

# PLI Current

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# Championing the Rights of People with Serious Medical Needs in Immigration Detention

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There is a human rights crisis in immigration detention facilities across this country. People in immigration detention live in deplorable conditions that endanger their health, including those that are confined to county jails that contract with the United States Immigration and Customs Enforcement agency (ICE) to house people awaiting their immigration proceedings. Immigration detention is supposed to be non-punitive, yet for many it can damage their health and even cost them their lives.

As advocates, we can fight back. Following the lead of decades of advocacy and litigation by the prisoners' rights community, immigrant justice advocates, their supporters, and those who have experienced immigration detention can build a body of law to hold ICE, the jails, medical providers, and other relevant

entities accountable. In so doing, we can use challenges focused on health and the lack of access to healthcare as a catalyst to bring an end to the immigration detention machine.

For over forty years, the New York Lawyers for the Public Interest (NYLPI) has been a leading civil rights advocate for New Yorkers experiencing marginalization, building strength and capacity for individual solutions and long-term impact. NYLPI's Health Justice Program works to bring a racial justice and immigrant rights focus to healthcare advocacy in New York City and New York State. We work to: (1) challenge health disparities; (2) eliminate racial and ethnic discrimination and systemic and institutional barriers that limit universal access to healthcare; (3) promote immigrant and language access to healthcare, including representing undocumented and uninsured immigrants and people confined to immigration detention with serious healthcare needs; and (4) address the social determinants of health so that all New Yorkers can live a healthy life.

In close partnership with immigration legal services providers and community-based advocates, five years ago, NYLPI began a program seeking to improve access to healthcare in detention, help people get released, assist in immigration cases where necessary, and fundamentally shine a light on the conditions in detention and hold ICE and county jails accountable. NYLPI developed a multi-pronged program, including individual advocacy for current and recently detained individuals, high-impact reports, litigation, and strategic systemic solutions. Essential to our work is NYLPI's medical-legal-community partnership, which includes a growing network of medical professionals who have volunteered to perform medical record reviews and in-person consultations for people in detention to be used in requests for better care, requests for release, and underlying immigration cases. NYLPI and the Medical Provider Network Steering Committee recruit volunteer medical providers and provide training in immigration detention structures, performing reviews of medical records, performing in-person consultations in immigration detention jails, drafting advocacy letters, and raising awareness of conditions in immigration detention in medical spaces. Through the work of the medical-legal-community partnership, as well as our deep connections in the advocacy and directly impacted community, NYLPI consistently analyzes patterns and experiences to inform systemic strategies.

Despite the constitutional right to adequate healthcare, very few cases are brought. Litigation is a valuable tool that, along with organizing and political

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pressure, can help hold these entities accountable and find some redress for those harmed and their families. There are strict rules and timelines that every advocate or client considering this form of advocacy must remember. Two New York Lawyers for the Public Interest’s cases, *Charles v. Orange County*, No. 16-5527 (S.D.N.Y. 2016) and *Charles v. United States*, No. 18-cv-00883 (S.D.N.Y. 2018), demonstrate the value in bringing litigation to shine a light on these atrocious conditions, affirm the legal standards for people in civil confinement, and provide redress for harmed individuals.

**People in immigration detention experience a variety of health-related failures and constitutional violations on a daily basis, including failing to provide mental health discharge planning.**

People in immigration detention experience a variety of health-related failures and constitutional violations on a daily basis, including failing to provide mental health discharge planning. Mental health discharge planning, including an interim supply of medication and a plan addressing how one would receive care once released, is an essential component of adequate healthcare—and when denied can lead to decompensation and hospitalization. This is what happened to our clients detained in Orange County, New York who were “discharged and dumped” from immigration detention. We sued the County for its deliberate indifference to our clients’ serious medical needs. The U.S. Court of Appeals for the Second Circuit handed down a landmark decision in a “case of first impression,” *Charles v. Orange County*, that found government officials can be held accountable on constitutional grounds for failing to provide mental health discharge planning for people in immigration detention. We also sued the United States under the

Federal Tort Claims Act, and the U.S. District Court for the Southern District of New York allowed our case to proceed, ending in a large settlement for our client. Our role is to step up and bring the cases that will help establish stronger accountability for others, not just as lawyers but as people trying to use the law to make change.

