

Why Do States Privatize their Prisons? The Unintended Consequences of Inmate Litigation*

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Abstract

The United States has witnessed privatization of a variety of government functions over the last three decades. Media and politicians often attribute the decision to privatize to ideological commitments to small government and fiscal pressure. These claims are particularly notable in the context of prison privatization, where states and the federal government have employed private companies to operate and manage private correctional facilities. I argue state prison privatization is not a function of simple ideological or economic considerations. Rather, prison privatization has been an unintended consequence of the administrative and legal costs associated with litigation brought by prisoners. I assemble an original database of prison privatization in the US and demonstrate that the privatization of prisons is best predicted by the legal pressure on state corrections systems, rather than the ideological orientation of a state government.

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In the late 1980s, Texas was one of the first states to contract with a private company to operate and manage correctional facilities. In the next decade, over 20 private prisons opened in the state, holding inmates under Texas, county, federal, or other states' jurisdictions. Despite Texas' growing experience with private prisons, peculiar loopholes remained. For example, two Oregon inmates held in a Texas private prison managed to escape in 1996, traveling nearly 200 miles before being apprehended (Associated Press 1996). Though this appears like a regular prison break, the state soon discovered standard practice in public prisons did not easily translate to private prisons, as the two men could not technically be charged with any crime because *escaping from a private prison was not yet illegal* (Associated Press 1996). While governments have largely closed these seemingly inexplicable loopholes in the past few decades as prison privatization has continued to grow, this example highlights the ever changing legal and political climate surrounding the private operation of correctional facilities, a practice that has become commonplace across the country. Thirty-five states housed at least some of their inmates in private facilities at some point between 1986 and 2016, decisions that have been continuously marred by controversy.

Modern prison privatization began in the 1980s as many state, local, and national government services were also outsourced to the private sector (Government Accountability Office 1997, Henig 1989). In 1986, at least 1,600 inmates were held in privately operated state, local, or national prisons and jails. By 2016, that number had reached more than 160,000, a hundred-fold increase in only thirty years. Though the share of inmates in these private facilities still remains low - 18% of federal prisoners and 9% of state prisoners as of 2016 (Carson 2018) - the policy has garnered significant controversy since its inception. Policymakers at the state and national level, along with citizens, have struggled to come to terms with the idea of government contracting with private companies to incarcerate the accused and convicted (Cody and Bennett 1987, Thompson and Elling 2002, United States. Congress. House. Committee on the Judiciary. Subcommittee on Courts and the Administration of Justice 1986). Are private prisons cheaper, safer, or more efficient than public ones (e.g. Burkhardt 2018, Perrone and Pratt 2003, U.S. Department of Justice 2016)? Or is that

question entirely irrelevant, and what policymakers should be questioning is whether private companies have the legal or moral right to incarcerate individuals and to what degree should profit play in this process?

This paper seeks to understand the mechanism by which states decide to privatize their prisons. The traditional political economy approach to framing and explaining prison privatization has been the focus of past studies (Kim and Price 2014, Nicholson-Crotty 2004, Page 2011). By this logic, Republican states and states with suffering economies will be more likely to privatize their prisons, whereas states with healthy unions will be less likely to privatize. I argue none of these explanations are sufficient to explain state's adoption of private prisons, highlighting the distinction between more common forms of privatization, like water and sewer services, and prison privatization. The unique characteristics of prisons and prison operation, I propose, mean the more traditional explanations fall short.

I argue the distinction between carceral privatization and other forms of privatization is an important one. Rather than being driven by politics, economics, or unionization, prison privatization is the product of increased inmate political activity and states' responses to judicial orders. This unique set of circumstances is akin to other explanations of the building of the carceral state (Gottschalk 2006, Hinton 2016, Murakawa 2014) that favor institutional factors above and beyond partisanship to explain prison policy over the last four decades. This paper makes an important contribution to that literature by emphasizing the role of strange bedfellows in explaining the rise and expansion of the private carceral state. Additionally, this paper speaks to the literature on the utility of using courts for social change, and suggests the rights revolution has potentially adverse consequences for those who stand to benefit from it.

This paper proceeds as follows: first, I introduce a theoretical framework to explain variation in state adoption and expansion of carceral privatization, a term that includes prisons built and operated by for-profits with contracts from state governments. I argue the growth of inmate lawsuits prompts states to privatize: more prisoner lawsuits, regardless of outcome, makes it more likely a state will turn to private prison operators. These states

still face the ever-increasing numbers of inmates entering prisons and jails each year, but do not have the ability to negotiate with the legislature or the public at large to provide the funds for new prison construction. States are incentivized to privatize to transfer legal and financial accountability for these lawsuits from themselves to private companies. Next, I introduce an original dataset collected from thousands of pages of Securities and Exchange Commission (SEC) reports on the location and capacity of prisons from 1986 to present, a significant data innovation in the study of private prisons. I test this hypothesis empirically using this dataset and find support for my theory, which suggests that the character of states' corrections systems, and in particular their policies regarding prison privatization, are significantly shaped by pressure exerted by the judicial branch and the legal challenges prisoners bring to bear on state carceral institutions, and not by the traditional partisanship, economics, or unionization explanations.

1 Common Explanations for Privatization

At its most extreme, privatization strives for full private ownership of formerly public resources and organizations which, according to this perspective, improves those services relative to those government run (Daley 1996). Citizen support for privatization is driven by a general distrust of power, and government power in particular (Quinlan, Thomas and Gautreaux 2004). This political philosophy is associated with the Republican party specifically, as politicians under the conservative banner rally against government operation of public services. Republican politicians at the state, local, and national level were the primary force behind the privatization of dozens of industries, including corrections, beginning in the 1980s (Daley 1996, Schneider 1999). The association between conservative ideology and prison privatization in particular has borne out in empirical studies (Nicholson-Crotty 2004, Price and Riccucci 2005).

There is reason to believe Republicans are more supportive of not only privatization, but prison privatization in particular. Conservative politicians over the last four decades led the campaign for more punitive criminal justice policies and the development of governmen-

tal capacity to punish and incarcerate criminal offenders (Gottschalk 2006, Kim and Price 2014). Following this logic, we may expect Republicans to be more supportive of policies that encourage privatization, as the party praises privately-run services and tougher criminal sentencing in tandem (Kim and Price 2014). The literature suggests Republican states are more likely to place more of their inmates in private prisons.

The second expectation from the literature concerns an issue private prison companies claim to ameliorate, government financial stress. States attempted to pass bonds to construct new prisons to stem prison overcrowding, but citizens repeatedly voted down these bonds or set controls on spending.¹ State governments responded by shifting capital expenditures for prisons into the recurrent state budget where no constitutional barriers on the debt ceiling stood in the way. Harding (2001) describes how some state governments contracted out to design, construct, finance, and manage prisons. State governments then postponed paying the costs through a lease/buyback arrangement over a long period of time, essentially buying the asset now and paying for it later. This appealing strategy of postponing costs of prisons often became the default for constructing new facilities.

Private prison companies take advantage of the belief that privatization cuts costs by promoting themselves as frugal alternatives to the public sector. The largest private prison company in the country, CoreCivic, pledges to build a 1,000-bed prison for under \$75 million compared to a public cost of more than \$150 million (Corrections Corporation of America 2013). This mechanism is also one identified by prison operators themselves: one 1998 report found fifty-seven percent of prison managers cited operational and construction cost savings as a reason why the facility or state turned to private prisons as a solution (McDonald et al. 1998). Despite these proclamations, however, private prisons are not consistently empirically cheaper for the government to operate as promises of cost savings typically go unfulfilled (Selman and Leighton 2010). Regardless of the financial reality however, the perception that private prisons will save money remains. The literature suggests states under fiscal stress are more likely to place their prisoners in private correctional facilities.

¹The watershed example of this phenomenon is California's Proposition 13 in 1978, which set expenditure controls and revenue restrictions on many local governments (McDonald et al. 1998).

The final strand of thought from the literature explores the relationship between unions and privatization. Unions often oppose privatization on the grounds that it increases both costs and the potential for corruption and decreases both accountability and job opportunities for union workers (Naff 1991). Broadly, unions seek instead to raise wages and gain higher quality insurance policies for their members, and empirical evidence suggests that they do, at least for fire- and police-protection employees (Anzia and Moe 2015). In particular, unionized corrections workers may be afraid that privatization will spur layoffs and lower wages and benefits (Brudney et al. 2005). Page (2011) documents how the California Correctional Peace Officers Association (CCPOA) fought against private prison companies entering the system because private facilities do not use union labor, threaten the job security of its workers, and jeopardize the political legitimacy of the CCPOA as a union, one of the strongest in the country. Nationwide, bailiffs, correctional officers, and jailers have one of the highest rates of union membership, at 47.9% as of 2015 (Hirsch and Macpherson 2003). In contrast, the rate of public sector union membership is about 12% lower, at 35.2% as of 2015 and corrections workers have a rate of union membership that ranks in the top 20 of nearly 500 occupations, after teachers, police officers, firefighters, and others (Hirsch and Macpherson 2003). Therefore, the literature expects states that have a lower rate of union membership among their corrections officers to be more likely to house inmates in private prisons.

