

Tolerating the Harms of Detention, With and Without COVID-19

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I INTRODUCTION

What does COVID-19 teach about the lives of people in detention and the obligations of those running such facilities? How should the experiences of this pandemic inform the body politic about COVID-19 and about incarceration?

In a host of ways, COVID-19 has been radically disruptive. Yet, for people in detention, whether housed in jails before trial, in prisons after conviction, or as immigrants potentially subject to deportation, COVID-19 presents challenges that they faced before this pandemic. The loss of free movement and autonomy is what detention in the United States currently is. A risk of contagion accompanies confinement, which too often entails hyper-density as well as profound isolation, if people are held in solitary confinement.

The stunning dysfunction, expense, and racial inequities of the prison system have become topics of national concern. From a variety of vantage points (whether from conservative groups described as “right on crime” or progressive activists), curbing incarceration has become imperative. When COVID-19 hit, some commentators thought that it would provide a new impetus for radical revisions in support of the prison abolition movement. Yet, the heightened risks of COVID-19 atop the other harms incarcerated people face have not, to date, dislodged widespread commitments in the United States to incarceration.

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This chapter analyzes how the experiences of COVID-19 for people in detention illuminate both the achievements and the limits of the previous decades. Health care became inscribed as a constitutional right of detained and incarcerated people, yet its implementation remained elusive. COVID-19 underscored the total dependence of detained people on the governments that confine them and made vivid the health care failures endemic before COVID-19 and the degree of connection between prisons and the communities in which they sit. The divisive debates about regulation, government obligations, and the need for joint venturing to reduce the risk of disease have shaped the responses to COVID-19, in and outside the prison gates.

II COVID-19 – IN AND OUT OF PRISON

Congregate settings such as jails and prisons enable the rapid spread of infectious diseases that are transmitted person to person, especially those passed by droplets emitted by coughing and sneezing. People are generally required to share bathrooms, showers, eating areas, and other common spaces. Many facilities are old, dilapidated, and have poor ventilation.

The density of prison populations, before and after the development and availability of COVID-19 testing, vaccines, and treatment, is an obvious problem. Detained people arrive from other institutions, as do visitors and service providers, including full-time staff, contract personnel, vendors, health care professionals, attorneys, and religious leaders. Under usual circumstances, people in need of specialized health care are sent to outside medical facilities.

Once COVID-19 hit, international and national public health organizations began to provide some guidance. In March 2020, the World Health Organization released “Preparedness, Prevention and Control of COVID-19 in Prisons and other Places of Detention.”¹ Shortly thereafter, the Centers for Disease Control and Prevention (CDC) put forth its “Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities.”² Both documents called for operationalizing basic tenets of infection prevention: cleaning and disinfecting, hand hygiene, testing, contact tracing, quarantining, and medical isolation. Yet, and to the dismay of many health care experts, incarcerated people, and their families, the CDC guidelines were silent on an important facet of prevention: lowering prison population density.

Given poor equipment, limited resources and, at times, a lack of commitment, implementation of the guidance provided was uneven. Most facilities lacked

¹ World Health Org., Eur. Reg'l Office, Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention (Mar. 15, 2020), www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/publications/2020/preparedness-prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention,-15-march-2020-produced-by-who/europe.

² Ctrs. for Disease Control & Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID- 19) in Correctional and Detention Facilities (June 9, 2021), www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

disinfecting supplies and adequately trained personnel to support infection prevention. Despite mandates for soap and hand sanitizer, prisons set time limits on how long people could use sinks; gave out minimal amounts of free soap; required prisoners to purchase (if they could) more disinfectants; and rejected sanitizers because they are often alcohol-based, flammable, or potentially ingestible.

Moreover, many facilities did not have spaces for appropriate medical quarantine. Some people were warehoused in common areas and others put in cells designed to isolate for punishment. Some institutions imposed lockdowns that cut off access to outside health care providers and often prevented specialists, as well as lawyers, family, and other visitors, from coming in. Nonetheless, staff continued to go in and out, and some facilities admitted new people into detention. In public health terms, the result was a “tinderbox scenario” in which rampant spread occurred, in and around prisons.

In July 2020, the *New York Times* reported that 80 percent of the largest clusters of COVID-19 cases had occurred in prisons.³ By November 2020, the health disparities between people residing and working in prisons and the general public widened. Staff in federal and state prisons were 3.2 times more likely to be infected with COVID-19 compared to the US population, and the likelihood for incarcerated people was 1.4 times higher still.⁴ As of June 2021, one report identified 398,627 COVID-19 cases and 2,715 deaths of people confined in prisons.⁵ In another model of the impact which controlled for differences in race and gender, the death rate from COVID-19 in prisons was three times higher than in the general US population.⁶ COVID-19 infection rates in Immigration and Customs Enforcement (ICE) detention were twenty times higher than in the general population and five times greater than in prisons.⁷

Yet such estimates were an undercount. Not all systems keep high-quality records or make complete and accurate accountings public. In the summer of 2021, researchers at the University of California, Los Angeles-based *COVID Behind Bars Data Project* reported that several states had stripped public-facing dashboards of relevant information on infection and death rates.⁸ These statistics have public health implications beyond those facilities. As noted, staff members come in and out, and detained people rely on area hospitals for acute care. A 2020 modeling study predicted that,

³ Coronavirus in the U.S.: Latest Map and Case Count, NY Times, www.nytimes.com/interactive/2021/us/covid-cases.html#clusters (last visited July 2020).

