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Power, Vulnerability, and the Effects of COVID-19 on Migrants Held by the Detention Industry in the United States

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Abstract

Violations of the human rights of migrants start with a policy of widespread detention, followed by degrading conditions in detention centers, which are gravely impacted by COVID-19, adding to a picture of systemic breaches of human rights. The detention of migrants in privatized detention centers leads to questions regarding human rights, ethics, and responsibility. For migrants held in detention centers, public health and containment related measures for COVID-19 are largely outside of their control and left in the hands of the detention industry, raising questions of power and vulnerability. COVID-19 intensifies an already precarious situation, amplifying vulnerabilities and experiences of harm by detained migrants. This article begins by describing main challenges to the human rights of migrants and asylum seekers held by the migrant detention industry. The article questions the structural conditions that are given and the hegemonic conceptions that have been formed against processes of naming and symbolically subordinating the other (Butler 2000). Special focus is given to the interplay between politics/public sector and business/private sector and their exercise of power over migrants. This is framed in light of Gilson and Butler's understanding of the relational nature of situational vulnerability. The article concludes with a discussion exploring the social consequences of COVID-19 in the case of migrant detention in the US in the interplay of power and vulnerability, with a focus on justice. The discussion is framed with consideration for the privatized nature of the detention industry, which leads to the question of responsibility of the state versus private institutions in ensuring the safety of detained migrants during a global pandemic.

Key Words: *human rights; vulnerability; detention industry; migrant detention; COVID-19*

1.0 Introduction

Approximately 80% of the circa 40,000 migrants held in detention centers in the United States (US) are kept in for-profit private security facilities¹ (Center for International Human Rights 2020; Slack and Heyman 2020). This privatization of state functions to the private sector raises important concerns about the enforcement of human rights standards, ethics, responsibility, accountability, and vulnerability. The rise of this privatization trend is concomitant with a general reduction in the

¹ This includes companies such as the GEO Group (GEO), CoreCivic, Management & Training Corporation (MTC), LaSalle Corrections (LaSalle), Caliburn International (Caliburn), and Immigration Centers of America (ICA).

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standards for the protection of migrants in many countries. Although a new administration in the US as of January 2021 may shed new light on the issue, at least with an expressed concern, the status quo of privatized migrant detention facilities requires attention and calls for public and academic debate. COVID-19 in such detention centers further exposed the harm involved in the exploitation of vulnerability of migrants by shedding light on many sorts of health and sanitary issues, already threatened by constant breaches of human rights. Overcrowded facilities, in which migrants are numbers for profit, without the required state's accountability for their rights, creates a chaotic reality. The constant transportation of detainees to and from facilities in the middle of the pandemic was an important contributing factor in the rapid spread of the virus and a reported tendency of such facilities to cut costs resulted in reduced access to health services, hygiene, and basic protection (Denney and Valdez 2021; UN Human Rights Council 2020).

The aim of this article is to explore the extent to which the concept of vulnerability as proposed by Gilson/Butler may be of use in understanding and responding to the injustices faced by migrants held by the detention industry in the US in times of COVID-19. In addition, the article explores: (1) how structural conditions and hegemonic conceptions on the subordination of the other relate to the distribution and attribution of vulnerability and (2) how the exercise of power over migrants – shaped by neoliberal politics – privatizes state's responsibilities and jeopardizes human rights of detained migrants during a global pandemic. The term migrant is used in its inclusive definition as any person residing outside his or her country of origin – referring to refugees, asylum seekers, international migrants, victims of smuggling and trafficking, and the stateless – where 'migrants' and 'people on the move' may be used interchangeably (Carling 2017; IOM 2019; UN Human Rights Council 2018).

This is an interdisciplinary work, based on international human rights law and the ethics of vulnerability (Butler 2009; Gilson 2011, 2014, 2016, 2018). The arguments are based on global and regional international human rights law instruments, reports from international human rights agencies and civil society, and US district court cases addressing migrant detention and COVID-19. The discussion is framed with consideration for the privatized nature of the migrant detention industry, which leads to questions of responsibility of the state versus private institutions in ensuring the safety of detained migrants during a global pandemic.

First, the main challenges to the human rights of migrants held by the detention industry are addressed, focusing on international legal standards on the protection of human rights of migrants deprived of liberty, the criminalization of migration, the context of the detention industry in the US, and the responsibility/accountability of the state and the private sector. These challenges are understood to be intensified by the COVID-19 pandemic. Further, the cruel pedagogy of the virus, as proposed by Boaventura de Sousa Santos (2020), is contextualized within a deeper civilizational crisis rooted in the logic of neoliberalism, as proposed by Michel Mafessoli (2020). Second, the conceptual framework is discussed by setting out Gilson's theory of vulnerability and Butler's conceptions of vulnerability, power, and hegemony, which will guide and inform the analysis. Third, the article concludes with a discussion exploring the social consequences of COVID-19 in the case of migrant detention in the US and the interplay between power and vulnerability, with a focus on justice.

2.0 Challenges to the Human Rights of Migrants Held by the Detention Industry

2.1 International Legal Standards on the Protection of the Human Rights of Migrants Deprived of Liberty and the Criminalization of Migration

Violations of the human rights of migrants start with a policy of widespread detention, followed by degrading conditions in detention centers – which are currently gravely impacted by COVID-19 – adding to a picture of systematic breaches of human rights. As of 6 October 2021, there have been 28,661 migrant detainees who have tested positive for COVID-19 while in Immigration and Customs Enforcement (ICE) custody since February 2020 (ICE 2021a). Some reports fear that ICE may be underreporting and that this number is, in reality, much higher (Miller, Ripepi, Ernstes and Peguero 2020; Rodriguez 2020). Analyzing data from 92 of ICE’s detention centers between April to August 2020, Erfani et al. (2021) found the case rate among detainees was on average more than 13 times the rate of the US population (see also Casanova et al. 2021).

