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 a (potentially 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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> "People who determine they don't want us at the time will be back. We've planted a big seed in their minds, and when they have problems later on they'll say, 'Why didn't we select CCA when we had a chance?' Those people are going to come back."
> - *Robert Britton, Corrections Corporation of America Vice-President of Development, 1989*[1]

> "Kentucky closed its last private prison in 2013 after years of problems, including allegations of sexual abuse and a prison riot in 2004 ... But in November, with a prison population topping more than 24,600, state officials reluctantly signed a contract with Tennessee-based CoreCivic to house about 800 inmates ... Justice Secretary John Tilley called it a short-term solution."
> - *Associated Press, March 23, 2018*[2]

In 1986, Kentucky became the first state in the nation to house some portion of its inmates in a privately operated facility, the Marion Adjustment Center (Austin and Coventry 2001). For over three decades after the state's pioneering investment in private prisons, Kentucky kept the Marion Adjustment Center private, transferring control of the facility to the country's current largest private prison operator, Corrections Corporation of America (CCA; now known as CoreCivic) in the late 1990s. Despite this lengthy relationship with the private sector, the state decided to close its last private prison in 2013 after reports of physical and sexual violence within the CoreCivic facility. However, in response to surging prison populations and limited bed space, the state is once again turning to a private corporation to manage at least a portion of its inmates. Kentucky's experience, while cyclical, is emblematic of the small but consistent presence private prison firms have had in state corrections systems over the last three decades. In fact, 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 with 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

[1] This quote is from Corrections Corporation of America (1989).

[2] `https://www.usnews.com/news/best-states/kentucky/articles/2018-03-23/kentucky-lawmakers-rethinking-future-of-private-prisons`

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 and continued use by governments. 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. 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 first consider these explanations and find none 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 argue, 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 is an important contribution to that literature by emphasizing the role of strange bedfellows in explaining the rise and expansion of the carceral state to the private sector.

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.

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 successful lawsuits make states less likely to privatize. Under the watchful eye of lawyers and attorneys, the state bureaucracy professionalizes and builds or expands existing facilities to adhere to the judicial decree. I also predict more 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. Private prison companies pledge to alleviate these concerns via a quick and cheap building process. I introduce an original dataset collected from the 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 these hypotheses 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.

1 Common Explanations for Privatization

At its most extreme, privatization strives for full private ownership of formerly public resources and organizations. These forces determine the allocation of governmental services and, according to this perspective, improve 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 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).

In particular, 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 governmental 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 proclaim to ameliorate, government financial stress. States attempted to pass bonds to construct new prisons to ameliorate prison overcrowding, but citizens repeatedly voted down these bonds or set controls on spending[3]. 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

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

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 and Crawford 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.

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, an empirical effect that seems to exist 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 and Wright 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.

Armed with a new dataset, I test these theoretical expectations from the literature

in a quantitative model in which the outcome is private design capacity[4]. This information is part of my original longitudinal dataset on the location and capacity of private prisons from the 1986 to present. Private design[5] 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 these three 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 explanatory variables are a dummy variable for Republican governor, a dummy variable for the presence of a Republican-controlled legislature[6] (i.e. both chambers), and 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[7] 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 year[8] 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

[4]See 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.

[5]Note 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, Securities and Exchange Commission (SEC) reports (see Section 3).

[6]See the appendix for results using Shor and McCarty (2011) measures of state legislative ideology.

[7]See appendix for the same model using a general measure of state union membership.

[8]This data comes from BJS 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.

measure by one thousand.

The model also contains two control variables, 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).

To analyze the relationship of politics, economics, and unionization to the extent of privatization within a corrections system[9], I estimate an ordinary least squares (OLS) model. I lag the independent variable so privatization data from year t is matched with independent variables from year $t-1$. Finally, I include both state and year fixed effects, as well as clustering the standard errors by state.

The results from the OLS model that explores how politics, economics, and unionization influence whether or not a state decides to privatize is in Table 1.

Table 1: OLS Model of Level of Prison Privatization

	Private Design Capacity
Republican Legislature	103.141
	(304.185)
Republican Governor	159.510
	(138.463)
Budget Gap Per Capita	562.121
	(614.361)
# Unionized Corrections Officers (Thousands)	308.360*
	(178.754)
Incarceration Rate	8.061***
	(2.949)
Violent Crime Rate	−3.999**
	(1.832)
Unified Rep. Gov't	124.959
	(355.729)
N	1,417
State Fixed Effects	✓
Year Fixed Effects	✓
R^2	0.730
Adjusted R^2	0.714
Residual Std. Error	1,222.002 (df = 1333)

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

[9]In the appendix, I also estimate a Cox proportional hazards model on the likelihood a state privatizes for the first time. None of the variables are significant.