⁴ Julie A. Ward et al., COVID-19 Cases among Employees of U.S. Federal and State Prisons, 60 *Am. J. Preventive Med.* 840, 841 (2021).

⁵ The Marshall Project, A State-By-State Look at 15 Months of Coronavirus in Prisons (July 1, 2021), www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons.

⁶ Brendan Saloner et al., COVID-19 Cases and Deaths in Federal and State Prisons, 324 *JAMA* 602, 603 (2020).

⁷ Isabelle Niu & Emily Rhyne, 4 Takeaways from Our Investigation into ICE’s Mishandling of COVID-19, NY Times (Apr. 25, 2021), www.nytimes.com/2021/04/25/video/immigration-detention-covid-takeaways.html.

⁸ Michael Ollove, Some States Are Cloaking Prison COVID Data, Pew Charitable Trusts: Stateline (Oct. 27, 2021), www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/10/27/some-states-are-cloaking-prison-covid-data.

were every intensive care unit bed made available for sick detainees, COVID-19 outbreaks in nine ICE detention centers would, within three months, overwhelm local intensive care units within a fifty-mile radius, and that the capacity to care for others would be greatly reduced. Other researchers focused on the comparable impacts to the community from COVID-19 in prisons.⁹ For example, a multi-county study using data from the summer of 2020 estimated that incarceration contributed to over half a million COVID-19 cases both inside facilities and in the surrounding communities.¹⁰

III SEEKING THE PROTECTION OF THE LAW

Documentation of detention facilities' health care failures came by way of expert analyses provided to legislatures, government officials, and courts. One overview of the inadequacies in the Federal Bureau of Prisons (BOP), with some 120 facilities across the United States, came from testimony by Homer Venters, a physician and epidemiologist who had served as the Medical Director and Chief Medical Officer of New York City Correctional Health Services, and then as a member of the Biden–Harris COVID-19 Health Equity Task Force.¹¹ In his April 14, 2021 statement to the US Senate Judiciary Committee, Dr. Venters reported that COVID-19 “revealed a disturbing lack of access to care” in general. To seek care in the BOP, a written request had to be submitted; with and without the pandemic, requests were ignored, mishandled, or received a delayed response.

The consequence, as Dr. Venters reported, was that “when COVID-19 arrived, incarcerated people relied on broken systems of sick call to seek care.” Individuals who did report COVID-19 symptoms were often met with delays; that slow response resulted in belated care and isolation, which meant that contagious individuals could unwittingly transmit the virus to others. For people who had other medical issues, the situation became dire. Many described disabling delays – before as well as during acute phases of COVID-19 – in receiving specialized and necessary care. The result, according to Dr. Venters, was that the “pre-existing weakness in the BOP health services worsened the morbidity and mortality of COVID-19.”¹²

⁹ Michael Irvine et al., Modeling COVID-19 and its Impacts on US Immigration and Customs Enforcement (ICE) Detention Facilities, 2020, 97 *J. Urb. Health* 439, 444 (2020); see also Danielle Wallace et al., Is There a Temporal Relationship between COVID-19 Infections among Prison Staff, Incarcerated Persons and the Larger Community in the United States?, 18 *Int'l J. Env't Rsch. Pub. Health* 6873 (2021).

¹⁰ Gregory Hooks & Wendy Sawyer, Mass Incarceration, COVID-19, and Community Spread, Prison Pol'y Initiative (Dec. 2020), www.prisonpolicy.org/reports/covidspread.html#aggregate.

¹¹ Health Priorities for the Federal Bureau of Prisons: Hearing Before the U.S. Senate Comm. on the Judiciary, 117th Cong. 1, 3 (Apr. 14, 2021) (statement of Dr. Homer Venters), <https://s3.documentcloud.org/documents/20616259/ventersbop.pdf>.

¹² *Id.* at 3–4; see also Katie Park, Keri Blakinger, & Claudia Lauer, A Half-Million People Got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?, Marshall Project (June 30, 2021), www.themarshallproject.org/2021/06/30/a-half-million-people-got-covid-19-in-prison-are-officials-ready-for-the-next-pandemic;

Parallels abounded in the states. In October 2021, a California state court judge provided more than 100 pages on the failures in the state. His conclusion was that California's Department of Corrections had caused "the worst epidemiological disaster in California correctional history;" rather than comply with the various recommendations to mitigate harms, "it chose to litigate the matter while people died."¹³

