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# Detained during a Pandemic: Human Rights behind Locked Doors

**Justine N. Stefanelli**

American Society of International Law, Washington, DC 20008, USA; jstefanelli@asil.org

**Abstract:** Every year, thousands of people are detained in United States immigration detention centers. Built to prison specifications and often run by private companies, these detention centers have long been criticized by academics and advocacy groups. Problems such as overcrowding and lack of access to basic healthcare and legal representation have plagued individuals in detention centers for years. These failings have been illuminated by the COVID-19 pandemic, which has disproportionately impacted detained migrants. Against a human rights backdrop, this article will examine how the U.S. immigration detention system has proven even more problematic in the context of the pandemic and offer insights to help avoid similar outcomes in the future.

**Keywords:** detention; immigration; human rights; healthcare; access to justice



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## 1. Introduction

At the end of September 2020, the average daily population of detained immigrants in the United States (U.S.) was down to 19,068 because of COVID-19 mitigation efforts (U.S. Immigration and Customs Enforcement 2021; U.S. Immigration and Customs Enforcement). However, the 2019 average daily population was 50,165 (U.S. Immigration and Customs Enforcement 2020a). While there were fewer numbers of detainees in 2020, their length of stay in detention facilities went from an average of one month in 2019 to double that in 2020 (U.S. Immigration and Customs Enforcement 2020a, 2021), as it got harder to execute deportation orders and to apply for release from detention.

At the time of writing, U.S. ICE confirmed 15,056 COVID-19 cases among detainees since ICE began testing in February 2020.[1] Just over 10% of its detained population are positive for COVID-19 and are being actively monitored or are under isolation.[2] ICE has reported a total of nine deaths from COVID-19, but the accuracy of this number is disputed.[3] From the start, reports of insufficient sanitization supplies, staff without masks, and failures to facilitate social distancing hit the news. In response, angry and frightened detainees launched hunger strikes, and civil society organizations filed lawsuits advocating for the safety and human rights of detainees.

Described by one scholar as the "American Gulag" (Dow 2004), immigration detention centers have raised serious concerns for many years, particularly since the 1980s when the U.S. faced large numbers of migrants arriving from Cuba and Haiti. For the first time, U.S. detention capacity was stretched to its limits, and migrants were forced to reside in crude camps outdoors, particularly in Florida (Wilsher 2012). This period marked the start of the modern detention estate and the expansion of detention capacity in the United States (Wilsher 2012). The U.S. immigration detention system is now the largest in the world (Global Detention Project 2021). Though it began modestly, it has grown into a system that detains roughly 400,000 people annually (Jefferis 2020). This vast empire has unsurprisingly been the target of much criticism. Scholars and civil society organizations have raised concerns over every aspect of the detention framework, including the method by which a detention order is made;[4] the availability and quality of opportunities to be released from detention;[5] and the constitutional legitimacy of detaining noncitizens.[6] Beyond these,

perhaps the greatest area of concern has been the conditions in detention centers[7] and the effect of such conditions on the mental and physical health of those detained.[8] These concerns only increased as the pandemic spread among immigration detention centers.

The pandemic hit immigration detention facilities hard. Pre-existing problems in detention centers, such as overcrowding, shared space, and lack of access to healthcare and legal representation were exacerbated by the pandemic and the slow and inadequate response of the U.S. Government to early concerns raised by human rights watchdogs. As two commentators put it in the early days of the pandemic, "Because the transmission of SARS-CoV-2 is predominantly from person to person through droplets, a pillar of infection prevention is social distancing and disinfection, which is antithetical to closed detention settings" (Meyer et al. 2020).

Although one year on the situation has improved, it is important to reflect on the U.S. Government's response to the pandemic's impact in detention centers in light of international and domestic law obligations concerning immigration detention and to identify some lessons learned to avoid a similar crisis in the future.

Following this introduction, Section 2 will introduce the nature and function of immigration detention in the United States and review the domestic and international standards applicable to the detention of noncitizens in the United States. It will also delve into criticisms of detention, particularly regarding healthcare, to more explicitly illustrate how the pandemic made a poor situation worse for immigration detainees.[9] Section 3 will review the response of ICE to the pandemic and demonstrate how detainees' access to healthcare was particularly compromised by ICE's insufficient reaction to the pandemic. Section 4 will look at the specific issue of access to justice and what happened in the immigration courts following the onset of the pandemic. Section 5 will identify what steps should and could have been taken to mitigate the impact of the COVID-19 pandemic and any similar situations that may arise in the future. Section 6 concludes that the U.S. immigration detention system must be reviewed using a human rights-based approach, to prevent what happened following the COVID-19 pandemic from happening again.

## 2. Detention and the Law

From its modest roots in the context of deporting Irish and French revolutionaries from the U.S., through its employment in the 1980s to address the sudden influx of Cubans and Haitians, immigration detention has grown to be an essential part of American immigration law enforcement (Wilsher 2012, pp. 1–118).[10] Although the procedures by which detention can be ordered are regulated by U.S. law, the manner in which detention is carried out is left largely unchecked. This section will briefly address the purpose of detention before moving on to the domestic and international standards that govern its implementation and an overview of criticisms of the U.S. detention regime that predated the pandemic.

