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## KEY FACTS

- The immigrant detention system has greatly expanded in recent decades.
- As of January 27, 2021, around 14,700 individuals remain detained, though this number was as high as 55,000 at the end of 2019.
- As of January 2021, eight people have lost their lives to COVID-19 while in the custody of Immigration and Customs Enforcement (ICE), though more may have perished after leaving custody while infected.
- Detained immigrants are subject to punitive conditions of confinement that can initiate or exacerbate physical and mental illness.
- There are alternatives.
- Studies of various groups of people who were released from detention on various alternatives to detention programs show extremely high levels of compliance.
- California's recent legislative changes may provide a case study for the rest of the nation.

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## Immigrant Detention and COVID-19: A Tragic Call to Action for Federal and State Officials

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### Introduction

In this issue brief, we review research on immigration detention, with a particular focus on conditions of confinement and the pains of imprisonment experienced by detained people in the United States. We then discuss federal and state actions to save lives and uphold human dignity in both the shorter-term timeline (of the pandemic) and the longer-term.

Conditions of confinement in immigrant detention facilities—including unsanitary conditions and substandard or even grossly negligent medical care—make them a hotbed for the viral spread of COVID-19 and other deleterious health outcomes [1]. Substandard conditions of confinement also lead to human rights and other abuses. Perhaps most problematically, when detention facilities violate the very standards they agree to in their own contracts with ICE, these violations largely go unaddressed [2]. Private, for-profit facilities such as those operated by Geo Group, CoreCivic, and LaSalle Corrections are often the worst offenders [3].

As of January 2021, eight people have lost their lives to COVID-19 while in the custody of Immigration and Customs Enforcement (ICE). And COVID-19 continues to spread in detention facilities: on March 20, 2020, there were no confirmed COVID-19 cases in ICE detention; by May 21 there were 1,163 documented cases, which rose to over 6,600 cases by October and over 9,000 cases by January 2021 [4]. This disastrous public health and human rights catastrophe has already resulted in the loss of human life and put pressure on the medical infrastructure in communities surrounding detention facilities.

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## Understanding ICE detention: Imprisonment without trial

We begin with an overview of ICE detention, both to highlight its troubling synchronicity with mass incarceration more broadly as well as to help distinguish its legal characteristics from the criminal justice system.

The immigrant detention system in the United States has greatly expanded in recent decades, largely mirroring the growth of the prison industrial complex, while targeting a population that, while facing only civil charges, is forced to navigate a highly complex set of laws and regulations, with no right to an attorney, and few limits on detention length [5, 6]. Indeed, ICE detention is imprisonment without trial and without many basic constitutional protections including access to attorneys or limits on the length of imprisonment.

ICE detains hundreds of thousands of individuals per year in a vast network of mostly subcontracted facilities, most commonly jails operated by local Sheriff's departments and standalone detention centers operated by for-profit contractors [7]. As of January 2021, around 14,700 individuals remain detained, though this number was as high as 55,000 at the end of 2019. Detained individuals are often transferred through multiple facilities before their release or removal. A single individual may come into contact with hundreds of other detained people during their stay in detention, with little-to-no ability to practice social distancing, and often with great disruption to family life.



Despite being imprisoned in actual jails or jail-like settings, detained immigrants are not serving sentences. Instead, the legally recognized purpose of detention is to ensure compliance with immigration proceedings. Yet there is no evidence that this imprisonment is necessary. Studies of various groups of people who were released from detention on various alternatives to detention programs show

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extremely high levels of compliance [8-10]. One comprehensive study of immigration court data spanning 2008-2015 found that people who are released from detention comply with their immigration proceedings at very high rates and are just as likely to comply with their court cases as those who were not detained [10].

## The Black Box: Conditions of confinement in ICE detention facilities

Although there are legal differences between criminal incarceration and immigration detention, scholars argue that the physical and emotional experiences of the systems are “eerily” similar [11-15]. Detained people experience “pains of mass imprisonment” (containment, exploitation, coercion, and legal violence) just as prisoners do, in contexts that are similarly and systematically racialized and abusive [13].

Conditions of confinement in immigrant detention facilities are troublingly similar to prisons and jails, often involving “extreme overcrowding, unsanitary conditions, inadequate ventilation, lack of access to clean drinking water and nutritionally inadequate food...[and], perhaps most alarming, even ‘grossly negligent’ medical care” [1, 16]. Detained immigrants may also be subject to punitive conditions of confinement that can initiate or exacerbate physical and mental illness [15, 17]. For example, one of the most extreme forms of punishment, solitary confinement, is disproportionately used among some of the most vulnerable detained immigrants, and those who stand to suffer most from the practice: those with mental illness [17].

A recent analysis of FOIA data from all ICE records of solitary confinement in US immigration detention from 2013-2017 also found that the practice was used in a vastly disproportionate manner among Black immigrants: “immigrants from Africa and the Caribbean—likely to be racialized minorities—are overrepresented in solitary confinement cases by 680 percent, compared to their share of the detained population” [15].