There are several international and regional human rights instruments that provide human rights guarantees regarding the deprivation of liberty². Persons deprived of liberty are also protected against torture and other cruel, inhuman, or degrading treatment or punishment under the Convention against Torture. Article 10 of the International Covenant on Civil and Political Rights (ICCPR) states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. Although both of these treaties were ratified by the US, American exceptionalism still dictates the implementation of human rights treaties (Ignatieff 2009).

Detention of migrants in international legal standards is understood as an exceptional measure of last resort. In its latest report from August 2020, the UN Committee on Migrant Workers expressed serious concern at the criminalization of the irregular entry or stay of migrants as well as punishing such conduct with deprivation of liberty. The Committee also highlighted main rights and principles which aim to avoid arbitrary detention and protect migrants deprived of liberty. The Committee is one among several UN bodies and agencies which have stated that whenever states resort to restrictions of liberty on the grounds of immigration or residence situations – whether governed by criminal or administrative rules – such deprivation of liberty must remain in line with the criteria set by human rights standards in order to not constitute arbitrary detention (UN Committee on Migrant Workers 2020). For example, the Special Rapporteur on the Human Rights of Migrants indicated that the detention of migrants can only be justified if a person either (1) poses a danger to him or herself or to society, or (2) there is a risk he or she will avoid administrative or other proceedings (UN Committee on Migrant Workers 2020; UN Human Rights Council 2012). Further, the threat of these scenarios must be substantiated by facts.

Further concerns by international human rights monitoring mechanisms are addressed specifically at privatized prisons and detention facilities. In its Resolution 33/4 from 2016, the

² These include, among others, the Universal Declaration of Human Rights, the ICCPR, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the United Nations Standard Minimum Rules for the Treatment of Prisoners. Specifically, the right to liberty and security of person is recognized in the Universal Declaration of Human Rights (Article 3), the ICCPR (Article 9, 10), the Convention on the Rights of the Child (Article 37(b)-(d)), the American Convention on Human Rights (Article 7) (UN General Assembly 2017; UN Human Rights Council 2020).

Human Rights Council emphasized its concern about the impact of the activities of private military and security companies on the enjoyment of human rights, in particular when operating in privatized prisons and immigration-related detention facilities. In that same resolution, the Council further noted that such companies and their personnel were rarely held accountable for violations of human rights (see also UN General Assembly 2017; UN Human Rights Council 2020). This leads to questions regarding the migrant detention industry in the US, as well as the responsibility/accountability of the state and human rights obligations of the private sector, which will be addressed in the following section.

There have been a number of district court cases in the US which address the conditions of ICE detention facilities during COVID-19 (Miller et al. 2020). Private detention facilities have the incentive to avoid testing detainees and staff to avoid expensive safety measures, to oppose bail for detainees who pose no danger to the community and are not a flight risk, and to cut corners on safety in order to maximize profit (see *Rivas v. Jennings* (Case No. 20-cv-02731-VC); UN Human Rights Council 2020). In addition, there remains a gap between policy and practice of detention centers where – particularly in the case of privatized detention centers – the facts can be challenging to verify. For instance, *Rivas v. Jennings* describes that despite a policy of quarantining new intakes for 14 days before joining the general population, in practice no such quarantining was occurring³. In *Roman v. Wolf* (Case No. 977 F.3d 935) the court held that the unsanitary and crowded conditions in a privately owned detention center – coupled with the failure of the government to address these conditions during COVID-19 – likely violated the constitutional rights of detainees.

The detention of migrants – especially when considering privatized detention centers – leads to many questions regarding the criminalization of migration, human rights, ethics, and responsibility. Under the Trump administration, policies such as the *Zero Tolerance Policy* were introduced, which prosecuted “all adults apprehended crossing the border illegally, with no exception for asylum seekers or those with children” (Chattopadhyay 2019; Sessions 2018; UN Human Rights Council 2020). Although migrant detention was not new under the Trump administration, such expanded and targeted policies translate the recent rise of far right ideologies and reflect the influence of nationalism combined with populism into politics. This has led to parts of the human race being reduced from a status of bearer of rights to a subordinate one (Rheindorf and Wodak 2018; Wodak 2015).

President Biden’s recent Executive Order demands the Department of Justice not to renew federal government contracts with privately operated criminal detention facilities⁴. While the executive order restricts renewing contracts with private prisons, it does not reach privately operated migrant detention facilities. The Biden administration has also issued an interim guidance to ICE, which describes prioritizing targets who may present risks to national security, border security, and public safety tightening the wider guidance of the former administration. While the guidance does have a shift in terminology – from “aliens” to “noncitizens” – there has been, as of yet, no significant change under the Biden administration regarding migrant detention, privatized

³ For more examples of gaps between policy and practice see *Urdaneta v. Keeton* (Case No. CV-20-00654-PHX-SPL (JFM)) and *O.M.G. v. Wolf* (Civil Action No. 20-786 (JEB)).

⁴ Executive Order 14006 of January 26, 2021. Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities.

or otherwise. On 16 March 2021, President Biden addressed would-be migrants coming to the US in an interview with ABC News: “I can say quite clearly don’t come over” (ABC News 2021). Ultimately, however, the respect for human rights obligations should be guaranteed by their universality and not by which political party or administration is in power. McBeth (2004) stresses human rights prescribed in international human rights law are inherent to *all* human beings by the nature of their humanity and human rights instruments stress applicability irrespective of migration status.