The results highlight how inconsequential two of the main variables are: neither partisanship nor the budget gap is significantly related to the likelihood a state privatizes its prisons. Unionization membership among corrections officials is significant and positive. This indicates that a higher number of unionized corrections officers results in higher levels of privatization, a result opposite the one theorized by the literature. 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. Finally, the control variables behave as expected. A higher incarceration rate makes it more likely for a state to house more of its inmates in private facilities and a higher violent crime rate has a negative effect on the number of prisoners in private correctional facilities (likely because states are turning to public prisons at that point).

This result may be surprising, but is less shocking with a cursory examination of one state, Hawaii. 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 contradiction presents 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. 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 policymaking 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.

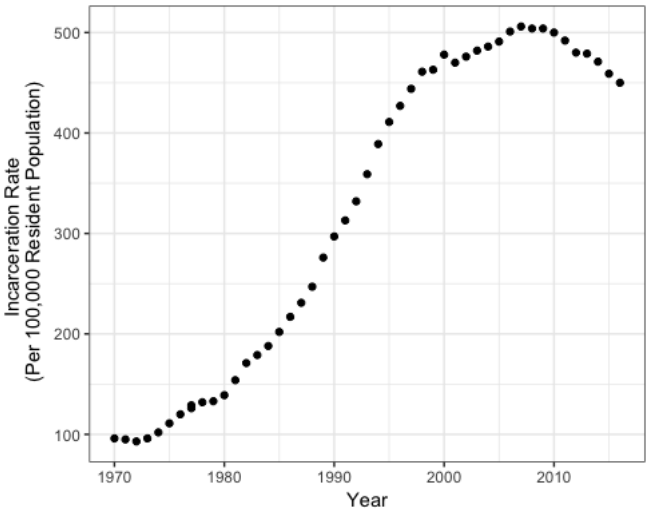

Figure 1: Incarceration rate of prisoners under jurisdiction of state and federal correctional authorities, 1970 to 2016. Data from the Bureau of Justice Statistics.

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.

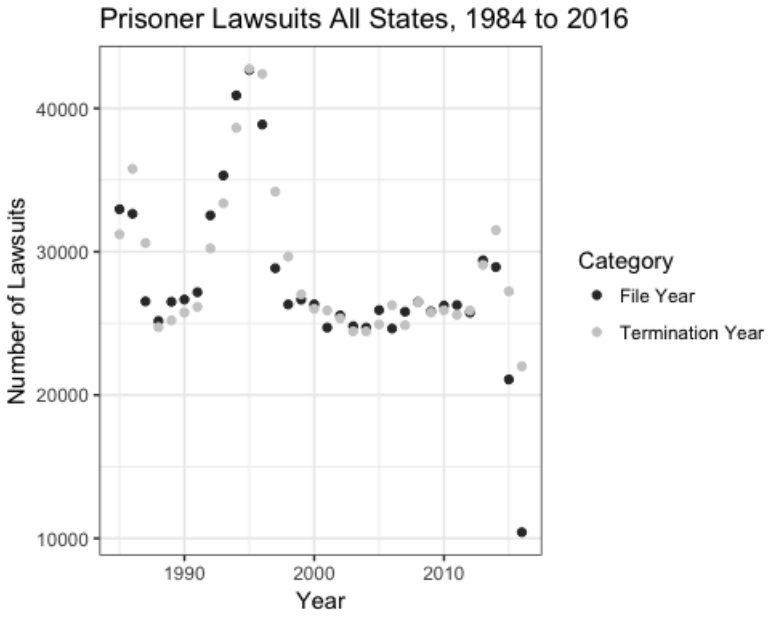

Figure 2: Prisoners' lawsuits, filed and terminated, in each year from 1984 to 2016. Data from the Federal Judicial Center.

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 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 far[10] (Feeley and Rubin 2000). As the 1980s continued, as 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 of both the general public at that time 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 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

[10]Indeed, 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).

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 Successful 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).

The judges in these cases become involved in the administration of their orders long after their initial declaration (Feeley and Rubin 2000, Feeley and Swearingen 2004, Justice 1990, Yackle 1989). Judges often worked directly with plaintiffs' lawyers throughout the litigation process and were instrumental in bringing in successful lawyers, experienced with litigating cases regarding civil rights, which signaled both their willingness and commitment to ensuring prisoner well-being (Justice 1990, Perkinson 2010). In *Ruiz v. Estelle*, the block-buster prisoners' rights case in Texas, the judge in the case even solicited the U.S. Department of Justice's Civil Rights Division to file an amicus curiae ("friend of the court") brief, a move that later led to the division's eventual role as full partner in the case (Perkinson 2010). Next, both the judge and attorneys were essential in the court order's implementation. Whereas the prison litigation in Arkansas was piecemeal prior to *Holt v. Sarver II*, for example, it became more holistic and effective once experienced lawyers stepped in to represent prisoners

(Schlanger 1998-1999). Moreover, once the judge handed down the court order, he worked with the attorneys to ensure state compliance with judicial recommendations (Ekland-Olson and Martin 1988, Feeley and Rubin 2000, Yackle 1989). Lawyers were able to alert the judge quickly if the state did not follow through on their promises. Continued attention to public prisons shone a spotlight on an otherwise opaque system.

