

IMMIGRATION DETENTION AS A VIOLATION OF TRANSGENDER
DETAINEES' SUBSTANTIVE DUE PROCESS RIGHTS

by
Emily Torstveit Ngara*

Noncitizens in immigration proceedings are often subject to civil detention pending a final decision on their case. Transgender individuals in immigration detention are at high risk for physical and sexual assault, cruel and degrading treatment, denial of necessary medical care, and protective isolation. The well-documented harms caused to transgender individuals in detention violate Fifth Amendment substantive due process. This Article documents the harms of immigration detention specific to the transgender community, reviews substantive due process jurisprudence in the civil detention context, and analogizes Eighth Amendment claims for transgender prisoners to substantive due process claims. Immigration detention is predicated on the government's interest in noncitizens appearing for their hearings. The Article concludes by exploring alternatives to detention that are effective enough to safeguard the government's interest while promoting the fair application of our immigration laws and safeguarding the rights of transgender noncitizens.

Introduction 749

I. Conditions of Detention for Trans Individuals 754

 A. *Humiliating and Degrading Treatment* 755

 B. *Denial of Adequate and Necessary Medical Care* 756

 C. *Sexual Assault* 759

 D. *Protective Solitary Confinement* 760

 E. *Failure of Efforts to “Make Detention Better”* 763

II. Immigration Detention of Trans Noncitizens as a Violation of Fifth
Amendment Substantive Due Process 767

 A. *Substantive Due Process Arguments from Other Civil Detention
Settings* 770

* Associate Clinical Professor, Georgia State University College of Law. J.D. University of Pennsylvania, LL.M. University of the District of Columbia. I would like to thank Elizabeth Keyes, Kristina Campbell, Will Miller, CJ Peters, Denise Gilman, Carrie L. Rosenbaum, Phil Torrey, Marisa Cianciarulo, Lauris Wren, Finley Wolff, Tim Lytton, Kit Johnson, and Joseph Thai for invaluable feedback, support, and advice. Any errors are my own.

B.	<i>The Eighth Amendment Argument</i>	773
1.	<i>Conditions of Detention</i>	774
2.	<i>Provision of Medical Care</i>	775
3.	<i>Sexual and Physical Assault</i>	776
4.	<i>Inhumane and Degrading Treatment</i>	777
5.	<i>Treatment of Trans Prisoners and Detainees and the Eighth Amendment</i>	777
C.	<i>The Accardi Doctrine</i>	778
D.	<i>Substantive Due Process and Trans Detainees</i>	781
III.	Alternatives to Detention.....	784
A.	<i>Intensive Supervision Appearance Program (ISAP) and Electronic Monitoring Device (EMD)</i>	785
B.	<i>Community Supervision</i>	787
C.	<i>Bond</i>	788
D.	<i>Appointment of Counsel</i>	789
	Conclusion.....	789

INTRODUCTION

The long-standing legal fiction that deportation is not a punishment in the penological sense has meant that immigration detention is considered civil in nature.¹ Noncitizens are generally taken into immigration custody after the issuance of an administrative warrant signed by an immigration officer.² Every day, Immigration and Customs Enforcement (ICE) maintains beds to detain at least 34,000 noncitizens in civil detention in facilities across the country, including regional jails, state and county prisons, private prisons, and ICE-operated detention facilities.³ The Trump administration acted to increase detention of noncitizens and increase detention capacity by identifying additional detention beds.⁴ As of September 2019, the United States was detaining upwards of 52,000 noncitizens on any given day.⁵

¹ *Chae Chan Ping v. United States*, 130 U.S. 581, 606–09 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 709, 730 (1893); *Wong Wing v. United States*, 163 U.S. 228, 235–37 (1896).

² 8 U.S.C. § 1357 (2018); 8 C.F.R. § 287.5 (2021).

³ Department of Homeland Security Appropriations Act of 2015, Pub. L. No. 114-4, 129 Stat. 39, 43 (2015).

⁴ David Nakamura, *Trump Administration Moving Quickly to Build up Nationwide Deportation Force*, WASH. POST (Apr. 12, 2017), https://www.washingtonpost.com/politics/trump-administration-moving-quickly-to-build-up-nationwide-deportation-force/2017/04/12/7a7f59c2-1f87-11e7-be2a-3a1fb24d4671_story.html?utm_term=.24b5306e4b5f.

⁵ Emily Kassie, *DETAINED: How the US Built the World's Largest Immigrant Detention System*, GUARDIAN (Sept. 24, 2019, 6:39 PM), <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump>.

This number dropped during the COVID-19 pandemic under the Centers for Disease Control and Prevention's (CDC) Title 42 order, which closed the border due to purported public health concerns and has resulted in the expulsion of most recent entrants.⁶ The daily average number of ICE detainees, which does not include recently apprehended entrants in Border Patrol custody, dropped to 12,490 in October 2021 and continued to decline, hovering between 4,500 and 5,000 for the first several months of fiscal year (FY) 2022.⁷

A few facilities where these detainees are held are run by ICE, but the majority are local jails or private prisons that have contracted to provide bed space to ICE for the detention of noncitizens.⁸ Noncitizens are currently housed in approximately 250 facilities throughout the United States.⁹ Of these detainees, during non-pandemic times, approximately 115 identified as transgender.¹⁰

⁶ Armando Garcia, Deena Zaru & Quinn Owen, *What is Title 42? Amid Backlash, Biden Administration Defends Use of Trump-Era Order to Expel Migrants*, ABC NEWS (Sept. 26, 2021, 8:09 AM), <https://abcnews.go.com/US/title-42-amid-backlash-biden-administration-defends-trump/story?id=80149086> (noting that 938,045 migrants were expelled under Title 42 between October 2020 and August 2021).

⁷ U.S. IMMIGR. & CUSTOMS ENFT FY 2021 STAT., <https://www.ice.gov/detain/detention-management> (under "Detention Statistics," choose "Previous Year-End Reports"; then download "FY 2021 Detention Statistics"); U.S. IMMIGR. & CUSTOMS ENFT FY 2022 YTD STAT., <https://www.ice.gov/detain/detention-management> (under "Detention Statistics," choose "FY 2022 ICE Statistics"; then download "Detention FY 2022 YTD, Alternatives to Detention FY 2022 YTD and Facilities FY 2022 YTD, Footnotes") (last visited Sept. 17, 2022) [hereinafter 2022 ICE STAT.]. In the first four months of FY 2022, the total number of Department of Homeland Security detainees was over 20,000 each month due to an increased number of detainees in Customs and Border Protection custody. *Id.* Many of these individuals were apprehended crossing the border and then returned under the CDC Title 42 order. *See Q&A: US Title 42 Policy to Expel Migrants at the Border*, HUM. RTS. WATCH (Apr. 8, 2021, 4:15 PM), <https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border>.

⁸ HUM. RTS. WATCH, "DO YOU SEE HOW MUCH I'M SUFFERING HERE?" ABUSE AGAINST TRANSGENDER WOMEN IN US IMMIGRATION DETENTION 9 (2016).

⁹ *Id.*

¹⁰ Susan Montoya Bryan, *US Considers More Options for Detaining Transgender Migrants*, ABC NEWS (June 13, 2019, 6:33 PM), <https://abcnews.go.com/US/wireStory/us-considers-options-detaining-transgender-migrants-63690503>. Data from the pandemic suggests that the number of trans detainees has dropped significantly; however, ICE statistics may under-report the number of trans detainees as the statistics are based on detainees self-identifying as trans to ICE officers during the intake process, which some detainees are afraid to do. *See Sam Levin, A Trans Woman Detained by Ice for Two Years Is Fighting for Freedom: 'I've been forgotten,'* GUARDIAN (June 9, 2021, 6:00 PM), <https://www.theguardian.com/us-news/2021/jun/09/a-trans-woman-detained-by-ice-for-two-years-is-fighting-for-freedom-ive-been-forgotten>. According to ICE's FY 2021 statistics, as of September 13, 2021, 96 trans individuals had been booked into ICE custody. *See* U.S. IMMIGR. & CUSTOMS ENFT FY 2021 STAT., <https://www.ice.gov/detain/detentionmanagement> [<https://web.archive.org/web/20210930192156/https://www.ice.gov/detain/detention-management>] (under "Detention Statistics," download "FY 2021 Detention

The adjective “transgender” is used to describe individuals whose gender identity differs from the gender they were assigned at birth, in contrast to cisgender individuals who identify as the gender they were assigned at birth. For purposes of this Article, the term transgender will also be used to describe individuals who identify as non-binary, meaning that they do not identify as only male or only female.¹¹ The transgender umbrella term as used in this Article will also include genderfluid and genderqueer individuals, though many people who identify as trans do not identify as non-binary or genderfluid. Transgender identity is separate from and independent of sexual orientation. For purposes of this Article, the term “trans” will be used to refer to the diverse and varied community that includes transgender individuals and individuals with other gender-nonconforming identities—those whose gender identity may not match documentation based on a gender assigned to them at birth.¹²

Trans noncitizens are often asylum seekers, and many have endured grave harm in their country of origin as a result of their gender identity. Once in detention, trans individuals are many times more likely to be sexually and physically assaulted by fellow detainees and/or facility personnel and routinely face sexual harassment, including degrading strip searches conducted by male guards. In fact, transgender women comprise approximately 1 in 500 people in immigration detention, yet they account for 1 in 5 substantiated complaints of sexual assault.¹³ Another problem frequently reported by trans detainees is the inability to access vital medical care. In a professed effort to prevent physical harm to trans detainees, facilities often resort

Statistics”) (reflecting the YTD number for FY 2022). In the first eight months of FY 2022, ICE had detained a total of 83 trans-identifying noncitizens. See 2022 ICE STAT., *supra* note 7.

¹¹ Non-binary could mean that an individual’s gender identity has elements of both male and female, that their gender is neither male nor female, that they do not identify as any gender, or that their gender changes over time. Not all non-binary individuals identify as transgender, but because non-binary, genderqueer, and gender-nonconforming individuals face many of the same horrors transgender individuals do in detention, the term “trans” will be used in this Article to include individuals who identify as non-binary.

¹² It is important to note that the term “trans” refers to gender and gender identity and is unconnected to sexuality or sexual orientation. A trans individual may identify as straight, gay, bisexual, queer, asexual, or none of the above. Likewise, a trans individual may or may not be undergoing or interested in hormone replacement therapy or surgical or other medical interventions for gender dysphoria. For more information on the identities mentioned here, see Bex Montz, *Acronyms Explained*, OUTRIGHT ACTION INT’L (Sept. 20, 2021), <https://outrightinternational.org/content/acronyms-explained>, and *Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> (last visited Sept. 17, 2022).

¹³ Laura Pirkle, *Transgender Individuals in Immigration and Customs Enforcement (ICE) Detention Centers in the US*, OUTRIGHT ACTION INT’L (Apr. 4, 2016), <https://www.outrightinternational.org/content/transgender-individuals-immigration-and-customs-enforcement-ice-detention-centers-us>.

to administrative segregation or so-called “protective solitary confinement,” a practice which carries its own set of severe emotional, psychological, and physiological harms.

The Obama administration implemented policies intended to improve conditions of detention for trans noncitizens in ICE custody. Unfortunately, the changes in policy were not effective in ensuring the safety of trans detainees. These policy changes were largely revoked by the Trump administration, and the treatment of trans noncitizens in immigration detention became even more inhumane.¹⁴ Recognizing the past failure of policy changes to produce sufficient improvement in the detention experience of trans detainees, this Article does not advocate for the return to efforts to “make detention better.” Indeed, as demonstrated by the Trump administration’s revocation of protections put in place by the Obama administration, even if they could produce safe, humane conditions of detention, policy changes are inadequate to protect trans detainees in the long-term. Rather, this Article argues for a realignment of substantive due process jurisprudence to better reflect our evolving communal values and understanding of the individual harms suffered by trans detainees. If ICE cannot detain trans noncitizens in a safe, humane manner, as it has consistently demonstrated it is unable to do over the course of multiple administrations, these detainees must be released. While the government does have an important interest in ensuring that noncitizens in removal proceedings appear for their hearings and comply with the final orders of immigration judges, that interest can be met in a far less restrictive, harmful, and expensive manner. Although many of the arguments advanced in this Article may also be applicable to other vulnerable groups in immigration detention, this Article will focus on trans detainees and the unique combination of harms they face in immigration detention.

