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**CLUSTER REPORT SUBMITTED BY:**

American Civil Liberties Union (ACLU),<sup>1</sup> ACLU Foundation, over 500,000 members, and 53 affiliates<sup>2</sup>

**EXECUTIVE SUMMARY:**

Actions of the executive, federal legislative, and judicial branches of the United States have seriously restricted access to justice for victims of civil liberties and human rights violations, and have limited the availability of effective (or, in some cases, any) remedies for these violations. For example, federal legislation and Supreme Court decisions have greatly limited access to federal review of state court death penalty convictions. Indigent capital defendants are systematically denied access to justice, as they are often appointed attorneys who are overworked, underpaid, lacking critical resources, incompetent, or inexperienced, and the lack of a right to counsel in post-conviction proceedings leaves them with little recourse. Prisoners seeking a remedy for injuries inflicted by prison staff and others, or seeking the protection of the courts against dangerous or unhealthy conditions of confinement, also have been denied any remedy and have had their cases thrown out of court due to federal legislation that created numerous burdens and restrictions on lawsuits brought by prisoners in the federal courts.

Victims of torture and “extraordinary rendition” have been denied their day in court. The federal government has used judicially-created doctrines such as the so-called “state secrets” privilege and qualified immunity to dismiss civil suits alleging torture; cruel, inhuman, or degrading treatment; forced disappearance; and arbitrary detention, without consideration on the merits. Immigrants also are systematically denied access to justice. The U.S. government has claimed that there is no right to judicial review of diplomatic assurances when it has sought to transfer individuals to countries known to employ torture. Federal immigration officials also have used a procedure known as stipulated removal to deport non-U.S. citizens without a hearing before an immigration judge and regardless of whether they are eligible to remain in the United States.

Recent U.S. Supreme Court cases have also sharply limited the ability of individuals to bring legal action for rights violations. Rights available to women victims of domestic violence have been curtailed, with the Court striking down a civil remedy under the Violence Against Women Act and finding no constitutional violation for police failure to enforce a mandatory judicial protective order. Courts also have barred women domestic workers from obtaining any remedy for abuses by their diplomat employers who claim diplomatic immunity from suit. For people of color, the Supreme Court has created often insurmountable procedural obstacles for victims of racial or ethnic discrimination seeking judicial relief under Title VI of the historic Civil Rights Act. Concerning undocumented migrant worker’s rights, courts have severely circumscribed available remedies including back pay, state tort remedies, and workers’ compensation.

## **I. Human Rights Framework: Access to Justice and Right to Effective Remedy**

Access to justice is an essential right for victims of all human rights violations.<sup>3</sup> A cornerstone of the right to access to justice is access to courts, including fair and impartial judicial proceedings, when a person faces criminal charges or has been deprived of liberty, or when a person wishes to commence litigation concerning civil rights or human rights violations.<sup>4</sup> Under international law states must take steps to ensure access to justice is effective, such as by providing adequate legal counsel.<sup>5</sup> Further, states must ensure access to justice without discrimination, and must adopt measures to ensure access for all on an equal basis.<sup>6</sup> Another foundational principle of human rights law is the right to an effective remedy for victims of human rights violations.<sup>7</sup> Under international law, states have a duty to provide judicial, civil, and administrative remedies.<sup>8</sup> States' duty to provide effective remedy for human rights violations includes an obligation to investigate alleged human rights violations,<sup>9</sup> even when the perpetrator is a private actor.<sup>10</sup> In addition, states' duty to provide effective remedy also encompasses an obligation to punish those responsible for human rights violations,<sup>11</sup> as well as an obligation to provide compensation to victims of human rights violations.<sup>12</sup>

## **II. Capital Punishment**

The U.S. death penalty system, which includes the administration of the death penalty in 35 states, the federal system and the military, is flawed and unsalvageable despite recent U.S. Supreme Court cases barring the execution of juveniles and the mentally retarded. As of March 30, 2010, at least 1,200 people—including men, women, children (at the time of the crime), mentally retarded, and mentally ill—have been executed in the United States since the death penalty was reinstated by the Supreme Court in 1976.<sup>13</sup> As of July 2009, 3,279 people were awaiting execution across the country.<sup>14</sup>

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

With rare exceptions, defendants facing capital charges cannot afford a lawyer, and therefore rely on the state to appoint an attorney to provide an adequate defense. While capital cases are among the most complex, time-intensive and financially draining cases to try, indigent capital defendants often are appointed attorneys who are overworked, underpaid, lacking critical resources, incompetent, or inexperienced in trying death penalty cases.<sup>15</sup> Incompetent defense attorneys fail to investigate cases thoroughly, fail to present compelling or mitigating evidence, and fail to call witnesses that would aid in the defense. In addition, enormous caseloads, caps on defender fees, and a critical lack of resources for investigation and expert assistance are barriers to the presentation of an adequate and effective defense.

The problem of inadequate counsel is not isolated to a few bad attorneys; it is a widespread and systematic failure to ensure access to justice for defendants facing capital charges and those convicted of capital crimes.<sup>16</sup> Few states provide adequate funds to compensate lawyers for their work or to investigate cases properly. In addition to inadequate funding, the majority of death-penalty states lack adequate competency standards. Many states require only minimal training and experience for attorneys handling death penalty cases, and in some cases capital defense attorneys fail to meet the minimum guidelines for capital defense set by the American Bar Association (ABA). A 2002 report on indigent defense by the Texas Defender Service found that death row prisoners “face a one-in-three chance of being executed without having the case properly investigated by a competent attorney or without having any claims of innocence or unfairness heard.”<sup>17</sup> Among other reasons, many death sentences are set aside because a federal court finds the lawyer who represented the accused at his first trial in state court was so incompetent that the accused's constitutional right to effective counsel was violated.<sup>18</sup>

The absence of a right to counsel in post-conviction proceedings,<sup>19</sup> in addition to the myriad procedural and substantive hurdles in raising a claim of ineffective assistance of counsel,<sup>20</sup> leaves capital defendants with

little recourse when they have been denied adequate legal representation or have endured other constitutional violations. Inadequate counsel not only adversely affects the client at trial and sentencing, but substandard attorneys fail to investigate and preserve objections, resulting in an inadequate trial record. These errors vastly reduce the scope of appellate review, decreasing the possibility that errors will be corrected later. Success in challenging a death sentence on the ground that the accused's constitutional rights were violated depends on the death-sentenced inmate having quality representation in their habeas corpus appeal to the federal courts, which assesses the case for violations to the U.S. Constitution. Yet beyond the first appeal to federal court, people fighting their death sentences have no constitutional right to a lawyer, and the quality of available counsel can be even more abysmal in these appeals than at the trial level.<sup>21</sup>

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

Federal legislation, most prominently the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>22</sup> and the USA PATRIOT Improvement and Reauthorization Act of 2005, as well as numerous Supreme Court decisions on federal habeas corpus, have greatly limited access to federal review of state court death penalty convictions. These laws drastically limit the availability of federal habeas corpus relief for defendants sentenced to death. As a result, defendants who are later able to present evidence establishing their innocence that may not have been available at the time of trial, and could have led to a different result if it had been presented, are left with no recourse. In addition to the denial of relief to defendants who have powerful evidence of their innocence, many defendants who have suffered serious constitutional violations, such as inadequate defense counsel, racially discriminatory jury selection, and suppression of exculpatory evidence have been left without federal judicial recourse.

The AEDPA limits the ability of state detainees to bring habeas corpus claims in federal court and drastically curtails the ability of federal courts to adjudicate meritorious claims and review state court decisions for constitutional error. Before the AEDPA's passage, between 1976 and 1991, death row inmates were granted relief in 47 % of all federal habeas cases, underscoring the need for appellate review beyond the direct appellate process.<sup>23</sup> Additionally, "there have been no systematic trial-level improvements that have coincided with the AEDPA's adoption and implementation."<sup>24</sup>

Since the AEDPA's enactment in 1996, state and federal prisoners have been forced to navigate a labyrinth of complex procedural rules and stringent deadlines in order to assert claims of serious constitutional violations in post-conviction proceedings. State prisoners particularly have been burdened by the AEDPA, which requires greater deference to state court decisions and, thus, constrains federal review of federal constitutional violations. Indeed, federal courts may only grant habeas relief to state prisoners where the state court's decision was "contrary to, or involved an unreasonable application of clearly established Federal law" as determined by the U.S. Supreme Court, or based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."<sup>25</sup> It is not enough for the state court decision to be wrong as a matter of constitutional law, it must have been unreasonably wrong. Interpretations of these limitations by the U.S. Supreme Court and lower federal courts have created an unduly high burden for petitioners to obtain federal habeas relief. Moreover, a one-year statute of limitations and prohibitions against successive habeas petitions serve as an absolute bar to federal habeas review. As a result, federal courts are unable to reach the merits of substantive claims, which include, among others, claims of racial bias in jury selection, ineffective assistance of counsel, and prosecutorial misconduct, due to substantial deference to state court proceedings or mere technical reasons.

