

Immigration Detention, Inc.

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Executive Summary

This article addresses the influence of economic inequality on immigration detention. The US Department of Homeland Security (DHS) detains roughly 350,000 migrants each year and maintains more than 30,000 beds each day. This massive detention system raises issues of economic power and powerlessness. This article connects, for the first time, the influence of economic inequality on system-wide immigration detention policy as well as on individual detention decisions.

The article begins with a description of the systemic impact that for-profit prisons have had on the federal immigration detention system, by promoting wide-scale detention. The resulting expansion of detention has led to ever-increasing profitability for the private for-profit prison sector, which allows the companies to exercise even more influence over policymakers to achieve yet higher levels of detention. The influence of wealthy private prison corporations also affects the very nature of immigration detention, leading to the use of jail-like facilities that are the product offered by the private prison industry.

The article then describes the mechanisms by which economic inequality dictates the likelihood and length of detention in individual cases. The detention or release decisions made by DHS in individual cases must account for the need to keep numerous detention beds full to satisfy the contracts made with powerful private prison companies. DHS regularly sets bond amounts at levels that are not correlated to flight risk or danger, but rather to the length of time that the individual must be held in detention to keep the available space full. The article presents data, obtained from immigration authorities, regarding detention and bond patterns at a specific detention center that demonstrate this point. The research finds an inverse relationship between the number of newly arriving immigrants in the detention center and the bond amounts set by US Immigration and Customs Enforcement (ICE). During times when new arrivals were few, the amount required to be released from detention on bond was high; during times when there were many new arrivals, bond amounts were reduced or set at zero.

The article also presents another way in which economic inequality affects the likelihood of detention at the individual level. Release and detention are largely controlled through the use of monetary bond requirements, which must be paid in full. The regular use of financial bonds as the exclusive mechanism for release means that those migrants who are most able to pay are most likely to be released, without regard to their likelihood of absconding or endangering the community. Wealth thus determines detention rather than an individualized determination of the necessity of depriving an individual of liberty.

The article urges that the role of economic inequality in immigration detention raises troubling issues of democratic governance and the commodification of traditional governmental functions. The current system also leads to an unjustifiable redistribution of wealth from the poor to the rich.

Looking at immigration detention through the lens of economic inequality offers new lines of theoretical inquiry into immigration detention. It connects the discussion of immigration detention to scholarly critiques of for-profit prisons and the privatization of state security functions more generally. It also brings a new perspective to prior work in the immigration and criminal justice contexts, questioning the fairness and utility of requiring payment of monetary bonds to obtain liberty from detention.

The article concludes with recommendations for reform. These reforms would help to sideline the influence of economic inequality in immigration detention decision making.

Keywords

immigrant detention, for-profit prisons, private prison corporations, economic inequality, bond patterns

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Introduction

The Texas Legislature recently gave serious consideration to legislation that would have allowed the granting of childcare licenses to immigration detention centers that hold asylum-seeking mothers and children.¹ The licensing bill was proposed at the request of the private for-profit prison company — the GEO Group — that runs one of these family detention facilities. According to a state legislator, “the legislation came from” a GEO lobbyist (Hoffman 2017a). Indeed, the GEO Group admitted that it sought state licensing because it believed that the “licensing process [would] allow longer lengths of stay” for families in immigration detention, and thereby protect and possibly increase its profits (GEO Group 2016, 32). The GEO Group pushed the legislation in the wake of court rulings that limited the detention of children accompanied by their parents in unlicensed detention centers, putting lucrative contracts for family detention held by the GEO Group and other private companies at some risk.²

The company spent significant money lobbying the Texas legislature to vote favorably on the bill (Hoffman 2017a). Meanwhile, faith leaders, pediatricians, mental health specialists, immigration attorneys, child welfare specialists, and others all testified against the licensing bill as harming rather than helping children and families³ (Bova 2017a). They pointed out the well-documented damage caused by family detention to children and other trauma survivors.⁴ Yet for months on end, as the bill was debated, it appeared that these voices would be drowned out by the GEO Group.

The bill was initially approved by the Texas Senate but eventually defeated. However, the fact that the state legislature came so close to adopting legislation that would have made it easier to detain families, furthering the financial interests of the private for-profit prison companies that operate the facilities, was troubling. Such is the potential power of money in the immigration detention context.

The Problem of Economic Inequality and Immigration Detention

In recent years, the United States has detained more than 350,000 migrants a year; an average of more than 30,000 individuals are detained each day for immigration reasons (DHS 2016; ICE 2016). This massive detention structure has been understudied from the perspective of economic inequality.⁵ Yet immigration detention raises important issues of economic power and powerlessness. Money plays a role both at the macro level in determining the structure and extent of immigration detention and at the micro level in dictating who is detained and whether and when individuals will be released. This reality reveals several profound problems.

First, the influence of money in detention presents a worrisome challenge to democratic governance (Verkuil 2007). On the systemic level, the interests of private for-profit prison companies in securing government funding and support for increasing levels of immigration detention have the potential to override taxpayer interests in policies that would limit the use of expensive detention of migrants except when truly necessary. Corporate interests are likely to win out over other goals as well, such as maintaining a proper balance between immigration enforcement, and fairness and respect for the constitutional right to liberty. At the individual level, the corruptive influence of economic power works to favor detention in individual cases without regard to permissible considerations of flight risk or danger to the community. Economic inequality thus contributes to the development and maintenance of an expansive immigration detention system, and a system that favors detention in individual cases, even when such result is not justifiable or desirable as a legal or policy matter.

The result is a commodification of traditional government functions with a dehumanizing effect on detained persons, which has already been a considerable concern in the criminal justice context (Taylor-Grover et al. 2012; Cummings, Pond, and Lamparello 2016). As public policy goals lose sway to economic interests, vulnerable human beings are treated as commodities traded for profit (Eisen 2018, 46–7). Private prison companies bid to house migrants, and the government then pays for the migrants’ care and custody at a price that profits the company mightily. Migrants even contribute to corporate profit margins by performing much of the labor required to run the very prisons in which they are held.⁶

Second, the detention system is both driven by economic inequality and simultaneously deepens economic inequality. Individuals with the fewest economic resources are those most likely to suffer the deprivations of liberty needed to fuel expansive detention levels that ensure profits for the private prison companies. Wealth and poverty thus determine the contours of detention and affect enjoyment of the fundamental right to liberty, raising troubling discrimination concerns. This scheme then leads to further redistribution of wealth. Lucrative government detention contracts provide wealth to for-profit prison owners, executives, and

¹S.B. 1080, 85th Sess. (Tex. 2017).

²See *Flores v. Lynch*, 212 F.Supp.3d 907 (C.D. Cal. 2015).

³The S.B. 1080 Witness list can be found at the Texas Legislative Page for S.B. 1080, ftp://ftp.legis.state.tx.us/bills/85R/witlistbill/html/senate_bills/SB01000_SB01099/SB01018S.HTM.

⁴See Zayas (2014) and Hoffman (2017b).

⁵Exceptions include Carson and Diaz (2015) and Gruberg (2015).

⁶Several lawsuits filed in federal court document this practice and challenge its legality. See *State of Washington v. The Geo Group*, No. 17-2-11422-2 (Sup. Ct. Wash. 2017); and *Menocal v. The Geo Group*, 2018 WL 797165 (10th Cir. Feb. 9, 2018).

shareholders, who are likely to hold economic power already.⁷ Meanwhile, taxpayers without such wealth contribute to company profits by funding government payments to the companies. Low-income migrants caught up in the detention machinery and their families lose the detainee's income and then must pay expensive bond amounts to achieve release, plunging many families into poverty. Detention thus contributes to the rich becoming richer while the poor become poorer.