### *2.1. The Detention Machine*

The U.S. Department of Justice (DOJ) and the Department of Homeland Security (DHS) share jurisdiction over immigration detention. The DOJ essentially manages the operation of DHS, including the judicial review of immigration matters (excluding detention). Within the DOJ, the Executive Office for Immigration Review is responsible for immigration adjudication. It includes three units: (1) the Office of the Chief Immigration Judge (which comprises a number of immigration courts throughout the U.S.); (2) the Board of Immigration Appeals (BIA) (which hears appeals from the immigration courts); and (3) the Office of the Chief Administrative Hearing Officer (which deals exclusively with cases relating to the employment of migrants without the right to reside in the U.S.). Decisions of the BIA can be appealed to the federal courts, though their review powers are very limited (Stefanelli 2020, pp. 74–75). If a person wants to be released from detention, he or she must apply for habeas corpus at a federal district court.[11]

Within DHS, there are two immigration departments: Customs and Border Protection (CBP) to enforce immigration law at the borders of the country, and Immigration and

Customs Enforcement (ICE), which enforces immigration law within the United States and manages immigration detention. DHS has the power to detain noncitizens in a number of circumstances, including (1) detention pending a decision on removal from the U.S., (2) detention pending removal after it has been ordered, (3) detention pending a decision on entry at the borders, and (4) detention pending a decision on asylum.[12] Whether someone is detained largely depends on whether the immigration authorities believe that the person's release would pose a risk of harm to the United States or the public, or a risk of flight (i.e., to avoid prosecution by immigration authorities for violations of the law). Noncitizens who have committed certain qualifying crimes while in the U.S., or those who are deportable on grounds of terrorism, must be detained pending a decision on removal.[13] For most other noncitizens, risk is determined on a case-by-case basis using an automated risk assessment tool that assigns a public safety and flight risk score based on DHS enforcement priorities. However, the algorithm has been criticized as being unduly weighted in favor of detention (Noferi and Koulish 2014; Koulish 2016).

If a person is detained, he or she will be housed in one of ICE's 134 detention facilities, primarily located in major cities across the U.S.[14] These facilities come in many shapes and sizes, and they house adults and children—sometimes together in special family residential centers.[15] Some are run by state or federal authorities, while others are privately owned and/or operated by for-profit companies such as the GEO Group or CoreCivic (Ryo and Peacock 2018; Kennedy 2020).[16] Some are wholly dedicated to housing immigration detainees, while others (typically prisons that house both those convicted under criminal law and those detained under immigration powers) will include people convicted of criminal activity. In 2009, Congress issued what has become known as the "bed mandate" for detention centers. Under that mandate, ICE is required to maintain 34,000 beds in detention centers on a daily basis. In other words, immigration detention is subject to a statutory quota (Sinha 2016).

### 2.2. Domestic Detention Standards

Regardless of the type of detention facility, standards for operation apply. Immigration-detainee-only facilities must abide by certain standards.

The Performance-Based National Detention Standards (PBNDS). This 455-page set of standards was created in 2011 in an "ongoing effort to tailor the conditions of immigration detention to its unique purpose . . . [and] to improve medical and mental health services [and] increase access to legal services" (U.S. Immigration and Customs Enforcement 2011, p. I; Papst 2009). In the words of one scholar, "the PBNDS standards are relatively high and would make immigration detention centers habitable" (Kennedy 2020). The PBNDS cover seven main subjects, some of which provide basic human rights, such as a grievance system and medical screening (Noferi 2014, pp. 555–56), and they include a number of "expected outcomes", which are specific implementation targets for each aspect of the PBNDS. However, the PBNDS do not indicate whether, and to what extent, there are consequences for a failure to reach an expected outcome, nor are there any legal means for ICE to ensure that privately-run detention centers adhere to the standards (Sthanki 2013, p. 465).

Non-immigration-exclusive detention facilities (such as prisons) are expected to comply with the 2019 National Detention Standards for Non-Dedicated Facilities (NDSNDF). According to ICE, these are "facilities used by ICE . . . with an Average Daily Population of less than 10" (U.S. Immigration and Customs Enforcement 2019). NDSNDF standard 4.3 notes that it is policy for "All detainees [to] have access to appropriate medical, dental, and mental health care, including emergency services" (U.S. Immigration and Customs Enforcement 2019, p. 112). The NDSNDF also calls for each facility to have "written plans" to address infectious and communicable diseases (U.S. Immigration and Customs Enforcement 2019, p. 114). Unlike the PBNDS, the NDSNDF does not include subject-specific expected outcomes.