Barring access to the federal courts undermines confidence in criminal convictions as thousands of prisoners are left with no recourse for constitutional violations that deprived them of a fair trial. This is especially alarming for prisoners facing execution, where there should be no margin of error. With the knowledge that prejudicial error will occur in an unacceptable number of criminal proceedings, including

capital cases, it is imperative to ensure access to federal post-conviction proceedings. The constraints on the federal courts to serve as a final check on state capital convictions are particularly damning for prisoners asserting claims of actual innocence when we know with certainty that defendants have been, and will be, wrongfully convicted of capital crimes. In fact, as of November 2009, 138 death-row inmates from 26 states have been officially exonerated upon proof of innocence and released from custody after serving years (often decades) on death row.<sup>26</sup>

### **III. Prisoners' Rights**

#### **a. Denial of Access to Justice under the Prison Litigation Reform Act**

In 1996, Congress passed the Prison Litigation Reform Act (PLRA) with the stated purpose of curtailing allegedly frivolous litigation by prisoners.<sup>27</sup> However, since its enactment, the Act has had a disastrous effect on the ability of prisoners to seek protection of their rights in the U.S. federal courts. The PLRA created numerous burdens and restrictions on lawsuits brought by prisoners in the federal courts.<sup>28</sup> As a result of these restrictions, prisoners seeking a remedy for injuries inflicted by prison staff and others, or seeking the protection of the courts against dangerous or unhealthy conditions of confinement, have had their cases dismissed. Three provisions in particular affect the ability of individual prisoners, most of whom have no access to legal counsel, to bring their claims before the federal courts.

The PLRA provisions often referred to as the “physical injury requirement” prevent prisoners, including juvenile and pre-trial detainees, from obtaining money damages in federal court for violations of their civil and human rights that can amount to torture or cruel and demeaning treatment.<sup>29</sup> These provisions require that, in order to sue for compensatory damages in federal court, a prisoner must demonstrate a “prior showing of physical injury” before he or she can win damages for mental or emotional injuries. Most federal courts have applied this provision to bar damages claims involving all constitutional violations that intrinsically do not involve a physical injury. The following are a few examples of cases in which prisoners were denied relief because they have no “physical injury”: actions challenging the violation of prisoners’ religious rights;<sup>30</sup> sexual assault including forcible sodomy;<sup>31</sup> a prisoner’s false arrest and illegal detention;<sup>32</sup> prison officials’ failure to protect a prisoner from repeated beatings that resulted in cuts and bruises;<sup>33</sup> placement in filthy cells and exposure to the deranged behavior of psychiatric patients;<sup>34</sup> and a prison official’s denial of a prisoner’s psychiatric medications to deliberately cause the prisoner to experience pain and depression.<sup>35</sup> These cases represent serious and in some cases intentional rights violations, but the PLRA leaves prisoners without a remedy.<sup>36</sup>

The PLRA provision referred to as the “exhaustion requirement” requires courts to dismiss a prisoner’s case if she has not completed all internal complaint procedures at her prison or jail facility prior to filing suit.<sup>37</sup> Before a prisoner may file a lawsuit in court, a prisoner must first comply with all deadlines and other procedural rules of his prison or jail’s grievance system, and if he fails to comply with all technical requirements or misses a filing deadline, he may not sue. In practice, this provision has sharply limited the ability of prisoners to seek protection and judicial remedies for serious violations of their civil and other human rights for several reasons.<sup>38</sup> First, the PLRA’s exhaustion requirement has proven to be a trap for the unschooled and the disabled, though in general, prisoners have very low rates of literacy and education,<sup>39</sup> and the number of severely mentally ill and cognitively impaired persons in prison is high.<sup>40</sup> Second, internal complaint procedures or grievance systems create numerous stumbling blocks for prisoners seeking a remedy. Deadlines are very short in many grievance systems—almost always a month or less, and sometimes five days or less—and these deadlines operate as statutes of limitations for federal civil rights claims.<sup>41</sup> In addition, a typical system may have three or more deadlines that could lead to forfeiture of a claim, as prisoners must appeal to all levels of a grievance system. For illiterate, mentally ill, or cognitively challenged prisoners, these administrative systems are virtually impossible to navigate. As a result, constitutional claims for many of the most vulnerable are lost irrevocably under PLRA because of

technical misunderstandings rather than lack of legal merit. Third, there is a well-established practice of threatening and retaliating against prisoners who file grievances. Under some grievance regimes, prisoners are even required to obtain grievance forms from or file their grievances with the very same individuals who have abused them or violated their rights.<sup>42</sup> All these factors bar prisoners' access to the courts and deny them remedies for serious violations of their rights.

The provisions of the PLRA also apply to children confined in prisons, jails, and juvenile detention facilities.<sup>43</sup> Application of the PLRA to children is especially problematic because youth are exceptionally vulnerable to abuse in institutions, such that court oversight is particularly important.<sup>44</sup> In addition, the PLRA's exhaustion requirement has been an especially problematic obstacle to justice for incarcerated children, particularly because some courts have ruled that efforts to pursue grievance procedures by children's parents or other adults do not satisfy the PLRA.<sup>45</sup> The PLRA has created a lack of oversight and accountability for abuse of children, and increases their vulnerability to physical and sexual abuse and other rights violations.

#### **IV. National Security**

The last decade has seen systematic efforts to limit access to justice by the executive, Congress, and the courts themselves in the name of national security in the U.S.-led "war on terror." Under the Bush Administration, the Executive Branch diminished access to the courts, in order to shift the power of justice into its own hands. For eight years the Bush Administration sought to act unsupervised by the judiciary, invoking "national security" and the discredited unitary executive theory as reasons why the courts' reach did not extend to the Oval Office or to undisclosed locations. The Obama Administration has adopted similar positions to deny plaintiffs their day in court, and to protect senior officials from litigation, regardless of their actions and roles. The Obama Administration has embraced the Bush Administration's claim that, by invoking "state secrets," the government can not only restrict discovery but can quash an entire lawsuit—without demonstrating the validity of their claim to a judge. The federal government has also used the judicially-created doctrine of qualified immunity to dismiss civil suits alleging torture; cruel, inhuman, or degrading treatment; forced disappearance; and arbitrary detention without consideration on the merits.<sup>46</sup> In addition, civil cases alleging torture, cruel, inhuman or degrading treatment, and extra-judicial killings by private military contractors face procedural hurdles and defenses, resulting in dismissal.<sup>47</sup>

##### **a. The "State Secrets" Privilege as a Bar to Justice and Remedy for Torture Victims**

The United States government has intervened in cases alleging forced disappearance and torture by U.S. officials and U.S.-based corporations to assert the "state secrets" privilege—a common law evidentiary privilege—and to have these cases dismissed without any consideration of unclassified, publicly available information substantiating victims' allegations. Courts by and large have accepted the government's assertions.<sup>48</sup> The U.S. government's "state secrets" tactic to dispose of lawsuits in which it says that any discussion of a lawsuit's accusations would endanger national security has short-circuited judicial scrutiny.<sup>49</sup> As a result, victims of torture and secret detention have been denied their day in court. To date, not a single torture victim has had his day in court.

For example, the U.S. government invoked the common-law "state secrets" privilege to squelch a lawsuit brought by the ACLU in April 2006. The lawsuit concerned the secret detention of German citizen Khaled El-Masri, and it sought compensation for his unlawful detention and torture.<sup>50</sup> Mr. El-Masri was abducted while on holiday and detained from December 31, 2003 through May 28, 2004 in Macedonia and Afghanistan where he was subjected to torture and abuse.<sup>51</sup> In 2006, a judge dismissed the case, accepting the CIA's claim that simply holding proceedings would jeopardize state secrets, and denying Mr. El-Masri's only real chance for justice in domestic courts.<sup>52</sup> The ACLU appealed the dismissal, and the U.S.

Court of Appeals for the Fourth Circuit upheld the lower court decision that denied Mr. El-Masri a hearing in the United States.<sup>53</sup> In October 2007, the U.S. Supreme Court refused to review Mr. El-Masri's case.<sup>54</sup>

However, the rendition of Mr. El-Masri to detention and interrogation in Afghanistan by agents of the U.S. represents the most widely known example of a publicly acknowledged program. High-level government officials have publicly discussed the rendition program, and Mr. El-Masri's allegations have been the subject of widespread media reports in the world's leading newspapers and news programs, many of them based on the accounts of government officials. Having exhausted domestic remedies, on April 9, 2008, the ACLU filed a petition with the Inter-American Commission on Human Rights (IACHR) on behalf of Mr. El-Masri, arguing, *inter alia*, that due to the application of the state secrets doctrine, Mr. El-Masri was deprived of the right of effective access to a court and that his right to a remedy for the human rights violations he suffered had been violated.<sup>55</sup> To date, the U.S. government not responded to the petition.