To be sure, financial considerations are not the only determinants of the extent or nature of immigration detention. There are certainly examples of rapid detention expansion, even when private prison corporations and monetary bond requirements play little or no role (Diaz and Kuhner 2008; Majcher and Flynn 2014). However, the evidence also suggests that a detention-focused approach to migration is less likely to take hold when economic interests are not in play (Ceriani Cernadas 2017).

In addition, other factors beyond economic inequality have undoubtedly contributed to wide-scale immigration detention in the United States, but these other explanatory factors for detention cannot be fully separated from the influence of money. Disregard for fundamental human rights and US constitutional norms limiting detention has been necessary for mass immigration detention to take hold in the United States.⁸ The expansion of immigration detention is also explained in part by "tough on crime" politics, systemic racial injustice, a discourse that dehumanizes immigrants, and citizens-first ideological beliefs (Landay 1996; Gilman 2016). The strong law enforcement culture of immigration agencies and their officers also contributes to a focused reliance on detention, particularly since these agencies are "ill-equipped" to innovate with approaches or tools other than correctional-style detention (Schriro 2017, 457). Economic inequality, however, informs the discourse that supports these factors favoring detention.

Those actors with economic power direct the terms of the discussion so that their power and wealth are seen as positive attributes, minimizing scrutiny of their actions that cause economic suffering to detainees and their families.⁹ Corporations are able to depict themselves as providing efficient solutions for the government while creating jobs and contributing to the economy. In contrast, immigrants with limited resources are negatively viewed, even when they have arrived seeking refugee protection and regardless of the positive impact that they may have on the economy (Kallick and Mathema 2016; Preston 2016; Leanos 2017). Recent discussions around the reopening of a detention facility in Raymondville, Texas, provide an example. The owner of the facility, Management & Training Corporation (MTC), asserted that it is a "quality company" with "everything in place to make sure our facilities are safe" (Leanos 2017). When presented with evidence of abusive conditions so extreme that both immigration and criminal justice authorities previously found the facility unfit, MTC's response deflected responsibility to those in detention, stating that "inmates, or detainees, at times will attempt to cause problems."

Given that economic inequality does not fully explain the current immigration detention system, addressing the role of money will not lead to an immediate cure for the problematic aspects of immigration detention. Looking at immigration detention through the lens of economic inequality does, however, offer new insights. This approach has the potential to open important new lines of theoretical inquiry into immigration detention. It connects the discussion of immigration detention to scholarly critiques of for-profit prisons and the privatization of state security functions more generally (Dolovich 2005; Chesterman and Fisher 2009; DOJ 2016a, 2016b). It also brings a new perspective to prior work in the immigration and criminal justice contexts, questioning the fairness and utility of requiring payment of monetary bonds to obtain liberty from detention (Gilman 2016).

At the same time, a focus on economic power and powerlessness may allow for the development of new advocacy strategies to address immigration detention. By revealing financial influence, advocates may succeed in challenging decisions if they can establish that the decisions are motivated by profit rather than effective immigration policies. Such disclosure of financial influence played a role in halting the passage of the Texas legislation that would have allowed for childcare licensing of family detention centers. The legislation had significant momentum until press reports uncovered the role of private prison entities in its promotion (Hoffman 2017a). By focusing on money, advocates may even succeed in creating economic pressures against detention, for example by making previously profitable aspects of detention more expensive through litigation or public opinion campaigns.¹⁰

This article thus focuses on the impact of economic inequality on immigration detention and traces the role of money at all levels of the system. It connects for the first time the influence of money on system-wide immigration detention policy with the impact on individual detention decisions. It first describes the way in which economic inequality functions to promote wide-scale immigration detention by considering the systemic impacts resulting from the involvement of for-profit prisons. It then describes the mechanisms by which wealth dictates the likelihood and length of detention in the individual cases that make up the overall system. In doing so, it relies on data obtained from immigration authorities regarding detention and bond patterns at a specific detention facility. The article concludes with recommendations that would help to sideline the influence of economic inequality in immigration detention decision making.

⁷Some private prison companies are publicly traded, while others are privately held.

⁸See *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001), which provides that detention should be exceptional. See also *Human Rights Comm., A v. Australia*, communication no. 560/1993, ¶ 9.2 (Apr. 3, 1997), which provides that detention is arbitrary if not strictly "necessary."

⁹See CoreCivic (2017a), Geo Group (2017a), and Hoffman (2017d) for examples.

¹⁰See McLeod (2017) and Takei (2017) for important cautionary notes about relying on economic arguments against detention.

The Influence of Private For-Profit Prisons on the US Immigration Detention System

The Patterns of Influence

On the systemic level, the involvement of wealthy and powerful private prison companies helps to explain the ever-expanding nature of immigrant detention. The role of for-profit prisons in immigration detention has begun to receive some scrutiny, with the main inquiries relating to the prevalence of privatized immigration detention, cost and conditions considerations, and accountability (Carson and Diaz 2015; ACLU 2016; DOJ 2016a). The impact of the expanded role of wealthy prison companies on the detention system is more extensive than increasing costs and worsening conditions, however. There are many reasons to believe that the financial influence and lobbying efforts of private prison companies determine how much and what kind of immigration detention will occur in the first place.

The for-profit prison industry benefits financially from greater levels of detention and has every incentive to promote government policies that favor additional detention (OHCHR 2017, 8). The companies also have the ability to influence detention policies, because they wield economic power. As a result, they are able to persuade the US Congress and other policymakers to make decisions that favor the growth of immigration detention — thus increasing demand for the companies' detention product — alongside efforts to secure particular detention contracts (Justice Policy Institute 2011).¹¹

For example, beginning in 2010, private prison companies persuaded the US Congress to mandate a daily immigration detention quota. Pursuant to yearly appropriations bills, Immigration and Customs Enforcement (ICE) was required for years to maintain 33,000–34,000 immigration detention beds nationwide, every day, regardless of need (Carson and Diaz 2015).¹² Constitutional law and good policy require that determinations of the need for detention beds result from individualized assessment of the flight risk or public safety risk presented by each potential detainee, not from a preset quota.¹³ Nonetheless, the private for-profit prison industry achieved the bed quota, thereby guaranteeing demand for high numbers of their detention beds and lucrative profits. In addition, the prison companies have simultaneously often insisted on contracts with federal immigration authorities that guarantee minimum occupancy rates or fixed payments, which further incentivize high levels of detention to fill beds because the government has already committed to pay for them (DWN and CCR 2015; Harlan 2016).

Private prison influence over detention policy also builds on itself. Expanding detention results in ever-increasing profitability, which allows the companies to accumulate economic power and even more influence. Increased profits, for example, mean that the companies have additional resources that can be used to lobby, offer campaign contributions, fund analyses in support of detention, and take other steps to press for additional detention and profits, in a repetitive cycle.

Through this dynamic, levels of immigration detention have steadily climbed, particularly in the past 10 years, as lobbying and campaign contribution expenditures by private prison companies have increased (Gidda 2017; Ordoñez 2017). Figure 1 graphs the increasing amount of money spent by the two largest for-profit prison companies on lobbying from 2006 to 2014 and the corresponding expansion of immigration detention bed space during that same time period.