The use of solitary confinement at all—let alone among

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vulnerable populations—is extremely problematic given that “it can amount to cruel, inhuman, or degrading treatment, or even torture, in violation of international human rights standards” [15]. Indeed, the United Nations argues that “solitary confinement in excess of 15 days should be banned, and should never be permitted for individuals with mental illness” [15]. Detained people face many threats to their physical and mental health. Many detained people have pre-existing health conditions that are not adequately addressed in detention, and could lead to severe outcomes in the context of the COVID-19 pandemic [18]. Detained immigrants often also experience anticipatory stress and uncertainty as they await a judicial decision in their deportation proceedings [19, 20].

Most recently, a whistleblower report uncovered shocking revelations of horrific medical conditions in an ICE detention facility in Georgia [21]. The allegations, brought forth by a nurse employed at the Irwin County Detention Center in Georgia, detail the forced sterilization of immigrant women, along with widespread failure to safeguard detained people from the spread of COVID-19.

## **A Call to Action: The Role of Federal and State Governments**

We are truly at a life-or-death crossroads. Although ICE has reduced the population of detained people who may be vulnerable to COVID-19, in nearly all cases prompted by litigation from civil rights organizations [22], this sporadic strategy will not be enough. And it will not fix the egregious conditions of confinement in detention facilities that lead to suffering and death even in non-pandemic circumstances. Below we outline key ways that federal and state governments can act now to stop the spread of the virus, save lives, and uphold human dignity [1].

We then zero in on a case study of legislation from California that may serve as a model for other states.

### **Federal Action**

1. DHS should immediately release all detained people, beginning with individuals who are at increased risk for COVID-19.
2. The federal government should empower state and local public health authorities to issue specific orders directed towards ICE detention facilities and play an active role in vaccine distribution, COVID testing, oversight and compliance.
3. Transfer and release decisions should be removed from agency-specific custodial decisions to decisions predicated on public health and the protection of human life.
4. DHS should shift resources away from apprehensions and detention and instead develop plans to ensure the health and safety of those being released from custody and reintegrated into the community or to temporary shelters.
5. Initiate immediate and impartial investigations into the recent deaths in ICE custody. These investigations should center on the need for public health decisions to be made by qualified public health officials and not enforcement agencies. It should also seek clear accountability for violations of standards by private detention operators.
6. The Biden Administration must radically reimagine if not completely end detention. There is a clear body of evidence of extensive human and fiscal costs to detention, but little evidence that detention is necessary in order to ensure compliance with immigration proceedings. In the short term, the Biden administration should immediately terminate contracts with for-profit detention facilities, and halt deportations during the pandemic.

### **State Action**

Although immigration laws are federal, and states do not have jurisdiction to release detainees, state lawmakers can take five immediate, proactive steps. We draw on examples from California to illustrate actions states can take:

1. Recognize that the state has role to play in overseeing health and safety in federal detention facilities, and issue guidance to public health departments and other state agencies to take appropriate steps to ensure oversight and accountability. California is currently considering AB 263 to address this issue.

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2. Identify specific policies which can protect public health, including ending the transfer of individuals from state prisons and jails into ICE detention facilities.
3. Use state's undisputed police powers to oversee and inspect health and safety in detention facilities. This form of action has withstood constitutional scrutiny when undertaken in California with Assembly Bill (AB) 103.
4. Ensure accountability by requiring for-profit detention facility operators strictly adhere to the minimum standards enumerated in their contracts, as California has recently done under AB 3228.
5. Support efforts by advocates and attorneys to provide access to counsel for those detained and facilitate their release through a coordinated and statewide effort.

## CALIFORNIA AS CASE STUDY

California provides a case study for state legislation to address immigration detention. In 2019, Governor Newsom signed AB 32 into law, thereby prohibiting the state from entering into or renewing contracts with for-profit prisons and immigrant detention facilities in California. Then, in 2020, Governor Newsom signed AB 3228 to ensure for-profit contractors meet the minimum standards set forth in any existing contracts that had yet to expire in the state. Importantly, this bill creates a system of civil penalties for violations of contracts. In 2021, California introduced additional legislation (AB 263) targeting public health oversight in private immigration facilities. The bill would require all private facilities in the state to strictly comply with public health orders and workplace health and safety regulations. Each of California's legislative proposals were supported by immigrants' rights groups and civil rights organizations, and opposed by private contractors.

These bills can be a model for other states. In considering a similar legislative strategy, advocates might assess the potential for unintended short-term consequences of specific legislative proposals, while also assessing long-term goals. For example, ending contracts between local cities and ICE could result in an unintended short-term spike in the use of private facilities as contractors scramble to renew contracts before the policy's enactment date. It is often advisable to formulate a policy roadmap that outlines short-term gains to protect human life and improve conditions, while simultaneously working on longer-term goals.



## Conclusion

The COVID-19 pandemic exposes a federal immigration detention system of imprisonment without trial that has long failed to properly ensure the health and wellbeing of detained people—and with little-to-no accountability. In the long term, we must work to end this broken system and prioritize the humane treatment of immigrants. In the short-term, the most immediate, life-saving solution is to release detained people, starting immediately with anyone at risk for severe illness. State lawmakers must also do their part to ensure ICE detention centers are no longer routinely violating the very minimal standards set forth in their own contracts, let alone human rights. California's recent legislative changes may provide a case study for the rest of the nation.

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*This issue brief is also available in Spanish.*

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