Prolonged attention paid to the corrections systems makes compliance with court orders, whether they mandate new construction of prisons or more vague requirements to alleviate overcrowding and horrific conditions, all the more likely. Because state bureaucracies are forced to heed the requests of both the judge and attorneys involved in the process, they are more likely to develop more professional expectations for prison systems as a whole and genuinely incorporate the requests of judges into corrections systems (Feeley and Rubin 2000). It provided a venue for national correctional leaders to institute more professional and expansive standards across the country and attracted a new kind of correctional administrator, reform-minded and skilled bureaucrats who possessed more expertise than previous administrators (Feeley and Swearingen 2004). Additionally, court orders were not only tolerated and adapted by prison officials, but were even welcomed. The orders effectively gave bureaucrats within corrections departments leverage in the budget process, to procure additional resources for the facilities (Rosenberg 2008). It also insulated these officials from negative public opinion to prison conditions: by allowing corrections bureaucrats to blame new unpopular rules on judicial mandates rather than decisions made by the department, it shifted the blame for horrific conditions away from bureaucrats to other actors (Rosenberg 2008). Finally, the bureaucratization of prison guidelines, ensuring written, uniform, and reasonable rules within these facilities, helped protect against future charges of unfairness (Jacobs 1980). Court orders additionally motivated the department to innovate in its activities and provide adequate resources to prisoners (Feeley and Rubin 2000).

States were forced to accommodate the requests of judicial orders under the watchful eye of both the judge and attorneys alike. Often, states either expanded existing prisons or constructed new facilities. In the process of doing so, corrections departments also developed

strict rules and standards for governing prison life to adapt to the court orders and thus alleviate the worst of the prison conditions. The state slowly, sometimes painfully, implements court orders and builds or renovates public facilities themselves. The promises of private companies, to save money and build new facilities easily and cheaply, fall on deaf ears in states with the most successful litigation. Additionally, because the bureaucracy professionalizes, recruiting reform-minded corrections officials who initiate the adoption of national standards, the department has no need for outside managers of these facilities.

The most successful lawsuits translated into substantive reforms within corrections systems. Because of the involvement of advocacy networks, judges themselves, and the cooperation of the bureaucracy, corrections departments effectively reformed to meet the demands of court orders. This reformation occurs in-house, as states remove antiquated traditions of prison life and instead develop comprehensive sets of standards for the operation and maintenance of prisons. Privatization of these facilities is not only unnecessary, it is a waste of time and resources as the state would have to educate the prison companies about changes in prison management more broadly. This leads me to my first hypothesis.

Hypothesis 1. *States in which prisoners won more court orders against prison officials are less likely to privatize their corrections systems.*

2.4 More Lawsuits and Public Prisons

While some inmate lawsuits were successful, the vast majority of others were failures. 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 the cases described in the previous section, 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 offer one estimate: 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 Corpo-

ration 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), one of the largest private prison companies in the United States, 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).

This dynamic appears at first glance to be contradictory to the results in Section 1: I argue fiscal stress is not a primary predictor of the adoption of prison privatization, but the excerpts from the annual reports seem to suggest otherwise. The difference in the theory presented here is not that fiscal considerations are irrelevant, but specifically that the relevant costs come from the issuance of a successful court order.

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 forms the basis for my second hypothesis.

Hypothesis 2. *States in which prisoners filed more lawsuits, regardless of outcome, are more likely to privatize their corrections systems.*

3 Inmates' Lawsuits and Private Prisons: An Empirical Analysis

To test the two main hypotheses of this paper, it is necessary to have two separate datasets: the first, a longitudinal collection of the presence of private prisons in the states and the second, information on all prisoner lawsuits and characteristics of successful ones.

The federal government only began collecting data on private prisons in 1999 and no state keeps a comprehensive 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 and existence 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, the GEO Group, Correctional Services Corporation (CSC), and Cornell Companies[11]. 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 and

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

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

The analysis below considers one main dependent variable[12], *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-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.