The lawsuit that prompted that account is one marker of significant changes that have been won by people in detention who, in prior centuries, had virtually no legal protection. In the 1960s, incarcerated people around the United States challenged the injustice of their exclusion from constitutional rights. Through political protests, petitions to government officials, and pleadings in courts, incarcerated people pushed the law to make good on what they read the Constitution to promise: the equal protection of the law and a ban on cruel and unusual punishments. Prisoners asserted that they had rights to a modicum of safety, sanitation, and activities and to protection against violence, such as being whipped, starved, stripped, or held in cold bare cells.¹⁴

The specific issue of health care reached the Supreme Court in 1976 through the efforts of J.W. Gamble, who was incarcerated in Texas. He filed a handwritten petition and told a federal judge that, while working, he had been hit by a 600-pound bale of cotton. Although seen by prison doctors, the prison did not follow through on the doctor's prescriptions and then sent him to solitary confinement as punishment because of his inability to work. Reversing a lower court decision that had thrown Gamble out of court, appellate judges noted the "woefully inadequate" medical services; one facility had a single doctor for 17,000 incarcerated people.¹⁵

What *does* the Constitution say about health care in prisons? The Fifth and Fourteenth Amendments protect "life, liberty, and property" from deprivations without "due process," and the Eighth Amendment prohibits "cruel and unusual punishments" from being used on those serving a criminal sentence. Before Gamble's case went to the Supreme Court, a few lower courts concluded that, either as a matter of a person's "liberty" or because of the ban on "cruel" punishments, prison officials had to provide some health care, but many judges responded to only the direst situations. Writing for the majority honing in on what the Eighth Amendment required, Justice Thurgood Marshall explained in *Estelle v. Gamble* that the ban on cruel and unusual punishments embodied "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," which required states not to be deliberately indifferent "to serious medical needs."¹⁶

Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, NY Times (Apr. 10, 2021), www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html.

¹³ In re Hall, Nos. SC212933, 213244, 212566 at 112–13 (Cal. Super. Ct. Marin Cnty. Nov. 16, 2021).

¹⁴ See, generally, Judith Resnik et al., *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 *Nw. U. L. Rev.* 45 (2020); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 *Mich. L. Rev.* 1994 (1999).

¹⁵ *Gamble v. Estelle*, 516 F.2d 937, 940 (5th Cir. 1975).

¹⁶ *Estelle v. Gamble*, 429 U.S. 97, 102, 104 (1976).

Even as this constitutional pronouncement was a major breakthrough, its test raises many questions. If a prison system does not provide adequate care, why should the *intent* – as contrasted with knowledge – of the administrators matter? And why should the burden rest with the incarcerated person? Those points were part of the dissent in *Estelle* by Justice John Paul Stevens, criticizing the majority’s “deliberate indifference” requirement.

Losing *and* winning is one way to understand what happened thereafter. That ruling insulated prison officials, who could rebut claims by arguing they did not have the requisite level of intent to be subjected to injunctive orders to make changes or be held liable for monetary damages. Less than nine months after Mr. Gamble “won” in the Supreme Court, the appellate court dismissed his case because he could not meet the “rigorous guidelines” of showing the prison system’s indifference to “satisfy” the Supreme Court’s standard.¹⁷

Yet the Supreme Court’s decision also opened the courthouse door to arguments about the level and kind of care provided in detention. The opinion has supported a host of court rulings requiring system-wide relief to improve medical and mental health services for people in prison. In 2011, obligations established in *Estelle v. Gamble* were part of another Supreme Court decision upholding the release of people from prison in California because massive overpopulation rendered it impossible to provide minimally adequate health care.¹⁸ *Estelle v. Gamble* also spawned new organizations aiming to improve care.¹⁹ Several private corporations saw the potential for profits. A few have a large market share of lucrative contracts and long lists of complaints about their failures to provide adequate services.

A distinctive feature of the *Estelle v. Gamble* ruling needs to be highlighted. In contrast to the constitutions of many other countries, the Constitution of the United States has rarely been read to require affirmative support from the government. Many commentators see the Constitution as creating “negative liberties” that produce freedom from government intervention rather than “positive rights” of provisioning. Moreover, even as other countries have social policies that provide for universal health care, as well as education and other benefits, the United States currently does not. Yet the Court’s 1976 requirement that prisons not be deliberately indifferent to serious medical needs does impose an affirmative obligation to provide health care. Prisons are, therefore, one of the few places in the United States where a form of access to health care has a degree of constitutional protection.

In the decades since *Estelle v. Gamble*, it has become clear that *some* level of health care should not be equated with *high-quality* care. Long before the arrival of COVID-19, an array of reports and lawsuits documented the ongoing failures of

¹⁷ *Gamble v. Estelle*, 554 F.2d 653, 654 (5th Cir. 1977).

¹⁸ *Brown v. Plata*, 563 U.S. 493 (2011).

