

TIME TO DITCH DELIBERATE INDIFFERENCE: COVID-19, IMMIGRANT CHALLENGES, AND THE FUTURE OF DUE PROCESS

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INTRODUCTION

During the first three years of the Trump administration, the mass detention of immigrant detainees in unsafe, unsanitary, and overcrowded facilities became a major source of public criticism of the president and his policies.¹ According to one study, in 2019 the average number of individuals detained in the U.S. immigrant detention system exceeded 50,000 people per day.² Widespread news reporting exposed the disturbingly poor conditions of immigrant detention centers across the country, ranging from dangerous overcrowding and poor sanitation, to allegations of sexual assault and forced mass hysterectomies by U.S. officials.³ The Department of Homeland Security's Office of Inspector General itself acknowledged the detrimental effects of the overcrowded conditions in some facilities.⁴

Despite the public awareness about these inhumane conditions and the risks they pose to the physical and mental health of detainees,⁵ immigrant

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1. See, e.g., *U.S.: New Report Shines Spotlight on Abuses and Growth in Immigrant Detention Under Trump*, HUMAN RIGHTS WATCH (Apr. 30, 2020, 10:00 AM), <https://www.hrw.org/news/2020/04/30/us-new-report-shines-spotlight-abuses-and-growth-immigrant-detention-under-trump>.

2. Eunice Hyunhye Cho, Tara Tidwell Cullen & Clara Long, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, ACLU (2020), https://www.aclu.org/sites/default/files/field_document/justice-free_zones_immigrant_detention_report_aclu_hrw_nijc_0.pdf.

3. Madeleine Joung, *What Is Happening at Migrant Detention Centers? Here's What to Know*, TIME (July 12, 2019, 2:01 PM), <https://time.com/5623148/migrant-detention-centers-conditions/>; Rachel Treisman, *Whistleblower Alleges 'Medical Neglect,' Questionable Hysterectomies of ICE Detainees*, NAT'L PUB. RADIO (Sept. 16, 2020, 10:40 AM), <https://www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detainee>.

4. OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., MANAGEMENT ALERT – DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY (REDACTED) (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf.

5. See, e.g., *id.* at 7; Chloe Reichel, *How Detention Centers Affect the Health of Immigrant Children: A Research Roundup*, JOURNALIST'S RESOURCE (July 22, 2019), <https://journalistsresource.org/studies/government/immigration/health-effects-immigration-detention-children/>; *Southern Border: Conditions at Immigrant Detention Centers*, AM. MED. ASS'N, <https://www.ama-assn.org/delivering-care/population-care/southern-border-conditions-immigrant-detention-centers> (last visited Nov. 17, 2020) [hereinafter AM. MED. ASS'N].

detainees often face an uphill battle in challenging inadequate medical care or unhealthy conditions of their confinement. Immigrant detainees, like other pretrial detainees, are purportedly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.⁶ These rights supposedly afford immigrant detainees greater protection than post-conviction detainees. Unlike post-conviction prisoners, who are only protected against cruel and unusual punishment by the Eighth Amendment,⁷ immigrant detainees are constitutionally protected against *any* conditions or treatment that amount to punishment.⁸ However, when immigrant detainees, or other pretrial detainees, seek to assert due process rights and challenge the conditions of their confinement or inadequate medical attention, many courts hold these detainees to the same “deliberate indifference” standard as post-conviction detainees asserting Eighth Amendment violations.⁹

This Comment argues that requiring pretrial detainees to make the same heightened showing under the Due Process Clause as prisoners under the Eighth Amendment is inappropriate. Part I provides an overview of the standards that apply to pretrial detainees challenging unsafe conditions under the Due Process Clause, and discusses the circuit split that emerged following the Supreme Court’s decision in *Kingsley v. Hendrickson*.¹⁰ Part II describes cases that immigrant detainees have brought during the COVID-19 pandemic, arguing that these cases best demonstrate the need for the universal adoption of the “objective reasonableness” standard for cases involving due process challenges to unsafe conditions.

