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Essay

A plea to apply principles of quarantine ethics to prisoners and immigration detainees during the COVID-19 crisis

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Individuals who are detained in prisons and immigration centers are exposed to a high risk of illness and death from COVID-19. These facilities generally contain both isolation units for those who are already infected and quarantine units for those who are suspected of having the virus.[1] Even where individual inmates and detainees are not personally suspected of having the virus (such as would require assignment to the quarantine unit within the facility), virtually all those confined are at risk, due to close contact from overcrowding and multiple challenges in maintaining sanitation. Under these circumstances I argue for facility-wide applicability of principles of Quarantine Ethics that provide for adequate medical treatment and safe, healthful conditions of confinement.

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1 CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, May 7, 2020, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (accessed Aug. 18, 2020).

'Quarantine Ethics' is a shorthand formulation of the ethical analytical framework by which one justifies imposing involuntary confinement, and the conditions of that confinement, during a public health emergency. Mark Rothstein identifies the following criteria: (i) necessity, effectiveness, and scientific rationale; (ii) proportionality and least infringement of individual liberty; (iii) humane supportive services; and (iv) public justification (incorporating transparency, due process and fairness).[2] Mine is a novel application in that I am not addressing the typical scenario, for example, where a member of the general public with a communicable disease is placed in involuntary quarantine and the question arises whether the confinement was necessary and the least restrictive alternative. Rather I assume the legitimacy of the decision to confine and instead argue for applicability of conditions of care appropriately applied to those who are involuntarily committed during a public health emergency. My concern arises from the adequacy of the conditions of confinement to safeguard the health of those incarcerated or detained in immigration custody. A prisoner lacks many of the legal rights of ordinary citizens, but he or she retains fundamental human rights, for example, to be detained without abuse or torture and with sufficient food, shelter, and adequate medical care.

I explain below that current legal precedent applicable to care and treatment of prisoners and immigration detainees is insufficient to protect against unreasonable risk, and I call for enhanced measures to promote the safety of those detained under basic principles of human rights. Given the high rate at which African Americans are incarcerated, and immigration detention that is overwhelmingly Hispanic, if safe care and adequate medical treatment are not provided, there is a disproportionate impact on people of color.

Incarcerating far more individuals than any other country, the American criminal justice system currently confines 2.3 million people—in state and federal prisons, jails, and immigration detention facilities.[3] As of August 17, 2020, 2020, the US Bureau of Prisons (BOP) acknowledged that 26% of the federal prisoners tested to date have tested positive for COVID-19.[4] Approximately 21,000 individuals are confined in detention centers operated by the U.S. Immigration and Customs Enforcement (ICE).[5] As of August 1, 2020, ICE reported that 20% of the detainees screened to date tested positive for COVID-19.[6] However, early in the pandemic ICE conducted very little testing. As of May 31, 2020, ICE reported that more than 50% of those in ICE

2 Mark Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine,* 12 Ind. L. Rev. 227, 250 (2015). For a similar formulation, see E.G. Upshur, *Principles for the Justification of Public Health Intervention*, 9 Can. J. Pub. Health 101, 102–03 (2002).

3 Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2020*, Mar. 24, 2020. https://www.prisonpolicy.org/reports/pie2020.html (accessed Aug. 18, 2020). Some 1,291,000 are confined in state prisons, 631,000 in local jails, and 22,600 in federal prisons and jails. Other confinements include 42,000 in immigration facilities, as well as those confined in juvenile detention, involuntary mental commitment, and Indian Country, military, or territorial facilities.

4 BOP, *COVID19 Cases*. As of Aug. 17, 2020, there were 11,328 positive tests out of 43,872 completed tests. Privately managed facilities are excluded. There are currently 131,116 federal inmates in BOP-managed facilities and 13,569 in community-based facilities. https://www.bop.gov/coronavirus/ (accessed Aug. 18, 2020).