¹⁹ See, for example, National Commission on Correctional Health Care, www.ncchc.org/ (last visited Oct. 20, 2021); Community Oriented Correctional Health Services, <https://cochs.org/> (last visited Oct. 20, 2021); American College of Correctional Physicians, <https://accpmed.org/> (last visited Oct. 20, 2021).

prison systems to provide minimally adequate care as compared to what was available in the community.²⁰

IV DE-DENSIFICATION AS A PUBLIC HEALTH STRATEGY AND AS A LEGAL OBLIGATION

This account makes plain that detention itself is a major source of risk of infections. When COVID-19 hit, social distancing, coupled with masks and, as the science developed, testing and vaccines, became the safety protocols for people for whom these were available. In congregate settings, when masks, testing, and vaccines were often not available, “de-densification” was central. One study identified both testing and de-densification as key, as together they reduced transmission by more than 55 percent.²¹

Prison overcrowding is an artifact of decades of social policy. Beginning with the political shifts in the latter part of the twentieth century, a “war on crime,” fueled by racist tropes, produced prosecution policies and sentencing laws that resulted in massive numbers of people held in detention.²² Incarceration rates that had been relatively stable (with about 320,000 people incarcerated nationwide in 1980) rose to record highs.²³ By the end of 2020, the Federal Bureau of Justice Statistics reported that 1.4 million people were incarcerated in prisons, with another 750,000 held in jails. About 58 percent of the US population was categorized as “white,” even though only 31 percent of people in prison are white prisoners. In this context, as in many others, the risks of detention are borne disproportionately by people of color.²⁴

The public health call to de-densify was in sync with the goals of the decarceration movement, which has been vividly embodied in Angela Davis’s call for “prison abolition.”²⁵ Advocates’ hope was that COVID-19, along with the myriad harms and costs of incarceration, would widen acceptance of the need to limit incarceration.²⁶

²⁰ US Dep’t of Just., Office of the Inspector Gen., Review of the Federal Bureau of Prisons’ Medical Staffing Challenges (Mar. 2016), <https://oig.justice.gov/reports/2016/e1602.pdf>; see, for example, *Briggs v. Dunn*, 257 F.Supp.3d 1171, 1267–68 (M.D. Ala. 2017); *Briggs v. Dunn*, 367 F.Supp.3d 1340 (M.D. Ala. 2019).

²¹ Giovanni Malloy et al., The Effectiveness of Interventions to Reduce COVID-19 Transmission in a Large Urban Jail, 11 *BMJ Open* 1, 6 (2020).

²² See, for example, Jeremy Travis, Bruce Western & F. Stevens Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 104–29 (2014); Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (2017); Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (2006).

²³ Bureau of Just. Stat., *Prisoners in 1980*, at 1 (1981), <https://bjs.ojp.gov/content/pub/pdf/p80.pdf>.

²⁴ Ann Carson, Bureau of Just. Stat., *Prisoners in 2019*, at 2, 6 (2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf>; Zhen Zeng & Todd D. Minton, *Jail Inmates in 2019*, at 2 (2021), <https://bjs.ojp.gov/content/pub/pdf/j19.pdf>; U.S. Census Bureau, *Racial and Ethnic Diversity in the United States: 2010 Census and 2020 Census* (Aug. 12, 2021), www.census.gov/library/visualizations/interactive/racial-and-ethnic-diversity-in-the-united-states-2010-and-2020-census.html.

²⁵ Angela Y. Davis, *Are Prisons Obsolete?* (2011); see also Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (2007).

²⁶ See, for example, Joshua Petersen, James Cavallaro & Andrew Clark, *Connecticut at the Crossroads: COVID-19, the State Budget Crisis and the Path Towards Decarceration, Public Safety and*

Advocates deployed that movement's slogans (such as "Free Them All") and coined others (such as "Free Them All 4 Public Health") to mark the abolitionist aim.

Whether abolitionist or not, an array of communities and professionals mobilized to try to mitigate the risk COVID-19 caused in detention. People in prison and their lawyers filed hundreds of lawsuits, some seeking individual releases and others class-wide remedies.²⁷ One theory was that, because COVID-19 infection put a person at risk of illness and death, COVID-19 turned a lawful sentence for a term of years into unlawful detention. The remedy was release, either by "enlarging" the place of custody to permit serving time outside of prison, to admit a person to "bail," or to grant a petition for habeas corpus.²⁸ Another theory was that, under *Estelle v. Gamble*, prison systems were deliberately indifferent to known medical needs. Some lower court judges agreed and ordered soap, masks, distancing, reduction of time, release of eligible individuals, and more.

These efforts were complicated by a 1996 statute known as the Prison Litigation Reform Act, through which Congress circumscribed judges' authority to respond when prisoners sought relief from conditions of confinement. One line of COVID-19 cases rejected lawsuits because prisoners had not "exhausted" administrative remedies by asking prison officials for action before going to the courts, even though the public health crisis and the limited kinds of relief in prison grievance programs undermined the utility of such requests.²⁹ Other trial-level judges recognized the need for release and did so by shortening sentences or relocating individuals to spend the remaining time in "home confinement."³⁰ Some of those rulings remained in place,³¹ but appellate courts stayed or reversed others,³² and in a few instances, the Supreme Court (over dissents) blocked relief.³³ Those decisions generally relied on

Community Investment, Univ. Network for Hum. Rts. (Jan. 2021), https://static1.squarespace.com/static/5b3538249d5abb21360e858f/t/600f29b9d383732f202b08dc/1611606459237/ConnecticutAtTheCrossroads_25Jan21.pdf.