The U.S. government invoked the "state secrets" privilege in another lawsuit brought by the ACLU in 2007. The ACLU filed a federal lawsuit against Jeppesen DataPlan, Inc., a subsidiary of Boeing Company, on behalf of five extraordinary rendition victims. The suit charges that Jeppesen knowingly participated in these renditions by providing critical flight planning and logistical support services to aircraft and crews used by the CIA to forcibly disappear these five men to torture, detention and interrogation. According to published reports, Jeppesen had actual knowledge of the consequences of its activities.<sup>56</sup> Shortly after the suit was filed, the government intervened and asserted the "state secrets" privilege, claiming further litigation would undermine national security interests, even though much of the evidence needed to try the case was already available to the public. Two years ago, the trial court accepted Bush Administration claims that the "state secrets" privilege allowed them to put an end to the entire proceedings. In April 2009, however, three judges from the 9<sup>th</sup> Circuit federal appeals court reversed that ruling, over Obama Administration objections. The administration subsequently asked for a hearing before the full court, asserting again the right to crush a lawsuit against a company that was a knowing accomplice to torture. The case is currently awaiting final decision by the full bench of the Ninth Circuit federal appeals court.

## **V. Women's Rights**

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

Victims of domestic violence face court-created obstacles to obtaining federal civil rights and state law remedies for violations of their fundamental human rights. Two Supreme Court cases in particular, *United States v. Morrison* and *Castle Rock v. Gonzales*, erode federal civil rights remedies for female victims of domestic violence.<sup>57</sup> In *Morrison*, the Court held that Congress did not have the power to create a private cause of action under the Violence Against Women Act, and in *Gonzales*, the Court found no constitutional violation for police failure to enforce a prior mandatory judicial protective order.<sup>58</sup>

*Morrison* arose out of an alleged sexual assault perpetrated against a college student. After the school's disciplinary procedures failed to punish the alleged perpetrators, the student filed suit under a provision providing a federal civil remedy for victims of gender-motivated violence. In 2000, the U.S. Supreme Court held that this provision exceeded Congress's powers despite voluminous congressional findings justifying congressional power based on both Congress's reasoning that gender-motivated violence in the aggregate negatively impacts interstate commerce and the need to avoid gender bias in the state systems.<sup>59</sup> The Court noted that the fact that the law applied uniformly nationwide bound even those municipalities without any history of discrimination or bias against victims of gender-motivated violence, and that violence against women is a local not national issue and a matter therefore for state law. Accordingly, there is now no federal statutory basis for women seeking a remedy to compensate for violence by private actors.

The possibility of a federal remedy against local officials who fail to protect women from privately inflicted violence under constitutional protections was also shut out in the *Gonzales* case. Mr. Gonzales violated a restraining order against him and abducted his daughters from his ex-wife's home. Ms. Gonzales reported the abduction to the police and informed them that her husband had a history of mental instability and erratic behavior. She phoned repeatedly and pleaded with the police to search for her children. The police repeatedly refused to enforce the restraining order. Ten hours after the abduction, Mr. Gonzales opened fire outside of the police station and was immediately shot and killed. The police discovered the bodies of the three murdered Gonzales children in his truck. Ms. Gonzales filed suit alleging that the police failure to enforce the restraining order deprived her of due process. The U.S. Supreme Court refused to recognize her right to relief, holding that the government had no affirmative duty to protect its citizens from privately inflicted violence despite the existence of a valid protective order, a state law requiring arrest for any violations of a protective order, knowledge of imminent harm and opportunity to act to prevent the harm.<sup>60</sup> As a result, the only recourse for such violations is in state courts, which tend to discriminate against victims of gender violence, and also generally provide state officials immunity for such conduct.<sup>61</sup> Accordingly, there is also now no federal remedy to compensate for the failure of state actors to protect women from and/or prevent domestic violence.<sup>62</sup>

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

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

Domestic workers abused by foreign diplomats in the U.S. face barriers to obtaining any remedy for exploitation and other workplace abuses. Unlike other employers, diplomats are generally immune from civil, criminal and administrative processes in the U.S. unless the sending countries waive their immunity. Aggravating the problem, U.S. courts have interpreted the commercial activity exception contained in Article 31(c) of the Vienna Convention on Diplomatic Relations to exclude the hiring and employment of domestic workers.<sup>63</sup> Diplomatic immunity bars domestic workers from claiming their legal rights in court and, as a result, gives diplomats a free pass to mistreat domestic workers deliberately and with impunity.<sup>64</sup>

The United States government has failed to ensure women domestic workers abused by their diplomat employers any form of redress on account of diplomatic immunity.<sup>65</sup> The U.S. government has submitted "Statements of Interest" in lawsuits brought by abused workers, in support of diplomats' positions, arguing that the U.S. has entered into a number of treaties that establish its obligation to accord diplomatic immunity from prosecution.<sup>66</sup> Pursuant to these treaties, diplomats are entitled to the same privileges and immunities in the U.S. as the U.S. accords to diplomatic envoys, immunities defined by the Vienna Convention, including immunity from the civil jurisdiction of the courts in this country.<sup>67</sup> In *Tabion v. Mufti*, the federal court of appeals relied on what it called the State Department's "narrow interpretation" of commercial activity and held that employment of a domestic servant did not constitute commercial activity.<sup>68</sup> As a result, certain diplomats are sheltered from the legal repercussions of exploiting employees including domestic workers.<sup>69</sup> Yet domestic workers, including workers employed by diplomats, too often face a range of civil and human rights violations including forced labor and trafficking rising to the level of modern-day slavery.

## **VI. Immigrants' Rights**

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

Over the last five years, federal immigration officials have expanded implementation of a program called stipulated removal that allows for deportation of non-U.S. citizens without a hearing before an immigration judge. This procedure is used to swiftly deport detained noncitizens under circumstances in which these detainees are unaware of the rights they are giving up or the potential consequences that may result. Immigrants who sign stipulated orders of removal waive their rights to a hearing before an immigration judge and agree to have a removal order entered against them, regardless of whether they are actually eligible to remain in the United States. The use of stipulated removal orders increased 535% between 2004 and 2008.<sup>70</sup> According to data obtained through a Freedom of Information Act (FOIA) request, federal immigration officials entered 31,554 stipulated removal orders in 2007 alone.<sup>71</sup>

In practice, many immigrants who have signed stipulated removal orders do not understand that they have done so, much less the impact these orders have on their right to remain in or reenter the United States lawfully in the future. Worse, immigrants have reported being coerced to sign stipulated orders of removal. According to press reports, federal agents have pressured detained immigrants to sign stipulated orders as a way of avoiding prolonged immigration detention.<sup>72</sup> Immigrants who sign stipulated removal orders may have colorable claims for immigration relief based on a variety of factors, including the length of their presence, their family ties to the country, their status as crime victims, or their fear of being persecuted or tortured if they are returned to their home country. By agreeing to stipulated removal orders, they unknowingly waive the opportunity to pursue these claims.

The overwhelming majority of noncitizens who sign stipulated orders of removal do so without the benefit of legal representation. As of 2008, nearly 95% of those who signed stipulated orders since 1999 were not represented by an attorney in their deportation proceedings.<sup>73</sup> The lack of representation is particularly problematic because individuals who sign stipulated orders do so without ever seeing an immigration judge. Immigration judges normally inform immigrants about their eligibility for relief from removal. Without either hearings or lawyers, immigrants may never discover that they have legal claims against deportation.