5 ICE, Detention Management, https://www.ice.gov/detention-management#wcm-survey-target-id (accessed Aug. 18, 2020).

6 *Id.* (Other immigration detainees are held in local jails or private detention centers).

custody tested positive.[7] The Vera Institute of Justice has prepared a detailed simulation estimating that 19% of all detainees between mid-March and mid-May 2020 contracted COVID, 15 times higher than the number of cases acknowledged by ICE in mid-May.[8]

Today's prisons and immigration centers are breeding grounds for the pandemic. According to the US Centers for Disease Control (CDC), prisons and detention centers are particularly susceptible due to 'crowded dormitories, shared lavatories, limited medical and isolation resources, daily entry and exit of staff members and visitors, continual introduction of newly incarcerated or detained persons, and transport of incarcerated or detained persons in multi-person vehicles for court-related, medical, or security reasons'.[9]

I. LEGAL PRECEDENT APPLICABLE TO RIGHTS OF CARE AND TREATMENT

Two legal remedies are at least theoretically available to inmates: constitutional challenges to adequacy of care and statutory procedures for compassionate release. I first address the adequacy of these remedies to those who are incarcerated and then discuss remedies available to immigration detainees.

Constitutional protections for individuals confined by the state or federal government include the right to reasonable safety and medical care. The rationale for this principle is simple: 'an inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met'.[10] While recognizing that harmful prison conditions such as inadequate medical care can violate the Eighth Amendment's prohibition against cruel and unusual punishment, 'only acts or omissions sufficiently harmful to evidence deliberate indifference to medical needs violate the Eighth Amendment'.[11] In *Helling v McKinney*, the Supreme Court found that an inmate's exposure to second-hand tobacco smoke in a prison cell raised a cognizable claim for cruel and unusual punishment in violation of the Eighth Amendment.[12] Pertinent to the current pandemic, the Court in *Helling* observed that the Eighth Amendment protects against serious harms from future risks such as infectious disease even though the disease may not infect all those exposed:

> We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.[13]

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7 In total, 2781 individuals in its custody, with 1461 positive cases. *Id.*

8 Vera Instit. of Justice, *The Hidden Curve: Estimating the Spread of Covid-19 among People in Ice Detention* (June 2020), https://www.vera.org/downloads/pdfdownloads/the-hidden-curve-report.pdf (accessed Aug. 18, 2020).

9 Megan Wallace et al., *COVID-19 in Correctional and Detention Facilities-United States, February–April 2020,* CDC (May 15, 2020).

10 Estelle v, Gamble, 429 U.S. 97, 103 (1976) (rejecting claim of inadequate medical care because prison officials were not deliberately indifferent to inmate's back injury).

11 *Id.*, at 107.

12 509 U.S. 25, 33 (1993) (remanding for determination as to whether prison officials demonstrated deliberate indifference).

13 *Id.*, 509 U.S. at 31.

In *Farmer v Brennan*, the US Supreme Court stated: 'the Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and . . . the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment'.[14] Prison officials' 'deliberate indifference to a substantial risk of serious harm to an inmate' infringes the constitutional protection against cruel and unusual punishment.[15] The *Farmer* decision held that the Eighth Amendment's 'deliberate indifference' test includes both an objective and subjective prong. To satisfy the objective prong, an inmate must show 'that he is incarcerated under conditions posing a substantial risk of serious harm'.[16] Under the subjective prong, 'acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk'.[17]

Courts have reached mixed outcomes in applying this legal standard to incarcerated inmates in COVID-19 litigation. US District Court Judge Colleen Kollar-Kotelly granted preliminary injunctive relief requiring immediate improvement in conditions to mitigate exposure at the DC Jail, based on a finding that infection rates at the jail were 14 times higher than in the District of Columbia as a whole.[18] Social distancing was not enforced in the jail, sanitation measures were inadequate, inmates experienced delay in accessing medical care, and conditions in isolation units were punitive. These conditions satisfied the showing of 'deliberate indifference' to the health of convicted inmates requiring immediate improvement in conditions under the Eight Amendment.[19]

On the other hand, the US Court of Appeals for the Sixth Circuit reversed a lower court ruling granting petitioners' Eighth Amendment claim relating to conditions of confinement at the federal correctional facility in Elkton, Ohio.[20] Those conditions included isolating and quarantining inmates who may have contracted the virus; limiting group gatherings; screening staff and visitors; giving prisoners soap, disinfectants, and water; and providing masks to inmates and personal protective equipment to staff.[21] In another case, involving a detention center in Brooklyn, New York, the court denied plaintiff's claim for injunctive relief on the grounds that the facility had not yet experienced an elevated incidence of virus cases.[22] Further, the court found that the facility had adopted counter measures that belied a claim of prison officials' gross indifference.[23]