Though these three explanations dominate the existing quantitative and qualitative literature on private prisons (e.g. Kim and Price 2014, Nicholson-Crotty 2004, Price and Riccucci 2005, Selman and Leighton 2010), these are not sufficient for fully understanding this phenomenon. First, there is significant reason to cast doubt on the partisanship explanation as Republican and Democratic states alike across the country currently have contracts with for-profit correctional companies and platforms for all parties praised privatization at some point in the last three decades (Culp 2005). Furthermore, public support for private prisons more generally does not neatly fall onto partisan lines - evidence suggests Republicans and Democrats are inconsistent in their approval of private prisons (Enns and Ramirez 2018). There is therefore reason to doubt partisanship as a main driver of this policy. Second, though

rhetoric surrounding private prisons frames the debate as one of saving money, it is doubtful that privatizing correctional institutions saves any money at all (Selman and Leighton 2010). Moreover, though the 1980s in particular were a time of government austerity, public support for incarceration more generally helped politicians to acquire the necessary capital to build and/or renovate prisons, often through complex financial strategies (Enns 2016, Harding 2001). Third, it is unclear to what extent corrections officers' unions have power over policy, save for the prototypical example of CCPOA in California (Page 2011). And even in that case, arguably the most powerful corrections officers' union did not stop private prisons from opening in California.

These theoretical considerations aside, a cursory examination of one state that heavily relies on private prisons helps to anecdotally disprove the three mechanisms described above. Hawaii is home to the lowest unemployment rate in the country and is one of the most Democratic states in the nation. These characteristics aside, the state is also exemplary among its counterparts for another reason: Hawaii incarcerated more than 25% of its inmates in private facilities in 2016, the fifth-largest percentage in the country (Carson 2018). It becomes difficult to square this reality with the media's reporting of a typical state that privatizes its prisons, a state controlled by Republicans specifically in times of economic stress. This one example is not meant to be definitive, but to highlight an intriguing puzzle, as the anecdotal stories of carceral privatization do not cleanly map onto empirical realities. More specifically, if states like Hawaii privatize their prisons at one of the highest rates in the nation, what, if at all, can we say about the common characteristics of states that adopt this policy?

2 A New Perspective: Inmate Political Activity & Prison Privatization

I argue mounting pressure placed on the bureaucracy and state government more generally from prisoners' lawsuits convinced states of the promises of prison privatization. States are incentivized to pass blame and accountability away from the government and transfer that responsibility to private companies. To fully flesh out this contention, I first review the

historical background of the prisoners' rights movement in the judiciary and other institutions more broadly, before returning to the central argument. How did state governments, in concert with actions undertaken by prisoners, lawyers, and judges, decide to privatize their correctional institutions? How did the actions of these four actors change as the legal environment for prisoner petitions shifted, ultimately resulting in the unintended consequence of the adoption of privatization?

2.1 Historical Jurisprudence and Prisoners' Rights

American jurisprudence virtually ignored prisoners for much of the country's history. The judiciary was not alone, however: for centuries, prisoners were relegated to dark cells, in a mass of violence and darkness. It is not until the development of the penitentiary, aiming to rehabilitate offenders jointly through solitude and labor, that governments gave much thought to the fate of the incarcerated (de Tocqueville and de Beaumont 2014). Given the scarcity of attention to the plight of prisoners, it is no surprise courts followed the lead of both the national and state governments in their neglect of prison conditions more broadly. When the courts did consider prisoners, that consideration largely occurred to cement the incarcerated's place at the bottom of the social and political hierarchy. *Ruffin v. Commonwealth* (1871), a Virginia court case that occurred shortly after millions of African-Americans were legally freed from slavery, retained the slave concept only to apply it to those confined in prisons and jails. Slavery was legally outlawed in the United States in 1865, but for prisoners, that state-sponsored confinement continued long after.

All the while, the courts largely deferred to state governments in the administration of correctional facilities in an approach termed the "hands-off" doctrine. Officially, this doctrine stemmed from the court's perceived lack of jurisdiction in supervising prisons or interfering with the daily activities within a correctional institution (*Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts* 1963). Though the courts considered prisons virtually outside their jurisdictional purview for the first half of the twentieth century, sympathetic language crept into court opinions beginning in the 1940s

and 1950s that indicated a changing attitude toward prisoners and their right to litigate (Feeley and Rubin 2000). The hands-off approach eroded piecemeal in the evolution of law surrounding prisoners as the federal judiciary took particular interest in promoting the rights of the incarcerated.

Greater attention to the plight of the incarcerated was particularly useful at attracting legal advocates to prisoners' causes. Many of the first prisoners' rights cases were filed pro se, without the aid of an attorney - including the blockbuster 1964 Supreme Court case *Cooper v. Pate* which finally gave state prisoners the right to sue their captors - and often as part of a greater litigation campaign by groups like the Nation of Islam (NOI) (Gottschalk 2006). However, as the federal courts stepped away from the hands-off doctrine and began issuing decisions against state corrections systems, the fate of prisoners was linked to a broader struggle for rights in the United States. This larger mobilization effort, the rights revolution, occurred as other disadvantaged groups were similarly utilizing the judiciary to acquire rights previously denied to them. Disadvantaged groups like prisoners, women, people of color, and others utilized the courts in this period like never before to acquire rights previously denied to them (Epps 1998, Rosenberg 2008). This movement expanded civil rights and liberties in the context of the judiciary, by levying attention to these rights, and supporting and implementing them (Epps 1998). For prisoners, activists were crucial to the success of this litigation campaign as they linked the prisoners' cause to that of other powerless groups, thus ensuring inmates were part of a larger rights movement (Rosenberg 2008). The most involved activists nationally worked with the New York City Legal Aid Society, the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund, and the American Civil Liberties Union's (ACLU) National Prison Project, though there were smaller regional and local organizations that aided prisoners in filing lawsuits as well (Gottschalk 2006, Jacobs 1980, Schlanger 2006). These organizations, and the lawyers within these groups, were previously part of the struggle for civil rights, highlighting how prison conditions were a question of fundamental rights (Jacobs 1980). Thus, legal advocacy on behalf of prisoners was in full swing, with multiple national organizations utilizing the

courts to push for the protection of prisoners' civil liberties while incarcerated.

Soon, a wave of litigation hit the federal courts as prisoner lawsuits, filed by inmates of all races, once dismissed by judges were now receiving a fair hearing. In 1960, prisoners filed only 872 claims in federal court, just 2 percent of the total docket (Feeley and Rubin 2000). That number soon exploded: by 1965, prisoners filed 12 percent of all filings in federal courts and by 1971, they filed 18 percent of all filings, more than 12,000 individual complaints (Feeley and Rubin 2000). Though the majority of these claims were often dismissed quickly, the federal judiciary still faced a mountain of litigation that they previously did not. This problem was confounded even further by a new and growing challenge to prisons and jails across the country: mass incarceration.

2.2 Mass Incarceration and Overcrowded Prisons

The 1980s heralded a monumental shift in criminal justice in America. Prior to the 1970s, states largely relied on the rehabilitative approach to corrections. Governments used indeterminate sentencing, which allowed administrative authorities like parole boards to personalize offenders' sentences based on capacity for and evidence of rehabilitation, to reduce recidivism and ease the formerly incarcerated person's transition back into the community (Gottschalk 2006). Simultaneously, states employed education and vocational programs, substance abuse treatment and other counseling, and other residential programs to prepare an inmate for release (Seiter and Kadela 2003). In the next ten years, indeterminate sentencing was abolished at the federal level and replaced with determinate sentencing, mandatory minimum drug laws passed with sweeping congressional majorities, and truth-in-sentencing laws mandated that offenders serve at least 85% of their sentence (Gottschalk 2006). These radical changes in the criminal justice system pushed hundreds of thousands of people into prison and community supervision programs like probation and parole each year.

Incarceration rates were largely stable in the first half of the twentieth century before exploding in the 1980s (see Figure 1). The incarceration rate rose precipitously as punitive laws at the state, national, and local level criminalized drug possession and dealing and

increased mandatory minimum sentencing for a variety of crimes (Murakawa 2014). This shift vastly expanded the reach and scope of the criminal justice system, as thousands of people, the majority of whom were African-American or Latino, were swept into prisons and jails (Alexander 2010). This nationwide change is evident across political and social lines: Republicans, Democrats, Whites, Blacks, and the public at large all supported the expansion of the carceral state, at least at the beginning of the 1980s (Beckett 1999, Enns 2016, Fortner 2015, Greenberg and West 2001, Murakawa 2014, Smith 2004). Thus, while variation existed in states' criminal justice policy, swelling prison populations and no place to put new incoming inmates meant that all were facing similar difficulties as the 1980s began.