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

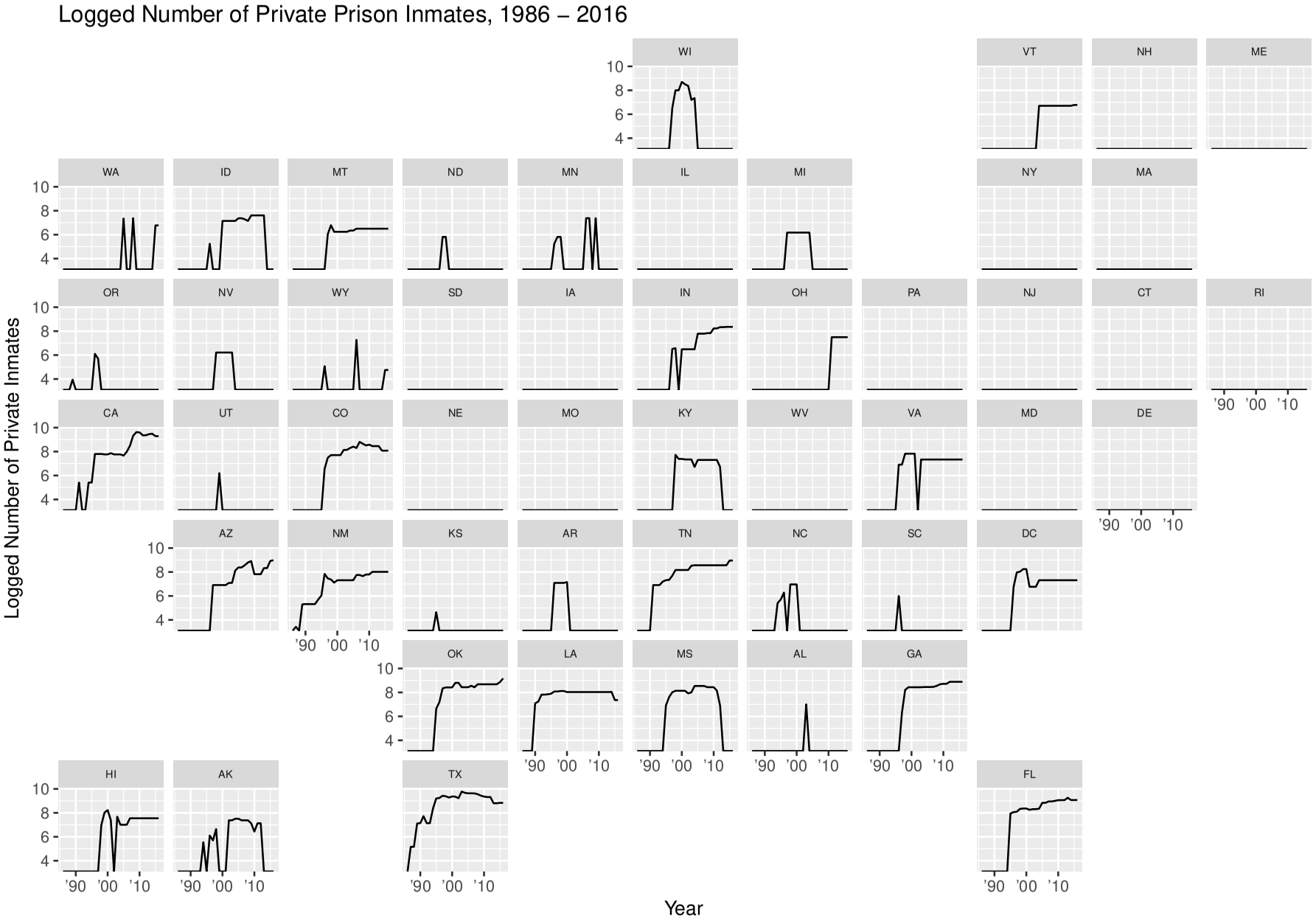

Figure 3: Logged number of inmates held in private facilities, 1986 to 2016.

To analyze both successful lawsuits and more lawsuits overall, I utilized two separate datasets. For the first hypothesis, which argues more successful lawsuits make a state less likely to privatize its corrections systems, I rely on the Civil Rights Clearinghouse (CRC) data developed by the University of Michigan Law School.

The CRC is an online database of important court case outcomes filed in a variety of case categories, such as elections and voting rights, presidential authority, public housing, among about a dozen others. Scholars at the CRC scour all filings in these categories and find the most "important cases," those seeking injunctive litigation, real policy or operational change, rather than those simply seeking damages. Therefore, the universe of cases included in this dataset are the most consequential cases filed in either the "Jail Conditions"[13] or "Prison Conditions" categories, as determined by a number of law experts. This encompasses 1,413 cases filed in all fifty states over the time period 1959 to present. Because the private prison data begins in 1986, I truncate this dataset to fit that timeframe, and only consider those that cases that were resolved from 1986 to present, resulting in a final collection of 368 of those cases.