In Part I, this Article examines the harmful conditions of detention for trans detainees in immigration custody, including hostile and degrading treatment, denial of vital medical treatment, the substantial risk of sexual assault, and the effects of administrative segregation, or “protective solitary.” Part II outlines current substantive due process jurisprudence, examines and compares Eighth Amendment jurisprudence, and advocates for realigning substantive due process protections to better reflect the evolving values of society. The final Part explores existing alternatives to detention that would allow the U.S. government to protect its interest in ensuring noncitizens’ compliance with removal proceedings without resorting to the detention of trans noncitizens. Although there are a number of viable options, this Article advocates for a combination of the appointment of counsel and community supervision for trans noncitizens in removal proceedings as the option that would best

¹⁴ See Scott Bixby, *Trans Activists Say Biden’s ICE Is Just as Bad as Trump’s*, DAILY BEAST (June 24, 2021, 4:20 AM), <https://www.thedailybeast.com/trans-activists-say-bidens-ice-is-just-as-bad-as-trumps?ref=scroll>; Levin, *supra* note 10.

ensure compliance while safeguarding the well-being of a very vulnerable population.

I. CONDITIONS OF DETENTION FOR TRANS INDIVIDUALS

Immigration detention is often experienced as demoralizing, traumatic, and degrading by cisgender detainees.¹⁵ Trans detainees are particularly vulnerable to, and disproportionately experience, humiliating and degrading treatment from detention facility staff, denial of adequate medical care, and sexual assault and harassment. In a professed effort to protect trans detainees from physical and sexual violence in the general population, trans detainees are much more likely to be placed in administrative segregation, or protective solitary, a practice with the potential for extreme negative effects on both mental and physical health.¹⁶

ICE has been using an automated Risk Classification Assessment (RCA) tool to determine whether detainees should be released and to assess housing arrangements since January 2013.¹⁷ ICE officers have individual discretion to release or detain noncitizens even if they have been recommended for release.¹⁸ Although ICE receives automated recommendations to consider release as an option in 70% of cases involving a noncitizen who has expressed that they fear being abused in detention as a result of their sexual orientation or gender identity, ICE officers made the decision to detain in 68% of those cases.¹⁹ This is particularly troubling given that prior to January 2014, ICE was overriding 21.9% of the total RCA release recommendations. Between January and August 2014, that override rate dropped to 7.6%.²⁰ This means that not only are trans detainees at greater risk for substantial harms in immigration detention, they are also much more likely to remain detained despite indications that they pose no flight risk or danger to the community. On average, trans detainees are held in ICE custody for 99 days, over twice as long as the average for cisgender detainees, and some trans detainees spend well over two years in detention.²¹

¹⁵ Jenny Zhao, *VICTORY! In San Francisco, Immigration Detainees No Longer Shackled*, ACLU N. CAL. (Jan. 23, 2014), <https://www.aclunc.org/blog/victory-san-francisco-immigration-detainees-no-longer-shackled>.

¹⁶ HUM. RTS. WATCH, *supra* note 8, at 32–33.

¹⁷ *Id.* at 17.

¹⁸ *Id.*; Pirkel, *supra* note 13.

¹⁹ HUM. RTS. WATCH, *supra* note 8, at 17.

²⁰ OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., *OIG-15-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION* (Revised) 14 (2015).

²¹ Murat Oztaskin, *The Harrowing, Two-Year Detention of a Transgender Asylum Seeker*, NEW YORKER (Oct. 31, 2019), <https://www.newyorker.com/news/dispatch/the-harrowing-two-year-detention-of-a-transgender-asylum-seeker>.

A. *Humiliating and Degrading Treatment*

Trans migrants in immigration detention, most of whom are transgender women, are detained in conditions that are “often humiliating, dangerous, and even deadly.”²² Often, a trans noncitizen’s first experiences of immigration detention include humiliation and degrading treatment. This indicates to detainees that they are not safe in detention, and this understanding is reinforced by the continued humiliation and degrading treatment that all too often escalates into even greater harm.

Barbra Perez, a Cuban-born transgender woman, was arrested by ICE in her driveway in 2014.²³ During her transfer to the LaSalle Immigrant Detention Center in Jena, Louisiana, Perez was held in a Plexiglas cage at the front of the bus.²⁴ When the bus arrived, officers asked the driver how many male and female detainees he was delivering.²⁵ He pointed at Perez and said “[t]wenty-seven and a half males.”²⁶ Perez, who was detained in a male facility, described being incarcerated as a man after living her life as a woman as having “stripped me to the core and made all my insecurities flood to the surface.”²⁷ Detainees are regularly misgendered,²⁸ and in the words of another formerly detained trans noncitizen, “Misgendering is violence If the system is that the government will not respect your gender identity, how could you feel safe?”²⁹

Nicoll Hernández Polanco, a transgender woman who escaped nearly a decade of extreme violence and sexual assault in Guatemala and Mexico, presented herself at the U.S. border to request asylum.³⁰ During her first month of immigration detention, Hernández Polanco reported six to eight pat downs every day conducted by male guards.³¹ During the pat downs the guards would make sexually harassing comments as they groped her buttocks and breasts and occasionally pulled her hair.³² Hernández Polanco was also subjected to verbal abuse by ICE staff who called her

²² Mia Nakano, *Being Trans is Not Criminal*, HYPHEN MAG. (Sept. 29, 2015), <http://hyphenmagazine.com/print/blog/archive/2015/04/being-trans-not-criminal-us-immigration-system-thinks-it>.

²³ Barbra Perez, *A Fragile Shell of Who I Used to Be*, NEW REPUBLIC (Feb. 16, 2016), <https://newrepublic.com/article/129965/fragile-shell-used>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ “Misgendering” is the act of referring to someone as a gender that does not match their gender identity. In the case of trans women, this often means being referred to as male, a man, or through the use of male pronouns.

²⁹ Bixby, *supra* note 14.

³⁰ Nakano, *supra* note 22.

³¹ *Id.*

³² *Id.*

“fucking gay,” “bitch,” and “the woman with balls” in the presence of other detainees and “it” in front of her attorney.³³

Maura Martinez, a trans woman from Nicaragua, came to the United States in the mid-1990s.³⁴ Starting at age five, she endured sustained sexual and physical abuse from multiple relatives because of her gender identity.³⁵ From the moment she entered ICE detention, she felt she had no rights, and she dreaded waking up every day.³⁶ The harassment she received in the facility was like reliving all the trauma she suffered as a child.³⁷

Trans detainees are routinely subjected to strip searches conducted by male guards, particularly after meeting with their attorneys or attending court hearings. Enduring these strip searches can be especially traumatic for trans detainees who are all too often survivors of sexual or gender-based violence, as being compelled to disrobe and subjected to invasive cavity searches by male guards evokes painful memories of prior abuse.³⁸ Trans detainees are supposed to be able to choose the gender of the guard performing the strip search, but in practice, this rarely happens.³⁹ Requiring re-traumatization following each meeting with a detainee’s attorney also discourages access to counsel.

B. *Denial of Adequate and Necessary Medical Care*

Trans immigrants in ICE custody are often denied access to vital medical care, including HIV treatment and hormone replacement therapy.⁴⁰ Some are denied access to medical care altogether.⁴¹ Several trans detainees reported to Human Rights Watch that they were denied access to their HIV medication for two to three months after being detained, and one woman reported being provided medication for tuberculosis that she later learned had impaired the efficacy of her HIV medication.⁴² Strict compliance with an antiretroviral regimen is essential to survival—including sustaining HIV suppression, preventing drug resistance, reducing the risk

³³ *Id.*

³⁴ Levin, *supra* note 10.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ HUM. RTS. WATCH, *supra* note 8, at 28.

³⁹ *Id.* at 29 (citing U.S. IMMIGR. & CUSTOMS ENF’T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 123 (rev. ed. 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>).

⁴⁰ *Id.* at 41.

⁴¹ *Id.* at 1.

⁴² *Id.* at 43.

of transmission, and maintaining overall health and quality of life.⁴³ Without consistent treatment, HIV-positive detainees may develop resistance to their medication, which can lead to opportunistic infections or other serious HIV-related illnesses.⁴⁴ Reliable access to antiretroviral treatments in detention is particularly important for trans detainees, and transgender women in particular, as they are almost 50 times more likely to contract HIV than other adults of reproductive age.⁴⁵

Two HIV-positive transgender detainees recently died in ICE custody or shortly after their release. On May 25, 2018, Roxsana Hernandez Rodriguez, a 33-year-old trans woman from Honduras, died after 16 days in ICE custody.⁴⁶ Hernandez Rodriguez died of dehydration and complications from HIV, and an independent autopsy found “deep hemorrhaging of the soft tissues and muscles over her ribs,” leading to concerns that she had been abused before her death.⁴⁷ Hernandez Rodriguez experienced symptoms of severe dehydration for days, yet received “no medical evaluation or treatment, until she was gravely ill.”⁴⁸ By the time she was transported to a hospital, it was too late.⁴⁹

On June 1, 2019, Johana Medina Leon, a 25-year-old trans woman from El Salvador, died four days after being transferred from ICE custody to the Del Sol Medical Center in El Paso, Texas.⁵⁰ Medina Leon was in ICE custody for six weeks, during which time she tested positive for HIV.⁵¹ She began to suffer from chest pains and pleaded with ICE for medical attention.⁵² She was not taken to the hospital until she became gravely ill and lost consciousness.⁵³

In addition to treatment for HIV, access to hormone replacement therapy is of extreme importance for many trans detainees. According to the World Professional

⁴³ *Id.* (citing U.S. DEP’T OF HEALTH & HUM. SERVS., GUIDELINES FOR THE USE OF ANTIRETROVIRAL AGENTS IN ADULTS AND ADOLESCENTS WITH HIV § K-1 (2017), https://clinicalinfo.hiv.gov/sites/default/files/guidelines/archive/AdultandAdolescentGL_2021_08_16.pdf).

⁴⁴ *Id.*

⁴⁵ *Id.* at 42 (citing *HIV and Transgender People*, CDC, <https://www.cdc.gov/hiv/group/gender/transgender> (last visited Sept. 17, 2022)).

⁴⁶ Sandra E. Garcia, *Independent Autopsy of Transgender Asylum Seeker Who Died in ICE Custody Shows Signs of Abuse*, N.Y. TIMES (Nov. 27, 2018), <https://nytimes.com/2018/11/27/us/trans-woman-roxsana-hernandez-ice-autopsy.html>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Ben Kesslen, *Transgender Asylum-Seeker Dies After Six Weeks in ICE Custody*, NBC NEWS (June 3, 2019, 1:28 PM), <https://www.nbcnews.com/news/us-news/transgender-asylum-seeker-dies-after-six-weeks-ice-custody-n1012956>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

Association for Trans Health (WPATH), hormone replacement therapy is medically necessary for many individuals with gender dysphoria, including trans individuals.⁵⁴ WPATH further advises that “[t]he consequences of abrupt withdrawal of hormones or lack of initiation of hormone therapy when medically necessary include a high likelihood of negative outcomes such as surgical self-treatment by autocastration, depressed mood, dysphoria, and/or suicidality.”⁵⁵

ICE’s medical policy does state that trans detainees who had been receiving hormone therapy prior to detention should continue to have access to that treatment in detention. The policy also provides that a medical professional should assess individuals who have not been receiving hormone therapy prior to detention and provide treatment where appropriate.⁵⁶ However, the majority of transgender women interviewed by Human Rights Watch reported that they did not receive access to hormones for one to five months after being detained.⁵⁷ Two transgender women reported that they were given access to hormones in pill form only, rather than injections, and the pills caused symptoms such as dizziness and stomach pain that the injections did not.⁵⁸ One detainee reported that ICE’s failure to provide her with her hormone treatments was not for lack of access: “When I was suddenly released twenty-four days later I’d lost seventeen pounds. I was handed my hormones along with my property, so they must have had them the entire time and just not wanted to give them to me.”⁵⁹

Trans detainees are also regularly denied routine medical care while being subjected to degrading and transphobic statements from detention facility medical staff. One detainee described the inadequate medical care she received in detention, explaining that although she had been taking hormones before her detention, she was told by medical personnel that they did not have them.⁶⁰ Instead, she was given ibuprofen.⁶¹ At one point she and some other detainees were told, “We’re tired of seeing you here, you need to drink six glasses of water an hour. We’re sick of it,

⁵⁴ HUM. RTS. WATCH, *supra* note 8, at 45 (citing WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 33 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?_t=1613669341).

⁵⁵ *Id.* (quoting WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 54, at 67).

⁵⁶ *Id.* (citing Memorandum from Thomas Homan, Exec. Assoc. Dir., U.S. Immigr. & Customs Enft on Further Guidance Regarding the Care of Transgender Detainees, attach. 1 (June 19, 2015) [hereinafter ICE Memorandum]).

⁵⁷ *Id.*

⁵⁸ *Id.* at 45–46.

⁵⁹ Perez, *supra* note 23.

⁶⁰ HUM. RTS. WATCH, *supra* note 8, at 46.