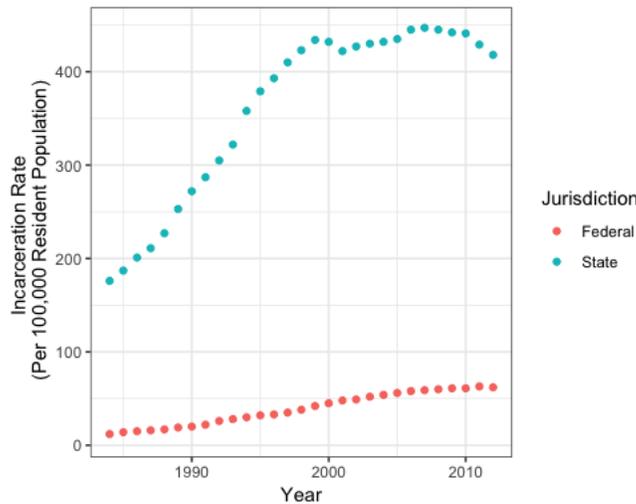


Figure 1: Incarceration rate of prisoners under jurisdiction of state and federal correctional authorities, 1970 to 2016. Data from the Bureau of Justice Statistics.

The challenge facing states in this decade was a complicated one: how to balance changing attitudes toward criminalization and prisons with the very real constraint of outdated facilities too small to hold a burgeoning prison population. For a time, states experimented with simply making do with whatever resources they had. The practice of double- or triple-celling, housing two to three prisoners in a cell meant for one, became the most common tactic used by state and local governments to accommodate the ever-increasing number of individuals entering the corrections system (Feeley and Rubin 2000). Lawsuits against this practice, as well as continuing fights for liberties such as healthcare and food grew even

higher in number as prisons exceeded their capacities. Figure 2 shows the growth of these lawsuits, emblematic of a larger shift in litigation strategy.

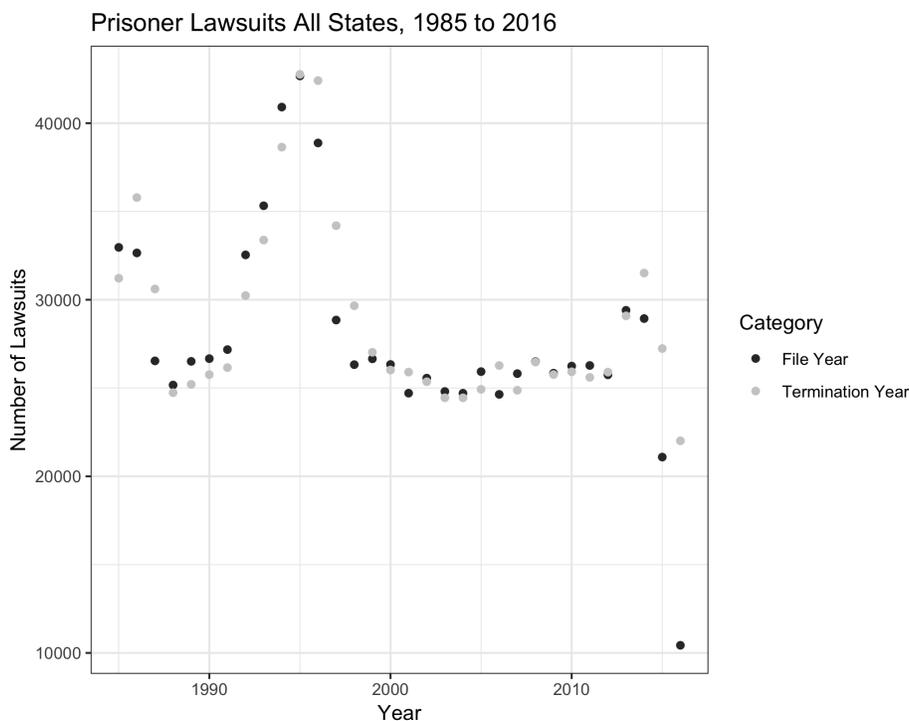


Figure 2: Prisoners’ lawsuits, filed and terminated, in each year from 1985 to 2016. Data from the Federal Judicial Center.

Lawyers involved in prisoners’ cases also changed. Whereas the beginning of this movement attracted attorneys from the ACLU and NAACP that had come directly from the civil rights movement - sometimes “follow[ing] their clients into jail” (Schlanger 1998-1999) - the national organizations involved in this litigation took a step back from this approach. The NAACP ended their involvement in these cases in the late 1970s, federal funding for prison legal aid groups decreased in the 1980s, and decreasing foundation support for groups like the ACLU’s National Prison Project soon followed (Schlanger 2006). Similarly, the legal strategy shifted as the most horrific conditions were litigated early on. The questions of conditions that remained after the initial blockbuster cases were qualitatively different from before or as one lawyer from the ACLU National Prison Project said, “cheap victories are now nonexistent” (Schlanger 2006). Prisoners’ rights cases have also become more rigorous

over time, as standards for evidence of proof of deliberate neglect within these facilities has increased. As a result, lawyers shifted their strategy from challenging entire prison systems like in the large cases in the 1960s and 1970s to more specific claims about discrete actions taken by officials within correctional facilities.

As inmates utilized their legal freedoms more so than any time in the past, judges experienced a massive increase in their inmate caseload. Prisoners, a group previously largely absent from the judiciary, now filed tens of thousands of lawsuits each year. While some judges still felt it necessary to correct abuses occurring within prisons, others felt fatigue at the growing number of petitions. Some judges believed the blockbuster prisoners' rights cases betrayed the hands-off doctrine and that moves to continue allowing prisoners to sue states while incarcerated went too far² (Feeley and Rubin 2000). As the 1980s continued, and the worst practices faded away, judges began questioning the utility of further litigation as prisoners already won such significant victories (Feeley and Rubin 2000). Finally, Ronald Reagan's appointment of conservative justices in the 1980s made the success rate for prisoners even lower (Schlanger 2006). Courts began scaling back prisoner victories in free speech, due process, legal access, and free exercise of religion (Feeley and Rubin 2000).

State governments were forced to proactively address overcrowding concerns before being sued by prisoners. Officials possessed one straightforward option to ameliorate their overcrowding concerns: a state could release existing prisoners onto parole or probation to make room for the new entrants. Some court cases mandated precisely this action, requiring states to provide early release mechanisms and inmate population limits to prevent dangerous overcrowding (Taggart 1989). This strategy became less common as the decade wore on, as public opinion heavily favored keeping inmates *inside* prisons, rather than letting them out to potentially endanger citizens (Enns 2016).

The other option for the overcrowding problem is to construct new facilities to accommodate the thousands of new prisoners entering the system each year, a strategy undertaken

²Indeed, Justice William Rehnquist dissented in a 1978 case *Hutto v. Finney*, which approved of the remedial actions the lower court had mandated in Arkansas prisons, writing "I fear that the Court has allowed itself to be moved beyond the well-established bounds limiting the exercise of remedial authority by the federal district courts" (Feeley and Rubin 2000).

by most state corrections' bureaucracies (Vaughn 1993). Beginning in the 1980s, however, there were two main avenues to new construction: either the state built or renovated new facilities themselves, or the state could instead rely on an alluring new prospect to take on the physical and financial burden of construction, private prison companies.

2.3 Prisoner Lawsuits and Private Prisons

Most states experienced at least one successful prisoner lawsuit that challenged overcrowding conditions within state corrections systems. In some, entire corrections systems were placed under court order. A federal judge placed the entire Arkansas prison system under a court order for violating the Eighth Amendment rights of prisoners in *Holt v. Sarver II* in 1970, the first comprehensive court order of its kind (Feeley and Rubin 2000). Following this landmark decision, entire prison systems across the country were declared unconstitutional, reaching 9 states in 1983, 13 in 1990, and 15 by 1995 (Schlanger 2006). The effect of the court orders was not always so dramatic, though. In other states, individual facilities were the only ones under court order. Forty-four states had some court order against one of their state prisons in 1984 and the same number faced at least one court order against a local jail within the state in 1983. Eventually, forty-eight out of the fifty-three jurisdictions in the United States had at least one facility declared unconstitutional (Feeley and Rubin 2000). Despite these successes, however, the vast majority of inmate lawsuits are failures - 88% by one estimate (Schlanger 2015) and even higher failure rates like 98.4% in other estimates (Ostrom, Hanson and Cheesman 2003).

