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### An Analysis of and Response to Current U.S. Immigration Policy

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## Introduction

In President Bill Clinton's 1995 State of the Union address; we got our first glimpse of immigration being framed as a national crisis (Bill Clinton, 2019). He asserted that "illegal aliens" posed a threat to our country, to law-abiding taxpayers and that more needed to be done to protect our nation's borders (Bill Clinton, 2019). This rhetoric would be utilized by future Presidents like Bush and Trump. When Trump announced his candidacy in 2015, he did so with the assertion that he was going to be tough on immigration, and he made the unfounded claim, like Clinton, that immigrants are dangerous and a threat to the safety of Americans (Moreno & Price, 2016). By having immigration continuously framed as a threat to national security, especially in a post 9/11 America, people have become more amenable to treating immigrants as criminals, detaining them in less than satisfactory conditions, and isolating them from the rest of society. Support for privatization of public services has roots in neoliberal ideology which asserts that the best thing the government can do for the nation's economy is to utilize and expand upon private-public partnerships. These partnerships have resulted in market-like mechanisms being embedded into the public domain; immigration policy is not an exception (Moreno & Price, 2016).

Corporations like CoreCivic and the GEO group spend several million dollars a year lobbying officials in state, local and federal government to support laws and policies that increase the number of people subject to detention (*Mandatory Detention, n.d.*). These private corporations are responsible for the detainment of nearly 80% of those held under the authority of Immigration and Customs Enforcement (ICE); making the detention of immigrants a new market for the private prison industry to exploit; generating profits by capitalizing on the political discourse that actively reinforces immigrants as a security threat; therefore having a

vested interest in shaping subsequent public policies that disproportionately target and burden immigrants and Latinos in the U.S. (Moreno & Price, 2016 *Mandatory Detention*, n.d.).

I pose the following research questions:

- 1) what specific immigration policies have allowed for the proliferation of private immigrant detention centers,
- 2) who were the key players involved in the formation of those policies,
- 3) what is the human cost of upholding such policies,
- 4) are there any avenues for reform?

Advocates for harsher immigration policy cite an increase in immigration detention over the past three decades; while this increase is undeniable - 180,532 detainees in 2000, compared to 363,064 detainees in 2010 and 486,190 detainees in 2019 - it neglects a very important aspect of the situation (Kassie, 2019). The increase did not come about because most immigrants are so dangerous or violent that they must be detained (Moreno & Price, 2016). The increase is a direct result of private corporations expending endless amounts of money and time to get more punitive immigration policies passed (Moreno & Price, 2016). Unlike with mass incarceration; where some of the more punitive policies have been rewritten; policies concerning U.S. immigration detention only seem to be becoming more aggressive as time goes on. This ever-increasing aggression creates a high cost for the families, individuals, and communities affected by detention. Reform may be possible, but it will likely be difficult.

### **The impact of 9/11 on Immigration Policy**

"After 9/11 immigration policy became counter-terrorist policy in the U.S." (Moreno & Price, 2016, p. 364). Since that fateful day "The categories of foreigners, immigrants, and suspicious minorities have been increasingly conflated - irrespective of their actual status -

because the impossibility of knowing where and against whom to fight back had led to increasing unease about the identity and the location of the enemy" (Moreno & Price, 2016, p. 364). Within a week of 9/11 the Bush administration began targeting those attempting to immigrate into the U.S. (Kerwin, 2005). In the name of national security, the administration restructured the federal government, and Immigration Naturalization Service was absorbed into the Department of Homeland Security (DHS) (Kirkham, 2012). The DHS was to encompass U.S. Customs and Border Patrol, U.S. Citizenship and Immigration Services, and U.S. Immigrations and Customs Enforcement (ICE) (*DHS Public*, n.d.). By 2005 the Bush administration had put an end to the practice of catch and release, which allowed nonviolent/noncriminal undocumented immigrants seeking asylum to await their removal hearings outside of detention facilities (Juárez et al., 2018). The DHS secretary at the time, Michael Chertoff, asserted that ending the practice would be no problem thanks to the increased bedspace and detention capabilities of DHS and ICE (Juárez et al., 2018). The increased bedspace and detention capabilities of these two agencies came from the government's long standing relationship with the private prison industry.