While a convicted prisoner is entitled to protection only against 'cruel and unusual' punishment under the Eighth Amendment, a pretrial detainee, not yet found guilty of any crime, may not be subjected to punishment of any description. Because pretrial

14 511 U.S. 825, 832 (1994) (risk that transsexual inmate would be subject to repeated rape).

15 *Id.,* at 828.

16 *Id.,* at 834.

17 *Id.,* at 836.

18 Banks v. Booth, 2020 U.S.Dist. LEXIS 107762 (D.D.C. June 18, 2020) at *20.

19 *Id.,* at *41. The DC Jail, like most local jails, confines both inmates convicted of misdemeanors and pretrial detainees—individuals held for trial without bail. As discussed *infra*, note 26, while the Banks court applied an Eighth Amendment standard to convicted inmates requiring a showing of deliberate indifference, the court ruled that pretrial detainees were only required to meet a lower standard, a showing that officials knew of 'excessive risk'.

20 Wilson v. Williams, 2020 U.S. App. LEXIS 18087 (6th Cir. Ohio June 9, 2020).

21 *Id.,* at *22–23.

22 Chunn v. Edge, 2020 U.S. Dist. LEXIS 100930 (E.D.N.Y., June 9, 2020) at *87–88.

23 *Id.,* at *91–92.

detainees are presumed innocent, they are 'entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish'.[24] In *Banks*, the court ruled that pretrial detainees need only show that jail officials 'knew or should have known that the conditions posed an excessive risk to the health of inmates'.[25]

Whether based on Eighth Amendment or Due Process protections, litigation is an insufficient remedy for prisoners to pursue for several reasons. First, litigation is *ad hoc* and requires representation by *pro bono* legal services. Second, a given facility may not yet have reached a high rate of incidence at the time suit is brought. Third, in cases where plaintiffs must meet the subjective element under *Farmer*, it is more difficult to establish defendants' deliberate indifference. Moreover, prison officials may demonstrate or promise some corrective action, often leading to continued litigation as to the extent of compliance with the undertakings. In any event, release of prisoners is not generally available as legal relief even where deliberate indifference is found. The appropriate remedy for relief from prison conditions that violate the Eighth Amendment during legal incarceration is to require the discontinuance of any improper practices or correction of any condition causing cruel and unusual punishment.[26]

Judicial relief is also insufficient to assure safe conditions because, even where correctional facilities increase cleaning practices, provide masks, and conduct testing, the critical safety factor of social distancing is often impractical. Though failure to relieve overcrowding permitting social distancing may not trigger an Eighth Amendment violation—that is a showing that prison officials are 'deliberately indifferent'—inmates are exposed to a substantial risk of infection. In partially dissenting from the majority opinion in *Wilson,* Chief Judge Cole noted that overcrowding at Elkton made social distancing impossible given that inmates sleep in close proximity in dormitories of 150 prisoners.[27] The US Court of Appeals for the Eleventh Circuit ruled that crowded conditions in the MetroWest Miami jail made social distancing impossible but did not establish 'deliberate indifference'.[28]

A second potential remedy for prisoners arises from statutory provisions that provide, in narrow circumstances, for compassionate release. There has been a significant amount of litigation under the compassionate release provisions of the First Step Act, a 2018 federal statute that authorizes courts to modify terms of imprisonment.[29] In addition to release based on terminal illness and other factors, a 'catchall provision' allows courts to order compassionate release based on a finding that 'extraordinary and compelling reasons' for release exist and that a prisoner 'is not likely to present a danger to the community'.[30] A New Hampshire court recently granted compassionate

24 Youngberg v. Romeo, 457 U.S. 307, 322 (1982).

25 Banks, 2020 U.S. Dist. LEXIS 107762 at *9, *15 (applying Due Process test to inmates pretrial and Eighth Amendment 'deliberate indifference' standard to convicted inmates). However, there is a circuit split on the applicability of the 'deliberate indifference' standard to claims brought by pretrial detainees challenging conditions of confinement not yet resolved by the Supreme Court. See Gomes v. U.S. Dep't of Homeland Security, 2020 U.S.Dist. LEXIS 85081 at *29–30.