The use of stipulated removal orders on a large scale in the context of workplace raids also raises very serious concerns. On May 12, 2008, U.S. Immigration and Customs Enforcement (ICE) conducted the largest single-site immigration raid in U.S. history at Agriprocessors, Inc., a kosher meatpacking plant in Postville, Iowa.<sup>74</sup> After the raid, 306 immigrant workers were criminally prosecuted for allegedly using false documents to work.<sup>75</sup> Within seven days, 300 of the workers had pled guilty, principally to knowingly using false Social Security numbers or other false employment documents.<sup>76</sup> As a result, the Postville defendants waived all of their rights—including their right to indictment, to court reporters, to review the pre-sentence investigation report, and to appeal their convictions and sentences. Formulaic guilty pleas demanded by prosecutors also almost universally required defendants to accept mandatory stipulated judicial orders of deportation. These orders barred any further consideration of defendants' immigration status or claims, though many defendants may have had valid claims for immigration relief or ineffective assistance of counsel. The circumstances—with an average of 17 defendants represented by a single lawyer; complex immigration issues; significant language, educational and cultural barriers; and the extreme time limit prosecutors set for the plea offers—made adequate legal defense investigation and counseling almost impossible.<sup>77</sup>

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



The U.S. has circumvented its treaty obligations by transferring individuals to foreign countries that provide “diplomatic assurances” that they will not torture such individuals. Diplomatic assurances are assurances from countries—including those with a known record of torture or ill-treatment—that they will treat prisoners humanely. Such “assurances” are inherently unreliable, not legally binding, and provide no recourse for the transferred individual. To the extent that U.S. officials even try to monitor whether these assurances are honored, such monitoring is ineffective.<sup>78</sup> For example, U.S. officials reportedly suggest questions to foreign intelligence interrogators and then turn a blind eye to the methods employed to extract the information.<sup>79</sup> The U.S. government has claimed that there is no right to judicial review of diplomatic assurances when it has sought to transfer individuals to countries known to employ torture. The U.S. executive branch has claimed *carte blanche* authority to remove individuals on the basis of diplomatic assurances—in some cases even terminating protection granted under the Convention Against Torture (CAT)—without any judicial review.

International law dictates that states must not expel, return, or extradite any person to a country where they risk torture. The CAT, ratified by the U.S. in 1994 and implemented by domestic legislation, prohibits the U.S. from transferring a person “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The U.S. government has sought to use diplomatic assurances to circumvent its treaty obligations under the CAT, and has argued that individuals the government seeks to remove by means of diplomatic assurances are precluded from any review of claims arising under the CAT and that the CAT does not apply as a matter of law to individuals transferred from U.S. custody abroad to a third country.<sup>80</sup>

With regard to individuals present in the United States, to whom CAT indisputably applies, the U.S. government has also sought to use diplomatic assurances. For example, Sameh Khouzam, an Egyptian Coptic Christian who came to the United States in 1998 fleeing religious persecution in Egypt, was granted protection from deportation under the CAT in 2004 after a federal appeals court found that he would likely be tortured if sent back to Egypt. Despite this finding, as well as State Department reports showing that Egypt routinely engages in torture, the U.S. government tried to summarily deport Khouzam to Egypt based on diplomatic assurances the U.S. claims to have received from the Egyptian government that it asserts are “sufficiently reliable” to protect him from torture. The government provided no prior notice to Mr. Khouzam regarding the diplomatic assurances, and neither he nor his lawyers were permitted to see the Egyptian assurances that are the basis for terminating his CAT protection. Nor had the U.S. government offered any explanation for why these assurances would be deemed sufficiently reliable to protect Mr. Khouzam from torture. The government argued that Mr. Khouzam was entitled to no more process than a three-sentence letter summarily informing him that he would be removed after 72 hours on the basis of Egyptian assurances not to torture him which had been deemed “sufficiently reliable.” The government also denied Mr. Khouzam any opportunity to review the assurances, or to present evidence or arguments challenging the assurances before an immigration judge, the Board of Immigration Appeals, or any other body.<sup>81</sup> Ultimately, as a result of the ACLU’s litigation, a federal court held that removing Mr. Khouzam to Egypt based on unreviewable diplomatic assurances would violate his right to due process.<sup>82</sup> The U.S. Court of Appeals for the Third Circuit agreed, remanding Mr. Khouzam’s case to the Board of Immigration Appeals to review the adequacy of the assurances. The Obama Administration declined to appeal the ruling.<sup>83</sup>

In August 2009, the Obama Administration announced that it will continue the extraordinary rendition program.<sup>84</sup> The Obama Administration also announced that it will continue to rely on diplomatic assurances, including where there is no judicial review, to reduce the likelihood that transferred detainees will face torture—the same procedure used by the Bush administration that failed to protect suspects from torture.<sup>85</sup> In addition, the Obama Administration announced the U.S. would establish a system for monitoring their post-rendition treatment, in an attempt to ensure that individuals will not be tortured once they are transferred to other countries.

## VII. Racial Justice

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

Some of the greatest obstacles to access to courts for plaintiffs seeking judicial relief from instances of racial or ethnic injustice arise from court decisions which affect procedural requirements for bringing cases. Although these decisions do not deal specifically with the substantive coverage of individual laws, they, in effect, erect barriers to access to courts which are just as effective at denying justice to plaintiffs as would the repeal of substantive civil rights statutes. The two most striking examples of changes in procedural requirements which have had negative effects on the enforcement of civil rights and civil liberties are the U.S. Supreme Court's decisions in *Alexander v. Sandoval*,<sup>86</sup> which eliminated private causes of action to enforce disparate impact regulations under Title VI of the Civil Rights Act of 1964, and the heightened pleading requirements for bringing a viable case imposed by *Bell Atlantic Corp. v. Twombly*<sup>87</sup> and *Ashcroft v. Iqbal*.<sup>88</sup> In each case, the impact on plaintiffs seeking relief from discrimination was severe and immediate.

Title VI prohibits discrimination on the basis of race and national origin in any program receiving federal funding.<sup>89</sup> Under regulations promulgated under the law, plaintiffs were originally permitted to challenge programs that had a discriminatory impact on legally protected classes. The use of this standard allowed plaintiffs to act as "private attorneys general" who could bring cases to achieve the broad goals of non-discrimination which informed the nation's civil rights laws. As a result of the *Sandoval* decision, however, that option was no longer available and private plaintiffs are now required to meet the far more onerous requirement of proving intentional discrimination in federally funded program. Given the fact that much present-day discrimination is subtle or even frequently unintentional, the decision swiftly removed the most powerful weapon in confronting the most prevalent forms of discrimination today.

Even if a plaintiff were able to get into court to assert a claim, *Twombly* and *Iqbal* made it far more difficult for civil rights cases to survive motions to dismiss. For decades, the Supreme Court used a standard under which plaintiffs were only required to state a short and plain statement of the claim which would provide fair notice to the defendants of the nature of the claim against them.<sup>90</sup> *Twombly* and *Iqbal* substantially raised the pleadings requirements so that plaintiffs must now plead at the outset specific facts sufficient to show that the defendant is liable for the misconduct alleged. In effect, plaintiffs are required to prove their case at the time the case is filed, even before discovery is held or face dismissal before there is any adjudication on the merits of the case.

Although the two rulings are neutral on their face, in practice they disproportionately disadvantage plaintiffs in civil rights actions.<sup>91</sup> Operating under these vague and subjective new legal standards, defendants are increasingly urging federal judges to dismiss federal lawsuits, before the claimants have any opportunity to develop facts in support of their claims through discovery, on the basis that the factual allegations do not establish a "plausible" claim for relief.<sup>92</sup> In most civil rights actions, the evidence needed to prove the case is usually within the exclusive possession of the defendant or its agents or employees. To obtain that information has usually required that defendants avail themselves of all opportunities for discovery permitted under the Federal Rules of Civil Procedure. After *Iqbal* and *Twombly*, plaintiffs find themselves facing dismissal prior to discovery for failure to plead the facts which they could only have gained access to in the discovery process.<sup>93</sup>

The combined effects of the limitations on bringing private causes of action under Title VI regulations and those imposing stricter pleading requirements are ones which frequently escape public discussion because they involve relatively arcane details of legal procedure. But taken together, they substantially undercut equal access to the courts and therefore erode a fundamental democratic principal: being able to seek relief

from unlawful discrimination in the courts. Until legislation is passed reversing these decisions, or the Judicial Conference adopts changes to the rule governing motions to dismiss, plaintiffs with potentially meritorious claims will be denied the opportunity to assure the rights to which they are entitled.<sup>94</sup>

### **b. Denial of Undocumented Workers' Access to Effective Remedy**

Because of recent jurisprudential decisions beginning with the *Hoffman Plastic Compounds, Inc. v. NLRB* Supreme Court case in 2002, undocumented workers are denied access to effective remedy for employment rights violations under U.S. labor and employment laws, on the basis of workers' immigration status.<sup>95</sup> In *Hoffman*, the U.S. Supreme Court held that the National Labor Relations Board (NLRB) lacked the authority to order an award of back pay—compensation for wages an individual would have received had he not been unlawfully terminated before finding new employment—to an undocumented worker who had been the victim of an unfair labor practice by his employer.<sup>96</sup> Since then, employer defendants have invoked *Hoffman* to argue that undocumented workers are not entitled to backpay or other remedies under labor or employment-related statutes, including Title VII (employment discrimination), the Americans with Disabilities Act (disability discrimination), the Age Discrimination in Employment Act, the Fair Labor Standards Act (setting forth right to federal minimum wage and overtime), state workers' compensations schemes, and state law counterparts to the federal anti-discrimination and wage and hour laws.