There are a few reasons for this. First, the most egregious of violations were addressed in large lawsuits and only individual complaints remained. Second, though the federal courts supported the expansion of prisoners' rights, retrenchment of those liberties soon followed. The Supreme Court raised evidentiary standards for prison cases in 1979 and 1981, thus making them increasingly complex and expensive for attorneys to litigate (Schlanger 2006, Sturm 1994). Finally, the passage of the Prison Litigation Reform Act (PLRA) in 1996 added even additional obstacles for prisoners. This act sought to stem the mounting pressure

placed on the corrections system by decreasing the number and severity of lawsuits prisoners filed against the state. PLRA had numerous provisions: it required prisoners to exhaust any administrative remedies within prisons prior to filing an outside lawsuit in the federal system, limited both the damages inmates could receive and prisoners' attorneys' fees, and finally, imposed filing fees even on indigent inmates (Schlanger 2006). These restrictions immediately decreased the number of lawsuits prisoners filed - by 40 percent, even as the incarceration rate continued to climb - as most of the requirements were so high as to effectively ensure thousands of filings wouldn't be processed each year (Schlanger 2006).

Unlike successful cases, failed cases do not prompt any judicial action whatsoever. Prisoners, lawyers, and judges do not closely watch state bureaucracies to ensure compliance with any court order. It is even more likely that prisoners are filing unsuccessful lawsuits pro se, without the aid of an attorney, thus removing an essential actor from providing third-party enforcement of adequate conditions within prisons and jails. The state is not legally required to fix any substantive problems inside prisons and jails.

I argue states needed to respond even to unsuccessful lawsuits because of the contemporaneous rise in incarceration and subsequent overcrowding in state facilities. Prisoners sued state governments alleging cruel and unusual punishment for practices undertaken to temporarily alleviate this problem, including double- or triple-celling. Though the vast majority of these cases did not result in a court order, the bureaucracy nevertheless realized after thousands of prisoners filed petitions that their temporary solutions to overcrowding, essentially just making do with the outdated facilities they currently had, were no longer tenable. In fact, most responded to the overcrowding crisis by building new facilities (Holbert and Call 1989, Vaughn 1993). Because of the lack of enforcement of a court order, though, states had the flexibility to investigate the best options for their overcrowding woes.

The option to build a new, public-run facility is not necessarily desirable because of the cost of doing so. Though the precise costs of building new prisons differs depending on capacity and location, private prison companies themselves claim to build facilities for much less (Corrections Corporation of America 2013). Even if it is hard to pin down a specific

estimate for the cost of building a new facility, states' budgets reflect the immense cost of new construction. States spent nearly 10% of their total corrections budgets on the construction of new prisons and purchasing of land in the 1980s and early 1990s, approximately \$2 billion collectively each year (Kyckelhahn 2014). It is no cheap task to acquire the amount of funds necessary to construct a new prison. Compounding this difficulty is the reticence of voters to increased spending on corrections. Voters passed restrictions on government expenditures and tax collection, and voted against bond measures to fund prison construction (Gilmore 2007, Joyce and Mullins 1991). Similarly, the bureaucracy could not use the court order as a bargaining chip in the budgeting process (Feeley and Rubin 2000).

States that were not forced to reform their prisons under the watchful eye of attorneys and judges thus did not find this public option desirable. Private companies then entered the market, promising to alleviate the stress on state governments. This was a conscious marketing decision by these companies: a 1988 annual report from the Corrections Corporation of America (CCA - now CoreCivic) confirms the intuition that these companies provide flexible financing for states that need it. As the report reads, "CCA's combined design-build-finance capabilities permit government to build, renovate, or add beds quickly without upfront capital outlays" (Corrections Corporation of America 1988). Similarly, the other largest private prison operator in the country, GEO Group, formerly known as Wackenhut Corporation, offers a similar promise in their annual report from 1990: they help governments "... financ[e] new facility construction, such as tax exempt municipal bonds or certificates of participation, and has developed relationships with major public finance underwriters" (Wackenhut Corporation 1990). Private prison companies are marketing themselves as helpful in finding financial solutions for states' prison funding problems.

CCA's 1986 annual report reads "government response to this growth has been hampered by the administrative and budgetary problems traditionally plaguing public sector facilities ... many jurisdictions have placed a low priority on corrections funding. The outcome has been a proliferation of out-dated facilities with a lack of sufficient capacity" (Corrections Corporation of America 1986). CCA's and GEO Group's promises of fast-track construction

and flexible financing is alluring to state officials struggling with how to build new prisons. CCA's lobbying efforts specifically state the company was targeting politicians in states that are sympathetic to privatization. Private companies realized the benefit of targeting their marketing to these locales. This intuition is nicely captured from CCA's annual report in 1988: "in short, the additional contracts that have been awarded to CCA in the past year represent, in part, a lack of viable alternatives for government in a "must do" environment" (Corrections Corporation of America 1988).

States therefore had a need for new facilities even without the administration of a court order that could not be filled by public facilities, due to the reticence of voters to increased spending and the de-prioritization of corrections in the state budgeting process. Private companies concentrated their lobbying and marketing efforts in states most conducive to privatization and these companies highlighted the cost savings and efficiency they would bring to prisons. These states, unburdened by judicial and legal surveillance of their activities, chose privatization as the most logical response to their overcrowding problems. This dynamic is driven by all lawsuits, not just lawsuits filed to protest overcrowding, because any lawsuit filed has the potential of revealing the poor state of the prison system. Whether it be overcrowding concerns, or inadequacies in medical care, or other complaints, these lawsuits highlight the inadequacy of the existing prison system to accommodate the current prison population. This argument is similar in flavor to others who argued successful court orders promoted prison expansion and increases in spending on prison capacity (Boylan and Mocan 2014, Guetzkow and Schoon 2015, Schoenfeld 2010), but this study emphasizes the role of *all* lawsuits in this process, and not just successful ones. Without the bargaining chip of a successful lawsuit to prompt public prison expansion, states needed an alternative source of revenue for this expansion: partnerships with private prison companies.

From a theoretical perspective, prison privatization allows the state to shift accountability away from the government to the private sector (Kay 1987, White 2001). No longer is it the fault of the public sector that prisons are failing, but rather it is now the responsibility of the private sector, allowing states to shift the blame for poor conditions onto private prison

companies. This mechanism is similar to the debate at the core of the use of private military contractors abroad (Leander 2009).

Within the broad concept of accountability, there are several ways in which privatizing helps state government. First, there is the question of political accountability. In this vein, a growing number of inmate lawsuits brings public scorn and attention to poor conditions within prisons (Jacobs 1980). Privatizing the prisons, then, allows states to shift political accountability to these private companies and the negative media attention that comes with suffering prison conditions. Similarly, privatization is often accompanied with the appointment of a contract monitor or other government official, whose responsibility it is to oversee private operation of the prison. The appointment of this person, who in theory is supposed to ensure the government keeps a close eye on any problems happening within the facilities (Selman and Leighton 2010), in fact helps lessen governmental accountability (Rahe 2010). Adding a layer of bureaucracy diffuses the blame for poor conditions within prisons - with the addition of the monitor, who is to blame for problems within prisons? It is thus more difficult, if not impossible, for voters to hold governmental representatives politically accountable for poor conditions in prisons, as there are multiple layers of bureaucracy to contend with, and no clear attribution of responsibility for institutional failures. Not to mention, governmental officials may be reticent to question the contractor's operations, if the state is heavily reliant on them to manage their prisons (Rahe 2010). Thus, privatizing prisons allows state governments to shift accountability away from themselves and add a complex layer of bureaucracy to make it even more difficult to hold the state responsible for poor conditions in these facilities.

As one example, Idaho began contracting with CoreCivic to operate Idaho Correctional Center in 2000. For the next decade, the state knew the facility was violating the contract and misrepresenting staff hours, but it was not until extensive litigation occurred that the state took action and took back state ownership of the facility (Tartaglia 2014). This is an example of the political accountability mechanism working in reverse: the state privatized initially to avoid the problems associated with prisoner litigation, but soon that litigation

got so severe that the state was facing media and public scorn about it. The state then took control of the facility back, as privatization no longer helped the state avoid accountability for these lawsuits.

Second, there is question of legal accountability, a complex question in the context of private prisons. In public prisons, inmates can bring claims against corrections officers, wardens, or the state itself for unconstitutional conditions of confinement. When a state holds some of its inmates in private facilities, the question of who the inmate can sue is a broader question - a private corrections officer³, the private company, a government monitor, or the government itself (Tartaglia 2014). However, court decisions since the advent of private prisons have declared that private prisoners cannot sue the private guards or the private companies when there are sufficient state tort remedies, if the prisoner were to sue under section 1983 of federal law, the most common legal avenue for inmates (Tartaglia 2014). Similarly, inmates can only hold government monitors legally accountable if that monitor is actively and personally involved in depriving a prisoner of some right, an extremely high burden to prove. All that said, the law surrounding who is exactly responsible for events within private prisons is far from settled, making an already opaque litigation system even more inaccessible to the inmates seeking to sue (Raheer 2010). By privatizing, states receive two potential significant benefits: it is perhaps even more difficult to hold them responsible legally for actions that happen within private prisons, and makes the litigation process even more difficult for inmates to access, thus stemming the flow of litigation overall.