There is very little, other than pressure from wealthy private interests, to recommend the expansion of detention over the past decade, further illustrating the role of the private prison industry as a driver of detention. Irregular border crossings are at historic lows, as shown by Figure 2, which maps the decline in border apprehensions from 2000 to 2016 by US Customs and Border Protection (CBP). In addition, the undocumented population in the United States is declining (Warren 2016), and only a small proportion of those in immigration detention have criminal histories (DHS 2016, 6; TRAC 2017). Expanding detention cannot easily be justified as necessary to address new flows of undocumented immigrants or an increased public safety threat, then, but instead must be attributed at least in part to the influence of the private for-profit prison industry.

The identification of corporate wealth and power as an important factor driving immigration detention levels is supported by experiences in the criminal justice context. Observers of the criminal justice system have noted that private prison companies played a role in contributing to additional detention during time periods when there was no obvious policy basis for expanded imprisonment. As for-profit prisons took on a larger role in state prison systems and increased their financial involvement with state policymakers, criminal incarceration numbers grew, even as crime rates fell (Mitchell 2015).

¹¹ Justice Policy Institute (2011) describes the strategies used by private prison companies to secure increased incarceration, including campaign contributions, lobbying, and securing relationships with policymakers.

¹² The fiscal year 2017 appropriations bill did not contain an explicit quota, nor does the proposed 2018 appropriations legislation. Both, however, include language requiring certain levels of spending on detention and related enforcement activities. See Pub. L. No. 115–31, 131 Stat. 135, 407 (2017). Government budget documents indicate that the appropriations amounts are intended to support a specific number of detention beds each fiscal year at levels that are higher than those dictated by the prior quotas (DHS 2017, 4).

¹³ See NJJN (2013); *Zadvydys v. Davis*, 533 U.S., 690–91; *Demore v. Kim*, 538 U.S. 510, 531–32 (2003) (Kennedy, concurring); and *U.S. v. Salerno*, 481 U.S. 739, 748–51 (1987). In the criminal justice context, contracts between private prisons and local and state governments often contain detention quotas (NJJN 2013). These quotas are problematic in ways that are similar to the immigration detention context. Those quotas could theoretically be contracted away, however, whereas the immigration detention quota was mandated by Congress and left no room for negotiation.

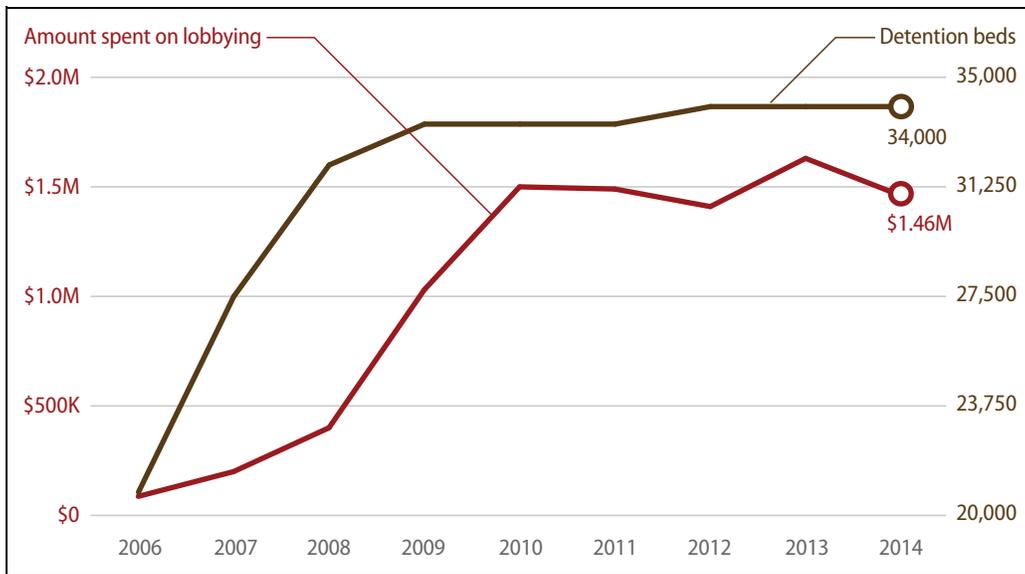


Figure 1. Growth in Lobbying and Detention Beds.
 Source: Gruberg (2015); this figure was created by the Center for American Progress (www.americanprogress.org).

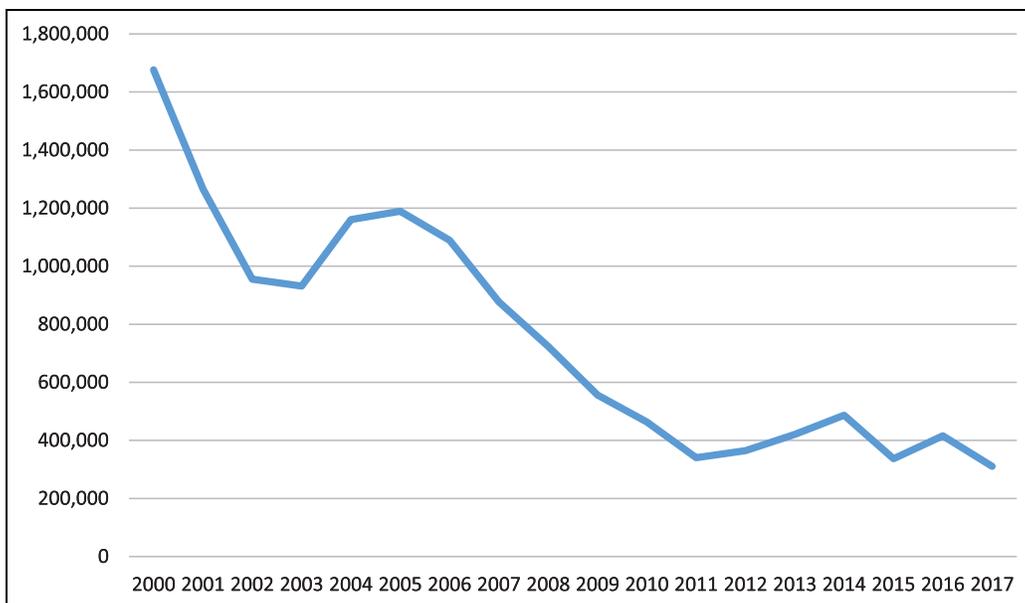


Figure 2. Border Apprehensions: US Customs and Border Protection Data.
 Source: CBP (2017a); figure created by the authors.

In the criminal justice context, in recent years, there has been a modest movement away from the use of private for-profit prisons as part of a broader effort to reduce high levels of incarceration and the attendant costs. Figure 3 documents the annual percentage change of the criminal prison population in the United States (controlling for population size) from 1978 to 2015. Since the 1990s, there has been a decrease in the annual percentage change in the prison population, and the actual prison population finally began to fall in 2011 after an all-time high in 2009–2010. Even states like Texas slightly reduced the number of individuals incarcerated and terminated several contracts with private prison corporations “in response to the state’s tight budget” and successful efforts to shrink the inmate population (Grissom 2017; see also Koh 2013).