⁶¹ *Id.*

either drink water or we'll send you to the hole [solitary confinement]." One provider told a transgender woman seeking medical attention that "[y]ou all think you're women, but you're really men. You're acting ridiculous."⁶²

C. Sexual Assault

Transphobia, language barriers, fear of retribution or deportation, and isolation make detained immigrants especially vulnerable to sexual assault in detention.⁶³ Trans detainees are disproportionately at risk for sexual assault by fellow detainees and guards when housed with men in detention and given little privacy.⁶⁴ LGBTQ detainees are 97 times more likely to be sexually assaulted in detention than non-LGBTQ detainees.⁶⁵ Transgender women comprise only 1 in 500 people in immigration detention, yet they account for 1 in 5 substantiated sexual assault complaints.⁶⁶ For transgender women being housed in a men's facility, it can be extremely difficult to avoid their attackers. A Honduran detainee who was raped in an intake cell by two other detainees while a third man served as lookout was then assigned to the same unit as her rapists.⁶⁷ Officials did transfer her to another unit when she reported the rape, but not before being told that, "You [transgender women] are the ones that cause these problems and always call the men's attention."⁶⁸

Transgender women are assaulted when forced to use the communal shower with dozens of male detainees, and are verbally and sexually harassed in shared dormitories where they have to dress and sleep.⁶⁹ Guards often observe these interactions in silence and refuse to intervene, do not investigate when complaints are filed, or even engage in verbal and sexual abuse themselves.⁷⁰ In fact, two-thirds of sexual assaults against trans detainees are perpetrated by detention facility personnel.⁷¹ Officials threatened to put a trans detainee in solitary confinement for "engaging in sexual contact with another detainee" when she reported being sexually assaulted by

⁶² *Id.*

⁶³ *Id.* at 19 (citing NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 21–22 (2009)).

⁶⁴ *Id.*; Pirkel, *supra* note 13.

⁶⁵ Sharita Gruberg, *ICE's Rejection of Its Own Rules Is Placing LGBT Immigrants at Severe Risk of Sexual Abuse*, AM. PROGRESS (May 30, 2018), <https://www.americanprogress.org/article/ices-rejection-rules-placing-lgbt-immigrants-severe-risk-sexual-abuse/>.

⁶⁶ Pirkel, *supra* note 13.

⁶⁷ HUM. RTS. WATCH, *supra* note 8, at 20.

⁶⁸ *Id.*

⁶⁹ *Id.* at 20–21.

⁷⁰ *Id.* at 21, 24.

⁷¹ Bixby, *supra* note 14 (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-38, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE app. II at 60 (2013)).

another detainee.⁷² A 2013 Government Accountability Office investigation found that of the four assaults perpetrated by ICE detention facility personnel, three involved transgender victims.⁷³ There have also been at least two reported cases of guards sexually assaulting transgender women while they were housed in solitary confinement.⁷⁴

Over half of the complaints to the Department of Homeland Security (DHS) Office of the Inspector General by LGBTQ detainees over a five-year period recounted sexual or physical abuse.⁷⁵ This is similar to prison settings where LGBTQ prisoners are 15 times more likely to be victims of sexual assault than the general population.⁷⁶ For example, a 2014 national inmate survey conducted by the U.S. Bureau of Justice Statistics found that 40% of trans people held in state and federal facilities reported sexual abuse, compared to 14% of lesbian, gay, and bisexual prisoners and just over 3% of heterosexual prisoners.⁷⁷

D. Protective Solitary Confinement

One particularly harmful practice that trans and other gender-nonconforming detainees are more likely to experience in detention than cisgender detainees is administrative segregation. LGBTQ and gender-nonconforming detainees are frequently put in administrative segregation as a response to their increased risk of experiencing sexual or other violence at the hands of other detainees.⁷⁸ Complaints lodged with the DHS Office of Inspector General also allege that detention officials use administrative segregation as harassment or punishment for being trans.⁷⁹ The conditions of solitary confinement vary, but generally, detainees are isolated in a small cell, sometimes without windows, for 22 to 23 hours per day.⁸⁰ Administrative segregation, also known as protective solitary, punishes the individual who has been

⁷² HUM. RTS. WATCH, *supra* note 8, at 25.

⁷³ Jake Naughton, *Nowhere to Run: Detained Transgender Immigrants Are Abused, Beaten, and Worse*, TAKE PART (May 22, 2015), <http://takepart.com/feature/2015/05/22/transgender-immigrants-detention> [<https://archive.ph/6mvGw>] (citing U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 71, app. II, tbl.10).

⁷⁴ HUM. RTS. WATCH, *supra* note 8, at 14 (citing U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 71, app. II, tbl.10).

⁷⁵ Naughton, *supra* note 73.

⁷⁶ *Id.*

⁷⁷ HUM. RTS. WATCH, *supra* note 8, at 14–15 (citing U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12*, at tbl.2 (2014)).

⁷⁸ Naughton, *supra*, note 73.

⁷⁹ *Id.*

⁸⁰ Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?pagewanted=all&_r=0.

or is at risk of being the victim of sexual or physical violence, rather than the perpetrator of the violence.⁸¹

Trans detainees have often suffered severe trauma in their home countries, making them more vulnerable to the ill effects of administrative segregation. A 2003 study found that the majority of asylum seekers in general detention who were surveyed suffered from anxiety, depression, and post-traumatic stress disorder, concluding that “detaining asylum seekers exacerbates symptoms of depression, anxiety, and post-traumatic stress disorder in this vulnerable population.”⁸² Each of the transgender women interviewed by Human Rights Watch in 2015 reported that their time in detention had caused mental health problems such as sleep problems, anxiety, depression, and even led them to contemplate self-harm or suicide.⁸³ For many, these mental health problems amplified longstanding histories of trauma.⁸⁴ The psychological impact of solitary is even greater than general detention and can be more severe for asylum seekers. Isolation can exacerbate the depression, anxiety, and post-traumatic stress disorder in asylum seekers who have suffered previous trauma, abuse, or torture.⁸⁵ Transgender women who spent lengthy periods in solitary confinement during their immigration detention reported particularly acute psychological effects as a result of their time in isolation.⁸⁶

A recent investigation by Human Rights Watch revealed that half of the transgender women who had been in immigration detention reported being held in solitary at some point during their detention.⁸⁷ Many of those who had been in solitary were held there for more than 15 days, and some were held for up to eight weeks.⁸⁸ Transgender women housed at Rappahannock Regional Jail in Virginia were held in administrative segregation in an area of the jail generally reserved for male sex offenders.⁸⁹

⁸¹ James Alec Gelin, *Unwarranted Punishment: Why the Practice of Isolating Transgender Youth in Juvenile Detention Facilities Violates the Eighth Amendment*, 18 U.C. DAVIS J. JUV. L. & POL'Y 1, 12 (2014).

⁸² HUM. RTS. WATCH, *supra* note 8, at 42 (quoting Allen S. Keller, Barry Rosenfeld, Chau Trinh-Shevrin, Chris Meserve, Emily Sachs, Jonathan A. Levis, Elizabeth Singer, Hawthorne Smith, John Wilkinson, Glen Kim, Kathleen Alden & Douglas Ford, *Mental Health of Detained Asylum Seekers*, 362 LANCET 1721, 1723 (2003)).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Gelin, *supra* note 81, at 11; HUM. RTS. WATCH, *supra* note 8, at 32.

⁸⁶ HUM. RTS. WATCH, *supra* note 8, at 35.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Andrew Harmon, *Eight Months in Solitary*, ADVOCATE (May 7, 2012, 8:42 AM), <http://www.advocate.com/news/news-features/2012/05/07/transgender-detainees-face-challenges-broken-immigration-system?page=0,0>.

When Barbra Perez arrived at the LaSalle detention facility, she was taken directly to the administrative segregation unit, where other detainees screamed, banged on cell walls, and made obscene gestures.⁹⁰ She describes her experience in an article for *The New Republic*:

After just a few days in there I became a fragile shell of who I used to be. I was given no recreation time. A shower only every other day. The phone was attached to a hand truck, which would be wheeled to you at the guards' leisure. In that mental state, I started doubting who I was. There was no one to talk to, no way to process what was happening to me. The anxiety and helplessness started to break me down, which is exactly what it's designed to do.⁹¹

Solitary confinement causes mental, emotional, and physical symptoms which begin within a very short time.⁹² Individuals who have been put in solitary confinement experience a much higher risk of depression, anxiety, self-harm, and psychosis. One attorney reported that her trans client in immigration detention had been held in solitary confinement for 18 months.⁹³ In 2013, approximately 300 immigration detainees were being held in solitary confinement each day, including many trans detainees who were purportedly held in isolation for their own protection.⁹⁴ Long-term solitary has garnered much attention recently, but even short stays in solitary confinement can cause grave and potentially irreversible harm.⁹⁵ As little as 48 hours without sight, sound, or tactile sensations can be enough to cause detainees to hallucinate.⁹⁶

As previously mentioned, solitary confinement is particularly harmful for asylum seekers, many of whom have already suffered significant trauma in their home countries and often on the journey to the United States.⁹⁷ A study of individuals

⁹⁰ Perez, *supra* note 23.

⁹¹ *Id.*

⁹² For detailed information on the myriad of harms posed by solitary confinement, see Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W. L. REV. 265, 273–74 (1977); Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 580 (1999); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 477 (2006); Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 754–55 (2015); Opinion, *Solitary Confinement: Cruel but not Unusual*, WASH. POST (Aug. 3, 2013), https://www.washingtonpost.com/opinions/solitary-confinement-cruel-but-not-unusual/2013/08/03/9c9b6992-f0b0-11e2-bed3-b9b6fe264871_story.html.

⁹³ HUM. RTS. WATCH, *supra* note 8, at 33.

⁹⁴ *Id.* at 34.

⁹⁵ Emily Coffey, *Madness in the Hole: Solitary Confinement & Mental Health of Prison Inmates*, 18 PUB. INT. L. REP. 17, 19 (2012).

⁹⁶ Bennion, *supra* note 92, at 755.

⁹⁷ HUM. RTS. WATCH, *supra* note 8, at 32, 42.

remanded to custody prior to trial and held in isolation has shown that the indefinite timeframe and uncertainty of the outcome of the case can exacerbate the negative impact of solitary confinement.⁹⁸ Asylum seekers are detained in similarly uncertain conditions as their cases make their way through immigration court. Many trans detainees traumatized by protective solitary confinement abandon their immigration claims, deciding that risking the possibility of death is preferable to continued torture in solitary confinement.⁹⁹

Administrative segregation impairs a detainee's ability to prepare or assist in preparing their own case by impairing memory and cognitive function, often compounding similar symptoms caused by past trauma. This makes it even more difficult for detainees to provide necessary case information to their attorneys and to testify in a detailed, consistent, and coherent manner.

E. Failure of Efforts to "Make Detention Better"

Though many of the past efforts to improve detention conditions for trans detainees made by the Obama administration have been rolled back by the Trump administration, it is helpful to understand that despite these efforts, conditions on the ground did not improve to a point where they could be considered acceptable, particularly in a civil detention context. The failure of these policy changes to adequately address the issues discussed above may be due to the top-down nature of immigration policy. Although the people drafting the new policies may have been invested in making improvements, the people responsible for enforcing those policies were unwilling or unable to implement the changes effectively.¹⁰⁰

In 2012, then-President Obama issued a memorandum directing federal agencies operating confinement facilities, including ICE, to abide by the Prison Rape Elimination Act (PREA).¹⁰¹ In February 2014, DHS issued detailed standards in compliance with the memorandum and made a formal commitment to "prevent, detect, and respond to sexual abuse" in immigration detention facilities.¹⁰² Unfortunately, because the majority of ICE detainees are held in contracted facilities such

⁹⁸ Scharff Smith, *supra* note 92, at 498.

⁹⁹ Nakano, *supra* note 22.

¹⁰⁰ Geneva Sands & Nick Valencia, *2nd Customs and Border Protection-Connected Secret Facebook Group Shows Mocking Images*, CNN POL., <https://www.cnn.com/2019/07/05/politics/cbp-second-facebook-group-images/index.html> (July 5, 2019, 5:49 PM); Reis Thebault & Nick Miroff, *CBP Officials Knew About Derogatory Facebook Group Years Ago and Have Investigated Posts from It Before*, WASH. POST (July 5, 2019), <https://www.washingtonpost.com/nation/2019/07/06/cbp-officials-knew-about-derogatory-facebook-group-years-ago-have-investigated-posts-it-before/>.

¹⁰¹ Memorandum on Implementing the Prison Rape Elimination Act of 2003, 77 Fed. Reg. 30,873 (May 23, 2012).

