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Ending Mass Incarceration, But Not for Immigrants: A Tale of Two Policies

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While the critical subject of a runaway U.S. criminal justice system is gaining momentum toward reforms, the Obama Administration is vigorously defending the mass detention of non-U.S. citizens, including the detention of women and children. Recent developments in both arenas demonstrate the stark contrast in the way the government is treating these two American modes of "hyperincarceration."

Last week President Obama became the first sitting president to visit a prison when he toured the El Reno Federal Correctional Institute near Oklahoma City. The president remarked on the prison system's overall problems of violent and overcrowded conditions, and is calling for reforms such as lighter sentences for non-violent drug offenses. Just before this visit, the president commuted the sentences of 46 nonviolent drug offenders. While some question whether the Administration's approach will actually significantly reduce incarceration rates, there is no doubt that we are in the midst of a national conversation about a U.S. criminal justice system whose scope compelled legal scholar Michelle Alexander to label it the "New Jim Crow."

Conspicuously absent from this conversation, however, is the fact that immigration detention is now the "largest mass incarceration movement in U.S. history." Here is a snapshot of the numbers, as provided by the Center for Migration Studies:

In FY 2012, the United States Department of Homeland Security (DHS) detained a record 477,523 adult noncitizens. Since the Obama Administration announced its detention reform initiative in 2009, the number of noncitizens DHS detains yearly has increased by nearly 25 percent. Since passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, it has expanded over fivefold.

Since 2010, Congress has included a "bed mandate" in DHS' Appropriations Bill, stating that the agency "shall" have a certain number of detention beds a day—currently 34,000-occupied. The Congressional imposition of an enforcement quota is

unprecedented, and has been a boon for private prison corporations who manages sixty-two percent of immigration detention beds today.

The immigration bed mandate is a bizarre, tail wagging the dog scheme, which is especially strange within the context of a civil, not criminal, system. If the government is seeking to deport non-U.S. citizens after they have been convicted of a crime that allegedly render them deportable, these non-citizens first serve their criminal sentence before being placed in immigration detention. The purpose of detention is to ensure that individuals appear for their court dates, although studies show that alternatives to detention are as effective and cost taxpayers much less. The reality is that immigrants -- almost half a million a year -- are being locked up in conditions very similar, if not identical, to prisons, but with none of the rights or accountability available in the criminal context.

Calling for a reduction in criminal incarceration while sustaining the mass detention of immigrants is what law professor César Cuauhtémoc García Hernández characterizes as the Administration's "prison reform blind spot." Perhaps the starkest example is the government's policy toward women and children migrants. Since 2014, the U.S. has experienced an unprecedented high number of women and children migrating from Central America. These migrants, fleeing extreme violence in their home countries, are seeking humanitarian relief, but instead have arrived into a "no release" detention policy. Groups filed a lawsuit challenging the government's policy, and last Friday a federal judge ruled in favor of the migrants.

The lawsuit, *Flores v. Johnson*, sought to enforce a 1997 settlement agreement (in *Flores v. Reno*) requiring that minors be placed in safe and appropriate conditions while in federal immigration custody. One of the practices alleged to be a violation of this agreement is the detention of children in secure, unlicensed facilities. The government unsuccessfully argued that the original *Flores* agreement only covered unaccompanied minors, whereas the children at issue now are with their mothers. It also argued that the licensing provision in the settlement agreement cannot be interpreted to apply to family detention facilities, a position the court called "backwards" reasoning.

Lastly and perhaps most brazenly, the government proffered a policy argument in favor of detaining children, namely not incentivizing accompanied children and their parents to migrate to the U.S. In doing so, it offered the testimony of one border patrol agent who presented his experience and some statistics to claim that detention deters immigrants from entering the U.S. through the South Texas region. The court rejected

that a policy argument is relevant to interpreting compliance with a binding agreement, and also was unconvinced by the border patrol agent's evidence.

Last Friday's decision calls into question the future of family detention facilities like the one in Dilley, Texas -- a facility built in 2014 by a for-profit prison company, the Corrections Corporation of America, to hold 2,400 women and children. The bigger question is what will spark an about-face for the mass incarceration of immigrants generally.