Privatized detention centers may exemplify how socio-political organization and institutional arrangements create and enable a system whereby certain groups are discriminated against and excluded from power and influence (Wodak 2015). This happens as private corporations are given state-like responsibilities related to an institutionalized state function without the same level of oversight and accountability required by the state. They express the will of the then prevailing government, through the delegation of power, norms, and hierarchy, which are used to maintain and further increase relations of subordination, marked by segregation, racism, discrimination, and exclusion (Rheindorf and Wodak 2020; Wodak 2015). Built on this is a political agenda without any evidenced-based factor other than nationalistic right wing orientations implementing hegemonic power at the cost of human rights (Mezzanotti 2020). Such a shift has been present in many areas of social life, but it is particularly clear considering the politicization, securitization, and criminalization of migration (Mezzanotti 2020; UN Human Rights Council 2015). The International Organization for Migration (IOM 2020) describes the weaponization of international migration, where some utilize migration as a political tool by tapping into the fear in communities. Further, social media is utilized fostering division and polarization, where “tribal tactics” are deployed online to depict migration “in a negative and misleading light” (IOM 2020: 7). Notions that migrants are a threat to the nation, are dangerous, criminals, illegal beings are present in most discourses on the criminalization of migration (Mezzanotti 2020). The criminalization of migration is evident in policies and practices of the migrant detention industry and challenges the human rights of migrants in detention centers.

2.2 The Migrant Detention Industry

The for-profit detention industry is worth 3-billion USD per year and is dependent on the large-scale detention of asylum seekers and other migrants (Central for International Human Rights 2020). The US operates the largest migrant detention system on the globe, consisting of some 200 facilities. In addition, the US has also supported the detention of migrants in neighboring countries. In the 100 days after President Trump took office, ICE reported it had arrested more than 41,000 people, an increase of 37 percent over the same period the previous year (ICE 2017). Privatized detention centers expanded widely under the Trump administration, but the number of migrant detainees has shrunk during the COVID-19 pandemic. However, the latest data indicates the numbers are rising and as of 3 October 2021 there were 21,890 migrants held in ICE detention facilities (ICE 2021a).

The predominantly privatized nature of the migrant detention industry in the US leads to important questions regarding responsibility and accountability relating to human rights. Considering legal principles, migrants are entitled to human rights, regardless of their immigration status. The primary responsibility to protect migrants – within their territories and their own

citizens – belongs to states (UN Committee on Migrant Workers 2020). The fundamental principle regarding state sovereignty and migration management is that the power to manage migration – including at borders – must be exercised in full respect for international commitments (Mezzanotti 2018).

When detention is privatized, the state has a greater responsibility in terms of supervision to be able to intervene and protect human rights whenever necessary (McBeth 2004; UN Human Rights Council 2020). On the other hand, the responsibility of corporations to respect human rights in their operations and business relationships is now widely accepted (UN General Assembly 2017). The Guiding Principles for Business and Human Rights recognize both existing obligations of states to respect, protect, and fulfill human rights obligations, and the obligation of business entities to comply with and respect human rights standards in carrying out their operations (OHCHR 2011). Nonetheless, the practice of for-profit corporations working with migrant detention is far from being in accordance with international human rights standards, as will be further explained.

The detention industry is also intertwined with policies which increase the use of incarceration, feeding into the profitability of privatized detention centers; external corporate pressures – including via lobbying – ensure continued operation and demand for existence (Chomsky 2014; UN Human Rights Council 2020). The control of detention facilities by private contractors causes perverse incentives that may lead to the detention of more people for longer periods of time. Multinational private security companies have a strong incentive to contribute to the public discourse regarding the normalization of detention of irregular migrants, to influence national immigration policy, and to lobby for repressive national legislation to further criminalize the status of irregular migrants, including asylum seekers (UN Human Rights Council 2020).

Many private security companies manage to include guaranteed minimum bed quotas in their contracts with governments (UN Human Rights Council 2020). In addition to minimum bed quotas, some companies offer a discount on the per diem rate for additional beds that exceed the minimum bed quota to encourage the contracting governmental agency to use the full capacity of the facility (Freedom for Immigrants 2019). In situations where private contracting companies receive payment based on the number of prisoners they oversee, incentives would likely push them to use political leverage to ensure their detainee population is as high as possible (UN Human Rights Council 2020).

It has been extensively argued in the literature, by NGOs and UN reports, that a primary rationale for migrant detention is not to meet legitimate and limited aims of administrative detention, but to satisfy the profit motives of private companies (Freedom for Immigrants 2019; UN Human Rights Council 2020). Some of the human rights concerns related to privately run facilities include: inhuman conditions, neglect, lack of adequate physical and mental care of detainees, economic exploitation, restrictions on religious freedom, ill treatment, physical abuse, sexual assault, deaths in custody, lack of transparency, lack of access to legal representation, and other due process violations (UN General Assembly 2017; UN Human Rights Council 2020). There is also concern about how the need to make a profit pushes companies to propose unrealistic bids in order to win contracts and to cut corners in delivering on them.

Even when abuses and violations have been disclosed by civil society, including the media, no real sanctions seem to have been imposed on the company, other than the reputational attack that the private security company may suffer in certain cases (UN Human Rights Council 2020). While human rights violations and abuses are not specific to the privatized detention industry, there is agreement that the very nature of the private sector in general, and privatized prison companies in particular, further increase the risk of human rights abuses and violations (Center for International Human Rights 2020). Further, privatization of detention makes it more difficult to investigate and prosecute alleged human rights abuses and violations. For instance, in the context of migrant detention, victims and witnesses are often deported or threatened with deportation after having reported abuses (UN Human Rights Council 2020).

States have a responsibility to ensure that legislation and contracts with agencies – both public and private – sufficiently include human rights obligations. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) provide standards to be met by detention centers, regardless of the budget available to states (Center for International Human Rights 2020; Freedom for Immigrants 2019; UN Human Rights Council 2020). In this context, a theory of vulnerability may be of use to understand and respond to the injustices faced by migrants held by the detention industry in the US, especially in light of amplified vulnerabilities in the wake of COVID-19.