I. PRETRIAL DETAINEES UNDER THE DUE PROCESS CLAUSE: THE *KINGSLEY* CIRCUIT SPLIT

Deliberate indifference claims brought by prisoners challenging the conditions of confinement or alleging failure to provide adequate medical care have two components: an objective component, requiring the plaintiff to show that conditions or conduct pose a substantial risk of serious harm, and a subjective component, requiring the plaintiff to show that the officials knew of the risk, and consciously and recklessly disregarded it.¹¹ This

6. U.S. CONST. amend. V; U.S. CONST. amend. XIV; *E.D. v. Sharkey*, 928 F.3d 299, 306–07 (3d Cir. 2019) (joining other circuits in holding civil immigration detainee is entitled to same due process protections as a citizen pretrial detainee).

7. U.S. CONST. amend. VIII.

8. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”).

9. *See, e.g., Villegas v. Metro. Gov’t of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013) (“Pretrial detainee claims, though they sound in the Due Process Clause . . . are analyzed under the same rubric as Eighth Amendment Claims brought by prisoners.”).

10. *Kingsley v. Hendrickson*, 576 U.S. 389 (2015).

11. *See Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (establishing deliberate indifference standard for claims regarding medical care); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (extending deliberate indifference standard to claims challenging conditions of confinement).

second prong, referred to by some courts as the “*mens rea* prong,”¹² requires detainees to show that the defendant officials were subjectively aware of a substantial risk and failed to respond reasonably.¹³ This is often too high a burden for detainees to meet, as they frequently cannot put forth specific evidence demonstrating that officials were subjectively aware of a risk or subjectively believed response measures to be inadequate.¹⁴

However, in courts that continue to apply the Eighth Amendment deliberate indifference standard and require a showing of a subjective *mens rea*, immigrant detainees have struggled to prevail on these claims without clear evidence of defendant officials’ subjective state of mind. Immigrant detainees have failed to meet the subjective prong when officials have put forth evidence that they took some steps to mitigate the risk of infection that they viewed as reasonable, even when these steps fall far short of the objectively critical measures called for by medical experts. In the COVID-19 context, the continued application of the subjective standard has led to the defeat of Due Process challenges where defendant officials failed to implement social distancing measures deemed critical by leading scientists.¹⁵

After the Supreme Court’s holding in *Kingsley v. Hendrickson*,¹⁶ a circuit split emerged regarding the standard a pretrial detainee must meet when challenging confinement conditions under the Due Process Clause. *Kingsley* involved a pretrial detainee’s claim that jail officers used excessive force against him.¹⁷ In rejecting a subjective requirement for such claims, Justice Breyer, writing for the Court, noted that “pretrial detainees (unlike convicted prisoners) cannot be punished at all.”¹⁸ *Kingsley* involved only excessive force claims and did not squarely address the deliberate indifference test with regard to conditions of confinement or inadequate medical care under the Due Process Clause—an issue the Supreme Court has yet to revisit.¹⁹ Nonetheless, *Kingsley* clearly set forth the proposition that “pretrial detainee[s] must show only that the force purposely or knowingly used against him was objectively unreasonable.”²⁰ The Court

12. *See, e.g.,* Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017).

13. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (stating that to satisfy the subjective component, “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference”).

14. *See, e.g.,* Swain v. Junior, 958 F.3d 1081, 1089 (11th Cir. 2020) (finding subjective component not satisfied when no evidence that defendant officers subjectively believed measures inadequate).

15. *See* Wilson v. Williams, 961 F.3d 829, 841–42 (6th Cir. 2020) (finding subjective prong not satisfied when officials took measures such as providing disinfectant, cancelling visitation, and providing masks, even though those steps are less effective at spreading COVID-19 than social distancing).

16. *Kingsley v. Hendrickson*, 576 U.S. 389 (2015).

17. *Id.* at 391.

18. *Id.* at 400.

19. *See* County of Orange v. Gordon, 139 S. Ct. 794, 795 (2019) (mem.) (denying certiorari to case addressing if post-*Kingsley* deliberate indifference Due Process claims include subjective considerations).

20. *Kingsley*, 576 U.S. at 396–97.

made no indication by its reasoning that this standard should differ in due process claims where the word “force” is substituted for “risks to health and safety.”