²⁷ See, for example, *Martinez-Brooks v. Easter*, 459 F.Supp.3d 411, 418 (D. Conn. 2020); COVID-19 Special Collection, Civil Rights Litigation Clearinghouse, <https://clearinghouse.net/results.php?searchSpecialCollection=62> (last visited Oct. 24, 2021).

²⁸ Brief of Law Professors on the Remedial Powers of Federal Courts as Amici Curiae Supporting Petitioners-Appellees, *Hernandez Roman v. Wolf*, 829 F.App'x 165 (9th Cir. 2020) (Nos. 20-55436, 20-55662); *Wilson v. Williams*, 455 F.Supp.3d 467, 478 (N.D. Ohio 2020), enforcement granted, No. 4:20-CV-00794, 2020 WL 2542131 (N.D. Ohio May 19, 2020), vacated and remanded, No. 20-3547, 2020 WL 9813537 (6th Cir. Sept. 17, 2020), and vacated, 961 F.3d 829 (6th Cir. 2020).

²⁹ See *Ross v. Blake*, 578 U.S. 632 (2016).

³⁰ See, for example, *Wilson v. Williams*, 455 F.Supp.3d 467, 478 (N.D. Ohio 2020), enforcement granted, No. 4:20-CV-00794, 2020 WL 2542131 (N.D. Ohio May 19, 2020), vacated and remanded, No. 20-3547, 2020 WL 9813537 (6th Cir. Sept. 17, 2020), and vacated, 961 F.3d 829 (6th Cir. 2020). But see *Money v. Pritzker*, 453 F.Supp.3d 1103 (N.D. Ill. 2020) (rejecting this view).

³¹ See, for example, *Torres v. Milusnic*, 472 F.Supp.3d 713 (C.D. Cal. 2020), enforcement granted in part, denied in part, No. 20-4450, 2021 WL 3829699 (C.D. Cal. Aug. 27, 2021).

³² *Valentine v. Collier*, 490 F.Supp.3d 1121, 1175 (S.D. Tex. 2020), rev'd, 993 F.3d 270 (5th Cir. 2021), application to vacate stay denied, 140 S.Ct. 1598 (2020).

³³ *Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, at *1 (9th Cir. June 17, 2020), application for a stay granted, 140 S.Ct. 2620 (2020); *Valentine v. Collier*, 490 F.Supp.3d 1121, 1175 (S.D. Tex. 2020), rev'd, 993 F.3d 270 (5th Cir. 2021), application to vacate stay denied, 141 S.Ct. 57 (2020).

prison officials' arguments that whatever they did to buffer against COVID-19 was sufficient under the test of "deliberate indifference to known medical needs." Thus, after an initial spurt of lower court judges insisting on methods to lessen the risks to people's lives and health, several courts showed their tolerance for the status quo.³⁴

Courts were one venue to seek de-densification, executive action another. Many communities called on directors of correctional facilities, governors, federal officials, and legislatures to take affirmative steps to de-densify. One response came from Congress in the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act, which became law in March 2020. That Act authorized the Attorney General, during the Act's covered emergency period, to direct the BOP to expand the number of people eligible for "home confinement" by "lengthen[ing] the maximum amount of time for which the Director is authorized to place a prisoner in home confinement."³⁵ Thus, people who would otherwise not have met the requirements for reassignment were able – if the BOP acted – to serve the remainder of their sentences at their homes or in halfway houses.³⁶

On April 3, 2020, the Attorney General made the relevant finding that the emergency conditions created by COVID-19 materially affected the functioning of the BOP.³⁷ That decision gave the BOP Director authority to de-densify by letting some people out and lowering the number of people held in close proximity to one another. Yet the BOP used this opportunity less than it could have done. For example, at the sole federal prison in Connecticut, prison officials did little until incarcerated people brought a class-action lawsuit and a federal court issued an order that the prison's warden had likely violated the Eighth Amendment by failing to release people eligible for home confinement.³⁸ As of October 18, 2021, the agency's website reported that since March 2020, the BOP had released 33,056 people on home confinement and that 7,586 individuals then remained on home confinement status.³⁹ Those numbers demonstrate that many released individuals would have been eligible for release even without the CARES Act provision, for they were close to the end of their sentences.

Low numbers of releases were also visible in data from states. For example, by the fall of 2020, 10,000 people were confined in Connecticut state prisons and jails, of whom 3,100 were either held before trial or on misdemeanor convictions – all facing the risks that COVID-19 imposed. A lawsuit challenged those failures, but as some

³⁴ See Brandon L. Barrett & Lee Kovarsky, *Viral Injustice*, 110 *Cal. L. Rev.* 117 (2022).

³⁵ See Memorandum Opinion for the General Counsel Federal Bureau of Prisons, *Home Confinement of Federal Prisoners After the COVID-19 Emergency* (Jan. 15, 2021), www.justice.gov/olc/file/1355886/download.

³⁶ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12003, 134 Stat. 281, 516 (2020).

³⁷ See Attorney General, Memorandum for Director of Bureau of Prisons (Apr. 3, 2020), www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf.

