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ICE's New Policy on Segregation and the Continuing Use of Solitary Confinement within the Context of International Human Rights, 47 J. Marshall L. Rev. 1433 (2014)

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ICE'S NEW POLICY ON SEGREGATION AND THE CONTINUING USE OF SOLITARY CONFINEMENT WITHIN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS

SARAH DÁVILA-RUHAAK

I. Real Solitary	1434
II. Introduction.....	1434
III. Solitary Confinement	1436
A. Physical and psychological effects of solitary confinement.....	1437
1. Generally	1437
IV. General framework for Solitary Confinement	1439
A. Immigration Policies on Detention	1439
B. Immigration Policies Relating to the Use of Solitary Confinement	1440
1. New Directive on Segregation	1441
2. Review Process of Detainees with Vulnerabilities	1442
3. Review Process for Detainees in Extended Segregation	1443
4. No Right of Action for Wrongful Segregation Placements.....	1443
V. International Protections Against the Use of Solitary Confinement	1444
A. Right to Due Process	1444
1. Delays and Lack of Reporting of in Solitary Confinement	1445
B. Right to Humane Treatment	1446
1. The Use of Solitary Confinement Causing Physical, Mental and Moral Anguish.....	1448
2. Vulnerable Persons in Solitary Confinement	1449
3. Immigrant Detainees are Virtually Indistinguishable from Criminally Convicted Persons in Detention Facilities	1450
VI. Conclusion.....	1451

I. REAL SOLITARY

A feeling of abandonment ... dead-end desperation... helplessness, tension. It is a physical reaction, a demand for release or a need to escape at all costs... [Isolated prisoners] feel caged rather than confined, abandoned rather than alone, suffocated rather than isolated. They react to solitary confinement with surges of panic or rage. They lose control, break down, regress..."¹

II. INTRODUCTION

The use of solitary confinement in immigration detention has been at the center of media, immigration reform, and the work of many immigrants' rights and human rights advocates. Journalists and domestic and internationally-oriented advocates have been reporting the use of solitary confinement and the inhumane treatment that immigrant detainees are subjected to in detention facilities while awaiting resolution of immigration cases.² Nicholas Katzenback, a former United States Attorney General, recognized that "the growth rate in the number of prisoners housed in segregation far outpaced the growth rate of the overall prison population."³

¹ HANS TOCH, *MOSAIC OF DESPAIR: HUMAN BREAKDOWNS IN PRISON* 49 (1992).

² See NAT'L IMMIGR. JUST. CTR. & PHYSICIAN FOR HUM. RTS., *INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION* 3 (Sept. 2012) [hereinafter *INVISIBLE IN ISOLATION*], available at https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf (examining the use of solitary confinement in the immigration detention system, provided testimonies of detainees, and recommended the eradication of the use of solitary confinement); Ian Urbina & Catherine Rents, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), available at <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html> [hereinafter *Immigrants Held in Solitary Cells*] (reporting on federal data indicating that approximately 300 immigrant detainees were placed in solitary confinement. The article further reported that approximately half of immigrant detainees were isolated for 15 days or more, and that approximately 35 of the 300 were detained for more than 75 days); The Times Editorial Board, *Cruel and Inhuman Conditions for Immigrants*, L.A. TIMES, Sept. 18, 2013, <http://www.articles.latimes.com/2013/sep/18/opinion/la-ed-solitary-dhs-immigrant-detainees-20130918> (reporting that the use of solitary confinement is widespread in immigration detention facilities. It also reported on studies that indicated that detainees subjected to prolonged isolation are at risk of mental illness and suicide).

³ Kathryn D. DeMarco, *Disabled by Solitude: The Convention on the Rights*

U.S. Immigration and Customs Enforcement (“ICE”) and detention facilities around the country handle approximately 34,000 immigrant detainees daily.⁴ Since 2005 the number of immigrants detained has increased by a worrisome 85 percent.⁵ “Nearly half are isolated for 15 days or more,” which represents the limit at which point psychiatric and other experts recognize as causing severe mental harm.⁶

The case can be made that extended solitary as a common practice constitutes cruel, inhumane and degrading treatment or torture in violation of basic principles of human rights. “The near pervasive practice of extended solitary confinement as a commonplace and legally legitimate detention method demonstrates extreme disregard for incarcerated US citizens and is tangible basis upon which torture for foreign nationals seems somehow more feasible.”⁷ The conditions to which immigrants are subjected to in immigration detention should no longer be viewed as a domestic issue that concerns immigration law exclusively. The treatment of immigrant detainees and especially the use of solitary confinement should be contextualized within the discourse of universal human rights protections that are afforded to all

of Persons with Disabilities and Its Impact on the Use of Supermax Solitary Confinement, 66 U. MIAMI L. REV. 523, 527 (2011) available at <http://lawreview.law.miami.edu/wp-content/uploads/2012/02/DeMarco.pdf>, citing John J. Gibbons & Nicholas de B. Katzenbach, VERA INST. OF JUST., CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 53 (2006), available at http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf),

⁴ INVISIBLE IN ISOLATION, *supra* note 2, at 3.