The first hypothesis examines those lawsuits that resulted in a court order. The main independent variable of analysis is therefore *Sum Court Orders*, a sum of the court orders issued in each state-year over the period 1986 to 2016. These 368 cases are filed from 1972 to the present, cover 46 states (with the exception of Alaska, Minnesota, North Dakota, and West Virginia), and range in number in each state-year from one to ten. More than three-quarters of the sample only experience one injunctive court order in each state-year, so this dataset is likely only capturing the most significant prisoners' case annually in each state. Finally, though the CRC includes important inmates' rights cases from all jurisdictions, this paper only considers those filed in *district courts*, to facilitate the empirical analysis and ensure appropriate comparison between the cases across states. Moreover, most prisoners file their cases in federal court because of the allegations that prison officials are violating their

[13]I include "Jail Conditions" cases in my analysis because states did and continue to hold state inmates in local jails to ease overcrowding issues (Carson 2018). Therefore, court orders against local jails can also burden state governments.

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.

Armed with the CRC collection of successful prisoners' rights cases, I then collected data on the sheer number of these cases that are filed annually for the estimation of my second hypothesis, that argues higher number of lawsuits overall will make it more likely for a state to privatize its correctional facilities.

I constructed a large dataset of all the "Prisoner Petition" cases[14] filed in the federal courts from 1986 (the first year of available SEC data for private prisons) to 2016. 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.

3.1 Successful Lawsuits and Carceral Privatization

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

[14]Formally, 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.

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, successful lawsuits, to be correlated with the error term in any estimation, resulting in biased estimates. 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 random variation in case assignment in the district courts.

Scholars often assume district court judges are randomly given cases ("from the wheel"[15]). 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.

[15]Clerks 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).

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 (Ashenfelter, Eisenberg and Schwab 1995, Boyd 2013, Hall 2010). It is safe to assume that each judge in the district hears at least one prisoner case per year, so the composition of the pool of judges likely reflects the true distribution of judges in the circuit. Thus, 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 Court Orders*. To do this, I consider the characteristics of *all* judges assigned to prisoners' rights cases in each state-year. Because judges are assigned randomly to these cases, the background characteristics can be utilized as similarly randomly assigned. The instrumental variable I chose is *Proportion Prior Prosecutor*, the proportion of prisoners' rights cases heard in each state-year that were heard by judges who were formerly prosecutors. I expect the relationship between *Sum Court Orders* and *Proportion Prior Prosecutor* to be positive for a few reasons. First, while it is often taken as a given that prosecutors will be less amenable to the requests of prisoners, it is likely that assumption is false. For one, as Myers (1988) points out, prosecutors are more likely to apply the law uniformly than other judges. Their prior legal experience lends them a healthy respect for the law and its application. Because so many of the prisoners' rights cases, particularly at the beginning, had egregious violations of inmates' rights at the core of the case, it is likely prior prosecutors would take these violations of the law more seriously than judges without that experience. Additionally, some empirical work follows this intuition as well: prior prosecutors are slightly more likely to decide a case in the plaintiffs' favor in civil rights cases, including those involving prisoners (Ashenfelter, Eisenberg and Schwab 1995).

Finally, an instrumental variable requires the exclusion restriction to be satisfied.

This restriction mandates that the instrumental variable, *Proportion Prior Prosecutor,* has no independent effect on prison privatization other than through the independent variable, successful lawsuits (Sovey and Green 2011). From a narrative perspective, this is likely. For one, the judiciary is not a policymaking institution, so judges cannot directly aid in the adoption of private prisons. The only mechanism of control judges have over state corrections is via their judicial decisions and court orders, which is precisely why this variable is an appropriate instrument for successful lawsuits.

However, there is one significant concern about the random assignment of judges. The assignment of judges within districts is random, but it is not random across districts. There are 89 districts in the fifty states and twenty-four states are home to more than one district court. So, while the assumption of random assignment is valid within district, there is non-random assignment across districts. And in particular, because inmates overwhelmingly file their complaints in the district in which they are incarcerated, there are some districts (in more rural areas) that will have more of these suits than others. To alleviate this concern, the appendix contains boxplots of the yearly standard deviations of *Proportion Prior Prosecutor* within states that have more than one district court. While there are some states - West Virginia, for example - in which this variable significantly differs across districts[16], that is likely only an issue in a half-dozen states. Though this is not ideal, it provides some evidence that for the majority of states that house more than one district court, the distribution of this variable is fairly consistent across districts.

