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PROFITEERING FROM THE SUFFERING OF IMMIGRANTS - AN ANALYSIS OF JUDICIAL RESPONSIBILITIES AND LEGISLATIVE BURDENS

By J. Singh[*] and S. Kundu[**]

ABSTRACT

Logical thinking about detention, or any kind of punitive activity that restricts the basic liberties of a human being, leads one to conclude that it must be used with caution and restraint and be implemented for those citizens and noncitizens who pose a relatively graver threat to society. Detention must also be fiscally sound and ensure that the negative externalities of the policy be minimized. However, in reality the American policy of detaining illegal immigrants to fill detention facility bed quotas has defied this cautious approach. It is in fact an arbitrary system of unscientific threat classifications, used in an effort to meet some legislatively set guaranteed minimum quotas. Furthermore, such quotas are motivated by maximizing profit for private corporations which in turn create negative externalities in the form of increased and unjustified tax burdens. Through the resulting severing of socio-communal ties and human rights violations, this policy aggravates the problems faced by the nation's most vulnerable populations. We analyze and illustrate the collective responsibilities of the various stakeholders in promulgating and implementing such policies with unjustified human costs, especially in the case of noncitizens. The judiciary, the legislature, the private prisons lobby, and the enforcing agencies have worked together to ensure the continued usage of flawed tools to manage immigration law. We conclude

[*] Faculty of Law, Campus Law Centre, University of Delhi, India. Email at: jayantisingh2006@gmail.com

[**] Innovations for Poverty Action (IPA), Yale University, USA. Email at: sayankundu89@gmail.com

by suggesting the alternatives, their fiscal and humanitarian benefits, and providing counterfactuals that would had been prevalent in the absence of such a policy.

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LIST OF ABBREVIATIONS USED

Alternate to Detention	ATD
American Legislative Exchange Council	ALEC
American Psychological Association	APA
Antiterrorism and Effective Death Penalty Act	AEDPA
Appearance Assistance Program	AAP
Behavioral Interventions	BI
Corrections Corporation of America	CCA
Customs and Border Protection	CBP
Department of Homeland Security	DHS
Department of Justice	DOJ
Detention Bed Quota	DBQ
Executive Office for Immigration Review	EOIR
Government Accountability Office	GAO
Illegal Immigration Reform and Immigrant Responsibility Act	IIRIRA
Immigration and Nationality Act	INA
Intensive Supervision Appearance Program	ISAP
Lawful Permanent Resident	LPR
Lesbian Gay Bisexual Trans	LGBT
Personal Information Form	PIF
Private Prison Corporations	PPCs
Risk Classification Assessment	RCA
The GEO Group	GEO
Toronto Bail Program	TBP
United Nations High Commissioner for Refugees	UNHCR
United Nations Human Rights Council	UNHRC
United States of America	USA / US
US Immigration and Customs Enforcement	ICE

I. INTRODUCTION

In 2009, Congress introduced the detention bed quota ("DBQ") into the Department of Homeland Security ("DHS") Appropriation Acts which mandates Immigration and Customs Enforcement ("ICE") to maintain a daily immigrant detention level of 34,000 individuals regardless of need. This is conducive to the private prison corporations ("PPC") business model. The harmony of interests between the ICE and the PPC antagonizes the instruments of criminal jurisprudence upholding personal liberty and individual freedom i.e. bail bonds and parole as oberserved in *Stack v. Boyle*.[1] We analyse how this appetite of for-profit prisons for more inmates affects the even-handedness of the criminal justice system especially in the context of the immigration detention policy.[2] Further, we contrast the eagerness of the ICE to detain immigrants to the effectiveness of the procedural and substantive rights available to them in matters of detention.

The detainees are classified into two categories. First, the low flight risk detainees[3] and second, ones eligible for mandatory detention. Through an analysis of the procedure of immigration court laid down for both categories we study the ambit of judiciary's responsibility in matters of detention and also its conformity with the customary tenets of human rights. Additionally, we analyse the legislative burdens of DBQ. We investigate whether the DBQ has promulgated cronyism resulting in a monopolistic market, which has contributed to the complaints of low quality of services and facilities. For example, the two biggest PPCs handle nearly 72% of the ICE detention beds.[4] We illustrate the skewed crony effects that the DBQ has resulted in and how it hampers the principles of privatisation. We analyse the clause of guaranteed minimums and the model of "tiered pricing"[5] to estimate how the DBQ policy has contributed to this soaring cost. Our findings suggest that this policy's costs have soared disproportionately to sustain the profits of the PPCs.

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[1] 342 U.S. 1, 4 (1951).

[2] United States v. Banuelos, No. 2:06-mj-00547 (C.D. Cal. Apr. 12, 2006).

[3] United States v. Lozano, No. 1:09-CR-158-WKW[WO], 2009 WL 3834081 (M.D. Ala. Nov. 16, 2009).

[4] ERO CUSTODY MGMT. DIV., ICE AUTHORIZED FACILITIES MATRIX (2015).

[5] DET. WATCH NETWORK & CTR. FOR CONSTITUTIONAL RIGHTS, BANKING ON DETENTION: LOCAL LOCKUP QUOTAS & THE IMMIGRANT DRAGNET 6 (2015), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf

Additionally, we look at mandatory detention and the RCA tool in order to better understand and critique the enforcement tools that the agencies employ in an effort to match the DBQ. Through this paper we attempt to disenfranchise the DBQ by highlighting its bias against the immigrants and the justice system's failure to effectively operationalize the Alternatives to Detention ("ATD"). We conclude by recommending structural corrections like assimilation of ATD programs which may result in a model of punitive justice that is fiscally responsible, considerate of human rights, and not dependent upon higher recidivism rates.

II. LITERATURE REVIEW

In this section, we delve into the existing literature and philosophies that govern the four pillars of the research work i.e. the criminal justice system with a special attention to the prosecution of immigrants, mandatory detention as a tool, the theories of privatization and market economics that promulgate private prisons as an idea, and lastly the nature of immigration and immigrants. Understanding and discussing these philosophies lays an important groundwork for the greater purpose of this research endeavor i.e. to distinguish how the various institutions and flawed incentives that govern the immigration detention system today and how the same is being used for the purpose of profiteering from the suffering of immigrants.

A. Understanding the Criminal Justice System and Its Philosophies

Immigrants are quite different from the general citizen population in terms of their human capital attributes and employment patterns. Immigrants are disproportionately poor, uneducated, unskilled, non-English speaking, and are overwhelmingly members of minority racial and ethnic groups.[6] The judicial framework has remained unpredictable in the issue of safeguards available for immigrants in case of mandatory detention. In this context, even immigration law has been unable to cope with the dynamic nature of the changing attitudes towards migrants.

Immigration related detention is governed by the Immigration and Nationality Act ("INA"), prescribing discretionary as well as mandatory detention and making all immigration proceedings subject to either form of detention. In the very first case concerning immigrant detention under

[6] V.M. Briggs, Jr., *Immigration Policy and the U.S. Economy: An Institutional Perspective*, 30(3) J. OF ECON. ISSUES, 370 (1996).

the amended INA to reach the Supreme Court, the petitioners challenged the constitutionality of INA Section 241(a)(6), a provision authorizing further detention of certain removable noncitizens beyond the 90 day period.[7] In this case, the two petitioners had final orders of removal; however, the government had been unable to repatriate them because either their countries of origin refused to accept them or no other country would give them refuge.[8] The Court attempted to circumvent constitutional invalidation by construing Section 241(a)(6) to have an implicit "reasonable time" limitation, subject to federal court review.[9] The Court created a six-month presumptive limit, and only when even after expiry of this period the noncitizen had no reason to believe in the possibility of removal in the foreseeable future would he be eligible for conditional release.[10] The interpretation by the apex court in the above matter was the first expression of a pro-detention attitude for mere precautionary reasons.

In another case, a lawful permanent resident ("LPR"), who had been detained for six months during the pendency of his removal hearing pursuant to Section 236(c) of the INA, challenged the constitutionality of that provision. [11] The Supreme Court held that mandatory detention of criminal noncitizens pending a determination of their removability was constitutional, because Congress was "justifiably concerned that deportable criminal [noncitizens] who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers . . . ."[12] This observation further highlights that the current framework for reviewing an immigrant's challenges to detention provides inadequate protections against erroneous detentions and underlines an overtly cautious stand taken by the courts.[13]

Gomes however points towards a not so recent tendency of courts to play a political role in the context of a country's immigration policy and overreach into the realm of foreign affairs.[14] In the case of immigration,

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[7] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).
[8] *Id*. at 684-86.
[9] *Id*. at 689.
[10] *Id*. at 700-01.
[11] Demore v. Kim, 538 U.S. 510 (2003).
[12] *Id*. at 513.
[13] Falza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111:8 COLUM. L. REV. 1833 (2011).
[14] CHARLES GOMES, RÉSEAU EUROPEÉN DROIT ET SOCIÉTÉ, INTERNATIONAL

with this so called 'judicialisation' of politics, this particular change brings to light that exclusion, deportation, visa denial, naturalization, citizenship, and asylum policies toward immigrants are no longer an exclusive domain of the political classes.[15] The third pillar has been zealous in invalidating acts made by federal government agencies.

He concludes that this judicial overreach is an expression of the change in the normative thinking of judiciary towards immigration where it awards weightage to the idea of transnational configuration of American society.[16] The main argument shows how the judiciary is more concerned with the protection of fundamental rights in spite of the national origin of the individuals.[17] In a sense, the immigrant's non-access to judicial review in case of exclusion or deportation tends to be almost impossible nowadays. This new approach towards immigrants opened the doors of the state to noncitizen populations and legitimized their membership by the universalistic frame of constitutional rights, which are no longer limited to the protection of American citizen.[18] This paper in the following sections points to the failure of this 'judicialisation' as the immigration court system remains elusive to this transnational idea of American society.