Finally, family detention centers must abide by the Family Residential Standards 2020 (U.S. Immigration and Customs Enforcement 2020b). Like the PBNDS, these standards include expected outcomes and include provisions governing healthcare. For example, section 4.3 requires that residents "have access to a continuum of health care services including screening, prevention, health education, diagnoses, and treatment".

The way that ICE manages its detention facilities has long been criticized. For a start, the use of three sets of standards has been called confusing, making "it difficult for entities to hold facilities accountable" and collect accurate data concerning the healthcare of detainees (Bowen 2020, p. 299). More substantively, it has been highlighted that "'[n]o checks and balances currently exist within ICE. ICE investigates itself", and that detention center abuses are conducted "with impunity, and without recourse" (Sthanki 2013, pp. 448–49; United Nations Working Group on Arbitrary Detention 2010, para. 35).[17] Moreover, because the standards are not legally binding, they are effectively unenforceable (Sthanki 2013, p. 464; Global Detention Project 2010, p. 13). Though both the PBNDS and the NDSNDF include an internal grievance mechanism whereby detainees can file a complaint with a designated facility representative or committee, detainees rarely make recourse to this option, for fear of retribution by facility staff (Sthanki 2013, p. 466). Prior to the adoption of the PBNDS, Amnesty International commented that "conditions of detention in many facilities do not meet either international human rights standards or ICE guidelines" (Amnesty International 2009, p. 7). In 2017, the DHS Office of Inspector General conducted unannounced inspections of five immigration detention facilities to evaluate their compliance with ICE standards (U.S. Department of Homeland Security Office of Inspector General, "About Us" 2017).[18] It found a number of violations, including "unsafe and unhealthy detention conditions", but noted that ICE had begun to take "corrective action" in response to the report (U.S. Department of Homeland Security Office of Inspector General, "About Us" 2017, p. 1). Despite such action, violations continue. For example, A 2020 report by the House Committee on Homeland Security found that ICE facilities fail to meet basic standards of care for migrants (U.S. House of Representatives Committee on Homeland Security 2020). In particular, the report condemned ICE's failure to properly oversee detention facilities and to provide sufficient medical care, including for COVID-19 (U.S. House of Representatives Committee on Homeland Security 2020, pp. 7–10, 13–19).

Beyond this, there is no U.S. law that governs the way that detention centers are managed.[19] Thus, it is necessary to turn to international law for guidance.

### 2.3. International Detention Standards

Although various international human rights law instruments govern immigration detention, they are not all legally binding on the United States. This article will therefore focus on the two main binding legal instruments that address the rights of migrants in detention: the International Covenant on Civil and Political Rights (ICCPR)[20] and the United Nations Convention Against Torture and Cruel, Inhuman or Degrading Treatment (UNCAT).[21] These standards apply to all government entities and agencies, as well as private contractors that carry out government functions, such as running immigration detention centers.

The U.S. ratified the ICCPR in 1992. It applies to government entities and agents, but it provides no enforceable rights for individuals in U.S. courts. However, the U.S. must report to the United Nations (UN) Human Rights Committee to demonstrate its compliance with the Convention. The U.S. is therefore obligated to ensure that all government officials are complying with the Convention's obligations with respect to detained persons (Skinner 2008, p. 292). Article 6 ICCPR guarantees the right to life to "every human being". The UN Human Rights Committee has explained that this requires states to "take special measures of protection towards persons in situation [sic] of vulnerability", including refugees and asylum seekers, and that a "heightened duty of care" applies to those "deprived of their liberty by the State" (United Nations Human Rights Committee 2018, para. 23). Article 7 of the ICCPR provides that, "No one shall be subjected to torture or to cruel, inhuman or

degrading treatment or punishment". This means that governments are required to provide "adequate medical care during detention", (United Nations Human Rights Committee 1990, p. 69) including "prompt and regular access be given to doctors and lawyers" to prevent "physical and mental suffering".[22]

The U.S. ratified the UNCAT in 1994 and has enacted a number of domestic laws to implement its provisions (Garcia 2009).[23] As with the ICCPR, the U.S. must report periodically on its compliance with the UNCAT to the Committee Against Torture. UNCAT includes a general prohibition on torture and other inhuman and degrading treatment. Together, Articles 10 and 11 make clear that parties to the Convention must comply with its provisions with respect to individuals held in custody (Skinner 2008, p. 292). The Committee has found that the UNCAT may be violated if a state fails to provide adequate medical care (Amon 2020).

Although this article focuses on the two legal instruments just described, it is worth highlighting the UN Standard Rules for the Treatment of Prisoners (also known as the Nelson Mandela Rules). Although not legally binding, the Nelson Mandela Rules go beyond the standards set forth in the two instruments above (United Nations General Assembly 2016). For example, they provide detailed standards regarding accommodation, hygiene, clothing and bedding, food, and healthcare services, including the rule that detainees "should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status" (United Nations General Assembly 2016, Rule 24).