However, after *Kingsley*, the circuits diverged about whether it is necessary for pretrial detainees—including immigrant detainees—to satisfy a subjective element in claims of deliberate indifference. The Second, Seventh, and Ninth Circuits have determined that after *Kingsley*, the subjective requirement does not apply to deliberate indifference claims brought by pretrial detainees.²¹ Rather, these circuits allow pretrial detainees to prevail upon a showing that the defendant failed to act to mitigate the risk of objectively dangerous conditions about which the defendant knew or should have known.²² Plaintiffs also persuaded the Ninth Circuit to extend *Kingsley* beyond excessive force claims to failure-to-protect deliberate indifference claims.²³ The Ninth Circuit reasoned that the underlying right protecting pretrial detainees is the same in both categories of claims, arising out of the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment’s Cruel and Unusual Punishment Clause.²⁴

The Fifth, Eighth, Tenth, and Eleventh Circuits, however, have either retained the subjective element of the deliberate indifference test in due process claims, or declined to decide the applicability of *Kingsley* to such cases.²⁵ Courts in these circuits continue to demand that the plaintiff show some degree of subjective knowledge, intentionality, or culpability on the part of the facility officials to succeed on their claims.²⁶ These circuits have often avoided the issue of the merits of extending *Kingsley* by deciding appeals on other grounds,²⁷ or noting that circuit precedent simply requires

21. See, e.g., *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (“[T]he ‘subjective prong’ . . . of a deliberate indifference claim is defined objectively”); *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (concluding that medical-care claims brought by pretrial detainees are only subject to *Kingsley*’s objective unreasonableness inquiry); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (extending *Kingsley* rationale to deliberate indifference standard in failure-to-protect claims); see also *C.G.B. v. Wolf*, No. 20-cv-1072 (CRC), 2020 WL 2935111, at *22 n.31 (D.D.C. June 2, 2020) (noting that D.C. Circuit has not addressed the issue, but following the lead of other courts in determining that *Kingsley* applies to conditions-of-confinement claim).

22. *Darnell*, 849 F.3d at 35.

23. *Castro*, 833 F.3d at 1069–70.

24. *Id.*

25. See, e.g., *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419–20 n.4 (5th Cir. 2017) (declining to extend *Kingsley* beyond excessive force claims by pretrial detainees); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (stating that *Kingsley* is limited to excessive force claims and does not apply to deliberate indifference claims); *Perry v. Durborow*, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018) (expressly declining to address *Kingsley*’s impact on a pretrial detainee’s claim of supervisory liability premised on deliberate indifference); *Grochowski v. Clayton County*, 961 F.3d 1311, 1318 & n.4 (11th Cir. 2020) (declining to apply *Kingsley* because it was decided after relevant activity).

26. See, e.g., *Whitney*, 887 F.3d at 860 (holding deliberate indifference not met when defendant officer did not have actual knowledge of risk).

27. See, e.g., *Perry*, 892 F.3d at 1122 n.1 (declining to address *Kingsley*’s impact on Fourteenth Amendment claims).

continued application of the subjective standard.²⁸ However, even courts that still require the subjective prong have acknowledged the uncertainty of the deliberate indifference standard after *Kingsley*; the Sixth Circuit, for instance, explicitly recognized that the Supreme Court’s “shift in Fourteenth Amendment deliberate indifference jurisprudence calls into serious doubt whether [pretrial detainees] need even show that the [defendants] were subjectively aware” of risks to the detainees’ health.²⁹

II. THE CASE FOR UNIVERSALLY ELIMINATING THE SUBJECTIVE ELEMENT OF DELIBERATE INDIFFERENCE

Criticism of the deliberate indifference standard, and particularly the subjective prong, is as old as the standard itself.³⁰ The application of the deliberate indifference standard to the due process claims of pretrial detainees is particularly troubling because such detainees are purportedly protected from *any* conditions that amount to punishment. Some conditions that may be lawful to impose on convicted prisoners may be unlawful if imposed on pretrial detainees.³¹ Given these supposedly more expansive rights, it is puzzling why challenges to confinement conditions, and the risks such conditions pose to health and safety, are evaluated under the same rubric that is applied to post-conviction detainees’ claims.³²

The subjective prong has also proved to be a significant practical barrier for pretrial detainees, as courts have rejected detainees’ challenges on the grounds that defendant officers did not subjectively believe their safety measures were inadequate,³³ or that officers were not subjectively aware of a substantial risk.³⁴ To ensure the protection of the rights of these detainees, who have not been afforded the usual protections of the criminal justice

28. *Alderson*, 848 F.3d at 419 n.4 (rejecting the concurring opinion’s suggestion to reconsider the appropriate standard after *Kingsley* because of binding Fifth Circuit precedent).