B. Understanding Mandatory Detention and Its Philosophies

Mandatory detention is a form of structural violence.[19] It is an extraordinary deprivation of liberty that provides neither bond nor relief. Such deprivation is reinforced by a system of law that treats noncitizens worse than citizens and provides weak civil law safeguards against immense enforcement power. The violence is made even harsher by ICE's erroneous calls for mandatory detention that go enforced without review. Such harm is generally limited to those without counsel and of color. Mandatory detention is also a tool of institutional violence; a creature of plenary power, with gross asymmetries of power between the state and the individual, it will likely be left to the political process—not the courts—to mandate shifts in policy as part of comprehensive immigration reform.[20]

MIGRATION AND THE "JUDICIALIZATION" OF FOREIGN POLICY IN THE UNITED STATES, http://www.reds.msh-paris.fr/communication/textes/gomes.htm (last visited Nov. 5, 2017).

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *Id.*

[19] ANN-MARI JORDENS, HOPE: REFUGEES AND THEIR SUPPORTERS IN AUSTRALIA SINCE 1947 115, 268-69. (2012).

[20] ROBERT KOULISH, USING RISK TO ASSESS THE LEGAL VIOLENCE OF MANDATORY

The blooming of the corrections industry is stimulated by a close nexus between societal hysteria, resultant encashment on the same by policy makers, and the parity of industrial interest with a 'tough on crime' approach. For Nuzum, immigrants are a subset within this narrative of checking crime.[21] From this societal hysteria stems discomfort between races and assumptions regarding the 'color' of crimes. Thus, the need for the expansion of the corrections industry is "more perceptual than real".[22] He goes on to state:

"This misperception is fueled by all forms of the media as well as political grandstanding focused on re-election and power rather than the public good. Existing social inequalities are exploited and reinforced to justify the continuation of ineffective policies and thereby guarantee a permanent and expanding market for the products of the corrections industry."[23]

By definition, private corporations were not established for serving the public good; they were established to generate profit for corporate owners and shareholders.[24] The PPCs are motivated by profit and not consciousness of justice. Unfortunately, they have entered into the business of correctional and reformative justice without the ethics and spirit of the latter.

Durham points to the inherent characteristics of sub-government politics.[25] She highlights the quality of permanence in the relationship between government and private industry.[26] Enhanced focus on the private sector and economic concerns by policymakers undermines the importance of developing alternative methods of responding to the issue of crime.[27] This relationship is no temporary arrangement; once the state caresses private interests in this arena, it is unable to discontinue the commercial relationship as it would seem justified according to economic estimates on its face.[28]

DETENTION 16 (2016).

[21] Marlyce Nuzum, *The Commercialization of Justice*, 8(3) CRITICAL CRIMINOLOGIST 5 (1998), http://divisiononcriticalcriminology.com/wp-content/uploads/Critical-Criminology-08-3.pdf

[22] *Id*. at 7.

[23] *Id*.

[24] *Id.*

[25] Alexis M. Durham III, *Origins of Interest in the Privatization of Punishment*, 27(1) CRIMINOLOGY 107 (1989).

[26] *Id*.

[27] *Id*.

[28] *Id*.

C. *Understanding the Theories of Privatization*

Shapiro and Willing, in their seminal work on the theories, benefits, and comparative advantages of privatization identify that when private enterprises are subjected to "sophisticated regulations," there is no discernible difference between the performances of the private enterprise and its public counterpart.[29] The reliance of the PPCs that work with ICE and DHS and their continued lobbying to maintain the DBQ (we discuss their lobbying activities in detail in subsequent sections) points towards their adherence to "sophisticated regulations."[30] The authors used "neutrality theorems" of the market to establish such a finding.[31] Furthermore, examining the PPC ecosystem in the USA, it can be considered as a market with limited competition – thus, a mixed oligopoly, as noted by Kish and Lipton.[32] Mixed oligopolies are usually welfare neutral, especially when there is a uniform production subsidy policy regulating the market (in this case, the DBQ of 34,000 can be considered as a uniform production for which subsidies are provided to the PPCs).[33] Panagriya and Rodrik use a similar logic to classify the sugarcane industry with its minimum production quota as a production subsidy.[34] Although they hypothesize that such a policy will be conducive for less lobbying, the PPCs seem to have violated this economic rationale with its ever-increasing lobbying activities.[35] Considering, the rationale towards privatization of prison is at loggerheads with traditional theories of economics, it is important to investigate the clout that the PPCs enjoy with the government and their continued patronage in spite of overwhelming evidence suggesting otherwise.

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[29] Carl Shapiro & D.R. Willig, *Economic Rationale for the Scope of Privatization*, in 2 PRIVATIZATION: CRITICAL PERSPECTIVES ON THE WORLD ECON. 90 (2004). Sophisticated regulation can be defined as non-intrusive regulations that governments often employ to provide benefits or to punish private organizations without being overt about the process like taxes, hearings at regulatory courts, environmental regulations, etc.

[30] *Id*.

[31] *Id.*

[32] Richard J. Kish & Amy F. Lipton, *Do Private Prisons Really offer Savings Compared with their Public Counterparts?,* 33(1) ECON. AFFAIRS 93-107 (2013).

[33] Kenneth Fjell & John S. Heywood, *Mixed oligopoly, subsidization and the order of firm's moves: the relevance of privatization*, 83(3) ECON. LETTERS 411-416 (2004).

[34] Arvind Panagariya & Dani Rodrik, *Political-Economy Arguments for a Uniform Tariff*, 34(3) INTERNATIONAL ECON. REVIEW 685-703 (1993).

[35] Bethany Carson & Elena Diaz, *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*, GRASSROOTS LEADERSHIP (Apr. 2015), https://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota.

The attempt to privatize incarceration is not a recent one in the legislative history of the USA and can be traced back to its days of prevalent slavery in the 19th century.[36] A more formalized process of privatization of incarceration with the United States' Congress' support can be traced to the 1980s.[37] This was mostly due to the fact that this period saw mass scale federal funding cuts to various departments of the government because of the administration's zeal to be fiscally conservative.[38] When these cut backs resulted in deteriorating conditions for the nation's incarcerated population,[39] privatization became the obvious choice. However, the question whether to continue with the policy of using PPCs, especially to prosecute one of the most vulnerable populations in the country, needs an informed debate after three decades' worth of evidence highlighting failure and cronyism. The below analysis is a modest attempt at the same.

D. Understanding Theories of Immigration and Immigrants

First, freedom of movement is both a direct condition or constituent of autonomy and a prerequisite to exercising other types of freedom (which are in turn themselves conditions or constituents of autonomy). Second, restricting movement on the basis of citizenship violates equality of opportunity because it restricts access to social opportunities on the basis of a status that is overwhelmingly ascribed at birth; it is to transform birthright citizenship into a "feudal class privilege".[40] The "cantilever" argument purports to show that all the reasons for which liberal democracies treat freedom of movement within their own territory as a general human right are also reasons for treating freedom of movement between states as a general human right.[41] This argument in favor of a universalistic approach to immigration is beyond the scope of this paper. We attempt to highlight only the vulnerability of this section of the population with regard to present laws and general judicial and legislative attitude.

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[36] David N. Khey, *Privatization of Prison*, *in* THE ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1-8 (2015).

[37] *Id*.

[38] *Id*.

[39] *Id.*

[40] Joseph H. Carens, *a case for open borders*, OPENDEMOCRACY (Jun. 5, 2015), https://www.opendemocracy.net/beyondslavery/joseph-h-carens/case-for-open-borders.

[41] JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION 364 (2013).

Chronological tracing of policy towards immigrants underlines the manpower needs of the 'American dream'. The United States was committed very early to its philosophy of "manifest destiny". The goal was the occupation and settlement of the country from coast to coast and the stabilization of its northern and southern boundaries. This policy required men as soldiers and as workers. Immigration, therefore, satisfied needs to which government gives highest priority: economic well-being and defense. The constant infusion of newcomers with a high proportion of matured individuals, combined with enormous undeveloped resources, gave unusual impetus to the production of wealth and laid the basis for the expanding market which Americans deem today as the condition of prosperity.

Thus, the traditional American policy of unlimited immigration was based essentially on economic and defense considerations. It gave rise, however, to the idea that immigration was necessary to the continued spiritual and cultural life of America; in part, because America's strength was based on its multiracial character, and in part, because of a spiritual and religious obligation to all of mankind. This idea, however, was not universally accepted, perhaps not even by majority of Americans.[42]

Legomsky points to the failure of embryonic literature to chronicle the asymmetry of modern immigration law where it has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication.[43] Legomsky further identifies that presently immigration to the United States is based upon the following principles: the reunification of families, admitting immigrants with skills that are valuable to the U.S. economy, protecting refugees, and promoting diversity. [44]

The criminalization of immigration and immigrants is not new to the realm of modern international political economy. Europe and the United States have historically been frontrunners in this pursuit. Giorgio argues that "[t]he apparent de-bordering of the western world under the impulse of economic globalization has been paralleled by a simultaneous process of re-bordering of late-capitalist societies against global migrations."[45]

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[42] Louis L. Jaffe, *The Philosophy of Our Immigration Law,* 21 L. & CONTEMPORARY PROBLEMS 358, 358-75 (1956).

[43] Stephen H. Legomsky, *New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007).