⁵ *Id.* U.S. Dept of Homeland Security, *U.S. Immigration and Customs Enforcement: Salaries and Expenses — FY 2014 Congressional Budget Justification*, in U.S. Department of Homeland Security Annual Performance Report: Fiscal Years 2012–2014, 43-51, available at <http://www.dhs.gov/sites/default/files/publications/MGMT/DHS-%20Annual%20Performance%20Report%20and%20Congressional-Budget-Justification-FY2014.pdf>. See also IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 2 [hereinafter THE MATH OF IMMIGRATION DETENTION], available at <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf>. (noting that the U.S. Department of Homeland Security (DHS) has sought to obtain \$2 billion in funding for immigration detention centers for 2014). The report notes that this figure is sought to cover operational costs for approximately 257 facilities, at an average of \$5.05 million per day. Immigration detention not only inhumane, degrading and may amount to torture, but it is extremely costly. Many within the government question the effectiveness of the current system. Representative Spencer Bachus referred to the alternatives to detention during a House Judiciary Committee aimed at questioning the efficiency of the current “bed mandate” system.

⁶ *Immigrants Held in Solitary Cells*, *supra* note 2.

⁷ Charles A. Pettigrew, Comment, *Technology and the Eight Amendment: The Problem of Supermax Prisons*, 4 N.C.J.L. & TECH. 191, 191-92 (2002).

persons irrespective of their immigration status.

The purpose of this essay is to discuss ICE Policy 11065.1 on segregation, its deficiencies and its unlikely full implementation, and emphasize that the current use of solitary confinement in immigration detention is in contravention of international human rights principles.

While the focus of this essay is solitary confinement in immigration detention, the general discussion of solitary confinement and its physical and mental health effects is not limited to immigration detention. Solitary confinement has the same effects on an immigrant detainee as any person with legal status, especially since a great number of immigrant detainees are housed in the same detention facilities as criminally convicted persons.⁸ The core difference between the protections available to immigrant detainees lay in the standards and regulations issued by ICE regarding the special protections that immigrant detainees are afforded while in detention pending their civil immigration proceedings. Those protections will be discussed below.

This essay will first discuss the physical and psychological effects that result from the use of solitary confinement. It will then discuss the United States standards regulating the use of solitary confinement within the immigration detention context, especially the newly issued directive regarding segregation. Subsequently, the discussion will uncover the reality of the use of solitary confinement in detention centers and outline the deficiencies with the new ICE directive. In addition, the essay will examine the international legal standards and protections afforded to immigrant detainees, and how the current solitary confinement standards and practices are in contravention of human rights norms.

III. SOLITARY CONFINEMENT

Solitary confinement is a “form of segregation in which individuals are held in total or near-total isolation.”⁹ Detainees in solitary confinement are held in small individual cells for 23 to 24 hours a day. During the segregation, detainees are prevented from having access to the same treatment as to the rest of the population, including the access to recreation, visitation, and other privileges.¹⁰ “When there is contact with other people, it is usually

⁸ Dora Schriro, U.S. DEP’T OF HOMELAND SECURITY, IMMIGR. AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 17 (2009), *available at* <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

⁹ INVISIBLE IN ISOLATION, *supra* note 2, at 2; *Solitary Confinement Facts*, American Friends Service Committee, <http://www.afsc.org/resource/solitary-confinement-facts> (last visited May 3, 2013).

¹⁰ INVISIBLE IN ISOLATION, *supra* note 2, at 2.

brief, routine, and superficial, such as being escorted to the showers by a guard.”¹¹ Some detainees have described it as a “slow constant peeling of the skin, stripping of the flesh.”¹²

The use of solitary confinement is not a contemporary creation. Solitary confinement has been central to prison systems since the early 19th century.¹³ Researchers have concluded that the use of solitary confinement through the use of segregation units may amount to psychological torture.¹⁴ “The medical evidence shows indisputably that even relatively short periods in solitary confinement can cause irreversible damage, especially to the vulnerable people.”¹⁵ Within the context of immigration detention, detainees who have been subjected to solitary confinement may suffer from severe anxiety, depression, and post-traumatic stress.¹⁶

A. *Physical and psychological effects of solitary confinement*

1. Generally

It is clear from medical journals in the last century that the use of extended solitary confinement causes severe psychological effects.¹⁷ Some of the symptoms that are commonly associated with solitary confinement are: hyperresponsivity to external stimuli; perceptual distortions, illusions, and hallucinations; panic attacks; difficulties in concentration and memory; intrusive

¹¹ Interim Report of the Special Rapporteur on Torture, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 77, Gen. Assembly, transmitted by Note of the Secretary-General, U.N. Doc. A/63/175 (July 28, 2008).

¹² Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 116 (2008).

¹³ Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME AND JUST. 441, 441-528 (2006).

¹⁴ CENTER FOR CONSTITUTIONAL RIGHTS, FACT SHEET, TORTURE: THE USE OF SOLITARY CONFINEMENT IN U.S. PRISONS, CENTER FOR CONSTITUTIONAL RIGHTS, available at <http://ccrjustice.org/files/CCR-Factsheet-Solitary-Confinement.pdf> (last visited Sept. 17, 2014).

¹⁵ Press Release, *Abolish Solitary Confinement in Immigration and National Security Facilities, PHR Urges*, available at <http://physiciansforhumanrights.org/press/press-releases/abolish-solitary-confinement.html>.