³⁸ *Martinez-Brooks v. Easter*, 459 F.Supp.3d 411 (D. Conn. 2020).

³⁹ Bureau of Prisons, *COVID-19 Home Confinement Information*, www.bop.gov/coronavirus/ (last visited Mar. 28, 2022).

courts took a narrow view of the “deliberate indifference” standard, an agreement was put into place about monitoring conditions rather than releasing individuals.⁴⁰

Lawsuits to protect people detained by immigration were at times somewhat more successful than those brought on behalf of people in state and federal prisons. Several facility-wide class-action lawsuits resulted in the release of significant numbers of people from ICE detention, even when lower court decisions were subsequently modified or reversed.⁴¹ These ICE detention suits did not face the legal hurdles imposed by the Prison Litigation Reform Act, including its exhaustion requirements. Moreover, because people held in ICE detention are “civil” detainees, their right to health care comes from constitutional guarantees of liberty rather than prohibitions on cruel and unusual punishment. A few judges focused on the lack of health care and did not require demonstration of proof of intent (“deliberate indifference”), as courts have done in the post-conviction context.⁴²

In terms of the whole country, between January 2020 and January 2021, the number of people held in jails and in prisons declined somewhat in some jurisdictions.⁴³ Yet rather than resulting from releases of people who were already incarcerated, much of that decline was attributed to COVID-19-induced slowdowns in prosecution and in courts, as well as the appropriate reluctance of some prosecutors and judges to put people in confinement while awaiting trial. Moreover, the benefits of these policies did not inure to people of color as they did to white populations.⁴⁴ Atop these front-end shifts, only a few governors exercised their pardon, clemency, parole, or other authority to release people from prison, and when they did, it was typically to release only small numbers. One exception came from North Carolina, where the governor, responding to litigation about prison conditions, issued an order for a plan to release 3,500 people.⁴⁵

Populations declined in the federally run immigration detention system as well. In the winter of 2020, the government held approximately 39,000 non-citizens for potential removal. By April 2021, that number was down to 14,000.⁴⁶ Whether the reduction in population was due to decisions by the Department of Homeland

⁴⁰ Conn. Dep’t of Corr. Rsch. Unit, Average Confined Inmate Population and Legal Status (Oct. 2020), <https://portal.ct.gov/-/media/DOC/Pdf/MonthlyStat/Stat1012020.pdf>.

⁴¹ See, for example, *Fraihat v. US Immigr. & Customs Enft.*, 445 F.Supp.3d 709 (C.D. Cal. 2020), order clarified, No. EDCV 19-1546, 2020 WL 6541994 (C.D. Cal. 2020), rev’d and remanded, 16 F.4th 613 (9th Cir. 2021); *Roman v. Wolf*, 977 F.3d 935 (9th Cir. 2021); *Savino v. Souza*, 459 F.Supp.3d 317 (D. Mass. 2020).

⁴² See, for example, *Malam v. Adducci*, 455 F.Supp.3d 384 (E.D. Mich. 2020), appeal dismissed, No. 20-1977, 2021 WL 1400901, at *1 (6th Cir. Mar. 11, 2021).

⁴³ Emily Widra, How Much Have COVID-19 Releases Changed Prison and Jail Populations?, Prison Policy Initiative (Feb. 3, 2021), www.prisonpolicy.org/blog/2021/02/03/january-population-update/.

⁴⁴ Brennan Klein et al., The COVID-19 Pandemic Amplified Long-Standing Racial Disparities in the United States Criminal Justice System, *medRxiv* (2021).

⁴⁵ Jordan Wilkie, NC Prisons Settle NAACP Case, Agree to Fast-Track Release of 3,500 Inmates, Carolina Public Press (Feb. 25, 2021), <https://carolinapublicpress.org/42883/nc-prisons-settle-naacp-case-agree-to-fast-track-release-of-3500-inmates/>.

⁴⁶ Dep’t of Homeland Sec., ICE Details COVID-19 Impacts on Immigration Enforcement in FY 2020, www.ice.gov/features/ERO-2020 (last visited Oct. 24, 2021).

Security to de-densify is not clear; arrests for immigration violations did decline. Some analysts point to the government's virtual closing of the border as a significant source of the decrease, and this possibility could have more explanatory power than a decrease in arrests inside the country.⁴⁷

In general, the consensus among public health experts on de-densification was not met by adequate responses from a host of governmental officials, the CDC included. A few initiatives aspired to do more. For example, "complete clemency" is the shorthand for providing that all the people released from the federal system through the CARES Act and serving their sentences under home confinement should remain outside prison.⁴⁸ In addition, the harms of COVID-19 helped to energize efforts in some jurisdictions to legislate to limit the practice of reincarcerating people who may have violated conditions when on bail, probation, or parole. Violations range from committing new crimes to minor problems such as not showing up on time for a meeting or not completing drug testing and mental health treatment. An initiative in New York called "Less is More" had, since 2017, sought to limit using such violations to put people back into high-risk detention. New York City's Rikers Island provided a horrific example; in the first ten months of 2021, thirteen people – held before trial – died because of an understaffed, lawless, and dangerous facility.⁴⁹ New York's legislature passed "Less Is More," which Governor Kathleen Hochul signed in that September 2021.⁵⁰