These changes in the criminal justice system do not call into question the role of wealthy private prison corporations in immigration detention policies, however. The changes in the criminal justice sector highlight the likelihood that wealth and power *disparities* have particular influence on policy. In the criminal context, powerful economic incentives pushed state actors to align with those advocating for lower detention levels on other grounds, to preserve state treasuries and limit tax obligations (Koh 2013). In a clash between

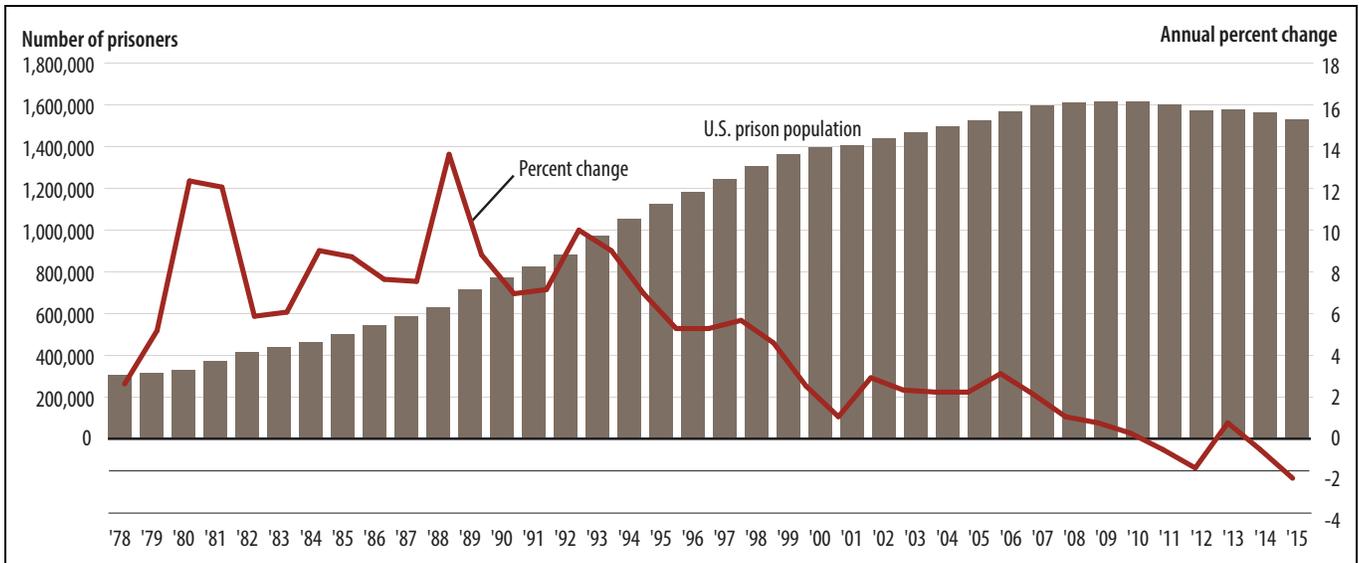


Figure 3. Prisoners under the Jurisdiction of State or Federal Correctional Authorities, 1978–2015.

Note: Jurisdiction refers to the legal authority of state or federal correctional officials over a prisoner, regardless of where the prisoner is held.

Source: Carson and Anderson (2016).

economic interests, the private prison corporations were not as successful in dictating policy. The economic context is different at the federal level, however. Few, if any, actors with economic power challenge private for-profit prisons and their preferred immigration detention policies. Neither Congress nor the executive branch has an incentive to limit detention funding meaningfully.

In fact, as the criminal justice system began to move slowly away from private incarceration models, particularly at the state level, private prison companies expanded their efforts to achieve higher levels of federal immigration detention. As Figure 1 demonstrates, this focus by for-profit companies on federal immigration detention policy began in earnest around 2008.¹⁴ Immigration detention spiked at the same time, as seen in Figure 4.¹⁵

An additional important aspect of private for-profit prison influence is that it determines the form of immigration detention and ensures that it remains prison-like and punitive in nature (Lopez 2018). Commentators and researchers have debated whether the conditions of detention offered by private prison companies are worse or more dangerous than those in publicly run facilities (Volokh 2014; DOJ 2016a). This debate generally focuses on day-to-day living conditions within the confines of jails or detention centers by analyzing issues such as access to medical care or food quality. On these conditions questions, there is no conclusive answer. Privately run facilities have a profit motive for cutting costs on food, health care, and staffing to maximize profit, and they are sometimes able to avoid accountability because of their private for-profit nature (MRS/USCCB and CMS 2015, 185–6). Unfortunately, though, publicly run detention centers, particularly those run by local sheriff's offices, also regularly fail to ensure proper health, food, and sanitation conditions (Hamilton 2017; Eisen 2018, 177).

There is little doubt, though, regarding the influence of wealthy private prison companies in determining the type of facility in which immigration detention will take place. These are correctional companies, and they run facilities that are prison-like.¹⁶ For example, one such company — CoreCivic, formally known as Corrections Corporation of America (CCA) — describes itself as “the nation’s fifth largest corrections system” (CoreCivic 2017b). Another company, Management & Training Corporation (MTC), states that “corrections” is part of its “core business” portfolio (MTC 2017).

In the immigration context, which involves detention for administrative purposes only, detention could and should function very differently from the corrections model (Schiro 2009; ABA 2012, 1–7; OHCHR 2017). Correctional facilities are, however, the product that private prison companies provide. When private prison companies secure contracts for immigration detention, they use facilities that are correctional in nature (Eisen 2018, 234).

¹⁴See Figure 1 from 2007 to 2008.

¹⁵There were earlier spikes in immigration detention as well, some of which are attributable to policy decisions and legislation, although financial influence may have also played a role.

¹⁶See, for example, https://www.geogroup.com/GEO_Corrections (touting 140 correctional and detention facilities on its GEO Corrections webpage), <http://emeraldcm.com/ecm/services/emerald-companies/> (describing its services in an “effective correctional environment”), and <http://www.lasallecorrections.com/security/> (“LaSalle Corrections is very proud of our personnel’s depth of corrections experience”).

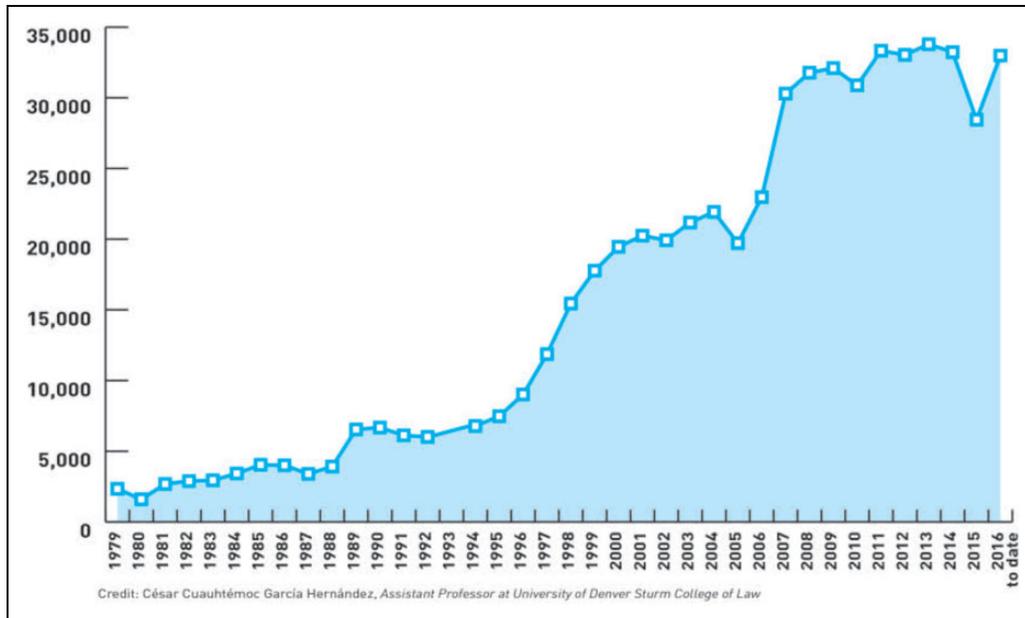


Figure 4. Immigration and Naturalization Services (INS)/ICE Average Daily Population, 1979–2016.
Source: ACLU (2016).