¹⁶ PHYSICIANS FOR HUMAN RIGHTS, BURIED ALIVE: SOLITARY CONFINEMENT IN THE U.S. DETENTION SYSTEM 32, available at https://s3.amazonaws.com/PHR_Reports/Solitary-Confinement-April-2013-full.pdf [hereinafter BURIED ALIVE]

¹⁷ Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 73, 78 (2005) (citing Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L & SOC. CHANGE 477, 483 (1977)).

obsessional thoughts; overt paranoia; and violence and self-harm.¹⁸ The long-term effects of solitary confinement “include symptoms of post-traumatic stress such as flashbacks, chronic hypervigilance, and hopelessness, as well as continued intolerance of social interaction after release.”¹⁹

The design and use of segregation units aim to break and incapacitate detainees. “[S]olitary confinement cells...are constructed to minimize sensory input of any kind to the inmate. They provide the type of atmosphere that produces sensory deprivation stress or psychotic reactions.”²⁰

Studies in the United States have found that detainees in extended periods of segregation may suffer “perpetual distortions, hallucinations, hyperresponsivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control.”²¹ Similarly, German studies found from hundreds of cases of psychoses linked to detention conditions could include vivid hallucinations, dissociative tendencies, agitation, aimless violence, and delusions.²² These studies concluded that solitary confinement precipitated the psychosis.²³

“Prisoners subjected to extensive segregation in [Special Housing Units] have additional difficulties severe enough to cause near permanent mental and emotional damage.”²⁴ Some detainees in long-term segregation at Segregation Housing Units (“SHUs”) have “smeared themselves with feces,” urinated on the floor of their cells, been found “babbling and shrieking, banging their hands on the wall, and one prisoner scrubbed his body to remove imaginary bugs.”²⁵

An important question to ask ourselves is, if it is clear that the use of solitary is harmful for the health of detainees, why is it still used as an administrative measure for detention centers? “The Commission on Safety and Abuse in America’s Prisons stated that after ten days in solitary confinement there are ‘practically no benefits’ to such confinement, while the ‘harm is clear.’”²⁶

¹⁸ BURIED ALIVE, *supra* note 16, at 31 (citing Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 328 (2006)).

¹⁹ *Id.*

²⁰ John F. Cockrell, *Solitary Confinement: The Law Today and the Way Forward*, 37 LAW & PSYCHOL. REV. 211, 214 (2013) (quoting Edward Kaufman, *The Violation of Psychiatric Standards of Care in Prisons*, 137 AM. J. PSYCHIATRY 566, 567 (1980)).

²¹ Madrid v. Gomez, 889 F. Supp. 1146, 1230-32 (N.D. Cal. 1995).

²² Grassian, *supra* note 18, at 367-72.

²³ *Id.*

²⁴ Vasiliades, *supra* note 17, at 78.

²⁵ Ruiz v. Johnson, 37 F. Supp. 2d 855, 909, 912 (S.D. Tex. 1999).

²⁶ DeMarco, *supra* note 3, at 523, quoting Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is this Torture?*, THE NEW YORKER (Mar. 30, 2009), available at <http://www.newyorker.com/magazine/2009/03/30/hellhole>.

IV. GENERAL FRAMEWORK FOR SOLITARY CONFINEMENT

A. Immigration Policies on Detention

In general, ICE detainees are placed in detention centers for the purpose of assuring that they appear in the removal and deportation proceedings.²⁷ The process is allegedly not designed to punish detainees, but to assure the effective functioning of the deportation and removal proceedings. ICE has the authority and discretion to adopt and implement policies relating to immigrant removal and relief.²⁸

The reality of immigration detention is, however, critically intertwined with the criminal penal system. Immigrant detainees are held in the same facilities as criminally convicted persons²⁹ and subjected to similar, if not the same, treatment. In 2011, DHS “held a record-breaking 429,000 immigrants in over 250 facilities across the country.”³⁰

With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. One study notes that “ICE relies primarily on correctional incarceration standards ... and on correctional principles of care, custody, and control.”³¹ “These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained [immigrant] population.”³²

State and local law enforcement agencies enter into agreements with ICE, under which they are deputized and carry out government functions on behalf of the federal government in regards to civil detention.³³ The central function that is particularly important is that immigrant detainees in deportation or removal proceedings are held in the same facilities as criminally convicted persons and are subjected to the same policies while awaiting the resolution of their immigration case. Through our research we have found that many detention centers (whether county jails, prisons, or other detention facilities) do not distinguish immigrant detainees from the general population either because they cannot distinguish them or because they

²⁷ Schriro, *supra* note 8, at #2.

²⁸ Daniel Kanstroom, *The Better Part of Valor: The Real ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 166 (2007).

²⁹ Schriro, *supra* note 8, at 2, 4.

³⁰ AMERICAN CIVIL LIBERTIES UNION, IMMIGRATION DETENTION, <https://www.aclu.org/immigrants-rights/immigration-detention> (last visited Sept. 17, 2014).

³¹ INVISIBLE IN ISOLATION, *supra* note 2 at 29.

³² Schriro, *supra* note 8, at 4.

³³ Immigration and Nationality Act, 8 U.S.C. § 1357(g) (2000).

implement the detention center's internal policies irrespective of the detainee's legal status.³⁴ The practice of treating immigrant detainees as indistinguishable of criminally convicted persons is in contravention of the contractual obligations under the ICE contracts.³⁵ Specifically, detention centers are required to comply with ICE standards as it applies to immigrant detainees while housed in those facilities, including the regulations on solitary confinement.³⁶

B. *Immigration Policies Relating to the Use of Solitary Confinement*

Immigration detention is regulated by three sets of standards: the 2000 National Detention Standards (hereinafter "NDS"),³⁷ and the Performance-Based National Detention Standards (hereinafter "PBNDS") of 2008³⁸ and 2011.³⁹ A majority of facilities have adopted and operate loosely under the guidelines of the 2000 and 2008 standards.⁴⁰ The NDS and PBNDS only provided descriptions of the different types of segregation,⁴¹ but did not provide for effective mechanisms limiting the use of solitary confinement. The protections that the PBNDS 2011 provided for is the mandated daily face-to-face mental health assessments for detainees in segregation⁴² and the notification to ICE when a detainee is in segregation for over 30 days.⁴³

³⁴ Documents produced from Freedom of Information Act requests to I.C.E.-contracted detention centers, in the possession of The John Marshall Law School Human Rights Project. See *infra* notes 66, 79, 80 and accompanying text.