29. *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018); *see also* *Coreas v. Bounds*, 451 F. Supp. 3d 407, 422 (D. Md. 2020) (noting that a “different, less stringent standard” could be applied to the claims of pretrial detainees relating to health and safety after *Kingsley*, but stating Fourth Circuit precedent requires applying Eighth Amendment deliberate indifference standard); *Gomes v. U.S. Dep’t of Homeland Sec.*, 460 F. Supp. 3d 132, 148 (D.N.H. 2020) (declining to explicitly reject the subjective prong but noting that “it is likely that civil detainees no longer need to show subjective deliberate indifference in order to state a due process claim for inadequate conditions of confinement”).

30. *See* *Estelle v. Gamble*, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting).

31. *See* *Hubbard v. Taylor*, 399 F.3d 150, 167 n.23 (3d Cir. 2005) (“[P]retrial detainees are entitled to greater constitutional protection than that provided by the Eighth Amendment.”).

32. *See* DeAnna Pratt Swearingen, *Innocent Until Arrested?: Deliberate Indifference Toward Detainees’ Due-Process Rights*, 62 ARK. L. REV. 101, 112 (noting that the deliberate indifference standard as applied to pretrial detainees “does not account for the fundamental legal and moral differences between pretrial detainees and convicted prisoners”).

33. *See, e.g., A.S.M. v. Warden*, 467 F. Supp. 3d 1341, 1350 (M.D. Ga. 2020).

34. *See, e.g., Jackson v. West*, 787 F.3d 1345, 1354 (11th Cir. 2015).

system,³⁵ this Part argues—first by addressing the conditions of the current global pandemic as a case study, and then by addressing claims more generally—that courts should universally adopt a purely objective standard for evaluating claims about conditions that pose risks to the health or safety of pretrial detainees. Namely, courts should ask whether the conditions objectively pose a substantial risk to the detainees’ wellbeing—without any consideration given to the officers’ knowledge or intentions.

A. The Subjective Prong as a Barrier to Challenging Unsafe Pandemic Conditions

The cases brought by immigrant detainees challenging COVID-19-related risks demonstrate why it is imperative that courts adopt a purely objective standard for pretrial detainees’ due process claims. There is little dispute that COVID-19 poses an objectively serious risk to the health and safety of those who are exposed. Although some courts have declined to find the objective prong satisfied for detainees who do not belong to a particularly high-risk population,³⁶ such as the elderly or those with underlying conditions, both the courts and medical experts have noted that the disease poses serious risks to all individuals, regardless of age or current health status.³⁷ Even where facilities have no confirmed cases,³⁸ or where detainees are not currently ill nor exhibiting symptoms of COVID-19,³⁹ courts have recognized that the dangers of the virus nonetheless present an objectively serious risk to the health of detainees.

Despite the awareness of the objective threat that COVID-19 poses, particularly in correctional and detention facilities, many immigrant

35. Because pretrial detainees have not yet been convicted in a trial by a jury of their peers, or afforded other built-in protections of the criminal justice system, the threshold for asserting these challenges under the Due Process clause should be lower than under the Eighth Amendment. *See Cobb v. Aytch*, 643 F.2d 946, 957 (3d Cir. 1981) (“[P]retrial detainees have federally protected liberty interests that are different in kind from those of sentenced inmates.”).

36. *See, e.g., Fofana v. Albence*, 454 F. Supp. 3d 651, 665 (E.D. Mich. 2020) (finding objective prong not met for detainees in their twenties and thirties who did not suffer from any conditions placing them at high risk for serious illness if exposed).