The focus on correctional institutions does not prevent private prison companies from branching out to promote other corrections-based products when profit opportunities arise (Eisen 2018, 233). In recent years, private prison companies have secured contracts with federal immigration agencies to track released migrants with electronic ankle monitors. About 70,000 migrants are on electronic monitors run by BI Incorporated, which is a component of GEO (GEO Group 2017b, 13). A recent GEO report announced that new ICE detention contracts for electronic monitoring increased revenues by 33 percent and constituted “milestones [that] have paved the way for continued positive momentum for our company” (GEO Group 2017b, 3).

Thus, private prison companies not only achieve expansion of immigration detention but also turn to their benefit any minimal efforts to move beyond detention, through use of other corrections tools. Even when the government releases migrants, private prison companies have become involved in the management of those nondetained migrants through electronic monitoring and supervision techniques borrowed from the criminal justice world. By moving into these additional areas of nondetained supervision, the companies ensure profit in realms beyond detention. Even more importantly, they enjoy the opportunity to define and occupy the nondetention space and to crowd out competing, community-based models and entities. In this way, they set up the management of migration as requiring a correctional approach from beginning to end, which allows them to promote detention as a centerpiece and other corrections products as necessary supplemental tools. Once set up this way, it becomes natural for the government to turn to private prison companies for assistance rather than using administrative processing models that would be more apt. Very similar phenomena have taken place in the criminal justice context with negative consequences, but immigration policymakers have failed to take account of those experiences (Graziani, Ben-Moshe, and Cole 2017).

The Family Detention Example

The family detention experience provides an important example of the ways in which money acts as a driver of immigration detention. In 2014, the US government treated as a crisis the increase in numbers of unaccompanied children and families with young children crossing the US southern border to seek asylum protection. At the same time, the private for-profit prison companies had a “product” — jails — that they could offer to address the “crisis” (CoreCivic 2015, 20; CoreCivic 2016, 24).¹⁷ Even though their product was not a good fit for mothers and children who simply needed to have their claims processed and presented no threat, and so did not warrant imprisonment, the private for-profit prison companies won out.

The for-profit prison companies were successful in securing contracts for two new family detention centers in Texas to hold women and children arriving in family units. ICE decided in August 2014 to convert and expand a men’s immigration detention center run by the GEO Group in Karnes City, Texas, with more than 600 spaces, to use as a detention center for mothers and children (GEO Group 2014).¹⁸

¹⁷CoreCivic (2016, 24) notes that they identified the possibility of family detention and offered “solutions” to ICE.

¹⁸The facility subsequently further expanded its capacity to detain mothers and children (GEO Group 2016).

It then contracted with CoreCivic to open a new detention camp in Dilley, Texas, with space for 2,400 women and children, beginning in December 2014 (CoreCivic 2015). Prior to this expansion, there were fewer than 100 beds nationwide for women and children in a small county-run facility in Pennsylvania. These new contracts with private companies created more than 3,000 additional detention beds for women and children (Schriro 2017).

The government could have adopted many other alternatives for caring for asylum-seeking families and processing their claims without a resort to secure detention in facilities operated by prison companies (MRS/USCCB and CMS 2015). Other alternatives would have been more humane, less costly, and more legally legitimate while still meeting the goal of assuring that migrants appear for their immigration hearings (Noferi 2015).¹⁹ In fact, in 2009, the government had ended a previous wide-scale family detention program at another CoreCivic-run facility in Taylor, Texas, and did not identify any negative outcomes (ICE 2009). With the revival of family detention, CoreCivic noted that its models were not well suited for detaining families. For example, the company identified issues with “security protocols and techniques typically utilized in correctional and detention settings” (CoreCivic 2016, 34). Despite acknowledging the shortcomings of using its “product” for family detention, CoreCivic offered the government such detention anyway, beginning again in 2014. The jail-like detention model pushed by the wealthy and powerful GEO and CoreCivic corporate entities won out over other alternatives.

Securing these contracts to detain women and children ensured new profit centers for private prison companies. After GEO began operating a family detention center in August 2014, it announced more than \$30 million in increased quarterly profits at the beginning of 2015: “GEO reported total revenues for the first quarter 2015 of \$427.4 million up from total revenues of \$393.1 million for the first quarter 2014” (GEO Group 2015). The company’s total revenue for 2015 was almost \$2 billion (GEO Group 2016, 3). Similarly, CoreCivic announced that its family detention center contract brought in \$245 million in revenue for 2015, which was a “significant” part of overall company profits (CoreCivic 2015, 34, 61).

When courts later found automatic and prolonged detention of families in unlicensed facilities to be unlawful,²⁰ private prison companies became concerned that their profits would suffer. CoreCivic specifically noted that the court decisions had the potential to “materially affect . . . cash flows [and] financial condition” (CoreCivic 2015, 32). The companies immediately took steps to ensure their continued profits. The GEO Group developed a new solution. On release from detention with their children, mothers would be placed on an electronic ankle monitor offered by BI (a company owned by the GEO Group, as mentioned above). Almost all mothers released from family detention still must wear these intrusive monitors, and GEO has enjoyed the profits of involvement in both family detention and monitoring (Bova 2017b).

The private prison companies also took action to ensure that family detention would continue. They used their power and wealth in efforts to seek a childcare license to support continued use of family detention and lengthier detention stays in Texas, as described above. They very nearly succeeded in achieving this objective and have likely not given up the fight (Bova 2017a).

The Influence of Money on the Detention of Individuals

The Connection between Systemic Issues and Individual Detention Decisions

The structural realities described above have very real impacts on the decisions made regarding detention in individual cases, thwarting the requirement that migrants be detained only when there exists a special governmental justification for the deprivation of liberty in the particular case (ABA 2012). The US Supreme Court has held that immigration detention is civil detention, just like any other custody not based on a criminal conviction.²¹ Detention of individuals therefore must be exceptional and requires a “special justification” offered by the government. Unless Congress makes a legislative determination requiring mandatory detention for a limited period for a particular category of migrants, detention is permissible only if based on an individualized determination that a particular migrant poses “a risk of flight or a danger to the community.”²² Because the private prison industry has achieved policies favoring mass detention of migrants, however, the detention or release decisions made in individual cases are hinged to the need to fill the numerous detention beds that have been brought into existence. As a result, individual migrants are detained and denied release, even when there is no specific justification for the deprivation of their liberty on the grounds that they present a flight risk or danger to the community.

ICE uses several mechanisms to ensure high detention levels. These mechanisms determine not only how many will be detained after apprehension (rather than immediately released) but also how long individuals remain in detention. In terms of filling detention beds and guaranteeing overall high detention levels, the result is the same whether more individuals are detained for shorter periods or whether fewer individuals are detained for longer periods. There is evidence that ICE manages detention length to ensure high detention rates. For example, the number of immigrants who entered detention decreased in fiscal years 2015 and 2016 in

¹⁹ See *Flores v. Lynch*, 212 F.Supp.3d 907.