³⁵ INTERGOVERNMENTAL SERVICE AGREEMENT BETWEEN THE UNITED STATES DEPT. OF HOMELAND SECURITY U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, OFFICE OF ENFORCEMENT AND REMOVAL OPERATIONS AND KARNES COUNTY (Dec. 7, 2010), available at <http://www.ice.gov/doclib/foia/isa/karnescountycivildetentionfacility-igsa11-0004.pdf>.

³⁶ *Id.*

³⁷ U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, 2000 DETENTION OPERATIONS MANUAL [hereinafter NDS 2000], available at <http://www.ice.gov/detention-standards/2000/>.

³⁸ U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, 2008 PERFORMANCE-BASED NATIONAL DETENTION STANDARDS [hereinafter PBNDS 2008], available at <http://www.ice.gov/detention-standards/2008/>.

³⁹ U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, 2011 PERFORMANCE-BASED NATIONAL DETENTION STANDARDS [hereinafter PBNDS 2011], available at <http://www.ice.gov/detention-standards/2011/>; *Buried Alive*, *supra* note 16, at 12.

⁴⁰ PBNDS 2008, *supra* note 38; PBNDS 2011, *supra* note 39.

⁴¹ Although this essay primarily refers to solitary confinement, since I.C.E. uses the term "segregation," the essay will use segregation as well.

⁴² INVISIBLE IN ISOLATION, *supra* note 2, at 5; PBNDS 2011, *supra* note 39, at § 2.12.

⁴³ INVISIBLE AT ISOLATION, *supra* note 2, at 5; PBNDS 2011, *supra* note 39, at 154.

Despite the existence of the PBNDS 2011, a majority of detention facilities have not adopted them, and those facilities that have adopted them circumvent the regulations relating to solitary confinement by releasing detainees after 29 days of segregation, waiting one day, and then placing them in segregation the following day.⁴⁴ This failure to adopt the PBNDS 2011 and proactive circumvention of the time limits defeats any protections provided for in the standards.

As the government has been under serious criticism⁴⁵ for failing to protect criminally and non-criminally convicted detainees, such as immigrant detainees, ICE has made an attempt to address its use of solitary confinement.

On September 4, 2013 ICE issued Directive 11065.1 (hereinafter "new directive"). The new directive provides for increase in oversight and reporting mechanisms when solitary confinement is used.⁴⁶ The new directive asserts that its purpose is to "ensure the safety, health and welfare of detainees."⁴⁷

Prior to the issuance of the new directive, administrative segregation allowed for the separation of a detainee "for administrative reasons," which included the protection of detainees or the general population or for "good order."⁴⁸ Disciplinary segregation is the separation of a person for the purpose of penalizing individuals for breaking detention facility rules.⁴⁹

1. New Directive on Segregation

The new directive provides that a detainee can only be placed

⁴⁴ In 2012 the National Immigrant Justice Center and Physicians for Human Rights gathered data reflecting this practice, which is documented in the *Invisible in Isolation* report. *INVISIBLE IN ISOLATION*, *supra* note 2. In 2013, law student investigators from The John Marshall Law School Human Rights Project in Chicago have discovered additional instances of persons being held for periods exceeding 30 days and even 60 days. See INT'L COVENANT ON CIV. & POL. RTS., ICCPR SHADOW REPORT CONCERNING THE USE OF SOLITARY CONFINEMENT IN IMMIGRATION DETENTION FACILITIES IN THE UNITED STATES OF AMERICA, IN RELATION TO THE UNITED STATES' 4TH PERIODIC REPORT (Sept. 10, 2013) [hereinafter *ICCPR Shadow Report*] (discussing the use of solitary confinement in immigrant detention facilities across the United States, and argues that such practices are a violation of the International Covenant on Civil and Political Rights). Further documentation received from FOIA requests are on file with The John Marshall Law School Human Rights Project. See *infra* notes 66, 79, 80 and accompanying text.

⁴⁵ *Immigrants Held in Solitary Cells*, *supra* note 2.

⁴⁶ ICE Directive No. 11065.1, Review of the Use of Segregation for ICE Detainees, (ICE 2013) [hereinafter *I.C.E. Directive*], available at http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

⁴⁷ *I.C.E. Directive*, *supra* note 46, at § 2.

⁴⁸ PBNDS 2011, *supra* note 39, at § 2.12.

⁴⁹ *INVISIBLE IN ISOLATION*, *supra* note 2 (citing NDS 2000, *supra* note 36, at 1).

in administrative segregation if identified as having a special vulnerability. Detainees are considered to have a special vulnerability if they are: known to be suffering from mental illness or serious medical illness; have a disability, are elderly, pregnant or nursing; would be susceptible to harm in the general population due to their sexual orientation or gender identity; have been victims of sexual assault, torture, trafficking or abuse.⁵⁰

Once a person is identified as “vulnerable,” segregation can only be used as the last resort and for the shortest period of time.⁵¹ If an alternative to the segregation exists, it must be sought and segregation should be avoided.⁵² In regards to disciplinary segregation, the new directive requires that the punishment should be based on a serious misconduct and that prior authorization of segregation by a facility disciplinary panel must be provided.⁵³

It is important to note that the new directive does not include age, religion, race, or ethnic identification as factors that may render a detainee vulnerable. These factors are fundamental when considering the potential vulnerability of a person, since religion, race, ethnic and linguistic identifications have been at the heart of discriminatory policies and actions against minorities and immigrants. To not include these factors to assess vulnerability within the circumstances of the person’s detention is to ignore the reality of today’s conflicted society and facility detainee and personnel composition.