[44] *Id.*

[45] Alessandro De Giorgi, *Immigration control, post-Fordism, and less eligibility: A materialist critique of the criminalization of immigration across Europe*, 12(2)

Giorgio further argues that this re-bordering process has been augmented by the usage of incarceration as a tool of disincentives to deter immigrants which has often resulted in hyper-criminalization.[46] He delves into analyzing this trend in the context of Europe which has resulted in the portrayal of this population as a criminal populace which has built popular opinion against them that has not only augmented stringent immigration laws across the western world, but has fueled intense lobbying activities.

A seminal piece of work in immigrant psychology identifies economic migration as a cornerstone of the current trends in immigration that we witness (in tandem with conflict migration).[47] However, the process of hyper-criminalization of immigrants (especially in light of the skewed detention classification that ICE implements) is a deeply immoral one exactly for this reason. On the front of social integrity, Angel-Ajani analyses how these policies also contribute to the ascent of racism and racialized violence which further makes the immigrant groups susceptible to prosecution and incarceration. [48]

In light of the existing literature that discusses at length the problem of private incentives, skewed criminal justice, and undesirable treatment of immigrants, it is imperative that we delve into this issue further and analyze in a modern context how the DBQ that ICE implements is not only resulting in moral issues with judicial high-handedness, but also takes a toll on the American taxpayer over and above being discriminatory and abusive towards immigrants.

III. THE WHY, HOW, AND WHAT-IF OF THE PROBLEM

In light of the discussion of the existing literature and philosophies above, we need to delve into the practical nature of these problems in order to understand not only how and why this system is existing and flourishing, but also what the possible practical solutions at hand are for resolving the situation. Throughout this analysis, we demonstrate the same. We begin by demonstrating how the DBQ is implemented by ICE for individual detention centers and continues to build on other contributors to the problem.

PUNISHMENT & SOC'Y 147-167 (2010).

[46] *Id.*

[47] APA PRESIDENTIAL TASK FORCE ON IMMIGRATION, CROSSROADS: THE PSYCHOLOGY OF IMMIGRANTS IN THE NEW CENTURY (2012).

[48] Asale Angel-Ajani, *Italy's Racial Cauldron: Immigration, Criminalization and the Cultural Politics of Race,* 12(3) CULTURAL DYNAMICS 331, 331-52 (2000).

A. Detention Bed Quota, Tiered Pricing, and Guaranteed Minimums

Although there is an over-arching DBQ figure, this number is usually broken down into facility-wise "guaranteed minimums" for the purpose of implementation of the policy.[49] This usually translates to the number of beds for which payment will be provided to the facility even if the actual number of occupied beds is less.[50] Once the facility's guaranteed minimum number is attained, the facility operator provides ICE with "tiered-pricing".[51] As per the agreement of tiered-pricing, ICE receives a discount on each person detained above the guaranteed minimum.[52]

However, the problem lies in the fact that in an effort to fulfil the guaranteed minimum at a facility, ICE often transfers inmates from one facility which has attained the guaranteed minimum level of detainees to another facility where the guaranteed minimum number of detainees has not been attained.[53] Through this ICE attempts to minimize costs as the agency is responsible for payment of the guaranteed minimums' expenses to the facility's contractor irrespective of the beds being occupied.[54] This gives rise to two problems with regard to fiscal wastage:

> 1. In facilities where guaranteed minimums exist on contract, ICE ends up paying for detainee beds even when they remain unoccupied. According to estimates by the United States Government Accountability Office ("GAO"), between 2011 and 2013, ICE paid $3.6 million for unused detention beds in facilities.[55]
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> 2. In facilities where ICE could have taken the benefit of the tiered-pricing contractual agreement after fulfilling the "guaranteed minimum" quota for the facility to minimize the agency's costs for detaining illegal

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[49] Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 80 (2017).

[50] *Id*.

[51] BANKING ON DETENTION: LOCAL LOCKUP QUOTAS & THE IMMIGRANT DRAGNET, DETENTION WATCH NETWORK & CENTER FOR CONSTITUTIONAL RIGHTS 6 (2015), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf.

[52] *Id*.

[53] *Id*. at 6-7.

[54] *Id*.

[55] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-153, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS 19 (2014).

> immigrants, the same is not availed in an effort to not pay for empty beds at other facilities where the guaranteed minimums quota has not yet been attained. The same GAO investigation found that in multiple ICE facilities, because ICE did not maximize a facility's detaining capabilities, the cost per bed increased by $2 per bed per day in 2012 and 2013.[56]

Ironically, the wastage seems to be attributed to ICE's good intentions of honouring the contracts that it has with its contractors, in an effort to maximize their limited resources (wherein they are taking advantage of empty beds in facilities where the guaranteed minimum limit hasn't been reached instead of paying the concessional extra amount at facilities where the limit has already been reached). We opine that the problem is deeper and more structural; namely the provision of "guaranteed minimums" that exist with private facility contractors. The "guaranteed minimum" basically acts as an insurance coverage for the contractor of the facility wherein he gets paid a price-floor even if the actual costs it is incurring is lower (by virtue of lower occupancy). This only adds to the bottom-line of the private contractor while having negative effects for the treasury (in the form of excessive costs) and a diminished public good (in the form of higher incarceration rates for illegal immigrants).

For this purpose, we need to think about the counterfactual i.e. the situation that would had hypothetically existed in the absence of the DBQ (and by its extension the absence of the contractual provisions of guaranteed minimums and tiered-pricing). In absence of such a policy, the fixed costs of running a detention facility would had remained the same as it is currently, while the variable cost of the detention program (which is dependent on the number of illegal immigrants actually being detained) would have been considerably lower since there would be no requirement to pay private bodies for a minimum number of detainees irrespective of the actual number. This would prove to be a $2 per day, per inmate saving, as per the GAO. In absence of such an appetite for minimum detention quotas and profit-linked "guaranteed minimums", the country's judiciary and legislature would be more inclined to look at more cost-effective and humane alternatives to detentions which would further reduce the fiscal burden. Apart from benefits to the fiscal burden on the taxpayer, this would also result in less activism on part of the law-enforcing agencies and the judiciary in an effort to meet the minimum detention criterion in order to "make-good" for the committed costs. This would mean a

[56] *Id*. at 20.

functional criminal justice system which detains and sentences those who have infracted based on the actual nature of their crimes instead of subjecting them to executive overreach in order to satiate flawed policymaking and insatiable profit-mongering by private bodies.

The rest of the paper delves into analysing this problem. We discuss the role of the judicial and the legislative branches of the government in propagating and implementing such a flawed policy. For this purpose, we look at the judicial framework that has continued to provide for this policy through its criminal justice and immigration related cases. We also look at the lobbying expenses of the PPCs and their connection to the legislative branch in an effort to better understand the reasons behind such a policy. We further this investigation by looking at the RCA tool which ICE uses for its mandatory detention program and establish the structural violence that it propagates through its use of the tool and mandatory detention techniques in an effort to further satiate the profit-making appetite of the PPCs. Finally, we look at the ATDs in an effort to find a solution from this problem given the contributing factors to the existence and continuance of the flawed DBQ policy are taken care of.

B. Growth of PPCs and Their Revenue Streams

PPCs like CCA and GEO have historically relied upon maintaining or augmenting the status quo on incarceration, the cost of which is borne by immigrants. While many studies have underlined the social cost of such a skewed incarceration system, the fact that such costs are either non-monetized or passed on as negative externalities to the population does not impact the revenues of the PPCs and thus goes unnoticed.

For the past 15 years, CCA's revenues have been over $1 billion and have grown 88% during this time.[57] Between 2002 and 2010, the company's revenues from all its operations soared by nearly 121%.[58] Nearly 87% of this increase could be accrued to the operations of its American corrections divisions.[59]

In order to better understand this trend of revenue stream, it is imperative that we look at the strategies that the PPCs employ in order to secure these allocations – lobbying and campaign contributions.

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[57] CORRECTIONS CORP. OF AMERICA, ANNUAL REPORT (FORM 10-K) (2011).
[58] CORRECTIONS CORP. OF AMERICA, ANNUAL REPORT (FORM 10-K) (2010).
[59] GEO GROUP, ANNUAL REPORT (FORM 10-K) (2011).

C. PPCs' Expenses to Influence Legislation

Numerous reports have claimed that the PPCs, specifically the GEO group and the CCA group of private prisons, have lobbied both houses of Congress to push for favorable legislation to increase their already soaring profits in both county detention facilities and state jails. The PPCs, however, continue to deny the same. For example, the GEO Group has released a statement announcing that they have "never directly or indirectly lobbied to influence immigration policy. We have not discussed any immigration reform related matters with any members of Congress, and we will not participate in the current immigration reform debate."[60] Similarly, CCA insists on the fact that their company's policies prohibit them from lobbying for legislation that influences criminal justice, sentencing procedures, and enforcement policies.[61] However, facts and figures contradict such claims.

Expenses to influence legislation can be broadly broken down into two contributing segments i.e. campaign contributions to politicians who in turn sponsor legislations that favor certain contributors and expenses incurred directly for lobbying purposes. Below, we discuss how the PPCs have extensively used both these tools to lobby for favorable legislation.

The 2010 Arizona senate bill AZ SB 1070 amended the already strict anti-immigration federal and state laws to enable state law-enforcement agencies to stop, detain, and arrest suspected illegal immigrants and scrutinize their immigration registration documents, among many other stricter actions. Although not being in possession of one's immigration registration documents was already considered a federal misdemeanor, the Arizona bill classified it as an additional state misdemeanor as well, which took it out of the ambit of federal law-enforcement agencies alone. Although there were attempts to impose an injunction on the controversial aspects of the law, the Supreme Court upheld the bill in *Arizona v. United States*.[62]

Analyzing lobbying expenses of the PPCs, what is interesting is the finding that out of the 36 co-sponsors of the bill, 30 of them received

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[60] *US immigration reform draws 3,000 lobbyists*, FINANCIAL TIMES (Mar. 20, 2013), https://www.ft.com/content/83b39af0-9181-11e2-b839-00144feabdc0.

