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# Vulnerability and Detention in the Time of COVID: An American Failure

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## Abstract

COVID's assault on humanity is not merely biological; it is social. Though death and illness are the most identifiable consequences of the virus, the damage to the social fabric is significant. The paradoxical challenge of COVID is that, to address it, human beings must distance themselves at a time when support and togetherness are most needed. Our analysis is framed in terms of the vulnerabilities embedded within our shared human existence and ethical issues rooted in the nature of our dependent state. Relying on notions of dignity, vulnerability, and community membership, we analyze a particularly horrific situation – the treatment of undocumented persons in the United States – and argue that COVID is not the sole culprit in the narrative of this last year, but rather it is a catalyst to the exacerbation of already existing inequalities. Finally, we offer examples of what a vulnerability-sensitive policy framework might look like in the context of COVID.

**Disciplines :** LAW, PHILOSOPHY, BIOLOGY

**Keywords :** DETENTION, COVID, VULNERABILITY, DIGNITY

## Introduction

**T**he assault COVID has waged upon humanity is not merely biological; it is social. Though death and illness are the most identifiable and arguably the most painful consequences of what the virus has wrought, the damage to the social fabric of many communities – local, national, and international – must not be underappreciated. In this paper, we focus on this latter kind of damage. COVID is challenging, in part, because of its paradoxical nature: to respond to it well, vulnerable human beings must distance themselves at a time when mutual support and togetherness is most needed. This paradox has contributed to further spread of the virus, as well as opportunities for both bad and well-meaning but confused actors to seep into the cracks in the social fabric, accelerating and deepening COVID's divisive work. However, COVID is not the sole culprit in the narrative of this last year, but rather it is a catalyst to the exacerbation of already existing inequalities and increasing vulnerabilities.

In this paper, we pay special attention to the vulnerabilities embedded within our shared human existence. We focus on ethical issues rooted in the nature of our dependent state, taking seriously human dignity, human rights law, and membership in communities. Our analysis centers on an especially problematic instance where vulnerable persons were both physically and socially distanced from the larger society in a manner so horrific it strains the metaphor: the plight of undocumented persons in the United States during and leading up to the COVID pandemic. Drawing on the framework of international human rights law, we argue that governments have an affirmative duty to mitigate the impact of vulnerability and inequality. We conclude with examples of what a vulnerability-sensitive policy framework might look like in the context of COVID.

## The virus

SARS-CoV-2, the causative agent of COVID, continues to present significant challenges to public health. As of 17 November 2021, there were over 250 million known global cases, with over 5.1 million deaths (Dong *et al.*, 2020). SARS-CoV-2 is the seventh coronavirus capable of causing human disease (Wu *et al.*, 2020; Zhou *et al.*, 2020). The toll the virus has taken on the vulnerable is significant.

Like SARS-CoV-1, SARS-CoV-2 binds the human ACE2 Receptor (Walls *et al.*, 2020). However, unlike SARS-CoV-1, which caused significant disease in patients, the signs and symptoms of SARS-CoV-2 vary tremendously from person to person, ranging from asymptomatic infections to serious damage to the lungs and cardiovascular systems (Wiersinga *et al.*, 2020). SARS-CoV-1 is believed to have spread optimally after the onset of symptoms, whereas pre-symptomatic/asymptomatic carriers of SARS-CoV-2 can drive the spread of the virus (Petersen, 2020). The role of pre-symptomatic/asymptomatic carriers makes public health efforts to control the spread extremely challenging and continues to hamper efforts to contain SARS-CoV-2 (Petersen, 2020). It also creates ambiguity about the scope of personal responsibility when the chain of events following potentially risky behavior may be unclear. SARS-CoV-2 is spread primarily person to person via respiratory droplets (Wiersinga *et al.*, 2020). Immigrants detained within overcrowded United States Immigration and Customs Enforcement (ICE) detention facilities are especially vulnerable to infection by respiratory viruses like SARS-CoV-2 due to the inability to social distance, poor sanitation conditions, and lack of adequate medical care (Keller and Wagner, 2020; Lopez *et al.*, 2021).