2.3 The Cruel Pedagogy of the Virus

Much of the world's population is not in a position to follow the recommendations of the World Health Organization to defend themselves against the virus for reasons related to poverty and lack of recognition (Santos 2020). In the context of migration, many of the facilities where migrants are detained do not meet minimum sanitary requirements; people are held in overcrowded and unsanitary conditions, with limited or no access to health services (Center for International Human Rights 2020). Public health and containment related measures for COVID-19 are largely outside of their control and left in the hands of the detention industry, raising questions of power and situational vulnerability.

States should take necessary precautionary measures to prevent the spread of the virus and implement emergency measures to ensure that detained migrants have access to appropriate levels of medical care and maintain contact with their families and the 'outside world'⁵. On a global scale, immediate responses to COVID-19 have included closing migrant detention centers for visitors and service providers, increasing use of quarantining and solitary confinement, delaying legal and administrative proceedings which may result in risk of deportation without due process, and increasing use of detention upon arrival (International Detention Coalition 2020).

The Inter-American Commission on Human Rights (IACHR 2020: 1) has addressed the issue of migrant detention during COVID-19 in Resolution 41/2020, where the Commission

⁵ Including the Committee on the Protection of Migration Workers and their Families; the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see CAT/OP/10); and the Committee on the Elimination of Racial Discrimination (see CERD/C/GRC/CO/20-22, para. 23; CERD/C/ESP/CO/21-23, para. 22; and CERD/C/NOR/CO/21-22, para. 36).

requested that the US adopt measures to protect the health, life, and personal integrity of migrants in ensuring that “detention conditions comply with applicable international standards, particularly with regards to the threat posed by the COVID-19” (see also Kvalvaag 2021). As COVID-19 presents an “imminent risk of irreparable harm”, it is crucial that those in detention have their human rights respected while deprived of liberty (IACHR 2020: 1). This involves ensuring that detained migrants have access to proper, speedy, and appropriate access to remedies considering the threat caused by COVID-19, that is, access to proper medical treatment prescribed by respective physicians or specialists. In addition, the state was called upon for identifying migrants who have medical circumstances which might be considered for a discretionary release. In fact, judicial decisions in the US have ordered the release of 3,741 migrants from ICE custody as of 22 March 2021 (ICE 2021b). However, this is a fraction of migrants in custody.

Maffesoli (2020) suggests to consider the primary and tragic causes of the pandemic, understood as a crisis that marks the exhaustion of the logic of modernity. Maffesoli makes clear that this global pandemic is a direct consequence of a progressivist, economicist, and utilitarian civilizational paradigm. For Maffesoli, the ‘sanitary crisis’ – that which may lead to individual death – is a modality of an ongoing social crisis, requiring a much more profound change of paradigm.

COVID-19 aggravates social injustices experienced by migrants held in detention centers, motivated by capitalist profit. The findings of Erfani et al. (2021) describe that the COVID-19 case rate in migrant detention centers is, on average, 13 times that of the US population; however, they have not received priority access to vaccines, which suggests there are inequalities and heightened risk. The case rate is also significantly higher than the COVID-19 rates in US prisons in general, which have been found to be 5 to 7 times higher than in the general population (Denney and Valdez 2021). Denney and Valdez (2021), investigating both the prisons and migrant detention centers in the US, argue the disproportional spread of COVID-19 is a product of existing inequities of structural racism. Farr (2021: 10) highlights how the increase in privatized migrant detention over the past 25 years paralleled “a history of neoliberal and anti-socialist US backed armed conflicts in Central America that displaced Indigenous and Latinx people of color” and that enforcement of migration control has become focused on race. This operates alongside the criminalization of migration described earlier.

Maffesoli’s call highlights the need to look at the larger social crisis, in this chapter’s more specific scope, at the cycle between broken policies, human rights violations, and the widespread detention of migrants in private facilities. The civilizational crisis raises the focus to the issue of why migrants are held in institutions which are designed to maximize profit in an economicist and utilitarian fashion, which allow conditions that are ripe for the spread of the pandemic, in the first place. In the IACHR Resolution, the detention conditions prior to the pandemic were denounced, with issues documented including abuse of solitary confinement, prolonged detention, improper nutrition and unsanitary environment, lack of medical and mental care in dire situations, and hurdles to accountability. In one facility that was under scrutiny in the report, suspicious death, several suicide attempts, and 25 assaults, including sexual assaults, occurring in a one year time frame were denounced (IACHR 2020: 2).

Similarly, Santos (2020), in his book ‘The cruel pedagogy of the virus’, explains how the pandemic reproduces, reinforces, and aggravates the social injustices of our societies, where social groups which make up the ‘South’ are affected in the most merciless way. For Santos, the pandemic “only aggravates and makes explicit latent and historically constituted inequalities” (Santos 2020: 8). The ‘South’ is understood as a relational concept which inevitably refers to inequality and embraces subjects oppressed by capitalist exploitation and racial and sexual discrimination (Santos 2020). Santos (2020) argues the ‘South’ exposes the darker side of modernity, not there by chance but rather due to colonial power and the logic of neoliberalism. Santos raises the question of what potential knowledge will emerge from the COVID-19 pandemic; he argues that, hopefully, the virus might teach us how to germinate seeds of change in the ruins of our failed economic system (Santos 2020).

Ultimately, Maffesoli and Santos assist in understanding that while COVID-19 may create imminent risk of irreparable harm and as such warrants initiatives to protect human rights of detained migrants, that COVID-19 also accentuates a larger social, civilizational crisis rooted in the logic of neoliberalism and historic inequalities. This leads to questions of vulnerability and hegemonic conceptions on the subordination of the other.

3.0 Vulnerability: A Framework to Understand the Injustices Faced by Migrants Held by the Detention Industry in Times of COVID-19?