Limiting state liability for privatization is evident in the construction of private prison contracts that require private companies to indemnify states of problems that occur within private prisons. As one example, a 2009 contract, collected by In the Public Interest, between CoreCivic and Nashville-Davidson County reads “The Contractor shall *protect, defend, indemnify, save and hold harmless Metro, all Metro Departments, agencies, boards and commissions, its officers, agents, servants and employees, including volunteers, from and against any and all claims, demands, expenses and liability* arising out of acts or omissions of the

³Though, note that private corrections officers do not receive qualified immunity as public corrections guards do, making them relatively easier to sue than their public counterparts (Volkh 2013).

Contractor, its agents, servants, subcontractors and employees and any and all costs, expenses and attorney’s fees incurred as a result of any such claim, demand or cause of action” (emphasis added; In the Public Interest 2013). These clauses are commonplace in both the contracts and any enabling legislation of privatization, specifically codifying that states are indemnified from legal action and only the private companies are responsible instead.

The limited liability also has financial benefits: states are incentivized to avoid further prisoner litigation to save money⁴ and personnel time (Burkhardt and Jones 2016). Though there is no concrete source on the precise costs of inmate litigation, the estimates reported in journalistic accounts are significant: California, for example, spent over \$200 million over fifteen years on legal fees and costs of providing inmates with attorneys to sue the government (Associated Press 2013). Florida spent over \$1.5 million on these lawsuits annually in the 1990s (State Journal Register 1996). One inmate in Wisconsin alone filed 117 lawsuits in the 1990s, costing the state \$1.7 million dollars (Wisconsin State Journal 1998). Though these are anecdotal examples, the total monetary cost to states is significant: in 1995, one advocacy group estimated states spent more than \$80 million annually on these lawsuits (Maya 2002). And, of course, while this is not a significant proportion of state budgets, it nevertheless represents a cost seen as simply unnecessary for the states to absorb.

Though I am not able to test the legal and political accountability mechanisms specifically, they form the basis for my primary hypothesis.

Hypothesis 1. *States in which more prisoner lawsuits are terminated, regardless of outcome, are more likely to privatize their corrections systems.*

3 Original Data

To test the main claim of this paper first and foremost requires a dataset on private prisons. However, this is an easier proposition in theory than in practice. For one, the federal government only began collecting data on private prisons in 1999 and no state keeps a comprehensive

⁴It is possible private companies will then simply absorb the litigation costs into their contract. While this is possible, contractors remain solely financially responsible for litigation within these facilities that is prompted by deliberate and misleading reports to the state government (Raheer 2010).

record of this information. Private prison companies were also not subject to Freedom of Information Act (FOIA) requests for most of the last three decades (Eisen 2018). As a result, it has been impossible for scholars studying the growth of this policy to adequately analyze factors contributing to it without intensive data and archival work.

My private prisons dataset bridges this gap, providing the first opportunity for scholars to assess the growth of prison privatization at all levels, state, local, and national, for the last three decades. I painstakingly read and copied dozens of Securities and Exchange Commission (SEC)'s 10-K reports, annual reports publicly-traded companies are required to file. These reports contain information on the location of companies' privately operated facilities and, for the most part, data on customers, design capacity, and contract length, which I then used to construct a longitudinal dataset on the growth of prison privatization.

My sample includes facilities operated by four companies: CoreCivic, GEO Group, Correctional Services Corporation (CSC), and Cornell Companies⁵. The entire sample encompasses private prisons from 1986 to present, but the coverage differs across different firms. CoreCivic is included in the data from 1986 to present, GEO Group from 1989 to present, CSC from 1997 to 2004, and Cornell from 1996 to 2009. The GEO Group acquired both CSC and Cornell Companies in 2005 and 2010, respectively, and both companies have acquired smaller, non-traded private prison companies over the last three decades. What is now a \$5 billion industry dominated by CoreCivic and the GEO Group began in the 1980s with dozens of companies vying for contracts with government partners. While there was once more than a dozen firms operating private correctional facilities in the United States (McDonald et al. 1998), that number has dropped dramatically. As of 2014, GEO and CoreCivic alone comprised approximately 85% of the market share by themselves (Mumford, Schanzenbach and Nunn 2016). The third largest competitor, a privately-owned company called the Management and Training Corporation (MTC) comes in a distant third, controlling approximately 11% of the market (Mumford, Schanzenbach and Nunn 2016). The final result is a dataset of private jail or prison facilities, at either the local, state, or federal level, operated

⁵CoreCivic is formerly the Corrections Corporation of America, GEO Group is formerly Wackenhut Corrections Corporation, and Correctional Services Corporation was formerly Esmor Correctional Corporation.

by publicly-traded private prison companies from 1986 to present.

These companies operate by entering into a contract with a governmental entity, whether it be a state, local, or national institution, with a variety of guarantees written into the contract. For example, it is a source of much controversy that many private prison contracts contain occupancy guarantees, with contracts requiring facilities to remain 80 to 100% full (In the Public Interest 2013). Similarly, most contracts also mandate the state pays for a certain number of prison beds, whether or not they are full (Eisen 2018). These controversies aside, the states that contract with private prison companies allow these companies to manage a certain number of the state's inmates. In some cases, as in Hawaii and Alaska (see below), the state contracts with a private company to house inmates in private facilities out-of-state. On the other hand, states could require the private company to renovate or build a new facility within the state to house prisoners. Though the analysis below considers all type of privatization to be equal, whether the inmates are in private facilities in- or out-of-state, this diversity is another source of interest for scholars studying this phenomenon.

The analysis below considers one main dependent variable⁶, *Private Design Capacity*, which is the sum of inmates under the state's jurisdiction that are held in private facilities. The geographic distribution of this variable is fairly diverse. Figure 3 displays the logged number of inmates housed in state-level private facilities over the last three decades. I chose to log the variable to highlight each state's relative usage of this policy over the last few decades, as there are some states that vastly out-incarcerate others.

From the graph, there are a few evident patterns. First, for the most part, once a state decides to house their inmates in private facilities, the government continues that policy. This is most obviously the case in states such as California, Arizona, Georgia, and Texas, all of which utilize private prison companies at least partially (and increasingly) throughout this time period. Though that is a general pattern, it is by no means universal. States like Wisconsin, Arkansas, Nevada, among others, house some inmates in private facilities at some point throughout this time period, but only do so temporarily, likely only to alleviate short-

⁶See Appendix for two additional variables: *Proportion Inmates in Private Facilities*, and *Number of Private Facilities - State Only*.

term overcrowding concerns in their corrections systems. Finally, there are some states that never utilize private prisons for their state’s inmates, like most of the Northeast and states like Nebraska and Missouri. Texas had the largest population of inmates in these private facilities between 1986 and 2016, at over 17,000 in any single year, while Hawaii had the highest proportion of inmates in private institutions relative to publicly-run ones, at over 70% in any given year (not shown; see appendix for this map). The average state between 1986 and 2016 housed just over 4% of their inmates in private facilities.

Armed with a new dataset on private prisons, now we need sources of information on my explanatory variable of interest, prisoner lawsuits.

I constructed a large dataset of all the “Prisoner Petition” cases⁷ filed in the federal courts from 1986 (the first year of available SEC data for private prisons) to 2016. Most prisoners file their cases in federal court because of the allegations that prison officials are violating their federal, constitutional rights (Piehl and Schlanger 2004). Because approximately two-thirds of all inmate litigation is filed in federal courts, I look at this venue as a prisoner’s primary legal strategy.

I first used the Federal Judicial Center’s Integrated Database (FJC) to identify the full universe of cases filed and terminated each year. Importantly, though, FJC does not contain information on the judges presiding over each case. To get this information, I collected data from Bloomberg Law, a similar dataset to FJC that also contained the original judge presiding over each case in the dataset. Together, these two sources formed the basis of a comprehensive dataset of each court case filed and terminated in each state-year. Next, I merged these two sources together to create a dataset of 849,310 court cases filed by prisoners in all states from 1986 through 2016. The final dataset for this second independent variable is a state-year dataset with data on *Sum Lawsuits*, the sum of inmate litigation terminated in each year from 1986 to 2016.

⁷Formally, this dataset includes cases with the Nature of Suit codes of either 540 (Prisoner Petitions: Mandamus and Other), 550 (Prisoner Petitions: Civil Rights), or 555 (Prisoner Petitions: Prison Conditions). Importantly, the results do not change if I only use NOS codes 550 and 555, which explicitly reference civil rights violations or prison condition issues.