26 See Gomez v. United States, 899 F.2d 1124, 1127 (11th Cir. 1990) (denying release of inmate with advanced AIDS; remedy is for facility to provide improved medical treatment).

27 Opinion of Chief Judge Cole, concurring in part and dissenting in part, Wilson, *supra* note 20, at *35.

28 Swain v. Junior, 958 F.3d 1081, 1089–90 (11th Cir. 2020).

29 First Step Act, Pub. L. No. 115–391, 132 Stat. 5194 (2018) (codified at 28 U.S.C. §3582(c).

30 18 U.S. C. §3582 (c)(1)(A)(i); 18 U.S.C. §3582(c)(1)(d).

release to an individual with a respiratory condition attributable to bronchitis and heavy smoking.[31] The court found that petitioner's condition satisfied the statutory criteria of 'extraordinary and compelling reasons' to warrant a sentence reduction and that the defendant, convicted of trafficking oxycodone, was 'not likely to pose a danger to the safety of any other person or to the community' if released.[32] In other cases, respiratory conditions have been found insufficient to justify release.[33] Similarly, there have been mixed outcomes where petitioners based their compassionate release claims on hypertension.[34] The compassionate release provisions were not designed with COVID-19 in mind and require individual *ad hoc* litigation of each prisoner's medical condition and medical history. Prisoners who have committed crimes of violence, even if many years ago, may automatically be precluded from compassionate release.

Immigration detainees are civil detainees and as such are also entitled to the constitutional protections of the Due Process Clause as their confinement is not intended to punish.[35] Depending on the region of the country, immigrant litigants may be required nonetheless to show 'deliberate indifference' in a claim challenging the adequacy of treatment at ICE facilities.[36] ICE released a Docket Review Guidance in April 2020 proposing, although not requiring, that field offices identify detainees in high-risk categories for individualized review regarding continued custody.[37] In *Friahat v ICE*, a California district court granted class action relief requiring that immigration officials make timely custody determinations for individuals at high risk due to age or medical condition.[38] However, litigation remains a problematic approach, and courts have been resistant to ordering release.[39] In the meantime, there has been an alarming spike in specific ICE facilities. In Farmville, Virginia, almost 90% of residents tested positive for COVID as of July 29, 2020.[40] Reports of severe overcrowding continue and staff have neglected to wear masks or other protective equipment.[41] Detainees in Texas immigration centers are more than 15 times more likely to have COVID-19 than the state's general population.[42]

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31 U.S. v. Rich, 2020 U.S. Dist. Lexis 97079 (D.N.H. June 3 2020) at *3–4.

32 18 U.S.C. §3142 (g).

33 See eg, United States v. Slone, 2000 U.S. Dist. LEXIS 113586 (E.D. Pa., June 30, 2020) at *11–12.

34 Courts have considered the evolving data on the association between hypertension and COVID-19; defendant's own medical history, age and comorbidity; and the specific conditions in the prison where the petitioner was detained. For a recent discussion, see United States v. Salvagno, 2020 U.S. Dist. LEXIS 109879 (N.D. New York, June 22, 2020) at *17, *et seq*.

35 Youngberg, 457 U.S. at 322; Mehmood v. Guerra, 783 Fed. App'x 938, 941 (11th Cir. 2019).

36 See Gomes v. U.S. Dep't. of Homeland Security, *supra*, note at *30–32; compare Achilla v. Witte, 2020 U.S. Dist LEXIS 85828 (E.D. N.D. Ala., May 15, 2020) at*57–58.

37 ICE, Docket Review Guidance, Dkt. No. 121-4 April 4, 2020.

38 Fraihat v. ICE, 2020 U.S. Dist. LEXIS 72015 (C.D. Cal., April 20, 2020) at *29, *86; Rodriguez-Alcantra v. Archambeault, 2020 U.S. Dist. LEXIS 83937 (S.D. Cal. May 1, 2020) at *7–10.