[61] CORRECTIONS CORP. OF AMERICA, REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM (FORM 10-K) (2015).

[62] 567 U.S. 387 (2012); Robert Barnes, *Supreme Court upholds key part of Arizona law for now, strikes down other provisions*, THE WASHINGTON POST (June 25, 2015), https://www.washingtonpost.com/politics/supreme-court-rules-on-arizona-immigration-law/2012/06/25/gJQA0Nrm1V_story.html?hpid=z1&utm_term=.eefb92ef9daf.

campaign contributions from either the CCA, the GEO group, or the ALEC group which both CCA and GEO are a part of.[63] Additionally, NPR reports that the Arizona bill was drafted in presence of CCA officials who insisted on the inclusion of such stringent language, which will only help the PPCs as it increases the number of illegal immigrants in detention centers run by the private corporations.[64] What is further worrying is the statement in a report by the Justice Policy Institute:

"While CCA played a significant role in influencing state legislators, the connection between the private prison industry and SB 1070 did not end on the statehouse floor. Two of Arizona Governor Jan Brewer's top advisers had direct ties to the private prison industry. Prior to joining the Brewer administration, two senior advisors both worked as lobbyists with private prison companies as clients."[65]

The passage of SB 1070 also made way for similar stringent immigration law reforms in a number of other southern states like Georgia and Tennessee. An analysis done by the Justice Policy Institute shows that between 2003 and 2010, the campaign contributions of CCA to election campaigns in California, Florida, and Georgia (all southern states with a high degree of immigrant population) accounted for two-thirds of its total giving in all states.[66] GEO Group's campaign contributions in Florida, California, and New Mexico between 2003 and 2010 also amounted to two-thirds of the company's total giving in all states.[67]

Additionally, analysis of lobbying details that have been disclosed by CCA to the Senate grossly contradict their claims. Out of the approximately $10.56 million that CCA has spent lobbying between 2008 and 2014, approximately $9.8 million has gone towards its lobbying the DHS Appropriations Subcommittee which maintains the immigration detention quota language.[68] A time-series analysis of the percentage of CCA's lobbying expenses spent on immigration issues was done by the Grassroots Leadership organization and demonstrates that the percentage spent has steadily increased over the years with some dip in recent years

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[63] Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law,* NPR (Oct. 28, 2010), http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law.

[64] *Id*.

[65] JUSTICE POLICY INSTITUTE, GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 30 (2011).

[66] *Id*. at 16.

[67] *Id*.

[68] Carson, *supra* note 35.

(2013 onwards) after the DBQ was set at 34,000.[69] See figure 1 below. Additionally, as per a report by Grassroots Leadership organization, the top 10 private prison lobbyists between 2007 and 2014 have connections to either CCA or GEO, who have paid these lobbyists a total of $19 million over this period.[70]

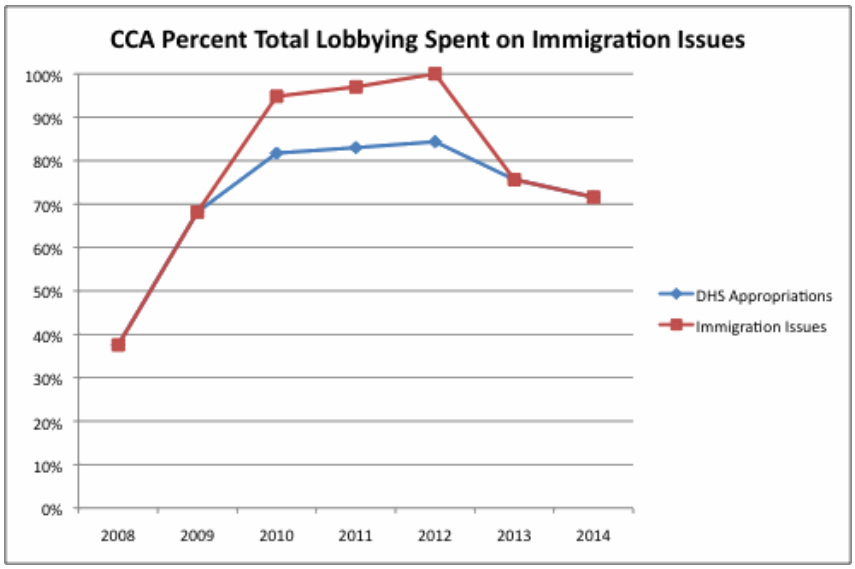

Fig. 1 - Time-series analysis of the percentage of the lobbying expenses by CCA towards DHS Appropriations and Immigration Issues.[71]

An analysis of the lobbying activities demonstrates how the PPCs have heavily relied on them in order to preserve the DBQ which secures their profit margins. For example, 12.4% of CCA's revenues are accrued from ICE facilities[72] while it is 15.6% for GEO group.[73] This has fueled incarcerated immigrants in detention facilities becoming one of the fastest growing incarcerated populations in the USA.[74] Moreover, the DBQ has acted as an artificial insurance policy for the PPCs assuring a minimum

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[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] CORRECTIONS CORP. OF AMERICA, 2014 CCA INVESTOR PRESENTATION (2014).
[73] GEO GROUP, ANNUAL REPORT (FORM 10-K) (2013).
[74] Mark Hugo Lopez & Michael T. Light, *A Rising Share: Hispanics and Federal Crime*, PEW RESEARCH CENTER (Feb. 18, 2009), http://www.pewhispanic.org/2009/02/18/a-rising-share-hispanics-and-federal-crime/.

level of revenue for them irrespective of market fluctuations or policy uncertainty. As an addendum, it is evident from the lobbying practices of the PPCs that they have consistently vouched for more stringent policies of immigrant detention and apprehension which aid their goal of increasing DBQ, as demonstrated above.

IV. THE RESPONSIBILITY OF THE JUDICIARY IN FAILURE OF IMMIGRANT JUSTICE AND ADMINISTRATIVE OVERREACH

The lack of judicial remedy to immigrant detention can be attributed to a nexus of incongruous and undefined rights of such detainees under the American Constitution, the 'tough on crime' attitude of agencies like ICE, and more significantly the inadequacy of the immigration court system to deliver justice based on set procedures.[75] The already ill-equipped immigration court system is further paralyzed by executive overreach, thus not giving the judiciary enough legroom to establish an effective system for delivering justice. This complexity and power struggle between the judiciary and the executive culminates into prolonged detentions. While waiting for their day in immigration court, ICE often holds noncitizens in either one of the 234 detention centers throughout the country or in one of their designated immigrant beds in a criminal jail.[76] Carson argues that the current system of immigration court and detention is unconstitutional on ethical and legal grounds, where it not only denies equal protection before the law to noncitizens but also arbitrarily pitches the state machinery against the detainee.[77]

The foremost cause for the issues plaguing the immigration court system emanates from the fact that immigration law is treated as 'civil' and not 'criminal' in nature. This makes for a rather artificial distinction in the face of the denial of basic legal rights. Furthermore, deportation itself is not classified as a 'punishment' because noncitizens deportation proceedings "are civil rather than criminal in nature and rules for the latter are inapplicable [to the former]."[78] It is rather an administrative mechanism to return immigrants to their native countries as pronounced

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[75] Alex Stamm & Inimai Chettiar, *"Tough on Crime" No Longer the American Mantra?*, ACLU (May 1, 2012 at 4:35 PM), https://www.aclu.org/blog/mass-incarceration/tough-crime-no-longer-american-mantra.

[76] Anna Paden Carson, *Justice for Noncitizens: A Case for Reforming the Immigration Legal System*, 5 VA. ENGAGE J., Art. 4 at 4 (2017), http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1047&context=vaej

[77] *Id*. at 13-24.

[78] Hernandez v. INS, 528 F.2d 366, 368 (9th Cir. 1975).

by the Supreme Court as early as in 1893,[79] reaffirming that the enforcement of immigration law indeed falls under the executive branch of government and that Congress holds the exclusive authority to establish and regulate all national immigration policy.

In an attempt to understand the arbitrary nature of the immigration court system, Carson argues that immigration law is removal centric and, being 'civil' in nature, the noncitizens are often denied the due process of law and equal protection before law right from the time of arrest.[80] Once in the custody of the Federal Government, immigrants are not advised of their rights before being questioned and are subjected to preliminary examinations before immigration officers, not independent judges.[81] While removal proceedings are pending, broad categories of immigrants are subjected to mandatory detention (we illustrate this further in our later sections). This in turn transforms into a niche for filling the detention quotas.

Ironically, criminal suspects have been afforded the right to remain silent before any interrogation begins, which protects them from themselves - i.e. the right against self-incrimination from the point of arrest itself.[82] Legal aid is extended to criminal defendants in case they cannot afford an attorney.[83] This principle was highlighted by the landmark decision of the Supreme Court in *Miranda v. Arizona.*[84] However, in case of immigration law violations by noncitizens they do not receive *Miranda* warnings before interrogations. Interestingly, the Federal Government generally refuses to allow immigrants to have an attorney present at all during interrogation. This emanates from the established position that such constitutional safeguards are not required in civil proceedings.[85]

A. Denial of Request of Bond Hearing

The system of bond hearing can also be considered a failure in the context of the immigration court system. The process in which it is meted to noncitizens is not only delayed but also defeats the purpose of a judicial

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[79] *See* Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[80] Carson, *supra* note 76, at 13-24.