37. Nina Bai, *Coronavirus Is Sickening Young Adults and Spreading Through Them, Experts Say*, UNIV. CAL. S.F. NEWS CTR. (March 24, 2020), <https://www.ucsf.edu/news/2020/03/416961/coronavirus-sickening-young-adults-and-spreading-through-them-experts-say>; *Gayle v. Meade*, No. 20-21553-Civ, 2020 WL 3041326, at *18 (S.D. Fla. June 6, 2020) (pointing out that “COVID-19 attacks all age groups indiscriminately and it is impossible to determine who will succumb to the illness”); *Gomes v. U.S. Dep’t of Homeland Sec.*, 460 F. Supp. 3d 132, 154 (D.N.H. 2020) (recognizing that COVID-19 presents risk of harm to all persons, and not just to detainees with higher-risk conditions).

38. *See, e.g., Fofana*, 454 F. Supp. 3d at 663–64 (finding high-risk detainee satisfied objective prong without alleging confirmed case in facility).

39. *See e.g., Thakker v. Doll*, 451 F. Supp. 3d 358, 371 n.15 (M.D. Pa. 2020) (noting that objective prong does not require plaintiffs to show they actually suffered from serious injuries).

detainees have lost claims challenging their conditions in courts that continue to apply the subjective prong, which gives deference to officials to take steps that they find reasonable,⁴⁰ even if such steps are clearly insufficient in the eyes of objective science. The best-available science indicates that certain steps like wearing masks, frequent sanitation, and, most critically, social distancing, are key in slowing the spread of the virus.⁴¹ U.S. Immigration and Customs Enforcement (“ICE”) has even released guidance requiring facilities to utilize these mitigation strategies.⁴²

However, even where immigrant detainees have demonstrated that these safety measures are not implemented or enforced, thus exposing them to heightened risks to their health, courts have rejected their claims absent a showing that the defendants “subjectively believed the measures they were taking were inadequate.”⁴³ For instance, the subjective prong of the deliberate indifference has permitted officers to keep detainees packed closely together, despite the objective science that says social distancing is one of the most effective ways to reduce risk of transmission.⁴⁴ The subjective prong instead allows officers to take far less effective measures like limiting visitation and increasing the use of sanitization products. These measures fall far short of the duty of detention officers to provide “reasonable safety,” as required by the Constitution,⁴⁵ given that the best science, circulated both internally and widely known to the public, clearly requires more.

Courts that have evaluated COVID-related challenges using the objective approach have much more effectively protected the due process rights of immigrant detainees. Rather than looking into the minds of officials or administrators to determine why they failed to take appropriate precautions to prevent the transmission of a known deadly virus, these courts have illustrated why it is more important to look at whether officers or administrators knew or should have known that detainees’ conditions of confinement pose excessive risks to their health.⁴⁶

40. *See* *Aslanturk v. Hott*, 459 F. Supp. 3d 681, 699 (E.D. Va. 2020).

41. *Coronavirus Disease (COVID-19) Advice for the Public*, WHO (Oct. 13, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> [hereinafter *WHO Guidance*]; *Preventing the Spread of Coronavirus*, HARV. HEALTH PUBL’G (Nov. 5, 2020) (“Highly realistic projections show that unless we begin extreme social distancing now . . . our hospitals and other healthcare facilities will not be able to handle the likely influx of patients.”); *Thakker*, 451 F. Supp. 3d at 371 (“Social distancing and proper hygiene are the *only* effective means by which we can stop the spread of COVID-19.”).

42. U.S. IMMIGR. & CUSTOMS ENF’T, COVID-19 PANDEMIC RESPONSE REQUIREMENTS 6–7 (2020), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

43. *Swain v. Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020).

44. *See WHO Guidance*, *supra* note 41.

45. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

46. *See, e.g., Basank v. Decker*, 449 F. Supp. 3d 205, 214 (S.D.N.Y. 2020).

B. Beyond the Pandemic: Rejecting the Subjective Prong

Even in courts that continue to apply a requirement of subjective knowledge, immigrants have been able to succeed on some deliberate indifference claims because of the unprecedented, unique circumstances surrounding the COVID-19 pandemic.⁴⁷ In deciding these claims, courts have placed great emphasis on the extraordinary circumstances and public awareness of the risks associated with transmission of the virus. In doing so, courts have implied that absent such extraordinary conditions, it would be difficult for detainees to succeed on other types of claims, despite the high risks to which they may be exposed.