Logged Number of Private Prison Inmates, 1986 – 2016

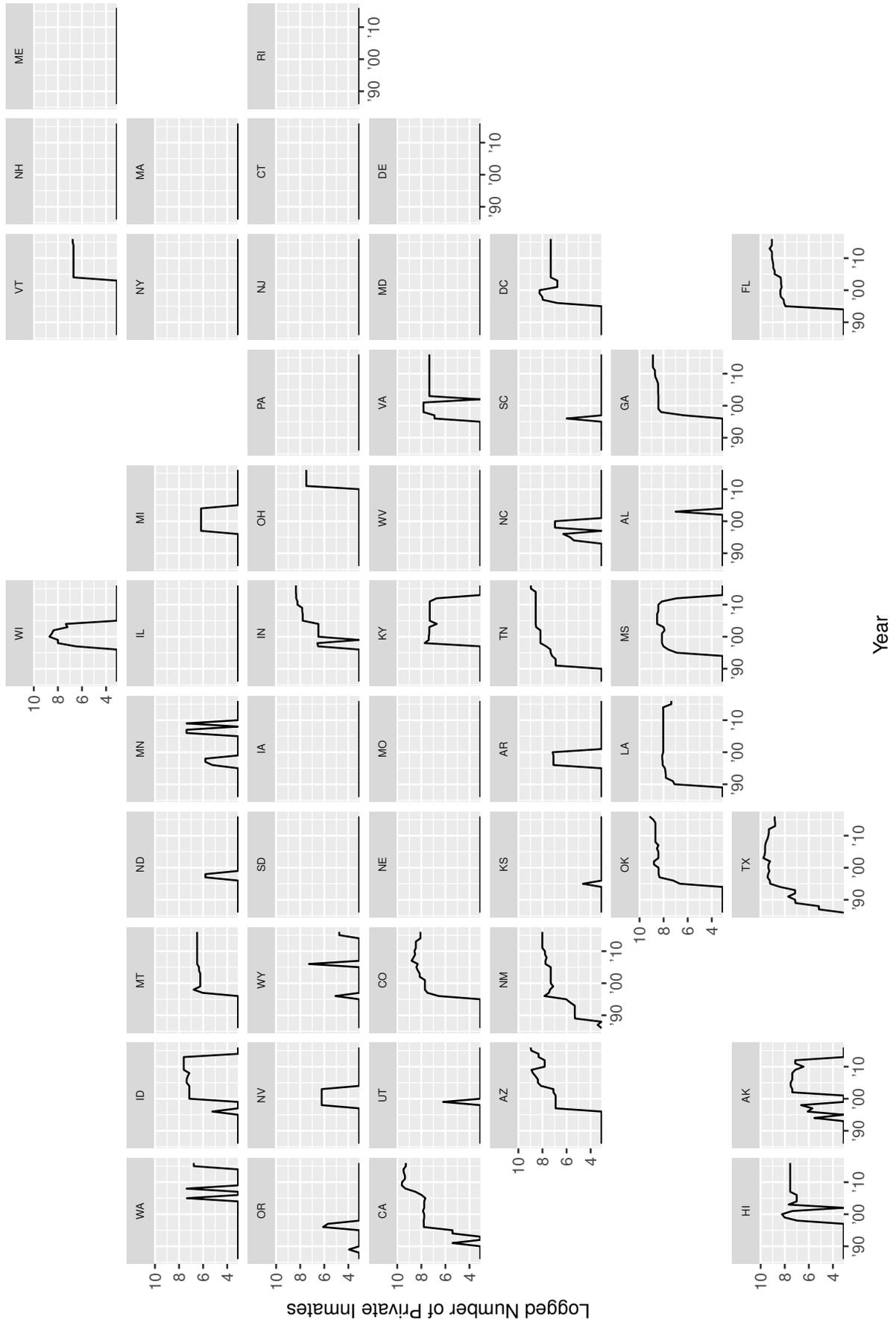


Figure 3: Logged number of inmates held in private facilities, 1986 to 2016.

4 What Prompts a State to Privatize?

4.1 Comparing Litigation Theory and Privatization Theories

As a first cut, I analyze a straightforward ordinary least squares (OLS) model testing the relationship between prisoner lawsuits and private prisons, taking into account the other theories preeminent in the privatization literature.

$$\begin{aligned} PrivateDesignCapacity_{i,t} = & \alpha_i + \delta_t + \beta_1(SumLawsuits_{i_{t-1},t_{t-1}}) + \\ & \beta_x(OtherTheories)_{i_{t-1},t_{t-1}} + X_{i_{t-1},t_{t-1}} + \epsilon_{i,t} \end{aligned} \tag{1}$$

The outcome in Equation 1 is private design capacity⁸. This information is part of my original longitudinal dataset on the location and capacity of private prisons from the 1986 to present. Private design capacity measures the number of state private inmates in private prisons - it does not include those in privately operated local jails or federal facilities. Prior to the collection of this dataset, scholars studying prison privatization could not adequately estimate the effect of any variables on the growth of private carceral facilities - my data allows us to estimate this relationship completely, for all states across multiple decades, for the first time.

The coefficient of interest is β_1 , which identifies how the sum of all inmate litigation terminated in each state-year affects private design capacity. Next, to assuage concerns about the potential of omitted variable bias regarding the most common explanations in the literature - partisanship, fiscal stress, and unionization - I include these variables in the equation as *Other Theories* to test how my theorized mechanism performs against these.

The other theory variables are a dummy variable for Republican governor, a dummy variable for the presence of a Republican-controlled legislature (i.e. both chambers), and

⁸See the appendix for alternative variables, like *Proportion in Private Facilities* and *Sum State Private Facilities*, a measure of the sum of private facilities within a state's border that houses state inmates. This variable is design, not operational capacity. Companies only report the design capacity of their facilities and not the actual number of inmates located there in the source of the data. The appendix contains additional details on this calculation, particularly in regard to weighting this variable if a facility had multiple government customers.

a final dummy variable for the interaction of these two, unified Republican government. These values come from the National Conference on State Legislatures (NCSL) and the Book of the States. My second explanatory variable is budget gap per capita, from the Census Bureau, and represents the per capita difference between revenue and expenditures in any given state-year. My final independent variable of interest is a proxy for the number of unionized corrections officers. Unfortunately, there is no nationwide data that records this information. I thus calculated a proxy. First, I used Page (2011)'s classification of which states had a corrections officers' union as of 2011, either affiliated with the AFL-CIO or independently run, a total of thirty-six states. Second, I used Hirsch and Macpherson (2003)'s data on the nationwide percentage of unionized corrections officers. I then multiplied the national percentage of corrections officers who are unionized by the total number of corrections employees in each state and year⁹ before finally multiplying that number by the dummy variable of whether the state had a union in 2011 or not. I then divide the final measure by one thousand.

The model also contains two control variables in $X_{i_{t-1}, t_{t-1}}$, violent crime rate, the number of violent crimes per 100,000 population from the Federal Bureau of Investigation, and incarceration rate, the number of prisoners in each state per 100,000 state population from the Bureau of Justice Statistics (BJS). These control variables help to mitigate concerns about additional omitted variable bias. Finally, α_i and δ_t represent state and year fixed effects, and the errors are clustered by state.

Table 1 shows the results of Equation 1. Column 1 estimates Equation 1 without the sum of prisoner lawsuits, while Column 2 includes all variables in the specification.

The results highlight how broadly inconsequential the literature's theories are at explaining the number of inmates privately incarcerated. Neither partisanship nor the budget gap is significantly related to the number of private inmates, and unionization is either barely *positively* significant or not significant, a result contra to the one expected by the literature.

⁹This data comes from the Bureau of Justice Statistics and reflects the sum of full- and part-time employed corrections officers. This variable does not incorporate full-time equivalent measures, but the correlation between the total number of full- and part-time corrections workers and just full-time workers is 0.9963963.

Table 1: OLS Model of Level of Prison Privatization

	Private Design Capacity	
	(1)	(2)
Sum Lawsuits		1.372*** (0.421)
Republican Legislature	-29.151 (289.413)	168.350 (279.545)
Republican Governor	118.295 (147.830)	138.159 (140.200)
Unified Rep. Gov't	238.898 (339.304)	156.625 (357.411)
Budget Gap Per Capita	13.003 (92.446)	6.904 (86.632)
# Unionized Corrections Officers (Thousands)	298.209* (177.921)	205.917 (152.227)
Incarceration Rate	7.566*** (2.865)	7.903*** (2.398)
Violent Crime Rate	-3.887** (1.904)	-3.622** (1.682)
N	1,417	1,417
State Fixed Effects	✓	✓
Year Fixed Effects	✓	✓
R ²	0.734	0.753
Adjusted R ²	0.718	0.737
Residual Std. Error	1,245.408 (df = 1333)	1,202.241 (df = 1332)

*p < .1; **p < .05; ***p < .01
SE's clustered by state.

Though it is difficult to say why this is so, perhaps the reason is the potential weakness of these unions. Comprehensive studies of corrections officers unions have not been undertaken to the author's knowledge, and while the prototypical example is the CCPOA, the strength of that union may be an outlier in the context of the other state-level organizations.