[81] *Id*.

[82] U.S. CONST. amend. V, § 3.

[83] Gideon v. Wainwright, 372 U.S. 335 (1963).

[84] 384 U.S. 436 (1966).

[85] *See* Bustos-Torres v. INS, 898 F.2d 1053, 1056 (5th Cir. 1990) ("Miranda warnings are not required in the deportation context, for deportations are civil, not criminal in nature . . . .").

oversight in general. The immigrants are rarely afforded the luxury of a prompt hearing before a neutral magistrate; to aggravate the consequences of this denial, interrogations are often behind closed doors and by the arresting agents themselves. This is in sharp contrast to what is provided to criminal suspects and is a matter of right to argue for their release on bail.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA")[86] and Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),[87] detention without bond is mandatory for nearly all noncitizens with criminal convictions, including convictions for non-violent actions, while their removal proceedings are pending. This makes them ineligible for bond—or at least a bond hearing—even when not at flight risk.[88] Incidentally, the Supreme Court in *Demore*[89] and *Zadvydas*[90] reiterated its faith in the assertion that post-removal period detention is limited to a period reasonably necessary to bring about removal, and may not be indefinite in cases where removal is not possible. Despite the clear deduction underlining the decision, the rulings have received minimal enforcement wherein both ICE and Executive Office for Immigration Review ("EOIR") have chosen to interpret the parameter of the "foreseeable future" much too widely and thereby continue to detain immigrants for periods longer than six months.

Congress passed the first mandatory immigration detention law back in 1988 which made possible the detention without bond of noncitizens who had been convicted of an "aggravated felony".[91] The law took away the authority of federal immigration officials to release these individuals on bond pending their removal proceedings.[92] In the case of criminal custody, Congress thought that it should prohibit the release of suspects of serious crimes before deportation.[93] This was a preemptive step and overtly precautionary assuming the "graver" danger to the society in case

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[86] ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[87] OMNIBUS CONSOLIDATED APPROPRIATIONS ACT, Pub. L. 104–208, 110 Stat. 3009-546 (1996).

[88] MICHAEL TAN, LOCKED UP WITHOUT END: INDEFINITE DETENTION OF IMMIGRANTS WILL NOT MAKE AMERICA SAFER 3-4 (2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Tan_-_Locked_Up_Without_End_100611_0.pdf.

[89] Demore v. Kim, 538 U.S. 510 (2003).

[90] Zadvydas v. Davis, 533 U.S. 678 (2001).

[91] TAN, *supra* note 88, at 3.

[92] *Id*.

[93] *Id*.

the suspects were given a right to secure release in the period of proceedings. The government justified such a move on the pretext of being able to effectuate ultimate deportation and removal as such detention would prevent absconding.[94] Congress actually created a category of people convicted of "aggravated felonies" barring them from any kind of relief during proceedings which included bond hearing, right to counsel, and even presumption of innocence before conviction.[95] Additionally, in 1996 Congress further expanded the types of removable offenses that triggered mandatory detention like drugs crimes and "crimes involving moral turpitude."[96] These steps not only curtail the right of discretion for the agencies but also immigration courts which are already in a restrictive sphere because of spillovers from the executive. It is a classic case of "control strategy."[97]

As a result, decision makers (i.e. the federal agencies and even courts) lack the means or the incentive to collect and use information to release individuals who do not pose a flight risk or danger - including individuals who may not ultimately be removed from the United States - at significant cost to the administration of the immigration system as a whole.[98] Detention becomes inevitable for noncitizens once they are apprehended. Here, the distinction between civil and criminal treatment of immigration takes a hit where, in the latter detention is a preemptive step to stop criminal activity prior to removal. The former in any case denies immigrants the necessary safeguards.

B. Lack of Attributes of an Impartial Forum and Delay

However, the above position does a grave disservice to the immigration court system critique. The system cannot be called a neutral forum preserving the independence of the judiciary. From producing evidence in the form of immigration records that are important for establishing a legal status in the US, to the basic expectation of an impartial immigration judge, these safeguards are blatantly denied to noncitizens. First, the immigration court itself is housed in the EOIR, which is located in the Department of Justice ("DOJ"). Second, the

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[94] *Id*. at 4.

[95] *Id*. at 3-4.

[96] 8 U.S.C. § 1227(a)(2)(A)(ii)-(iii).

[97] Matthew Stephenson, *Information Acquisition and Institutional Design*, 124 HARVARD L. REV. 1422, 1438-46 (2011).

[98] Travis Silva, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 1227-1273 (2012).

immigration judges are technically employees of the executive branch, which make them more DOJ attorneys than judges. And as the DOJ does their performance evaluations, it stresses on case completion goals, rather than judicial standards of conduct.[99]

The other challenge for the immigration court system comes from the belief that a congressional act seemingly holds more weight than Supreme Court decisions, as the EOIR falls under the executive rather than judicial branch. The consequence of this is adjudged from the staggering number of pending cases in front of immigration judges. According to a report by Human Rights First, the caseload of pending cases has more than doubled between 2010 and 2016, from 223,707 to 492,978 with an average waiting period of 1072 days for a day in court.[100]

Congress is spending more to apprehend noncitizens than to adjudicate their rights. It has failed to provide the EOIR with adequate appropriations[101], while continually increasing funding for the enforcement arms of DHS, ICE, and Customs and Border Protection ("CBP").[102] Clearly, resources for the immigration courts have not kept pace with the meteoric rise in allocation for immigration enforcement agencies. The number of newly filed immigration cases has increased substantially, while the number of completed cases has continued to decline.[103] The legal framework guiding immigration proceedings fails to provide incentives for early case resolution. Immigration cases end up going to trial at a much higher rate than other cases.[104]

According to the Bureau of Justice Statistics, what further contributes to delay is a skewed system of plea-bargain-like benefits.[105] In the case of

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[99] Dana Lee Marks, *Still a Legal 'Cinderella'? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, THE FEDERAL LAWYER, March 2012, at 29-30.

[100] *Reducing the Immigration Court Backlog and Delays*, HUMAN RIGHTS FIRST (Jul. 7, 2016), https://www.humanrightsfirst.org/sites/default/files/HRF-Backgrounder-Immigration-Courts.pdf.

[102] Department of Homeland Security Appropriations Act, S. Con. Res. 3607, 111th Cong. (2010) (enacted).

[102] Department of Homeland Security Appropriations Act, S. Con. Res. 3607, 111th Cong. (2010) (enacted).

[103] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 21-23 (2014).

[104] CHARLES ROTH & RAIA STOICHEVA, NAT'L IMMIGRANT JUSTICE CTR., ORDER IN THE COURT: COMMONSENSE SOLUTIONS TO IMPROVE EFFICIENCY AND FAIRNESS IN THE IMMIGRATION COURT (2014).

[105] MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2013-2014, U.S. DEP'T OF JUSTICE 27 (2017), https://www.bjs.gov/content/pub/pdf/fjs1314.pdf.

noncitizens, they cannot exercise this reasonable right during proceedings as it sometimes implies acquiescence to ultimate removal from the country when indicted for other criminal offences. Not only does this deny the simple safeguards to the accused, but it has bigger costs for impoverished immigrants, the ones with family ties with US citizens and those with a possibly sound case against removal if provided with appropriate legal help. Exposed to an unreasonably high bond, avoidable delays, and repeated appearances, most noncitizens defendants submit to the institutional pressures from the prosecution to plead guilty at the first opportunity without weighing the terms of their case, in the hope of returning to their jobs and families. The immigrant status plays ill for these individuals even in cases of misdemeanors with "minimal punitive consequences."[106] In the watershed decision *Padilla v. Kentucky* the Supreme Court directed that plea bargains for noncitizens be crafted creatively, "in order to craft a conviction and sentence that reduce the likelihood of deportation . . . ."[107]

Unfortunately, the proportionality principle with regard to the crime committed and unnecessary deportation often fails noncitizens. In contrast, the plea bargain system is not used to creatively determine the sentence due to aggressive immigration enforcement.

For individuals in ICE custody, court delays can mean prolonged detention in remote facilities, with limited access to counsel or to medical treatment, during proceedings.[108] Immigration detention can be a traumatic experience and in the case of transgender immigrants, especially women, it can be more harmful due to the abuse they have previously endured.[109] Further, complete disregard to health conditions and deficiencies in initial screening for chronic diseases (including referral to outside care), and pain management of detainees have been identified by numerous governmental and nongovernmental groups.[110] This leaves

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[106] Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1754 (2013).

[107] 559 U.S. 356, 373 (2010).

[108] NAT'L IMMIGRANT JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT (2010).

[109] Brian Stauffer, *"Do You See How Much I'm Suffering Here?": Abuse Against Transgender Women in US Immigration Detention*, HUMAN RIGHTS WATCH (2016), https://www.hrw.org/report/2016/03/23/do-you-see-how-much-im-suffering-here/abuse-against-transgender-women-us.

[110] Mark Dow, *Designed to Punish: Immigrant Detention and Deportation*, 74(2) SOC. RES. 533-546, (2007).

immigrant detainees more vulnerable to such dangers in addition to the denial of basic legal rights.