## Vulnerability and dependence

Human beings are inherently dependent on one another. This dependence can be a great asset given our various and shared vulnerabilities, but it can also be a detriment when we fail to acknowledge those vulnerabilities and to care for those with whom we are mutually dependent. As the philosopher

Alasdair MacIntyre writes, “We human beings are vulnerable to many kinds of affliction and most of us are at some time afflicted by serious ills. How we cope is only in small part up to us. It is most often to others that we owe our survival, let alone our flourishing.” (MacIntyre, 1999, p. 1). MacIntyre’s comment, though written two decades ago as an indictment of moral philosophies that failed to account for and understand disability, offers a helpful lens through which to view the ethical challenges presented by the needs to distance and to come together in response to COVID. Though COVID has brought its own particular challenges, the ethical issues it raises are not new, but are rather the exacerbation of already existing inequalities and increasing vulnerabilities.

As vulnerable beings, the need for human cooperation to adequately respond to the pandemic should not be surprising. This cooperation has taken, in part, a perplexing and seemingly paradoxical form as proper responses to the virus require us to separate when we most need each other. The inaptly named “social distancing,” the mantra for maintaining a physical distance between persons to slow the spread of the virus, was a better description for what has, in many instances, occurred: a separation of members of a community. Physical distancing in response to COVID is a good thing, even if challenging; social distancing is not. Though other means of transmission are possible, SARS-CoV-2 is spread predominantly via direct contact through respiratory droplets (Wiersinga *et al.*, 2020). Thus, physical distancing is an effective response to the spread of the virus. Coupled with surveillance testing and masking, distancing remains one of the most effective tools in preventing the spread of the virus. Social distancing, however, has furthered the othering that persons of marginalized groups have faced and has enabled indignities to be leveled against those among us currently in the most vulnerable states.

Clarity in our language is important here. As Dr. Nancy Berlinger has argued, vulnerable persons do not encounter neutral structures; rather, the structures themselves are the source of vulnerabilities (Berlinger, 2020).

Moreover, it is not as though there are the vulnerable and the invulnerable; all human beings are vulnerable, as MacIntyre eloquently highlights, and we are all dependent on others to lesser and greater degrees at different points in our lives. COVID shed greater light on our shared human vulnerability, which is not always at the forefront of social and political theorizing, or more glaringly, of institutional aims and the practices they support. It also highlighted the fact that not all of us were similarly situated and resourced *vis-à-vis* the pandemic. Those who lack shelter, the ability to acquire food under distancing guidelines, or the status of citizen faced unique vulnerabilities by our distancing response.

The conception of human beings as inherently vulnerable and dependent is not universally accepted, but even where it is, the normative implications of this account of humanity are not always embraced. A certain kind of atomistic thinking – conceiving of ourselves as unconnected individuals – can easily seep into theorizing about situations that require physical distancing. Were all persons well-situated, functioning optimally as aligned with the environment they find themselves in, similarly healthy, and moving about the worlds they inhabit with ease, dealing with the pandemic would be challenging enough. For those facing unique vulnerabilities such as persons in detention facilities, surviving during the pandemic is often impossible.

### **Communities on ice: failing to recognize dignity**

The United States hosts the world's largest immigration system and maintains over 200 active detention centers, including private and government facilities. These facilities, where vulnerable immigrant populations are housed while awaiting a hearing in court, have consistently failed to meet basic standards of care (Blunt, 2017). The United States Immigration and Customs

Enforcement (ICE)<sup>1</sup>, which operates these facilities, has been criticized for these inadequate conditions as well as for racism, corruption, neglect, violence, and sexual abuse<sup>2</sup>. In 2018 alone, more than 2,800 families were separated at the border under the country's zero-tolerance policy, further exacerbating underlying issues rooted in ICE's blatant indifference to their vulnerable population's health and medical needs.