¹⁰² HUM. RTS. WATCH, *supra* note 8, at 10 (quoting Press Release, Dep't of Homeland Sec., DHS Announces Finalization of Prison Rape Elimination Act Standards (Feb. 28, 2014),

as county jails and private prisons, which operate with limited oversight and insufficient implementation of the standards, this progress has not impacted their conditions of detention.¹⁰³

ICE unveiled new guidelines for the detention of trans noncitizens in June 2015 formally acknowledging how vulnerable trans individuals are in detention.¹⁰⁴ The guidelines direct officials to “consider whether the use of detention resources is warranted” and to determine “on a case by case basis, all relevant factors in this determination, including whether an individual identifies as transgender.”¹⁰⁵ The guidelines also call for officials to consider an assessment by mental health and medical experts when making housing decisions; set out particular intake procedures to gather sufficient information to properly identify trans individuals and use the correct gender pronouns; provide for sensitivity trainings for guards and improved access to gender-affirming medical care; and create a Transgender Care and Classification Committee including facility supervisors, medical and mental health personnel, and other ICE officials who will create a plan for the trans detainees’ housing and care.¹⁰⁶ The guidelines still allow transgender women to be placed in administrative segregation as a result of their gender identity, though the guidelines provide that such a placement should be made only as a “last resort” when no other options exist.¹⁰⁷ While the guidelines represented an important advancement in policy, they were not incorporated into the contracts with any of the more than 200 facilities holding ICE detainees and lack an independent mechanism to enforce their use.¹⁰⁸

In early 2016, ICE began transferring many trans detainees to a special segregated unit at the Santa Ana City Jail in Santa Ana, California, exclusively for transgender women.¹⁰⁹ However, even after the creation of transgender pods, ICE did not abandon the practice of housing transgender women with men.¹¹⁰ The guidelines still allow officials to elect to detain transgender women in men’s facilities or keep them in administrative segregation indefinitely because officials cannot or will not develop a safe and humane plan to detain them.¹¹¹

<https://www.dhs.gov/news/2014/02/28/dhs-announces-finalization-prison-rape-elimination-act-standards>).

¹⁰³ *Id.*

¹⁰⁴ *Id.* (citing ICE Memorandum, *supra* note 56).

¹⁰⁵ *Id.* (quoting ICE Memorandum, *supra* note 56, at 1).

¹⁰⁶ *Id.* at 11 (citing ICE Memorandum, *supra* note 56, at 2–6).

¹⁰⁷ *Id.* at 12 (citing ICE Memorandum, *supra* note 56, at 4).

¹⁰⁸ *Id.* at 11.

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.*; see also Gruberg, *supra* note 65.

¹¹¹ HUM. RTS. WATCH, *supra* note 8, at 2 (citing ICE Memorandum, *supra* note 56, at 4).

In February 2016, ICE officials stated that they did not know the number of transgender women in detention, where they were detained, nor the conditions under which they were being detained, but the agency estimated that around 65 transgender women were detained on any given day.¹¹² In December 2015, ICE officials stated that 36 transgender women were being detained in the segregated unit at the Santa Ana City Jail, and 20 were being detained in other facilities throughout the United States at the same time.¹¹³

The special unit in Santa Ana devoted to housing transgender women in a humane and sensitive environment has not eliminated the above-mentioned harms to the detainees. Several women who have been detained in the unit have reported that they have had difficulty obtaining necessary medical treatment or been harmed by interruptions to or restrictions on their care, regularly endured abusive and humiliating strip searches by male guards, and been subjected to unreasonable use of solitary confinement.¹¹⁴ Detainees at Santa Ana have also faced harassment from guards, discriminatory interactions with medical providers, and breaches of confidentiality.¹¹⁵ As of March 2016, the Santa Ana facility had not incorporated the 2015 ICE Memorandum guidelines into the operating contract with ICE.¹¹⁶

The city of Santa Ana began reducing the number of ICE detainees housed at the jail in preparation to end the agreement, and in February of 2017, ICE decided to end the contract with the Santa Ana jail.¹¹⁷ ICE had originally intended to send trans detainees to a new detention facility, Prairieland, in Alvarado, Texas, that was slated to open in November 2016 with the “most advanced care guidelines for transgender detainees.”¹¹⁸ Instead of moving the detainees in the trans pod at Santa Ana to Prairieland when Santa Ana closed, ICE opted to set up a new transgender pod at the Cibola County Correctional Center in Cibola County, New Mexico.¹¹⁹ ICE entered into the contract with CoreCivic, the private prison company that runs

¹¹² *Id.*

¹¹³ *Id.* (citing Norma Ribeiro, *Inmigrantes Transgénero Denuncian que el Centro de Detención de Santa Ana Es un ‘Infierno’* [Transgender Immigrants Denounce Santa Ana Detention Center as ‘Hell’], UNIVISION (Dec. 16, 2015, 9:56 PM), <https://www.univision.com/noticias/univisioninvestiga/inmigrantes-transgenero-denuncian-que-el-centro-de-detencion-de-santa-ana-es-un-infierno>).

¹¹⁴ *Id.* at 3, 26.

¹¹⁵ *Id.* at 26, 41.

¹¹⁶ *Id.* at 12–13.

¹¹⁷ *ICE Ends Detention Contract with Santa Ana*, KQED: CAL. REP. (Feb. 24, 2017), <https://www.kqed.org/news/11332269/ice-ends-detention-contract-with-santa-ana>.

¹¹⁸ Jorge Rivas, *Immigration Officials to Start Sending Transgender Women to the Middle of Texas*, SPLINTER NEWS (May 23, 2016, 7:00 AM), <https://splinternews.com/immigration-officials-to-start-sending-transgender-wome-1793856944>.

¹¹⁹ Oztaskin, *supra* note 21.

Cibola, in October 2016.¹²⁰ CoreCivic had run Cibola as a federal penitentiary for 16 years when the Bureau of Prisons cancelled the contract in July 2016 after it was determined that several inmates had died as a result of gross medical negligence at the center.¹²¹ Many of the same guards returned to staff the facility when it reopened as an ICE facility.¹²²

Abuse and medical neglect at Cibola continued, including withholding treatment for HIV and other chronic conditions and skin infections, withholding hormone replacement therapy, mental health concerns, withholding water, and verbal and psychological mistreatment.¹²³ In 2018, trans asylum-seeker Roxsana Hernandez Rodriguez died after authorities at Cibola failed to provide her medical care for HIV for 12 days, despite Hernandez Rodriguez exhibiting many tell-tale symptoms of distress and repeated requests for care from Hernandez Rodriguez herself as well as other detainees.¹²⁴ An independent autopsy also showed that Hernandez Rodriguez suffered physical abuse while in ICE custody, though ICE denied those findings.¹²⁵ The following year, Johana Medina León, also a trans asylum seeker, died shortly after being released from ICE custody at another notorious New Mexico facility, the Otero County Processing Center, where she too was denied treatment for HIV.¹²⁶

In early 2020, ICE began transferring detainees out of the trans pod at Cibola following findings from DHS's Civil Rights Office and ICE's Health Corps that staff at Cibola had ignored hundreds of detainee requests for medical care.¹²⁷ With the trans pod empty, trans women are once again being housed with cisgender men,

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*; Hannah Critchfield, *Migrants Inside ICE's Only Transgender Unit Decry Conditions*, PHX. NEW TIMES (July 12, 2019, 2:50 PM), <https://www.phoenixnewtimes.com/news/transgender-migrants-decry-conditions-new-mexico-ice-detention-11325981>; Reuters, *Serious Health Care Lapses Found in Detention Center Housing Trans Migrants*, NBC NEWS (Mar. 2, 2020, 9:54 AM), <https://www.nbcnews.com/feature/nbc-out/serious-health-care-lapses-found-detention-center-housing-trans-migrants-n1147101>.

¹²⁴ Trudy Ring, *Prison Operators' Negligence Caused Trans Migrant's Death, Suit Claims*, ADVOCATE (May 14, 2020, 9:12 PM), <https://www.advocate.com/transgender/2020/5/14/prison-operators-negligence-caused-trans-migrants-death-suit-claims>; Tim Fitzsimons, *Democratic Lawmakers Call on ICE to Release Transgender Migrants*, NBC NEWS (Jan. 16, 2020, 8:50 AM), <https://www.nbcnews.com/feature/nbc-out/democratic-lawmakers-call-ice-release-transgender-migrants-n1116621>.

¹²⁵ Critchfield, *supra* note 123.

¹²⁶ Fitzsimons, *supra* note 124; Tim Stelloh, *Transgender, Gay Migrants Allegedly Suffer 'Rampant' Abuse at New Mexico ICE Facility*, NBC NEWS (Mar. 25, 2019, 8:54 PM), <https://www.nbcnews.com/news/us-news/transgender-gay-migrants-allegedly-suffer-rampant-abuse-new-mexico-ice-n987286>.

¹²⁷ Bixby, *supra* note 14.

leaving them the choice of submitting to violence and intimidation in the general population or psychological torment in protective solitary.¹²⁸

Although the incoming Biden administration promised accountability for inhumane treatment and conditions for trans noncitizens in immigration detention, one year into Biden's administration, things remain the same as they were before the inauguration.¹²⁹

II. IMMIGRATION DETENTION OF TRANS NONCITIZENS AS A VIOLATION OF FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS

The Due Process Clause of the Fifth Amendment has been interpreted to have a procedural and a substantive meaning. Procedural due process is used to ensure that the process used by the government to deprive a person of life, liberty, or property is sufficient to ensure fairness. Substantive due process is concerned with determining whether the government's purpose or justification for depriving a person of their life, liberty, or property is sufficient to justify the action.¹³⁰ The Supreme Court has held that substantive due process "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'"¹³¹ This Article will explore substantive due process as it applies to trans and gender-nonconforming noncitizens in immigration detention.

Over the past century, substantive due process jurisprudence has changed significantly.¹³² In the early part of the 20th century, substantive due process was used liberally to strike down laws imposing economic regulations.¹³³ The Court no longer recognizes economic substantive due process in the years since *West Coast Hotel Co. v. Parrish*.¹³⁴ The substantive due process doctrine was used to justify several important individual liberty cases decided by the Supreme Court, including *Roe v. Wade*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and *Lawrence v. Texas*.¹³⁵

¹²⁸ *Id.*

¹²⁹ *Id.*; Levin, *supra* note 10.

¹³⁰ Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

¹³¹ *United States v. Salerno*, 481 U.S. 739, 746 (1987) (first quoting *Rochin v. California*, 342 U.S. 165, 172 (1952); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

¹³² Chemerinsky, *supra* note 130, at 1502–08.

¹³³ *Id.* at 1503.

¹³⁴ 300 U.S. 379 (1937).

¹³⁵ *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247–48, 2239 (2022) (overruling *Roe* and *Casey*).

Substantive due process has also served as the means to challenge the conditions of civil detention in the context of pretrial detention, civil commitment, and immigration detention.¹³⁶ At present, the bar for successfully challenging civil detention as a violation of substantive due process under the Fifth and Fourteenth Amendments is high, but courts have recognized instances where the conditions of civil detention do implicate substantive due process.¹³⁷

As a threshold matter, noncitizens in immigration detention are protected by due process under the U.S. Constitution. The Fifth Amendment refers to “persons” in the United States.¹³⁸ The Supreme Court has consistently found that “persons” in this context includes noncitizens, regardless of their status.¹³⁹ In the case of procedural due process, the Supreme Court has noted that noncitizens seeking and being denied entry into the United States are not entitled to the same level of process as individuals who have entered the United States, stating that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”¹⁴⁰

The Supreme Court has found that detention is perforce a part of the deportation procedure.¹⁴¹ Immigration detention has nonetheless been challenged as a violation of substantive due process on several occasions, albeit with limited success. In *Reno v. Flores*, unaccompanied minors¹⁴² challenged the constitutionality of regulations limiting the release of minors to a “‘a parent or lawful guardian,’ except in ‘unusual and extraordinary cases,’ when the juvenile could be released to ‘a responsible individual who agrees to provide care and be responsible for the welfare and

¹³⁶ *Bell v. Wolfsh*, 441 U.S. 520 (1979); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Demore v. Kim*, 538 U.S. 510 (2003).

¹³⁷ *Torres v. U.S. Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1064–65 (C.D. Cal. 2019); *Banks v. Booth*, 459 F. Supp. 3d 143, 153–60 (D.D.C. 2020).

¹³⁸ U.S. CONST. amend. V.

¹³⁹ David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 368 (2003); *Plyler v. Doe*, 457 U.S. 202, 212 (1982); *cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264–66, 270–71 (1990) (analyzing applicability of the First, Second, Fourth, Fifth, and Sixth Amendments to noncitizens in the United States).

¹⁴⁰ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)); *accord* *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982) (describing the difference in constitutional rights afforded to a noncitizen seeking entry, a resident noncitizen, and a returning Lawful Permanent Resident); *see also* *U.S. Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020).