Immigration detention is solely a governmental holding mechanism used simply to fulfill civil immigration enforcement goals (like DBQs, as discussed in this paper). It becomes apparent that immigration law has metamorphosed into an administrative resource appropriation tool. Not only does the "civil" classification fly in the face of constitutional guarantees to citizens and noncitizens, but is conducive for the pro-detention and pro-deportation agenda of enforcements agencies. It is more easily justifiable to deny detainees their fundamental human rights when they are not identified as "criminal suspects". The judiciary with regard to immigrants has transformed into an agent and facilitator of detention and other policies. Delays, hearing denials, a lack of scrupulous evidence, denials of access to legal aid, congressional circumspection of Supreme Court verdicts, and the absence of a neutral adjudicating forum are just a part of the judicial failure towards noncitizens.

Even a willingness on the part of the judiciary will not yield great dividends as immigration law has been systematically assimilated into the executive branch. How this judicial helplessness and executive overreach is detrimental to basic values of justice is evident from the above analysis. This paper in the following sections connects this collective failure to a perfect breeding ground for private profit interests, with an increased budgetary allocation to agencies like ICE making it financially detrimental and against the basic tenets of reformative justice and universal human values.

V. THE STRUCTURAL SKEWNESS OF THE MANDATORY DETENTION PROGRAM

Mandatory detention is at the heart of the DBQ and the profiteering that is promulgated from the suffering of immigrants. The implementation of the mandatory detention program is justified by ICE on two grounds. First, their continued attempt to keep America and Americans safe from those legal and illegal immigrants who pose a threat to society, and second, their continued effort to ensure that those immigrants who are charged by ICE do not flee or evade court hearings. The assumption that follows is that only individuals who pose a mix of high threat to society and are classified as being a high flight risk will be subjected to mandatory detentions and the rest will be placed under ATDs. However, the facts

emerging from ICE's Risk Classification Assessment ("RCA") tool begs to differ.

The RCA is an algorithmic system which ICE uses on every immigration related detainee during booking them and is programmed to assess the level of risk the individual possess on the two grounds, which ICE then uses to justify mandatory detentions.[111] The system analyzes data on the individual, including a criminal background check, and measures the social equities of the individuals in the form of local ties, residential history, family and community ties, reports of substance abuse, and other similar information.[112] This data is gathered through background check systems and intake interviews that are conducted by ICE officers.[113] The RCA then analyzes the information to recommend if the individual should be detained or released, the amount of the bail (if the individual is to be released), and the supervision levels in the case that the individual is to be detained.[114] For both the risk factors on which the detainee is analyzed (threat to society and flight risk from further proceedings) the system assigns a high, medium, or low rating.[115]

ICE uses static-data, i.e. data available on various criminal databases across states and federal levels, to determine the risk of threat to society and, as a result, can be considered failsafe for almost all the cases.[116] However, in order to determine the risk of flight, ICE relies on dynamic-data, i.e. data the ICE officers collect during the intake interview by asking a series of questions to the individual.[117] This is an inquiry into an individual's familial ties to the community and society, history of substance abuse, workplace information and authorization, among other

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[111] Press Release, U.S. Immigration and Customs Enforcement, ICE announces enhanced oversight and release procedures for custody determinations involving detainees with criminal convictions (Mar. 18, 2015), http://www.ice.gov/news/releases/ice-announces-enhanced-oversight-and-release-procedures-custody-determinations.

[112] Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2144 (2017).

[113] *Id*.

[114] *Id*.

[115] DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENTS, https://www.dhs.gov/privacy-impact-assessments (last visited Oct. 16, 2017); DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT ALTERNATIVES TO DETENTION (REVISED) (2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf (last updated Feb. 4, 2015).

[116] Marouf, *supra* note 112.

[117] *Id*.

things.[118] Although questions about community ties, familial connections, and workplace are usually asked to determine an individual's societal equity to his current location and determine if he poses a risk of flight, it is quite possible for individuals to be conservative in providing this information which they may fear will be used for harassing other family members, workplace colleagues, and an open investigation into other known illegal immigrant colleagues and family members. Studies conclude that static-data is often more reliable than dynamic-data, the latter being prone to under-reporting and thereby leading to over-weightage of the risk assessment that ultimately determines the status of detention.[119] Thus, we see that at the very outset, the RCA tool's input parameters have a skewed design to classify immigrants in custody as eligible for mandatory detention.

The RCA classifies every individual in one of the four final recommendations – detain with access to bonds, detain without access to bonds, uncertain i.e. the decision needs to be taken by the supervisor, and release.[120] The RCA also provides an additional security recommendation which has five categories: low, low-medium, medium, high-medium, and high security.[121]

For the purpose of better understanding the skewed systematic problems with the usage of RCA for mandatory detentions, Koulish obtained detailed data for 592 cases that were conducted by the Baltimore ICE office in Spring 2013.[122] Although this data was specific to Baltimore, the distribution of the data is similar to that of national level aggregate figures.[123] Koulish's analysis of the data demonstrates that ICE detained nearly 82% of all the individuals who were risk-assessed by the RCA tool while only 18% of these individuals were released.[124] 63% of those who were mandatorily detained for judicial proceedings had a high classification for one or both risk categories.[125] This means that 37% of those who were detained by ICE had neither high flight risk nor high public safety risk, and yet were put in conditions akin to jail

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[118] *Id*.

[119] MARIE VANNOSTRAND & CHRISTOPHER T. LOWENKAMP, ARNOLD INST., ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW (2013).

[120] Robert Koulish, *Immigration Detention in the Risk Classification Assessment Era*, 16 CONNECTICUT PUB. INT. L. J. 1, 15 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2865972

[121] *Id.* at 16.

[122] *Id*. at 4.

[123] *Id*.

[124] *Id*.

[125] *Id*. at 23.

punishment.[126] This is contradictory to the essence of mandatory detention, where only those individuals who pose a high risk to public safety and are high flight risk (although the second can be debated in light of the surge in cost-effective technological and community-based ATDs that are available; we discuss these in a later section), or at least are rated as high in one of the two categories, are detained and have their human rights and liberty subjugated. Pursuant to Koulish's study, many of those who were mandatorily detained by ICE could had been released had ICE adhered to the philosophy behind mandatory detention and ensured its exclusivity for the most dangerous of individuals only.[127]

What is interesting in Koulish's analysis of the data is the finding that those individuals who were mandatorily detained without bond for crimes that had happened in the past had similar flight and public safety risk assessments as those who were subjected to detention for judicial proceedings or released. This brings us back to the concern which is at the very basis of RCA's algorithm and ICE's philosophy – are all those who are mandatorily detainable because of past crimes a danger to public safety and a high flight risk? In this context it is interesting to note that from those who were mandatorily detained 37% were classified as either medium or low public safety risks.[128] Additionally, these individuals pose less of a flight risk due to the time they have spent in United States (by virtue of the fact that they are being mandatorily detained for a crime that they had committed in the past) and the societal equities which they enjoy in the form of strong familial and community ties. Studies have also found that such individuals' past crimes are usually minor misdemeanors and not serious crimes as one might think.[129]

Koulish's most important finding can be summarized with one statement – per the data, there is almost no discernible difference in risk to public safety between those who are released pending judicial proceedings and those who are mandatorily detained pending judicial proceedings.[130] This leads one to conclude that ICE gives a higher weightage to the risk of flight assessment of an individual rather than the safety risks to America and Americans. This is problematic for two reasons – first, the available alternatives owed to technological progress which can efficiently and near perfectly monitor a suspect and minimize their flight risks to minimal

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[126] *Id*.
[127] *Id*.
[128] *Id*.
[129] Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 75 (2014).
[130] Koulish, *supra* note 120, at 23.

levels is aplenty and also a considerably lighter fiscal burden. There has also been significant progress in the field of sociological research which has enabled evidence-based pilot programs run by the likes of Vera Institute of Justice which rely on community-based capital to ensure that flight risk among suspects are minimized. We discuss these in more detail in a dedicated later section. The second reason why this approach towards using mandatory detention to minimize flight risk is worrisome is because of the fact that time and time again the leadership at ICE and DHS have reiterated that the department "focus[es their] detention and removal resources on public safety and national security threats to ensure [they] are doing everything [they] can to keep America safe".[131] Such a contradiction between the leadership and actions of a crucial department like the DHS should be a matter of concern.

A. Not So Taxpayer Friendly

The need to privatize imprisonment for immigrants has always found traction on two fronts; first, that the privatizing of prisons reduces costs and thus will lessen the government's fiscal burden, and, second, that privatizing ensures lower costs while maintaining or improving security, health, hygiene, and other similar indicators.

While the first rationale makes sense in a perfectly competitive market, we have demonstrated how this does not hold true in the case of privatized immigration detention centres in United States, where continued efforts by a small conglomerate of PPCs has promoted legislation which is financially burdensome for the taxpayer and has resulted in higher costs to the treasury in order to sustain the PPCs profit margins.

The second rationale has found traction through the literature of market economics, wherein it is opined that those private service providers who will fail to provide these conditions will be crowded out of the market because they will garner lesser contracts and will soon become unsustainable. However, such an assumption is contingent on the fact that the market for private prisons is perfectly competitive with a large number of private players to compete with each other. In reality, the market for private prisons can be called monopolistic or oligopolistic at best, with a few firms receiving contracts at county, state, and federal levels. This encourages one to compare the conditions prevalent in the private prisons with their state-owned counterparts.

[131] Press Release, *supra* note 111.