This article will first cover the general patterns of deficiencies we have seen over the last five years in immigration detention facilities in the New York area. Second, it will survey basic forms of civil rights challenges for those who have experienced negative health consequences while being confined to immigration detention, specifically focused on county jails that contract with ICE.<sup>1</sup> Third, it will describe the *Charles* cases, including recent appellate law related to the standard for determining whether an entity or official has been deliberately indifferent to the serious medical needs of an individual in civil detention.

## **Healthcare in Immigration Detention**

For the last five years, New York Lawyers for the Public Interest has developed a medical-legal-community partnership that assists people to seek better care in detention, release from detention, or immigration relief, as well as track and analyze patterns and practices. This has resulted in gathering the experiences of over 100 people detained at New York–area county jails. Through these conversations, consultations with volunteer medical providers, and advocacy with community-based organizations we found a host of deficiencies in the medical care provided to people in immigration detention, including: 1) denial of continued treatment underway upon a person’s admission; 2) incomplete intake assessments; 3) language access barriers; 4) lengthy delays in receiving medical treatment; 5) denial of requests for off-site specialized care; 6) inadequate treatment for acute pain; 7) failure to manage chronic illness; 8) denial of adequate exercise and nutrition; 9) failure to evaluate and manage mental health problems; 10) failure to keep medical records up to standards; and 11) failure to provide mental health discharge planning. The responsibility for individuals in immigration detention lies with both the county jails and with ICE and the United States.

## **Civil Rights Litigation Strategies**

Under current law, there are several avenues for holding county jails and ICE accountable for failing to provide adequate medical care to people in immigration

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detention.<sup>2</sup> First, one can bring a 42 U.S.C. § 1983 claim against County defendants as state actors violating the U.S. Constitution while acting under color of law. When suing a municipal defendant, one must show that the action was based on a custom, policy, or practice, pursuant to *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). The statute of limitations for a § 1983 case in New York is three years and in New Jersey is two years. Attorneys' fees are available. There is no exhaustion requirement. See *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982). One can also sue the County under state tort law, for example, negligence or intentional infliction of emotional distress. In so doing, there are very strict timelines for filing a Notice of Claim to put the County on notice. Each state has a form and specific procedure. In both New York and New Jersey, the statute of limitations for filing a Notice of Claim is ninety days. N.Y. G.M.L. § 50-e; N.J. Rev. Stat. § 59:8-8. Further, it is important to watch the case filing statute of limitations as well. For example, in New York, one must file the case in court within one year and ninety days of the incident, but at least thirty days after filing the Notice of Claim. N.Y. G.M.L. § 50-i. Additionally, the County is entitled to a 50-h hearing, where it can question the claimant on issues related to the Notice of Claim. N.Y. G.M.L. § 50-h.

If seeking to hold ICE accountable, there are two avenues available in most circumstances, and similarly both have many exceptions and timelines which require detailed analysis.<sup>3</sup> The Federal Tort Claims Act (FTCA) provides an exception for specific torts to the federal government's general immunity. 28 U.S.C. § 2675. There are strict administrative exhaustion rules, and the United States must be named as the defendant. A person seeking to bring an FTCA claim must fill out Form 95 within two years of the incident and cannot file in court until six months have elapsed since the filing of Form 95, or they must file in court within six months of the federal government's decision on the administrative claim. 28 C.F.R. § 14.2; available at: <https://www.gsa.gov/forms-library/claim-damage-injury-or-death>. Under the FTCA, an individual can only receive compensatory damages, while attorneys' fees generally are not available. 28 U.S.C. §§ 2674 and 2678. Finally, although it has been very limited through case law, it is important to still consider whether to bring a case against ICE or individual federal actors for constitutional violations using *Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A *Bivens* case is available through § 1983 and thus does not require administrative exhaustion. The damages are also broader

than under the FTCA; however, there is a limitation that the plaintiff must lack a statutory cause of action or meaningful remedy, so most courts do not allow both FTCA and *Bivens* claims to proceed simultaneously.