### *2.4. Criticisms*

Despite the existence of the above standards, conditions in detention centers regarding healthcare have long been a subject of criticism from scholars, civil society organizations, and the UN.[24] For example, Detention Watch Network has referred to "ICE's shameful record of medical negligence . . . poor sanitation, and demonstrated inability to properly respond to past infectious disease outbreaks" (Detention Watch Network 2020a, p. 1), and the medical care provided in immigration detention centers has been called "dangerously substandard" (Human Rights Watch 2018).

The UN Human Rights Committee last issued its observations on the U.S. in 2014, mandating that the U.S. ensure compliance with Articles 7 and 10 (United Nations Human Rights Committee 2014a, para. 20). The Committee is currently awaiting another report from the U.S. and, in particular, an update on "the conditions within immigrant detention facilities, both publicly and privately owned, including access to healthcare" (United Nations Human Rights Committee 2019, para. 21). The UN Committee Against Torture expressed concern about "reports of substandard conditions of detention in immigration facilities" (United Nations Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2014, para. 19) and has specifically asked the U.S. to respond to such reports (United Nations Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2017, para. 28). Moreover, the UN Working Group on Arbitrary Detention noted in a 2017 report on a visit to the U.S. that detainees in private facilities "expressed concern about . . . the poor quality of food and drinking water . . . and access to medical services" (United Nations Working Group on Arbitrary Detention 2017, para. 34).

When COVID-19 reached the U.S., the immigration detention system was therefore already struggling to meet the healthcare needs of detainees. Detention facilities were overcrowded, despite then-President Donald Trump's increasing the number of detention facilities (American Civil Liberties Union 2020, p. 14 (American Civil Liberties Union)). ICE was already under fire for its poor monitoring and prevention of disease in its facilities.[25] As the first few months of the pandemic demonstrated, immigration detainees were particularly vulnerable to the pandemic and did not have adequate resources to avoid its impact.

## 3. The Pandemic Strikes

It is important to emphasize that closed environments, such as detention centers, are particularly vulnerable to the spread of disease. In addition to overcrowding, the communal nature of detention centers means that people are unable to socially distance—bathrooms and sinks are shared, as are mealtimes, and staff come and go from the outside world (Amon 2020). In fact, it was reported in November 2020 that COVID-19 infection rates in detention centers were 13 times higher than the national infection rate (Driesbach 2020).[26]

As indicated in Section 1 above, ICE issues statistics regarding the impact of COVID-19 on detention centers. To supplement reports from a system that has sometimes been called a "black box", a number of other organizations also began tracking the effect of COVID-19 in detention centers from the start of the pandemic (Cho 2020). In April 2020, the organization Freedom for Immigrants (FFI) began issuing regular analyses and updates on the impact of COVID-19 on those in ICE custody. In its first update, just over a month after the World Health Organization declared COVID-19 a pandemic (World Health Organization 2020), FFI reported on the dire circumstances in detention facilities, including "crowded and unsanitary conditions, continued transfers of people between facilities with known or suspected outbreaks, and a lack of or insufficient quantities of soap and personal protective equipment (PPE), for the people in custody as well as staff and guards" (Freedom for Immigrants 2020, p. 1). The update also included detainees' concerns "that ICE was either failing to provide or deliberately blocking information about the spread of COVID-19 inside detention" (Freedom for Immigrants 2020, p. 1). The FFI updates continued in this vein, noting that the observations in their reports "remained consistent—at every stage of the pandemic, ICE failed to implement even basic public health protocols to mitigate against the spread of COVID-19" (Freedom for Immigrants 2021, p. 1). Reports surfaced of detainees' lack of access to soap and hand sanitizer, or in some instances, being required to purchase these items in detention center commissaries (Zwick 2020).

In recognition of the vulnerability of detainees, the Centers for Disease Control issued "Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities" in March 2020.[27] ICE detention facilities are required to comply with CDC guidelines on environmental health (U.S. Immigration and Customs Enforcement 2011, sct. V.A). The CDC recommended that ICE "provide a no-cost supply of soap" to detained persons, in quantities sufficient to allow for multiple hand washings; provide alcohol-based sanitizer with at least 50% alcohol; implement social distancing strategies; and provide clear information about the existence of COVID-19 cases within detention centers and the need to maintain good hygiene and distance from other detainees. Despite this, ICE continued to operate its detention centers largely unchanged.

Although ICE announced in March 2020 that it would be focusing its immigration enforcement efforts on "public-safety risks and individuals subject to mandatory detention based on criminal grounds",[28] ICE continued to transfer detainees between ICE facilities, and between ICE facilities and prisons, even when ICE facilities were dealing with known outbreaks (American Civil Liberties Union 2021, p. 6). In April, ICE ordered its officers to reassess the need to detain those over 60 years of age and anyone with immune-system-compromising illnesses (Hsu 2020). This led to the release of approximately 700 people (Flynn 2020). That same month (and for several more thereafter), judges around the U.S. were ordering detention centers to reduce their populations (Brennan Center for Justice 2021). Staff at some facilities were told not to wear masks to prevent the spread of panic among detainees and, reportedly, some centers offered masks to detainees who were willing to sign a waiver releasing one of the private detention centers from liability, should they become ill (Detention Watch Network 2020b). Some facilities began using quarantines to isolate and stop the spread of infection, but it appears that their use was not uniform and sometimes included quarantines of groups of people (Zwick 2020). ICE also continued deporting detainees, sometimes without testing them for COVID-19 (ibid). Later, when travel bans were imposed, an inability to remove even those who tested negative for COVID-19 only served to worsen the problem of overcrowding in centers (Chishti and