3.1 The Concept of Vulnerability and Injustices Faced by Migrants Deprived of Liberty

Vulnerability is often described as relating to a disadvantaged social position and susceptibility to harm; however, Gilson (2011, 2014, 2016, 2018) argues these are elements of, but by themselves insufficient, in describing vulnerability. Gilson (2018) describes vulnerability as defined by four features: (1) a fundamental, shared condition; (2) this condition is one of potential that is determined only in concrete social circumstances; (3) vulnerability is connected to specific positions, experiences, and events, thus differently experienced by “those who are differently situated”; and (4) it is necessarily connected to relationality, being both ambivalent and ambiguous in how it is experienced and valued (p. 231). Gilson describes these features of vulnerability as occurring at two distinct levels. When Gilson (2014) describes vulnerability as something fundamental, she appeals to the normative significance of vulnerability as an unavoidable feature of human existence which is inherent in our social and physical being. This is described as “ontological vulnerability”: “an unavoidable receptivity, openness, and the ability to affect and be affected” (Gilson 2014: 37). The second level is “situational vulnerability” which appeals to the concrete social circumstances and connection to specific positions, experiences, and events, or rather, how vulnerability manifests in concrete relationships and practices. In this way, vulnerability is both “a condition and an experience” (Gilson 2014: 37). With this logic as her foundation, Gilson (2014) argues that it is ontological vulnerability which is unavoidable, while situational forms of vulnerability are not necessary.

Gilson’s understanding of vulnerability is informed by Butler, who highlights vulnerability is “distributed unevenly because of legacies of oppression, past and present policy choices, and the obduracy of institutional structures to change” (Butler 2009: 45). For Butler, ontology is political and social and cannot be separated from power relations in a specific context; therefore ontological

distinctions have ethical implications (Butler 2009; Gilson 2014). This has implications for precariousness and precarity – more particular notions than vulnerability (see Gilson 2014) – where precarity is a political notion in which precariousness is maximized for some and minimized for others (Butler 2009; Gilson 2014). As a political condition, “some lives are regarded as more valuable and significant than others” (Gilson 2014: 45).

Vulnerability is conceptualized by Butler, Gambetti and Sabsay (2016) as emerging from social relations, where they argue vulnerability (1) is relational and social and (2) situated in specific social and historical relations. With this understanding “vulnerability can also be claimed by those who seek to rationalize the subjugation of minorities” (Butler, Gambetti, and Sabsay 2016: 4). Similarly, Gilson (2016) highlights that situational vulnerability is politically framed and that a “lack of recognition” of vulnerability “makes it more likely to precipitate harm” (p. 45-46). Framing migrants as a ‘threat’ “intensifies the precariousness of their existence” and makes possible the precarity allowing for the expansion of privatized migrant detention industry (Gilson 2014: 45). Vulnerability may be a useful tool when examining the phenomenon of the mass detention of migrants, particularly when considering its privatization, in the context of the US a “prison nation”. In this context, the chapter addresses how the detention of migrants creates a social situation where vulnerability may allow for an openness to harm and how stereotypes that are currently dominant in the discourse on migration (which include the criminalization, securitization, and politicization of migration and its aid) prevent recognition of these forms of vulnerabilities and their aptitude to call for ethical response, which culminates in exacerbating harm (Gilson 2016).

The current apparent exclusion of certain categories of human beings from protections that were once deemed universal seems to challenge the traditional ethics of human rights. James Griffin (2008) argues that ethics “should be concerned not just with identifying right and wrong, but also with realizing the right and preventing the wrong” (p. 19). Griffin (2008) addresses how the ethics of human rights has been exclusive while conditioning human rights to a constitutive criteria based on autonomy, freedom, and reason.

Despite the universal formulations in international human rights law, there has been many challenges when it comes to the rights of migrants. The basic ethics of human rights seems to be challenged by showing its complex nature: not simply binary between ‘wrong’ and ‘not wrong’. In political struggle and the moral battle, those who are most situationally vulnerable may be more susceptible to harm. Gilson (2016) argues that vulnerabilities may be recognized as ways of being open to harm, but their connection to others’ actions and fundamental vulnerability are usually disregarded.

As vulnerability is relational and situated, factors such as migrant status, age, health, gender, ethnicity as well as historic inequalities, the criminalization, securitization, and politicization of migration all impact the uneven distribution of situational vulnerability; situational vulnerability is only determined in concrete social circumstances, in this case associated with privatized migrant detention centers. The stigma associated with migrants’ identities cannot be separated from the direct harm done by mass detention, allowing for further exploitation of migrants’ situational vulnerability.

The relational aspect of vulnerability also highlights what Gilson (2016: 50) terms “privileges” and “perils” – being connected to power – as well as who’s vulnerability is “perceived as warranting ethical response (e.g., protection and aid)”. Vulnerability is described as encompassing a privilege when vulnerability is publicly legible and credible and “when the claim is made *in relation to* another who is recognized as a threat or danger” (Gilson 2016: 48). Not only are the claims to vulnerability publicly recognized, but these claims can be used to justify action “to protect oneself and mitigate one’s vulnerability” (Gilson 2016: 48). As vulnerability is politically mediated (Gilson 2016), political discourses which portray migrants as a threat recognize a publicly intelligible articulation of the vulnerability of a white, ‘American’ majority⁶; in this way, the imagined ‘threat’ of migrants is used to justify migrant detention in the name of vulnerability. In other words, the framing of white ‘Americans’ as vulnerable to the ‘threat’ posed by migrants “leads to practices of securitization that increase the precarity of the people and places that are deemed the sources of threat or risk” (Gilson 2018: 231-232). At the same time, the stereotypes, stigmas, and ideological framing underpinning notions of migrants as a ‘threat’ contribute to perceptions of migrants as “invulnerable”, making possible a disregard for and exploitation of the vulnerability of migrants (Gilson 2016).