The explanatory variable of interest, the sum of all prisoner lawsuits, is associated with a significantly positive effect on the number of private prison inmates (and the proportion in private facilities and the sum of state facilities; see the appendix). Importantly, this result is significant at the 0.05 level, whereas *none* of the common explanations¹⁰ from the

¹⁰See appendix for robustness checks, including the Shor and McCarty (2011) legislative ideology measures

literature reach statistical significance. An increase in one additional inmate lawsuit in a state-year results in an increase of more than one additional inmate in a private facility, a magnitude that is consequential when considering the average state faces around 500 of these lawsuits annually. The average state, then, would house more than 500 additional inmates in private facilities. Though the size of the significance of the incarceration rate is larger, that comports with the overall positive association between private prisons and inmate population. Additionally, if we use the proportion of inmates in private facilities as the dependent variable, in the appendix, the sum of prisoner lawsuits remains significant and positive, whereas incarceration rate loses its significance - highlighting the importance of inmate litigation in predicting states' usage of this policy. That the sum of prisoner lawsuits remain significant once the incarceration rate is accounted for¹¹ helps to bolster the theoretical perspective put forth in this paper.

Table 1 provides evidence for prisoner lawsuits spurring states to privatize. However, there is one issue with the analysis as currently written: the problem of endogeneity.

4.2 Instrumental Variables Estimation

Evaluating whether prisoners' rights lawsuits caused a state to privatize part of their corrections systems is a difficult methodological task. Endogeneity likely exists, as prisoners' lawsuits could lead to a higher degree of privatization within the state, or higher prison privatization could alter the pattern of prisoner-driven litigation. Though I expect the causal direction of the first possibility, the theorized relationship, to show up empirically, it is likely the second possibility could also exist. Indeed, at least part of the attraction of privatization for state governments is transfer of liability, so governments are relieved of the responsibility of defending themselves against costly and extended periods of litigation involving prisoners (Kay 1987). In particular, this potential issue can result in the independent variable, prisoner lawsuits, to be correlated with the error term in any estimation, resulting in biased estimates.

instead of the dummy and a state public union membership value instead of the unionized proxy.

¹¹And, indeed, the R^2 between overall incarceration rate and the sum of prisoner lawsuits is only approximately 0.36.

To overcome this problem, I utilize an instrumental variables approach.

The key advantage this approach provides is it utilizes an instrumental variable in place of the independent variable, successful lawsuits, that only influences the dependent variable, prison privatization, via the independent variable (Sovey and Green 2011). A valid instrument additionally is independent of other preexisting determinants of the dependent variable, prison privatization. A valid instrument in this case must fit several characteristics, the most important of which is the instrument must serve as a source of exogenous variation that is currently missing from the analysis. To fit this characteristic, I look to the exogenous imposition of caseloads across the district courts.

Scholars often assume district court judges are randomly given cases (“from the wheel”¹²). Though this practice is often taken as a given by scholars studying the effects of district judges’ characteristics on outcomes like sentencing disparities (e.g. Payne 1997, Schanzenbach 2005), it may be of practical importance that cases are not truly assigned randomly. Some studies have found non-random practices in assignment procedures in individual district courts (Ashenfelter, Eisenberg and Schwab 1995, Macfarlane 2014), so the assumption of random assignment is not always supported by the evidence. Indeed, scholars studying similar phenomenon at the Court of Appeals have cautioned against using random assignment as a cure-all for causal inference identification problems in studying the effect of judges’ characteristics on various outcomes (Boyd, Epstein and Martin 2010, Hall 2010). Despite these legitimate concerns of nonrandom assignment, there are a few reasons to believe this is not a significant problem for the analysis presented here.

First, the analyses that cast doubt on the true random assignment of judges to cases often cite the Court of Appeals as the venue (Chilton and Levy 2015, Hall 2010). There hasn’t been a conclusive declaration about non-random problems in the district courts. Second, though the concerns of non-random assignment are important because of causal inference concerns, it seems that the assignment is random in the aggregate, at least in most districts

¹²Clerks in some district courts, like the Southern District of New York, literally spin a wooden wheel filled with index cards with judge names written on them and draw one name to randomly assign each case (Macfarlane 2014).

(Ashenfelter, Eisenberg and Schwab 1995, Boyd 2013, Hall 2010). It is likely the case that judges are not selecting into any cases writ large and specifically the prisoners' rights cases, allaying any concerns about non-random assignment.

Because the assignment of judges is random, it allows me to use that exogeneity to find an instrument for my independent variable, *Sum of Lawsuits Terminated*, a count of the number of prisoners' rights lawsuits terminated in each state-year. To do this, I consider the caseload facing judges assigned to prisoners' rights cases in each state-year. Because judges are assigned randomly to these cases, it is likely that judges are not systematically able to get out of presiding over their cases. I therefore use *Weighted Cases Per Judge Serving* as my instrumental variable. This measure, developed by Habel and Scott (2014), represents the weighted number of cases¹³ both active and senior judges hear in each state-year¹⁴. This is a plausible instrument for *Sum of Lawsuits Terminated* because one may expect judges that hear fewer cases each year to terminate fewer cases and vice versa, an overburdened judge has an incentive to terminate more cases quickly to clear her docket. If cases are indeed assigned randomly, then this variable is likely fairly consistent across districts and unlikely to be easily manipulable by the judges themselves. Finally, it is important the exclusion restriction is satisfied, which means the instrumental variable, *Weighted Cases Per Judge Serving*, must not have any independent effect on prison privatization other than through the independent variable, the sum of all prisoners' lawsuits (Sovey and Green 2011). This exclusion restriction is likely satisfied, as *Weighted Cases Per Judges Serving* only influences prison privatization through *Sum of Lawsuits Terminated*. It is unlikely varying numbers of cases heard prompts judges to alter a state's corrections policy, as judges do not possess this policymaking power and judges cannot easily modify the number of cases they hear. Additionally, it is highly unlikely states will modify the character of their prison systems due to the number of cases judges terminate in each year, thus alleviating any concerns about the exclusion restriction of this estimation.

¹³The FJC defines case weights to account for the varying lengths of time different categories of cases take to adjudicate (Habel and Scott 2014).

¹⁴This variable counts senior judges as 0.25 for each year served, because of their lesser case load, and full, active judges as 1. See the appendix for more details and alternative operationalizations of this variable.

I estimate the TSLS equations below to identify the effect of a higher number of lawsuits on prison privatization:

$$SumLawsuits_{i,t-1} = \alpha_c + \delta_t + \beta_3(WeightedCasesPerJudgeServing_{i,t-1,t-1}) + \epsilon_{c_1,t_1} \quad (2)$$

$$PrivateDesignCapacity_{i,t} = \alpha_c + \delta_t + \beta_4(\widehat{SumLawsuits}_{i,t-1,t-1}) + \epsilon_{c_2,t_2} \quad (3)$$

In Equations 2 and 3, *Private Design Capacity* reflects the sum of private prison inmates a state contracted with a company to manage, regardless of which of the four companies above provided that service. For those facilities with multiple customers, I averaged the total bed capacity across the jurisdictions¹⁵. α_c refers to a vector of circuit intercepts, δ_t is a vector of year intercepts, and $\epsilon_{c,t}$ is a matrix of error terms. Finally, I cluster by circuit to reflect the systematic differences between various circuits. I use circuit fixed effects and clustered standard errors¹⁶ rather than state, as in the earlier analysis, as nearly one-third of the states have *no* variation in the dependent variable. The control variables in Equation 1 help to mitigate those concerns, but none are exogenous and can be included in the TSLS estimation. A smaller number of circuits do not vary over time and while that is not ideal, it at least allows me to control for some geographic heterogeneity.

To measure my key variables, I utilize a variety of approaches. First, the instrumental variable is *Weighted Cases Per Judge Serving*. Second, I needed an estimate for my endogenous independent variable, *Sum Lawsuits*. This data comes from the FJC and represents a count of the number of prisoners' rights lawsuits terminated in each state-year, regardless of outcome (i.e. both successful and unsuccessful lawsuits are incorporated in this number).

All explanatory variables, including the instrumental variable and the endogenous variable, are lagged by one year. So, *Sum Lawsuits*, and thus *Weighted Cases Per Judge Serving*, in one state-year are matched with *Private Design Capacity* in the following year, reflecting the time lag of the effect of court decisions.

¹⁵More detail on this process in the Appendix.

¹⁶Note, though, the results remain significant even when clustering by state.

The results from both the IV and OLS for the dependent variable of the lagged number of inmates in private facilities are in Table 2 below.

Table 2: Hypothesis 1: Lagged Private Design Capacity

	Lagged Private DC OLS (1)	Sum Lawsuits First Stage IV (2)	Lagged Private DC IV (3)
Sum Lawsuits	1.581*** (0.475)		2.103*** (0.774)
Weight per Judge Serving		1.070** (0.430)	
Constant	-1,277.341*** (408.839)	-143.289 (172.193)	-1,374.887*** (490.936)
N	1,581	1,400	1,400
Residual Std. Error	1,665.849 (df = 1539)	525.071 (df = 1361)	1,656.405 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
F-Statistic		105.88	

*p < .1; **p < .05; ***p < .01

All models have se's clustered by circuit.