Some courts have exported the *Hoffman* rationale into other contexts, curtailing both undocumented workers' access to courts and entitlement to various rights and remedies. For example, a New Jersey state court interpreted *Hoffman* to preclude the ability of undocumented migrants terminated for discriminatory reasons to avail themselves of the protection afforded by New Jersey's anti-discrimination law.<sup>97</sup> Because federal discrimination statutes only apply to private employers with a minimum of 15 employees, the practical effect of such a ruling is that any undocumented migrant who works for an employer with fewer than 15 employees in the State of New Jersey has no enforceable right to be free from discriminatory termination in the work place.

In addition, other states including Kansas, New York, California, Pennsylvania, Michigan, Illinois, and Florida have similarly restricted the rights of undocumented workers since *Hoffman*. As a result, undocumented workers have lost protections in the areas of available remedies when injured or killed on the job, overtime pay, workers' compensation (a state-based system that provides remuneration for employees who have been injured while working on the job), family and medical leave and other areas.<sup>98</sup> Since *Hoffman*, a number of state courts have held that undocumented immigrants' access to certain workers' compensation benefits are limited by their immigration status, and in states where an individual may sue in tort for injury or wrongful death, those benefits have also been limited. Moreover, in some states, procedural and other barriers have blocked unauthorized workers' access to workers' compensation. For example, in Pennsylvania, undocumented immigrant workers' access to compensation for disability payments, based on the workers' wages at the time of the accident, have been limited by a decision of that state's highest court.<sup>99</sup> In Michigan, injured workers' access to workers' compensation benefits has been similarly limited by the highest state court.<sup>100</sup>

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

## ANNEX: RECOMMENDATIONS AND ENDNOTES

### RECOMMENDATIONS:

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

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

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

**Prisoners' right to remedy:** Congress should act immediately to ensure the Prison Abuse Remedies Act of 2009, H.R. 4335 (PARA) becomes law, and the Obama Administration should support its passage, to reinstate the ability of prisoners to challenge conditions of confinement that violate their rights by repealing the "physical injury" requirement of the Prison Litigation Reform Act (PLRA); exempting juveniles under age 18 from the burdens created by the PLRA; and amending the "exhaustion requirement."

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

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

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

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

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

**Erosion of remedies for victims of racial discrimination:** Congress should introduce and pass legislation addressing the *Sandoval* decision by providing a private right of action against entities receiving federal funding based on evidence of disparate impact under Title VI. In addition, Congress should pass legislation<sup>101</sup> to restore the historic construction of the rule governing motions to dismiss and the Judicial Conference should adopt changes to the rule itself to help make that change permanent and protect it from further judicial meddling.

**Violations of undocumented workers' employment rights:** Congress should introduce and pass the Civil Rights Act of 2009, which would address the *Hoffman Plastics* decision and ensure employment protections for non-citizens regardless of their immigration status. State legislatures should strengthen protections in state anti-discrimination and workers' compensation laws for undocumented persons.

## ENDNOTES:

<sup>1</sup> The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I, including the persecution of political dissidents and the denial of due process rights for non-citizens. In the intervening decades, the ACLU has advocated to hold the U.S. government accountable to the rights protected under the U.S. Constitution and other civil and human rights laws.

<sup>2</sup> This submission to the historic Universal Periodic Review of the United States is contributed by a coalition comprised of the American Civil Liberties Union (ACLU), ACLU Foundation, over 500,000 ACLU members, ACLU of Alabama, ACLU of Alaska, ACLU of Arizona, ACLU of Arkansas, ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties, ACLU of Colorado, ACLU of Connecticut, ACLU of Delaware, ACLU of Florida, ACLU of Georgia, ACLU of Hawaii, ACLU of Idaho, ACLU of Illinois, ACLU of Indiana, ACLU of Iowa, ACLU of Kansas and Western Missouri, ACLU of Kentucky, ACLU of Louisiana, Maine Civil Liberties Union, ACLU of Maryland, ACLU of Massachusetts, ACLU of Michigan, ACLU of Minnesota, ACLU of Mississippi, ACLU of Eastern Missouri, ACLU of Montana, ACLU of the National Capital Area, ACLU of Nebraska, ACLU of Nevada, New Hampshire Civil Liberties Union, ACLU of New Jersey, ACLU of New Mexico, New York Civil Liberties Union, ACLU of North Carolina, ACLU of Ohio, ACLU of Oklahoma, ACLU of Oregon, ACLU of Pennsylvania, ACLU of Puerto Rico, ACLU of Rhode Island, ACLU National Office in Charleston South Carolina, ACLU of South Dakota, ACLU of Tennessee, ACLU of Texas, ACLU of Utah, ACLU of Vermont, ACLU of Virginia, ACLU of Washington, ACLU of West Virginia, ACLU of Wisconsin, and ACLU of Wyoming.

<sup>3</sup> See, e.g., Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *adopted* November 29, 1985, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *adopted* December 16, 2005, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005); U.N. Human Rights Commission, *Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms*, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, E.CN.4/2000/62, §§ 2(b), 2(c), 3(d), *available at* [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/42bd1bd544910ae3802568a20060e21f/\\$FILE/G0010236.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/42bd1bd544910ae3802568a20060e21f/$FILE/G0010236.doc); See also Francesco Francioni, ed., *ACCESS TO JUSTICE AS A HUMAN RIGHT* (Oxford: Oxford University Press, 2007).

<sup>4</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, art. 9; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *opened for signature* Nov. 4, 1950, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11, *entered into force* 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, arts. 5, 6.

<sup>5</sup> Inter-Am. Comm'n on Human Rights, *Access to Justice as a Guaranty of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights* 47 (2007) para. 182, OEA/Ser.L./V/II.129 doc. 4. The Commission also noted the importance of access to counsel in its recent report entitled "Access to Justice for Women Victims of Violence in the Americas."

<sup>6</sup> International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008, art. 13 ("States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.").

<sup>7</sup> Universal Declaration of Human Rights, *adopted and proclaimed* December 10, 1948, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); ICCPR, *supra* note 4, art. 2(3) ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), *adopted* December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987, *ratified* by the United States on October 21, 1994, art. 14, sec. 1 (requiring countries to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), *adopted* December 21, 1965, G.A.

Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* January 4, 1969, *ratified* by the United States on October 21, 1994, art. 6 (granting victims of racial discrimination “the right to seek ... just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), art. 25 (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4, art. 13 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).

<sup>8</sup> See, e.g., Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); Committee on Economic, Social and Cultural Rights, General Comment 9, *The Domestic Application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003).

<sup>9</sup> Case No. 6586 Inter-Am. C.H.R. 91, OEA/ser.L.V/II/61, doc. 22 rev. 1 (1983), at paras. 166, 176; See also *Gary Hermosilla et al.*, Case No. 10.843, Inter-Am C.H.R. (1988).

<sup>10</sup> See, e.g., *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, Communication No. 30/1978, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 109, para. 13.3 (1985); see also *Alberto Grille Motta v. Uruguay*, Communication No. 11/1977, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 54, para. 14 (1984); *William Torres Ramirez v. Uruguay*, Communication No. 4/1977 (26 January 1978), Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 4, para. 16 (1984); *Edgardo Dante Santullo Valcada v. Uruguay*, Communication No. 9/1977, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 43, para. 11 (1984); *Anthony McLeod v. Jamaica*, Communication No. 734/1997, U.N. Doc. CCPR/C/59/D/734/1997 (3 June 1998); *McCann and others v. United Kingdom*, 324 Eur. Ct. H.R. 31 (ser. A) (1995); *Avsar v. Turkey*, App. No. 25657/94, Eur. Ct. H.R., at para. 393 (2001). See also Thomas M. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, *Michigan Journal of International Law*, 23 MICH. J. INT’L L. 977, 986 (2002).

<sup>11</sup> See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 451, 482 (1990); Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, at 207, U.N. Doc. A/47/49 (1992), adopted Dec. 18, 1992 (stating that individuals responsible for forced disappearances are liable under civil law).

<sup>12</sup> See, e.g., Convention against Torture, *supra* note 7, art. 14; ICCPR, *supra* note 4, art. 9(5); American Convention on Human Rights, *supra* note CHK, art. 63(1); European Convention, *supra* note CHK, art 5(5); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 3, arts. 8-21; Study Concerning the Right to Restitution, *Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Preliminary Report*, submitted by Mr. Theo van Boven, Special Rapporteur, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 42d Sess., at 1, U.N. Doc. E/CN.4/Sub.2/1990/10 (1990) (quoting Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Resolution 1988/11 (Sept. 1, 1988)).

<sup>13</sup> Death Penalty Information Center, *Executions in 2010*, available at <http://deathpenaltyinfo.org/executions-2010>; Death Penalty Information Center, *The Death Penalty in 2009: Year End Report*, Dec. 2009, available at <http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf>.