2. Review Process of Detainees with Vulnerabilities

The new directive provides that there must be a review process for all detainees placed in segregation for over 14 days, who have been identified as vulnerable, or if there are other factors relating to the risk of victimization of a detainee.⁵⁴ As part of this review, if a detainee’s medical or mental illness worsens, or there is a suicide risk, appropriate health care must be provided.⁵⁵ If there is a determination that the segregation caused the deterioration of a detainee’s medical or mental health, an alternative to segregation must be sought.⁵⁶

Requiring the identification of “vulnerability” that provides for greater protection is a good step in the right direction, however falls short. As mentioned earlier, the facility personnel must *know* of the vulnerability, which creates a great disincentive for the

⁵⁰ I.C.E. Directive, *supra* note 46, at § 5.1.

⁵¹ *Id.* at § 5.2.

⁵² *Id.*

⁵³ *Id.* at § 3.2.

⁵⁴ *Id.* at § 4.3.

⁵⁵ *Id.*

⁵⁶ *Id.* at § 5.2.

facility personnel to inquire about any vulnerabilities prior to the segregation. The knowledge requirement does not provide for a due diligence requirement by the personnel, thus allowing for the personnel to hide behind their alleged ignorance of such vulnerability. In addition, it is not clear the level of mental or medical assessment that will be conducted during segregation.

Once in segregation, detainees should be medically and mentally assessed periodically and the directive should clarify what the response time will be for assistance and specific alternatives to segregation, regardless of whether the segregation has caused the worsening of medical or mental illness.

3. Review Process for Detainees in Extended Segregation

Prior to the new directive, detainees could be held in extended segregation during 30 days prior to any reporting of the segregation. With the new directive, there must be reporting “whenever a detainee has been held continuously in segregation for 14 days [within a 21-day period], 30 days, and at every 30-day interval”⁵⁷ The directive does not include prohibit placing a detainee in segregation for a time period under the limit, removing the individual from segregation for a day or two, and then placing the individual in segregation, thus restarting the clock on the time limit. Removing the detainee prior to the time triggering reporting, and then re-starting the clock results in a longer segregation than without reporting such segregation.

4. No Right of Action for Wrongful Segregation Placements

It is clear from the language that the new directive does not provide detainees with concrete actionable rights. “This document is an internal policy statement of ICE. 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.”⁵⁸ In addition, the PBNDS 2008 and 2011, and NDS 2000 are systematically circumvented, as are other standards, such as the Prison Rape Elimination Act, thus calling into question the likelihood of the new directive being fully implemented.⁵⁹

Even if the new directive is implemented, it is likely to be ineffective due to the complex relationship between ICE and privately owned or county-managed detention facilities, and the long chain of command to be followed.⁶⁰ Additionally, the lack of

⁵⁷ *Id.* at § 5.1.

⁵⁸ *Id.* at § 10.

⁵⁹ Prison Rape Elimination Act of 2003, Pub. L. No. 108–79, 117 Stat. 972.

⁶⁰ I.C.E. Directive, *supra* note 46, § 5.

protection for those not qualifying as persons with “special vulnerabilities,” may be targeted and at risk due to other reasons such as religion, race or ethnic group identification.

V. INTERNATIONAL PROTECTIONS AGAINST THE USE OF SOLITARY CONFINEMENT

A. *Right to Due Process*

The right to due process has been widely recognized under international law. Traditionally the right to due process recognizes the protection against abuses of the legal system such as the lack to an effective remedy⁶¹ and excessive punishments. More specifically, the right to due process includes the right to access legal resources and the right to representation, the right to access judicial remedies, and, most importantly for our discussion, the right to submit complaints to the administration and receive a proper resolution.⁶²

The Inter-American Commission on Human Rights has recognized that failing to provide immigrant detainees of their due process rights would be contrary to the American Declaration of the Rights and Duties of Man and as such the due process protections must be strictly enforced due to the circumstances surrounding detention and severity of the possible consequences.⁶³

⁶¹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 5, U.N. Doc. A/RES/217(III), art. 8 (Dec. 10, 1948) [hereinafter UDHR]. *See also* American Declaration of Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser.L/V/II.23, doc.21 rev.6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc.6 rev.1, art. XVII, at 17 (1992) [hereinafter American Declaration] (providing for the “Right to recognition of juridical personality” and for every person to be recognized as “having rights and obligations”). The American Declaration has been a foundational instrument to establish jurisdiction over claims against the United States. The United States is a signatory of the American Declaration. International Covenant on Civil and Political Rights art. 9(4), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

⁶² *See, e.g.*, ICCPR, *supra* note 61, art. 14; (holding that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal.”); *see also* Al-Jedda v. United Kingdom, 2011 Eur. Ct. H.R. 1092, para. 40-41 (July 7, 2011) (The European Court of Human Rights referencing paragraph 7 of the United Nations Security Council Resolution 1546 which provides that detainees “should enjoy all the protections envisaged in all the rights by international human rights conventions”); U.N. Sec. Council Res. 1546, S/RES/1546 (2004) (quoting the Security Council in its report relating to resolution 1546 to recognize that there is “an urgent need to provide [a] remedy to lengthy internment...without adequate judicial oversight”); Report of the Secretary-General pursuant to paragraph 30 of resolution 1546 (2004), U.N. Sec. Council S/RES/1546 (2004).