B. Problem of Condition at ICE Detention Centres

Camp and Gaes identify in their research that private prisons are significantly worse off than those operated by the Federal Government on multiple fronts and especially with regard to drug use and escapes. [132] With regard to security, even the rate of homicides within prison complexes by prison inmates were found to be higher in private prisons than in low and medium security publicly owned prisons.[133] For instance, reports describe detention facilities in Artesia, New Mexico as failing to provide due process for immigrants.[134] Children are often confined for long periods in holding cells in extremely cold conditions due to the use of long-term, unchecked solitary confinement in ICE contract facilities.[135] Detained immigrants often receive worse treatment and fewer protections than criminals serving prison sentences[136] and incidents of sexual abuse, harassment, and sexual misconduct often go unreported.[137] Further, alarming rates of violence, verbal abuse, and discrimination against lesbian, gay, bisexual, and transgender persons, is highlighted in recent reports.[138] And in some cases federal officers are known to have pressured the inmate to stipulate to the removal of counsel based on inaccurate information and even false promises of diminished periods in custody.[139]

Observations by other governmental agencies for oversight, NGOs,

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[132] Scott D. Camp & Gerald G. Gaes, *Growth and Quality of U.S. Private Prisons: Evidence from a National Survey*, 1 CRIMINOLOGY & PUB. POL'Y 427 (2002).

[133] *Id*. at 442-43.

[134] Editorial Board, *Deported from the Middle of Nowhere*, N.Y. TIMES (Aug. 25, 2014), https://www.nytimes.com/2014/08/26/opinion/at-an-immigrant-detention-center-due-process-denied.html

[135] SHARITA GRUBERG, CTR. FOR AMERICAN PROGRESS, DIGNITY DENIED: LGBT IMMIGRANTS IN US IMMIGRATION DETENTION (2013), https://www.americanprogress.org/wp-content/uploads/2013/11/ImmigrationEnforcement.pdf.

[136] DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENF'T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009).

[137] Meghan Rhoad, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, HUMAN RIGHTS WATCH (2010), https://www.hrw.org/report/2010/08/25/detained-and-risk/sexual-abuse-and-harassment-united-states-immigration-detention.

[138] INTERNATIONAL DETENTION COALITION, LGBTI PERSONS IN IMMIGRATION DETENTION 10 (2016), https://idcoalition.org/publication/view/lgbti-persons-in-immigration-detention-position-paper/

[139] JENNIFER LEE KOH ET AL., NAT'L IMMIGRATION LAW CTR., DEPORTATION WITHOUT DUE PROCESS (2011), https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf.

and assorted experts have identified the mistreatment of asylum seekers, torture survivors, the mentally ill, women, children, families, indefinitely detained persons, mandatory detainees, and particular ethnic and national groups.[140] Criticism is not spared for other systemic problems of confinement, the lack of access to legal assistance, restrictions on visitation, limited pastoral care, poor health services, the misuse of segregation, physical and emotional abuse, and even deaths in custody.[141]

As is evident from the discussion above, we have a broken system that classifies usually harmless immigrants for mandatory detentions or discretional detention pending judicial review which is pre-emptive and overzealous in detaining those who are wrongly classified as flight risk. Additionally, this approach leads to housing of this vulnerable strata in private prisons facilities which want to reduce costs and increase profits, and for those reasons have a low regard for concerns like the safety, security, and hygiene of these individuals. Summarily, the system is clearly rigged to benefit the PPCs alone because all of the externalities of the system are borne by taxpayers and the immigrants.

What is worrying in this context is that the structural violence that the policy of mandatory detention propagates affects society's most socio-economically vulnerable population. This is the result of covert racism and overt nationalism that promulgates xenophobia among legal and legislative institutions. This has led to an increasing lack of individualized detention determinations for immigrants, which have been replaced by categorical determinations of detention. This is no longer just limited to categories of crimes, but has promulgated to categories of races and immigrants' origin countries. Although lawmakers and law enforcement agencies continue to rationalize such skewed structural deficiencies in the face of overwhelming counter-evidence on the grounds of public safety and flight risk, it is something else that is at risk today – the prevalence of a rule of law which is the cornerstone of a modern democratic country like the United States.

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[140] U.S. Conference of Catholic Bishops, *Unlocking Human Dignity: A Plan to Transform the US Immigrant Detention System*, 3(2) J. ON MIGRATION & HUM. SECURITY 159 (2015).

[141] CATHOLIC LEGAL IMMIGRATION NETWORK, INC., PLACING IMMIGRANTS AT RISK: THE IMPACT OF OUR LAWS AND POLICIES ON AMERICAN FAMILIES (2000).

VI. ALTERNATIVES TO DETENTION – THE SOLUTION

According to the UNHCR 2012 Detention Guidelines, ATD is not a legal term but is: "[any] legislation, policy or practice that allows asylum seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement."[142]

ATD may involve various restrictions on movement or liberty while meeting human rights standards. However, when employed, ATDs, like detention, must adhere to the principle of legality, necessity, and proportionality. The application should not be discriminatory in giving regard to the dignity of each individual. ATDs can be the substitute to an abundant control-centric approach. It needs to be recognized that ATDs provide us with a monitoring system for potential and adjudicated convicts without violating basic human rights, societal fabrics, and by allowing a more correction-centric judiciary and penitentiary system. However, the scope of this paper is limited to a closer look at potential benefits of ATDs, specifically to immigrants. This section discusses arguments for a legislative and behavioral shift to the usage of ATDs. Further it aims to establish that agencies like ICE can effectively employ ATDs for low flight risk detainees, and that this could be beneficial in multiple ways. For this purpose, we examine the costs and benefits of various ATD programs. The section ends with a fiscal and humanitarian justification for employing ATDs.

In the previous sections, it was highlighted that the immigration court system suffers from various limitations with regard to providing a fair trial to immigrants, the right to a hearing, and adequate legal assistance. The detention agencies are worried that it would be difficult to secure appearance from the immigrants if they are released before proceedings are complete. Such a place-based approach is often myopic as it tends to become a mere variant of detention wherein the place of confinement takes precedence over the assurance of avoiding flight during proceedings. Present systems of such a nature hold stereotypical assumptions about expected migrant behavior and thus are not empirical. They assume the worst of people, rather than the best.[143] Pretrial incarceration can have further deleterious effects. First, the chances of being given punishment increases for those who are released on bail as a defendant's credibility is determined by money, no matter the verdict. Second, detention of even two or three days increases the likelihood of committing new crimes by

[142] UNITED NATIONS HIGH COMM'R FOR REFUGEES, DETENTION GUIDELINES 10 (2012).

[143] Robyn Sampson, *Thinking Outside the Fence*, 44 FORCED IMMIGR. REV. (2013).

40% compared to those held for just one day.[144] Further, prolonged detention leads to challenges like the loss of ties to community, isolation from family which may even include US citizens, and the reduction in chances of getting effective legal assistance, among other things.

Another fundamental adjustment in behavior to ATDs is needed to avoid making them return-focused. Here the ATD becomes mere lip-service to human dignity and liberty, while preserving the migrant-skeptic approach. Such programs tend to perform poorly when compared to the ones that explore all the ways to resolve the immigration case while maintaining reverence to the basic human rights of dignity and liberty. An ATD cannot be designed with the assumption that migrants are invariably susceptible to committing crimes if afforded pre-trial release.

Immigrant detention is the fastest growing and least examined and critiqued form of incarceration in the United States.[145] ICE and other agencies focused on DBQ fulfilment, coupled with the failure of the immigration court system to counter unnecessary detention, has taken a toll on the search for effective ATDs models similar to the ones adopted in various countries. While there is evidence to show some growth in the recognition of the value of community-based ATDs in the US, shortfalls in funding, opposition from private corporations because of lower profit margins, and a resultant lack of political will are hindering the implementation of improved services and best practices.

ICE employs some ATDs to secure compliance and participation from immigrants who are not detained during court proceedings, namely those on parole, released on their own recognizance, or bonded, as well as those subject to check-ins at ICE offices, home visits, telephonic monitoring, and GPS monitoring through an electronic ankle bracelet.[146]

A. Vera's AAP: An Adaptable Model

ICE can draw a lot from the experience of the erstwhile Immigration and Naturalization Service ("INS") and its first ever pilot ATD program back in September 1996. In association with the Vera Institute of Justice, INS began to design, implement, and evaluate a three-year demonstration

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[144] JESSICA MORRIS, ROOSEVELT INST., ALTERNATIVES TO PRETRIAL INCARCERATION: CREATING A MORE JUST JUSTICE SYSTEM THROUGH BAIL REFORM IN MASSACHUSETTS (2015).

[145] Nina Bernstein, *City of Immigrants Fills Jail Cells With Its Own*, N.Y. TIMES, Dec. 26, 2008, at A1.

[146] *Alternatives to Detention*, DETENTION WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/alternatives (last visited Oct. 25, 2017).

program for supervision of people in removal proceedings named the Appearance Assistance Program (AAP).[147] It began operations in February 1997, and it screened noncitizens at INS facilities in the New York and Newark districts.[148] It tested different methods and levels of supervision to learn how to increase rates of court appearances and compliance with adverse rulings.[149]

The program had two comprehensive degrees of supervision: (1) intensive supervision for noncitizens who would have definitely faced detention but for the pilot and (2) regular supervision for the ones not likely to be detained irrespective of the pilot.[150] Through these it was sought to increase the rates of court appearances and compliance with removal orders, and also to make more rational use of detention space by reserving beds for people who truly are dangerous or are a high flight risk.[151] In the case of intensive supervision, individuals needed to establish community ties, a prior record of compliance, no general threat to public safety, and verify their address.[152] Further, a community sponsor, called the guarantor was to maintain a regular contact with the participant.[153]

The aim of the pilot was to demonstrate that people with strong community ties were more likely to be present for court hearings and comply with adverse rulings.[154] Mizner clearly breaks down the methodology employed for the program, where Vera devised a model to screen noncitizens once they were apprehended and followed up till the final verdict of their cases.[155] The supervisors regularly met the participants, urged them to show up for hearings by informing them about the benefits of appearing and the consequences of not appearing, and provided information that cleared up any of their misconceptions about the process.[156] For instance, some noncitizens believed that INS lacked the capacity to punish them.[157] And some who were deemed a flight risk did not factor in that eventually if they wanted to legitimately migrate to the

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[147] DAVID MIZNER, VERA INST. OF JUSTICE, THE APPEARANCE ASSISTANCE PROGRAM 4 (1998).
[148] *Id*.
[149] *Id.*
[150] *Id*. at 7.
[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] *Id*. at 6.
[155] *Id.*
[156] *Id*. at 6-7.
[157] *Id*. at 5.