In finding that the subjective prong has been met for COVID-related claims, some courts have pointed to how the Centers for Disease Control and Prevention (“CDC”) has been vocal about providing guidance to correctional detention facilities regarding the extreme nature of the pandemic.⁴⁸ Given these guidelines, even under the subjective standard, courts have concluded that there is “no doubt” that officers are aware of the grave threats posed by the pandemic, which are exacerbated by overcrowding and poor sanitation.⁴⁹ Where officials have not implemented recommended steps like social distancing measures or improved cleaning and hygiene policies, despite the ubiquitous knowledge that such measures are necessary to reduce the risk of infection, courts have found the subjective element to be satisfied.⁵⁰ Many courts have considered the competing interests of detention and correctional facilities, which have largely been afforded vast amounts of deference in determining appropriate conditions and policies.⁵¹ However, even some of these courts have expressed a resounding sentiment that any countervailing institutional interest ICE facilities may have in enforcing immigration laws and

47. *See, e.g.*, *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 442–43 (D. Conn. 2020) (finding inmates likely to succeed under Eighth Amendment deliberate indifference standard because facility had failed to transfer medically vulnerable inmates to home confinement in meaningful numbers and social distancing remained impossible); *Carranza v. Reams*, No. 20-cv-00977-PAB, 2020 WL 2320174, at *10 (D. Colo. May 11, 2020) (finding high-risk inmates likely to succeed under Eighth Amendment deliberate indifference standard when defendant knew high-risk inmates were vulnerable to COVID-19, but did not order medical staff to identify vulnerable inmates and mitigation efforts with regard to high-risk inmates were not reasonable).

48. *See, e.g.*, *Awshana v. Adduci*, 453 F. Supp. 3d 1045, 1054–55 (E.D. Mich. 2020).

49. *See, e.g., id.* at 1054.

50. *See, e.g.*, *Perez-Perez v. Adduci*, 459 F. Supp. 3d 918, 928–29 (E.D. Mich. 2020) (finding subjective element met where “defendants are willing to house immigrant detainees in a manner that increases the risk of infection”).

51. *See Turner v. Safley*, 482 U.S. 78, 90 (1987) (“[C]ourts should be particularly deferential to the informed discretion of corrections officials.”); *see also Jones v. Wolf*, 467 F. Supp. 3d 74, 83–84 (W.D.N.Y. 2020) (“The central dispute is therefore whether the petitioners’ detention at the [detention facility] under current conditions during the COVID-19 pandemic is ‘excessive’ in relation to the government’s legitimate interests in keeping them detained.”).

maintaining their facilities is significantly outweighed by the due process right to be free from the risk of severe infection and possible death.⁵²

However, these cases highlight the dangers of continuing to require the subjective requirement in circumstances that are less extraordinary than a global pandemic. In challenges where immigrant detainees have prevailed by sufficiently showing the subjective element was met, courts have emphasized the remarkable nature of the COVID-19 pandemic,⁵³ corresponding public awareness, and the explicit guidance about safety protocols shared by ICE and the CDC, which make it highly unlikely that government officials would not have been subjectively aware of the risks that unsafe conditions would impose on prisoners.⁵⁴ But there are a whole host of other health risks unrelated to COVID-19 that conditions in detention facilities create, from psychological trauma to infections resulting from poor sanitation or medical neglect.⁵⁵

Even without the looming threat of COVID-19, these conditions pose a serious threat to the health and safety of detainees from the perspective of objective science.⁵⁶ In future challenges to such conditions, which impose objectively unreasonable risks from a medical perspective but are

52. See *Thakker v. Doll*, 451 F. Supp. 3d 358, 370 (M.D. Pa. 2020) (“[W]e can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments.”); *Malam v. Adducci*, 452 F. Supp. 3d 643, 660 (E.D. Mich. 2020) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)) (noting that continued detention in high-risk conditions “cannot ‘reasonably relate[] to any legitimate government purpose’”).