Pierce 2020). Detainees at a privately-run detention center in Georgia reported that they were routinely denied COVID-19-related medical care and punished harshly for asking for such treatment (Del Valle and Olivares 2020; Olivares 2020). In late 2020, it became evident that communities with ICE facilities were experiencing more serious outbreaks and a faster rate of infection than communities without detention centers (Detention Watch Network 2020b, p. 26).

A related problem was ICE's failure to halt *all* enforcement operations at the start of the pandemic. As indicated above, ICE refocused its enforcement operations on safety risks, but because it did not stop completely, new people were detained, thus exacerbating conditions in detention centers. As the Brennan Center recommended, "ICE and CBP should release all individuals who are not a 'credible threat' to public safety on parole/bond, including all people without a criminal record or with only a minor violation as their most serious criminal conviction. This would encompass most of the detained population" (Brennan Center for Justice 2021).

In addition to an ICE-led decision to release, ICE has the discretion to grant parole to noncitizens in certain circumstances. In particular, the governing statute gives ICE the discretion to temporarily parole individuals "on a case-by-case basis for urgent humanitarian reasons or significant public benefit".[29] It must be requested by the detainee. Guidance on humanitarian parole provides examples of the types of people in detention that should be considered for release, including people who have "serious medical conditions" and people "whose continued detention is not in the public interest".[30] In addition, it must normally be demonstrated that the immigrant applicant for parole does not pose a flight or security risk.[31] Several organizations called on attorneys to apply for humanitarian parole, especially for high-risk detainees (Meyer et al. 2020; Immigration Justice Campaign 2020). However, because most detainees have no legal representation (discussed below), this option remained largely unknown to them.[32]

In response to these circumstances, a number of detainees launched hunger strikes, and several civil society organizations filed lawsuits on behalf of detainees to secure their release, many of which are ongoing at the time of writing.[33]

## 4. Access to Justice

Section 2.3 above indicated that the Human Rights Committee has interpreted Article 7 to require access to lawyers. In addition, Article 9(4) provides a right to judicial review for those deprived of their liberty that has also been interpreted by the Committee as including "prompt and regular access" to lawyers (United Nations Human Rights Committee 2014b, para. 58). Once it became evident that the pandemic could have a devastating effect in the United States, the Executive Office for Immigration Review (EOIR), the office that manages the immigration court system, began grappling with how to respond to COVID-19. On 15 March 2020, the EOIR announced that hearings scheduled for people not in detention would be postponed, but that the courts would remain open for other matters. It later began to close immigration courts and announced rules requiring visitors (including attorneys) to courts operated by DHS and located in detention centers to wear PPE—some even specified that visitors must provide their own (Adelstein and Keith 2020).

While it may seem a positive development that the EOIR did not suspend hearings for detainees, given the poor quality of protection measures implemented in ICE facilities, continuing in-person hearings for detained immigrants posed an unnecessary risk of contamination for all people present in the immigration courts, including the immigrants themselves. Speaking to the Texas Tribune, Judge Ashley Tabaddor, president of the National Association of Immigration Judges, commented that "[f]ailing to close all of the nation's Immigration Courts, both non-detained and detained settings, now will exacerbate a once-in-a-century public health crisis and lead to a greater loss of life" (Aguilar 2020). In addition, the requirement to wear PPE at a time when there was a shortage of PPE, meant that some lawyers were unable to go to the courts and detention centers to see clients whose cases were progressing (Aguilar 2020).

These specific circumstances must be viewed in the larger context of access to justice for immigrants. In particular, unlike criminal defendants, immigrants do not have the right to a court-appointed lawyer. This leaves most immigrants without representation when it comes to contesting their detention and deportation orders (Eagly and Shafer 2015).[34] Without legal representation, it is often extremely difficult to obtain release. In fact, represented immigrants are "three times more likely to be released and 10.5 times more likely to establish their right to remain in the United States" than unrepresented immigrants (Vera Institute of Justice 2020, p. 1). Not being able to obtain release from detention because of a lack of access to a lawyer means that many immigrants are unnecessarily detained for prolonged periods of time in facilities that were already struggling to meet human rights minimums before the pandemic.

Each of these issues together created a perfect storm in immigration detention facilities. Although pandemics on the scale of COVID-19 are infrequent, it is not smart to assume that they will continue to be so rare. It is also not wise to presume that the low number of detainees reported by ICE at the end of 2020 is a sign of a change in detention practice. Indeed, as of 4 June 2021, ICE reported 24,100 people in detention.[35] That is a 26% increase from the 19,068 people detained at the end of 2020. It seems that ICE is returning to its pre-pandemic level of detaining immigrants. It is therefore of the utmost importance to consider what can and should be done to safeguard the fundamental rights of detainees in future outbreaks.