39 See eg, Achilla v. Witte, supra note 38, 2020 U.S. Dist LEXIS 85828 at *62–64.

40 ICE, Detention Management, https://www.ice.gov/detention-management#wcm-survey-target-id. (July 29, 2020) (accessed Aug. 18, 2020). The facility is run for ICE by the Immigration Centers of America.

41 Antonio Olivio, *Judge Orders New Health Inspection at Virginia Immigration Center with Large Coronavirus Outbreak*, Washington Post, Aug. 17, 2020. https://www.washingtonpost.com/local/virginia-politics/judge-orders-another-health-inspection-at-virginia-immigration-center-with-large-coronavirus-outbreak/2020/08/17/6bd4d220-e0a0-11ea-8181-606e603bb1c4_story.html?variant=1 (accessed Aug. 18, 2020).

42 Elizabeth Trovall, *People In Texas ICE Detention Centers Are 15 Times More Likely Than The Public To Have COVID-19*, Houston Media, July 20, 2020. https://www.houstonpublicmedia.org/articles/news/poli

II. VIOLATIONS OF ETHICAL CARE

Under Erving Goffman's Theory of Stigma, individuals and groups may experience stigma based on race/tribe; bodily difference; and/or behavioral condemnation.[43] Those who have been classified as criminals or undocumented immigrants are often outcast, based on their status or identity as people of color or foreign ethnicity. There is a risk that the lives of individuals who are subject to social stigma may be discredited, as has occurred in other incidences of plague and epidemic. Susan Sontag has observed that as a result of homophobia and panic over AIDS, there was a quasi-moral condemnation of patients, as if the disease were both a consequence of and punishment for moral turpitude.[44]

The general population and the political branches of government may similarly disregard the high incidence of COVID-19 in prison and immigration detention facilities because of disapproval of the underlying conduct that gave rise to detention. Because many of those detained are marginalized, elevated incidence of illness and death in these populations may be devalued and ignored. The moral philosopher Judith Butler distinguishes between 'apprehending a life' and recognizing the figure as fully human. A figure 'can be apprehended as "living,"' but not necessarily 'recognized as a life.'[45] Lives that are not recognizable are also not grievable: '[t]hey cannot be mourned because they are always already lost or, rather, never "were."'[46]

Current conditions in prisons and immigration detention facilities violate ethical principles in two major respects: health care and protection from the virus is inadequate, and the impact of this neglect has a discriminatory impact on racial and ethnic minorities. It is appropriate to apply guidance from quarantine ethics given the porous conditions in these facilities where all who are detained are at risk.

Following the SARS epidemic, Lawrence Gostin et al. articulated consensus principles for quarantine, including that quarantine orders must represent 'the least restrictive/intrusive alternative'; reflect 'fairness and justice'; preclude 'the unjustified targeting of already socially vulnerable populations'; and operate transparently, so officials' decisions are made in 'an open and fully accountable manner'.[47] When individuals are quarantined, public health authorities must provide adequate health care and protection:

> Since isolation and quarantine are designed to promote well-being and not to punish the individual, public health authorities have the obligation to provide quarters that are decent and not degrading. . . . Patients should have adequate health care, protection from further exposure to SARS, the necessities of life such as food and clothing, and means of communication with family, friends, and attorneys.[48]

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tics/immigration/2020/07/20/378238/covid-19-plagues-ice-detention-centers-across-texas/ (accessed Aug. 18, 2020).

43 Erving Goffman, Notes on the Management of Spoiled Identity 4 (1963).

44 Susan Sontag. Illness as Metaphor and AIDS and Its Metaphors 145 (2001).

45 Judith Butler, Frames of War: When Is Life Grievable? 8 (2009).

46 *Id.*, at 33.

47 Lawrence O. Gostin et al., Ethical and Legal Challenges Posed by Severe Acute Respiratory Syndrome: Implications for the Control of Severe Infectious Disease Threats, 290 Jama 3229, 3232 (2003).