This aspect of vulnerability is linked to notions of safety and security, where perceived “security is purchased for some at the cost of heightened exposure to harm for others” (Gilson 2018: 230). Profiting on this stereotyping, pathologizing, and criminalizing of migration and situational vulnerability, corporate stakeholders are able to maximize profit due to the lack of recognition of – or potentially indifference to – the vulnerability of migrants. Detention centers, as places where the exploitation of detainees vulnerability is perceived as warranted, thus become invisible “so the harms done to secure the safety of other places and people are not made apparent” (Gilson 2018: 235). This relational aspect of vulnerability relates to the question of how structural conditions and hegemonic conceptions on the subordination of the other relate to the distribution and attribution of vulnerability. Acknowledging the relational nature of vulnerability also entails that “one may make use of knowledge of who is particularly vulnerable in the sense of susceptible to harm to exploit that vulnerability” (Gilson 2014: 91).

The concrete, social circumstances for migrants deprived of liberty – especially in light of COVID-19 – may result in experiences of harm, which are affected by ones situated position and which may be experienced differently (Gilson 2011, 2014, 2016, 2018). For example, some of the circumstances experienced in detention centers include misuse of solitary confinement to prevent the spread of COVID-19 and violations in due process relating to challenges regarding attorney visits and lack of secure videoconferencing options (Miller et al. 2020). The “general brutality of prison life” (Gilson 2016: 46), which is rooted in profit rather than crimes being committed, is not properly recognized. This is connected to the relational aspect of vulnerability in that by connecting migrants to perceived threat, the vulnerability of migrants is disregarded and these harms are deemed warranted.

⁶ ‘American’ is used here to denote US citizens, but is used in quotes as many of the migrants in detention centers come from the Americas.

While vulnerability is always characterizing the human experience, the openness of being affected to COVID-19 in the context of private migrant detention centers creates amplified potentials for significant harm. The historically constituted inequalities highlighted by Santos are inherently linked to the relational situational vulnerabilities described by Gilson. Santos (2020) highlights that the violations of human rights of individuals from the ‘South’ for capitalist exploitation is not a new phenomenon and, within this chapter’s scope of analysis, privatized migrant detention may be a reproduction of this. The pandemic aggravates inequalities: although anyone may be ‘vulnerable’ to catching COVID-19, Denney and Valdez (2021) highlight during the pandemic the death rate among prisoners and migrant detainees in the US has skyrocketed, where those who are incarcerated (after adjusting for age) are more than 3 times as likely to die from COVID-19. In this way, the pandemic makes explicit both inequalities as well as the dark logic of neoliberalism and cutting corners for profit. In the words of the IACHR (2020: 1) the threat of COVID-19 produces “imminent risk of irreparable harm” and the US has human rights obligations in ensuring that detained migrants have access to proper, speedy, and appropriate remedies considering the threat caused by COVID-19. Further, human rights standards indicate that the detention of migrants can only be justified if a person either poses a danger to him or herself or to society, or there is a risk he or she will avoid administrative or other proceedings; considering these standards, questions of arbitrariness may be raised (UN Committee on Migrant Workers 2020; UN Human Rights Council 2012).

Circling back to the ethics of human rights, the relational nature of vulnerability demonstrates not only how all are ontologically vulnerable, but also how vulnerability relates to harm. This requires us to recognize not only our own vulnerabilities, but also that of others and opens for a different kind of logic in the ethics of human rights. How to relate to one another matters, as what people do influences one another: this is part of the ontology of being human. Therefore, Gilson suggests the following relationship between vulnerability and ethical obligation: “vulnerability demands ethical responsiveness via caring for and protecting the vulnerable... We have ethical obligations because others are vulnerable to us... in light of the fundamental vulnerability that we all share and cannot avoid” (Gilson 2014: 31). Therefore, vulnerability requires responsiveness to the ways individuals affect others, which demands responsibility (Gilson 2014). Gilson (2014) argues that the institution of rights “protects one’s interests insofar as one is a vulnerable party and the deprivation of these rights heightens one’s vulnerability” (p. 15). Normative projects, therefore, aim to establish legal rights and ethical obligations to protect those who are vulnerable in the “pursuit of social and ethical ideals”, as it is vulnerability that “compels or motivates ethical action” (Gilson 2014: 15-16). Privatized detention centers have been reported for violations of human rights; the rights of migrants deprived of liberty provides an avenue to hold states accountable for those detained within their territories with an aim to avoid arbitrary detention and protect those who may experience harm while in detention.

Thus, by utilizing Gilson’s relational understanding of vulnerability, the article highlights how the situational vulnerability and potential harms experienced vis-à-vis migrant detention is inherently linked to the privilege and profit of corporate stakeholders and, thereby, contributing to Gilson’s (2016: 53) call for disrupting the dominant framework for understanding vulnerability, violence, harm, and justice. Traditionally, state’s human rights obligations consist of obligations to

respect, protect, and promote human rights (McBeth 2004). When considering state institutions, this translates into the state providing the service and ensuring standards are met; thus, when the responsibility for these institutions are privatized, obligations and accountability shift (McBeth 2004). However, states remain obligated to monitor and intervene to protect the human rights of detainees when detention centers are privatized (McBeth 2004; UN Human Rights Council 2020). Although many of the harms present inside private detention centers may also be present within public institutions, human rights monitoring mechanisms stress the lack of transparency, oversight, and accountability which occurs when detention is privatized and that states often overlook their human rights obligations to monitor and intervene where necessary to protect human rights in private institutions (UN Human Rights Council 2017, 2020). This lack of transparency, oversight, and accountability, coupled with the challenges in holding non-state actors accountable for human rights violations and incentives to maximize profit, make private detention centers particularly fertile grounds for potential human rights violations (UN Human Rights Council 2020).