⁶³ *Report on Immigration in the United States Detention and Due Process*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, Doc 78/10 (Dec. 30, 2010); The Right

In addition, due process has been understood within the context of state responsibility, in which the State is responsible for “any act or omission on the part of the State bodies in a proceeding, whether of an administrative, punitive or jurisdictional nature.”⁶⁴

1. Delays and Lack of Reporting of in Solitary Confinement

In addition to the general principles of due process, detainees have the right to receive “prompt” notice of the reasons for the detention or, in the case of solitary confinement, the reasons for the segregation.⁶⁵ This right to notice provides detainees with a right to dispute the validity or conditions of the detention “without delay.”⁶⁶ The reality reflects, however, that detainees fear that submitting complaints relating to their detention conditions will negatively affect their case or their treatment by prison personnel. In Washoe County, Nevada, seven detainees filed an Inmate Grievance Form against prison personnel and as a consequence they were removed from their housing blocks and were segregated.⁶⁷ By way of segregation, the detainees were reminded of the State’s control, and that detainees are subject to the degrading treatment by prison personnel. The use of solitary confinement as a form of coercion to obstruct access to a legal

to Information on Consular Assistance Within the Framework of the Guarantees of Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999).

⁶⁴ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

⁶⁵ ICCPR, *supra* note 61, art. 9(4). See Gen. Assembly, Hum. Rts. Comm., *Report of the Human Rights Committee*, para. 79(12), at 61, U.N. Doc. A/56/40 (Vol. I) (Supp.) (Jan. 1, 2001) (noting that “The Committee is concerned about the length of detention (72 hours) before detainees are informed of the charges being brought against them. This period of detention before detainees are informed of the charges being brought against them is too long and not in compliance with article 9, paragraph 2, of the Covenant. The Committee also deplores the unwillingness of the delegation to answer questions”); Gen. Assembly, Hum. Rts. Comm., *Report of the Human Rights Committee*, paras. 100–11, at 21–22, U.N. Doc. A/52/40 (Vol. I) (Supp.) (Jan. 1, 1997) (stating that a waiting period of ninety-six hours before judicial review is violative of due process); INVISIBLE IN ISOLATION, *supra* note 2, at 21 (noting that “ICE detention standards state that individuals should only be placed in disciplinary segregation after they have had a disciplinary hearing and a review panel has determined that they have violated a facility rule.”); PBNDS 2011, *supra* note 39, at 145 (noting that “[t]he detainee shall be advised of the reasons he/she is being placed in a dry cell, the purpose of this placement, the conditions that he/she can expect.”).

⁶⁶ ICCPR, *supra* note 61, art. 9(4).

⁶⁷ See FOIA Response Washoe County Jail, Nev., Part 1, at 79 (Apr. 4, 2012) (on file with The John Marshall Law School Human Rights Project) (produced by Washoe County Jail in response to Freedom of Information Act requests that The John Marshall Law School Human Rights Project (now International Human Rights Clinic) requested).

remedy is clearly in contravention of the right to due process.

B. *Right to Humane Treatment*

Under international human rights, it is a well-accepted principle that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁶⁸ The right to humane treatment has been recognized as non-derogable due to its conception as an essential and central protection in human rights.⁶⁹ “The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), prohibit torture, inhuman or degrading treatment or punishment.”⁷⁰ The Inter-American Commission’s Principles and Best Practices recognize and establish that the right to humane treatment takes priority over other rights when possibly in conflict.⁷¹ Central to our discussion of the use of solitary confinement is the concept of torture or degrading and inhumane treatment.

[T]he term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or

⁶⁸ UDHR, *supra* note 61, art. 5; ICCPR, *supra* note 61, art. 7; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1, para. 1, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (June 26, 1987) [hereinafter CAT].

⁶⁹ Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Pub. Comm. Against Torture in Israel v. Gov’t of Israel, Case No. HCJ 769/02 (2005), *available at* <http://www.haguejusticeportal.net/index.php?id=7624>. INTER-AM. COMM’N H.R., REPORT ON TERRORISM AND HUMAN RIGHTS, OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. (2002) [hereinafter REPORT ON TERRORISM], *available at* <http://www1.umn.edu/humanrts/iachr/terrorism-index.html>; American Declaration, *supra* note 61, art. XXV.

⁷⁰ *Buried Alive*, *supra* note 16, at 27. See UDHR, *supra* note 61, art. 5 (stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment”); ICCPR, *supra* note 61, art. 7; (stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); CAT, *supra* note 68, art. 1, (stating that “torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”).

⁷¹ Inter-Am. Comm’n H.R., *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, approved by the Commission during its 131st regular period of sessions (2008), *available at* <http://www.oas.org/en/iachr/mandate/Basics/principlesdeprived.asp>.

acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁷²

From a cursory reading of article 1 of the CAT, some may question whether the use of solitary confinement can be considered a form of torture. However, when considering the reality of how the use of solitary confinement is implemented, it is clearer that the practice may fall within the definition of torture under article 1. If solitary confinement is used as a punitive measure by way of segregating and targeting particular individuals, due to their identity, challenge of authority or other reason, in violation of the domestic minimum standards, then such State-sponsored conduct in some instances may rise to the level of torture. Two Special Rapporteurs on torture and other cruel, inhuman, or degrading treatment or punishment have issued reports stating that “the prolonged isolation of detainees, may amount to torture.”⁷³

The United Nations General Assembly’s Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Body of Principles”) contains an absolute ban on the use of torture or other cruel, inhuman, or degrading treatment or punishment in a prison setting.⁷⁴ The Body of Principles explains that “the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness” may amount to torture or other cruel, inhuman, or

⁷² CAT, *supra* note 68, art. 1.