US, they would be termed absconders.[158] The pilot also included regular monitoring, orientation sessions stressing the importance of compliance, periodical visits to AAP offices, and verification of addresses.[159] Moreover, the supervisors connected the participants with lawyers willing to guide the participants through the court process.[160] Finally, a computer software package was provided for access to up-to-date information.[161]

Results show that 80% of the participants appeared for their hearings.[162] The importance of these mechanisms is evident from the comments of Judge Philip Morace, who has stated that "[t]he AAP is providing a vital service by educating people about the process before they get to their hearings."[163]

Lastly, the AAP is not necessarily anti-detention. As Mizner observes, it is merely an early warning system and aims to change the way detention is used rather than eliminate it.[164] Vera's AAP wanted to ensure that detention happens only as a necessary evil and a last resort, and noncitizens are detained only after deportation is ordered or they defy intensive supervision norms. This supports the assertion that flight risk increases once deportation orders are issued. Hence, only at this stage does detention becomes necessary.

B. Success Stories Due to Information Dissemination

With the above background, we attempt to comment on the ATDs adopted in certain other countries based on sound reasoning and empirical evidence. The UNHCR conducted research on ATD systems in Toronto, Ontario, Canada and Geneva, Switzerland based on the systems' ability to spread awareness among immigrants, provide a proper hearing, provide consistency and promptness in decision making, and most importantly providing access to trusted legal advice.[165] Strikingly, both systems were premised on securing a commitment on the part of the immigrants to cooperate with agencies and state.[166] For instance, the Toronto Shelter

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[158] *Id.* at 12.
[159] *Id*. at 6-13.
[160] *Id*. at 11.
[161] *Id*. at 6-7.
[162] *Id*. at 14-15.
[163] *Id*. at 11.
[164] *Id*. at 14.
[165] CATHRYN COSTELLO & ESRA KAYTAZ, UNITED NATIONS HIGH COMM'R FOR REFUGEES, BUILDING EMPIRICAL RESEARCH INTO ALTERNATIVES TO DETENTION: PERCEPTIONS OF ASYLUM-SEEKERS AND REFUGEES IN TORONTO AND GENEVA (2013).
[166] *Id.*

System is a laudable success because asylum seekers reportedly received legal advice and were provided a list of experienced lawyers.[167] Interestingly, it was left to private lawyers to represent clients; this division of labor seemed beneficial, in that having various sources of information and advice seemed to reinforce trust in the system. In contrast, in Geneva, the lack of information and advice meant that the interviewees overwhelmingly perceived the process as unfair.[168] This was because a common feature of the system was the co-mingling of persons at different stages of the asylum process and with different statuses, which resulted in administrative difficulties when it came to deportation or detention decisions.[169]

It appears that in Toronto conditional release is the norm. Amongst the interviewees who had been in detention, all had been subject to conditional release.[170] Four interviewees had a private bondsperson, while nine were clients of the Toronto Bail Program ("TBP") and one was both a client of the TBP and had a private bondsperson.[171] Private bondspersons post bail in the region of $2,000- $5,000 CAD.[172] In addition, detainees must accept certain conditions, such as registering their addresses, appearing at immigration procedures, and presenting to the immigration authorities.[173]

Immigrants in Toronto were thus compliant, as they wanted to demonstrate their law-abidingness.[174] They also wanted to avoid the sanction of being detained again.[175] Moreover, the TBP also rewards clients for complying with reporting obligations by reducing the frequency of reporting over time.[176]

Thus, the TBP not only rewarded good behavior and maintained a healthy dialogue between authorities and immigrants, but also in turn prevented any undesired cynicism and suspicion between the two parties.

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[167] *Id*. at 24-25
[168] *Id*. at 25.
[169] *Id*.
[170] *Id*. at 31-33.
[171] *Id*.
[172] *Id*. at 32.
[173] *Id.*
[174] *Id*. at 33-34.
[175] *Id*.
[176] *Id*. at 33.

C. Fiscal Benefits of ATDs

Given the current economic climate, it is especially critical that all enforcement initiatives are tailored to derive the optimal benefit from each dollar spent. Policies not only need to be compliant with human rights considerations and other matters of jurisprudence, but also need to be cost-effective to minimize the burden on the taxpayer. In this aspect as well, numerous empirical studies have demonstrated how ATDs are astronomically better than traditional brick-and-mortar detention mechanisms that ICE has historically employed.

Since 2009 ICE has contracted with Behavioral Interventions ("BI"), which is owned by the GEO Group, one of the largest PPCs in USA, to implement an ATD program – ISAP II.[177] The program uses a variety of ATD mechanisms like ankle monitors, voice recognition software, spot checks, employer verification, among many others.[178] In 2013, the program supervised 40,613 immigrants at an estimated cost that ranged between 17 cents to $17 per person per day.[179]

Although the ISAP II is a move in the right direction, it suffers from various shortcomings, including: (1) enrollment of noncitizens residing in the community instead of drawing from noncitizens who are in detention. Rather than looking to the current detention populations and utilizing various supervision methods as a step down from unnecessary detention, the program is seeking individuals already released into the community and thereby restricting the liberty of more people; (2) inappropriate levels of supervision; (3) the program overly emphasizes enforcement at the expense of case management; (4) a lack of confidentiality undermines communication; and (5) there is no mechanism to control potential bias towards restrictive measures.[180]

On the other hand, the DBQ, as of 2016, mandates that an average of 34,000 immigrant detainees be held at ICE facilities.[181] This is almost

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[177] Press Release, The GEO Group Closes $415 Million Acquisition of B.I. Incorporated, BUSINESS WIRE (Feb. 11, 2011), https://www.businesswire.com/news/home/20110211005372/en/GEO-Group-Closes-415-Million-Acquisition-B.I.

[178] ACLU, ALTERNATIVES TO IMMIGRATION DETENTION: LESS COSTLY AND MORE HUMANE THAN FEDERAL LOCK-UP 1, https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf

[179] *Id*. at 1-2.

[180] LUTHERAN IMMIGRATION & REFUGEE SERV., UNLOCKING LIBERTY: A WAY FORWARD FOR U.S. IMMIGRATION DETENTION POLICY (2012).

[181] Consolidated Appropriations Act of 2016, Pub. L. No. 114–113, 129 Stat. 2242 (2015).

double the DBQ of 18,000 that was introduced in 2004.[182] The average daily cost of detaining one immigrant in an ICE facility is $159 per person per day in detention as of 2013.[183] Thus, we see that even the costliest form of ATDs which ICE and their contractors have themselves implemented is significantly less than the cost of detaining an immigrant in a brick-and-mortar ICE facility. The fiscal wastage in this case is going towards ensuring zero flight risk instead of conducting rigorous cost-benefit and cost-effectiveness studies to see if such wastages are justified. Although the alternatives are unable to guarantee that they will minimize flight risks the way detention is able to,[184] a cost-benefit analysis makes one favorably inclined to change the status quo to support ATDs. Conducting a rigorous cost-benefit analysis of this change is beyond the scope of this paper, however, it is imperative that one be done in order to make a stronger case for the abolition of mandatory detentions and the DBQ.

Since the benefit can be achieved only by carefully balancing all of the goals, any debate between detention and ATD must consider the goals in aggregate rather than in isolation. As the primary enforcement tool, detention not only costs more than the broad spectrum of alternative measures, but also undermines the integrity of the United States' international and domestic commitments to protect liberty. Implementing individualized custody determinations, coupled with case management by people who have experience working with immigrants, could substantially reduce detention and guarantee that resources are utilized to ensure that immigrants report for immigration proceedings. This diversion would increase resources for and deliver improved care to anyone the government must detain.

VII. RECOMMENDATIONS AND CONCLUSIONS.

It is evident from the above analysis that a rigorous cost-benefit analysis will highlight the positives of ATD as a substitute for detention. The benefits of ATD are not only fiscal, as the program also increases the inclination of immigrants to be generally law-abiding.

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[182] DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., DETENTION AND REMOVAL OF ILLEGAL ALIENS (2006).

[183] To calculate the average daily cost of detaining one immigrant in an ICE facility, the daily expense number is divided by the prevalent DBQ for the year in question.

[184] Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485 (2012).

A need has arisen to learn from the experiences of Vera and redefine immigration court procedures and improving a predictable system. Information dissemination and communication with immigrants before or during detention has the potential of completely demystifying mandatory detention. Further, disassociating private interests from ATD programs to avoid conflicts of interest and transferring DBQ allocations to ATD programs and the immigrant court system will go a long way.

But ICE seems to have abandoned any focused effort towards adapting the Vera model. The model provides rich insight into the immigrant psyche, but the agency chooses to act for the benefit of PPCs under the veneer of saving precious tax revenue. ICE is complacent and unwilling to keep an open mind regarding detention. It refuses to rethink alternative mechanisms and has even outsourced these programs for PPCs to run. Not only is this a conflict of interest, but also an attack on liberty in general and immigration law in particular. Any unintended future consequences of this system must be mitigated by revising it now.