In addition, the private detention industry has engaged in a multi-million-dollar lobbying effort to influence policies which increase the use of migrant detention (Chomsky 2014: 108; UN Human Rights Council 2020). Despite the private detention industry trying to present themselves “as just meeting existing ‘demand’ for prison beds and responding to current ‘market’ conditions, in fact they have worked hard over the past decade to create markets for their product” (Chomsky 2014: 109). For example, minimum bed quotas and other incentives encourage increased use of detention rather than abiding by the legal principle of detention as a measure of last resort. Here it is critical to highlight that both seeking asylum and being in the US without authorization are not crimes (Chomsky 2014); therefore, this use of detention may be perceived as a deterrence mechanism and may raise questions of arbitrariness.

Despite there being many of the same types of situational vulnerabilities and potential harms *within* private and public institutions, there are inherent differences between these institutions and these differences are further exacerbated by COVID-19. The UN Human Rights Council (2020) specifically addresses that countries which outsource migrant detention to private companies have widespread and persistent reports of abuse. Further, one may question why President Biden – acting in line with the policies of the Obama administration – has signed an Executive Order which does not allow the Department of Justice to renew contracts with private detention centers, but has not done the same for the Department of Homeland Security and ICE. What is acceptable about profiting off of the detention of migrants, but not the imprisonment of criminals? Here, the article appeals to the relational aspect of vulnerability and the universality of human rights based on humanity (McBeth 2004). “An ethics based on vulnerability cannot simply require that we respond to vulnerable others” but also demands us to ask both whose vulnerability is recognized and how our conception of vulnerability is framed in inequitable ways (Gilson 2014: 67-68). Through current anti-migration discourses the majority group is portrayed as vulnerable to the ‘threats’ posed by migrants and the white ‘Americans’ vulnerability is recognized, affirmed, and accepted, while the vulnerability of migrants in detention centers is not, preventing these forms of vulnerabilities to call for ethical response. These same processes allow for public justification of the denial of human rights to a group who is covered by the universal protections in international

human rights law. This leads to questions of power and how economic, social, and political structures affect the unequal distribution of vulnerability.

3.2 Hegemonic Conceptions on the Subordination of the Other: People on the Move and Forced Immobility in Times of COVID-19

The effects of the COVID-19 pandemic on migrants held by the detention industry exposes how economic, social, and political structures determine the unequal distribution of vulnerability according to structural power relations. For Butler (2020a), the virus is unthinkable outside the framework of social and economic inequalities. In this context, even though we are all vulnerable to the virus, the loss is unequal to different populations. Between the forced immobility caused by the virus and the arbitrary detention of people on the move, “Lives are supported and maintained differently, and there are radically different ways in which human physical vulnerability is distributed across the globe. Certain lives will be highly protected, and the abrogation of their claims to sanctity will be sufficient to mobilize the forces of war. Other lives will not find such fast and furious support and will not even qualify as ‘grievable’”(Butler 2004: 32).

The widespread detention of migrants in for-profit facilities in the US violates human rights standards and may be characterized by unilateral “acts of sovereignty” anchored in discourse. The US government decides that human rights standards do not apply to this population in these circumstances and evokes the power to decide on the fate of human lives with obedience to no predefined legal standards (Butler 2004).

Drawing upon Foucault’s concept of biopolitics, Butler distinguishes sovereignty from governmentality, but unlike Foucault, Butler considers that both phenomena can coexist. Governmentality, in this sense, gains importance to the analysis here, when viewed as the ways in which political power is used to regulate and manage populations and goods, as opposed to how sovereignty once provided legitimacy to the rule of law and state power. Governmentality materializes through acts that may suspend laws, subject populations, regulate behaviors, and restrict rights through the delegation of state power to bureaucratic institutions, the law itself, or other sets of tools and tactics. It may contradictorily suspend the law in order to legitimize a discourse of exercise of sovereignty (Butler 2000, 2004). The manipulation of vulnerable populations through governmentality is a key element for the debate around the ethics and politics of the hegemonic articulations in the context of relativization of rights. This process relates to what Butler (2009) calls “framing”, which consists of, in this case, subjecting migrants to a tactic that involves false accusations (for example that they are rapists, thieves, burglars, etc.) which, combined with a component of fear (“migrants will steal your jobs, ruin our societies”), leads to prejudgment that allows for the general acceptance of policies such as the *Zero Tolerance Policy*. Power dictates such frames in the context of exercising governmentality, and it is the advent of new frames that allows us to understand ‘taken for granted realities’ that might dismantle the authoritarian control of frames. The process by which frames circulate within the context of a given society allow them to decide which lives will be recognized (Butler 2009).

Interestingly, Butler further adds to Foucault’s cultural construction of the subject through discourse by claiming that such constructive cultural processes shall take into account the de-production of subjects. In other words, because the construction of subjects is not universal – in

the sense that it does not include all subjects – it affects those that are not constructed as subjects, either at all or maybe just partially. Those are therefore excluded from the production of recognizable subjects. This exclusion is operationalized through the framing of migrants, as they are only partially produced, and such production is done to the extent that they are framed as social threats (Butler 2004, 2009).

Through governmentality, frames are imposed and manipulated by the use of power, by the manipulation of the media and other means. Such circulation is intended to maintain a frame's hegemony, and the precarity of the lives of those framed is reinstated, ideologically imposed, and accepted, thus reaching hegemonic status. Norms of recognition, in this sense, may lead to a presupposition of such precariousness, but at the same time precariousness can be rejected by norms of recognition (Butler 2009).

The effects of this phenomena is that power distributes vulnerabilities through framing individuals, which in this case constitutes a hegemonic construction of migrants as dangerous threats to society. Their vulnerability thus becomes precariousness through governmentality. The state therefore enacts racism, producing racist divisions in the population, either on the grounds of race or ethnicity and religion, confirming “a larger operation of biopower that unjustifiably distinguishes between grievable and ungrivable lives” (Butler 2020b: loc. 710; Butler 2009).