To assess the causal effect of successful lawsuits on prison privatization, I utilize an instrumental variables approach, instrumenting for successful lawsuits via the proportion of judges who were prior prosecutors in each state-year. I estimate the following two-stage least squares (TSLS) equation on the data, details of which are found below. Equation 1 refers to the first stage and equation 2 refers to the second stage, in which I use the fitted values from the first equation in place of *Sum Court Orders.*

$$SumCourtOrders_{i,t-1} = \alpha_c + \delta_t + \beta_1(PropPriorProsecutor_{i_{t-1},t_{t-1}}) + \epsilon_{c_1,t_1} \qquad (1)$$

[16]The results from Hypothesis 1 do not change if West Virginia is excluded.

$$PrivateDesignCapacity_{i,t} = \alpha_c + \delta_t + \beta_2(\hat{SumCourtOrders}_{i_{t-1},t_{t-1}}) + \epsilon_{c_2,t_2} \quad (2)$$

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 jurisdictions[17].

In Equations 1 and 2, 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 choose not to cluster by state, which would be the natural approach, because nearly one-third of the states have *no* variation in the dependent variable. In contrast, only about one-third of the circuits do not vary over time and while that is not ideal, it at least allows me to control for some geographic heterogeneity without biasing the regression estimates too much.

To measure my key variables, I utilize a variety of approaches. First, the instrumental variable is *Proportion Prior Prosecutor*, the proportion of all prisoners cases in each state-year heard by judges who were previously prosecutors. I relied on the Bonica and Sen (2017) dataset of federal judges, matched those judges with the dataset on prisoners' rights cases, and examined the composition of the judges' prior experiences. I then searched the prior employment field of the Bonica and Sen (2017) dataset to find those who were previously prosecutors and calculated the proportion of these cases heard by those employed as prosecutors. Approximately 24% of the prisoner petitions dataset was missing the judge assigned to the case, but only 5% of the final state-year dataset is missing any judge name, and thus *Proportion Prior Prosecutor*, for the variable. The bulk of the missing data, however, is still in the first few years of the dataset.

Second, I needed an estimate for my endogenous independent variable, *Sum Court Orders*. This data comes from the CRC and represents the sum of court orders issued[18] in

[17]More detail on this process in the Appendix.

[18]I chose to use the raw number because more than 95% of this variable takes on the value of 0 or 1. I expect a comprehensive court order to affect a large state like California in a similar way as it would if it hit a small state like New Hampshire and do not expect qualitatively different responses to the judicial requests across different types of states.

the important prisoners' rights cases in each state-year.

All explanatory variables, including the instrumental variable and the endogenous variable, are lagged by one year. So, *Sum Court Orders*, and thus *Proportion Prior Prosecutor*, in one state-year are matched with the set of dependent variables - either *Private Design Capacity*, *Proportion Inmates in Private Facilities* or *Number of Private Facilities - State Only* - in the following year, reflecting the time lag of the effect of court decisions.

The first hypothesis considers the effect of successful lawsuits on *Private Design Capacity.* I display the results using regular ordinary least squares (OLS), along with the first and second stages of the TSLS estimation in Table 2.

Table 2: Hypothesis 1: Lagged Private Design Capacity

	Lagged Private DC *OLS*	Sum Court Orders *First Stage IV*	Lagged Private DC *IV*
	(1)	(2)	(3)
Sum Court Orders	224.947		−3,965.921*
	(221.872)		(2,388.462)
Prop. Prior Prosecutor		0.692	
		(0.424)	
Constant	−983.816***	0.183***	−330.852
	(301.907)	(0.070)	(672.226)
N	1,550	1,550	1,550
Residual Std. Error (df = 1508)	1,881.891	0.676	3,409.449
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
F-Statistic		11.424	
*p < .1; **p < .05; ***p < .01			

Note: All models have se's clustered by circuit.

Of note is the first stage of the instrumental variables regression in Column 2. The F-statistic for this instrument, which helps to differentiate between weak and strong instruments, is more than ten, a common benchmark for identifying whether the instrument is sufficiently strong (Sovey and Green 2011). The F-statistic here is appropriately high, meaning *Proportion Prior Prosecutor* is sufficiently strongly correlated with *Sum Court Orders.* This lends confidence to the instrumental variables analysis reported in Column 3. Though

the coefficient isn't significant, its p-value only barely misses statistical significance, meaning that the proportion of judges who were prior prosecutors adequately predicts the sum of prisoners' court orders. Additionally, the results from Column 3 support the contention of Hypothesis 1. Within a circuit, one additional court order reduces the number of inmates in private facilities by more than 3,000, which is the approximate mean value of private prisoners among states with positive values of that variable. Moreover, the results from a Wu-Hausman test, which tests whether the instrumental variables regression is as consistent as OLS and whether the variable I am instrumenting for, *Sum Court Orders*, is endogenous and would bias OLS results. The test results were highly significant, indicating that IV is consistent and OLS is not. This may explain why the OLS results in Column 1 are not significant: since OLS is not consistent, the results there may be biased. Overall, it seems there is strong support for the hypothesis that a higher number of court orders issued in each state-year in prison and jail conditions cases makes it less likely for a state to privatize. This comports with our expectations from the cases cited in the previous chapter: Arkansas, for example, under *Holt v. Sarver I* and *Holt v. Sarver II* implemented real reforms after a court order was issued. Corrections officials themselves instituted substantive changes in the prison system, to alleviate the pressure from judges and lawyers watching to ensure compliance.