¹⁴¹ *See* *Carlson v. Landon*, 342 U.S. 524, 541–42 (1952) (holding that there is no violation of due process where there is “reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government,” which in this case, was communism).

¹⁴² Unaccompanied Alien Children are minors who enter the United States without a parent or legal guardian. 8 C.F.R. § 236.3(b)(3) (2021).

well being of the child.”¹⁴³ The Court upheld the detention of unaccompanied minors, noting that juveniles are generally “in custody,” whether that be of the state or a parent or guardian, giving them a somewhat more limited liberty interest than an adult would have.¹⁴⁴ Justice Scalia, writing for the Court, reiterated that due to Congress’s plenary power over immigration, rules are often passed that would be “unacceptable if applied to citizens.”¹⁴⁵ The Court held that the regulations regarding the detention of unaccompanied minors were subject to “the (unexacting) standard of rationally advancing some legitimate governmental purpose.”¹⁴⁶ The challenged regulations were held to rationally advance the legitimate government interest of protecting the juvenile.¹⁴⁷ The *Flores* Court did not address the claims made regarding conditions of detention, as a consent decree had settled those claims.¹⁴⁸

In *Demore v. Kim*, the Supreme Court also held that mandatory detention for noncitizens with certain criminal convictions is not a violation of substantive due process.¹⁴⁹ That decision relied heavily on statistics from the Executive Office for Immigration Review showing that the length of time a noncitizen was detained was generally less than six months.¹⁵⁰ Those statistics have recently been found to be erroneous,¹⁵¹ leaving open the question of whether that changes the analysis in *Demore*.¹⁵²

¹⁴³ *Reno v. Flores*, 507 U.S. 292, 296 (1993) (quoting Galvez-Maldonado *ex rel.* Flores v. Meese, 934 F.2d 991, 994 (9th Cir. 1990), *vacated and superseded on reh’g*, 942 F.2d 1352 (9th Cir. 1991)).

¹⁴⁴ *Id.* at 303, 305–06.

¹⁴⁵ *Id.* (quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976)).

¹⁴⁶ *Id.* at 306.

¹⁴⁷ *Id.* at 311.

¹⁴⁸ *Id.* at 296, 301.

¹⁴⁹ 538 U.S. 510 (2003).

¹⁵⁰ *Id.* at 529–31.

¹⁵¹ Letter from Jean C. King, Gen. Couns., U.S. Dep’t of Just., to Ian Heath Gershengorn, Acting Solic. Gen., Off. of the Solic. Gen. attach. (Aug. 25, 2016); Jess Bravin, *Justice Department Gave Supreme Court Incorrect Data in Immigration Case*, WALL ST. J. (Aug. 30, 2016, 3:48 PM), <http://www.wsj.com/articles/justice-department-gave-supreme-court-incorrect-data-in-immigration-case-1472569756>.

¹⁵² Leaning on the reasoning in *Zadvydas v. Davis*, several circuits read a six-month limit on mandatory detention without a bond hearing into the mandatory detention statute of the Immigration and Nationality Act. 8 U.S.C. § 1231(a)(6) (2018); *see* *Zadvydas v. Davis*, 533 U.S. 678, 682, 689 (2001). In *Jennings v. Rodriguez*, the Supreme Court noted that the language of § 1231(a)(6), which governs detention following an order of removal, differed from the statute at issue, 8 U.S.C. § 1225(b) (2018). The Court held that the language of § 1225(b) did not support the same reading of an implicit temporal limitation and that the doctrine of constitutional avoidance was incorrectly applied by the Ninth Circuit. The Court remanded the case for the lower court to consider the constitutionality of § 1225(b). *Jennings v. Rodriguez*, 138 S. Ct. 830, 834 (2018).

The Court did recognize that prolonged, indefinite detention with no reasonable expectation of release or removal from the United States would run afoul of substantive due process in *Zadvydas v. Davis*.¹⁵³ To avoid the constitutional problem, the *Zadvydas* Court read an implicit temporal limitation into the challenged statute, stating that noncitizens may not be held indefinitely after a final order of removal if there is not a significant likelihood that the noncitizen will be removed in the reasonably foreseeable future.¹⁵⁴

While challenges to immigration detention as a violation of substantive due process have had limited success, the case of trans detainees is distinguishable from past precedent. The cases brought on behalf of unaccompanied minors, individuals subject to mandatory detention, and individuals subject to indefinite detention did not involve an analysis of the conditions of detention. In the case of trans immigration detainees, the challenge is not to the idea of detention itself, but rather to the cruel and degrading treatment, the lack of necessary medical care, the greatly increased risk of sexual assault and harassment, and the devastating impact on mental and physical health resulting from administrative segregation.

A. *Substantive Due Process Arguments from Other Civil Detention Settings*

In formulating an argument that conditions of confinement for trans immigration detainees, including the cruel and degrading treatment, lack of medical care, high risk of physical and sexual assault, and use of protective solitary, are a violation of substantive due process, it is informative to look to the case law pertaining to the constitutionality of other forms of civil detention. The substantive component of the Due Process Clause bars arbitrary and wrongful government action no matter how fair the procedure used to effectuate those actions.¹⁵⁵ Being free from bodily restraint is and always has been at the center of the liberty interests that the Due Process Clause protects from arbitrary and wrongful governmental action.¹⁵⁶ The Due Process Clause was designed to prevent government agents “from abusing [their] power, or employing it as an instrument of oppression.”¹⁵⁷

The Court has long recognized that the Due Process Clause does protect detainees from some restrictions and conditions in pretrial detention.¹⁵⁸ As the liberty interest survives lawful criminal incarceration, it must also survive civil detention.¹⁵⁹

¹⁵³ *Zadvydas*, 533 U.S. at 701–02.

¹⁵⁴ *Id.* at 701.

¹⁵⁵ See *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

¹⁵⁶ *Id.*

¹⁵⁷ *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (quoting *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989)).

¹⁵⁸ See *Youngberg v. Romeo*, 457 U.S. 307, 317–21 (1982).

¹⁵⁹ *Id.* at 315–16.

Those subject to involuntary civil detention are entitled to “more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”¹⁶⁰ It is the government’s unquestioned duty to provide reasonable safety to every detainee and employee in a facility.¹⁶¹

Because civil detention, whether in the pretrial, involuntary commitment, or immigration detention context, is explicitly not intended as a punishment due to its civil nature, when challenging detention conditions on substantive due process grounds, the Court has determined that the proper inquiry is whether the challenged conditions punish the detainee.¹⁶² Punishment has been defined as “a deliberate act intended to chastise or deter.”¹⁶³ Not every restraint on liberty imposed during pretrial detention constitutes punishment in the constitutional sense.¹⁶⁴ If the government has exerted its authority to detain someone prior to trial, it follows that it may act as necessary to carry out that detention.¹⁶⁵ In determining whether the confinement constitutes punishment, the Court has provided some relevant considerations:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.¹⁶⁶

Unless officials’ expressed intent to punish can be established, the determination of what constitutes punishment in a civil detention setting will generally depend on whether a non-punitive purpose can rationally be connected to the action and whether the action appears to be excessive compared to the non-punitive purpose asserted.¹⁶⁷ The Court has held that restraints on liberty that are “reasonably related” to the facility’s interest in maintaining proper functioning and security, without more, are not unconstitutional punishment.¹⁶⁸ That detention has been labeled as civil is not necessarily dispositive, but the Court has said that it will only

¹⁶⁰ *Id.* at 321–22.

¹⁶¹ *Id.* at 324.

¹⁶² *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

¹⁶³ *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

¹⁶⁴ *Bell*, 441 U.S. at 536–37.

¹⁶⁵ *Id.* at 537.

¹⁶⁶ *Id.* at 537–38 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

¹⁶⁷ *Id.* at 538.

¹⁶⁸ *Id.* at 540.

reject the intent of Congress if there is conclusive evidence that the law is so punitive in effect or intent that it negates the civil designation.¹⁶⁹

Examples of restrictions that have been upheld as rationally related to jail security and function include double bunking of detainees, restricting access to books to those shipped directly from publishers, book clubs, or book stores, a ban on receiving packages, and guards searching cells without the detainee present.¹⁷⁰ The Court has also found that the pretrial detention of accused juvenile delinquents is constitutional when there is a serious risk of the child committing a crime before a court date has been established.¹⁷¹ In upholding the Kansas Sexually Violent Predator Act, the Court stated that “the confinement of ‘mentally unstable individuals who present a danger to the public’ [i]s one classic example of nonpunitive detention.”¹⁷² Because the Kansas Sexually Violent Predator Act required that each year a court must “determine beyond a reasonable doubt that the detainee satisfies the same standards as required for initial commitment,” the requirements of due process were met.¹⁷³

The Court has held that while the individual’s interest in liberty is fundamental, it may be subordinated to the public interest in circumstances where the government’s justification is strong enough, such as an individual accused of a serious crime who has been found to constitute a demonstrated danger to the community.¹⁷⁴ Liberty is the norm and detention before or without a trial is the “carefully limited exception.”¹⁷⁵

In determining whether a challenged restriction or condition is reasonably related or excessive to the justification, the courts must weigh the strength of the justification against the harshness of the condition or restriction.¹⁷⁶ This inquiry focuses on the magnitude of the government’s concerns, even if those concerns are not robustly present.¹⁷⁷ Government conduct that shocks the conscience is more likely to tip the scales in favor of a finding that a detainee’s substantive due process rights have been violated. Indeed, conduct that shocked the conscience has led to a holding that an individual’s substantive due process rights were violated. In *Rochin*

¹⁶⁹ *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

¹⁷⁰ *See Bell*, 441 U.S. 520.

¹⁷¹ *Schall v. Martin*, 467 U.S. 253 (1984).

¹⁷² *Hendricks*, 521 U.S. at 363 (quoting *United States v. Salerno*, 481 U.S. 739, 748–49 (1987)).

¹⁷³ *Id.* at 364.

¹⁷⁴ *Salerno*, 481 U.S. at 750–51.

¹⁷⁵ *Id.* at 755.

¹⁷⁶ *Block v. Rutherford*, 468 U.S. 576, 586–87 (1984).

¹⁷⁷ *Id.* at 584–85.

v. California, three deputy sheriffs forced their way into Rochin's bedroom and observed him swallow two capsules that had been on his bedside table.¹⁷⁸ The deputies then jumped on Rochin and attempted to remove the capsules from his mouth.¹⁷⁹ When that failed, he was handcuffed and taken to a hospital where a tube was forced into his stomach against his will, and his stomach was pumped to recover the capsules.¹⁸⁰ The Court found that these actions did more than "offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."¹⁸¹

In a non-detention custodial setting, the Tenth Circuit held in *Garcia v. Miera* that corporal punishments in a school setting that were "so grossly excessive as to be shocking to the conscience" violated a student's substantive due process rights.¹⁸² In that case, a nine-year-old girl was first held by the ankles and hit repeatedly on the legs with a large split board until she bled and was left with a permanent scar.¹⁸³ She was later beaten to the point that she had pain for three weeks, and an examining doctor indicated that he had not seen bruises of this nature from routine spankings in his many years of practice.¹⁸⁴ Both incidents were found to be sufficiently shocking to the conscience that they could constitute a violation of the student's right to substantive due process.¹⁸⁵

Thus, it appears that substantial physical harm or invasion of the body is more likely to have substantive due process implications than detention itself or restrictions that do not involve physical harm or invasion. Section II.D *infra* will explore how this substantive due process jurisprudence applies to trans and gender-nonconforming noncitizens in civil immigration detention.

B. *The Eighth Amendment Argument*

The Eighth Amendment prohibits the imposition of excessive bail or fines and the infliction of cruel and unusual punishments.¹⁸⁶ "Undue suffering, unrelated to any legitimate penological purpose, is considered a form of punishment proscribed by the Eighth Amendment."¹⁸⁷ The Amendment has been interpreted to apply only to criminal detention situations where prisoners are punished after being convicted

¹⁷⁸ 342 U.S. 165, 166 (1952).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 172.

¹⁸² 817 F.2d 650, 656–58 (10th Cir. 1987).

¹⁸³ *Id.* at 658.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ U.S. CONST. amend. VIII.

¹⁸⁷ *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014).

of a crime.¹⁸⁸ While the Eighth Amendment is not directly applicable to the immigration detention of trans noncitizens, if the conditions of detention facing trans immigration detainees are bad enough to violate the higher Eighth Amendment standard, the courts should recognize that the conditions also constitute a substantive due process violation. Indeed, the First Circuit has recognized that the two standards are “not all that far apart,” though the substantive due process standard is more favorable to plaintiffs.¹⁸⁹

Being taken into civil custody, even when proper procedures are followed, does not extinguish all of an individual’s substantive liberty interests.¹⁹⁰ In the context of civil commitment, the Supreme Court has noted the “historic liberty interest” in personal security and has found that interest to be protected substantively by the Due Process Clause.¹⁹¹ The Court further stated that “that right is not extinguished by lawful confinement, even for penal purposes. If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.”¹⁹² Thus, if conditions of civil detention would rise to the level of an Eighth Amendment claim if they existed in a criminal detention context, they will necessarily also constitute a violation of substantive due process rights.