The hegemonic framing of migrants by the state, anchored in political discourse, is the ultimate state creation of types of subjects for the purpose of subtraction of rights. The use of private enterprises and suppression of rights are all related to governmentality, as they constitute tactics to exert power, generate profits to the private entities through government procurement contracts, divert state accountability to unlawfulness, and enable donations by such private entities to politicians and political parties⁷. The situational vulnerability of migrants is exploited through a neoliberal model creating profit for some and perils for others, while the vulnerability of migrants in detention goes unacknowledged and the harms in detention are rendered justified.

4.0 Conclusion

An analysis of Gilson, Butler, Maffesoli, and Santos indicates that problems with the migrant detention industry are not restricted to the most immediate harms presented by the pandemic; rather, the pandemic has exposed and exacerbated wider, systematic issues within the neoliberal model of privatized detention and the social injustices and relational inequities faced by migrants from the ‘South’. Privatized detention centers epitomize many aspects of a failed economic system and a broken utilitarian paradigm which, in many ways, displace and undermine states human rights obligations to migrants while maximizing profitability to corporations. While vulnerabilities and social injustices have existed – and have been aggravated by the criminalization, securitization, and politicization of migration, along with weakening multilateral governance (Mezzanotti, 2020) – COVID-19 amplifies and further exposes these potentials for harm in terms of (1) insufficient standards in detention centers; (2) lack of proper medical treatment; (3) lack of proper state

⁷ One of these corporations in the USA is the GEO Group, which has spent millions of dollars in lobbying and donations, mostly to members of the Republican Party (<https://www.opensecrets.org/orgs/geo-group/summary?id=D000022003>).

supervision and accountability of human rights standards in private detention centers; and (4) the larger structural injustices in the privatized model of migrant detention as a whole.

The social consequences of COVID-19 in the case of migrant detention and the interplay between power and vulnerability have implications for justice. Gilson (2011: 309, 2014) argues that injustice may be understood as “the unjust distribution of vulnerability”; as vulnerability is connected to relationality, the imbalanced reciprocity of vulnerability creates relational distortion and, thereby, enforces patterns and structures which allow for the exploitation of vulnerability (Gilson 2018). The exploitation of the situational vulnerabilities experienced by migrants by the detention industry is built on ideological underpinning of migrants as a threat or danger and was present prior to COVID-19, made possible due to the perceived vulnerability of a white, ‘American’ majority. This directly links to notions of safety and security in which privileged groups use their perceived vulnerability to, in this case, justify the detention of migrants (Gilson 2018). At the same time privatized detention centers retain a position of power and privilege, benefiting financially from the exploitation of the situational vulnerability of the migrant population. COVID-19 has exacerbated the potentials for harm experienced by migrants in detention centers and further exposed the brokenness of privatized nature of detention centers in protecting human rights. An attempt to address injustice, in this case, involves a desire to “transform a situation of social subordination that exacerbates...vulnerability” which renders migrants as more susceptible to harms incurred in detention centers (Gilson 2011: 309).

This chapter’s aim has been to explore the extent to which the concept of vulnerability as proposed by Gilson/Butler may be of use in understanding and responding to the injustices faced by migrants held by the detention industry in the US in times of COVID-19. The exploitation of the situational vulnerability of migrants by privatized detention centers exemplifies the relationality of vulnerability as well as its unjust distribution. This has consequences for at least two levels: (1) the most immediate harms presented by COVID-19 and (2) the larger context of the exposed civilizational crisis. At the first level, the overcrowded detention centers, lack of sanitary precautions, transport of detainees between detention centers, delay of legal and administrative procedures, and cost cutting to maximize profit have resulted in serious social consequences and amplified potential harms experienced by migrants in an already precarious situation (UN Human Rights Council 2020). The health, security, and human rights in general of migrants are minimized, while profits for corporate stakeholders are placed at the forefront. At the second level, the civilizational crisis which the pandemic exposed highlights more than sanitary problems, including the brokenness of an economic system and utilitarian paradigm where privatized detention centers profit by exploiting the vulnerabilities of migrants. Here accountability is lacking and the responsibility of states in ensuring human rights obligations is obscured.

Two interconnected issues relating to the exposed civilization crisis are also explored. First, how structural conditions and hegemonic conceptions on the subordination of the other relate to the distribution and attribution of vulnerability. In the case of migrant detention, Gilson is utilized to argue that the perceived ‘threat’ of migrants and related perceived vulnerability of white, ‘Americans’ is used as justification for the exploitation of vulnerability present in the case of migrant detention. Private corporations exploit the situational vulnerability of migrants for financial gain and the vulnerability to harms experienced in detention goes unrecognized or is

considered justified. This is related to the second issue: how the exercise of power over migrants – shaped by neoliberal politics – privatizes state’s responsibilities and jeopardizes human rights of detained migrants during a global pandemic. The detention industry uses their power to lobby and influence politics; the state passes off their duty to these private detention facilities where the responsibility is shifted and accountability is blurred. District court cases have illustrated that even when private detention centers have policies which are aimed to protect the rights of detained migrants during the pandemic, there are large gaps between what is mentioned in the policy and what happens in practice. Violations of the rights of detainees and the harms which they experience become difficult to verify. The stigma associated with migrants’ identities has been used to justify mass detention; this is inherently linked to the previously addressed issues of the subordination of migrants and the exploitation of migrant vulnerability. International human rights law describes detention as a matter of last resort; yet, migrants in the US appear to be detained more as a securitization and deterrence practice.

COVID-19 has further exposed the unjust distribution of vulnerability and amplified consequences relating to potentials for harm, where the conditions in detention centers and cutting corners to maximize profitability for corporate stakeholders has more immediate social consequences during a global pandemic. As suggested by Gilson (2011), attempts to address this injustice must include a desire to transform the social subordination of the migrant which exacerbates vulnerability; this is necessary, alongside holding the state and private detention centers accountable for experienced harms and the social consequences of their breaches of human rights.

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