48 *Id.* at 3234. *See also* Maxwell Smith and Ross Upshur, *Pandemic Disease, Public Health and Ethics,* Oxford Handbook of Public Health Ethics 798 (Anna C. Mastroianni et al. eds., 2019) (calling for 'safe, habitable, and humane conditions of confinement' during mandatory quarantine).

Some forty states have adopted some or all of the principles of the Model State Health Emergency Power Act.[49] Section 604, relating to conditions of quarantine, provides that isolated individuals who are already ill must be confined separately from quarantined individuals. In addition:

> (6) The needs of persons isolated and quarantined shall be addressed in a systematic and competent fashion, including, but not limited to, providing adequate food, clothing, shelter . . . medication, and competent medical care. . . . (7) Premises used for isolation and quarantine shall be maintained in a safe and hygienic manner and be designed to minimize the likelihood of further transmission of infection or other harms to persons isolated and quarantined.[50]

As David Fidler et al. comment in their essay on the ethics of quarantine, 'ethnicity and perceptions about a social group' may shape 'control measures aimed or individuals and communities'.[51] In *Jew Ho v Williamson*, a case from 1900, public health officials quarantined an entire district of San Francisco, ostensibly to contain an epidemic of bubonic plague, but the quarantine operated exclusively against the Chinese community.[52] The federal court held the quarantine unconstitutional because health authorities acted with an 'evil eye and an unequal hand'.[53] The scenario in which prisoners and detainees are exposed to COVID-19 differs from *Jew Ho* in that the decision to confine is not itself discriminatory. However, while racial and ethnic disparities in incarceration have declined in recent years, conditions that do not prevent the spread of COVID-19 have a disparate impact on minorities.

African Americans are imprisoned at five times the rate of whites in state prisons and at seven times the rate of whites in federal prisons.[54] African Americans comprise 12% of the US adult population but 33% of the prison population.[55] Hispanics comprise 16% of the general population and 23% of the prison population.[56] Moreover, a high rate of preexisting medical conditions such as diabetes and cardiovascular may render African Americans and Hispanic populations particularly vulnerable to COVID-19.[57]

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49 The Model State Emergency Health Powers Act. Center for Law and the Public's Health at Georgetown and Johns Hopkins Univs. Proposed Draft 2001, http://www.publichealthlaw.net (accessed Aug. 18, 2020).

50 *Id.*

51 David Fidler et al., *Through the Quarantine Looking Glass*, 35 J. L. Med. Ethics (2007) 616, 619.

52 Jew Ho v. Williamson, 103 F. 10, 12-13 (C.C.N.D. Cal. 1900).

53 *Id.*, at 24.

54 William J. Sabol, *Trends in Correctional Control by Race and Sex*, Council on Criminal Justice (Dec. 2019), 3. cdn.ymaws.com/councilonj.org/resource/collection/4683B90A-08CF-493F-89ED-A0D7C4BF7551/Trends_in_Correctional_Control_-_FINAL.pdf (accessed Aug. 18, 2020).

55 John Gramlich, *Black Imprisonment Rate in the US Has Fallen by a Third Since 2006*. Pew Research Center (May 6, 2020).

56 Whites comprise 64% of the U.S. adult population and 30% of the prison population. *Id.*

57 CDC, COVID19 in Racial and Ethnic Minority Groups, https://www.cdc.gov/coronavirus/2019-cov/need-extra-precautions/racial-ethnic-minorities.html (June 25, 2020) (accessed Aug. 18, 2020); Meghan Borysova et al., *Racial and Ethnic Health Disparities in Incarcerated Populations*, 5 J. Health Dispar. Res. Pract. 92 (2012).

