

<sup>95</sup> *Id.* Whereas the whistleblower complaint primarily describes nonconsensual, not medically indicated hysterectomies, the petitioners in the complaint allege that were they subjected to a variety of procedures, including surgeries (some of the women were unsure what types of surgeries they had received and others reported narrowly avoiding receiving hysterectomies), pap smears, transvaginal ultrasounds, and contraceptive injections, often without explanation or without an interpreter present. Additionally, many allege that gynecological exams and procedures were performed in a violent and painful manner that amounted to or were reminiscent of sexual assault. Furthermore, petitioners allege that after they spoke out about the abuse and went on hunger strikes in protest of detention conditions, they experienced a variety of forms of retaliation, including solitary confinement, transfers to different units, restricted access to phones and email, and physical assault. Consolidated Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Declaratory and Injunctive Relief and for Damages at 27-97, *Oldaker v. Giles*, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. Dec. 21, 2020), [https://www.nipnlg.org/PDFs/practitioners/our\\_lit/impact\\_litigation/2020\\_21Dec\\_oldaker-v-giles-complaint.pdf](https://www.nipnlg.org/PDFs/practitioners/our_lit/impact_litigation/2020_21Dec_oldaker-v-giles-complaint.pdf).

Informed consent and informed refusal must be voluntary. Detained immigrant women rarely feel their actions are voluntary. They live under the threat of punishment and under the power of others making decisions for them.<sup>96</sup> Detained women here from other countries may be unaware of their constitutional rights and may not ask relevant questions or make an effort to absorb information. After signing any consent, the patients may have felt that they rightly transferred control to the doctor.<sup>97</sup>

## V. CALL FOR ACTION

In light of the above evidence and the serious legal, ethical and human rights issues raised by a review of the publicly available evidence, the New York City Bar Association calls upon your offices to cooperate with investigations of the reports by immigrant women while detained at Irwin of medical abuses and human rights violations, as well as violations of constitutional rights. It is of utmost importance that the scope of any investigation must include a review of the role and contribution of for-profit management companies in the medical abuses that have been reported, as well as the systemic patterns of medical neglect and lack of oversight. Additionally, for those immigrant women who have made reports and are survivors of Dr. Amin's abuse, and may also be witnesses in criminal investigations, their deportations must be halted. In efforts to mitigate the suffering of all immigrant women who remain detained at Irwin or other detention centers and reduce risks to their health and wellbeing, especially during the pandemic, we also call for increased oversight of detention centers and monitoring of compliance with applicable detention center standards, an overall improvement in the standard of medical care for detained immigrant women, and appropriate actions to protect the health of detained immigrant women from the serious threat posed by COVID-19 in accordance with applicable agency and public health guidance.

Finally, we call for an end to the wholesale detention of immigrants in the United States. The action we call for is not intended to bar the confinement of particular individuals if warranted in connection with criminal charges unrelated to entering the U.S. - who will otherwise be entitled to due process protections - but as a remedy for the well-documented systemic failures of U.S. immigration policy in ensuring the rights of all detained immigrants, including all those detained in congregate facility settings, as protected under United States and international law.

Respectfully,

Immigration & Nationality Law Committee  
Danny Alicea, Chair  
Mary Beth Morrissey\*

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<sup>96</sup> Rachel Roth & Sara L. Ainsworth, *If They Hand You a Paper, You Sign It: A Call to End the Sterilization of Women in Prison*, 26 *Hastings WOMEN's L.J.* 7 (2015).

<sup>97</sup> Wouter K.G. Leclercq et al., *A Review of Surgical Informed Consent: Past, Present, and Future. A Quest to Help Patients Make Better Decisions*, *WORLD J. SURG.* 1406 (2010).

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**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*