²⁰ *Ibid.*; and *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 170–71 (D.D.C. 2015).

²¹ *Zadvydas v. Davis*, 533 U.S. at 690–91.

²² *Demore v. Kim*, 538 U.S., 532; 8 CFR § 236.1(c)(8); and *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

comparison with the period between fiscal years 2011 and 2014 (ICE 2016, 8). There was, however, a notable increase in the average length of time each individual spent in detention in fiscal years 2015 and 2016 (ICE 2016, 5). By fiscal year 2016, lengthier detention stays brought the average daily detention population back to almost pre-2015 levels, even though fewer individuals were detained (ICE 2016, 5, 9).

ICE has the ability to manage detention length through its custody decisions in individual cases. For most immigration cases (not involving mandatory detention categories or final removal orders), when an individual is apprehended and put into removal proceedings, ICE has the ability to order (1) detention, (2) release on bond, or (3) release on recognizance, also known as release on conditional parole.²³ These ICE detention decisions should be based on determinations regarding whether the individual poses a flight risk or danger to the community.²⁴ Decisions about whether to detain or release an individual detainee are not subjected to automatic or immediate review, however, and the review of custody determinations that is eventually available in Immigration Court is limited (Gilman 2016, 187). ICE therefore has significant ability to manage detention levels through individual custody decisions.

In some cases, ICE simply orders continued detention of individuals after apprehension, without an option for release on bond or other conditions. Such a decision is known as a “no-bond” decision. When ICE makes a no-bond decision, the migrant will remain detained for at least a period of weeks while Immigration Court review takes place. That review may then result in release or continued detention. ICE can thus ensure lengthier detention times, in support of high detention levels, by issuing no-bond decisions.²⁵

ICE has adopted across-the-board no-bond policies at various junctures. In 2014, when ICE returned to a policy of widespread family detention, it initially adopted a no-bond policy for mothers and children in the new detention centers (Gilman 2016, 184). Similarly, after the inauguration of President Donald Trump in early 2017, ICE adopted no-bond policies for at least some detention centers (Hoffman 2017c). These policies have necessarily led to extended detention for the individual migrants subject to the policy, without any regard to whether they present a flight risk or danger to the community.

The no-bond policies undoubtedly further political goals of elected officials as well as the financial goals of private prison companies to maintain high detention levels (Hayes and Montopoli 2017). As noted above, however, the political motivations for pursuing no-bond policies cannot be divorced from the influence of the profit motive for maintaining high detention levels. Thus, for example, the no-bond decisions made at the beginning of the Trump administration furthered an immigration agenda focused on detention and deportation, but those decisions also favored the interests of private prison companies that supported the Trump administration (Schouten 2017). They ensured high levels of detention at a period when there were lower numbers of migrants subject to detention because of a significant drop in irregular border crossings.²⁶

Specific monetary bond requirements are another mechanism used to increase the likelihood and/or length of detention in individual cases, to ensure overall detention at high levels. ICE regularly imposes high bond requirements as a condition of release, without correlation to individualized flight risk or danger factors and despite evidence indicating that detention is not necessary to ensure appearances at immigration hearings (Eagly and Shafer 2015; Noferi 2015).

Data obtained through Freedom of Information Act litigation help to illustrate this point. The data provide information relating to reasons for release, length of detention, and bond amounts for custody decisions made between July 2013 and March 2014 for individuals held at the T. Don Hutto Detention Center in Taylor, Texas (hereafter, Hutto).²⁷ During this time period, the Hutto detention center held only adult women, almost exclusively asylum seekers. The following figures and information are based on the Hutto data. Although the information is now several years old, it reflects practices that have been observed for years. Recent reports suggest that any recent changes are in the direction of expanded detention, fewer individualized determinations, and higher bonds (Duffy 2017; Solis 2017). The data are still useful, then, in understanding patterns of detention decision making.

The Hutto data show that ICE does not make individualized determinations regarding detention based on specific indicators of flight risk or danger to the community. Instead, ICE regularly applies categorical custody determinations to individuals in detention during a particular time period to manage numbers of detainees and length of time in detention.

Figure 5 shows the uniformity by which ICE assesses bonds for individuals awaiting hearings and a decision in their case, during specific periods of time. Between October 15, 2013, and January 15, 2014, ICE made an initial custody determination that allowed release without paying a bond at all — on an order of recognizance (OR) — in the majority of cases ($n = 1461$). For the time periods

²³ Immigration and Nationality Act, 8 U.S.C. § 1226(a); and 8 C.F.R. § 236.1(c)(8).

²⁴ 8 C.F.R. 236.1(c)(8).

²⁵ One might ask why ICE does not simply issue “no-bond” custody decisions in all cases if the systemic pressures are to maximize detention. There are still some limits on the detention bed space available, so it would not be possible to detain every individual who has contact with immigration enforcement authorities for lengthy periods. In addition, legal challenges to an obviously categorical policy would be likely.

²⁶ Notably, based on the authors’ experience at the T. Don Hutto Detention Center, ICE began to allow release on bond again once the numbers of border crossers began to increase again in May 2017 (see CBP 2017a, 2017b).

²⁷ Excel spreadsheet provided by the US Department of Homeland Security on August 31, 2016, and on file with the author (hereinafter referred to as Hutto data). We thank Stephanie Taylor for carrying out the litigation necessary to obtain this information.

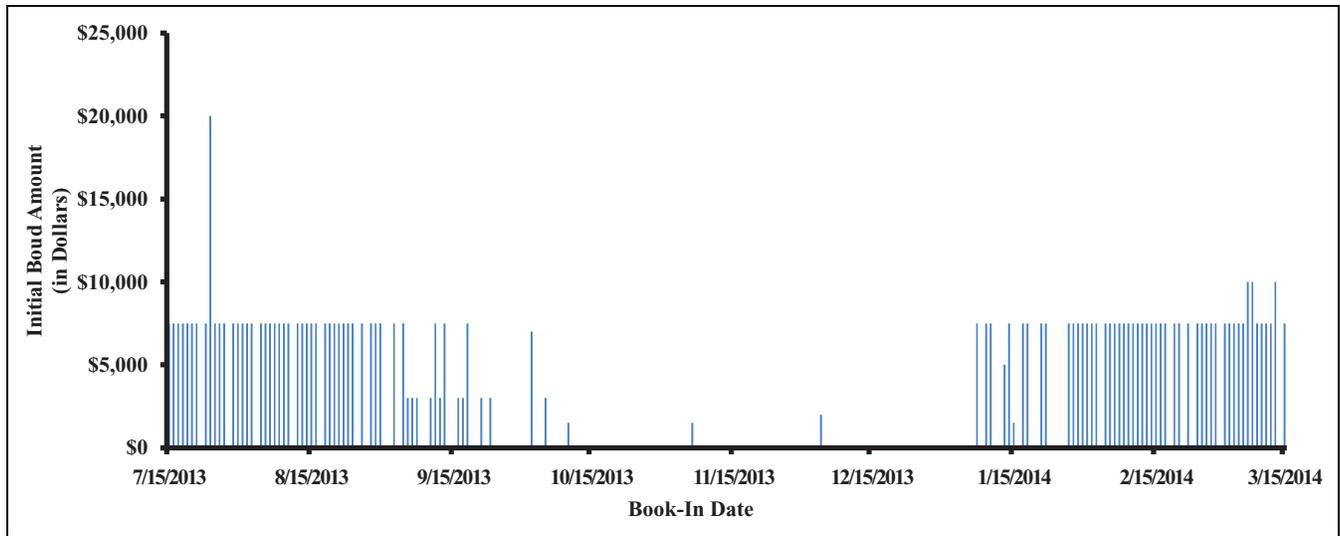


Figure 5. Initial Bond Set Amount by Book-In Date at Hutto, July 2013 to March 2014.
 Source: Hutto data; figure created by the authors.