Detention facilities exhibit a disregard for the dignity, safety, and health of those in their care. Despite the well-documented harrowing reality of the treatment of immigrant detainees, ICE has continuously eluded accountability or reform. This is only possible because vulnerable immigrant populations are being othered and placed outside the bounds of inclusive treatment<sup>3</sup>. Human pain and their undignified treatment have been monetized: in FY 2019, more than 75% of ICE detainees were held in facilities run by five

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1 - The United States Immigration and Customs Enforcement (ICE) is an agency that operates under the Department of Homeland Security. ICE's mission is to "protect America from the cross-border and illegal immigration that threaten national security and public safety. This mission is executed through the enforcement of more than 400 federal statutes and focuses on immigration enforcement and combating transitional crime" (Department of Homeland Security, 2020). Following the September 11, 2001 attacks on the World Trade Center, the White House issued a major reorganization and dismantled the Immigration and Naturalization Service (INS) as part of its anti-terrorism strategy. The functions of INS were transferred to three new entities: Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection.

2 - SPERI, Alice. 2020. Homeland Security Wants to Erase Its History of Misconduct. *The Intercept* [online]. 6 octobre 2020. [Accessed 22 March 2022] Available at: <https://theintercept.com/2020/10/06/homeland-security-dhs-misconduct-records-erasure/>

3 - In fact, for Fiscal Year (FY) 2021, ICE requested a spending authority of \$10.4 billion from the President's budget (24% increase from the year prior) of which \$5.7 billion is budgeted for enforcement and removal operations. The request also specifies that ICE expects the average daily detainee population to be 60,000 (U.S. Immigration and Customs Enforcement, n.d.) For context, in FY 2019, ICE's average daily population was 50,165, up from 38,106 in FY 2017 and 28,449 in FY 2015. This is, in part, due to the Trump Administration's immigration policies which have focused on immigrants regardless of status of convicted crimes, a shift from the Obama Administration priorities that focused on removal of serious criminal offenders (Alvarado *et al.*, 2019). The policy change has expanded ICE's removal of immigrants without criminal convictions and has resulted in an increase in contract detention facilities, which are privately operated.

privately owned companies<sup>4</sup>. Private facilities have notably received more complaints and have been the subject of damning reports (Detention Watch Network, Hooks, Libal, 2020). Though upsetting, this is not surprising; in this context, the profit motive is yet another structural feature enabling some to benefit when the most vulnerable are further exploited.

Medical care has been found to be deficient in ICE facilities, with personnel frequently ignoring or delaying mental and physical care of detainees and allowing medical care to deteriorate to the point that emergency transfers are required<sup>5</sup> (Detention Watch Network, Hooks, Libal, 2020). ICE refuses to acknowledge documented failures of its facilities and operations and has failed to take swift or appropriate action to bring facilities up to even its own published standards. In 2015, the Department of Homeland Security's Office of Civil Rights and Civil Liberties (CRCL) concluded an investigation of the Adelanto, California facility, which found that clinical leadership was incompetent and medical care was problematic (House of Representatives Committee on Homeland Security, 2020). Two years later, CRCL returned for another investigation and reported that medical care issues had not been corrected. This is not an isolated incident. In 2019, a field medical coordinator conducted an unannounced inspection at the Cibola, New Mexico facility, operated by CoreCivic, and found approximately 300 sick claim submissions from detainees that had gone unanswered over 90 days. Detainees with chronic conditions were not receiving sufficient medical care, and the facility failed to properly quarantine individuals with communicable diseases. Additionally, medical staff failed to document treatment plans, assess detainees with chronic conditions, or provide physical examinations.

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4 - ALVARADO, Monsy, BALCERZAK, Shley, BARCHENGER, Stacey, CAMPBELL, Jon, *et al.* 2019. These people are profitable: Under Trump, private prisons are cashing in on ICE detainees. *USA Today* [online]. 20 décembre 2019. [Accessed 22 March 2022]. Available at: <https://eu.usatoday.com/in-depth/news/nation/2019/12/19/ice-detention-private-prisons-expands-under-trump-administration/4393366002/>

5 - In 2020, the US House of Representatives Committee on Homeland Security issued a report stating that ICE detention facilities fail to effectively identify and correct deficient conditions and frequently fail to meet basic standards of care. In fact, during the Committee's visitations, ICE repeatedly road-blocked their access to parts of the facilities and time available to interview detainees, at times outright rejecting the Committee's requests for access.