Eighth Amendment jurisprudence extends protection from cruel and unusual punishment resulting from conditions of confinement, failure to provide necessary medical care, and inhumane and degrading treatment in addition to physical punishment rising to the level of cruel and unusual. These categories align with the particular dangers faced by trans detainees in immigration custody described in Part I.

1. *Conditions of Detention*

The Supreme Court has held that deprivations which deny “the minimal civilized measure of life’s necessities” violate the Eighth Amendment protection against cruel and unusual punishment.¹⁹³ Indeed, the Eighth Amendment “requires that inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’”¹⁹⁴ A court need not wait for physical harm or death before providing a remedy for unsafe conditions.¹⁹⁵

¹⁸⁸ See *Youngberg v. Romeo*, 457 U.S. 307 (1982).

¹⁸⁹ *Battista v. Clarke*, 645 F.3d 449, 453 (1st Cir. 2011).

¹⁹⁰ *Youngberg*, 457 U.S. at 315.

¹⁹¹ *Id.*

¹⁹² *Id.* at 315–16 (citations omitted).

¹⁹³ *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

¹⁹⁴ *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (quoting *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989)).

¹⁹⁵ *Id.* at 33–34.

An Eighth Amendment inquiry requires evaluation of the official's state of mind, as the Court has held that the Eighth Amendment prohibits conduct characterized by "obduracy and wantonness, not inadvertence or error in good faith."¹⁹⁶ Prison officials must show deliberate indifference to the inhumane conditions of confinement.¹⁹⁷ Deliberate indifference requires that a prison official act or fail to act despite their knowledge of a substantial risk of serious harm.¹⁹⁸

Conditions of confinement can also be considered in combination, so long as the cumulative effect "produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets."¹⁹⁹

As described in Part I, ICE regularly exposes trans detainees to unsafe conditions, including housing trans women in men's facilities and, in some cases, holding trans women in the same housing unit as detainees who ICE knows have already sexually assaulted them. This clearly violates the requirement that detainees, as well as prisoners, be provided "reasonable safety."

2. *Provision of Medical Care*

When society deprives prisoners of the means of taking care of themselves, it must take up the burden of providing adequate medical care. "[T]he failure to provide such care 'may actually produce physical torture or a lingering death.'"²⁰⁰ This does not mean that prison administrators must provide care that is "ideal" or of the prisoner's own choosing, but the care must be adequate.²⁰¹ In *Estelle v. Gamble*, the Supreme Court expounded on prior case law to find that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment"²⁰² and noted that this was the case even when the prisoner's medical need was not life threatening.²⁰³ Guards intentionally interfering with prescribed treatment or intentionally delaying or denying access to medical care, as well as prison doctors' indifferent response to a prisoner's needs, will constitute an Eighth Amendment violation.²⁰⁴

An Eighth Amendment claim is context-dependent and may change to reflect "contemporary standards of decency."²⁰⁵ A medical professional's decision to take

¹⁹⁶ *Wilson*, 501 U.S. at 298–99 (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

¹⁹⁷ *Helling*, 509 U.S. at 32–34.

¹⁹⁸ *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

¹⁹⁹ *Wilson*, 501 U.S. at 304.

²⁰⁰ *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014) (quoting *Brown v. Plata*, 563 U.S. 493, 510 (2011)).

²⁰¹ *Id.* at 82–83.

²⁰² 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

²⁰³ *Id.* at 104–05.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 102–03.

an “easier and less efficacious route in treating an inmate” can violate the Eighth Amendment if that treatment is “so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.”²⁰⁶ Generally, however, treatment decisions made by professionals are presumptively valid, and the Court has stated that it is inappropriate “for the courts to specify which of several professionally acceptable choices should have been made.”²⁰⁷ If a decision constitutes so great a departure from accepted standards and practice that it demonstrates that the decision was not, in fact, based on professional judgment, the court may find an Eighth Amendment violation.²⁰⁸ Lower courts have found that grossly inadequate care as well as “medical care that is so cursory as to amount to no treatment at all” can constitute deliberate indifference to serious medical needs.²⁰⁹

As described in Section I.B *supra*, trans detainees are routinely provided with grossly incompetent, inadequate medical treatment, even when exhibiting signs of serious illness. The deaths of two trans detainees since May 2018 demonstrate the inadequacy of available medical treatment. The reports of trans women being denied hormone treatment, even when they enter custody with the necessary hormones in their possession, as well as the provision of tuberculosis treatments known to interfere with antiretrovirals to HIV-positive trans detainees, further demonstrate the deliberate indifference of medical providers at ICE detention facilities.

3. *Sexual and Physical Assault*

Sexual and physical assault by prison personnel and fellow prisoners constitutes serious harm.²¹⁰ If officials are deliberately indifferent to a substantial risk of sexual or physical assault, that is sufficient to violate the Eighth Amendment. The court in *Tay v. Dennison* granted a preliminary injunction to a trans prisoner who brought an Eighth Amendment claim after suffering numerous horrific physical and sexual assaults at several facilities.²¹¹ In *Shorter v. United States*, the Third Circuit allowed the Eighth Amendment claim of a trans prisoner who was raped and stabbed by a fellow prisoner to go forward, finding that Shorter had sufficiently stated an Eighth Amendment claim, after the district court dismissed the complaint *sua sponte*.²¹²

²⁰⁶ *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988).

²⁰⁷ *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980) (Seitz, C.J., concurring)).

²⁰⁸ *Id.* at 323.

²⁰⁹ *Melton v. Abston*, 841 F.3d 1207, 1223 (11th Cir. 2016).

²¹⁰ *Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994); HUM. RTS. WATCH, *supra* note 8, at 13–15.

²¹¹ 457 F. Supp. 3d 657 (S.D. Ill. 2020).

²¹² 12 F.4th 366 (3d Cir. 2021).

4. *Inhumane and Degrading Treatment*

The Supreme Court has extended the reach of the Eighth Amendment beyond “physically barbarous punishments” and found that the Amendment requires that punishments be evaluated against “broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”²¹³ Punishments which are contrary to “the evolving standards of decency that mark the progress of a maturing society,” or entail the “unnecessary and wanton infliction of pain” violate the Eighth Amendment proscription of cruel and unusual punishment.²¹⁴

Inhumane and degrading treatment, ranging from verbal abuse to invasive and excessive strip searches, is intended to punish trans detainees for their gender identity and certainly represents an unnecessary and wanton infliction of pain. Solitary confinement, to which a disproportionate number of trans detainees are subjected, is also an unnecessary infliction of pain, as well as contrary to society’s evolving standards of decency.

5. *Treatment of Trans Prisoners and Detainees and the Eighth Amendment*

Federal courts have found that Gender Dysphoria, or as it was previously known, Gender Identity Disorder (GID), constitutes a serious medical need and deliberate indifference to this need can constitute an Eighth Amendment violation.²¹⁵

The Seventh Circuit overturned a Wisconsin statute forbidding the use of state or federal funding to provide or facilitate the provision of hormone therapy or sexual reassignment surgery, finding the law violated the Eighth Amendment.²¹⁶ The court recognized the extreme harm that can result from an abrupt discontinuation of hormone treatment:

When hormones are withdrawn from a patient who has been receiving hormone treatment, severe complications may arise. The dysphoria and associated psychological symptoms may resurface in more acute form. In addition, there may be severe physical effects such as muscle wasting, high blood pres-

²¹³ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (first quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976); and then quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

²¹⁴ *Id.* at 102–03 (first quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958); and then quoting *Gregg*, 428 U.S. at 173 (1976)).

²¹⁵ See, e.g., *Alexander v. Weiner*, 841 F. Supp. 2d 486, 492 (D. Mass. 2012); see also *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011) (noting that defendants did not challenge the district court’s holding that GID was a serious medical condition); *Mitchell v. Kallas*, 895 F.3d 492, 498–99 (7th Cir. 2018); *Monroe v. Baldwin*, 424 F. Supp. 3d 526, 542–43 (S.D. Ill. 2019); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019).

²¹⁶ *Fields*, 653 F.3d at 559.

sure, and neurological complications. All three plaintiffs in this case experienced some of these effects when DOC doctors discontinued their treatment following the passage of Act 105.²¹⁷

Several courts have recognized that treatment for gender dysphoria may be medically necessary, including hormone replacement therapy and gender confirmation surgery. From the court decisions finding that the failure to provide that treatment when medically indicated or discontinuing treatment upon incarceration constitute violations of the more rigorous Eighth Amendment prohibition on cruel and unusual punishment, it is clear that the same lack of treatment for trans immigration detainees must be considered a violation of their substantive due process rights.

C. *The Accardi Doctrine*

The Due Process Clause of the Fifth Amendment is animated by the notion of fair play.²¹⁸ This same notion of fair play prohibits an executive agency from ignoring or disregarding its own regulations that impact individual liberty or interest.²¹⁹ The administrative law concept that an executive agency is bound by the rules it promulgates to regulate the rights and interests of others has come to be known as the *Accardi* doctrine,²²⁰ in reference to the Supreme Court's decision in *United States ex rel. Accardi v. Shaughnessy*.²²¹

Though animated by a similar notion of ensuring fair play, the *Accardi* doctrine is an administrative law principle, not a constitutional law principle.²²² In *Accardi*, the Supreme Court overturned the denial of an application for suspension of deportation based on the failure of the Board of Immigration Appeals to exercise its own discretion as required by the regulations in effect at the time of the decision.²²³ To be successful, an *Accardi* claim must involve "circumscribed, discrete agency actions," which can include failure to act.²²⁴ The agency action must also be final, the result of an agency's decision-making process, and must be an action implicating rights, obligations, or legal consequences.²²⁵

The *Accardi* doctrine is not limited to formal regulations where the rights of individuals are implicated.²²⁶ In those instances, the agency must follow its own

²¹⁷ *Id.* at 554.

²¹⁸ *Montilla v. Immigr. & Naturalization Serv.*, 926 F.2d 162, 164, 167 (2nd Cir. 1991).

²¹⁹ *Id.* at 164.

²²⁰ *Id.* at 166–67.

²²¹ *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

²²² *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 212 (D.D.C. 2020).

²²³ *Accardi*, 347 U.S. at 366–68.

²²⁴ *C.G.B.*, 464 F. Supp. 3d at 225 (quoting *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 387 F. Supp. 3d 33, 48–49 (D.D.C. 2019)).

²²⁵ *Id.*

²²⁶ *Montilla v. Immigr. & Naturalization Serv.*, 926 F.2d 162, 164, 167 (2nd Cir. 1991).

procedures, even if they have not been published in the Federal Register.²²⁷ This is true even when the rules in question limit otherwise discretionary actions or provide more protection than the Due Process Clause or other constitutional or statutory protections.²²⁸ “[A]n agency is bound to the standards by which it professes its action to be judged.”²²⁹

The spirit of the *Accardi* doctrine was codified in the Administrative Procedure Act (APA), which requires a reviewing court to hold unlawful and set aside “arbitrary” and “capricious” conduct, which includes failing to comply with the agency’s own procedures.²³⁰ Failure to comply with internal policy manuals setting forth agency procedures implicates both the *Accardi* doctrine and the APA.²³¹

The Performance-Based National Detention Standards of 2011 (PBNDS) constitute ICE’s policies and procedures for operating detention facilities.²³² Failure to enforce the terms of contracts with detention facilities based on the PBNDS in the face of conditions that fall well below the minimum standards set forth in the PBNDS should, therefore, be held to violate the APA.²³³

Detention conditions for trans and gender-nonconforming noncitizens routinely fall well below the standards set forth in the PBNDS. The PBNDS has several sections that control invasive searches of detainees, requiring that searches “be conducted in the least-intrusive manner possible”; requiring that reasonable suspicion of contraband be present to justify a strip search;²³⁴ prohibiting routinely requiring detainees to remove their clothing or expose private parts of their body to search for contraband;²³⁵ and prohibiting strip searches after visits with consular representatives, attorneys, and legal assistants absent a “specific and articulable suspicion that

²²⁷ *Id.*

²²⁸ *Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 246 (D.C. Cir. 2003) (citing *Steenholdt v. Fed. Aviation Admin.*, 314 F.3d 633, 637–39 (D.C. Cir. 2003)).

²²⁹ *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

²³⁰ 5 U.S.C. § 706(2)(A) (2018); *Torres v. U.S. Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1068 (C.D. Cal. 2019).