## 5. Lessons Learned

From the start of the pandemic, people and organizations working in immigration and human rights law identified a number of ways to prevent or mitigate the spread of COVID-19 (or any other virus on this scale) in immigration detention facilities, including the immediate release of all detainees (Detention Watch Network 2020a, p. 5; Vera Institute of Justice 2020; García Hernández and Moctezuma García 2020). While it may not be feasible to empty all of the detention centers, releasing detainees who do not pose a risk of harm or flight is reasonable and effective. Fewer detainees in facilities means that those who remain detained can more easily socially distance themselves from one another. Some even called for a commitment from DHS not to re-detain those who were released because of COVID-19 "absent a compelling, individualized reason to do so" (American Civil Liberties Union 2020, p. 8). ICE should have temporarily stopped all enforcement operations so that new people were not detained and added to the facilities' populations (Detention Watch Network 2020a, pp. 4–5; Vera Institute of Justice 2020, p. 4). To stop the spread of disease between facilities and the community, ICE should have also halted all detainee transfers. Within detention centers and immigration courts, clear and honest information about the virus should have been provided to detainees in a language they could understand, and hygiene products should have been made freely and widely available. Steps should also have been taken to ensure that detainees have access to vaccines under the same conditions as the general public, taking into account detainees who pose a higher risk for contracting the virus (American Civil Liberties Union 2020, p. 8). Finally, the immigration courts should have suspended all types of proceedings, not just those for non-detained immigrants, and ICE should have immediately halted the execution of all deportation orders.

ICE's inadequate and delayed response to the pandemic worsened its impact in detention centers. The fallout made it clear that there is work to be done beyond the need to respond quickly and intelligently when a pandemic strikes. Several systemic issues must be addressed so that if and when another pandemic strikes, an already-strained system is not put under further pressure.

First, detention should be used as a last resort, imposed only after an individual assessment has concluded that the person poses a risk of harm or flight. Those who do not pose such risks should be released, and an alternative to detention should be applied. The UN Working Group on Arbitrary Detention has explained that "[a]lternatives to detention can take various forms: reporting at regular intervals to the authorities; release on bail;

or stay in open centers or at a designated place. Such measures are already successfully applied in a number of countries. They must however not become alternatives to release" (United Nations Working Group on Arbitrary Detention 2010, para. 65). To that end, the ACLU has recommended that the DHS "[e]stablish a nationwide program of community-based alternatives to detention run by nonprofit organizations providing case management services" (American Civil Liberties Union 2020, p. 8). Second, where people are detained, it is essential for them to have effective access to legal representation. Although immigrants do not have the right to court-appointed lawyers like criminal defendants do, communities should "continue to invest in and grow publicly funded legal representation programs" (Vera Institute of Justice 2020, p. 3). Although some programs currently exist, they are by no means sufficient to provide resources for the thousands of people detained without legal representation.[36] Third, while in detention, access to healthcare should be improved. In particular, it makes sense to ensure that immigration detention healthcare systems are connected with general healthcare and emergency planning systems and that there is information sharing between the health and justice departments (Kinner et al. 2020). Fourth, in recognition that under normal circumstances ICE violates its own standards without consequence (Hamilton YEAR, p. 120), it is vital that independent oversight mechanisms with enforcement power are put in place to ensure that any breaches of the rules are corrected and punished and that detainees can effectively report wrongdoing to an independent body or agency. This is especially important considering that more than two-thirds of detainees are housed in private detention centers (Amnesty International 2020, p. 29). Relatedly, the U.S. should take seriously its commitments to the ICCPR and the UNCAT, for example by implementing recommendations from the Human Rights Committee and the Committee Against Torture and ensuring that detainees can enforce the standards in U.S. courts. A review of the ICE detentions standards should be conducted against the international legal framework, including the superior standards set forth in the Nelson Mandela Rules, and the rules should be consolidated insofar as possible to avoid inconsistent implementation. Fifth, immigration detention facilities should engage in pandemic response strategy development. To assist in this process, ICE should be factored into the broader public health response planning so that it is not left to develop strategies in isolation (Kinner et al. 2020). On a more granular level, each facility should have protocols in place for screening visitors, supplying PPE, social distancing, cleaning and disinfection, and restricting movement—including limiting staff and visitors to essential personnel (Kinner et al. 2020). Sixth, the U.S. Government should put an end to the use of private immigration detention facilities. In January 2021, the Biden Administration ordered the U.S. Department of Justice to take steps to end its reliance on private prisons for federal prisoners,[37] and human rights experts have since called for an extension of that mandate to immigration detention facilities (Scaffidi 2021). Bringing all immigration detention centers under the direct control of ICE, combined with revamping the standards applicable in those centers, are essential steps on the journey toward achieving a human rights-compliant immigration detention system.