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

<sup>15</sup> See ACLU, *Broken Justice: The Death Penalty in Alabama* (Oct. 2005), available at [http://www.aclualabama.org/WhatWeDo/BrokenJustice\\_report.pdf](http://www.aclualabama.org/WhatWeDo/BrokenJustice_report.pdf); The Southern Center for Human Rights, “*If You Cannot Afford a Lawyer...*”: A Report on Georgia’s Failed Indigent Defense System (Jan. 2003).

<sup>16</sup> *Id.*

<sup>17</sup> Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts*, Dec. 2002, available at <http://02f2fd4.netsolhost.com/tds/images/publications/chapters.pdf>.

<sup>18</sup> James S. Liebman et al., *A Broken System: Error Rates in Capital Cases: 1973-1995* (Jun. 2000), available at [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf).

<sup>19</sup> While the U.S. Supreme Court has recognized a defendant’s Sixth Amendment right to counsel in criminal cases, see *Gideon v. Wainwright*, 372 U.S. 355 (1963), it has not recognized that right in post-conviction proceedings, see *Murray v. Giarratano*, 492 U.S. 1 (1989).

<sup>20</sup> Claims of ineffective assistance of counsel in violation of the Sixth Amendment are subject to a two-prong standard, set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that counsel performed deficiently and that the deficient performance prejudiced the defendant’s case.

<sup>21</sup> *Murray v. Giarratano*, *supra* note 19.

<sup>22</sup> Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104 – 132, § 101 – 08, 110 Stat 1214 (1996).

<sup>23</sup> Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?* 27 LOY. U. CHI. L.J. 523, 526 (1996).

- <sup>24</sup> James S. Liebman, *An "Effective Death Penalty"?* *AEDPA and Error Detection in Capital Cases*, 67 Brooklyn L. Rev. 411, 425 (2001).
- <sup>25</sup> 28 U.S.C. § 2254(d).
- <sup>26</sup> Death Penalty Information Center, *Innocence and the Death Penalty*, available at <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>; Death Penalty Information Center, *The Innocence List*, available at <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.
- <sup>27</sup> Pub. L. 104-134 (Apr. 26, 1996).
- <sup>28</sup> See Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the United States* (June 2009), available at <http://www.hrw.org/en/reports/2009/06/15/no-equal-justice>.
- <sup>29</sup> The provision reads as follows: "No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). See also 28 U.S.C. § 1346(b)(2) (applying "physical injury requirement" to suits where the United States is a defendant).
- <sup>30</sup> *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001) (no damages for violation of religious rights); *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) (no damages for violation of religious rights).
- <sup>31</sup> See *Hancock v. Payne*, 2006 WL 21751 at \*1, 3 (S.D. Miss. Jan. 4, 2006) (complaints that officers forcibly sodomized prisoners barred by provision); *Smith v. Shady*, 2006 WL 314514 at \*2 (M.D. Pa. Feb. 3, 2006) (complaint that correctional officer grabbed prisoner's penis barred by provision).
- <sup>32</sup> *Young v. Knight*, 113 F.3d 1248, 1997 WL 297692 (10th Cir. June 5, 1997); See also *Colby v. Sarpy Co.*, 2006 WL 519396 (D. Neb. Mar. 1, 2006) (dismissal of a claim of wrongful confinement for four months).
- <sup>33</sup> *Luong v. Hatt*, 979 F. Supp. 481 (N.D. Tex. 1997).
- <sup>34</sup> *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999).
- <sup>35</sup> *Weatherspoon v. Valdez*, 2005 WL 1201118 (N.D. Tex. May 17, 2005).
- <sup>36</sup> The Convention against Torture defines torture as either "physical" or "mental." The Committee against Torture has called for repeal of the PLRA's "physical injury" provision, citing article 14 of the Convention, which requires that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation." Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America, CAT/C/USA/CO/2*, paras. 29-30 (Concluding Observations/Comments), July 25, 2006; Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America, 15/05/2000.A/55/44*, paras. 179-80 (Concluding Observations/Comments), May 15, 2000.
- <sup>37</sup> 42 U.S.C. § 1997e(a).
- <sup>38</sup> See Giovanna E. Shay and Joanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 *Cardozo Law Review* 291, 321 (2007) (reporting that in cases in which an exhaustion issue was raised after the Supreme Court decision in *Woodford v. Ngo*, 548 U.S. 81, 126 S. Ct. 2378 (2006), all of the prisoner's claims survived in fewer than 15% of reported cases).
- <sup>39</sup> The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. See Karl O. Haigler, et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17-19 (1994), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102>.
- <sup>40</sup> According to a 2006 U.S. Department of Justice report, 56% of State prisoners, 45% of Federal prisoners, and 64% of jail prisoners in the United States suffer from mental illness. Moreover, experts estimate that people with mental retardation may constitute as much as 10 percent of the prison population. See Doris J. James and Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates, Bureau of Justice Statistics Special Report 1*, Department of Justice, Bureau of Justice Statistics, December 14, 2006; Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, available at [www.thearc.org/faqs/crimqa.html](http://www.thearc.org/faqs/crimqa.html).
- <sup>41</sup> See *Woodford v. Ngo*, *supra* note 15 at 2402 (Stevens, J., dissenting) (noting that most grievance systems have deadlines of 15 days or less, and that the grievance systems of nine states have deadlines of between two and five days).
- <sup>42</sup> See, e.g., *Pearson v. Welborn*, 471 F.3d 732, 745 (7th Cir. 2006) (affirming jury verdict that prisoner was sent to a "supermax" facility for a year in retaliation for First Amendment-protected complaints about conditions); *Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances).
- <sup>43</sup> See 18 U.S.C. § 3626(g)(3), (5); 42 U.S.C. § 1997e(h); 28 U.S.C. § 1915(h); and 28 U.S.C. § 1915A(c).
- <sup>44</sup> For example, the Federal Bureau of Justice Statistics recently found widespread sexual abuse of incarcerated juveniles across the nation, with 12% of all youth in state juvenile facilities reporting one or more incidents of sexual victimization within the past year. Staff sexual and physical abuse and harassment of youth in custody has been an issue in states from New York to Hawaii. In the Texas juvenile system, for example, boys and girls were sexually and physically abused by prison staff, and faced retaliation, including being thrown into an isolation cell in shackles if they complained. See, e.g., Allen J. Beck, Ph.D, Paige M. Harrison, and Paul Guerino, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09 1*, Department of Justice, Bureau of Justice Statistics (Jan. 2010); Stop Prisoner Rape, *THE SEXUAL ABUSE OF FEMALE INMATES IN OHIO* (Dec. 2003), available at <http://www.spr.org/pdf/sexabuseohio.pdf> (including discussion of sexual assaults by staff in juvenile wing of

facility); ACLU of Hawai'i, HAWAI'I YOUTH CORRECTIONAL FACILITY TO PAY OVER HALF A MILLION DOLLARS FOR 'RELENTLESS CAMPAIGN OF HARASSMENT' OF GAY AND TRANSGENDER YOUTH, June 15, 2006 (threats of violence and physical and sexual assault), available at <http://www.acluhawaii.org/news.php?id=24>; Letter from Deval Patrick, Assistant Attorney General, Civil Rights Division of U.S. Department of Justice to Louisiana Governor Mike Foster, July 15, 1996 (describing physical and sexual assaults on youth held in secure juvenile facilities in Louisiana); American Civil Liberties Union & Human Rights Watch, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS, 44-56, 63-71 (2006); Gregg Jones, et al., *TYC Facilities Ruled by Fear*, DALLAS MORNING NEWS, March 18, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/031807dnprotycrctaliat.3e701e5.html>.

<sup>45</sup> See, e.g., *M.C. ex rel. Crider v. Whitcomb*, 2007 WL 854019, at \*3 (S.D. Ind. 2007); *Harris v. Le Roy Baca*, 2003 WL 21384306, at \*3 (C.D. Cal. 2003) (rejecting the contention that a grievance filed by counsel on prisoner's behalf satisfies the exhaustion requirement); *El'Shabazz v. City of Philadelphia*, 2007 WL 2155676, at \*3 (E.D. Pa. 2007) (grievances filed by prisoner's father on his behalf did not satisfy PLRA); *Minix v. Pazera*, 2005 WL 1799538, at \*7 (N.D. Ind. 2005) (efforts of detained juvenile's mother to stop ongoing abuse of her son did not satisfy PLRA); *Brock v. Kenton County, KY*, 93 Fed. Appx. 793, 795, 799 (6th Cir. 2004).

<sup>46</sup> See, e.g. *Rasul v. Myers*, 563 F.3d 527, 528 (D.C. Cir. 2009) (no reasonable government official would know that Guantanamo detainees had due process rights or a right to be free from "cruel and unusual punishment" as provided by the Fifth and Eighth Amendments to the U.S. Constitution); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. N.Y. 2009) (government argued qualified immunity, but court did not rule on it); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007).