### **Immigration Policy and the Private Prison Industry**

"The private prison industry is a multibillion dollar a year industry that includes a conglomerate of private prison corporations, security firms and construction companies that are in the business of incarcerating citizens...for profit" (Morín et al., 2021, p. 492). CoreCivic and the GEO group own and operate more than 200 facilities nationwide and in 2020 they accrued a combined 4 billion dollars in revenue (Morín et al., 2021). Under the cover of the War on Drugs, these private corporations successfully cultivated a prison industrial complex; wherein they used extensive lobbying efforts to profit off the rapid expansion of U.S. incarceration (Moreno &

Price, 2016). However, since 2009 the citizen population in federal and state prisons has declined (Moreno-Saldivar & Price, 2015).

Research suggests private prison companies have helped cultivate the immigration industrial complex to compensate for the declining prison populations (Moreno-Saldivar & Price, 2015). The immigration industrial complex asserts that private prison corporations have lobbied extensively to increase their ability to profit off detained immigrants (Moreno-Saldivar & Price, 2015). It is aided by the fear inducing rhetoric that has framed immigration since President Clinton in the 90's; this rhetoric provides strong support for the movement towards increased criminalization of immigration; which makes it seem like there is an immigration crisis when the only crisis is how our country has decided to deal with immigration in a post 9/11 world (Moreno-Saldivar & Price, 2015). Multiple sources agreed that immigrants commit crimes at relatively low rates compared to the native-born and that the presence of immigrants is negatively correlated with crime rates (Chacón, 2012; Juárez et al., 2018). Additionally, "...cities with a higher percentage of immigrants have been associated with lower crime rates..." (Juárez et al., 2018, p. 79). Despite all of this, "Criminal law is increasingly being used to manage a problem that has never been a criminal law problem" (Chacón, 2012, p. 617).

A security/insecurity cycle has taken hold, where we have enacted escalated security measures that have wrongfully ensnared a large group of already vulnerable people. "Criminal law [has] merely become a vehicle by which legislators attempt to address the litany of problems that unauthorized immigrants are purported to have caused – from alleged beheadings to school overcrowding, and job shortages" (Chacón, 2012, p. 629). Immigrants have been made to serve as scapegoats, solely responsible for all the ills of our nation (Moreno-Saldivar & Price, 2015). In our current era more than half of federal criminal prosecutions are related to

immigration crimes and many states and localities have begun enacting ordinances aimed at criminalizing offenses related to migration (Chacón, 2012). In this incredibly hostile climate, immigrants are increasingly subjected to erroneous escalated security measures that ironically validate previously unjustified assumptions concerning immigrant criminality (Moreno-Saldivar & Price, 2015; Chacón, 2012).

"A closer look at U.S. immigration detention policy will uncover that the most powerful player in policymaking is not the U.S. government but the private prison industry" (Wright, 2017, p. 335). The private prison industry monitors and lobbies federal legislation pertaining to immigration and has effectively inflated the detention center industry far beyond the actual needs for such facilities (Moreno-Saldivar & Price, 2015; Juárez et al., 2018). Both the GEO group and CoreCivic make political donations with the expectation that the recipient will advance their policy interests in the legislature (Morín et al., 2021). One study using data from the 113th and 114<sup>th</sup> Congress found that "...legislators representing districts where privately contracted companies manage, or own detention facilities, are more likely to introduce anti-immigration bills by a factor of three..." (Collingwood et al., 2018, p. 276). Private prison corporations lobby ICE, DHS, the Department of Justice (DOJ), Bureau of Prisons (BOP), both houses of Congress and the Department of Labor (Moreno-Saldivar & Price, 2015). All their efforts are in the name of preserving their bottom line. "CoreCivic and the GEO Group have both listed in their 10k filings to the Securities Exchange Commission that immigration reform is a threat to their business" (Wright, 2017, p. 336). 10k filings are intended to give a clear picture as to what kinds of risk the company faces (Kenton, 2022). It is undeniable that profit will always be the primary concern of these corporations, and the U.S., instead of impartially regulating, allows private

prison corporations to shape regulation which then reflects interests relevant to their profit motive, not the interests of the public (Moreno & Price, 2016).