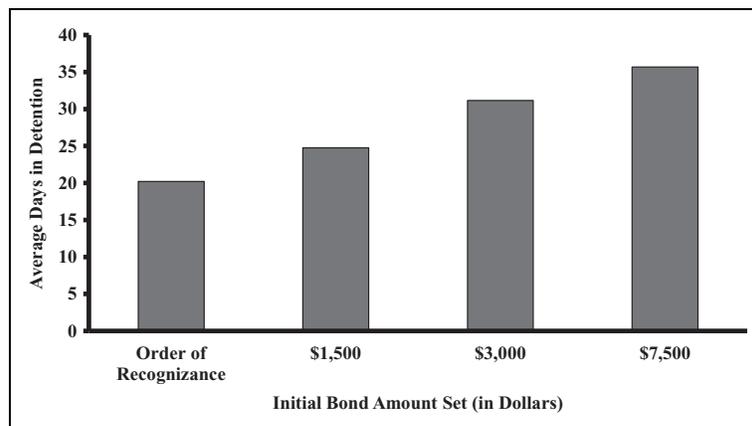


Figure 6. Average Days in Detention by Initial Bond Amount Set at Hutto, July 2013 to March 2014.
 Source: Hutto data; figure created by the authors.

immediately preceding October 2013 and following January 2014, ICE set most bonds at a consistent rate of \$7,500 ($n = 1696$). In both cases, the custody decisions and bond amounts appear to be nearly categorical for their respective time periods.

Bonds are not just set categorically but also often set categorically high. For example, for people booked into detention at Hutto during a month-long period between mid-February and mid-March 2014, ICE assessed \$7,500 bonds to 298 out of 304 individuals. Only six individuals did not receive a \$7,500 bond, with two receiving a lower bond amount and four receiving a higher amount.²⁸

High bond amounts are often out of reach for detained migrants and their families to pay, and so lengthy detention results (Eagly and Shafer 2015, 69–70). In this way, through bond decisions in individual cases, ICE assures high levels of detention. The Hutto data reveal this reality.

Figure 6 shows the average number of days spent in detention by the most common initial bond amount set. As depicted in Figure 6, people who pay \$0 under an order of recognizance spend the fewest average number of days detained, and the average number of days in detention increases with higher bond amounts. For example, an individual assessed a \$1,500 bond by ICE in its initial detention decision was detained an average of 10 fewer days than an individual assessed a \$7,500 bond in that initial ICE decision.

The likelihood that ICE assesses high bond amounts to ensure high levels of detention is supported by the fact that ICE must be aware of the impact of these high bonds in prolonging detention. There are also strong indicators that ICE knows

²⁸Appreciation goes to the National Immigrant Justice Center (NIJC) for noting this trend in the data.

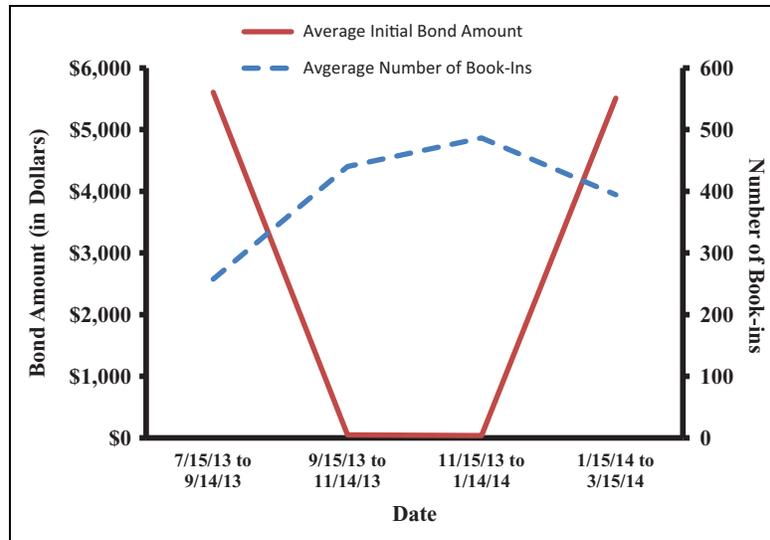


Figure 7. Average Initial Bond Amount and Average Number of Book-Ins at Hutto, July 2013 to March 2014. Source: Hutto data; figure created by the authors.

that such high bonds are not necessary to address flight risk or danger. In many cases, ICE’s initial high bonds are reduced before an individual obtains release from detention. For example, out of the 916 bonds initially set at \$7,500 by ICE in the Hutto data, more than a quarter (253) were subsequently reduced before an individual paid bond and was released. The bond reductions may be conducted by ICE or the immigration courts; regardless, these bond reductions are an acknowledgment that the initially assessed bond amounts did not respond to a meaningful flight risk or danger. The reductions further make evident that many migrants cannot pay high bonds and that those bonds thus function to detain rather than to address flight risk or danger.

Figure 7 provides additional evidence of ICE’s use of bond amounts to maintain the size of the detained population, increasing bond and detention length when there are fewer migrants entering detention and decreasing bond to limit detention length when greater numbers of migrants enter detention. From July 15, 2013, to September 14, 2013, the average number of book-ins per month at the Hutto facility was about 257 people, and the average initial bond amount for that same timeframe was approximately \$5,605.83. This high bond amount kept people detained longer so that the detained population number would remain stable in the midst of relatively low book-in numbers. Between September 15, 2013, and November 14, 2013, however, we see the inverse nature of this relationship, in which there is no longer a scarcity of book-ins and lower bond amounts are assessed. Because the number of book-ins rises to 440 per month, the average initial bond amount decreases to \$47.16 — essentially \$0 for the majority of cases, with the average rising to \$47.16 only due to a small number of cases in which a bond amount in the thousands of dollars was set. This pattern continues for the period that follows, in which the average number of book-ins remained high at 486 per month and the average initial bond set remained low at \$38.03. In the final time period depicted, the relationship changes once the average number of book-ins decreases to 394 book-ins per month — a 100 person per month decline from the previous period. There is a corresponding increase in the average initial bond amount to \$5,511.41.

In the aggregate, high-bond decisions in individual cases also promote expansive detention in another way. Forfeited bond money helps to fund detention. Government appropriations of taxpayer dollars to pay for detention contracts are the primary source of detention funding, but the government also relies on bonds paid by detained migrants and their families as a portion of the funding. The DHS Office of the Inspector General has specifically noted that “breached immigration bonds” are used “to cover the shortfall” between the detention bed quota and the funding appropriated by Congress (DHS 2014a). Internal guidance regarding bonds also indicates: “Another benefit of the bond program is that, by statute, the amounts collected on breached bonds are deposited into a special fund . . . ICE may use money deposited in the [fund] to pay for detention bed space” (DHS, 2014b).