53. See *Jones v. Wolf*, 476 F. Supp. 3d 74, 92 (W.D.N.Y. 2020) (“[T]he recommended measures for preventing the spread of COVID-19 are unprecedented. Indeed, this Court is not aware of any other disease that caused New York State—let alone most of the nation—to decide that the only reasonable course of action was to shutter the economy, shelter in place, and isolate at home for weeks on end.”); see also *Fofana v. Albence*, 454 F. Supp. 3d 651, 663 (E.D. Mich. 2020) (finding subjective prong met because officials aware of the problems posed by institutional confinement and novel coronavirus).

54. *Gayle v. Meade*, No. 20-21553-Civ, 2020 WL 3041326, at *18 (S.D. Fla. June 6, 2020) (noting that ICE’s conduct of creating guidelines addressing the pandemic made it “hard to imagine” that ICE was unaware of risk of serious harm involved in contracting COVID-19).

55. See Elizabeth Trovall, *Why Immigration Facilities Are Struggling To Contain a Mumps Outbreak Among Detained Migrants*, HOUS. PUB. MEDIA (Sept. 23, 2019, 6:00 AM), <https://www.houstonpublicmedia.org/articles/news/in-depth/2019/09/23/346620/why-immigration-facilities-are-struggling-to-contain-a-mumps-outbreak-among-detained-migrants/>; Serena Marshall, Lana Zak & Jennifer Metz, *Doctor Compares Conditions for Unaccompanied Children at Immigrant Holding Centers to ‘Torture Facilities’*, ABC NEWS (June 23, 2019, 3:51 PM), <https://abcnews.go.com/Politics/doctor-compares-conditions-immigrant-holding-centers-torture-facilities/story?id=63879031> (noting that children in detention facility observed by physician all showed evidence of trauma and spoke of not having access to basic sanitation); see generally M. von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason & C. Katona, *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC PSYCHIATRY 382 (2018) (discussing studies that suggest existence of relationship between detention and adverse mental health effects).

56. See generally AM. MED. ASS’N, *supra* note 5 (describing AMA’s efforts to improve health and safety of immigrant detainees).

drastically less salient or publicly known about than a global pandemic, it will be more difficult for detainees to demonstrate that officials had subjective knowledge of these risks or acted with a sufficiently culpable state of mind. Confronted with the high burden of a subjective standard, detainees bringing challenges against conditions that pose objectively serious health risks may find themselves without a remedy for these dangerous, life-threatening deprivations. Continuing to apply a subjective standard where the stakes for detainees are high, but not quite perhaps not as publicly salient as in a global pandemic, will therefore leave detainees powerless to meaningfully enforce their right to be free from any conditions amounting to punishment,⁵⁷ including conditions that pose unreasonable danger to their health and safety.⁵⁸

CONCLUSION

The challenges to conditions of confinement brought during the COVID-19 pandemic underscore the importance of evaluating serious risks of possible harm or injury using purely objective, science-based standards. Overcrowding and poor sanitation pose serious health risks independent of a highly contagious respiratory disease, but the rapid spread of COVID-19 throughout immigrant detention facilities has highlighted how these conditions are plainly, objectively unreasonable given the widespread awareness of how the virus is transmitted. Rather than focusing on what facility officials or administrators subjectively knew or understood about the risks, or what their intentions may have been when failing to address conditions that pose objective risks, the sole inquiry should focus on whether the risk was objectively unreasonable.⁵⁹ Immigrant detainees, and pretrial detainees more broadly, make up some of the most vulnerable individuals implicated in America's penal system. To protect their safety, and to preserve the public's interest in promoting public health,⁶⁰ the subjective standard should be done away with. Instead of peering into the subjective intentions of government officials, courts should let science speak for itself.

57. See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

58. See *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982).

59. See William J. Rold, *ICE Detainee Wins Injunction/Habeas Relief for COVID-19 Risk*, LGBT L. NOTES, June 2020, at 12, 13 (“If detainees need not show subjective intent, the protests of [the Department of Homeland Security] that, in effect, it is ‘doing its best and has good policies’ is of far less import. Advocates can focus more directly on the objective science, as applied.”).

60. *Thakker v. Doll*, 451 F. Supp. 3d 358, 372 (M.D. Pa. 2020) (“Efforts to . . . promote public health are clearly in the public's best interest . . .”).