The private prison industry is good at getting what it wants; individual corporations know to focus on ideological/partisan allies, especially incumbents, those belonging to policy relevant committee assignments and those with access to more resources (Morín et al., 2021). For example, to grow the prison industrial complex many private prison corporations appealed to members of the American Legislative Exchange Council (ALEC), who subsequently went on to champion privatization initiatives by advocating for harsher sentencing laws (Moreno & Price, 2016). Later, ALEC was involved heavily with Arizona SB 1070; it designed and drafted the legislation and advocated for other states to follow suit (Moreno & Price, 2016). Arizona SB 1070 increases the number of immigrants detained while simultaneously increasing the duration of their detainment (Chacón, 2012). Additionally, the GEO Group and CoreCivic lobbied federal officials extensively for the 'bed mandate' (Juárez et al., 2018). This mandate was passed by congress in 2009 and required that ICE hold a minimum of 34,000 immigrants per night in detention (Juárez et al., 2018). Since 2010 CoreCivic has spent 75% of its total lobbying expenditure on the DHS Security Appropriations Committee. Not coincidentally, this Committee holds the power to continue or cease the bed mandate (Juárez et al., 2018). Thus, "Although the increased growth of private interest in immigration detention is dependent on detention policies, it is also apparent that detention policies have become increasingly dependent on private interest" (Moreno-Saldivar & Price, 2015, p. 42).

### **Foundational Immigration Policies**

"The Immigration Naturalization Act of 1965 collected many provisions and reorganized the structure of immigration law", it was later amended in 1996 with the passage of the Illegal

Immigration Reform and Immigrant Responsibility Act (IIRIRA) under the Clinton administration (Act of Sept. 30, 1996; *Immigration and Nationality*, n.d.; Juárez et al., 2018, p. 75). The IIRIRA no longer recognized asylum seekers; all individuals entering illegally were to be detained and made to wait to go in front of an immigration judge; who then makes the decision as to whether the individual(s) claim for asylum is credible or not (*Mandatory Detention*, n.d.). Additionally, mandatory detention was imposed on immigrants not just for entering the country without documentation, but also for things like shoplifting, petty drug possession or vehicle infractions, i.e., driving without a license (*Mandatory Detention*, n.d.; Act of Sept. 30, 1996). Even a person lawfully in the U.S. but not a U.S. citizen is subject to mandatory detention if they are convicted of an aggravated felony or crime of moral turpitude (Wright, 2017). This may seem logically and ethically sound until one learns that under the law as it is currently written; failing to appear in court for mail fraud is considered an aggravated felony and being a “habitual drunkard” is considered a crime of moral turpitude (Wright, 2017, p. 319; *Chapter 5 - Conditional*, n.d.). In all instances of mandatory detention individuals have no entitlement to a bond hearing or any other way to secure their release (*Mandatory Detention*, n.d.). People are made to wait in detention for months, even years before making it in front of a judge (Wright, 2017).

The Obama administration was the first to attempt to reduce the federal governments use of private immigration detention centers (IDCs), however this effort was quickly reversed by the Trump administration (DeLaPerriere, 2020). Throughout his campaign, Trump consistently blamed immigrants from central and South America for the dissolution of American culture and the failings of the U.S. economy (Moreno & Price, 2016). He frequently stated he was going to be tough and unforgiving towards immigrants, and he held true to his word (Bump, 2016;



Moreno & Price, 2016). In April of 2018 under direction from the Trump administration, the U.S. Department of Justice (DOJ) began executing the zero-tolerance policy; criminally prosecuting 100% of families and individuals apprehended by border patrol with absolutely no exception for asylum seekers (Mattingly et al., 2020; DeLaPerriere, 2020). This "...resulted in the separation of a reported 2,342 children from parents who were charged with illegal entry..." (Mattingly et al., 2020, p. 873).

### **Human Cost of Immigration Policies**

Immigrants, their families, and their communities are being harmed greatly by the incredibly punitive immigration laws our country currently has in place (Juárez et al., 2018). According to a study that used data from the National Child Traumatic Stress Network Core Data Set; which includes comprehensive information on demographic characteristics, functional impairment, clinical diagnoses and trauma history details; children who underwent the intense stress of being separated from their families were found to be at an increased risk for detrimental health outcomes - things like PTSD, sleep disorders, ADHD, and depression to name a few (Mattingly et al., 2020). The same study found that compared to U.S. born youth, immigrant youth have higher day to day functioning impairment and higher levels of dissociation, substance abuse, suicide, sexually transmitted diseases, and shorter life expectancies overall (Mattingly et al., 2020).