⁷³ INTERIM REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, *supra* note 11, para. 77. *See also* SPECIAL RAPPORTEUR ON TORTURE, INTERIM REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, *passim*, Gen. Assembly, *transmitted by Note of the Secretary-General*, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan E. Méndez) (noting that “physical conditions and the prison regime of solitary confinement cause severe mental and physical pain or suffering, when used as a punishment, during pre-trial detention, indefinitely, prolonged, on juveniles or persons with mental disabilities, it can amount to cruel, inhuman or degrading treatment or punishment and even torture”).

⁷⁴ *Buried Alive*, *supra* note 16, at 28. *See* Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, annex, art. 1 & 6, U.N. Doc A/RES/43/173 (Dec. 9, 1988) (stating that the term “‘cruel, inhuman or degrading treatment or punishment’ should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.”); *see also* U.N. Hum. Rts. Comm., General Comment 20, art. 6–7, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994) (noting that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.”) Article 7 of the ICCPR refers to torture or to cruel, inhuman or degrading treatment or punishment.

degrading treatment or punishment.⁷⁵ In addition, the Basic Principles for the Treatment of Prisoners (hereinafter “Basic Principles”) emphasizes that solitary confinement as a punishment or restriction, should be abolished.⁷⁶

1. The Use of Solitary Confinement Causing Physical, Mental and Moral Anguish

“Every person has the right to have his physical, mental, and moral integrity respected.”⁷⁷ This protection is particularly important for our discussion, since it emphasizes that the right to humane treatment is not limited to physical abuse, but more importantly it includes the protection from mental and moral mistreatment.⁷⁸ This protection of course is central to the use of solitary confinement, since the severe mental and moral consequences have been documented extensively.

According to ICE, disciplinary segregation is only permitted if the detainee has committed serious misconduct in violation of a facility rule.⁷⁹ In practice, however, disciplinary segregation is commonly used as a punitive measure for minor infractions or minor deviations from facility regulation. For example, detainees have been “sent to the hole” for requesting to watch Spanish language television, for submitting complaints to the facility administration for intimidation and wrongful placement in segregation,⁸⁰ or for having medically necessary pills on his person that had been previously approved by another facility.⁸¹ Disciplinary segregation is not only used under serious or exceptional circumstances, but to also maintain day-to-day order and remind detainees of the facility rules. The use of solitary is conceptualized as punitive at its core, not as a consequence of misconduct, and as a way to control detainees and maintain an environment of fear and acquiescence.

⁷⁵ G.A. Res. 43/173, art. 6.

⁷⁶ Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, Annex, art. 7, at 45, U.N. Doc. A/RES/45/49 (Dec. 14, 1990).

⁷⁷ G.A. Res. 45/111.

⁷⁸ American Convention on Human Rights art. 5, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁷⁹ *Id.*

⁸⁰ See FOIA Response Washoe County Jail, Nev., *supra* note 67, at 80 (produced by Washoe County Jail in response to Freedom of Information Act requests that The John Marshall Law School Human Rights Project (now International Human Rights Clinic) requested and has in its possession).

⁸¹ See FOIA Response Seneca County, Ohio, Part 2, 5 (Mar. 12, 2012) (on file with The John Marshall Law School Human Rights Project) (produced by Seneca County Jail, Ohio, in response to Freedom of Information Act requests that The John Marshall Law School Human Rights Project (now International Human Rights Clinic) requested and has in its possession).

2. Vulnerable Persons in Solitary Confinement

Vulnerable persons have been recognized in domestic systems and international law as persons needing special protections. States must “afford specific guarantees for the care, aid and protection” of such persons.⁸² Though vulnerable persons are entitled to special protections under international law, most detention centers housing criminally convicted persons and immigrant detainees house vulnerable persons such as LGBT individuals and persons with physical and mental disabilities.⁸³

Even though the new directive provides for enhanced protections for “vulnerable” persons, the classification of “vulnerable” does not include such factors such as age, race, ethnic or linguistic identity. In addition, practice demonstrates that vulnerable persons continue to be segregated. Facilities regularly segregate (use solitary confinement) persons with particular vulnerabilities or as a way to “manage” the jail or prison population.⁸⁴ This is especially troubling considering that “[t]orture survivors, victims of human trafficking, and other vulnerable groups can be detained for months or even years, further aggravating their isolation, depression, and other mental health problems associated with their past trauma.”⁸⁵ Between 2010 to 2013, approximately 6,000 persons were detained who were torture survivors and who were seeking asylum protection.⁸⁶

It has been widely recognized by many groups, including the UN Refugee Agency (hereinafter “UNHCR”) that the detention of immigrants, especially asylum seekers, as a way to penalize their illegal entry or stay is in contravention of the 1951 Refugee Convention.⁸⁷ States “shall not apply to the movements of such

⁸² *Report on Terrorism*, *supra* note 69, para. 194.

⁸³ INVISIBLE IN ISOLATION, *supra* note 2, at 3.

⁸⁴ *Id.* at 3, 8.