<sup>47</sup> See, e.g., *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (Alien Tort Statute claim dismissed on ground that non-state actors cannot be liable. This decision grants unwarranted immunity for private contractors through an erroneous conclusion equating them with armed forces—a perversion of International Humanitarian Law rules and principles of distinction between combatants and civilians).

<sup>48</sup> See, e.g., *Mohamed v. Jeppesen Dataplan*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd*, 563 F.3d 992 (9th Cir. Cal. 2009), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. Cal. 2009); *El-Masri v. Tenet*, 479 F.3d 296 (4th Cir. Va. (2007).); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. N.Y. 2009) (government asserted state secret privilege, but court did not rule on it).

<sup>49</sup> Scott Shane, "Invoking Secrets Privileges Becomes a More Popular Legal Tactic by U.S.," N.Y. TIMES, Jun. 4, 2006.

<sup>50</sup> See, e.g. Complaint, *Khaled El-Masri v. George J. Tenet*, No. 05-cv-1417 (E.D. Va., filed Dec. 6, 2005), available at [http://www.aclu.org/images/extraordinaryrendition/asset\\_upload\\_file829\\_22211.pdf](http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf).

<sup>51</sup> Brief for Plaintiff, Statement of Khaled El-Masri, *Khaled El-Masri v. George J. Tenet*, No. 05-cv-1417 (E.D. Va., filed Dec. 6, 2005), available at <http://www.aclu.org/safefree/extraordinaryrendition/22201res20051206.html>.

<sup>52</sup> *Khaled El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

<sup>53</sup> *Khaled El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007).

<sup>54</sup> *Khaled El-Masri v. U.S.*, 128 S.Ct. 373 (2007).

<sup>55</sup> ACLU, PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF KHALED EL-MASRI BY THE UNITED STATES OF AMERICA WITH A REQUEST FOR AN INVESTIGATION AND HEARING ON THE MERITS at 77-85 (Apr. 9, 2008) (on file with the Inter-American Commission on Human Rights, Organization of American States), available at [http://www.aclu.org/files/pdfs/safefree/elmasri\\_iachr\\_20080409.pdf](http://www.aclu.org/files/pdfs/safefree/elmasri_iachr_20080409.pdf).

<sup>56</sup> A former Jeppesen employee informed *The New Yorker* magazine that, at an internal corporate meeting, a senior Jeppesen official stated, "We do all of the extraordinary rendition flights—you know, the torture flights. Let's face it, some of these flights end up that way." See Jane Mayer, *Outsourcing: The C.I.A.'s Travel Agent*, THE NEW YORKER, Oct. 30, 2006.

<sup>57</sup> *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Castle Rock*, 125 S. Ct. 2796 (2005).

<sup>58</sup> *Id.*

<sup>59</sup> *Morrison*, 529 U.S. at 618-20.

<sup>60</sup> *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>61</sup> In this case, the Court's decision also distorts state legislatures' intent in requiring enforcement of protective orders and ignores the dynamics of police non-responsiveness to domestic violence that led to these laws. It displays blindness to the realities of domestic violence and the legal structures created to respond to it.

<sup>62</sup> In an effort to seek redress for this systemic failure of the police and other governmental actors to respond to domestic violence victims, the ACLU filed a petition with the Inter-American Commission on Human Rights in December 2005.

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

<sup>63</sup> Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, *United States accession*, April 29, 1970, 23 U.S.T. 3227, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf).

<sup>64</sup> For example, in *Sabbithi, et al. v. Al Saleh, et al.*, the ACLU represents Kumari Sabbithi, Joaquina Quadros, and Tina Fernandes, three Indian women who were employed as domestic workers by a Military Attaché to the Embassy of Kuwait and his wife, to work in their home in Virginia. In the summer of 2005, the three women were brought to the United States under false pretenses, where they were subjected to physical and psychological abuse by their employers and forced to work against their will. In the winter of that year, fearing for their lives, each of the women individually fled the household. In January 2007, the three workers brought a lawsuit against the diplomat, his wife, and the State of Kuwait for trafficking and forced labor. In March 2009, the court granted the Motion to Dismiss by the diplomat and his wife, on the grounds of diplomatic immunity. In



November 2009, the court also granted the Motion to Dismiss by the State of Kuwait, on grounds related to service. The ACLU filed and was granted a Motion for Reconsideration. A hearing is scheduled for May 2010 in federal district court in Washington, D.C. See *Sabbithi v. Al Saleh*, No. 07-cv-00115 (D.D.C. filed Jan. 18, 2007).

<sup>65</sup> In 2007, the ACLU petitioned the Inter-American Commission on Human Rights (IACHR) on behalf of five domestic workers, asking the IACHR to hold the United States responsible for its neglect and failure to protect domestic workers employed by diplomats from human rights abuses and to ensure that these workers can seek meaningful redress for their rights. The petition is still pending. See *Petition Alleging Violations of the Human Rights of Domestic Workers Employed by Diplomats by the United States of America*, Inter-American Commission on Human Rights (2007), available at <http://www.aclu.org/womens-rights/petition-un-domestic-workers-iachr>.

<sup>66</sup> See, e.g., U.S. Dep't of State, Statement of Interest in *Gonzalez Paredes v. Vila*, No. 06-0059-cv (D.D.C.), docket no. 23; Statement of Interest of the United States, *Begum v. Saleh*, No. 1:99-cv-11834-RMB (S.D.N.Y. filed Dec. 7, 1999), available at [www.state.gov/documents/organization/6655.doc](http://www.state.gov/documents/organization/6655.doc). See also Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, Jun. 26-Nov. 21, 1947, 61 Stat. 3416; Convention on Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, *United States accession*, Apr. 29, 1970, 21 U.S.T. 1418.

<sup>67</sup> See, e.g., *Begum v. Saleh*, where the complaint sought damages for defendants' allegedly holding plaintiff in involuntary servitude prohibited by the Thirteenth Amendment, failure to pay minimum wage under federal and state laws, assault and battery, false imprisonment, conversion, and trespass to chattels.

<sup>68</sup> *Tabion v. Mufti*, 73 F.3d 535, 537-540 (4th Cir. 1996).

<sup>69</sup> For example, in *Vishranthamma v. Al-Awadi*, the ACLU serves as amicus in support of Swarna Vishranthamma, a domestic worker who was exploited and abused by her employer, the First Secretary to the Kuwaiti mission to the U.N. For four years, she was forced to work seven days a week, 18 hours a day, paid far below minimum wage, and given no overtime compensation. She was also physically and sexually abused, repeatedly threatened, and verbally assaulted. Her employers confiscated her passport, threatened her with arrest should she try to leave, and severely restricted her contact with family and friends. Despite her fears of retaliation, she ultimately escaped from her employer's home. Ms. Vishranthamma filed a civil action against her employer seeking redress and compensation for the exploitation she endured, but the case was dismissed by the Southern District of New York, after the court concluded her employer was entitled to diplomatic immunity. On February 16, 2010, the ACLU and 12 other organizations submitted an amicus brief to the U.S. Court of Appeals for the Second Circuit in support of Ms. Vishranthamma's claims against her former employers, arguing that human trafficking and exploitation of domestic workers are commercial activities outside the scope of the Vienna Convention's immunity for diplomats. The case is currently pending.

<sup>70</sup> Jayashri Srikantiah, Stanford Immigrants' Rights Clinic, and Karen Tumlin, National Immigration Law Center, *BACKGROUND: STIPULATED REMOVAL* (2008), available at <http://www.nilc.org/immlawpolicy/removpsds/stipulated-removal-bkgrndr-2008-11.pdf>.

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., Anna Gorman, *Concerns Arise Over Fast-Track Deportation Program*, L.A. TIMES, Mar. 2, 2009. As of 2008, nearly half of all stipulated orders entered since 1999 were signed at just three large immigration detention facilities in Eloy, Arizona; Lancaster, California; and Los Fresnos, Texas. Srikantiah and Tumlin, *supra* note 70.

<sup>73</sup> Srikantiah and Tumlin, *supra* note 70

<sup>74</sup> Department of Justice and ICE Joint Press Release, "ICE and DOJ Joint Enforcement Action at Iowa Meatpacking Plant," May 12, 2008, available at <http://www.ice.gov/pi/news/newsreleases/articles/080512cedarrapids.html>.

<sup>75</sup> Department of Justice Press Release, "Over 300 Criminal Arrests In Postville ICE Operation," May 15, 2008, available at [http://www.usdoj.gov/usao/ian/press/May\\_08/5\\_15?08\\_Agriprocessors.html](http://www.usdoj.gov/usao/ian/press/May_08/5_15?08_Agriprocessors.html).