## **Challenging Discharging and Dumping As Deliberate Indifference to Serious Medical Needs**

In 2015 and 2016, respectively, our clients Michelet Charles and Carol Small were discharged and dumped after spending one year and eight months, respectively, in immigration detention at Orange County Detention Center. Both individuals had diagnosed mental illnesses that required daily medication and psychiatric treatment. For decades prior to detention, Mr. Charles managed his illness, along with maintaining employment and family life. Ms. Small was diagnosed in detention. Both received medication and somewhat regular psychiatric visits while in detention and the County was well aware of their needs. However, no one ever spoke to either of them during their nearly year-long detention about what would happen when they were released, how they could expect to connect to care, or how to get medication. Both individuals were released without interim medication and without any plan.

### **Objective recklessness can be shown by demonstrating that an actor knew or should have known of the resulting serious harm.**

For Mr. Charles, after winning immigration relief in the form of cancellation of removal, he was released from Varick Street Immigration Court in Manhattan with only his identification. Along with his immigration attorney, he asked his ICE Deportation Officer how, at the very least, he could get his remaining medication and the D.O. told him to ask Orange County. The next day, Mr. Charles and his daughter drove the three hours back to Orange County jail and were told

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at the door that he could not be given the medication remaining from his prescription because he had been released. He was given only his commissary money. Within two weeks, his health spiraled downward, and he spent nearly two months in inpatient care at a Long Island hospital.

Ms. Small was released directly from Orange County jail after a stipulation between her attorney and the federal government. Even with eleven days' notice of her release, she was also released without any interim medication or even a discussion of what would come next. Ms. Small was released at 6:30 at night with bus fare to New York City. She arrived in the city at 1:30 a.m. and slept in a diner for the night. Within a matter of days, she checked herself into an emergency room to try to receive the healthcare she needed.

Again, neither the County nor ICE ever provided any mental health discharge planning to either individual, never even a discussion, despite many opportunities.

### ***Charles v. Orange County—From Loss to Success***

In July 2016, NYLPI and its *pro bono* partner, the law firm Simpson Thacher & Bartlett, filed a § 1983 case in the Southern District of New York on behalf of Mr. Charles and Ms. Small against the County, the Sheriff's Department, the mental health provider, and the individual clinic directors. The case alleged the defendants were deliberately indifferent to the plaintiffs' serious medical needs by failing to provide mental health discharge planning in violation of the Fourteenth Amendment to the United States Constitution.<sup>4</sup> Recent case law from the U.S. Supreme Court and the Second Circuit helps outline the framework for a constitutional case on behalf of an individual in civil immigration detention. In 2015, the Supreme Court, in *Kingsley v. Hendrickson*, found that individuals in pre-trial detention are to be treated as well as, if not better than, those who are in criminal post-conviction custody. 135 S. Ct. 2466, 2473 (2015). The Second Circuit interpreted this decision in *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017), and held that when determining whether an actor is deliberately indifferent to serious medical needs, a court looks to whether the action was objectively reckless, not whether there was individual malice. Objective recklessness can be shown by demonstrating that an actor knew or should have known of the resulting serious harm. *Id.* at 35.