⁸⁵ DETENTION WATCH NETWORK, *About the U.S. Detention and Deportation System*, <http://detentionwatchnetwork.org/resources> (last visited Aug. 29, 2014). See also *Buried Alive*, *supra* note 16, at 32 (referring to “one groundbreaking study of detained asylum seekers, most of whom have survived torture and persecution before fleeing to the United States and requesting asylum, investigators found extremely high rates of anxiety, depression, and PTSD symptoms.”). Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, 56-57 (2003), available at <http://physiciansforhumanrights.org/library/reports/from-persecution-to-prison.html>.

⁸⁶ THE CENTER FOR VICTIMS OF TORTURE, ET AL., *TORTURED AND DETAINED: SURVIVOR STORIES OF U.S. IMMIGRATION DETENTION 2* (Nov. 2013), available at http://www.cvt.org/sites/cvt.org/files/Report_TorturedAndDetained_Nov2013.pdf.

⁸⁷ Kristy Siegfried, *Alternatives to Immigration Detention Prove Cheaper, More Humane*, IRIN, U.N. Office for the Coordination of Humanitarian

refugees restrictions other than those which are necessary.”⁸⁸ The UN General Assembly has recognize the need to emphasize “that detention shall be the last resort and permissible only for the shortest period of time and that alternatives to detention should be sought whenever possible.”⁸⁹

3. Immigrant Detainees are Virtually Indistinguishable from Criminally Convicted Persons in Detention Facilities

Within the concept of humane treatment, it has been recognized that unconvicted persons must not be detained with convicted persons.⁹⁰ This special protection under the right to humane treatment is essential for the protection of immigrant detainees due to the inability of detention centers to implement domestic and international protections when there is no physical separation of both populations.

Immigrant detainees are held in the same facilities (jails, prisons, and other detention centers) that house criminally convicted persons. “[M]ost immigration detention facilities are indistinguishable from jails: men and women are confined behind high walls lined with razor wire and have little freedom of movement or direct contact with family.”⁹¹

It has been widely accepted that if individuals detained under civil proceedings are subject to the similar conditions as convicted persons, the detention amounts to penalty.⁹² This is especially important when there are alternatives to the conditions or type of detention.⁹³ When there are alternatives less harsh, they must be

Affairs, (Aug. 30, 2013), <http://www.irinnews.org/report/98666/alternatives-to-immigration-detention-prove-cheaper-more-humane>; 1951 Convention Relating to the Status of Refugees, art. 31, G.A. Res. 429(V), (Jul. 28, 1951) [hereinafter Refugee Convention].

⁸⁸ Refugee Convention, *supra* note 87, art. 31(2).

⁸⁹ Special Rapporteur on Trafficking, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, para 67, Gen. Assembly, U.N. Doc. A/HRC/10/16 (Feb. 20, 2009) (by Joy Ngozi Ezeilo), available at [http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/110/43/PDF/G0911043.pdf?OpenElement](http://daccess-dds.ny.un.org/doc/UNDOC/GEN/G09/110/43/PDF/G0911043.pdf?OpenElement).

⁹⁰ INVISIBLE IN ISOLATION, *supra* note 2, at 8. See also Editorial, *Why Detain Nonviolent Immigrants?*, L.A. TIMES, Mar. 24, 2013, available at <http://www.latimes.com/news/opinion/editorials/la-ed-detainees-20130324,0,6561747.story><http://articles.latimes.com/2013/mar/24/opinion/la-ed-detainees-20130324> (reporting that more than 70% of immigrant detainees have no criminal history, although they are housed in the same facilities with convicted detainees).

⁹¹ INVISIBLE IN ISOLATION, *supra* note 2, at 3.

⁹² *Jones v. Blanas*, 393 F.3d 918, 933–34 (9th Cir. 2004) (citing *Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004)); *Bell v. Wolfish*, 441 U.S. 520, 536. (1979).

⁹³ *Demery*, 378 F.3d at 1028, (quoting *Bell*, 441 U.S. at 538).

considered.⁹⁴

It is therefore clear that the current practices of housing immigrant detainees in facilities that have been designed and are managed for penal purposes establish a punitive system for immigrant detainees awaiting their civil proceedings. This practice of placing immigrant detainees in the same facilities and subject to the same treatment is in contravention of international protections of unconvicted persons. In addition, the current practice of using solitary confinement to penalize immigrant detainees awaiting their immigration case is in contravention of international human rights.

VI. CONCLUSION

The systematic State-sponsored implementation of solitary confinement in immigration detention is in clear contravention of basic international human rights principles recognized by the international community, including the United Nations and the Inter-American System on Human Rights. The use of solitary confinement has been a “useful” tool of punishment for the State to control, degrade and mistreat detainees, thus destroying their humanity. “Prisons do not disappear problems, they disappear human beings.”⁹⁵ The United States should abandon the current use of solitary confinement and the current punitive use of immigration detention for other more humane and available alternatives.

⁹⁴ Hallstrom v. City of Garden City, 991 F.2d 1473, 1484 (9th Cir. 1993) (quoting *Bell*, 441 U.S. at 539 n.20). See also I.C.E. Directive, *supra* note 46, § 5.2 (noting that when a detainee is considered for segregation placement “[o]ptions for alternate housing or custodial arrangements” should have been considered).

⁹⁵ Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998, 12:00 PM), http://colorlines.com/archives/1998/09/masked_racism_reflections_on_the_prison_industrial_complex.html, quoted in Kijana Tashiri Askari, *A Survivor's Manual for Solitary Confinement: Self-Destruction to the Reconstruction of the Self—My Path to Redemption* (2011), available at <http://prisonerhungerstrikesolidarity.wordpress.com/a-survivors-manual-for-solitary-confinement-self-destruction-to-the-reconstruction-of-self/>