Beyond policy, it may be possible to achieve binding legislative change for detention centers. There are currently two bills before Congress that seek to improve the immigration detention framework. The New Way Forward Act was introduced to Congress in January 2021 and aims to reform the enforcement of U.S. immigration law (U.S. Congress 2021a). In particular, it seeks to end the use of mandatory detention of those who have committed certain crimes considered "aggravated felonies",[38] thereby extensively reducing the number of immigrants placed in detention. It also provides for automatic review by the Secretary of Homeland Security of the decision to detain an immigrant within 48 h of the person being taken into custody Noferi (2016). That same provision also imposes a rebuttable presumption that the immigrant should be released. Essentially, if enacted, the Act would reduce the use of detention and improve the quality of detention, where it is imposed.

The Dignity for Detained Immigrants Act was introduced to Congress in April 2021 and sets minimum standards for the protection of immigrants in DHS custody (U.S.

Congress 2021b). The bill includes provisions on oversight and transparency for detention facilities, including a process to deal with a failure to comply with the standards set forth in the bill; it provides a cause of action for detainees in facilities out of compliance with the standards; and it addresses broader concerns such as the pervasive use of private detention facilities and procedures for detaining noncitizens.

Though it may be difficult to achieve consensus on the sort of legislative change described above, it should not be difficult to put in place plans and procedures to ensure that detainees are taken care of both within and outside the context of a pandemic. At a bare minimum, detention centers should meet detainees' basic human rights requirements. Detainees should have been informed accurately about the virus and provided with free PPE and hygienic supplies, and all detention facility staff should have been wearing masks. DHS's failure to act quickly and intelligently and the U.S.'s failure to meet its international human rights obligations meant that detainees were without the information and resources necessary to avoid contracting COVID-19.

## 6. Conclusions

To avoid repeating the events of 2020, the U.S. must take more control over its detention estate. It should ensure that it meets its international obligations, and that ICE adheres to its own standards at all times. If the U.S. remains committed to detention as a primary means of immigration law enforcement, decisions to detain should be made more carefully and detention centers should be managed more strictly. Detention should be used sparingly so that facilities are not overcrowded and are able to provide the resources needed to combat the spread of infection. A more effective response also requires a detailed review of the operation of ICE facilities. ICE should not operate in a vacuum. It must be involved in pandemic and emergency response planning, and it should not be the judge of its own actions. It is important that we learn from this pandemic to avoid making the same mistakes in the future. Ultimately, a holistic and human rights-based approach to reforming immigration detention is a necessary part of accomplishing this goal.

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## Notes

1 ICE maintains a website that includes COVID-19 ICE Detainee Statistics, available online https://www.ice.gov/coronavirus#detStat (accessed on 16 June 2021). The website is updated frequently.

2 ICE Detainee Statistics, available online https://www.ice.gov/coronavirus#detStat (accessed on 16 June 2021).

3 There have been conflicting reports of the numbers of death. For example, the Brennan Center for Justice reports thatthere were 21 deaths in ICE custody in fiscal year 2020, most of which were due to Covid-19 (see Brennan Center for Justice 2021). Moreover, ICE number do not include those who died in the hospital after being released from detention (American Civil Liberties Union 2021, p. 6).

4 See, e.g., Noferi and Koulish (2014); Koulish (2016).

5 See, e.g., Legomsky (1999); Kimball (2009); Stefanelli (2020).

6 See, e.g., Caloz-Tschopp (1997); Chelgren (2011); Wilsher (2012).

7 See, e.g., Dow (2004); Bosworth and Kaufman (2011).

8 See, e.g., American Civil Liberties Union (2020); Hing (2010); Mukhopadhyay (2009); Pyntikova (2010); Saadi (2020).

9 The author wishes to emphasize that this article is in no way intended to infer that similar problems are not occurring on a similar, if not worse, level in the context of the detention of convicted persons in prisons. The discussion of the impact of COVID-19 on people in prison is beyond the scope of this article. However, the Equal Justice Initiative provides up-to-date information on the impact of the pandemic on prisons, and may be a good starting point for the reader who may not be familiar with that

specific issue. See Equal Justice Initiative, "Covid-19's Impact on People in Prison" (last updated 16 April 2021). Available online: https://eji.org/news/covid-19s-impact-on-people-in-prison/ (accessed on 7 July 2021).

10 The history and purpose of immigration detention in the U.S. is the subject of much scholarship and beyond the scope of this article. See, e.g., Stefanelli (2020, pp. 24–28 and notes therein).

11 The origin and functioning of habeas corpus is beyond the scope of this article, but see Stefanelli (2020, pp. 73–75 and related citations for more information).

12 The Immigration and Nationality Act 1952 provides DHS with the power to detain. See INA, Pub. L. 82–414, 66 Stat. 163 (enacted 27 June 1952) [hereinafter INA], §§ 235(b)(1)(B)(iii)(IV); 235(b)(2)(A); 236; 241.