If a state is actively turning away from privatization in the face of successful lawsuits, what does this look like in practice? One colorful example is *Tillery v. Owens*, a case filed by inmates in the U.S. District Court for the Western District of Pennsylvania in 1987 alleging unconstitutional conditions of confinement at the maximum security prison, State Correctional Institution in Pittsburgh (SCIP). This case is prototypical for a few reasons. First, attorneys within larger community organizations represented these prisoners. The National Prison Project at the American Civil Liberties Union (ACLU) represented the inmates, along with lawyers from the Neighborhood Legal Services Association. This supports the narrative that the most successful lawsuits are successful because of the involvement of larger organizations that help collate and communicate prisoners' claims. Second, Maurice B. Cohill, Jr., the judge on the case, became personally involved when he toured SCIP unannounced before

the bench trial. Finally, when Cohill sided with the plaintiffs, he appointed a special monitor to submit reports regarding the compliance of the prison officials, ensuring that the court kept a watchful eye on the prison to determine whether they made the appropriate administrative changes. Judge Cohill lambasted the prison officials for unconstitutional conditions, writing, "we might very well order that SCIP be closed immediately; it is an overcrowded, unsanitary, and understaffed fire trap."

From the company side, these successful lawsuits are recognized to be problems for business. *Brown v. Plata* was a case resolved in 2011 when the Supreme Court affirmed the California three-judge District Court's decision to impose a strict occupancy limit of 137.5% of a facility's rated design capacity, to counteract the horrific levels of overcrowding that resulted from prisons and jails operating at 200-300% capacity (Simon 2014). In each of the company's annual shareholder reports, they cite the strict 137.5% limit in California's prisons and specifically mention the negative effect this successful lawsuit will have on business. CoreCivic's report for fiscal year 2011 reads, "In an effort to meet the Federal court ruling, the fiscal year 2012 budget of the state of California calls for a significant reallocation of responsibilities from state government to local jurisdictions ... The return of the California inmates to the state of California would have a *significant adverse impact on our financial position*, results of operations, and cash flows" (emphasis added). The GEO Group's annual report for their shareholders in fiscal year 2012 is similarly negative: California "discontinued contracts with Community Correctional Facilities which housed low level state offenders across the state ... a material decrease in occupancy levels at one or more of our facilities could have a *material adverse effect on our revenues and profitability*, and consequently, on our financial condition and results of operations" (emphasis added).

All together, these prototypical cases helps to bolster the empirical claims found in this section: the involvement of judges, attorneys, and sometimes special monitors prompted (or forced) the state to professionalize its corrections operations to stay in compliance with the court order. Not only do states respond in the hypothesized ways, but companies do as well, as the shareholder reports warn of the negative potential impacts of court orders.

3.2 Inmate Lawsuits and Carceral Privatization

I test Hypothesis 2 using the same method, instrumental variables analysis, as above. The second independent variable is *Sum of Lawsuits Terminated,* a count of the number of prisoners' rights lawsuits terminated in each state-year. I use a new instrument in this section, *Weighted Cases Per Judges Serving.* This measure, developed by Habel and Scott (2014), represents the weighted number of cases[19] both active and senior judges hear in each state-year[20]. 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, from a supply and demand perspective. 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, the 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.

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

$$SumLawsuits_{i,t-1} = \alpha_c + \delta_t + \beta_3(WeightedCasesPerJudgeServing_{i_{t-1},t_{t-1}}) + \epsilon_{c_1,t_1} \quad (3)$$

$$PrivateDesignCapacity_{i,t} = \alpha_c + \delta_t + \beta_4(\hat{SumLawsuits}_{i_{t-1},t_{t-1}}) + \epsilon_{c_2,t_2} \quad (4)$$

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. Again, the variables are lagged, such that the sum of lawsuits in the previous

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

[20]This 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.

year is matched with the prison privatization data in the subsequent year.

The results from both the IV and OLS for the first dependent variable, the lagged number of inmates in private facilities, are in Table 3 below.