Despite ICE headquarters being notified of poor health conditions, the agency waited another four months before any detainees were transferred (House of Representatives Committee on Homeland Security, 2020). A third example comes from the River Correctional Facility in Louisiana, where detainees described cramped housing conditions that included stagnant pools of water, humid living areas, wet floors, minimal privacy, and frequent mosquito infestations. Each of these troubling cases continues to highlight further structural features that have led to the exploitation of the vulnerable. Accountability is lax in situations where reciprocity is absent, and it is often the case that the most vulnerable are not seen as possessing a status to demand reciprocity. This situation is only exacerbated when other members of society are further isolating themselves and focused on their own care and newly acknowledged vulnerabilities.

Given ICE's consistent indifference to detainees' health and wellbeing, it is unsurprising that ICE facilities have become "hotbeds of infections" during the COVID pandemic (Detention Watch Network, Hooks, Libal, 2020). As of February 2021, over 9,569 detainees<sup>6</sup> tested positive for COVID, and the facilities' positive rate was higher than the national average by 17% (Cahan, 2021). ICE's policies do not align with Centers for Disease Control and Prevention (CDC) guidelines, its personnel disregard detainee symptoms and ignore local health department collaboration (Detention Watch Network *et al.*, 2020), and its facilities do not maintain distancing protocols, adjust population density per required standards, or provide their vulnerable populations with needed personal protective equipment (PPE)<sup>7</sup>. Though COVID-related resources were scarce, it is not the case that they were unavailable. For example, at the Otay Mesa in California, among

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6 - Important to note that as of 30 march 2021, ICE has updated their website to reflect 992 positive cases as of 20 april 2021 in their facilities and the original data, provided by ICE, has been replaced with this new link : U.S. Immigration and Customs Enforcement. 2021. *ICE Guidance on COVID-19* [online]. Available at: <https://www.ice.gov/coronavirus>

7 - FAOUR Abdallah Fraihat, *et al.* v. U.S. Immigration and Customs Enforcement, *et al.*, EDCV 19-1546 JGB (SHKx). 2020. *Civil Minute-General* [online]. 7th october 2020. [Accessed 22 March 2022]. Available at: <https://creclaw.org/wp-content/uploads/2020/10/2020-10-08-Order-Granting-in-Part-and-Denying-in-Part-MTE-PI.pdf>

other facilities, staff were provided with PPE while detainees were not only denied access to it but punished with solitary confinement for ripping off their sleeves to make pseudo-masks. According to one former detainee, detainees who developed symptoms consistent with COVID were told they “did not meet criteria” for testing, and detainees who exhibited psychiatric symptoms, including hallucinations, were put in restraints instead of being provided with medical care (House of Representatives Committee on Homeland Security, 2020). Other detainees were left to vomit and have diarrhea in bathroom stalls shared by over 100 bunkmates, while toilets and stalls were not cleaned, frequently clogged, and overflowing. The three most important virologist-recommended practices to combat COVID – distancing, masking, and testing – were all blatantly ignored. Through 2020, ICE continued to arrest and conduct raids, forcing immigrants into close quarters during transportation to detention facilities. In addition, studies have found that communities with local ICE facilities were at increased risk of experiencing a COVID spreader event as a result of facility conditions (Cahan, 2021).

When viewed through the lens of international human rights law, the treatment of undocumented vulnerable populations in the United States during the pandemic is indefensible. The failure to provide adequate medical care and to adhere to public health recommendations on social distancing and the use of PPE violate basic human rights principles, including the right against cruel, inhuman, or degrading treatment or punishment (United Nations Office of the High Commissioner of Human Rights, 1984) and the right to the highest attainable standard of health (Hunt, 2007). The fact that undocumented persons in detention centers are migrants triggers additional protections under conventions related to refugees (United Nations Office of the High Commissioner of Human Rights, 1951) and migrant workers and their families (United Nations Office of the High Commissioner of Human Rights, 1990).