13 INA § 236(c).

14 U.S. Immigration and Customs Enforcement, Detention Facilities, https://www.ice.gov/detention-facilities (accessed on 18 May 2021).

15 See Detention Watch Network, "Family Detention," available online at: https://www.detentionwatchnetwork.org/issues/family-detention (accessed on 7 July 2021).

16 In fact, roughly two-thirds of immigration detention is managed by private companies such as these (Ryo and Peacock 2018).

17 The situation is compounded when it comes to privately-managed facilities, whose liability for detention center harms has been limited by the U.S. Supreme Court (Global Detention Project 2010, p. 13). See also Sthanki (2013, p. 450), discussing *Minneci v. Pollard*, 565 U.S. 118 (2012) and *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

18 The Office of Inspector General was established in 2002 and its mission is "to provide independent oversight and promote excellence, integrity, and accountability within DHS".

19 The U.S. Supreme Court has heldthat if the conditions in a detention facility amount to cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution, the Due Process Clause of the Fifth Amendment may be violated. Skinner discusses two relevant cases on this issue and points out that the UN Human Rights Committee has criticized the U.S. approach as not being in line with the object and purpose of the ICCPR (Skinner 2008, p. 284).

20 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 23 March 1976, ratified by U.S. 8 September 1992).

21 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 113, 116 (entered into force June signed by U.S 18 April 1988, ratified by U.S. 21 October 1994). The Convention was implemented by provisions in the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105–277, div. G, 21 October 1998, 112 Stat. 2681–761.

22 The UN Human Rights Committee has indicated that Article 10 ICCPR complements Article 7 so that together, they stand for the notion that "not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7 . . . but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons" (United Nations Human Rights Committee 1992, para. 3).

23 See, in particular, the Detainee Treatment Act of 2005, Pub. L. No. 109–148, §§ 1001–1006, 119 Stat. 2680, 2739 (2005) (codified at 42 U.S.C. § 200dd(a)). As Zivec writes, the Alien Tort Claims Act (28 U.S.C. § 1350 (2006)) "grants federal courts 'original jurisdiction of any civil action by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States.' Therefore, in theory a detainee could bring suit under the [Act] for violations of [UNCAT] and the Detainee Treatment Act of 2005. However, the Supreme Court has not yet addressed whether gross medical negligence can amount to cruel, inhuman, or degrading treatment or punishment" (Zivec 2011).

24 See, e.g., Zivec (2011), Tovino (2016a, 2016b), Bowen (2020), Morehouse (2010).

25 See Amnesty International (2020, p. 7), citing in note 13 the U.S. Congress's 2019 instruction to DHS to examine "how the Department delivers healthcare to individuals in its custody and to departmental personnel," including "outbreak response".

26 The vulnerability of detainees has previously been identified and examined in the context of HIV and AIDS. See Burris and Lipscombe (Sowder 1992; Burris 1992; Lipscombe 2013).

27 CDC, "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities" (23 March 2020), available online at: https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html. Updates are continually added to the Guidance, the most recent being from 6 May 2021.

28 ICE website, supra note 1.

29 INA, supra note 9, § 212(d)(5) (8 U.S.C. § 1182(d)(5)).

30 8 C.F.R. § 212.5(b).

31 8 C.F.R. § 212.5(d).

32 The Southern Poverty Law Center, for example, created a webinar for unrepresented detainees teaching them about humanitarian parole in English and Spanish. See https://www.splcenter.org/webinar-ice-humanitarian-parole-time-covid-19 (accessed on

16 June 2021). See also Innovation Law Lab, "Instructions for Completing the Pro Se COVID-19 Parole Request," https://www.ilcm.org/wp-content/uploads/2020/04/Pro-Se-HPR-Packet-COVID-19.pdf (accessed on 16 June 2021).

[33] See, e.g., American Civil Liberties Union (2021); Langona (2020). In addition, the American Immigration Council has filed a number of suits against ICE in the context of the pandemic. See https://www.americanimmigrationcouncil.org/what-we-do/litigation for more information (accessed on 16 June 2021).

[34] Detainees applying for release from detention via an application for habeas corpus can apply for appointed counsel, but the likelihood of a court granting the application is low. See Stefanelli (2020, p. 78).

[35] ICE website, supra note 1.

[36] Major cities, such as New York, Los Angeles, and Washington D.C. tend to have pro bono immigrant legal services to assist in litigation, including habeas corpus applications. For example, in Washington, D.C., the CAIR Coalition serves this function, as well as local general legal aid societies. More broadly, the American Bar Association has run projects that provide legal services to migrants detained in South Texas. However, these programs and organizations are severely understaffed and under-resourced.

[37] President Biden's Executive Order to that effect is available online https://www.federalregister.gov/documents/2021/01/29/2021-02070/reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention (accessed on 16 June 2021).

[38] For a discussion of mandatory detention, see, e.g., Noferi (2016).

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