Our case on behalf of individuals in civil immigration detention first alleged that the plaintiffs and defendants had a special relationship under *Estelle v. Gamble*, 429 U.S. 97 (1976), because the plaintiffs were in defendants' custody and could not care for themselves. Therefore, plaintiffs fall under the exception to the general principle that the state does not owe a duty to the general population to provide them with adequate healthcare. Using their diagnoses and medical history, we alleged the plaintiffs had serious medical needs and that the County had been deliberately indifferent to those needs by failing to provide mental health discharge planning.<sup>5</sup> This failure resulted in serious harm to the plaintiffs. We alleged that the plaintiffs received mental health care while detained, in the form of medication and somewhat regular psychiatric visits. However, they did not receive any mental health discharge planning, which, according to myriad medical professional organizations and ICE's own guidelines constitutes in-custody care in the form of a plan of care created from the moment mental healthcare begins to ensure that care continues with minimal interruption so as to not cause severe relapse when the care is eventually terminated. Discharge planning is medical care provided during treatment, prior to termination of care, and includes an interim supply of medication to last until the individual can be reasonably expected to find new medical services, a discharge document summarizing the individual's diagnoses and medications, and a list of referrals to outside medical providers.

Discharge planning had been raised in two previous cases which bolstered our claim. In *Wakefield v. Thompson*, in the case of an individual with a mental illness who required daily medication, the Ninth Circuit found that the defendant should have provided an interim medication supply to cover a "reasonable period of time to contact a doctor and get a new supply." 177 F.3d 1160 (9th Cir. 1999). The court noted that people are "not necessarily restored the instant they walk through the prison gates and into the civilian world," and failing to provide in-custody care in the form of mental health discharge planning to people in custody violates the Constitution. *Id.* at 1164. The Northern District of New York found similarly in a case concerning a person who was incarcerated and was released in the middle of a two-part surgery. *Lugo v. Senkowski*, 114 F. Supp. 2d 111 (N.D.N.Y. 2000).

### *District Court Decision*

The district court granted defendants Motion for Judgment on the Pleadings on a sad day in September. *Charles v. County of Orange, New York*, No.

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16-cv-5527 (NSR), 2017 WL 4402576 (S.D.N.Y. Sept. 29, 2017). The court found that a special relationship existed between the plaintiffs and defendants because plaintiffs were in defendants' custody. The court continued on to state that, "[t]aking the facts as alleged by Charles and Small as true, and the specific circumstances surrounding their release, they may have been owed a limited duty of protection beyond their periods of incarceration (a year and eight months, respectively) which was not satisfied by the state. Thus, the court finds that—at this stage in the litigation—the allegations fall within the special relationship exception." *Id.* at \*9. Nevertheless, the court found that because the impact on our clients was a temporal deprivation that was not sufficiently harmful, failure to provide mental health discharge planning did not "shock the conscience" where the plaintiffs were not in custody and free to seek assistance. *Id.* at \*10–12. The district court's decision turned on a misunderstanding of plaintiffs' claims related to where the care should have occurred. As noted previously, mental health discharge planning, according to a variety of medical associations, ICE detention standards, and plaintiffs' claims, is in-custody care. Further, plaintiffs' analysis was that the district court went beyond established law by requiring a separate "shock the conscience" hurdle to Fourteenth Amendment deliberate indifference claims. We appealed.

### *Decision of the United States Court of Appeals for the Second Circuit*

The Second Circuit agreed with us. See *Charles, et al. v. Orange County, et al.*, 925 F.3d 73 (2d Cir. 2019). The appellate court found, first, that mental health discharge planning, as clearly described and supported in the American Psychiatric Association's amicus brief, was in-custody care. Second, the court held that the appropriate test for evaluating deprivation of in-custody care for people in civil detention is whether there is a serious medical need and whether the actor was deliberately indifferent to such need based on an objective recklessness standard. *Id.* at 86–87. The case was remanded to consider remaining issues.<sup>6</sup>

In finding that mental health discharge planning is in-custody care, the Second Circuit put it plainly:

Common sense and experience further support Plaintiffs' theory that discharge planning is part of in-custody care. It comports with common sense that someone with a serious mental illness would need to receive a summary of his medical records, including documents indicating his diagnosis and his prescribed medications.... Those who have seen a doctor, visited a hospital

emergency room, undergone surgery, or received any kind of medical treatment for a serious physical, emotional, dental or visual problem, understand the need for, and have likely been provided, documentation of the medications prescribed to them, their diagnosis, and a copy of any test results, during the course of their treatment. *Charles*, 925 F.3d at 83.