Table 3: Hypothesis 2: Lagged Private Design Capacity

	Lagged Private DC OLS	Sum Lawsuits First Stage IV	Lagged Private DC IV
	(1)	(2)	(3)
Sum Lawsuits	1.581***		2.103***
	(0.475)		(0.774)
Weight per Judge Serving		1.070**	
		(0.430)	
Constant	−1,277.341***	−143.289	−1,374.887***
	(408.839)	(172.193)	(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 2 - 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.

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 Hypotheses 1 and 2. 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).

3.3 Robustness Checks

The first set of robustness checks I conduct regard the dependent variables in the analysis. I use alternative variables - *Proportion in Private Facilities*, *Number of Private Facilities - State Only*, and *Number of Private Facilities - All*. The results are substantively identical to those found in Tables 2 and 3.

Second, though all of these models include fixed effects, they do not include any 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.

Third, one may be concerned about the potential correlation between the size of the prison system and the number of lawsuits or, that the number of lawsuits rises naturally as the prison population swells. Rather than utilizing the absolute number of lawsuits across states, I instead logged the sum of lawsuits so that the number is fairly uniform across states. The replicated results, from Table 3 remain the same.

Finally, one may be concerned about the way I constructed the design capacity variable. Regarding facilities with prisoners from multiple states' correctional systems, I merely averaged the design capacity between the customers. However, it is likely possible that is not an accurate depiction of the distribution of inmates across jurisdictions. North Lake Correctional Facility, for example, has Vermont and Washington as its customers, but it is likely Vermont houses fewer inmates overall than Washington does, simply because the prison population of the former is smaller than the latter. To counteract this, I weighted the capacity variable via the following strategy: I found the total number of inmates under federal, state, or jail (i.e. local) jurisdiction for each year. Then, if a facility had multiple customers, I multiplied the total capacity by this share to get a more realistic representation of what proportion of the facility each jurisdiction would hold. If there were multiple customers of the same level (i.e. two cities or two states), I used a similar weighting scheme with their total prison or jail populations. I then recalculated *Private Design Capacity* according to this measure. The substantive results from Tables 2 and 3 do not change as a result using this variable, results of which are found in the appendix.

4 Discussion and Conclusion

Beginning with the puzzling result that none of the typical accounts of privatization predict carceral privatization, this paper makes an argument about a unique set of circumstances that contributed to the growth of this policy: a higher number of prisoner lawsuits results in

higher numbers of private inmates. On the other hand, more lawsuits overall make a state more likely to privatize.

These results are in line with other theoretical and quantitative work on the effects of prisoner litigation on various outcomes. For one, as Schlanger (2003) points out, prison bureaucracies are rational and seek to avoid paying fines or other costly penalties for their actions. By professionalizing their own corrections systems, these bureaucracies avoid that risk. That professionalization makes it less likely for them to turn to the private sector, as outsourcing those functions to private companies would be redundant and costly as states would have to ensure private companies were in compliance with new corrections standards. 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 Hypothesis 2, 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.

This theoretical intuition is bolstered even further by the nature of the successful lawsuits in this study. These orders specifically mandate the construction of new guidelines over inmate grievances, place specific population caps on prisons, or even mandate the construction of new facilities. There is diversity in the content of the orders depending on whether the inmates were suing state prisons or local jails, however. Most decrees handed down to state prisons alleged unconstitutional confinement, but were geared more toward the long-term safety of inmates. These decrees mandated actions such as more diversity in the religious services offered to inmates, recreation time for inmates in solitary confinement, and availability and quality of health and dental care[21]. These kinds of cases in state prisons prompted corrections departments to professionalize and develop guidelines with respect to the rights of the confined. Jail court orders, on the other hand, were more specific as to the remedies the government needed to undertake. Some of these decrees required the closure of the jail facility until it met minimum legal standards, placed population caps on the facility, gave the

[21] *Weir v. Nix*, filed in the Southern District of Iowa 1991; *McDonald v. Armontrout*, filed in the Western District of Missouri in 1985; *Hallett v. Payne*, filed in the Western District of Washington in 1993, respectively.

sheriff legal ability to release prisoners if and when the facility reached a certain population, or mandated the construction of a new jail[22]. Therefore, while the content differs slightly across the facility type, the decrees mandate some action from the government, whether it be through the development of new guidelines or the construction of a new facility. Successful lawsuits prompt institutional change within the states that experience them.

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

[22] *ACLU of New Mexico v. Board of County Commissioners of Valencia County*, filed in 1997 in the District of New Mexico; *Perry v. Fair*, filed in 1989 in the District of Massachusetts; *Cruz v. County of Fresno*, filed in 1993 in the Eastern District of California; *Woodson v. Sully*, filed in 1985 in the District of Kansas, respectively.

overall and private prisons. First, the results from Hypothesis 2 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 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 coordinates with the government to increase both quality and cost savings (Hart 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 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 (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 project 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 important 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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