A 2009 report by a former DHS senior official reported that immigrant detainees are held under circumstances that are unjustifiably punitive (Chacón, 2012). "Private prisons and immigration detention centers are known to have deficiencies in safety, security and health" (DeLaPerriere, 2020, p. 5). Sexual and psychological abuse run rampant in private IDCs (Juárez et al., 2018). LGBTQ+ immigrants are at increased risk for sexual abuse because their gender

identity is often not respected and so they get placed in facilities with the opposite sex (Juárez et al., 2018). Additionally, some reports have noted that detainees are not allowed any outdoor recreation and that they are made to stay inside cages topped with mesh; they are also forced to deal with a lack of appropriate clothing and access to personal hygiene items. The food in private IDCs is incredibly awful; food is often spoiled and moldy; detainees have reported waiting over 15 hours between meals just to be met with spoiled food (DeLaPerriere, 2020; Juárez et al., 2018). In some private IDCs, immigrants are expected to complete 'voluntary labor' in which they are expected to take on cleaning and laundry duties without pay (Juárez et al., 2018). If none of the aforementioned is concerning enough, one should also note the fact that "The quality of medical services at private [IDCs] is heavily criticized by human rights scholars and immigrants' rights groups for [its] substandard performance" (DeLaPerriere, 2020, p. 9). While only 219 people are known to have died in ICE custody since 2003, it is important to realize that this number is likely significantly higher, however, private corporations that own IDCs are not mandated to report fatalities and thus the number remains low (*Mandatory Detention, n.d.*).

### **Potential Avenues for Reform (Policy Recommendations)**

Opportunities for reform have been illuminated by the provisions of the Torture Convention the US signed in April of 1988 (Wright, 2017). The Torture Convention promoted an end to torture, cruel and inhumane punishment through regulation of domestic law and strict accountability among members (Wright, 2017). Members of the Convention are required to submit a report every four years to the Committee Against Torture (CAT); the committee then reviews the report and issues its concluding observations and recommendations for remedying those observations found to be in violation of the Convention (Wright, 2017). In 2014 CAT released their concluding observations for the U.S. and gave five suggestions based on twenty-

one identified problems, (Wright, 2017). The suggestions were, 1) review mandatory detention 2) expand alternatives to detention 3) comply with ICE directives 4) prevent sexual assault and 5) implement effective oversight measures (Wright, 2017). Mandatory detention is a particularly salient issue because it also raises concerns under the International Covenant on Civil and Political Rights (ICCPR) which prohibits arbitrary detention (Wright, 2017). Currently, U.S. detention and deportation policies lack the necessary safeguards to ensure the detention of immigrants is not arbitrary (Wright, 2017).

The key issue underlying all this of course is that the federal government primarily relies on partnership with private prison corporations (Juárez et al., 2018). These private companies are exempt from Freedom of Information Act requests, so one potential way to address the lack of oversight would be to focus reform efforts on the passage of the Private Prison Information Act (Moreno-Saldivar & Price, 2015). The Act seeks to make it so that records related to a nonfederal prison, correctional, or detention facility must be considered a federal agency record for purposes of the Freedom of Information Act (*H.R.5853 – 117th*, n.d.). Discouragingly, however, "Five iterations of the Private Prison Information Act have been introduced in Congress since 2005, and each time it has been defeated by vigorous lobbying efforts on behalf of the private corrections industry" (Moreno-Saldivar & Price, 2015, p.41-42).

Dealing with the lack of oversight is incredibly imperative because time and again private detention centers have failed to meet standards established by ICE (DeLaPerriere, 2020). This failure to meet standards is not as strongly discouraged as one might expect; in many instances ICE has not imposed consequences for noncompliance with the set standards (DeLaPerriere, 2020). Policy is nothing without enforcement behind it, and ICE is simply not enforcing (DeLaPerriere, 2020). Therefore, beyond passing the Private Prison Information Act, it is also

necessary to establish an effective and independent oversight mechanism to ensure adequate investigation into allegations of abuse or maltreatment in detention centers (Wright, 2017).