Next, the court turned to whether the County had been deliberately indifferent to our clients' serious medical needs. The court found:

The Supreme Court has held that the point of conscience shocking is reached when government actors are deliberately indifferent to the medical needs of pretrial detainees. *Lewis*, 523 U.S. at 849–50; *see Estelle*, 429 U.S. at 104–06; *City of Revere*, 463 U.S. at 244. In this particular context, “deliberately indifferent conduct” is “egregious enough to state a substantive due process claim.” *Lewis*, 523 U.S. at 849–50. A court need not, therefore, conduct a separate analysis, over and above the deliberate indifference analysis, of whether the state’s conduct “shocks the conscience.” *Charles*, 925 F.3d at 86.

The court affirmed our understanding of this two-pronged test and put the district court’s opinion on the shelf. Applying the standard to determine, first, whether our clients had serious medical needs, the court examined several factors, including but not limited to what a reasonable doctor would consider, whether daily activities were significantly affected, and the consequences from the denial of care. *Id.* at 86. The court found that, here, at this stage of the proceedings, there was a need for discharge planning based on the seriousness of our clients’ illnesses, supported by professional organizations and the harm caused. *Id.* at 83–84, 88–89. Second, the court affirmed the line of recent Supreme Court and Second Circuit rulings that deliberate indifference is akin to recklessness and does not require a malicious state of mind. *Id.* at 86–87. It is an objective standard where a court

### **Civil detention is not a constitution-free zone.**

looks to whether the defendant failed to act with reasonable care to mitigate risks the defendant knew, or should have known. The standard requires more than mere negligence, but does not require subjective malicious intent. *Id.* at 87. In our case, the court spelled out how the defendants had been objectively reckless.

Specifically, defendants knew the plaintiffs' diagnoses, and knew, or should have known, that failing to provide discharge planning would cause substantial harm. This conclusion was bolstered by the County's own written policies, the fact that the County provides mental health discharge planning to people in criminal custody, and, again, the health associations' guidance. *Id.* at 89.

With this decision, the Second Circuit supported the rights and dignity of people in immigration detention. The case placed another brick in the wall of accountability for those responsible once they take our friends and neighbors from the community and put them in immigration detention. Civil detention is not a constitution-free zone. Similar to those who are criminally incarcerated, people held in detention can stand up and assert their rights without having to demonstrate individual malice.

### ***Charles v. United States***

Alongside the County case, our client Mr. Charles also sued the United States under the Federal Tort Claims Act for failure to provide discharge planning. The case outlined the situations where ICE had control over Mr. Charles, that the defendant was aware of Mr. Charles' illnesses and needs, and that it failed to provide care in the form of mental health discharge planning. The federal government predictably sought to dismiss the case. Among other arguments, the government asserted it was immune from harming our client, using an independent contractor exception and saying ICE delegated its responsibility to Orange County. The federal district court disagreed, pointing out that NYLPI's Complaint set forth that ICE had direct custody of our client several times, knew of his mental illness, and refused to give him interim medication upon release. *Charles v. United States*, Case No. 18 CV 00883 (VB), 2019 WL 1409280 (S.D.N.Y. Mar. 28, 2019).

The court also rejected the government's argument that it was exercising its discretion and making a considered policy choice in the process of turning Mr. Charles out on the street without discharge planning. As the court said, "According to plaintiff, ICE officials simply were inattentive, lazy, or absentminded in failing to provide plaintiff with a discharge plan. Indeed, the 2011 ICE Detention Standards—regardless of whether they bind ICE officials or just facilities housing detainees—indicate ICE itself recognizes detainees should receive discharge plans." *Id.* at \*4. This is a substantial victory both for Mr. Charles and for the law.