ICE thus has reason to set bonds for individuals at high levels to ensure that there is sufficient potential for breached-bond funding to support the high levels of detention that have been set at the systemic level. Even when ICE is willing to permit release, ICE may set bonds in a manner that ensures maximum bond payments so that it can sustain high detention levels. ICE can set bond at a high level and gather bond payments from all who are able to pay at that level, then reduce bonds for those who cannot pay at the level initially set. This process allows the agency to find the maximum amount that each individual can pay. Under this system, individual detainees suffer the consequences of high bond assessments and resulting continued detention, while their payment of high bonds also ensures that the system will continue to detain others like them.

The Impact of Economic Inequality in Determining Individual Detention

Economic inequality also affects *which* migrants will be subject to detention and, particularly, which will be subjected to longer periods of detention. Economic disadvantage is a powerful indicator of likelihood of lengthy detention. Given that detention should be tied to governmental justifications relating to flight risk or danger rather than poverty, such detention disparities based on wealth are problematic. A few courts have held as much, establishing that detention based on inability to pay bond raises constitutional questions.²⁹ The case law is not well developed, however, and in practice, relative access to financial resources often still determines the likelihood and length of detention.

Affluent migrants are unlikely to face detention in the first place. Wealthier migrants have a greater possibility of securing and maintaining permanent legal status such that they are relatively unlikely to face removal proceedings, much less detention (Chen 2017; Macfarlane 2017).³⁰ Even when they do become subject to removal proceedings, wealthier migrants are more likely to have originally entered the United States on a visa and are thus less likely to be subject to detention, since detention resources are loosely focused on irregular border crossers and individuals with criminal histories (DHS 2016; Chen 2017; Macfarlane 2017). Thus, migrants subjected to detention are generally less well off financially than those never detained.

Among those detained, the least wealthy are most likely to remain detained for lengthier periods. Detention and release are largely controlled through monetary bond requirements, as noted above. Monetary bond is so central that government agencies and immigration practitioners do not talk about “custody decisions” or “review of detention” but instead reference “bond decisions” and “bond hearings” (Gilman 2016). Although a presumption of liberty should apply constitutionally, immediate release on recognizance is relatively uncommon.³¹ ICE regularly imposes monetary bond requirements, which must be paid in full before release will take place. If not paid, or until paid, these bond requirements result in detention.

In the criminal justice system, there has been broad recognition of the problems inherent in just such inequities arising from the use of monetary bonds.³² As a result, the criminal justice system has slowly moved away from widespread use of monetary bonds and has adopted pretrial systems that focus on achieving release and using nonfinancial means of addressing specific risk factors.³³ Such considerations have not yet filtered through to the immigration system.

Litigation is currently underway to require immigration courts to take wealth or “ability to pay” into account when setting bond.³⁴ Perhaps this litigation will lead to progress in addressing inequality concerns. The litigation does not, however, challenge the structural parameters that require high levels of detention. Even if bond decision making improves so that individuals would more frequently be able to pay bond and obtain release, the underlying problem of reliance on monetary bonds would remain and perhaps become even more institutionalized. In addition, improved individual custody decisions can do little in the context of an overall system that favors detention over release in reaction to the influence of economic inequality. The systemic emphasis on expansive detention would undoubtedly continue to result in high bond amounts, with the least wealthy suffering the brunt of the system.

Initial Recommendations for Reform

Consideration of the effects of economic inequality on immigration detention should lead to a call for reform. Reform measures must focus on the need to remove the distorting influence of wealthy corporate interests and should address the detention system’s particularly harsh impact on the poor. Lessening the role of money in immigration detention will not resolve the full range of problems associated with wide-scale immigration detention and its impact on individual migrants, but it will remove one set of problematic influences on the system so that other factors can come into focus and receive attention.

²⁹ *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017); and *Shokeh v. Thompson*, 369 F.3d 865, 871–72 (5th Cir. 2004), vacated as moot, 375 F.3d 351 (5th Cir. 2004), which holds “that a bond that has the effect of preventing an immigrant’s release because of inability to pay . . . is presumptively unreasonable.”

³⁰ Columbia Law School Human Rights Institute (2014, 5–6) finds that “Latin American immigrants are disproportionately targeted for removal proceedings” and are “more likely to be poor.” Sheridan (2011) describes the phenomenon in which Mexican nationals fleeing cartel violence migrated to the United States using investor visas rather than the asylum process that often takes place in immigration court.

³¹ See *Zadydas v. Davis*, 533 U.S. at 690–91; *Demore v. Kim*, 538 U.S. at 531–32; and *U.S. v. Salerno*, 481 U.S. 739, 748–51 (1987). TRAC (2015) finds that at one of the largest immigration detention centers in the country, only 43 out of 9510 detainees leaving custody in 2015 were released on recognizance.

³² Wiseman (2014) describes “wealth discrimination” resulting from the use of monetary conditions on release. Clark (2010) cites several commentaries concluding that the use of monetary bond ensures that the poorest defendants will remain in detention.

³³ See Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214, which creates a presumption of pretrial release and makes imposition of financial conditions a last resort. See also ABA Pretrial Release Standards, Standard 10.5.3, which provides that financial conditions are to be imposed only when no other less restrictive condition of release is available.

³⁴ *Hernandez v. Sessions*, 872 F.3d 976.

In recognition of the need to diminish the influence of the private prison industry to implement other reforms, government contracting with private prison companies for immigration detention and related programs should be the rare exception rather than the rule. As long as private prison companies profit from government contracts and then use their resulting wealth to influence detention policy, and as long as they see prospects for maintaining or increasing future profits through similar contracts, these companies will impede reforms that would hurt their interests. For this reason, the principal private prison companies expressed great concern at the end of 2016, when the Department of Justice indicated an intention to move away from contracting for bed space with private prison companies.³⁵ They engaged in lobbying to preserve their role and, on President Trump's assumption to office, achieved a reversal of the Department of Justice plan to move away from privatized detention. That reversal was further buttressed by executive orders mandating expanded immigration detention (Gilbert 2017). Any effort to break the cycle of corporate influence and expansive immigration detention will need to act firmly to sideline private prison companies. To the extent that private for-profit prison companies retain any role in immigration detention, robust independent mechanisms must be adopted to ensure accountability in connection with for-profit prison industry contracts and facilities.

In addition, the presumption of liberty should be restored in the immigration detention system, with detention permitted only in the exceptional case when adequate justification exists. If this constitutional standard were rigorously observed, corporate influence would find no foothold for pushing expansive detention. And if proper justifications for detention, relating to flight risk or danger to the community, were the only factors considered in making custody decisions, income inequality would have no impact on the likelihood of detention in individual cases.

The use of monetary bond requirements as a condition of release should be drastically reduced. Without this measure, wealth rather than risk will determine who is deprived of liberty. The immigration detention system could follow models found in the criminal justice system. These models allow for release without a monetary payment in most cases. They favor adoption of other measures that address specific risk factors and lead to low levels of flight or danger while avoiding the discriminatory effects of making release contingent on one's ability to pay.

Finally, further research on the role of money in immigration detention is needed. This is an area ripe for further inquiry, through a multidisciplinary approach that includes economists, political scientists, sociologists, and legal scholars.

Conclusion

Human rights and constitutional law principles that address unnecessary and unjustified incarceration may offer a more direct response to the set of issues raised by economic inequality in the immigration detention context. By looking at economic inequality and tracking the influence of money, however, new approaches to a very serious problem may become visible. The crisis caused by unjustified and harmful immigration detention is severe enough that all possible responses should be considered.

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³⁵See CoreCivic (2016), citing the DOJ announcement eight different times as a potential concern for profits.

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