ICE’s treatment of detainee vulnerable populations violates the obligation to treat persons deprived of their liberty with “humanity” and with “respect for the inherent dignity of the human person” (United Nations Office of

the High Commissioner of Human Rights, 1966). As theorist Andrew Coyle argues, the terms “humanity, “respect,” and “inherent dignity” indicate “the way each human being should be seen, that is as sharing with others a common membership of humankind and as meriting respect because the right to respect and preservation of dignity is inherent in being a human being” (Coyle, 2003). This focus on dignity, both as the ground for particular rights or treatments of others, and also in some cases as describing the content of particular treatments, is useful here. Though a variety of conceptual analyses of dignity exist, we have found it most helpful to think about the concept as highlighting three potential violations of human beings: denials of certain opportunities, placing human beings in certain humiliating situations, and certain instances of killing. The conditions in which the vulnerable ICE detainees live and the treatment they receive, as described above, are humiliating. Detainees are not treated as members of the human community, but as something other. They are denied opportunities that are both ethically demanded and legally supported. This is especially the case for certain groups of detainees, such as incarcerated women giving birth. As Priscilla Ocen writes:

Even when pregnant prisoners are provided medical assistance during labor and childbirth it is often at the expense of their dignity and basic humanity... Instead of approaching the pregnancy and childbirth of incarcerated women with dignity and respect, the childbirth process is often an occasion for particularized punishment, degradation, and humiliation. Prison officials frequently justify the use of shackles on pregnant prisoners by citing concerns for the safety of correctional officers and the public (Ocen, 2012, p. 1255-1256).

Similar – and worse – treatment has been documented in detention facilities where women have been subjected to particularized medical neglect and assault, including forced hysterectomies<sup>8</sup>. The horrific treatment incarcerated and detained persons have undergone in the U.S. is due, in

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8 - For a recent discussion of this: (Pilkington, 2020).

part, to a failure to recognize the dignity of all members of the human community as possessing a shared vulnerability and to mistakenly consider ethically irrelevant features, such as past crimes, associations, or places of origin.

### **Conclusion and steps forward: an affirmative governmental obligation to mitigate vulnerability**

As we have argued in this piece, the mistreatment of undocumented persons in the United States, during the pandemic and beyond, is emblematic of an unwillingness to recognize those who are vulnerable and dependent as full members of the human community. Combined with this unwillingness is an increasingly narrow view of the legitimate scope of government action, to the point that even basic public health measures like mask requirements have been challenged as oppressive infringements on individual rights. Too often, public dialogue on the pandemic has failed to appreciate the multiple ways in which all individuals are interconnected simply by virtue of their inherent humanity. This interconnectedness gives rise to an interlocking networking of rights and obligations that all societies should be expected to uphold.

Developing a societal ethos that takes interconnectedness seriously requires replacing individualistic and nationalistic mindsets with a more inclusive public policy framework. The international human rights principles discussed in the previous section provide the basis for constructing such a framework. The United Nations has described human rights as “rights we have simply because we exist as human beings” (United Nations, 2021). In addition to emphasizing the inherent dignity and worth of individual persons, human rights law recognizes the multiple ways in which individuals’ ability to flourish depends on cooperative action. A particular focus of human rights law is identifying and responding to the needs of those who are most vulnerable.

Human rights laws recognize that individual rights are not meaningful unless they are accompanied by corresponding affirmative obligations. Thus, they call on governments not only to refrain from interfering with

human rights directly, but also to protect individuals and groups from human rights abuses by non-state actors and to take positive actions to ensure that individuals' human rights are fulfilled. These obligations are more extensive than those recognized by many countries' domestic legal systems. For example, the individual rights recognized in the United States Constitution set limits on what the federal and state governments are permitted to do, but, with limited exceptions, they do not require governments to take positive actions.

The human rights framework recognizes that all members of the human community share overlapping rights and obligations. For example, the United Nations Committee on Economic, Social, and Cultural Rights (UNCESCR) has emphasized that "the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries" (United Nations Office of the High Commissioner of Human Rights, 2000). Human rights bodies have recognized specific obligations that extend beyond a country's borders, such as the duty to take collective action to counter the harms of climate change (United Nations General Assembly, 2018).

Concern for vulnerability is also a central theme of the international human rights framework. Several human rights instruments focus specifically on individuals that face heightened risks of rights violations, including persons with disabilities, indigenous peoples, racial minorities, and many others. The UNCESCR has called on governments to extend special protective measures to protect members of these communities (United Nations Office of the High Commissioner of Human Rights, 2000).