Parallel concerns helped to close an immigration detention facility, Bristol County House of Corrections in the Northeast. Advocates in New England documented terrible conditions of confinement and provided crucial support and organizing for the class-action litigation brought on behalf of all people detained at the facility.⁵¹ The litigation resulted in a significant reduction of the population at the facility, and, in 2021, the Biden Administration terminated its contract authorizing non-citizens to be detained at the facility.⁵² Members of California's congressional delegation, citing COVID-19, called for closing some of the detention facilities there as well.⁵³

⁴⁷ Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559 (proposed Mar. 24, 2020) (to be codified at 42 C.F.R. § 71).

⁴⁸ Am. C.L. Union, *The Redemption Campaign: Embracing Clemency* (June 23, 2021), www.aclu.org/news/topic/the-redemption-campaign-embracing-clemency/.

⁴⁹ Jan Ransom, *Rikers Death Pushes Toll in NYC Jails to 13 This Year*, NY Times (Oct. 15, 2021), www.nytimes.com/2021/10/15/nyregion/rikers-death-toll.html.

⁵⁰ *Less is More Act*, S.B. S1144A, 2021-22 Leg. Sess. (NY 2021).

⁵¹ *Savino v. Souza*, 459 F.Supp.3d 317 (D. Mass. 2020).

⁵² Laura Crimaldi, *Biden Administration Terminates ICE Contract with Bristol Sheriff Thomas Hodgson*, BostonGlobe (May 20, 2021), www.bostonglobe.com/2021/05/20/metro/biden-administration-terminates-ice-contract-bristol-sheriff-thomas-hodgson/.

⁵³ Deepa Fernandes, *Congressional Lawmakers Take Aim at Three Immigration Detention Centers in California*, SF Chron. (Oct. 22, 2021), [www.sfchronicle.com/california/article/Congressional-lawmakers-take-aim-at-three-16552821.php?utm_campaign=CMS%20Sharing%20Tools%20\(Premium\)&utm_source=t.co&utm_medium=referral](http://www.sfchronicle.com/california/article/Congressional-lawmakers-take-aim-at-three-16552821.php?utm_campaign=CMS%20Sharing%20Tools%20(Premium)&utm_source=t.co&utm_medium=referral).

V COVID-19 VACCINES: THE PROMISE AND CHALLENGES OF DELIVERY IN PRISONS

As is now familiar, COVID-19 prompted a remarkable effort to produce vaccines; the results exceeded many predictions in terms of timing and efficacy. When vaccine supplies were limited, some states put prisoners, along with others in congregate housing such as nursing homes, on the list of priority recipients.⁵⁴ Other states did not, and one court ruled that the state's categories for access had to treat prisoners the same as others, similarly situated, and make vaccinations available as the state did for all in congregate settings.⁵⁵

As vaccine availability increased, the issues turned from access to obligations: Who would get vaccinated, and could vaccines be mandated in detention? Available data suggested that, as of February 2022, in those jurisdictions providing information, the percentage of incarcerated people with at least one dose of a COVID-19 vaccine ranged from 52 percent to 94 percent. The rates of prison staff who had received at least one dose ranged from 23 percent to 82 percent.⁵⁶

That variation brought issues of obligation to the fore. In at least one instance, a court directed state facilities to lower the risk of the spread of infection by requiring vaccines for people denoted as “workers” entering the facilities.⁵⁷ In the fall of 2021, the White House COVID-19 Action Plan mandated vaccines for federal employees and federal contractors, and applied that requirement to people working for BOP and ICE.⁵⁸ In 2022, after the Supreme Court concluded that the Occupational Safety and Health Administration lacked the authority to mandate vaccines and testing for the private sector, the agency substituted guidelines that encouraged those practices and additional care for “at risk” populations.⁵⁹ Given the mix of public and private staff in detention facilities, facility administrators became the source of important decisions about how to protect the safety of people in detention and staff.⁶⁰

⁵⁴ Roni Caryn Rabin, In Massachusetts, Inmates Will Be Among First to Get Vaccines, *NY Times* (Dec. 18, 2020), www.nytimes.com/2020/12/18/health/coronavirus-vaccine-prisons-massachusetts.html.

⁵⁵ See *Maney v. Brown*, No. 6:20-CV-00570-SB, 2021 WL 354384 (D. Or. Feb. 3, 2021).

⁵⁶ COVID Behind Bars Data Project, UCLA Law, <https://uclacovidbehindbars.org> (last visited Feb. 23, 2022); see also Jaimie P. Meyer, Jaelen King & Alana Rosenberg, Meeting the Moment by Vaccinating Prison Staff Against COVID-19, 3 *JAMA Health Forum* 1 (2022).

⁵⁷ *Plata v. Newsom*, No. 01-CV-01351, 2021 WL 4448953, at *13 (N.D. Cal. Sept. 27, 2021).