III. POLICY RECOMMENDATIONS

I offer four recommendations to address the concerns raised in this essay:

First, there is a need to recognize that individuals who are lawfully confined in correctional and immigration detention are entitled to human rights protections. Unlike the very rare scenario in which an ordinary member of the public is involuntarily ordered into a quarantine facility and the question is whether the stringent criteria for confinement have been met; here the correctness of confinement is presumed. Thus, the human rights issue relates specifically to the conditions of confinement. Prisoners and immigration detainees lack many civic rights, but they are not divested of human rights consistent with the inherit dignity of the human person.[58] These rights include basic rights to health care, as well as avoidance of torture and ill treatment.[59]

The goals of criminal punishment—deterrence, incapacitation, rehabilitation, and retribution—are not served by detaining prisoners under conditions where they are exposed to a serious, potentially fatal, disease. The Federal BOP has a stated policy that inmates be confined under safe and healthful conditions.[60] Similarly, the purposes of detaining immigrants are not furthered by enhanced risk of contagion. ICE states as a goal that 'detainees in ICE custody reside in safe, secure, and humane environments under appropriate conditions of confinement'.[61] Immigration detainees include applicants who are being detained pending processing of their claims for asylum based on reasonable fear of persecution in their home countries.[62]

Second, criminal and immigration detention facilities should follow to the maximum practical extent CDC Guidance on Management of COVID-19 in Correctional and Detention Facilities.[63] While to date there have been improvements with respect to sanitation supplies, mask availability and similar measures, facility-specific compliance is contested in virtually every litigation brought by inmates and immigration detainees. However, the salient problem is that in many cases overcrowding precludes safe social distancing, greatly increasing the risk to inmates and staff.

Third, to reduce overcrowding, state and federal prison officials need to significantly reduce inmate populations. The USA accounts for 20% of the world's incarcerated population, although representing 5% of the world's population.[64] Only 5.3% of those confined in federal prisons and jails have committed violent offense; 34.5% have

58 United Nations, Human Rights and Prisons: A Pocketbook of International Human Rights Standards for Prison Officials 1 (2005).

59 *Id.* at 5–8. See also Anne L. Grilley, *Arbitrary and Unnecessary Quarantine: Building International and National Health Infrastructures to Protect Human Rights During Public Health Emergencies*, 34 Wis. Intl. L. J. 914 (2017).

60 *See*, BOP, Medical Care, https://www.bop.gov/inmates/custody_and_care/medical_care.jsp (accessed Aug. 18, 2020).

61 ICE, Detention Management, https://www.ice.gov/detention-management#wcm-survey-target-id (accessed Aug. 18, 2020).

62 Of 23,429 individuals in detention as of June 20, 2020, 3851 had established a claim for persecution or torture. *Id.*

63 CDC, Guidance on Management of Coronavirus in Correctional and Detention Facilities, *supra* note 1.

64 Peter Wagner and Wanda Bertram. *What Percent of the U.S. Is Incarcerated*? Prison Policy Inst., Jan. 16, 2020. https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/ (accessed Aug. 18, 2020).

committed drug offenses.[65] In total, 70% of individuals confined in local jails have not yet been convicted.[66]

In response to the pandemic, local jails have significantly reduced populations, typically, by more than 30%.[67] This reduction has been achieved by avoiding arrests for minor offenses and releasing individuals detained pretrial or those serving short sentences for minor misdemeanors. Jails, however, hold only one-third of those who are incarcerated. The typical state prison system has reduced its population by only 5% in response to the pandemic.[68] Illustratively, the Louisiana Department of Corrections established a review panel to consider cases for temporary emergency release. As of June 30, 2020, only 63 people had been released, 0.2% of the population.[69] The federal inmate population has declined on slightly, from 174,000 on April, 1, 2020 to 157,000 as of August 13, 2020.[70]

The Prison Policy Initiative recommends reducing the number of people in local jails by declining to arrest for petty offenses and by releasing individuals who are nearing the end of their sentence or who are medically vulnerable. [71] The number of people held in state and federal prisons can be reduced by expediting applications for parole, by releasing prisoners near the end of their term to home confinement, by releasing individuals who are medically vulnerable or elderly, and by declining to admit or releasing individuals who have committed technical, not otherwise, criminal violations of conditions of parole or probation.[72] Case law on prisoners' rights assumes the ability of prisons to provide reasonable conditions for safety and health—whether related to medical care or rape. Given the necessity for social distancing during the COVID crisis and the reality of overcrowding, this optimistic assumption is not viable. Reduction in the prison population is the humane and practical approach.