## Conclusion

After these two major wins, we settled both *Charles* cases, for \$900,000 and \$825,000, with Orange County and the United States, respectively. We hope these legal wins and substantial settlements will prevent ICE, the County, and other similar facilities from treating people with mental illnesses in their custody so horrifically again.

Through *Charles* and other cases NYLPI has brought or is considering bringing, we have learned lessons about how to best prepare litigation in this field. Initially, as civil rights attorneys providing assistance and advice to immigrant communities, we always consult with an immigration attorney—preferably the client’s own immigration attorney if they have one—on the risks and pitfalls to the individual case in filing any additional litigation. We live in a time where anti-immigration sentiment is rampant and immigration rules are unpredictable, thus making specialized practitioner advice essential. As quickly as we can, we gather medical records from the detention facility, and from sources of prior or post-detention care, as relevant. This process is often arduous and time-consuming, so our team may need to decide whether to proceed with administrative filings prior to a full-scale review. Nevertheless, as quickly as possible, we gather records and consult with medical providers who understand both the standard of care, and if possible, healthcare in institutional or incarcerated settings.

This review of medical records can be very helpful to determine whether the facts will meet requirements for accountability. Once we decide to proceed, the facts of the case and the court’s understanding of certain healthcare needs and consequences are vital. We have learned through our cases that it is important to clearly describe healthcare concerns, needs, and consequences, while at the same time maintaining clients’ respect and dignity. Of course, case law such as *Iqbal v. Twombly*, 556 U.S. 662 (2009), sets forth what must be included in a complaint, but when dealing with health needs and consequences, particularly those related to mental health, we have learned that descriptions that can explain the real-world impact are important. An advocate should not make any assumption about the forum’s understanding of healthcare needs. In our *Charles* case, we are forever grateful to our *amici* who were vital in explaining complex or nuanced medical situations.

As a community seeking to hold those who operate the immigration detention machine responsible, we must continue to bring cases even in the face of

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the changing landscapes of our politics. Taking the lead of decades of work by prisoners' rights advocates, we must bring cases to build a body of caselaw to help those who have been harmed and demonstrate the horrors of detention, to bring about change.

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**Laura F. Redman** was the Director of the Health Justice Program at New York Lawyers for the Public Interest (NYLPI) until September 2019 and continues to work with NYLPI as a consultant. Ms. Redman has also worked at the National Center for Law and Economic Justice, the Commission for Racial Equality in the U.K., and clerked for the U.S. Court of Appeals for the Second Circuit in its Staff Attorneys' Office. She earned her J.D. from Northeastern University School of Law and her M.A. in Gender Studies from Birkbeck College at the University of London. Ms. Redman served as faculty on the presentation of her PLI One-Hour Briefing Championing the Rights of People with Serious Medical Needs in Immigration Detention, upon which this article is based.

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## NOTES

1. Any information contained in this article is based on recent research of timelines and requirements in the local New York and New Jersey jurisdictions. Please consult an attorney experienced in these claims in your own jurisdiction and research relevant timelines and requirements before pursuing a claim.
2. This section refers to litigation addressing failures that have already occurred, seeking retroactive relief. Other rules and requirements apply when seeking prospective relief.
3. There is much written about both of these avenues. We encourage all practitioners interested in this practice to seek out guidance and CLEs related to these two claims specifically.
4. Because immigration detention is civil confinement, people in immigration detention bring claims under the Fourteenth Amendment rather than the Eighth Amendment, which is available for people in post-conviction criminal custody.
5. Plaintiffs also alleged facts related to the *Monell* pattern and practice requirement, although the issue was never reached by the court.
6. Since the case was at the Judgment on the Pleadings stage, which only requires plausibility of plaintiffs' allegations, the court specifically noted that it had left what constitutes mental health discharge planning and adequate healthcare to post-discovery factual analysis. *Charles, et al. v. Orange County, et al.*, 925 F.3d 73, 89 (2d Cir. 2019).