Effective is the operative word because the government currently investigates allegations of abuse or maltreatment in detention centers using an audit system that is complex, confusing, and inconsistent (Wright, 2017). Audits are conducted either by ICE employees or paid employees of contractors operating in the private prison industry, an obvious conflict of interest to everyone but those in charge (Wright, 2017). This current method of oversight is particularly problematic given that in 2009 Congress added a provision to the DHS Appropriations Act; if a contracted facility failed two consecutive audits, they could not continue their partnership with ICE (Wright, 2017). Since 2009 the rate of audit failure has dropped significantly, and no facility has failed twice in a row (Wright, 2017). The decrease in the rate of audit failure should not be confused with positive progress; it is much more likely auditors adjusted their criteria.

Widespread enforcement of criminal immigration laws is a relatively new phenomenon that may yet be reversed; even those who support the detainment of immigrants cannot forever deny that contracting for detention space on a large scale as our country currently does is not truly cost effective (DeLaPerriere, 2020; Chacón, 2012). In comparison, electronic monitoring as an alternative to mandatory detention policies is cost effective; it is still a form of custody, and it greatly reduces the negative consequences of physical detention (DeLaPerriere, 2020). For people whose only crime is entering the country illegally for purposes of finding work or new opportunity; this alternative seems to be a more humane response as it allows immigrants to maintain much more of their liberty (DeLaPerriere, 2020).

Reform should be motivated by the understanding that immigrants don't have the ability to fight against the oppression they're being faced with, they have not been afforded any kind of

voice so, it is up to the rest of us to educate ourselves and do something for them (Moreno & Price, 2016). Language barriers often inhibit immigrants' ability to ascertain legal defense for themselves (Moreno-Saldivar & Price, 2015). Moreover, "People in ICE detention are isolated from their communities and often transferred to facilities far from where they were originally detained, making family visits and access to counsel nearly impossible" (*Mandatory Detention*, n.d., p. 3). These communities should not be faulted for not speaking out against the tribulations their loved ones face; their silence is motivated by their own fear of the same oppression (Moreno & Price, 2016).

### **Concluding remarks**

U.S. immigration policy has taken on law enforcement characteristics that we have condemned other countries for employing; preventative arrests, detention of suspects for undetermined amounts of time, and closed deportation hearings for example (Kerwin, 2005). In a post 9/11 world immigration was solidified as a security threat; justifying the expansion of federal and state powers over immigration at the cost of democracy and individuals' civil liberties (Moreno & Price, 2016). The unfortunate reality is that most immigrants are seeking asylum for a variety of reasons, war, poverty, or threat of violence and our country has failed them by criminalizing their decision to flee and seek out safety and better opportunity for themselves and their families (Mattingly et al., 2020). Further research should consider that the issue of criminalizing immigration isn't isolated to the U.S. (Moreno-Saldivar & Price, 2015). In the UK private corporations also have a large stake in immigration detention (Moreno-Saldivar & Price, 2015).

Policies like the bed mandate (which mandates the detention of 34,000 immigrants each night), the Immigration Nationalization Act and subsequent amendments under the Illegal

Immigration Reform and Immigrant Responsibility Act, and Trump's zero tolerance policy (when it was active) all exemplify policies that allowed for the proliferation of private immigration detention centers. The most influential players involved in the formation of such policies have always been private prison corporations, namely the GEO Group and CoreCivic. The human cost of upholding such policies is great; an unascertainable number of lives have been lost due to the practice of mandatory detention. People fleeing victimization in their home country have come to the U.S. hoping for reprieve, only to find themselves revictimized and treated as criminals. Children of immigrants face extraordinary odds by virtue of the oppression they often find themselves exposed to. Reform is possible but it will be a long and arduous task given the high level of control private prison corporations exert over legislation related to immigration. To begin addressing the very complex issue that is the criminalization of immigration, it would behoove any reform movement to advocate for the repeal of the bed mandate, with a strong emphasis on the practicality and widespread applicability of electronic monitoring technology.

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