<sup>76</sup> U.S. Attorney's Office Northern District of Iowa Press Release, "300 Now Convicted and Sentenced Following May Arrests in Postville," Jun. 10, 2008, available at [http://www.usdoj.gov/usao/ian/press/June\\_08/6\\_10?08\\_Postville.html](http://www.usdoj.gov/usao/ian/press/June_08/6_10?08_Postville.html).

<sup>77</sup> Erik Camayd-Freixas, "Interpreting after the Largest ICE Raid in US History: A Personal Account," Jun. 13, 2008, available at <http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf>; Muzaffar Chishti, *Iowa Raid Raises Questions about Stepped-Up Immigration Enforcement*, Migration Policy Institute, Jun. 16, 2008, available at <http://www.migrationinformation.org/USFocus/display.cfm?ID=686>. Attorneys who represented the arrested workers were provided a pre-packaged "manual" at a meeting at the federal courthouse in Cedar Rapids in anticipation of the mass criminal prosecutions following the raid. It contained scripts for plea and sentencing hearings as well as documents providing for guilty pleas and waivers of rights. See Letter of Rockne Cole to Representative Zoe Lofgren (Jul. 24, 2008).. According to the Federal Courts' June 2008 Newsletter, *Third Branch*, the district court assembled checklists and forms related to initial appearances, status conferences, pleas and sentences prior to the raid. *Largest Ever Criminal Worksite Enforcement Operation Stretches Court*, THE THIRD BRANCH, Vol. 40 No. 6 (Jun. 2008), available at <http://www.uscourts.gov/ttb/2008-06/article01.cfm>.

<sup>78</sup> Human Rights Watch, *STILL AT RISK: DIPLOMATIC ASSURANCES ARE NO SAFEGUARD AGAINST TORTURE* (Apr. 2005), available at <http://www.hrw.org/en/reports/2005/04/14/still-risk-0>.

<sup>79</sup> Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html> (quoting senior United States official as stating that after an individual is rendered, the CIA are "still very much in control" and that they will often "feed questions to their investigators"). See also Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A01, available at

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[http://www.infowars.com/saved%20pages/Police\\_state/torture\\_wapost.htm](http://www.infowars.com/saved%20pages/Police_state/torture_wapost.htm); David E. Kaplan, et al., *Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After Al Qaeda*, U.S. NEWS & WORLD REPORT, Jun. 2, 2003, available at <http://www.usnews.com/usnews/news/articles/030602/2terror.b.htm> (describing rendition of individuals to Jordan, Egypt, Morocco and Syria). For a comprehensive news report on the practice of rendition See Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005.

<sup>80</sup> Second Periodic Report of the United States of America to the Committee Against Torture, UN Doc. CAT/C/48/Add.3/Rev.1, Jan. 13, 2006, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/400/82/PDF/G0640082.pdf?OpenElement>.

<sup>81</sup> *Khouzam v. Chertoff*, 549 F.3d 235 (3d Cir. 2008).

<sup>82</sup> *Khouzam v. Hogan, et al.*, 529 F. Supp. 2d 543 (M.D. Pa. 2008).

<sup>83</sup> *Khouzam v. Chertoff*, *supra* note 81.

<sup>84</sup> Department of Justice Press Release, “Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President,” Aug. 24, 2009, available at <http://www.fas.org/irp/news/2009/08/ag082409b.html>; See also David Johnston, *U.S. Says Rendition to Continue, but With More Oversight*, N.Y. TIMES, Aug. 24, 2009, available at <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>.

<sup>85</sup> *Id.*

<sup>86</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>87</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (creating a new requirement that, to overcome motions to dismiss, federal complaints must state enough facts to persuade the presiding court that the claim is “plausible”; this replaced a standard set out in 1957 in *Conley v. Gibson*, 355 U.S. 41 (1957), which said that civil cases should not be dismissed “unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief”).

<sup>88</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (ruling that civil claimants must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged” and that in making that determination a court is to “draw on its judicial experience and common sense”).

<sup>89</sup> 42 U.S.C. § 2000d et seq.

<sup>90</sup> See *Conley v. Gibson*, 355 U.S. 41 (1957) (holding that civil cases should not be dismissed “unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief”). The Supreme Court has cited the language of *Conley* in at least a dozen decisions in the half-century since the case was decided.

<sup>91</sup> See Editorial, *Restoring Access to the Courts*, N.Y. TIMES, Dec. 22, 2009; Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010), available at <http://www.lclark.edu/livewhale/download/?id=4103>.

<sup>92</sup> See, e.g., Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1494683](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1494683); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1535093](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535093).

<sup>93</sup> For examples of cases dismissed under the revised pleading standard, see, e.g., *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (in a case brought by a police commissioner and his deputies following termination of their employment, in which plaintiffs argued *inter alia* that the defendants discriminated against them on account of their race, dismissal of the action is affirmed without leave to amend because, based on the facts alleged in the complaint, the complaint fails to articulate any claim for relief that is plausible on its face as required under *Iqbal* and *Twombly*, finding in part that because one of the fired employees is white, it was implausible that the African-American plaintiffs were fired as a result of animus); *Oinonen v. TRX, Inc.*, 2010 WL 396112 (N.D.Tex. 2010) (dismissing, with leave to amend, an age discrimination disparate impact class action involving a mass layoff of workers over 40 years of age, on the basis of plaintiffs’ failure to meet heightened pleading standards under *Iqbal* and *Twombly*, finding that “Plaintiffs point to the layoff itself as the practice that disparately impacted older workers. However, they do not identify any specific test, requirement, or practice in the layoff selection process that is allegedly responsible for the purported statistical disparities. Identifying a specific practice is not a trivial burden, and is necessary to protect employers from potential liability when the statistical imbalances are the result of legitimate and non-discriminatory employment actions.”).

<sup>94</sup> See, e.g., H.R. 4115 Open Access to the Courts Act of 2009; S. 1504 Notice Pleading Restoration Act of 2009. Both were introduced in the 111<sup>th</sup> Congress and attempt to achieve the result of restoring the *Conley* standard as it had been construed prior to the *Iqbal* and *Twombly* decisions.

<sup>95</sup> In September 2003, the Inter-American Court of Human Rights issued an advisory opinion on the rights of undocumented migrants, in which it held that international principles of human rights prohibit discrimination on the basis of immigration status. In particular, the Court examined the consequences of the *Hoffman* decision on the rights of undocumented workers. The Court held that states must ensure the right to access to justice, the right to effective jurisdictional protection, and the right to remedy irrespective of migratory status, stating that “States must ensure that all persons have access, without any restriction, to a simple and effective recourse that protects them in determining their rights, irrespective of their migratory status.” See Inter-American Court of Human Rights, Advisory Opinion OC-18/03 Requested by the United Mexican States, *Juridical Condition and Rights of the Undocumented Migrants*, paras. 107-110, Sept. 17, 2003, available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf).

<sup>96</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

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<sup>97</sup> *Crespo v. Evergo*, 366 N.J.Super. 391 (N.J.Super.A.D., 2004).

<sup>98</sup> Recognizing that, in some states, employment and labor protections under state law have been either eliminated or severely limited for undocumented workers (including basic workplace protections such as freedom from workplace discrimination and entitlement to hold an employer responsible for a workplace injury), the ACLU, along with the National Employment Law Project and the Transnational Legal Clinic at the University of Pennsylvania School of Law, filed a petition urging the Inter-American Commission on Human Rights to find the United States in violation of its universal human rights obligations by failing to protect millions of undocumented workers from exploitation and discrimination in the workplace. The petition argues that the U.S. is not in compliance with international human rights law, which requires all nations to apply their workplace protections equally and without discrimination based on immigration status. The petition was submitted to the commission on behalf of the United Mine Workers of America, AFL-CIO, Interfaith Justice Network, and six immigrant workers who are representative of the millions of undocumented workers in the U.S. labor force. The petition is currently pending. *See* Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America, Inter-American Commission on Human Rights, Nov. 1, 2006, available at [http://www.aclu.org/files/images/asset\\_upload\\_file946\\_27232.pdf](http://www.aclu.org/files/images/asset_upload_file946_27232.pdf).

<sup>99</sup> *Reinforced Earth C. v. Workers' Compensation Appeal Bd. (Astudillo)* 570 Pa. 464.

<sup>100</sup> *Sanchez v. Eagle Alloy Inc.*, 254 Mich. App. 651 (Mich. Ct. App. 2003) cert. denied *Sanchez v. Eagle Alloy, Inc.*, 471 Mich. 851 (Mich. 2004).

<sup>101</sup> H.R. 4115 Open Access to the Courts Act of 2009 and S. 1504 Notice Pleading Restoration Act of 2009 have been introduced in the 111<sup>th</sup> Congress. Both attempt to achieve the result of restoring the *Conley* standard as it had been construed prior to the *Iqbal* and *Twombly* decisions.