²³¹ *Morton v. Ruiz*, 415 U.S. 199, 233–36 (1974) (applying *Accardi* to an internal Bureau of Indian Affairs manual).

²³² U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 39.

²³³ See *Torres v. U.S. Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1068–69 (C.D. Cal. 2019); cf. *Morton*, 415 U.S. at 233–36. The use of *Accardi* to challenge adherence to the PBNDS was successful in some courts during the COVID-19 pandemic and was not successful in others. For discussion of the use of *Accardi* in the context of the failure to adhere to the PBNDS requirement that detention facilities follow “[CDC] guidelines for the prevention and control of infectious and communicable diseases,” see *Jane v. Rodriguez*, No. 20-5922, 2020 WL 6867169, at *12–14 (D.N.J. Nov. 23, 2020).

²³⁴ U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 39, at 49.

²³⁵ *Id.* at 51.

contraband has been transferred to a detainee.”²³⁶ There are also several health-related standards that require medical and mental health screenings upon admission to a facility to identify needed medical care and housing,²³⁷ that detainees be provided medications and detailed medical care summaries upon release from detention,²³⁸ and that prescription medication be provided in a timely manner as prescribed by a licensed healthcare professional and in a manner that preserves the detainee’s privacy.²³⁹

There are also trans-specific standards that require, among other things, that trans detainees have access to mental health care, other transgender-related health care, and medication based on need, and require that treatment follow accepted guidelines regarding medically necessary transition-related care.²⁴⁰ There are numerous standards relating to preventing and investigating sexual assault, including requiring that facility staff that have a reasonable belief that a detainee is subject to “a substantial risk of imminent sexual abuse” act immediately to protect the detainee.²⁴¹ As is evident from the stories of detained and formerly detained trans and gender-nonconforming noncitizens, all of those standards are routinely violated when it comes to trans detainees.

The June 2015 ICE Memorandum on Guidance Regarding the Care of Transgender Detainees was not utilized by the Trump administration, but appears to have been revived by the Biden administration.²⁴² The 2015 guidance states that ICE “will provide a respectful, safe, and secure environment for all detainees, including those individuals who identify as transgender,” and goes on to reaffirm the “commitment to provide effective safeguards against sexual abuse and assault” in detention.²⁴³ The guidance goes on to require that sensitive information, including a detainee’s gender identity, must not be used against the detainee by ICE or shared with other detainees, and requires that ICE determine that a facility is “able to appropriately care for” a trans detainee.²⁴⁴

As discussed above, the agency has failed to incorporate the Memorandum into its contracts with hundreds of detention facilities.²⁴⁵ This failure, and the failure to

²³⁶ *Id.* at 121.

²³⁷ *Id.* at 49.

²³⁸ *Id.* at 57.

²³⁹ *Id.* at 259.

²⁴⁰ *Id.* at 273–74.

²⁴¹ *Id.* at 135.

²⁴² See ENF’T & REMOVAL OPERATIONS, U.S. IMMIGR. & CUSTOMS ENF’T, VULNERABLE POPULATIONS: TRANSGENDER CARE PROGRAM (2021), <https://www.ice.gov/doclib/detention/transgenderInfographic.pdf>.

²⁴³ ICE Memorandum, *supra* note 56, at 2.

²⁴⁴ *Id.* at 3–4.

²⁴⁵ HUM. RTS. WATCH, *supra* note 8, at 13.

enforce the terms of the Memorandum in ICE-owned and -operated facilities, constitutes final agency action for purposes of an *Accardi* claim.²⁴⁶

The ICE Memorandum couches much of the guidance in terms like “should” and “to the extent practicable,” leaving room for noncompliance.²⁴⁷ The Memorandum also explicitly states that it “is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.”²⁴⁸ The D.C. Circuit has found that a similar disclaimer in Department of Justice (DOJ) guidance on issuing subpoenas to the press did not create legally enforceable rights.²⁴⁹ The same court later clarified that that decision turned on the fact that the subpoena guidance applied to the department’s internal decision making, rather than benefitting individuals interacting with the agency.²⁵⁰ The court went on to explain that an agency cannot escape the application of *Accardi* by means of disclaiming the binding effect in the guidance itself; otherwise, the *Accardi* doctrine would be meaningless.²⁵¹

Because the PBNDS and the Transgender Care Memorandum both represent the culmination of an agency policy-making practice, and both implicate the rights of trans detainees, an *Accardi* claim is justified. ICE’s failure to incorporate the protections in the Transgender Care Memorandum into the contracts with detention facilities nationwide and the evidence of the conscious decision not to enforce the terms of the PBNDS are discrete actions ripe for challenge.

D. Substantive Due Process and Trans Detainees

The argument that the detention of trans noncitizens in ICE custody is a violation of substantive due process calls for a recognition of evolving communal values and the collective conscience, as well as a better understanding of the individual experience of detention and the extreme traumas suffered by many trans noncitizens in their countries of origin. In *Lawrence v. Texas*, the Court looked to the evolving standards in the United States, Europe, and around the world when interpreting the constitutional right to privacy in the United States.²⁵² The *Lawrence* Court found the laws and traditions from the prior 50 years to be most instructive in determining whether substantive due process protected private sexual conduct between two consenting adults.²⁵³ The Court recognized that the analysis begins with history and

²⁴⁶ See *Torres v. U.S. Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1069 (C.D. Cal. 2019).

²⁴⁷ ICE Memorandum, *supra* note 56.

²⁴⁸ *Id.* at 6.

²⁴⁹ *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d. 1141, 1152–53 (D.C. Cir. 2006).

²⁵⁰ *Damus v. Nielsen*, 313 F. Supp. 3d 317, 338 (D.D.C. 2018).

²⁵¹ *Id.* (citing *Abdi v. Duke*, 280 F. Supp. 3d 373, 389 (W.D.N.Y. 2017)).

²⁵² 539 U.S. 558, 576–77 (2003).

²⁵³ *Id.* at 571–72.

tradition but that, in some cases, the analysis may not end there.²⁵⁴ Justice Kennedy remarked that if the drafters of the Due Process Clause had “known the components of liberty in its manifold possibilities, they might have been more specific.”²⁵⁵ Instead he posited that the drafters knew that values evolve over time and allowed for each new generation to “invoke its principles in their own search for greater freedom.”²⁵⁶

The last several years have seen a growing awareness of the trans experience and outrage at the harms these individuals face in detention. Additionally, there is growing concern regarding the use of solitary confinement in the criminal context in the United States. The state of California has recently instituted an overhaul of solitary confinement in state prisons, and in 2015, the Obama administration requested a DOJ review of the use of restrictive housing.²⁵⁷ Solitary confinement has also fallen out of favor in the international context. In 2011, the U.N. Special Rapporteur on torture issued a report calling for a prohibition on the use of solitary confinement in all but the most serious of cases, and even then, never for juveniles, individuals with mental disabilities, nor for a period lasting more than 15 days.²⁵⁸ He recognized that the conditions of solitary confinement can amount to torture.²⁵⁹ The European Court of Human Rights has held that solitary, including protective solitary of a gay man in criminal detention, may be a violation of Article 3 of the European Convention on Human Rights, which deals with the prohibition of torture and inhuman or degrading treatment.²⁶⁰

Due process requirements are not rigid and they require balancing of the legitimate government purpose with the interest impacted by the government action.²⁶¹ Although it is clear that civil immigration detention has a legitimate purpose, the courts must still evaluate whether the conditions of confinement and the overall burden on the detained individual’s rights are outweighed by the gravity of the government’s stated purposes for those conditions.²⁶² In the case of trans detainees, the

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 578–79.

²⁵⁶ *Id.*

²⁵⁷ Ian Lovett, *California Agrees to Overhaul Use of Solitary Confinement*, N.Y. TIMES (Sept. 1, 2015), <https://www.nytimes.com/2015/09/02/us/solitary-confinement-california-prisons.html>; U.S. DEP’T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 1 (2016), <https://www.justice.gov/archives/dag/file/815551/download>.

²⁵⁸ *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UN NEWS (Oct. 18, 2011), <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says>.

²⁵⁹ *Id.*

²⁶⁰ *X v. Turkey*, App. No. 24626/09 Eur. Ct. H.R. (2012).

²⁶¹ *Superintendent v. Hill*, 472 U.S. 445, 454–55 (1985).

²⁶² *Schall v. Martin*, 467 U.S. 253, 269 (1984).

harm suffered by the detainees, often in the form of violent intrusions on their bodily integrity or severe psychological and physiological damage in isolation, cannot be outweighed in the civil detention context.

Courts and government agencies have come to understand that gender dysphoria is a serious medical condition and that the WPATH Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People are the appropriate benchmark for treatment of gender dysphoria.²⁶³ In 2011, the First Circuit addressed the issue of medical care for a pretrial trans detainee in *Battista v. Clarke*,²⁶⁴ recognizing that a more plaintiff-friendly standard was necessary in that case, as Battista was civilly committed, not serving a criminal sentence.²⁶⁵ The court settled on the standard of “whether the defendant failed to exercise a reasonable professional judgment” in denying the medically indicated treatment.²⁶⁶ Ultimately, the court found that the failure to provide Battista with hormone replacement therapy did violate her substantive due process rights.²⁶⁷ The First Circuit later refused to order prison administrators to provide gender affirmation surgery (referred to by the court as sex reassignment surgery, or “SRS”), finding that hormone therapy and other treatments were sufficient to meet the “adequate care” standard.²⁶⁸ In reading *Battista* as well as more recent precedent in the Eighth Amendment context, it is evident that this is an individualized determination, as adequate care for some individuals experiencing gender dysphoria may be gender confirmation surgery (GCS), while in others, GCS may not be required.

As detailed in Part III *infra*, less restrictive means exist that will allow the government to protect its compelling interest. If ICE cannot safely detain trans individuals in comparable conditions to cisgender noncitizens, trans individuals must be released. As discussed in Part I, the conditions of detention for trans individuals are extremely harmful, even when they do not include the use of administrative segregation. Further, asylum seekers and other survivors of torture and trauma, including the vast majority of trans immigration detainees, are especially susceptible to the mental health complications caused by the conditions faced in detention.²⁶⁹ Several studies have revealed that even in facilities that are comparatively well-run, the fact of being detained threatens detainees’ psychological health and well-being and exacerbates the severe psychological distress frequently found in survivors of

²⁶³ *Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019); HUM. RTS. WATCH, *supra* note 8, at 45.

²⁶⁴ 645 F.3d 449 (1st Cir. 2011).

²⁶⁵ *Id.* at 453.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 455–56.

²⁶⁸ *Kosilek v. Spencer*, 774 F.3d 63, 96 (1st Cir. 2014).

²⁶⁹ Gruberg, *supra* note 65.

torture and asylum seekers.²⁷⁰ The psychological impact, coupled with the increased risk of sexual assault, degrading and demeaning treatment, and failure to provide adequate medical care, makes the detention of trans noncitizens shocking to the conscience.²⁷¹

III. ALTERNATIVES TO DETENTION

The government does have a legitimate interest in ensuring that noncitizens in removal proceedings appear for their hearings and for removal from the country should that become necessary. If detention cannot be implemented in a way consistent with substantive due process, there are a variety of alternatives to detention that may safeguard the government's interest in preventing noncitizens from failing to appear.

Qualitative research funded by the U.N. High Commissioner for Refugees has shown “that asylum seekers are especially predisposed to comply with proceedings” due to four factors: first, due to the fear of persecution if returned to their home country, asylum seekers are motivated to attend hearings in the hopes of avoiding being removed to their country of origin; second, many asylum seekers feel that applying for asylum is an expression of faith in the legal system, which is important because many come from countries where the rule of law is deficient; third, asylum seekers trust the system to give them a fair hearing; and fourth, asylum seekers are especially motivated to avoid detention and will comply to escape detention.²⁷²

²⁷⁰ *Id.*; M. von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason & C. Katona, *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC PSYCHIATRY art. no. 382 (Dec. 6, 2018), <https://bmcp psychiatry.biomedcentral.com/articles/10.1186/s12888-018-1945-y#article-info>.

²⁷¹ On a practical note, it is important to mention that the Immigration and Nationality Act specifically prohibits federal district and circuit courts from enjoining the detention provisions on a class-wide basis. *See* 8 U.S.C. § 1252(f)(1) (2018). There has, however, been some disagreement on how to interpret that particular statute. *See* C.G.B. v. Wolf, 464 F. Supp. 3d 174, 198–200 (D.D.C. 2020) for a discussion of the various interpretations of § 1252(f)(1). Courts have also noted the challenges to class certification in conditions of detention cases, particularly concerning commonality and adequacy in cases concerning class members detained across multiple facilities. *See* Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709, 737–40 (C.D. Cal. 2020), *rev'd*, 16 F.4th 613 (9th Cir. 2021).