Human rights principles offer a framework for thinking about the scope of governmental obligations during the pandemic that affirms the interconnectedness of all members of the human community. As discussed in the previous section, governments have a duty under human rights laws to treat all persons, including those who are incarcerated or detained, with basic dignity and respect. Yet, human rights laws require governments to do more than simply refrain from abusive behavior. At the most basic

level, governments' human rights obligation to protect the health and well-being of the community creates an affirmative obligation to confront risks that cannot be avoided through individual action alone. Government interventions can be justified even when they restrict individual liberties like freedom of movement, provided they place as few restrictions on liberty as reasonably possible and that any limits on liberty are proportionate to the magnitude of the threat the community faces (American Association for the International Commission of Jurists, 1985). Thus, time-limited and science-based stay-at-home orders and social distancing requirements are fully consistent with a human rights-based pandemic response.

The human rights framework also explicitly recognizes that some members of the human community face vulnerabilities that can alter the benefits and burdens associated with public health interventions. For example, stay-at-home orders and social distancing requirements will protect most people from the risk of becoming infected, but they offer little protection to persons who are homeless or who live in crowded settings like immigrant detention centers or prisons. At the same time, while these measures may involve relatively minimal burdens on persons with stable incomes who are capable of working remotely, the burdens are far greater on persons in many low-wage jobs that cannot be performed from a distance. The human rights framework requires governments to take affirmative actions to address these disparities. For example, governments could consider measures like creating temporary shelters for persons who are homeless, rehousing or releasing detainees and prisoners, and providing financial and other assistance to persons who are unable to meet their basic needs when confined in their homes.

Responding to vulnerability also requires awareness of the fact that seemingly broad-based public health strategies may not reach everyone equally. For example, an important component of pandemic response efforts is disseminating clear information about how individuals can protect themselves from becoming infected. Ensuring that this information reaches the entire population requires affirmative efforts to overcome vulnerabilities stemming from factors like limited literacy,

inability to understand the dominant language, or lack of access to the internet. Similarly, even centrally located testing or vaccination centers may be inaccessible to people with mobility impairments or limited access to reliable transportation. Governments therefore have a duty to consider alternative strategies that can accommodate these people, such as mobile health clinics or distributing testing and vaccination supplies to primary health care providers.

The human rights framework also recognizes that governments' obligations are not limited to their own citizens or residents. As the UNCESCR observes, countries "have a joint and individual responsibility... to cooperate in providing disaster relief and humanitarian assistance in times of emergency" (United Nations Office of the High Commissioner of Human Rights, 2000). This responsibility includes a duty to share critical resources, including vaccines. Unfortunately, the international community has not yet lived up to this obligation. As of March 2021, high-income countries had enough vaccines to vaccinate more than two times their populations, but low- and middle-income countries had only enough to vaccinate one in three persons<sup>9</sup>.

Governments cannot avoid their human rights obligations simply because they cost money to implement. However, there are obviously practical constraints on how much governments can be expected to spend. Resource constraints are likely to be particularly pronounced during public health emergencies. From a human rights perspective, what is important is that governments recognize that they have an obligation to ensure that vulnerable individuals are not left out of pandemic response efforts. Even if they are not able to fully respond to all conditions of vulnerability, they should seek to identify and address the most pressing needs to the maximum extent that resources permit. Further, ignoring vulnerable members provides a population where the virus can continue to spread, and runs the risk of

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9 - ROUW, Anna *et al.* 2021. *Global COVID-19 vaccine access: a snapshot of inequality* [online]. Kaiser Family Foundation. 17 mars 2021 [Accessed 22 March 2022] Available at: <https://www.kff.org/policy-watch/global-COVID-19-vaccine-access-snapshot-of-inequality/>

selecting for variants less susceptible to vaccines, which will have a lasting impact on the entire population. Thus, to ensure a return to normalcy, all members of society must have access to vaccines and be provided public health measures designed to slow the spread of SARS-CoV-2.

In light of the shared vulnerability and dependence of human beings, persons, their governments, and the communities of which they are a part must not dismiss others from the human community. Respect for the dignity of persons, reciprocal recognition of vulnerability, and human rights laws require better treatment not only of detained persons but of all who face vulnerabilities during COVID and beyond.

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