⁵⁸ M.D. Carvajal, Director, US Dept. of Just., Fed. Bureau of Prisons, Memorandum for All Staff re Vaccination Mandate (Sept. 29, 2021), https://cdn.govexec.com/media/gbc/docs/pdfs_edit/100521cb1.pdf; US Immigr. & Customs Enf't, Enforcement and Removal Operations, COVID-19 Pandemic Response Requirements (Oct. 19, 2021), www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf.

⁵⁹ Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S.Ct. 661 (2022) (granting stay); US Dep't of Lab., Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, www.osha.gov/coronavirus/safework (last visited Mar. 18, 2022).

⁶⁰ See Meyer et al., *supra* note 56.

The question of imposing vaccine mandates for detained people is nested in oppressive histories of detention and of medical experimentation. As discussed, given the lack of care in many facilities, people in prison have many reasons to distrust the system that detains them. Further, informational sources are regulated; incarcerated patients face challenges in making well-informed choices. To respect a modicum of autonomy related to health care, most jurisdictions have not required vaccinations against diseases such as influenza.

COVID-19 contagion put stress on that approach. Innovative responses have aimed to address the challenges of ethical and equitable vaccine distribution in prisons. Public health experts focused on identifying “trusted messengers” who could provide information beyond what staff gave to incarcerated people. Such innovative information campaigns aimed to provide accurate knowledge and counteract misinformation. For example, the National Commission on Correctional Health Care and AMEND, based at the University of California, San Francisco Medical School, provided free materials, developed with input from people in detention, on COVID-19 vaccines.⁶¹ In Rhode Island, handouts shaped by incarcerated people were provided weeks before vaccines arrived to all people in detention in the Rhode Island Department of Corrections.⁶² The University of Massachusetts Medical School, through a contract with the Massachusetts Office of Public Safety, developed a “COVID-19 vaccines in prison” information campaign in several languages and included factsheets, posters, and videos; these were distributed to people incarcerated, staff, and state police.⁶³

VI COVID-19’S LESSONS

Our account of COVID-19 in US detention from 2020 to 2021 is embedded in the unhealthy (in all senses of that word) attachment to incarceration, which diminishes the well-being of the people required to live in prison, the staff who work there, and the communities and country of which they are a part. The global and national experience of this public health emergency has again underscored that massive incarceration undermines public and personal health. Moreover, even after vaccines rolled out and the end of an acute phase of pandemic came into sight in

⁶¹ AMEND, COVID-19 in Correctional Facility: Answers, Advice, and Answers, <https://amend.us/covid/> (last visited Oct. 24, 2021); Nat’l Comm. on Correctional Health Care, COVID-19 Coronavirus: What You Need to Know in Corrections, www.ncchc.org/covid-resources (last visited Oct. 24, 2021).

⁶² Nat’l Comm. on Correctional Health Care, Rhode Island DOC’s Vaccine Acceptance Success Story (Apr. 27, 2021), www.ncchc.org/blog/rhode-island-docs-vaccine-acceptance-success-story; Melanie DaSilva & Kayla Fish, RI Correctional Officers, Inmates Getting Vaccinated Despite Hesitancy in Other States, WPRI (Mar. 17, 2021), <https://doc.ri.gov/covid-19>.

⁶³ UMass Med. Sch. Commc’ns, Medical Students Improve Access to COVID-19 Vaccine Information for Multilingual Community, UMASS Chan Med. Sch. (May 5, 2021), www.umassmed.edu/news/news-archives/2021/05/medical-students-improve-access-to-covid-19-vaccine-information-for-multilingual-community/.

the United States, COVID-19 is becoming endemic and the risks it poses to people in congregate settings remain high.

Further, COVID-19 is far from the only risk to health associated with incarceration. Prison is bad for people on a host of dimensions. For example, according to 2020 federal data, people in prison have a 2.5 times higher risk of dying from homicides than those in the community.⁶⁴ One lesson that COVID-19 ought to have provided is that the hyper-density of detention (coupled at times with the profound isolation of solitary confinement) is unsafe as well as unwise and unjust.

COVID-19 also underscored the interdependence of communities around the world, including prisons, and the centrality of education in improving public health. The conflicts over collective action to respond to the health emergency of COVID-19 took place in many venues. Divides about mask and vaccine mandates, economic support, eviction bans, and religious exemptions in relationship to COVID-19 are intertwined with conflicts about the government's role in providing help and care more generally. Likewise, insufficient responses to COVID-19 in detention mirrored the lack of sufficient health care in prison for other diseases.

COVID-19 has thus served as a painful reminder that prison is a place where the harms of confinement are known and tolerated. We are "in medias res" – in the middle of understanding the import of the pandemic and in the middle of conflicts about how to generate the political and social will to provide for more safety and to support well-being for all. For people in prison, rethinking detention, with and without COVID-19, is required.

⁶⁴ Leah Wang & Wendy Sawyer, *New Data: State Prisons Are Increasingly Deadly Places*, Prison Pol'y Initiative (June 8, 2021), www.prisonpolicy.org/blog/2021/06/08/prison_mortality/.