Immigration detention facilities have experienced similar problems to prisons and jails: high rates of infection, inadequacy of supplies and protective equipment and overcrowding that precludes social distancing.[73] While federal and state prisons have lagged in releasing inmates, release by ICE has reduced its detainee population by

65 Prison Policy Initiative, *Mass Incarceration*, *supra* note 3 at 1. The inmate profile is somewhat different in state prisons, where 55% of prisoners have committed crimes of violence. *Id.*

66 *Id.*

67 Emily Widra and Peter Wagner, *While Jails Drastically Cut Populations, State Prisons Have Released Virtually No One*. Prison Policy Initiative (2020), https://www.prisonpolicy.org/blog/2020/05/14/jails-vs-prison-update/ (accessed Aug. 18, 2020).

68 *Id.*

69 Prison Policy Initiative, *Responses to the COVID-19 Pandemic* (June 30, 2019). https://www.prisonpolicy.org/virus/virusresponse.html (accessed Aug. 18, 2020).

70 BOP, *Statistics*. https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops (accessed Aug. 18, 2020).

71 Widra and Wagner, *supra*, note 67.

72 *Id.*

73 *See* U.S. Dep't of Homeland Security, Office of Inspector General, *Early Experiences with COVID-19 at ICE Detention Facilities* (June 18, 2020), for a discussion of concerns expressed by facility officials by facilities with respect to availability of sanitary supplies, the ability to isolate and quarantine those infected, shortages of protective equipment, the availability of staff, and the ability to manage social distancing. https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-42-Jun20.pdf (accessed Aug. 18, 2020).

about one-third between April 1, 2020 and August 1, 2020.[74] That progress needs to continue.

Finally, legislative action should also be considered to amend the compassionate release program to address the current crisis and to require the BOP to follow CDC recommendations in correctional facilities. Senators Brian Schatz and Dick Durbin have introduced the Emergency GRACE Act[75] that would accelerate the BOP approval process for compassionate release by directing that BOP identify those who are at a higher risk of death from the disease or illness during a public health emergency, including defendants over the age of 60; defendants with a terminal illness; and defendants with autoimmune disorders or other serious medical conditions, including heart disease, diabetes, HIV, respiratory disease, or cancer. The legislation would allow authorize *pro bono* counsel for individuals without representation and provide direct access to court without need to exhaust an administrative process. Individuals who are released would be able to access Medicaid shortly after their release. For those who remain incarcerated, all BOP facilities would be required to follow CDC recommendations for limiting the spread of the coronavirus, including robust and ongoing testing, providing free of charge adequate soap and disinfectants, comprehensive sanitation and cleaning of facilities, personal protective equipment, and responsive medical care.

IV. CONCLUSION

Even today, when public opinion seems highly polarized, bipartisan efforts at penal reform have on rare occasion been successful. In 2018, Congress passed the First Step Act that made moderate revisions to criminal sentencing, including adoption of the current federal statutory provisions governing compassionate release. Ideally, a consensus would emerge that improving the health and safety of prisoners and immigrants at a time of pandemic furthers the public interest.

Conditions of confinement should promote the safety of those who are detained. Those who have committed crimes may have been confined under due legal process, but their (mis)conduct in no way caused or contributed to the pandemic. Similarly, those who are subject to immigration proceedings or removal are in no way culpable for the virus. Nor is confinement under dangerous conditions an appropriate sanction for violation of criminal or civil immigration law.

Whether or not one believes that the USA incarcerates too many individuals with excessive sentences and whether or not one supports current policies on immigration detention, the current public health emergency calls for rethinking our prison and immigration detention policies. More intensive effort at releasing those not liable to pose a danger to the community should be adopted, and conditions of confinement must be improved. Current law assumes that correctional and immigrant detention facilities offer safe conditions of confinement. Examining the current conditions through an ethical perspective suggests the insufficiency of the current legal regime.

74 ICE, *Detention Management Statistics* (Aug. 17, 2020), https://www.ice.gov/detention-management (accessed Aug. 18, 2020).

75 The Emergency Grants of Release and Compassion Effectively Act of 2020 or the Emergency GRACE Act, S.3698 (May 12, 2020) (116th Congress, 2nd Session) (introduced by Mr. Schatz for himself, Mr. Durbin, Ms. Harris, Mr. Markey, and Mr. Wyden).