²⁷² MARK NOFERI, AM. IMMIGR. COUNCIL, CTR. FOR MIGRATION STUD., A HUMANE APPROACH CAN WORK: THE EFFECTIVENESS OF ALTERNATIVES TO DETENTION FOR ASYLUM SEEKERS 3 (2015) (citing Cathryn Costello & Esra Kaytaz, Division of International Protection, U.N. High Commissioner for Refugees, Rep. on Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva, CP2500, at 12–17 (2013), <https://www.refworld.org/pdfid/51a6fec84.pdf>).

Thus, in the case of trans detainees seeking to apply for asylum or other humanitarian relief, it is quite possible to safeguard the government's interest in a manner that is far less harmful to trans individuals in immigration proceedings.

In addition to reducing the psychological and physical harms to detainees, alternatives to detention are far more cost-efficient. It costs ICE an average of \$122 per day per immigrant detained.²⁷³ Although ICE does not record the cost of holding immigrants in solitary confinement, experts have estimated that the use of solitary can triple the cost of detention, making it hundreds of times more costly than lower-cost alternatives to detention.²⁷⁴

A. *Intensive Supervision Appearance Program (ISAP) and Electronic Monitoring Device (EMD)*

The Intensive Supervision Appearance Program (ISAP) is administered by Behavioral Interventions, Inc. (BI), a for-profit company owned by GEO Group, a private prison company.²⁷⁵ ISAP follows a very structured model of supervision with a specialist supervising a small number of participants and making use of a number of different supervision tools including reporting, home visits, electronic ankle shackles, and weekly schedules.²⁷⁶ As participants comply over time and find support in the community, the restrictions are gradually decreased.²⁷⁷

Another alternative to detention frequently used in conjunction with ISAP is the Electronic Monitoring Device (EMD). The EMD program is made up of two systems to monitor participants. The first system, Telephonic Reporting (TR), requires participants to call in to a database using voice recognition.²⁷⁸ The TR program can be used as an additional level of supervision following release or it can be used supplementarily to in-person reporting.²⁷⁹ The TR program is available in all 50 states, and participants can report daily, weekly, or monthly, though participants

²⁷³ Urbina & Rentz, *supra* note 80.

²⁷⁴ *Id.*

²⁷⁵ ACLU, ALTERNATIVES TO IMMIGRATION DETENTION: LESS COSTLY AND MORE HUMANE THAN FEDERAL LOCK-UP 1; RUTGERS SCH. OF L. NEWARK IMMIGR. RTS. CLINIC, FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 8 (2012).

²⁷⁶ Memorandum from Wesley J. Lee, Acting Dir., U.S. Immigr. & Customs Enf't, to ICE Field Off. Dirs., on Eligibility Criteria for Enrollment into the Intensive Supervision Appearance Program (ISAP) and the Electronic Monitoring Device (EMD) Program 2 (May 11, 2005) [hereinafter Lee Memorandum].

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 1.

²⁷⁹ *Id.* at 1–2.

must call in to the database at least monthly.²⁸⁰ As TR often decreases the frequency with which participants must report in person, it is often beneficial not only to the participant, but also to the officer.²⁸¹

The other part of EMD is Radio Frequency (RF) monitoring, which is an electronic ankle bracelet used to enforce a curfew system.²⁸² RF is generally used for noncitizens ICE is considering releasing from detention.²⁸³ Participants in RF must report to the local Detention and Removal Operations (DRO) office at least every six months.²⁸⁴ For FY 2013, ISAP used RF monitoring on 48% of participants in the “full-service” program.²⁸⁵ The other 52% participated in the TR program only.²⁸⁶ Recently, it seems that ICE has been opting to use RF on more asylum seekers, which has concerned advocates.²⁸⁷ The RF tracking devices are also problematic in many ways as they require that the wearer be plugged in for several hours a day to charge it, they make bathing difficult, and the public often perceives those wearing an ankle monitor as criminal.²⁸⁸ In some cases, the RF monitors are also re-traumatizing, and given that asylum seekers are predisposed to appear in court, are often unnecessary.²⁸⁹

In 2009, ICE revised the program and renamed it ISAP II.²⁹⁰ ISAP II is also operated by BI.²⁹¹ ISAP II continues to use EMD technologies, including both the TR and RF programs, as well as employer verification, unannounced home visits, and in-person reporting.²⁹² In 2013, 40,613 noncitizens, or approximately one-tenth of the total number of noncitizens detained by ICE each year, were supervised by ISAP II at a cost of between 17¢ to \$17 per person per day.²⁹³ Over the same period, the ISAP II program enjoyed a 99.6% court appearance rate and a 79.4% compliance with final orders of removal for participants in the full-service program.²⁹⁴

²⁸⁰ *Id.* at 2; Memorandum from Victor X. Cerda, Acting Dir., U.S. Immigr. & Customs Enft, to ICE Field Off. Dirs., on Reporting Requirements and Management of Alternatives to Detention Program Participants 1 (Mar. 8, 2005) [hereinafter Cerda Memorandum].

²⁸¹ Lee Memorandum, *supra* note 276, at 2.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ Cerda Memorandum, *supra* note 280, at 1.

²⁸⁵ NOFERI, *supra* note 272, at 9.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*; RUTGERS SCH. OF L. NEWARK IMMIGR. RTS. CLINIC, *supra* note 275, at 18.

²⁸⁹ NOFERI, *supra* note 272, at 9.

²⁹⁰ ACLU, *supra* note 275, at 1–2.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 2.

While in many ways preferable to detention, ISAP, and particularly the use of electronic ankle shackles, is itself highly problematic. The frequency of visits is often excessive, and the length of time needed to visit the office or stay at home on home-visit days makes it difficult for program participants, many of whom have employment authorization, to maintain employment or care for their children.²⁹⁵

In a recent study of the impacts of electronic ankle shackles, 90% of those surveyed reported negative impacts on their physical health, ranging from discomfort to “very severe” impacts and exacerbation of underlying health conditions.²⁹⁶ Physical harms included aches, pains, and cramps (74%), excessive heat (57%), numbness (55%), inflammation (45%), scarring (38%), cuts and bleeding (27%), and electrical shocks (22%).²⁹⁷ Of those experiencing physical effects, 65% reported the negative impacts were “constant.”²⁹⁸ The vast majority (88%) of respondents also indicated that the electronic ankle shackles had negative impacts on their mental health as well, including anxiety (80%), sleeplessness (73%), depression (71%), social isolation (61%), and even suicidal thoughts (12%).²⁹⁹ Other negative impacts include financial, family, and community harms.³⁰⁰

Fortunately, there are other highly effective and less harmful options.

B. *Community Supervision*

The government has also experimented with funding support programs provided in the community by nonprofit organizations. These programs provided case management services as well as referrals to legal representation and social services.³⁰¹ The programs improved court appearance rates as well as the rate of compliance with final orders by helping participants to understand their legal obligations and the immigration court system.³⁰² Not only do these programs improve outcomes and the functioning of the court system, they do so in a way that causes much less

²⁹⁵ Kate Linthicum, *Push for Cheaper Alternatives to Immigrant Detention Grows*, L.A. TIMES (May 31, 2014, 7:45 PM), <https://www.latimes.com/nation/la-na-immigration-detention-20140601-story.html>; RUTGERS SCH. OF L. NEWARK IMMIGR. RTS. CLINIC, *supra* note 275, at 16.

²⁹⁶ CARDOZO SCH. OF L. KATHRYN O. GREENBERG IMMIGR. JUST. CLINIC, FREEDOM FOR IMMIGRANTS & IMMIGRANT DEF. PROJECT, IMMIGRATION CYBER PRISONS: ENDING THE USE OF ELECTRONIC ANKLE SHACKLES 12 (2021).

²⁹⁷ *Id.* at 13 fig.1.

²⁹⁸ *Id.* at 13.

²⁹⁹ *Id.* at 15 fig.2.

³⁰⁰ *Id.* at 16–21.

³⁰¹ ACLU, *supra* note 275, at 2.

³⁰² *Id.*

damage to participants' health and psychological well-being and is far less disruptive to families and communities than traditional detention.³⁰³

Both the Catholic Migration and Refugee Service (MRS) and the Lutheran Immigration and Refugee Service (LIRS) have conducted pilot programs using community-based models.³⁰⁴ Compliance rates for both programs were between 96% and 97%.³⁰⁵ The MRS and LIRS programs were similar, and both involved case management, housing, and legal services, and fostered community connections for participants.³⁰⁶ The former Immigration and Naturalization Service funded a program piloted by the Vera Institute of Justice to provide services to over 500 noncitizens.³⁰⁷ The Vera program enjoyed a 93% hearing compliance rate among asylum seekers under intensive supervision.³⁰⁸ The sense of belonging and investment inspired by housing assistance and other social services can also encourage compliance with the court. Social service and housing assistance can also foster a sense of belonging in the United States, which in turn encourages compliance with court appearances.³⁰⁹

C. Bond

Immigration bonds function differently than criminal bonds. In the criminal context, it is possible to pay 10% of the bond amount to a bail bondsman who will pay the entire amount. This is not possible in the immigration context where the person posting bond must pay in the entirety or provide collateral for the entire amount.³¹⁰ The poster must also be a U.S. citizen or Lawful Permanent Resident.³¹¹ Bond amounts have been increasing steadily and many individuals remain in detention because they are unable to pay the high bond amounts.³¹²

³⁰³ *Id.*

³⁰⁴ HUM. RTS. FIRST, MYTH VS. FACT: IMMIGRANT FAMILIES' APPEARANCE RATES IN IMMIGRATION COURT (2015).

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ NOFERI, *supra* note 272, at 4–5.

³¹⁰ Meagan Flynn, *ICE Is Holding \$204 Million in Bond Money, and Some Immigrants Might Never Get It Back*, WASH. POST (Apr. 26, 2019, 3:11 PM), https://www.washingtonpost.com/immigration/ice-is-holding-204-million-in-bond-money-and-some-immigrants-might-never-get-it-back/2019/04/26/dcaa69a0-5709-11e9-9136-f8e636f1f6df_story.html.

³¹¹ *Id.*

³¹² *Id.*

Many of those released on bond are given an Order of Supervision (OSUP). The OSUP is administered by ICE, and check-ins are generally less frequent than ISAP check-ins and occur at the ICE office.³¹³

D. *Appointment of Counsel*

This option serves both to increase appearance rates and would help to ensure the fair and equitable application of our immigration laws. In 2015, 98% of families with legal representation appeared for their removal hearings.³¹⁴ Whether or not a noncitizen has legal representation is a strong indicator that the noncitizen will comply with court hearings.³¹⁵ Faith in the legal process is correlated with rates of appearance for court hearings as legal information and counsel, as well as proper notice of court dates, encourage compliance.³¹⁶ In the case of children in removal proceedings, 95.4% of those represented by counsel appeared for court hearings.³¹⁷ Since 2005, the compliance rates for represented children have not fallen below 91%.³¹⁸ This is true for asylum seekers as well. An analysis of 2.8 million cases from 2008 to 2018 showed that 96% of non-detained noncitizens who were represented by counsel appeared for their hearings.³¹⁹ Research has shown that access to reliable legal counsel early in the process is the single most important factor in promoting trust in the legal system, and by extension achieving compliance with the legal process.³²⁰

Appointed counsel coupled with community supervision would be the ideal alternative to detention for trans noncitizens. It would prevent the harms suffered in detention facilities while protecting the government's interest in ensuring that noncitizens in removal proceedings appear for their hearings and comply with the orders of the immigration judge.

CONCLUSION

The detention of trans noncitizens in civil immigration detention is a violation of Fifth Amendment substantive due process. If trans individuals cannot be detained in a way that safeguards both their physical and mental well-being, ICE should be

³¹³ RUTGERS SCH. OF L. NEWARK IMMIGR. RTS. CLINIC, *supra* note 275, at 6, 8–9.

³¹⁴ HUM. RTS. FIRST, *supra* note 304.

³¹⁵ ACLU, *supra* note 275, at 2.

³¹⁶ HUM. RTS. FIRST, *supra* note 304.

³¹⁷ AM. IMMIGR. COUNCIL, CHILDREN IN IMMIGRATION COURT: OVER 95 PERCENT REPRESENTED BY AN ATTORNEY APPEAR IN COURT 2 (2016).

³¹⁸ *Id.*

³¹⁹ CARDOZO SCH. OF L. KATHRYN O. GREENBERG IMMIGR. JUST. CLINIC et al., *supra* note 296, at 27 (citing INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, MEASURING *IN ABSENTIA* REMOVAL IN IMMIGRATION COURT (2021)).

³²⁰ NOFERI, *supra* note 272, at 3.

required to release trans detainees into community supervision programs and to appoint counsel.