The results corroborate the intuition behind Hypothesis 1 - as the sum of all prisoners' lawsuits increases, so too does the lagged number of inmates in private facilities. Encouragingly, the results from the OLS and IV estimations are fundamentally identical, highlighting that whether or not the estimation accounts for endogeneity does not substantively alter the findings presented here. Of note also is the F-statistic presented in the first stage IV results in Column 2: *Weight Per Judge Serving* is a significant predictor of *Sum Lawsuits*, suggesting it is a strong instrument for the key independent variable of interest (Sovey and Green 2011). Within a circuit, each additional lawsuit terminated in a year increases the number of private inmates by approximately 2, a value that seems small at first glance but is quite influential when considering the mean number of lawsuits terminated each year in each state is over 500. Encouragingly, this result is also similar in magnitude to the OLS estimates in Table 1. Even if we log the number of prisoner lawsuits (results in appendix), the positive and significant relationship here still remains.

One concern about this analysis could be the exclusion of exogenous controls. In an IV analysis, any covariates included must be exogenous, otherwise they will lead to bias. However, factors that may contribute to both the independent and dependent variable that are also exogenous are difficult to find: incarceration rate and any measure of state budgetary health, for example, are endogenous to both the measure of lawsuits and the extent of prison privatization in each state. The one plausibly exogenous variable that gets at the number of lawsuits that is not incarceration rate is population. When I include this exogenous control variable, the direction of the variables largely do not change, but some coefficients lose their statistical significance. It is likely, though, that some of the variation captured by circuit fixed effects already counts variation in factors like population, hence why the main empirical strategy does not include any exogenous covariates.

Substantively, what do these results mean? It is useful to return again to the example of Hawaii. In 1984, inmates at two prisons in the state sued, alleging correctional officials were in violation of prisoners' constitutional rights regarding overcrowding, healthcare, sanitation, among other concerns. The case, *Spear v. Waihee*, began with the help of the American Civil Liberties Union (ACLU) and resulted in a broad court order that lasted from 1985 to 1999 (The Hawaii State Auditor 2010). In the meantime, the state accommodated the broad requests of the judge but ten years after the imposition of the court order, Hawaii began its first private contract. The court order was soon lifted after the state sufficiently complied and Hawaii continued to sign private prison contracts. This example nicely illustrates the dynamics of Hypothesis 1. Whereas the state's initial response to the court order is to professionalize and adapt correctional standards to the lawsuit, the effect of more lawsuits over time forced the state's hand in privatizing part of their corrections systems. Or, as noted by the state auditor in a report on the status of Hawaii's contracts with private prison companies, "what started as a temporary solution to relieve prison overcrowding is today a matter of state policy" (The Hawaii State Auditor 2010).

These examples help to provide context for the results in the tables, but they cannot tease out which mechanism is at play. It could still be the case states are privatizing to

avoid the costly legal responsibility of inmate lawsuits or to avoid accountability (or both, as is argued here), but this analysis does not currently differentiate between the two. Future study of these mechanisms and case study analysis in particular may help to illuminate these considerations.

5 Discussion and Conclusion

This paper makes an argument about a unique set of circumstances that contributed to the growth of prison privatization: a higher number of prisoner lawsuits results in higher numbers of private inmates. The oft-cited dynamics of partisanship, fiscal stress, or unionization do not explain carceral privatization, but instead are a product of the unique pressures of mass incarceration and rising prisoners' lawsuits.

These results are in line with other theoretical and quantitative work on the effects of prisoner litigation on various outcomes. For one, as Schoenfeld (2018) notes, successful prison litigation helped spur the growth of mass incarceration in Florida. That mechanism is similar to the one theorized here, in which prisoner lawsuits are able to influence state decisionmaking about prison policy. Second, as Levitt (1996) finds, states respond to prisoner litigation when the lawsuit is filed, and not only when the final decision is handed down. This intuition supports my argument, that states are responding with policy action to pressure from the judicial branch even when that pressure is not the most acute - and even when faced with uncertainty over whether or not a court order will find the state at fault for the conditions within prisons.

Because of the relationship between prison populations writ large and more litigation, we may be concerned that it is the case that larger states are the ones to privatize at a higher rate and it has little to do with litigation. There are a few reasons to cast doubt on this explanation, however. For one, states that use prison privatization at the highest rate (like Hawaii or New Mexico) are not the largest states, nor do they have the largest prison populations. This provides at least *prima facie* evidence that size of the state broadly or of their prison population does not fully explain states' use of private prisons. The R^2 of the relationship

between total population and the lagged number housed in private prisons is 0.45, which indicates that a relationship exists but is by no means the sole predictor of the level of prison privatization in each state. Second and more importantly, the companies that are operating these prisons are actively considering the judiciary in their decisions to market - the 1986 annual report from the Corrections Corporation of America (now CoreCivic), for example, lists prison overcrowding as the major problem facing correctional facilities nationwide and specifically mentions 34 states were under court order to mitigate unconstitutional conditions within their prisons. More directly, the 1987 annual report from the same company explains, “the market segment with the most potential for the private sector is that portion which has the greatest need to relieve overcrowding, comply with court orders and operate with greater efficiency.” While this is by no means conclusive evidence, it provides anecdotal reason to believe these companies are at least targeting the states facing the most litigation the most aggressively - and *not* simply those with the highest prisoner or civilian population.

Finally, the results reported here have a few implications for both prison lawsuits overall and private prisons. First, the results cast doubt on the utility of prisoners filing as many lawsuits as possible to prompt procedural change within prisons. It suggests that even if prisons on the whole improved from successful litigation due to bureaucratization and fewer instances of physical brutality (Feeley and Rubin 2000, Jacobs 1980), there could still exist outcomes from litigation that are undesirable. It raises doubts about correctional systems being reformers by reducing the use of prisons and points to the importance of organizations like the ACLU in helping to bring successful lawsuits against the state government. It is ironic that though the ACLU is heavily opposed to prison privatization and brings suits against the government for violations occurring within private correctional facilities, their activity could have inspired inmates to file lawsuits, thus making it more likely for a state to privatize. While courts can be an avenue for social change in the area of prison policy, it is only via successful lawsuits and not necessarily the thousands of other court cases those victories inspire. To what degree could these activists have foreseen this policy change and how, if at all, could they have altered their litigation strategy to reflect it?

The normative concerns about this policy are certainly important. First, it is theorized, though difficult to prove, that private prison operators cut corners in their facilities to make more money and sacrifice inmate care for profit (Dolovich 2005). Theoretically, private managers cut costs at the expense of quality whereas public managers coordinate with the government to increase both quality and cost savings (Hart, Shleifer and Vishny 1997). Thus, prisons suffer under private managers because of misplaced priorities between cost savings and quality. Second, the concept of private prisons is by no means accepted either legally or politically. A typical conceptualization of the state gives the government a monopoly on the use of force to keep citizens safe (Weber 1965). It is unclear, then, whether governments are legally or morally allowed to yield this sovereignty to a private company. This is also a sentiment echoed by state governments - some passed statutes expressly forbidding privatization as according to state law, while others found justification for this policy within existing laws (Quinlan, Thomas and Gautreaux 2004). Either way, normative and legal questions did and continue to swirl around the operation of these facilities. Finally, some critics of private prisons are concerned with quality differences across facility types. The evidence on this is mixed, with some studies finding public correctional facilities are safer, more cost effective, and better managed, with others finding the opposite of private facilities performing better on these metrics (Burkhardt 2018, Perrone and Pratt 2003). These scholarly studies are inconsistent across articles, but state-sponsored reports of similar flavor find private facilities had a higher level of safety and security incidents (U.S. Department of Justice 2016). Therefore, even if there is mixed scholarly evidence on the true cost and quality difference between public and private prisons, in-house evaluations are not kind to private operators.

Finally, prisoners are often cited in the rights revolution as proposed by Epps (1998) and others as primary benefactors of this movement to enshrine vulnerable populations with individual rights. If it is the case, however, that efforts to bring about the rights revolution also brought forth policies that may be antithetical to that mission, how does that change the scholarly evaluation of that movement and its successes? When we analyze the outcomes of this revolution, should we consider downstream effects, like private prisons, that the founders

not only did not intend, but did not want? It is worth noting, finally, that no honest reading of this paper could be taken as an argument against efforts to protect prisoners rights through litigation, but rather as a commentary on how those normatively positive efforts may lead to a variety of undesirable and unanticipated outcomes.

It is safe to say the ACLU, one of the organizations at the forefront of fighting private immigration facilities, would not have predicted how their involvement skewed the carceral landscape so much. Rather, if opponents of this policy seek to prevent future prison privatization, this paper points to the importance of inter-institutional dynamics between the executive and judicial branches, along with the alteration of state governments' incentives to privatize in response to temporary problems within prisons and jails. Without these changes, it is likely these companies will enjoy the favorable position they hold under the Trump administration and within states that have grown to depend on private prisons or, as Hawaii's auditor general puts it, how a solution to a temporary problem has become a permanent fixture of state policy.

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